

## ARTICLES

# What Should International Lawyers Learn from Karl Marx?

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### Abstract

International law and Marxian theory both emanate from nineteenth-century progressivism. Although Marx had no interest in international law, many aspects of his work are very relevant for it. Where (modern) international law became secular and focused on states and human rights, (early) Marxian theory would claim that its secularization did not go far enough. Instead, statehood and individual rights appear as forms of *political theology*. Today, deconstruction carries on some of the heritage of Marxian dialectics. The task, however, is to move from doctrinal critique to progressive practice. In this, the theory of hegemony provides the best available account of how that can be undertaken without losing the ambition of the law's universality.

### Key words

civil society; hegemony; international law; Karl Marx; legal theory

Many claim, or at least suspect, that international law is in crisis. For some, informal globalization and the Iraq war have demonstrated international law's increasing marginality in international life, the growing pattern of violation of its key provisions interpreted as proof of its irrelevancy.<sup>1</sup> For others, the crisis emerges from endogenous origins, from international law's having become yet another aspect of a bureaucratic system of bargaining in Western-dominated international institutions by an 'international *Hofmafia*'.<sup>2</sup> While both criticisms have bite, my interest is drawn directly by neither. Instead, I want to examine the inside of the profession, where the crisis sometimes appears as a sense of the loss of international law's emancipatory promise, a creeping scepticism about whether there ever was any such project to begin with.

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1. Whether these facts are celebrated or regretted depends today, of course, on one's standpoint in regard to the merits of American unilateralism. In a recent interview, Jürgen Habermas has made the point that 'the Bush regime has through its moral phrases relegated *ad acta* the 220-year-old Kantian project of the legalization of international relations', interview with Eduardo Mendieta, to be published in *Blättern für internationale Politik* and in an English version in *Logos* in 2004. The present translation is the author's.
2. This latter criticism is sharpest in the works of Philip Allott. For the expression in the text, see his 'International Law and the International *Hofmafia*. Towards a sociology of international diplomacy', in P. Allott, *The Health of Nations. Society and Law beyond the State* (2003), 380–98.

I have elsewhere told the story of international law's emergence as part of liberal modernity in the latter half of the nineteenth century.<sup>3</sup> That it has been a part of 'modernity' has meant that it has been animated by a progressive and universalistic spirit, by firm confidence in the ability of liberal political institutions to transform the world into a democratic and rule-governed Kantian *Völkerstaat*. My sense, however, is that like many other aspects of modernity, the profession of international law in recent years has been bogged down in fruitless and repetitive forms of thinking about the international world: bureaucratic étatism on the one hand, imperial or nostalgic humanism on the other. It has become increasingly difficult for international lawyers to find a meaningful place in the international world that would resonate with the expectations of progress and enlightenment that characterized the profession's heroic period.

To assist international lawyers in grappling with this sense of existential crisis I wish to draw attention to three aspects of the teaching of Karl Marx. First, I shall provide a rapid sketch of the nature of the Marxian critical project to the extent that it seems relevant as an extension of international law's original effort to transform the international world. Second, I shall examine the relationship between Marxian thinking and certain critical analyses of international law, including the one in which I have been engaged for more than a decade. And last, I shall try to sketch an understanding of the role of international law as an element of international justice that would reach beyond the false universalisms offered by the equally unappealing alternatives of bureaucratic institutionalism and morally based empire.

I am not writing this as a Marxist. Marx would not have spoken about justice or injustice – apart from as a strategic concession, even then with the greatest reluctance.<sup>4</sup> 'Justice', Engels once wrote, was a 'social phlogiston'. For the cool eye of Marx, the language of justice obstructed reliable analysis of social relations. For him, notions such as 'justice' and of course 'international law' – had he given it a second's thought, which he never did – were part of the problem, not of its resolution. But I am writing this as an international lawyer to other international lawyers who are, I assume, as concerned as I am about the state of their craft. I am not asking 'what did Marx really say?', or 'what would be the Marxian analysis of the international world today?'. These are good questions, but not the ones I am interested in. I am using Marx in an instrumental and heretical fashion, in order to assist in a project that can scarcely be called Marxian in any traditional sense.

International law will not bring about world revolution. Perhaps no such revolution is possible, or necessary. But it might support just causes in the international world and become an object of progressive political commitment.<sup>5</sup> This, however, requires perceiving it as an aspect of something larger, some general approach to

3. M. Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960* (2001).

4. For a useful discussion see S. Lukes, *Marxism and Morality* (1985), 48–70.

5. For extensive analysis of international law's past oscillation between periods of renewal and stagnation, consensus and anxious disputation, and a call for reactivating the profession as a 'voice, viewpoint and a whole bunch of people pursuing projects with and against one another', see D. Kennedy, 'When Renewal Repeats. Thinking Against the Box', (2000) 32 *New York Journal of International Law and Politics* 335–500, at 466.

the problems of the international social world. If it is possible at all to redeem international law's transforming promise, and to make its adherents think more sharply and act more efficiently, this will require positioning it in a historical continuum that recognizes its being part of both modernity and of a critique of modernity simultaneously. 'All significant concepts of the modern theory of the state are secularized theological conceptions', Carl Schmitt once wrote, pointing to one of modernity's ambivalent aspects.<sup>6</sup> This ambivalence characterizes major concepts of international law, too, sovereignty and human rights above all: they provide the lineaments of a stable political order only on the basis of a *faith* that resolves interpretative controversies and fills normative vacuums by a matrix that situates this activity within a larger vision. That by itself is no problem. The problem is a *loss of faith* in the profession in any such matrix or vision, identified sharply within national law in the last sentence of Roberto Unger's manifesto for critical legal studies 20 years ago:

When we came, they were like a priesthood that had lost their faith and kept their jobs. They stood in tedious embarrassment before cold altars. But we turned away from those altars and found the mind's opportunity in the heart's revenge.<sup>7</sup>

## I. THE NATURE OF THE CRITICAL PROJECT

The year 1843 was a key year in the life of Karl Marx. He was dismissed from his position as the responsible editor of the *Rheinische Zeitung*, where his articles had grown increasingly radical and hostile to the Prussian government. In April he got married, he spent the summer in Kreuznach compiling the first five of his famous notebooks, and in November he moved to Paris. He threw himself into an intensive study of the French social philosophers and deepened his reflections on the materialist theses that had been put forward by Ludwig Feuerbach that same year in his *Preliminary Theses on the Reformation of Philosophy*. These developments led Marx to break definitively with his left-Hegelian friends. Using the method he had learned from Hegel he began the project of turning the latter's idealism on its head in two writings that he began that year, *Contribution to the Critique of Hegel's Philosophy of Right* and *On the Jewish Question*.<sup>8</sup>

The left-Hegelian radicals had been engaged in a fundamental critique of religion. Now Marx decided that this critique, while right in principle, did not go far enough. Religion had already become a pre-modern relic. The important task was instead to develop that critique into an attack on aspects of modernity itself. The key question was: why had the French Revolution failed? Answering it required an attack on the politics of liberal republicanism as it emerged from the restoration. These politics, Marx claimed, had remained imprisoned within what remained a religious pattern of thinking. It was thus necessary to attack that pattern itself – the

6. C. Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty*, trans. G. Schwab (1985), 36.

7. R. Unger, *The Critical Legal Studies Movement* (1983/1986), 119.

8. K. Marx, 'On the Jewish Question', in K. Marx, *Early Political Writings*, ed. J. O'Malley (1994), 28–50, and 'A Contribution to the Critique of Hegel's Philosophy of Right: Introduction', *ibid.*, 57–70.

'idealism' it manifested – so as to produce an effective critique of liberal modernity. The writings of 1843–4 extend the critique of religion in two directions: into a critique of the bourgeois state on the one hand, and into a critique of bourgeois humanism on the other.

### 1.1. Against the bourgeois state

Hegel had secularized Christianity into the ethical life (*Sittlichkeit*) that he saw embodied in the family, civil society, and the state. Family and civil society represented 'morality' and 'abstract right', neither of which could stand alone in the process that would lead human society – Hegel's 'Spirit' – to freedom. The pure subjectivity of morality and the abstract personhood of the legal subject in civil society needed to come together – and to be transcended – in the political life of the state that made concrete and universal what without it would remain only abstract and particular.<sup>9</sup>

From Feuerbach, Marx learned that to say that social phenomena were produced by the 'Spirit' of an 'age' was mere tautological abstraction. What existed were historical events and qualities. To say that they were the effect of a German '*Geist*' or the 'spirit of the Revolution' was to pin empty labels on concrete human acts and patterns of action. History was not produced by such abstractions but by concrete human individuals acting within material conditions that enabled such events to take place.<sup>10</sup> By 1843, such theses had been widely used so as to discredit religion: 'man makes religion, religion does not make man'.<sup>11</sup> Now this argument was to be transposed to the social realm.

For Hegel, the place of God as the Absolute had been taken over by the state, standing over family and civil society. This was what made Hegel *the* philosopher of secular modernity in the first place. Marx saw this transposition as sheer pre-modern mysticism. Only the family and civil society were real contexts of human action. The state was only a hypothesized reflection of some activities in which concrete individuals had been engaged within those two realms. 'So long as this is not recognized, Marx reasoned, humanity's genuine universal existence, its collective communal being, will be dissipated in the false universality of the political state.'<sup>12</sup> Where pre-modern religion set God above human society, liberal modernity (as articulated by Hegel) did the same with the personification of the state, thus creating the condition for human society's self-alienation. When Marx now famously turned Hegel on his head, this meant he overturned the state vs. civil society relationship in the same way as the critique of religion had transformed the relation between God and human society.

So much for the religious mysticism underlying the bourgeois state. Later on, Marx and his followers elaborated on the instrumental uses of the state for upholding class relations in civil society. But the famous thesis of the withering away of the state after

9. See G. W. F. Hegel, *Philosophy of Right*, trans. S. W. Dyde (1996 [1821/1896]), 248–74 (paras. 260–271). For a very useful recent discussion of the passage from 'abstract right' to the (concrete) ethical life (and universal freedom) in the state, see P. Franco, *Hegel's Philosophy of Freedom* (2000).

10. See further I. Berlin, *Karl Marx. His Life and Environment* (1978), 57–8.

11. Marx, 'A Contribution', *supra* note 8, at 57.

12. W. Breckman, *Marx, the Young Hegelians and the Origins of Radical Social Theory* (1999), 285.

the end of human prehistory remained an intrinsic part of Marx's view of history. Here Marxian thought is joined by much non-Marxian historical sociology, including the sociology of interdependence that has been a constituent of the ideology behind international law throughout the twentieth century. Today international lawyers may point to aspects of globalization that seem to advance the cosmopolitan promise in Kant's famous 1795 essay. However, few of them think that this also commits them to supporting the policies of the World Bank or the World Trade Organization, humanitarian intervention or the fight against terrorism. So the question is how to distinguish between commitment to universalism and the policies of powerful international actors constantly invoking the universal so as to justify their particular agendas. To make a distinction between real and false universalism, transformative promise and institutional realization, international lawyers could learn not only the Marxian critique of the state but the critique of the political theology that sustains it.

### 1.2. Against liberal humanism

The state was not the only object of reified mysticism. The liberal humanism that was the practical opponent of the Prussian state and claimed to bear the heritage of the revolution was, too, building on pre-scientific dogma. Making this point was the gist of that other key text from 1843, *On the Jewish Question*, drafted in response to the suggestion by Marx's former ideological fellow-traveller, Bruno Bauer, that Jewish emancipation could only take place through the emancipation of Jews from religion altogether. Like other left liberals, Bauer saw freedom in modern society in terms of the secular political liberty and equality of the citizen. Emancipation would mean full enjoyment of human rights within a non-confessional public order of the state.

For Marx such merely 'political' emancipation was not enough. Instead, a real 'human emancipation' would reach beyond religion and the state (itself founded on religious thinking) so as to grasp at the human relations that constituted the reality of civil society. To redeem the actuality of human beings and their relationships with each other the abstract person developed by liberal humanism had to be set aside just as the critique of religion had done to God. The state and human rights related to each other in liberal modernity as God and theology had done in pre-modern societies, alienating, as Marx would say, human beings from themselves and blinding them to the reality of their condition in bourgeois society.

In Hegel, the view of universal human rights as transcendental conditions of *Sittlichkeit* is vulnerable to the critique of morality as pure subjectivity. The individual is detached from the conditions in which individuality is produced. For Marx, political emancipation through human rights enjoyed by the abstract individual was, again, political theology at work, the presentation as transcendently given of something that was socially produced.<sup>13</sup> It was only an apparent paradox that the atheistic, democratic state fulfils Christianity's separation of the individual from

13. See also my 'The Effect of Rights on Political Culture', in Philip Alston (ed.), *The EU and Human Rights* (1999), 99–116.

humanity: 'Political democracy is Christian in that in it man – not merely one man but every man – has value as a sovereign being, the highest being'.<sup>14</sup> No wonder, Marx thought, a fully secular state such as the United States was compatible with a flourishing religious civil society.<sup>15</sup>

The *droits de l'homme* are yet another political theology: yet another personification of something transcendental over human species–nature.<sup>16</sup> But the abstract individual is in truth the individual of bourgeois society and the rights of this individual are, Marx famously argued, rights

of egoistic man, of the man who is separated from other men and from the community . . . This is the freedom of man as monad isolated and withdrawn into himself.<sup>17</sup>

Moreover, how human rights function in society is conditioned by the specific form of liberal modernity – namely the separation of the public from the private, state from civil society. Into this separation is injected a particular anthropology: 'it is not man as citizen but man as bourgeois who is taken to be the *real* and *true* human being'.<sup>18</sup> The initial freedom at the level of civil society ensures that only abstract individuals meet each other:

the human right of freedom is not based on the connection of man with man, but much more on the separation of man from man. It is the rights of separation, the right of the individual who is limited, enclosed within himself.<sup>19</sup>

The practical application of this in the sphere of civil society is the right of private property. Every other right serves this purpose: equality is the right of everyone to be considered a self-possessed monad (individual) while the right to security is to be secure in such possession.

This famous critique highlights the way in which the abstract individuality presumed by human rights is imposed over the concrete relations of civil society so that forms of factual subordination (capitalist/worker, man/woman) are made miraculously to appear like equality (citizen/citizen). That this critique is valid independently of whether the state is a monarchy or a republic separates it from the thinking of liberal reformists. Human rights are about perpetuating bourgeois civil society through the distribution of rights to individuals by the political state, not seen in terms of distribution, however, but as merely giving effect to something that exists 'naturally', beyond the realm of political contestation. And this, Marx delights in pointing out, is where the practice of bourgeois politics comes into conflict with its theory. As Robespierre had already stated, 'freedom of the press should not be

14. Marx, 'On the Jewish Question', *supra* note 8, at 38, 41.

15. Marx, 'On the Jewish Question', *supra* note 8, at 33. Marx's critique of political theology is twofold, or contradictory: on the one hand theological questions are reduced into secular ones, while on the other secular phenomena (e.g. bourgeois democracy) are interpreted as Christian theology. For Marx, ultimately, any non-socializing notion of the individual personhood was theological, and as such 'synonymous with heteronomy and alienation'. Breckman, *supra* note 12, at 295 and 297.

16. For the process through which the human individual emerges to take the place of God in secular society, and 'human rights' is instituted as a theology of an agnostic modernity, see L. Ferry, *L'Homme dieu ou le sens de la vie* (1996), 109 *et seq.*

17. Marx, 'On the Jewish Question', *supra* note 8, at 44, 45.

18. Marx, 'On the Jewish Question', *supra* note 8, at 46.

19. Marx, 'On the Jewish Question', *supra* note 8, at 45.

permitted when it compromises public freedom'. 'Freedom' and 'human rights' are completely conditioned by the needs of political life and turn into instruments of terror when they conflict with it: 'the end appears as the means and the means as the end'.<sup>20</sup>

This relationship between the bourgeois state and human rights can be viewed as two theologies first clashing, then merging into each other through the affirmation of state authority. On the one hand, secular modernity avoids chaos by adopting the single religion of statehood within which social conflict is redescribed as political – that is, religious – conflict. On the other hand, the danger this poses to civil society is countered by the postulation of human rights, presumed to exist naturally, as a set of transcendental limits to political power – yet applied by the same authorities whose power they should limit.<sup>21</sup> The totalitarian state of the twentieth century is counter-reformation in a modernistic garb. Within it, the rights and freedoms of members of civil society are worshipped through all-encompassing legislation that regulates the permissible uses of their freedom to the smallest detail. This seems necessary since the gifts both of faith and of freedom cannot coexist in real individuals. As Dostoyevsky's Grand Inquisitor famously told his Prisoner:

Why is the weak soul to blame for being unable to receive gifts so terrible? Surely you did not come here only to the chosen and for the chosen? But if so, then there is a mystery here and we cannot understand it. And if it is a mystery, then we, too, were entitled to preach mystery and to teach them that it is neither the free verdict of their hearts nor love that matters but the mystery which they must obey blindly, even against their conscience. So we have done. We have corrected your great work and have based it on *miracle, mystery, and authority*. And men rejoiced that they were once more led like sheep and that the terrible gift which had brought them so much suffering had at last been lifted from their hearts.<sup>22</sup>

Human rights cannot trump the power of the Inquisitor, since jurisdiction over what those rights are, and how conflicts over them should be resolved, belong to him.<sup>23</sup> So this is the difficulty. Human rights must either be accepted as faith, or then given over to the state. But the faith of weak (liberal) souls is thin, and so the Inquisitor will have final authority; what that religion says, when it counts, is conclusively determined by him. The state and human rights are locked into each other to form the realm of politics against which stands civil society as the enjoyment of bourgeois freedoms by autonomous monads: bureaucracy here, class rule there.

This is the prison-house of modern political theology that Marx sought to break. To break it, and not to resort to yet another theology, required that one start from what is, and not from what should be. This required dialectical thinking.

20. Marx, 'On the Jewish Question' *supra* note 8, 47.

21. The liberal theory of rights proposed by John Rawls or Ronald Dworkin, for instance, is premised on the functional idea of rights as limits to politics. Being 'outside' politics, they become absolute and non-negotiable, however, and, as Michael J. Perry has pointed out, can be only transcendently grounded. Human rights, as he puts it, are 'ineliminably religious'. M. J. Perry, *The Idea of Human Rights. Four Inquiries* (1998), 11–41.

22. F. Dostoyevsky, *The Brothers Karamazov* (1982), at 301 (emphasis in original).

23. I have discussed this paradox in detail in my 'The Effect of Rights on Political Culture', *supra* note 13.

## 2. DIALECTICAL THINKING: HOW MARX CONNECTS WITH THE INDETERMINACY OF THE LAW

The state/civil society opposition was, for Marx, the defining moment of political modernity. But the important general point was that to define something by reference to an opposition was the starting point of a properly *historical* view of that something – in this case of human society. An opposition was not an abstract ‘problem’ that had to be resolved by reason, as bourgeois politics always suggested. Instead, it was to be taken seriously, that is dialectically, as the source through which historical development would proceed by the ‘negation of the negation’, that is by the resolution of conflicts not by synthesis into some tranquil (bourgeois) normality but through moments of challenge, collapse, and construction.<sup>24</sup>

Stated formally, dialectics would show how any social reality would consist of an inherent tension between its opposite elements. The secondary element (e.g. civil society, working class) would put to question the major element (state, bourgeois rule) so that it would eventually collapse. In postmodernity, however, (pure) materialist dialectics itself enters into a dialectical relationship with the processes of symbolic representation of society that take place through the practices whereby social agents seek to control the meanings of shared symbols. Political struggle will then be understood as waged also on the meaning of legal symbols – words such as ‘sovereignty’, ‘democracy’, ‘human rights’, ‘*jus cogens*’, or ‘terrorism’, for example. Where dialectics shows the historical contingency of the social, ‘deconstruction’ points to the radical indeterminacy (or ‘undecidability’) of the symbolic and redescribes social conflict in terms of (political) conflict over what social symbols should *mean* – whose action they should support, whose action they should condemn. This is why it seems right to say that deconstruction performs the work of dialectics by showing the radical instability of forms of representing society. In this way it ‘would be either inconceivable or irrelevant if it were not related to the spirit of the tradition of a certain Marxism.’<sup>25</sup>

Such a perspective would enable international lawyers to interpret the dichotomies of international law in the light of the historical tensions in the international world – for instance the relationship between the public realm of state diplomacy on the one hand, and that of the international civil society on the other. But the important move would be not merely to notice this opposition (after all, it is the dominant focus of mainstream analyses) *but to analyse it deconstructively*, that is, by including in the analysis not only the critique of diplomacy by actors in civil society (negation) but also the challenge of legitimacy to the self-promoted representatives of civil society that calls for organization in the image of accountability structures that define formal statehood (negation of negation). This would mean a description of the setting in which ‘public diplomacy’ conflicts with ‘civil society’ as indeterminate:

24. Here again was a crucial difference between Marx and social revolutionaries such as Proudhon, for instance, for whom it would suffice to suspend what was ‘bad’ so as to bring about that which in society was ‘good’. See J. Ellul, *La pensée marxiste. Cours professé à l’Institut d’études politiques de Bordeaux de 1947 à 1979* (2003), 77–8.

25. E. Laclau, ‘The Time is Out of Joint’, in Laclau, *Emancipation(s)* (1996), 66.

neither side possesses a final truth, each depends on aspects of its counterpart. This would make the moment of *decision* visible: no choice within such a setting can be fully determined by a pre-existing structure (because, after all, the structures flow into each other). Deconstruction becomes a pragmatism:<sup>26</sup> if a decision is necessarily ungrounded in existing structure, then the way it affects actual individuals *now* is highlighted while any supposed long-term benefits appear increasingly dubious.

A dialectical–deconstructive analysis of the challenges to public diplomacy by globalization critics and social movements would accept that the tension between the public and the private encompassed within it is not going to go away through successive transformations, but that each novel configuration of forces would always already contain a critique of its achieved hierarchies and thus the seeds of their eventual collapse.<sup>27</sup> Had Marx analysed communism deconstructively (which he was not in a position to do as he was seeking to bring it about), he could not have failed to envisage the foreseeable historical role of non-submissive groups within *that* configuration whose activity was to lead to the eventual collapse of its totalizing ambition.

### 2.1. Dialectics and deconstruction in law

International lawyers are familiar with the way in which legal thought is locked into what seem like irresolvable dichotomies and paradoxes. Posing ourselves the question as to why a putative norm should be binding, we receive two responses. Either something is binding as an effect of a subject's will or command or it is binding independently of that will, because it is just that the standard should be so. Much of what international lawyers have to say about the sources of the law captures this dualism. But though the setting of the problem seems to demand a firm decision one way or another, neither seems fully able to trump its contrary. The 'justice' of an agnostic (liberal) society can only be what its members have 'consented' to – while why 'consent' should have such force, and where its limits lie ('you cannot consent to genocide'), must be received from some non-consensual principle of 'justice'. For modernity's secular religion, the emptiness of '*jus cogens*' or 'obligations *erga omnes*' is not an unfortunate temporary weakness but an absolutely central aspect of its constant putting to question of its own normativity in a terrain of radical political indeterminacy and social contingency.

Again, when we seek to answer the question about legal authority (sovereignty) with regard to a piece of territory or a group of people, we look into both what it is that history has produced ('effectiveness'), and what ideas of just government might tell us ('legitimacy'). Much of the law on territory and jurisdiction captures this opposition – though none of it is able to explain exhaustively why 'effectiveness' should trump 'legitimacy' (after all, *ex injuria non jus oritur*) or vice-versa (after all, 'rights cannot be presumed to exist merely because it might seem desirable that

26. This is the theme of the series of small essays by S. Critchley, J. Derrida, E. Laclau and R. Rorty in C. Mouffe (ed.), *Deconstruction and Pragmatism* (1996).

27. See also my 'Hierarchy in International Law: A Sketch', 8 EJIL (1997), 566–587.

they should'<sup>28</sup>). Neither is able to override the other because their opposition is part of the discursive world in which they belong – which they, in fact, create. Notions such as effectiveness and legitimacy (like consent and justice) interact dialectically: effectiveness creates legitimacy while legitimacy singles out the types of *effectivités* that have normative value (in contrast to those that are merely *contra legem*).<sup>29</sup> Paradox and self-reference become the postmodern description of what in a Marxian view would be a properly historical dialectic.<sup>30</sup> Each points to the way in which political intervention, that is, definite decision, is needed to achieve consequences in the lives of human beings.

Such structural dichotomies reflect the contradictory ways in which modern society sees itself. Voluntarist and naturalist theories of agreement, and historical and rational views of authority, mirror formidable oppositions between fact and value, individual and society. It is never just that there are two alternative institutional projects from which to choose, or two solutions for every legal problem, but that the proposed solutions, while cancelling each other out, also rely for their identity and force on each other. None can rid itself of its rival because it also needs the latter's support.<sup>31</sup> A command view of legal obligation has point only if we assume that 'will' overrides 'justice'. Indeed, that is what liberal voluntarism is supposed to do. And yet, when or whose commands should have that kind of force can be defended only by a theory of justice – while what the content of such a theory is can be demonstrated only by reference to what someone wills: the permissibility of reservations to treaties is determined by the 'object and purpose test' while what the 'object and purpose' of a treaty is is exhaustively determined by what it is that the parties have willed as such.

Discussed in this way, the law's constitutive oppositions seem irresolvable, and legal reason appears condemned to the eternal recurrence of the same: voluntarists engage with solidarists, positivists with naturalists, formalists with non-formalists. And so on.<sup>32</sup> But though none of the positions can claim priority on logical grounds, every legal regime still always appears as a *particular arrangement* of the opposites. Although at the level of abstract reason there is no closure, at the level of concrete history there is always some configuration of forces, some hierarchical arrangement. And how to reach that level of concreteness requires going beyond political theology. What is it that makes one term dominate the other here, in this case, between these contestants? And why would such domination justify *this* particular distribution of social costs and benefits?

28. *South West Africa Case* (2nd phase), [1966] ICJ Rep. 48.

29. For a recent example of this dialectic in terms of the opposition between and mutual interpenetration of 'title' and 'effectivités', see *Burkina Faso–Mali Boundary*, [1986] ICJ Rep. 564, para. 18.

30. Such paradox and self-reference are central to the kind of understanding of society expounded in N. Luhmann, *Die Wissenschaft der Gesellschaft* (1992). For a useful application of Luhmannian analysis in international law, see A. Fischer-Lescano, 'Die Emergenz der Globalverfassung', (2003) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 717.

31. See further my 'The Politics of International Law', 1 *EJIL* (1990), 4–32.

32. This is what I have described in *From Apology to Utopia. The Structure of International Legal Argument* (1989).

## 2.2. International relations: an excursus

Parallel considerations give a novel perspective to the significance of the fact that thinking about international relations continues to be trapped in a juxtaposition of 'realism' and 'idealism' as alternative frameworks for understanding the international world: each defers to the other without being able to grasp (self-reflectively) the historical role of its momentary predominance over its opposite. This may seem evident when applied to classical idealist views of international history, seen as a function of great ideas, cultures, or successions of epochal *Geiste*. But perhaps it is more relevant to note that even as 'realism' describes international politics as struggle for power by states in order to realize interests, it moves in one second from the account of the Peloponnesian wars by Thucydides around the year 400 BC to a discussion of the relations between Italian city states in the fourteenth and fifteenth centuries, to the peace of Utrecht in 1713, and to the Cold War. What is the force of a theory that freezes two and a half millennia into a single, unchanging pattern?<sup>33</sup>

A critique of political theology would show realism emptied of content by its privileging the political state over the 'structural configuration of forces' that in civil society create the conditions of official diplomacy. Such an analysis would focus on the social and economic relations of each period as the proper context for understanding its diplomacy: is there a need for the functional differentiation of a political realm distinct from the economic, for example in order to resolve problems of co-ordination in the reproduction of particular types of social relations?<sup>34</sup> This, however, means setting aside the distinction between the internal and the international that founds the disciplinary tradition of 'international relations' that, to paraphrase Marx, 'hangs like a nightmare over the minds of the living'.

Now it is true that the development of liberal epistemology has undermined this type of realism, downgrading it into a style of populist commentary on current affairs.<sup>35</sup> 'Reality' is today seen as constructed by frameworks involving normative preferences.<sup>36</sup> The normative turn in international relations studies in the 1990s is paralleled by the turn to ethics in international politics. A power struggle becomes a 'clash of civilizations' or a function of some inherent tension within a multicultural system. Recent studies suggest that transformations in the international world result from 'changes in metavalues', predominant among which is the 'moral purpose of the state'. Under this view normative change is crucial: Protestantism created the Westphalian system; anti-colonial ideas brought about decolonization.<sup>37</sup> As in all idealism, the conditions of the emergence or decline of such ideas remain shrouded in mystery.

The juxtaposition of realism and idealism remains undecidable. Both appear as political theologies engaged in a shouting match over whether human nature is bad or good, whose God is strongest. Dialectics would understand this undecidability as

33. Reliance on a single, unchanging notion of 'human nature' is regularly identified as a weak spot and a hidden idealism in such classical realists as Morgenthau or Niebuhr, for example.

34. Such a critique and alternative construction is made in J. Rosenberg, *The Empire of Civil Society* (1994).

35. See typically, R. D. Kaplan, *Warrior Politics. Why Leadership Demands a Pagan Ethos* (2002).

36. For a useful review and critique, see M. Zehfuss, *Constructivism in International Relations* (2002).

37. D. Philpott, *Revolutions in Sovereignty. How Ideas Shaped Modern International Relations* (2001).

inscribed in the liberal worldview itself. It would seek to explain the predominance of one over another at any particular moment from the hegemonic role it plays in upholding or challenging some particular configuration of forces.<sup>38</sup> The rise and fall of realism, for instance, could be connected with the transformation and dissolution of a Cold War consciousness. Against this, the new normative orientations might be seen in terms of a new struggle between an unmediated foreign policy moralism advocated by a single superpower and an anti-imperial formalism insisting on mediation through law and international institutions.<sup>39</sup>

Dialectics would understand the realism/idealism opposition as a clash of political theologies, each manifesting what could be called a logic of *identity*, a pattern of thought that reduces social phenomena to a mechanical series of single truths each of which appears final and authentic – perhaps human nature, perhaps the good – whose repetition forms the passing of social time. For dialectics, as for deconstruction, there is no such nature or good that would be independent from history, conceived as struggle between articulations emerging from opposing social forces: time is prior to meaning. Every identity is constructed by *decisions* that employ existing structures without being reducible to them. This is why each identity also carries within itself its own negation. ‘Chaque époque rêve la suivante’, Walter Benjamin once wrote. The move in thinking from a logic of identity for which the dichotomies of law are fatal, into dialectics that use the dichotomies as frameworks for historical explanation, is what lawyers should learn from Marx – just as they should today accept the indeterminacy of each such framework, that is, unlearn the essentialism through which Marxism and subsequent realisms thought about them.

### 2.3. Beyond dichotomies?

This would also mean analysing the play of legal dichotomies, not in terms of an abstract logic of concepts but as a series of articulations of positions in concrete, historically situated political struggles. Legal concepts would then be seen not as carriers of fixed meanings but as surfaces or, to follow Ernesto Laclau, floating signifiers, on which social conflict would become visible, and receive meaning and shape.<sup>40</sup> The irreducibly *political* character of law would not then cancel out law’s legal character. It would merely point to the inevitable moment of choice in legal practice in favour of one contested meaning against another.

For example, the dichotomy of consent and justice could be seen as one field of articulation of social relations. One aspect is predominant, the other a latent modification. In vulgar capitalism, as in much of international law, consent is understood to structure the market (diplomacy) while justice steps in as an occasional corrective. The corrective involves, however, a denial or a negation of the *raison d’être* of the predominant term with which it stands in tension. In a historical sense, the two act

38. I have discussed the hegemonic aspect of normative debate in international politics in ‘International Law and Hegemony. A Reconfiguration’, (2004) *Cambridge Review of International Affairs* (forthcoming).

39. This is how the US–Europe controversy is seen e.g. by Jürgen Habermas, *supra* note 1.

40. See especially Laclau, *Emancipation(s)*, *supra* note 25.

dialectically: social struggle is expressed in the way in which the secondary term challenges and finally overtakes the prominent one, overturning their relationship. The market of hunter-gatherers collapses into a system of public distribution in accordance with tribal decision: the emergence of common ownership in primitive society. Critique of tribal authority and distribution of labour will lead into class society and private property, a system that would again be collapsed into common property in socialism.

The point is not whether this particular account of history is correct but that it provides one example of how conceptual oppositions express the dialectics of social struggle. The logic of identity in standard realism and idealism is profoundly conservative in its search for that which is always already known: balance of power, humanitarian ideals. By contrast, dialectics grasps the world as history for which change and *practice* are central. Instead of some structure endlessly repeating itself, everything depends on decisions to maintain or challenge it. It is the dynamism of *practice* – where ‘the subject changes the object by understanding it’<sup>41</sup> – and not the internal forms of diplomacy or the market that accounts for change. The two are linked by political practice that now becomes the focus of what is simultaneously an explanatory and an emancipatory interest.<sup>42</sup>

A Marxian analysis would not take the distinction between public diplomacy and private economic relations for granted, ahistorically given. The privileging of the former by the reformist international lawyer would only appear as an international equivalent of advocating ‘merely political emancipation’. It would leave intact the relations of domination in civil society by assuming that they organize themselves automatically. But an international law that would only focus on limiting what states do, and celebrates the spontaneous realm of civil society, is profoundly ideological. It would buttress a limited public realm of sovereign equality with occasional intervention, and an unlimited, imperial structure of economic domination. A dialectical approach, by contrast, would focus on the fragility of each, by pointing to the fundamental nature of their mutual criticisms: republicanism as a *negation* of capitalism, cosmopolitan democracy as a *negation* of public diplomacy. A demonstration of the conceptual indeterminacy of the public/private distinction would break its ideological, passivity-inducing power. Transformative action would seem not only possible but perhaps the only justifiable choice.

So I conclude that present reality does give the appearance of harmony – that is what by definition ‘present reality’ always does. But dialectical thought reveals the hidden contradiction, the unconscious desire, the dangerous supplement, and makes room for political decision. Dialectics, as Jacques Ellul notes, is intrinsically critical.<sup>43</sup> It sees its object as a contradictory process, a movement of which the observer is a part.

41. L. Kolakowski, *Main Currents of Marxism 1: The Founders* (1978), 144.

42. In Marxian theory, ‘practice’ is an epistemological category: the validity of a view of society is measured by the type of practice it produces. The indissociable nature of theory and practice accounts for some of the optimistic romanticism of early left politics. Through notions such as ‘objective interests’ and ‘self-reflection’, it remains central to later critical theory. For a very accessible introduction, see R. Geuss, *The Idea of a Critical Theory. Habermas and the Frankfurt School* (1981), esp. 45–95.

43. Ellul, *supra* note 24, at 71.

And one has to insist that apart from encompassing such oppositions as those of civil society and state, base, and superstructure, it also includes the dichotomy between materialism and idealism. Today, dialectical imagination fuses with deconstruction to include also Marxian and other structuralist thought within its compass. After all, it may be that agents in civil society are able to identify their interests or even themselves as ‘agents’ only by reference to liberal-republican and democratic ideas of law and state. Democracy surely is a process that has itself as its (impossible) objective. The process of representation may become the source of the identity of that which is represented.<sup>44</sup>

Thus, for example, the unresolved tension in Marxian thinking between self-determination and internationalism can finally be seen not as a theoretical failure but an openness to what can be attained through *praxis*.<sup>45</sup> Many have pointed out the interdependence of these two opposing notions. For Marxian thought they present not a problem to be resolved, but a *horizon of political possibility*. Whether one would prefer action within a national or an international frame remains then a pure issue of situated reason, of addressing the consequences of alternative choices, and not a derivation from some abstract and unhistorical either-or theory. Against Rosa Luxemburg, Lenin was right. Only the historical situation can tell; only *praxis* may achieve. But what *is* that ‘situation’ today?

### 3. CIVIL SOCIETY AND UNIVERSALISM

Following Feuerbach, Marx set against the abstract – and thus false – universality of liberal rights the concrete universality of human beings as species-beings, but, unlike Feuerbach, interpreted this as their *social being*. Political theologies had created personified abstractions such as ‘the state’, ‘the individual’, ‘the monarch’, the ‘nation’, or ‘private property’. Sovereignty and private property, for instance, were structurally analogous: the state enjoyed sovereignty in the same way as the abstract individual enjoyed private property.<sup>46</sup> These were to be countered by concrete notions. The human being as social species-being was one that would enjoy property as shared by the species.

The redemption of civil society against the state by new social movements is today a routine aspect of transformative debates that take up the left-Hegelian themes of which Marx was profoundly critical.<sup>47</sup> The call is for political emancipation in order to rid the international world of the distorting structures of statehood against which civil society is portrayed as an authentic realm of human spontaneity. Yet there is a danger that the critiques of the state – as much a part of international law as statehood itself – collapse into an uncritical endorsement of informal social power. Something that is said to exist ‘naturally’ is celebrated because that is what it appears to be. The claims against the state have force as they are made as claims of

44. See further E. Laclau, ‘Power and Representation’, in Laclau, *Emancipation(s)*, *supra* note 25, at 98–9.

45. See R. Miliband, *Marxism and Politics* (1977), 98–105.

46. Breckman, *supra* note 12, at 289.

47. See B. Rajagopal, *International Law from Below: Development, Social Movements & Third World Resistance* (2003).

*authenticity* (the indigenous way of life, the real wishes of the proletariat, the unaffected state of the environment, the universal aspirations of women and so on). The 'real' now truly becomes 'rational' in the reactionary Hegelian sense and the 'movement' another transcendental (religious) condition for politics that cannot be touched by politics.

All this is pre-modern nostalgia. Marx would have had none of it. If he did privilege civil society against the state, this never promised that the life of the human species-being recognizing itself as such would be a state of pre-political harmony. The harmony of interests – the organic solidarity that Durkheim saw binding together the factory-owner and the shoemaker – was a bourgeois notion that merely veiled the domination of the weak by the strong. Globalization is that, too, the informal empire of economic forces no longer obstructed by 'irrational' boundaries. Though Marx was not free from occasionally lapsing into the utopian assumption that communism would unite the objectives of the individual and the community, the more important point is that in the transition, social conflict would not vanish but its resolution would no longer be achieved by automatically supporting the ruling class.

For international lawyers, it has always been the point of the states-system to constrain the claims of authenticity propagated in the global market of ideas. Nothing has undermined the need for a republican realm beyond this market that may judge such claims. But the Marxian critique of 'merely political emancipation' has shown that although this may be necessary in the work for a just society, it is far from sufficient. In order to reach towards 'human emancipation', a notion of universal humanity – or 'universality' *tout court* – is needed that goes beyond the representational structures of political states. But what is there, outside statehood, that might be able to represent 'humanity' and thus provide the perspective of international progress and enlightenment?

When Marx wrote of the 'positive possibility of German emancipation', he conceived this through his theory of civil society's division into classes and by extrapolating the proletariat as the *universal class*. When economics dictates that civil society in conditions of modernity will organize itself as a class society, dialectics persuades us that this is also what will undo it. Capitalist modernity itself contributes to the formation of one particular class, 'a class with *radical chains*', as Marx explained:

a class in civil society that is not of civil society, an estate that is the dissolution of all estates, a sphere of society having a universal character because of its universal suffering and claiming no *particular right* because no *particular wrong* but *unqualified wrong* is perpetrated on it.<sup>48</sup>

This class – the proletariat – would not just continue the old antagonisms. For it 'can only redeem itself through the *total redemption of humanity*'.<sup>49</sup> Here, for Marx, was the privileged particular that transcended its own particularity and became a representative of the whole.

48. Marx, 'Contribution to a Critique', *supra* note 8, at 69 (emphasis in original).

49. *Ibid.* (emphasis in original).

Now the experience of class struggle and real socialism has made it impossible to take in full seriousness the view of the proletariat as a universal class and proletarian revolution as human emancipation. Marx's economic reductionism remained blind to the significance of divisions emerging in the political and cultural realms of civil society – indeed he himself remained, as noted by Jean Cohen, imprisoned by a 'fetishistic logic'.<sup>50</sup> Instead, more recent left-liberal theory has focused on human rights as the representative of that which is universal. But, as we have seen, human rights are a theology of the bourgeois state whose citizens are obsessed by their weakness, and, fearful of 'evil', are ever ready to turn whatever powers into the hands of a bureaucratic theocracy.<sup>51</sup> So how to conceive that which is universal in a genuine, and not a 'false', sense?

Last June, perhaps five miles inland from the centre of the city of Recife, Brazil, on a pink concrete wall I saw a text in Portuguese that read 'No to the war of Bush'. Why was it there? The inhabitants of Recife were in no way touched by the military activities of a handful of Western countries in the Middle East. Indeed, the inhabitants of this suburban quarter of a major South American city seemed to have a number of other things to be concerned over – massive and endemic poverty, enormous differences of economic wealth, domestic violence, and so on. And they *are* concerned about these facts, as demonstrated by the election of Luiz Inácio ('Lula') da Silva as the country's first left-wing president. And still, not only that one concrete wall, but countless pieces of graffiti all over the city condemned the war waged by 'Bush' in no uncertain terms and often not just as 'wrong' but as 'illegal'. Nor is this phenomenon any Brazilian idiosyncrasy. In the city of Helsinki where I live, on my street, on the lamppost nearest to the door to my flat, was a sticker that declared the war against Iraq 'illegal'. And in Geneva, where I was attending the UN International Law Commission the week after leaving Recife, there was an enormous demonstration to protest against the G-8 meeting. A large number of the protesters carried slogans that condemned the Iraqi war in uncompromising terms: the war and the ensuing occupation were 'illegal'. Nor is this only my experience. The protests that took place on 15 February 2003 against the (then) planned Iraqi war gathered on the streets of the world more people than any other event since the end of the Second World War.

The point of this story is that the protest against 'Bush's war' has nothing bureaucratic and routine about it. It focuses on a single fact and event, and condemns that event often as not merely 'wrong', but 'illegal'. This highlights the fact that the war in Iraq is not only another brick in the wall of globalization. It is a singular scandal that cannot be explained away as a geographical or a 'third world' problem, or as a problem about communism, or capitalism, or 'the market', the 'Washington consensus', or even 'American imperialism'. It may be all of these but there is something more in this scandal. That fact is that the war is so patently and arrogantly 'illegal' that

50. J. Cohen, *Class and Civil Society. The Limits of Marxian Critical Theory* (1982), 188.

51. This is also the gist of the ('communist') critique of the ethics of human rights in A. Badiou, *Ethics. An Essay on the Understanding of Evil* (2001), 8–17 and *passim*.

even its protagonists never really cared to make a serious defence of it in terms of its lawfulness but were content with half-hearted, manipulative generalities about the suspicion of the existence of weapons of mass destruction, of Iraq's links with al-Qaeda, 'pre-emptive self-defence', and so on – justifications in which it is today difficult to see anything beyond cynicism.<sup>52</sup>

The scandal lies in the mockery that the war has sought to make of the desire for a world of justice and equality. It is a paradox that while diplomats and academics now often declare central aspects of international law 'dead' or at least in a severe crisis, there has never in the past half-century been such widespread invocation of international law as today. This is significant.

The events in Iraq raise the theme of the universal being conceived not in terms of a blueprint or a positive programme, or in terms of identity politics or sectarian interests but, as Marx conceived it, as a *universal violation*. The political struggles in Recife, Geneva, or Helsinki are different. The claims that are raised at these locations emerge from different experiences. But though the global trade regime, environmental degradation, and the occupation of Iraq may have different victims and follow different paths of rationality, they are not hermetically isolated from each other. They form a pattern, a hierarchy, and a particular configuration of forces. As the criticism of the Iraqi war was made in terms of its *illegality*, a grievance was being articulated that through that articulation was being lifted from the realm of what is particular to that which is universal.

That the war was condemned as a 'violation of international law' or as an attack on the 'rights' of Iraqi civilians is to appeal to something beyond particular interest, privileges, or charity enjoyed or claimed by someone. Such an invocation appeals to something that concerns every member of a projected (legal) community, a violation that touches no one in particular but *everyone in general*. It makes the point that the coalition actions are not an affair between the Iraqis and the Americans (or indeed between Bush and Saddam), but that everyone has a stake in them because the violation is universal. 'I do not condemn this action because it is against my interests or preferences. I condemn it because it is objectively wrong, *a violation not against me but against everyone*.'

The proletarian revolution that unites all is a myth. But like Georges Sorel's 'general strike', myths – for instance myths of the 'nation' – act as reference points against which individuals see themselves as something larger than particular identities with idiosyncratic preferences.<sup>53</sup> In the conditions of complex modernity, a sense of universality cannot be created out of objective interests (of the proletariat) or historical missions (of nations). Difference is irreducible to such stories. But those that are different may be united by what they experience as a violation that is directed at no-one in particular but at everyone in general. This is where international lawyers, learning from Marx, could see international law's emancipatory promise.

52. For discussion, see T. M. Franck, 'What Happens Now? The United Nations after Iraq', (2003) *AJIL* 607–21.

53. See further E. Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy. Towards a Radical Democratic Politics* (2001), 36–42 (on Sorel), and *passim* (for 'articulation' as central to the – hegemonic – effort to occupy the position of the general).

International law may act precisely as an instrument through which particular grievances may be articulated as universal ones and in this way, like myth, construct a sense of universal humanity through the act of invoking it. From such a perspective, the project of universal justice appears as a horizon at the intersection of a public realm of states regulated by international law and the civil society reaching beyond sectarian interests. That this intersection appears only occasionally, and even then in connection with events of exceptional magnitude, even scandal, is an aspect of the difficulty that any fundamental challenge to the iron laws of power must imply.