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The Thoughts of René-Jean Dupuy: Methodology or Poetry of International Law?

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Abstract

If the thoughts of René-Jean Dupuy had to be reduced to an expression, it would be his method of 'open dialectic' applied to international law and society which enabled him to highlight the dynamic opposition of 'relational' and 'institutional' international trends in an impressive array of short surveys and ambitious synthesis. This article first aims to remind readers of the accuracy of Dupuy's comprehensive approach to international law and society, in that he never disregarded the meaning of rules and institutions for actors – mainly political ones – the underlying values and justice considerations or even myths beyond technical rules or political antagonisms. But it does not suffice to celebrate the visionary and rhetorical skills of Dupuy. His contribution to the methodology of international law has to be assessed. Did he build up a new paradigm? Considering some uncertainties in the method of open dialectic and some shortcomings in his core concepts (inter alia a quite static conception of sovereignty), it may be doubted.

The works of René-Jean Dupuy represent a kind of *hapax* in the history of French doctrine in international law. Certainly, the man has been praised and elevated to the utmost distinction in circles devoted to this discipline, but the works remain without any equivalent in the French-speaking doctrine of international law. It is first of all a question of style. René-Jean Dupuy enshrined his works (especially the latest ones) in the tradition of French-speaking literature and even lyrics. He demonstrated a strong

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inclination towards metaphors and an even stronger sense for cosmogony.¹ While clearly disregarding attempts to reduce the world to a systematic – we will come back to this point later – he has not refrained from depicting the international scene in terms evoking some quasi-orthogonally structuring commonplaces of French poetry referring to cardinal points, four seasons, conflicting natural forces, winds, and so on. If no poet interprets the world more freely than lawyers do, as Jean Giraudoux let Hector say (*La guerre de Troie n'aura pas lieu*), only a handful of lawyers can be said to have developed a poetic vision of international life embracing almost all its fields. René-Jean Dupuy is of those few. The table of contents of his book *La clôture du système international. La cité terrestre* (1989) is itself worked on like a poem. In 1991, he delivered a conference paper at the Collège de France entitled *L'humanité dans l'imaginaire des nations* (1991), decorated with titles such as 'metamorphosis of dreams', 'from the humanity as an inheritance' to 'humanity as a promise', structured by the succession of 'apogee' and 'bitterness' in the 'mythology of the Third World', invigorated by expressions like 'the man outside the earth' to depict the exploration, representations, and uses of extra-atmospheric space. It is true that the reference to onirism and a style reminding one of Gaston Bachelard is the besetting scene of other professors in this honourable institution.² But years earlier, Dupuy already wrote in an introduction to the law of the 'institutional society' (for a definition, see *infra*): '[t]hereby leaving definitely the interstate plain of relational law, we would enter in vertical structures, assuming the subordination of States to organizations converging toward a power of summit. "All that rises converges". Sovereignities stick to the ground. They express the economic, social, and ideological contradictions that go against the edification of new,

¹ Let us note that some of Dupuy's contemporaries already hinted at the question of the consistency of style and thought. Reviewing Dupuy's first edition of *Le droit international* (1963) in the famous French collection of didactic books not exceeding 128 pages (*Que sais-je?*, Presses universitaires de France), Jean-Pierre Cot asserted, 'Professor Dupuy's aesthetic is rigorous. . . . A certain tradition of the Faculties of law shines bright, served by brilliant and often successful formulas. . . . Professor Dupuy manages to resolve with bliss difficulties [of presenting international law in only 128 pages], by presenting with dynamic titles an often classical substance. Thus, "The power of the State, a libertarian power" conceals a presentation of the sources of international law' (*L'esthétique du professeur Dupuy est rigoureuse. . . . Une certaine tradition des Facultés de droit brille de tous ses feux, sertie par des formules éclatantes et souvent heureuses. . . . Le Professeur Dupuy résout avec bonheur la difficulté, en présentant sous des titres dynamiques une substance souvent classique. Ainsi 'Le pouvoir de l'Etat, pouvoir libertaire' dissimule l'exposé des sources du droit international*' in 'Bibliographie critique', *AFDI* (1963) 1136 – all translations are from the author with the valuable help of Olivia Dasté (Master in Sociology, MIT/McGill University). On the other hand, D. Alland considers the abundant formulas used by Dupuy as the expression of a didactic concern and the quest for a synthesis going far beyond the recoupling of juridical notions unduly disjoncted. This art of synthesis would go back to a personal philosophical background that would give these unique works their incomparable value (in *Hommage à René-Jean Dupuy. Ouvertures en droit international* (2000), at 112–113).

² See also M. Delmas-Marty, *Ordering Pluralism. A Conceptual Framework for Understanding the Transnational Legal World* (trans. N. Norberg, 2009), especially the conclusion 'In the Land of Organized Clouds?'

superimposed powers'.³ Translating René-Jean Dupuy into English is anyway beyond my skills. The question addressed here is rather to determine to what extent – without prejudice to a brilliant rhetoric, a moving passion for the didactic, and an undeniable power of seduction – his thoughts are still valuable today and can still be built upon.

1 An Insightful Approach to Changes in International Law

Considering the sum of tributes paid to him⁴ and his remarkable ability to envisage emerging problematics that his counterparts simply ignored or underestimated, the question might sound indecent. That Dupuy has more often than not been ahead of his times and capable of anticipatory analysis of institutions in the making is not as striking in his patently prophetic works as in his earlier more technical studies.⁵ Be it self-evident or not, it is still worth highlighting some of his constant assertions that match with dominant topics in contemporary international law.

1. First of all, René-Jean Dupuy was one of the few in France who paid serious attention to voices from the South notwithstanding a constant will not to lose sight of the whole of international law. He certainly was no historian of international law, but hinted at the europeocentric history of international law and the European past of today's international law in an unusual way. He did not negate the link between positivism and imperialism insofar as no rule prohibited colonialism for instance.⁶ In the same vein, he scrupulously equated pretensions from the industrialized and developing world in the decades of (tried if not successful) changes from 1960 to 1980. Did he take the principle of equality of states too seriously, indeed himself the victim of illusions fatal to the Third World? His method of 'open dialectic' (*infra*) rather accounts

³ 'Quittant ainsi définitivement la plaine interétatique du droit relationnel, on entrerait dans des structures verticales, assumant la subordination des Etats à des organisations convergeant elles-mêmes vers un pouvoir de sommet. "Tout ce qui monte converge". Les souverainetés collent à la terre. Elles expriment les contradictions économiques, sociales, idéologiques qui s'opposent à l'édification de pouvoirs inédits et superposés' (*Le droit international*, *supra* note 1, at 74). The reader cannot help but see a painting of the contrasted geography of contemporary international law.

⁴ See, among others, the vibrant homage of M. Bedjaoui ('In memoriam: René-Jean Dupuy, 1918–1997', *AFDI* (1996) 3), the homage of Jean-Claude Pecker for the Collège de France (available at : www.college-de-france.fr/media/ins_dis/UPL53656_necrodupuy.pdf), the UNESCO book *René-Jean Dupuy. Une œuvre au service de l'humanité* (introd. F. Mayor, 1999) and SFDI, *Hommage à René-Jean Dupuy. Ouvertures en droit international* (2000).

⁵ For instance, he identified some major differences in the relations from international to national tribunals between the European system of human rights protection and the general rules of international law as early as 1957, when the European Commission of Human Rights was still an infant institution. To summarize: the European Convention entails a norm that all national authorities have to implement; it expresses the law of a community having direct effects within the domestic legal orders; the organs of this community, far from unduly interfering in the interpretation of national statute by the national judiciary, actually control the direct application of a common statute; they will logically act as appellate bodies of national judgments : 'La Commission européenne des droits de l'homme', *AFDI* (1957) 461. Note that the Convention has effectively been in force since 1955.

⁶ 'Communauté internationale et disparités de développement: Cours général de droit international public', 165 *RCADI* (1979-IV), at 116.

for this balanced presentation of conflicting pretensions: he adamantly refused openly to prophesy which one would win; he devoted himself to considering not only the (im)balance of objective forces but also the strength of myths and claims to justice. So, the history of international law cannot be reduced to a system of treaties and institutions used by states in their intercourse, since all of them are vested with representations rooted in civilizational patterns or calls for change or conservation – two very functions of law. In this sense, Dupuy would probably have applauded the renewal of the history of international law promoted by Y. Onuma⁷ for example.

2. This is to be related to Dupuy's conviction that international law after World War II overcame its original nature as a formalistic code of interstate relations and also became a growing set of substantial norms⁸. This set is dedicated to sharing common goods and alleviating common concerns and costs, whereas the former was dedicated to the rules of national appropriation and a strict delimitation of the burden of responsibility for the fate of only one people. Though he was certainly not the only one – even in France – to advocate the international law of development as a new branch,⁹ supported by a claim to distributive or redistributive justice and characterized by the differentiation of rights and obligations in accordance with differences of development, he still distinguished himself by never forgetting to consider such questions as shortages of natural resources or the need to protect the environment notwithstanding the injunction of development policies. The renovated law of the sea that emerged during the 1970s–1980s offered him the ideal field for exploring these topics in connection with other highlights of his thoughts: the building up of an institutional system and the myth of the international community, if not of humanity endowed with its own patrimony.¹⁰ However, Dupuy never forgets to underline that power and law, the law of coexistence and the law striving for justice, may conflict at any time, no-one being capable of predicting the final victory of any of them.¹¹

3. A third line of force in Dupuy's thoughts consists in the dynamic opposition of the 'relational' and 'institutional' international systems (or models, or rules, it depends).

⁷ See Onuma, 'When was the Law of International Society Born? – An Inquiry of the History of International Law from an Intercivilizational Perspective', 2 *J History of Int'l L* (2000) 1. Dupuy addressed this question briefly but resolutely in his contribution ('Les ambiguïtés de l'universalisme') to *Droit international au service de la paix, de la justice et du développement. Mélanges Michel Virally* (1991), at 273: '[g]iven its cultural diversity, is it conceivable for humanity to have a common international law?' ('Compte tenu de ses diversités culturelles, l'humanité peut-elle disposer d'un droit international commun?').

⁸ See 'Cours général: Communauté internationale et disparités de développement', *supra* note 6, at 115. Dupuy enshrined himself in a school of thought he named 'tripartite analysis' of international law, illustrated by Georg Schwartzberger and W. Friedmann. He took for granted that international law was no longer a law of coexistence but confronted economic, social, and cultural issues, aggravated by discrepancies in development and collective needs of humanity, all this being the substance of the law of cooperation (*La communauté internationale entre le mythe et l'histoire* (1986), especially at 25–29).

⁹ See Feuer, 'International Development Law: The Establishment of a Francophone School of Thought', 3 *European J Development Research* (1991) 70.

¹⁰ One of his major books, dating back to 1979, is *L'océan partagé* ('Shared Oceans') (1979).

¹¹ See *La Communauté internationale entre le mythe et l'histoire*, *supra* note 8.

The 'relational law' regulates occasional relations between states and satisfies needs when they appear, to finally disappear with them. The 'institutional law' presupposes the acknowledgment of common, stable interests entrusted to permanent institutions.¹² The institutional system is said to be the realm of a change both in the content and in the making of international law. International organizations being defined as cooperative institutions building upon common interests of states, their burgeoning since 1945 is linked with the expansion of substantial norms of international law progressively penetrating all fields of public regulation, which themselves keep expanding. But this substantial international law does not (always) emerge as formalistic rules did. Dupuy willingly admitted that rules of international law might not be based on formal consent or the solemn and slow accumulation of state practice sustained by a deep-rooted and well-shared *opinio juris*. *Soft law* was no source of fear for him. He also delineated the notion of 'wild customary rules of international law' as opposed to 'wise' ones, the wise ones being the product of time passing, the wild ones putting into question existing international law and proceeding from a voluntarism turned towards the future.¹³ Finally, he recognized that the General Assembly of the United Nations is vested with a quasi-legislative power. True enough, the attempts of the Third World to instrumentalize its power with a view to bypassing the principle of state consent to new obligations were doomed to failure – here lies a manifestation of the resistance of the 'relational system' – but a resolution taken by the General Assembly can, under certain conditions such as the representativity of votes in favour, crystallize a new customary rule of international law – here the institutional and relational systems interfere with each other.

4. Concern for justice is undoubtedly one of the levers activated by the Third World, if not one of the federative myths of the international community the positive existence of which Dupuy seemed sometimes to question. Always keen to identify a splitting in notions (utopia, the international system, the international community. . .), he proposed to distinguish between a 'historic international community' and a 'prophetic' one, with emphasis on the second. The first one has to do with the 'shrinking of the world' due to communication facilities and numerous interdependencies between peoples, a recurring commonplace in his work, borrowed from Paul Valéry. This 'objective solidarity' paved the way for the 'political myth' of the international community that each bloc tries to subject to its own project. During the 1970s–1980s, the Third World or the Non-Aligned Movement was more successful in mobilizing this myth for its own sake than the West was. They both aptly used the General Assembly of the United Nations as a tribune to promote their demands – the prophetic community needs an institutional system to hear its voice. They renewed the fundamentals of international law, the state remaining in the centre but being now situated, challenging the system of enforceable norms, and taking part *ab initio* in the community,

¹² 'Cours général', *supra* note 6, at 46–47.

¹³ 'Coutume sage et coutume sauvage', in *La Communauté internationale. Mélanges offerts à Charles Rousseau* (1974), especially at 83–84.

rather than abstracted from any historical and economical contingencies, defending the illusion of an allegedly neutral set of rules inherited from the 19th century, and glorifying its splendid isolation as a sovereign. While analysing *jus cogens* as a revival of jusnaturalism, Dupuy also attributed the recognition of the existence of peremptory norms of international law (*jus cogens*) to the action of Third World countries striving for equality, non-discrimination between states, and the annulment of any treaty prescribing unjust treatment of a party. This should be a first step towards the creation of a normative international community. Nonetheless, an innovation born in the institutional system tends to change the rules of the relational system while remaining dependent upon its basic mechanisms (notably in terms of recognition or enforcement).¹⁴ However, Dupuy considered that the myth of the community flourished unequally in international law: blossoming in the field of the right to development, doomed to failure in that of peacekeeping and criminal justice.¹⁵ This seems to explain why Dupuy particularly highlighted the attempt to make the international community subject to international law – and not only a matrix for renovated rules. It would be mankind endowed with an embryonic heritage. So, the international community would acquire two main characteristics: transcendency and transtemporality. In 1979, Dupuy concluded his lyrical developments on the international community with a vibrant tribute to peace and human rights. Both can only have their roots in the ‘universal conscience’ – along with economic development. To forget this would be to condemn the international community to disappear as a ‘lyrical illusion’.¹⁶ The last word sounds less like a prophecy than a pathetic petition. A couple of years later, his book *La communauté internationale entre le mythe et l’histoire* gave Dupuy an opportunity once more to set the ‘historical international community’, i.e., the community resulting from a growing interdependency between nations and issues, against the ‘prophetic international community’, i.e., the source of a constant questioning of rules, institutions, status of the ‘historical community’ that some would prefer to take for granted.¹⁷ Finally, a hint of melancholy is perceptible in a brief note dedicated 20 years later to the international community: the political myth has vanished since the end of the Cold War; since then, the international community has been a label overwhelmingly used by the USA to legitimate initiatives taken by a couple of powerful states turning their backs on institutional constraints and controls.¹⁸ But Dupuy still trusted in humanity, now being a fully fledged subject of international law and the ultimate reference of criminal justice.¹⁹

¹⁴ ‘Cours général’, *supra* note 6, at 200–205.

¹⁵ *Ibid.*, at 209; *La communauté internationale entre le mythe et l’histoire*, *supra* note 8, especially at 157–158.

¹⁶ ‘Cours général’, *supra* note 6, at 227.

¹⁷ *Supra* note 8, at 181.

¹⁸ ‘Communauté internationale’, *Répertoire international Dalloz* (1998) 3. His conclusion to *The Hague Workshop on the Development of the Role of the Security Council* (1993), at 487, sounded slightly less pessimistic.

¹⁹ The difference between humanity and international community is not always easy to grasp in Dupuy’s works. Humanity as a subject of international law is probably, here, an achievement of the prophetic international community.

To sum up briefly: all these thoughts (1–4) are not inspired by any personal revolutionary trend, even if Dupuy was probably sincerely moved by an aspiration to greater justice. His greatest merit was constantly remaining aware of international law as a dynamic system subjected to changes triggered by the social system, indeed like any historical phenomenon. This posture was favoured by the moment when Dupuy wrote, a moment of ‘colliding epochs’ in international law and relations.²⁰ He dared not say whether a time of harmony, guaranteed by the law, would necessarily come out of the complex of tensions he described. This reluctance to make assertions on the future is coherent with his acute awareness of the indeterminacy of history made by free men.²¹

5. It will not take us long to assert that Dupuy correctly identified nascent changes in international law that effectively materialized or expanded a few decades later. Let us turn to substantive international law. Its growth has never been checked. Environmental law, for instance, has developed as a new branch of international law characterized by a trend to differentiate obligations according to levels of development in a way comparable to that of the law of the sea and international economic law until the end of the 1980s. This differentiation was a major theme in Dupuy’s work. But it is worth noting that these early trends witnessed and advocated by Dupuy dramatically failed after the fall of the Berlin Wall. Nonetheless, Dupuy obviously identified recurring competition between the North and the South on the adequacy of ways of interpreting and repairing past inequalities between nations, the consequences of which still affect some of the members of the international community. This opposition has simply been rolled back – just temporarily? – from the economic field or the law of the sea (think of the Agreement of 28 July 1994 on Part XI of the Montego Bay Convention), and now preferentially expresses itself in discussions over the qualification of crimes of the past (consider the Durban conference, 2001), or during the negotiations within the framework of climate change conferences. Let us turn now to the very structures of the international system. The ‘dialectic of the relational and institutional systems’ is daily illustrated by the affirmation of the UN Security Council as a predominant institutional actor of international relations, by its sometimes being a transparent veil for initiatives taken by the most powerful of its members that seek more legitimacy than a legal basis for their undertakings, and by its being challenged by states (insiders or outsiders) tempted to bypass its oligarchic functioning by way of classical agreements or sanctions. Is this ‘dialectic’ still predominant? One can at least wonder whether it is exclusive of a dialectic Dupuy somehow neglected: that of the protection of sovereignty and the protection of human rights in international law (*infra*). A last word now on the interrelated dialectics of sovereignty and community, power and law. That rivalries between states have never ceased, that power games deeply influence the making of international law and its enforcement (which

²⁰ A matter of fact he exemplified in an outstanding in-depth study of the regime of the Antarctic (‘Le statut de l’Antarctique’, *AFDI* (1958) 196).

²¹ For a methodological criticism see *infra*.

is even more obvious since 1989 than before) have never been contested by Dupuy. There is nothing to add to this constant feature of the international life. But Dupuy simultaneously contended that the same states belonged to the international community and correctly asserted that this is not only an ideal to be contemplated but a juridical institution.²² This entails more truth than ever: some obligations are due to the international community (see Article 48 of the ILC Articles on State Responsibility for Unlawful Acts); the international community itself bears some subsidiary responsibility for the protection of civil populations threatened by genocide, war crimes, crimes against humanity, or ethnic purification (World Summit Outcome Document, 2005). The era of the international community as a myth is probably over: The myth has inspired new institutions and new approaches, much more sophisticated than those Dupuy witnessed (think of the theories of global public goods for instance). All this is too well known. But, surprisingly enough, Dupuy seemed to focus much more on the international community than on the rise of individuals as subjects of international law and actors apt to challenge the normative order built by and for states. Of course, he had no hesitation in admitting that states can deem it convenient to make of private societies or individuals new subjects of international law endowed with a processual capacity, if not with the ability to create norms together with states (see the *Texaco-Calasiatic*²³ arbitral award). Of course, he never dissociated international law from human rights. His works are undeniably those of a humanist. But he probably underestimated the subversive power of individuals, acting as plaintiffs before domestic or international courts or acting collectively through non-governmental structures. Above all, he paid relatively little attention to the link between the rise of individuals on the international scene and the strengthening of the international community as an institution of positive international law, due to a third dimension that undercuts the relational and the institutional system: the transnational social system commonly and approximately named ‘international civil society’. Dupuy rather considered that international organizations – and especially intergovernmental ones – were the bond between the individual and the international scene.²⁴ This relative disregard of buzzing social forces can be related to the fascination for the UN General Assembly – a typical interstate organ – seen as the matrix or embodiment of the international community. For Dupuy, the dynamic of the international community vanished when the centre of gravity was displaced from the *agora* to the executive-like Security Council.²⁵ That the institutional system, whatever it be, could be challenged by individuals or civil society remained largely foreign to his reflections. In this sense, he remained the captive of an interstatal representation of the international community (*infra*). Finally, Dupuy clearly envisaged international law as ‘a space of possibilities’ that is not given once and for all but can expand, even if it is relatively

²² See especially *La communauté internationale entre le mythe et l’histoire*, *supra* note 8, at 147 ff.

²³ See the contribution of Julien Cantegreil to this symposium.

²⁴ See *Le droit international*, *supra* note 1, at 88 ff.

²⁵ See ‘Communauté internationale’, *supra* note 18, at para. 19.

autonomous from social demands,²⁶ but he was at pains to admit that this expansion can advene under the pressure of non-state actors and from within the interstatal system. He equally underestimated the fact that international law would become a new *jus naturale* to which individuals were tempted to appeal against the law of their own nation. However, it would be vain to reproach a man whose work is first of all that of an enlightened witness to his century with not having translated his fine remarks on institutions dedicated to the protection of human rights²⁷ in theoretical or synthetic proposals at a time of changes (the years 1989–1991) the outcome of which was unpredictable.²⁸ Yet, as a later edition of his *Le droit international* remained almost unchanged in its structure, a doubt comes in: is this inability to take the whole measure of the on-going revolution (notably after 1989) a legitimate matter of time or a more questionable matter of method (*infra*)?

We arrive here at the turning point of this appraisal. Needless to say again – it has so often been said and written: Dupuy had visionary skills. It means to us that he was able to embrace conflicting trends, some of them possibly contradicting his own preferences. Taking all of them seriously, he was able thoroughly to depict international law as a system in tension, while a formalistic or exclusively technical approach tends to negate tensions and to deliver a false vision of international law or society. That said, his work is necessarily both actual and inactual: actual, because of the remanence of some structures or topics he took into account decades ago, and inactual because some unexpected changes have happened (think of September 11) since his death. The principle of ‘openness’ he constantly rightly upheld bars any attempt to confront his thoughts word by word with *post mortem* developments. The question ‘are his thoughts still valuable today?’ then has to be reconsidered from a methodological point of view. Does his contribution to the methodology of international law help us to think or rethink today’s international law regardless of whether or not it conforms to Dupuy’s past analysis?

2. A Perplexing Method: The ‘Open Dialectic’

Our author himself strove to explain his method, the ‘open dialectic’. However, it is doubtful whether some future scholars he impressed and inspired as students have faithfully taken up the challenge of inscribing their own work in a paradigm he would have founded. In a thorough study of the French-speaking doctrine during the

²⁶ P. Bourdieu, ‘La force du droit’, *Actes de la recherche en sciences sociales* (1986) 3.

²⁷ See *supra* note 5.

²⁸ The same could be said of a curious article published in 1996 in which Dupuy takes into consideration the emergence of a transboundary society challenging that of states (‘Le dédoublement du monde’, *RGDIP* (1996) 315). He remarkably drew attention to a phenomenon that was at the beginning of its rise – the Internet. But his opposition of the world of states, well delineated and regulated by the law, on the one hand, and the borderless and lawless world of transnational actors, on the other hand, is too manichean to convince. This could exemplify the limits of his use of ideal-types (*infra*).

20th century, E. Jouannet underlined that Dupuy belonged to these French-speaking internationalists, outnumbering their adversaries (like C. Chaumont), who opted for a method rather than a system, and especially for a ‘methodological realism’ or ‘pragmatic positivism’. Its main characteristic? To insist on fidelity to reality rather than on the conformity of reality to abstract and systematic schemes.²⁹ If juridical idealism disappears in this process, this form of realism can (but must not) incorporate ideals underlying some representations of international law that shape positive institutions. Such was Dupuy’s ‘methodological realism’, with an additional specificity: the rebuttal of the methodological superiority of pure juridical technique coupled with a pretention to ‘conceptualize’ the state of international society.³⁰ That being said, Jouannet asserts that Dupuy was probably less influential than C. De Visscher was.³¹ Even if she concedes that his adamant refusal to reduce tensions to a unity opens up on the fragmentation of international law and the corresponding doctrinal splitting up, Jouannet nonetheless concludes that his method was stimulating but not convincing enough.³² Let us take up this point: we share the view that the ‘open dialectic’ deserves some fundamental critics both in itself and considering the use Dupuy made of it.

1. Given the multiplicity of his publications, Dupuy did not spend too much time explaining the premises of his ‘open dialectic’. Although this methodological concept is probably borrowed from Alexandre Marc, a personalist philosopher well versed in European federalism,³³ Dupuy did not start with a critical appraisal of this concept, nor did he explain the reasons he would take it up or reshape it. This reference disappears in the first chapters of The Hague course and of *La Communauté internationale entre le mythe et l’histoire*, for the benefit of a presentation of three paradigms: the ‘harmonist one’, the ‘strategist one’, and the ‘tripartite one’. The first is probably for Dupuy the most critical. Georges Scelle was indeed a prominent theoretician of an international community progressing step by step towards the social stage of reconciliation and the organizational step of federalism, once the ‘functional dedoubling’

²⁹ ‘Regards sur un siècle de doctrine française du droit international’, *AFDI* (2000) 1, especially at 29.

³⁰ *Ibid.*, at 31.

³¹ *Ibid.*, at n. 141.

³² *Ibid.*, at 42, n. 188.

³³ C. Nicolou, ‘René-Jean Dupuy et le fédéralisme de Georges Scelle à Alexandre Marc’, in *Humanité et droit international. Mélanges René-Jean Dupuy* (1991), at 235. M. Bettati identified another affiliation, with Saint Augustine (‘Droit relationnel et droit institutionnel dans la pensée de René-Jean Dupuy’, in *SFDI, Hommage à René-Jean Dupuy*, *supra* note 4, at 97–104). Generally speaking, Dupuy’s precise bibliographical references (in footnotes) are relatively scarce. It is not his style to discuss at length others’ proposals. This tendency not to inscribe his reflections in a dialogical demonstration confers on his works the romantic charm of *autopoïésis*. Smartness? It is probably less futile than that. First, the author enjoyed an extraordinary talent for spontaneous synthesis, even if he rebutted it. Secondly, this way of writing is also shared by authors very different from him. There may be a French tradition of doctrinal ‘self-determination’. Thirdly and above all, Dupuy probably wanted to loosen the bonds with theoretical references he intellectually grew up with, but that happened to be misleading. By doing so, the importance of theoretical works and the dangers they entail (*infra*) might be deliberately diminished.

has been overcome. And Scelle was the fascinating professor who attracted the young Dupuy to international law.³⁴ Even if his own works were impregnated with 'objectivism', Dupuy nonetheless distanced himself from his first master. Scelle's international community is composed of individuals, Dupuy's is one of states. This is probably linked to a second difference: harmony is for Dupuy a noble ideal of no heuristic value. The international community does not mechanically proceed from a growing material solidarity between peoples and individuals (a growing interdependence in today's language); this factual community is only an infrastructure; the normative international community grows out of active myths defended by states and subject to lasting antagonisms. Dupuy finally rejected the theorization or postulation of harmony for two reasons. Facts contradict harmony. For a positivist like Dupuy, the religion of progress is then displaced in the intellectual field. Secondly, harmony reminds him of a form of utopia he resolutely rejected. He profoundly mistrusted the 'utopia of final aims' and preferred the more lenient 'utopia of means'.³⁵ Dupuy seems to have nothing in common with a first version of the second paradigm – the 'strategist' one – which postulates that international law is superseded by arguments of either necessity or opportunity in exceptional circumstances and with the second version according to which states are aware of their own interest but hermetically foreign to the interest of an international community. On the contrary, if Dupuy did not at all disdain the role of interests, even the most selfish ones, he considered that ideals can be inscribed in positive institutions and can influence them *along with* power relations. For this reason, his conception of the international community is tragic:³⁶ contrary to the easy conviction that community equals harmony (a common feature of 'harmonist' and 'strategist' thoughts), he contended that antagonisms are part of a communitarian dynamic. Finally, Dupuy paid his tribute to the 'tripartite' doctrine for its taking due account of the intertwining of three levels of international law (power law, coexistence, cooperation) he proposed to spin out with an emphasis on dialectic rather than the succession of ages. Strikingly, Dupuy did not even pay lip service to normativism. This is probably additional evidence of his more institutionalist trend and a consequence of a rather mechanistic conception of normativism.

So far for his acknowledged background. His own 'open dialectic' is defined in a couple of sentences: '[d]ialectic is a method based on the study of contradiction and the confrontation of opposing trends, it provides highly varied experiences due to the contact it enables with the curves of reality; . . . it tends to accentuate contradictions and complexities, which always emerge, of the entire social phenomenon being

³⁴ See Dupuy, 'Images de Georges Scelle', 2 *EJIL* (1990) 235.

³⁵ See *La clôture du système international. La cité terrestre* (1989), at 154–155. The reader of the latest works cannot but observe that Dupuy's vocabulary became ever more metaphysical, if not mystical. True enough, he was still convinced that the worst could happen. But all in all, his 'open dialectic' is impregnated with a religiosity analogous to the one he criticized in the scellian thoughts.

³⁶ The experience of humanity is itself a tragedy (see *ibid.*, at 7–8).

studied'.³⁷ The only precision deals with the openness: far from the Marxist dialectic, Dupuy resisted the temptation of historicism (in a popperian sense). Secondly, so as to present the antagonisms the international life (and community) is made up of, Dupuy had recourse to the method of ideal-types developed by Max Weber. The rationalization of international law and relations by Dupuy notably expresses itself in the concepts of 'institutional' and 'relational' society (and the corresponding law) (*supra*). He briefly justified this method, uncommon among jurists. It would be appropriate to the evidencing of sharply contrasted features picked up in the 'reality', a first step before demonstrating how they overlap. Both the use of ideal-types and the very notion of 'open dialectic' are questionable.

2. In the Weberian epistemology, ideal-types have a double value, both comprehensive and causal.³⁸ Dupuy undeniably engaged in a comprehensive approach to international practice. He first of all devoted his best studies to the sense actors assign to their practice or pretensions, a sense which is not reducible to national interest or state reason. Moreover, he was very careful not to evince the full-of-sense practice of dominated actors in quest of rehabilitation and the meaning of emerging institutions for the actors themselves. This was a precondition for a due depiction of antagonisms in the international society. It is certainly a fruitful method considering the fact that many international institutions (largely speaking) owe their existence to a formal agreement dissimulating divergent values. In other words, axiological antagonisms are embedded in positive juridical institutions. But, on the other hand, Dupuy's use of ideal-types falls short of any causal explanation.³⁹ This can be explained in two different ways. *Prima facie* this is a choice coherent with positivism in the juridical field where the explanation is either always the same – such is the content of the norm because the authority *legally* vested with the power of taking it decided so – or is supposed to exceed the ambit of juridical knowledge, by going back to social, economic, ideological patterns. This explanation does not hold for long since Dupuy constantly interrelated the analysis of international law and that of international society (consider once more his selection of paradigms). The second explanation could be that Dupuy seemed not to be very interested in investigating the considerations, constraints, antagonisms that shape at a micro-level the production of decisions (by judges for instance). Globally speaking, when Dupuy abandoned case studies and turned to the rationalization

³⁷ 'La dialectique est une méthode qui se fonde sur l'étude des contradictions et l'affrontement des tendances opposées, elle fournit des expériences très variées grâce au contact qu'elle permet avec les sinuosités du réel; . . . elle tend à la mise en relief des contradictions et des complexités, toujours renouvelées, de l'ensemble du phénomène social étudié': *La communauté internationale entre le mythe et l'histoire*, *supra* note 8, at 30.

³⁸ R. Aron, *Les étapes de la pensée sociologique* (1967), at 511.

³⁹ Examples of causal questioning: for what reasons should the 'institutional society' be accessory to 'relational society', and this for time to come? Why is the Inter-American Court of Human Rights more inclined to interpret, develop, and enforce the law of the international institutional society than the European Court of Human Rights, despite all similarities in their competences? Why did so many environmental protection regimes fail?

of international society and law, he tended to remain always at the same level of generality. The going back and forth between general propositions and cases is missing. As a consequence, the reader sometimes has the confusing impression that Dupuy so often confronts ideal-types with each other and so rarely reality with ideal-types that he loses a chance of improving the patterns and perhaps of getting finer comprehension of the rationales behind the array of practices he wants to report. Last but not least, in Dupuy's opinion, entering into the search for causality would entail the risk of predicting the outcome of historical development.

3. The fact is that Dupuy preferred not to predict – or to explain – the final victory of any of these ideal-types. Actually, his distrust of prophecy (or 'utopia of final aims', etc.) echoes his distrust of theory.⁴⁰ This is a curious example of an author taking pains to back his approach against a methodology common to social sciences and deliberately remaining at the threshold of *theory!* Espousing a radical critical approach, one could venture that this self-restraint has to do with a false neutrality finally close to the dominant approach of international law as a still formalistic system or that Dupuy developed a kind of soft critique of international law, leaving its deceptive function and shortcomings largely unrevealed. Personally, we would just venture that for the reasons said, the method of ideal-types as he used it sometimes leads to deceiving results⁴¹ as if the dialectical movement finally resolved itself in the opposite: the suspension of any movement, of any judgement. It is true that, as time passed, Dupuy seemed to forget a Weberian precept – '[v]alues are neither sensible, nor transcendent data. They are created by the human decisions that differ in nature from the way in which the spirit seizes reality and elaborates truth'⁴² – and to incorporate his own political values in his analysis based on ideal-types. By doing so, he gave more than a glimpse of the outcome that *should* be: greater integration of the international community and better protection of common goods. It resembles a prudent or *de lege ferenda* synthesis. However, his very conception of dialectic remains mysterious.

He certainly excelled in using dialectic as the art of the argumentative usage of language.⁴³ Then, far from adhering to any form of 'dialectical materialism', he nonetheless identified dialectic in the history of international society and law. In order to account for this movement, he put aside the thesis – the 'strategist theory' – and the antithesis – the 'harmonist' one – while recognizing that each concealed some

⁴⁰ See for instance 'Cours général', *supra* note 6, at 39. An additional explanation of his rebuttal of systems or theories could be that he deemed them unable to embrace change.

⁴¹ Is it illuminating to assert that factors of progress and factors of regression (two notions foreign to positivism) coexist here and there and to celebrate the indeterminacy of the future? (see *La communauté internationale entre le mythe et l'histoire*, *supra* note 8, at 31).

⁴² 'Les valeurs ne sont données ni dans le sensible, ni dans le transcendant. Elles sont créées par des décisions humaines qui diffèrent en nature des démarches par lesquelles l'esprit saisit le réel et élabore la vérité': Aron, *supra* note 38, at 523 (with extracts from M. Weber, *Essais sur la théorie de la science, 1904–1917* (trans. J. Freund, 1965), especially at 577–579).

⁴³ See the definition given by the *Trésor informatisé de la langue française*, available at: <http://atilf.atilf.fr/dendien/scripts/tlliv5/advanced.exe?8;s=3659879340>.

elements of truth. Replacing theory with methodology, he undertook to develop ‘an open dialectic’ based on a couple of ideal-types. This can be assessed in two very different ways. First, it can be viewed as a non-choice that might be criticized on behalf of the law of ‘non-contradiction’.⁴⁴ Secondly, it can be seen as an attempt to escape ‘the bipolarity of errors or some paradigms of the science of law’⁴⁵ by adopting a ‘moderate external point of view’ on the rules produced and implemented in international society. The first stage consists then in describing juridical phenomena through the discourses held by actors in the field; the second consists in the explanation of these discourses once related to surrounding phenomena; the third consists in a global re-interpretation of the whole phenomenon.⁴⁶ Dupuy’s method certainly matches this programme, at least up to certain point. Certainly, he was as attentive to rough practices as to discourses and decidedly sought the meaning of institutions and pretensions for actors. He even traced them back into the sphere of myths and always related them to the historical, social, economic, and environmental ‘situation’ of states (the main actors for him). But was it enough to build a new paradigm? It is now worth noting that Dupuy did not really go a step further and question the very notions of emerging regimes (such as the protection of the environment) he passionately studied. If emerging regimes for the protection of the environment evoked awareness of common interests and concerns, their categories stuck to sovereignty, appropriation of all resources of the territory, a ‘relational system’ based on the *do ut des* principle and a limited commitment to cooperation in the framework of neighbourliness, whereas a complete change of perspective was perhaps needed effectively to protect complex systems benefitting to all such as climate, aquifers, or biodiversity.⁴⁷ Things have probably changed little hitherto. Why Dupuy did not systematize some of his best intuitions⁴⁸ stemming from the opposite ideal-types (the ‘international community’, the ‘institutional system’⁴⁹) is not clear: it may be related to the state of law (then and probably still now) or to his personal attachment to a rather classical theory of state (*infra*). A third hypothesis could be that Dupuy was torn between the necessity of

⁴⁴ Popper, ‘What is Dialectic?’, in K.R. Popper, *Conjectures and refutations* (1963), at 3 in the version consulted at www.vordenker.de/ggphilosophy/popper_what-is-dialectic.pdf. For instance, it would be flawed simultaneously to assert that international organizations belong both to the relational and to the institutional model or simultaneously to reason along the lines of a latent objectivism and a strict voluntarism. *Contra*: A. Toublanc, in this symposium.

⁴⁵ This is the title of an article written by Ost and Van De Kerchove, ‘De la “bipolarité des erreurs” ou de quelques paradigmes de la science du droit’, *Archives de philosophie du droit* (1988) 177.

⁴⁶ This is a paraphrase of *ibid.*, at 180.

⁴⁷ See SFDI, Colloque d’Orléans, *L’eau en droit international* (forthcoming 2011), especially S. Paquerot’s contribution.

⁴⁸ He paid the best attention to the ‘common heritage of mankind’ in the UNCLOS, the antithesis of the Antarctic regime, but such a concept was forged with regard to resources situated beyond the limits of state jurisdiction. See R.-J. Dupuy and D. Vignes (eds), *Traité du nouveau droit de la mer* (1985), at 499–505.

⁴⁹ On the similarities, differences, and interrelations between the international community and the ‘institutional system’ see *L’humanité dans l’imaginaire des nations* (2009), at 98 ff.

accounting for the dominant juridical forms (formalistic, belonging to the relational sphere, to be analysed in more technical terms) and the wish to echo an alternative vision of international law (communautarian, still utopian, belonging to the institutional sphere). His 'open dialectic' would not only reflect antagonisms in the international society and law, but perhaps inevitable tensions within his own thoughts.⁵⁰

4. Considering that the antagonism between the 'relational' and the 'institutional' systems is the most structuring one in Dupuy's thoughts,⁵¹ it is worth turning our attention to the underlying concepts of state and international organization. Strikingly, Dupuy resorted to theories of state to build both these ideal-types. This has nothing to do with a reminiscence of monism with superiority of national law over international law. Such a question seems not to have preoccupied him much. Neither did he directly ask the question about the unity of state in national and international law. Well, he surprisingly referred to Jellinek and his theory of auto-limitation to affirm that the power of the state is 'unconditioned' in the relational system, but had said before that he undertook to build a model by exaggerating some features. Let us forget the frustration generated by this refusal to discuss Jellinek in itself. It is difficult to assert whether Dupuy was closer to monism (at least a moderate one, implying a relative superiority of international over national law) or to dualism. On the one hand, he appears to be closer to pluralism, but in a sociological sense: states behave otherwise in the 'relational' (where all are equals) and in the 'institutional' (where they are situated) models, but can import their relational habits into the institution.⁵² On the other hand, he simply dismissed any injunction to opt for one or the other. Dualism and monism would be illustrated respectively by the 'relational society' and by the 'institutional society', because international organizations remind one of structures well-known in domestic law and introducing a form of subordination.⁵³ However, he did not go so far as to assert the constitutional nature of the Charter of the United Nations for instance. As one sees, Dupuy jumped over a major line of division in the doctrine of international law. His 'dualism' was that of 'relational' and 'institutional' logics. Nonetheless, as one also sees, his ideal-types all build on the transposition of patterns very common in domestic systems or state philosophy. His acceptance of sovereignty is a classical one (the power of state is the supreme power),⁵⁴ even if he was tempted to substitute the notion of competence for that of sovereignty and to come back to Scelle.⁵⁵ Finally, he refrained therefrom because the primacy of international

⁵⁰ This hypothesis is freely borrowed from the presentation of E. Jouannet to O. Corten, *Le discours du droit international. Pour un positivisme critique* (2009), at 29–30.

⁵¹ In his 'Cours général' of 1979, *supra* note 6, at 114, he explained that the dialectic of power and justice was at work within the relation and institutional orders.

⁵² On state and international organization see Dupuy, 'General Introduction – Chapter 1', in R.-J. Dupuy (ed.), *Handbook on International Organizations* (1998), at 1.

⁵³ This 'eclecticism' is asserted in *Le droit international*, *supra* note 1, at 18.

⁵⁴ See for instance his theory of the existence and recognition of states that does not differ from that of Virally or De Visscher (the only admissible criterion is the effectiveness of the state).

⁵⁵ *Le droit international*, *supra* note 1, at 38.

law is not backed by a hierarchy of organs capable of ensuring its enforcement against the will of the state.⁵⁶ This could explain why he was inclined to conclude to the predominance of the relational model based on voluntarism. Predominance but not exclusiveness, then there is a competing model: the institutional one. As regards it, Dupuy's thoughts are simply disconcerting. A whole article of 1957 is devoted to 'L'organisation internationale et l'expression de la volonté générale'.⁵⁷ Jean-Jacques Rousseau presided over the introduction and found an echo in the structure of the text: the first part deals with the general will and direct democracy, and especially with 'the citizen-State'; the second part deals with representative democracy. It is curious that an author constantly trying to maintain his depiction of international law starts with the translation to international organizations of concepts borrowed from another author, Rousseau, who was more than sceptical towards international law and articulates them with the history of political forms within the state, as if there were a universal linear development from direct democracy to representative democracy. That Dupuy later demonstrated how relational patterns cross international systems based on representation does not clear his analysis of its original flaws. It seems to us that a set conception of forms of political organization – be it the state as an international subject or as a polity seen from within – may explain the shortcomings of Dupuy's dialectic and may have impeded its assumption of a new paradigm renovating the very notions of international law.

Notwithstanding the numerous criticisms formulated thereupon, Dupuy's thoughts deserve the attention of younger generations of scholars for one main reason: international law is more and more complex. It would be a distortion to reduce it either to a set of stable concepts and techniques or artificially to separate it from justice and legitimacy concerns, even if the latter have not ousted power and domination. His cry against comfortable (over)simplification or the exclusiveness of juridical technique was premonitory. But partially captive of the past, Dupuy largely left to the next generations the task of rethinking sovereignty and other core concepts of international law.

⁵⁶ *Ibid.*, at 39.

⁵⁷ *RGDIP* (1957) 527.