

# International Law: Torn between Coexistence, Cooperation and Globalization

## General Conclusions

Pierre-Marie Dupuy\*

### Abstract

*A comparison of the major trends of international law during the 1960s and the present time shows the consolidation in positive international law of the basic principles laid down in the UN Charter. There are nevertheless some very substantial differences between the time when the 'international community' placed greatest emphasis on the 'common heritage of mankind' and the time of globalization, the second posing new challenges to the sovereign state. It remains that the prohibition of force as set down in the Charter establishes the historical development of international law in the perspective of the specific categorical imperative defined by Kant's project of 'perpetual peace'. In this respect, it has become possible since 1945 to look at the development of international law from the viewpoint of progress.*

Last night, undoubtedly because I was feeling agitated about having to present the concluding remarks at a symposium where the discussion had been as substantial as it was varied, I had a dream. Wolfgang Friedmann had come back to join us in our work. He was hoping to compare the period during which he had written *The Changing Structure of International Law*<sup>1</sup> with ours, in an attempt to derive some useful lessons. By way of conclusion, then, I will recount the dream conversation that took place between Friedmann and myself. The relative density of our discussion is due not so much to my own ideas as to the wealth of knowledge and insight brought by each of the participants to the colloquium, which I sought to report as well as I could to the illustrious guest of my dream.

So that this tale might not have the opposite effect of making readers sleepy, I have sought retrospectively to create some order out of that disturbed night's discussion. I have accordingly structured it into six points.

### 1

In my dream, W.F. began by asking me whether anything fundamental had changed since that afternoon when he left us all, near Central Park<sup>2</sup>. He was particularly concerned to know how much the political evolution of international relations over these past ten or 15 years had affected the nature of international law.

In my wish to come straight to the point, I gave him a rapid summary of the changes that had taken place in the structure of international society since the disappearance of the socialist bloc. W.F. was interested to hear that today we normally refer to this transformation as the 'end of the Cold War', whereas for him, as history in fact would seem to confirm, the Cold War had actually ended in late 1962 after the Cuba crisis, which ushered in the period known as 'peaceful coexistence'. The fact that we no longer use this expression today is presumably not entirely a coincidence. It indicates a wish to gloss over a paradoxical period, a time when the normative creativity of the United Nations was able to deal with their divisions.<sup>3</sup>

I then described to him that brief period of euphoria associated with the Gulf War, when for a moment people believed that the initial design of the United Nations Charter had finally been realized. I told him of the particularly dynamic way that the Security Council, at

long last reconciled, had at one point decided to extend the interpretation of ‘threat to peace’. I indicated to him, in other words, how the Council had interpreted its powers at the start of this decade, seeking to adapt measures under Chapter VII of the United Nations Charter to the evolution of armed conflict, including non-international conflict. Following my descriptions, W. F. noted that this dynamic practice by the Council was a tangible realization of the link already existing in the Charter between the promotion of peace and protection of the human person, albeit in periods of armed conflict.

## 2

I insisted then on a lesson drawn from the period starting with the outbreak of the Gulf War and going to the end of the Bosnian war, which marked the rapid erosion of UN authority. Despite this latest setback, *infringement of the principle of non-recourse to violence is inseparable from breach of the other cardinal principles of the Charter*. The Security Council’s actions, though all too often inconsistent, pointed to a certain state of the law: war is no longer to be regarded only as a breach of an isolated obligation. Through the ‘constitution’ laid down by the Charter, the violation of recourse to violence now affects the whole set of rules upon which collective action by the ‘United Nations’ was founded. This was, incidentally, what enabled the Security Council, for instance, to take the decision, through its application of Chapter VII, to set up two international tribunals to try those responsible for crimes against peace and humanity in the former Yugoslavia and Rwanda.

Naturally, the development of international criminal jurisdiction could not but enthuse W.F. He immediately saw it as confirmation of the emergence of the individual as a subject of international law, endowed with rights but also liable to sanctions should the rights of other individuals, fellow citizens in mankind, be infringed. He was all the more struck for having devoted major sections of *The Changing Structure* to this very point. In his book, he had located the emergence of the individual as a subject of international law not just in the context of human *rights* but also in that of international criminal justice, as had been done for the first time by the Nuremberg and Tokyo tribunals. He therefore eagerly welcomed the appearance not only of the new ‘ad hoc’ tribunals, but also the prospect of an International Criminal Court mandated to apply a clearly formulated international criminal law. This confirmed, he indicated to me, that international law is definitely on the road to bringing about significant changes in its structures.

## 3

Next I turned to the question of the changing tides and vicissitudes, especially over the last ten years, of the notion of ‘international community’, as both legal concept and political myth.

‘So what has happened to it then?’, asked W.F., for whom reference to the community had always been of central importance.<sup>4</sup>

‘Since 1992’, I replied, ‘it has been the object of several hijack attempts on the part of certain rather particular national interests. It is thus by no means certain that Security Council Resolution 734, taken at the invitation of the United States and Britain against Libya, faithfully reflects the desire of the “international community as a whole”, whatever serious responsibility Libya might nevertheless hold for perpetuating international terrorism. The same thing may presumably also be said of Security Council Resolution 940 on the restoration of democracy in Haiti, or *a fortiori* in relation to the purely unilateral United States action to “punish” Saddam Hussein for his alleged plan to assassinate former President Bush. This usage is a deviation from the concept of “international community” and is no

doubt a perverse effect of the end not so much of the “Cold War” as quite specifically of “peaceful coexistence”.<sup>5</sup>

I explained to him that the apparent convergence of views among the diverse components of the international community had led some to believe that the ‘end of history’ that Hegel had announced was imminent. It was assumed that one and all are in fact finding their way towards the same democratic model. The universalized myth of the state based on the rule of law joins that of peace through law. Adopting such an illusion, which is clearly a sort of wishful thinking, reflects a sense of deep ambiguity. In order to be used legitimately, even implicitly, by the Security Council, with its restricted membership, the concept of ‘community’ would have to remain representative of the *tensions overcome* among its ever disparate members. The international community can only assert itself dialectically to the extent that it displays a transcendence of the contradictions running through it. And yet on the other hand, it pales with the unanimousness of international ‘political correctness’, which in turn feeds on the idea that the whole world has been struck by democratic enlightenment. Thus weakened, the community risks being captured by the most powerful state, sometimes compelled by its messianic tradition to believe that what it thinks best for itself is necessarily so for the rest of humanity too. I added that there was thus a manifest duty for all not to accept this strategic deviation from a universalist concept that no one owns.

W.F was quick to respond with a barrage of unsettling questions: ‘Does what you say, in perhaps rather overly polemic tones inspired by the “*furia francese*”, relate to a term that I have heard a lot during your discussions, namely “globalization”? Does this concept not by its very nature mean that the “law of cooperation” has now definitively taken on a universal dimension? Is this not a continuation of something that happily began in the 1960s, precisely, with the subsequent affirmation of the existence of the community of peoples and then of mankind, the bearer of a “common heritage” no less?’

#### 4

Without exactly turning into a nightmare, my dream was becoming decidedly disquieting, and I almost shook myself awake in order to be rid of it. For I was faced with the task of comparing the universalism of the period from the 1960s to the 1980s with the globalization of the 1990s. Nevertheless, in a flash some differences did strike me.

The first difference I saw was the contrast between the voluntary nature of the former as opposed to the induced, rather than spontaneous, nature of the latter. The promotion of the concept of ‘international community’, and a little later that of the ‘common heritage of mankind’, corresponded to the implementation of normative strategies intentionally undertaken by a group of states – those of the Third World – within the structure of the ‘Non-aligned’ movement. They launched these normative concepts as rallying cries or slogans aimed at fostering new legal rules in order above all to realize their ‘right to development’. A certain ideology of justice inspired these claims, with the platform of the General Assembly and the path of ‘soft law’ as the favoured means to disseminate them. The internationalism of the 1960s and 1970s was thus the outcome of a legal strategy carried forward by a political ideology.

It would, at least at first sight, seem as though things were quite different with the globalization of the 1990s. This came about with the universalization of markets, the spread of the consumer society values and the advance of technology. It is the result of technology more than of politics, and is especially due to the enormous strides that have been taken in the field of telecommunications with the advent of cybernetics. The universalism that was present at the time *The Changing Structure* was written sought to abolish inequalities between states while proclaiming the right of each to cultural difference. Globalization, or the discourse

surrounding it, claims instead to subject the entire world to the same economic constraints, led by computing technology. It operates not as a project but as an inevitability. It results less from the weakening of values than from the abolition of time. It is now possible to communicate anywhere in a single moment. In the cyberworld, as Nicolas Gogol prophetically remarked, ‘although you haven’t yet left, you are no longer there!’ The assertion of the apparent neutrality of all things technical replaces the desire to achieve a political design.

‘If that’s the way it is’, W.F. interrupted, ‘one might almost be tempted to say that globalization is universalism minus a conscience!’

‘Yet’, I replied, taking the analysis just a little bit further, ‘one soon sees that political strategy is far from absent from “globalization”. It appears in part as a counter-strike by those most directly threatened by the 1970s demand for a new international economic order. In fact, it leads to the dissemination of the idea of the right, held to be universal, to communicate. As with trade, which has been so broadly accompanied and promoted by the liberal economy, communication itself strongly risks becoming an end in itself.’

‘What, then, are its relationship with law?’ asked W.F.

‘I was just coming to that. The concepts of “international community” or of “mankind” were conceived, we have said, with a normative aim. They acted as a substrate for new rules of law. Among those who may be considered to have openly inspired these new rules are the “peoples” in the sense of United Nations law. The fact, though, is that their ultimate addressees remained the sovereign states. They accordingly found a natural area of expansion in the framework of international law. On the contrary, the notion of globalization designates a challenge to law. By partly substituting the network for the norm, it displays a new sort of transnational flow that seems in its turn to render the state *passé*. Just as the state has to date not been able to dampen the mood swings of financial markets or the strategies of multinationals, nor can it stop the ‘information highway’. National or even international regulations are largely powerless to cancel out the “planetarization” of information through the Internet.’

‘Nevertheless’, my argument continued, ‘one lesson to be learned as we approach the end of this century is that *the international community needs the state*, as a structure for organizing and creating norms for human conduct. We would therefore be mistaken to think that in the future, public international law will cease to be primarily a law of states. States remain all the more assured of occupying a central place in international law because they remain the privileged instruments of cooperation. The United Nations’ intervention in Somalia in January 1991, for instance, was justified by the vacuum created by the collapse of the state structure.’<sup>6</sup>

## 5

Encouraged by my interlocutor’s silence, I took the liberty to go on with a further observation, which touched on an even broader question.

As a faithful reflection of its time, *The Changing Structure* bore the mark of a certain rationalist optimism. In the book, the growing institutionalization of international society raises the hope of an improvement in the conditions for implementing the law. The closing of this century, though marked by millenarian fever, is by contrast typified by a feeling that the expansion of the material sphere of implementation of international standards is threatening the intrinsic unity of the international legal order.

In the 1960s and thereafter, we were already witnessing the emergence of problems concerning the relationship between general international law and the international law specific to each international organization. Particularly among Latin American jurists, the

question of relations between regional organizations and the United Nations was already being debated. However, the problem of maintaining the cohesion of the international legal order had not yet really been posed as such.

By contrast, the internationalists noted that the international legal order was progressively taking on a new substantive unity, marked by this phenomenon of cohesion of fundamental principles. All members of the international community were considered to be adhering to these principles, to the point of proclaiming the existence of binding norms.

Today, instead, many point to the dangers inherent in the growth of international jurisdictions, not just at regional but also at world level. The question of harmonizing their respective case law might well arise at some point in the future. We are also seeing a multiplication of specific systems for monitoring the implementation of obligations as laid down in important international conventions, particularly in the areas of human rights and environmental protection. The establishment of the World Trade Organization and its specific system for settling disputes has meant that international trade law seems to be taking on a greater autonomy. One almost has the impression that new legal feudalisms are claiming to erect their own 'rules of adjudication', to use Hart's expression, and are thus breaking with general international law. This is the very problem of 'self-contained regimes', although it was introduced as a result of a highly disputable interpretation of the judgment given by the International Court of Justice in the case of diplomatic personnel in Teheran.<sup>7</sup>

W.F. then replied that each generation of internationalists presumably has its particular mission. It is incumbent on current legal scholarship to analyse those institutions undergoing a process of autonomization in order to demonstrate that they are not perfectly autonomous regimes, as opposed to the belief held by some at one point, but are essentially technical phenomena in the framework of the expansion of international law within an order that profoundly maintains its unity.

## 6

W.F., however, was keen to avoid reducing our dialogue to a technical debate. He therefore took the initiative and returned to what had formed the basis for his approach when he wrote his seminal work. He insisted on the fact that the idea of 'peaceful coexistence', the productive period that marked the early 1960s, as we had already mentioned, was inspired by a certain '*progress*' in international law – a progress that was both ethical and technical. As states gained increasing awareness of their interdependency, they thus developed the principles contained in the UN Charter. On the strength of that solidarity, states also underpinned it with a dense network of permanent international institutions. Their respective rules radically changed the classical problem of implementation of law, as well as legal sanctions for breaches. Rather than marking a sort of 'rationalist idealism', as I had myself earlier called it almost with disdain, the point was, he had felt, a technical advance. And this remained so even if the practice of international organizations was never anything but the practice of their Member States.

I then felt it was time for me to let W.F. know of my strong commitment to his basic project, even if the subsequent events I had described to him might have led me to a rather critical view. As an attempt to better define the idea of 'progress of law', something particularly ambiguous in itself, I then insisted on the fact that introducing the United Nations Charter into the post-war international legal order had in fact in a certain way linked its promoters' design with that of the great minds of the eighteenth century. I was thinking of those who, in the spirit of the French and German Enlightenment, like Castel de Saint-Pierre and Immanuel Kant, had advocated the adoption of an international constitution for the rational promotion of 'perpetual peace'.

In this dream, however, W.F. remained as fine an expert in German philosophy as he had been in reality. He pointed out that for Kant the promotion of peace through the renunciation of force was not to be taken exactly as in Article 2(4) of the Charter. It was the categorical imperative specific to the law of international relations. It was an '*a priori*' principle posited as an ideal. It was not a rule of positive law.

I agreed with him. However, that was precisely why Kant's whole project could help us today in understanding the nature of the United Nations. We all well know that breaches of the rule laid down in Article 2(4) occur daily if not universally. They are indeed so frequent that, in the case of the military and paramilitary activities in and against Nicaragua in 1986, the International Court of Justice was impelled to a reminder: that despite the constant breaches of the principle of non-recourse to force, this rule had not fallen into desuetude. Indeed, noted the Court, 'In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.'<sup>8</sup> They were thus continuing to recognize the validity of the rule that they nonetheless ignored.

To be sure, I commented, in setting down the '*foedus pacificum*', or alliance for peace advocated by Kant a century and a half earlier, in the Charter, the international community produced two simultaneous outcomes. It provoked a risk for international law and, at the same time, it gave it a radically new trump card, already visible in the 1960s and confirmed today.

'Really? And what are they?', W.F. interrupted me, as if amused by the audacity of what I had said.

Emboldened as one may so easily be in a dream, I went on. The *risk* for contemporary international law, became one of being perpetually caught in flagrant contradiction with the new fundamental rule it had assigned to states, modelled on the various domestic laws: that law and force are incompatible and that the former ought to replace the latter. Previously, at least until the Kellogg-Briand Pact, states enjoyed the power to wage war in order to settle their differences. There might have been a logical inconsistency in this, but it was nonetheless highly practical. Recourse to force was able to pass for application of the law. But states no longer have this legal option. When they break the law, they now have only two possibilities: either to admit liability or to shelter behind an excuse they hope will absolve them. However, along with the risk, there is also the *trump card*.

'And what is that?'

'It is the fact that the law now has a meaning, that is to say, a direction and an orientation historically assigned to it. The renunciation of force, itself associated with respect for other cardinal principles laid down in the Charter, as we have just said, is not only a rule of positive law but also a project, an ultimate objective, a goal against which failures and setbacks, but also progress towards peace, may be measured. One can speak of "progress" (or regression) of law because since 1945, on the basis of the United Nations Charter, there exists a standard, a set of normative criteria which can be used in order to assess developments in law and monitor their application.'

'*Mutatis mutandis*, one might say the same thing of human rights, which would seem to be the other great innovation of the turning-point of the post-war period. They too constitute both positive law and a normative ideal, a '*sein*' and a '*sollen*' (an 'is' and an 'ought') assigned to everything, and thus legally subordinated to the achievement of a common goal.'

Turning towards W.F., I then asked him: 'Is this not, finally, a way of designating something close to what you yourself were among the first to analyse when you insisted on the competition going on between the law of cooperation and the law of coexistence? In this

sense, the law is now animated by a historic movement. It is this very movement that the classical formalist positivists do not wish to see. It is as if they were afraid their law had been changed for them: they seek to fix it in the position of the Lotus, that is, in the description that the Permanent International Court of Justice had given of it in 1928, in the case of that name, by bringing it down to the sole dimension of coexistence between equally rival sovereignties.’

From his silence I understood that W.F. undoubtedly shared my opinion. However, when I turned to seek his approval, I found he had disappeared. And thus my dream came to an end. I thought back to it when I woke up, fully determined to face the future of international law in the same way that I generally face my own: with disabused optimism.

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\* University of Paris (Panthéon-Assas, Paris 2), Director of the *Institut des hautes études internationales de Paris*, Member of the *EJIL* Editorial Board. Translated by Iain L. Fraser.

1 *The Changing Structure of International Law* (1964).

2 The reference here is to the tragic circumstances of Wolfgang Friedmann’s death.

3 This period was characterized by the common will of the socialist and liberal countries to overcome their respective ideological and economic differences in order to achieve some common goals.

4 Indeed, he had so often talked about this with his friend René-Jean Dupuy (my father). Friedmann, however, was not able to read his book on the topic, since it appeared after his death in 1986; see R.-J. Dupuy, *La communauté internationale entre le mythe et l’histoire* (1986).

5 In connection with the way reference to the ‘community’ more or less gives the great powers *carte blanche*, whether they propose its use or permit it, there is an interesting comment by Hegel in para. 333 of his *Philosophy of Law*. Wrong-footing Kant, he states: ‘Kant’s perception of perpetual peace... presupposes the adherence of States, based on subjective or religious moral motives, but always on their particular sovereign will, so that it would always be sullied by contingency.’

6 Another result of the persistence of the central role of the state is that the law of coexistence also continues to occupy a decisive place.

7 ICJ Reports (1980) para. 80, at 37.

8 ICJ Reports (1986) para. 186, at 98.