A Critical Introduction

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“Nationalism is an ambivalent passion, an inextricable mélange of inclusive solidarity and exclusive particularism – just as internationalism is an ambivalent passion, an inextricable mélange of desires for order and vitality... Internationalists must seduce; must offer alternative images of the good life to nationalists; must, above all, acknowledge their own passionate investment in the outcome of the struggle.”

“Nathaniel Berman is my new guru”, Svetlana Zasova informed me with a smile after reading the texts assembled in this volume. Svetlana is Franco-Macedonian, one of our young research fellows at the CERDIN (Centre d'Etudes et de Recherche en Droit International of the University of Paris-I): she had experienced the first part of the break-up of Yugoslavia (1991-1993) in Macedonia, and the second (1993-) in France. A direct witness of these events, she had at last recognized herself in the writings of a Western internationalist who was not from Eastern Europe but rather from America. What she had found so rich in Berman’s approach was the way in which he had theorized the questions of international intervention, legitimacy and minorities; the way in which he had succeeded in defining – in a manner more incisive, more detailed and more in-depth than others – the profound ambivalences of the international community when confronted with the Balkans (even if, in her view, he had not yet fully grasped the profound incomprehension and frustration experienced by the peoples of Eastern Europe).

My purpose in beginning with this anecdote is to help the reader to grasp, from the outset, the thoroughly comprehensive nature of Berman’s work, and the subtle perspective that he brings to the legal world when it is confronted by the passions to which nationalism and colonialism give rise. An American internationalist, Berman managed to achieve a broad, shared understanding with a young Franco-Macedonian researcher with regard to the burning issue of nationalism. I realize that it is difficult to be surprised today by anything

1 “Nationalism ‘Good’ and ‘Bad’: The Vicissitudes of an Obsession”, p. 6.
concerning the history of international law, the histories of the Balkans or *a fortiori* the phenomena of nationalism and colonialism. And yet I’ll wager that, on reading Berman, the reader will be surprised. In his work, cultural Modernism interacts with the international law of Danzig; the fantasies surrounding Jerusalem with the concrete political and legal projects for that city; internationalist dreams with the institutional programs for Bosnia and Palestine; and the most industrious international bureaucracy with the most creative and audacious legal imagination. Berman is the internationalist of marginal categories, of forgotten legal institutions, of audacious, if imprudent, practices and inspiring, even if unimplemented, grand projects; yet he is also the chronicler of emancipatory dreams and the most paradoxical successes of international law. He explores the byroads least travelled in the history of international law, the crevices and the terrains that are least familiar to us. He invites us to re-live the history of international law in another manner, by a somewhat oblique route, reviving in the process that which has been treated as singular, as marginal, whether authors or legal innovations. He sheds new light on historical legal experiences that we have been in a hurry to forget, such as that of Upper Silesia or the Plan for Palestine, tainted as they are by their tragic ends. Berman is the author who most seeks to reacquaint us with our predecessors who have long since fallen into obscurity, whether jurists such as Robert Redslob or Georges Kaeckenbeeck or experts on nationalist conflicts such as Carlile Aylmer Macartney or Sarah Wambaugh. Yet he is also an internationalist with a great interest in literature and psychoanalysis, determined to decipher the most profound ambivalences of the internationalist world, and more interested in passions than in legal reason. He has – with great intelligence, and in my view better than anyone else – grasped the full complexity of the issues posed to international law by two major, ever-present and recurrent phenomena: colonialism and nationalism.

I

In the Anglo-Saxon world, Berman has inspired a small but sophisticated circle of internationalists and historians. Yet he is often considered too European in America, whilst appearing too American to Europeans (in particular as a result of his critique of legal formalism). In reality, Berman is at the crossroads of these two worlds: an American internationalist who has specialized in European international legal history, and who has drawn on the work of French authors, above all from the domains of literature and philosophy, as much as he has on the “Legal Realism” of American law schools. In order to
fully understand the intellectual trajectory that runs through the works collected in this startling volume, to better interpret these texts (which are as much reflections on the contemporary international legal project as they are inquiries into our history), we must first return to the intellectual and human context that the author inhabits. To do so, we must ask not only “Who is Nathaniel Berman?”, but also “Where has he come from?” His life clarifies, justifies, explains – in part at least – his intellectual choices, his interests, and the depth of his writings. His personal history can shed light on the intermingling of different influences, as it has roots in both European and American history; his family life belongs to both Europe and America.

Berman is an American whose family came from Central and Eastern Europe, emigrating during the great wave of Jewish immigration during the 1880s and 1890s to New York. Following his studies in philosophy at Yale and law at Harvard, he received a fellowship to spend one year in Paris, where he took courses given by the major intellectuals of the day: figures such as Derrida, Deleuze, Kristeva, Cixous, Baudrillard, Marin, all well-known in the US by that stage, under the somewhat reductive designation of “post-structuralists.” But it was above all American political life in his formative years – the turmoil created by the Vietnam War, the African-American civil rights movement and the Israel-Palestine question – that was to determine his most basic political choices. Berman belongs to that generation of Americans who, although only children at the time of the Vietnam War, were nonetheless profoundly marked by the genuine trauma that it caused in the heart of American society. Vietnam forced into the public consciousness the idea that American power – a liberal power – could fail completely; not primarily in losing the war, but rather in appearing as a dangerous, rather than benevolent, force in the world. Relations with the Third World in general were equally profoundly altered.

It is, to my mind, for this reason that this generation of American intellectuals, haunted by the specter of Vietnam, were confronted by a major human and intellectual challenge when faced with the “humanitarian interventions” led by the United States (and at times authorized by the United Nations) in Somalia, in Haiti, in Kosovo, and, in another sense entirely, in Iraq; and would thus force a profound re-structuring of left-wing, democratic American political thought. A broad, unprecedented consensus, excluding only the radical left and the isolationist right, emerged during the 1990s in favour of the imperative to defend democracy in the world, the rights of peoples and of individuals, and the occasional
necessity to resort to force in the name of law. Seen in this context, the radicalization that characterized the foreign policy of George W. Bush served to reintroduce an older set of classic divides. In particular, it brought the left back to a more traditional, anti-imperialist opposition in which American interventions in the name of international law and justice were once again perceived as exceptionally pernicious and mendacious instruments for the promotion of American political interests. This explains the undercurrent of anger – of an American internationalist confronted with the current neo-conservative policy of his country\(^2\) – that on occasion pierces through Berman’s ironic style, along with the denunciation of inequalities in the distribution of power and wealth, and the study of different legal forms of domination.

It is nevertheless also the case that the United States has in recent times been the site of a genuine rekindling of interest in international law. This is the result of a number of different factors: the considerable expansion of law at the international level and the ethical challenges to which this gives rise in the fields of trade, the environment, criminal law and Third World aid; the emergence of a new generation of Americans animated by individualistic and democratic ideals now projected onto international law; and the internal changes in American society, coupled with the upheavals of the post-Cold War world (which Berman calls the new “après guerre”).\(^3\) A whole series of contemporary works on the problems created by the new, globalized, yet fragmented, international society in which we live, and the place therein for international law and institutions, bears witness to this development. Between the Wilsonian cosmopolitanism bequeathed by the early 20\(^{th}\) century and the nationalistic neo-conservativism of today, between the idealism of the Democrats and the realism of the Republicans, a multifaceted reflection on international law has emerged – one that is extremely sophisticated, subtle, interesting, interested, and engaged; yet one that also seeks to find a new means of promoting American values.

Notwithstanding, however, these multiform currents, contemporary American internationalist thought still carries with it a predominantly Legal Realist substructure.\(^4\) This is a crucial element in gaining a full understanding of the American context, and the ways in which Berman is inscribed within it. Legal Realism sought to show that the defense of legal

\(^2\) “In the Wake of Empire”, Epilogue.

\(^3\) “Power and Irony, or International Law after the Après-Guerre”, in E. Jouannet, H. Ruiz-Fabri and J-M. Sorel (eds.), *Le droit international vu par une génération de juristes* (2008).

rule-formalism leads to an impasse in our understanding of law, as the reality of law depends upon the actual, practical context (social, economic and political) in which it is to be applied; and on the concrete consequences of rules, rather than simply their *a priori* formal validity. From this starting point, the basic goal of much American legal thought has been to reconstruct a law and an approach to law that escapes from the aporias of Continental internationalist formalism. How can we ground and explain law, and the fact that it remains law, when it is neither fully formal nor fully objective? Among the various theories that have sought to respond to such questions, Critical Legal Studies stands out in the manner in which it has radicalized Legal Realism, and has sought to deconstruct all attempts to legitimize law after the Realist critique. It was within this movement that Berman was originally situated, and it is from this starting point that we can begin to understand his critique both of Continental formalism and of American pragmatism. This also explains the fact that, while he is steeped in American culture through the Legal Realist sources of his critical work, he in no way endorses the most common form of American pragmatism. At no point does he offer us a “policy proposal” (except in a radically altered form in “Legalizing Jerusalem or, Of Faith, Fantasy and Law”). He does not assess law in terms of its concrete consequences alone; indeed, his superb article on “European Nationalism and the Modernist Renewal of International Law” can be read as a wide-ranging and in-depth genealogical critique of the very idea of “policy proposals” with regard to nationalism. It also appears close to a particular theoretical and historical culture that seems very French, very European; and from this perspective the influence of both the Critical Legal Studies movement and the education that he received in France is apparent.

It is important to stress these early associations if we are to understand Berman’s writings, as they explain the genealogical, structuralist and deconstructionist approach – to which I will return below – that set him apart from the majority of American internationalists. Neither should, however, their importance be over-emphasized, as Berman’s thought evades all efforts at doctrinal classification. He locates his analyses beyond both Continental formal positivism and American pragmatism. His proposition is not that we abandon either the European or the American approach, but rather that we “de-dogmatize” them. Since both positivism and pragmatism have become unreflective, unconscious modes of internationalist

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6 “But the Alternative is Despair”: European Nationalism and the Modernist Renewal of International Law” – COMPLETE.
thought, Berman’s goal is above all to re-situate them within their historical and social context. He thus seeks to de-dogmatize and re-locate the idea of law as a collection of formal rules (the more European vision) and as a pragmatic instrument (the more American vision) in order to bring to light its historical, psychoanalytic, and cultural dimensions. And it is through its relations to nationalist passions and colonial and imperial ambivalences that this dimension emerges most strikingly in international law.

It is from the European history of international law that Berman draws the substance of his most profound reflections. Berman is an American who remains fascinated by Europe, for whom Europe exercises an ambivalent attraction (an ambivalence equalled by that which we ourselves feel with regard to the United States); and it is this that lay behind his decision to spend a year in France, and to maintain professional contacts there afterwards. When I asked him what had led to look into Europe in the interwar period for what would be his first major study (on nationalism and Modernist renewal, as noted above), he responded that everything began with the terrible and tragic European failure that was the Second World War. He has looked to the past in order to see what happened in Europe, to understand the efforts of the internationalists of the interwar period to construct an international order in which nationalism would have its place as a force at once vital and “disciplined”; and to discern both that which was innovative or intriguing in these efforts, and that which was morally dubious. He wanted, moreover, to comprehend the moral and cultural blind spots that alone could explain how the recognition of the idea of self-determination and the principle of nationalities could co-exist simultaneously with colonialism and the crypto-colonial Mandate system.

Yet Berman’s project is not limited to this alone: another starting point of equal importance to him is the contemporary development of international law. At the time at which he began looking into the history of international law – that is, during the 1980s – we were in an period commonly viewed as characterized by the dominance of a somewhat lifeless legal pragmatism and realism, resulting from liberalism’s loss of dynamism and the progressive extinction of the grand Third Worldist and Marxist ideologies. This drove Berman’s desire to revive historic texts, and to begin work on a new historical genealogy of international law in order to understand how we had arrived at this empty, lifeless, soulless pragmatism of international law. His intuition was that this pragmatism was the dead surface of something quite alive, something which at the end of the Cold War had reemerged in the form of an
“unreflective repetition” of attitudes and policies in relation to nationalism uncannily similar to those of the interwar period.\footnote{Op. cit. Conclusion, p. 65.}

To talk of the European history of international law is also to evoke its colonial heritage, and thus to be confronted with another face of European power. This dark side of European power has held Berman’s attention for the same reason that he was interested in nationalism: colonialism is, indeed, another facet of European culture, and it is intimately related in many different ways to Eurocentric international law. Throughout the texts collected in this volume, Berman thus brings together the common attitudes, blind spots, dreams and fantasies held by internationalists and statists alike when confronted with that which is perceived as the “primitivism” of the colonized and the “primitivism” of nationalists; with the Other.

Imperialism, Fascism, nationalism and colonialism are closely related to the history of international law, and this led a number of post-1945 authors to a radicalized deconstruction not only of political modernity but also of law itself in the name of Marxism or structuralism. Prewar International law was indicted for both its its impotence and its injustice, as well as for its troublesome complicity with colonizing European ethnocentrism. It was in this context that the notion of the “progress” of international law was decisively problematized and critiqued, in particular in terms of the perverse effects of the supposed process of rationalisation and pacification of the international sphere through the creation and application of legal rules. Berman formed part of this movement, this calling-into-question; but he did so, to my mind at least, in a manner much more subtle than that of his deconstructionist predecessors, as he looked beyond the one-dimensional radical critiques often offered, examining the historical transformations in a particularly nuanced, detailed and perceptive manner. He immersed himself in the rediscovery and analysis of the legal institutions and practices of the past, and as a result of this thorough re-interpretation found not the proof of the definitive failure of international law, but rather an understanding of it as the crucible in which alternative and unstable trajectories have met and diverged – and, above all, as having been permeated for at least two hundred years by the passions of nationalism, imperialism and colonialism on one hand, and internationalism, humanism and liberalism on
the other. International law thus described seems never completely negative nor completely positive, but rather, thoroughly ambivalent.

Despite the fact that they are profoundly opposed to each other, the phenomena of nationalism and colonialism are intimately interlinked with European history and its Eurocentric international law; yet Berman has never sought to over-simplify this relationship. Instead, his goal has above all been to demonstrate that the relation between international law, nationalism and colonialism is at once fascinating and enigmatic – and, on occasion, brutal. At each point he de-centres his work in order to illustrate that there are lessons to be drawn of more general applicability, beyond the European context – for example, in his article on Jerusalem, a text that embodies perfectly both his ideas and his personality.

It is thus clear that Berman is not interested in law either as a system of norms or as a “policy proposal”, but above all as the historical and cultural product of our deepest longings and multifaceted desires, as the expression of our ambivalent drives and passions – which together signify that the set of solutions, regimes and rules that constitute international law are unstable and disconcerting rather than predictable and rational. But why the recourse to psychoanalysis and the themes of passions and ambivalence? To history? To culture? Why turn to these other disciplines in order to understand international law? What can they contribute – and is it possible for such contributions to develop the discipline of international law?

II
Ambivalence and Passions

Berman does not approach international law in a classical manner, as a function either of a pragmatic calculation of state interests or of formal legal categories, but rather, in more iconoclastic fashion, as emerging from our fantasies, our contradictions and our variegated psychological mechanisms – and, more generally, and more profoundly still, with regard to a fundamental anthropological and psychological ambivalence that is constitutive of human identity. In many of his studies, he refers to the psychoanalytic theme of ambivalence in order to explain our relations to international law and to legal institutions. Indeed, ambivalence functions as the main interpretive lens through which he understands international legal
passions, paradoxes and fantasies. But what is ambivalence? Berman offers one possible definition towards the end of this volume:

“I will use the notion of ambivalence to refer to the inability of an individual, a group, or a culture to rid themselves of ideas, passions, or relationships that they nevertheless also claim to condemn or deny.”

It is clearly necessary to resituate this definition of ambivalence, as well as Berman’s other usages of the term, within the field of psychoanalysis; it is, to my mind at least, difficult to grasp the scope of his work without understanding these sorts of definitions and their implicit conceptual bases. The psychoanalysis to which Berman has recourse has in effect forged its own the concepts according to a particular conception of the human subject that is evidently not neutral, and which serves to orient thought. Ambivalence, fantasy, desire, doubling, splitting: all of these are concepts that, when taken in their psychological sense, compel us to consider the difference between the consciousness that the subject has of himself and the reality of what he is. Berman makes use of all of these notions in the course of his work, but it is in the last text in this volume, on “imperial ambivalences”, that he gives them their most detailed articulation. For those less familiar with psychoanalysis, it is worth recalling that ambivalence can be more precisely defined as “a paradoxical mental state that leads the subject into intrapsychic conflict”.9 Put more simply, it refers to the fact that an individual can experience contradictory feelings of love and hate for the same object, which thus explain this interior conflict. In taking up this idea, Berman bases his approach principally on the work of Melanie Klein and Julia Kristeva, but develops, at the level of social groups, a set of analyses that recall primarily those of Sigmund Freud. According to Freud (in Civilization and its Discontents, 1929) the repression of drives – to which individuals are inevitably subject as a result of the demands of collective life – leads in the first instance to aggression against those responsible for that repression. But as these same agents of repression are initially protectors, objects of love (primordially: parents), this aggression turns back against itself and produces feelings of guilt and anguish. Freud thus provided us with a model that enables us to understand the ambivalence of individual affective relations, including those vis-à-vis the self, in which love and hate are always intermingled because they simply reproduce the affective relations of childhood. But Freud also sought to furnish us with a model for understanding major social phenomena, and the

9 P. Fedida, Dictionnaire abrégé, comparatif et critique des notions principales de la psychanalyse, Larousse, 1974, p. 28 [état psychique paradoxal qui conduit le sujet à un conflit intrapsychique].
different theoretical possibilities that he opened up were exploited in various ways by his successors, among whom were the English School of Klein. Klein (The Psycho-Analysis of Children, 1932) referred to the phenomenon of ambivalence in order to characterize one of the fundamental psychological mechanisms operative from the very first months of a human being’s life, from this moment the individual – as a being of desire – is caught between the drives of life and death. In Klein’s view, if the drive – as the energy that animates each individual – is fundamentally ambivalent, it will construct the objects to which it is addressed in its own image (that is, as ambivalent). Yet, the ambivalence of this constructed object (in particular the mother for the young child), is unbearable for the subject; the individual, therefore, “splits” the object into a “good” and a “bad” version. In doing so, the relation to the “good” object involves an element of idealization, and the relation to the “bad” object entails, for its part, anguish and fear. The dynamics of ambivalence are inseparable from the self-construction of the subject. The two versions of the object, the “good” and the “bad,” inevitably emerge together, giving rise to mechanisms of repression and conflicting fantasies.

Transposed into the domain of law, the relation between human ambivalence and passions produces the same effects of doubling, splitting, repression and fantasy at the level of the selection and application of legal discourses, principles and practices. It is worth emphasizing and explaining at this point the more specific relation between ambivalence and passions in terms of the classical analyses of international law. Berman often combines these two terms in his research – without, however, always retaining the psychoanalytical sense of “passion”, which is often described as “the abandonment of the ego to an object”. Moreover, although it has been the object of many studies, “passion” is not always used as a psychological term, and, following Klein’s example, it is preferable to use the terms “affect” or “emotion” in order to describe more nuanced states. In addition, the notion of “passion” has come from another disciplinary field – that of philosophy – in which its meaning has undergone a particular evolution; and this is, it seems to me, also apparent in Berman’s writing. The meaning currently most widely-shared of the notion of human passion no longer refers exclusively to a “passivity of the soul” leading ineluctably to irrational behaviour, but rather a more complex affective state in which the rational and the irrational are intertwined. It is clearly in this sense that Berman envisages passions. He refers principally to what he calls “juridical passions.” He shows both how these can take absolutist forms, such as

fundamentalist nationalist or religious positions,\textsuperscript{11} that are inevitably destructive of all creative forms of law, but also how they can function as the affective motor driving the most creative of juridical constructions.

We know that passions can lead to contrary, equivocal, and profoundly complex outcomes. Nationalist passion leads, on occasion, to the destruction of the subject who experiences it and the negation of its object; yet it can also appear as marvellous, particularly in the ardent eyes of the Romantic subject. The human passions seem, therefore, to develop in an equivocal, rather than one-dimensional manner; and much of Berman’s detailed work seeks to help us grasp their paradoxical aspects. Above all, he highlights their ambivalence, the way they become doubled as a function of the splits projected by subjects on objects that becomes either desired or rejected – or both.

However, demonstrating that legal institutions and practices reflect ambivalent passions does not mean that we must automatically condemn them as such.\textsuperscript{12} Is it not, in fact, the very contrariety of human passions that obliges us to look to law for a solution, as one possible site of their satisfaction? Is it not the essential contradiction of passion always to be embodied in something other than itself?

In Berman’s view, it is crucial that we successfully comprehend the process by which passions leave their imprint at once upon the creation, interpretation and application of international rights and rules; the ways in which they combine, conflict or intertwine in the realm of law and, in doing so, render impossible all understanding of law in a strictly formalist or strictly pragmatist manner. At the same time, his response to certain contemporary theories of law-as-language would undoubtedly be that it is too simple to view law as nothing more than a tool of communication, that legal discourses and practices can also mask absence and repression. Of course, this is not to condemn law as a simple reflection of our passions and our unconscious psychological mechanisms, but rather to show that it can never be the product of our reason alone, simply because reason can never completely control it. In elaborating the law, in evaluating its efficacy, and in systematizing its rules, we all too often presume a postulate of cognitive and pragmatic rationality – and,

\textsuperscript{11} “Legalizing Jerusalem or, Of Faith, Fantasy and Law” COMPLETE
\textsuperscript{12} Except, of course, where ambivalence itself is used as a “technology of power”. See, in this regard, “Imperial Ambivalences: Scenes from a Critical History of Internationalism” COMPLETE

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thereby, we ignore the profound ambivalence and passionate character of individual and collective legal subjects. Above all, we ignore the fact that internationalism is also a passion.

The same analysis can be applied to states and their governments. Whatever their utilitarian logic, states do not really exist as the “cold monsters” of which Nietzsche spoke. It is not a case of simply transposing human passion “as is” to states, but rather recognizing that the latter, both as national communities and as governments, have their own share of irrationality and passion that guide their actions every bit as much as do rationality and enlightened self-interest. In this regard, Berman cites a particularly illuminating comment by Freud: “[Nation's] interests serve them, at most, as rationalizations for their passions; they parade their interests as justifications for serving their passions”.  

Moreover, states constantly effect a split between the “good” and the “bad” uses and interpretations of international law, which is a reflection of their own particular national traditions and identities and of the reaction of governments to these traditions and identities, not simply a function of their “interests” alone. It is not, therefore, possible to reduce their foreign policy with regard to international law to simple utilitarian calculations or the pursuit of interest; instead, considerations of morality, of culture, of passion – each pervaded by ambivalence – are unavoidably intertwined. Analyses of this latter sort are not, however, the norm; indeed, they run counter to the understanding of international law currently most widespread, in which it is viewed as an instrument of state interests. It is, moreover, no longer solely the passions of domination that characterize relations between states in our globalized and deeply interdependent age. Rather, as Monique Canto-Sperber has remarked, states are often driven by passions peculiar to this era of communication, such as the passion of comparison. Comparison brings out in states a profound ambivalence between their desire for equality and recognition on one hand and resentment and envy on the other.

The putative subordination of passions to interests is characteristic of the liberal internationalist project, which has always sought to substitute for passions – considered

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violent and barbaric – the enlightened self-interest of each state, as well as the rule of law. It is impossible to develop this point further within the confines of this introduction, but the history of the interest/passion couplet would itself be a fascinating topic to explore in this regard; we would see how, from the 16th century onwards, the utilitarian notion of interest began to become the dominant paradigm for understanding human motivations, including those of the governing princes. And, although a “classical” approach, it remains today, in my view, one of the dominant paradigms of internationalist thought. In France, for example, it was best expressed in the book by Guy Ladrait de Lacharrière on the external legal policy of states, which received a particularly favourable welcome from internationalists with whose worldviews it seemed to fit nicely. Across the Atlantic, the trends towards pragmatism also favoured analyses based upon the strength of interests and the rational behaviour of actors. Irrational acts were seen as behavioural anomalies, with the analyst’s goal being to reintegrate them within a broader rational framework. By contrast, the suggestive force of Berman’s work lies in its demonstration of the importance and the inevitability of the play of passions at the very heart of international law: of tribalism and nationalism, of the passions of colonial and imperial domination, and also those of internationalism itself, which Berman shows to be the product of a will to power, of a desire for and fear of the “primitive” (as well as of specialization and technological aspirations). He stresses the importance of the work of certain authors and internationalists from the interwar period in order to show that, contrary to what is often thought, internationalists constantly obsess about passions, and the desire to discipline these through law. In doing so, international law constructs, produces, imagines and provokes as many fantasies and passions as it disciplines and domesticates. It needs revolts, explosions, and passions in order to establish its influence and thereby to achieve

As expressed, for example, by Montesquieu: “Happy is it for men that they are in a situation in which, though their passions prompt them to be wicked, it is, nevertheless, to their interest to be humane and virtuous.” Montesquieu, The Spirit of Laws, Book XXI Chapter 20; quoted in P. Hassner, La terreur et l’empire, II, Seuil, 2003, p. 399.


For the paradigmatic example amongst recent publications, see J. Goldsmith et E. A. Posner, The Limits of International Law, Oxford University Press, 2007. The American debate on the gaming of rational actors has given rise to a vast literature, clearly beyond the scope of this introduction. However, for work on the economic analysis of law, which has likewise stimulated much debate in the US and elsewhere, see G. S. Becker, Accounting for Tastes, Harvard University Press, 1996; and B. S. Frey, Inspiring Economics : Human Motivation in Political Economy, E. Elgar, 2001 and R. A Posner, The Frontiers of Legal Theory, Harvard University Press, 2001. It is clear that, if Berman’s hypotheses are correct, they greatly undermine this sort of analysis in which actors’ behaviour is reduced to a rational cost/benefit calculation.
legitimacy. Internationalists themselves have an ambivalent desire towards “primitive” passions, as they render necessary the imposition of the “paradoxical alliance” that confirms the authority and legitimacy of law. These paradoxes, according to Berman, are related to the perennial tension between “power” and “principle”:

“International lawyers often dream of the final absorption of sovereign power by internationalist principle, of conflict by cooperation, of atomization by community. Yet, despite, or perhaps because of, these dreams, their stances in the ‘current state of the world,’ the fallen world of compromise, division, and incomprehension, a world characterized above all by dramatic imbalances of power and wealth, are just as often beset by the dynamics of ambivalence.”

Indeed, Berman’s overall project is to demonstrate the variety of complex forms that can be taken by the relations between power, international law, and nationalist and colonialist passions. He thus embarks on passionate analyses of self-determination (“Nationalism ‘Good’ and ‘Bad’: The Vicissitudes of an Obsession” or “Beyond Colonialism and Nationalism?”), international intervention (“Between ‘Alliance’ and ‘Localization’: Nationalism and the New Oscillationism”), colonial and imperial legal practices (“Imperial Ambivalences” and “The Nationality Decrees Case; or, Of Intimacy and Consent”), and even of legitimacy and the notion of international community (“Intervention in a ‘Divided World’: Axes of Legitimacy”). These relations can operate in divergent ways: legal principles and practices can seek to take account of and control passions, leading to the type of complex and audacious projects that we saw during the interwar period in Upper Silesia and the Saarland and which resurfaced later in certain UN plans, such as those for Palestine in 1947 and Kosovo in 1999 (“‘But the Alternative is Despair’: European Nationalism and the Modernist Renewal of International Law”); or they can, to the contrary, “localize” passions in an attempt to neutralize them, as they did in the wars in Spain in the 1930s and Bosnia in the 1990s (“Between ‘Alliance’ and ‘Localization’: Nationalism and the New Oscillationism”); or they can be interpreted in such a way as to justify both one position and its opposite in different contexts (self-determination and territorial integrity, the inviolability of borders and humanitarian intervention, and so on) – but they always follow the same Modernist blueprint.

Above all, however, international law – and this is the fundamental characteristic of its relation to the passions – cannot be considered as a simple juridical response to identity conflicts. On the contrary, it participates in the construction of these conflicts through its conceptual, discursive, and practical activity. Here again we are concerned with the legal version of the process of identity-construction portrayed by certain psychoanalytical theories: a process in which the construction of internal identity takes an external detour; in which the subject's own identity, in this case that of international law, is constructed by reference to the Other, whether the colonized, the nationalist, the resistance fighter, the rogue state, and so on; or conversely the colonizer, the internationalist, the regular combatant, the legitimate state, etc. Berman thus takes up a fundamental psychoanalytical theory of identity-construction and transposes it to international law, using it to explain the formation of certain juridical notions, categories and principles. Each notion is formed and is conditioned by its opposite, by its Other, in the same way in which each identity needs its Other in order to construct its Self: colonizer/colonized; nationalist/internationalist; rogue state/legitimate state, etc. This point is of fundamental importance here, as it results in a significant reversal of the conventional perspective: while nationalism (or “indigenism”) is often presented as a sort of “primitive” in need of legal framing or control, Berman’s view is that it is international law that itself produces this "primitive" through its own discursive and practical activity. He further illustrates how nationalists or colonized peoples construct a large part of their identity through reliance upon the pre-existing juridical categories of international law.

Berman’s approach would thus confirm the analysis by the early 20th century sociologist of conflict Georg Simmel (Conflict, 1908;1955), who had also insisted upon the profoundly ambivalent nature of the individual and of society, and moreover showed that the struggles in which individuals engage not for themselves but for collective ideals or passions are probably more radical and ruthless than those that are fought for personal reasons. It is for this reason that, in the context of the issues at stake in Berman's work, both the internationalist jurists and experts, on the one hand, and the nationalist, colonialist, and anti-colonialist intellectuals, on the other, can at times aggravate potential conflicts, fears and fantasies by conceptualizing them in the form of abstract collective ideas or that of legal principles and practices. This is, of course, the opposite of what we almost always assume:

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that by conceptualizing issues and juridifying passions and identity conflicts, we thereby rationalize and defuse them. Berman shows us that, in reality, lawyers, internationalists and politicians can also construct legal tools that inflame the passions and arouse fantasies.

“And so nationalism is an artifact of the imperialism that dominates it, the ‘humble state’ of the colonized an artifact of colonialism, and the colonial past an artifact of the international law that will never be able to ‘disassociate itself’ from it but will spend its history baffled by its inability to do so.”

This complex reflection draws on the work of a number of authors who have emerged from decolonization, and who have enormously advanced our understanding of the relations between colonizer and colonized. The great Martinican writer Édouard Glissant (Le discours antillais Seuil, 1981) showed that the “creolization” of discourse was not a product of an African cultural essence, but rather a construct that emerged from the colonial situation. A similar, though hardly identical, notion was embodied in the earlier concept of “Négritude” as interpreted by the Martinican poet Aimé Césaire (Discours sur la négritude (1950), Gallimard, 1997), even if he placed much more emphasis on the repressed African element of the identity of colonized peoples. The Tunisian writer Albert Memmi (Portrait du colonisé précédé du portrait du colonisateur (1957), Gallimard 2002) also illustrated how the relation between colonizer and colonized conditioned both. Above all, it was, of course, Frantz Fanon (Peau noire, masques blancs (1952), Gallimard, 1971), the “psychoanalyst of colonialism”, who demonstrated the “split” dimension of these relations. It is difficult to overstate the importance and relevance of such analyses to the present-day context, in view of the extent to which the question of national, ethnic, religious and cultural identity has again become a crucial theme of contemporary reflection on international law, going well beyond the traditional focus on states. It is at the heart of the debates surrounding human rights, terrorism, the effects of cultural integration resulting from globalization, the phenomena of neo-colonialism, the laws of war and peace. It also plainly lies at the heart of global questions concerning multiculturalism. In his work on La condition politique, Marcel Gauchet highlighted ideas such as the notion that “human identity is constructed around a logic of paradox.” Sylvie Mesure and Alain Renaud also concur in this kind of analysis, invoking “the paradoxes of democratic identity.”

22 “Imperial Ambivalences: Scenes from a Critical History of Internationalism”, conclusion, p.44.
“multidimensional identity” in *Identity and Violence.* And, finally, in a manner even closer still to Berman’s work, one must cite Julia Kristeva’s magnificent *Strangers to Ourselves.* Berman’s transposition of post-colonial analyses to international law succeeds brilliantly in doing on the international plane what these other authors had done from a more domestic perspective: the unearthing of the paradoxes and contradictions of human identity, of our legal practices and of our self-construction as “internationalists.”

In light of the preceding analysis, there is one facile criticism that might immediately be raised: that Berman simply ends up with a sort of “cult of paradox”, or even some form of dubious occultism. Yet it seems to me that this kind of critique is misguided. Above all, we must not misread Berman’s dissection of law’s ambivalences and paradoxical solutions as simply a stylistic flourish, nor as a hyper-sophisticated quest for complexity, nor even as the “truth” of Berman’s thought. There is no radicalism of that sort in his work, none of the hermeticism of style that can be found in some of the authors upon whom he draws. In following the development of his works, we see that it is rather international law itself that betrays this cult of paradox, particularly in the Modernist iteration that is Berman’s main object of study. In other words, it is the legal solutions supplied by law and by internationalists that, in Berman’s view, are paradoxical. One must, however, equally note his repeated insistence that the paradoxical nature of law when confronted with identity conflicts or colonial situations is based upon psychoanalytic mechanisms that underpin human behaviour. The fragmentation of the subject (the subject divided or doubled within itself) that results from its ambivalence – an ambivalence which is constitutive of the human being – leads to the foregrounding of the paradoxes of law and its incoherencies, and to the complexity of the passions (which is then reflected institutionally).

However, it is Berman’s psychoanalytical reasoning itself that can be directly challenged, or at least is open to question. That psychoanalysis, which has taken on the form of a very general intellectual current, has had a real impact on other disciplines is well-known. We have also witnessed a great wave of vulgarization of the discipline, which in turn has enabled it to be genuinely integrated at a collective level within a number of different

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fields of knowledge. Yet the use of the concepts, ideas, theory and practices of psychoanalysis has aroused controversy and debate. Psychoanalytic notions lend themselves to taking a wide variety of forms, a phenomenon which has given rise to ferocious indictments of all those suspected of deforming or distorting the Freudian or Lacanian message. In France, Pierre Legendre is without doubt the author who has most brilliantly sought to apply the instruments of psychoanalysis to the world of law, but he has been accused by some of having fallaciously misunderstood Lacan’s theory by reducing law to its symbolic function and turning the subject of the unconscious into a subject subjected to his unconscious. Moreover, judicial practice has also been the object of critiques seeking to highlight such distortions. Franck Chaumont thus refers to the extremely frequent recourse to psychoanalytical concepts in criminal law, indeed to such an extent that the act of judging has itself been undermined by its apparent need to look to psychoanalysis (and psychology) for a sort of external legitimacy.

In short, inevitable misunderstandings and much confusion was introduced by the claim made by a particular psycho-juridical discourse that the concepts of psychoanalysis mapped directly onto those of the legal field. It should not, moreover, be forgotten that the concepts of psychoanalysis were formed in the practice of psychoanalysis itself, in what we call therapy, so that theoretical definitions remain open to various possibilities of revision and thus might be thought incapable of relevant transposition to domains other than that of the individual. This is a problem that, in my view, must inevitably confront any “therapy” that is to be directly imposed upon the law; a problem that would be resolved differently according to our view of the possibilities for such transposition, and the lessons that can be drawn from therapeutic practice. And depending upon the position that we adopt in this regard, it would undoubtedly be less the psychoanalytic premises of Berman’s work that might be contested than their transposition to social-historical phenomena. Berman, however, benefits from the authority of some major psychoanalysts on this issue. Carl Jung went into great and original detail on the existence of a “collective and archaic unconscious” of which individuals themselves are the bearers (Métamorphoses de l’âme et de ses symboles (1950) Poche, 1996). Marc Nacht, a major specialist in Lacanian psychoanalysis (L’inconscient et le politique,

29 Legendre is responsible for making the notion of “dogmatic” again central to the analysis of Modernity.
Erès, 2004), has for his part illustrated clearly that such a transposition is possible if we are careful not to misunderstand the nature of the correspondence between individual psychological phenomena and collective acts. In his view, social phenomena should not be understood as extensions of individual psychological conduct. On the contrary, it is because social phenomena are interwoven throughout all individual subjectivities that we cannot ignore the interdependence between the formation of individual psyches and the formation of representations at work in collectivities. In any event, Berman does not really develop Klein’s approach to individual, childhood psychoanalysis when he uses it to posit implicit hypotheses about the great social and collective domains of international relations and law. Even though he uses Klein’s work, he deliberately situates himself within the tradition of Freud, who always considered it possible to use psychoanalysis in order to study social and collective institutions and the major phenomena of culture and civilization (Freud, *Group Psychology and the Analysis of the Ego* (1959)). From this perspective, the unconscious and its basic mechanisms are not only private matters but always also collective ones, characteristic of individuals in society and peoples and states within international society.

In this way, we might raise a third criticism against Berman: that he draws inspiration, over and above the work of Klein, from a somewhat archaic Freud in order to explain social passions rather than describe individual conduct: the Freud, perhaps, of *Totem and Taboo* (1913) or *Civilization and its Discontents* (1929).\(^{32}\) Making a claim of this sort would, however, be risky, as the relation that Berman draws between law and passions is closer still to the work of Michel Foucault, Herbert Marcuse or Gilles Deleuze, who, each in his own way, insisted that law and other forms of social control had functions that were not merely repressive. In particular, the hypothesis of ambivalence – as Berman conceives it – is an invitation to rethink entirely anew the relations between the realms of law and of “non-law”. It is an invitation to reflect more precisely upon the question of passions and their relation to international legal institutions. Law is not presented, in a classic Freudian manner, as the site of the collective prohibition of drives, but rather as a multifaceted instrument of regulation, emancipation, and illusion – as well as of satisfaction, repression and control of individual and social passions, drives and fantasies, whether nationalist, colonialist, imperialist or internationalist.

\(^{32}\) For some more recent interpretations of this work, see in particular J. le Rider, M. Plon, G. Raulet and H. Rey-Flaud, *Autour du Malaise dans la culture de Freud*, PUF, 1998.
A fourth risk for Berman resides not so much in the transposition of psychoanalytic concepts to a domain such as law, but rather in the potential for an academic psychoanalytic discourse to take itself for a normative model generalizable to all contexts. Such an approach could be dangerous – indeed, I would even say false and illusory – if it is allowed to become the ultimate benchmark of the anthropological foundations of humanity and thus comes to lay down, as we sometimes see in domestic law, an entire set of normative prescriptions in the name of intangible structural principles concerning, for example, the family, homosexuality, or relations of kinship. Berman, however, seems keen to evade this potential trap, as he is careful to remain prudent in his use of psychoanalytic concepts. He is not concerned with the general symbolic function of law, and he himself warns his reader against the idea that he might provide a genuine psychoanalytic theory of the phenomenon of international law. “Of course,” he explains, “I only use psychoanalytic concepts by analogy, without seeking to engage in ‘wild psychoanalysis’ of the subjectivity of the theorists and lawyers in question”. Instead, he performs what may be called a “psychoanalysis of texts,” rather than of authors. At the same time, his thought is considerably more subtle than that of many others because, even as he deconstructs in “historic-psycho-cultural” fashion the ordinary discourse and concepts of international law, he also takes into account that which constitutes the internal requirements of the discourse on law, and of law itself. He does not seek to pin a ready-made psychoanalytic theory onto that discourse, and onto the legal practices and the texts that accompany them; rather, he begins with these texts in order to propose some simple hypotheses of interpretation: inductive, not deductive; non-dogmatic; and open to debate. It is this that makes his project particularly fruitful and such an innovative, original and important contribution. Berman’s approach is not normative: it relies not upon a sort of a priori self-justification of certain explanatory principles, but rather upon an internal conceptualization of internationalist legal practice in the light of certain mainstays of Modern psychoanalysis, with regard to the ways in which internationalists conceptualize what they actually do, and the way in which that practice is presented to us. The resulting approach is a particularly provocative one in relation to our usual habits of thought.

In a discipline largely (in France) committed to formalist positivism, there is a well-known tendency to confuse at times certain aspirational features of legal theory with those of law itself. In other words, we often project onto law and its concepts the systematicity and

34 “Imperial Ambivalences: Scenes from a Critical History of Internationalism”, p. 11.
rigour that we desire for our legal theory – to such an extent that we attribute to international law non-contradiction of an extremely rigorous nature, and sometimes even completeness and perfect systematicity, and so on. By contrast, while Berman is certainly comprehensive in his consideration of legal concepts, institutions and experiences, and undertakes a very coherent discourse on these issues, he does so without in any way claiming to systematize law or its concepts. On the contrary, the underlying goal of his critique is to denounce, via the foregrounding of ambivalence, the lawyers’ pretension to found their positions on a fetishized notion of a veritable legal rationality – whereas, in reality, legal discourse is pervaded with contradictions. In doing so, he immediately provokes debate. His analyses call into question not only our understanding of law, but also of our status as internationalists and the status of law as science. Berman would certainly reject the latter term, emphasizing instead the fundamental heterogeneity of law and showing that the legal solutions that we propose are far from being truly rational and conscious, and are thus incapable of complete systematization. In terms of the premises of his thought, it is clear that, in his view, positivism entails a dual illusion: that of the coherence of legal science and the univocity of its object; whereas he insists instead on the heterogeneity of the legal subject, its discourse and practices. Berman’s contribution to international law does not, therefore, stem from an increase in positivity and systematicity, as is often thought to be desirable, but rather from his bringing to light its unconscious and chaotic trajectories, its multiple displacements of categories and principles, and its fundamental unpredictability. In this way, he can be inscribed within a movement that is critical of law and of the science of law, typical of American critical legal scholars who heightened the already-powerful skepticism of the Legal Realists with regard to formal rules and to all pretensions to a strictly positivistic science of law (an approach often referred to in the US as “conceptualism”). 35 It is in “Legalizing Jerusalem or, Of Faith, Fantasy and Law” that Berman most clearly sets out his critical position. The study of law cannot be limited to the exegesis or the logical and conceptual analysis of legal norms. In Berman’s view, law is not only normative but also psycho-cultural and historical, and we must also seek to know and to grasp this dimension of it. The dynamics of ambivalence and the cultural attitudes that are expressed in the discourses and practices of law, as well as in the intuitions of legal actors, are just as important to take into consideration as any other facet of law.

Seen from this perspective, the content of the law and the process of its formation or application become just as decisive as its formal elements. Law is expressed in certain forms, but formalism is not a mechanism that can alone ensure the authority of law. The relation between form and substance must therefore be integrated into the analysis. In any event, the critique is not addressed to legal formalism and the famous form/content distinction alone; it also strikes powerfully at American pragmatism, which, as a result of its utilitarian and instrumentalist tendencies, often reduces law to a simple calculation of interests – and more recently to costs as incentive mechanisms (Law and Economics). Lastly, the critique also implicitly targets the sociology of law for its uncritical empiricism and materialist positivism. Berman’s critique does not in fact resemble closely those critical movements in law founded upon the contributions of social sciences such as economics or sociology. Rather, and in a manner very close to the work of Richard Rorty (Philosophy and the Mirror of Nature, 1979) and also Jacques Derrida (La dissémination, 1981), it is anti-foundationalist and post-Modernist; it thus denounces sociological objectivism and legal formalism and pragmatism equally. Instead, it privileges cultural and interpretative historiography, and the plurality of meaning.

Nonetheless, while Berman understands ambivalence as a constitutive trait of the human being and the major psycho-social fact that enables us to apprehend the irrationality that lies behind the apparent rationality of international law, it remains impossible for him to escape the critique of a certain monolithic quality of his interpretive stance. Berman effects a shift of perspective in international law in the move from general studies of the field to an approach focusing on a single element thereof: the unearthing of the paradoxes and the ambivalences of the legal realm. However, while such a viewpoint might initially appear complex, does it not entail in reality a simplification of our understanding of the legal sphere? The lens of ambivalence permits the foregrounding of an entire series of binary couplets, and Berman does not seek to reduce the tension between their terms; yet he does seem to reduce our perception of the phenomena that he studies to these couplets: inclusion/exclusion; principle/power; colonizer/colonized; insiders/outsiders, etc. As a result, we might wonder whether a full exposition of these identity-charged, ambivalent, split, fantasized, impassioned issues should not involve a more comprehensive approach to law and its history, to the tensions and contradictions that permeate international society. Exclusion, colonization, domination are not merely psycho-social states, but are equally the result of economic and political processes. Berman’s explanatory apparatus seems to be deployed at one level of
analysis only, with the result that it can begin to lose relevance when we turn our attention to that which actually exists, and attempt to apprehend fully the economic and social conflicts and problems that theories seek to reduce: that is, the economic practices and mechanisms that structure the distribution of wealth, and the measures and devices that we should seek to introduce in order to render them less unjust. Berman glimpses, but never delves into, the fact that all of these struggles – nationalist, anti-colonialist, internationalist or anti-imperialist – also find their original motivation in an experience (of whatever form) lived by a people, a state, a group or an individual of oppression by socio-economic conditions, as a function of the place that they occupy within the social structure. And the socio-economic problems themselves do not become conflicts to be resolved, do not excite the passions, unless they create situations that are themselves perceived as “unjust” by the individual or the members of the group. Put simply, although Berman introduces at this point the idea of “ambivalence as a technology of power”, and is frequently critical of the intimate relations between law and power, he does on occasion seem to be too quick to obscure the fact that the passions, motivations and conflicts of which he speaks also find their origin in social and economic struggles fuelled by the experience of domination perceived as injustice. He therefore perhaps fails to develop sufficiently what I will refer to – following Nancy Fraser (Qu’est-ce que la justice sociale ? Reconnaissance et redistribution, La découverte, 2005) – as an “economic, social and moral grammar” of our passions and our ambivalences. Such a grammar would not call into question his internal analysis of legal practices, nor would it provide a causal explanation of these practices in this type of conflict; it would, however, expand our comprehension of the psychological mechanisms that are at work in these situations.

### III

**Historical Genealogy and the Cultural Approach**

Why the turn to the history of international law? And to which history? Berman’s writings rarely look to the grand official history of international law; rather, they explore certain very particular events that occurred at very precise moments in history. Like one of the imaginary characters to whom he gives voice in “In the Wake of Empire”, the text that opens the present volume, he adopts the methodology of historical genealogy in line with his conceptions of the subject and of historical truth. In his own words:
But the genealogist knows that things are not what they seem: family history always includes lawless unions, scandalous relations, illicit progeny, swindled fortunes, madwomen in the attic. In this spirit, international legal genealogy rejects linear accounts of the origins and progress of the ‘international legal community.’ It recounts the forging of that community through acts of unholy matrimony, through liaisons mostly asymmetrical, even when consensual, and all-too-often irreversibly coercive and massively violent – and usually constructing the power of some patriarch or other... this power which is also called ‘sovereignty’.  

He does not set out any comprehensive theory or general historical method, and does not claim to produce a discourse of truth on law; rather, he brings together a set of very precise experiences relating to certain practices and discourses in existence at a given moment. In contrast with a general theoretical judgment, the turn to historical genealogy allows for the emphasis of detail and singularity. However, despite the fact that he pays close attention to precise examples, and to singular cases and institutions (such as the opposed internationalist responses to “civil wars” in “Between ‘Alliance’ and ‘Localization’: Nationalism and the New Oscillationism”, or the international institutions of the Saarland or Danzig in “‘But the Alternative is Despair’: European Nationalism and the Modernist Renewal of International Law”), Berman does not simply reduce these to their context – for two principal reasons. First, his goal is to criticize the pragmatic approach in general, whether it be that of traditional American pragmatism or that at work in the discourse and practices of those European internationalists of the interwar period who were consciously opposed to Wilsonian idealism. For example, from the perspective of American pragmatism – a view paradigmatically espoused today by authors such as Richard Posner (The Problems of Jurisprudence, Harvard University Press, 1990) – rules of law, which are more-or-less observed by individuals, are relative, localized in time and space, and their content depends entirely upon cultural circumstances and particularities. Berman shows that, contrary to their claims, pragmatists do not simply give particular solutions to particular cases; whatever they might say, they in reality always seek to impose uncannily similar general frameworks for the resolution of widely disparate conflicts. The generality of these political and juridical constants is thus lodged at the very heart of every putatively specific solution. He then goes on, it seems to me, to confer the status of “Events” upon certain particular examples by means of their very contingency: that is, on the basis of their capacity to reveal genuine ruptures, points at which new cultural forms and examples of judicial ingenuity emerge – or, alternatively, on the basis of their perpetuation of techniques of domination. In doing so, he

36 “In the Wake of Empire”.
seeks to impart the ways in which these historical situations can still teach us something today in terms of the construction of innovative legal configurations whose principal quality would ultimately be their capacity for self-modification and adaptation. He shows that scrupulous investigation into the very smallest details of a legal text, programme or practice is necessary if we are to gain an in-depth understanding of its subtlety and the ways in which it can be viewed as exemplary (whether in a positive or a negative sense). Thanks to him, singular, particular experiences take on new meaning and new importance as a result of their juxtaposition with other experiences or practices. He brings together elements that had hitherto been dispersed, fragmented or disordered – particularly historical phenomena that do not appear to share any common meaning, such as the Modernist cultural renewal in Europe and the legal constructions of the interwar period, or legal practices that are even thought to be directly opposed, such as the Mandate system of the old colonizers and the legal status of Kosovo or East Timor.

It is precisely this act of establishing relationships, at once diachronic and synchronic, that brings these practices into communication with each other, allowing for new developments that are an expression not of linear progress but rather of a succession of “Events”. One essential idea of the turn to historical genealogy is that history – as genealogy – in some sense forms the ultimate horizon of all legal phenomena. And Berman absolutely refuses to see in history any sort of continuous development, any kind of narrative of human progress that could ultimately be used to justify the horrors that have accompanied the history of international law. His insistence on not speaking of historical progress is thus related to a moral stance; a stance that, moreover, means that the extreme attention that he pays to certain particular moments in the history of international law, to certain “Events” (during the interwar period in particular), does not lead him into relativism. He writes a history of particular facts that is of tropological or moral significance; that is, it is offered just as much for the meaning that it can impart to the present as it is from the perspective of reconstituting the past. It is ultimately for this reason that he considers us clearly able to form moral judgments on law and on history, which enables us to differentiate, from a moral point of view, between certain legal practices that he has otherwise shown to be closely related; and thus to justify some and not others.

37 This is analogous to Todorov’s approach in *La conquête de l'Amérique*, Seuil, 1982, pp. 307ff.
“At the end of my analysis, it should be quite possible to vociferously condemn, for example, the 1912 imposition of a French protectorate on Morocco while passionately supporting the 1999 imposition of U.N. rule on Kosovo. Those are in fact my own positions.”

In this way, Berman affiliates himself very clearly with the long line of historians who are hostile to the deterministic, scientific positivism of the 19th century, and who, since the 20th century, have rejected the idea of a comprehensive history that is capable of unifying the different elements of historical reality on the basis of a general causality or purpose. His goal is rather to recount the multiple histories of international law and their relations to nationalism, colonialism and imperialism, while continuing to show that internationalists tend to project the same general frameworks and the same specific legal techniques onto radically different situations. If I make much of this tradition here, it is because it seems to me so important to emphasize that, as a result, Berman does not position himself in the same way as do the majority of neo-Marxist and Third Worldist scholars with regard to these questions of nationalism, imperialism or colonialism, although they have also written much on these subjects. His historical genealogy can be differentiated from the rationalist genealogy that inspired Marxism and at least one strand in the Third Worldist movement. His conclusions will, therefore, be very different, despite the fact that all such analyses share a denunciation of imperialism and colonialism. Berman notably demonstrates the ambivalences, oppositions and paradoxes of the legal claims of the anti-colonialists and the anti-imperialists, as well as of their adversaries. Thus, in “Imperial Ambivalences”, he explains that he wants to move beyond “traditional dichotomies in order to grasp the complexity of the phenomenon of law”, and

“…to give a sense of my analytical prejudice, bypassing engagement with systematic theories of nationalism and colonialism, which lack any grip on their political and emotional complexity, in favor of the complex and contradictory passions which constitute both domination and resistance. Rather than coherent theories, the discourse and practice of colonialism and nationalism (as well as anti-colonialism and anti-nationalism) are informed by more complex dynamics”.

It is, moreover, in this that Berman makes what is, in my view, an unmatched contribution to our understanding of the embarrassing, shameful, and condemned phenomena of colonialism and imperialism – phenomena that have, to a greater or lesser degree, always

accompanied the practice of international law. He does not present them in schematic fashion as the products of violence, alienation or domination alone, but also as the fruits of our ambivalences, our passions and our fantasies. This is not, of course, to say that we can find here a justification of colonialism or imperialism (both of which he denounces in very strong terms), but rather a more refined understanding of the mental processes that underlie such practices. In the same way, he moves beyond the well-known critique of Western metaphysics and rationality, both in terms of their certitudes (the rational and conscious subject, logical coherence, and the desire for order) and their violence (colonialism and imperialism). While he takes this critique into account, he always examines these phenomena through the lens of the doubled situations of dominant and dominated, aggressor and resistant, the colonizer and the colonized, and so on.

His historical approach can therefore seem very close to that of Paul Veyne (Comment on écrit l’histoire, Seuil, 1971) who was largely inspired by the work of Foucault in conceiving of history as the site of recurrent discontinuities. At the same time, the comparison here between the approaches of Veyne and Berman also enables us to consider the differences between them: in Berman’s work, an unconscious discursive structure always persists in the face of all of the discontinuities. Here we find the idea of a sort of continuity present within discontinuity – although the persistent structure is not of a Hegelian or Marxist sort, as it is not fully rational in nature; rather, it is based at once on culture and on the ambivalent dynamics of the unconscious.

“The nineties have brought back both articulations of nationalist demands and international calls for comprehensive reconstructions in forms strikingly familiar from the twenties. Current debates about the relative merits of self-determination and minority protection and between competing interpretations of each are so similar to their interwar counterparts that one can only verify that one is not reading an interwar text by checking an article's publication date... In the midst of such unreflective repetition, historical reflection on the framework shaping our understanding of nationalism and alternative international responses is urgently needed.”

According to this passage, even beyond the structuring of behaviour by the unconscious dynamics of ambivalence, there exists a cultural “framework” that explains the import of history. Indeed, according to Berman, the destiny of contemporary law and the
attitude of internationalists to nationalists are linked, to a significant degree, to what he calls
the “Modernist matrix”; that is, to a particular grouping of elements born with the leading
figures of the cultural avant-garde during the early 20th century and the interwar legal
experiments undertaken in response to the problem of European nationalism. This matrix
displays a number of characteristics that have had a lasting influence on all Western
internationalist thought, and explain the repetitive conduct that can be observed up to the
present day. We can find in it a fascination with the “primitive” (in the person of the
colonized non-European or the separatist nationalist Eastern European), a concern for the
autonomy of law, and a desire to construct complex legal-political plans composed of
heterogeneous elements. Berman’s cultural approach is quite particular, and requires
clarification. His claim is not that law can be enriched through cultural discourse through
supplemental references to literature, art or religion; nor does he contend that culture pre-
exists law, making the latter a mere derivative artefact devoid of any specificity. Rather, his
point is that law embodies attitudes commonly called “cultural,” and that we should thus
interpret law as we interpret a work of art. His goal in this book is therefore to show that we
cannot interpret the international law of the interwar period without understanding it as a site
of Modernist cultural construction and contestation – rather than as a mere adjunct to, or
reflection of, cultural developments external to it. A variety of images of the “primitive,” as
well as the “Modernist innovator” were invented in international law, just as they were,
though not in identical forms, in other cultural fields.

In this way, the “Modernist matrix” represents a veritable cultural structure that, in
Berman’s view, exercises effective power both over our internal processes and our external
conduct. At the same time, however, it is closely related to the psychological mechanisms
that lie at the heart of his analysis; and it is interesting to see the manner in which Berman
brings them together. Both Freud and Klein were much criticized for their failure to take
account of historical, social and cultural context in their analysis of individuals. In response,
an entire movement (termed “culturalist”) of socio- and ethno-psychoanalysts developed in
the United States, pioneered by figures such as Margaret Mead, William Orman Beeman and

41 See also N. Berman, “Modernism, Nationalism, and the Rhetoric of Reconstruction”, Yale Journal of Law and
the Humanities, 1992, vol. 4, pp. 351ff ; “A Perilous Ambivalence: Nationalist Desire, Legal Autonomy, and
“Economic Consequences, Nationalist Passions: Keynes, Crisis, Culture, and Policy”, American University
Ruth Benedict. The importance of this movement lies precisely in its re-situation of the psychological mechanisms of the unconscious within the social and cultural context. The same insight can be found in Berman’s work. He explains the relation of individuals and groups to international law by means of a structure that operates at once on the psychological, cultural and historical planes. It is for this reason that international law results from both the conceptual matrix of cultural Modernism and also – and always – from our strongest ambivalent desires. To take again the example of the construction of the nationalist or the colonized as “primitive”: Berman effectively demonstrates how the mixture of fascination and fear engendered (even today) by this cultural “primitivism”, a legacy of interwar Modernism, is deeply rooted in our ambivalent drives – even though the identification of the “primitive” has shifted with the decades, going from the African “barbarian” to the Muslim “terrorist,” via the Balkan “nationalist,” among numerous others.

From this perspective, Berman’s overall project goes further than one might think, moving beyond the realm of theory in order to speak also to the concrete terrain of legal practice. His theoretical and historical reflections are inseparable from the questions he poses as a legal technician; and he seeks to assist the practitioner in finding the most appropriate legal solutions in any given situation. This perhaps paradoxical conclusion seems to follow directly from his premises: that is, that we must make use of psychoanalytical and cultural tools in the creation, interpretation and operationalization of international law – in particular when it is confronted with powerful passions or identity conflicts. And it is in this we can observe a genuinely “realist” approach. In other words, law must be adapted to our fantasies, our passions: not by subjecting it directly to them, and neither, conversely, by seeking to use law to disregard, curb or manipulate them, but rather in terms of the “paradoxical Modernist alliance” that lies at the heart of Berman’s study on “European Nationalism and the Modernist Renewal of International Law”. More precisely, this implies neither the overcoming of contradictions nor becoming locked into binary oppositions, but rather the paradoxical “juxtaposition of heterogeneous elements”. Therefore, through an analysis of legal technique itself, Berman reminds lawyers of the benefits of inventiveness and

43 On the very general, contemporary Cultural Studies movement, which encompasses numerous works of this sort but with a deconstructivist approach, see the fascinating texts compiled in A. Sarat and J. Simon (eds.), Cultural, Analysis, Cultural Studies and the Law: Moving Beyond Legal Realism, Duke U.P, 2003.
44 “‘But the Alternative is Despair’: European Nationalism and the Modernist Renewal of International Law” COMPLETE
imagination when confronted with extreme situations of nationalism and other identity-based demands. In his view, for example, the better legal response to the problem posed by Jerusalem is not to “sidestep” nationalist or religious fantasies in the name of so-called practical “realities”, but rather to provide a “fantastical” response that alone is capable of generating a “realistic” legal framework for that city. And he sets out in very precise terms the elements of such a solution. Although this approach, of course, makes no claim to absolute truth or universality, it may, in Berman’s view, provide one of the keys to the future of international law. It is indeed one possible path, at the very least in the most incendiary of situations.

Nonetheless, Berman is at the same time doubtful of any of the implications for positive solutions that can be drawn from his own analyses. At the end of each of his studies, he often poses rather darkly some version of the following question: how can we think that a satisfactory legal response is possible to the problems of nationalism and to cultural and religious identity conflicts when the greatest innovations of legal Modernism themselves ended badly or were never even applied, and when it is ultimately the most self-destructive versions of identity passions that seem predominant today? Does not the ultimate failure of the Modernist constructions – and the repetition of a string of failures or, at best, equivocal successes, in Palestine, Rwanda, Somalia, Kosovo, and so on – itself foster disillusion, and lead us to share the skepticism, the total devaluation of international law, advocated by the Anglo-Saxon international relations “realists”? Indeed, Berman is, in my view, at his most convincing in his fascinating study of what he refers to as “parodic realism”, in “Beyond Colonialism and Nationalism? Ethiopia, Czechoslovakia and ‘Peaceful Change.’” In this study, he analyses how, during the 1930s, the Modernist matrix itself became in reality a parody, delegitimized to such an extent that its strongest principles – such as self-determination or sovereignty – were manipulated to serve aggressive, Fascist ends, such as the Italian intervention in Ethiopia or the incorporation of the Sudetenland into Germany.

Berman does not claim to provide a definitive explanation for the failures or fragile successes of Modernist compositions. Indeed, to do so would run counter to his whole philosophy, and thus he leaves such questions open. He has already shown that, if the solution of the “paradoxical alliance,” and the “juxtaposition of heterogeneous elements,” is

45 “Legalizing Jerusalem or, Of Faith, Fantasy and Law” COMPLETE
more subtle and suitable, and without doubt more imaginative, than formal or pragmatic responses, it nonetheless itself remains the product of a Modernist matrix that always seeks to legitimate power through law in an ambiguous manner.

Berman thus brings together an external and an internal perspective. The internal perspective was analyzed above in relation to the “tendency to ambivalence” and to the different mechanisms at work in the discourses and practices of legal actors. However, Berman also explains – from an external perspective – the intellectual and cultural structures within which contemporary law takes shape. He himself only rarely uses the notion of “structure,” preferring that of “matrix” (“‘But the Alternative is Despair’: European Nationalism and the Modernist Renewal of International Law”) or more recently still, that of “configuration” (“Intervention in a Divided World: Axes of Legitimacy), which has proved to be extremely fertile. It recalls the sociological history of Norbert Elias (La dynamique de l’Occident, Pocket, 2003), in which a “configuration” is a structured and variable arrangement of heterogeneous and interdependent elements. This unusual term implies at once interdependence and process. Thinking in terms of configuration might become, in some sense, the solution offered by Berman for apprehending singularity whilst at the same time explaining the persistence of a certain structure despite social transformations. The “configuration” remains central, but evolves with time, with alterations in historical balances of power and with each particular and concrete circumstance. Put simply, for Berman persistence does not mean invariability. There is a persistence in the function of the configuration inasmuch as it structures certain general patterns of response offered by jurists over time, but there is considerable variance in terms of the forms in which it is presented. The “Modernist matrix” has continually transformed itself since its invention in the interwar period, and it has been precisely these metamorphoses that Berman has studied in order to rediscover its continuing persistence right up to the present day.

These terminological and semantic precisions are to my mind essential as they enable us to situate Berman’s work within what we call “post-structuralism,” wherein we can recognize the strong influence of the most relevant elements of the Derrida’s thought. There is, above all, a “dissemination” of meaning and of forms. Moreover, in each of Berman’s studies, he seeks to isolate an element within legal discourse, texts or practices that

46 See J. Derrida, La dissémination, Seuil, 1993.
destabilizes the structure, the matrix. In Berman’s view, the most general disruptive, destabilizing element within international legal Modernism is the putative “primitivism” of anti-colonial or nationalist passions. In each case, whether in the colonial, imperial or nationalist context, the “primitive” is an element of the intellectual structure upon which legal discourse is built; and it is an element whose incendiary, indeterminate, multifaceted and erotic nature inevitably destabilizes that structure. It is thus at once the foundation of the system and that which deprives the system of any foundation. This destabilization of the intellectual and cultural structure also stems from his psychoanalytic approach. International legal outcomes do not correspond neatly to simple variations in the matrix, but are equally the result of a set of powerful libidinous desires that are thoroughly immersed in the ambivalence of our identities. It is in this sense that he often points to the mixture of fascination and fear that emerges in international legal texts in relation to the “primitive,” to the libidinal desire underlying some of the most formal of legal constructions.47

This texture of beliefs, cultural constructions and desires thus forms an unstable configuration that both underpins and shapes legal propositions. Legal analysis thus becomes a function of the forms that are culturally acceptable within a given culture at a given point in time, and of the passions and desires that are intertwined within these. This shift from the rational towards the passionate is brilliantly set out in “Between ‘Alliance’ and ‘Localization’: Nationalism and the New Oscillationism” and in “Nationalism ‘Good’ and ‘Bad’: Vicissitudes of an Obsession.” The recourse by internationalists to rationality, to strictly legal arguments, quickly exhausts itself, and they are thus unconsciously obliged to found their conclusions on emotions, passions, ambivalent judgements and diverse cultural attitudes. The ultimate demonstration of this point lies in the fact that legal rationality, fetishized by internationalists, can never provide its own foundations because it is itself the product of profoundly passionate and cultural beliefs. This, however, is the supreme paradox: that actors continuously manipulate legal materials and conceal their ambivalence or their radical subjectivity behind apparently formal or pragmatic responses, themselves calculated to reinforce the illusion of a solution that is founded in law. In this way, actors reinforce their pragmatism or formalism along with the idea of legal rationality; and they also consolidate their strength, as ambivalence itself can be harnessed in service of power – as Berman

convincingly demonstrates in “Imperial Ambivalences” and in “Intervention in a Divided World: Axes of Legitimacy.”

The effect of this unmasking carried out by Berman is extremely powerful, even if one does not fully concur in all of his conclusions. Indeed, it seems to me that dogmatic rationalism has run its course in any event and that, for some considerable time, the positivist position has been to accord a more modest, regulatory role to rationality within legal thought. Berman must, moreover, take credit for refusing to caricature positivism in this manner, showing it instead in its moderate and relative forms – which are themselves forms of contemporary pragmatism. That said, however, to proclaim on that basis the death of all forms of legal rationality remains genuinely intellectually impossible. Berman’s own attitude to international legal practices seems – in keeping with that of the majority of American CLS scholars – ambiguous, insisting on the relative autonomy of law and on its worth, yet demonstrating at the same time its incoherencies and contradictions; seeking to bring out the specificity that is proper to law, yet induced imperceptibly to reduce it to a cultural or psychoanalytical fact, or to a simple language game. It does not seem possible to deduce the critics’ qualified valorization of law from their conceptual premises. Indeed, that valorization seems to contradict those very premises, at least without reducing law to something other than itself. The denunciation of the excesses and the ravages of legal (and technological) rationalism in its dual, formalist/pragmatist aspect has been a constant theme of the Nietzschean-Heideggerian trend that we also find in Berman’s work. It is the ultimate goal of his analyses, and yet it dooms him to confinement within what strikes me as an impasse – regardless of the level at which the analysis in question is situated, be it cultural, legal or moral. What is it that renders a 19th century protectorate treaty more reprehensible than the establishment of a UN protectorate over Kosovo? What is it that renders the NATO intervention in Kosovo acceptable but not that of the Coalition in Iraq? If recourse to legal rules is not sufficient in order to resolve a controversy, and if, in addition, there exists no possibility of rational foundation for our cultural and moral attitudes, on what basis can we justify this act or denounce that one? In fact, there is in my view a morality inevitably implicated in our cultural attitudes and practices that is not a simple language game and that can be rationally founded. As Axel Honneth has emphasized (The Struggle for Recognition, 1996), perhaps all of our conflicts have their roots in moral – even ambivalent – sentiments of injustice. If we look again at the experiences that Berman describes, we see that he never analyses the conditions under which individuals ascribe moral significance to them. This is
certainly not his principal concern, and yet it might pose a problem for his thought because, while experiences lacking in moral significance may be amenable to simpler legal solutions, in the form of negotiation or of a paradoxical balancing, legal responses to morally significant experiences – such as those lived by individuals confronted with genocide, crimes against humanity or neo-colonialism – can only be apposite if they confront the issue of the “correctness” of the moral claims of those involved. These claims convey a sense of injustice that cannot be reduced to a cultural or psychoanalytical experience, even if they are “culturally constructed” and determined in part by our unconscious. Is it not for precisely this reason that even a paradoxical treatment is insufficient in certain situations, because it responds to the issue of ambivalence but not to that of normative moral expectations? And might there not be, as Honneth again has suggested, solutions to this type of “morally significant” situations in which an experience of mutual recognition coupled with a deliberative moment enables the individual involved to develop a positive relation to the self, a positive image of himself? There exists also a legal rationality that is aware of its own limitations, that can be critical, that sees truth as relative (as Prosper Weil argued it should), but that can operate nevertheless: indeed, it is that which permits the adoption of positions and the making of judgments founded on law. Lastly, if law without any doubt contains internal contradictions and a substantial element of irrationality (both of which are brought brilliantly to light by Berman), the fact that it is subject to incessant ambivalent movements, to passions and to power relations is precisely what renders it necessary to also theorize its systematicity. This question remains, therefore, open; although this should in no way inhibit anyone from drawing lessons from the singularly stimulating body of work collected in this volume.

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The work of Nathaniel Berman on the history and nature of international law is not only of interest to those enamoured with the past. It is, indeed, very much as a seasoned lawyer that Berman turns his attention of these questions, and it is to internationalist practitioners and theoreticians both that he seeks to address himself. He shows us that the study of law is not unitary; that there is no single historical memory; that legal intelligence can take many forms; and that the rationality of law is a myth perpetuated in order to

consolidate power. Moreover, he unmasks the unconscious of internationalists and the variety of forms that passions can take in the legal realm. In doing so, the complex and subtle thought contained in the following pages reveals an existential anxiety that is related to the “baffling inability” of internationalists and political decision-makers to manage these phenomena in the long-term. There is also a more general underlying concern to demystify international law and the relations between law and power; a concern that leads him to disconcert us and to disabuse us of our own history as internationalists – a history learned from the great doctrinal textbooks – in order to make us understand another aspect of international law in terms of its recurrent cycles of “unreflective repetition” and its profound and ineluctable ambivalence. His work on international law’s past, and on the psychoanalytic mechanisms of law more generally, enables him both to put even the most contemporary struggles in historical perspective and to insist upon the need to remain vigilant when faced with the repetitive or dominating effects of particular legal practices. That nationalism, (neo) colonialism and imperialism are urgent issues in the beginning of the 21st century cannot, of course, be denied by any serious observer. Nor can Berman’s interest in history be dissociated from his internationalist calling; and this is why he always extends his historical analyses up to the present day. He provides us with no certain answers, no linear developments; rather, in the Kristevan terms that he uses in “Imperial Ambivalences,” he in some sense renders us “strangers to ourselves”. And in this way, along with proposing a new way of seeing international law, he suggests that we discover a new identity for ourselves as internationalists.