

# INTERNATIONAL LEGAL THEORY: HAVEN'T WE OVERESTIMATED THE DIVIDE BETWEEN FRANCE AND THE UNITED STATES?

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## Introduction

In the French world of international law, two claims about American and French scholarship are often made. The first claim is that American scholars would no longer consider the establishment of the content of the law to be a legitimate academic activity. Whereas French scholars would allegedly concentrate most of their energy on establishing the existence, content, and application of legal rules, American researchers would study law almost exclusively from an outside perspective. Instead, their main objective would be to evaluate the role and functions of international law in the international society or to assess its conformity with social values. A second claim is that French scholars would remain fundamentally tied to the belief that it is possible to conceptually separate formal legal rules from other elements of our social existence such as political opinions, values, and societal influences, while American scholars would have abandoned that distinction. In the United States what is law would no longer be defined by reference to formal sources or legal interpretation mechanisms, such as those established by article 38 of the Statute of the International Court of Justice<sup>1</sup> and article 31 and following of the Vienna Convention on the Law of Treaties.<sup>2</sup> Rather, law and its content would be defined by criteria such as the efficiency of the legal rule, its application or non-application in the international community, its conformity with certain values, and so forth.

Critics go as far as saying that the sociological focus of American scholarship would in reality camouflage a lack of rigor and a misguided tendency to mix international law and social facts in a way that would

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1. Statute of the International Court of Justice art. 38, June 26, 1975, 58 Stat. 1055, 3 Bevans 1153.

2. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

ultimately benefit the United States as a political actor. Some sustain these claims are valid, others dismiss them as a simplistic anti-American cliché, but very few, it seems, substantiate either argument with empirical evidence. This article can be seen as a first attempt to fill that gap. By systematically evaluating one year of articles and analysis of the *American Journal of International Law* (AJIL), it shows that those two claims do not accurately describe current American scholarship.

The article is structured as follows. In the first part, I expand on the way American and French scholarship describe each other. We then proceed to the analysis of the literature of the AJIL, and finally conclude that current American scholarship has not abandoned the determination of the content of positive international law as a legitimate activity, nor does it mix international law with other social facts indiscriminately.

### I. A Gap. . . in Theory

Since 2003, and the highly publicized confrontation between the United States and some of its Western allies over the war in Iraq, a great number of studies have underlined the differences dividing the Western world,<sup>3</sup> not only from a political and philosophical standpoint,<sup>4</sup> but from a legal perspective as well. International law has not been left aside of this debate. According to some recent studies, the misunderstanding between the American and European legal scholars and lawyers is so wide that it would be now fair to say that international law, as a discipline, is facing a “gap,”<sup>5</sup> experiencing a “dialogue of deaf,”<sup>6</sup> or even witnessing the building of a true “Tower of Babel.”<sup>7</sup>

The main transatlantic difference would concern the abandonment of the study of international law “from within”. According to Jean-Pierre Cot,

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3. One such study focuses on the year 2003 as the tipping point in the transatlantic rupture. Dana Zartner Falstrom, Symposium, *Thought Versus Action: The Influence Of Legal Tradition On French And American Approaches To International Law*, 58 ME. L. REV. 337 (2006); Emmanuelle Jouannet, *Les Visions Françaises et Américaines du Droit International. Cultures juridiques et droit international*, in DROIT INT’L ET DIVERSITÉ DES CULTURES JURIDIQUES – INT’L LAW & DIVERSITY OF LEGAL CULTURES 44 (Pedone, 2008). See also OLIVIER CORTEN, *The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate*, 16 EUR. J. OF INT’L L. 803, 822 (2005) (underlying that American scholars tend to favor an extensive approach in interpreting the exceptions to the prohibition on the use of force, whereas the European approach tends to use a more restrictive approach).

4. See generally JÜRGEN HABERMAS, *THE DIVIDED WEST* (Polity Press 2006).

5. Jean-Pierre Cot, *Tableau de la pensée juridique américaine*, 110 REVUE GÉNÉRALE DE DROIT INT’L PUB. 537, 593 (2006).

6. *Id.*

7. Jean d’Aspremont, *La Déformalisation en Droit International et l’Abandon de la Théorie des Sources dans la Doctrine Contemporaine*, 30 L’OBSERVATEUR DES NATIONS UNIES 39, 54 (2011).

working towards identifying legal norms, determining their content, and their correct application are tasks that are neglected by the majority of American scholars who have, simply put, been converted into legal sociologists:

American legal thought has experienced a mutation . . . in international law. The objective of analysis, classically attentive to the study of the normative legal order, to identification, interpretation and application of the rule of law, has changed. Today, it is now focused primarily on elaboration of norms of social conduct.<sup>8</sup>

The Max Planck Encyclopedia of Public International Law contains a similar statement:

Where most European lawyers focus predominantly on international law's normative force – examining its-rule-structures – lawyers from the US and the Third World are often more preoccupied with questions about international law's normative scope and institutional management . . . . Such a distinction between normative doctrines—doctrines about legal sources, about interpretation and application of the law—and sociological doctrines—doctrines about international law's objectives and institutional effects—reflects differing orientations of academic training and conceptions of the proper roles of the lawyer vi-à-vis the judge, diplomat or the policy maker.<sup>9</sup>

This tendency to describe the evolution of the American discipline as a gradual abandonment of *law ascertainment*<sup>10</sup> is not an exclusively European trait. Reading the review made by David Kennedy,<sup>11</sup> or the symposium published by the AJIL at the end of the 1990's, one gets the impression that almost every American scholar has given up on working on the existence or interpretation of positive international law. The focus seems rather to be on the study of legal process, norms efficiency or on the

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8. Cot, *supra* note 5, at 537.

9. Martti Koskenniemi, *International Legal Theory and Doctrine*, in THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INT'L LAW vol. 5, at 983 para. 28 (Rüdiger Wolfrum ed., 2012).

10. The idea of law ascertainment is fundamentally linked to the positivist vision that law can be established *in abstracto* before being “applied” to the “reality of the facts” (fact ascertainment). See Frank R. Strong, *Pedagogic Training of a Law Faculty*, 25 J. LEGAL EDUC. 226, 231 (1972).

11. See, e.g., David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. INT'L L. 9 (1999) available at <http://www.law.harvard.edu/faculty/dkennedy/publications/french.pdf> (French translation).

conformity of norms with specific values such as gender or ethnic equality.<sup>12</sup>

In France, the discourse on international law as a discipline is drastically different. Contrary to their American counterparts, French scholars tend to describe themselves as being focused on one main activity: to determine the existence and the rightful interpretation of the norms of international law. This does not mean that all French scholars agree this is a good thing. Some regret, for example, that the French debate in international law is “shrinking”<sup>13</sup> and underline the “doctrinal decline” and the “positivist reduction” of the discipline.<sup>14</sup> They also denounce, for example, that by focusing narrowly on determining the content of legal norms, the French academic world would have become incapable of formulating a more radical critique of those norms.

French scholars also emphasize that legal theory among French international lawyers used to be richer than it tends to be now. The tendency to study “natural law,” or to underline the “objective interpretation” of some norms, or even to question the existence of international law as being a true “legal system” might nowadays seem a bit archaic, but it was a way for French international lawyers to provide for an external assessment of the international legal order. During the 1970s and the 1980s, the work made by the *École de Reims* went even further in assessing international law from the outside and in conceptualizing a French critical school of international law. It is important to remember that, at a time when “critical legal studies” were far from mainstream in the U.S. academia, the French *École de Reims* was already conceptualizing the role of international law in the reproduction of material and symbolic inequalities.<sup>15</sup>

During the 1990s and the early 2000s, however, while the diversity of approaches were flourishing in the United States, the French schools of international law went - if not silent - more quiet, and it is hard to point a real and new theoretical debate during those years. And that phenomenon can probably be relatively easy to explain. As Emmanuelle Jouannet points

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12. On the various American approaches of international law see Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT'L L. 291 (1999).

13. Cot, *supra* note 5, at 539.

14. Emmanuelle Jouannet, *Regards sur un siècle de doctrine française du droit international*, 46 ANNUAIRE FRANÇAIS DE DROIT INT'L 1, 36-37 (2000).

15. The *École de Reims* gathered from 1973 to 1989 in Reims (FR). All the reports and the proceedings of the meetings were reproduced in the ANNALES DE LA FACULTÉ DE DROIT ET DES SCIENCES ÉCONOMIQUES DE REIMS, available at <http://www.univ-reims.fr/site/editions-et-presses-universitaires-de-reims/catalogue/themes/rencontres-de-reims.15443.html> (last visited Oct 15, 2013). Today, the *École de Bruxelles* and its “critical positivism” can be seen as one of the heirs of the *École de Reims*. On that topic, see Jean Salmon, Professor at the Université libre de Bruxelles, *L'École de Bruxelles en Droit International* (Mar. 21, 2013), available at <http://cdi.ulb.ac.be/a-propos-du-centre/lecole-critique-de-droit-international-de-bruxelles/>.

out, a good part of the theoretical debates in the Francophone world was driven by one central question: is international law *real law*, and does it have any influence on the reality of international relations? It is therefore not surprising that this debate was less central after the end of the Cold War, when international lawyers witnessed a normative explosion and the unfolding of what was then seen as the first truly universal consensus on how the world should be ruled.<sup>16</sup> As to the *École de Reims*, their theoretical approaches had fallen on the wrong side of history. After all, who could defend the idea of a Marxist approach of International Law in the 1990's and 2000's, especially in continental Europe where a reference to Marx in any academic document was paradoxically more unthinkable than it was (and still is) in the United States? As a result, the discipline seems to have instead focused even deeper on the study of practical and technical issues, confining international lawyers to the study of international law from the inside<sup>17</sup> and leaving the external evaluation of international norms to political scientists or philosophers.<sup>18</sup>

While the opposition between the supposedly prevalent sociological approach of the American scholars and the mainly positivist approach favored in France remains the main transatlantic tension, another difference is sometimes emphasized. In the process of determining the existence and the content of the norms, American scholars, it is said, would have abandoned the idea that, a clear distinction could be drawn between the law, defined formally, and other social elements such as ideological preferences, efficiency of the norm. The claim is that the sociological approaches favored by many American scholars would have bled into their interpretative process and that no difference would be left between what law is and what it *ought* to be.

This mixture of genres is considered problematic by a number of European scholars. As Guglielmo Verdirame notes, “[t]hese [transatlantic] differences are often stylized into the complaint of Europeans that American scholarship lacks rigor and that its penchant for interdisciplinary methods has gone too far, to the detriment of proper legal analysis.”<sup>19</sup>

Writing on *Policy-Oriented Jurisprudence*, a typically American approach, Jean-Pierre Cot states the following:

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16. Jouannet, *supra* note 14.

17. *Id.* at 16. In the United States, on the other hand, the existence of a group of law skeptics would have forced international law scholars to keep defending the efficiency of international law and its relevance in the international society, keeping alive a debate that tended to disappear in continental Europe. Voy. Guglielmo Verdirame, ‘*The Divided West*’: *International Lawyers in Europe and America*, 18 EUR. J. INT’L L. 553, 562, 561 (2007) (“Mainstream legal thinking in Europe remains fundamentally faithful to the fact-norm distinction . . .”).

18. Jouannet *supra* note 14, at 35.

19. Verdirame, *supra* note 17, at 554.

Everyone has his political preferences. But here, the problem is that of subjectivity. The prescriptive component inherent in *Policy-Oriented Jurisprudence* necessarily calls for value judgments and policy choices. Instead of being explicit, these choices are wrapped in scientific language that does not fool anyone . . . . The interdisciplinary element that is dear to *Policy-Oriented Jurisprudence*, as is to the International Legal Process, is not itself a problem so long as the epistemological foundation is established beforehand.<sup>20</sup>

In the *Gentle Civilizer of Nations*, Martti Koskenniemi sustains that that trait can be linked to the realist tradition of the American international theory. The latter does indeed claim that, in the social world, law is not isolated from the rest of the social reality. Judges and lawyers are part of the social world and cannot claim to be “neutral” or above the rest of society. Some scholars would have taken that claim for what it was not and concluded that, if so, any social element could be brought into the process of determining which international norms law must apply and how they must be interpreted.<sup>21</sup> Ultimately, this is a matter of deformalization of the law: the question of determining whether it is acceptable to make use of non-formal sources to define the scope of the law.<sup>22</sup> Many American scholars would think that this deformalization is desirable while a great number of European thinkers would believe that it is not.<sup>23</sup>

In conclusion, American scholars would practice the discipline of international law in a manner that is very different from that of their French counterparts. On the one hand, they would not view the determination of the content of the rule of law as a legitimate scientific activity. On the other

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20. Cot, *supra* note 5, at 571.

21. MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW* 475-503 (Cambridge University Press, 2002). According to Koskenniemi, this is because the American lawyer’s job has shifted.

Once the critique of formalism has freed the lawyer from the constrain of rules . . . the lawyer is encouraged to begin a quest for the fabled moral norms that dictate what are rational choices for everyone, in other words, to re-imagine the law’s job as having to do with the resolution of the 3,000-year old enigma about objective morality.

*Id.* at 493-94.

22. As Jean d’Aspremont phrases it: “the concept of deformalization means the move away from formal law-ascertainment and the resort to non-formal indicators to ascertainment legal rules. Deformalization is thus an attitude whereby rules of international law are not identified by virtue of formal criteria”, Jean d’Aspremont, *The Politics of Deformalization in International Law*, 3 GOETTINGEN J. INT’L L. 503, 507 (2011).

23. Koskenniemi, *supra* note 21, at 495. See JEAN D’ASPREMONT, *FORMALISM AND THE SOURCES OF INTERNATIONAL LAW: A THEORY OF THE ASCERTAINMENT OF LEGAL RULES* 1, n.1 (2011) (describing the European approach).

hand, they would renounce the idea of maintaining a clear separation between law, defined formally, and other social elements.

## II. A Proximity in Practice

An observation of the literature published in the AJIL during the year 2011 will put the importance of the two alleged American particularities into perspective.<sup>24</sup>

Each issue of AJIL is divided into two roughly equivalent parts. The first part is devoted to what we shall call demonstrative studies. They are comprised of either large-scale studies, or reflections on current events in international law (which are generally included under the heading “Current Developments” or “Agora”). The second part of each issue is devoted to descriptive studies. They are intended to reflect on the latest relevant jurisprudence and elements of American practice in the area of international law.

Reading these articles, one is struck first by the prevalence of works whose principal goal is the determination of the content of formal rules of law. This prevalence is first evidenced by the decision of the editorial board to continue to devote more than half of the journal to the publication of reviews of decisions and reports on American practice in the field of international law. Of course, these could serve any study of sociological or theoretical nature. It is quite clear, however, that in their current state, they are written with the objective of determining the influences of the new jurisprudential or political developments on the content (or existence) of formal rules of international law.<sup>25</sup>

This tendency to study the content of formal rules is not merely found in the descriptive section of the journal. The majority of the twelve

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24. The A.J.I.L. serves as a suitable laboratory for examining the current state of American research in international law not only because it is one of the most important journals in the field, but also because it is a fundamentally American publication. Although not all contributing authors are affiliated with American universities, the two editors-in-chief, as well as 18 of the 26 members of its board of editors are. According to the rankings of the Washington and Lee University School of Law, the American Journal of International Law would be the fourth most important American publication in international law (according to the 2013 combined scores). See *Law journals: Submissions and Rankings, 2006-2013*, WASH. & LEE SCH. L., L. LIBR., <http://lawlib.wlu.edu/LJ/index.aspx> (last visited Aug. 22, 2014). The professors from non-American Universities on the board come from Canada (University of Toronto and University of Ottawa); United Kingdom (Oxford, King's College and L.S.E.), Israel (Tel Aviv University) and Switzerland (University of Geneva). *Board of Directors*, AM. SOC'Y INT'L L., <http://asil.org/sites/default/AJIL%20Board%20of%20Editors.pdf> (last visited Aug. 22, 2014).

25. The articles gathered under the “international decisions” part of the A.J.I.L. usually start with a summary of the facts and of the decision. They are usually concluded by a note of the author underlining the new elements this decision brought to the state of positive international law. For a classic example, see Eirik Bjorge, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, 105 AM. J. INT'L L. 534 (2011).

demonstrative studies published in 2011 present similar characteristics. Eight out of the twelve of them have for main goal to determine the content of certain formal rules of international law. Among the remaining four studies, two are devoted to sociological studies, one to the history of international law. The last one appears difficult to categorize inside our epistemological landscape (*cfr. infra*).

Despite the tedious nature of the exercise, it seems necessary to review these studies one by one. The idea is not to go into every detail of every study but rather to try and isolate in each of them the main question and the main answer offered by the author. From there, it seems quite simple to categorize the study into one or the other scientific project, whether it aims to determine the content of the law or to understand the link between international law and other social facts or values. The distinction between law and other social elements will also be evaluated in each article. The question will be whether, in establishing the existence of a legal rule or attempting to determine its content, the author uses the formal mechanisms provided under positive international law,<sup>26</sup> or whether he/she instead draws on sources or interpretive elements that are *a priori* not recognized by international law, such as values, political views, or some standards of efficiency.

The following eight articles of the 2011 AJIL have as their main objective the determination of the content of rules of international law.

In *Self-Determination in Regional Human Rights*,<sup>27</sup> Dinah Shelton offers a very classic study. Her objective is to determine the contours of the right to self-determination as practiced at regional levels, and particularly, the question of the recognition of “remedial secession.” To sustain her claims, she uses formal sources such as regional treatises and decisions of regional organizations charged with their application.

In *The Legal Effects of United Nations Resolutions in the Kosovo Advisory Opinion*,<sup>28</sup> M.D. Öberg seeks to understand what the opinion of the International Court of Justice in the Kosovo decision can teach us about four different points: the extent to which the Court is bound by the facts established by the General Assembly; the identification of the beneficiaries of the resolutions of the Security Council (CS); the extinction of the effects of the SC resolutions, as well as the legality of its delegations of power. To achieve his objective, the author compares the decision of the Court with other formal sources of international law.

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26. See Vienna Convention on the Law of Treaties arts. 31-33; Statute of the International Court of Justice, art. 38.

27. Dinah Shelton, *Self-Determination in Regional Human Rights Law*, 105 AM. J. INT'L L. 60 (2011).

28. Marko Divac Öberg, *The Legal Effects of United Nations Resolutions in the Kosovo Advisory Opinion*, 105 AM. J. INT'L L. 81 (2011).

In *State Weakness, Irregular Warfare, And The Right To Self-Defense Post-9/11*,<sup>29</sup> Theresa Reinold explores the issue of self defense when a state cannot (or does not wish to) prevent its territory from serving as a base for irregular forces. Her objective is to determine the current state of international law based on the formal sources, thus embodying the classic positivist, formalist approach: recent state practice<sup>30</sup> and recent jurisprudence of the ICJ.<sup>31</sup>

In *Exchange Rate Misalignment And International Law*,<sup>32</sup> Claus D. Zimmermann attempts to assess the legality of a current practice: the distortion of exchange rates. He first establishes the formal normative framework, namely the rules set by the International Monetary Fund (IMF), and interprets its scope by essentially drawing on other formal rules (the organization's practice and doctrine).<sup>33</sup> After having in fact established the main possible scenarios of the distortion of exchange rates,<sup>34</sup> the author assesses the legality of each of them regarding the General Agreement on Tariffs and Trade (GATT)<sup>35</sup> and establishes whether the recent proposals of the U.S. Congress would be legal under the same formal sources.<sup>36</sup> The author concludes by outlining the current ambiguity in certain provisions of international law on the matter.<sup>37</sup>

In *The 2010 Judicial Activity of the International Court of Justice*,<sup>38</sup> Jacob Katz Cogan offers an essentially descriptive account of the decisions of the International Court of Justice regarding formal rules of International Law.

In *A Historic Breakthrough on the Crime of Aggression*,<sup>39</sup> Stefan Barriga and Leena Grover summarize the negotiations that led to the inclusion of the crime of Aggression in the Statute of the International Criminal Court (ICC). The authors underscore the different proposed interpretations, those finally accepted by the negotiators, etc. The article is in fact a summary of the *travaux préparatoires* of the Convention (one of

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29. Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AM. J. INT'L L. 244 (2011).

30. *Id.* at 245.

31. *Id.* at 284.

32. Claus D. Zimmermann, *Exchange Rate Misalignment and International Law*, 105 AM. J. INT'L L. 423 (2011).

33. *Id.* at 427-37.

34. *Id.* at 437-41.

35. *Id.* at 441-55.

36. *Id.* at 455-60.

37. *Id.* at 460-72.

38. Jacob Katz Cogan, *The 2010 Judicial Activity of the International Court of Justice*, 105 AM. J. INT'L L. 477 (2011).

39. Stefan Barriga & Leena Grover, *A Historic Breakthrough on the Crime of Aggression*, 105 AM. J. INT'L L. 517 (2011).

the main interpretation mechanisms provided for by the Vienna Convention).

In *A New International Law of Citizenship*,<sup>40</sup> Peter J. Spiro establishes the contours of what he believes is an emerging international right to citizenship. To establish its existence, he relies only on formal sources of international law (texts, national practice and legislation).<sup>41</sup> However, he dedicates the final pages of his text to evaluating this novel right in light of the values that he identifies as “liberal.”<sup>42</sup> The small magnitude of these final considerations does not, however, appear to challenge the fact that the determination of the content of this “new right” remains the main objective of the article.

Finally, in *China’s FTAs: Legal Characteristics and Implications*,<sup>43</sup> Guiguo Wang’s is divided between two objectives. In the first two parts of the article, Wang aims at revealing the characteristics of the free-trade agreements concluded by China, consequently pursuing the classic objective of determining the content of the law by studying its formal sources. In the last two parts, he presents China’s supposed motivations and the potential consequences of these agreements, thus offering a small detour towards the sociology of law.

In 2011, AJIL only published three studies that did not have the determination of the content of international law as their primary objective. The first is *The Road Not Taken: The European Union as a Global Human Rights Actor*.<sup>44</sup> In this study, Gráinne de Búrca challenges the narrative of progress used to describe the relationship of the European Union with human rights. According to her, the integration of human rights in the Treaty of Lisbon is less ambitious than were the European proposals of the 1950s. The final two studies use sociological approaches. In the first, *The Diplomacy Of Universal Jurisdiction*,<sup>45</sup> Máximo Langer statistically establishes that universal jurisdiction is used by the powerful states to bring to trial nationals of weak states and sees little chance that things will change in the future and that universal jurisdiction will be used in the relationship between states that are equally powerful. Finally, in *The Kosovo Advisory*

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40. Peter Spiro, *A New International Law of Citizenship*, 105 AM. J. INT’L L. 694 (2011).

41. *Id.* at 694-737.

42. *Id.* at 738-45.

43. Guiguo Wang, *China’s FTAs: Legal Characteristics and Implications*, 105 AM. J. INT’L L. 493 (2011).

44. Gráinne de Búrca, *The Road Not Taken: The European Union as a Global Human Rights Actor*, 105 AM. J. INT’L L. 649 (2011).

45. Máximo Langer, *The Diplomacy Of Universal Jurisdiction*, 105 AM. J. INT’L L. 1 (2011).

*Opinion*, Richard Falk evaluates the practical influence of the opinion of the International Court of Justice.<sup>46</sup>

What is striking about these articles is not only the amount of energy involved in the traditional scientific project of international law, but also the rigorous distinction that is maintained between law and non-law throughout the whole volume. We do not find the expected mixture of formal rules, values, and political views and do not feel the need to proceed to the epistemological cleansing to which Jean-Pierre Cot invited us.<sup>47</sup> There is one exception, however. In *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, John Bellinger and Vijay Padmanabhan, both formerly employed by the U.S. Department of State, examine the issue of detentions consecutive to an armed conflict. Their goal is to determine the content of current international law, to identify gaps, and to propose solutions that would fill those gaps. The study errs, however, at the critical moment when it does not identify the criteria in light of which existing international law is evaluated. The alleged “deficiencies” of international law are presented as evidence and common sense. The authors claim that international law is not fit to deal with the current state of the international relations because conflicts would nowadays be longer than before, involve more states and less clearly identifiable combatants. These three statements, essential in the presentation are not truly supported any more than the supposed difficulty of articulating human rights and international humanitarian law.<sup>48</sup> Consequently, the gaps and the solutions proposed to remedy them seem to betray a bias that is not dispelled by the former positions of these two authors. This work is however the only one in which the issue of the difference between law and other social elements (here a obvious political agenda towards a deconstruction of traditional protections ensured by international law) truly shows.

### Conclusion

This study focuses on only a limited sample of literature. It demonstrates, however, that on the whole (eight of the twelve works examined), American scholars continue to consider the determination of the content of rules of international law a legitimate scientific activity and do not appear to have abandoned the distinction between law and other social

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46. The author claims to do *legal sociology*. Richard Falk, *The Kosovo Advisory Opinion*, 105 AM. J. INT'L L. 50, 52 (2011).

47. Cot, *supra* note 5, at 571.

48. See, e.g., John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT'L L. 201, 209-10 (2011). Authors show that some difficulties may arise but do not demonstrate how these problems are new or why they would call for a revision of international law.

elements. The American particularities, and by extension, the apparent “gap” that would separate the United States and France, appear, at first glance, highly inflated. Of course, research must be done on other American publications and we can not deny that transatlantic oppositions exist on the way the content of international law should be determined - the conflict between the extensive and restrictive approaches to the prohibition on the use of force constitutes a classic example of this transatlantic divide<sup>49</sup> - but it is also true that the traditional project of international legal scholars still remains central on both side of the Atlantic.

It appears that what Steven Ratner and Anne-Marie Slaughter said at the end of the 1990s is still true: “describing the law as it is” still remains the main activity of American internationalists, their *lingua franca*.<sup>50</sup> It also seems that the alleged tendency of American scholars to conflate law and other social elements in their interpretation process finds almost no illustration in the works examined here, and that, *a priori*, descriptions of the sort amount to caricature.<sup>51</sup>

It is worth noting in conclusion that a little less than a century ago, the caricature was reversed. At the time, a significant proportion of American and British scholars viewed their continental counterparts as incapable of making a clear distinction between law and other social elements.<sup>52</sup> As H. Lauterpacht demonstrates, it was in reality a gross misunderstanding. The continental scholars accorded great importance to theoretical approaches, and in particular, to the question of the conformity of positive law to certain values perceived as superior. This did however not meant that they conflated law as it was with law as they wished it would be:

The view that the science of jurisprudence and of legal philosophy on the Continent is distinguished by its confusion of what law is with what it ought to be, shows merely an imperfect acquaintance with Continental legal thinking . . . . [F]or historical reasons, the preoccupation on the Continent with the problems of legal philosophy, especially in regard to the purpose of the law and the nature of judicial function, has been more intensive than in this country [the United Kingdom] and, until recently, in the United States. The output of this aspect of legal thinking has been so large as to give to the casual observer the misleading impression that this is the whole of Continental legal thinking, and to cause him to

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49. Corten, *supra* note 3, at 822.

50. Ratner & Slaughter, *supra* note 12, at 293-95.

51. For a concurring opinion, see Jouannet, *supra* note 3, at 61.

52. One of the proofs of this incapacity would lie in the fact that the English language has a way of differentiating a material norm from its content (law vs. right) while in French, Spanish, German or Italian, that distinction would be linguistically impossible (*droit, derecho, diritto, Recht*). See Hersch Lauterpacht, *The So-Called Anglo-American and Continental Schools of Thought in International Law*, 12 BRIT. Y.B. INT'L L. 31, 48 (1931).

attribute to the latter a confusion into which the observer alone has fallen.<sup>53</sup>

In light of the findings of this study, it is reasonable to ask whether the current “transatlantic gap” is not based on a similar misunderstanding.

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53. *Id.* at 52.