

Book Review - Michael Byers & Georg Nolte (eds.), United States Hegemony and the Foundations of International Law (2003).

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Michael Byers & Georg Nolte (eds.), *United States Hegemony and the Foundations of International Law*. Cambridge University Press, Cambridge, 2003. 531 pages.

The relationship of the United States to international law has often been problematic. Since the end of the Cold War the debate on that relationship has gained new vigor as the US has grown into a hyper-power, the influence of which has either been compared to that of the Roman Empire or considered to be without precedent. How is the existence of such a power compatible with a collective system of governance based on such principles as sovereign equality and state consent?

It is these questions that this impressive volume aims to address through six parts - international community, sovereign equality, use of force, treaty law, customary international law, and compliance. The editors, Michael Byers from Duke University and Georg Nolte from the University of Göttingen, invited twelve relatively young scholars from different cultural and academic backgrounds to offer their views on the topics, followed by commentaries from eighteen 'more senior' scholars - a combination that aimed to 'add energy and diversity to debates about the role and character of contemporary international law.'¹ The list of contributors is impressive, including such names as Jost Delbrück, Pierre-Marie Dupuy, Thomas M. Franck, Jochen Abr. Frowein, Matthias Herdegen, Andrew Hurrell, Martti Koskenniemi, Nico Krisch, Vaughan Lowe, Andreas Paulus, Alain Pellet, Catherine Redgwell, Volker Rittberger, Bruno Simma, Christian Tomuschat and Rüdiger Wolfrum.

The central theme of the book is the power of the United States. Unfortunately the volume remains without elaboration on the concept; it does not offer discussion on what power means, how it is exercised and by whom - questions that are central in political science. Instead most contributions cling to the formal assumption that

¹ Michael Byers & Georg Nolte, 'Preface,' XV.

power is exercised through formal governments; *governance* is attributed to *government*. But is this the case in a world of powerful multinational corporations and other non-state actors? Before pursuing these questions, attention shall be devoted to the other aspects of the volume, beginning with its creation.

The book was created largely as a collaboration: each chapter was discussed and reworked three times during seminars that took place in 2001. The majority of contributors are European. One wonders whether the United States had sufficient representation to give the topic fair treatment. The editors, however, defend their choice, pointing out that no book concludes any given topic. As they see it, academic discussion is only completed when all interested parties have expressed their views and in this long chain of exchanges any individual book represents merely one part. Consequently the editors stood by their desire to create a book based on forums in which European scholars in particular could express their views on this topic.

The goal of the editors was to offer discussions with a historical perspective. In this, they sought inspiration in particular from Wilhelm G. Grewe and Heinrich Triepel, two scholars belonging to the long line of prominent but controversial German lawyers of the last century, whose works suggest that even if specific historical analogies do not fit, looking at them can help in adopting a more considered view of phenomena that are hard to conceptualize from a contemporary perspective.² Such a perspective can also offer insights into the relationship between a leading State or entity and other States and entities.

The plan was thus to offer a calm and impartial debate on issues holding great theoretical importance, yet at a comfortable distance from reality. However, the events of 11th September 2001 interfered with this ambition, causing the underlying tensions surrounding in particular the use of force, to explode. In a seminar held in Göttingen in October 2001, one of the seminars at which the papers were discussed, what was intended as a festive dinner turned into a shouting match, and the discussion threatened to become an embodiment of real antagonism between scholars based in Europe and the US.³ Although wounded feelings have since been soothed, it comes as no surprise that the most openly controversial contributions are found under the title 'use of force', with the sharpest disagreements prevailing between Marcelo Kohen and Thomas Franck.⁴

² Wilhelm G. Grewe, *Epochen der Völkerrechtsgeschichten*, Nomos, (1984); Heinrich Triepel, *Die Hegemonie - Ein Buch von führenden Staaten*, (1938). See Georg Nolte, 'Conclusions', 497.

³ Thanks for Jarna Petman, present in Göttingen, for a discussion on the seminar.

⁴ Marcelo G. Kohen, 'The use of force by the United States after the end of the Cold War, and its impact on international law,' 197-231; Thomas M. Franck, 'Commentary,' 264-274. The second half of Thomas

The finished book conveys a sense of historical perspectives and contemporary commentaries accompanied by an analytic detachment from the current world. This combination stems no doubt from the fact that the venture was launched in May 2000, well prior to the terrorist attacks on the Twin Towers. However, whether this is an unambiguous asset is difficult to ascertain, as some essays give an air of impartiality that appears ill-suited considering everything that has happened in the relationship between international law and the US. Yet, echoing what was stated above on the advantages of wider perspectives, the tone becomes a minor cost of a greater good: considering the strong emotions awakened by the United States' fight against terrorism and in particular the war on Iraq, the book remains a welcome voice of reason, serving as a reminder of the importance of the bigger historical picture. It is certainly too early to tell how recent US actions have modified the principles of international law.

It nevertheless appears that since the writing of these essays, certain developments have occurred – such as new domestic US anti- terrorism laws and the bilateral pacts negotiated to shield US military personnel from ICC jurisdiction – already confirming some of their conclusions. This is particularly true in regards to Nico Krisch' excellent essay, in which he describes the various mechanisms the United States uses in its domestic legislation, administration, and judiciary, to weaken the role of consent in international law and to restrict the scope of State immunity, formerly the cornerstone of the principle of sovereign equality.

These same actions have resulted in successful assertions by the United States of qualitative distinctions between States, such as democratic and non-democratic, liberal and non-liberal, and their labeling as rogue states belonging to the 'the axis of Evil.'⁵ Disturbing is also the multitude of examples in which US predominance translates into actual treaty law through negotiations, at times accompanied with threats of sanctions, and implementation, as is discussed by Pierre Klein in his detailed and perceptive contribution.⁶

Contributors disagree, however, on the effects of these developments on the

Franck's commentary was published as an editorial comment in the *American Journal of International Law*, defending US use of force in Afghanistan as self-defence. See Thomas M. Franck, 'Terrorism and the Right of Self-Defence' (2001) 95(3) *AJIL* 893.

⁵ Nico Krisch, 'More equal than the rest? Hierarchy, equality and US predominance in international law,' 135-175.

⁶ Pierre Klein, 'The effects of US predominance on the elaboration of treaty regimes and on the evolution of the law of treaties,' 363-391.

principles of international law. Cosnard suggests that although examples can easily be found of situations in which the United States takes advantage of its predominance, no fundamental changes have occurred. He notes that even if the United State may appear as a compelling force in negotiations, the negotiating process has remained intact: the United States is legally powerless to compel others to engage in new obligations. He also emphasizes that “when a state is not bound by an international obligation, it chooses not to be above international law, but *beside* international law.” To him, this situation has always been possible because no rule is totally universal, precisely because of the principle of sovereign equality, the invocation of which has always been the privilege of powerful states.⁷

The consequences of recent US actions appear, however, too important to be dismissed as merely falling ‘*beside international law*’. The increasing frequency with which the US resorts to bilateral arrangements effectively expands the scope of US national law to domains that would traditionally have been considered that of international law. Therefore, as Krisch demonstrates, these actions are relevant to international law despite the intuition that the two are separate and unrelated phenomena. However, what is even more important is the fact that through these actions, the US appears to assume a *de facto* hierarchically superior position over other States and their citizens, without submitting itself and its citizens to any law other than its own. By doing this, Krisch argues, the US comes close to operating as a world government, thus undermining the principle of sovereign equality.⁸

But is this view tenable? Should US power be considered to have transformed “strength into right, and obedience into duty”?⁹ Generally there appears considerable reservation towards such an idea, as for example Cohen states explicitly that “it remains to be demonstrated that American supremacy has already been transformed into law”.¹⁰ Other authors are more cautious, approaching the matter primarily from the direction of the US’ ability to *hinder* developments in international law.¹¹ Andreas Paulus considers it also unlikely that the international community could develop without regard to US views on what the international community is

⁷ Michel Cosnard, ‘Sovereign Equality - ‘The Wimbledon sails on,’ 117-134, at 124 and 125-6.

⁸ Krisch (note 5), 135-175.

⁹ Jean-Jacques Rousseau, *The Social Contract*, (1762), ch III: ‘The Right of the Strongest.’ Quoted in Kohen (note 3), 229.

¹⁰ Kohen (note 4), 229.

¹¹ Edward Kwakwa, ‘The international community, international law, and the United States: three in one, two against one, or one and the same?’ 25-56, especially 51.

and, in particular, what it is not about, namely “the building of truly global governance, let alone government”.¹²

Considering these views together, the role the authors are willing to grant the US falls short of the image of a world government, of a hyper-power ruling the earth as it wishes; rather, the contrary. As Martti Koskenniemi points out, “as we have admired America’s achievements in the past, we have often been surprised at what it has been *unable to achieve*.”¹³ Kwakwa emphasizes the way in which the US is still dependent on the international community, as “the incredible power of the US will not be enough to enable it to ‘go it alone’”.¹⁴ Views, nevertheless, differ as to why that is so, as to what the primary factors restricting US authority are. Cosnard sees it as the ‘will’ of the United States. He concludes that if it wanted to, a superpower *could* change the foundations of the international legal system, or even more directly, commit a *coup de force*. But if the US possesses such powers, why has it not acted on them? Cosnard stresses the wishes of the US by stating that “the United States has never planned to govern the world, with all the duties such a program bears”.¹⁵

The idea sounds curious; is it indeed the ‘will’ of the United States that ultimately sets limits on its global influence? The idea does not receive support from all contributors, and instead a different explanatory scheme begins to emerge. To consider this alternative, attention needs first to be given to the concept of hegemon; what does it mean, and does the characterization fit the US today? Although the book is not based on an explicit theory of hegemon, some elaboration is offered in different commentaries, together suggesting that a hegemon as a coherent unit, attempting to represent *its* interests and values as universal, *its* rule as community.

As has been discussed, convincing evidence has been offered as to the tendency of the US to manifest itself as something universal, but does it also fulfill the second criterion of coherence; is the US sufficiently unified to wield the kind of power of a hegemon? Here views vary greatly. Stephen Ratner draws attention to the heterogeneous nature of the US and the difficulty of identifying any single American view as “each community within the United States has diverse views that

¹² Andreas Paulus, ‘The influence of the United States on the concept of the ‘International Community’, 57-90, 89.

¹³ Martti Koskenniemi, ‘Comments on chapters 1 and 2,’ 98.

¹⁴ Kwakwa (note 11), 26.

¹⁵ Cosnard (note 7), 134.

defy explanation".¹⁶

Nolte addresses Ratner's point, first by noting that "the contributions in this book mostly discuss the United States as something more complicated than a monolithic actor", and secondly by commenting, that despite diversity, there nevertheless exist situations in which the United States, as a state, acts in unitary and even coherent fashion. He emphasizes that even if the US is diverse internally, on the outside, "from the point of view of those who are addressed or affected by its decisions, the United States very often does appear as a unitary actor".¹⁷ He then points out that the notion of *government* does not become superfluous through the notion of *governance*. The latter often conceals the real agent behind power structures, thus depersonalizing the exercise of power; "it focuses on the process by which a certain goal is achieved rather than on the role of a certain actor or institution". Thus a notion of *government* is useful to "designate centrally responsible and powerful actors within (international) society".¹⁸

This view raises two problems: first, are those responsible and powerful actors in question states i.e. is *actual* governance still performed by governments? Secondly, is it sufficient to consider the diversity of the US as an internal condition, while treating it as a unitary actor on the international level? Vaughan Lowe discusses both perspectives, examining the international implications of the different levels of US government and noting the influence US non-governmental sector holds in international decision making. Most importantly, he points out that "US companies are international actors. They conclude bilateral agreements with States in the form of concessions, they compromise arbitration cases ... they are making customary international law in much the same way that States do".¹⁹

Koskenniemi advocates a reassessment in the nature of international community and in the role States play in it. He cites the vision of Hardt and Negri who consider the world in transit toward what Michel Foucault calls 'a biopolitical Empire' – an Empire that has no capital, that is ruled from no one spot but equally binding on Washington and Karachi, on all of us.²⁰ In this image, there are no interests that arise from States, but only interest-positions dictated by an impersonal, globally effective economic and cultural logic, a structural Empire which is, however, no

¹⁶ Stephen Ratner, 'Comments on Chapters 2 and 3', in particular 101-104.

¹⁷ Nolte (note 2), 492.

¹⁸ Krisch (note 5), 172.

¹⁹ Vaughan Lowe, 'Comments to Chapters 16 and 17,' 477.

²⁰ Michael Hardt and Antonio Negri, *Empire*, Harvard University Press, (2000).

less powerful as a result of not being ruled by formal decision-making from any one particular place. The outcome is a “logic of imperial administration” which is against formal institutions, and instead of supporting “the homogenous *national* power of the United States, works through military, financial and cultural structures that have become independent of political goal-setting and institutional control”.²¹

In an optimistic assessment, this change emphasizes the role of the ‘international community’ which receives its identity “from the horizon of universality that is part of its self-definition”. The new international community, not being “the handmaiden of some hegemonic substance”, according to Koskenniemi, is everything the Empire is not: transparent, rule-oriented and inclusive. All this involves “the familiar ideals of equality, rule of law and due process, but also a broad commitment to what could be called situated cosmopolitanism”.²² Byers and Nolte sympathize with this view, referring to Grewe’s idea that the post-Cold War epoch might be different, in that the development of an ‘international community’ could promote a “reshaping of the foundations of the international legal system in a different direction, so as to favour global interests rather than simply the national interests of the United States”.²³

But is there justification for such optimism? Even if the new ‘biopolitical Empire’ could assist the international community in escaping US domination in a positivist sense, is the same true at the level of ideology? Is it possible to separate global interests from the interests of the US? Cosnard is doubtful, transcending positivism by emphasizing that “the limitations on sovereignty are not due to the predominance of the United States, but are rather the consequence of the victory of the values of the Western world”.²⁴

An interesting question emerges: what if ‘community’ comes to mean rule by those who are able to articulate their interests as universal ones? Does not the old realist prophecy come true? “Just as pleas for ‘national solidarity’ in domestic politics always come from a dominant group which can use this solidarity to strengthen its control over the nation as a whole, so pleas for international solidarity and world union come from those dominant nations which may hope to exercise control over

²¹ Koskenniemi (note 13), 99.

²² *Id.*, 100.

²³ Byers & Nolte XV, (note 1).

²⁴ Cosnard (note 7), 131-2. For a discussion on the relationship of the international community and the US, see Kwakwa, (note 11), and Paulus, (note 12).

a unified world. 'International order' and 'international solidarity' will always be slogans of those who feel strong enough to impose them on others."²⁵

If the above is becoming reality, it would become futile to seek answers to the role of the US in the international community from principles of international law; the real scope of power relations would have escaped these notions, reducing them to mere a formalist utopia of a world where sovereign equality and state consent still play a role in international affairs.

These are, however, matters that the present volume does not address. This is perhaps regrettable, as it is such considerations on the notion of power and the role of international law in general that might offer the greatest contribution to the ongoing debate. All this notwithstanding, the volume can be considered a success in its desire to raise questions and be lauded for its calm historical perspective. It serves thus as an important contribution in the 'long chain of exchanges' in this important discussion in which many things are yet to be said.

²⁵ E.H. Carr, *The Twenty Years Crisis*, 2nd edition, Macmillan, (1946), 86.