Comparative Legal Studies and the Internationalization of Law
Professor Mireille Delmas-Marty

Course: The Relative and the Universal[1]

The Limits of Legal Relativism (or the Force/Power/Strength of Things)
2003-2004

The worst enemy of legal relativism is not universalism. Despite the creation of legal concepts like human rights or crimes against humanity, universalism made its appearance in positive law only in fragments, and their weaknesses are such (fuzzy concepts, conflicting values, ineffective norms) that they do not preclude the return to relativism. One could even think that these weaknesses favor the rise in power of an "imperialist humanitarianism"[1] which could express a dominant relativism, hidden behind certain applications, civil or criminal, of the principle of universal jurisdiction.

That is to say that the couple universalism/relativism cannot be analyzed from a single theoretical viewpoint, as if the insufficiencies of one were sufficient to guarantee the validity of the other. All the more that relativism is not in itself a unified legal theory, but an ambiguous term, an uncertain blending of an empirical description – the diversity of systems – and of a moral prescription – the pluralism of values; that is, particularism and neutrality, admitted and even prescribed in the name of tolerance. Strictly understood, pluralism places side by side but does not harmonize different systems, which it postulates contrary to political autonomy and legal equality. But such a postulate clashes with the inequalities and interdependences that undermine the very foundations of relativism. In this sense the worst enemy of relativism is indeed the force/power/strength of things.

Neither the *Dictionary of theory and of sociology of law*, nor the *Dictionary of political philosophy*, nor that of the *legal culture* defines relativism.[2] The term refers rather to moral philosophy and to ethics and the debate now under way respecting the existence of agreements, or of disagreements, related to values.[3] Considering that moral relativism is not in itself an ethical position, but a position on ethics, or meta-ethics, which relies on descriptive relativism, Anne Fagot-Largeault asked herself, in the *Journée annuelles du Comité national d'éthique*, about moral attitudes, such as tolerance and noninterference, that this position can inspire downstream. This meta-ethics does not suffice, according to her, to provide the basis for a radical normative

---

[1] Trans. Diane Amann. This translation is a working paper and should not be quoted.

[1] A. Cassese, "Y-a-t-il un conflit insurmontable entre souveraineté des États et justice pénale internationale?, in *Crimes internationaux et juridictions internationales*, dir. A. Cassese & M. Delmas-Marty, PUF, 2002, p. 25.

[2] See *Dictionnaire encyclopédique de théorie et de sociologie de droit*, dir. A.-J. Arnaud, LGDJ, 2e éd., 1993; *Dictionnaire de la culture juridique*, dir. D. Alland & S. Rials, PUF, 2003; *Dictionnaire de philosophie politique*, dir. Ph. Raynaud & S. Rials, PUF, 3e éd., 2003.

[3] David B. Wong, "Relativisme moral," in *Dictionnaire d'éthique et de philosophie morale*, dir. M. Canto-Sperber, PUF, 3e éd., 2001.

relativism, because this "carries the risk of leading to brute force to resolve conflicts." She further concludes: "the delicate point is to find the conditions of a genuine exchange which do not unleash the fear of a loss of identity."[4]

It is true that the misadventures of European integration demonstrate, sometimes to the point of caricature, the extent of the difficulties to surmount in order to find such an exchange. All the more that the process, despite its delays, is already sufficiently engaged to provoke a hardening of part of the doctrine. From the description of the diversity of systems of law, one slips toward a relativism which dogmatizes itself (unilateralism for some, dualism for the others), in the name of a moral principle of tolerance and of pluralism which is defined all the more by what it refuses (harmonization and *a fortiori* unification of systems of law that by the search for methods that would guarantee the autonomy of each system.

Doubtless it must be admitted that the very concepts of "system" and of "legal order" give only a very imperfect representation of the normative ensembles, of the uncertain and unstable contours, which traverse national borders like clouds whose form has changed even before one has managed to make out their shape.[5]

I wonder if the present situation does not proceed from an illusion that has been inverted. The illusion of pluralism, to take up the formula of Jean Carbonnier, bumps up against at present the fact that in the end the hierarchy of norms always always takes it away to the benefit of state-based law: pluralism "believes to have filmed the combat between two systems of law, but what it shows is one legal system grappling with the shadow of another."[6] But the illusion of relativism (which is called particularism, dualism or unilateralism) today bumps up against the fact that, despite the apparent discontinuity of normative ensembles, perfect autonomy does not exist,[7] nor equality among states, however much the U.N. Charter affirms it.

In fact it must not be forgotten that, if law shares with morality its normative character, it also shares with political science its relation with power. The problem is that in private law, even international, this relation is seldom visible, although it has a tendency to invade every field of public international law, favoring the political approach to the detriment of the legal approach. Somewhat in the manner of caricature, one would say that private international law operates as if inequalities do not exist, while public international law labors to demonstrate that in spite of these inequalities, law does exist in the international sphere. Devalued for the reason that it seldom will be effective, international law suffers from its proximity to international relations, whose doctrine seems marked by the predominance of academics from the United States, a country set free by its

---

[4] Anne Fagot-Largeault, "Les problèmes du relativisme moral," in *Une même éthique pour tous?* dir. J.P. Changeux, éd. Odile Jacob, 1997, p. 43 s.

[5] M. Delmas-Marty, “Au pays des nuages ordonnés,” postface de *Pour un droit commun*, Seuil, 1994, p. 283 *sq.*; “Plurijuridisme et mondialisation,” conclusion du colloque de l’Association internationale de méthodologie juridique, Aix-en-Provence, 4-6 sept 2003 (forthcoming); M. Delmas-Marty, “La grande complexité juridique du monde,” in *Études en l’honneur de Gérard Timsit*, Bruylant, 2004 (forthcoming).

[6] J. Carbonnier, *Sociologie juridique*, PUF, 1978, p. 214; coll. Quadrige, 1994, p. 361.

[7] See J.-B. Auby, *La Globalisation, le droit et l’État*, Montchrestien, 2003; J. Chevallier, *L’État post-moderne*, LGDJ, 2003.

position of "superpower" from the obligation to suffer the consequences of its repeated violations of international law, and thus placed in a situation in fact absolutely exceptional.

Without for all that to deny the existence of inequalities, Japanese internationalist Yasuaki Onuma,[8] prefers to insist on expressive functions (communication, expression of values, and finally, justification and legitimation) in order not to reduce international law solely to a repressive function that supposes an obligatory law rendered effective by mechanisms of control and sanction. Approaching the question of power under its multiple facets permits him to nuance the differences between the relativism of the strong and that of the weak. Even the most powerful country ought to consider this new fact that the autonomy of legal systems can find itself directly called into question by situations of interdependence born of globalization, because the situations mark the limits, legal and not only political, of relativism.

In fact, today's globalization is not limited to reaching the level of the precedent, in terms of economic mobility and international financial integration, but is characterized legally by "topsy-turvy borders."[9] Marked simultaneously by the intensification of the mobility of persons and goods and by the establishment of virtual spaces not linked to territory, and not material attention-getter, globalization takes unprecedented legal forms that no doubt better express the term "globalization," in its dual sense of spatial-temporal extension and of an integral or total vision.

The subjects of law called "international" are not only states but also certain private actors. At the same time internal law, locked within the frontiers of national territory, even enlarged by clauses of extraterritoriality or by cooperation agreements, no longer provides an adequate legal framework. That it is a matter of the mobility of cross-border offenders, of the circulation at electronic speed, in a space that has become virtual, of a stream of intangibles (a flow of money, but also of data), or still the global effects of the risks, observable from one end of the planet to the other, globalization modifies the landmarks that permit the situation of legal relations in space and time and condition the functioning of legal systems.

1. Of globalized crimes

Criminal law seemed however the domain that benefited from the relative: "Pleasant justice that a river bounds! Truth on this side of the Pyrenees, error on the other ... Larceny, incest, murder of infants and of fathers, all had their place among the virtuous actions."[10] And Montesquieu, agreeing with Pascal, distinguishes the laws of nature from positive laws "so

---

[8] Onuma Yasuaki, "International Law in and with International politics: The functions of international Law in International Society," *European Journal of international Law* (2003), vol. 14, no. 1, p. 119 (free translation).

[9] A.J. Arnaud, *Critique de la raison juridique, vol. 2 Gouvernants sans frontières, Entre mondialisation et post-mondialisation*, LGDJ, 2003, p. 31.

[10] B. Pascal, *Pensées*, Gallimard, coll. “La Pléiade,” 1969, fragment 230, p. 1150 *sq.*

tailored to the people for whom they are made that it is a stroke of luck if the laws of one nation should suit another."[11] He notes, however, the mechanism of interdependence: "two nations that negotiate together render themselves reciprocally dependent." He adds this nuance, that "if the spirit of commerce unites nations, it does not likewise unite the particulars."[12] Will it rather be the inverse today, where the spirit of commerce unites, or, more modestly, brings together those private actors known as multinational enterprises, while nations remain divided from a legal standpoint, notably in relation to penal matters?

Global commerce brings together legal systems because it demands more equality among competitors. Inequalities within a country matter little; however, equality among competing partners is indispensable. In order that the game may be played with equal arms, the playing field must be leveled.[13] But in this regard penal sanctions appear more effective than administrative or civil rules. On the condition of renouncing relativism to the benefit of a certain harmonization respecting what acts are criminal and what are to be the sanctions for those acts.

Nothing surprising therefore if liberalism, after having suppressed the borders of commerce and favored deregulation in dissociating economic space from political territory,[14] entails a return to a criminal law that must be adapted to this dissociation. For lack of an impossible unification, and in order to complete a slow and seldom efficient cooperation, it is harmonization that seems to prevail in the most recent international plans, which aim at corruption beyond the borders of nations, or more broadly cross-border trafficking, ranging from very ancient practices, such as slave-trading, to the appearance of every new crime of laundering, born of globalization and lace like it in transversal position regarding the ensemble of globalized crimes.

From the corruption beyond borders to cross-border trafficking, then to terrorism without borders, little by little the very idea of borders will fade.

Corruption beyond borders

The notion of corruption remains profoundly tied to the history and the culture of each country. If Montesquieu compares virtue to democratic government (and corruption to its absence), Islamic law introduces a bifurcation between the lay conception of the term and corruption as "disorder on earth," a religious conception which includes divers acts considered subversive with regard to religious precepts, and the secular conception of the term.[15]

---

[11] Montesquieu, *L'esprit des lois*, Gallimard, La Pléiade, p. 237.

[12] *Ibidem* p. 585, 596.

[13] M. Pieth, *Anti-Money Laundering: Levelling the Playing Field*, Summary of Study by the Basel Institute on Governance (UK, USA, Switzerland), déc. 2002.

[14] P. Rosanvallon, *Le Capitalisme utopique. Histoire de l'idée de libéralisme*, Seuil, 1999, p. 89 *sq.*

[15] A. Nadjafi, "Iran: la corruption et les figures voisines," op. cit.; S. Hosseini, "La protection de la dignité de la femme dans les écoles de droit coranique," thèse dactyl., université Paris-I, 1998. [book p 247]

At first glance this relativism does not seem openly threatened by international initiatives. To read the preamble to the 2003 U.N. Convention against Corruption, it is a matter all at the same to protect national interests (states' resources, their political stability and their sustainable development) as well as values supposed to be universal (democratic institutions and values, ethical values and justice) against globalized practices/applications ("corruption strikes all societies and all economies"). In reality, the critical word is thus pronounced, even if the plural attenuated the reach of it: "corruption strikes all economies." The argument is yet more clear in the 1997 OECD convention ("The struggle against corruption of foreign public officials in international commercial transactions"): "corruption, which raises grave moral and political concerns, affects the good management of public affairs and economic development and damages international conditions of competition."

Because it is a matter of the market. To permit liberty and fluidity of exchange, competition must not be bent out of shape. It must therefore [?] rules which are substituted to the pure violence of balances of power. Which brings us back to Durkheim, and to his analysis of the contract which "does not suffice of itself" because it is only possible thanks to a body of rules "which is social in origin."[16] But this body of rules of social origin does not return only, like it would then be thought, to an organic solidarity and to restitutionary sanctions. Criminal law is in the frontline in the economic global space where international law imposes henceforth criminal sanctions.

Beyond a simple geographic extension, the question is to know whether the change tends to privilege ethical values, which brings us back to universalism, where or if it obeys principally economic constraints. If the stated objective is the reaffirmation of the universal value of human rights and of principles of democracy and of the *État de droit*, the practices/applications are more ambiguous because they do not substitute straightaway the protection of global interests for that of national interests, but express rather the entanglement of multiple interests, global but also national and sometimes regional, with a character that is public but also private.[17]

The struggle against corruption beyond national borders thus illustrates in exemplary fashion the differences between universalism and globalization. On the one hand universalism seems to call for a globalized law according to a traditional model that is hierarchical and vertical, transposing technologies of state power toward a control of a *supra*national type (like that exercised, for example, by the European courts or the International Criminal Court). But one knows that the national resistances are particularly strong in criminal law. If the control of corruption is internationalized, however, it is by other means, more horizontal and apparently less constraining, of an *inter*national type ([mutual evaluation)[book p 258], even *trans*national (public-private partnership).[book 261]

Whence the questions about a tendency toward privatization which, under the appearance of consent, could hide a lack of democratic control. All the more that this mix of horizontal integration (self-regulation, mutual evaluation) and vertical (state jurisdictional controls) and this

---

[16] E. Durkheim, *De la division du travail social*, PUF, 9e éd. 1973, p. 193.

[17] book p 250 continues with *Lockheed* scandal as example

combination of hard law, like the OECD Convention and national systems of criminal law, and soft law, like standards and codes of conduct, creates an incertitude of definitions that affect the foreseeability of norms. Juridical insecurity is still aggravated by the complexity of a process that endeavors to bring together national laws,[18] but without suppressing diversity. It is besides in order to surmount the heterogeneity of practices/applications, national and international, that the idea of an integrated partnership between public and private actors, has been launched by economic operators themselves, notably for arms dealing and defense (a sector particularly lucrative where the commissions increase by percentages amounting to between 30 and 45 percent of the value of the contracts compared with a general average of 5 to 15 percent[19]). First conceived on the fringe of national legal systems, the proposed model would be empowered to extend itself to such a sort that at the end national legal systems could find themselves in their turn marginalized. Instrumentalized by the path of deprived denunciation, criminal law would become a simple means of pressure to assure the functioning of the ensemble.

The example of corruption beyond borders thus leads to the formulation of a hypothesis that the state is no longer the insurmountable horizon of technologies of power and could become one instrument among others, taken in a vast interactive network characterized in effect by the globalization of economic stakes and the limitations of political sovereignty.

It remains to verify whether the hypothesis is transposable to other sectors; in particular, to cross-border trafficking.

Cross-border trafficking

Slave-trading, like drug-trafficking, has not always been defined as a crime; they attained this status, to the degree that the practices/applications develop across borders which progressively open up. This movement of criminalization is explained sometimes because the trafficking is concerned with an object forbidden on account of its dangerousness (drug-trafficking, but also trafficking in arms and discarded pollutants, etc.); sometimes because it is concerned with an object outside the bounds of commerce, that is a matter of cultural goods (trafficking in works of art), of products of the human body (organ trafficking) or of human beings themselves. It is less the commodity than the commodification that is then the base for a prohibition, for which the slave trade, then the trade in human beings, have become the emblematic figure.

Without exhausting the matter, far [s'en faut], the question of cross-border trafficking,[20] these two examples recall that, if reproved themselves today, such practices were not always

---

[18] Najia Capus, "Self-regulation in combatting money laundering," *Journal of Money Laundering*, vol. 6, 2003, p. 355 *sq*.; Nicolas Queloz, "La Suisse et le contrôle du blanchiment d'argent: la quadrature du cercle entre régulations privées, contrôles administratifs et interventions pénales," *Agone*, 2001, no. 32, p. 3 *sq*.

[19] J. Chevallier, "Lutte contre la corruption et loyauté dans les relations internationales," in *La Loyauté dans les relations internationales*, dir. J. Laroche, L'Harmattan, 2001, p. 185 *sq*.

[20] See *L'Illicite dans le commerce international*, dir. Ph. Kahn & C. Kessedjian, Litec, 1996, notably M.-A. Hermitte, p. 109 *sq*; & R. Koering-Joulin & J. Huet, p. 347 *sq*.

forbidden. It must not be forgotten that the abolition of slavery was first a national occurrence (the states being favorable or unfavorable to the slave trade according to their commercial interests) and that universalist ideas, that were a matter of the recognition of equality, or much later of the equal dignity of all human beings, will be long before it is translated into positive law. The French Revolution, if it was attached to universalism of human rights, will wait until 1794 to suppress slavery, which will be reestablished by Bonaparte some years later (in 1802), and will not be definitively abolished until 1848. Even the appearance of "new forms of slavery," called "contemporary" (the subject of the second U.N. Protocol which thus refers all at once to domestic slavery, sexual slavery or yet that which is tied to clandestine labor), have not made to disappear every vestige of national interests. Thus their criminalization seems all the more to respond to fluctuations of national interests that at the emergence of universal values.

As for the criminalization of drug trafficking, which leads to that of laundering the proceeds of that traffic, it situates itself in the context of the "war against drugs." The American overconsumption of drugs had led large cartels to implement a process ever more sophisticated to repatriate and reinject into national economies, notably in Colombia, the considerable monetary masses, by means of import-export companies, of real estate companies, and of shell companies.[21] The internationalization of financial circuits have begun to worry the Americans responsible, in search of methods other than criminal law, which seems to them to have dubious effectiveness in the recovery of funds. Slogans like "going for money" or "cut the head of the serpent" must have led to combine civil and criminal procedures, then to reconstitute the paper trail, which supposes a global approach to associate the principal financial and banking centers to the definition of a coherent policy.

Thus one distinguishes two movements. First a progressive criminalization of principal traffics, then ambiguous because it expresses a mixture of relativism (by sending back to national interests) and of universalism (by reference to human rights and humanity) then a movement, that one could say of "overcriminalization" because it leads to a penal initiative more and more repressive, marking a recoil freer from relativism to the benefit of a repression which tends toward unification. But it is a matter less of protecting universal values than to render operational new concepts of laundering and of organized criminality, born with financial globalization, or activated by it.

The contrast is so striking between the fullness of the plan put in place against laundering and the derisive results in terms of recovery of funds, that one comes to ask oneself if a strategy so apparently inefficient does not have for its real objective the legitimation of the stiffening of criminal law in the domain, politically more correct, of the criminality that is called organized.

The problem is that one does not know where this notion of "organized criminality," or "criminal organization," more criminological than legal, begins and ends. In the absence of international definition – because initiatives like the Palermo Convention against transnational organized crime (U.N. 2000) or the Convention of Merida against corruption (U.N. 2003), refer to [façon quelque peu] circular to the organization of infractions considered "grave" – it is a

[21] See C. Cutajar-Rivière, *La Société-écran. Essai sur sa notion et son régime juridique*, LGDJ, 1998; *Le Blanchiment des profits illicites*, dir. C. Cutajar-Rivière, Presses universitaires de Strasbourg, 2000.

matter of an empty formula that the legislator can use to stiffen the repression practically in any domain.22

The notion of organized criminality will thus be a sort of "Trojan horse"23 which inserts into the legal system a model of "overcriminalization," or more exactly of "overrepression," ranging from the extension of procedures of exception (prolongation of *garde á vue* and provisional detentions beyond the durations of the common law, negotiations with criminals in exchange for their impunity [sic]), up to the new police methods, up to there reserved to intelligence services and of counterespionage (undercover operations. illegal extraterritorial arrests, utilization of listening apparati in buildings, or of tracking by satellites).

First launched in a bilateral fashion by the United States, by means of mutual assistance treaties, conceived before all to furnish evidence and information, little burdened with respect for the fundamental rights of suspects and of victims,24 the model is henceforth transposed to multilateral instruments, but always according to this same conception, which makes little of the place of instruments of the protection of human rights. If the relativism of criminal law tends to wear away in these domains of cross-border criminality, it is therefore not in the name of universalism but in the name of practical realities, such that they are perceived by the dominant power.

It is also this conception, warlike but not necessarily effective, which prevails henceforth in the struggle against terrorism become without borders.

Terrorism without borders

If there is a crime deeply inscribed within national borders, surely it is terrorism. Let us not forget that the term appeared in the juridical language with the French Revolution when, confronted with foreign invasion and domestic threats, the National Convention, in the name of the "Terror" proclaimed on Aug. 30, 1793, adopted an ensemble of measures of exception. The terror, symbolzied – one could almost say popularized – by the guillotine, was presented as necessary to consolidate the revooutionand save the Republic. In the discourse of Robespierre, one believes to undestand as a esponse to Montesquieu, opposing the republic, which is maintained by virtue, to the despotic government, for which the "resort" is fear: "... for virtue, it is not necessary,nad honor would be dangerous ... if must be that fear [abatte] all courage and extinguishes up to the least sentiment of ambition."25 Robespierre, himself, has the ambition to reconcil virtue and terror, "virtue without which terror is [funeste], terror without which virtue is impotent." When the convention reversed him, 9 thermidor an II, they can not render him

---

[22] See S. Manacorda, "La riposte pénale contra la criminalité organisée dans le droit de l'Union européenne," in *L'Infraction d'organisation criminelle en Europe,* dr. S. Manacorda, PUF, 2002, p. 234.

[23] Ch. Van den Wyngaert, "Les transformations du droit pénal international en réponse au défi de la criminalité organisée," in *Les Systèmes pénaux à l'épreuve du crime organisé*, section IV, *RIDP*, 1999, p. 42.

[24] Bruce Zagaris, "Rapport États-Unis," *RIDP*, 1999.

[25] Montesquieu, *De l'esprit des lois*, op. cit., II, ch. IX, p. 258.

responsible for the terror which they had themselves proclaimed; also they accused him of terrorism, designating thus the abuse of terror exercised by the State.

Almost at the same time a second semantic gloss was produced which today still obscures the debate about terrorism: of the terror of the State (political violence) to the terror against he State (criminal violence). It is thus that Babeuf, accused of pillage for having [preche] the share of goods during hte "Conspiracy of Equals," will be "destituted as a terrorist,"26 then executed.

The fact that henceforth terrorism signifies a terror directed against the state, without all the more making disappeared terrorism of the state, has not aided the search for a common definition. Although most criminal definitions carry a meaning at the same time repressive and expressive – the repression of murder dedicates the law to life just as that of robbery does property law –, criminalized acts such as "terrorism" can have been committed against persons or against goods, even upstream; also terrorism does not express any specific value and its meaning is exclusively repressive: to stiffen the repression in the fact of organized violence related to attacks on state security.

It is therefore not surprising that, in the absence of a common definition, terrorism is not within the competence of the International Criminal Court (ICC), with the exception that certain terrorist acts may qualify as crimes against humanity.

And however, practices have changed radically, as if the attacks of September 11, 2001, filmed and broadcast on televisions everywhere, had engraved in memories, in a perhaps irreversible manner, the passage from terrorism across borders to terrorism without borders.27 If it is correct that terrorist organizations use in their turn the means, technologies, financial and media-related, of globalization, in return terrorism is perceived henceforth as a direct threat against globalization. That it would be a matter of permitting the [remise] of suspected or convicted persons throughout Europe or of assimilating terrorism to aggression and the repression of war (U.N. Resolutions of Sept. 12 and 28, 2001), USA Patriot Act of Oct. 26, 2001),28 legal instruments implemented since September 11 tend to suppress the borders of repression, real and figurative.

Despite the refusal of states to introduce terrorism into the list of crimes within the jurisdiction of the ICC, a movement of "depoliticization" is no less engaged in it, in order to favor international extradition. One sees, since the 1980s, a progressive extension of the work of Interpol, whose statute excludes however any intervention in matters presenting a political character, to matters of terrorism. In the course of the decade that followed, questions of terrorism were explicitly integrated into the jurisdiction of the European Office of Police (Europol Convention of 1995, entered into force in 1999). Finally the veritable collapse [? – basculement] has been marked in Europe by the simultaneous adoption on June 13, 2002, of the Framework

---

[26] Babeuf, *Pièces*, I, 90, cité in *Littré. [see p 286 bk]*

[27] M. Wieviorka, "La violence métapolitique," in *La Violence*, Balland, 2004, p. 61 *sq.*

[28] On this act, see, *e.g.*, Diane Marie Amann, "Le dispositif américain de lutte contre le terrorisme," *RSC*, 2002, p. 745 *sq.*; Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror*, Princeton University Press, 2004.

Decision relative to the struggle against terrorism and of that which established a European arrest warrant,29 suppressing the procedure of extradition and imposing the transfer of suspects to the state which asks for them, for a list of 32 crimes, including terrorism.

Thus it is that the passage from international terrorism to global terrorism marks the fallback, even the failure, of legal relativism, not to the benefit of universal values (respect for human rights is not the primary preoccupation), but on account of a conception henceforth global.

But the reaction of states to the attacks of September 11 is not limited to a new stiffening of criminal repression and results in a calling into question more radical than simply the depoliticization of terrorism. It is a matter all at once of criminalizing the financing of terrorism and of globalizing the criminal repression, to such a point that one finally loses sight, in the United Sates but also in Europe, of the difference between internal and external security; that is, between peace and war.

In considering the attacks of September 11 "a menace to international peace and security," the United Nations (resolutions cited above, September 2001) marked the point of departure of this slow erosion of the distinction between internal and external security, and so between repression and war. Since October 26, 2001, the law designated by its acronym USA PATRIOT,[30] extends the powers of surveillance of the Attorney General in the matter of administrative wiretaps and of police detention and effects the stiffening of a criminal justice system of exception, which extends besides beyond investigations for terrorism, the catchphrase "sneak and peek" (sect. 213, Patriot Act) permitting the federal government to ask for a "secret search" in all federal criminal investigations. But this law expresses more fundamentally the slippage of criminal repression toward the "war against international terrorism." Thus foreign nationals are detained for the most part on the military base at Guantánamo, outside of U.S. territory, according to a plan that a British court called a "legal black-hole."[31] To refuse detainees prisoner of war status, the U.S. government borrowed from an old decision of the Supreme Court the strange label of "unlawful combatants."[32] The Patriot Act permits more broadly substitution of espionage for inquiry and deviation from the guarantees of the criminal justice system. Federal intelligence services, normally able to conduct wiretaps and interceptions of administrative security in the domain of foreign affairs, can henceforth intervene in criminal investigations, on the basis of broad criteria applied in

---

[29] J. Pradel, “Le mandat d’arrêt européen: un premier pas vers une révolution copernicienne du droit français de l’extradition,” *D.*, 2004, chr. 1392 et 1462; on the first jurisprudential interpretations, dedicating a restrictive interpretation of the European arrest warrant, see Crim., 12 juillet 2004, *JCP*, 2004, act. 394.

[30] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Publ. L. No. 107-56 (Loi d'unification et renforcement de l'Amérique par la mise à disposition d'outils appropriés nécessaires à l'interception et obstruction du terrorisme).

[31] Abbasi affair, Ct. App. (Civ. Div.) 6 nov. 2002.

[32] Ex parte Quirin, 317 US 1 (1942); cf. L. Vierucci, “Prisoners of war or protected persons qua unlawful combatants?”, *JICJ*, 2002, p. 284 *sq*. By its judgments of June 28, 2004, the U.S. Supreme Court accorded however certain rights to American prisoners (*Hamdi* et al. c. *Rumsfeld* and *Rumsfeld* c. *Padilla*) and aliens (*Rasul* et al. c. *Bush*).

administrative matters. The plan even authorizes the exchange of information among the services, which can divulge, without oversight of a judge nor guarantees as to the use of that information, intelligence collected notably from wiretaps and other interceptions of security. Well beyond criminal investigations, the objective is to globalize intelligence by the play of interconnected files.

Finally the fiscal law for 2004 overcomes a supplemental step in the matter of intelligence in permitted the Federal Bureau of Investigation to access without warrant, and by a simple administrative procedure, files of financial institutions, having made clear that the law considered as such businesses as well as insurance companies, travel agencies, real estate agents, brokers, or even jewelers, casinos, and auto dealers.

This amalgam between security and intelligence, which concerns all the more international security than interior security, has reached Europe too. As well as the stiffening of national antiterrorism laws adopted since 2001,[33] one can observe a growing confusion among the three categories of operations of police which correspond to the three pillars of the European construction (operations of financial police, integrated into the first pillar and run by the antifraud office, OLAF; peacekeeping operations, run, notably by the gendarmerie, in the name of civil and military management of crises, second pillar; and finally struggle against transnational criminality, notably terrorism, third pillar, Europol). The confusion seems entertained by the states which demand a "return to internal security and investment in external security." At the risk of inciting agents engaged in external security to encroach upon internal security, or, conversely, to integrate internal security (which relates in principle to Europol) in the financial management of the Union, while the European Office of Struggle Against Fraud decides to launch inquiries on the financing of terrorism.

That is to say how the globalization of crimes is inseparable from the globalization of the stream of intangibles, whether it is a matter of financial flows or of flows of information.

2. Of the Stream of Intangibles

The attacks of September 11 illustrate in exemplary fashion the link among terrorism, financial flows and the flow of information. If there were then a "global" crime, it is not only because the victims and the perpetrators were of multiple nationalities, and that the target was planetary; but more still on account of the utilization, perfectly mastered, of the principal instruments of globalization. It seems in effect that the preparation of attacks and their realization have been rendered possible thanks to the Internet's network of communication,34 the organizers having themselves been very skillful actors of financial capitalism. That is why penalists are beginning to give up criminological studies on the psychology of terrorists in order to analyze the flow of intangibles, economic and financial and of bank plans.

If "the immaterial" [N.B. my "intangible"] seems more neutral than the "material," all depends on the use to which it is put, because the neutral is not inactive; quite to the contrary, its power is in its flexibility and its fluctuations, its "vibratory energy" to evoke what Roland Barthes called "*le temps vibré*," citing the example of a billiards player in a gesture "apparently hesitant, and yet typically adroit."[35] No longer expressing only the mobility of persons and things, going from one territory to another,

---

[33] See *Terrorisme, victimes et responsabilité pénale internationale*, op. cit. 2003.

[34] M. Wieviorka, *The Makign of Terrorism*, Chicago University Press, 2d éd., 2002, préface to the 2e éd., 2003; “La violence méta-politique,” in *La Violence*, Balland, 2004, p. 61 *sq.*

[35] R. Barthes, *Le neutre, Course au Collège de France*, 1977-78, Seuil, 2002, p. 174; see also "L'actif du neutre," *Ibidem*, p. 116 s.; "Idéosphère et pouvoirs," *Ibidem*, p. 126 s.

globalization is developing in non-territorialized spaces, necessarily global because immaterial/intangible, the flow of information circulating by Internet or being exchanged in financial markets.

Here, more still than for globalized crimes, the limits of legal relativism are apparent. It is thus that the "global governance" is become the magic formula proposed to govern globalization without global government.[36] But the applications hardly resemble such an objective: national laws maintain their grip and global strategies sometimes elaborated by multilateral agreements, of a regional or global level, are sometimes also imposed in a unilateral fashion. It remains to be seen how these various strategies come together, from the financial stream to the information stream, to call for, in the name of pragmatism, an overtaking of relativism.

Financial Flows

On the financial plane, the global situation is characterized by the incapacity to resolve the problem of those paradises, fiscal and bank, that function like zones of nonlaw, favoring criminal circuits and damaging the movement toward concurrence.

These paradises go back a long way,37 but the direct investments in financial places at weak fiscal imposition has especially intensified since 1985 as an effect of deregulation. Even so, if globalization makes evasion by means of such paradises easier, it also renders them paradoxically more difficult to support, on account of the negative series of effects that they provoke – a domino effect – and leads to "blacklisting," a method that consists of naming and shaming. Yet it would have to succeed to harmonize the lists, despite the heterogeneity of interests at stake, which goes from the repression of criminality (Financial Action Task Force), to fiscal preoccupations (OECD) or financial stability (Forum of Financial Stability). The disparities lead one to ask about the genuine stakes that seem to be focused on some centers, neglecting the fact that offshore sites are used not only by large-scale criminals, but also by multinational enterprises, in their efforts to avoid fiscal rules and the corporate law of their countries of origin. The recent financial scandals, from the Enron affair to the Parmalat affair, seem to place the entire system in question, demonstrating that the existence of national initiatives, characterized by their fragmentation but also their instability, prevents neither the impotence of the law, nor the risk of excess by means of extraterritorial clauses. From the void, one thus passes to the too-full, the silences at the normative proliferation.

Thus French law accumulates reforms (laws on new economic regulations, 2001; anonymous companies, 2002; financial security and economic initiative, 2003), leading to a decriminalization,38 all the more vast that the criminal law related to business is also neutralized by the procedure of "pleading guilty" of the law known as *Perben II*, applicable to most corporate delicts, notably to the abuse of social goods.

If the normative proliferation does not guarantee efficiency – the current texts already call for reform –, it is without doubt also that it is accompanied by fragmentation, in the absence of a global authority/power over financial markets. It is true that the principal global initiative is the United States' Sarbanes-Oxley law (2002). While France decriminalizes, and Europe labors to harmonize its financial legislation, the United States pursued in effect its movement of criminalization and internationalization, with legislation applicable to all companies of the world, as soon as they are listed in the United States [i.e. on the Stock Exchange -?]

---

[36] P. Jacquet, J. Pisani-Ferry & L. Tubiana, "À la recherche de la gouvernance mondiale," in *Revue d'économie financière*, p. 161.

[37] See P. Lascoumes & Th. Godefroy, "La question des places *off shore*. Mobilisation unanime mais enjeu composite," in *Les Coulisses de la mondialisation, Cahiers de l'Ihesi*, 2003, no. 52, p. 113 *sq.*

[38] B. Bouloc, "La dépénalisation dans le droit pénal des affaires," *D.*, 2003, DA, p. 2492 *sq.*

One comes from this to the observation that "the massive introduction of public economic law into the field of conflicts of law born from the interconnection of markets is accompanied by a politicization characterized by litigation,"[39] muddling the certainties ties to the waterproof compartmentalization of public law and of private law in the traditional theories of private international law and marking the necessity of a renewal of traditional legal categories. All the more that conversely, public international law litigation, which is treated by the Dispute Settlement Board of the WTO, although reputed to be inter-state," concerned with very near, even is confused, with the interests of private economic actors, to such a point that it is evident that the state is made in reality the spokesperson of these interests."[40]

A private law that is politicized and publicized, a public law that is privatized: one measures at what point economic and financial globalization disturbs the legal order to which we have been accustomed and which we had believed immutable. There is not however any question of being given the time to rethink the entire ensemble. At the blackboard of legal systems, one rarely erases but gladly adds, between the lines, or in the margins, new formulas that modify little by little the whole picture. When this tinkering becomes too visible to be ignored, one gives it a name, as noble and reassuring as possible, such as "global governance."

At once distinct from "enterprise governance," which is limited to the private field of corporate law, and from "good governance," which promotes the adoption of good practices in the conduct of public national affairs, "global governance" gives credence to the existence of a discipline that one would come to teach although it is especially a matter of a dream.[41] As a practice, global governance, in permanent evolution, is first characterized by energy freed by the flow of intangibles. It appears like a stabilized model than a movement, a dynamic of transformation which multiplies the interfaces, places of passage for improbable encounters, where the public and the private, the hard and the soft, cross without becoming united.

Before imagining methods to transform the prevailing cacophony into a polyphony, as harmonious as possible, it remains to explore other domains, notably that of the flow of information, symbolized by the Internet, where the place left to relativism of national laws seems to be all the more reduced.

The Flow of Information

---

[39] H. Muir Watt, "Globalisation des marchés et économie du droit international privé," in *La mondialisation entre illusion et utopie*, *Dalloz 2003*, p. 245.

[40] H. Ruiz Fabri, "La juridictionalisation du règlement des litiges économiques entre États," *Rev. arbitrage*, 2003, no. 3, p. 897.

[41] According to Foucault, the new technology of government, like all technology, takes three forms in the course of history and of its development: a dream, then a practice, and finally an academic discipline, in *Dits et écrits*, 1994, tome IV (1980-88), p. 821.

From financial flow to the flow of information, it is a matter neither of [déréglementation], nor deregulation, but of the emergence of a space not assimilable to a territory (and in this sense "virtual"), which is neither private nor public, but simply outside the law. The question of legal relativism therefore is not posed within the same terms, as soon as self-regulation precedes the elaboration of state norms. But it is not longer enough and the response of states appears unavoidable, placing upon self-regulation (*soft law*) a hard law, civil and criminal, applied, for lack of anything better, by national jurisdictions. One legislates therefore, from the Digital Millennium Copyright Act of Oct. 28, 1998, adapting U.S. intellectual property law to new technologies, to China's Internet Regulations of Oct. 1, 2000, and then to France with the laws adopted in 2000 (adaptation of evidence law, conditions of implementation of services in lines and of digital television, public auctions at a distance), then in 2004 (digital economy). But national laws themselves were surpassed and internationalization increased after September 11, at the European level (Council of Europe Convention on Cybercriminality, 2001; European Union directives, 2002; proposal for a Framework Decision "against attacks on systems of information," 2003). At the global level, the Geneva Summit on the Information Society (2003) concluded with adoption of a declaration "to build an information society" and refers to "a global challenge for the new millennium," calling for the creation by the U.N. Secretary-General of a Working Group on "Internet Governance."

It remains to be seen how to apply this objective to digital networks deprived of any central headquarters: neither objects nor subjects of law, but conceived to some extent as a "route," or a "trajectory" (passing by the access provider, the shelterer [hébergeur], the content publisher and finally the user; that is, the Internaut). The strength/force/power of things, immaterial/intangible things, thus leading to the transcending of national laws, calling however for "framing" or "regulating" (but these words are doubtless still too rigid) this "virtual" space, where the flow of information follows its trajectory "in real time."

The advent of a virtual space offers in fait possibilities for almost infinite interconnections, according to a rhythm accelerated by the speeds of treatment of information, even though the systems of law suppose a spatial-temporal framework that is defined and stable. If the antagonism with the law has doubtless favored the initial development of the network, it poses henceforth, to the degree that conflicts arise, legal problems which hold notably to ubiquity, right in the virtual space but contrary to the conditions of existence even of the law. Impossible to localize, because it is found everywhere all at once, the Internet, which thus escapes state regulation for ideological reasons that by the force of things, will be by its very nature devoted to self-regulation; sketched according to financial flows, the triangle of actors would take its full shape with the flow of information, indicating, at the side of public actors, civil society, and at the same time economic actors.

All the more that ubiquity is also a formidable obstacle to the repartitioning of jurisdiction among different legal systems that are simultaneously applicable, so much that it multiplies the potential conflicts of jurisdictions and calls for a "coregulation" [see book 338] in order to find a balance between the traditional regulatory approach (nearer to the European conception) and the

self-regulation methods that are predominant in the United States[42] for reasons tied without doubt to economic liberalism, but also to the constitutional system which leaves to federated states the conclusion of contracts and contractual relations.

The risk of conflicts holds at the plurality of jurisdictions simultaneously competent, precisely on account of the phenomena of the very ubiquity of the networks. That one applies the principle of territoriality (the wrong is reputedly committed on national territory (as soon as one of the constitutive acts has taken place on this territory," art. 113-2, al. 2, CP français), or that of personality, active or passive, the ubiquity of exchanges seems to attribute to national criminal judges a near-universal jurisdiction. As for civil judges, the choice of the criterion is particularly difficult: to deduce from one possibility of universal access an applicability of all existing laws would lead to "creating a total juridical insecurity;"43 but the criterion of place of origin leads to the domination of American law and encourages all the fraudulent flights toward "informational paradises" what are not pure fictions; which the criterion of the "target" at whom the message aims (by reason of characteristics such as the language, the type of discourse, the very conception of the site, the nature of the offer) gives considerable power to the judge.

Some cases, like *Yahoo*, which related to messages tied to Nazism, showed that beyond the ubiquity of information, difficulties increased on account of the philosophical premises according to which the very architecture of the network would be dedicated, in the name of values supposed to be universal, a freedom of expression almost absolute, as it is conceived by the U.S. Constitution. The very violence of the reactions to the intervention of a French judge show that cultural relativism will be still more difficult to admit in the virtual world than in the real world. [see book 344]

The rapidity of exchanges "in real time" underscores besides the difficulty of a legal framework. Not content to have introduced ubiquity, the Internet adds an effect of immediacy which modifies the responsibilities that the law of the press had carefully tied, "in cascade" one sometimes says, from the director of the publication to the author and then to the producer. On the networks, the same actors can in effect exercise practically all the functions and it will be necessary to base their responsibilities on identical laws supposing common values. Part of the irresistible dynamic of digital networks, which express the force of things, we must come back to the universalism of human rights. Beyond civil and political rights, such as freedom of expression, privacy or security of persons and goods, the Declaration adopted at the Global Summit on the Information Society (2003) adds economic, social and cultural rights, underlining the access of all to information – and more broadly to communication – is a condition of development.

Ubiquity and immediacy, which make up the specificity of the flow of information on the Internet, would doubtless make easier this access of all to the Internet; but this specificity entails also the risk of "total or integral accident"44 which would concern at the same time the whole planet. After the gigantic breakdowns due to the delocalized production of energy providers, the propagation of electronic viruses gives a first idea of the new risks, those that affirm straightaway at the planetary level and in the face of which national legal responses seem if not useless, at least very insufficient. The Internet announces thus another form of globalization, that which holds to risks which are situated henceforth at the planetary level.

3. Global Risks

The risks lead us back to Earth, from virtual space to real space. But it apparently takes us away from the field of law because the element that characterizes these risks is first of all uncertainty. Every risk supposes a danger, thus an injury, but a possible injury: one does not

---

[42] Joseph Drexl, "Mondialisation et société de l'information: le commerce électronique et la protection des consommateurs," in *Mondialisation et droit économique*, *RIDE*, 2002, no. 2-3, no. special, p. 405 *sq.*

[43] M. Vivant, "Le commerce électronique: défi pour le juge," *D.*, 2003, DA, chr. 675; also "Cybermonde: droit et droits des réseaux," *JCP*, 1996, I, 3969.

[44] P. Virilio, p. cit. p. 13 [bk 351]

know if it is going to come about or not. And on can besides try to assess either the probability that the accident will occur when the danger is established (known risk), or the probability that an activity may be dangerous (potential risk).45

The goal is not therefore to suppress all risks – which, unlike with crimes, do not constitute an evil in themselves but make, quite to the contrary, an integral part of living –, but to distinguish between "acceptable" and "unacceptable" risks. Put otherwise, to judge, in the function of possible damage, the degree of acceptability, then to fix a ground for decision (acceptable/legal or unacceptable/illegal).

Uncertainty is thus joined with imprecision, the random with the fuzz [flou], because conduct whose dangerousness seems established can remain acceptable if the injury, even probable, appears of weak fullness; although conversely, conduct whose dangerousness is not established can be judged nonetheless unacceptable if the potential consequences seem grave and irreversible. If globalization does not give rise to speaking with care of new risks, it multiplies the systems of applicable law, each defining in its manner the criteria to be weighed and the ground for decision, while the character potentially grave and irreversible of global harms, inviting consideration of risks not only known but even only potential, adds to uncertainty.

To take into account uncertainty need not lead to basing on fear an ethic which in the end blocks scientific research as well as political decision-making. Doubtless a balance may be struck between Promethean adventure and timid withdrawal. [book p 356] To refuse to demonize Prometheus does not come back to celebrate him as a hero, but to incite focus on the complexity of technological risks, in their interactions with risks called natural, and to integrate a time that is neither the "real time" of electronic exchanges, nor the very historic time of each national space, but a long time which calls for a new classification in order to designate what can resist in the long run: the "durable." It is thus that globalization incites to a global policy of prevention (in the case of known risk) and of precaution (in the case of potential risk) whether it is a matter of biotechnological or ecological risks.

Biotechnological risks

Biotechnologies[46] first send back to the values of each society, illustrating thus the conflict between the relativism of values and the universalism of human rights or of the concept of humanity.47 But globalization, under the weight of a growing scientific and economic interdependence, calls for common principles within which to frame practices even before an injury seems probable. It is thus a culture of anticipation that must be acquired: from the known risk to the potential risk, decision-making must integrate not only probabilities, but also uncertainties, in the name of this new form of knowledge practice that is named "precaution principle." Still a magical word, as misleading as

---

[45] On this distinction, see *Le principe de précaution*, report by Ph. Kourilsky & G. Viney, éd. Odile Jacob, 1999, p. 18.

[46] See the definition proposed by Article 2 of the U.N. Convention on biodiversity: “every technological application which utilizes biological systems, living organisms, or the [dérivés] de these to realize or modify the products or the procedes to a specific usage.”

[47] M. Delmas-Marty, “Faut-il interdire le clonage humain?,” *D.*, 2003, chr. 2517; H. Atlan & M. Delmas-Marty, “Clonage, où allons-nous?,” *Le Monde*, 30 juin 2004.

"global governance," to the extent that it conveys the illusion of a common understanding, which do not seem however acquired neither scientifically nor juridically.

By the tensions that it provokes, notably between the American continent and a more reticent Europe, the question of GMO (genetically modified organisms, such as the transgenic corn developed in Switzerland by Novartis or in the United States by Monsanto), shows at once the limits of relativism and the difficulty of finding an adequate response. Common international norms would be necessary but the juxtaposition between them of initiatives that are uncoordinated, and sometimes contradictory, contributes more to disorder than a genuine putting in order.

In theory the WTO preserves a national margin of appreciation, states being able to claim a risk, ecological or sanitary, in opposition to the importation of products like GMOs. But conditions are restrictive and the margin is narrow:48 there must be "a scientific test," demonstrating, if not the danger, at least the plausible character of the claimed potential risk and conducting the development of research tending to support the hypothesis, and a "test of coherence" in order to guarantee that analogous risks will be treated in similar fashion; finally proportionality between the claimed risk and the measure taken must be proved. This is why, in the vast majority of cases, the Dispute Settlement Body rejects the complaint.

But the circulation of GMOs simultaneously falls under international commercial law and international environmental and health law (Convention Relative to Biological Diversity, adopted at the World Summit at Rio in 1992 and Protocol negotiated in Carthage, an eventually adopted in Montreal, entered in force in October 2003). Conversely from WTO, which considers every limitation of commerce as an exception, the Carthage [Cartagena?] Protocol is dedicated to the principle of prior informed consent from the importing state and admits the possibility of imposing on the exporter the obligation to evaluate risks. The conflict between the two initiatives respecting determination of the responsibilities between the exporter and the importer will only be resolved in working out their complementarity and in so preparing for the advent of an "international biovigilance."49

The idea of biovigilance is not specific to globalization. It is founded on the principle "of precaution," which to me seems characterized more by the idea of anticipation than by a systematic distrust that privileges the worst-case scenario and so leads to immobility. It is not the idea in itself, but the poor formulation, at once legal (principle) and vague (precaution), which raises lively criticism, and principle of imputation, which commands the attribution of a new type of responsibility.

Like principle of action, that of precaution/anticipation ought to incite politicians to implement procedures of research and evaluation on uncertainties that concern the threat of major risks. At the national, or even regional, level, the problem can be resolved but at the global level, the difficulty is considerably increased by the absence of any global government to replace it. To be sure the Carthage Protocol foresees establishment, in states that have not provided it (mostly developing countries), a national framework for evaluation and management of modified living organisms, but it would remain to build and international network and especially to reach agreement on the principal question, which is to know if there is a place to limit precaution to a policy principle of action, engaging only states, or of recognizing its applicability as a source of a "universal responsibility" for public and private actors.

This new form of responsibility without fault would indicate then, beyond the theory of risk, the taking into account of a certain degree of incertitude: it would have to demonstrate that in the state of scientific knowledge, one does not reach a ground of alert, defined by reference to an ensemble of explicit criteria, the "evidence" thus required not reaching a definitive truth but of provisional and evolutive indices. The passage of a national conception of responsibility oriented toward the past (punishment based on fault) or the present (compensation for injury) to a global

---

[48] Ch. Noiville, “Une marge nationale étroite,” in *Du bon gouvernement des risques*, op. cit. p. 138, 149, 161 *sq.*

[49] J. Bourrinet, “Intrdouction générale,” op. cit., p. 19 *squ. [bk 367]*

conception oriented toward the future (conservation of the living), could be planned on the model of universal competence, attributing competence to national jurisdictions, on the condition that they would be bound to apply the common rules and provided with sufficient means.

If global risks thus initiate a return toward the universalism of values, the movement is amplified when one passes from biotechnological risks to ecological risks.

Ecological risks

From biotechnological risks to ecological risks, the symmetry is only apparent because the first expression focuses on the origin of risk (biotechnologies), while the second looks to injury which would threaten the ecological balance or the ecosystem. But this inversion does not prevent the inclusion of certain biotechnological risks in the broader category of ecological risks. On the condition of taking into account the interactions that command this notion of ecological equilibrium or of ecosystem. Even though ecology first designated the study of interactions among animal and plant species and their milieus, the term took on a larger meaning to the degree that "ecologists" became activists engaged in the defense of the "environment," another neologism extending the ecological approach to human societies.50

If it is true that "the analysis of interactions among the inhabitants of the world can no longer confine itself to the sole institutions ruling the society of men, this club of producers of norms, of signs and of wealth to which nonhumans are admitted only as picturesque accessories to decorate the grand theater whose holders of language monopolize the scene,"[51] it remains that at the club of producers of norms, modesty is not always appropriate. To believe in it the preamble of the Declaration of the U.N. Conference on the Environment (Stockholm, June 16, 1972), we are (we "men") "the most precious in the world." Twenty years later, the Declaration of Rio on the environment and development replaced "men" with "human beings," but it still places us "at the center of concerns relative to sustainable development," considering Earth as "humanity's home." However, in recalling that the Earth "constitutes a whole marked by interdependence," the Rio Declaration shows the limits of legal relativism and announces a "global partnership" which would suppose "new levels of cooperation among states, the key sectors of society and of peoples." This formula apparently vague seems nevertheless to indicate that a change of normative level is necessary, therefore that the traditional cooperation will not suffice and that there would have to be common norms, at least partially integrated. A first international framework was outlined at Rio by three conventions (biodiversity, climactic changes and desertification), the first two benefitting from the support of the European Union.

As for the risk of exhaustion of resources, international law takes into account goals as different as the protection of the environment (conservation and durable utilization of resources), the promotion of development (equitable sharing of advantages flowing from utilization), and finally respect for intellectual property (on account of the patentability of living matter henceforth admitted). Whence the attitude of developing states that, out of concern for guarding their sovereignty over biological resources, rejected at the Rio summit the expression "common patrimony of humanity." The choice of the more neutral term of "common preoccupation of humanity" goes together with the research at their intention of new intellectual property laws inspired by existing collective rights (appellations of origin, collective marks, marks of certification) which would have the vocation of being integrated into national legislation and

---

[50] M. Prieur, "Introduction," in *Droit de l'environnement*, Dalloz, 3e éd. 1996, no. 1 *sq.*

[51] Ph. Descola, Chaire d'Anthropologie de la nature, *Leçon inaugurale au Collège de France*, March 29, 2001.

implemented by national judges. Thus all happens as if globalization were removing environmental law from the debate about universalism of values in order to engage unavoidably in the path of a commercial and economic approach. And the phenomenon seems still increased in the matter of climatic change.

Whatever may be the uncertainties that subsist as to the understanding of climatic phenomena, for which as to the foreseeing of changes, it seems to prepare itself according to an uncertain rhythm, probably slow but susceptible to unforeseen bursts/booms, a climatic change tied to a rise of concentrations of [gaz à effet de serre (GES)] to which human activities contribute in a decisive manner.[52]

In a perspective also obviously global, national, or even regional, legal responses can seem derisory and an international initiative more precise than the Rio Convention on Climatic Change becomes indispensable, but it is particularly difficult to imagine, on account of the extreme diversity of claimed interests. One must await the Kyoto Protocol (1997) to have such an instrument, at once legal and economic, at one's disposal. The goal is to reduce the costs in permitting to polluters for whom antipollution measures are costly to buy permits to pollute from those for whom the measures present less cost. And the mechanism consists of defining the quantities of emissions authorized for 2008-2012, according to quotas fixed to each country by reference to its emissions in 1990. The Accord thus organizes a free distribution of emission permits which will then be transferable to other polluters. In this sense, it creates a "permit market," where these transfers are negotiated. If one can deplore the institution of what has sometimes been called "markets for the right to pollute," at least the limitations are imposed under penalty of sanction.

But the principle weakness of the plan is the absence of the United States. Although it was a forerunner in the matter of a permit market and had been at the original of the proposal (destined to avoid the eco-tax), the United States then withdrew from the process. Conversely, the European Union is working toward an application in anticipation of the Kyoto Protocol, but the effect of the training on other countries has not been acquired. One remains far from the "world partnership," announced at Rio, which would call for something well beyond simple cooperation, a search for coherence which would outline already a world government.

This is that the political question of the defense of collective interests seems to wear away that of economic efficiency, which relates henceforth for the essential of private actors. Under their influence, international environmental law uses an "economic tool," which falls under principles like the polluter-payer principle, or user-payer, and regroups law of responsibility (civil, administrative, and criminal), fiscality (eco-taxes), certification (eco-label), or property rights (intellectual property in permit markets created by the Kyoto Protocol).

But this dialectic between market and environment (the order of the market recognizes the necessity to protect the environment and environmental law incorporates economic constraints)

---

[52] E. Bard, Chair *Évolution du climat et de l'océan, Leçon inaugurale*, Nov. 7, 2002, fig. 3 p. 15, p. 42; Symposium *L'homme face au climat*, Collège de France, Oct. 12-13, 2004.

leads to the abandonment of a solution, blow by blow, to the arbitrariness of judges. To reintroduce the political dimension will be indispensable to base the legitimacy of the choices of values that indicate the notions as "collective global good" or "common good of humanity." To reach that, one must doubtless not renounce too soon relativism of national systems, but endeavor to go beyond the opposition between relativism and universalism in engaging "beyond the relative and the universal."

In sum, the decor is in place but the play has not been performed, and an effort at imagination is necessary, not to oppose itself to globalization in dogmatic fashion, but to rely on the force of things in order to invent responses. The dialectic between irreducible diversity revealed by comparative studies and the unity of the international legal order, still utopian but already announced by international law, remains to transform into an open and evolutive synthesis. Such an "ordered pluralism" seems to me the sole means to avoid the double threat of a hegemonic order or of and impotent disorder. It is in any case the path that I will try to explore in 2005.

[end of book]

This is why the imagination is more than ever necessary, not in opposing itself to globalization in dogmatic fashion, but in relying on the force of things to invent responses. It is in this that it is a matter of “imagining forces”: the expression marks the action in the process of taking place, still to recommence, and borrows to Bachelard invite to a dialectic between the irreducible diversity revealed by comparative studies and the unity of the international legal order, still utopian but already announced by international law. To transform this dialectic into an open and evolutive synthesis, an “ordered pluralism,” is without doubt the sole path for avoiding the double menace of hegemonic order or of an impotent disorder.