Introduction

The complexities of foundational change

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Wilhelm Grewe, in *Epochen der Völkerrechtsgeschichte*, argued that successive hegemons have shaped the foundations of the international legal system.[1] In the sixteenth century, Spain redefined basic concepts of justice and universality so as to justify the conquest of indigenous Americans. In the eighteenth century, France developed the modern concept of borders, and the balance of power, to suit its principally continental strengths. In the nineteenth century, Britain forged new rules on piracy, neutrality, and colonialism – again, to suit its particular interests as the predominant power of the time.

As Shirley Scott points out in her contribution to this volume, Grewe did not claim that the changes wrought to the international legal system as a consequence of hegemony were necessarily planned or directed: "It was not that the dominant power controlled every development within the system during that epoch but that the dominant power was the one against whose ideas regarding the system of international law all others debated."[2] Nor did the changes occur abruptly: they were instead the result of a gradual process, as the international legal system adapted itself to the political realities of a new age.

Robert Keohane, in *After Hegemony*, demonstrated that the influence of dominant powers is considerably more complex than traditional international relations realists assumed, and that international regimes sometimes develop a life of their own that carries them forward after the influence of the hegemon wanes.[3] Keohane and others built on this insight to develop

[1] Wilhelm Grewe, *Epochen der Völkerrechtsgeschichte* (Baden-Baden: Nomos, 1984). For a similar view from the discipline of international relations, with regard to the influence of "dominant powers" on the international system as a whole, see Martin Wight, *Power Politics*, ed. Hedley Bull and Carsten Holbraad (London: Royal Institute of International Affairs, 1978), pp. 30–40.
[2] Scott, below, p. 451.
[3] Robert Keohane, *After Hegemony* (Princeton: Princeton University Press, 1984).

regime theory and then institutionalism – sophisticated explanations as to the interaction of power and normative structures in a world of sovereign yet interdependent States.[4] Other international relations scholars, working from much the same intellectual base, later advanced constructivist explanations for the development and perseverance of regimes, institutions, and, more recently, international law.[5] According to these explanations, the development and evolution of shared understandings through communicative processes among technocratic and political elites can give rise, not only to normative structures, but also to associated, deeply felt conceptions of legitimacy, which then contribute significantly to the resilience of the norms.

Grewe's argument, honed during a lifetime of both scholarship and practical experience (as legal adviser to the West German Foreign Ministry and ambassador to the United States and NATO at the height of the Cold War), thus anticipated important aspects of subsequent theories. Dominant powers are indeed able to reshape the foundations of the international legal system. However, this process takes time, the essence of foundations being that they are relatively resistant to change. As a result, foundational change is seldom the consequence of deliberate planning, but is instead the outcome of repeated claims and actions that challenge existing legal limits, and thus prompt shifting patterns of response and debate on the part of other States.

Complicating the picture yet further is the epilogue that Grewe wrote in 1998 to the English version of his book.[6] Here he suggested that the United States might, in the post–Cold War epoch, not be as successful as previous hegemons in reshaping the foundations of international law. The development of an "international community" extending beyond the traditional nation-State meant that community interests could now play a role in the evolution of international law. Grewe concluded that it was too soon to tell which influence would prevail, the influence of the single superpower in

[4] See e.g. Robert Keohane, *International Institutions and State Power* (Boulder: Westview, 1989); Oran Young, *International Cooperation* (Ithaca: Cornell University Press, 1989); Volker Rittberger (ed.), *Regime Theory and International Relations* (Oxford: Clarendon Press, 1993).

[5] See e.g. John Ruggie, *Constructing the World Polity* (New York: Routledge, 1998); Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999); Jutta Brunnée and Stephen Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 *Columbia Journal of Transnational Law* 19.

[6] Wilhelm Grewe, *The Epochs of International Law*, trans. and rev. Michael Byers (Berlin: de Gruyter, 2000).

the development of a legal system suited to its particular interests, or the influence of the international community in the development of a system more favorable to broader needs and concerns.

This volume addresses the issue whether, and how, the current predominance of the United States is leading to foundational change in the international legal system. It contains chapters written by twelve scholars of international law and international relations, who between them address six key areas or concepts that could be undergoing change: international community, sovereign equality, the law governing the use of force, the process through which customary international law is made, the law of treaties, and compliance. An analysis of the current state of each of these areas or concepts, as seen from a long-term perspective, should provide some insight into the possible effects of US predominance on the foundations of international law.

The concept of international community is an obvious place to start. Has the development of this concept restrained the influence of the United States on the international legal system, as Grewe suggested it might? Or has it perhaps facilitated US influence, acting as a tool for the advancement of US interests and values? Most provocatively, is the United States in fact a part of the international community, or does it instead stand somewhat apart?

In the first chapter, Edward Kwakwa argues that the United States, when behaving in a unilateralist or isolationist manner, "acts according to its perceived interests, as does any other State," and that its lack of support for community interests is thus the norm rather than the exception.[7] The difference, Kwakwa explains, is that "the sheer might and superpower status of the United States are such that its actions are bound to have a greater impact on the international community and on the foundations of international law."[8]

The United States does often cooperate with States sharing the same interests and values. Kwakwa draws on some fascinating examples from the World Intellectual Property Organization to demonstrate that United States law-making efforts usually require "the active cooperation of key segments of the rest of the international community; the incredible power of the United States will not be enough to enable it to 'go it alone'…"[9] But does the fact that the United States relies on other States support the

[7] Kwakwa, below, p. 26. [8] Kwakwa, below, p. 26. [9] Kwakwa, below, p. 26.

concept of international community? Or are these instances of cooperation instead only ad hoc and temporary coalitions of convenience on the part of a purely self-interested superpower?

The true power of the United States, and the limits of the concept of international community, are most readily apparent when it decides *not* to participate in lawmaking. As Kwakwa explains, "the global reach of the United States often makes it an indispensable party in multilateral treaty making."[10] Thus, "while US refusal to join a legal regime does not equate with US rejection of international law, it is arguable that in those instances in which the United States is an indispensable party for the formulation of international law, any unilateralist stance by the United States could be tantamount to the single superpower impeding or opposing the development of that law."[11] In issue areas such as global warming, arms control and international crime, disinterest or active opposition on the part of the United States causes major problems for efforts at multilateral cooperation. Indeed, it is arguable that, under the administration of President George W. Bush, the United States increasingly sees itself as an absolute sovereign whose favored position could be compromised by the concept of international community – and thus by many aspects of international law.

Kwakwa suggests that the "special position of the United States" implies "a distinctive and, by definition, a greater responsibility in the international community . . . a responsibility arising from the undisputed facts of American dominance in almost all aspects of human endeavour."[12] But would such a position be consistent with the concept of an international community that included the United States? One of the arguments advanced by the United States in opposition to the Rome Statute of the International Criminal Court is that the United States has special responsibilities with regard to international security.[13] In this particular instance, at least, the "special position" of the United States is used to justify its opposition to a quintessentially community-oriented lawmaking exercise: the creation of mechanisms for the prosecution of individuals for crimes under international law.

Perhaps the problem with the Rome Statute is not the fact that it promotes community interests, but rather that it does so through a new supranational institution. As Andreas Paulus explains, the debate about international

[10] Kwakwa, below, p. 51. [11] Kwakwa, below, p. 56. [12] Kwakwa, below, p. 36.
[13] See, e.g., David J. Scheffer, "The United States and the International Criminal Court" (1999) 93 *American Journal of International Law* 12 at 18.

community has revolved around the tension between the apparent need for international institutions, on the one hand, and the potential problems arising from new forms of governance or government on the other. Faced with this tension, "US perspectives have exerted a decisive influence on the concept of international community, gearing it away from governmental analogies towards the propagation of liberal values in an inter-State setting."[14]

Paulus concludes that "it is unlikely that the international community will be able to develop without regard to these basic US views on what the international community is about and, especially, on what it is not about: the building of truly global governance, let alone government."[15] But if this conclusion is accurate, how does one explain the adoption and coming into force of the Rome Statute, the adoption and coming into force of the Ottawa Landmines Convention, or current lawmaking efforts directed at curbing climate change? The United States initially sought to negotiate exceptions for itself in all three regimes – along the lines of the special treatment accorded the five permanent members of the Security Council in the UN Charter – but these efforts were rebuffed by other States. The influence of the United States on the concept of international community clearly does matter, but perhaps not as much as it may at first seem.

If the concept of international community is changing, what about our understanding of the relationship among the principal actors within that community? Is the concept of sovereign equality perhaps changing as well?

Michel Cosnard certainly does not think that it is. As he explains, the propensity of powerful States to stand aloof from new rules and institutions does not challenge the concept of sovereign equality:

> when a state is not bound by an international obligation, it chooses not to be *above* international law, but *beside* international law. This situation has always been possible because no rule is totally universal, precisely because of the principle of sovereign equality; it has always been the privilege of powerful states to invoke this principle. Since the main regulating principle of sovereign equality is still operative, international law as a system is not as affected as some authors suggest. It is another thing to think that the United States could be above the law, which would mean that when it is legally bound, it could freely choose not to observe its international obligations. This proposition is not legally sustainable, because it purely and simply denies the existence of international law.[16]

[14] Paulus, below, p. 89. [15] Paulus, below, p. 89. [16] Cosnard, below, pp. 125–6.

Nor, in Cosnard's view, does the existence of unequal rules or other forms of special treatment affect the concept of sovereign equality:

> the mere fact that unequal rules exist is not a symptom in itself of a retreat from the principle of sovereign equality, and certainly not one that results from the appearance of the United States as a single superpower. It would be so only if the United States, and the United States alone, now enjoyed systematic exception or exemption from the law – and not for reasons of diplomatic impossibility or convenience – so that we could consider the emergence of a new principle of inequality in its favor. We could even say that, because there always have been unequal rules in international law, US predominance has no real effect on the principle of sovereign equality.[17]

Cosnard's argument is highly positivist, focusing on consent as an essential aspect of legal obligation and regarding inequalities based on consent as supportive rather than undermining of sovereign equality. But unlike most positivists, he carries the argument further, suggesting that one should ask why consent is so frequently forthcoming. As he explains, when considering possible changes to the concept of sovereign equality, "it is important to focus on the values that are behind the predominance of the United States."[18] It is here that Cosnard's position transcends positivism:

> 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. The reasons for the absence of resistance to the United States' will at the political level may be found in an absence of real determination to oppose the values that this will represents. Certainly, the lack of alternative, or of counterweight, might lead to an erosion of exclusivity. But at the present stage, as long as we can find motives for the abstention of other States, we might conclude that it is not a balance of power as such which causes the phenomenon.[19]

The existence of alternative explanations, together with the fact that US influence has not yet led the international system to shift from an oligarchic to monarchical model, reinforce, for Cosnard, his view that the foundations of the international legal system remain largely unchanged. "The difference from the bipolar world is," he explains, "that the opposition is not as Manichean as it could be during the Cold War."[20]

[17] Cosnard, below, pp. 121–2.
[18] Cosnard, below, p. 131.
[19] Cosnard, below, pp. 131–2.
[20] Cosnard, below, p. 133.

Importantly, Cosnard concedes that a single superpower could change the foundations of the international legal system, if it deliberately set out to do so. Positivism does not provide an insurmountable bulwark against the truly determined hegemon:

> The unchanged nature of the international legal system is not only due to its ability to contain a superpower. Like any legal system, it could not resist a *coup de force* by a superpower less benevolent than the United States. The United States has never planned to govern the world, with all the duties such a program bears. There is certainly a particularity in the fact that we are now in an era of the *United States*' predominance, and we can be sure that the effects on the international legal system would not be the same were another State predominant. The United States is aware of its power and feels that it is sometimes necessary to show it to the rest of the world; at other times it just wants not to be bothered and isolates itself as only a continent-country can do. This leads to a somehow erratic international policy, with only a few obsessional enemies, too unconstructed to provoke fundamental changes.[21]

This last point again raises the question whether the United States has, in the last two years, become more deliberate with regard to the reshaping of international law. If the United States is now embarked on a conscious effort to alter the foundations of the international legal system, will the concept of sovereign equality eventually change?

Nico Krisch argues that the concept of sovereign equality has, in fact, already changed as a result of US predominance. However, this change has occurred, not only because the United States has sought to modify traditional international law, but because it has moved away from that law and towards an increased use of its own domestic law to govern relations at the international level. Krisch provocatively suggests that the United States is developing into an early form of international government.

Krisch begins by noting that "the concept of sovereign equality has always been a source of irritation for powerful States, and so it is today for the United States as the sole remaining superpower."[22] He explains that the effects of sovereign equality are most significant at the foundational level of lawmaking, since the concept "operates as a regulative ideal for the further development of international law."[23] Sovereign equality makes it "very difficult to deviate from the parties' equality in rights and obligations" when

[21] Cosnard, below, p. 134. [22] Krisch, below, p. 136. [23] Krisch, below, p. 136.

creating new legal instruments, and thus limits the ability of powerful States to influence the direction of change.[24]

In response to these limitations:

> the United States has chosen to retreat from international law: it has made extensive use of reservations and frequently refused to sign or ratify important new treaties. Instead, it has increasingly relied on institutions in which it enjoys superior status or which do not face the formal restrictions of international law, and it has turned to unilateral means, and notably to its domestic law, as a tool of foreign policy.[25]

In Krisch's view, the "hierarchical superiority" of the United States that has resulted from this shift in focus to alternative instruments and domestic law "is either inconsistent with sovereign equality, or – if one wants to defend hierarchy – sovereign equality has to be abandoned as a principle of international law."[26]

Interestingly enough, Cosnard's and Krisch's seemingly divergent positions are not incompatible with each other. Within the traditional confines of international law, the principle of consent and the concept of sovereign equality could still operate in the usual way. Krisch's point is that, rather than seeking to change that part of the international legal system, the United States has shifted its lawmaking efforts elsewhere. Whether this shift is simply an unconscious response to the priorities of an internally focused, commercially oriented domestic system, or instead reflects a strategic effort to avoid opposition, remains unclear. What is clear is that any analysis of the effects of US predominance on the foundations of the international legal system has to examine areas that, in the past, might not have been regarded as falling within international law. Krisch makes an important contribution here, identifying a new area of complexity and raising yet more difficult questions.

The use of force in international relations has fallen squarely within the domain of international law since the adoption of the UN Charter in 1945. At the same time, the use of force remains a highly politicised area where, in terms of the capacity actually to use force, the United States maintains a substantial lead. It might therefore be assumed that the law governing the use of force is particularly susceptible to change as a result of US predominance.

[24] Krisch, below, p. 136. [25] Krisch, below, p. 136. [26] Krisch, below, p. 174.

According to Marcelo Kohen, such an assumption would be misplaced:

> There is no doubt as to the American military position: the United States is the most powerful State in the world. Its supremacy is overwhelming. But military power is one thing, its legal use is another. Rousseau stated more than two centuries ago: "The strongest is never strong enough to be always the master, unless he transforms strength into right, and obedience into duty." It remains to be demonstrated that American supremacy has already been transformed into law.[27]

Taking the example of the US response to the events of 11 September 2001, Kohen points out that

> With the nearly unanimous position taken by States after the terrorist attacks . . . the United States had a unique opportunity to revert to the rule of law at the international level. The conditions were largely favorable for the adoption of a bundle of collective measures, including some forcible action undertaken at least with Security Council approval. The US government made considerable progress toward multilateralism in different fields of international cooperation against terrorism, with only one, but none the less remarkable, exception: the use of force. It preferred not to alter its doctrine of self-defense, in order to maintain its freedom to use force unilaterally whenever it considers it necessary to do so.[28]

Since the 1980s, the United States has repeatedly claimed that the right of self-defense extends to military action against States that harbor or otherwise support terrorists. The terrorist attacks on New York and Washington, and the widespread sympathy for the United States that followed, may have provided an opportunity to transform this claim into a widely accepted modification of customary international law.[29] In Kohen's view, however, recent State practice simply does not provide the widespread, nearly unequivocal support necessary for a change to a well-established customary rule. And the lack of support for the US legal claim is reinforced, Kohen suggests, by the serious practical ramifications that such a change would have, for instance, by opening the way for "unforeseeable uses of force in a great number of actual or potential situations in future."[30] The claim

[27] Kohen, below, p. 229. [28] Kohen, below, p. 229.
[29] See Michael Byers, "Terrorism, the Use of Force and International Law after 11 September" (2002) 51 *International and Comparative Law Quarterly* 401.
[30] Kohen, below, p. 230.

"amounts to the negation of Article 2(4) of the Charter and the collective security system," with all of the negative consequences that would entail.[31]

Brad Roth also addresses the law governing the use of force, but from a different angle. His focus is "the role of jurists, through their characterizations and assessments of US-led practice and their advocacy of doctrinal stability or change, in bolstering or undermining the capacity of international law to serve as a normative basis for constraining United States unilateralism in a unipolar world."[32] Scholarly discourse is an important element within the international legal system, and certain doctrinal approaches are more supportive of United States hegemony than others. For this reason, Roth considers it important that the various approaches are subject to close scrutiny, and that choices between them are carefully made.

Roth canvasses the different arguments advanced by academic lawyers to justify the 1999 NATO intervention in the former Yugoslavia in order to demonstrate, and then dissect, two approaches to international law that are particularly influential in the United States, namely "policy-oriented jurisprudence" and "moralistic positivism." He then suggests an alternative approach – the "incremental extension" of legal principles and policies "to cover the case at hand" – that he believes would do less damage to the delicate balance underlying this area of international law. As he explains:

> At stake is the viability of any meaningful international law of peace and security. The essence of the project entails generally applicable norms, arrived at through a process of accommodation among notionally equal juridical entities that cannot be expected to agree comprehensively on questions of justice.[33]

And yet, despite his concern to maintain the integrity of a legal system applicable to all States, Roth acknowledges that

> Today, the unrivalled military power of the United States and the ascendancy of its articulated ideals call into question the continued vitality of such a project, as well as its continued justification on moral and policy grounds. The legal principle of sovereign equality, always limited in practical effect, may seem all the less relevant in conditions of unipolarity, where weak States confronting US-led alliances have no powerful supporters to bolster their position. US assertions of prerogative are thus emboldened. In the designation of "rogue states" and in the post-11 September 2001 warning that States not "with us" will be deemed to be "with the terrorists" the rhetoric of US foreign

[31] Kohen, below, p. 230. [32] Roth, below, p. 233. [33] Roth, below, p. 260.