No Need to Panic!
Or: plus ça change, plus c’est la même chose

Michael Bothe*

I. Introduction

The basic issue raised by Karl Zemanek’s introductory article is this: Do we have to change the rules of international law because there is now, contrary to the situation which existed before, a one and only player which concentrates overwhelming power in its hands? Is there, or rather: is there about to develop, a new hegemonic or “imperial” system of law creation and application?

Imbalances or asymmetries of power do cause difficulties for the international law creation process as there is not enough reciprocity as a driving force for accepting mutual obligations. But they are not a new phenomenon. For centuries, international law has dealt with them. In the 17th century, there was an imbalance of power between the various States competing on the seas, in particular the Dutch and the British. Despite the overwhelming sea power of Britain, the principle of *mare liberum*, which protects the weaker users of the sea, was upheld.1

That history should warn against premature conclusions as to the establishment of a new hegemonic world order. A closer look at the norm creating processes is necessary in order to ascertain the true impact of the overwhelming power of the United States in the modern or, to use a more fashionable expression, “post modern” law creation processes.2 I would like to specify the basic issues as follows: Has the United States a specific veto power concerning the development of new international regulations? Can the US achieve modifications of existing international law where this law is perceived by relevant American actors to be contrary to American interests? Or, more generally speaking, is there a special, “imperial” role of the US in the law making process, and if so, which?

---

* Prof. em. Johann Wolfgang Goethe Universität, Frankfurt/Main, Head of the Research Unit, Peace Research Institute Frankfurt.


So far, the international community has not abandoned its decentralised procedures of law making based on consensus. But on the other hand, power has, and has always had, an impact on consensus building. Influence on the decision of others is the very essence of power.

II. American Non-Participation—an Effective Veto Power?

Let us first look at American non-participation in international agreements. Is there anything like an American veto power?

There are still a number of human rights treaties to which the United States is not a party because it does not like those treaties. The best known examples are the Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child. That absence of the United States, regrettable as it is, has not prevented these conventions from constituting flourishing treaty regimes. Treaty bodies have been established, they work for the implementation of the treaties, and there is no sign that United States absence affects in any way the viability of these treaties.

In the field of international humanitarian law, the absence of the United States from the 1977 Protocols additional to the Geneva Conventions, controversial also in the United States, presents perhaps a more serious question. Which impact does the absence of the single most important military power have on the functioning of a treaty regime relating to the law of war? It is worth recalling that the United States took a very active part in the negotiations and that it and its NATO allies tried to solve certain perceived problems involved in some of the provisions of Protocol I (in particular its applicability to the use of nuclear weapons) by way of declarations made on the occasion of signature and/or ratification. Nevertheless, many NATO countries were for a long time reluctant to ratify, but by now all of them have joined the club, except the United States and Turkey. But also the United States has recognised that most of the provisions of Protocol I reflect customary international law. Thus, US non-ratification does not really affect the interoperability of NATO forces, as far as their obligations under the laws of war are concerned.

True, the application of international humanitarian law has to face difficulties, as it always has. The United States has its share in this crisis by insisting on a claim that certain categories of persons, "unlawful combatants", are not entitled to certain

---


4 G. Aldrich, "The Taliban, Al Qaeda and the Determination of Illegal Combatants", 96 AJIL 891 (2002); Y. Naqvi, "Doubtful Prisoner of War Status" 84 IRRC 571 (2002); S. Oeter,