# Wolfgang Friedmann and the Major Developments in International Law: 1945-1964

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In the international system, no absolute power controls state behavior and this leaves room for cooperation and conflict. Since interaction is inescapable, states are in need of a system to standardize their acquaintances. This is where international law comes in. International law provides rules that stabilize and harmonize interactions. In the midst of an anarchical system, international law allows for the formation of an 'international society,' where states see themselves as restrained by a common set of rules, and work under common institutions. In his first magnum opus on international law, Friedmann examines the problems confronting law against a changing social background.

In the "Changing Structure of International Law" Friedmann begins by considering the main changes that have taken place in international law: its vertical extension to new fields such as economic collaboration and welfare, its horizontal expansion to take in all the civilizations and cultures of the world as well as the influence of various ideologies. Friedman examines three main levels of international law: the law of co-existence (where international law is limited to the traditional field of diplomatic inter-state relations and its role is extremely limited), the law of co-operation on a universal level (also restricted due to the ideological divisions), and the law of co-operation on a regional level (for instance, the European Economic Community, where Friedmann sees considerable greater possibilities).

Friedmann explains the objective, necessary aspect of the development of international law. States whether they liked it or not, were drawn into a cooperation movement since in both economic and technical terms they had become objectively interdependent (Leben, 1997). 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. This development of an international law expressing the need for states to cooperate in order to attain objectives brings Friedmann to the question of the sanction in international law. In this context, states need to participate in institutions of international cooperation and the threat of being deprived of the benefits of such participation, creates a type of institutional sanction that should assure the international law of cooperation of greater effectiveness than the international law of coexistence (Leben, 1997).

However, this assessment of the effectiveness of the 'sanction of non-participation,' according to Friedmann, did not prove true in practice, since if states need organizations, organizations have more need of states. It is apparent that Friedmann's emphasis caused him to overestimate the break between the international law of coexistence and the international law of cooperation, as well as fail to thoroughly understand the international law of coexistence as being the model anarchic law (Leben, 1997). Where Friedmann only saw 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. Additionally, it is probable that this unilateralist logic of international law has not disappeared with the setting up of international organizations but, on the contrary, in some instances, has tended to perpetuate itself even within these organizations (Leben, 1997).

Friedmann did not cherish too many illusions as to the resistance that might arise along the road towards more effective 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. While in recognition of the attraction of nationalism; he saw its ravages arising more in the non-Western world despite, "…the utter inadequacy of nationalism as an effective expression of the military, political, and economic realities of our time…" (Friedmann, 1964).

Friedmann observed the extent to which a more clearly established hierarchy of norms has emerged in the international legal system, as the publication of his book in the nascent and not so nascent doctrines of*jus cogen, obligations erga omnes*, crimes of state, custom and treaty, norm and consequence, and the other staples of the hierarchy discourse. By contrast, other authors examined the risks of a weakened international law, an international law made feeble by its own norms. The international normative system, as Weil stressed, is ultimately, and has always been an instrument for achieving a threefold objective: to ensure each state respect for its sovereignty within its frontiers and to regulate inter-state relations of coexistence and of cooperation (Leben, 1997). As noted by Charles Leben in recent years, part of the French school of international law has attempted to demonstrate what Jean Combacau calls the "specific genius" of international law, namely the presence of a unilateralist logic specific to a decentralized legal order constructed on the unilateral assessments of states with equal sovereignty (Combacau, 1986). This logic does not disappear with the growth of international organizations but, on the contrary, tends to perpetuate itself within that very organization (Leben 1997).

The international legal system follows a mode of organization that ignores power, whether it be of another state or of the community that the states or their peoples are deemed to constitute together. Following is a general principle according to which, Combacau insists, neither legal acts nor legal facts, whose legal effects are predetermined by the existence of an objective rule ordering them, will automatically produce the same effect in international law as they would in domestic law (Combacau, 1986). Another theme identified in Friedmann's work is the new subjects of international law. These constitute international organizations, the consecration of which was still very recent at the time of Friedmann's writing. There is also the possibility for physical or legal persons to be to a limited extent, subjects of international law. Friedmann distinguishes the position of companies vis-à-vis international law from that of physical persons, that is, individuals.

Friedmann treats the whole issue of multinational enterprises (or transnational companies) with a considerable degree of clairvoyance, which had not yet appeared in the international legal literature. In speaking of the 'manyfold international economic activitities of private corporations,' Friedmann refers to the activities of multinational enterprises (Friedmann, 1964). His analyses cover the whole problem of international investment and the development of agreements between states and private enterprises. 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 (Leben, 1997). Furthermore, Friedmann notes the growth in the number of arbitrations between states and private companies in the area of international investments and argues that the time is ripe for the realization of certain projects aimed at creating a permanent mechanism for settling disputes on these issues. 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. Significantly, in March 1965, the Washington Convention was signed setting up the International Centre for Settlement of Investment Disputes.

Friedmann emphasizes the general principles of law, to which he accords an important function in the development of international law. While he recognizes that the International Court of Justice is reluctant to have recourse to these principles for fear of being accused of creating judge-made law, 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. He 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. Friedman showed more confidence in the French administrative model than did French arbitrators in the celebrated cases that were still to come before the court. Regarding individuals, Friedmann, under the acknowledged influence of Jessup and of Lauterpacht, 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 (Leben, 1997).

Friedmann noted first of all 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 for Friedmann is the first expression of the constitution of an international status of the individual: if the individual can be directly prosecuted for infringements of international law, then the individual ought also to be able directly to benefit from rights conferred by international law (Friedmann, 1964). Friedmann dwells a lot 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.

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 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 responsibility.

Friedmann loathed Hegel, who he saw as the father of an ideology that was ultimately to lead to Fascism, Nazism and state Communism. 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 (Leben, 1997). Yet it is in precisely this area that recent developments in international law have been most striking, with the creation of the Tribunals for ex-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).

The question of whether there is a 'criminalization of international law' is another important theme of Friedmann's work. Regarding the recognition and protection by international law of human rights, it is critical to note the importance of the European Convention on Human Rights for Friedmann, and his hope to see at least some of its mechanisms taken up by other regional groupings, or at the world level. Friedmann devotes considerable attention to the theme of humanity or 'mankind.' In addressing the question of the divisions of mankind and the universality of international law, he displays the need to distinguish between international law of coexistence and international law of cooperation. 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; and finally, the ruling out of aggressive war (Leben, 1997).

Friedmann reviews the doctrines of Islam, India, traditional China and other Asiatic countries, as well as Soviet doctrine of international law. Friedmann's concern was to detach himself from the purely 'Eurocentrist' viewpoint that Western authors are often accused of. He 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. However, 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. Additionally, Friedmann illustrates 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 (Leben, 1997).

Ultimately, for Friedmann the real rift can be found in the international law of cooperation: the gap between developed and developing countries, market-economy and state-trading countries, where the heterogeneity of interests, values

and philosophies is strongest, contributing to the division of mankind. Friedmann highlights the question of the rules of international law on nationalization through the claim for permanent sovereignty of states over their natural resources; 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. Based on his analysis of the international system of his time as supplementing the classical law of coexistence by a law of cooperation, Friedmann's main theme was not centered on hierarchies but on the expansion of international law to new areas beyond the scope of classical international law. He predicted that "in due course the international legal order will no doubt either have to be equipped with a more clearly established hierarchy of norms, and more powerful sanctions, or decline and perish. The present is an era of either dawn or twilight" (Friedmann, 1964).

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