Abstract

René-Jean Dupuy and Wolfgang Friedmann were good friends and for a large part shared a common vision of how post-World War II international law was structured and the ways in which it was evolving. It is worth comparing their respective views as they reflect the way in which a generation of international lawyers perceived in particular the impact of international organizations on modern international law seen as a true international legal order. Although influenced by the ideas of that period (the 1960s and 1970s), the views of these two great ‘men of vision’ remain of immense interest for the present and for times to come.

During the summer of 1964, the heavenly Villa Serbelloni on the bank of Lake Como hosted the ‘study group’ in charge of reviewing the past and future of the Hague Academy of International Law. Among the participants, together in particular with Professor Shigeru Oda, a few years later to become a judge at the ICJ, were two brilliant international lawyers. One of them was Wolfgang Friedmann, already a professor at Columbia. The other was René-Jean Dupuy, my father, who soon afterwards became the Secretary-General of the Hague Academy, a post he held for almost 20 years. The two men considered themselves as belonging to the same generation.\(^1\) They had indeed much in common, starting with their humanistic culture. At night, when the work of the study group was over, after dinner, Wolfgang played the piano to accompany René-Jean who was an excellent baritone singer. The two men shared in particular a common passion for Franz Schubert’s Lieder and more generally for the beauty of the German language which was WF’s mother tongue, but with which RJ was familiar, due to his studies. They also knew the price of defending human rights through democracy, as both had fought against the troops of the Third Reich. WF as

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\(^{1}\) W. Friedmann was born in 1907 (he was killed in 1972); René-Jean Dupuy was born in 1918. He passed away in 1997.

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a newly naturalized English citizen and RJ as a French soldier incorporated in the US army, as most of the young French citizens living in French Algeria had been after November 1942. Their common experience of the horrors of war had made both decide to become international lawyers: they shared a common vision of the role and function of a law aimed at strengthening and organizing the ‘outlawry of war’ and the promotion of human rights. The two men shared similar visions with regard, first, to the structure of the international society of the post-second war period, and, secondly, to the progressive importance acquired in international law by the ‘International Community’.

1 The Structure of the International Society

Every trained international lawyer is familiar with the distinction raised by Wolfgang Friedmann between the international law of coexistence and the international law of cooperation as it was presented in particular in his famous book, *The Changing Structure of International Law*. René-Jean Dupuy is the author of another binary distinction which presents both similarities and differentiations with that of Friedmann. As explained elsewhere in this issue of *EJIL*, he raised a distinction between the ‘Institutional Society’ and the ‘Relational Society’. While Friedmann’s classification is functional in essence, that of RJD is structural in the sense that it relies more directly on the growing importance (both in number and scope of jurisdiction) of the international interstate institutions set up right after 1945 in the move towards the creation of the United Nations. The first of the two was probably more influenced by the ideas of David Mitrany; the second by the teachings of his professor at the University of Paris Law School, Georges Scelle. Nevertheless, the connection between the two categorizations is obvious. The ‘Institutional Society’ of the French author is a by-product of the ever growing need for cooperation between states. Like Friedmann, R.-J. Dupuy insisted on the vertical and coordinated structure of the UN as opposed to the persistently horizontal dimension of the ‘Relational Society’, another name for the ‘Westphalian Society’ characterized by the mere juxtaposition of equal and rival sovereign states. What is interesting, considering the period during which these works were written (namely during the 1960s and 1970s) is the weight given by both authors to the institutionalization of the international society and their common tendency to perhaps attach a bit too much weight to the centralizing movement characterizing the institutionalization of the international society.

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2 After the landing of the US army in Algeria, a French *Département* at that time.
4 See in particular his *Le droit international public* (1963); see also his General Course of Public International Law at the Hague Academy of International Law, 165 *RdC* (1979-IV), in particular at 9 ff.
6 See 1 *EJIL* (1990). It is to be noted that W. Friedmann, who spoke fluent French, was also familiar with the ideas of Georges Scelle.
7 If one takes into account that Friedmann died as early as Sept. 1972 and that RJD gave his General Course of International Law at the Hague Academy in 1979.
In that respect, Friedmann tends to insist even more on the qualitative change introduced into the whole international legal system. Dealing with the theoretical issue of sanctions in international law, he suggested that the risk of being deprived of the benefits of the participation provided by international institutions aimed at carrying out essential functions for the welfare of all states would incite each of them to comply with its obligations as a member state of the international organization concerned. In that respect, R.-J. Dupuy, certainly less oriented towards a review of the issue of sanctions in the framework of the theory of norms in international law, insisted perhaps more realistically from the outset on the fact, very often not well enough remembered by his readers, that the relationship between the two societies that he defined was one of persistent and even perpetual competition, not of substitution of the ‘Institutional Society’ to the ‘Relational Society’. This is precisely what he in his General Course calls the ‘open dialectic’ featuring his approach, one which not only does not proceed in substitutive terms but which will never achieve the happy stage of synthesis in the Hegelian vision. In his General Course of International Law in particular, he demonstrates and exemplifies how each of the two ‘societies’ interacts with the other. International organizations, in particular, despite the setting up of common organs, some of them endowed with powers of decision duly recognized by the member states, like in particular the UN Security Council within the framework of Chapter Seven, are also the place where new types of competitions among states are developing. This is, among others, one of the reasons the institutional ‘sanction of non-participation’ did not develop as far as had been expected by Friedmann, although one must admit that the later creation of new adjudicative bodies, in particular the Appellate Body of the WTO, can be seen as the true realization of some of his anticipations.

Whatever the case may be, R.-J. Dupuy, like W. Friedmann, pays a great deal of attention to the new logics of the UN security system. Both authors, nevertheless, have witnessed the paralysis of the Security Council by the overwhelming use of the veto; and RJD takes every opportunity to recall that ‘peace through law’ is and will remain a myth as long as law remains a mere tool in the hands of governments. Nothing can replace the political will of states to abide by their legal obligations. As for R.-J. Dupuy, it is important to insist on this realistic dimension of his work as he has been much too often depicted, amazingly enough in particular by a number of his French colleagues, as a mere idealist with an harmonistic vision of the future of the international community. Far from this, his approach was mainly characterized by the absence of any happy end, but by the perception of a perpetual revival of efforts for cooperation due less to virtue than to necessity. Being at the same time a true expert in political philosophy, which he taught for more than 25 years, and in particular an analyst of the thoughts

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9 *General Course, supra* note 4, at 39.

10 See Leben, *supra* note 3.

of another Frenchman born in Algeria, Albert Camus, whom he almost met at school. RJD often referred to the vision of the latter according to which Sisyphus remains happy while again and again pushing up the rock which persistently falls down the mountain.

2 The International Community

R.-J. Dupuy and W. Friedmann shared among others a common interest for the necessity of developing cooperation between developed and developing countries to help the states belonging to the second category to achieve economic development and satisfy the basic needs of their populations. In his General Course, RJD paid attention to a second level of dialectical tension which came as a complement to the opposition between the ‘institutional’ and the ‘relational’ societies. He looked at this second couple as the dialectical tension confronting ‘Power’ with ‘Justice’. Justice was for the most part to be realized by the developed countries in their effort to fulfill their duty to assist the developing countries, the majority of which were proceeding from the satisfaction of the right of people to political independence, as achieved between the late 1950s and the mid 1960s. In that respect, RJD stayed close to other brilliant French-speaking authors, some of whom, like Mohamed Bedjaoui and Mohamed Benouna, came from ‘the South’. This trend of thoughts was particularly active in France as a former colonial Empire at the time immediately after the independence of almost all the former French colonies. These authors paid great attention to the attempts made by the newcomer states, in particular within the General Assembly of the United Nations, to complete the political dimension of the self-determination of people by the conquest of their plain sovereignty over their natural resources. This was at the starting point of the development of international soft law, mainly by way of resolutions adopted by the UN General Assembly, some of them of particular political importance, like the controversial UN Charter of Economic Rights and Duties of States (1974). In that context, the reference to the international community was a key concept. As demonstrated by his rather tempered award in the Texaco Calasiastic v. Lybia Case (1977), R.-J. Dupuy was far from defending the most

13 It would be unfair to say that Friedmann was less conscious of the obstacles to the centralization of legal sanctions. See his book L’efficacité des organisations internationales (1966).
16 The term ‘droit international du développement’ (‘international law of development’), seldom, if ever, referred to in the English written legal literature of the time, with the exception of W. Friedmann, was launched by another important French author, Prof. Michel Virally, in an article published in the Annuaire français de droit international, (AFDI) (1965) 3, under the title ‘Vers un droit international du développement’; see Feuer, ‘Le droit international du développement: une création de la pensée francophone’, AFDI (1970) 88.
17 UN GA Res 1803 (XVII).
18 UN GA Res 3281 (XXIX).
19 53 International Law Reports (1977) 484.
extreme interpretation of the ‘right to development’, as he did not go so far as to question the right of foreign private investors to fair and equitable compensation for the expropriation of their investment. Nevertheless, like in particular Michel Virally and W. Friedmann, he considered that the growing necessity of cooperation between the developed countries (including socialist powers like the USSR) with the ‘Third World’ was based both on a requirement of equity and the best means of satisfying common interest in the long term. At the same time, the fast and increasing number of multilateral conventions adopted within the United Nations and dealing with the newly internationalized spaces, like Antarctica and the extra-atmospheric space including the Moon and other celestial bodies (1967), referred equally to the common interests of all states, each of them belonging to the ‘international community’.

This is another place where R.-J. Dupuy again met W. Friedmann’s interest in an emerging new communitarian dimension of public international law, as it was and still is produced by the common confrontation of all its members by the same challenges. Of course, it should not be forgotten that the sole ‘community’ here at stake is the exact opposite to the many specific and determined ‘communities’ claiming their own minority rights, a movement at that time still pre-empted by the universal proclamation of human rights. What was primarily at stake in the minds of these authors was the World, i.e., the Universal Community of People, at that time still mainly perceived through its inter-state format (the international civil society still being in its infancy) as the text of Article 53 of the Vienna Convention on the Law of Treaties (VCLT) illustrates.

Here lies nevertheless one striking difference between the two authors. Whereas Friedmann, surprisingly enough, does not even mention the importance of the emerging notion of jus cogens of international law in his works, R.-J. Dupuy pays great attention to it, emphasizing the fact that, contrary to natural law, peremptory norms of international law, precisely because they reflect in legal form the main common values of the different components of the international community, are subject to evolution, as reflected among others in VCLT Articles 64 and 66. While the two were very interested in the multicultural dimension of modern international law and the necessity of getting rid of a solely Western approach to it, it is possible that Friedmann, having already disappeared in 1972, did not have enough time to comment on this new type of rule, interested as he was by the legal theory of norms.

As far as their common vision of ‘the international community’ is concerned, R.-J. Dupuy seems even more conscious of the inherent tension featuring this very concept. He insisted constantly on the fact that this community was condemned to be torn between a mythical and a ‘historical’, i.e., political, dimension, going so far as to give the new version of his General Course as published under the auspices of UNESCO.

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21 A fact which is most probably to be explained by the date of his death, 1972, as compared to that of the adoption of the Vienna Convention on the Law of Treaties, in late 1969.
the title of *La communauté internationale entre le mythe et l’histoire*, a way of depicting it more by reference to its philosophical background than to its legal nature.

Finally – and here again there is a differentiation to be noted between the two friends on each side of the Atlantic – R.-J. Dupuy’s vision of the international community became more and more linked with the elaboration of his theory of Humanity as a new key concept, if not even a new subject of international law emerging with the 1970 UN General Assembly resolution on the Sea Bed depicted as the ‘Common Heritage of Mankind’. Here again, nevertheless, R.-J. Dupuy never forgot the ever persistent asperity of state sovereignty. At the same time, towards the end of his passionate life, he perceived that the development of new technologies, starting with the Internet, made the states’ pretention to safeguard the integrity of their territorial sovereignty more and more illusory.

Even if prematurely interrupted by Wolfgang’s dramatic end, murdered in Central Park, the dialogue between him and René-Jean always kept something of the flavour of their duet while together interpreting Franz Schubert’s *Lieder* in Bellagio: a common conviction that international law is to be understood and interpreted through its changes and evolutions rather than through its continuity as the law of competition among sovereignties. Much science and a touch of romantism. Two men with vision. There are not that many of them among international lawyers in one generation.

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23 (1986).