

## Remarks on Scelle's Theory of "Role Splitting" (*dédoublement fonctionnel*) in International Law

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It is the purpose of this paper to focus briefly on one of the main pillars of G. Scelle's contribution to the theory of international law, namely his construct of "role splitting" ("*dédoublement fonctionnel*") in the international legal community. To this end, I shall first sketch out Scelle's view and then endeavour briefly to appraise it. Finally, I shall raise the question of whether the doctrine is still vital today.<sup>1</sup>

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<sup>1</sup> On Scelle's doctrine of *dédoublement fonctionnel*, see in particular the following works by him: *Précis de droit des gens. Principes et systématique* (Vol. I) (1932) 43, 54-56, 217; (Vol. II) (1934) 10, 319, 450; (hereinafter: *Précis*); 'La doctrine de L. Duguit et les fondements du droit des gens', in *Archives de philosophie du droit et de sociologie juridique* (1932) 98-99; 'Règles générales du droit de la paix', in 46 *Recueil des cours de l'Académie de La Haye* (1933) 356. (hereinafter: *Règles générales*); 'Essai sur les sources formelles du droit international', in *Recueil en l'honneur de F. Gény* (Vol. III) (1934) 410; 'Théorie du gouvernement international', in *Annuaire de l'Institut international de droit public* (1935) 41-59; 'Théorie et pratique de la fonction exécutive en droit international', in 55 *Recueil des cours de l'Académie de La Haye* (1936) 91-106 (hereinafter: *Théorie et pratique*); *Manuel de droit international public* (1948) 15-24, 799. (hereinafter: *Manuel*); 'Quelques réflexions sur l'abolition de la compétence de guerre', in *Revue générale de droit international public* (1954) 7-13 (hereinafter: 'Quelques réflexions'); 'Le phénomène juridique du dédoublement fonctionnel', in *Rechtsfragen der Internationalen Organisation – Festschrift für H. Wehberg* (1956) 324-342 (hereinafter: 'Le phénomène juridique'); 'Quelques réflexions hétérodoxes sur la technique de l'ordre juridique interétatique', in *Hommage d'une génération de juristes au Président Basdevant* (1960) 473-488 (hereinafter: 'Quelques réflexions hétérodoxes').

On Scelle's doctrine at issue see in particular H. Wiebringhaus, *Das Gesetz der funktionellen Verdoppelung. Beitrag zu einer universalistischen Theorie des internationalen Privat- und Völkerrechts* (2nd ed. 1955) 23-38. See also Ch. Carabiber, 'Le fédéralisme international dans l'œuvre du professeur G. Scelle', in *La technique et les principes du droit public – Etudes en l'honneur de Georges Scelle* (Vol. I) (1950) 55-66; F. Luchaire, 'L'exercice de la fonction exécutive du droit international par les organes étatiques', *id.* (Vol. II) 815-820. A. Miaja de la Muela, 'La teoría del desdoblamiento funcional en el derecho internacional privado', in *Revista española de derecho internacional* (Vol. VI) (1953) 133-141; G. Vlachos, 'La théorie du pluralisme international de G. Scelle', in *Philosophia – Yearbook of the Research Center for Greek Philosophy at the Academy of Athens* (1983-84) issue 13-14, at 429-443.

## I. Scelle's Doctrine: Basic Premises

To grasp Scelle's doctrine in its real purport, it is necessary to become aware of its basic conceptual assumptions. They are four, and I shall outline them briefly.

The first is that Scelle does not conceive the international community as most other international lawyers do, namely as an agglomerate of states and inter-state entities (intergovernmental organizations) governed by a body of rules designed to direct and regulate their behaviour. In contrast, Scelle, under the clear influence of the French publicist Léon Duguit's doctrine of the plurality of legal orders, takes the view that the world community ("*société internationale globale ou oecuménique*") consists of a plurality of communities, starting with the family and moving on to local or provincial communities, regions, nation-wide associations and groupings, up to the state society, to the special or regional international groupings ("*communautés internationales particulières*") and, at the very top, the *civitas maxima*, i.e. the world community. In other words, for Scelle the world community swarms with myriad legal orders (in today's parlance we would call them 'sub-systems'); they do not live by themselves, each in its own area, but intersect and overlap with each other. Within this global community, states constitute the fundamental political element, for in the present historical stage, all individuals and groups are linked to one state or another.<sup>2</sup>

The second basic concept is that according to Scelle one should discard the traditional view whereby in the world community states appear in the form of structures endowed with legal personality: this view, according to Scelle, falls into the trap of anthropomorphizing actual reality. In fact, the world community does not result from the coexistence or the juxtaposition of states, but rather consists of the "interpenetration of peoples through international intercourse" ("*l'interpénétration des peuples par le commerce international*").<sup>3</sup> Individuals and groups establish mutual relations beyond national borders. Indeed, the very essence of the international community is constituted by dealings between individuals; public international law, i.e. the law regulating relations between governments, serves the purpose of facilitating relations between individuals. Two consequences follow. First, the real subjects of international law are not states, but individuals: they act on behalf of states, as "rulers or members of the executive" ("*gouvernants*"), their competence being then discretionary, or as "state officials" ("*agents*"). Another class of subjects consists of mere individuals acting on their own behalf (here one can clearly detect the influence of H. Kelsen's theory of the role of the individual in the international community). The second consequence is that in Scelle's view it would be artificial to differentiate between the branch of international law dealing with governmental action (public international law) and the branch concerned with dealings of individuals (private inter-

<sup>2</sup> *Manuel*, *supra* note 1, at 18.

<sup>3</sup> *Manuel*, *supra* note 1, at 18.

national law or rules governing conflict of laws). For Scelle the two levels – that of inter-state action and that of inter-individual action – are in reality inextricably bound up with each other and indeed constitute but one level of reality.

The third basic concept underlying Scelle's theory of "*dédoublement fonctionnel*" regards the relations between the various legal orders making up the world community. According to Scelle there exists a hierarchy in this regard. All the various communities existing within a state are subject to the state legal order, which conditions their scope, validity and field of competence. All national legal orders are, in turn, subject to the international legal order: international law overrides national law. For Scelle, this however does not mean that international *rules* take precedence over state rules, but that the international legal *order* as such is superior to national legal systems. The reason for this primacy is that if it were not so, the normative force of international law would be precarious, and indeed international law would come down to a set of ineffective principles of ethics (plainly, here the realism normally permeating Scelle's investigation of law yields to an internationalist approach strongly influenced by value judgments).

The fourth underlying assumption of the doctrine at issue is that any legal system, to exist, needs to rely on three basic functions, which Scelle terms "essential social functions": law-making, adjudication and enforcement. Scelle posits these three functions in a rather doctrinaire and dogmatic fashion (clearly in the wake of all those publicists who had insisted that the three basic functions are central to the notion of a state – as the prototype of any legal order).<sup>4</sup>

## II. Scelle's Doctrine: its Essential Content

We are now in a position to illustrate Scelle's doctrine of "*dédoublement fonctionnel*." The great jurist observes at the outset that the "original and persistent flaw of the international legal order" is the lack of legislative, judicial and enforcement organs acting on behalf of the whole community. This being so, and in view of the necessity for any legal order to rest on the three aforementioned functions, the inescapable consequence for Scelle is that the three social functions do exist in the world community, but are organized in a quite unique fashion. As there are no "specifically international rulers and agents" ("*gouvernants et agents spécifiquement internationaux*"), national members of the executive as well as state officials fulfil a "dual" role: they act as state organs whenever they operate within the national legal system; they act *qua* international agents when they operate within the international legal system. Thus, when the head of state or the state legislature take part in the formation of a law-making treaty, they act as international law-making bodies; by the same token, any time a domestic court deals with a conflict of law question, it

<sup>4</sup> For references, see *infra*, notes 27 and 28.

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acts *qua* an international judicial body; similarly, any time one or more state officials undertake an enforcement action (resort to force short of war, reprisals, armed intervention, war proper) they act as international enforcement agencies ("*agents exécutifs internationaux*").<sup>5</sup> To avoid possible misunderstandings, it should be emphasized that for Scelle national officials *do not have double roles which are fulfilled simultaneously*, but a dual role in the sense that they operate in a Dr. Jekyll and Mr. Hyde manner, exhibiting a split personality. In other words, although from the point of view of their *legal status* they are and remain national organs, they can *function either as national or as international agents*.

What I have just recalled applies, in the view of G. Scelle, to classical or traditional international law, which holds sway in a typical "interstate society" ("*société interétatique*"). With this class of society, Scelle contrasts what he terms the "suprastate society" ("*société superétatique*"), where one can discern social organs proper to the society, and distinct from national organs.<sup>6</sup> In this category one finds, according to Scelle, "federalism" (broadly conceived), which embraces such wide range of institutional forms as the federal state and the confederation of states. Plainly, in this class of society the law of *dédoublement fonctionnel* no longer applies.

It should be immediately stressed that this part of Scelle's scientific contribution has been subject to fluctuations and a great deal of uncertainty. The concept of "suprastate society" was introduced by Scelle in the 30s (and either dropped or at least muted in his writings published after 1945) primarily as a sort of "ideal type" ("*Idealtyp*") in the sense of Max Weber.<sup>7</sup> At that stage, Scelle did not develop the concept. He stated a number of times that the League of Nations, although it did not

<sup>5</sup> Scelle explains the double role thus: "dans l'ordre interétatique, où il n'existe pas de gouvernants et agents spécifiquement internationaux, les agents et gouvernants étatiques qui les remplacent sont investis d'un *double rôle*. Ils sont agents et gouvernants *nationaux* lorsqu'ils fonctionnent dans l'ordre juridique étatique; ils sont agents et gouvernants *internationaux* lorsqu'ils agissent dans l'ordre juridique international. C'est ce que nous appellerons *la loi fondamentale du dédoublement fonctionnel*", *Règles générales*, *supra* note 1, at 358. It is useful to mention a more sophisticated definition of the doctrine at issue, formulated by Scelle in one of his last works: "Ce phénomène pourra se définir ainsi: les agents dotés d'une compétence institutionnelle ou investis par un ordre juridique utilisent leur capacité 'fonctionnelle' telle qu'elle est organisée dans l'ordre juridique qui les a institués, mais pour assurer l'efficacité des normes d'un autre ordre juridique privé des organes nécessaires à cette réalisation, ou n'en possédant que d'insuffisants" ('Le phénomène juridique du dédoublement fonctionnel', *supra* note 1, at 331).

<sup>6</sup> In one of his later works Scelle redefined the concept by pointing out the following: "Elle [la technique de 'l'institutionnalisme'] consiste essentiellement à créer, pour l'exercice des fonctions juridiques essentielles de l'ordre international, des organes dont les membres sont *ex officio* dénationalisés, c'est-à-dire indépendants des gouvernants étatiques pour lesquels leurs décisions deviennent obligatoires": 'Quelques réflexions', *supra* note 1, at 9.

<sup>7</sup> Namely a logically precise theoretical construct based on a certain number of elements of reality, and which is not intended to reflect the multiplicity of specific historical situations, but merely to enable us 'to determine the typological locus of a historical phenomenon... to see if, in particular traits or in their total character, the phenomena approximate one of our constructions' (M. Weber, 'Religious Rejections of the World and Their Directions' (1915), in H.H. Gerth & C. Wright Mills (eds.), *From Max Weber: Essays in Sociology* (1967) 323.).

amount to a "suprastate society" proper, constituted a "suprastate phenomenon" very similar to a confederation of states<sup>8</sup> and that with the building up of the League of Nations, the international community had "made a general effort of constructive federalism" ("*un effort généralisé de fédéralisme constructif*").<sup>9</sup> He noted in particular that "federal" elements could especially be discerned on the plane of law-making and of judicial activity.<sup>10</sup> However, Scelle did not delve into the basic question of the relations between the fulfillment of the three social functions in the traditional international community and within the League of Nations (or, after 1945, in the United Nations system). To put it differently, Scelle did not explore in depth the nexus between the old and the new "model" of international community.

This is, in short, what Scelle terms "the fundamental law of role splitting" ("*la loi fondamentale du dédoublement fonctionnel*"),<sup>11</sup> a law that Scelle concedes to be "one of the most shocking concepts for traditional and instinctive views."<sup>12</sup> He points out, however, that at least two compelling reasons make the adoption of his view imperative. First, it would be absurd to characterize a legal act by adopting formal criteria only, with the consequence that any time a legal act is performed by a national agent, it must always and exclusively be termed "national." If, by contrast, allowance is made for the substance and the content of a legal act, it follows that any time such an act deals with an international situation or an international relation, it falls within the purview of the international legal order, and must be regarded as an international act. The second reason is that if one were not to accept Scelle's theory, one should perforce conclude that there are no social functions proper in the

<sup>8</sup> *Précis*, *supra* note 1, I, at 57, 250-260.

<sup>9</sup> *Théorie et pratique*, *supra* note 1, at 101. In a later writing Scelle pointed out that "On a pu voir s'ébaucher, depuis la naissance de la S.d.N. et surtout de l'O.N.U, un système fédéraliste oecuménique qu'on ne peut guère connaître qu'incomplètement tellement il est complexe, fragmentaire et à cheval sur le fédéral et le confédéral": "Le phénomène juridique", *supra* note 1, at 341.

<sup>10</sup> *Théorie et pratique*, *supra* note 1, at 101. In a later writing, Scelle noted that what he then called "the new technique" of legal order undermining state sovereignty was still hesitant and had acquired some weight only in the area of international adjudication and administration: see "Quelques réflexions", *supra* note 1, at 9.

<sup>11</sup> *Règles générales*, *supra* note 1, at 358. In subsequent writings Scelle stated that in his view that of "role splitting" is one of two "fundamental laws" (*lois capitales*) of international law, the other law being that of hierarchy between legal orders (*hiérarchie des ordres juridiques*): see *Manuel*, *supra* note 1, at 20-21. It should be stressed that in later writings Scelle changed his mind on this point. Thus, for instance, in a paper of 1956 he asserted that there are in fact two laws of legal technique, and the role splitting is simply a consequence of them: "La première [of these two laws] est celle de la naissance même et l'évolution des ordres juridiques. La seconde est la loi de hiérarchie des ordres juridiques. Un autre phénomène, celui du 'dédoublement fonctionnel' [...] repose sur les deux premiers": "Le phénomène juridique du dédoublement fonctionnel", in *Rechtsfragen der Internationalen Organisation, Festschrift für H. Wehberg* (1956) 324.

<sup>12</sup> *Précis*, *supra* note 1, I, at 56, n. 1.

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international legal order, that is, there is no legislation, no adjudication proper, and no collective enforcement.<sup>13</sup>

It should further be pointed out that Scelle is aware of the limitations of *dédou-blement fonctionnel*. He points out that this "law [...] is the dangerous substitute of the institutional organization lacking in the international legal order. It is a makeshift construct, in the present stage of inter-state trends"<sup>14</sup> and he fervently hopes that it will be gradually replaced by a better institutional scheme, by a "hierarchy of the institutions corresponding to the law of hierarchy of legal orders."<sup>15</sup> In addition, Scelle draws attention to all the shortcomings of the *dédou-blement fonctionnel*: thus, for instance he emphasizes that the unilateral fulfillment of international functions by national agents may lead and does indeed lead to conflict (*conflits de compétences*) between governing officials performing international functions by way of competition (*en concurrence*) and not by way of subordination (*et non en subordination*), that is to say anarchically and not according to a hierarchical order.<sup>16</sup> Furthermore, as far as the law-making function is concerned, Scelle emphasizes that the content of the powers conferred by the national order and by international law do not coincide as a rule. Normally, executives are vested with a more extensive law-making power in the international area than under municipal law. By the same token, legislative assemblies, which normally enjoy wide law-making powers under national law, have a limited role in international legislation.<sup>17</sup> As far as the judicial function is concerned, Scelle pinpoints a number of deficiencies, chiefly as regards the lack of legal security for individuals, who are not sure about the proper court that will settle a transnational dispute, nor about the applicable law.<sup>18</sup>

### III. The Ideological Underpinnings of Scelle's Doctrine

Before I move on to evaluate Scelle's doctrine, it may prove useful to briefly point to its ideological presuppositions. To my mind, two sets of values make up the ideological underpinning of his doctrine. First, the choice not to undertake merely a positivist analysis of international law, but to have constant recourse to sociology and history when exploring international reality.<sup>19</sup> His departure from a purely posi-

<sup>13</sup> *Manuel*, *supra* note 1, at 22.

<sup>14</sup> *Manuel*, *supra* note 1, at 22.

<sup>15</sup> *Manuel*, *supra* note 1, at 22.

<sup>16</sup> *Précis*, *supra* note 1, II, at 10.

<sup>17</sup> *Précis*, *supra* note 1, II, at 452.

<sup>18</sup> *Manuel*, *supra* note 1, at 800-807, 815-817.

<sup>19</sup> See, e.g., *Règles générales*, *supra* note 1, at 691. See also Scelle's preface to H. Wiebringhaus' *Das Gesetz der funktionellen Verdoppelung* etc., *supra* note 1, at 6 ("[L]'étude du Droit, séparé

tivist approach and the large use of methods and concepts drawn from other disciplines cannot be regarded as a merely scientific choice: it is a value choice based on dissatisfaction with the status quo in the same way that choosing to scrutinize international law from a merely positivist vantage point implies (if only unwittingly) a "conservative" tendency.

The second set of values consists of the strongly held view that what is now usually called the community of nations is in fact a society of rulers ("*une société de gouvernants*") who try to perpetuate their authority by clinging to the postulate of state sovereignty. Scelle is one of the most outspoken and tenacious critics of sovereignty: in one of his writings he states that the idea of sovereignty is the "modern expression of the old ideology of tribal nationalism"<sup>20</sup> and in another he disparagingly speaks of the preposterous holding on to sovereignty by old and new states, obfuscated by nationalism and selfishness.<sup>21</sup> Progress, in Scelle's view, can be made in the international community only if one moves towards restraining the authority of rulers and succeeds in establishing a set of international social agencies or bodies capable of bringing the international legal order into line with the basic configuration of state systems. For, in Scelle's opinion, the ideal social system is that to be found in "state societies": Scelle calls the state "the prototype to which our mind should reduce any political organization"<sup>22</sup> and points out that it is only within the state system that law and order can be realized, on account of the monopoly of force by social organs and the hierarchical structure of the state.<sup>23</sup> This entails that in his view the international lawyer must fight against state sovereignty and lay emphasis on individuals, peoples and nations, as well as all those human collectivities other than states which exist on the international scene (international trade unions, churches, international confederations of political parties, non-governmental organizations, etc.): they can play a decisive role in rendering the world community less sovereignty-oriented. Scelle repeatedly lays emphasis on the need for democratically-minded people to strive for the restraining of state sovereignty and the consequent building up of a truly ecumenical community: "Even

de ses racines sociologiques, risque de cesser d'être une science sociale pour devenir une rhétorique exégétique et formaliste s'écartant de la réalité").

20 'Le phénomène juridique du dédoublement fonctionnel', *supra* note 1, at 333.

21 "Gouvernements souvent ivres d'une souveraineté toute neuve et de ce chef excusables, mais aussi gouvernements anciens et puissants, aux ambitions impérialistes, aux préjugés nationalistes et conservateurs dont le catéchisme a pour dogmes fondamentaux l'égoïsme et la souveraineté de la force", 'Quelques réflexions hétérodoxes', *supra* note 1, at 481.

22 "Prototype auquel notre esprit doit ramener toute organisation politique", 'Le phénomène juridique du dédoublement fonctionnel', *supra* note 1, at 336.

23 "Comme c'est dans les sociétés étatiques que ce processus [assurer la paix par l'ordre] se réalise le mieux, parce que les 'institutions' sont les plus solidement établies et que la force dont elles disposent y est hiérarchisée et monopolisée, on y peut éliminer, dans la mesure du possible, la violence et la passion qui caractérisent la nature humaine", 'Réflexions hétérodoxes sur l'ordre juridique', *supra* note 1, at 474. One of the tasks of the international lawyer is to find out and put into effect "the general and far-off rules of human solidarity and oppose them to the individual and collective egoisms" (*Règles générales*, *supra* note 1, at 693).

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in non-dictatorial regimes, ignorance and passivity of peoples often make subsist the de facto authority of a society of princes. If democratic control is really exercised, we can then speak of a society of peoples and individuals. Only then can an ecumenical legal order take form or at least announce itself."<sup>24</sup> The final goal must be "progressive universal federalism", the only means, in Scelle's mind, of averting new attempts at "universal imperialism."<sup>25</sup>

Plainly, Scelle's doctrine cannot be dissociated from its ideological substratum: to do so would mean to miss the intent, underlying that doctrine, of demystifying current conceptions and legal fictions, of attacking the present state of affairs, and of suggesting the path that ought to be taken with a view to attaining a better international legal order. In short, for Scelle the doctrine of *dédoublement fonctionnel* did not constitute only a theoretical construct; it was also intended to be a tool for enlightening rulers, lawyers and the public at large and persuading them of the need to work for a more satisfactory configuration of international institutions.<sup>26</sup>

### IV. An Appraisal of Scelle's Doctrine: Six Basic Criteria

Scelle's doctrine of *dédoublement fonctionnel*, like any scientific theory, can be evaluated from several vantage points. First, one may assess it on its merits, that is, ask whether it reflects (or reflected) international reality or constitutes instead a deformation or mystification of that reality. Second, one should establish whether the doctrine is original, i.e. whether at the time it was advanced, it was a breakthrough in international legal literature or at least improved the existing corpus of views. Third, one ought to ask whether the doctrine is consistently set forth and developed, or whether it is in conflict with other views advanced by its author. Fourth, one must ascertain whether the doctrine has been propounded as a fully-fledged set of views enunciated in all their consequences and implications, or has instead been put in the form of a mere sketch, of a conglomerate of hints and propositions, lacking a perfect finish. Fifth, one may enquire whether the doctrine has had an impact on international legal literature, or has instead been dismissed by other scholars. Finally, one ought to see whether the doctrine is still vital today as a key to the understanding of present realities or belongs instead to the dusty museum where all the past theories that have lost their teeth are stockpiled.

<sup>24</sup> 'Réflexions hétérodoxes', *supra* note 1, at 477.

<sup>25</sup> *Id.*, at 488.

<sup>26</sup> This point has already been made by some authors. It may suffice to mention here Wiebringhaus, *supra* note 1, at 30-31 ("Der Grundtendenz der hier besprochenen Theorie [i.e. Scelle's theory] gemäß sind aber beide, Funktionsverdoppelung und nationale Staatssouveränität, im Zuge einer weiteren Festigung der zwischenstaatlichen Solidarität zu progressivem Verschwinden verurteilt, da sie innerhalb einer vernünftig geordneten Rechtsgemeinschaft der Völker jegliche Daseinsberechtigung verlieren werden.")



### A. A Doctrine Capable of Explaining Reality?

From the first point of view (the test, undoubtedly possessing “relative” value, of *adaequatio rei et intellectus*), it cannot be gainsaid that Scelle’s construct did indeed reflect the international reality of the period between World War I and World War II and even the period following 1945. It seems indisputable that no international law-making or enforcement bodies existed at the time, and that consequently the principal “social functions” in the international community were or indeed are remitted to state organs; by the same token, it stands to reason that neither the League of Nations nor the United Nations substantially altered this state of affairs. Scelle’s doctrine can indeed be seen as the scholarly reflection of a period of transition, when the basic pattern of the old international community is being challenged but the new organizational scheme that emerged as a result of dissatisfaction with the past (the League of Nations and later on the U.N.) is still unable to markedly improve upon the old structure. Scelle brilliantly and acutely pinpoints the clash between the *old*, that persistently tries to hold out, and the *new*, that incessantly endeavours to come to light. His theory of *dédoublement fonctionnel* is no doubt made possible by the historical circumstances surrounding his research work: the collapse after World War I of old schemes and ideas, the hope that at long last the international community would take the path followed many centuries ago by national states and become endowed with centralized institutions, the lucid realization that states were unwilling or at any rate not prepared to take that path and that consequently even after the Great War, the past model of the international community would continue to subsist.

Although it can generally be said that Scelle worked out an important key to the understanding of international reality, there is a point where Scelle’s view can be faulted. When dealing with the exercise of the judicial function in the old international community, Scelle contends that it is fulfilled by the domestic courts of the various states settling conflict of law issues. No mention is made of international arbitral courts, which had indeed existed in the international community since its inception, although of course they acquired greater importance in the 19th and the 20th centuries. Scelle totally neglected those courts, and only focused on the Permanent Court of International Justice (followed by the ICJ). With regard to this Court, Scelle emphasized that admittedly it constituted a collective body fulfilling a judicial function (i.e. it was not a state organ) but this could be accounted for by the fact that the League of Nations, to which the Court belonged, was a sort of “suprastate society.” Thus, the presence on the international scene of an international arbitral court is explained away by resort to a different theoretical construct to that of *dédoublement fonctionnel*. In other words, Scelle is unable to justify – within the context of “role splitting” – the existence of arbitral courts (which no doubt cannot be regarded as organs belonging to one or more states but, once set up, are independent of

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the states behind them and fulfill a "social function"). When faced with a sophisticated system of arbitration (the PCIJ and then the ICJ), he jumps to a totally different scheme in order theoretically to warrant that form of arbitration.

It can therefore be argued that Scelle's doctrine inadequately explains at least one of the three "social functions." As far as this function is concerned, the doctrine of "role splitting" amounts to a straitjacket that forces and disfigures reality. It is appropriate to point out that, in addition to taking into account international arbitral courts, Scelle could have relied on better examples to corroborate his theory as far as judicial settlement of disputes by national courts was concerned. He could have mentioned the various cases where domestic courts have pronounced over war crimes (think for example of the Leipzig Court that in 1921-22 handled the cases of German war criminals who under Articles 229 and 230 of the Versailles Treaty should have been tried by the victor powers; think also of the various national courts that dealt with similar cases after World War II). In these instances, municipal courts fulfill a task that international tribunals would more aptly and objectively undertake. However, so long as states shy away from establishing such tribunals, one is forced to fall back on national courts: these courts in the event implement international legal rules, thus behaving as "organs" of the international community.

A second criticism of Scelle's doctrine has already been hinted at above: the analysis undertaken by the French international lawyer never satisfactorily explains the nexus between the two classes of international society to which he refers. The coexistence of the two "international models" is not explored in depth.

A third criticism is that Scelle fails to carefully distinguish between the instances where state agents, while behaving as international organs, pursue national interests, and the instances where they instead realize values or interests of the international community at large. As I pointed out above, Scelle does notice the decisive difference existing between the two classes: however, all too often he stops short of delving into the matter. Instead, this is precisely the crucial point: once it is realized that state officials act as international agents, what matters is to enquire into when and why they promote *metanational* values or long-term, communal objectives (peace, human rights, self-determination of peoples, etc.) or instead take action for the exclusive purpose of safeguarding *national* (or short-term, self-centred) interests. The distinction between the two classes can in effect become the litmus test for assessing to what extent the international community is still anarchical and individualistic or is instead moving towards solidarity and common welfare.

### B. An Original Doctrine?

I shall now move on to the second of the various tests put forward above for the purpose of gauging Scelle's doctrine: originality. In this regard, let me point out right away that of course scientific theories rarely act as a sort of big bang, suddenly

introducing light and order where there previously existed darkness and chaos. Scholarly theories usually build upon previous theoretical constructs and insight and even when they shed new light on a certain subject they are unthinkable without the contribution of previous authors. Often originality merely consists of focusing on ideas previously neglected or given scant consideration. Charles Péguy once said that “there are ideas that one draws from his own entrails and ideas that one finds in the pocket of his own overcoat or in the overcoat of his neighbour” (“il y a des idées que l’on trouve dans ses entrailles et d’autres que l’on trouve dans la poche de son pardessus ou dans le pardessus de son voisin”). Now, it is apparent that Scelle did not draw his central ideas from the pockets of other scholars but, in conceiving his own original ideas, he drew much benefit from the views of others.

On close analysis, it appears that two trends in legal literature are the basis of Scelle’s reflection (although they are not specifically mentioned by Scelle in support of his own views). The first line of thought is that of all those (chiefly German) authors that had propounded a transposition of the three basic functions of any state legal system (law-making, adjudication, enforcement) onto the international community, either to conclude that those functions did not operate there<sup>27</sup> or to hold that they indeed could be discerned even in the international community, although there they operate in a different way from the way they do in state legal orders.<sup>28</sup>

The second line of thought goes back to H. Kelsen: according to him and to his followers, the most salient feature of the international community lies in the fact that the basic “social functions” to be found in any legal order are “decentralized”: in state legal systems the three functions are fulfilled by central bodies (parliament, domestic courts and national enforcement agencies), whereas in the international community those functions are remitted to each state. This view, first adumbrated by H. Kelsen in 1920,<sup>29</sup> was later developed in his Hague Lectures of 1932 and in

<sup>27</sup> Kaltenborn, *Kritik des Völkerrechts nach dem jetzigen Standpunkte der Wissenschaft* (Leipzig 1847) 312; see also the writings quoted by Walz, *Wesen des Völkerrechts und Kritik der Völkerrechtsleugner* (1930) 88-110.

<sup>28</sup> See Bergbohm, *Staatsverträge und Gesetze als Quellen des Völkerrechts* (Dorpat 1877) 5; Heilborn, *Völkerrecht*, in von Holtzendorff & Kohler (eds.), *Enzyklopädie der Rechtswissenschaft* (6th ed., Leipzig-Berlin 1904) 978-979; Ullmann, *Völkerrecht* (Tübingen, 1908) 17-26.

<sup>29</sup> See *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre* (Tübingen 1920) 257-267. He pointed out among other things that in the international community there is a lack of “arbeitsteilig fungierende Spezialorgane für die generelle Rechtserzeugung und für die Rechtsdurchsetzung”, and it follows that each state acts as a law-making and law-enforcing agency, thereby operating as an ‘Organ der Rechtsgemeinschaft’. See also *Allgemeine Staatslehre* (Berlin, 1925) 174-175.

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subsequent writings.<sup>30</sup> Kelsen's views were then taken up by a number of Italian authors, led by R. Ago.<sup>31</sup>

Although these two lines of thought constitute, in my view, the forefathers of Scelle's doctrine,<sup>32</sup> this does not imply that his doctrine lacks originality. For one thing, at least the theory of the three "social functions" does not play a great role in the enquiry of its authors, whereas it is given pride of place in Scelle's thought. This radical shift in focus gives that theory a new dimension in the context of Scelle's reflection. The same holds true, subject to a major qualification, for Kelsen's doctrine of "decentralization" in the international community. Although this concept constitutes one of the basic pillars of Kelsen's perception of the international community, at least in the 30s and 40s it was not fully developed in all its implications and ramifications. It is a seminal idea, central to Kelsen's conception of international law; however, at least before the appearance of the *Principles of International Law* (1952), it remained dormant, in some sense. For another thing, even the theory that is closer to Scelle's doctrine, namely Kelsen's concept of "decentralization", is different from that of Scelle. Both conceptions share the idea that the international community lacks centralized bodies or agencies fulfilling the three basic functions. The consequences stemming from this basic premise are however different in the two theories. In Kelsen's view, international law confers on each member of the community, i.e. each *state*, the power to fulfil those functions, either individually or jointly with other states. By contrast, in Scelle's conception the emphasis is laid on the idiosyncratic role that state officials or members of national executives play when acting as organs of the international community. This shift in emphasis entails among other things that greater light is cast on the fact that ultimately it is through the action of *state agents* that international law comes to be given flesh and blood.

To stress the originality of Scelle's conception, it may be added that his new look at the basic configuration of the international community, and the emphasis placed on the "dual" function of state officials led him among other things to be par-

30 'Théorie générale du droit international public. Problèmes choisis', in *Recueil des Cours de l'Académie de La Haye* (1932) 124-137; *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* (Leipzig, Wien, 1934) 131-132. A final and more mature formulation can be found in *General Theory of Law and State* (Cambridge (Mass.), 1949) 303, as well as in *Principles of International Law* (New York, 1952) 8-17, 36, 101-102, 104, 402-403; (2nd ed. edited by Tucker, New York 1966) 11-15, 19-20, 31-32, 552, and 'Théorie du droit international public', in *Recueil des Cours de l'Académie de La Haye* (1953) 18-55.

31 R. Ago, *Lezioni di diritto internazionale* (1943) 77-79, 95-96, 113; G. Sperduti, *Lezioni di diritto internazionale* (1958) 161-167; A. Malintoppi, 'De la notion d'organisation en droit international', in *Recueil d'études de droit international en hommage à P. Guggenheim* (1968) 830; A. Cassese, *Il controllo internazionale - Contributo alla teoria delle funzioni di organizzazione dell'ordinamento internazionale* (1971) 54-55, 281.

32 It should be noted that, although Scelle did not explicitly cite the two currents of thought, in some of his late writings he made explicit reference to some of the concepts they utilised; thus, for instance, he spoke of "decentralization" in a paper of 1956: 'Le phénomène juridique', *supra* note 1, at 331-332.

ticularly alert to a new phenomenon emerging in the world community: that of international supervision. The setting up – particularly within the League of Nations and the International Labour Organization—of international bodies responsible for scrutinizing compliance by states with international legal standards, prompted Scelle to enquire into this new international scheme, to establish to what extent international supervision is exercised by organs of individual states (in the form of *dédoublement fonctionnel*) or is instead fulfilled by social organs proper.<sup>33</sup>

### C. A Coherent Doctrine?

I shall now try to assess Scelle's contribution from a third point of view, and examine its intrinsic consistency, to see whether or not it is at odds with other parts of the whole of Scelle's legal thinking.

One should here draw a distinction between Scelle's early writing on the issue, and some of the work which appeared after World War II. In the early writing, one may easily discern a perfect coherence between the doctrine at issue and the other basic views propounded by G. Scelle. Even on the point that appears least tenable (namely the fact of reducing the judicial function in the international community to cases of state jurisdiction over conflict of laws issues), the doctrine is fully consistent with its premises: the suppression of any distinction between inter-state and inter-individual relations, and the consequent merger of public and private international law questions. In contrast, one can discern a contradiction in at least one of his late works. He probably became aware of how fallacious his conception of the judicial function in the traditional international society was; he therefore dropped altogether the reference previously made to the judicial settling of conflict of law cases by domestic courts, and replaced it by a reference to international arbitration, conceived of as a manifestation of *dédoublement fonctionnel*.<sup>34</sup> Here one must note that this new view taken by Scelle, while it is much sounder than the previous one as far as consistency with the international reality is concerned, is markedly at odds with the whole doctrine of *dédoublement fonctionnel*. For, admittedly it is for states to decide whether or not to submit to arbitration and consequently set up arbitral courts; how-

<sup>33</sup> See the following writings by Scelle: *Règles générales*, *supra* note 1, at 632-641; 'Théorie du gouvernement international', in *Annuaire de l'institut international de droit public* (1935) 74-81; *Théorie et pratique*, *supra* note 1, at 107-135.

<sup>34</sup> In an article of 1954, Scelle, in explaining the functioning of the 'role splitting', in the international community, says the following concerning the interpretative and judicial function: "[...] dans chaque cas particulier l'interprétation des normes ou des situations litigieuses appartient à chaque gouvernement étatique; [...] l'interprétation juridictionnelle n'intervient que lorsque les gouvernements plaideurs ont consenti à ériger un Tribunal et à lui reconnaître compétence" 'Quelques réflexions sur l'abolition de la compétence de guerre', in *Revue générale de droit international public* (1954) 4. By contrast, it is not clear whether in other writings of the same period Scelle sticks to his old view or instead drops it; see in particular 'Le phénomène juridique du dédoublement fonctionnel' *supra* note 1, at 339-340; 'Quelques réflexions hétérodoxes sur la technique de l'ordre juridique interétatique', *supra* note 1, at 486-487.

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ever, once the court has been established, the fulfillment of the arbitral (or judicial) function is a task carried out by a social body, and not by a state organ. This part of the doctrine therefore becomes incompatible with the basic assumption of the whole theory, i.e. that the three social functions are fulfilled by state agents (by the executive of each state or by state officials) acting as organs of the international community.

### D. A Finished Doctrine?

Let us now turn to the fourth criterion by which Scelle's theory can be gauged. This test consists of asking whether the doctrine at issue was developed by its author in all its ramifications, or was instead left unfinished. If one goes through Scelle's numerous writings devoted to the concept of *dédoulement fonctionnel*, one is struck by three things. First, he took up this idea many times, each time trying to redefine, expand or revise it. One gets the impression that in a way Scelle was haunted by the concept (one might surmise that this, to some extent at least, was due to Scelle's dissatisfaction with his own treatment of the subject).

This remark brings me to a second point: although Scelle returned to the concept many times, he never finished it off by examining all its consequences and repercussions. One is left with the impression that each time he dwelt on the subject, he contented himself with a sketch, with an outline, often based more on intuitions and sharp insight than on a theoretical construct logically thought through. One never finds oneself confronted with a full-fledged theory articulated in all its minute ramifications – a theory such as those so solidly built up and coherently developed by international lawyers like H. Triepel, D. Anzilotti, H. Kelsen or A. Verdross, to quote but a few leading scholars in this field.

The third thing that strikes the reader is that Scelle's doctrine went through many changes, if not oscillations. This, combined with the rather summary character of his expositions of the matter, render it rather difficult to safely seize his thought on the issue.

### E. An Influential Doctrine?

Let us now deal more expeditiously with the question of whether Scelle's theory has had an impact on the legal literature – this, as I stated above, constitutes a sixth criterion for evaluating a scholarly contribution. In one of his aphorisms of 1949, Ludwig Wittgenstein said that "There are remarks that sow and remarks that reap" ("Es gibt Bemerkungen, die säen, und Bemerkungen, die ernten"). It stands to reason that Scelle's views belong to the first category. I shall confine myself to making three points.

First, the concept of "role splitting" has been taken up by a number of French, Belgian and German scholars (e.g. Carabiber, Guillien, Luchaire, Chaumont, Morange, Bourquin, Buchmann, Kaasik, Kopelmanas, Wiebringhaus).<sup>35</sup> It has also been taken into account by a variety of authors, ranging from the Austrian Verdross,<sup>36</sup> the Belgian Rolin,<sup>37</sup> the Italian Ago,<sup>38</sup> the German Scheuner,<sup>39</sup> the Greek Eustathiades,<sup>40</sup> the Spaniard Miaja de la Muela,<sup>41</sup> to the Soviet Tunkin.<sup>42</sup> More recently it has even been utilized by the European Commission of Human Rights and by a Government appearing before the European Court of Human Rights.<sup>43</sup>

Second, the concept at issue has proved to be scientifically fecund, for it has stimulated either new research in areas previously neglected,<sup>44</sup> or has set off a rethinking of many traditional ideas or a refining of new concepts. Thus, for instance, the theory of "decentralization" referred to above, although originally delineated by Kelsen, no doubt has been subsequently enriched by other scholars also in the light of Scelle's constructs. These, in other terms, have acted as a powerful ferment in legal thinking. Another area where Scelle's concepts have sparked a revisitation of traditional ideas is that of private international law, where Kopelmanas, Wiebringhaus and Miaja de la Muela stand out for their utilization of Scelle's doctrine.<sup>45</sup>

35 For the writings by Carabiber, Guillien, Luchaire, Chaumont, Morange, Bourquin, see *La technique et les principes du droit public, Etudes en l'honneur de G. Scelle*, vols. 2, Paris 1950, *passim*. See also J. Buchmann, *A la recherche d'un ordre international* (Louvain 1957) 19-30; Kaasik and Kopelmanas, *infra* note 44 and Wiebringhaus, *supra* note 1.

36 *Völkerrecht* (5th ed., 1964) 122.

37 Rolin, 'Les principes de droit international public', *Recueil des Cours de l'Académie de la Haye* (1950) 323, 463-464.

38 Ago, *Scienza giuridica e diritto internazionale* (1950) 54.

39 Scheuner, 'Naturrechtliche Strömungen im heutigen Völkerrecht', 13 *Zeit. f. aust.öf. Recht und Völkerrecht* (1951) 576, 588-589.

40 C.Th. Eustathiades, 'Les sujets du droit international et la responsabilité internationale - Nouvelles tendances', *Recueil des Cours de l'Académie de la Haye* (1953) 510-511.

41 A. Miaja de la Muela, 'La teoría del desoblamiento funcional en el derecho internacional privado', in *Revista española de derecho internacional* (Vol. VI) (1953) 133-141.

42 G. Tunkin, *Theory of International Law* (W.E. Butler, ed.) (1974) 132, 230, 231, 242, 345, 367.

43 See *Schiesser v. Switzerland*, Report of the Commission (9 March 1978) 28 and the Application of the Swiss Government to the Court (11 July 1978) 10, as well as the Swiss Memorial (at 52).

44 This applies to the question of international supervision referred to above, on which authors such as Kaasik and Kopelmanas (See N. Kaasik, *Le contrôle international* (Paris 1933) 17, 19; L. Kopelmanas, 'Le contrôle international', in *Recueil des Cours de l'Académie de la Haye* (1950) 59, especially 69-88) have made important contributions on the basis of Scelle's ideas, as well as the question of international administration, or "services public internationaux", on which significant works have been stimulated by Scelle's theories (see, e.g., Chaumont's paper, *supra* note 35).

45 See Kopelmanas, *supra* note 44; Wiebringhaus, *supra* note 1; Miaja de la Muela, *supra* note 1, at 141.

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My third point is that Scelle's theory (both the specific concept of *dédoublement fonctionnel* and his general conception of international law) has had another conspicuous impact on the subsequent legal literature. His new approach to the enquiry into international reality, his jettisoning of the purely positivist method, with all the attendant consequences – his great reliance on other disciplines (in particular history and sociology), his departure from the positivist obsession with the distinction between analysis into existing law (*de lege lata*) and proposals for new law (*de lege ferenda*), his intent to "play with one's cards on the table" as far as the ideological underpinnings of his legal views were concerned, as well as the resulting fresh and inspiring insight into international reality – all set the stage for a similarly original and heterodox vision of international law. I am referring to the vigorous and highly original conception of international law put forward by one of the best disciples of G. Scelle: René-Jean Dupuy. To be sure, the whole array of Dupuy's conceptual tools are special to him (think, e.g., of the concepts of "historical" and "mythical" community, of "relational" and "institutional" law, of "universal" and "situational" law, of the construct of "dialectics between power and justice" and between "legality and legitimacy", to quote but the principal ones). The same holds true for Dupuy's reconstruction of the international community, for his drawing upon an impressive range of literary and philosophical sources, and the splendour of his style. Nevertheless, Dupuy has in common with Scelle the intent to radically depart from well trodden paths and look at international reality afresh, while relying on a set of conceptual tools with which jurists are not familiar, together with a remarkable capacity for vision. This approach among other things accounts for the – utterly displaced – short shrift given to both Scelle's and Dupuy's contribution by a number of "black letter lawyers" excessively fascinated by what the Germans used to call "*Paraphenjuristerei*." These lawyers contend that Scelle's and Dupuy's investigations pertain more to jurisprudence or sociology of law than to a sober enquiry into existing law. To some extent this may be true, but one should not gloss over two things: first, the theoretical framework utilized by the two jurists has often led them to gain insight into some crucial features of positive law; second, both of them, and especially R.J. Dupuy, have not neglected detailed investigations into specific norms or institutions of positive law, thus excelling even as mere exegetists.

### G. Still a Vital Doctrine Today?

We can now move on to the last criterion by which one can appraise Scelle's theory: whether or not it is still applicable to the present international community.

In this regard, it is not difficult to realize that Scelle's views, far from becoming obsolete, have maintained their validity and have even acquired a new contemporary vitality. Four points can be made in this respect.

First, Scelle's concepts of "inter-state society" and "suprastate society" still constitute important keys to the understanding of the present evolution of the interna-



tional community at large (and, in a way, have been taken up or echoed by a few authors who have instead spoken of the "Westphalian" and the "U.N. Charter" models of world community).<sup>46</sup> This community, in its present stage of development, still constitutes an "interstate society" where the law of *dédoulement fonctionnel* holds sway (except for the arbitral or judicial function). In other words, international collective organs capable of either passing binding legal standards or of enforcing them, are still lacking, in spite of all the well known ameliorations introduced by the United Nations. Thus, given the present structure of the world community at large, the concept of "role splitting" still constitutes a valid intellectual tool for analyzing international law (for the same reason, the concept of "decentralization" also continues to represent a theoretically flawless and practically useful instrument of enquiry).

My second point is that, as a result of the present state of affairs and the current trends emerging in the world community, Scelle's doctrine has even come to acquire an enhanced vitality, as far as the "social function" of *law enforcement* is concerned. Two major developments have brought about this result. For one thing, the failure of the collective enforcement system established in 1945 has ended up in each individual state regaining its traditional role as a law-enforcement agency (although of course this can now occur only within the restraints postulated by the U.N. Charter and its legal developments). National enforcement officials continue to act as enforcement agents of international law. However, we can discern here a tension between two conflicting tendencies. There is on the one hand the tendency of many states to adopt "sanctions" within the boundaries set by the U.N. system, particularly as regards resort to armed force. These states no doubt endeavour to pursue national interests to the extent that these are consonant with internationally accepted values (peace, justice, respect for human rights and rights of peoples, etc.). On this score, one could say that these states, when enforcing international law on an individual basis, act *on behalf of the international community as well*. There are, on the other hand, states that act solely out of self-interest, in total disregard of accepted standards or by shrewdly by-passing those standards (for instance, by broadening the concept of self-defence beyond the limits permitted by a sound and realistic interpretation of Article 51 of the U.N. Charter). In this respect the attitude of the United States merits emphasis. In addition to invoking Article 51 in many instances in which it was extremely doubtful –to say the least– that that provision applied, the U.S. has recently propounded a doctrine whereby the President has the power to order that U.S. enforcement officials seize abroad terrorists or drug traffickers without the consent of the territorial state (so-called 'rendition').<sup>47</sup> Apart from this ex-

<sup>46</sup> See L. Gross, 'The Peace of Westphalia 1648-1948', in 42 *American Journal of International Law* (1948) 20, followed by R.A. Falk, 'The Interplay of Westphalia and Charter Conceptions of International Legal Order', in C.G. Black & R.A. Falk (eds.), *The Future of the International Legal Order* (Vol. I) (1969) 33, and A. Cassese, *International Law in a Divided World* (1986) 10.

<sup>47</sup> Outlined in the opinion by the Justice Department's Office of Legal Counsel of 21 June 1989 'Authority of the FBI to Override Customary or Other International Law in the Course of Ex-

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treme instance of unauthorized extra-territorial jurisdiction, it stands to reason that all those states that behave the way referred to above do not act on behalf of the international community when they enforce international law.

The second major development is inextricably bound up with the first (and, at least in some respects, could be even regarded as its consequence): momentous normative trends have emerged in the world community which aim at imposing respect for a *set of fundamental values* that conspicuously restrain state sovereignty. By the same token, the *right of intervention* of states *vis-à-vis* those which fail to stick to these fundamental values has been broadened. Three significant developments stand out in this respect: (1) the emergence of *obligations erga omnes*, especially in the area of human rights, and the ensuing right of other states to demand that those obligations be fulfilled; (2) the gradual expansion of the category of *international crimes*, which now embrace not only the classical Nuremberg crimes (war crimes, crimes against peace and crimes against humanity linked to the war phenomenon) but also such crimes as genocide perpetrated in time of peace, torture, and now also terrorism (possibly drug-trafficking – if carried out on a large and transnational scale – may eventually come within the purview of this category); (3) the emergence of *international crimes of states* (which, as is known, do not necessarily overlap with the class of international crimes), resulting in a new right gradually accruing to states, namely the right both to demand of other states that they stop such crimes and to resort to counter-measures against them. This threefold development has resulted (or is resulting) in states attaining the *right to complain about possible breaches* by other states as well as the *right to take peaceful measures* designed to stop the breaches (measures ranging from the exercise of criminal jurisdiction on the principle of *forum deprehensionis* to the resort to peaceful "countermeasures"). Individual states come to be endowed with such enforcement rights because at present no international collective organs exist capable of forcefully imposing compliance with the international principles just referred to. It follows that the new trends emerging in the international community have led (or are leading) to an enhancement of the "dual" role played by state agents under Scelle's doctrine of *dédoublement fonctionnel*. Admittedly, one of the conspicuous (and healthy) features of these new normative developments is that attempts are always made to involve one or another *collective* organ in the process leading to the enforcement action by individual states: think, for example, of the decisive role that a resolution of the U.N. General Assembly condemning an international crime of state (genocide, forcible denial of the right of peoples to self-determination, etc.) can have as a factor *legitimizing* individual states in adopting peaceful counter-measures against the delinquent state; or think of the significant combination of state action and collective endorsement in the process for monitoring violations of human rights set up in the Vienna Final

tratorial Law Enforcement Activities'. See also the Statements by W.P. Barr, A. D. Sofaer, and O.B. Revell to the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, U.S. House of Representatives on 8 November 1989.

Document of the Helsinki Process (of 19 January 1989). Nevertheless, in these and similar cases the collective phase usually comes before the enforcement action by the individual state. More generally, in the final analysis it is for the individual state to decide upon the "sanction" to adopt. It should however be added that an idiosyncratic feature of this development is that now individual states are required to *act on behalf of the world community*; in other words, when enforcing the new international standards referred to above, they must pursue *metanational* values and thus refrain from catering to national interests.

My third point is that, within the normative context just referred to, *domestic courts* are increasingly called upon to play a weighty role as instruments for safeguarding the international legal order. Two different trends should be emphasized.

First, there is an increasing number of international treaties ( ranging from the 1949 Geneva Conventions on the victims of war, as supplemented by the 1977 Geneva Protocols, to the numerous multilateral treaties on terrorism) that grant each contracting party the power to exercise a sort of quasi-universal jurisdiction over offenders.<sup>48</sup> These treaties provide for the right to bring to trial (or extradite) any author suspected of a crime prohibited by the treaties, regardless of whether or not the author or the victim of the crime has the nationality of the prosecuting state or whether the crime was perpetrated on its territory. The only requirement prescribed by these treaties is that the crime has affected a "good" ( person or thing) belonging to another contracting state. Plainly, when the domestic court of one of these states pronounces upon one of the aforementioned crimes, it acts on behalf of the whole community of contracting states and not exclusively in the interest of the prosecuting state. In addition, that court replaces, in a sense, a missing international criminal court. The national judge thus acts as an organ of the international community. *The law of "role splitting" is thus at last truly realized as regards adjudication.*

Let me move on to the second trend – which, unlike the first, does not result from international legislation, but originates from a need *directly* felt by national judges. In some Western countries domestic courts increasingly try to substitute for the missing international organs of collective enforcement as well as for the scant will of executives to vindicate rights not based on reciprocity. Faced with international inertness as well as the unwillingness of executives to take action, domestic courts step in and act of behalf of the whole international community. They thus act as organs of the international community, as bodies intent both on verifying whether states comply with international legal standards and on implementing those standards. I shall confine myself to quoting a few cases, which I shall group under four different headings.

<sup>48</sup> For references to these treaties see Dinstein, 'The International Legal Response to Terrorism', in *International Law at the Time of its Codification, Essays in Honour of R. Ago* (Vol. II ) (1987) 139, and Cassese 'The International Community's "Legal Response" to Terrorism', 38 *ICLQ* (1989) 589.

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First, there are cases where, faced with the unwillingness of governments to take a stand, domestic courts have pronounced upon the legality or illegality of conspicuous instances of use of force by states. In this respect the *Shimoda* case stands out: since no international body had passed judgment on the lawfulness of the atomic bombing at Hiroshima and Nagasaki, and in addition the Japanese Government had eventually changed its mind on the matter, in 1963 a Tokyo District Court decided the issue, although in the final analysis it held against the complainants.<sup>49</sup>

A second set of cases are those where domestic courts pass criminal judgment on individuals whom the territorial state failed to prosecute. The most important in this respect is the famous *Eichmann* case. In its judgment of 29 May 1962, the Supreme Court of Israel dismissed all the submissions of the appellant Eichmann who claimed that Israeli courts lacked jurisdiction over his alleged crimes because there was no territorial or personal link between the crimes and Israel; in its final remarks the Court stated the following: "Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The state of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and *in the capacity of a guardian of international law and an agent for its enforcement*, to try the appellant. That being the case, no importance attaches to the fact that the state of Israel did not exist when the offences were committed."<sup>50</sup> This judgment, which was recently echoed by a U.S. Court in the *Demjaniuk* case<sup>51</sup> was in a way taken up by another U. S. court in the *Yunis* case. Yunis, a resident and citizen of Lebanon accused of participating in the hijacking of a Jordanian airliner which resulted in the holding hostage of the passengers (including several Americans), was brought to trial in the U. S. after being arrested by U.S. authorities on the high seas. Yunis challenged the U.S. courts' jurisdiction arguing that there was no nexus between the hijacking and U.S. territory (the aircraft never flew over

<sup>49</sup> For the English version of the judgment, see 8 *Japanese Annual of International Law* (1964) 212. On this case see Falk, 'The *Shimoda* case: A Legal Appraisal of the Atomic Attacks upon Hiroshima and Nagasaki', in 59 *AJIL* (1965) 759-793; A. Cassese, *Violence and Law in the Modern Age* (1988) 153-156.

There are however also cases where domestic courts refused to decide upon such issues: mention can be made of the *Federici* case, on which see Cassese, *Violence and Law*, *supra* same note, at 151-152, as well as the *Amerada Hess Shipping* case, decided by the U.S. Supreme Court in 1989, in 109 Sup. Ct. Rep. at 686.

<sup>50</sup> 36 *International Law Reports* (1968) 304; (emphasis added); see also at 300.

<sup>51</sup> A U.S. Court of Appeals (Sixth Circuit) held on 31 October 1985 that the petitioner, a Ukrainian accused of crimes against humanity committed in Poland during World War II, could be handed over to Israeli authorities to be tried in Israel, basically because in the case at issue "neither the nationality of the accused or the victim(s), nor the location of the crime [were] significant". "The underlying assumption - the Court held - is that the crimes [attributed to Demjanjuk] are offences against the law of nations or against humanity and that *the prosecuting nation is acting for all nations*. This being so, Israel or any other nation, regardless of its status in 1942 or 1943, may undertake to vindicate the interest of all nations by seeking to punish the perpetrators of such crimes" 776 F.2d 571 (1985) at para. 21 (emphasis added).

U.S. airspace and had no contact with U.S. territory). In its judgment of 12 February 1988, the U.S. District Court of the District of Columbia dismissed the defendant's motion and affirmed the jurisdiction of U.S. courts; it held: "Not only is the United States *acting on behalf of the world community to punish alleged offenders of crimes that threatened the very foundations of world order*, but the United States has its own interest in protecting its nationals."<sup>52</sup>

The three cases I have just mentioned have two things in common: first, the territorial state either failed or did not wish to bring the offender to trial; second, another state decided to take action (after its enforcement agencies had apprehended the offender, its courts were seized with the matter). It is probably because they felt the need to justify the replacing of another state as well as the way the offender had been apprehended, that the courts went out of their way to proclaim that they were acting on behalf of the whole international community.

A third set of cases should be emphasized, where U.S. courts, faced with serious breaches of human rights perpetrated in foreign countries without the offenders being brought to trial there, treated these breaches *qua* torts entailing the obligation of the offender to compensate the victims. On this score, it may suffice to mention a few well-known cases: *Filartiga*, *Letelier* and *Siderman* as well as *Forti v. Suarez-Mason*.<sup>53</sup> In all these cases national courts filled the gap existing both at the international level (no collective body took action) and at the domestic level (no authority of the territorial state intervened). Those courts therefore acted on behalf of the international community at large, to vindicate rights pertaining to human dignity.

A fourth set embraces cases where national courts took upon themselves the task of ensuring compatibility of municipal legislation with international legal standards for the purpose of heading off serious breaches of international law by the executive or the legislature. On this score a significant and indicative case is *U.S. v. PLO*, recently decided upon by the U.S. District Court of the Southern District of New York.<sup>54</sup> Faced with a clear conflict between the Executive and Congress, with Congress plainly intending to close down the PLO mission to the United Nations (thereby seriously breaching the Headquarters Agreement between the United Nations and the U.S.), the court placed such an interpretation of the relevant U.S. statute as to render it consistent with the Agreement. Here, a national court played an important role in ensuring state compliance with international law.

All the above cases clearly show how domestic courts can have a lot of weight in pronouncing upon transnational issues, thereby assuring that international law is

<sup>52</sup> See 681 F. Supp. 896 (D.D.C. 1988), at 903 (emphasis added). See also Lowenfeld, 'U.S. Law Enforcement Abroad: The Constitution and International Law', 83 *AJIL* (1989) 880.

<sup>53</sup> For references concerning the three first cases, see my book *Violence and Law*, *supra* note 49, at 156-168. For the fourth case see 672 F. Supp., at 1535: the relevant decisions were handed down on 6 October 1987 and 25 July 1988 by the U.S. District Court for the Northern District of California.

<sup>54</sup> See 27 *ILM* (1988) 1055-1091.

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effectively complied with. Although one should of course be aware of the inherent dangers of these national decisions,<sup>55</sup> they no doubt constitute a telling confirmation of how *truthful and effective* is – or, rather, has become – Scelle's doctrine of *dédoulement fonctionnel* with regard to national adjudicating bodies. Furthermore, they show that domestic courts have taken into account *metanational* considerations (protection of human rights, need to repress terrorism, need to implement international legal standards etc.) rather than being motivated by national short-term interests alone. This is indeed a refreshing and healthy development that hopefully will gradually expand outside the United States and countries in Western Europe.

I shall now come to my fourth and final general point on Scelle's theory. Scelle's perspectives have enormous potential for explaining the phenomenon of the European Community in the context of international law. Scelle's vision of international law involving individuals and groups establishing mutual relations beyond national borders is perfectly illustrated by Community law (in particular in the four freedoms: free movement of persons, goods, services and capital). Scelle saw international law as a way of facilitating relations between private bodies: now, it is clear that Community law is less concerned with inter-state relations and relates more to facilitating transborder freedoms for individuals. Also of interest is Scelle's insistence on a hierarchy in the different legal orders. He insisted that the international legal order *had* to be superior to the national one or it would be nothing more than an ethical code. Although this internationalist approach is a far from realistic appraisal of the relationship between national and international law, the Community legal order has been developed so that it was held that it had to be superior to national law. Lastly, Scelle contrasted "interstate society", with his preferred "ideal type": "suprastate society", claiming that both have social organs proper to the society. The Community order exhibits many of the characteristics of a "suprastate society" fulfilling almost completely Scelle's "essential social functions." The Commission and the Council (with some input from Parliament) approximate a *law-making* body, and the Court of Justice *adjudicates* questions of Community law. In relation to *law enforcement*, the Community system may suggest that Scelle himself did not fully understand the implications of his analysis. Law enforcement in the Community system relies on the national courts and the national legal systems most of the time. This is what gives it its strength since it has the whole enforcement apparatus of the state at its disposal, and the "habit of obedience" which attaches to domestic law attaches in the same manner to Community law.<sup>56</sup>

<sup>55</sup> The danger to which allusion is made in the text is that national courts, in expanding their jurisdiction over transnational cases, may eventually endorse the tendency of some executives, particularly the U.S. Administration as of late, to take upon themselves the task of *policing the world*. The expansion of municipal courts' jurisdiction proves to be a healthy development only if it is designed to afford greater protection to human rights and more generally to place restraints on state sovereignty.

<sup>56</sup> See J.H.H. Weiler, *Il sistema Comunitario europeo* (1985) 96-106.