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Concerning French International Law Manuels: A Critical Review of the Principal French Textbooks In Public International Law

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REVIEW ESSAY

CONCERNING FRENCH INTERNATIONAL LAW *MANUELS*: A CRITICAL REVIEW OF THE PRINCIPAL FRENCH TEXTBOOKS IN PUBLIC INTERNATIONAL LAW[1]

DOMINIQUE CARREAU,[2] DROIT INTERNATIONAL PUBLIC (Pedone, 8th ed. 2004).
JEAN COMBACAU & SERGE SUR,[3] DROIT INTERNATIONAL PUBLIC (Montchrestien, 6th ed. 2004).
EMMANUEL DECAUX,[4] DROIT INTERNATIONAL PUBLIC (Dalloz, 4th ed. 2004).
PIERRE-MARIE DUPUY,[5] DROIT INTERNATIONAL PUBLIC (Dalloz, 7th ed. 2004).
ALAIN PELLET & PATRICK DAILLIER,[6] DROIT INTERNATIONAL PUBLIC (L.G.D.J., 7th ed. 2002).

*Reviewed by Alix Toublanc**

I. INTRODUCTION

The perspectives of French lawyers concerning international law and international institutions are formed largely by the basic course in public international law that they took as law students. Students in the course attend formal lectures by the professor (*cours magistraux*) and often supplementary section meetings, or tutorials, with instructors (*travaux dirigés*), as well as read all or part of a basic textbook (*manuel*) in public international law and other assigned materials.

One way to gain insight into the fundamental ways of thinking about international law of French lawyers and law-trained officials is to take a close look at the *manuels* that they studied as law students. Are these *manuels* narrow and technically focused, limiting inquiry to the text of treaties and other authoritative sources of international law? Or are they broad-ranging and policy-oriented, opening avenues to consideration

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1. The first difficulty in writing this article was selecting the textbooks to analyze. It was solved by using the two criteria of representation and diversity of perspective. The analysis was thus limited to those textbooks used most by students that also presented the personal views of the author or authors. Although other textbooks are not discussed, the ones that are should provide a representative overview of the diversity of French doctrine.

2. Dominique Carreau is a professor at the Université de Paris I (Panthéon-Sorbonne).

3. Jean Combacau and Serge Sur ("Combacau-Sur") are professors at the Université de Paris II (Panthéon-Assas).

4. Emmanuel Decaux is a professor at the Université de Paris II (Panthéon-Assas).

5. Pierre-Marie Dupuy is a professor at the European University Institute and the Université de Paris II (Panthéon-Assas).

6. Patrick Daillier and Alain Pellet ("Daillier-Pellet") are professors at the Université de Paris (Nanterre). Alain Pellet is a member and former President of the United Nations International Law Commission.

of a wide variety of factors? Do they advocate and employ methods which privilege logical and deductive reasoning for arriving at solutions to legal problems? Or do they direct attention to analysis that looks also to the purpose of rules? Do they present international law from a policy-neutral perspective? Or do they engage in judgments about existing rules or suggest the development of new rules? Do they conceive international law as state-centered? Or do they see it rather from a "world community" perspective? These are some of the questions which will be addressed in this article.

Presenting French textbooks to the American internationalist public logically leads one to try to explain how they differ from the casebooks used by American law students.[7] This, however, raises a further, implicit question: whether there is sufficient unity in French doctrine to justify a presentation of the underlying spirit of French textbooks as a whole.

The first question is relatively easy to answer because there are clear differences in the form of French *manuels* and American casebooks: French textbooks are almost always smaller in size than American casebooks. The main reason is that, as a general rule, they do not include the documents and annexes which appear in abundance in American casebooks, i.e., sizeable extracts from case law and the writings of scholars. In France, these are simply quoted and summarized by the author of the textbook because these sorts of documents are more often provided in handouts distributed to students to prepare tutorials rather than directly included in the textbooks themselves.[8]

The second point appears more difficult to resolve: is there sufficient substantive unity between these textbooks to justify presenting them as a whole and developing "the" French concept of international law, which is probably what the American internationalist reading this review is hoping to find? Of course, there are many similarities, especially in the presentation of the subject in general. Each textbook commences with a more or less detailed study of the history of international law and a description of the various schools of thought. This is followed, although the order may vary, by a study of the relations between international and national law, sources, subjects, the application of international law in the international and national legal orders, the responsibility of states, the law of peace and international security, and the regime of international spaces, which is particularly developed in the Combacau-Sur textbook. However, the latter excludes economic questions relating to trade regulation, investment, and development law, whereas these matters are presented by Pierre-Marie Dupuy and amply developed in the Daillier-Pellet textbook. Combacau-Sur, Daillier-Pellet, and Pierre-Marie Dupuy also analyze questions relating to environmental law. Human rights, another sensitive subject of contemporary inter-

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7. For a critical review of the leading contemporary American international law casebooks, see David J. Bederman, *International Law Casebooks: Tradition, Revision, and Pedagogy*, 98 AM. J. INT'L L. 200 (2004) (book review).

8. The exception to this rule is Emmanuel Decaux's textbook, DROIT INTERNATIONAL PUBLIC, which includes many extracts from case law and doctrine. French law students also have access to important documents, like the U.N. Charter, Vienna Convention on the Law of Treaties, many U.N. General Assembly and Security Council Resolutions, etc. in PIERRE-MARIE DUPUY, LES GRANDS TEXTES DE DROIT INTERNATIONAL PUBLIC (4th ed. 2004). In fact, Professor Dupuy indicates in the Preface to this work that it is cross-referenced to his *manuel*, and his *manuel* is cross-referenced to his collection of documents. In this sense it resembles a documentary supplement to an American casebook.

national law, is discussed in all the textbooks, but particularly well developed in those of Pierre-Marie Dupuy and Daillier-Pellet.

Nevertheless, making a list of the subjects common to all the authors clearly does not allow us to determine whether there is any unity of doctrine: a "French concept" of international law. The way in which these subjects are treated will be the determining factor. It is the doctrinal conclusions drawn by their authors from case law and practice that will reveal any unity or important variations in the principal French public international law textbooks.

In fact, there are two main sorts of variation in French textbooks. They first become evident at an early stage, when the authors define the object of study and the methodology. Part I of this article will therefore address the questions of definition and methodology. Differences among French textbooks also result from more substantive theoretical disagreements concerning the nature and meaning of international law. These disagreements relate to differing views with respect to objectivism[9] and voluntarism,[10] which will be addressed in Part II of this article. Thus, although it will not be possible to present American readers with a unitary French concept of international law, they may, at least, be impressed by the richness and diversity of French doctrine.

II. PRELIMINARY PROBLEMS OF DEFINITION AND SCOPE OF ANALYSIS

The diversity of French doctrine is evident in the very first pages of the textbooks we are considering with their different definitions of international law. This is confirmed by varying conceptions of the appropriate scope of the study, although one should note the common concern of all authors to present the most neutral analysis possible.

A. The Problem of Defining International Law

The content of a textbook on international law logically depends, above all, on the definition of the subject to be studied that is chosen by the authors. As there is no objective definition of international law, one may prefer a more or less strict, or more or less classic definition extending from the law governing interstate relations to the law governing transnational phenomena more generally. Unsurprisingly, one finds a wide variety of definitions in French textbooks, from the most classic to the broadest, which exercise a decisive influence on the substantive content of the textbooks and the subjects studied. Although there is no real unity in French doctrine on this point, it is possible to observe a dominant tendency.

The most restrained definition may be found in the textbook by Jean Combacau and Serge Sur: "Public international law is the law produced through relations between two or more States."[11] The classicism of this definition already foreshadows the

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9. Objectivism determines that the binding force of law is based on a reference to something outside will, outside the frame of Kelsenian formalism, on objective elements based on the nature of the society or on social needs which the State can only record. Positive law is considered as the more or less successful translation of objective law, which preexists and gives the binding force to positive law.

10. Voluntarism determines that the binding force of international law is based on the consent of the subjects of law, especially the sovereign States.

11. 1 JEAN COMBACAU & SERGE SUR, DROIT INTERNATIONAL PUBLIC 15 (Montchrestien, 6th ed. 2004)

consequences for questions such as the sources and subjects of international law. A wider definition is provided in Pierre-Marie Dupuy's textbook: "International law is composed of the whole range of rules and bodies intended to govern international society."[12] A similar perspective can be found in the definition adopted by Alain Pellet and Patrick Daillier: "International law is defined as the law applicable to international society."[13] The implicit intention not to limit international law to a purely interstate phenomenon is patent in these definitions. Emmanuel Decaux states this intention explicitly: "International law is no longer interstate law, limited to relations between a closed club of States; it is the law of international society as a whole, governing a range of subjects whose transnational relations are constantly increasing."[14] Dominique Carreau even considers that one can no longer use the term "public international law," as law defining relations between states, because this no longer corresponds to the state of contemporary international society. The author would prefer to adopt the position of Philip Jessup, asserting that we should now use the term "transnational law," i.e., "all law which regulates actions or events that transcend national borders."[15] This wide range of definitions, from the most Westphalian to the most contemporary, testifies to the great diversity of French doctrine. The consequences of this diversity in definition are significant.

The first group of definitions dictates a strictly limited field of study, excluding any study of international relations, private international law, or transnational law. Jean Combacau and Serge Sur thus consider that the "rules governing private transstate relations and rules of any origin that do not stem from the state legal order" do not come within the ambit of their study.[16] Alain Pellet and Patrick Daillier's textbook presents a less strictly interstate definition of international law, although they explicitly indicate that it excludes private international law and *lex mercatoria*.[17] Dominique Carreau's textbook counters this dominant tendency, stating that it will also "include those areas coming within the French conception of private international law, such as international contracts and the relations between States and individuals."[18] Accordingly, the author covers the question of agreements between non-state authorities.[19]

Emmanuel Decaux's textbook stands out for its inclusion of "the forces and limits of law in the 21st century world, including issues relating to globalization and American unilateralism, the instrumentalization of international justice and the challenges of terrorism."[20] This approach is both wider and more political. It is less strictly technical, and the frontier with international relations is less marked. Thus,

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(my translation).

12. 2 PIERRE-MARIE DUPUY, DROIT INTERNATIONAL PUBLIC 1 (Dalloz, 7th ed. 2004) (my translation).

13. ALAIN PELLET & PATRICK DAILLIER, DROIT INTERNATIONAL PUBLIC 35 (L.G.D.J., 7th ed. 2002) (my translation).

14. EMMANUEL DECAUX, DROIT INTERNATIONAL PUBLIC 14 (Dalloz, 4th ed. 2004) (my translation).

15. DOMINIQUE CARREAU, DROIT INTERNATIONAL PUBLIC 34 (Pedone, 8th ed. 2004); *see also* PHILIP C. JESSUP, TRANSNATIONAL LAW (1956).

16. COMBACAU & SUR, *supra* note 11, at 17.

17. DAILLIER & PELLET, *supra* note 13, at x. *Lex mercatoria* was a system of customary law that regulated the dealings of mariners and merchants until the 17th century. It's principles formed the basis of the Uniform Commercial Code. BLACK'S LAW DICTIONARY 893 (7th ed. 1999).

18. CARREAU, *supra* note 15, at 34 (my translation).

19. *Id.* at 175-98.

20. DECAUX, *supra* note 14, at front cover.

from the outset, it appears clear that there is no unity in French doctrine, since there is not even agreement on the subject of a textbook on international law.

B. A Common Positivist Methodology

What do French internationalists think the function of an international law textbook should be? Should it simply explain existing rules in the most neutral, scientific way possible? Or should it also take a stand, denounce weaknesses in the system as described, and suggest improvements?

French doctrine was divided on this point as early as the period between the two World Wars. Some of those who were doctrinally close to positivism considered that the role of the jurist is simply to present the current state of the rules in the most impersonal manner possible. Others, on the contrary, following the natural law tradition, wished to go beyond description to denounce the unjust effects of some rules. Thus, for example, Edmond Giraud, a representative of the positivist perspective, claimed that "the role of the professor is essentially to make an exact, true and clear statement of positive law, whatever his opinion of that law."[21] On the other hand, Louis Le Fur considered that both legal good and evil exist and legal neutrality would be social abdication, rewarding injustice and violence.[22] Much later, Michel Virally would similarly claim that "[t]he analysis of positive law appears impracticable without an appreciation of the justice or injustice of its provisions."[23]

At first glance, a study of current French international law textbooks seems to demonstrate that this quarrel has calmed and that the search for neutrality dominates most of them. Does this mean that positivism has won this battle? Yes, as long as a distinction is made, as suggested by Norberto Bobbio, between positivism as a "means

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21. Edmund Giraud, *Le droit positif. Ses rapports avec la philosophie et la politique*, *in* MÉLANGES BASDEVANT 222 (1960). Of course, Hans Kelsen's position on this subject is well known, affirming that "legal science should not evaluate or judge, but rather provide a description unsullied by any values." Hans Kelsen, *Théorie du droit international public*, 84 RECUEIL DES COURS 1, 8 (1953). Kelsen (1881-1973) was an Austrian, subsequent U.S. national, and professor (Universities of Vienna, Cologne, Geneva, Harvard, and Berkeley). His principal contributions to international law were *Peace through law* (1944), *The Law of the United Nations* (1950), and *Principles of international law* (1952). Kelsen, who remains better known and more influential on continental Europe applied something like Kant's Transcendental Argument to law. The normative theory of Kelsen considers law as being made up of a series of norms, ultimately deriving their validity from a basic norm (Grund norm), and this basic norm is in turn presupposed by those seeing legal order as normative. As a legal positivist, Kelsen does not mean to ground the normative force of his basic norm on its moral validity, but makes his theory pure of sociological, moral, or practice-based elements.

22. Louis Le Fur, *La théorie du droit naturel depuis le XVIIe siecle et la doctrine moderne*, 18 RECUEIL DES COURS 259, 385 (1927).

23. MICHEL VIRALLY, LE DROIT INTERNATIONAL EN DEVENIR 67 (1990) (my translation). *See also* Hersch Lauterpacht, *Régles générales du droit de la paix*, 62 RECUEIL DES COURS 95, 177-82 (1937). Hersch Lauterpacht's description of the tasks and problems of the science of international law includes the critical examination of the reality of international obligations flowing from treaties and the adaptation of traditional notions of international law to reflect progress in other areas of the law.

of approaching legal studies" and positivism as a theory or as an ideology.[24] Indeed, a positivist approach is recognized by the main international law textbooks.

Thus, Jean Combacau and Serge Sur acknowledge that their textbook "follows a doctrinal continuum, that of legal positivism . . . . Just like the most rigorous internal disciplines, international law is based on a technique. This work follows that technique because it best explains the concrete role of law in international practice . . . ."[25] For his part, Pierre-Marie Dupuy uses a "scientifically positive" approach, extolling methodological positivism, "analyzing the international legal phenomenon, including its most contemporary aspects, such as it is," which the author summarizes as "well tempered scientific positivism."[26] The textbook by Alain Pellet and Patrick Daillier participates in the rebirth of a form of positivism without dogmatic voluntarism, a pragmatic positivism describing the state of positive law through a systematic examination of all sources, case law as well as diplomatic practice.[27] Methodological positivism is extolled in the name of refusing an ideological approach to law. Thus, for example, Jean Combacau and Serge Sur denounce the fact that "international law has often been the object of approaches that relate more to discourse about the law than to a study of the law itself."[28] For their part, Patrick Daillier and Alain Pellet reject the "legal militancy" of some textbooks, which aim to turn international law doctrine into an instrument of political action,[29] whereas Pierre-Marie Dupuy states his intention to describe the law "such as it is and not such as one may want it to be."[30]

This common intention to describe the law such as it is actually practiced is clearly perceptible in the analysis of the relations between international and national law. Indeed, the quarrel between monism and dualism seems to have lost the force and dogmatism it showed in the period between the two World Wars. The positions taken currently are more subtle. Even Alain Pellet and Patrick Daillier, who expressly defend the monist concept of the pre-eminence of international law, acknowledge the fact that in practice the two doctrines often lead to similar results, dualist countries agreeing that international law is "part of the law of the land," and monist countries requiring procedures for the introduction of international rules into internal law.[31] Emmanuel Decaux sees the monism/dualism quarrel as "Manichean" and "generally outdated."[32]

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24. Norberto Bobbio (1909-2004) was Italy's leading legal and political philosopher (THE PHENOMENOLOGICAL TURN IN SOCIAL AND LEGAL PHILOSOPHY (1934), THE USE OF ANALOGY IN LEGAL LOGIC (1938), A THEORY OF JUDICIAL NORMS (1958)). He elaborated a general theory of the practice and validity of law and regarded the Kelsenian theory as missing the institutional context of law making. Law and rights are conceived as a historical achievement belonging to a particular form of State. Bobbio distinguishes three main senses of legal positivism: as a value free approach to law, as a legalistic theory of law and State, and as an ideology of justice affirming the duty to obey the law as such. *See* NORBERTO BOBBIO, IL POSITIVISMO GIURIDICO (1996).

25. COMBACAU & SUR, *supra* note 11, at v (my translation).

26. DUPUY, *supra* note 12, at 396, 362 (my translation).

27. PELLET & DAILLIER, *supra* note 13, at 78, 80.

28. COMBACAU & SUR, *supra* note 11, at v (my translation).

29. PELLET & DAILLIER, *supra* note 13, at 81.

30. DUPUY, *supra* note 12, at 396 (my translation).

31. PELLET & DAILLIER, *supra* note 13, at 95.

32. DECAUX, *supra* note 14, at 67.

Pierre-Marie Dupuy lists the limits of each theory taken in isolation and notes that in theory, these relations are established largely on internal constitutional options adopted by each State and, in practice, on the interpretation adopted by their courts.[33] The same observation is made by Combacau and Sur, leading them to the conclusion that the monist option "is just a deviation, or even a modality of dualism."[34] Therefore, the study of practice is fundamental and testifies to a realistic, neutral approach to the law. Nevertheless, although the analysis of practice is similar and, in this case, leads to the common observation that state constitutions offer a variety of solutions, the theoretical consequences drawn by some authors are more diverse: the need for monism claimed by Daillier and Pellet, the inevitability of dualism according to Combacau and Sur.

This shows the difficulty, if not impossibility, of a totally neutral, scientific approach to the law, given that it is not a precise science, admitting various interpretations and divergent practices. In addition, subjectivity is reintroduced in the textbooks due to the practical need to make a selection among all the data collected, developing some areas at the expense of others. Emmanuel Decaux admits this quite simply: "[W]e have sought to bring out the essential elements, by insisting subjectively on a number of major aspects that help to situate current issues in international law."[35]

C. The Problem of the Scope of Analysis

In reality, the interpretation of objective data taken from practice inevitably passes through the filter of the preconceived ideas that different authors have of the matter, its limits and even its object, aims, and underlying nature. Michel Virally had already issued a warning on this subject: "One does not seek to establish what the law is, but what it should be, based on philosophical, methodological or even ideological predispositions."[36] These substantive problems appear right from the start of the analysis, when delimiting the scope of the relevant elements to be taken into account during the study. Thus, different responses will be given to the question whether it is necessary to include a consideration of the origins and aims of law in a description of the legal phenomenon.

From a scientific viewpoint, one may be tempted to reply in the negative, because these questions are likely to be influenced by the moral or religious convictions of the authors. They introduce the study of values into the description of the law—values that suffer from their relativity. Yet, if one prudently excludes these questions, the resulting description may be incomplete, only describing the visible aspects of the legal phenomenon. Thus, despite the same concern for realistic description of the law, a postulate common to all authors, the responses may vary greatly, which explains the diversity of French textbooks in this regard.

For Jean Combacau and Serge Sur, the search for scientific neutrality implies a strictly technical approach to the law.[37] Yet this is seen as insufficient by Patrick

33. DUPUY, *supra* note 12, at 407.
34. COMBACAU & SUR, *supra* note 11, at 181 (my translation).
35. DECAUX, *supra* note 14, at 1 (my translation).
36. VIRALLY, *supra* note 23, at 31 (my translation).
37. COMBACAU & SUR, *supra* note 11, at v.

Daillier and Alain Pellet, who attempt to avoid "dogmatism" so as to remain in contact with the realities of international life.[38] The technical approach must, therefore, be complemented by a study of the social context. Pierre-Marie Dupuy also notes that, from his perspective, it is not very scientific to exclude the social and historical context, such as the finality of a rule, which allows reintroduction into the analysis of considerations of justice or social necessity, at least when they are directly deduced from the rule.[39] He writes that "truly sociological data . . . cannot be irrelevant to legal analysis, if only because it has a direct impact on the technical aspects of the law. Thus, the integration of an analysis of such data does not mean taking an ideological approach or taking one's desires for reality."[40]

The last two approaches are in direct opposition to Kelsen's affirmation that:

> [Pure theory] does not discount the fact that the content of all legal systems is determined by historical, economic, moral and political factors, but . . . . [I]t leaves it to the political, economic and historical sciences . . . to explain why a particular positive legal system has a particular content and not another . . . . Indeed, the knowledge of positive law is based on other principles than the knowledge of historical and economic facts, or moral and political values . . . .[41]

On the contrary, these definitions hark back directly to the preoccupations of the theory of sociological objectivism, in their attempt to bring to light the substantive sources of law constituted by social necessity. That the majority of French doctrine should be favorable to this approach is not surprising given the heritage left by the philosophy of Georges Scelle[42] and Maurice Bourquin.[43] These differences in the scope of analysis are not without effects and lead to important differences concerning the very nature of international law.

III. OPPOSING CONCEPTIONS OF INTERNATIONAL LAW

Although not as vigorous or radical as the doctrinal disagreements during the period between the two World Wars, the differences identified above are linked to the objectivist versus voluntarist debate concerning the origin of international law and the analogy with national law.

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38. PELLET & DAILLIER, *supra* note 13, at 77-78.

39. DUPUY, *supra* note 12, at 10.

40. *Id.* at 356 (my translation).

41. Kelsen, *supra* note 21, at 7 (my translation).

42. Georges Scelle (1878-1961), French public servant and professor (Dijon and Geneva). Principal works: LE PACTE DES NATIONS ET SA LIAISON AVEC LES TRAITÉS DE PAIX (1919); PRÉCIS DE DROIT DES GENS (1932 and 1934), THÉORIE ET PRATIQUE DE LA FONCTION EXECUTIVE EN DROIT INTERNATIONAL (1936). Scelle's theory emphasized the material sources of international law, especially social necessity, and predicted the growth of federalism as the inevitable consequence of the interdependence of nations. For Scelle, the international world was already a society and possessed a hierarchical constitution.

43. Maurice Bourquin (1884-1961), born in Tournai, Belgium, a professor (Geneva), and diplomat at the Société des nations (League of Nations). Bourquin analysed law as a product of social life and emphazised the interdependence of nations, but his doctrine is less dogmatic and systematic than Scelle's. *See generally* Maurice Bourquin, *Academie de droit international*, *in* 35 RECUEIL DES COURS (1931).

A. A Persistent Cleavage Between Positivism and Objectivism

The issue here is the conceptual framework through which the data collected will be filtered and analyzed. Their classification, explanation, and the identification of their meaning are based on theoretical predispositions that appear clearly in all the textbooks considered. This is true of the voluntarist positivism in the textbook by Jean Combacau and Serge Sur. Significantly, chapter two is entitled: "The origin of international law: international commitment by the State." The authors explain that "the criterion for the existence of a rule of international law resides ultimately in a commitment by States with respect to it and the international obligations of each State by virtue of its own commitment. This is the basis of all international law."[44] The issue of origins having been so clearly resolved, questions regarding the social and historical context become irrelevant, at least in the context of legal analysis, and the strictly technical approach recommended by the authors is thus the most legally relevant solution. On the contrary, the importance of the will of the state in the creation of international law is minimized in Alain Pellet and Patrick Daillier's textbook, which criticizes voluntarism for not taking account of the social context in which law is formed. They note that, in reality, "a State that expresses its will acts under the pressure of a specific economic and political necessity and within a given social context."[45]

This explains the primary importance, recognized by these authors, of describing sociological aspects. Developments concerning the social context underlying the elaboration of a rule thus respond to a logical need. Accordingly, this is the textbook that most clearly integrates the French heritage of sociological objectivism identified by Georges Scelle[46] that sees law as the fruit of social necessity, the state simply observing the objective, prior existence of the rule. The role of the state is thus reduced to the simple function of recording the law. Although the authors' approach is less systematic and dogmatic in this case, it is nevertheless directly influenced by the "Scellian" philosophy.[47]

Finally, Pierre-Marie Dupuy's textbook, while recognizing the essential role of consent, argues that it is no longer possible "to continue interpreting the most recent means of rule creation . . . using the conceptual framework that was used at the time of the Lotus case."[48] The author rejects, therefore, a strict voluntarist approach. In practice, this textbook pays great attention to the social context of rule-making, which is similar to the approach of sociological objectivism. It also attempts to study normative goals, noting in particular that it appears "absolutely fundamental not to forget that the United Nations Charter . . . assigns specific goals to international society as a whole."[49] This attention to the aims of the rule, which may also be found in the

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44. COMBACAU & SUR, *supra* note 11, at 47 (my translation).

45. PELLET & DAILLIER, *supra* note 13, at 103 (my translation).

46. *See supra* note 42 and accompanying text.

47. The authors do, however, keep a certain distance from Scelle and criticize his rejection of the concept of sovereignty, which they regard as contradicted by the reality of international society. PELLET & DAILLIER, *supra* note 13, at 106.

48. DUPUY, *supra* note 12, at 395 (my translation).

49. *Id.* at 356-57. In the *Lotus* case, S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), the Permanent Court of International Justice decided whether Turkey could exercise criminal jurisdiction

work of Dominique Carreau and Emmanuel Decaux, brings the author close to the natural law movement, although in a non-dogmatic way and attentive to the realities of international life, as extolled by Charles de Visscher, who relied on "human goals, the basis of the international order," as "the ultimate reasons for the legal rule."[50]

B. International Law: Primitive Law Still Being Perfected or a Different Sort of Law?

In the final analysis, these differences concerning the scope of international law explain the divergence between the authors. Indeed, they provide radically differing replies to the following question: Is current international law still at a sort of primitive, imperfect stage, requiring reliance on the centralized, state models to continue improving, or, alternatively, does it have its own specific irreducible nature and characteristics that render it impossible to compare the two systems? This comes down to asking whether the international system will continue to apply the system inherited from the Westphalian treaties, based on the sovereign state as the sole or dominant subject of international law. Is its underlying principle a simple law of coexistence between equal sovereignties or has it become an essentially cooperative form of law, perhaps even the law of an emerging international community that will eventually become centralized in the image of its constituent states?

The textbook by Jean Combacau and Serge Sur is clearly centered on the permanence and dominant presence of the state. This appears in the preface, which states that the book "is, above all, attentive to international law as produced and applied by States, which are both its source and essentials subjects."[51] This is in no way reduced by the emergence of international organizations which, except for the specific case of the European Union, result from a "static interstate approach"[52] and have not become real players alongside their member states. They are thus treated as "second level subjects, fundamentally subordinate to their creators."[53] The expression "international community" is rarely used by these authors and always between inverted commas, since it lacks the political homogeneity "that would justify giving it an institutional organization separate from that of States."[54]

Beyond the absence of any institutional community, the authors also insist on the weakness of the normative community. This explains their rather skeptical analysis of *jus cogens*, seen as the fruit of a bygone epoch during which both new and socialist

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over a French sea captain who collided with a Turkish ship on the high seas. *Id.* at 5. The court concluded that no provisions of international law prohibited such jurisdiction and thus it was permissible. *Id.* at 30. In a brief dictum, the court explained, "[t]he rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted . . . . Restrictions upon the independence of States cannot therefore be presumed." *Id.* at 18. The *Lotus* case is a significant example of a voluntarist conception of international law. For some authors, this conception of international law is still relevant.

50. CHARLES DE VISSCHER, THÉORIES ET RÉALITÉS EN DROIT INTERNATIONAL PUBLIC 153 (4th ed. 1970). *See also* Pierre-Marie Dupuy, *The European Tradition in International Law: Charles de Visscher*, 11 EUR. J. INT'L L. 871, 873 (2000).

51. COMBACAU & SUR, *supra* note 11, at v.

52. *Id.* at 705.

53. *Id.*

54. *Id.* at 7 (my translation).

states influenced the content of international law. The nature and real meaning of *jus cogens* were never clarified and its influence on international practice is questioned.[55] Similarly, the concept of an "international public order" is treated as a militant view of international law that is far from being shared unanimously. This opinion is developed during the study of collective countermeasures and the concept of international crime.[56] This classic, Westphalian vision of international law emphasizes its permanent aspects. The changes during the last few decades are thus seen as quantitative rather than qualitative. International society is decentralized by nature and has no reason to align itself on the centralized state model. The introduction of concepts such as "public order" or even, to a certain extent, the distinction between civil and criminal law, is thus perceived as a perturbation because it counters a proved, secular logic.

Adopting a nuanced dialectic approach, Pierre-Marie Dupuy traces the evolution of international law, but also recognizes the contradictions which affect it. He summarizes this tension as "the relative progress of international law."[57] Although the "pre-eminence" of states is recognized, the author also insists on the "constants and evolution of international law," which:

> is still the law of coexistence between equal sovereignties, contributing to the adjustment of their respective competence and competing pretensions. It equally maintains to be the law of cooperation in a range of areas in constant expansion. Finally, it is the law of the international community and Humanity, whose interests it will be required to protect in the nascent century, or even guarantee their Survival.[58]

This even-handed vision is perceptible in Pierre-Marie Dupuy's study of international organizations. The author recognizes that, in many respects, they remain in strict dependence on states. He also notes, however, that through the dynamics of their operation, international organizations are forced to escape the tutelage of their members[59] and thus acquire legal autonomy, eventually ending up "face to face with States."[60] The theme of the "international community" is also analyzed as being one of the "major axes of contemporary international law."[61] Although the ideological connotations of the concept are recognized, the author demonstrates that it still has a normative impact leading to an international public order. Nevertheless, he observes that its effectiveness is limited by the absence of institutional centralization.[62] Human rights and the issue of individual legal personality are considered to be one of the major phenomena of contemporary international law, which "has probably displaced the centre of gravity of the entire international legal system, even though this remained imperceptible at first."[63] This vision is far from being static, or supportive of the separate, inherently interstate nature of international law. It clearly shows the

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55. *Id.* at 159.
56. *Id.* at 215.
57. DUPUY, *supra* note 12, at 102 (emphasis omitted).
58. *Id.* at 23 (my translation).
59. *Id.* at 146.
60. *Id.* at 170.
61. *Id.* at 389.
62. *Id.*
63. *Id.* at 26 (my translation).

dynamism of the system, although this dynamism is seen as challenged and its results uncertain. There is no dogmatism, therefore, but no principled solution either.

Emmanuel Decaux notes a rupture with classic international law and points out the dynamics of an international order searching for justice and peace. He defines three stages in the evolution of international law in which contemporary international law is placed under the sign of globalization,[64] that of an international society "yet to be" requiring a "world organization above States."[65] This implies an ultimate stage of evolution that does not go as far as envisaging a "superstate," but at least a high level of centralization. Dominique Carreau's textbook also presents a dynamic perspective on international law, the evolution of which seems to have accelerated since 1945. The author stigmatizes old-fashioned, obsolete concepts of international law, which are undergoing both horizontal and vertical transformation, integrating new actors and new areas. This does not prevent the author, when comparing national and international law, from noting that the latter is still marked by its inferiority and weakness, especially in the domain of execution and control, and that it has serious failings.[66] This textbook undoubtedly pushes furthest the comparison with national law, taken as a paradigm.

Conversely, the Daillier-Pellet textbook places particular emphasis on the theme of the international community. In fact, it is the title of the second section, which underlines the progressive recognition of a certain legal personality of the international community.[67] In particular, the authors note that the community does *not yet* enjoy the capacity to exercise its rights directly. Accordingly, it is characterized as a minor subject of international law.[68] The creation of *jus cogens*, "a considerable legal event,"[69] is proof for the authors of the existence of an international public order. On this subject, the authors assert that "[i]n establishing the written constitutional bases of the international community, you have to start somewhere and this occurred with the principle [of *jus cogens*] adopted in the [Vienna] Convention."[70] This evolution may still be far from complete, yet the dynamics of the international order and the irresistible attraction of the national model are palpable, with the temptation to organize international society along the lines of a superstate with its own constitution.

IV. CONCLUSION

Law of a naturally quasi-anarchic decentralized society, law of a society in full mutation and affected by contradictory tensions, or even law of an emerging international community? These are the fundamental fractures revealed by the study of French internationalist doctrine through its main textbooks. These fractures can be summarized in a few questions: Is the Lotus case view of law still relevant today? Is it a purely interstate phenomenon based on consent or a product of social life the State

64. DECAUX, *supra* note 14, at 309.
65. *Id.* at 14.
66. CARREAU, *supra* note 15, at 36.
67. PELLET & DAILLIER, *supra* note 13, at 401 (my translation).
68. *Id.* at 402.
69. *Id.* at 208.
70. *Id.* (my translation).

can only record? Can one speak of progress in international law toward an international community?

The great diversity of answers given to these questions show that there exists no "French school" of international law, apart from a common positivist methodology, which is at least perhaps what really distinguishes French casebooks from American casebooks. The debate about the foundations and goals of international law seems to still endure in France.

STRIKING AN EQUITABLE BALANCE: PLACING REASONABLE LIMITS ON RETROACTIVE ZONING CHANGES AFTER *KITTERY RETAIL VENTURES, LLC V. TOWN OF KITTERY*

I. INTRODUCTION
II. RETROACTIVITY OF ZONING ORDINANCES
III. UNPACKING COMMON LAW VESTED RIGHTS DOCTRINE
  A. The Triggering Question: When Do Rights Vest?
  B. The Scope Question: Vested Right To Do What?
  C. The Equitable Backstop: Wrongful Delay, Bad Faith, and Discriminatory Enactment
IV. *KITTERY RETAIL VENTURES, LLC V. TOWN OF KITTERY*
V. DISTINGUISHING *KITTERY RETAIL VENTURES* AND *FISHERMAN'S WHARF*
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VII. A LEGISLATIVE SOLUTION FOR REASONABLE RETROACTIVITY
  A. Statutory Approaches to "Vested Rights" in Other States
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VIII. CONCLUSION