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BOOK REVIEWS

Andraž Zidar

The World Community between Hegemony and Constitutionalism

Eleven International Publishing, Den Haag, 2019, ISBN 978-9462369245, 354 p. (Hardcover)

[Světové společenství mezi hegemonií a konstitucionalismem]

Being a practitioner in international law, the vast majority of the legal publications I study are the commentaries to the key multilateral treaties such as the Vienna Convention on Diplomatic Relations and the Vienna Convention on the Law of Treaties (VCLT) or articles on specific issues. Yet it seems to me that – in order to gain a deeper understanding of international law - it is a good idea to occasionally read a more general book on international law that does not deal with current practical problems, but rather follows main developments in the field. It feels like studying an impressionist painting in an art gallery: only by taking a few steps back and looking at it from a distance does one ges the real appreciation of such a piece of work, a "wider picture". By following this idea, I recently had a chance to review "The World Community between Hegemony and Constitutionalism" by Andraž Zidar, a Slovenian legal expert and diplomat.

The author divided the book into three main parts. In the first one, he analyzes the general concepts of "Power, Hegemony, and Constitutionalism", as they are understood in fields other than international law, mainly sociology, philosophy, and constitutional law. With regard to the teachings on "power", he quotes Niccolò Machiavelli, Jean Bodin, and Thomas Hobbes, while paying the closest attention to Max Weber, the leading thinker on power. The concept of "hegemony" is explained against the historical background of imperialism and empire. For a lawyer, the most interesting part is the one on "constitutionalism" where Andraž Zidar provides an overview of historical attempts to limit the government, starting with the theories of the Greek philosophers and continuing over the Magna Carta Libertatum to the Republic of Venice. Then he moves to the doctrine of the separation of powers and the mechanism of checks and balances elaborated on by John Locke and Charles Montesquieu and successfully applied in the U.S. Constitution of 1787. In this context, he deals with other key elements of "constitutionalism", *i.e.*, judicial review, rule of law, and human rights. Finally, the author proposes his own definition of "constitutionalism", as "agglomeration of power in the form of a structural framework for the pursuit of the common good, accompanied by the exigency of putting limitations on the so constituted power". Subsequently, he puts hegemony and constitutionalism against each other as two opposite phenomena, since hegemony is associated with an extension of power, while constitutionalism with its limitation, yet he also identifies several instances where they overlap. In the second part, titled "Power, Hegemony and Constitutionalism in International Law", Andraž Zidar applies the above-mentioned concepts coming from philosophy and constitutional law in the field of international law. At the beginning, he analyses the relationship between power and law by setting three different scenarios: power on the law, power in the law and power by the law. The author focuses on the second scenario, where he evaluates customary international law as a form of lawmaking in international law through which states may project their power. He recalls the notion of the "specially affected" states, formulated by the International Court of Justice (ICJ) in the

North Sea Continental Shelf cases, that may serve as a basis for powerful states to play an important role in this process. In the law of treaties, he identifies an influence of power in the disparity in obligations of the parties, quoting, *inter alia*, the socialist doctrine that classified all treaties between capitalist and developing states concerning military bases as unequal. It may be recalled from the Czech perspective that there were some unequal treaties of this kind within the Eastern bloc too, such as the Agreement between Czechoslovakia and the USSR on the Temporary Stay of Soviet Forces in the Territory of Czechoslovakia, concluded right after the Soviet invasion in 1968. Furthermore, in relation to the conclusion of treaties, the author rightfully mentions Article 52 of the VCLT stipulating that a treaty is void "if its conclusion has been procured by the threat or use of force". Here, again, another document from the history of Czechoslovakia could be cited: the shameful Munich Agreement. As a recent example, when an unequal treaty was found by the ICJ, the author mentions the Chagos Archipelago advisory opinion. The ICJ concluded that the agreement between the United Kingdom and Mauritius on the detachment of these islands from the latter cannot constitute an international agreement due to the lack of "free and genuine expression of the will of the people concerned."

Subsequently, Andraž Zidar moves to the relationship between hegemony and international law, referring to the publication of Detlev Vagts titled "Hegemonic International Law". In this context, he describes there "hegemonic models of international law": nationalist model, rational choice model, and interventionist model.

First, the nationalist model means that states use law in order to promote their own interests. The author finds certain patterns of this model in the behavior of all three super-powers. In the United States, the neoconservative thinkers such as John Bolton gave precedence to the U.S. Constitution over international law. Similar views subordinating international law to the domestic law were expressed by the U.S. Supreme Court in the Chinese Exclusion case or in the infamous "torture memos" drafted the Bush Jr. administration. Another U.S. example fitting this model of behavior is extraterritorial legislation, such as the Helms-Burton Act and the Kennedy-D'Amato Act. Moreover, the Obama administration brought the increased practice of targeted killings based on a congressional resolution (Authorization for Use of Military Force) and the Trump administration's new measures against the International Criminal Court (ICC). The nationalist model is also found in Chinese actions, be it through the Belt and Road Initiative, formalized through legally non-binding Memoranda of Understanding, or be it through efforts to establish sovereignty over various islands in East China and South China seas, regardless of the outcomes of arbitration under the UNCLOS. The Russian contribution to this model was identified in Russia's complicated relationship with the European Court of Human Rights (ECtHR) and its judgments, in planting the Russian titanium flag on the seabed beneath the North Pole in order to reinforce its claims in the Arctic Ocean and its interventions in Georgia and the Ukraine.

Second, the rational choice model, derived from economics and its cost-benefit analysis, was demonstrated in the examples of the pragmatic policy of the Obama administration vis-à-vis the ICC and of the Trump administration's renegotiation of the NAFTA into a new restructured agreement. The author also found this pattern of behavior in China's vote in the UN Security Council in favor of the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY), in its abstention on the resolution establishing the International

Criminal Tribunal for Rwanda (ICTR), and on the referral of the situation in Darfur to the ICC.

Third, the author explains the interventionist model, coming both from neoconservative and liberal backgrounds. In the United States, it can be traced down to the conservative think tank "The Project for the New American Century", the 2002 National Security Strategy containing the preemptive self-defense doctrine and the "Coalition of the Willing" intervention in Iraq, justified by its members by UN Security Council resolutions 678 (1990), 687 (1990), and 1441 (2002). Quite surprisingly, Andraž Zidar also found an interventionist pattern in the policy of the European Union that is perhaps more known for its inaction (in particular with regard to the recent migration crisis). Here, he quotes Jan Zielonka and József Böröcz who see in the EU the so-called "liberal imperialism" and provides as an example of this imperial order the Eastern European enlargement process. This assertion, however, deserves some criticism, since it completely ignores the will of the new EU Member States – they joined the EU not because of some imperial pressure from Brussels, but based on their own decision (and only after a long negotiation with the EU institutions). Finally, according to the author, Russia is pursuing this model of behavior through its intervention in Syria, conducted under the pretext of the fight against international terrorism.

Andraž Zidar then analyses the relationship between constitutionalism and international law, claiming the existence of a new discipline of international law called "international constitutional law". In this regard, he characterizes five different "functions of international constitutionalism". First, the normative function, aiming to identify "international rules and principles of such importance that they deserve the label of constitutional". The starting point is *ius cogens*, as defined in Article 53 of the VCLT and invoked in the judgments of the ICTY and the ECtHR, and obligations *erga omnes* found by the ICJ in the Barcelona Traction case. Subsequently, the author deals with the legal framework of four international organizations: the UN, WTO, Council of Europe, and EU. Second, he moves to an institutional function, guaranteeing the effective implementation of norms in practice, in particular, in relation to above-stated international organizations. Third, he describes the judicial component of international constitutionalism, while focusing on the question of the existence of possible international judicial review. As one example, he found the Tadić case before the ICTY. With regard to the cautious approach of the ICJ, he concludes that the ICJ "is yet to construe its own Marbury v. Madison case". The ECtHR, however, was considered to perform some degree of judicial review due to the mechanism of individual complaints similar to those before domestic constitutional courts. Special attention is devoted to the issues of *erga omnes* effects of judgments of these international courts and possible remedies. With respect to the ICJ, he deals with the cases of Breard, LaGrand, and Avena, where the ICJ issued provisional measures ordering a stay of execution of these individuals, which was disregarded by the United States. Russia demonstrated similar approach to several judgements of the ECtHR. In view of the above, Andraž Zidar admits that there are "practical limitations on the evolving power of international courts". Fourth, he characterizes the coordinative component of international constitutionalism, referring to Anne-Marie Slaughter and her concept of "transgovernmentalism". Fifth, he mentions an (equally abstract) self-referential component.

In his final part, called "hegemo-constitutional instances in the world community", the author analyzes three domains of international law. The first one is devoted to the international organizations, where the UN Security Council is portrayed as a "global legislator", based

on Articles 24, 25, 39, and 41 of the UN Charter. As practical examples of its legislative power, he provides Security Council resolutions 1373 (2001), 1540 (2004), and 2178 (2014) containing generic and abstract norms on the fight against international terrorism, proliferation of weapons of mass destruction, and on the sanctioning of foreign terrorist fighters. Similar relevant examples are found in relation to the EU and WTO. The second domain deals with intervention on humanitarian grounds where the author explains the conflict between state sovereignty and protection of humanity, evaluating the intervention in Kosovo as "damaging to the system of the collective security and to the normative framework of the United Nations" and, subsequently, covering the creation and application of the Responsibility to Protect doctrine in Côte d'Ivoire and Libya. The third domain is international adjudication, where the author focuses on judicial tensions on the issue of state responsibility between the ICJ and ICTY and on the procedural issue of jurisdiction, citing the MOX Plant case and Achmea case before the Court of Justice of the EU (CJEU). In relation to the latter, Andraž Zidar pointed out that "the Achmea judgment sent a shockwave through the international investment law community" and claimed that the CJEU "acted as a judicial hegemon". For a lawyer coming from a new EU member State, this judgment – just correcting the outdated "double standards" within the EU – was hardly a shock. Finally, he dealt with judicial tension in the area of the protection of human rights, namely in the Bosphorus case between the CJEU and the ECtHR.

Overall, the reviewed book offers a fresh and unconventional look at the current international law framework from a constitutionalist perspective. Andraž Zidar presents the outcomes of an enormous amount of legal research to prove a certain degree of analogy between a domestic constitutional system and the international one. There are, however, a few minor discrepancies that downplay a bit the otherwise high scientific standard of the book. To provide examples, when describing the nationalist model, the author calls Russia "the principal successor state of the former Soviet Union". If Russia was a successor state, it would have to be admitted as a new member to the United Nations. The Russian position - accepted by the international community - has been that the Russian Federation preserved the international legal personality of the USSR (*i.e.*, that it is a continuator of the USSR). As a consequence, the Russian Federation retained, *inter alia*, the seat of one of the permanent members of the Security Council. Furthermore, when analyzing the Security Council resolution 1674 (2006) on the protection of civilians in armed conflict, he stated: "As there is no explicit reference to Chapter VII, it seems this resolution is nonbinding." Despite this sweeping conclusion, the author calls the Security Council "a global legislator". The question of the binding nature of Security Council resolutions is more complex and would perhaps deserve closer attention (particularly a reference to the advisory opinion of the ICJ in the Namibia case - that language of a resolution should be carefully analyzed – is missing). In spite of these minor issues, I can sincerely recommend to any lawyer wishing to get a "wider picture" of international law to read this book.

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