BOOK REVIEW

'Much Wailing, and Gnashing of Teeth': On the Loneliest Superpower and the Flailing of Impotent Limbs

Michael Byers and Georg Nolte, editors: *United States Hegemony and the Foundations of International Law* (Cambridge University Press, 2003)

'The challenge of the postmodern world is to get used to the idea of double standards' - Robert Cooper, *The Observer*, 7 April, 2002.

It is difficult to imagine a text more timely than this one edited by Michael Byers and Georg Nolte. To summarise structure and content first: the text consists of eighteen contributions made at the Göttingen Conference of the same name, held in October of 2001. The text is divided into six chapters: 'International Community'; 'Sovereign Equality'; 'Use of Force'; 'Customary International Law'; 'Law of Treaties'; and 'Compliance'. Each topic is discussed in two full-length presentations, which, in turn, are critically analysed by three separate 'Comments'. An 'Introduction' by Byers and a 'Conclusion' by Nolte bring the total number of contributions to twenty. Although the text is divided thematically, virtually all of the papers (some more so than others) touch upon a single underlying issue: whether and to what degree the United States has managed to exploit its position as 'sole' superpower as a means of effecting a unilateralist alteration of the fundamental norms and rules of Public International Law.

The majority of contributors contend that while the US has regularly been able to fulfil its 'national interest' (however defined) through utilising the established mechanisms of International Law, it has been largely unable to unilaterally effect a basic alteration of these mechanisms. As a result, even though the only superpower, it follows that: (i) the US remains effectively 'bound' by International Law, and (ii) that political considerations of Hegemony or superpower status are irrelevant for critical evaluations of the health and efficacy of the international legal order. In the remainder of this review, I would like to explore these two assertions as a means of critical explication of the text.

The book commences with a classic piece of academic 'under-speak' offered by Nolte:

> In late September 2001, we seriously considered rescheduling the Göttingen conference, given that the overall topic, and particularly the issue of the use of force, was at that point not only prominent but also emotionally charged. In the end, and after consulting with all of the contributors, we decided to go ahead. As a result a lively and, at times, difficult debate animated the conference (xvii).

One of the small intellectual pleasures of reading the proceedings of an academic

conference is trying to figure out who was screaming at whom. Given that half the contributors were North American, and the other half western European, predominantly French and German, it is not difficult to imagine how 'the sides shaped up'. Nevertheless, there are a few surprises: Shirley Scott severely scolds the US for illicitly entering excessive reservations to Human Rights treaties, and Jochen Abraham Frowein offers tacit support for the US-led intervention in Afghanistan. If the conference were held today, in the ever-lengthening shadow of 'Operation Iraqi Freedom', it would be interesting to see whether even this modicum of trans-Atlantic goodwill would be on display.

My core criticisms of the text do not concern the substantive quality of the contributions, which range from solid to excellent - with the possible exception being Stephen Toope's piece on the US being overwhelmed on the customary law crystallisation 'front' by Canada. Rather, my main concerns are with what I perceive as two serious lacunae within the organisation of the conference itself. First of all, there is no agreed-upon definition of the concept of Hegemony itself as a subject of discussion; furthermore, virtually none of the contributors even attempt a definition. This is freely acknowledged by Nolte:

> Perhaps there should have been a chapter on the concept of hegemony. However, even if such a chapter had developed a more specific concept of hegemony, it would have been difficult to make thirty authors base their contributions on that particular understanding (493).

Beyond the rather obvious rejoinder of 'Why not?', I suspect that the absence of terminological precision is due to more fundamental, and largely unacknowledged, ideological preferences. The two classic works on the role of Hegemony within International Law - *The Epochs of International Law* by Wilhelm Grewe[1] (recently translated by Michael Byers) and *Die Hegemonie* by Heinrich Triepel[2] (unfortunately still not translated into English) - were both written during the Third Reich by authors who were either government employees or professional academics. What is problematic about this is not any issue of 'tainting' by National Socialism, but both authors' relationship with the nefarious (or 'badly misunderstood', depending upon your perspective) Realist political philosopher Carl Schmitt who, among other things, suggested that the US Monroe Doctrine could be used as persuasive legal authority to extend German domination over central eastern Europe. Hegemony theory is inextricably intertwined with the International Theory of Realism; Nolte, for example, categorises the concluding chapters of Grewe's *Epochs* as reflections of his 'intellectual and moral origins lying in a conservative, Nietzschean-inspired 'cold Realism' (497). Here the editor, perhaps unwittingly, draws our attention to the real reasons for absence of doctrinal engagement: Hegemony is too 'politically incorrect' a concept to be comfortably entertained by international lawyers who tend, as a profession, to Liberalism and Progressivism. To put it rather baldly: for the truly Progressive lawyer, Hegemony can only be entertained

1 Wilhelm Grewe, *The Epochs of International Law*, Michael Byers (trans) (2000) ('*Epochs*').
2 Hienrich Triepel, *Die Hegemonie - Ein Buch von führenden Staaten* (1938).

as a causal determinant of law in order to be ultimately rejected. Why the profession should display this kind of collective ideological bias when the historical development of the field points overwhelmingly to the exact opposite is a major issue in its own right. What concerns us here, however, is just how few of the contributors actually proceed to undertake these kind of self-critical considerations. Pierre Klein, in one of the truly excellent submissions, at least makes an attempt:

> History shows that it is very generally much more efficient in the long run for States to 'apply power within the framework of an institution or legal system', rather than to resort to raw military force or economic coercion. The most obvious reason for this is that turning a relationship between two or more entities of unequal power which is - ex *hypothesi* - initially based upon sheer material power into a relationship which enjoys the recognition and protection of the law inevitably legitimises the factual domination exerted by the more powerful State over the other(s). This transformation entitles the former to resort to the means put at its disposal by the international legal system in order to enforce the - now legal - obligations owed to it by the latter, within the 'neutral' framework of international law. *The very notions of 'force' or 'power' are thereby obliterated to a large extent* (363, citations omitted, emphasis added).

International lawyers tend to shy away from this kind of analysis precisely because it is altogether too 'illiberally' painful. A truly serious consideration of the theory of Hegemony within the development of International Law, either as a causal explanation (ie, as 'creator' of the system) or as hermeneutical instrument (ie, the determinant of the 'true' meaning of legal discourse) necessarily compels a naked re-assessment of the centrality of international politics - and, therefore, of statist power - within the formation and enforcement of international public order. The question now becomes why the international legal profession has proven so reluctant to do this, especially as other branches of the law - Family, Contract, Criminal, Constitutional - have all increasingly shown themselves willing to reconcile themselves, at least up to a point, with a 'critical theory' approach.

The unrelenting normativity of international legal discourse proves inseparable from the thorny issue of State Sovereignty, one of the foundational premises of both Hegemony and Realism. The *grise eminence* of Realism, Kenneth Waltz, has even gone so far as to characterise the hegemonic State - and hegemons are *always* States, *never 'Empires'* - as 'a surrogate of government', exercising leadership through the 'anti-anarchical' function of organising, stabilising, and, therefore, legitimating international politics.[3] Liberalism, however, thanks to the 'magic' of neo-Wilsonian multilateralism, has endeavoured mightily to relegate the unilateralist 'Sovereign' to the status of a mere 'subject' within the broader 'international legal *community*' - a societal amalgamation of all sovereign States, now formally equal - which has itself been invested with all of the

[3] Kenneth Waltz, *Theory of International Politics* (1979).

constitutionalist prerogatives of a (supra-) Sovereign. It is because of rhetorical stratagems of this kind that Progressive international lawyers are able to maintain, with a straight face, that Human Rights treaties constitute some kind of 'globalist legislation'; in fact, the very best chapter in the text, 'Law of Treaties', provides a very useful account of successful US unilateralist exertions against the crystallisation of the alleged free standing 'universalism' of Human Rights treaty regimes. Once again, the text's failure to provide the reader with a comprehensive definition of Hegemony proves critical. In fact, when examined in some detail, Grewe's formulation proves remarkably subtle and nuanced:

> ... an international legal order can only be assumed to exist if there is a plurality of relatively independent (though not necessarily equal-ranking) bodies politic which are linked to each other in political, economic and cultural relationships and which are not subject to a superimposed authority having comprehensive law-making jurisdiction and executive competence. In their mutual relations these bodies politic must observe norms which are deemed to be binding on the basis of a legal consciousness rooted in religious, cultural and other common values.[4] The stronger the leading position of the particular predominant power, the more that State marked the spiritual vision of the age, the more its ideas and concepts prevailed, the more it conferred general and absolute validity on expressions of its national expansionist ideology.[5]

Understood correctly, Hegemony runs the myriad gamut of 'leadership techniques' from 'domination' (*Herrschaft*) all the way to highly cost-effective 'influence' (*Einfluss*). It should now be clear why so many of the contributors proved so reluctant to 'theorise critically' about Hegemony and US legal behaviour. If Hegemony is simplistically misidentified with *Herrschaft*, then it becomes possible to empirically 'prove' that the wannabe unilateralist United States is in fact fully subject to a robust multilateral form of governance. Positive examples of 'failed' US attempts to unilaterally control the development of international customary law (cf Toopes: Arctic pollution; the 12 mile territorial sea; the abandonment of the Hull Formula) are all interpreted as counter-factuals against that presumed dominium the US *should* be enjoying if: (i) the US really was a 'hegemon', or; (ii) Hegemony operated to effectively alter the evolution of International Law. Since the US demonstrably does not always 'prevail' - a wholly accurate observation - then, by the necessity of Liberal logic, the US *must be bound*, and, therefore, a 'post-hegemonic' international legal order prevails. Hence, Toope is able to rather dismissively label the United States as 'the ineffective hegemon' (290).

The obvious logical fallacy at work here is due to the category mistake of confusing 'America-as-Hegemon' with 'America-as-Empire'. Hegemony theory expressly asserts that a State begins to lose its leadership status as soon as it shifts from cost-efficient Hegemony to cost-prohibitive Imperialism. The role played by ideological legitimation in hegemonic governance simply cannot be

4 Grewe, above n 1, 7.
5 Ibid 23.

underestimated. Herein, the majority of the contributors are rhetorically betrayed by their unblinkered Liberalism; *Herrschaft* has been illicitly inflated at the expense of *Einfluss*. If Grewe and Triepel are correct in their original assertions that Hegemony proves inseparable from Legitimacy, then a completely different picture of the yearned for ultra-Liberal/post-Realist international public order emerges. As Nico Kirsch quite accurately points out, a more detailed and exhaustive analysis of Hegemony reveals that Liberal analysis of multilateralist governance 'often conceals the agent behind such structures and depersonalises 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' (172). It is precisely *because* the US-as-hegemon acts through multilateralist institutions and mechanisms that a form of 'governmental surrogacy' is achieved, creating the need 'to retain the category of government beside that of governance, in order to designate centrally responsible and powerful actors within [international] society' (172). Or, as the late, great, and much lamented Susan Strange endeavoured to remind us, '[p]ower ... is to be gauged by influence over outcomes rather than mere possession of capabilities or control over institutions'.[6]

If, however, the Liberal stratagem is inverted and *Einfluss* is inflated at the expense of *Herrschaft*, then 'Realist' US Hegemony appears extraordinarily robust indeed! By successfully conflating its 'national interests' with the effective 'globalisation' of liberal political and economic governance, the US in fact manages to very effectively maximise its position as rule-enforcing hegemon within the context of a more nuanced version of Realist international political order. Within the context of this more sophisticated model of Hegemony, individual concessions by or even 'defeats' of the hegemon on particular issues appear more as cost-expedient 'trade-offs' inside the broader long-term strategy of guaranteeing the effectiveness of global governance (though, admittedly, at times this may prove extremely expensive in the short to medium term). And, of course, the more the hegemonic State succeeds in guaranteeing international stability, the greater legitimacy, or *Einfluss*, it accumulates, adding even greater weight to its hegemonic status. Pace Toope, the more the US 'loses', the more that it actually 'wins'. The far more serious test of the health of Liberal multilateralism would be the empirical counter-factual of the entirety of the international community successfully preventing the hegemon from performing an action that it considered absolutely necessary to its vital national self-interest. The successful bilateralist implementation of 'Operation Iraqi Freedom' provides Liberals with cold comfort.

For the un-reconstituted Liberal, this avenue of approach raises the spectre of that most terrifying of possibilities: if both the normative and institutional pillars of international public order (the League of Nations; the United Nations; the Genocide Convention) are in fact the historical products of US hegemonic governance, then when, if ever, is the US ever materially bound by the precepts of such an order? From this vantage point, the US insistence on global

6 Susan Strange, *The Retreat of the State: the Diffusion of Power in the World Economy* (1996) 53.

recognition of its 'special status' (re Condoleeza Rice) seems less like arrogance and more like a commonsensical acknowledgement of contemporary realities. If the US actually qualifies as a 'true' hegemon - that is, *one that genuinely exerts legitimating Einfluss* - then it really does become necessary for it to avoid the interference with the unilateralist exercise of its hegemonic function that entangling multilateralist commitments necessarily entail. A methodologically rigorous analysis of International Law from the doctrinal perspective of Hegemony theory reveals Liberal laments about the 'decay' of international public order by 'unrestrained' US unilateralism to be wholly misplaced at best and historically naïve at worst. If Grewe and Triepel are correct, international public order has always existed solely through the operational presence of a hegemon; for our period in time it merely happens to be the United States. That unending nightly barrage of Australian international legal experts appearing on the ABC and SBS displaying a weird combination of puzzlement, bewilderment, outrage, exasperation, and vague feelings of hurt at the latest manifestation of 'inexplicable' (and, apparently, wholly unanticipated) US unilateralism really only have themselves to blame. The recent exhortations from the UN Secretary-General on the need for collective compromise with the hegemon in order to avoid 'institutional irrelevance' - including, remarkably, open consideration of the resuscitation of the neo-colonialist Trusteeship Council - must only add to their Progressive discomfit.

My second main criticism follows from my first; with the singular exception of Edward Kwakwa, there are no contributors from the Developing World. Issues of representation, balance, and fairness aside, this rather startling omission logically flows from the first. Virtually all of the contributors frame the issue of Hegemony within strictly binary terms, postulating the US as sole dominator against the remainder of the international community. Within this Manichean 'frame', a western European country such as France or Germany can plausibly present itself as 'spokespersons' for the majority of the globe. However, as World-System historians such as Fernand Braudel and Immanuel Wallerstein have conclusively proven, Hegemony is never such a 'zero-sum' game.[7] Instead, there are a plurality of international actors, each with their own form of strategic engagement with hegemonic *Herrschaft* and *Einfluss*, and each with differential rates of success. This European monopolisation of 'counter-hegemonic' function literally beggars belief. Far from constituting 'peripheral' States united in opposition to the US hegemon, western European countries are far more profitably be viewed as 'core' States, engaged in complex and contending relations with both the hegemon and the peripheral and semi-peripheral States of the Developing World. United French-German-Russian opposition to US military intervention in the Middle East was noticeably absent at the press conferences in Cancun following the collapse of talks on ending protectionist First World farm subsidies; commonality of collective trans-Atlantic economic interests seemingly outweighed 'core versus hegemon' disputes over the use of armed force. Convergence on international trade issues conclusively demonstrate

[7] See, eg, Immanuel Wallerstein, *The Politics of the World Economy* (1984).

'core' State acceptance of hegemonic US leadership in the globalisation of Liberalism, with all of its attendant risks to the formal and substantive equality of Third World nations. According to Brad Roth,

> [t]he legal restraints [imposed by State sovereignty] that humanitarians so frequently find inconvenient stem primarily, not from the legacy of the Cold War, but from the more durable and useful tendency of the international system to reflect and respect a plurality of views on fundamental questions of political order. The international legal order is by nature an accommodation among peoples who persistently disagree about justice. The recent diminution of fundamental differences among participants in the international system, while very real, can all too easily be exaggerated in the service of methodological approaches that either assume away fundamental differences or else delegitimate them (233).

The myopic obsession on de-legitimating statist sovereignty as a means of combating European perceptions of unilateralist *Herrschaft* in actual fact contributes to the perpetuation of inter-State domination by other means. What Liberalism truly represents is the systematic weakening of the most fundamental means of legal protection afforded the Developing World against the neo-colonialist encroachments of the Old Order. As Andrew Hurrell usefully reminds us,

> [c]oercive socialization represents a political reality that has always threatened to destabilize or dilute the formal concept of consent in international law. Globalization has not changed this, but rather has added to the complexity of the mechanisms and channels through which coercive socialization operates (353).

I would like to conclude by quoting a gem provided by David M Malone, a passage all that more remarkable for expressing basic truths that seldom, if ever, find their way into International Law texts:

> Legal advisers in foreign ministries are often lonely. Their commitment to international norms of legality is often inconvenient, even more often irritating, to colleagues wanting to get on with the promotion and protection of their national interests. Within delegations to the UN Security Council, legal advisers are rarely consulted on the law per se - rather, they are urgently instructed to produce legal justifications, often thin rationalizations, for the politically expedient positions of their countries (481-2).

Would the perspective of 'law-as-rationalisation' rather than the worn-out 'law-as-reason' have prevailed in Göttingen! In summation, the profound absence of philosophical sophistication on the part of the majority of the contributions signifies the enormity of the opportunity lost to have produced a truly great legal text.

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