
Conservative and Progressive Visions in French International Legal Doctrine

Anthony Carty*

Dupuy, Pierre Marie. *L'Unité de l'Ordre Juridique International*, Cours général de droit international public (2000) *Recueil des cours*, tome 297 (2002). Leiden : Martinus Nijhoff, 2003. Pp. 489.

Perrin de Brichambaut, Marc, Jean-François Dobelle and Marie-Reine d'Haussy. *Leçons de droit international public*. Paris: Presse de Sciences PO et Dalloz, 2002. Pp. 523

Daillier, Patrick, Alain Pellet (Nguyen Quoc Dinh). *Droit international public*. 7e edition, Paris: L.G.D.J., 2002. Pp. 1510

Abstract

How can one develop a progressive agenda of international law, while at the same time not sacrificing the unity and rigour which traditional formalism can appear to claim? In France formalists will not come out of a limited agenda of preservation of the integrity of the French and other classical states, while the progressives, searching for grounds of solidarity in international society, tread uncertainly in the formlessness of material demands made upon the law. Dupuy finds a material basis of unity of the legal order in a triad comprising the general principles of international law, the instrument of the legal fiction and the Kantian theory of the transcendental grounding of the validity of law. Dupuy places the task of developing such a material law in the hands of the international judiciary, despite reservations about their performance. Indeed, it is difficult to imagine any judiciary with the philosophical skill to undertake the tasks he sets them. In fact it is Pierre Legendre, the type of polymath which French culture so readily supports, who demonstrates how problematic is the formalist legal thinking based upon the classical French state. Despite Dupuy's conciliatory spirit towards his formalist compatriots he has opened a Pandora's box for them.

* School of Law, University of Westminster. E-mail: A.Carty@westminster.ac.uk

In France it is possible analytically, if not necessarily existentially, to distinguish at least two equally dominant traditions of international law scholarship, which are very aware of one another and enjoy to disagree with one another,¹ albeit neither draws an absolutely clear theoretical line against the other. They are both attached to the centrality of the state, but the one stresses more its formal hierarchical authority in relation to the nation, while the other stresses more the state's grounding in the democratic tradition and the commitment to the Declaration of Rights of 1789. The first uses the legal ideology of formalism to assure the continued authority of the state, particularly in its neo-Hobbesian view of relations with other states, but also in relation to a potentially anarchic French civil population. The other, while not denying the importance of the state as the legitimate form of democratic national expression, is more preoccupied with how that state, in collaboration with other states, can be used to express or develop solidarity and enhance human values.

The first school is represented above all by Combacau and Sur. I have already published at length on these two scholars not only in an *EJIL* Symposium,² but also in a much longer piece in the book edited by Michael Stolleis and Masaharu Yanagihara, *East Asian and European Perspectives on International Law*.³ There I focus on what I call a history of French–German antagonisms with respect to state and nation. This shows an external face of France and roots it deeply in a political culture going back to Jean Bodin, and marking, consistently, Richelieu, Napoleon and ending with Clemenceau. Now I would like only to remark two points, before turning long overdue attention to the second school. There is very open confirmation of this first perspective by the recent collective volume *Leçons de droit international*, put together by three legal advisers of the French Foreign Ministry, Marc Perrin de Brichambaut, Jean-François Dobelle and Marie-Reine d'Haussy. I think this is especially significant because they wish to stress a very clear message in their *Leçons* to the students of the *Institut d'études politiques* in Paris (the starting ground for a career in the French state): states remain the primary actors in international law, continuing to be firmly attached to their sovereignty, and accepting to share it with others only with reticence. They oblige by discounting the significance of all of the last two centuries of history in understanding the state in international law. The principle traits of the state go back to the emergence of the modern state with Jean Bodin's *La République*. While they recognize the French Revolution and the role of its ideology of the self-determination of peoples and its contribution to nationalism in the 19th century and decolonization in the 20th century, it has to be stressed that, in the view of the authors, nothing

¹ Given the character of the Société française pour le droit international, centred around the institution of the annual Colloquium, not to mention numerous additional *tables rondes*, which encourages extensive open debate among French international lawyers.

² Carty, 'Convergences and Divergences in European International Law Traditions', 11 *EJIL* (2000) 713.

³ See A. Carty, *State and Nation in the International Law Tradition: A History of French–German Antagonisms and Possible Responses in the Spanish Late Medieval Tradition* (2004), at 215–242.

important has changed since.⁴ The titular holder of sovereignty has moved from the Prince to the Nation, but the meaning of sovereignty has not changed and the authors affirm that nothing of history has put in question the model of the sovereign state.

The second point involves a repetition of an argument drawn from my second article in order to show that there is nothing pragmatic and technical about legal formalism. The passion of Prosper Weil for the classical international law of interstate recognition is what grounds his critique, 'Towards Relative Normativity in International Law'.⁵ It incorporates the values of hierarchy and authority, seen as essential for the preservation of civilized society, something which Bodin discovered and which better not be forgotten. The rule of law, that is the impartial and detached authority of the state, is essential to prevent civil society returning to a primitivism of the Hobbsean state of nature. Sur affirms that the state is the pillar of classical international law. 'International law cannot be contemplated without the state, even less can it be thought of as being against the state.'⁶ Sur notes a recent tendency whereby each individual is viewed as a minority in and of himself linked to multiple individual nationalities. This leads to a deep dissociation from the unique tie which identifies a state to its citizens. 'There is a strong risk of it leading to zero loyalty in practice... Who can fail to see that in this way we legitimize and legalize inequality... We would thus turn such a right into a machine for manufacturing, at best ethnic states or, at worst, ghettos ridden with mafias and sects...' The necessity of the state can be seen from the consequences of its collapse. 'We see everywhere and irremediably, a return to barbarism, with the civil wars which result from this collapse.'⁷ This is pure Bodin, a direct reference to French wars of religion of the late 16th century, and not merely to the supposedly mafia-ridden ghettos of Kosovo and Chechnya.

One cannot help noting as a matter for community of tone between Sur and Perrin de Brichambaut *et al.* that the latter draw upon the British policy maker and adviser of Prime Minister Blair, Robert Cooper, for a typology of the behaviour of states in contemporary international society: *viz.* four categories, pre-modern, modern and post-modern, and, all by itself, the US.⁸ Cooper's position is an unashamed apology for a new imperialism, now to be somehow benign. While Perrin de Brichambaut does not explicitly endorse this part of Cooper's view, a conservative perspective, by definition, tends to stress the more disorderly aspects of human nature.

Such conservative convictions are so deeply held that it is not easy to enter into debate with those who hold them. At the same time it is not difficult to see how clearly

⁴ M. Perrin de Brichambaut, J. F. Dobelle, and M.R. d'Haussy, *Leçons* (2002), at 22. They continue to draw upon Serge Sur for a typology of the basic character of international law (*ibid.*, at 24–26), in the sense of relative absence of institutionalization beyond the state.

⁵ Weil, 'Towards Relative Normativity in International Law?', 77 *AJIL* (1983) 413.

⁶ Sur, 'The State between Fragmentation and Globalisation', 8 *EJIL* (1997) 421, at 422.

⁷ *Ibid.*, at 426.

⁸ Brichambaut, Dobelle, and d'Haussy, *supra* note 4, at 43–45, views now systematically developed in R. Cooper, *The Breaking of Nations* (2004).

the lines are drawn. Perrin de Brichambaut and his colleagues oblige, in their same text, by referring to a very indicative paper by Sur, *Les phénomènes de mode en droit international*.⁹ Sur refers to transformations in the concerns of international lawyers over the last 30 years, a spectacular ideological turnabout. One moved from a social law concern for development, following decolonization, with all the language of the patrimony of humanity and compensation and rebalance for inequality, to a penal law concern for the protection of individuals and civil societies. ‘The international law of protection, of compassion and of repression has replaced the international law of liberation, of solidarity and of hope.’¹⁰ This ironical description of changing fashions in international law is perhaps an appropriate avenue to introduce opposing strands of French international law thinking.

I propose to consider, firstly, aspects of *Droit International Public* (2002) the 7th edition by Alain Pellet and Patrick Dailler, building upon the work of Nguyen Quoc Dinh. Of this 1,500 page tome it is possible only to highlight certain features. It occupies the same institutional context as the work of Combacau and Sur, and has definitely, in my view, the implicit ambition of offering an alternative vision of France in the world to the French university student. A chapter devoted to theory correctly locates the tradition of voluntarism and formalism in the Germany of the Second *Kaiserreich*, and disposes of Jellinek and Triepel in terms which would have been acceptable to the inter-war French international law theorists Louis Le Fur and Georges Scelle. A law built only upon the will of the state expresses the reality of a state isolated in the international community, unable to commit itself beyond an ever changing and unstable self-perception of its own interest. This represents no vision of how a state can or should relate to others. Instead the authors call for the realization of integration of each state in the objective world of an international community. One difficulty is that the authors of *Droit international public* have reservations about both Le Fur and Scelle. The natural law foundations of the former are subjective and just as potentially destabilizing as the interest theory of the pre-1914 Germans, while Scelle’s denial of the reality of the state favours the material elements of law creation, which Scelle mysteriously describes as a biological necessity. Scelle himself follows a much clearer exposition of legal sociology from Duguit – that objective social pressure will compel states to agree to mechanisms of constraint to ensure observance of conduct essential to the community’s survival and development. The difficulty with the latter approach is that it has no compelling normative content, and the difficulty with Scelle is that his total deconstruction of the state into the individual leaves no credible formal framework with which to frame the material elements of law. This leaves the authors to conclude on a rather amorphous note that law has to be understood in its political, economic and social context. A truly sociological perspective must be, in some

⁹ Published in the *Colloque de Paris* (2001), at 49–65.

¹⁰ See the final sentence of a summary of Sur’s argument, in Brichambaut, Dobelle, and d’Haussy, *supra* note 4, at 32.

unclear sense, realist in its search for the sentiment of obligation in the social environment.¹¹

Despite the epistemological hesitancy of the authors, there is no mistaking the vision which they see as necessary to impart, nor its practical significance in a work which constitutes a massive survey of all of the drama of contemporary international society. To begin with, the authors reject the voluntarist concept of general customary law as no more than a form of tacit treaty and affirm an unmistakably optimistic view of the development of international society, that is in the general sense of the word, idealist, without denying their own previous call for a sociology of international society which was not a mere projection of the hopes of the authors. I quote at length the passage on the formation of general custom. The objectivist approach recognizes that the formation of norms is a sociological process that follows a necessary logic, or responds to a social necessity. However they continue:

Most often, however, the customary rule corresponds to the presence of an international balance of forces at a given moment, to a confrontation of the subjects of the law in the face of an international problem. The spontaneous formation of such rules is realised following a crystallisation of a collective juridical conscience of a social necessity [*par suite d'une prise de conscience juridique collective*]. Only this explanation permits one to ground the validity *erga omnes* of general customs, while at the same time permitting their indispensable evolution. This does not betray the reality of differences of power among subjects of international law, because it is perfectly compatible with the fact that the 'silent majority' of states must often incline itself before the analysis of social necessities proposed by the great powers.¹²

A selection of topics may illustrate how the authors proceed. The discussion of aspects of *jus cogens* in the law of treaties and the attempted codification of state responsibility, are the usual lines of confrontation between voluntarists and objectivists. I will look to the first issue. The obligations of humanitarian assistance and economic and technical assistance for development are also indications of a vision that is intended to be anchored in a role for France in international society. Again, I will look at the first of these. The famous Articles 53 and 64 of the Vienna Convention on the Law of Treaties (VCLT, 1969) are supposed to codify the idea of an objective law, along the lines of Scelle. An international super-legality would cover individual liberties, against torture, slavery, and the collective liberty of self-determination. The difficulty again is that recourse to material criteria for law is to suppose resolved the problems of modalities of the formation of international public order in a society that is not highly integrated. The authors affirm that, nonetheless, the UN Conference on the Law of Treaties affirmed by a massive majority the existence of a universal juridical community founded on its own proper values, towards which the members had to incline. This has been affirmed in several subsequent ICJ cases. Yet the authors strike a note of caution that a statement of principle does not resolve practical issues of application. The solution of Hersch Lauterpacht was to give the charge of determining the content of *jus cogens* to judges, but it is difficult to

¹¹ *Ibid.*, especially at paras. 51–57, at 98–107.

¹² *Ibid.*, at para. 208, at 325.

imagine that states would allow such an enormous legislative power to fall to them. The International Law Commission effectively left the issue unresolved in referring only to the formal aspect of the formation of imperative norms, although it invited states to submit particular instances to the ICJ if they wished (Article 66). There have been numerous international court and tribunal references to examples of *jus cogens* that show its indisputable place within the framework of positive international law, thereby irrefutably disavowing the voluntarist approach to international law. At the same time, the authors end on a seriously ambiguous note. The language of *jus cogens* opens the way to the objectionable (offensive) return to the subjectivism of natural law, allowing states to rid themselves of whatever obligations they please by appealing to hypothetical imperative norms. To assimilate *jus cogens* to natural law is abusive. For instance, no one will claim that a treaty to use illegal force retains its positive law validity because it is contrary to natural law.¹³ It is clear that the authors share the voluntarist disdain for the natural law tradition in a manner that can only expose would-be objectivists to the voluntarist objection of moral–legal confusion. When they say that the notion of imperative law contradicts the foundations of the voluntarist approach, in the final analysis they are not themselves convinced that this structure has to change. This would happen at the moment that a state had imposed upon it a rule of *jus cogens* that it did not accept. Perhaps the authors cannot imagine a concrete example except the silly one already mentioned.

The authors consider the undoubted fact that human rights are now no longer in the domestic sovereign reserve of states. However, the claim of a right or a duty of intervention or involvement (*d'ingerence*), whereby states or NGOs could bring assistance to populations in a state of distress has not yet received an incontestable juridical acceptance. If this duty exists, the authors think it is more a matter of morality than positive law. It is difficult to see how assistance can be imposed without the consent of states in the absence of a Security Council resolution, which there was in the case of Iraq and the Kurds (1991, SC Resolution 688). In the General Assembly, France had initiated three resolutions inviting all states in need of assistance due to citizens suffering a natural disaster or equivalent, a modest reference to the fact of civil war, to facilitate the involvement of relief organizations, whilst respecting the principle of sovereignty. However, the authors do go much further and cite a dictum of the ICJ in the *Nicaragua* case,¹⁴ namely that furnishing strictly humanitarian aid to persons in another country would not be considered an illicit intervention if it presented a purely humanitarian character and involved no discrimination. This, say the authors, is probably an acceptable juridical definition of the right of humanitarian assistance. The experience of the UN in ex-Yugoslavia, Somalia and Rwanda is comparable, although the authors can point to Security Council resolutions. They

¹³ See *ibid.*, in particular, para. 128, at 207, and, generally, paras. 124–128, at 201–207. This passage in French does not seem happily constructed: '*Personne n'ose prétendre d'un traité organisant, par exemple, un recours illégitime à la force, conserve sa pleine validité au regard du droit positif parce qu'il est contraire au seul droit naturel!*'

¹⁴ ICJ Reports (1986)1, at 124–125.

quote with approval a report of the then Secretary-General, Boutros-Ghali for 1991, which contains a strong statement, apparently in line with an objectivist approach to the creation of norms. It is not a matter of facing a dilemma of contradiction between sovereignty and protection of human rights. Rather 'What is in play is not a right of intervention, but a collective obligation to bring help and reparation in situations of emergency where human rights are in peril . . .'.¹⁵ The authors conclude immediately by citing Article 4.h of the Constitutive Act of the African Union, which offers a remarkable conclusion to this development of the law. The Union has the right to intervene in any member state following a decision of the Conference, in certain grave circumstances, such as crimes of war, crimes against humanity and genocide. This seems a very categorical application of the idea of an international legal community that develops its law through the necessity it realizes of responding to the strong pressure of events through new legal solutions. It is still a surprisingly categorical statement of a view of the legal powers of the international community which was nowhere in evidence during the crisis over Iraq leading to the war in 2003. Nonetheless, whatever the epistemological hesitancy of the authors, a clear vision emerges from their work that corresponds to at least one vision of France.

The final contribution to the French dimension, which I offer here, will be Pierre-Marie Dupuy's *L'Unité de l'ordre juridique international*, also a *Cours général de droit international public*, but not in the context of teaching in French law faculties. Rather, it is a more reflective academic work which confronts an abstract issue that is fundamentally pressing in French international law science at the present time. Of course, it should also be equally pressing for the profession as a whole, but may not be so openly recognized. How can one develop a systematic, well-grounded approach to a progressive agenda of international law, while at the same time not sacrificing the unity and rigour which traditional formalism can appear to claim? The scene is already set in terms of the apparent unwillingness of formalists to come out of a very limited agenda of preservation of the integrity of the French and other classical states, while the progressives, who want to follow Duguit and Scelle, appear to tread uncertainly in the formlessness of material demands made upon the development of the discipline.

There are several features of Dupuy's system that provoke different kinds of reactions. The order in which I will expound and comment on these ideas does not follow exactly the author's own presentation. There is a very cogent exposition of the thorough anchoring of imperative material standards of law in both the jurisprudence of the post-1945 World Court and international conventional law. There is a very original and convincing grounding of this imperative law in a triad composing the general principles of international law, the instrument of the legal fiction and the Kantian theory of the transcendental grounding of the validity of law. The problematic which remains and is fully recognized by the author is that the development of communal standards of order should, by the logic of its nature, be undertaken

¹⁵ *Ibid.*, at para. 288, at 449.

collectively. However, as the author notes, the Security Council has shown itself to consistently fail in being independent, impartial and decisive, since the Bosnia debacle and the Dayton Accords. At the same time, recent judgments of the ICJ (particularly *East Timor* and *The Arrest Warrant* case) show that no great hope can be placed in the judiciary to realize the social morality inherent in the ethic of the imperative norms of international law. Still, the author, understandably, persists in placing the task of developing the law in the hands of the judiciary. I will suggest that what he wants to see happen is also the function of doctrine and that, having rethought the foundations of the material international law, the author is leading in the direction of a specific function for a new philosophy of international law. At the same time, the author leaves intact the formal foundations of the law, particularly the integrity of the classical definition of the state. This, I think, is a problematic aspect of his argument. Indeed, I think he shows himself that the formal foundations of the unity of the law are even more problematic than its material foundations.

It is surely a decisive argument against formalists in international law that positive sources of the law which they cannot refute in their own terms have thoroughly and repeatedly anchored imperative norms into the system of law. This has happened in the declarations of purposes and principles of the UN Charter itself. It is in Article 53 of the Vienna Convention on the Law of Treaties and the Statutes of the ad hoc and Permanent International Criminal Tribunals. It is found in the judgments of the ICJ in *the Corfu Channel* case, the *Reservations to the Genocide Convention* case, the *Barcelona Traction* case, the *Namibia* case, the *Teheran Hostages* case, *Certain Military Actions against Nicaragua* and the *Legality of the Threat or Use of Nuclear Weapons* case. The formalist tries to say that such judgments and conventions disturb the structure of the law and have to be expelled if it is not to fall apart.¹⁶ However, this is a classic case, recognizable by the philosophy of science, where one paradigm is being challenged by another. To be more precise, a dominant paradigm is giving birth to an opposing one within its own parameters.¹⁷

Dupuy systematizes the developments of imperative material law within the parameters of positive formal law in the following terms, particularly with reference to the role which the judges have already assumed. From the *Corfu Channel* case onwards, the ICJ judges appear more to reason from standards of the social morality of public order than from observance of state practice (at 184–185). The instrument ‘elementary considerations of humanity’ appears to be used by the judges to make a normative liaison between the ethical foundations of the legal norm and the norm itself. The Court, as the General Assembly, in numerous resolutions, seems to affirm principles as existing in themselves, independent of the reality of international relations (at 185–187). Dupuy concludes his work by calling upon the judiciary, which he calls the ‘international magistrate’, to draw out the ethical implications

¹⁶ Combacau, ‘Le droit international: bric à brac ou system?’ [1986] *Archives de philosophie du droit Le système juridique* 1, at 85 ff.

¹⁷ See Kuhn, *The Structure of Scientific Revolutions* (2nd edn., 1970) and the application of these ideas by M. Hollis and S. Smith in *Explaining and Understanding International Relations* (1990).

underlying and common to founding texts of the law, by having recourse to general principles of law. In doing so, judges will thereby not merely act as mouthpieces of the law, but also make themselves the voice of the social morality which the law embodies (at 400 *et seq.*). His final word is that it is for the judge to identify the imperative rules of law, to take up into the law what the search for a universal social ethic invites, '*au juge de devoir se prononcer sur l'ordre des priorités à discerner au sein même des normes impératives*' (at 481).

In the most complex and crucial part of his argument, Dupuy provides an original structure for the notion of imperative law, which it does not have at present. It is simply identified analytically as that part of international law from which there cannot be derogation by a simple unilateral or bilateral act. There is nothing to explain how such imperative law could develop or assert itself more widely within the system of international law. Dupuy offers a way with his connection between legal fiction and a transcendental theory of law. At the same time I think he thus belies his wish to give authority to an international magistrate, which he himself recognizes is almost as problematic as the Security Council. The authority he wishes to accord to judges belongs to his idea of law itself, whether or not the judges wish to take it up.

In the context of a very realist perception of the disappointments of late 20th-century society, the failure of the aspirations of the new international economic order and the wild exploitation of the developing world by multinational companies, rampant unilateral violence on the part of leading states (especially the UK and the US), civil wars, oppression of minorities and widespread use of torture, it must appear naïve and even whimsical to talk of the needs and demands of 'elementary considerations of humanity' and the rights of the international juridical community (at 259 *et seq.*).

Dupuy invokes a very complex idea of legal/juridical fiction. It is a technical artifice which has to render what is effectively false or only partially true in empirical reality, to be true in law, in order to allow one to deduce legal consequences indispensable for juridical relations among the subjects of law (at 260 *et seq.*). In positive law, therefore, the international legal community exists, there are criteria of social solidarity, even if necessarily subjective and meta-juridical. This community is not itself a system of imperative rules but designates itself the entity that creates, or identifies the rules (at page 262 *et seq.*). I think it is this wider concept of law's designating function that need not be confined to the judiciary. Dupuy refers to the collective project of the UN Charter 'We the Peoples of the United Nations'), the collegial before the bilateral (at page 265 *et seq.*). Then Dupuy makes another crucial step. It is Kant who said that the idea of reason, as a community of peoples, is a legal principle, and the renunciation of force is a categorical imperative, *just as perpetual peace as a postulate entails an incessant effort to tend towards it* (at 266 *et seq.*). We must understand a rational idea of a pure law as a transcendental exigency. We must act *as if what never was must be*. *The fictional element is precisely the 'as if', including the imperative upon states to ensure an international cooperation to eradicate not merely war but the structural causes of war, underdevelopment and the violation of the rights of the human person* (at 267).

Dupuy is very determined to disassociate the idea of imperative law from classical natural law, whether commanded by God or by Reason. It is one thing to affirm that

inalienable principles are such commands and another to say at a historical moment, the international community has together collectively agreed to consider – as a purely hypothetical form – that certain rules cannot be abrogated by convention. This is a voluntarism large enough to admit the expression of a social constraint to which states consent (at 272–276). The transcendental idea of law is that a legal order must contain rules that cannot be contested without putting the very existence of the order in question (at 311 *et seq.*). One such principle, going back to Kant, is the prohibition of unilateral force and war, the practice of which by the US and the UK is putting the very existence of the international order in mortal danger (at 412).

The theory of the formal unity of law supposes that there are agreed so-called secondary rules which can identify, by their source, which social, ethical or whatever standards qualify as law. The secondary rules will indicate hierarchies of rules within a systemic framework and identify the principal subjects or addressees of the legal norms. The assumption is that the unity of the legal order is formal because the criteria for the identification of the norms have to do with the origin or source of the rules and not their content. It is not necessary, and probably not possible, to find unity in a legal order in terms of content. At an elementary level one can see the sense of this in remarking that contract law concerns the forms for the validation of exchanges of promises as contracts. There is no need to be preoccupied as lawyers with the ends that people set themselves in concluding contracts. This would contradict the maxim that law is concerned with forms not purposes. Of course, the idea of *ordre public* runs counter to this, although Dupuy would argue that the general outline of imperative norms has been consensually established.

I think it is clear enough, even from Combacau's self-reflection, not to mention Dupuy's own reflections on the formal sources of law, that international law enjoys no such formal unity. The crucial weakness of this order is that it cannot control the unlimited sovereign right of a state to give its own interpretation of the extent of the obligations which it can formally conclude. This is an argument used, correctly by Combacau in his famous essay,¹⁸ to discount the value of any norm, for instance on reservations to treaties, in Article 19 of the VCLT. Reservations are valid for those who accept them. He ends up saying that all norms are reduced to a relativity of the opposability of those norms which other states are willing to accept as opposable to them. He calls this subjective validity. In my view this is a historically and ideologically correct interpretation of international legal positivism and marks it as an absurd monstrosity of the idea of law. The problem goes back, in the view of James Brierly of Oxford, to the unlimited right of subjective judgment that the liberal Enlightenment thinker Vattel accorded to sovereign states, hollowing out the objective rationalism of his predecessors. This decadence of law is what has made it so vulnerable to the crisis military politics of the US and the UK after the so-called 9/11. These states can and do scream whatever they like in the name of national security.¹⁹

¹⁸ *Supra* note 12, esp. at 99.

¹⁹ See Carty, 'The Terrors of Sovereignty and the Freedom to Fear', in J. Strawson (ed.), *Law After Ground Zero* (2002), at 44 ff.

Dupuy also appears to endorse this criticism of formalism when he juxtaposes the concept of opposability to bilateral legal relations (all Combacau appears to accept) and validity, as belonging to a hierarchical order, in which there are priority values (at 393). More importantly Dupuy devotes considerable care to demonstrating that there are no formal, i.e. secondary, rules of international law that identify how general customary law distinguishes legal norms from other types of norm or conduct. He goes through both objectivist and voluntarist theories of customary law and finds them either vague, with references to 'social necessity', or circular, with references to recognition of what is, or supposedly already is, legal. There are no formal criteria, especially with respect to legal change, merely a nostalgia for formal procedures (at 189 to 197).

Obviously Dupuy does not go so far as to deny that states consent to law, but I think there is a contradiction in his continued adherence to a formalist definition of the state. I think that in formalist terms it is also recognized by others such as Cassese, in his *International Law*, that the system of international law has no formal criteria that certify the existence of its main subjects the way a national legal order confers citizenship, nomenclature and patrimony.²⁰ Cassese goes on immediately to rely upon the ultra-formalist theory of Anzilotti, that subjects of the international legal order are those who are addressed by its norms. This weirdly roundabout way of identifying the subjects of law, formalism reduced to absurdity, is clearly open to the observation that the subjective formalists such as Combacau will have to insist that some states exist for some subjects and others do not. In practice this is quite true. I would hardly think that positivist legal formalism has presented the world with a legal order. What one has instead is a Hobbesian anarchy of whimsical national communities.

This is why I think a primary task of international legal theory has to be to rethink the state as a primary subject of international law. In his discussion of the pair legality/legitimacy Dupuy recognizes this. Following Bobbio, he argues the legality of power, from which come the rules of law, supposes that the power itself is established in conformity with a valid rule; but this validity itself presupposes the legitimacy of the power; and this last power, in its turn, parts from a presumption that the rules it promulgates are just. He quotes Bobbio as saying: 'going from on-high to below, one finds that justice founds legitimacy, legitimacy founds validity and validity founds legality (at 406).

Presumably some people must actually be doing all of this somewhere or other. What international legal theory needs is precisely a material theory of its main communities in the international arena, to dissolve the dichotomy of the sovereignty of states and the self-determination of peoples. For instance, one might regard the US, like every other so-called state, as a historically situated, territorially-based people, not population, with inherited traditions, prejudices, strivings, etc. which contribute to the style and content of its behaviour. The US then

²⁰ A. Cassese, *International Law* (2001), at 47.

constitutes a point of epistemic reference in cultural and therefore normative terms. The state is the corporate, i.e. institutional, expression which this psychosociological entity gives itself, retaining its collective intertentionality – its awareness of itself as an acting subject – through a maze of subordinate institutions *within which individuals, including international officials and other lawyers, work with and against one another to achieve certain aims with more or less conscious integrity and coherence.*²¹ Scelle and Hersch Lauterpacht are correct when they argue that ethical and legal responsibility can only start at this concrete phenomenological level.

Finally, one has to stress the dynamic aspect of what Dupuy is arguing. He is not just trying to describe the international legal order, stressing one analytical description of it as being more scientific in the Kuhnian sense than another. He is also arguing that it is the task of the international magistrate to develop the potential of the imperative law underlying the international legal order. Presumably the conventional law can be left to the legislative power of states and to arbitrations. My only reservation here is that it should not be left to judges, who, as Dupuy sees, cannot be relied upon to take up the task. Dupuy is right to see that there is a distinctive role for law that cannot be filled by moral philosophy, political theory or sociology, etc. The idea of the almost blinding quality of law, its categorical character is captured by the idea of judgment. Yet, the categorical quality of law is also inherent in the idea of law itself, which has more apostles than judges. Kant has played a major part in Western culture in noticing law's categorical quality. In a wonderful historical panorama, the French legal medievalist, Pierre Legendre describes this virtually magical character of the Western legal tradition very well. The elusive quality of the authority of Law is that its function as a third party (*Un Tiers*) is independently to strike a line of interdiction/taboo in the sand that separates the individual from himself, while, at the same time, identifying his place in society, as separate from and limited by the other. It defines the subject in defining its limits (or capacities, a less troubling word for the liberal). In other words a taboo has to come from outside, on high, or wherever, to wage war against the myth or story of narcissus, that is the ground of every individual's, and hence every society's self-destruction.

Legendre says, and he writes as a Frenchman, that it is a narcissist French intellectual culture that considers that such a task can only be undertaken by the French state. That state owes whatever authority that it still has to a much older and wider European tradition going back to the Christian canonists and the secular medieval successors to the Roman jurists, the glossators. Dupuy would like to transfer this authority to an international magistrate, which is reasonable, although one has to remember the origin of most, if not all, of that judiciary as loyal and dependable servants of their own states. It is precisely the purpose of the law, the true imperative law, to come between the will of the individual and himself, or his accomplice in

²¹ Themes I explore in 'Scandinavian Realism and Phenomenological Approaches to Statehood and General Custom in International Law', 14 *EJIL* (2003) 817, at 820 and 837.

contract, and to issue a prohibition, so uncongenial to the advanced liberal culture, which shows, with its nonsensical theories of subjective validity, that it has lost all sense of the idea of law. However, the judge should not have the exclusive prerogative to develop the imperative law. As Legendre points out, the quality attaches to the discipline, not the forms of its exercise: '*Le juge est juge, c'est à dire juriste . . .*'²²

²² P. Legendre, *Sur la question dogmatique en Occident* (1999), at 205.

