The Changing Structure of International Law Revisited By Way of Introduction*

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In the academic year 1968-9, the University of Paris II hosted Wolfgang Friedmann, on sabbatical from Columbia University, as Associate Professor. A number of young French students thus had the opportunity to follow a seminar in international economic law which was to influence deeply the careers of several of them, among them myself. Quite apart from the topic dealt with – international economic law was not yet commonly taught in French universities – it was Friedmann's personality as such that exercised undeniable charm. His Mozartian first name expressed his character, but only in part. Indeed, Friedmann had two forenames, which clashed rather brusquely to our Parisian student ears: alongside Wolfgang was Gaston, the first pointing to his German father, and the second to his French mother.

This combination was symbolic in itself, for Friedmann combined multiple cultural worlds (*Kultur* is a word that often recurs in *The Changing Structure*) and civilizations: German and French cultures, but also, since his home country had sunk into barbarism, British culture (as far as I know, Friedmann remained a British citizen until the end of his life), American culture and still other non-Western ones, in which he was to display an interest during his many teaching periods abroad.[1]

It was perhaps, indeed certainly, this man of culture that primarily interested the students we were: opening his *General Theory of Law*, translated into French in 1965,[2] and discovering an author equally at ease in the French school of exegesis, the German school of public law, or in British and American legal scholarship,

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1 For a note on W. Friedmann's life and work, see the Special Issue of the *Columbia Journal of Transnational Law* on him, 10 *CJTL* (1971) 1, for the tenth anniversary of that journal, which he had helped to create and inspire. A year later the recipient of that homage was to die prematurely and tragically. See the articles by O. Lissitzyn and the Editors opening the journal for 1972 (11 *CJTL* (1972) 3).

2 W. Friedmann, *Théorie générale du droit* (1965).

exercised great fascination over the students. Similarly, his *The Changing Structure of International Law*,[3] where George Scelle is cited and discussed just as much as Jessup, Lauterpacht as well as Kelsen, Brierly and Geny, and where judgments of the *Conseil d'Etat* are referred to as often as those of the United States Supreme Court or the House of Lords, offered a model of an internationalist who, to paraphrase Dworkin, took the adjective 'international' in the expression 'international law' seriously.

It was from a feeling that this international legal culture had become less 'plural', less diversified, less truly 'international' than in Friedmann's time that the idea arose to invite a group of 'trans-Atlantic' authors to participate in a Symposium on the current state of international law, with the aim of strengthening the still too loose links between people and schools of thought on both sides of the ocean.

Hence the idea of setting out from a reconsideration of the themes of Friedmann's undoubtedly best-known work, *The Changing Structure of International Law*. We felt this book typified one current of thought in international law (which might be called a current of institutionalist thought) that marked the 1960s. Other names one might mention in this connection are Jessup, Jenks, and certainly Lauterpacht, on the side of English-language scholarship, and on the French side authors influenced by Scelle, including R.-J. Dupuy, Colliard or, equally, Virally.[4] It would undoubtedly be easy to find representatives of this school in other European countries.

Four themes were selected for discussion in this Symposium. For each of these, two authors, one on either side of the Atlantic, were asked to contribute papers. A third writer was invited to comment on the two texts. This issue of the Journal features the contributions on the first theme: The State between Fragmentation and Globalization. Articles on the other three themes will be presented in forthcoming issues.

In this introduction, we shall briefly review some of the most typical themes developed by Friedmann in his work, as being representative of the 1960s scholarship that was to influence many authors of the next generation, namely our own. Looking backward will provide a starting point for the forward-looking considerations of the authors contributing to this Symposium.

3 W. Friedmann, *The Changing Structure of International Law* (1964) (hereinafter *The Changing Structure*).

4 For R.-J. Dupuy, sadly recently deceased, the closeness is particularly striking, with his distinction between the international law of the relational society and international law of the institutional society. See *Le droit international*, first published in 1963 in the *Que sais-je?* series and continually reissued since. See also of course his *Cours général* at the Hague, 'Communauté internationale et disparités de développement', *RdC* 165 (1979, IV) 9. For M. Virally one might cite this significant passage from the Foreword to his *L'Organisation mondiale* (1972), at 5, in connection with the setting up of the 'United Nations family': 'Very few are prepared to admit that what we have here is a new form of political organization of human societies, in no way less novel or important than those the modern state presented at its time ...' Again, in the 1996 *Cours* (forthcoming) by J.A. Carillo Salcedo, the stress is placed on the transformation in the structure of international law wrought by the development of international organization.

I. The Distinction between the International Law of Coexistence and the International Law of Cooperation

The most widely known theme in Friedmann's thought concerns the distinction between the international law of coexistence and the international law of cooperation. At the same time as Friedmann was working on this topic, R.-J. Dupuy in France was developing an equivalent distinction between the international law of the 'relational society' and the international law of the 'institutional society'.[5] It is hardly surprising that it was Dupuy who prefaced Friedmann's *De l'efficacité des institutions internationales*, published in France in 1970, which gathered together his main analyses.

For Friedmann, contemporary international law was experiencing a twofold extension: a horizontal movement, following the great decolonization movement of the 1950s and 1960s, and a vertical one, bringing within the sphere of international law questions hitherto dealt with only nationally.[6] What attracted me personally at the time about his explanations was the 'objective', 'necessary' aspect of the development of international law: states were, whether they liked it or not, drawn into a cooperation movement because in both economic and technical terms they had become objectively interdependent. Governments needed to ensure this cooperation not only by concluding bilateral or multilateral treaties in ever-growing numbers, but especially by creating international organizations to carry out the functions essential to the welfare of all states. Friedmann was undoubtedly influenced here by the so-called functionalist doctrine, as presented by David Mitrany in his brief 1943 work,[7] though his name is not, it would appear, cited in *The Changing Structure*.

This development of an international law expressing the need for states to cooperate in order to attain objectives beneficial to all enabled Friedmann to furnish a new answer to the old question of the sanction in international law: to the extent that states need to participate in institutions of international cooperation, the threat of being deprived of the benefits of that participation creates a type of institutional sanction that should assure the international law of cooperation of greater effectiveness than the international law of coexistence, which had no real sanction if, with Friedmann and against Kelsen, one rejects the notion that reprisals and war are the sanctions under this law.[8] It would not, however, seem that this assessment of the effectiveness of the 'sanction of non-participation', as he called it, proved true in practice, since if states need organizations, organizations have still more need of states.[9]

5 *Supra* note 4.

6 A summary of the theses defended by Friedmann in his work can be found in Chapter 22, at 365–381.

7 D. Mitrany, *A Working Peace System* (1943).

8 The question of sanctions is discussed in Chapter 8 of *The Changing Structure*. Friedmann's thesis on 'the sanctions of non-participation' is set out at 88–95.

9 See C. Leben, *Les sanctions privatives de droit ou de qualité dans les organisations internationales spécialisées* (1979). This book derived from a doctoral thesis aimed at assessing the accuracy

Playing devil's advocate, one might add that the emphasis laid by Friedmann and other writers who shared – and still do – his sensitivity to the qualitative change brought by the international law of cooperation not only made them somewhat overestimate the break between the international law of coexistence and the international law of cooperation, but also meant that they did not seek a thorough understanding of the specific *modus operandi* of the international law of coexistence, as being the prototype of a decentralized, i.e. anarchic, law. By contrast, part of the French school of international law in recent years has sought to show what Combacau calls 'the specific genius' of international law. Where Friedmann saw only the effects of a 'rhetorical international law' that expressed states' bad faith, authors like Combacau or Alland demonstrated the presence of a logic specific to a model of a decentralized legal order constructed on the unilateral assessments of states with equal sovereignty.[10] Still more, it would seem that this unilateralist logic of international law has not disappeared with the setting up of international organizations but, on the contrary, in a good number of cases has tended to perpetuate itself even within these organizations.

Friedmann did not, however, cherish too many illusions as to the resistance that might arise along the road towards more effective international law. It is no coincidence that his work in French cited above starts with a section entitled 'Undeceived Thoughts on the Role of International Law'. Those resistances were the ones that nationalism and the defence of national sovereignty raised against the advance of international law. According to Friedmann, this obsession with national sovereignty would be completely anachronistic in an interdependent world. He did not, however, fail to recognize the attraction of nationalism; but he saw its ravages arising more in the non-Western world despite, he wrote, '... the utter inadequacy of nationalism as an effective expression of the military, political, and economic realities of our time ...'[11] What might he say today in a world where nationalist passions no longer spare any continent, flaring up even in Europe itself as we have recently and dramatically witnessed?

In the last analysis, if the course of history has not exactly followed Friedmann's expectations, the contradiction he noted between national fervour and international, transnational and even supranational realities certainly exists and has deepened still further. This topic will be explored by the authors in these pages. Their task is to examine the present situation of the state, caught as it is between mounting internal divisions and the globalization of economic and technical phenomena which have experienced unceasing growth since the time that Friedmann wrote his major work.

of Friedmann's intuitions. The findings showed that his enthusiasm over 'sanctions of non-participation' ought at the very least to be moderated.

10 See Combacau, 'Le droit international: bric-à-brac ou système?', *Archives de philosophie du droit* (1986) 85. By the same author, *Le droit des traités* (1991), where the argument on treaty law is entirely conducted on the basis of the logic of an anarchical system. Similarly, J. Combacau and S. Sur, *Droit international public* (2nd ed., 1995), at 23–29; and D. Alland, *Justice privée et ordre juridique international. Etude théorique des contre-mesures en droit international public* (1994).

11 *The Changing Structure*, 35–37, at 36.

II. The Hierarchy of Norms

One may search in vain in the 410 pages *of The Changing Structure of International Law* for the least allusion to the question of a hierarchy of norms in international law, to which so many books and articles have since been devoted: *jus cogens*, obligations *erga omnes*, the distinction between crimes and delicts in international law were all issues that appeared after Friedmann had spent his life thinking about international law. Is this very absence not, though, confirmation of Friedmann's main intuition, which dominates his entire approach to international law? For by placing the changing structure of international law at the centre of his thoughts, he could only mean that international law has a basically evolutionary, rather than fixed, structure. Indeed, the best proof of this evolutionary nature is surely to be found in the emergence, only a few years after Friedmann's work was published, of this set of problems he knew not of, so close then and yet so distant already, which relate to the possible (or impossible) existence of a hierarchy of norms in international law.

But for us today, 'revisiting' the panorama Friedmann left us, we must obviously take these new developments into account. This is surely an additional manifestation of our fidelity to the spirit that animated Friedmann when he wrote *The Changing Structure*. Thus, the second theme to be explored in this Symposium is whether a hierarchy of norms does indeed exist in international law.

III. The New Subjects of International Law

Another theme one might identify in Friedmann's work, again to be found frequently among the 1960s authors mentioned earlier, is that of the 'new subjects' of international law, dealt with by Friedmann in Chapters 13-15 of *The Changing Structure*. These are, first of all, certainly the international organizations, the consecration of which as such, in the International Court of Justice's opinion of 11 April 1949 on *Reparation for Damages Suffered in the Service of the United Nations*, was still very recent at the time Friedmann was writing.

But there is also, and this is a point which traditionally encounters innumerable objections, the possibility for physical or legal persons also to be, to a limited extent, subjects of international law. It is interesting to note that Friedmann deals with this point by very clearly distinguishing the position of companies *vis-à-vis* international law from that of physical persons, i.e. individuals.

A. Companies

Friedmann, in fact, treats the whole issue of multinational enterprises (or transnational companies) with a considerable degree of clairvoyance, even though he never uses these terms, which had not yet appeared in the international legal

literature.[12] But in speaking of the 'manyfold international economic activitities of private corporations', Friedmann is indeed referring to the activities of multinational enterprises, though not yet with a very clear concept of these.

Friedmann's analyses cover the whole problem of international investment and the development of agreements between states and private enterprises. Here too, he does not actually use the term 'state contract', coined by Mann as long ago as 1944,[13] though it is very much the point. Thus, he notes that private companies clearly do not have the same status *vis-à-vis* international law as intergovernmental organizations, but that to the extent that their activities are subject to public international law they acquire a limited status in the international legal order.[14] This adumbrates a discussion that was to rage in subsequent years on the internationalization of certain types of contracts concluded by states.[15]

He notes in this connection the growth in the number of arbitrations between states and private companies in the area of international investments (especially in connection with concession agreements) and argues that the time is ripe for the realization of certain projects aimed at creating a permanent mechanism for settling disputes on these questions. This type of mechanism would enable companies to bring an action directly against a state before an international court, without having to have recourse to the diplomatic protection of their national state.[16] Indeed, not much later, in March 1965, the Washington Convention was signed, setting up the International Centre for Settlement of Investment Disputes. We are all familiar with the role it was to play.[17]

One might add that he devotes an entire chapter (Chapter 12) to the general principles of law, to which, following Lauterpacht, he accords an important function in the development of international law. And while he recognizes that the International Court of Justice is reluctant to have recourse to these principles for fear

12 *Ibid*, ch. 14.

13 Mann, 'The Law Governing State Contracts', *BYbIL* (1944) 11, reprinted *in Studies in International Law* (1973) 179.

14 '... it does mean that they participate in the international legal process and that they acquire a limited status in public international law, to the extent that their activities are controlled by public rather than private international law'. *The Changing Structure*, at 375.

15 See esp. the classic studies by Weil, 'Problèmes relatifs aux contrats passés entre un Etat et un particulier', *RdC* (1969, III) 94, and 'Droit international et contrats d'Etat', in *Mélanges offerts à Paul Reuter* (1981) 549. For one of the last echoes of the controversy see, Lillich, 'The Law Governing Disputes under Economic Development Agreements: Reexamining in the Concept of Internationalization', in R.B. Lillich and C.N. Brower (eds.), *International Arbitration in the 21st Century: Towards 'Judicialization' and 'Uniformity'* (1994) 61. This author discusses Bowett's refusal to accept the application of international law and of general principles of law to economic development agreements. See Bowett, 'State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach', *BYbIL* (1988) 49, esp. at 51–52.

16 *The Changing Structure*, at 238.

17 *Ibid*, at 238, and on the ICSID Convention see Delaume, 'La convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats', *Journal du droit international* (1966) 26; Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of other States', *RdC* (1972, II) 333.

of being accused of creating judge-made law,[18] he argues that this might not be the case in the arbitration being developed in connection with concessions and other types of contracts concluded between states and companies. And we indeed know the importance that these principles came to have in all future litigation on state contracts. It should be noted in passing that Friedmann considered that the principles governing the functioning of the French administrative contract might be treated as an example of general principles of law applicable to this type of state contract. On this point, rightly or wrongly, he showed more confidence in the French administrative model than did French arbitrators in the celebrated cases that were still to come before the court.[19]

B. Individuals

Regarding individuals, Friedmann, under the acknowledged influence of Jessup[20] and of Lauterpacht[21] maintained that an evolution of international law was under way; an evolution he sincerely desired, while remaining acutely aware that the essentially intergovernmental structure of this law necessarily brings the deepest resistance to such breakthroughs in the international legal order by the individual.

It should be noted first of all that he tackles the problem starting from the international criminal responsibility of the individual, strikingly confirmed by the Nuremberg and Tokyo Tribunals. This responsibility requires the prosecution of war criminals and those guilty of crimes against humanity and peace. This responsibility is for Friedmann the first expression of the constitution of an international status of the individual: for if the individual can be directly prosecuted for infringements of international law, then the individual ought also to be able directly to benefit, he argues, from rights conferred by international law.[22]

18 His expression, *The Changing Structure*, at 190. For Sir H. Lauterpacht's ideas on the question see *The Development of International Law by the International Court* (1958), ch. 9.

19 As we know, in the Arbitration ruling *Texaco-Calasiatic (TOPCO) v. Libyan Government*, 29 January 1977, *Journal du droit international* (1977) 350, the sole arbitrator, R.-J. Dupuy, considered that '... the theory of administrative contracts is rather specifically French ...' and could not be 'considered to correspond to a "general principle of law"...' (para. 57 of the ruling). Similarly, in the ICSID Ruling of 20 November 1984 (*Amco Asia v. Republic of Indonesia*), the Arbitration Tribunal chaired by B. Goldman declared that '... the French concepts of unilateral administrative act or of administrative contract and the French rules applying to these notions are not practices or rules common to all nations.' See *Journal du droit international* (1987) 145 (note by Gaillard) 149.

20 *A Modern Law of Nations* (1948).

21 'The Subjects of the Law of Nations', *LQR* (1947) 438, *LQR* (1948) 97.

22 See *The Changing Structure*, at 234:

> Although there has been no organic connection between the movement for an international recognition of human rights, mainly through the United Nations Declaration of Human Rights and the subsequent draft covenants of the United Nations, and the imposition of individual criminal responsibility on prominent individuals of the German and Japanese nationalities, in the Nuremberg and Tokyo trials of war criminals, there should be a general correlation between rights and duties. To the extent that the individual is held entitled to assert certain claims to human dignity and the protection of vital human interests on an international level, he can also be fairly held to assume a corresponding degree of responsibility for actions that directly interfere with such values.

Friedmann dwells much on this development of an international penal law, the first manifestations of which appeared with the incrimination of piracy as a crime *jure gentium*, then of the slave trade, white slave traffic, drug trafficking, and so forth.[23] However, it was the establishment of the Nuremberg and Tokyo Tribunals that he repeatedly returned to in his work, as constituting for him the most important milestone in the evolution of international law. He argues that

> the principle that, in certain exceptional circumstances, the individual may be held responsible for certain actions committed against aliens or even against his own nationals, is an important affirmation of the fact that it is ultimately individuals who compose mankind, and that the philosophy of international law is beginning to move away from the poisonous Hegelian and neo-Hegelian doctrines which postulate the state as the total integration of the individual and the necessary repository of both his freedom and his responsibility.[24]

Friedmann loathed Hegel, who he saw as the father of an ideology that was ultimately to lead to Fascism, Nazism and state Communism.[25]

However, while expressing deep commitment to the creation of an international criminal tribunal that would not be just a victors' court, so as to prosecute offences directly incriminated by international law, he recognizes that the draft convention drawn up in 1951 under UN auspices had no prospect of being adopted in any foreseeable future.[26] Yet it is in precisely this area that recent developments in international law have been most striking, with the creation of the Tribunals for the former Yugoslavia (1993) and for Rwanda (1994), and with the drawing up by the International Law Commission of a draft statute for an International Criminal Court (1994) and a draft Code of Crimes against the Peace and Security of Humanity (1996).

Thus, with good reason, the third theme selected for reflection in this Symposium is the question of whether we are indeed witnessing a 'criminalization of international law'.

As regards the recognition and protection by international law of human rights, one may merely mention here the importance for Friedmann of the example of the European Convention on Human Rights, and his hope to see at least some of its mechanisms taken up by other regional groupings, or at the world level (the two UN Covenants were at the time of his writing still under discussion, and were to be adopted only in 1966).[27]

23 *Ibid*, at 167 *et seq.*
24 *Ibid*, at 247.
25 See *Ibid*, at 42, note 3: '... the unmitigated nationalism of Hegelian philosophy contrasted with the internationalist and humanitarian conception of Kant. It found its logical culmination in modern fascism, national socialism and, combined with certain aspects of Marxism, in modern state Communism.'
26 *Ibid*, at 146 and 168.
27 *Ibid*, at 242–244.

IV. The International Community

Finally, Friedmann devotes considerable attention to the theme of humanity ('mankind'). In looking into the question of the divisions of mankind and the universality of international law (Chapters 18-21), he once again shows the need to distinguish between international law of coexistence and international law of co-operation.

Concerning the international law of coexistence, Friedmann considers whether there are any major differences of approach between the Western and other civilizations in relation to this law's three essential points, namely:

- relations between national sovereignty and international law;
- the assertion that one is bound by promises at least as long as there has been no fundamental change of circumstances (a combination, therefore, of *pacta sunt servanda* and *rebus sic stantibus*);
- and finally, the ruling out of aggressive war.[28]

To this end, he reviews the doctrines of Islam, India (where he had taught), traditional China and other Asiatic countries, as well as Soviet doctrine of international law.[29] It is certainly worth underlining here Friedmann's concern to detach himself from the purely 'Eurocentrist' viewpoint that Western authors are often accused of.

In this examination, Friedmann came up against doctrines which at first sight proved difficult to reconcile with the great rules of what he called the international law of coexistence. This was the case for the traditional doctrine of Islam, which divides the world into *dar al islam* (the Muslim world) and *dar al harb* (all other countries), over which Muslim supremacy was to be exercised through *Jihad*. But he notes that an equivalent doctrine had indeed existed in Christian Europe, and that just as Europe had abandoned the crusades against heretics, modern Muslim countries were no longer strictly held to the traditional doctrine and proclaimed the same principles of international law of coexistence as other states. It remains to be seen to what extent this analysis remains valid in our time, for countries which, following the Iranian revolution, have adopted a more fundamentalist attitude towards traditional precepts.

Friedmann goes on to show that the communist revolutionary doctrine is incompatible with the principles of the law of coexistence. But the defence of the interests of communist states had turned them into tenacious defenders of that very law, in their strict views on respect for state sovereignty.[30]

28 *Ibid*, at 299.
29 *Ibid*, at 303–313.
30 *Ibid*, at 333–340. On the evolution of Soviet conceptions of international law, see I. Lapenna, *Conceptions soviétiques du droit international public* (1954); K. Grzybowski, *Soviet Public International Law. Doctrines and Diplomatic Practice* (1970).

Ultimately, for Friedmann the real rift is to be found in the international law of cooperation: the gap between developed and developing countries, between market-economy and state-trading countries. It is here that the heterogeneity of interests, values and philosophies is strongest, contributing to the division of mankind. Friedmann naturally raises the question of the rules of international law on nationalization through the claim for permanent sovereignty of states over their natural resources, or the question of the rules of economic liberalism on which the international institutions set up after the Second World War, such as the IMF or GATT, were based.[31] It should be noted that 1964, the year that Friedmann's work was published, was also the year of the creation of UNCTAD, which was set up with the aim of promoting a different economic logic.

But how do things stand today, at a time when the ideological division between capitalist and communist countries – which for Friedmann was one of the essential faultlines in international society – has practically disappeared, when the ground rules of international liberalism are now adopted by all, including China (one wonders whether it ought still to be called communist), and when the unity of the grouping of developing countries has disintegrated? At the same time, the division between the developed countries and the so-called developing countries, many of which are instead heading for even greater underdevelopment, is stronger than ever. These themes will be taken up in the fourth part of this Symposium, devoted to the international community.

31 *The Changing Structure*, ch. 21, at 341–361.