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Apollin Koagne Zouapet

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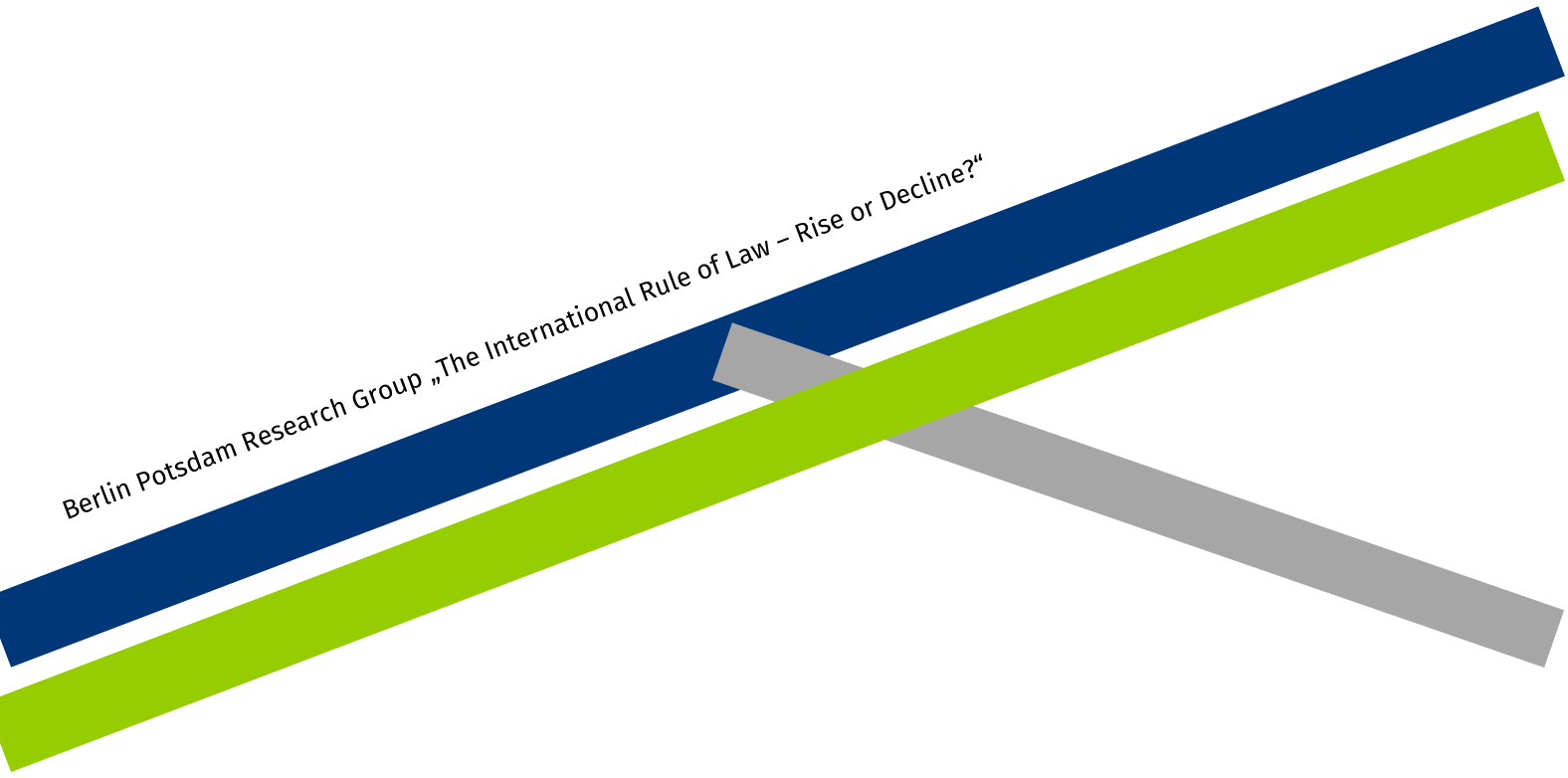

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Regional Approaches to International Law (RAIL): Rise or Decline of International Law?*

Apollin Koagne Zouapet[1]

Abstract:

The fragmentation of international law is both a renewed fear and a driving force in international legal thinking. The discourse of international law has thus always been careful to denounce anything that could undermine the universality and unity of international law, and in so doing, has developed new ideas and mechanisms that can help to curb any risk of fragmentation, supposed or real. In parallel with this movement, there are increasingly pressing calls, both from actors in international society and within international law, for greater consideration of multiculturalism and pluralism in society in the development and application of international legal rules. The present reflection focuses on the articulation of these two movements by asking whether regional approaches to international law (RAIL) pose a real threat to the coherence and integrity of international law. The article concludes that RAIL can be a source of enrichment and consolidation of international law if these approaches are conducted with a view to developing a truly universal international law and not to calling into question its foundations. To reach this conclusion, the paper invites international lawyers to revisit the dogmas of universality and unity in order to question the true meaning of these notions and to think about the future of their discipline.

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1. Introduction: Missing the Good Old Days: Angst, Fear and Passions... A New History of Fragmentation

At one of the very first events of the European Society of International Law (ESIL), Sir Michael Wood warned the young Society of the danger of a particularistic approach to international law. For Wood, there can be no such thing as a European approach or vision of international law:

> First, there is, and can only be, one system of international law in today's world. International law is universal - or it is nothing. Secondly, while there may be an infinite variety of approaches to (or visions of) international law, it is not helpful to seek to corral this rich variety into a European approach or vision, an American one (or perhaps an Anglo-American one), and other visions, somehow embracing the rest of the world.[2]

The fear of the eminent author has not prevented the multiplication of national and regional societies, some of which clearly claim the ambition to develop a regional or national vision/approach to international law. At the first World Meeting of Societies for International Law, organised at the initiative of the Société Française de Droit International in 2015, some forty regional and national societies were present.[3] They have more than doubled their number at the second meeting in 2019 in The Hague.[4] This multiplication of national and regional learned societies of international law has been accompanied by the production of numerous scientific writings questioning and/or calling for a regional or even national approach or vision to international law.[5] Regional groupings are thus increasingly dynamic frameworks for reflection and animation of the scientific life of the discipline: each regional society has its journal, colloquia and prizes.[6] It therefore seems that a division of international law, due to the multiplication of specific branches, is now being grafted onto a

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[2] Michael Wood, "A European vision of international law: for what purpose?", in Hélène Ruiz Fabri, Emmanuelle Jouannet, Vincent Tomkiewicz (eds.), *Select proceedings of the European Society of International Law, Volume 1 2006,* Oxford and Portland, Oregon, Hart Publishing, 2008, p.152. In the same sense for a vehement negation of a European international law, Alexander Orakhelashvili, "The idea of European international law", *European Journal of International Law,* vol.17, n°2, 2006, pp.315-347.

[3] http://www.sfdi.org/wp-content/uploads/2015/06/Liste-des-participants-version-finale.pdf, accessed on 12 December 2020.

[4] https://rencontremondiale-worldmeeting.org/societies-represented/, accessed on 12 December 2020.

[5] See amongst others, Francesco Messineo, "Is there an Italian conception of international law", *Cambridge Journal of International and Comparative Law,* vol.2, n°4, 2013, pp.879-905; Hanqin Xue, "Chinese contemporary perspectives on international law. History, culture and international law", *Recueil des Cours,* vol.355, 2012, pp.41-234; Hélène Ruiz Fabri, "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", *Asian Journal of International Law,* vol.1, 2011, pp.83-98; Olivier Corten, "Existe-t-il une approche critique francophone du droit international? Réflexions à partir de l'ouvrage Théories critiques du droit international", *Revue Belge de Droit International,* vol.46, n°1, 2013, pp.257-270; Paolo Palchetti, "International law and national perspective in a time of globalization: the persistence of a national identity in Italian scholarship of international law", *KFG Working Paper Series,* n°20, Berlin-Potsdam Research Group "The International Rule of Law – Rise or Decline", Berlin, November 2018, p.8, available at https://www.kfg-intlaw.de/Publications/working_papers.php?ID=1, accessed on 12 December 2020; Alejandro Rodiles, "International humanitarian law-making in Latin America. Between the international community, humanity and extreme violence", in Heike Krieger (ed.), *Law making and legitimacy in international humanitarian law*, Cheltenham, Edward Elgard Publishing, forthcoming; see the different contributions on the French, German, American, Canadian and European approaches/visions/influences in Société Française pour le Droit international, *Droit international et diversité des cultures juridiques/International law and diversity of legal cultures,* Paris, Editions A. Pedone, 2008, p.473.

[6] As Koskenniemi underlined, those events, including the publication of a yearbook, "participates in a field of legal activism that is not all free from local approaches and, no doubt, biases of various kinds", Martti Koskenniemi, "The case for comparative international law", *Finnish Yearbook of International Law,* vol.20, 2009, p.3; in the same vein, Boris N. Mamlyuk, Ugo Mattei, "Comparative international law", *Brooklyn Journal of International Law,* vol.36, 2011, p.393.

regionalisation that carries with it a new risk of fragmentation and loss of the universality of international law defended by Michael Wood.

The anxiety and fear associated with a possible fragmentation of international law are not new and seem to be consubstantial with the very existence of the discipline.[7] Torn between the imperative of unity of a law intended to govern all the actors of international society and the calls for diversity from these actors, at least some of them, international law seems to be undergoing an existential crisis: "it wants to be universal (but not totalitarian) and particular (but not anarchist)".[8] The field of international law looks stuck "between the centripetal search for unity and universality and the centrifugal pull of national and regional differences".[9] This existential crisis of international law is all the more incurable since its specialists perceive fragmentation only in terms of their idea of what international law is or should be. Indeed, while some are concerned that the unity of international law is being undermined in the face of divergent and (too) specialised interpretations, others, on the contrary, welcome the sign of greater pluralism, which, without necessarily leading to legal relativism, would make it possible to reflect the diversity of international law. As Charlotte Martineau notes, the debate on the fragmentation of international law is first and foremost a formidable rhetorical tool in the construction of an academic and political vision, the expression of faith and/or fears in and about the evolution of international law. Moreover, the author argues, the debate on fragmentation is revealing of the environment of international law:

> In periods of confidence, international lawyers apprehend the world from the point of view of legal unity under which the elaboration of special norms and institutions is not to be feared. Diversity is integrated into unity. Regional institutions, for instance, are seen as creative laboratories that will eventually generate progress at the global level. (...) In periods of anxiety, international lawyers tend to see the world as an anarchic society that could misuse the same special rules and institutions. Diversity becomes a threat to unity. Because specialization threatens the uniting ambition of international law, those who promote special or regional mechanisms are denounced for pushing aside universal mechanisms and thus for jeopardizing the federating project – they are said to be engaged in fragmenting the system.[10]

Seen in this light, the current debate on the fragmentation of international law expresses anxiety about both the discourse on international law of certain political leaders and the centrifugal tendencies of certain special regimes and regional groupings. [11] While the United Nations

[7] See on the argumentative structure of the fragmentation debate in a historical perspective, Anne-Charlotte Martineau, "The rhetoric of fragmentation: fear and faith in international law", *Leiden Journal of International Law,* vol. 22, n°1, 2009, pp.1-28.

[8] Ibid., p.5; see also René-Jean Dupuy, "Conclusions of the workshop", in René-Jean Dupuy (ed.), *The future of international law in a multicultural world,* The Hague/Boston/London, Martinus Nijhoff Publishers, 1984, p.470; Malcolm Jorgensen, "Equilibrium & fragmentation in the international rule of law: the rising Chinese geolegal order", *KFG Working Paper Series,* n°21, Berlin-Potsdam Research Group "The International Rule of Law – Rise or Decline", Berlin, November 2018, p.8, available at https://www.kfg-intlaw.de/Publications/working_papers.php?ID=1, accessed on 12 December 2020.

[9] Anthea Roberts, *Is international law international?,* Oxford, Oxford University Press, 2012, p.3.

[10] Martineau, supra note 7, pp.8-9.

[11] See Heike Krieger, Georg Nolte, "The international rule of law – rise or decline? – Approaching current foundational challenges", in Heike Krieger, Georg Nolte (eds.), *The International Rule of Law: rise or decline?,* Oxford, Oxford University Press, 2019, pp.8-10; see also, Heike Krieger, "Populists governments and international law", *European Journal of International Law*, vol.30, n°3, 2019, pp.971–996; Campbell A. McLachlan, "Populism, the pandemic & prospects for international law", *KFG Working Paper Series*, n°45, Berlin-Potsdam Research Group "The International Rule of Law - Rise or Decline?", Berlin, October 2020, available at https://www.kfg-intlaw.de/Publications/working_papers.php?ID=1, accessed on 12 December 2020.

International Law Commission (ILC) has addressed the issue, it has seemed to respond reassuringly to the threat of a possible material fragmentation of international law in the face of certain functional regimes, considering that regional approaches can only have an impact if they have a normative scope.[12] For the ILC, on the one hand, the strong presumption of the universality of international law in the legal profession limits such regional approaches and doctrines to mere convergences of interests, values and political objectives. On the other hand, regionalism can arguably be seen as a specific application of special regimes of international law.[13] Presuming and affirming the unity and universality of international law, the Commission examines regionalism solely through the prism of the hierarchy of norms and the rudimentary relationship between domestic or regional legal orders and the international legal order.[14] However, there seems to be a need for a more open approach to the issue and not to limit it to an already agreed conception of international law. The debate on regionalism or, in the case of this reflection, on regional approaches to international law cannot free itself from an ontological reflection on international law: the first question to be posed before asking whether or not regional approaches are desirable is "desirable in relation to what?".[15] It is this preliminary question that this article seeks to address.

The question of regionalism has always been generally perceived and analysed through the prism of the unity and/or universality of international law.[16] The idea of a universal international law governing the relations between the actors of the international society implies the existence of a certain number of rules and principles whose validity is not suspended to the particular contingencies of this or that region. This idea is further strengthened when universal rules derive their validity from specific values, an embodiment of the "legal conscience of mankind", the minimum from which the unity of international law develops.[17] This contribution is unlikely to deviate

[12] See Report of the Study Group of the International Law Commission, finalised by Martti Koskenniemi, "Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law", UN Doc A/CN.4/L.682, 13 April 2006.
[13] Ibid., paras.103-108, paras.199-208.
[14] See for an analysis of the Report and conclusions of the ILC Study Group, André de Hoogh, "Regionalism and the unity of international law from a positivist perspective", in Mariano J. Aznar, Mary E. Footer (eds.), *Select proceedings of the European Society of International Law: regionalism and international law Valencia, 13-15 September 2012,* Oxford, Hart Publishing, 2015, pp.51-76.
[15] Louise Fawcett, "Regionalism: from concept to contemporary practice", in *Select proceedings of the European Society of International Law: regionalism and international law Valencia,* supra note 14, p.10.
[16] The first affirmation of a regional international law probably dates back to the beginning of the 20th century with the publication by Alejandro Alvarez of his book on American international law. A little later, the American Institute of International Law set out to examine American legal issues either in accordance with generally accepted principles or by creating new principles adapted to the special needs of the American continent,see Alexandre Alvarez, *Le droit international américain. Son fondement, sa nature, d'après l'histoire diplomatique des états du nouveau monde et leur vie politique et économique*, Paris, A. Pedone,1910, p.392; William Samore, "The New International Law of Alejandro Alvarez", *American Journal of International Law,* vol.52, n°1, 1958, pp.41-54; Jorge L. Esquirol, "Alejandro Álvarez's Latin American Law: a question of identity", *Leiden Journal of International Law,* vol. 19, n°4, 2006, pp.931-956; 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", *Harvard International Law Journal,* vol.47, n°1, 2006, pp.283-306; Liliana Obregón, "Regionalism (re-)constructed: a short history of a 'Latin American international law'", in *Select proceedings of the European Society of International Law: regionalism and international law Valencia,* supra note 14, pp.25-38; Jorge L. Esquirol, "Latin America", in Bardo Fassbender, Anne Peters (eds.), *The Oxford handbook of the history of international law,* Oxford, Oxford University Press, 2012, pp.553-577; Rodiles, "International humanitarian law-making in Latin America", supra note 5.
[17] Joseph-Marie Bipoun-Woum, *Le droit international africain. Problèmes généraux- règlement des conflits,* Paris, Librairie Générale de Droit et de Jurisprudence, 1970, pp.11-12; Edward McWhinney, "Comparative international law: regional or sectorial, inter-systemic approaches to contemporary international law", in *The future of international law in a multicultural world,* supra note 8, pp.224-225; Hanqin Xue, "Meaningful dialogue through a common discourse: law and values in a multi-polar world", *Asian Journal of International Law,* vol.1, 2011, p.13.

from this. Indeed, asking about a rise or decline of international law contains the "contestable assertion" that international law could be a unified object of observation.[18] That is why this paper focuses on "regional approaches to international law" and not on the idea of "regional international law". Nevertheless, and contrary to the approach often followed, this paper will question the very notions of unity and universality and the representations that international law scholars make of them. As rightly pointed, whether we want it or not, in the background of such reflection always lies a play of influence. The answer depends very much on how the question is phrased and the disciplinary bias of the author.[19] An important part of the analysis will, therefore, focus on the discourse of/on international law, i.e. "acts to signify generalised; socially constructed categories of thought to which important social meanings and values are attributed. Discourses promote particular categories of thought and belief that guide our responses to the prevailing social environment".[20] From this perspective, this study will take a comparative international law approach: identifying, analysing and explaining similarities and differences in how actors in different legal systems understand, interpret, apply and approach international law.[21]

Because of their centrality in the discourse on international law, the unity and universality of international law will be the main axes from which the discussion will be conducted. Although the two terms are sometimes used interchangeably, and despite the close interrelationship that exists between them when applied to international law, the two words are nevertheless not synonymous. As Mario Prost explains, "to say that law is universal is not the same thing as to say that it is one or unitary. Law can be both universal and fragmented. Similarly, a regional or local order can be perfectly unitary. There is no a priori or necessary connection between unity and universality".[22] Unity always necessitates some form of connection or rapport between the constituent parts. There must exist a certain structure in the object, that is, a mutual connection between its different parts that makes it possible to perceive it as a unitary whole.[23] To find unity in an immaterial thing as international law, for example, some causal link must exist between its constituent parts that justifies the categorical synthesis (substantial, cultural, logical…).[24] Universality, on the other hand, can have two main meanings. At the most fundamental or basic level, the universality of law signifies its omnipresence: the law can be encountered everywhere at once.[25] At a second level, universality means generality; to say that international law is universal in this second sense is thus to say

[18] Krieger and Nolte, supra note 11, p.17; d'Aspremont points out that the question is also part of a liberal narrative of international law, even if this narrative is fortunately not (from my point of view) monolithic, Jean d'Aspremont, "Do non-state actors strengthen or weaken international law? The story of a liberal symbiosis", in *The International Rule of Law: rise or decline?*, supra note 11, pp.131-134.
[19] Ruiz Fabri, "Reflections on the necessity of regional approaches to international law through the prism of the European example…", supra note 5, p.84.
[20] Tony Evans, "International human rights law as power/knowledge", *Human Rights Quarterly,* vol.27, n°3, 2005, p.1049.
[21] Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier, Mila Versteeg, "Conceptualising comparative international law", in Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier, Mila Versteeg (eds.), *Comparative international law,* Oxford, Oxford University Press, 2018, p.6.
[22] Mario Prost, *The concept of unity in public international law,* Oxford and Portland Oregon, Hart Publishing, 2012, pp.34-35.
[23] Ibid., p.25.
[24] After stressing the arbitrary and versatile nature of the establishment of the unity of immaterial things such as law, Prost indicates that unity can derive from several causes or criteria that are often subjective, ibid., pp.25-31.
[25] Ibid., p.35.

something about its reach and scope. "It signals the all-inclusiveness of the international legal domain but says little about the unity of its forms or substance".[26]

In the discourse on international law, and despite Prost's reservation on the synonymy that may exist between the unity and universality of international law,[27] the validity of one term is derived from the other. If international law is one, it is because it is elaborated inclusively and universally, taking into account all the variations and contributions of the different actors involved; its universality of elaboration, therefore, gives it its unity. Its universal vocation is thus the glue that holds together the different elements and branches of international law. Here, the unity of international law allows it to define the common interests of the members of the international society despite the extreme diversity of society or issues. In turn, this unity ensures its universal application by all and for all: it is because international law does not admit variations that it must be interpreted and applied in a uniform, or at least consistent, manner. Thus there is a "virtuous" circle where each characteristic infinitely reinforces the other.

Thus, even if each of the following sections of the article is devoted to one of the pillars, the cross-cutting nature of the arguments will sometimes make it possible to address one or other of the aspects. Section 2 will be devoted to the impact of regional approaches on the universality of international law. It will demonstrate that RAIL can contribute effectively to the development of inclusive international law, provided that the universality of international law is not dogmatic but is understood as a method for the development and application of international law. Section 3 will in turn examine the relationship between RAIL and the unity of international law and will demonstrate that these approaches, properly exercised, can be instruments for building a united and pluralistic international law. Naturally, this can only be legal pluralism. Although many other normative dynamics may as such interact with international law, international law cannot reasonably "accommodate all forms of pluralism constituted by normative systems and therefore cannot be critiqued on that basis. International law only represents part of the normative spectrum and is necessarily part of a larger pluralistic system".[28] While this is undoubtedly a necessary preliminary question for the debate here, this analysis will neitheraddress the notions of region and how they are created[29] nor the methods of developing regional approaches of international law.[30] The latter question will sometimes be addressed but indirectly and always from the perspective of the

[26] Ibid.; see also for a more broad presentation of different conceptions of universality, Sebastian Heselhaus, "Universality in international law in the 20th century", in Thilo Marauhn, Heinhard Steiger (eds.), *Universality and continuity in international law,* Den Haag, Eleven International Publishing, 2011, pp.472-474; Bruno Simma, "Universality of international law from the perspective of a practitioner", *European Journal of International Law,* vol.20, n°2, 2009, pp.267-268.

[27] Prost, supra note 22, pp.36-38.

[28] André Nollkaemper, "Inside or out: two types of international legal pluralism", in Jan Klabbers, Touko Piiparinen (eds.), *Normative pluralism and international law, exploring global governance,* Cambridge, Cambridge University Press, 2013, p.116.

[29] See on the issue, amongst others, Jean Salmon, "Quelques réflexions sur les concepts de régionalisme et de région", in *Select proceedings of the European Society of International Law: regionalism and international law Valencia,* supra note 14, pp.45-48; Ana PeyróLlopis, "L'impact de la globalisation sur la société internationale et son droit", in *Select proceedings of the European Society of International Law: regionalism and international law Valencia,* supra note 14, pp.139-151.

[30] See for example Ruiz Fabri, "Reflections on the necessity of regional approaches to international law through the prism of the European example…", supra note 5, pp.89-96; Wood, supra note 2, pp.157-158; Simon Chesterman, "Asia's ambivalence about international law and institutions: past, present and futures", *European Journal of International Law,* vol.27, n°4, 2016, pp.945-978; William W. Burke-White, "Power shifts in international law: structural realignment and substantive pluralism", *Harvard International Law Journal,* vol.56, n°1, 2015, pp.38-42.

development of international law, i.e. from the point of view of the impact that the means and methods of developing a regional approach may have on international law itself.

2. Regional Approaches and Universality of International Law: Means to an End

For many, if not all, international lawyers, to question the universality of international law is to question the very raison d'être of the discipline. Robert Jennings said in this regard that universality is the first and essential general principle of international law that is vital to safeguard.[31] This universality not only defines the geographical (worldwide) and personal (for all subjects of international law) scope of application of the rules of international law, but also founds the spirit and collegial feeling of the "invisible college of international lawyers".[32] Indeed, "unlike any other body of lawyers, international lawyers speak the common language of a universally accepted discipline, share a common commitment to furthering the universal reign of law and the universal ideal of human dignity and keep functioning constantly across national borders".[33] It is this commitment, this devotion of international lawyers to international law that can undoubtedly explain their idealised vision of the universality of international law. Such a dogmatic conception of universality can be problematic and even ultimately lead to the loss of this character by international law. As Jennings rightly points out, a universality that would be so rigid that it would not admit the possibility of regional approaches would lead to imperialist law; an imperialist law imposed by certain States or other fundamentalist ideologies on other subjects of international law. The postulate of universality though, logically necessary to any system of law that claims to be a true international law, may fall short of the full realisation of universality in act: it may take the form of an assumption of superior power, superior culture or civilization by one group of subjects (states or others) so that international law then takes the form of a legal sanction for the subjection more or less of some people to others.[34]

The purpose of this contribution is not to contest the universal vocation of international law; on the contrary, it affirms that universality is consubstantial with international law but invites further reflection on it. Such a reflection requires consideration of whether the application of international law extends to any subject concerned, whether no object is excluded and whether its objectives are achieved to the benefit of all.[35] This leads to the realisation that the universality of international law is a project, a process that is built up daily. In the words of Sebastian Heselhaus, "the assumption is that contrary to a glance at first sight, universality of international law has not come to an end. On the contrary, universality still is and in the 21st century will be a permanent and prevailing task, not

[31] Robert Jennings, "Universal international law in a multicultural world", in Maarten Bros, Ian Brownlie (eds.), *Liber amicorum for the Rt. Hon Lord Wilberforce,* Oxford, Clarendon Press, 1987, p.41. Many important notions in international law, such as *jus cogens* and obligations *erga omnes* presuppose the idea of international law with universal validity.
[32] Oscar Schachter, "The invisible college of international lawyers", *Northwestern University Law Review*, vol.72, 1977, pp.217-226.
[33] Christopher G. Weeramantry, *Universalising international law,* Leiden/Boston, Martinus Nijhoff Publishers, 2004, p.79; on the commitment of international lawyers to their discipline, Martti Koskenniemi, "Between commitment and cynicism: outline or a theory on international law as practice", in *Collection of essays by legal advisers of international organizations and practitioners in the field of international law,* New York, UN Office of Legal Affairs, 1999, pp.497-501.
[34] Jennings, supra note 31, p.42.
[35] Monique Chemillier-Gendreau, "À quelles conditions l'universalité du droit international est-elle possible?", *Recueil des Cours,* vol.355, 2012, p.19; Onuma Yasuaki, "A transcivilizational perspective on international law. Questioning prevalent cognitive frameworks in the emerging multi-polar and multi-civilizational world of the twenty-first century", *Recueil des Cours*, vol.342, 2010, pp.220-221.

only for the community of states, but for the academic legal community as well".[36] It is therefore essential, in order to build a universal international law, that international lawyers admit that, far from being acquired and immutably inscribed in the genes of international law, universality is a horizon, a roadmap that invites a specific methodological approach. The first paragraph of this section will thus call for a move away from the illusion of a pseudo-universality of international law towards the elaboration of a genuine universalisation of international law. The second paragraph will indicate that regional approaches can be one of the tools and means to build this truly universal international law.

a) Dropping the Mask: Putting an End to the Illusion of Proclaimed Universality

Is International Law International? The title of Roberts' book has something disturbing and disconcerting in that it questions what seems obvious to the vast majority of international lawyers, namely the universal vocation of international law.[37]As the author acknowledges from the very first pages of her book, international law aspires to be the world's Esperanto: the "ideal of international law suggests that it is constructed by drawing equally on people, materials, and ideas from all national and regional traditions".[38] But, she adds, the reality is different from this theoretical postulate. International law is, in fact, the product of the domination of certain States and regional groups, very often Western, which, without having the monopoly to define what international law is, succeed in imposing their vision and approaches.[39] Going further, Roberts emphasises the subjectivity that lies at the heart of the "science" of international law: "what count as international law depends in part on how the actors concerned construct their understandings of the field and pass them on to the next generation".[40] As shocking as it may seem, this assertion by Roberts is nonetheless difficult to contest. Like all the social sciences and other "Humanities", the study of international law and the formulation of the rules of international law contain a significant amount of subjectivity related to the human nature of those who study it.

Unless one challenges the insurmountable subjectivity of the actors of international law (State representatives, judges, international civil servants, academics, counsel and lawyers…) or deifies them by depriving them of their human weakness (if one considers that a subjective appreciation of the world is a weakness), one must admit that the alleged universality of international law is only an illusion and that all these actors appreciate norms and rules through the prism of their position, culture and/or interests. Indeed, "international law aspires to be a universal field, but is also, and inevitably, a deeply human product".[41] As pointed out by Martti Koskenniemi, a court's decision or lawyer's opinion is always a genuinely political act, a choice between alternatives not fully dictated

[36] Heselhaus, supra note 26, p.474.
[37] Roberts, supra note 9; for her part, Chemilier-Gendreau states that the term "international" which characterises this branch of law is not at first sight synonymous with universal. It refers first of all to the fact that it is a law between nations, Chemillier-Gendreau, supra note 35, p.17; another study also addresses the issue of the "internationality" of international law from a historical perspective. Stephen Neff indicates that the ambiguity of the expression "international law" makes it difficult to identify the date of the emergence of the discipline, Stephen C. Neff, "A short history of international law", in Malcolm D. Evans (ed.), *International law,* Oxford, Oxford University Press, 2018, p.4; on the link between colonialism and "universalisation" of international law, Antony Anghie, *Imperialism, sovereignty and the making of international law,* Cambridge, Cambridge University Press, 2005, p.380.
[38] Roberts, supra note 9, p.8.
[39] Ibid., p.9.
[40] Ibid., p.2.
[41] Ibid., p.320; see also Mohsen al Attar, "Reframing the 'universality' of international law in a globalizing world", *McGill Law Journal/Revue de droit de McGill,* vol.59, n°1, 2013, pp.138-139.

by external criteria. [42] To put it another way, every scholar/judge/lawyer/legal adviser in international law necessarily has a bias, intended or unintended, unconscious or assumed, in his/her approach to international law: in deciding which aspects he/she wants to discuss, which elements he/she wants to highlight, he/she inevitably ignores certain elements or underestimates their importance.[43]

Any answer is necessarily situated, i.e. linked to the person giving it, and may therefore vary according to that person's professional situation, origin and training.[44] Concepts and principles now considered universal such as freedom of the seas or *jus cogens* were first theorised and proposed to address specific concerns in particular contexts.[45] There is no strictly globalist or cosmopolitical vision of international law, as Emannuelle Jouannet reminds us, but rather an inevitable multiplicity of particular national, regional, individual and institutional visions of international law. This can be explained by the fact that all the players in the international game are conditioned by their own legal culture and not by a cosmopolitical legal culture that does not yet really exist as such. If it can be admitted that international law itself constitutes a kind of common language, an Esperanto as indicated above, this language is expressed through singular voices that continue to emerge from particular and differentiated legal cultures. [46] This is why it is essential that every actor of international law is aware of his/her own biases and has the modesty to recognise his/her consubstantial subjectivity.

Having said that, however, the problem is not subjectivity in the approaches to and development of international law, but its negation. The existence of different legal cultures and perspectives is not an obstacle to the universality of international law as long as the recognition of these differences enables bridges to be built between them. Instead of nourishing what Nathaniel Berman calls the "fantasy" of "dédoublement fonctionnel" it is appropriate, according to this author, to simply

[42] Martti Koskenniemi, "What is international law for?", in *International law,* supra note 37, p.42; see also Prost, supra note 22, p.129; Lucie Delabie, *Approches américaines du droit international. Entre unité et diversité,* Paris, A. Pedone, 2011, pp.224-341; David Kennedy, "One, two, three, many legal orders: legal pluralism and the cosmopolitan dream", *New York University Review of Law & Social Change*, vol.31, n°3, 2007, pp.647-649; Andrea Bianchi, Anne Saab, "Fear and international law-making: an exploratory inquiry", *Leiden Journal of International Law,* n°32, 2019, pp.351-365.

[43] Emmanuelle Jouannet opportunely reminds us that bias is not necessarily conscious and deliberate. Indeed, legal culture acts most of the time in an unconscious way, which makes it difficult to identify; and wanting to talk about it is already presupposing that one is determined by a legal culture that continues to mark us, Emmanuelle Jouannet, "Les visions française et américaine du droit international: cultures juridiques et droit international", in *Droit international et diversité des cultures juridiques/International law and diversity of legal cultures*, supra note 5, p.50; see also in the same book on the limits of the cultural paradigm and the link between legal culture and society, Mathias Forteau, "L'idée d'une culture internationale du droit international et les Nations Unies", pp.358-360; see for stimulating reading on the issue of theoretical assumptions, Iain Scobbie, "A view of Delft: some thoughts about thinking about international law", in *International Law,* supra note 37, pp.51-85.

[44] Ruiz Fabri, "Reflections on the necessity of regional approaches to international law through the prism of the European example…", supra note 5, p.85; see on the "imperial ambivalences" of international law and lawyers about the exercise of power, and of the West about the rest of the world, Nathaniel Berman, *Passion and ambivalence: colonialism, nationalism and international law,* Leiden, Brill, 2011, pp.419-424.

[45] On the notion of *mare liberum* developed by Grotius in direct response to the needs of colonial empires, see McWhinney, "Comparative international law: regional or sectorial, inter-systemic approaches to contemporary international law", supra note 17, p.223; Matthew Craven, "Colonialism and domination", in *The Oxford Handbook of the history of international law,* supra note 16, pp.862-863; on the genesis of *jus cogens,* as exposing the "dark sides of international law", see Felix Lange, "Challenging the Paris Peace Treaties, state sovereignty and western-dominated international law – The multifaceted genesis of the jus cogens", *KFG Working Paper Series,* n°19, Berlin-Potsdam Research Group "The International Rule of Law – Rise or Decline", Berlin, October 2018, p.21, available at https://www.kfg-intlaw.de/Publications/working_papers.php?ID=1, accessed on 12 December 2020.

[46] Jouannet, "Les visions française et américaine du droit international", supra note 43, pp.43-44.

acknowledge our "dédoublement passionnel": "we can be both believers in cosmopolitan peace and yet remain who we are: passionate, partisan nationalists".[47] The main obstacle to the universality of international law is thus not the diversity of approaches but the hegemonic will of certain operators of international law to claim that their approach, their vision is universal since it is objective, and/or necessary for the good of humanity. This gives them an excuse to cling to their beliefs and convictions, refusing any debate, confident that they are necessarily right and others wrong. This actually reveals a kind of contempt and condescension for others: "respect for others includes the recognition that they are equally capable of carrying their own burdens of judgement and that in doing so they might well reach conclusions different from our own".[48] It is necessary, writes Ruiz Fabri, to realise the ambivalence of the reference to the universal as, since the latter has no voice of its own to express itself, it is constantly susceptible to subjective appropriations, possibly suspicious of ulterior motives, and the suspicion of imperialist temptation can never be dismissed. And she rightly warns Europe and European academics, but this applies to all international lawyers and all regions of the world, against this temptation.[49]

Indeed, the "European subjectivity has traditionally been presented and has often been received as universal objectivity".[50] This criticism was, for example, voiced as early as 1947 by the representatives of certain States who considered that the Drafting Committee of the Universal Declaration of Human Rights had essentially only taken over the standards of Western civilisation while ignoring older civilisations.[51] In the field of the history of international law, periodisation is based on a division that corresponds primarily to a Western-centred approach falsely presented as objective. Yet nothing is more subjective than periodisation: depending on whether one decides to tell the history of international law from an African, Chinese, Arab-Muslim, socialist or European perspective, one will have recourse to different divisions of time according to the temporal landmarks specific to the culture concerned. Beyond periodisation, this strongly European perspective which assimilates the history of European international law (*jus europaeum*) to the history of international law produces a regrettable distortion of the history of the law of nations. This distortion is reflected in an over-

[47] He states that "in rejecting narrow formalist rigor or technocratic pragmatic precision in favor of a passionate internationalist faith, it is paradoxically the most 'realistic' of approaches", Berman, supra note 44, p.407.
[48] Emmanuel Voyiakis, "International law and the objective of value", *Leiden Journal of International Law,* vol.22, n°1, 2009, p.57.
[49] Ruiz Fabri, "Reflections on the necessity of regional approaches to international law through the prism of the European example…", supra note 5, p.95; in the same way, Martti Koskenniemi, "International law in Europe: between tradition and renewal", *European Journal of International Law,* vol.16, n°1, 2005, p.115; another author harshly castigates "ces 'juristes impérialistes', si bien intentionnés, 'fiers de leur mission et surs de leurs pouvoirs'", Wanda Capeller, "Droits infligés et 'chantiers du survivances': De quel lieu parle-t-on?", in Wanda Capeller, Takanori Kitamura (eds.), *Une introduction aux cultures juridiques non occidentales,* Bruxelles, Bruylant, 1998, p.29; see also on the risk of instrumentalising the universal and the general interest, Pal Wrange, "Is there a general interest hors la loi?", in *Select proceedings of the European Society of International Law, Volume 1 2006,* supra note 2, pp.279-292.
[50] al Attar, supra note 41, p.127; Capeller denounces a "shamelessly pretentious" European production of legal studies, Capeller, supra note 49, p.13; see also Masaji Chiba, "Droit non-occidental", in *Une introduction aux cultures juridiques non occidentales,* supra note 49, p.44; Mohamed Bennouna, "Droit international et diversité culturelle", in *International law on the eve of the twenty-first century. Views from the International Law Commission,* New York, United Nations 1997, p.81; Philip C. Jessup, "Non-universal international law", *Columbia Journal of Transnational Law,* vol.12, n°3, 1973, pp.415-429; Makau Mutua, "What is TWAIL?", *American Society of International Law Proceedings,* vol.94, 2000, p.37; Anu Bradford, Eric A. Posner, "Universal exceptionalism in international law", *Harvard International Law Journal,* vol.52, n°1, 2011, p.6; Kostiantyn Gorobets, "The unity of international law: an exercise in metaphorical thinking", available on https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3599840, accessed 22 December 2020, pp.15-16.
[51] Liliana Obregón, "The civilized and the uncivilized", in *The Oxford handbook of the history of international law,* supra note 16, p.928.

emphasis on European authors and practice, and an underemphasis on, or even an omission of, non-European experiences.[52] Similarly, in the field of identification of customary law, both national and international jurisdictions, learned societies and authors tend to rely almost exclusively on the practice or caselaw of a handful of mainly Western states and English and sometimes French-sources. As a result, the practice of non-Western States as well as non-Anglophone/Francophone sources are often left out, or insufficiently considered in the analysis.[53] The problem, once again, is not the non-exhaustiveness or selectivity of the data collected but the willingness to present these results as objectives and reflecting universally accepted or elaborated international law. It is undoubtedly this reality that explains why international law is no longer simply an instrument for preserving peace and resolving conflicts but has itself become an object of conflict.

By endowing it with a proclaimed rather than a constructed universality, international lawyers have made it "a weapon of choice, an instrument of assertion, a strategic stake" in the eyes of States, who think they can use it to defend any position.[54] This leads irremediably to a crisis of universality. Fashionable concepts such as "international community" help to convey the erroneous idea that such a community, very embryonic and still (very slowly) being built, already exists, and contribute to this "race for universality"; a tool at the service of the dominant rhetoric to conceal its domination under the guise of pluralism in order to make it better accepted, and above all to make it unquestionable, on pain of the protester passing as anti-humanist.[55] Today more than yesterday, these words of Hubert Vedrine, former French Foreign Minister, remain true:

> Je me demande si cette attente très forte à l'égard du droit international ne constitue pas la principale menace qui pèse sur lui. J'ai cité plus haut la formule : 'la communauté internationale'. Que de fois ai-je entendu dire : 'mais que fait la communauté internationale ?'. Elle ne fait rien puisqu'elle n'existe pas en tant que telle. Il y a les Etats-Unis, ou la Chine, ou la Russie, ou la Grande-Bretagne, ou la France, ou l'Europe, ou tous les autres, et ils ne sont pas d'accord.[56]

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[52] See Oliver Diggelmann, "The periodization of the history of international law", in *The Oxford handbook of the history of international law,* supra note 16, pp.1000-1001; Arnulf Becker Lorca, "Eurocentrism in the history of international law", in *The Oxford handbook of the history of international law,* supra note 16, pp.1034-1057; Bhupinder S. Chimni, "The past, present and future of international law: a critical Third World approach", *Melbourne Journal of International Law,* vol.8, 2007, pp.499-516; Henhard Steiger, "Universality and continuity in international public law", in *Universality and continuity in international law,* supra note 26, pp.13-43; Ram Prakash Anand, "Universality of international law: an asian perspective", in *Universality and continuity in international law,* supra note 26, pp.87-105; Arnulf Becker Lorca, "Universal international law: Nineteenth-century histories of imposition and appropriation", *Harvard International Law Journal,* vol.51, n°2, 2010, pp.475-552.

[53] Of course, this may be linked to the accessibility and availability of documents from countries, particularly in the South. But it is important to emphasise that the digital divide, far from being an excuse and/or justification, is part of the problem. See Anthea Roberts, Sandesh Sivakumaran, "The theory and reality of the sources of international law", in *International Law,* supra note 37, pp.105-16; Alan Boyle, Christine Chinkin, *The making of international law,* Oxford, Oxford University Press, 2007, pp.28-29; Katerina Linos, "Methodological guidance. How to develop comparative international law case studies", in *Comparative international law,* supra note 21, p.37; Roberts, supra note 9, pp.270-278.

[54] Emmanuelle Jouannet, "What is the use of international law? International law as a twenty-first century guardian of welfare", in *Select proceedings of the European Society of International Law, Volume 1 2006,* supra note 2, p.55; Christopher G. Weeramantry, "International law and the developing world: a millennial analysis", *Harvard International Law Journal*, vol.41, n°2, 2000, pp.278-279.

[55] Robert Charvin, "'Communauté' internationale ou empires oligarchiques", *Droits*, vol.69, n°1, 2019, pp.15-16.

[56] Hubert Védrine, "A quoi sert le droit international?", in *Select proceedings of the European Society of International Law, Volume 1 2006*, supra note 2, p.99; see also the intervention of Jutta Brunée at the final round table of the annual colloquium of the European Society of International Law, in Hélène Ruiz Fabri, Rüdiger

Universality is not and could not mean an unalterable truth, legal principles and rules enacted by a cultural or social group as being imposed on the whole of international society because these principles and rules would carry, in the opinion of those who enact and defend them, unquestionable universal values. This was the case, for example, of the "universalists" who, at the beginning of the twentieth century, criticised any movement for the reform of international law by Latin American states, without really trying to understand the different realities that these states were trying to address or taking time to consider the alternative to the "universal rules" proposed by this region of the world. Yet, for these Latin American states and the authors who supported their approach, it was only an effort to appropriate European international law in order to adapt it to the realities of this part of the world.[57] However, international law must be a tool, malleable to solve the concrete problems faced by individuals and governments on the planet. This is one of the justifications for regional approaches to international law: approaching international law as a tool that people may use to solve problems. Such an approach, far from weakening international law, enriches it. There is indeed a need for a reconsideration of the theoretical edifice of international law and for attention to be paid to its vertical dimension and deep structure.[58]

Rather than maintaining a dogmatic approach to the alleged universality of international law, it is probably appropriate, as has been proposed, to move away from this illusion and adopt a more fruitful approach to the universalisation of international law. Universality of international law "does not mean uniformity but rather richness of variety and diversity".[59] This is probably why Mireille Delmas-Marty invites lawyers to write "universalism" in the plural. Not a plural of majesty, but a plural of modesty, as universalism, as soon as it is invoked in the legal field, seems to fluctuate between reason and faith, demonstration and revelation.[60] As the eminent author points out, it would no doubt be more accurate to speak of a "process of universalisation".[61] This universalisation, and thus the progressive construction of the universality of international law, requires "to adopt an ethos of justice (*meaning*) -parity of participation- and then to establish rules (machinery) that facilitate popular and democratic engagement".[62]This presupposes upstream recognition by each of the actors of the inevitable subjectivity of their discourse and vision, and therefore the need for greater humility in their pretension to enact the universal. Such an approach could shield international lawyers from the dismay they feel at the tension that exists between a fantasised universality and a reality that

Wolfrum, Jane Gogolin (eds.), *Select Proceedings of the European Society of International Law, Volume 2 2008,* Oxford and Portland, Oregon, Hart Publishing, 2010, pp.235-266.

[57] See al Attar, supra note 41, pp.99-104; Esquirol, "Latin America", supra note 16, pp.562-564; Rodiles, "International humanitarian law-making in Latin America", supra note 5.

[58] In the words of Ginther, deep-structure means in the first place the national and regional/sub-regional socio-political economic and cultural framework upon which the realisation and effectiveness of international law will ultimately depend, Konrad Ginther, "New perspectives and conceptions of international law and the teaching o international law: introductory remarks", in Konrad Ginther, Wolgang Benedek (eds.), *New perspectives and conceptions of international law. An Afro-European dialogue,* Wien/New York, Springer-Verlag, 1983, p.3; see also Paul B. Stephan, "Comparative international law, foreign relations law, and fragmentation: can the center hold?", in *Comparative international law,* supra note 21, p.66.

[59] Jennings, supra note 31, p.42; Abdulqawi Yusuf, "Diversity of legal traditions and international law: keynote address", *Cambridge Journal of International Law,* vol.2, n°4, 2013, p.683; Vladlen Stepanovich Vereshchetin, "Cultural and ideological pluralism and international law: revisited 20 years on", in Sienho Yee, Jacques-Yvan Morin (eds.), *Multiculturalism and international law: essays in honour of Edward McWhinney,* Leiden/Boston, Martinus Nijhoff Publishers, 2009, p.127; Bennouna, supra note 50, p.80; Bebhinn Donnelly-Lazarov, "Natural law and the possibility of universal normative foundations", in *Select Proceedings of the European Society of International Law, Volume 2 2008,* supra note 56, pp.235-266.

[60] Mireille Delmas-Marty, *Les forces imaginantes du droit. Le relatif et l'universel*, Paris, Editions du Seuil, 2004, p.26.

[61] Ibid., p.54.

[62] al Attar, supra note 41, p.99.

denies it. They then have recourse, according to Berman, to psychic mechanisms aimed at denying or contesting that reality, notably "disavowal". He refers to this term, "disavowal", to designate "the simultaneous acknowledgment and denial of a troubling reality, in which there is 'blockage' between experience and the discourse used to frame that experience". It is not a psychotic denial of reality, but rather a mechanism "to protect the integrity of the writer's discourse and subjectivity in the face of a reality in which power and principle seem irremediably divided, and in which the factual situation and the interpretive frame provided by the prevailing discourse seem irreconcilable".[63]

Thus, recognising the necessary diversity of cultures and the irreducible subjectivity of one's approach can be positive and serve the cause of the universality of international law as long as it allows one to distance oneself from one's own "evidences", to be attentive to the different cultural contexts in which international law can be apprehended and thus, to better understand differences in interpretation and application. It is only after this humble recognition that one's point of view is only a view from a certain point, that universality as a process "would allow subjectivities to collide in a structured environment, thus facilitating (…) authentic collective rationality and self-correction, or (…) to reconfigure international lawmaking processes"[64] to enable the building of a truly universal international law. As the philosopher before him/her understood, the international lawyer must recognise that he/she is condemned to the peculiarity of his/her statements, which, whatever their claim, will always be marked by their enunciation. It is only by fully integrating the "relativity of his/her knowledge", as of all possible knowledge, that he/she will be able to succeed in building the universal.[65] Indeed, immanent subjectivity of the actors and operators of international law does not constitute an obstacle to the construction of universal international law if one accepts the inter-subjective nature of this quest.[66] Recognising such an approach will make it possible to perceive RAIL not as a challenge to the universality of international law from a logic of competitive points of view but as constructive contributions in a collective approach to the development of consensual and universal international law.

Therefore, RAIL can be one of the ways in which subjectivities can structure themselves, positively confronting each other to identify points of convergence that serve as a basis for the elaboration of universal norms and to highlight places of disagreement that invite the initiation of a constructive dialogue. It is only by seeking to understand the particularities of the various conceptions of international law, not by denying them, and their mutual impact, that it will be possible to make international law a truly universal common language. It would help to think of the world no longer in terms of "abstract universals but seeing all players as both universal and particular at the same time, speaking a shared language but doing that from their own, localizable standpoint".[67] RAIL can indeed facilitate the broadening of the networks and sources of international lawyers, suggested by

[63] Berman, supra note 44, p.441; Berman illustrates the use of this mechanism among international lawyers by studying the discourse of two of them, Suzanne Bastid and Georges Scelle, both eminent publicists attached to international law and defenders of their country's interests, ibid., pp.411-456.
[64] al Attar, supra note 41, p.99.
[65] See François Ewald, "Le point de vue du philosophe", in *The future of international law in a multicultural world,* supra note 8, p.49; it is to this modesty that Oppenheim invites us, reminding us that no one is the depositary of an immutable truth; not even Grotius, who "was not an infallible pope" but "a child of his time and therefore a product of his age", Lassa Oppenheim, "The science of international law: its task and method", *The American Journal of International Law,* vol.2, n°2, 1908, p.328.
[66] Voyiakis, supra note 48, p.76; contrary to what Leslie Green has written, who saw regional and political groupings as the end of all hope for universal international law, Leslie C. Green, "Is there a universal international law today?", *Canadian Yearbook of International Law,* vol.23, n°3, 1985, p.32.
[67] Koskenniemi, "The case for comparative international law", supra note 6, p.4.

some authors, to enable them "to encompass a more diverse range of perspectives and materials than has often taken place within the divisible college to date".[68]

b) Regional Approaches: Source of Legitimisation for a Universal International Law under Construction

Increasingly present in the discourse of jurists, legitimacy is one of those non-specifically legal concepts that have been reclaimed by the law. This recurrent recourse to legitimacy in the discourse on international law also arouses the caution of some. Indeed, unlike legality, which is clothed in the aura of objectivity, legitimacy is accused of being based on a psychological spring which makes its strength depend on subjective feelings. This subjectivity attached to the evaluation of legitimacy would leave the door open to certain instrumentalism, particularly for initiatives that are directly contrary to legality; prompting some, paraphrasing Carl Schmitt, to claim that "whoever invokes legitimacy, wants to cheat".[69]

However, whatever may be said about it and whatever legitimate mistrust one may have for the use of this concept in law, legitimacy is at the heart of the legal phenomenon. As has been written, legitimacy makes the rule of law more effective by justifying it to legal subjects through a kind of accreditation, such as a certificate of guarantee.[70] In the name of what, indeed, can international law be invoked to make it prevail over relations between States and other subjects of international law, if not by a higher imperative that will enable it to apply, to demand obedience, without being challenged?[71] In a society without a sovereign such as the international society, in order to achieve the adherence of States to legality, they must still be convinced that this is a fully and substantially legitimate law. In such a society, legitimacy ensures the effectiveness of the rule of law by instilling in sovereign subjects such as States, beyond the fear of possible sanctions or loss of benefits in case of violation of international law, the feeling that it is "just and right" (what Buchanan calls "Moral reason-based support") to submit to the rule in question. This belief in the legitimacy of the rule is particularly necessary when "there is reason for some to doubt that it is indeed advantageous for all relative to the non-institutional alternative. Moral reason-based support can reduce the costs of achieving compliance, which might be prohibitively high if the threat of coercion were the only reason for compliance".[72] In a context where there is an expansion of international law both *ratione materiae* and *ratione personae*, it is evident that the legitimacy of international law is not only a concern of States but also of non-State groups and individual citizens, who sometimes may

[68] Roberts, supra note 9, p.322; Ginther, supra note 58, p.3; Jouannet, "Les visions française et américaine du droit international", supra note 43, p.52; Weeramantry, *Universalising international law,* supra note 33, p.88; Wang Tieya, "Universal approach to the teaching of international law", in *International law as a language for international relations,* published for and on behalf of the United Nations, The Hague/London/Boston, Kluwer Law International, 1996, pp.320-324; Kennedy, supra note 42, p.649.

[69] Jan Klabbers, Touko Piiparinen, "Normative pluralism: an exploration", in *Normative pluralism and international law,* supra note 28, p.32, see in general pp.30-31; see also on the possible misuse of legitimacy, Alexandre Viala, "La légitimité et ses rapports au droit", *Les Cahiers Portalis*, vol.7, n°1, 2020, pp.27-28; John Tasioulas, "The legitimacy of international law", in Samantha Besson, John Tasioulas (eds.), *The philosophy of international law,* Oxford, Oxford University Press, 2010, pp.99-100; Boyle and Chinkin, supra note 53, p.25.

[70] Joël-Benoît d'Onorio, "La légitimité: de quel droit?", *Les Cahiers Portalis*, vol.7, n°1, 2020, p.93.

[71] Ibid.

[72] Allen Buchanan, "The legitimacy of international law", in *The philosophy of international law,* supra note 69, p.81; see also Mattias Kumm, "The legitimacy of international law: a constitutionalist framework of analysis", *European Journal of International Law,* vol.15, n°5, 2004, p.908; Tasioulas, supra note 69, pp.97-98; Boyle and Chinkin, supra note 53, pp.24-25; Yasuaki, supra note 35, pp.152-153; 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", *International Community Law review,* vol.8, 2006, p.29.

reasonably question the legitimacy of international institutions and international norms even though their own States have consented to them: the more international law resembles domestic law, the more it is expected to meet the same standards of legitimacy.[73]

However, many authors, notably the Third World Approaches to International Law (TWAIL), have criticised the consubstantial illegitimacy of international law, linked to how it has been elaborated and constructed so far.[74] Although confined to the State level (whereas legitimacy requires going beyond this framework as outlined above),[75] this section argues that RAIL can be a dynamic tool for the construction of both the legitimacy and the universality of international law, establishing a double-track tunnel between the two. On the one hand, regional approaches, by broadening the material on which international law is constructed, by allowing for better representation and representativeness, make it possible to build international law that is perceived as truly universal and therefore legitimate. On the other hand, contributing to the development of international law will maintain the commitment to norms and rules perceived as just and legitimate, facilitating its universal application. As with unity and universality, RAIL can thus create a virtuous circle of legitimacy and universality of international law, both of which are mutually reinforcing.

aa) Regional Approaches, Tools of Universality, Condition/Instrument of the Legitimacy of International Law

One of the arguments put forward for the rejection of any regional vision of international law is the risk that such an approach would cause international law to lose its ontological neutrality and thus its vocation for universality. As recalled above, such objectivity of law as a social product is impossible because of the insurmountable subjectivity of the human being. Consequently, to adapt d'Onorio's remarks, the claim of a supposed "neutrality" of law, postulated by its supposed "objectivity", inevitably leads to its "sanitisation of legitimacy", which may lead to the worst: the anaesthetised conscience of international lawyers will no longer be able to exercise its necessary discernment and will remain without reactions or "sufficient immune defences" in the face of the instrumentalisation of international law, or its submission to geopolitical power relations alone.[76] No more than any other branch of law, international law exists not only to be thought but above all to be applied and embodied by and for living beings, with their greatness and limitations.[77] Pretending to "purify" international law of all foreign elements, particularly the consideration of power relations and the realities of international society, would be just as speculative and ethereal as trying to remove from it all considerations of morality and justice in the name of arid positivism.

By taking into account social reality, and therefore that international law is intended to apply to an international society that is itself multicultural and plural, regional approaches broaden the philosophical foundations of international law. Indeed, international law cannot address problems which are truly global, crying out for a universal solution, while remaining set in a narrowly monocultural mould. The legitimacy of international law lies first and foremost in its universal

[73] Buchanan, supra note 72, p.87; Daniel Bodansky, "The legitimacy of international governance: a coming challenge for international environmental law?", *The American Journal of International Law,* vol.93, n°3, 1999, p.606; Nollkaemper, supra note 28, p.105.
[74] See Nollkaemper, supra note 28, p.100.
[75] On this point, the author fully agrees with the views of Hilary Charlesworth, Christine Chinkin, *The boundaries of international law. A feminist analysis,* Manchester, Juris Publishing, 2000, p.1.
[76] d'Onorio, supra note 70, p.105.
[77] Ibid., p.107.

foundation: "the history of international law did not start with the peace treaty of Westphalia in 1648, and that it was not only a European invention".[78] RAIL thus make it possible to universalise the origins and foundations of international law by going beyond the Eurocentrism that is sometimes displayed to look at other regions of the world. Another reason for resorting to regional approaches to international law is the one indicated by Judge Weermantry, which should probably be repeated here *in extenso*:

> Another factor that emphasizes the importance of universalism in international law is its lacks of enforcement mechanisms, lacking sheriff or constable or soldier to enforce it, international law needs to rely upon its own moral strength and universality for it to command acceptance on a worldwide basis and to marshal the strength to prevail over the physical might of states. It must therefore to be a set of concepts as universally supported and as deeply rooted in worldwide tradition as research can reveal. Shut out such universality and one cuts off the taproots from which it derives its nourishment. Little wonder then that it will be weak in the allegiance it commands. There is an imperative need therefore for widening the intercultural base on which the structure of international law stands.[79]

Indeed, multilateralism can create a specific kind of legitimacy which is procedural and based on pluralism: "everyone's view of the world counts, to some extent at least, in the creation of the rules of the system".80 This broadening of the perspectives of international law to give it universal legitimacy is not limited to history or the formulation of rules but also their application. By shortening the handle of the universal and thus bringing it closer to the national, RAIL can help to overcome the challenges that exceptionalism and exemptionalism pose to the effectiveness of universal international law.

(1) Overcoming the Eurocentrism of International Law: From *Jus Europaeum* to *Jus Universalis*

In spite of the universal principles it claims to elaborate and promote, international law has for a long time, and so far, been developed based on Western and Christian principles. Little or no space has been given to non-Western States and non-Christian cultures in the history of international law and the source of the rules and norms of international law.[81] It is not excessive to note that Western States and scholars have always played a critical and disproportionate role in the creation of international law to date. Traditional and mainstream writing in international law has often taken for granted that international law was originally created by Europeans and spread through the

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[78] Fatiha Sahli, Abdelmalek El Ouazzani, "Africa North and Arab countries", in *The Oxford handbook of the history of international law,* supra note 16, p.385.
[79] Weeramantry, *Universalising international law,* supra note 33, p.3; see also Abdul G. Koroma, "International law and multiculturalism", in *Multiculturalism and international law,* supra note 59, pp.79-80.
[80] Nico Krisch, "Imperial international law", *Global Law Working Paper 01/04,* Hauser Global Law School Program, NYU School of Law, p.10.
[81] Becker Lorca, "Eurocentrism in the history of international law", supra note 52, pp.1034-1057; Manohar L. Sarin, "The Asian-African states and the development of international law", in *The future of international law in a multicultural world,* supra note 8, p.121; Ram Prakash Anand, "Attitude of the Asian-African states towards certain problems of international law", in Frederick E. Snyder, Surakiart Sathirathai (eds.), *Third World attitudes toward international law,* Dodrecht/Boston/Lancaster, Martinus Nijhoff Publishers, 1987, p.7; Tiyanjana Maluwa, "Reassessing aspects of the contribution of African states to the development of international law through African regional multilateral treaties", *Michigan Journal of International Law,* vol.41, n°2, 2020, p.327; Salvatore Caserta, "Western centrism, contemporary international law, and international courts", *Leiden Journal of International Law*, 2021, pp.3-4.

colonial enterprise.[82] Some authors have even gone so far as to assert that international law was "one of the West's great gifts to the world".[83] Such statements are not isolated and Becker Lorca records such assertions by eminent classical authors such as Oppenheim or Verzijl.[84] Seen from this angle, it must be admitted that "what might have been understood initially as 'European' international law was recast as 'universal' international law".[85]

However, if we admit that human groups organised in societies, and without necessarily taking the form of States according to Western canons, existed elsewhere in the world before colonisation and that consequently, they elaborated rules and principles to govern their relations and exchanges, we must fatally admit that an international law even in a "primitive form" existed in these geographical and cultural areas.[86] Therefore, to build a truly universal international law, it is imperative to go beyond a narrow approach not only to the history of *jus gentium* but also to the values and places of formulation of the principles that should govern international relations. It is imperative for the universality of international law to bear in mind that pre-colonial societies had legal rules governing their relations and that their accession to independence did not mean a birth but rather a "rebirth", a "come-back": the "new states" were certainly not new in the sense that they entered into statehood from a vacuum.[87] If this reality is admitted, it is understandable that "when all the 'newer States' are now in a position freely to express their own opinions and safeguard their interests, it seems quite natural that they to a large extent base their actions on their old historical, cultural and religious traditions".[88]

RAIL are thus justified by a desire to transform an international law that was European, then strongly westernised, into a truly universal international law. As international law governs more and more aspects of the lives of individuals and the activities of States on the planet, it is fundamental that it becomes truly universal in its process of elaboration and no longer merely presented or perceived as the product of one or two civilisations. The universality of international law is only possible if it is

[82] Roberts, supra note 9, p.280; Abdulqawi A. Yusuf, *Pan-Africanism and international law,* The Hague, AIL-Pocket, 2014, pp.57-60.
[83] Adda B. Bozeman, "An introduction to various cultural traditions of international law – A preliminary assessment", in *The future of international law in a multicultural world,* supra note 8, p.98; see also during the same colloquium a speaker asserting that classical international law "is a Western legal experience with a universal dimension". See the intervention of François Ewald during the debates, in *The future of international law in a multicultural world,* supra note 8, p.214; for an opposing view that international law was not European but was claimed to be so in order to justify colonialism, Orakhelashvili, supra note 2, pp.325, 333-334, 339.
[84] According to Becker Lorca, these statements stem from the apprehension of Western lawyers about the expansion of international law to non-Western States, with the correlative risk that Western States will lose their privileged place at the heart of the law of nations, Becker Lorca, "Eurocentrism in the history of international law", supra note 52, pp.1041-1042.
[85] Roberts, supra note 9, p.280.
[86] This is what some authors have tried to establish and demonstrate, see amongst others, Taslim Olawale Elias, *Africa and the development of international law,* Dodrecht, Martinus Nijhoff Publishers, second edition, 1988, p.297; Felix Chuks Okoye, *International law and the new African states,* London, Sweet & Maxwell, 1972, p.225; Jeremy L. Levitt, "African origins of international law: myth or reality", *UCLA Journal of International Law and Foreign Affairs,* vol.19, 2015, pp.113-165; Weeramantry, *Universalising international law,* supra note 33, pp.1-31; Mashood A. Baderin, "Muhamad Al-Shaybani (749/50-805)", in *The Oxford handbook of the history of international law,* supra note 16, pp.1081-1085; Sarin, supra note 81, pp.117-142; for a general critique and presentation of some of those studies, James Thuo Gathii, "International Law and Eurocentricity", *European Journal of International Law,* vol.9, 1998, p.184-211.
[87] Bo Johnson Theutenberg, "Different trends of the international legal system of today", in *The future of international law in a multicultural world,* supra note 8, p.261; on this subject, the author is careful to point out that "the term 'developing' [countries] applies only in its industrial sense, because the occidental world has scarcely anything to teach the developing world about moral values, religion and justice".
[88] Ibid.; see also Okoye, supra note 86, p.178; Anghie, supra note 37, p.198.

identified not as a monocultural construct but as the fruit of an intercultural and inter-civilisational dialogue bequeathed to all humankind.[89]

> This implies the identification and appraisal of principles and rules common to several or more of the different, competing 'regional' systems, and the search for a new type of jus gentium international law, itself strongly influenced and directed by the new jus natural style interest in ultimate, ordering principles on which to base a new, more representative and pluralistic, world public order system, whether these ordering principles be styled as 'imperative principles', jus cogens, or something more.[90]

Regional approaches can also help to bring greater representativeness to the centres and places of impetus of international law to counterbalance the over-representation of the Western vision in these places. The inclusion of the requirement of representation of "different civilisations and cultures" in the statutes of international jurisdictions or international institutions such as the ILC is aimed precisely at ensuring this representativeness and hence the universality of international law. Indeed, behind this requirement of representativeness lies the ideal of universality of international law which requires that international law draws equally on people, materials and ideas from all national and regional traditions. Nevertheless, as some authors have rightly noted, it is not enough to come from a certain region to have a vision of international law in that region. Nor does one necessarily have to be from a region to espouse its approach to international law. Education, training and other realities play an essential role in this respect (see infra 3.c)).[91] Thus, despite the emphasis on representation in international law institutions, people, materials and ideas from certain States and regions dominate particular transnational sites and flows in international law.[92] Regional approaches can overcome these formal requirements of representativeness by focusing not on the passports of those who are elected or appointed but by obliging them to draw on material that is genuinely representative of the views and approaches of different regions of the world. RAIL, as comparative international law, would thus enable institutions to determine what is "international" across the regions and groups and encourage subjects of international law to feel they have input regarding international norms and institutions.[93]

Regional approaches, because they allow the operator to focus on a region, its needs, its values and its legal engineering, will make it possible to overcome another pernicious approach to which false universalism leads, which seeks universal norms only on the basis of a Western premise. This approach, which can be described as "Them Too", consists for international lawyers in starting from

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[89] Weeramantry, *Universalising international law,* supra note 33, p.61.
[90] McWhinney, supra note 17, p.227.
[91] See for example Wood, supra note 2, pp.157-158; Ruiz Fabri, "Reflections on the necessity of regional approaches to international law through the prism of the European example…", supra note 5, pp.89-96. This may perhaps explain why "the thinking of the International Court of Justice from Third World countries had not, on the basis of their published separate and dissenting opinions, reflected any important influence of their national background", Hugh Thirlway, "Reflections on multiculturalism and international law", in *Multiculturalism and international law,* supra note 59, p.110, note 41.
[92] Roberts, supra note 9, pp.256-260. For example, the representativeness of the ILC as a whole may be seen as not being sufficiently reflected in the selection and appointment of special rapporteurs by the Commission. It has been observed that most special rapporteurs have been from the West, Mathias Forteau, "Comparative international law within, not against, international law. Lessons from the International Law Commission", in *Comparative international law,* supra note 21, p.168.
[93] Roberts, supra note 9, p.255; Ginther, supra note 58, pp.1,6; Abdulqawi A. Yusuf, "From reluctance to acquiescence: the evolving attitude of African states towards judicial and arbitral settlement of disputes", *Leiden Journal of International Law,* vol.28, n°3, 2015, p.614.

the rules and principles identified in the national or regional Western legal orders to seek confirmation in other legal orders or the jurisprudence of other countries and regions.[94] The "Them Too" approach is problematic because it places the approach within a logic that induces a selectivity of the materials that will be retained, only those confirming or reinforcing Western principles being highlighted, to the exclusion of those that contradict them. In this approach, the absence of equivalent or contradictory principles is considered at best as an absence of objection, at worst as tacit acquiescence. Moreover, this "legal ethnocentrism"[95] results in maintaining the West as the centre of proposal and formulation of universal norms while other regions of the world are reduced to a role of validating or contesting proposals without being able to formulate proposals themselves (see infra 3. b) aa)). Becoming aware of this Eurocentrism, or rather now West-centrism of international law is the first step in order to begin the reconstruction of universal international law. Looking back, it can be said that "the moment when the international legal system first began to be challenged by some of the newly independent states as being too europocentric was also the moment when the international legal system was for the first time becoming in fact, not merely theoretically, universal". [96] Regional approaches to international law are part of this logic, by introducing a break with a "cathedral and Eurocentric international law",[97] to open the door to the construction of a universal law in its elaboration and enforcement.

(2) Putting an End to Exceptionalism and Exemptionalism

One of the strong trends in the discourse on international law is undoubtedly what can be called "deformalisation" in international law-making. This deformalisation is intended to speed up the process of changing the rules of international law, which has been found too slow in the face of the need to protect certain values deemed important or to change institutions perceived as unsuited to the changing world.[98] This deformalisation results in a flexibilisation of the making processes of international law, "the replacement of formal criteria for determining the law by more substantive ones which usually reflect the universalist principles underlying a hegemon's foreign policy".[99] While this deformalisation is guided by noble motives, notably humanitarian requirements and what is often presented as the protection of the "interests of the international community",[100] it raises difficulties because of the particularly vague nature of the criteria on which it is based, which leaves a great deal of discretion to those who invoke it and thus gives greater room for manoeuvre to those who have the possibility and capacity to use it, i.e. those who have a certain power in international relations. Indeed, the deformalisation of international law-making allows the change that corresponds to the dominant States and groups who thus control the instances and dynamics of modification of the law on a highly selective bias. This deformalisation, therefore, makes it possible

[94] See for the criticism of the use of that approach in the field of human rights, Koroma, supra note 79, pp.82-83.
[95] See Jouannet for whom liberal Western democracies have instilled in international law a "certain legal ethnocentrism", Jouannet, "What is the use of international law", supra note 54, p.62.
[96] Jennings, supra note 31, p.47; in the same vein, Yusuf, "Diversity of legal traditions and international law", supra note 59, p.685.
[97] Blaise Tchikaya, "La codification régionale du droit international à l'Union Africaine: nouvelle fragmentation ou continuité", in *Journal of the African Union Commission on International Law*, second edition, 2015, p.278.
[98] For studies on this deformalisation of international law to "adapt" certain institutions of international law, see for example Apollin Koagne Zouapet, *Les immunités juridiques dans l'ordre juridique international. Le prisme de la constance,* Paris, Pedone, 2020, pp.245-440; Apollin Koagne Zouapet, "Peut-on faire du neuf avec du vieux? Remarques cursives sur la protection diplomatique à l'aune du droit international des hommes", *Romanian Journal of International Law*, vol.22, 2019, pp.7-43.
[99] Krisch, "Imperial international law", note 80, p.23.
[100] Ibid., p.24; Berman denounces precisely on this subject the double hypocrisy of international lawyers who have an unassumed nationalism and decry that of others presented as bad. Berman, supra note 44, p.393.

to call into question the principle of the equality of the major subjects of international society, i.e. States, either by undermining the right of all States to participate in the making of international law (exceptionalism) or by granting itself the privilege of not observing international law, which is a negation of the equal submission of all to the law (exemptionalism).

It is the United States that is very often singled out as the prototype of exemptionalism: very active in pushing for the adoption of many conventions, it only very rarely consents to be bound by these instruments. They thus participate in the drafting of legal rules that they consider necessary to frame the actions of other actors but not necessarily their own. In addition to this exemptionalism from conventional rules, there is a more direct exemptionalism, which Nico Kirsch describes as "hierarchical",[101] and which is made possible by the presence of the United States in bodies such as the United Nations Security Council. The United States can thus participate actively in the drafting of rules that are binding on other States, even against their will under the United Nations Charter, while at the same time being able to use this same body to exempt itself from compliance with certain rules or to exempt its nationals from the jurisdiction of certain institutions such as the International Criminal Court. Similarly, giving its national legislation and courts almost universal scope and jurisdiction provides a tool for the United States to create law for other States and to monitor its observance while it itself remains unbound and unmonitored. [102] But these exemptionalist manoeuvres are not unique to the United States.

Ana Bradford and Eric Posner, in an article in support of exemptionalism, indicate that the US attitude towards international law is neither distinctive nor exceptional. All powerful nations, be it the United States, China or the European Union (sic) are adopting the same strategy. And if only American exemptionalism is mentioned, it is because scholars are far too focused on the US hyperpower to notice the identical behaviour of other States.[103] Whether one can be dubious when these authors state that "when the United States applies double standards, it simply acts like any other state",[104] it cannot be denied that some of the strategies of exemptionalism described above are applied and used by other Powers, to a greater or lesser degree.[105] But unlike Bradford and Posner, who believe that the fact that exemptionalism leads to violations of international law is not so serious because "all states violate international law some of the time",[106] this study suggests that such a strategy is problematic and undermines the effectiveness of international law and hence its universality. On the one hand, to accept the very principle of an "admissible margin of violation" of international law is a negation of the law itself: a legal obligation is either binding or it is not. Great powers each violating the portion of the law that is not appropriate to them will simply create zones of lawlessness in

[101] Krisch, "Imperial international law", note 80, p.31.
[102] See for US exemptionalism, Krisch, "Imperial international law", note 80, pp.30-35, 47-54; Tasioulas, supra note 69, pp.103-105; Delabie, supra note 41, pp.57-59.
[103] Bradford and Posner, supra note 50, p.5.
[104] Ibid., p.10.
[105] Bradford and Posner compare EU, Chinese and US exemptionism, ibid., pp.12-44; see on universal regulation of the Organisation for Economic Co-operation and Development (OECD), Nico Krisch, "International law in times of hegemony: unequal power and the shaping of the international legal order", *European Journal of International Law,* vol.16, n°3, 2005, pp.398-399; on EU, Cedric Ryngaert, "Whither territoriality? The European Union's use of territoriality to set norms with universal effects", in Cedric Ryngaert, Erik J. Molenaar, Sarah Nouwen (eds.), *What's wrong with international law? Liber amicorum A.H.A. Soons,* Leiden, Brill Nijhoff, 2015, pp.434-448.
[106] Bradford and Posner, supra note 50, pp.47-48; it is important to remember that while the international lawyer must take into account the international environment in which he or she evolves, he/she should not "succumb" to all factual and ideational realities by adapting its methods and findings to any given political, social and economic climate,see Anne Peters, "The rise and decline of the international rule of law and the job of scholars", in *The International Rule of law: rise or decline?*, supra note 11, pp.56-65.

accordance with their interests. On the other hand, Bradford and Posner's approach corresponds to the views of international lawyers at the centre, quite arrogant,[107] which are difficult to accept for peripheral States that do not have the luxury of violating rules by demanding that they be respected by others. Exemptionalism, thus, directly challenges the universality of international law, just as exceptionalism does.

The debate about the value of UN General Assembly resolutions is an illustration of the opportunistic use of a body and international law, under exceptionalism, to serve the interests of powerful States. As Alan Boyle and Christine Chinkin point out, when in the early years of the United Nations, Western States dominated the General Assembly, the merely "recommendatory" nature of its resolutions did not prevent the General Assembly from being able to recognise and "affirm" the existence of fundamental legal norms in the international legal order. It was thus the General Assembly that "universalised" the principles contained in a treaty concluded between four countries – the Nuremberg Charter. It is also the General Assembly which was able to adopt a resolution on the maintenance of peace and security – Uniting for Peace Resolution – at the instigation of the United States to bypass the opposition in a blocked Security Council. However, General Assembly resolutions lost their "creative capacity" when, in the aftermath of the vast decolonisation movement, the General Assembly found itself dominated by Third World States that wanted to use their majority in this body to advance their own political and economic agendas, sometimes in contradiction with the interests of Western powers. Western States, academics and arbitrators/judges have henceforth repeatedly pointed to the total lack of normativity of the resolutions creating, for example, the new international economic order.[108]

The intervention of the North Atlantic Treaty Organization (NATO) in Kosovo is another illustration of the use of the "exceptionalist" argument to justify violations of international law. Eminent Western international lawyers, while acknowledging the illegality of NATO's action, have found it to be legitimate. Some authors have even gone so far as to take up the idea that "law breaking is an essential method of law making".[109] Beyond the very debatable idea that a violation of international law on ethical grounds can lead to a more ethical international law, one can wonder when the violation of law becomes morally necessary and, above all, who appreciates this necessity, who decides whether the law is in irreconcilable opposition to ethics (whose ethics, by the way?). The risk of abuse of the ethical argument, which the invocation of the exceptional character is not sufficient to curb, is clearly visible, as illustrated by the controversial recurrence of the argument of the exceptional circumstances invoked to justify the secessions being supported, while at the same time decrying those supported by others in Kosovo, Abkhazia, South Ossetia, etc.[110] Therefore, "when or

[107] See for a fair criticism of this liberal imperialism, Richard Falk, "International law and the future", in Richard Falk, Balakrishnan Rajagopal, Jacqueline Stevens (eds.), *International Law and the Third World. Reshaping justice,* London and New York, Routledge-Cavendish, 2008, pp.23-33.

[108] Boyle and Chinkin, supra note 53, p.32; see also, Jochen von Bernstorff, Philipp Dann, "The battle for international law. An introduction", in Jochen von Bernstorff, Philipp Dann (eds.), *The battle for international law. South-North perspectives on the decolonization era,* Oxford, Oxford University Press, 2019, p.29; Elias, supra note 78, pp.73-77.

[109] See for a presentation and analysis of these ideas, especially those of Bruno Simma and Antonio Cassese, Klabbers and Piiparinen, supra note 69, pp.13-15; see also on the intervention in Kosovo and the right of humanitarian intervention granted themselves by Western States, Nico Krisch, "International law in times of hegemony", supra note 105, p.395; Xue, "Chinese contemporary perspectives on international law", supra note 5, pp.112-113; Charvin, supra note 55, p.6.

[110] On this topic, see the analyses of Olivier Corten, "Déclarations unilatérales d'indépendance et reconnaissances prématurées du Kosovo à l'Ossétie du sud et à l'Abkhazie*", Revue Générale de Droit International Public*, vol.112, n°4, 2008, pp.721-759; Marcelo Koyen, "L'Ukraine et le respect du droit

when not an exception would be admissible would be largely up to the powerful to decide, which might lead to a situation where the powerful can make use of a right and the weak cannot".[111]

If international law is merely an option that the subjects of the international legal order can decide to discard in the face of options that seem to them, on a totally discretionary basis, to be better, it is clear that they will almost always find a just reason in their eyes to depart from the international norm in the particular case. Following the formula of Jan Klabbers and Touko Piiparinen, international law then becomes simply "a policy among policy options and seems to lose some of its authority". International law becomes one instrument among others at the service of policy or individual purposes: "if we do not like the solution offered by the law, our response is no longer toward working to changing the law, but simply to finding a way to overrule it by invoking a different normative order and making the (often implicit) argument that this order should prevail".[112]

Marcelo Kohen is right to warn of the risk that both exceptionalism and exemptionalism pose to international law: a truly international community and truly universal international law can only be founded based on mutual respect for the rules. Not observing a rule when it suits him/her and asking others to do so when it does not suit him/her means, according to Kohen, bringing the international society back not to the Cold War era but to the time before the Congress of Vienna two centuries ago, when power relations alone decided the fate of the world.[113] There is no question of naively believing that the legal consecration of the principle of equality between States has brought about material inequalities between states, and prevents the existence of a certain "hierarchy" between them in international society, and consequently in the international legal order. In particular the prestige, the capacities and influence of certain States mean that special attention is paid to their practice or opinion in the international legal order. Nevertheless, the apparent respect for this equality or at least the formal recognition of this principle by all must be preserved.[114]Furthermore, in a world which depends on the universal authority of international law, this authority is greatly diluted or even rendered ineffective when powerful nations sometimes pursue a course of exceptionalism, requiring special rules and exemptions for themselves when their interests are affected.[115] The preservation of the authority of international law is one of the objectives that regional approaches can serve by maintaining a dose of pluralism in the international legal order, or at least a form of tolerance for divergent visions of what the international legal order should be or should not be.

Beyond power relations, the "argument of the exceptional" may be an indication that social reality requires an amendment of the existing rule to take this reality into account. It is here that RAIL can be a tool for this rapid modification of the rule, or more precisely for taking into account a general will to see the rule modified and/or adapted. If it is accepted that the coexistence of contradictory customary international rules is logically impossible,[116] it can be deduced that by adopting or supporting a position at the regional level, a State cannot support the contrary position at the

international", *Le Temps*, 12 March 2014, available at https://www.letemps.ch/opinions/lukraine-respect-droit-international, accessed on 25 December 2020.

[111] Krisch, "Imperial international law", supra note 80, p.27.

[112] Klabbers and Piiparinen, supra note 69, p.28.

[113] Koyen, supra note 110.

[114] Barbara Delcourt, "International law and the European Union. The liberal imperialism doctrine as a normative framework for the Union's foreign policy", in *Select proceedings of the European Society of International Law,Volume 1 2006,* supra note 2, p.186.

[115] Weeramantry, *Universalising international law,* supra note 33, p.419.

[116] See Jan Klabbers, Silke Trommer, "Peaceful coexistence: normative pluralism in international law", in *Normative pluralism and international law,* supra note 28, p.71.

international level. Consequently, this obliges actors who want to propose to amend the customary rule and to formulate an exception to the general rule to convince/mobilise at least one regional bloc to adopt its position. This does not mean, however, that it would be sufficient to form a regional bloc of particularly powerful States to define a universal exception: this requirement to convince one's regional bloc(s) is necessarily accompanied by an obligation to observe the reactions of other regional blocs. What is facilitated in this way is the identification of this *opinio juris* in a context of relative urgency, which does not allow the "sentiment" of each State or subject of international law to be scrutinised.

In a pluralistic world, RAIL can thus be an instrument that allows actors to make pragmatic choices, or at least to give them the means to do so, by making compromise and consensus an integral part of any strategy for resolving a normative conflict. The trap of exceptionalism and exemptionalism is that they allow the powerful to tell others how to act while reserving the right to act according to their particular interests, in disregard of the rights and expectations of other members of international society. To this end, RAIL, by favouring a negotiated rather than an imposed solution and thus "absence of a one-size-fits-all solution, while it may disappoint the legal mind, is probably beneficial, in that it allows for normative conflicts to be dealt with in the arena of politics, which is, ultimately, where they belong".[117] As it will be seen, the history of international law perfectly illustrates the idea that hell is paved with good intentions: international law has been very (too) often at the service of imperialism, the tool of the powerful to impose what seemed to them the "good of humanity" (infra 2.b)bb)(2)). Processes and formalism, even if they may seem cumbersome and a source of unacceptable slowness for those who would like to see international law quickly embrace certain values considered fundamental, "provides limits to arbitrary power" and "constitutes a horizon of universality, embedded in a culture of restraint, a commitment to listening to others' claims and seeking to take them into account".[118] Repositioning regional approaches within the resolution of normative conflicts and deformalisation of international law-making brought about by exceptionalism and exemptionalism, without denying the reality of power in international relations, would at least ensure that international law is not its valet and, above all, would recall all the virtues of multilateralism.

bb) Regional Approaches, Ferment of Legitimacy, Condition/Instrument of Universality of International Law

In his reflection on the objectives and purpose of international law, Koskenniemi identifies four objectives, two of which are indirect. One of these indirect objectives of international law, he writes, is international law itself. In this sense, international law's value and its misery lie in its being the fragile surface of political community among social agents-states, other communities, individuals– who disagree about their preferences but do this within a structure that invites them to argue in terms of an assumed universality.[119] The second objective is the promise of justice in international law. But, Koskenniemi specifies, it is a promise that can never be totally kept, because "not only is law never justice itself, but the two cannot exist side by side. If there is justice, then no law is needed – and if there is law, then there is only a (more or less well-founded) expectation of justice".[120] There is thus inscribed in international law, a certain messianic structure, the announcement of something

[117] Ibid., p.92.
[118] Boyle and Chinkin, supra note 53, p.25.
[119] Koskenniemi, "What is international law for?", supra note 42, pp.46-47.
[120] Ibid., p.47.

that is constantly being postponed. At certain points, international law is, therefore, an act of faith, and this is what makes it possible and requires a critique of its inevitable violence, bias and exclusions.[121] It is these biases, violence and exclusions, which seemed to be ignored by the judges of the International Court of Justice (ICJ), that were denounced, sometimes in very virulent terms, by many States after the famous judgment of the Court in 1966, and which led to a crisis of confidence between the Court and an important part of the community of States.[122]

RAIL can help infuse legitimacy into international law and build universality into the logic of the two indirect functions identified by Koskenniemi. By broadening the base of shared values on which international law is built, they can reflect a common faith, while at the same time providing a framework within which possible divergences can be expressed. Indeed, international law can only fully assume its functions if it is perceived to be both legitimate, corresponding to social needs and consistent with the values considered essential in the society it must govern. The legitimacy and universality require that the rules of international law are not too far removed from what the majority of international society, States but also individuals and other non-state groups, consider to be justice because they reflect shared values.[123] In order to be truly perceived as shared, these values must not be the values of a section of society, nor those of yesterday, much less those of a hypothetical future, but those that are the subject of a consensus that can be revealed by RAIL. Thus, breaking with a past where it is perceived as a vector of imperialism, international law will then be able to inspire all peoples who could say, "yes, it is our international law, we participated in drafting it".[124]

(1) Regional Approaches, Tool for Defining Universal Values

Ubi societas, ibi jus... This Latin maxim, which is one of the first that every young law student learns, indicates not only that law is inherent in a social organisation, but also that law is the product of a given society. All law, including international law, necessarily reflects the aspirations, representations and values of a society. The law thus has an inherent political dimension, in that it is a tool at the service of a model that a given community wishes to achieve. It is this model and the values it embodies that allow the law to adapt to new circumstances by indicating the direction in which practices and institutions should evolve.[125] The values defended and promoted must therefore be the compass for adapting international law to the changes in international society, and in certain hypotheses to indicate the desired evolutions of this society. Moreover, the values at the heart of international law are also an essential element in establishing its universality: they must reflect a "universal culture" or at least be relevant to all cultures "because international law is sure to be

[121] Ibid.
[122] *South West Africa*, Second Phase, Judgment, I.C.J. Reports 1966, p.6; see for the statements and the ensuing crisis, Ingo Venzke, "The International Court of Justice during the battle for international law (1955-1975). Colonial imprints and possibilities of change", in *The battle for international law,* supra note 108, pp.235-256.
[123] See Alain Pellet, "Values and power relations– The 'disillusionment' of international law?", *KFG Working Paper Series,* n°34, Berlin-Potsdam Research Group "The International Rule of Law – Rise or Decline", Berlin, May 2019, p.7, available at https://www.kfg-intlaw.de/Publications/working_papers.php?ID=1, accessed on 26 December 2020; Remi Bachand, "Les quatre strates du droit international analyses du point de vue des subalternes", *Revue Québevoise de Droit International,* vol.24, n°1, 2011, p.40; Armin von Bogdandy, Sergio Dellavalle, "Universalism and particularism as paradigms of international law", *International Law and Justice Working Papers,* vol.3, 2008, p.14.
[124] Brian-Vincent Ikejiaku, "International Law is Western Made Global Law: The Perception of Third-World Category", *African Journal of Legal Studies*, vol.6, n°2-3, 2003, p.355.
[125] See in the same direction, Scobbie, supra note 43, p.56.

ignored if it is not culturally relevant".[126] The definition of common, shared or more precisely universal values is, therefore, a major challenge for the universality and effectiveness of international law.

The difficulty for international law is that "values, religious or ideological, maintaining impulsions which, by their very nature, tend towards hegemony, are not suited to lend themselves to co-operation, and they accept dialogue and compromise only as a pause in a continuous struggle".[127] The difficulty in international law is that the determination of values has almost always been univocal and unilateral, in defiance of the multiculturalism and pluralism that must permeate a truly universal international law. Some cultures or civilisations believe that they have a messianic mission to indicate the direction of history and progress to the whole of humanity. The feeling of cultural superiority and values that dominated the colonial period still seems to persist in the norm-making process of international law, despite the significant changes in international relations over the last sixty years. Within this logic, "history is a linear, unidirectional progression with the superior and scientific Western civilization leading and paving the way for others to follow".[128]

Despite the conviction among some that colonialism is a black page of history turned, the mission of "civilization" of the West is still prevalent in the discourse of law and international law. In that discourse, there is still sometimes the underlying vision of "western thought and western law as essential liberating and beneficial, capable of bringing about 'development' and well-being while overcoming oppression, discrimination and prejudice".[129] This idea is particularly prevalent in the discourse of human rights, the new religion of international relations, which claims to be the new paradigm calling for an in-depth reform of international law. This new paradigm makes it possible to distinguish between the "good" state which "controls its demonic proclivities by cleansing itself with, and internalizing human rights", and the "evil" state which "express[es] itself through an illiberal, anti-democratic, or other authoritarian culture".[130] The problem is not the idea that the State must show respect for human rights and protect the human person to achieve "international civility". As the State is a means to ensure the well-being of its members, it is indeed fundamental that it respects human rights and ensures and protects the dignity of the entire population under its authority. The struggle for the promotion of human rights and their respect by all actors in international society is a noble one, and it should be remembered that the purpose of this article is not to attribute vile imperialist intentions to human rights defenders. Rather, it highlights the

[126] Koroma, supra note 79, p.81; into the same direction, Jouannet, "What is the use of international law?", supra note 54, p.81; for a survey of the role of shared global values and value-based norms in international law, see Tiyanjana Maluwa, "The contestation of value-based norms: confirmation or erosion of international law?", in *The International Rule of Law: rise or decline*, supra note 11, pp.313-320.
[127] Dupuy, "Conclusions of the workshop", supra note 8, p.476.
[128] David Slater, *Contesting occidental vision of the global: The geopolitics of theory and North-South relations,* quoted by Makau Mutua, "Savages, victims, and saviors: the metaphor of human rights", *Harvard International Law Journal,* vol.42, n°1, p.201, note 2; see also Rodolfo Sacco, "Les problèmes d'unification du droit", in Louis Vogel (ed.), *Unifier le droit: le rêve impossible?*, Paris, Droit Global Law, LGDJ, 2001/1, p.12; Xue, "Meaningful dialogue through a common discourse", supra note 17, p.16. Numerous studies have been devoted to the "mission of civilisation" and the role of international law in basing colonisation on this idea. See among others, Seymour Drescher, Paul Finkelman, "Slavery", in *The Oxford Handbook of the history of international law,* supra note 16, pp.890-916; Obregón, "The civilized and the uncivilized", supra note 51, pp.917-939.
[129] H. Patrick Glenn, *Legal traditions of the world,* Oxford, Oxford University Press, fifth edition, 2014, p.272.
[130] Mutua, "Savages, victims and saviors", supra note 128, p.203; see for an illustration of this type of discourse, Ebrahim Beigzadeh, Ali-Hossein Nadjafi, "Malentendu Nord-Sud autour du droit international: réalité ou mythe", in *Select proceedings of the European Society of International Law, Volume 1 2006,* supra note 2, pp.224-225; Christian Tomuschat, "Obligations arising for states without or against their will", *Recueil des Cours,* vol.241, 1993, pp.318-319.

systemic biases that can handicap this noble battle and the danger of an "imperialist humanism",[131] which in the past led so-called civilised nations to confuse civilisation with colonisation.[132]

What is embarrassing and problematic is the representation behind the metaphor of human rights, that it is not the State who does not respect human rights that is "barbaric", but the cultural foundations of that State. "The state only becomes a vampire when 'bad' culture overcomes or disallows the development of 'good' culture. The real savage though, is not the state but a cultural deviation from human rights".[133] Human rights thus lead to the inclusion of "normative universalism" in positive law, and postulate from the outset a community of law on a planetary scale without having demonstrated the prior existence of a community of values.[134] Therefore, it seems normal for "advanced cultures" to purge other cultures of their "defects". For John Rawls for example, the law of peoples applies only within the society of "well-ordered peoples". Vis-à-vis "outlaw societies", which do not comply with the liberal and reasonable law of peoples, the "well-ordered peoples" have a defensive right to ensure that the law of peoples is accepted.[135] This theory inexorably affects the universality of international law based on the assumptions and premises of the universalist claims of a culture/civilisation that sees itself as superior to others and at the centre of the universe.[136] This may explain, for example, why regional human rights instruments are assessed solely through the prism of the Western model,[137] or why Article 6 of the European Convention on Human Rights is the paragon in terms of the right of access to justice, which alone should guide the understanding of this right despite the variations it experiences in other regional instruments.[138]

Thus, in the diffusion of values related to the protection of the human person, there is, unfortunately, a new dynamic of "cultural civilisation" with the role for some of saviours and redemptive people, who are the good angels, protecting, civilising, restricting and safeguarding barbaric practices

[131] The fight against cultural bias in this noble struggle requires, first of all, to admit criticism of the discourse of human rights and to move away from the absolutism of human rights which leads to considering any doubt about their universality as "criminal". On this subject, see the enlightening analysis of Jouannet, "What is the use of international law?", supra note 54, pp.79-81; on the legitimacy of human rights, Buchanan, supra note 72, pp.95-96.

[132] Mireille Delmas-Marty, "Droit international et humanisme juridique: quelles perspectives", in *Select proceedings of the European Society of International Law,Volume 1 2006,* supra note 2, p.388.

[133] Mutua, "Savages, victims and saviors", supra note 128, p.203; see also David Kennedy, "International human rights movement: part of the problem?", *Harvard Human Rights Journal,* vol.15, 2002, pp.111-112, 114-116; this discourse recalls that of classical authors such as Victoria, Wolf or Calvo to justify Western imperialism in international law, see Obregón, "The civilized and the uncivilized", supra note 51, pp.917-939; Antony Anghie, "The evolution of international law: colonial and postcolonial realities", in *International law and the Third World*, supra note 107, pp.40-42.

[134] Delmas-Marty, *Les forces imaginantes du droit*, supra note 60, p.121.

[135] Quoted by Heinhard Steiger, supra note 52, p.20. This right to intervene to ensure that the law is accepted and respected is opposable especially to peoples of the "Global South" caricatured as the "epicentre for state brutality" engaged in almost daily human rights violations, see Ikechi Mgbeoji, "The civilised self and the barbaric other: imperial delusions of order and the challenges of human security", *International law and the Third World,* supra note 107, p.159; Yadh Ben Achour, *Le rôle des civilisations dans le système international (droit et relations internationales),* Bruxelles, Bruylant, Editions de l'Université de Bruxelles, 2003, pp.124-129; Muthucumaraswamy Sornarajah, "Power and justice: Third World resistance in international law", *Singapore Yearbook of International Law,* vol.10, 2006, p.26; Kumm, supra note 72, p.911.

[136] Mutua, "Savages, victims and saviors", supra note 128, p.233.

[137] Koroma, supra note 79, pp.81-83; for a critique of this "universalisation" of regional treaties, Tomuschat, supra note 130, p.268.

[138] Koagne Zouapet, *Les immunités dans l'ordre juridique international,* supra note 98, pp.397-398; see on "hegemonic custom", Laurence R. Helfer, Ingrid B. Wuerth, "Customary international law: an instrument choice perspective", *Michigan Journal of International Law*, vol.37, n°4, 2016, pp.584-590.

against victim peoples from other parts of the world.[139] Again, it is necessary to stress that the problem is not the values themselves or the idea of a more anthropomorphic international law centred on the protection of the human person. The problem is the approach followed so far, which makes any universality of international law difficult since Western values are considered as the starting point for any reflection that aims above all at the westernisation of non-Western cultures: the man raised to the universal at the end of the 18th century is never but the white and Western man.[140] Besides this, there is the fact that "victims" who need to be "saved" are often "saved" in spite of themselves, with their opinions not taken into account to ensure that they feel the need to be rescued or what, if anything, they aspire to.[141]A universal international law must be a multicultural mosaic, based on common and universal values, themselves born of a "cross-contamination" of cultures all perceived as morally equivalent. RAIL are thus the leaven of legitimacy for universal international law by laying down the premises for this "cross-contamination" of values.

Rein Müllerson's warning must be borne in mind in any debate on the values that should underpin international law: "both the desire to lead separate and distinct lives as well as attempts to impose one's own understanding of the true and the good to others are both fraught with existential danger".[142] It is, therefore, important to avoid "cultural proselytism" under the guise of international law and values that it is supposed to protect or that should be enshrined in it. Patrick Glenn's questioning of the tendency of Europeans and Westerners to impose their law in their endeavour to colonise and "civilise" the world remains relevant today: "Is their rationality necessarily universal in ambition, in spite of the lack of universality in Europe itself? Are Westerners essentially fundamentalists, such that their ways are so true that they have to be followed elsewhere?"[143] This is certainly true for Western cultures but also for all other human cultures and civilisations.

It should also always be borne in mind that the "validity of a cultural norm is a local truth, and judgment or evaluation of that truth by a norm from an external culture is extremely problematic, if not altogether an invalid exercise".[144] This is all the more necessary since what has been termed "cultural chauvinism"[145] is not unique to Western culture and is found in all cultures and civilisations. Proof of this can be found in the numerous works and publications on national or regional visions of international law, each of which claims to defend universal values and virtues useful for peace and stability in international relations.[146] Because they all consider themselves superior and are convinced that the values they defend are best able to ensure the well-being of mankind in the representation they make of it, all cultures see themselves as "civilised" and perceived cultures with contrary or different practices and beliefs as "barbaric". Every civilisation has its barbarian, including the barbarian himself: the Greeks, Romans, Chinese, Muslims, the colonising powers of all eras have

[139] Mutua, "Savages, victims and saviors", supra note 128, p.204; the author also stresses the fact that the rise of human rights is linked to the shock caused by unheard-of acts of barbarity committed almost always in Europe or by Europeans. There is, therefore, a certain paradox in the narrative of the "mission of civilisation", ibid., pp.209-219.
[140] Ewald, supra note 65, p.50.
[141] Evans, supra note 20, p.1050.
[142] Rein Müllerson, "From E unum pluribus to E pluribus unum in the journey from an African village to a global village", in *Multiculturalism and international law*, supra note 59, p.58.
[143] H. Patrick Glenn, *Legal traditions of the world,* Oxford, Oxford University Press, fifth edition, 2014, p.64.
[144] Mutua, "Savages, victims and saviors", supra note 128, p.220; see also Moragodage Christopher Walter Pinto, "What's wrong with international law?", in *What's wrong with international law?,* supra note 105, p.381; Capeller, supra note 49, p.17.
[145] Mgbeoji, supra note 135, p.152; see also Henri Sanson, "Le point de vue du sociologue: modèles de coexistence dans la différence de cultures", in *The future of international law in a multicultural world,* supra note 8, p.64.
[146] See supra note 5.

drawn their barbarians from their own portraits through an arbitrary reading of the image of the other in the light of their own truth.[147] Political communities, be they religious, national or cultural, are, unfortunately, "ideocracies",[148] bearers of a revolutionary message and self-invested in a universal mission to "civilise" the "barbarians". Under the prism of "civilised self and barbaric others", a clash of civilisations seems inevitable, with each culture converting and saving the others, each convinced that its values are the salvation and future of humanity: international law must be universal, but according to "our universality". To emerge from this inescapable confrontation and to give international law its role in pacifying international relations, it is important to place pluralism and diversity at the heart of the universality with which this law is endowed. A universality that neither means similarity nor unanimity or absence of contradictions and discord.[149]

The discord over what are considered to be fundamental values with a vocation for universality is indeed part of the process of building a truly universal international law. "There can be no progress without discord, no new developments without a new exertion of forces and energies. In international law, complex thinking must thus be able to integrate and absorb conflicts and competition between norms, regimes and institutions as normal, perhaps even desirable, elements in the life of the law".[150] Discord over the essential values that international law must uphold or protect only becomes a source of conflict and blockage if each of the actors believes that they have a mission of civilisation. On the contrary, these discords can enrich international law if they are perceived as an indication of the path towards universality, at the crossroads of several systems. Even when different cultures differ on an issue, more dialogue can often reveal a common underlying value. It is this task of identifying and reconciling values that RAIL can accomplish; building "bridges, conversations, cooperation, understanding, and respect among the world's quite different ethical worlds".[151] RAIL can thus serve as those "landmarks" Delmas-Marty talks about, these various processes on the way to identifying universal values and constructing universal law, making it possible to order the multiple without reducing it to the hegemonic extension of a single system.[152]

This in no way means that Europe or the West, like any other region/culture, cannot offer the world universal values. Nor should it be thought that Western values cannot achieve universality – quite the contrary. Parochialism should be avoided, which would consist in believing that the localised

[147] Ben Achour, supra note 135, p.4; Bo Johnson Theutenberg, "Different trends of the international legal system of today", in *The future of international law in a multicultural world,* supra note 8, p.264; Gustavo Gozzi, "The particularistic universalism of international law in the nineteenth century", *Harvard International law Journal,* vol.52, 2010, p.77; Yasuaki, "A transcivilizational perspective on international law", supra note 35, pp.303-306; Contrary to what Dupuy may have written, Western thinking, like all other thinking, has a part of ethnocentrism. See Réné-Jean Dupuy, "Les ambiguités de l'universalisme", in Maarten Bros, Ian Brownlie (eds.), *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally,* Paris, Pedone, 1991, pp.273-274; see also for the trials of the Tokyo Military Tribunal as a mission of civilization, Chesterman, supra note 30, p.954.

[148] The expression is borrowed from Marcel Merle, "Le point de vue du politologue", in *The future of international law in a multicultural world,* supra note 8, p.46.

[149] René-Jean Dupuy, "Introduction of the subject", in *The future of international law in a multicultural world,* supra note 8, p.29.

[150] Prost, supra note 22, p.211; Kamto says the same thing about achieving justice in the international order, Maurice Kamto, "Global justice, global governance and international law. Comment on Eyal Benvenisti", in *The International Rule of Law: rise or decline?,* supra note 11, p.365.

[151] David, supra note 42, p.658.

[152] Delmas-Marty, *Les forces imaginantes du droit*, supra note 60, p.412; see also Alexandra Xanthaki, "Multiculturalism and international law: discussing universal standards", *Human Rights Quaterly,* vol.32, 2010, pp.38-42; Touko Piiparinen, "Exploring the methodology of normative pluralism in global age", in *Global pluralism and international law,* supra note 28, p.63; Kennedy, "One, two, three, many legal orders…", supra note 42, p.656; Bennouna, supra note 50, pp.85, 88-89.

historical origin of certain values precludes their objective universal standing. Indeed, international law cannot be reduced to a voluntarist positivism that would lead to the need for the consent of all States to indicate universal values. International law is not only an instrument for regional, categorical or specialised interests but can, or more precisely must, carry or even impose the values necessary for the well-being of humanity and the planet.[153] But this requires a method that preserves precisely this universality of values.[154] This is not to say that a norm or value of Western origin cannot attain universality. It is about focusing on the process of access of norms and values to universality on the one hand and on the other hand of admitting that a value can be fundamental for Europe and the West without being universal, or universal without having a Western origin. It is a question of the need to respect an approach that will make it possible to avoid any imperialist temptation. What is erroneously referred to as the "degradation of universal values" is not the result of hostility or rejection of international law enshrined in values,[155] but more a challenge to the imposed rather than constructed universality of those values.

Ruiz Fabri explains it well by indicating that the fact that Europe and the West have built guarantees rooted in legal tools and the rule of law is not necessarily sufficient to dispel the mistrust fuelled by their historical heritage and the fear the assertion of Western tradition or values could conceal the rebirth of conceptions and objectives which have nowadays been formally repudiated.[156] It is about putting Europe and all other regions of the world on the same level by imposing on them the same burden of proof of the relevance of the need for a value as universal; prescribe to all the same obligation to convince that a value being promoted is shared and is indeed universal. Even in the case of shared values and representations, it is essential to avoid the "Them Too" trap indicated above, by giving the impression that a culture or a region of the world is the referent from which the validity of proposals for international law is assessed. A truly universal international law is only possible if it respects and safeguards "the other of otherness".[157] RAIL thus make it possible to appreciate and identify cultural values regarding the areas in question, without an external reference that would serve as an indication of the meaning of the history and evolution of human societies.

RAIL can facilitate the identification and understanding of the values and perceptions of other groups and break out of the "in-between" decried by Anthea Roberts. Because they are convinced of the universality of the values they promote and defend, international lawyers do not bother to check that these values are shared by other regions of the world, projecting an inaccurate or insufficiently nuanced account of State practice and giving the mistaken impression that the featured approach is universally adopted or relatively uncontroversial.[158] Facilitating a comparative approach from the perspective of identifying universalist intersections, RAIL can be useful in identifying shared values, and capturing the slightest variations and nuances that are sources of disagreement and thus help

[153] Jouannet, "What is the use of international law?", supra note 54, p.69.
[154] In the same direction, Xue, "Meaningful dialogue through a common discourse", supra note 17, p.14; Mutua, "What is TWAIL?", supra note 50, p.38.
[155] See Philip Allott, "The concept of international law", *European Journal of International Law,* vol.10, 1999, p.47; On the crisis and contestations of value-based international law, see Maluwa, "The contestation of value-based norms…", supra note 126, pp.311-334; Krieger and Nolte, supra note 11, pp.12-13; Martti Koskenniemi, "The fate of public international law: between technique and politics", *The Modern Law Review,* vol.70, n°1, 2007, pp.15-19.
[156] Ruiz Fabri, "Reflections on the necessity of regional approaches to international law through the prism of the European example", supra note 5, p.95; see also Bennouna, supra note 50, p.83; Yasuaki, "A transcivilizational perspective on international law", supra note 35, pp.334-336.
[157] Bhupinder S. Chimni, "A Just World Under Law: A View From the South", *American University International Law Review,* vol.22, n°2, 2007, p.215.
[158] Roberts, supra note 9, p.179.

foster dialogue. This implies breaking away from the narrow view of law simply as a means of implementing values. The opposite dynamic is possible, and international law, through RAIL, can contribute to the construction and securing of universal values.[159] The comparison made possible by RAIL can lead not only to the harmonisation of points of view but also to the acceptance of differences, allowing a better understanding of the choices to be made together.

As Jouannet demonstrates, the lessons of shared history, the reflexive appropriation of cultures can help to guide choices but cannot replace political, and therefore non-legal, debate on the best way to evolve together.[160] And it is a mistake to believe that this political choice is only possible by imposing one's own values on others; RAIL can facilitate the emergence of collective choices, and help to avoid the trap of "imperialist humanism". Indeed, building a universal international law requires the definition of the dream model of society, and requires as a first step deliberate regional and inter-regional efforts simply to survey the extent of consensus, points of disagreement to define their inherent structural components. International law will only be truly humanist while remaining universalist if the values of humanism it embodies are combined with pluralism and realism,[161] to guard against any imperialist attempt.

(2) Regional Approaches, Counterweight and Guard Against Imperial International Law

As outlined above, "Western people have a tendency to think that colonialism is something which occurred in the eighteenth and nineteenth centuries and is now over. The rest of the world doesn't see things quite the same way".[162] For many populations and human groups around the world, the memory of colonisation and the role of international law in legitimising it is too vivid for them to believe without reservation the former colonial powers when they claim that they have changed and proclaim a new, more intrusive conception of law based on values presented as universal. Seen from Africa, the Arab world, Asia or Latin America, explains Vedrine, it looks a lot like Jules Ferry's "duty to civilise" or Kipling's "Burden of the white man".[163] This is still a world in which "one's chance of getting nabbed for committing a 'universal crime' varies with the inverse square of the distance from London to Brussels".[164] The former colonised cannot reasonably be blamed for being distrustful and cautious with an international law that has sometimes been the tool of their enslavement and subjugation.[165]

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[159] On this specific "content-related" function of law, see Dana Burchardt, "The functions of law and their challenges: the differentiated functionality of international law", *KFG Working Paper Series,* n°17, Berlin-Potsdam Research Group "The International Rule of Law – Rise or Decline", Berlin, June 2018, pp.7-8, available at https://www.kfg-intlaw.de/Publications/working_papers.php?ID=1, accessed on 12 December 2020.
[160] Jouannet, "Les visions française et américaine du droit international", supra note 43, p.90.
[161] Delmas-Marty, "Droit international et humanisme juridique: quelles perspectives?", supra note 132, p.389.
[162] Glenn, supra note 129, p.272. See also George Abi-Saab, "The Third world and the future of the international legal order", *Revue Egyptienne de Droit International,* vol.79, 1973, pp.31-32; Bhupinder Chimni, "Third World Approaches to International Law: A Manifesto", *International Comparative Law Review,* vol.8, 2006, p.3; compare with Tomuschat stating that "colonialism is a word of the past. It does not afflict the contemporary world", Christian Tomuschat, "Asia and international law: common ground and regional diversity", *Asian Journal of International Law,* vol.1, 2011, p.221.
[163] Vedrine, supra note 56, p.102; see also Anghie, "The evolution of international law", supra note 133, pp.44-47; Sornarajah, "Power and justice…", supra note 135, pp.27-28; Gozzi, supra note 147, p.86.
[164] Kennedy, "One, two, three, many legal orders…", supra note 42, p.642.
[165] An excellent overview of the use of international law for and against the liberation struggle of these peoples is presented in *The battle for international law,* supra note 108, p.496; see also Ibrahim J. Gassama, "International law, colonialism, and the African", in Martin Shanguhyia, Toyin Falola (eds.), *The Palgrave handbook of colonial and postcolonial history,* New York, Palgrave Macmillan, 2018, pp.564-565.

This is the only way to understand, for example the attachment of States in certain regions of the world, precisely those that have experienced colonisation, to a concept that seems obsolete for others: that of sovereignty. Outside of States and the framework of Western academics, sovereignty, and the institutions that are perceived as attached to it, such as immunities, are still seen as necessary to preserve a freshly and hard-won independence.[166] More importantly, this attachment to sovereignty enables certain States and the groups they represent to have a real say in the process of developing international law, which they would lose if the law were "deformalised" in the name of the universality of values.[167] To overcome the trap of strict voluntarism, which confines the development of international law to almost unanimity of States, and above all minimise the risk that "nations of power and influence use their special position to browbeat, coax or bribe the less influential members of the world community to support their point of view",[168] RAIL offers the possibility of opening an inclusive debate in regional blocs, so that the visions of all regions of the world can be adequately represented. For these human groups, there is neither "good" nor "benign" imperialism.

Indeed, part of the discourse on international law consists in reducing international law to a face-to-face confrontation between great powers, between ideological blocs that all claim to show the rest of the world the way forward. Critical articles on the dangers of the Chinese conception of international law, US instrumentalism, Russian selectivity or rigid European formalism are published to justify the accuracy of their own vision.[169] One reserves the right to make a plea for the weeds in the name of methodological rigour to support the positions of one's bloc[170] while decrying imperialism in the approach of others when they dare to defend a law that is considered vile or "scandalous".[171] We are all busy denouncing the biases of others while carefully avoiding indicating from which position we are talking and thus our biases. When one finally concedes that the approach advocated in fact results in imposing its values and conceptions on others, one immediately adds that this imperialism is benign, justified and differs from what one decries in others because it is the

[166] See Koagne Zouapet, *Les immunités dans l'ordre juridique international,* supra note 98, pp.123-125, 341-347; Bipoun-Woum, supra note 17, pp.145-146; Abi-Saab, supra note 162, pp.39-45; S. Prakash Sinha, "Perspective of the newly independent states on the binding quality of international law", in *Third world attitudes towards international law,* supra note 81, p.28; Vedrine, supra note 56, p.101; Anand, "Attitude of the Asian-African states towards certain problems of international law", supra note 81, p.15; Sornarajah, "Power and justice…", supra note 135, p.50; Helfer and Wuerth, supra note 138, pp.583-584; David P. Fidler, "Revolt against or from within the West?: TWAIL, the developing world, and the future direction of international law", *Chinese Journal of International Law*, vol.2, 2003, pp.39-40; Charvin, supra note 55, p.26.

[167] Delcourt, supra note 114, pp.187-188; Nico Krisch, "International law in times of hegemony: unequal power and the shaping of the international legal order", supra note 105, pp.392-394.

[168] Weeramantry, *Universalising international law,* supra note 33, p.419.

[169] See SFDI, *International law and diversity of legal cultures,* supra note 5, where the diversity of legal cultures in international law is examined in a face-to-face confrontation between Europe and the United States; Joost Pauwelyn, "Europe, America and the 'unity' of international law", *Duke Law School Legal Studies Paper,* n°103, 2006, p.27, where the author believes that the future of international law depends on a face-to-face meeting between the United States and Europe, ensuring that "the American and European model is one of the greatest challenges for us international lawyers in the 21st century"; Bogdandy and Dellavalle, supra note 123, conceive their task as providing a critical standpoint from which to understand and assess the positions held by international lawyers but also as supporting "intercultural dialogue on international law". However, this intercultural dialogue in the article is limited to an analysis of the ideas of European and American international lawyers.

[170] Alain Pellet, "Le 'bon' droit et l'ivraie – Plaidoyer pour l'ivraie: remarques sur quelques problèmes de méthode en droit international du développement", in *Mélanges Charles Chaumont. Le droit des peuples à disposer d'eux-mêmes,* Paris, Pedone, 1984, pp.465-493.

[171] Pellet, "Values and power relations", supra note 123, pp.6, 8.

bearer of universal values necessary for the well-being and happiness of mankind.[172] In these discourses and confrontations of visions all assuming a messianic role, the rest of the world seems to be limited to the role of docile disciples, at best faithful apostles, having to simply choose between the options presented, between the imperialism best suited to them. Their choice is, for example, limited to choosing, in matters of cybersecurity and information security, between the Tallinn Manual and the SCO Agreement, adopted by regional groups according to their interests and without consulting the vast majority of the world's States.[173] RAIL appear to be a means of freeing oneself from the law of imperialism and imperial law denounced by Laghmani,[174] an opportunity for the "eternally colonised" to indicate a "third way", to participate in the elaboration of international law, and the establishment of international institutions more adapted to their interests and political choices. In short, RAIL offer resistance to imperial international law by substituting "professed universal objectivity with actual organic subjectivity".[175]

International law indeed is no longer just an instrument of social regulation. It is used by States, according to their interests and as the case may be, as an object for promoting and transforming the world politically, economically, socially or to fight against what they consider to be inequalities. In this perspective, it has become a new mode for the exercise of power, since it requires putting in place specific regulatory techniques and practices.[176] If this reality is admitted, it is possible to understand, without justifying it, some (not all) of the attitudes and positions of some emerging powers as "an effort to have their normative experiences better reflected in international law destined to regulate [them]. To use a Hegelian expression, [they are] carrying out [their] own 'struggle for recognition'".[177] This willingness to oppose in order to be recognised is clearly expressed in the oppositions of the Organisation of African Unity/African Union to the Security Council both during the sanctions against Libya at the beginning of the 90s and the referral of situations concerning serving heads of State to the International Criminal Court. Beyond the divergence of approach, the pan-African organisation criticised the Security Council for ignoring its proposals in favour of the interests of Council members.[178] This is what has been called "regionalism with a universalist

[172] See for an account of this strategy of "good" imperialism, Delcourt, supra note 114, pp.190-202; Berman, supra note 43, pp.415-418, 430; Ryngaert, supra note 105, pp.442-447. See for illustration of these defences of national and regional approaches that are considered to carry a universal law, Frédérique Coulée, "L'influence française sur le droit international", in *International law and diversity of legal cultures,* supra note 5, p.13.

[173] On the biases and instrumental side of each of these initiatives, see inter alia Roberts, supra note 9, pp.308-315.

[174] Slim Laghmani, "L'ambivalence du renouveau du *jus gentium*", in *Select proceedings of the European Society of Internatonal Law,Volume 1 2006,* supra note 2, pp.209-218.

[175] al Attar, supra note 41, p.123.

[176] Jouannet, "What is the use of international law for?", supra note 54, p.57. See also Burchardt, supra note 159, pp.11-13; Jorgensen, supra note 8, pp.19-24.

[177] Keun-Gwan Lee, "The 'reception' of European international law in China, Japan and Korea: a comparative and critical perspective", in *Universality and continuity in international law,* supra note 26, p.442. See also Burke-White, supra note 30, p.3. This "struggle for recognition" may explain the constitution of totally heterogeneous blocs and coalitions built solely on the common denunciation by their members of Western imperialism and the desire to free their creative forces from the grip of it, Ben Achour, supra note 135, pp.157-158.

[178] See Tshibangu Kalala, "La décision de l'OUA de ne plus respecter les sanctions décrétées par l'ONU contre la Libye: désobéissance civile des Etats africains à l'égard de l'ONU", *Revue Belge de Droit international*, vol.2, 1999, pp.545-576 ; Maurice Kamto, "L' 'affaire Al Bashir' et les relations de l'Afrique avec la Cour pénale internationale", in Maurice Kamga, Makane Moïse Mbengue (eds.), *Liber Amicorum Raymond Ranjeva. L'Afrique et le droit international: variations sur l'organisation internationale,* Paris, Pedone, 2013, pp.147-170; Olivier Corten, "L'Union Africaine, une organisation régionale susceptible de s'émanciper de l'autorité du Conseil de sécurité? *Opinio juris* et pratique récente des Etats", in *Select proceedings of the European Society of international law: regionalism and international law,* supra note 14, pp.203-218; Maluwa, "The contestation of value-based norms…", supra note 126, pp.322-329. See more generally on opposition in international law, Isabelle Ley,

character" constituted as an attempt by its members to free themselves from imperialism. It does not aim at distancing itself from the international society but, on the contrary, at claiming the equal sovereignty of its different members to be able to participate fully in it.[179] The same logic can be found in regional initiatives for the codification of international law.[180]

If this willingness of the States to have their opinion taken into account is understood and accepted, international law cannot be reduced to a purely technical operation, regardless of the political, economic and social context in which norms are developed and applied. As has been written, "strictly legal discourse will not tell us why things are as they are and which might be the best way to change them".[181] Without fully addressing this concern, RAIL at least partially enable a reorganisation of international power. They are then the vehicle for a "re-politicisation" of international problems, in the noble sense of the word, "i.e. in the sense that the problems and solutions need to be perceived as political problems and solutions rather than techno-ethical problems and solutions. Legal imagination and ingenuity could thus be put to the service of fundamental political challenges as newly defined".[182]

It follows that, based on RAIL, fundamental questions of the international legal order and international law could be discussed and studied in cooperation with international lawyers with visions and expertise from all regions of the world. This will ultimately both liberate international law gradually from its heavy colonialist past and enable it to be the tool of a more democratic and egalitarian international society. The colonial foundations that led to the "universalisation" of international law in the service of the interests of certain States can no longer be sustained over the long term. Jorgensen is right to highlight that the

> "project of a universal system of international law entails often irreconcilable visions for global order, but the process of perpetually interposing alternative legal ideas against one another remains the most effective force for uncovering hegemonic interests embedded in the rule of law".[183]

The proliferation of institutions and the dynamics of regional cooperation can no longer be ignored and must be considered as contributions to the development of a truly universal, pluralist and diversified international law. The Pan-African Investment Code (PAIC) is a perfect illustration of the RAIL logic. It represents an African consensus on the shaping of international investment law, with specific as well as innovative features, and has been drafted from the perspective of developing and least-developed countries.[184] Such flexibility of rules or impetus for a new reform is not a challenge

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"Opposition in international law – Alternatively and revisibility as elements of a legitimacy concept for public international law", *Leiden Journal of International Law,* vol.28, n°4, 2015, pp.717-742.

[179] Mathias Forteau, "Commentaire sur de Hoogh et Pullkowski", in *Select proceedings of the European Society of international law: regionalism and international law,* supra note 14, p.89.

[180] Maurice Kamto, "La codification du droit international en Afrique: méthode et défis", in *Journal of the African Union Commission on International Law*, second edition, 2015, p.256.

[181] Jouannet, "What is the use of international law for?", supra note 54, p.89.

[182] Ibid., pp.89-90. Compare with Ram Prakash Anand, "Attitude of the 'new' Asian-African countries toward the International Court of Justice", in *Third world attitudes toward international law,* supra note 81, p.167.

[183] Jorgensen, supra note 8, p.37.

[184] On the elaboration of the PAIC, see Makane Moïse Mbengue, Stefanie Schacherer, "Africa and the rethinking of international investment law. About the elaboration of the Pan-African Investment Code", in *Comaparative international law*, supra note 21, pp.549-569. See also for what has been called "Eastphalia", Chesterman, supra note 30, p.968.

to the universality or unity of international law, but an effort to democratise a law that adapts to a plural and diverse society.

3. Regional Approaches and Unity of International Law: Democratising a Political and Professional Project

As pointed out in the previous section, pluralism and multiculturalism are not legal concepts, but political and sociological choices that correspond to a vision of society, to the construction of a more inclusive model of society. RAIL, by facilitating the construction of a representative, pluralistic and multicultural international law, allows for its true universality. This universality in turn, as indicated in the prolegomena of this article, strengthens the unity of international law while nourishing itself from it. However, this is only possible if, as with universality, the concept of unity is dusted off to avoid a dogmatic vision of it. On this point, the debate on the fragmentation of international law due to the multiplication of courts and tribunals and special regimes has led to a more nuanced understanding of what the unity of international law is and can be. It is, as will be indicated in the first section of this part, unity in diversity: *unitas multiplex*. The purpose of this section is to indicate how RAIL can be a tool for the edification of this united but diversified international law if one avoids the trap of an identity-based withdrawal and preserves for international law its mission as a language between different actors of the international society. To this end, special attention must be paid to international lawyers because they are the main authors of the discourse on international law. Their perceptions and positions are thus of great importance both for the validity of RAIL and for the representation of the unity of international law.

a) Regional Approaches, Means of Construction of a Diversified and Pluralist International Law

Like Michael Wood, quoted at the beginning of this paper, many studies have iteratively underlined the danger posed to international law by regional or national approaches. For its proponents, by highlighting the differences between the visions of international law, RAIL can weaken and undermine the unity and even the very existence of international law. An excessive focus on regional particularities would lead to obscure the general and overlook the values international law carries, and which are important for the rule of law in international society.[185] As with universality, these fears and apprehensions are essentially dictated by international lawyers' representation of the unity of international law. The unity of international law is perceived as meaning uniformity, total homogeneity in the interpretation and application of the rule of international law. As with universality, there is sometimes a dogmatic approach to defining the unity of international law that corresponds to a certain representation of what international law should be, rather than what it is; "a somewhat compulsive, almost obsessive concern".[186]

The idea of a united or single international law that would fall prey to centrifugal tendencies resists little examination of reality: there are no periods during which international law was homogeneously conceived either one way or another.[187] International law, Prost recalls, is essentially a special or regional, even local phenomenon. Conventional norms, which make up a large part of the norms of

[185] For a presentation of these arguments, Roberts et al., supra note 21, pp.27-28; Stephan, supra note 58, p.62; Nico Kirsch, "The many fields of international law", in *Comparative international law*, supra note 21, p.91.
[186] Prost, supra note 22, p.192.
[187] Martineau, supra note 7, p.3.

international law, are proof of this division of law into special regimes, binding several or a few actors, with real risks of confrontation and normative inconsistencies. There are very few universal treaties covering all the subjects (even if limited to States) of international society. Even assuming that such universal treaties are multiplying, they do not signify a unity of international law: there "is still the possibility of conflict between legal universals, that is, incompatibilities or even antinomies between the rationality, teleology rights and obligations of universal regimes".[188] While international law is certainly unique, because it is, it is not in the sense of uniformity; it does not constitute such a homogeneous whole that any variation or particular approach that RAIL would imply would call it into question. Opposing the unity of international law to pluralism and diversity is more a question of political interpretation than the interpretation of a legal principle, a normative choice based on a political option taken upstream, "un alibi pseudo-scientifique à une position politique, position qui pourrait servir à des fins avec lesquelles la théorie même ne serait pas d'accord".[189]

Indeed, the idea of a unity signifying uniformity of international law resides on a postulate that is not indisputable, that of an international culture, or more precisely an international legal culture.[190] Forteau points out that the idea of an international culture of international law, and therefore of a single culture, is not only surprising but also off-beat because the culture is by nature a comparative grammar and therefore has little conceptual virtue when applied to a single society. In the absence of an object of comparison with this international legal culture, until other planets with countries and their own international law make comparison possible, the existence of an international culture of international law seems at best to lead to an impasse, if not nonsense.[191] The terms of the debate are therefore to indicate that there is an international legal culture because there is only one international law and it is therefore inconceivable that the same international norm could be interpreted in different ways within the same social group as the international society. But here, too, this is a petition of principle that has no justification. There is nothing to prevent the recipients of this body of norms from viewing it differently, explains Forteau. This is all the more true since it is not a given that each of the addressees, even if they apply and accept this corpus, will adhere to it. It, therefore, follows that the unity of international law cannot be understood as necessarily implying a corresponding cultural uniformity.[192] It can lead to it, but this uniformity, if it is possible or desirable (which is doubtful), needs to be constructed, and it is to this that RAIL can contribute. In addition to these theoretical arguments which explain the necessary diversity that any idea of unity

[188] Mario Prost thus cites the case of the GATT and certain agreements relating to the environment, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), as an illustration, Prost, supra note 22, pp.36-38. See also Nollkaemper, supra note 28, pp.111-115; Gorobets, supra note 50, p.11; Koskenniemi, "The case for comparative international law", supra note 6, p.6.

[189] Peter Sack, "Le droit: perspectives occidentales, perspectives non occidentales", in *Une introduction aux cultures juridiques non occidentales,* supra note 48, p.57. See also Martineau, supra note 7, pp.7-8, 28; Koskenniemi, "The fate of public international law", supra note 155, pp.24-25. Gorobets evokes the representations of constellations in the sky. The stars are linked together according to an image that corresponds to a familiar image, which is not the same for everyone, but above all masks the fact that in reality the stars are not linked in this way, Gorobets, supra note 50, p.15-17.

[190] In this connection, it should be emphasised that although law is a cultural phenomenon, the word "culture" even associated with the adjective "legal" is not a legal concept. The concept of "legal culture" therefore remains both very vague and evanescent, see Philippe Weckel, Anne Rainaud, "Union Européenne et développement d'une culture de droit international", in *International law and diversity of legal cultures*, supra note 5, pp.300-301; Prost, supra note 22, pp.135-140.

[191] Mathias Forteau, "L'idée d'une culture internationale du droit international et les Nations Unies", in *International law and diversity of legal cultures,* supra note 5, p.361.

[192] Ibid., p.363.

in international law must incorporate, there is the empirical obstacle: the diversity of the actors in international society.

Multiculturalism and pluralism are part of the DNA of international law. The emergence of international law, its very raison d'être, is in itself a "tribute to multiculturalism".[193] The role of international law is amongst others to represent and reconcile heterogeneity where it is legitimate to do so.[194] This corresponds to what one sociologist has called "pluralism of equality".[195] It is because sovereign States were aware of their differences and their divergences that they decided to put in place a body of rules to govern their relations and interactions with each other. If these differences of views and approaches were to disappear, international law as it stands today would disappear because it would have been transformed into the internal (imperial) law of a super-federation of all the world's States. It is difficult to move, in the name of an idealistic vision, so abruptly from diversity to unity which would mean uniformity. Secreted for a pluralist and diverse society, international law must not only respond to this diversity but must also reflect it. As noticed, most people would probably agree that diversity of culture is not only an inevitable fact, but that it also benefits and enriches humankind. Indeed, a uniform world would not only be dull, but it would also stagnate as history shows us; societies that tried to impose uniformity of thought and behaviour sooner or later collapsed. Pluralism and diversity are therefore as important for international law as biodiversity is for humanity.[196] Following the beautiful Bedjaoui formula, "le vrai esprit international (...) voit dans les nations civilisées autant de facettes d'un même cristal, chacune réfléchissant à sa manière la lumière civilisatrice et chacune devenant une part nécessaire et intégrale d'une pierre précieuse".[197] RAIL aretherefore the tool to maintain pluralism and diversity by offering the possibility of new ideas and visions that allow international law to constantly renew itself and fulfil its functions in international society. RAIL allow pluralism to enrich international law by emphasizing the second meaning of the word, that of a "general suspicion of a notion of 'the truth'". Pluralism, of which RAIL is one of the vectors, opposes value monism, hegemonic and suppressive discourses that use and misuse the notion of truth and universality as a pretext to dominate and subjugate alternative worldviews.[198] This is not necessarily antinomic to unity.

Another choice of interpretation, of determining the criterion of the unity of international law is possible,[199] and this choice can and must include pluralism and multiculturalism. This means "looking beyond substantive norms, considering other levels of analysis and contemplating the possibility that the unity of international law reside[s] elsewhere than in its rules and institutions" and also means "developing new conceptual tools and frameworks to deal with these non-

[193] Manuel Rama-Moutaldo, "Universalism and particularism in the creation process of international law", in *Multiculturalism and international law,* supra note 59, p.130. See on law as a system of legal relations, Allott, supra note 155, pp.36-37.
[194] Donnelly-Lazarov, supra note 59, p.255.
[195] See Sanson, supra note 145, pp.62-64.
[196] Müllerson, supra note 142, p.34. See also Edward McWhinney, *The International Court of Justice and the western tradition of international law,* Dordrecht/Boston/Lancaster, Martinus Nijhoff Publishers, 1987, pp.20-21; Martineau, supra note 7, p.8. This idea would also correspond to Kant's cosmopolitanism, Jessica Almqvist, "Coping with multilateralism through cosmopolitan law", in *Select proceedings of the European Society of International Law,Volume 2 2008,* supra note 56, p.103.
[197] Mohamed Bedjaoui, *Fonction politique internationale et influences nationales,* quoted by Forteau, "L'idée d'une culture internationale du droit international et les Nations Unies", supra note 191, p.367.
[198] Piiparinen, supra note 152, p.55.
[199] See Prost, supra note 22, pp.29-30. See also the plea of McWhinney for a new general theory of international law, McWhinney, *The International Court of Justice and the western tradition of international law,* supra note 196, pp.32-34.

substantive forms of unity and considering what these may signify" [200] in the context of the fragmentation debate and the demand for many regional and/or national approaches to international law. Prost thus proposes, for example, to understand the unity of international law as a more diffuse way of thinking, a mix of images and ideas that forms a sort of latent cognitive frame and informs the experience, perception and interpretation of international lawyers.[201] International law itself can be a "conceptual unifier".[202] Such an understanding of the unity of international law makes it reconcilable with RAIL's demand for pluralism and diversity. To those who see RAIL as a threat to the existence of international law, Stephan's response is intended to be reassuring:

> Is uniformity and universality essential for international law to survive as a distinct field? Would international law still command our respect even if it were to concede its instability and contingency? Can one do international law if one cannot guarantee a reliable fit-for-all-purposes product? My answers, in short, are no, yes, and yes. These answers depend on a particular understanding of what it means to do international law, and thus of the work that international law does. To put it in reductive terms, I urge international lawyers to embrace diversity and pluralism by making clear distinctions among the multiple roles that international law can play.[203]

Like Paul Stephan invites international lawyers to do, RAIL enable the latter to move away from the "metaphysical principles" to which their attachment to a certain (false) idea of unity obliges them, and to adhere to the idea of a plural international law that is in keeping with the social realities it should govern. International law must apply to a diverse and plural international society with differing expectations and interests. It is only natural that visions and approaches to law should vary according to social needs and realities. It is neither, however, a question of having several international laws nor of having each actor's conception of international law suiting its interests and reality. It is about having a collectively defined international law with a general framework that is sufficiently representative to allow for necessary variations and adaptations to local realities without losing its essence. More than an analytical approach, it is a functional approach that "assumes the complex relationship between a legal system and the society in which it operates. (…) It marries analysis with induction and privileges engagement with social behaviour". [204] The unity of international law in diversity is possible and even necessary if we get out of the closed choice that proponents of fragmentation want to impose between unity/uniformity and pluralism/disintegration. To do this, it suffices to accept, as Bergé suggests, that despite the increased competition from constructions that are foreign to it and the growing heterogeneity of the elements that compose it, public international law can be the subject of an overall theorization halfway between normativism and functionalism. It is possible to define a "method of approach to diversity" in international law that would give it its unity. [205] This calls for modesty on the part of international lawyers, whatever their function, and for the inclusion in legal reasoning of "indeterminacy", i.e. admitting that the path is not predetermined and that the universalisation of

[200] Prost, supra note 22, p.129.
[201] Ibid., p.144.
[202] Burchardt, supra note 159, p.10.
[203] Stephan, supra note 58, p.65.
[204] Ibid., p.67.
[205] Jean-Sylvestre Bergé, "Fragmentation: la diversité dans l'unité et inversement", in Hervé Ascensio et al. (eds.), *Dictionnaire des idées reçues en droit international,* Paris, Editions Pedone, 2017, pp.254-255.

international law perhaps calls for a recomposition for which a certain degree of indeterminacy in space and time is necessary.[206]

The task is far from easy, and it is right to draw attention to the risk to international law of the drift of RAIL into regionalist and/or nationalist approaches (see below 3.b)bb)). International lawyers will have to find the right balance between the imperative need for universal rules and the need for rules that take into account different realities and the interests of all members of what would truly be an "international community". International law will have to show itself capable of intelligently and coherently reconciling the different visions revealed by RAIL, however diverse they might be, and their encompassment by rules of international law that are both common and applicable to all. This is a real challenge that the ILC faced in its work, and whose experience, whether praised or criticised, could be instructive. According to one of its former members, the "ILC does not frequently face, in its day-to-day work, cultural, 'civilizational', or political opposition on what international law is or should be. (...) It may in fact be that, so far as international law is concerned, differences in positive law are more relevant than differences affecting conceptions on law. (...) It eventually appears that in most cases diversity and unity are not conflicting, but rather complementary".[207]

Based on this experience, RAIL do not appear as a threat to international law but rather as an instrument for its refinement and enrichment. But, and it is worth emphasising, this depends on how regional approaches and pluralism are constructed. In Yusuf's proposal, RAIL

> can be likened to the "laboratories" of federal systems: experimentation and legal innovation often occur at the decentralised level, where legislators (in this case, international legislators) are closer to their constituents. From there, effective legal principles and rules and best practices can be diffused to and copied by other systems and– eventually and progressively– seep into the fabric of universal international law. Therefore, regional diversity is likely to be an engine for the development of international law in the years to come.[208]

RAIL should not push for the disintegration of international law by exacerbating an identity-based withdrawal closed to all exchange, but, on the contrary, should include the search for consensus for the harmonious development of international law. Whether it is a question of "internal pluralism", i.e. confined by the rules of international law, or "external pluralism", which goes beyond the rules to imply political choices, the discourse must aim at consolidating the whole framework even when it contests certain elements of it.209 The unity of international law, which is therefore not uniformity, will be maintained thanks to the indispensable bridges and footbridges that regional approaches will necessarily have to build, underlining the points of convergence that link them together around a set of norms and values. In the words of another author, "under the right circumstances and with the correct methods, a process of contestation can morph into a process of mutual construction,

[206] Mireille Delmas-Marty proposes this method as a tool for comparative studies with a view to pluralist internationalisation integrating the diversity of legal systems, Delmas-Marty, *Les forces imaginantes du droit,* supra note 60, pp.15-17.
[207] See on that experience, Mathias Forteau, "Comparative international law within, not against, international law. Lessons from the International Law Commission", supra note 92, p.179.
[208] Yusuf, "Diversity of legal traditions and international law", supra note 59, p.702. An interesting illustration of this dynamic is illustrated in the field of climate, Géraud de Lassus Saint-Geniès, "L'articulation des approches universelle et régionale en matière de protection du climat", in *Select proceedings of the European Society of International Law: regionalism and international law,* supra note 14, pp.351-362.
[209] On the distinction between these two types of international legal pluralism and the fact that regional approaches may fluctuate between these two types, Nollkaemper, supra note 28, pp.94-139.

mollifying rather than intensifying social divisions".210 Several legal traditions are an expression of this reality: they have built and consolidated their unity by reconciling divergent views within them. In this process of building those legal traditions, unity has been built by integrating pluralism through "a high level of tolerance in each tradition of diversity, and each tradition makes use of multivalent or multi-valued logic thinking through the process of reconciliation".211 RAIL will be all the more likely to enrich and consolidate the unity of international law if they use a common language and common concepts: that of international law.

b) Regional Approaches as Inclusive Means of Communication in the Language of International Law

As has just been demonstrated, the existence of different legal cultures and visions does not prevent the unity of international law as long as these visions make it possible to build bridges and identify the points of convergence between them. This approach corresponds to the very purpose of international law, which is to develop a compromise between the different aims and objectives that international actors pursue. On this point, international law has been compared to a language that allows the different actors to interact and develop common standards, but also to maintain the differences that they deem necessary.[212] Indeed, like all law, international law is, in fact, a "science of means" to achieve the ends given to it by its social basis.[213] Its unity, therefore, depends greatly on its ability to have the broadest possible social basis. The more representative it is of international society, the less it will generate centrifugal dynamics that threaten its unity and universality. RAIL can be one of the means of consolidating and broadening the international base of international law by enabling genuine democratisation of international law, which will be more representative and more legitimate. RAIL could thus be seen as the phonology, syntax and semantics that make the language of international law comprehensible and intelligible to all its speakers.[214] By taking international law as an end in itself (in the service of a greater end), RAIL should thus facilitate communication between different actors. However, these regional approaches mustn't give in to the temptation to retreat into their own identity and remain means to an end, i.e. to develop an inclusive language of international law.

aa) The Democratisation of the Centres of Impetus and Formulation of Proposals

In a society composed essentially of equal and sovereign actors, democratisation understood as the representation and representativeness of each of the actors within the procedures for drawing up and applying the rules applicable to all is a fundamental element of the legitimacy of the system. It allows international law to be perceived as an instrument of cooperation rather than a tool of subjugation in the hands of some. The democratisation of international law implies a greater representation of different legal cultures and/or civilisations in international bodies and institutions

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210 al Attar, supra note 41, p.135.
211 H. Patrick Glenn, "A concept of legal tradition", *Queen's Law Journal,* vol.34, n°1, 2008, p.443.
212 See statement of Rein Müllerson at Final Round Table, in *Select proceedings of the European Society of International Law, Volume 1 2006,* supra note 2, p.741.
213 Georges Abi-Saab, "Droit international et humanisme juridique: quelles perspectives ?", in *Select proceedings of the European Society of International Law, Volume 1 2006,* supra note 2, p.392.
214 Classical models of language present languages such as French or German as consisting of three elements: the phonological component that determines how words and sentences are pronounced, the syntactic component that determines the combination of words and morphemes into sentences and the semantic component that assigns meaning or interpretation to words and sentences, see John Searle, "Qu'est ce que le langage", *Pratiques,* n°155/156, 2012, p.230.

for the development and application of international law. This concern is taken into account with the requirement in the statutes of many "technical" institutions, such as international courts or the United Nations International Law Commission, that different groups be represented. It can, therefore, be presumed that in the course of the work of codification and progressive development of law, the members of the ILC confront different visions of international law in order to reach a consensus that is representative of the whole of international society. But as noted above, in this area at least, the passport alone is not sufficient to represent a regional approach to international law. Education and training play a fundamental part in the legal culture of international lawyers. It should be noted that most members of the ILC, like other centres of impetus and development of international law, despite their different nationalities, have for the most part a strong Western legal culture. They are trained in the same universities, reading the same textbooks, which very often espouse the same bias and references.[215] In addition to this reality, there is what Sumpong Sucharitkul denounced ten years ago, which remains true today: most special rapporteurs have been most exclusively European or at any rate from the Western world.[216] Given the importance that the Special Rapporteur has in the formulation of projects and thus the approach of the ILC, the impact that this has on the direction of the Commission's work is crucial.

To this must be added the language barrier which favours the legal cultures whose languages are used within the Commission. While acknowledging the practicality of limiting the working languages to three, Sucharitkul denounces the fact that the languages chosen are exclusively European (English, French and Spanish) and requires a considerable additional effort on the part of those who do not master these languages, both in terms of legal culture (since the language of the Special Rapporteur determines the choice of concepts used) and language. Moreover, the members of the commission who do not have a Western legal culture face the challenge of working in drafting committees that are dominated by international lawyers with a common law or civil law legal culture.[217] All this leads to what another former member of the ILC has regrettably pointed out: the available practice as a basis for codification work comes only from certain States, i.e. from Western countries.[218] This may also explain why a study on the fragmentation of international law contains no reference to any African international courts, the less than 10 mentions of Africa are mostly in reference to the ICJ decisions; only one mention of Asia in the main text, and six references in footnotes on international arbitration cases. By contrast, Europe is mentioned over 170 times with a whole sub-section devoted to the European Court of Human Rights on the question of systemic integration.[219]

This undermines the legitimacy of the outcomes especially in the eyes of those who feel alienated from it and/or whose subjugation and domination it has served.[220] To overcome this difficulty,

[215] See Roberts, supra note 9, pp.36-40.
[216] Sompong Sucharitkul, "Legal multiculturalism and the International Law Commission", in *Multiculturalism and international law,* supra note 59, p.310. This can probably also be explained by the fact that more and more diplomats are being elected to the Commission and that the Commission has a preference for academics as special rapporteurs, Alain Pellet, "Conclusions générales", in SFDI, *La codification du droit international,* Paris, Pedone, 1999, p.335; Yves Daudet, "A l'occasion d'un cinquantenaire, quelques questions sur la codification en droit international", *Revue Générale de Droit International Public*, 1998, p.605.
[217] Sucharitkul, supra note 216, pp.311-312. On the specific issue of language, see Gleider I. Fernandez, "On multilingualism and the international legal process", in *Select proceedings of the European Society of International Law, Volume 2 2008,* pp.441-460.
[218] Forteau, "L'idée d'une culture internationale du droit international et les Nations Unies", supra note 191, p.372.
[219] James Thuo Gathii, "The promise of international law: a third world view", Grotius lecture presented at the virtual annual meeting of the American Society of International Law, 25 June 2020, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3635509, accessed on 4 January 2021.
[220] See Boyle and Chinkin, supra note 53, p.29.

international lawyers need to diversify the sources on which they rely when developing norms or formulating proposals. Letting the debate be organised around ideological groupings, in the name of cultural neutrality, runs the risk in practice of favouring a legal culture, one that will have the means to impose its own conceptions. This risk is all the greater since, as Forteau regrets, the methods of learning international law in Western States rarely incorporate the study of other legal cultures.[221] Members of "technical" bodies such as the International Law Commission must, therefore, be committed, notwithstanding the approaches with which they are familiar, to improve their knowledge of how international legal norms and regimes appear from different perspectives and through different eyes.[222] RAIL can provide a means of identifying these new sources, opening up to different visions, approaches and perspectives of international law.

The democratisation movement of which RAIL is the bearer, also touches on the agenda of international law, i.e. the questions to which international law must provide an answer at a given time. It should be stressed that this agenda has so far been driven solely by the interests and concerns of one part of international society. It is primarily a few states that dictate how the world order should be and what issues need to be placed on the international law agenda. Indeed, "what becomes a 'crisis' in the world and will involve the political energy and resources of the international system is determined in a thoroughly Western-dominated process".[223] If the rules of international law are mainly drawn up in a context of fear and to reassure people against them,[224] it is very often Western fears. An illustration of this state of affairs is the current "crisis" in arbitration, which has led to debates on possible reforms. For a long time, the complaints and protests of the countries of the South, then the main importers of investments and therefore defenders in arbitration proceedings, were inaudible drowned out by the litany of lauders of a system represented as necessary to protect investments. It was not until the countries of the North, faced with these procedures and their national public opinions, were moved by opaque procedures, with possible conflicts of interest of the actors, and clearly with an asserted pro-investor bias, that the reform process that the Third World States were calling for was initiated. The flaws and errors of the system pointed out for fifty years by Third World countries and considered irrelevant suddenly took on the character of a crisis requiring immediate action.[225]

Such a confiscation of the international law agenda is partly due to the illusion of the universality and unity of international law, which in fact leads to the concerns of Western countries, the main places where international law has been formulated and discussed so far, being considered as those of the whole planet. RAIL challenges this illusion by establishing several centres of impetus and proposals for international law. They allow attention to be paid equally to all regions of the world, avoiding the use of unity as a screen to marginalise the crises of others while universalising their own. It is a question, as Chimni wrote, of giving the same interest to the suffering of human beings

[221] Forteau, "L'idée d'une culture internationale du droit international et les Nations Unies", supra note 191, p.372.
[222] Roberts, supra note 9, p.16.
[223] Koskenniemi, "What is international law for?", supra note 42, p.34. See also Ineta Ziemele, "Legitimacy of the vision: Central and Eastern Europe", in *Select proceedings of the European Society of International Law, Volume 1 2006,* supra note 2, p.145; Ikejiaku, supra note 124, p.341. This does not prevent certain concepts and notions of international law from having their origin in non-Western regional claims, see notably Rama-Moutaldo, supra note 193, p.150; Yusuf, *Pan-Africanism and international law*, supra note 82, pp.136-155.
[224] Bianchi and Saab, supra note 42, pp.353-354.
[225] See Muthucumaraswamy Sornarajah, "The battle continues. Rebuilding empire through internationalization of state contracts", in *The battle for international law,* supra note 108, pp.174-197; Amr A. Shalakany, "Arbitration and the third world: a plea for reassessing bias under the specter of neoliberalism", *Harvard International Law Journal,* vol.41, n°2, 2000, pp.427-429; Chesterman, supra note 30, pp.975-976.

whoever and wherever they are, a universal empathy that does not distinguish according to place and origin of suffering and is capable of recognising in the face of the suffering Other his/her own face.[226]

This consideration of extra-Western dynamics and the admission of a non-Western impulse is necessary not to complete the gaps and incompleteness of the Western approach but as justified by itself. Ideas put forward by other regions of the world need not, to be retained, be subject to the condition that the *jus europaeum* does not contain them. It is, therefore, necessary to move away from the Eurocentric approach proposed by Hugh Thirlway:

> if there is a need for a more multicultural approach to international law, it is therefore necessary to look in non-European systems for ideas which, first, do not simply duplicate or overlap with ideas which are equally to be found in the European derived system; secondly are consistent with the structure of international society as it now exists, or could be implemented taking that structure as starting-point; and thirdly present, or appear to present, advantages to the governance of international relations which are not obtainable by a continuation or development of the existing system.[227]

The unity of international law cannot mean setting the European approach as a model for assessing the relevance of an idea or proposal. Indeed, the creation of international law is not more "the prerogative of countries bearing the cultural heritage of the West but the common task of all members of the international community".[228] RAIL should thus make it possible to reverse this burden of proof on non-Western proposals but also to avoid one of the most dangerous aspects of the hegemony which is "the ideological certainty it conveys, neutralizing human imagination and creativity".[229] This contribution of regional approaches to the democratisation of the centres of impetus does not only concern States but also other actors that have sometimes been considered as a sign of democratisation of international society.

Indeed, the increasingly greater role played by non-governmental organisations (NGOs), for example, has been welcomed as an evolution of international law that no longer depends exclusively on the will of States, but also on other actors, representing other interests.[230] However, while it cannot be denied that the increasingly growing role played by NGOs and their networks constitute a major step forward for a more human-centred international law or the protection of the environment and climate, it is doubtful whether this means a change in the centres of impetus and development of international law. In other words, if the place given to NGOs, and particularly to so-called "international" NGOs, indicates a democratisation *ratione personae*, it is far from going hand in hand with a democratisation *ratione loci*. If a diversification *ratione personae* is truly taking place, it is

[226] Chimni, "A just world under law", supra note 157, p.216.
[227] Thirlway, supra note 91, p.110.
[228] Prakash Anand, "Universality of international law: an Asian perspective", in *Universality and continuity in international law,* supra note 26, p.103. In the same vein, Mohsen Baharvand, "Contribution of the Asian-African Legal Consultative Organization to the codification and progressive development of international law", in *Journal of the African Union Commission on International Law*, second edition, 2015, p.291.
[229] al Attar, supra note 41, p.119. See also Katharine Fortin, "How to cope with diversity while preserving unity in customary international law? Some insights from international humanitarian law", *Journal of Conflict & Security*, vol.23, n°3, 2018, p.358.
[230] See amongst others, Pierre-Marie Dupuy, "Some reflections on contemporary international law and the appeal to universal values: A response to Martti Koskenniemi", *European Journal of International Law,* vol.16, n°1, 2005, p.137.

within the same machinery: the NGOs and actors in question are almost always Western organisations that act as spokespersons for the people, including those in the Third World. These developments do not accordingly lead to multiplication or democratisation of law-makers.[231] First, NGOs' agendas are not necessarily produced with greater democracy or transparency than the agendas of States or international organisations. They are described by Chinkin and Boyle as "often non-democratic, self-appointed" and "may consist of only a handful of people and determine their own agendas with an evangelical or elitist zeal. There is no guarantee that the views expressed by even high-profile NGOs are representative, either generally, or with respect for their claimed constituencies".[232] NGOs communicate little about their principals and donors and the impact that this funding has on their freedom and programmes of action. This is not to question the legitimacy of NGOs and the struggle they are waging, but to point out that it is incorrect to give them a presumption of good faith and legitimacy, any criticism being forbidden, simply because they are opposed to States.

More specifically on the subject of representativeness, the criticisms levelled at the society of States are valid for NGOs. On the one hand, the imbalance of power and therefore of capacity to influence international law that exists between Northern and Southern States is reproduced among NGOs. Talking about democratisation of the process of drafting and applying international law, by giving more power to "international civil society", would lead to giving more weight to the same fringe of international society that already dominates the process in the inter-state dynamic. As has rightly been observed, "the 'paradigmatic shift' in international society towards geo-governance may in fact amount to little more than another means of validating essentially Northern liberal interests in a post-colonial, post-cold war world. Indeed, it may promote still further a Western/Northern domination through the culture of law as an instrument of NGO activism".[233] On the other hand, the "diplomacy of good feelings" described for States can also be found in the action of so-called international NGOs, invested with a quasi-messianic mission that is not without recalling the mission of "civilisation" of certain States during the colonial adventures, paternalism as bonus.[234]

For example, "green colonialism" has been described as Western NGOs seeking to change the lifestyles of indigenous peoples in the South in the name of environmental protection and the preservation of nature, which is little or not at all affected by the age-old lifestyles of these populations.[235] Similarly, a feminism centred on the figure of the Western woman, aiming to free women in other regions of the world from the barbaric cultures that sometimes oppress them despite their reservations and convictions, was denounced.[236] Besides, the "Them Too" argument is used to support actions that are conceived according to the conceptions and priorities of Western civil society. If the large coalitions that are formed in the context of noble struggles such as climate

[231] Jean d'Aspremont, "The doctrinal illusion of the heterogeneity of international law-making process", in *Select proceedings of the European Society of International Law, Volume 2 2008,* supra note 56, pp.303-304. In the same direction, Krisch, "Imperial international law", supra note 80, pp.57-59.
[232] Boyle and Chinkin, supra note 53, p.58. In the same direction, Ley, supra note 178, pp.728-729; Krieger and Nolte, supra note 11, p.24.
[233] Boyle and Chinkin, supra note 53, p.60. Also, Charvin, supra note 55, p.14; Yasuaki, "A transcivilizational persective on international law", supra note 35, p.125-127.
[234] Mutua, "Savages, victims and saviors", supra note 128, pp.216-217, 226, 240-242.
[235] See notably GuillaumeBlanc*, L'invention du colonialisme vert. Pour en finir avec le mythe de l'Eden africain*, Paris, Flammarion, 2020, p.343; Ikejiaku, supra note 124, pp.349-351.
[236] See amongst others, Françoise Vergès, *Un féminisme décolonial,* Paris, La Fabrique Editions, 2019, p.152; Gayatri Chakravorty Spivak, "Three Women's Texts and a Critique of Imperialism", *Critical Inquiry,* vol.12, n°1, 1985, pp.243-261.

change are praised, it is forgotten to mention that these "networks" are formed on the initiative of Western NGOs, which alone have the funding capacity, with expertise mainly from the North, which draws up the "common positions" that Southern organisations, chosen from among those that approve this discourse, must ratify. Here, as in the society of States, the heterogeneity and pluralism of the contribution to law-making in the participation of civil society is purely an illusion. Here too, regional approaches are needed to enable local organisations to organise, structure themselves and participate in the development of regional visions that are inclusive and representative of the geographical or cultural space concerned.

The final element that RAIL can bring to international law is the necessary debate inherent in any democracy. While it is recognised that international law is also, unfortunately, an instrument used by States and other human groups to advance their values, interests and preferences in the world,[237] the role that RAIL can play as a framework for structuring a majority or an opposition within international law is also to be welcomed. If international law is an instrument of power, through exceptionalism and exemptionalism, then RAIL will give voice to those who are excluded from positions of power and are regularly treated as objects of the politics and policies of other actors. They are an instrument of opposition. On this account, RAIL are conducive to the development of the general will in the deliberative process: they introduce arguments and aspects into the process of the formulation of international law so that rational decisions can be made while taking account of all interests and aspects.[238] As a tool of pluralism, RAIL institutionalise "the continuous reflection and the ceaseless presence of a perspective from which one can see that all could be different, or rather, could have been different".[239] That reflection is carried out both upstream of the adoption of universal rules by proposing alternative solutions, and downstream by criticising existing rules and proposing amendments to improve existing norms and rules.[240]

One may legitimately wonder whether this democratisation of international law also implies giving a voice to the "rogue states", to those leaders whose discourse may seem to call into question the very idea of international law. The answer is without hesitation yes, for reasons that have been well explained elsewhere and that must be repeated here:

> International law has no alternative other than proactively negotiating with controversial leaders who are battling with internal protests and external terroristic troops, and even guaranteeing them the preservation of their balanced interests. Undeniably, the controversial leaders, dictators, and even violent protestors are a part of our cosmos, and if we argue in favour of cosmopolitan democracy, we need to make their voices heard. But does this leave room for compliance with international law rules in accommodating the political ends of the controversial leaders and dictators? The answer is *of course not*. (…) In other words, by giving a voice to such leaders, international law can, in the long run, to some extent, marginalise dictators from igniting wars against their neighbours or other opponents.[241]

[237] See Koskenniemi, "What is international law for?", supra note 42, p.46.
[238] Ley, supra note 178, p.725. Compare with the idea of "multi-hubs" of Burke-White, supra note 30, pp.26-28.
[239] Niklas Luhmann, "Theorie der politischen Opposition", *Zeitschrift für Politik*, vol.36, 1989, pp.13-26, quoted and translated by Ley, supra note 178, p.725.
[240] Ley, supra note 178, p.729. On the importance of this dynamic and the need for change, Anand, "Attitude of the Asian-African states towards certain problems of international law", supra note 81, p.11.
[241] Salar Abbasi, "Democracy in international law-making: an unfilled lacuna", *New Zealand Yearbook of International Law,* vol.14, 2016, pp.52-53. Indeed, the argument that a country does not apply democratic

This institutionalisation of internal opposition to international law, and not against international law, does not affect its unity, but reinforces it by demonstrating that international law is not a monolithic entity but the result of a dynamic political process. It is a question of renewing rather than stopping a certain history of international law.[242] "Acceptance, but also rejection that leads to change, is a necessary element of legitimacy of the international legal order".[243] As has been pointed out for the national legal orders, rather than seeing RAIL as an unwarranted barrier to the full effect of international law, they may be complementary to the ambitions of international law itself as a dynamic body of law that can cater to competing and diverse social interests.[244] RAIL, beyond the challenges they bring, do not call into question the unity of international law because they are the expression of a certain faith in international law. Revolutionary attempts, and thus real fragmentation, only come about if international law is transformed into an autocracy in which unity is used as a means of repression aimed at imposing a single party and a single way of thinking. As the opposition in any democracy never comes to an end but is constantly renewing itself through changes in the majority, RAIL can appear as "the expression of this permanent intra-societal process of communication".[245]

Thus, the adoption by African States of regional conventions in parallel with those drawn up at the international level was driven by a desire to show their attachment to elements that were rejected by the respective drafting committees or negotiating conferences of these instruments. This is the case, for example, of the Refugee Conventions or the Hazardous Waste Conventions.[246] By thus demonstrating their opposition to a chosen direction for international law, these States are not merely challenging it. In a positive way, they are giving the impetus for an orientation of international law in a direction that seems more relevant to them.[247] This regionalism does not, therefore, aim to divide international law or to weaken its unity, but to strengthen it, since it does not aim to create a dissident legal regime but is part of the dynamic of a single international law. The automatic correspondence between fragmentation and pluralism is a misleading one; a misleading idea promoted and used, most of all, by a handful and stronger states whose interest is not an enlargement of democracy and participation at the international level.[248] As has been said for Latin American international law, RAIL do not lead to a fragmentation of international law, but contributes to making international law more international, by providing international lawyers from often neglected and forgotten parts of the world a powerful conceptual framework for making them more audible, and a chance to make their vision and approach to international law heard at the global level.[249]

principles cannot be used to exclude it from the process of developing and applying international rules, Yasuaki, "A transcivilizational persective on international law", supra note 35, p.238.

[242] This is, for example, the spirit of the regional codification of international law in Africa and other initiatives from the Third World, see Tchikaya, supra note 97, pp.269-270; Sinha, supra note 166, p.24; McWhinney, *The International Court of Justice and the western tradition of international law,* supra note 196, p.15.

[243] Nollkaemper, supra note 28, p.133.

[244] Ibid.

[245] Ley, supra note 178, p.725.

[246] See Yusuf, *Pan-Africanism and international law,* supra note 82, pp.224-227, 245-248.

[247] See in that direction, Maluwa, "Reassessing aspects of the contribution of African States to the development of international law", supra note 81, pp.411-412.

[248] José Manuel Pureza, "New regionalism and global constitutionalism: allies, not rivals", in *Selet Proceedings of the European Society of International Law: regionalism and international law,* supra note 14, p.162.

[249] Alejandro Rodiles, "The great promise of comparative public law or latin America. Towards *ius commune americanum*", in *Comparative international law,* supra note 21, p.503.

bb) Avoiding Babelisation: Regional Approaches, not Regionalist nor Nationalist Visions

The period of crisis that international law is going through, which explains the anguish of fragmentation mentioned in the introduction, is conducive to an identity-based retrenchment resulting in a negation of the very essence of international law. RAIL should not be used to reinforce diametrically opposed antagonisms and visions of international law that they lead to regionalist or nationalist visions of international law as it has been a few times in the past. These regionalist and nationalist approaches, inscribed in an imperialist logic, tend to reject the common model and to want to unilaterally impose their model as the only relevant one. This was, for example, the case of a Soviet conception carried by Evgeny Korovin, who, by perceiving international law strictly as the product of a temporary compromise between the USSR and other States, negated practically all the fundamental concepts of international law, including the sources, subjects and institutions of international law.[250] Similarly, Carl Schmitt's rejection of Anglo-American liberal universalism has led the author to defend extreme positions, which are problematic for most international lawyers.[251]

Such approaches, far from enriching international law, lead to a profound indeterminacy of the very principles of international law.[252] Having a regional approach to international law does not in any way mean engaging in a kind of ideological proselytism, aimed at convincing people of the rightness of this approach, or even imposing it. Rather, "it means acknowledging in a pluralist– or realist–way that there may not be just one universal way of understanding and applying international law";[253] it is not to create an alternative international law but to bring together a plurality of existing perspectives.

The challenge and relevance of RAIL lie in their ability to develop a regional vision without being self-centred, avoiding being locked into an "international legal ghetto". RAIL are neither "particularism" nor a form of "group unilateralism". They do not aim at a form of self-exclusion of a group of subjects from international law but at defending identity and common interests in a universal environment whose cosmopolitanism reinforces. There is, therefore, no question of creating an "autarkic parallel order" or an "international legal ghetto".[254] RAIL request an ethical research position that highlights the significance of avoiding exaggerations, glossing over or erasure of uncomfortable truths.[255] It is about knowledge, not commitment:

> "knowledge relies on the speaker's ability to support one believes with evidence that, when laid out, will convince everyone sharing the speaker's concept of evidence and the rational argument of the truth thus validated. No emotional attachment to such a truth is needed".[256]

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[250] Mamlyuk and Mattei, supra note 6, pp.394-406.
[251] See Martti Koskenniemi, "Carl Schmitt and international law", in Jens Meierhenrich, Oliver Simmons (eds.), *The Oxford Handbook of Carl Schmitt,* Oxford, Oxford University Press, 2017, pp.592-611.
[252] Jouannet, "Les visions française et américaine du droit international: cultures juridiques et droit international", supra note 43, pp.44-45.
[253] Roberts, supra note 9, p.22.
[254] This follows from the definition of regionalism, see Antonio Remiro Brotons, "Commentaire sur Peyro et Pureza", in *Select proceedings of the European Society of International Law: regionalism and international law,* supra note 14, p.167; Kamto, "La codification du droit international en Afrique", supra note 180, p.268.
[255] Babatunde Fagbayibo, "Some thoughts on centring Pan-African epistemic in the teaching of public international law in African universities", *International Community Law Review*, vol.21, 2019, p.188.
[256] Koskenniemi, "Between commitment and cynicism…", supra note 33, p.499.

In the discourse of all actors, this requires a real effort to convince their interlocutors of the correctness and relevance of the solutions of "their" system if they are convinced of it, but also the humility and hindsight necessary to listen to what others have to propose without *a priori* or prejudices, admitting that they may be right.

In this respect, one may wonder about the promoters of a regional approach who assert without any nuances that

> "European states have always played and continue to play the leading role in the progressive development of common international law. Thus, the further cooperation of European states in the development of international law is in the interests of the international community. European international law is the province and common heritage of humankind";[257]

> "aujourd'hui l'Union Européenne est devenu le moteur principal de l'évolution du droit international positif"; "L'Union Européenne est aujourd'hui le moteur principal du progrès du droit international"; "les positions communes représentent aujourd'hui l'une des meilleures sources de la pratique étatique du droit international. Elles sont incontournables dans toute démarche d'identification de l'*opinio juris*"; "Le nombre des États et la puissance fédérée dans l'Union leur attribuent une exemplarité toute particulière"; "l'activité internationale de l'Union Européenne formalise l'état du droit international sur un grand nombre de questions et qu'elle conforte l'autorité politique de ce droit"...[258]

While it cannot be denied, as Weckel and Rainaud point out, that the international lawyer would be "blinded" if he/she was not aware of the "considerable legal consequences" of the irruption of the European Union in international society,[259] only a resolutely regionalist approach can lead to the belief that the practice and *opinio juris* of the 27 member States of the European Union (admitting that the practice and *opinio juris* of the EU correspond to those of its member States despite their different legal personalities) is more decisive than that of the 166 other member States of the United Nations that are not members of the EU. Unless assuming a certain hegemony and maintaining a Eurocentric vision of international law, why and how does the EU's international activity "reinforce the political authority" of international law more than that of organisations such as the Organisation of American States, the African Union, the Organisation Internationale de la Francophonie, the Commonwealth of Nations, the Organisation of Islamic Cooperation, the Asian-African Legal Consultative Organisation, to name but a few, all of which have more members than the EU (sometimes more than twice)? The European Union cannot be regarded as the guardian of international law and its approach as the right one, simply because it is not "contesting"

[257] Yury Kolosov, "A European vision of international law: for what purpose?", in *Select Proceedings of the European Society of International Law, Volume 1 2006,* supra note 2, p.167.
[258] "[T]oday the European Union has become the main driving force behind the development of positive international law"; "the European Union is today the main driving force behind the progress of international law"; "the common positions represent today one of the best sources of state practice in international law. They are indispensable in any process of identifying *opinio juris*"; "The number of States and the federated power in the Union give them a special exemplary character"; "The international activity of the European Union formalises the state of international law on a large number of issues and reinforces the political authority of this law"..., Weckel and Rainaud, supra note 190, pp.301-309.
[259] Ibid., p.301.

international law in the same way that "Third World culture" can be, nor is it "relativistic like the culture of the United States".[260]

The same reproach can be levelled at those who believe that only the presence of a national would suffice to guarantee an international body sufficient legitimacy. On the subject of the election of the members of the UN International Law Commission by the UN General Assembly, one author wrote that

> "si ce mode d'élection est légitime, comment ne pas s'offusquer cependant de l'absence de membre français au sein de la CDI après les élections de novembre 2016? Les enjeux politiques ont-ils pris le pas sur le critère de la compétence dans le processus d'élection des experts de la Commission (art.2§1 Statut de la CDI)?"[261]

This declaration seems to link the nationality of a State with competence, but above all makes it a criterion for the legitimacy of an international institution. While there is no doubt that in a particular election, a candidate of French nationality may be objectively more competent than another, and therefore that his/her non-election may be questionable, this cannot suffice to make nationality in itself a criterion of competence. This would be tantamount to saying that any French international lawyer is more competent than each of his/her colleagues from the other 192 member States of the United Nations. It is one thing to regret the extreme politicisation of elections to technical bodies such as the Commission, another to claim to reserve a permanent member for nationals of a State in the name of a competence that is consubstantial with nationality. The danger of such a claim by any State which, rightly or wrongly, considers that it has the best experts in international law, according to its understanding, is clear. The universality of international law requires that every international lawyer, as long as he/she is competent according to the criteria laid down in the texts, is entitled to stand for election to the bodies concerned. The legitimacy of the ILC should be based on its representativeness of international society as a whole and the competence of its members and not on the specific presence of a State within it.

Similarly, any strategy that would lead to an approach being seen as discredited because it served imperialist purposes in the past would weaken international law rather than strengthen it. The logic of RAIL should not be to replace one centre with another in the development and application of international law. One cannot, therefore, ask for the pre-eminence of one approach simply because "the centre of gravity is clearly shifting towards Asia" or the "relative economic decline [of the United States] accompanied by the collapse of its moral authority".[262] Beyond the fact that RAIL aim to lead to the construction of a true universality of democratically elaborated and applied international law, the logic of "each in turn" would lead to a competition for the control of international law, reduced to being a mere instrument in the hands of the powerful of the moment. In the same way, it is necessary to get out of the extreme susceptibility of certain international lawyers from the South, decried by Yasuaki, which leads them to consider and consequently reject any Western idea or proposal as bearing the seeds of imperialism.[263] The exactions and abuses suffered in the past are

[260] Ibid., p.309.
[261] "If this method of election is legitimate, how can one not be offended by the absence of a French member of the ILC after the November 2016 elections? Did political issues take precedence over the criterion of competence in the election process of the Commission's experts (art. 2§1 Statute of the ILC)?", Anne-Thida Norodom, "CDI: elle n'aurait servi à rien", in *Dictionnaire des idées reçues en droit international,* supra note 205, p.68.
[262] Chesterman, supra note 30, p.966.
[263] See Yasuaki, "A transcivilizational perspective on international law", supra note 35, p.111.

not enough to validate any reform proposal, nor do they totally discredit a region of the world in formulating universally valid principles. RAIL must neither allow for the giving of undue weight and importance to a region of the world or some countries in the international legal order nor on the contrary push for the disqualification of a region in the proposal of norms or values simply because they originate from a region or a group in international society. The method to be followed in the elaboration and defence of each regional approach must be the "hospitality" that Immanuel Kant recommended in the elaboration of his cosmopolitan law. It is simply a question of not considering foreign and different approaches as hostile and negating their vision, but simply a contribution to the "growth of culture and men's gradual progress toward greater agreement regarding their principles" which could "lead to mutual understanding and peace".[264] Different approaches do not inevitably mean opposition and conflict between them.

In the other direction, RAIL cannot be used as a pretext for extreme cultural relativism that would lead to a denial of the universality of human rights or the existence of *jus cogens* norms in international law such as the prohibition of torture. It is certainly a question of bringing new perspectives and new conceptions to international law where necessary but in accordance with accepted methodological canons. This is only possible if the operators of international law, without losing sight of the tensions and interests that run through it, bear in mind that it is first and foremost a question of drawing up a single, universal law for an international community under construction. This means in concrete terms, that "the promotion of a particular political doctrine in this context should not be ignorant of the prospects of some 'common ground' across differing international legal communities on the 'reasonableness' of the concepts and principles it sets forth".[265] Pluralism, which is advocated here through the RAIL, is an approach that aims to consolidate universal values, to define a common basis for the protection of men and women in all countries and not to lead to the nihilism of any universal value. Thus, it is not, for example, a question of challenging the need to promote and protect women's rights in a phallocrat society where they are marginalised, but of refusing to allow this noble mission to result in a culture deciding which clothes are oppressive or not for women across the globe. RAIL must make it possible to identify acceptable variations, but above all to open an inclusive dialogue, allowing a top-down harmonisation of the rules for the promotion and protection of women. Donnely-Lazarov's plea for allowing a "room for error" for each interlocutor in this debate, and above all tolerance for contrary opinions and convictions, is to be supported.[266]

RAIL can only serve the pluralism and diversity of international law while preserving its unity if they are developed under the paradigm of their own "incompleteness" ("incomplétude" in French).[267] This is a recognition by each approach of its own biases, its shortcomings and above all its inability to develop universal international law on its own. It is a weakness that is recognised and assumed, which is salutary and fruitful because it keeps international law free from dogmatism and facilitates the search for solutions. This incompleteness of each regional approach means flexibility, openness and creativity, and can therefore guide international lawyers in the search for adequate and

[264] Immanuel Kant, *To perpetual peace. A philosophy sketch,* Indianapolis, Hackett Publishing, 1983, para.367. See on this "hospitality" as a tool of multiculturalism in international law, Almqvist, supra note 196, pp.102-105.
[265] Almqvist, supra note 196, p.96.
[266] This tolerance, she writes, "ask us to accept that it may be appropriate to respect autonomy even when the opportunity for human fulfilment is not as advanced in one context than in another", Donnelly-Lazarov, supra note 59, p.263. See also, using the concept of "charity", Voyiakis, supra note 48, pp.77-78.
[267] The concept is borrowed from Delmas-Marty, *Les forces imaginantes du droit,* supra note 60, p.396.

universal solutions. One can imagine, of course, that an author might be anxious to avoid the dismay of a reader, who, seeking the applicable rule, would be disappointed by a statement of divergent practices suggesting that a clear and consensual rule has not yet been adopted. The advice given by Oppenheim more than a century ago remains relevant. It would be bad faith for the international lawyer to present the practice of his/her state or region as positive law. He/She may recommend a desirable law, but after taking precaution to indicate that it is only his/her recommendations and that other alternatives are proposed.[268] To be a "birthplace of progress" and to fulfil the hopes it raises, international law must combine a sense of history, duration, sociology, economics, reality and diversity, including legal diversity.[269]

Taking into account diversity and plurality is also a requirement in the identification and expression of regional approaches. Regional approaches can only be relevant and useful for the definition of truly universal and universally accepted international law if they are themselves representative of the dynamics and practices of the region concerned. This, therefore, requires upstream reflection on the real or supposed plurality of national or other groups' approaches and, in one way or another, a comparative approach. It is essential to elucidate who is or would be the author, where, when and how it would manifest itself.[270] It will then become possible for the promoters of such a regional approach to ask themselves "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."[271] It is a question for the promoters of all regional approaches to define the delicate duality that must distinguish all RAIL: what unites internally to enable a common vision to be defined; and what distinguishes externally to make this approach specific. This means building a regional coherence.[272] This is not an easy exercise and it must be carried out with great rigour.[273] This will make it possible both to avoid a proliferation of discourses claiming to be RAIL, in a world where regionalism goes beyond the territorial framework, and to have truly representative visions. It is imperative in all cases to avoid, within the designated regions, a nationalist approach, which would, in fact, result in transforming regional approaches into a field for the exercise of the imperialism of regional power. This requires modesty and the ability to get out of the trap of generalisation and analytical shortcuts. It also invites one to get out of the trap of a nationalist approach consisting of justifying and praising the decisions of one's State while criticizing or ignoring the contrary decisions of other Nations.[274]

For example, Roberts reports that a French international lawyer explained to her that French international law textbooks contain little reference to the case-law of other French-speaking countries that use these textbooks, because "France is the core of the Francophone world, it is less likely to look outward to case law of states on the francophone periphery and semi-periphery".[275] Such reasoning is problematic for at least two reasons. Firstly, it is based on a somewhat narcissistic petition of principle which is far from being proven: France would be representative of the French-

[268] See Oppenheim, supra note 65, pp.333-336.
[269] Védrine, supra note 56, pp.108-109.
[270] Ruiz Fabri, supra note 5, pp.88-89.
[271] Ibid., p.89.
[272] Ibid., pp.93-94. On, for example, the lack of regional coherence for a truly Asian approach to international law, see Chesterman, supra note 30, pp.960-961.
[273] On an illustration of those difficulties, Messineo, supra note 5, pp.903-904.
[274] See on what is considered to be a weakness of international lawyers, Oppenheim, supra note 65, pp.340-341. On the danger of such practice breaking down the international law system, Burke-White, supra note 30, p.78.
[275] Roberts, supra note 9, p.178.

speaking world because it would inspire the other States in this area, at least in terms of international law. On the one hand, it disregards the multiple circles to which a State can belong: it can be Francophone, Arab, Muslim and African (and therefore a member of the African Union). Why should the jurisprudence of its courts and tribunals be modelled solely on the French model to the exclusion of its other identities? On the other hand, even in the former French colonies, which for the most part inherited the French legal system after independence, they developed their own judicial identity and jurisprudence at the end of time: the constitutional councils of Benin, Cameroon and Senegal, although all inspired by the French Constitutional Council, each have a specific approach to issues of international law.[276]

Secondly, the reasoning suggests that international law is the law of the most powerful and therefore it is sufficient for the most powerful to adopt a practice for it to be law. If this reasoning is soundly based, one can therefore legitimately question the reality of the practice established by French textbooks if it is inspired by French practice alone. Moreover, one wonders why, if French authors are exempt from examining the case law and practice of other States within France's area of influence, authors from more powerful States should be embarrassed to pay attention to the practice of relatively less powerful States, including France. The result would be a transformation of international law into a kind of aristocratic system where only the voices of a self-designated representative elite count. Even within a given regional space, it is clear that there is a risk for the unity of international law of seeing the emergence of competing nationalist visions, all of which are self-proclaimed sufficiently representative to be regional. Such a discourse or perception is likely to call into question the universality of international law both in the eyes of the young French and Central African students who use the textbook: the former because he/she learns that he/she does not have to make the effort to research the practice of other States to establish the existence of a customary norm; the latter because he/she perceives that norms are adopted by others and imposed on him/her. On the contrary, for these learners to be imbued with the spirit and values of international law it is important to teach them and instil in them the need for a pluralistic approach, if necessary by reminding them of these words of Lassa Oppenheim:

> The jingoes and the chauvinists of all nations may laugh at our work, and those narrow-minded people who can not see beyond their limited horizon may belittle our efforts. Ours is the faith that removes mountains, for our cause is that of humanity. The all-powerful force of the good which pulses mankind forward through the depths of history will in time unite all nations under the firm roof of a universally recognized and precisely codified law.[277]

c) Regional Approaches, at the Service of Diversification of the "Invisible College"

In an article published in 1977, which is undoubtedly a classic in the legal literature on the subject, Oscar Schachter stated that the professional community of international lawyers was, despite their different nationalities and expertise, an "invisible college". That invisible college, though dispersed throughout the world and engaged in diverse occupations, is dedicated to a common intellectual enterprise and engaged in a continuous process of communication and collaboration. Schachter

[276] Indeed, "legal cultures" denote further subdivisions within each principal legal system. Thus, although the United States and Great Britain are both of common law tradition and the former has inherited its legal tradition from the latter, it would not occur to anyone that the study of the international law jurisprudence of the English courts would dispense with the study of US jurisprudence and vice versa.
[277] Oppenheim, supra note 65, p.356.

links the existence of this College of International Lawyers to the unity of international law, which thus provides the basis for this sense of belonging to a common community despite differences and divergences of approach.[278] Any reflection on the unity of international law can therefore hardly avoid an analysis of the invisible college of its professionals. This is all the more so as in other branches of law, they have a particularly important role to play in the development of international law. Indeed, absent a world legislator, international law depends to some extend at least on what international lawyers think and make of it. Part of international law's distinctiveness resides in the importance of doctrine and scholars in formalising and interpreting its rules.[279] Therefore, the need and interest in RAIL stem both from the biases of this community and from the need to bring greater diversity to it so that it is itself representative of international society. Indeed, as John Dugard points out, if there is something wrong with international law, international lawyers necessarily have a share of responsibility for it, just as they have an active role in the progress and success of international law: "international lawyers have in the past shaped international law for the better or for worse and continue to do so".[280]

This part aims to invite, after other authors, to a rethinking of the discipline of international law so that it can offer a more useful framework for international and national justice.[281] It argues that within the invisible college, there is a "visible community" that takes the lead in guiding the discipline, but which unfortunately due to its homogeneity and very little ideological and cultural diversity results in a biased representation of international society and visions of international law. The discourse of the unity of international law should not lead to ideological homogeneity here too, but on the contrary, demands greater diversity and genuine pluralism within the invisible college.

aa) Putting an End to Disciplinary Bias

Schachter's concept of the invisible college is closely related to the unity of international law. The concept carries the idea of a "cosmopolitan esprit de corps", an intellectual sensibility shared by all international lawyers around the globe that creates intellectual solidarity among all members of the discipline.[282] Taken to extremes, such a conception leads to the demand for a homogeneous, even monocultural vision of international law, based on an "international legal culture". As has been seen, however, such an international legal culture does not exist. Every international lawyer sees and perceives the international reality from a certain point, which inevitably affects the values and interests that he/she promotes. And as Anthea Roberts has shown pointedly, if there is a college of international lawyers, this college is divisible. On the one hand, international lawyers from the northern hemisphere dominate the production of international legal literature, omnipresent before international courts, and whose strongly Western-centric vision, or even in some cases as in the United States essentially based on national practice, dominates the discourse of international law spreading a Western approach, presented as universal.[283]

[278] Schachter, supra note 32.
[279] Prost, supra note 22, p.130.
[280] John Dugard, "What's wrong with international lawyers?", in *What's wrong with international law?*, supra note 105, pp.468-470.
[281] Charlesworth and Chinkin, supra note 75, p.1.
[282] Prost, supra note 22, p.142.
[283] Roberts, supra note 9, pp.8-10; Yasuaki, "A transcivilizational perspective on international law", supra note 35, pp.208-209.

On the other hand, in non-Western countries, the opposite approach is followed. The research and teaching of international law are conducted in a totally outward-looking manner, also focusing on Western practice and visions conveyed by the textbooks of Western authors that are mainly used there. The result is that, despite the difference in location or passports, the international lawyers who are trained or teach there have a predominantly Western-centric approach to international law. Thus, the maintenance of a Western-centric discourse of international law is not always unilaterally imposed but is co-authored.[284] This lack of educational diversity affects the sources and approaches that scholars use when identifying and analysing international law.[285] This can lead to the creation of a gap between the law as taught and as practised because the fact that their practice is not taken into account in textbooks does not deter political actors from defending their interests and their interpretation of international law.

From then on, the chanted unity becomes an illusion which ends up inhibiting the representativeness of the community by "universalising" the biases of one part of it. Disciplinary bias derives at a more fundamental level from the "discursive policies" of international law, which is elaborated and controlled by a Western-centric approach of international law. Each discipline is in effect governed by rules of formation that control the production of discourse and define its order of truth, its domain of validity, normativity and actuality.[286] It is these rules and policies that constitute "the syntax and the grammar of the discipline, the rules of language that every proposition or statement must reactivate to be accepted as valid, comprehensible or respectable (that is, to be 'within the true')".[287] International law is no exception to the rule. Any international lawyer, to be recognised as a member of the community, must necessarily refer to concepts, objects and ideas recognised by the community, use the concepts in a manner deemed appropriate, reflect on themes perceived as falling within the field of international law and adhere to a certain aesthetic of argument as well as the formal requirements of their presentation. It is only by submitting to this rigorous protocol that one's subject matter will be able to access the "scientificity" that allows his/her peers to assess the "truthfulness" or "falsity" of his/her positions. No one can claim access to or to be part of the invisible college unless he/she submits to these rules, which set the parameters for the production, dissemination and validation of juridical discourse in international law.[288] This is the case in practically all scientific fields. The problem in international law is that these protocols and standards have been defined unilaterally by one part of the world, for a "science" that is international in scope, and is applied and controlled for the most part by the members of the dominant legal cultures that have defined these discursive policies. This concerns, for example, the historiography of the

[284] See Lee, supra note 177, pp.437-438; Roberts, supra note 9, pp.54, 151-155; Fagbayibo, supra note 255, pp.171-172, 182-183; Yasuaki, "A transcivilizational perspective on international law", supra note 35, p.219; Capeller, supra note 49, p.18.

[285] A study of the legal concepts used in ICJ decisions tends to show that judges use references that systematically refer to principles originating in Western legal spaces despite the progressive enlargement of the Court to include judges from the Third World, Sana Ouechtati, "L'hétérogénéité dans la justice internationale. Le cas de la Cour internationale de justice", in *Select proceedings of the European Society of International Law, Volume 2 2008,* supra note 56, pp.426-427; in the same direction, Kurt Taylor Gaubatz, Matthew MacArthur, "How international is 'international' law?", *Michigan Journal of International Law,* vol.22, 2001, p.261. See also for an interesting study on legal culture as a problem at the International Criminal Court, Charles Reveillere, "Quelle place pour la critique à la Cour pénale internationale? Analyse grammaticale de ce qui fait la force d'une institution faible", *Droit et Société,* vol.105, n°2, 2020, pp.293-297. On the Western hegemony of training of judges, Amélie Marissal, "Cultures juridiques et internationalisation des élites du droit. Le cas de la Cour internationale de Justice", *Droit et Société,* vol.105, n°2, 2020, p.355.

[286] Prost, supra note 22, p.151.

[287] Ibid.

[288] Ibid., p.153.

discipline where the "canons" lead to foreclosing genealogical of the law's regional distinctiveness[289] or works described as "classics" invariably leading back to European authors.[290]

This control is carried out through the places where knowledge is produced and validated, which are overwhelmingly dominated by Westerners. Norms and standards are defined on the basis of a duopoly of the civil law and common law legal cultures. This "uniformisation" of legal cultures could have been welcomed if it had been the result of a deliberate overall movement, a sort of "natural selection" due to the option made for legal cultures perceived as carrying a sort of universality and in the perspective of the unity of international law. Unfortunately, one must regret with Jean-Marc Thouvenin that on the one hand, the range of solutions on offer is limited, as the competition between legal cultures does not "play to the full", and on the other hand, that little or no place is given to legal cultures that do not participate in this duopoly.[291] The most reputable publishing houses, which consequently give a halo of scientific credibility to publications, are practically all based in European countries with mainly Western collection directors and editorial board members or academics based in Western universities. The same is true of scientific journals, which are dominated by Western academics and practitioners. Roberts points out that the Western dominance on these editorial boards will in all likelihood result in the normalisation of certain Western perspectives. Comparable Western dominance does not characterise the editorial boards of other parts of the world international law journals, which for most of them feature a high proportion of Western-based academics in their editorial boards.[292]Moreover, most of these non-Western journals are published by European publishers. All this leads to the result that these "regional journals", although claiming to give space and visibility to the approaches and researchers of the region, only open a new space to the usual elite. As with the constitution of the editorial boards of these journals, their promoters are convinced that the credibility and "scientificity" of the journal depends on its ability to publish mainstream authors. These authors, who are mainly Western or have a Western approach to international law, do not lose their biases and prejudices, or transform their approach to international law simply because they are going to be published in an African, Asian, Chinese, Latin American or South African journal.[293]

The languages and concepts used in international law are mainly derived from Western languages, now mainly English. This makes the task of non-Western international lawyers, who have learned to think and imagine legal concepts in another language, a perilous exercise in translating their legal thought and culture, which inevitably leads to a certain loss of meaning in favour of the concepts of

[289]Becker Lorca, "International law in Latin America or Latin America international law", supra note 16, p.285.
[290] See for example Kaius Tuori, "The reception of ancient legal thought in early modern international law", in *The Oxford handbook of the history of international law,* supra note 16, pp.1012-1033.
[291] Jean-Marc Thouvenin, "Cultures juridiques et procédures judiciaires", in *International law and diversity of legal cultures,* supra note 5, p.398.
[292] Roberts, supra note 9, pp.109-110. See the criticisms and confusion of a librarian, Lyonette Louis Jacques, "What's wrong with international law scholarship: gaps in international legal literature", *Syracuse Journal of International Law and Commerce,* vol.35, n°2, 2008, pp.172-173. It is very instructive in this respect to read the studies on the subjects covered by the journals. See for illustration, Outi Korhonen, "Current trends in European law publications", *European Journal of International Law,* vol.9, 1998, pp.553-573; David J. Bederman, "Appraising a century of scholarship in the American Journal of International Law", *American Journal of International Law,* vol.100, n°1, 2006, pp.20-63; Richard H. Steinberg, Jonathan M. Zasloff, "Power and international law", *American Journal of International Law,* vol.100, n°1, 2006, pp.64-87.
[293] See for an illustration with the *Asian Journal of International Law,* Mamyluk and Mattei, supra note 6, pp.441-444.

the language in which they are obliged to express themselves.[294] This leads to an impoverishment of international law by limiting the creativity and capacity for renewal that it can draw from the diversity of cultures. Indeed, in addition to being a reflection of the pluralism of international society, multilingualism reduces the temptation for international lawyers to simply transpose concepts from their domestic law into international law.[295] Because many of the transnational international law journals are published in English and by major Western publishing houses, certain communities of scholars, most notably Western and common law scholars, may play a disproportionate role in defining the discursive policies of international law. As a result, "much of how 'international law' is understood depends on how those at Anglophone Academic institutions think of it".[296]

After the dark period of the history of international law, when the mission of civilisation also led to the exclusion of authors from certain parts of the world from the community of international lawyers for lack of membership of a common international scientific association,[297] the discursive policies of international law are singled out as leading to further exclusion of approaches deemed marginal. According to Keun-Gwan Lee, the discourse of non-Western peoples and nations, if judged to be "incommensurable" with the dominant normative view of Europe "undergirded by an alleged universal applicability", is relegated to the realm of irrelevance or dismissed by an incomprehensible clamour. Non-Western scholars have become voice in the international scholarship: "they have vocal cords. They make sounds (noises, rather), but not articulate and comprehensible voices which can be channelled into the process of international normative communication".[298] Prabhakar Singh's judgment is even harder: "today 'living in the Third world is bad breeding; becoming a Third world social scientist is even worse'. The former is like the original sin, the latter like acquired viciousness".[299]

To convince editorial boards of the "scientificity" of their position and to be in line with "the truth" of international law, scholars, especially those who do not have enough notoriety to allow themselves a certain amount of recklessness, must take care to present their arguments "through the works and ideas of the 'great' English and German scholars". Short quotations of those masters are then "embellished" with more precise contents of a "'second echelon' of scholarship, usually occupied by Spanish authors".[300] Peer review, even anonymous, obliges every writer of an article to find a balance between the original ideas he/she may have and the obligation to express himself/herself in the forms and vocabulary accepted by the "orthodoxy" of the discipline. All

[294] See about language and the conceptual biases that its use implies, Jeannine Drohla, "The languages of public international law: power politics under the cloak of cultural diversity", in *International law and diversity of legal cultures,* supra note 5, pp.174-175; Steiger, supra note 52, p.27; Gleider I. Hernandez, "On multilingualism and the international legal process", in *Select proceedings of the European Society of International Law, Volume 2 2008,* supra note 56, pp.452-455. On the impact of language on the expertise to be counsel before international courts, Shashank P. Kumar, Cecily Rose, "A study of lawyers appearing before the International Court of Justice, 1999-2012", *European Journal of International Law,* vol.25, n°3, 2014, pp.910-912.
[295] Hernandez, supra note 294, p.443.
[296] Roberts, supra note 9, p.xiv.. See also Drohla, supra note 294, p.175. In general on international law's limited geography of places and ideas, Gathii, "The promise of international law", supra note 219, pp.3-16.
[297] See Drescher and Finkelman, supra note 128, p.906. On the adoption of Western discourse and publication in Western journals as proof of "civilisation", Becker Lorca, "Universal international law: nineteenth-century histories…", supra note 52, pp.496-497.
[298] Lee, supra note 177, p.431.
[299] Prabhakar Singh, "Indian international law: from a colonized apologist to a subaltern protagonist", *Leiden Journal of International Law,* vol.23, 2010, pp.79-103.
[300] Becker Lorca, "International law in Latin America or Latin America international law", supra note 16, p.289. For Anghie, international law remains on this point and despite appearances "emphatically European", Anghie, "Imperialism, sovereignty and the making of international law", supra note 37, p.111.

researchers know that if they do not comply with the standards set by the dominant faction, they may experience Mr Semmelweis' misadventure: if they are not in "The Truth" of international law, their discourse is discredited.[301]

To have a chance of influencing disciplinary biases, one must have access to a journal classified as a reference journal, ideally, as a member of the editorial board or director (almost exclusively European and American journals), publish in prestigious publishing houses (all located in Western countries), to be able to make oneself understood in the lingua franca of the discipline (English nowadays) and possess sufficient symbolic capital (symbolic capital coming, for example, from having been trained in reputable Western universities).[302] But this is not enough to have an influence. The discourse still needs to be received "favourably" by "his/her peers". As already underlined, the publicist is part of the community of international lawyers, and it is how actors within the community receive and use the writing that determines its influence. This discourse must be taken up by other members of the invisible college, or more precisely the most influential among them (the "visible community") who, in doing so, "validate" it.[303] In this way, a sort of "virtuous circle" is constructed in which, to be recognised as an "expert" or "qualified", one must espouse the opinions of those who already have this title, and any new "expert" and "qualified" thus recognised contributes to establishing the authority of the opinion expressed.[304] On the contrary, a divergent discourse can be perceived as transgressive and outside the "science of international law": "teachings that do not speak the language, or which are considered disruptive, might be overlooked, dismissed, pigeonholed, or otherwise not valued. This is particularly true of work that challenges mainstream thinking or seeks to overturn orthodoxies".[305] For example, Mohamed Bedjaoui's positions, as Special Rapporteur of the ILC on succession of States in respect of rights and duties resulting from sources other than treaties, on the issue of acquired rights and State succession were considered too political because they departed from what was considered to be the doxa of international law in the late 1960s.[306]

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[301] The physician who at the end of the 19th century claimed that women's deaths due to postnatal infections were caused in part by "cadaverous particles" that doctors had on their hands and which they transmitted to women in childbirth from autopsy rooms to delivery rooms. Based on this hypothesis, Semmelweis believed that the mortality rate could be drastically reduced if doctors disinfected their hands before entering the delivery room. His work was rejected, mocked by the scientific community in Vienna because it did not meet the standards and scientific truth of his time, in particular the inadmissible idea for doctors that they could be the cause, even indirect, of so many deaths. As Mario Prost, who tells this sad story, concludes, "he spoke the truth but was not 'in the truth' of the medical field. His discourse remained trapped in a sort of wild exteriority until, years after his death, Pasteur's germ theory finally proved him right and made him a true pioneer of antisepsis", Prost, supra note 22, pp.150-151. As with the doctors of Semmelweis' time, international lawyers refuse to imagine themselves as possible obstacles to the universality of international law, Dugard, supra note 280, p.469.

[302] Bachand, supra note 123, pp.26-27.

[303] See Sandesh Sivakumaran, "The influence of teachings of publicists on the development of international law", *International and Comparative Law Quaterly,* vol.66, 2017, pp.23-24.

[304] See Sondre Torp Helmersen, "Finding 'the most highly qualified publicists': lessons from the International Court of Justice", *European Journal of International Law,* vol.30, n°2, 2019, pp.527-529; Pierre-Marie Dupuy, "Professeur de droit international: écoles buissonnières", in *Dictionnaire des idées reçues en droit international,* supra note 205, p.460; Sornarajah, "Power and justice…", supra note 135, p.31.

[305] Sivakumaran, supra note 303, p.35. On "professional western centrism", see Caserta, supra note 81, p.6. This leads Becker Lorca to argue that the international legal profession in the second half of the 19th century was more pluralistic and multicultural than "today's well-established invisible college", Becker Lorca, "Universal international law: nineteenth-century histories…", supra note 52, p.549.

[306] See Anna Brunner, "Acquired rights and state succession. The rise and fall of the Third world in the International Law Commission", in *The battle for international law,* supra note 108, pp.124-140; von Bernstorff and Dann, supra note 108, p.21. See also on the bias in favour of arbitration Sornarajah, "The battle continues. Rebuilding empire through internationalization of state contracts", supra note 225, pp.187-188.

It should be realised that the invisible college is traversed by diverse currents, ideologies and interests that do not make it a homogeneous society. As Prost explains, the cultural unity of the discipline does not denote an esprit de corps necessarily referring to a community of immediate interests and values, but rather a community to be built. What unites the invisible college is faith in this project and this ideal, a "collective consciousness", that is "the range of beliefs and sentiments common to average members of a group and that constitutes the group's 'social psyche'". [307] Consequently, regional approaches do not call into question the existence of the college but allow its diversity to be highlighted and strengthen its cohesion by providing it with the means to become more democratic. It would be necessary to move away from the paradigm that the invisible college can only exist as such and therefore be united only at the price of the destruction of what made the individuality of each of its components.[308] It follows that the fundamental questions of the discipline need to be elaborated more systematically in cooperation with academics having different philosophy, visions and approaches of international law.

If international lawyers want to preserve the unity of international law and thus its universality, they must take up the challenge of enriching it and broadening the ideological and cultural bases of international law as it is studied and practised. The university academy, as Bachand explains, participates both in the formation and "propagation" of biases and stereotypes. Its function is the internalisation of the structural biases of a discipline, i.e. the learning of the political preferences of the legal system.[309] If academics do not become aware of their biases in the teaching and study of international law, there is a real risk that challenging political preferences that are misrepresented as universal will lead to a fragmentation of international law. The invisible college could become fragmented "with chasms created whereby teachings no longer speak to certain members of the community".[310] The members of the invisible college must understand that any interpretation of the rules is political and stop, in their writing and teaching, reproducing "historically conservative disciplinary biases and considering them to be untouchable and unquestionable".[311] A more universal foundation for academia is therefore needed to preserve its unity. One of the principal challenges will be to delve into the mass of materials. RAIL can bring and make a genuine effort to enable the corpus of international law to reflect more clearly the universalism which is its foundation. For that, following Weeramantry's suggestion, international lawyers must take off the actual blinkers and thrust out taproots into the other major cultures of the world, which, unfortunately, many international lawyers know very little about.[312] This requires more internationality in the way the discipline is taught and studied.

[307] Prost, supra note 22, p.144.
[308] On that paradigm, see Vincent Descombes, *Les embarras de l'identité,* Paris, Gallimard, 2013, p.215.
[309] Bachand, supra note 123, p.28. See also, Evans, supra note 20, p.1055.
[310] Sivakumaran, supra note 303, p.36.
[311] Bachand, supra note 123, p.34. On this "closure" of the doctrinal space and the discouragement it causes among the "young talents", see Luigi Ferrari-Bravo, "Les rouages de l'enseignement du droit international", in *International law as language for international relations,* supra note 68, pp.350-351.
[312] Weeramantry, *Universalising international law,* supra note 33, p.88. It should be emphasised that this blindness and ignorance is often in good faith, as the centre's international lawyer is unaware of the privilege he/she has to make his/her voice heard: "Scholars simply have not thought to ask (or do not have time to ask) what Moldovian jurists think of the Trandnestrian conflict, or what Somali jurists think of the concept of universal jurisdiction and the International Criminal Court in the context of piracy", Mamlyuk and Mattei, supra note 6, pp.432.

> "The task of universalising international law requires a widening of the conceptual framework within which the discipline is set. This involves effort commencing at the level of legal education, where the mind-set of the future international lawyer is cast".[313]

It is a question of training no longer only lawyers, but "intellectuals". The first, in which, according to Abi-Saab, the majority of international lawyers can be found, "are mere legal plumbers who mechanically apply law as they studied (or received) it"; while the second, are "legal architects or social engineers".[314]

Indeed, international law can only be truly "international" if its study and teaching go beyond national and/or regional navel-gazing to open up to the history, visions and practices of other States, other cultural and social groups. An openness that does not mean judging others approaches by one's own presuppositions and prejudices, but a real effort to facilitate their understanding in a logic of dialogue and communication to build a truly international community subject to a common law. As recommended, to cope with these exhortations and the need to adapt teaching and learning patterns to the required ability of pluricultural thinking can only be achieved through depth studies in specific areas on the one hand and curriculum development in cooperation with those who are most directly concerned on the other hand.[315] In other words, "juxtaposing different professional sensibilities makes visible the limits, biases and blind spots of each".[316] RAIL can facilitate the search for and constitution of the material necessary for such education.

bb) Balancing the Network Elite

The fear of fragmentation of international law due to pluralism is not new and the diversification of international society has often been experienced with anxiety and apprehension by some international lawyers who saw it as a danger to the unity of international law and a real risk of fragmentation. Thus, Schmitt, Stone, Verzijl, Visscher and Jennings, each in their own time and with different arguments, saw in the expansion of international law to non-Western States not only the loss of the privilege of Western States in the elaboration of international law but above all an undermining of the capacity of the international legal order to harmonise the differences between States which until then shared a common cultural substratum.[317] It is almost a similar logic that can be found today in the argument of part of the invisible college, more precisely the visible community within it, for whom the argument of the unity of international law also aims at preserving a certain primacy of the latter.

Following Prost's analysis, like in any other legal professions, international lawyers struggle to secure a legitimate position for themselves within the legal field, and "compete for to conquer new markets for their legal expertise and services".[318] Seen from this perspective, RAIL, like any progressive

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[313] Weeramantry, *Universalising international law,* supra note 33, p.185.
[314] Georges Abi-Saab, "The Third world intellectual praxis: confrontation, participation, or operation behind enemy lines?", *Third World Quaterly,* vol.37, n°11, 2016, p.1961.
[315] Konrad Ginther, "The teaching of international law under a developmental aspect: the relevance of African cases and materials", in *New perspectives and conceptions of international law,* supra note 58, p.221.
[316] Kennedy, "One, two, three, many legal orders…", supra note 42, p.652. See also Oppenheim, supra note 65, p.325.
[317] See Becker Lorca, "Eurocentrism in the history of international law", supra note 52, pp.1041-1042; Anghie, *Imperialism, Sovereignty and the making of international law,* supra note 37, p.110; Yusuf, "Diversity of legal traditions and international law", supra note 59, pp.686-687.
[318] Prost, supra note 22, p.203.

specialisation in international law that is perceived as a fragmenting apple, can lead to a new distribution of knowledge, labour and power within the invisible college. The debate around RAIL, beyond theoretical and ideological interests, also appears as "the mirror of a sort of hegemonic struggle between different classes of international lawyers fighting for the appropriation or re-appropriation of certain forms of social capital".[319] There is indeed the fear that legitimation of RAIL will lead to the development of new networks of professionals, a new expertise leading to the birth of real autonomous "epistemic communities" with their own discursive policies that will eventually challenge the hierarchy within the college and the current supremacy of what Prost calls the "Einheitsjurist – the generalist uniform and versatile lawyer".[320] Indeed, the "merchants of unity" of international law and who express the most fears about a possible fragmentation of international law are very often these generalist international lawyers, a highly visible community within the invisible college, who see their raison d'être, their credibility and their utility called into question, "with their social capital declining, prospects (…) dimming for the 'general practitioners' of international law and their knowledge".[321] For these reasons, generalists will often prefer to fight marginalisation by engaging in "strategies of self-representation":

> Self-representation, for the anxious generalist, will typically consist of describing international law as fully integrated – in other words unified – system; defending that unity not only as an epistemological imperative but as an empirically verifiable fact; and characterising diversification, proliferation and complexification as threats to the legitimacy and the efficacy of the legal order.[322]

However, this fear is unfounded if one accepts that, despite the variations and specificities they may have, RAIL remain tools of international law, which is therefore both the framework for their elaboration and their ultimate purpose. RAIL are not "regional international laws" but reflections, contributions from a certain assumed point (for lack of a better one), to the elaboration and application of the common project that is international law. Consequently, the task of the generalist remains central to this mechanism, both to facilitate the building of bridges between the different visions, to identify and indicate points of convergence or divergence, to propose new fields of reflection and research, and above all to maintain the necessary distance to ensure that the desired pluralism always remains within the framework of the common language of international law and does not threaten its unity. Even if one has the vision of the generalist, the face of one capable of mastering all the possible fields of international law, then the RAIL, without denying it, simply prescribe a methodological requirement. It calls on every international lawyer to specify the place from which he/she is speaking on the one hand, and the obligation, on the other hand, to commit oneself to an honest and balanced search for diverse and plural material to draw truly universal conclusions.

Many studies have highlighted the approximations and errors that may exist in reference publications on practice and legislation in non-Western regions of the world. Rachel Murray thus cites as an example the case of human rights treaties and manuals which, despite their inclusive

[319] Ibid., see also Martineau, supra note 7, pp.2-4.
[320] Prost, supra note 22, p.203. Gaubatz and MacArthur point out that they are very often lawyers from the United States and a handful of Western European countries which have a "monopoly of international legal practice", Gaubatz and MacArthur, supra note 285, pp.241, 247. See also Ferrari-Bravo, supra note 311, p.350.
[321] Prost, supra note 22, p.204.
[322] Ibid., pp.206-207.

title, are almost exclusively focused on Western practice and jurisprudence, reducing the reference to other systems, notably the African system, to quasi-anecdotic. The African system has, moreover, very often been cited as the counter-example, to indicate what should not be done by pointing out its gaps and shortcomings, disregarding its originality and its achievements,[323] sometimes going so far as to express condescending derision.[324] Other authors have also described a lack of knowledge of the jurisprudence of African institutions in "reference manuals" that engage in generalisations and hasty conclusions. These "errors" are partly explained by the absence in the sources consulted by these authors of reference works published by researchers that could be considered peripheral.[325] Murray thus regrets that mainstream works, often used as reference manuals for student training, give an incomplete, distorted and sometimes inaccurate picture of the contributions of other regions of the world to the development and the promotion of international human rights law.

In international human rights law, as in all branches of international law, RAIL can provide a way out of this bias of perceiving institutions and texts from other regions of the world, which may differ from those interpretations by European or Western bodies, as a threat to international law, towards a truly universal international law. Murray's conclusion, therefore, is valid for the whole of international law:

> "Human rights if they are to be truly universal must be multi-cultural: the European student should study the African Charter in order to better understand African perspectives and conceptions of human rights as an important constituent part of a universal concept of human rights".[326]

RAIL must make it possible to overcome the damaging "ethno-chauvinism"[327] of certain publications, by admitting and validating regional expertise, which cannot be extended under a false universality and the pretext of the unity of international law, to confer on its holder the title for having a biased and inaccurate discourse on other regions of the world. Unfortunately, the falsely asserted universality and unity can have the effect of dispensing specialists in one region, and generalists, from the methodological obligation to compare partial and fragmentary conclusions with the practice and *opinio juris* from other regions, before making any generalisations. To use Forteau's formula, by irrigating international law, RAIL participates in strengthening it.[328] Of course, the opposite dynamic remains true: international law is the lifeblood of regional approaches.

RAIL make it possible to move from formal pluralism and diversity to a real effort to diversify the members of the invisible college. A true universalisation of international law requires that the visible community of the invisible college should be representative of both the diversity and ideological currents that run through it. It cannot be denied that one is more likely to be elected to the Institut

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[323] Rachel Murray, "International human rights: neglect of perspectives from African institutions", *International and Comparative Law Quaterly,* vol.55, n°1, 2006, p.193.
[324] Perhaps the most shocking example from this point of view is Geoffrey Robertson who writes: "The European Court and Privy Council do work (…). The Inter-American system is patchy, but better than nothing, while the African Commission is pathetic". After a presentation of factual inaccuracies in the practice of the African Commission on Human and Peoples' Rights, he concludes that the latter "has become a sad joke", should be renamed "the African Charter for Keeping the Rulers in Power", holds "slapstick" session and "is such a farce" and the hollowest of pretences, Geoffrey Robertson, *Crimes against humanity. The struggle for global justice*, London, Penguin, 2000, pp.60-64. See Murray, supra note 323, p.195.
[325] Christof Heyns, Magnus Killander, "Africa in international human rights textbooks", *African Journal of International and Comparative Law,* vol.15, n°1, 2007, pp.130-137.
[326] Murray, supra note 323, p.197. See also Yasuaki, "A transcivilizational perspective on international law", supra note 35, pp.128, 201.
[327] The expression is borrowed from al Attar, supra note 41, p.121.
[328] Forteau, "Commentaire sur de Hoogh et Pulkowski", supra note 179, p.92.

de Droit International if one studies, teaches and publishes in Great Britain than if one carries out the same activities in Papua New Guinea.[329] Writing a very good doctoral thesis in New York offers a better chance of being published and therefore of getting your ideas (and making yourself known) than even an excellent thesis in Bujumbura. Or, according to Gathii's observations, international law work produced in Luxembourg or Strasbourg is more likely to be regarded as a source of important theoretical innovations in international legal order than the one produced in Arusha.[330] The veil of the invisible college should not hide these realities, which are not peculiar to international law, but which are of singular importance in a disciplinary field in which representation and representativeness play a prominent role. Without being the miracle solution offering equal opportunity to all, RAIL, by placing the obligation of pluralism and diversity at the heart of international law, oblige the centre's international lawyer to look for material from the periphery, which, if he/she cannot find it directly himself/herself, forces him/her to seek it from his/her colleague in the periphery. This applies not only to teaching and research in international law but also to all other professions of international law (judges, arbitrators, counsels, mediators, conciliators, etc.). In doing so, RAIL oblige international lawyers to work together as a collegial team in the elaboration of a law truly "international" in the broadest sense of the word.

4. Conclusion: From the National through the Regional to the Universal

The attachment of international lawyers to their discipline and to the values it embodies should not blind them to its "commodification" by political actors, particularly States. For the latter, this "commodification" consists of a real effort, depending on the means at their disposal, to influence the establishment of norms and institutions reflecting the principles of their legal culture or the values they consider essential. By facilitating the expression of these principles and values within the framework of international law and in a common language, RAIL facilitate the necessary comparison between these different visions, and can thus lead to the harmonisation of points of view but also to the acceptance of differences in order to fully rehabilitate the political game at the international level through a better understanding of the choices to be made together.[331] Lawyers probably do not have the legitimacy to make choices about the model of international society. But, as has been beautifully written, in the absence of legitimacy to set the blueprint, lawyers can provide methods to help address the main challenges.[332] Indeed, when for example Article 38 of the Statute of the International Court of Justice cites "general principles of law recognized by civilized nations" as a source of international law, it places at the heart of the Court's approach the comparative approach to which RAIL also invite. RAIL are thus a "leaven introduced into the dough of classical international law to contribute to its evolution".[333]

Of course, States are neither the only ones to take into consideration nor the only framework for expressing values and a vision for international law. Many authors such as Weeramantry have, for example, emphasised the contribution that religions and other spiritual philosophies can make to

[329] The slow and progressive efforts of the august institution to diversify its membership are to be commended here, see Jean Salmon, "Institut de droit international: la valeur attend le nombre d'années", in *Dictionnaire des idées reçues en droit international,* supra note 205, pp.307-312.
[330] Gathii, "The promise of international law", supra note 219, p.5.
[331] Jouannet, "Les visions française et américaine du droit international…", supra note 43, p.90.
[332] "A défaut de légitimité pour établir le plan de l'édifice, les juristes peuvent apporter des méthodes pour contribuer à relever les principaux défis", Delmas-Marty, "Remarques conclusives", in *Select proceedings of the European Society of International Law, Volume1 2006,* supra note 2, p.440.
[333] Own translation. Charvin quoting Jean Touscoz, supra note 55, p.24.

the definition of common values and then to the development of universal international law.[334] RAIL are only one option among others, but an important one because they place at their centre an actor that has hitherto dominated international relations and the international legal order, namely the State.[335] Moreover, in some cases, the legal culture within certain States may be linked to religious and other cultural elements, which obliges any truly inclusive regional approach to integrate these elements and all infra/alter identities. This presupposes, and it has been stressed at length, that the regional approach is neither regionalist, guided by an ambition to redefine the world in a new "messianic mission of civilisation", nor nationalist, in that what is presented as a regional vision is in reality only the expression of a local hegemony that considers itself to be representative of regional diversity (be it geographical, linguistic, political, military regionalism, etc.). RAIL can only be a tool for consolidating and strengthening international law on the dual condition that it is sufficiently representative on the one hand, and on the other hand that it is considered by its promoters as a vision that is neither exclusive nor unique but a step towards the inclusive construction of universal international law.

This is not an easy task and there will undoubtedly be inevitable contradictions both at the regional level in the definition of what can be both common and distinctive to constitute a specifically regional vision and at the universal level to know what are the common values and how they relate to each other. One may agree for example to condemn torture, but disagree on what constitutes an act of torture… Nevertheless, this risk of contradictions and even opposition should not invalidate the method because, as Delmas-Marty reminds us, far from always marking inferiority, weakness is sometimes the quality that will make it possible to find the solution to a seemingly insoluble problem.[336] The contradictions are not the death of thought but on the contrary an invitation to more creativity and ingenuity on the part of the "invisible college". The theoreticians then have to relativise, and then to exorcise useless conceptual oppositions, to bring ideas closer together to allow them to live together if they can't be harmonised; they will be able to do this if they adopt the appropriate comparative methods.[337] For that, we must move away from a dogmatic approach, almost theological for some, of the unity of international law: "if all unities are not worth preserving, neither are all fragmentations worth rejecting. Making good law or good justice sometimes demands breaking old norms and institutions".[338] International lawyers have to think about international law's unity and universality "without complexes, in a dispassionate way", seeking to achieve greater coherence where possible but also "being prepared to welcome legal advances in their spontaneous and disorderly irruption, in the play of their differences and immediacy, even if contradictory or

[334] Weeramantry, *Universalising international law,* supra note 33, pp.17-30.
[335] On the question of whether State consent is necessary and/or sufficient to confer legitimacy on international law, see among others Buchanan, supra note 72, pp.90-93; Yasuaki, "A transcivilizational perspective on international law", supra note 35, pp.213-216.
[336] Delmas-Marty, *Les forces imaginantes du droit,* supra note 60, pp.395-396.
[337] Sacco, supra note 128, p.24. In the article quoted at the beginning of this paper, Wood acknowledges that defining and comparing regional approaches is no more difficult than identifying customary law, Wood, supra note 2, p.158.
[338] Prost, supra note 22, p.210. In the same direction, Joost Pauwelyn, "Bridging fragmentation and unity: international law as a universe of inter-connected islands", *Michigan Journal of International Law,* vol.25, n°4, 2004, p.904; Ley, supra note 178, p.741.

conflictual".[339] After all, progress has an element of subjectivity linked to the values defended and is difficult to prove empirically, especially in international law.[340]

The faith which animates the present reflection, and which is the one expressed and defended by many authors,[341] is that the political choices which make it possible to define a model of international society, and consequently the correlative international law, are collective choices which are not made through the imposition of one's own values on others but through inclusive dialogue, impregnated with tolerance and modesty. International law can only be truly universal and unified, representative and legitimate in the eyes of all if it allows access to a "differentiated identity". For this to happen, it is imperative that international lawyers, following Emmanuelle Jouannet's invitation, should consider international law as a multicultural and historical phenomenon.[342]

[339] Prost, supra note 22, p.210.
[340] See Tilmann Altwicker, Oliver Diggelmann, "How is progress constructed in international legal scholarship?", *European Journal of International Law,* vol.25, n°2, 2014, pp.425-444. See also on the link between progress and diversity, Sacco, supra note 128, pp.11-12; George Abi-Saab, "The Third world and the future of international law", *Revue Egyptienne de Droit International,* vol.29, 1973, pp.64-67.
[341] See Delmas-Marty, *Les forces imaginantes du droit,* supra note 60, p.9; Jouannet, "Les visions française et américaine du droit international…", supra note 43, p.90; Fortin, supra note 228, p.358.
[342] Jouannet, "Les visions française et américaine du droit international…", supra note 43, p.90.

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The Kolleg-Forschungsgruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. We assume that a systemically relevant crisis of international law of unusual proportions is currently taking place which requires a reassessment of the state and the role of the international legal order. Do the challenges which have arisen in recent years lead to a new type of international law? Do we witness the return of a ‘classical’ type of international law in which States have more political leeway? Or are we simply observing a slump in the development of an international rule of law based on a universal understanding of values? What role can, and should, international law play in the future?

The Research Group brings together international lawyers and political scientists from three institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Humboldt-Universität zu Berlin and Universität Potsdam. An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.

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