

Political argument and the legitimacy of international law: A case of distorted modernisation

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Introduction

The springboard for this paper is the observation that the terminology of international law, and especially the terminology of international humanitarian and human rights law, has assumed a radically enhanced role in public deliberation and political argument. The tendency to treat humanitarian and human rights legal norms as a standard against which to measure the legitimacy of acts of state has become increasingly marked. This phenomenon, if correctly observed, raises a number of intriguing sociological issues around the origins, meaning and desirability of this development.

I shall argue that there are good reasons to support the enlarged scope of international law in public life. These have to do with the need for a higher law to inhibit the otherwise overweening power of states to exercise coercive violence; to protect the rights and welfare of minorities, non-nationals and other vulnerable groups within nation states; to prevent aggressive wars, colonial conquests, occupations and inhuman methods of warfare; to compensate for the deficits of exclusively national forms of governmental decision-making; to generalise norms of democratic legitimacy; and not least to remove the ‘halo effect’ that once endowed heads of state with a sense of their own impunity.¹

My more qualified contention, however, is that the current tendency to construe international law as an ideal synthesis creates as many problems as it solves and should be resisted. A tendency toward idealisation is evident in a jurisprudence which treats the ‘constitutionalisation of international law’ as the marker of the transformation of law from an instrument of power into the crucible in which all power relations are dissolved; in a legal history which defines the transition from classical international law to contemporary cosmopolitan law as one in which *realpolitik* and state sovereignty finally give way to the authority of human rights and international law itself; and in a political theory which imagines a world order in which the role of political judgment is replaced by procedures of a wholly legalised international order still to come. My own intuition is that the answer to the distortion of political argument by power is not to be sought in the creation of a wholly legalised international order-to-come but in the enhancement of political argument. To use Durkheimian terminology, I shall argue that certain social pathologies are associated with the idealisation of international law and I shall focus

¹ The phrase ‘halo effect’ is drawn from Jaspers, K, *The Question of German Guilt* (New York, Fordham University Press, 2000).

on the construction of outlaw states and peoples. Working through John Rawls's *Law of Peoples*, I maintain that the tendency to idealise international law is related to the propensity to criminalise not just individuals and states but whole peoples. While it has been widely argued that the concept of 'outlaw' states introduces a hierarchical outlook into international law, the concern I explore is that the slippage from condemning a *state* for human rights abuses to condemning a *people* as unworthy of recognition within the Society of Peoples is internal to Rawls's conception of the Law of Peoples and introduces a potentially damaging logic of stigma. If the legitimacy of international law lies in its capacity to humanise political conflicts, so that even the perpetrator of crimes against humanity or genocide is treated as a responsible and rational human being, then it is imperative that we should resist the temptation to label those who commit such crimes as inhuman monsters, that is, to dehumanize the dehumanisers. Those who commit crimes of this nature typically dehumanize the people against whom their crimes are committed. The legitimacy of international law suffers to the extent that it is put into the service of reproducing the cycles of demonisation that preceded it.

In conclusion I raise the question of what my analysis of the legitimacy problems of international law suggests for the development of a politics of human rights. I maintain that the interpretation and application of human rights and humanitarian norms take place on a contested terrain where rival political interests and claims are argued out. Human rights and humanitarian norms are not and cannot become definitive of politics; rather they stand in need of a politics able to resist the 'Schmittian' temptation to use international law as a means by which the ancient practice of demonising others can once again be institutionalised in an apparently universalistic and legal guise. I suggest that the best chance of developing such a politics lies in recognising that the enhanced scope of international law does not provide the content for an abstract cosmopolitan ideal against which to measure the actual world, but rather represents the necessary legal form of contemporary capitalist society and its global reach. International law offers a major resource for combating illegitimate power but it is relative to other norms and always contains the possibility of conflict between what it is and what it ought to be.

International law and the legitimacy of state action

The starting point of this paper, then, is the observation that whether a particular act on the part of a state or group of states or non-state actors is deemed in accordance with or in violation of international law, is now regularly advanced as a basis for deciding on the legitimacy of the act in question or in some cases of the actor itself. Appeal is regularly made not only to international legal norms but also to the general *values* and *principles* of international law to defend or reject the legitimacy of a state action,

even if these values and principles require the reform of actually existing international laws for their realisation. The claim that an act of state accords with or violates international law is rarely tested in court, but the opinions of international lawyers, political theorists and political actors are regularly invoked. In major international conflicts (for example, genocide in Cambodia and Rwanda, the first Gulf War, the NATO intervention in Kosovo, the US-UK invasion of Iraq, the US occupation of Afghanistan, the US detention of ‘unlawful enemy combatants’ in Guantanamo, and Israel’s invasions of Lebanon and Gaza) it is a common rhetoric to appeal to some notion of international law or to some notions within international law to authorise a particular political argument. Labels drawn from the lexicon of international criminal law (crimes of aggression, war crimes, crimes against humanity, genocide, torture) or from the Geneva Conventions (‘disproportionate response’ and ‘collective punishment’) are now employed to depict perpetrators, not just as morally wrong or politically imprudent, but as offenders against international law. Judgments of this sort may be based on legal definition of the offences in question but also on common usage, which may substantially differ in form and content from legal definitions. There are cases of military action of which we may morally or politically disapprove, not least for the hardship they impose on civilians, but which may not be criminal according to existing norms of international law. We cannot assume that international law is necessarily on the side of what we consider right.²

Public engagement with international law on this scale appears to be a fairly recent phenomenon. International lawyers, political actors and academic observers have maintained that international law became the stuff of public debate mainly since 1989 and that its present public status contrasts with its relative invisibility in the post-1945 period when international law was widely regarded as ineffective or narrowly technocratic in its concerns and citizens were inclined to rely either on the resources of domestic legal systems or on their own moral and political judgments unmediated by law.³

² This tendency is illustrated in debates in the *Guardian* over the legality as well as legitimacy of the Israeli invasion of Gaza in January 2009. One letter to the *Guardian* runs as follows: ‘As international lawyers, we remind the UK government that it has a duty under international law to exert its influence to stop violations of international humanitarian law in the current conflict between Israel and Hamas. A fundamental principle of international humanitarian law is that the parties to a conflict must distinguish between civilians and those who participate directly in hostilities’ (14/01/09). This even-handed approach to the crucial distinction between civilians and combatants was matched by numerous attempts to place this aspect of international law on one side or the other of the conflict. Thus the British Committee for the Universities of Palestine wrote in their Declaration of ‘Gaza’s Guernica’: ‘We say enough is enough. As long as the state of Israel continues to defy humanity and international law, we, the citizens of the world, commit ourselves to boycotting Israel’ (28/12/08). On the other side, in response to the UNHCR Report on Gaza Robbie Sabel argued that ‘ Hamas knowingly and deliberately targeted civilians and civilian targets in Israel and based itself in civilian areas’ whilst there was no evidence that the phosphorous shells Israel used in civilian areas had been used ‘in an illegal way’ (7/05/09).

³ Hamid Ansari, Vice-President of India, inaugurating the International Conference on International Law in the Contemporary World organized by the Indian Society of International Law (ISIL), commented that the last three decades

In the field of legal theory the authority of international law in determining the legitimacy of state action is invoked from a surprising number of perspectives – even from within the field of critical legal studies which is not renowned for upholding any positive law as a standard against which to measure the legitimacy of political action. The elevation of international law, in whole or in part, into a standard for determining the legitimacy of state actions may be not as new as it appears, but my argument is that today the idea of international humanitarian and human rights law performs functions not unlike those performed in the past by the idea of a universal law of nature: it serves as the measure against which the positive actions of nation states can be critically assessed and as a trump card for concluding political argument.

Justifying the expanded scope of international law

The Marxist international lawyer, Bill Bowring, makes a totally compelling case for ‘the blatantly unlawful behaviour of the US and UK in the invasion and occupation of Iraq’. He situates the invasion and occupation of Iraq in relation to the normative decline of international law since the halcyon days of the period of decolonisation when its focus was on the ‘firm establishment of the right of peoples to self-determination’.⁴ In nostalgic mode Bowring describes the right of nations to self-determination as the ‘revolutionary kernel of international law’ and follows Alasdair MacIntyre in presenting the development of human rights as a regrettable displacement of the supremacy of the right of self-determination.⁵ This perspective is rooted in the normative requirements of decolonisation movements but does not address the normative dysfunctions of the right of nations to self-determination that gave rise to the expansion of human rights and humanitarian law in the first place.⁶ Good reasons have been

have witnessed the metamorphosis of international law from a tool for the regulation of formal diplomacy between states and coordination of international intercourse to an elaborate canvas covering complex areas of transnational concerns such as trade, economy and development, nuclear energy, outer space, human rights and environment. He opined that the problems created by the dramatic expansion of the scope and instrumentalities of international law should not blind us to the significant success achieved in ameliorating the welfare of mankind. He maintained that international human rights and humanitarian law have ‘expanded their scope and application to become one of the most comprehensively regulated branches of international law’ and that this is in the final analysis ‘for the good of humanity’. ‘Vice-President inaugurates Conference on International Law’, India Edunews.net, 2 Feb 2009, http://indiaedunews.net/Law/Vice-President_inaugurates_Conference_on_International_Law_7337/print.asp

⁴ See the introduction to Bowring, B, *The Degradation of the International Legal Order: The Rehabilitation of Law and the Possibility of Politics* (London, Glasshouse, 2008). Antony Anghie emphasises the enduring imperial character of the discipline of international law in Anghie, A, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, Cambridge University Press, 2005).

⁵ Alasdair MacIntyre characterises human rights as ‘the idiom alike of the good, the bad and the ugly’ in ‘Community, law and the idiom and rhetoric of rights’ (1991) 26 *Listening: Journal of Religion and Culture*, pp. 96-110, cited in Bowring (at note 4), p. 7.

⁶ Hannah Arendt comments that ‘at precisely the moment when the right to national self-determination was recognised for all of Europe and when its essential conviction, the supremacy of the will of the nation over all legal and “abstract”

advanced to support the enlarged scope of international law beyond, though not in place of, the right of nations to self-determination.⁷

What has changed? Today, international law not only claims a ‘soft’ influence over states to take human rights into account but in some instances demands compliance and declares a duty to obey. The norms of international law increasingly function as a higher law vis-à-vis that of states and there is an increasing number of treaty-based norms that obligate all states whether or not they have signed the treaty in question. These include prohibitions on torture, genocide, crimes against humanity, disappearances and the like. The dependence of international law on state consent has declined, as has the state’s degree of freedom in interpreting and enforcing international law. The involvement of the UN not only in conflicts *between* states but also in conflicts *within* states affords international law a pivotal role in responding to events such as civil wars, the breakdown of government, major human rights abuses and in some cases the promotion of democracy. Non-state or quasi-state actors (such as international courts and tribunals as well as transnational executives, non-governmental organisations as well as multi-national companies) have emerged as major players in international legal processes. International lawyers are now heard to say that the subject matter of international law has expanded to such an extent that there is no clear nucleus of sovereignty states can invoke against it.⁸

The case for the expanded role of international law may be historically grounded, Jürgen Habermas does, in ‘the monstrous mass crimes of the twentieth century’ as a result of which ‘states as the subjects of international law forfeited the presumption of innocence that underlies the prohibition on intervention and immunity against criminal prosecution under international law’.⁹ The principles of

institutions was universally accepted’. It indicated ‘the transformation of the state from an instrument of the law into an instrument of the nation’. Henceforth, she writes, ‘only nationals could be citizens, only people of the same national origin could enjoy the full protection of legal institutions’. See Arendt, H, *Origins of Totalitarianism* (New York, Harcourt Brace, 1979), p. 275. See also the critique of the right of nations to self-determination in Kedourie, E, *Nationalism* (Oxford, Blackwell, 1993).

⁷ Hannah Arendt comments: ‘We became aware of the existence of a right to have rights ... only when millions of people emerged who had lost and could not regain these rights because of the new global situation... This calamity arose not from any lack of civilisation ... but on the contrary ... because there was no longer any “uncivilised” spot on earth, because whether we like it or not we have really started to live in One World’, at note 6 pp. 296-7.

⁸ The relativisation of sovereignty in international law is reflected in the recent sociological literature on cosmopolitanism. For example, Daniel Levy and Natan Sznaider write that ‘an increasingly de-nationalized conception of legitimacy is contributing to a reconfiguration of sovereignty itself’. They suggest that whilst ‘states retain most of their sovereign functions, their legitimacy is no longer exclusively conditioned by a contract with the nation, but also by their adherence to a set of nation-transcending human rights ideals’. This becomes consequential for states as ‘adherence to global human rights norms confers legitimacy’. Levy, D, and Sznaider, N, ‘Sovereignty transformed: A sociology of human rights’ (2006) 57 *British Journal of Sociology*, pp. 657-676,

⁹ Habermas, J, ‘The Constitutionalization of International Law and the Legitimation Problems of a Constitution For World Society’ (2008) 15 *Constellations*, pp. 444-455 at 444.

equal sovereignty, human rights and the authority of international law itself are defended on the grounds that, even if different emphases and interpretations are given to these principles, they enable co-operation and trust between nations, foster civil and welfare rights of citizens and non-citizens alike, protect minorities, curtail the abuse of power by states and ensure freedom from domination by other states.¹⁰ They can generalise norms of democratic legitimacy and compensate for the structural deficits of national processes of decision-making when they lead to outcomes (like water shortages or pollution) that are unacceptable from a more regional or global point of view. They can provide principles on which to appeal against oppressive actions of the state even in the absence of or in opposition to the positive laws of the international community.

There are good reasons to think that the expanded scope of international law is not merely a facade or empty utopia notwithstanding the neglect of or contempt for international law sometimes shown by big and small powers alike. The non-participation or non-compliance of big powers is well known, witness the reluctance of the US government (most marked under George W Bush) to sign up to international treaties, such as those on torture, global warming and the international criminal court. However, the relation of big powers to international law has not generally been one of unilateralism alone but rather one of ambivalence between commitment to international law on the one hand (which may be more or less verbal) and isolationism, unilateral action, indifference and cynicism on the other. In the past the US played a major role in important developments of international law: the formation of the League of Nations, the Kellogg-Briand Pact (proscribing wars of aggression), the establishment of the Nuremberg Tribunal, the formation of the UN, the Declaration of Human Rights, etc. Today the election of Obama might be understood as pronouncing the long-term rational interests the US has in binding emerging major powers (like China, Russia, Brazil and India) to the rules of a politically constituted international community.¹¹

¹⁰ For the role played by the appeal to human rights in defending the welfare rights of asylum seekers see Morris, L, 'An emergent cosmopolitan paradigm? Asylum, welfare and human rights' (2009) 60 *British Journal of Sociology*, pp. 215-235

¹¹ During this presidential election, in an interview given to the American Society of International Law, Barack Obama articulated his view on the role of international law in foreign policy and contrasted it with that of President Bush: 'Promoting strong international norms helps us advance many interests, including non-proliferation, free and fair trade, a clean environment, and protecting our troops in wartime. Respect for international legal norms also plays a vital role in fighting terrorism. Because the [Bush] administration cast aside international norms that reflect American values, such as the Geneva Conventions, we are less able to promote those values abroad'. Quoted in 'Obama to Promote International Law and Diplomacy' Suite 101.com November 2008, http://international-politics.suite101.com/article.cfm/obama_to_promote_international_law_and_diplomacy

Powerful states have their own interests in supporting international law. These are for reasons to do with regulation (it sets rules), pacification (it reduces resistance), stabilisation (it preserves the current order) and legitimation (it justifies power). To be sure, powerful states also encounter restraints on the exercise of their power imposed by international law. The norms of international law restrict their freedom of action, prevent the rapid reshaping of international norms, and make it difficult for big powers to apply rules only to others and not to themselves. Powerful states can respond to these restraints with a multiplicity of strategies: they may try to manipulate international law to suit their own interests; they may try to reshape the concepts and rules of international law to exempt themselves from its provisions or carve out space for the pursuit of their own interests; they may create zones of exclusion where the norms of international law have no purchase (as in Guantanamo Bay); they may substitute domestic law over which they retain more complete control for the less certain authority of international law; or they may withdraw altogether from international law and simply bring military superiority to bear. All these strategies involve trade-offs but they point to the equivocations of power in relation to international law, not to a simple opposition.¹²

From the other side of the state-civil society divide, it has been argued that international law suffers from a deficit of democratic legitimacy and that the expanded role of international law simply aggravates this deficit. One response to this lack of democratic legitimacy is to appeal to the liberal tradition of natural right theory (from Locke to Dworkin and Rawls) that draws its resources from the natural order of things and conceives of human rights largely as an external barrier imposed on the sovereign legislator. While this liberal conception of international law cannot satisfy the principle of the co-originality of rights and democracy that we may wish to defend, Jürgen Habermas points out that we do not have to sever international law altogether from channels of democratic legitimation institutionalised within the nation state and to a lesser degree within transnational federations. The normative substance of international law rest on rights, legal principles and criminal codes tried and tested within democratic constitutions and the application and enforcement of international laws receive indirect backing from democratic processes instituted within nation states. Public interest groups in global civil society can confer a supplementary level of democratic legitimacy on human rights, even if their influence does not translate directly into political power.¹³ Whilst international law

¹² I follow here the argument of Kumm, M, 'The legitimacy of international law: A constitutionalist framework of analysis' (2004) 15 *European journal of International Law*, pp. 907-931.

¹³ Seyla Benhabib looks to the human rights activism of civil society organisations to underwrite the democratic normativity of international law and applies the concept of 'democratic iterations' in this context. She explores, for instance, women's rights movements in predominantly Moslem countries and their struggles for women's equality. See Benhabib, S, *Another*

does not and arguably cannot satisfy the standards of democratic legitimation that underwrite national law making and enforcement, some defensible reasons may be given for this – for example, that international law performs limited and generally supplementary functions compared with those performed by nation states and therefore does not need the same level of democratic legitimacy.¹⁴ The argument that international law is invalidated by its lack of democratic legitimacy may be no less one sided than the argument that the legitimacy of international law can be exclusively based on the substantive ground of its protection of human rights. It neglects the role that international human rights and humanitarian law can play in initiating or securing democracy at the national level.¹⁵

One of the problems confronting the enhanced role of international law is that different parties tend to pick and choose those aspects of international law which in some way favour their interests. Imperialists may be well disposed to those bits of international law which outlaw terrorism but not the bits which relate to the mistreatment of prisoners of war. Anti-imperialists may be better disposed to the bits of international law that uphold a right of resistance against occupation but less keen on international law's injunctions against harming civilians. Both parties may be disdainful of actually existing international law on the grounds that it is controlled by their opponents but still use the rhetoric of international law to accuse the other of hypocrisy as well as of violating international law itself. From both points of view it can appear that it is not just because the other party commits worse crimes that it deserves to be prosecuted but also because it is the biggest hypocrite – appealing to international law in theory but disregarding it in practice.¹⁶ The predisposition toward selectivity may cast doubt on the legitimacy of expanding the scope of international law. The argument, for example, that international criminal courts are selective in whom they choose to prosecute for war crimes, a selectivity based not on the nature of the crimes that have been committed or on the harm they have caused but on who the accused are and whether they are deemed allies or enemies of those who authorise the court, raises thorny problems that can serve to devalue the legitimacy of international

Cosmopolitanism, Tanner Lectures (Oxford, Oxford University Press, 2006). See also Stammers, N, 'Social movements and the social construction of human rights' (1999) 214 *Human Rights Quarterly*, pp. 980-1008; and Morris, L, 'Welfare, asylum and civil society: a case study in civil repair' (2009) 13 *Citizenship Studies*, pp. 365-379.

¹⁴ Jürgen Habermas argues along these lines in *The Divided West* (Cambridge, Polity Press, 2006), pp.139-143.

¹⁵ Hauke Brunkhorst offers a critical view of the legitimacy problems caused by the democratic deficit in human rights: 'While human rights are becoming stronger, democracy is becoming weaker. Each and every person everywhere has rights... but at the same time the political right of citizens to the legislative, parliamentary elaboration of these rights... is declining... The weak public sphere... has to leave the creation, modification, elaboration and implementation of these rights to the springing up of many different sources of law and are not (sufficiently) democratically legitimate'. *Solidarity: From Civic Friendship to a Global Legal Community* (Cambridge, Mass., MIT Press, 2005), pp. 149-150.

¹⁶ I am indebted to David Hirsh for this observation. See Hirsh, D, *Law against Genocide: Cosmopolitan Trials* (London, Glasshouse Press, 2003), pp. 151-160.

criminal law.¹⁷ Once again, the selectivity issue does not invalidate the expanded role of international law, even if the legitimacy problems that flow from it cannot be wished away. It is no more convincing an argument that one war criminal should not be prosecuted because another equally heinous war criminal has not been prosecuted than it would be in relation to speeding offences.

The appeal to international humanitarian and human rights law as an authoritative ground of political argument reflects the expanding scope of international law in general. The normatively equivocal development offers an essential response to escalating dangers that were inherent in the structure of the nation state from its beginning and came to the fore with the advent of imperialism and post-imperial nationalisms. At the end of a century which has known unprecedented levels of organised terror and mass misery alongside the equally unprecedented development of material wealth and democratic forms, I would say that the expanded role of international law in society meets urgent humanising requirements.

The idealising of international law

My more critical argument is targeted at the tendency to rationalise cosmopolitan law – by which I refer to the human rights and humanitarian aspects of international law – as an ideal synthesis of all prior conflicts. I maintained in the introduction that a tendency toward idealisation is to be found in a jurisprudence that treats the ‘constitutionalisation of international law’ as the marker of the transformation of law from an instrument of power into the ‘crucible in which power is dissolved’; in a historiography which treats the transition from ‘classical international law’ to ‘cosmopolitan law’ as a transition from *realpolitik* and state sovereignty to human rights and the authority of international law itself; and in a political philosophy which imagines a utopian world order in which the role of political judgment is displaced in the idea of a wholly legalised international order to come.¹⁸

Jürgen Habermas represents the constitutionalisation of international law as an alternative to both realist and ethical conceptions of the primacy of power over law: the former rooted in the *realpolitik* of ‘classical’ international relations, the latter in the projected benevolence of imperial domination. Habermas sees the constitutionalisation of international law as a resource for confronting the power

¹⁷ The issue is investigated in more depth and with a different conclusion in the work of David Chandler. See for instance ‘International justice’ in D Archibugi (ed) *Debating Cosmopolitanism* (London, Verso, 2003), pp. 27-39.

¹⁸ See Rosas, A, ‘State sovereignty and human rights: Toward a global constitutional project’ (1995) *Political Studies* (special issue on politics and human rights), pp. 61-78; Teubner, G, ‘Societal constitutionalism: alternatives to state-centred constitutional theory’, in C Joerges, I-J Sand and G Teubner (eds) *Transnational Governance and Constitutionalism* (Oxford and Portland, Hart Publishing, 2004).

both of nation states and of the nation state writ large as the world state. For Habermas the constitutionalisation of international law is sometimes presented not just as a marker of legal and social change but of the transubstantiation of law from instrument of power to the crucible of its dissolution: ‘constitutionalisation reverses the initial situation in which law serves as an instrument of power’.¹⁹ The historical narrative Habermas constructs is that within the framework of the nation state law was at first a means by which power was organised. Then with the advent of constitutional government a reversal was effected when power began to serve as the instrument of law, but this reversal was limited by the fact that the universal principles of the constitution and the power of the state were fused in one and the same institution. At the international level, however, where legitimate authority is no longer based on the formation of a world state but on the universal principles of the constitution itself, the effect of constitutionalisation is a legal order in which the supremacy of law over power can finally be actualised. According to this narrative the constitutionalisation of international law suggests nothing less than the inversion of the primacy of power over law into the primacy of law over power.²⁰ This metamorphosis of law lies in tension with Habermas’ own sociological writings where he emphasises that the problems and tasks we inherit today are symmetrical to the challenges our predecessors faced in the past.²¹

Jean Cohen has persuasively argued that the idea that international law *already* has a constitution, either written in the UN Charter or unwritten, to which the power of states has already been reduced to the status of servant, is vulnerable to the charge that it dresses up the strategic power-plays of strong states in the universalistic rhetoric of law and human rights.²² However, the idea of a constitutionalised international order-to-come also has its problems. It attributes current abuses of international law to the incompleteness of the transition from the old order of nation states and to the restricted reach of existing global remedies: the International Court of Justice lacks compulsory jurisdiction; the International Criminal Court lacks adequate definition of war crimes; the Security Council is in urgent need of reform; the UN does not yet have its own army or juridical mechanisms for deciding when to

¹⁹ Habermas *Divided West* at note 14, pp. 130-132 and 149.

²⁰ As Carl Schmitt put it, classical international law was not a ‘lawless chaos of egoistic wills to power...egoistic power structures existed side-by-side in the same space of one European order, wherein they mutually recognised each other as sovereigns. Each was the equal of the other, because each constituted a moment of the system of equilibrium’. Schmitt, C, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, trans. G.L. Ulmen (New York, Telos Press, 2003), p. 167. See also William Scheuerman *Carl Schmitt: The End of Law* (London, Rowman & Littlefield, 1999), esp. chapter 6.

²¹ See Johnson, P, ‘Globalising democracy: reflections on Habermas’s radicalism’ (2008) 11 *European Journal of Social Theory*, pp.71-86.

²² Cohen, J, ‘Whose Sovereignty? Empire Versus International Law’ (2004) 18 *Ethics and International Affairs*, p. 10.

use it. We are led to believe that if and when these restrictions are overcome, law will finally emancipate itself from the control of power. But how much credibility can we grant to this juridical narrative?

Consider the contentious case of humanitarian military intervention. It is evident that moral and political judgements have in the past played a pivotal role in its justification and authorisation.²³ However, if we declare that moral and political judgments are necessary only because the constitutionalisation of international law is not yet complete, then they must appear as a stop-gap measure to be surpassed when the constitutionalisation of international law is complete.²⁴ The move to situate humanitarian military intervention strictly within the framework of international law stems from a justified desire to put an end to merely moral justifications of the use of force and confront the danger that human rights rhetoric provides a justification for military aggression or imperial conquest.²⁵ It promises to overcome the ambivalences caused by having to choose between, say, endorsing *illegal* action by a coalition of states designed to protect people from serious violation of their human rights or adhering to an international legal framework incapable of offering an effective regime of rights enforcement. It does so by transferring responsibility for difficult judgments from the sphere of political deliberation to the legal system.²⁶ A court of law is to have the authority to make binding decisions on issues of intervention; perpetrators are to be prosecuted for criminal acts; a UN army is to be organised as an effective intervening force. The spectre of a new figure of universal sovereignty, international law with a fighting force at its disposal, haunts this cosmopolitan outlook. In answer to the question posed by Jacques Derrida, whether it represents poison or remedy or both, it would be an interesting thought-experiment to imagine what the constitutionalisation of international law might actually look like in this sphere of operations.²⁷ Would the same rulers now in power go to war against atrocity-committing regimes because judges say they should? Would the ‘responsibility to protect’ focus exclusively on military intervention or would it also include support for civil rights movements, free trade unions, women’s equality movements and democratic political parties in atrocity-committing

²³ Krisch, N, ‘Legality, morality and the dilemma of humanitarian interventions after Kosovo’ (2002) 13 *European Journal of International Law*, pp 323-335

²⁴ Smith, W, ‘Anticipating a cosmopolitan future: the case of humanitarian military intervention’ (2007) 44 *International Politics*, pp. 72-89.

²⁵ Fine, R, and Smith, W, ‘Cosmopolitanism and humanitarian military intervention’, in C Hughes and R Devetak (eds) *The Globalisation of Political Violence: Globalisation’s Shadow* (London, Routledge, 2008), pp. 46-66.

²⁶ See the case for an international court to make such decisions put forward by Archibugi, D, ‘Cosmopolitan Guidelines for Humanitarian Intervention’ (2004) 29 *Alternatives: Global, Local, Political*, pp. 1-22.

²⁷ Derrida, J, *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida*, ed. Giovanna Borradori (Chicago, University of Chicago, 2003), pp. 123-133.

regimes? Would it grant rights of asylum for those fleeing from atrocity-committing regimes? Would military action against atrocity-committing regimes be conceived exclusively in terms of exogenous state intervention or would it include support for endogenous liberation forces seeking to overthrow a genocidal regime – as was the case in Rwanda where genocide was brought to an end not by the international community but by the Rwanda Patriotic Front and Rwanda Patriotic Army?

I wonder whether the constitutionalisation of international law cannot to my mind do the work demanded of it. An alternative perspective might look for an answer to the distortion of political argument not in the creation of a wholly legalised international order but in the nurturing of less distorted forms of political argument. Rather than treat international law as the ultimate authority capable of transcending political power, we should come to terms with the fact that we live in a world without transcendent authority in which all standard of behaviour are questionable. Whilst in the past belief in transcendent authority relied on religious trust in a sacred beginning or on unquestioned standards of behaviour, my ‘Arendtian’ contention is that in our world international law should not be elevated into a reconstituted form of transcendent authority but be treated in a strictly secular fashion as a material resource ‘we’ have to hand in confronting anew the problems of living together and indeed in constituting ourselves as a collectivity in the first place.²⁸

International law and pariah peoples

Let me now turn to what I call, following Durkheim, the social pathologies that derive from the idealisation of international law. I can illustrate the problem I wish to highlight by reference to the *Law of Peoples* advanced by John Rawls. The principles Rawls outlines for the *Law of Peoples* are for the most part philosophical re-formulations of well-established principles of international law. They emphasise the self-determination of peoples, respect for treaties and other agreements between peoples, non-intervention in the internal affairs of other peoples, and norms regulating the conduct of war between peoples. In line with more recent developments in international law they also advance more interventionist themes: peoples are bound to honour human rights, the principle of non-intervention may be suspended in the case of major human rights abuses, and the authority of international organisations such as the United Nations must be upheld.

²⁸ That my contention is ‘Arendtian’ may be illustrated through the following quotation: ‘History and nature have become equally alien to us... [by contrast] humanity, which for the 18th century in Kantian terminology was no more than a regulative idea, has today become an inescapable fact. This new situation, in which “humanity” has in effect assumed the role formerly ascribed to nature or history, would mean in this context that the right to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself. It is by no means certain whether this is possible’. Arendt, H, *Origins of Totalitarianism*, at note 6, p. 297.

Rawls maintains that those Peoples who acknowledge and uphold human rights should be recognised as equal members of a Society of Peoples. He has a liberal view of membership in the sense that he includes within the Society of Peoples *non-liberal* regimes insofar as they are ‘reasonable’ or ‘decent’, that is, insofar as they do not have aggressive international aims, respect some basic human rights, have some idea of consulting their citizens, and to some extent acknowledge the authority of the Law of Peoples itself. However, Rawls excludes ‘outlaw states’ from the Society of Peoples, that is, those states which fail to meet these minimum standards. Outlaw states lies at the bottom of a threefold hierarchy of states Rawls sets up: liberal, decent and outlaw. It is characteristic of Rawls to say little about the institutional dynamics of classification and exclusion. How serious would a rights-violation have to be to exclude a state from the Society of Peoples? Which international body has the authority to determine exclusion and on what basis? Rawls’ ideal theory is designed to clarify the goals of reform and identify the wrongs that are most urgent to correct, but the politics of labelling outlaw states remains outside his purview.²⁹

The concept of ‘outlaw states’ has been accused of introducing a ‘fundamentalist’ outlook into international law. For example, Nico Krish argues that since the mid-1980s the US has developed a category of outlaw states under varying titles – ‘terrorist states’, ‘state sponsors of terrorism’, ‘rogue states’, ‘states of concern’, ‘axis of evil’ and even ‘the evil ones’.³⁰ He maintains that those states labelled ‘outlaw states’ have been treated as second-class states which no longer enjoy the full protection of international law. He also maintains that individual members of ‘outlaw states’ have been stripped of some of the rights they would otherwise enjoy under human rights and humanitarian law – for instance, through their designation as ‘unlawful combatants’. The further issue I want to raise stems from Rawls’s preference for the category of ‘peoples’ over that of ‘states’. This move is designed to break from the assumption said to underpin classical international law that allows for unrestricted state sovereignty in the pursuit of national interests. The concept of Peoples, Rawls argues, emphasises membership of a legal order in which sovereignty is mediated through law and can never be conceived as absolute.

²⁹ Although I do not share his conclusions, the difficulties of labelling are well rehearsed by Mandani, M, *Saviors and Survivors: Darfur, Politics and the War on Terror* (New York: Pantheon, 2009). This discussion is picked up by Carter, B and Virdee, S, ‘Racism and the sociological imagination’ (2008) 59 *British Journal of Sociology*, pp. 661 – 679.

³⁰ Kirsch, N, ‘Imperial international law’, Global Law Working Paper, Hauser Global Law School Program, www.nyulawglobal.org/workingpapers/detail/GLWP_0104.htm

This choice of terminology, however, has its downside inasmuch as the concept of a ‘people’ collapses a vital distinction within political thought – that between the state and the people over whom the state rules. Rawls would doubtless agree that to exclude a *people* from the *Society of Peoples* on the grounds that their *state* fails to observe basic human rights is an open door to injustice – whether or not the majority of the people support the state in question. The slippage from condemning a *state* for human rights abuses (whether against its own people or other people) to condemning a *people* as unworthy of recognition within the Society of Peoples introduces a dangerous principle into the idea of international law. In Rawls himself, there is a tension between on the one hand his notion of ‘outlaw states’ and on the other his preference for the concept of ‘peoples’ over that of ‘states’. In everyday political argument this confusion can be especially damaging if a ‘people’ is condemned and excluded from the society of peoples on account of acts committed by the state which rules the people in question. It is damaging because it threatens to pathologise a ‘people’ because of the actions of the state that acts in their name.

If one of the functions of international law is to humanise human conflicts and this is one of the sources of its legitimacy, then even individual perpetrators of war crimes, crimes against humanity, genocide and so on must be treated as responsible and rational human beings.³¹ The aim of international criminal or humanitarian law is not to demonise perpetrators in the same way as perpetrators typically demonise those against whom they commit their crimes. It is rather to break such old cycles of hatred. If perpetrators are prone to dehumanize their victims, the legitimacy of international human rights and humanitarian law rests on its ability not to repeat these cycles of hatred but on the contrary to reveal the humanity even of those individuals who played their part in the collective endeavor to destroy the idea of humanity. However, the demonisation even of individuals, that is, the willingness to treat them as inhuman monsters, is a potential internal to international law.³² Some critical lawyers argue that hegemonic powers in the West have at times used the idea of human rights to degrade non-Western

³¹ See, for example, the much misunderstood account in Arendt, H, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Harmondsworth, Penguin, 1977). Arendt emphasises the proclivity of the prosecution to treat the accused as an inhuman antisemitic monster and argues that it detracts from the purpose of a trial: ‘the question of individual guilt or innocence, the act of meting out justice to both the defendant and the victim, are the only things at stake in a criminal court’ (p. 298).

³² Alain Finkielkraut maintains in relation to the Barbie Trial that though ‘the Holocaust was from Eichmann to the engineers on the trains ... a crime of employees... it was precisely to remove from crime the excuse of service ... that the category of crimes against humanity was formulated.’ On the other hand, he warned against the temptation to reduce the prosecution to ‘an exultant face to face confrontation between Innocence and the Unspeakable Beast’. Finkielkraut argues that this would rewrite the Holocaust as a ‘meaningless idiot’s tale’ which leaves only a ‘gaping black hole’. Finkielkraut, A, *Remembering in Vain* (New York, Columbia University Press, 1992), pp. 3-4 and 60-61.

peoples and cultures.³³ Others have pointed out that human rights activists may be tempted to reproduce old colonial ways of thinking by pathologising non-Western cultures as inimical to the human rights of women.³⁴ Others argue that the idea of human rights has been used in a prejudicial way to criminalise ‘Israel’ alone among nations – and not just the state but also the people.³⁵ This is not the place to establish in which particular instances international human rights and humanitarian law has been most instrumentalised in the service of ‘othering’ individuals, states or peoples, but it is to suggest that this potentiality exists within international law and is brought to the surface through the idealisation of international law as a transcendent standard of judgment and category of understanding. It has to do with the casting of international law as a trump card in political argument that saves us the work of making our own case or as a new device for reproducing the imperial human-inhuman duality.

Conclusion: international law and the critique of distorted modernisation

David Kennedy’s comment that the international human rights movement might be ‘more part of the problem in today’s world than part of the solution’ goes much further down the road of cynicism than I would. It seems to me that he is right, however, when he observes that ‘promoting human rights can sometimes have bad consequences’ and highlights the danger that ‘well-intentioned people can end up supporting the very things they earlier wished to denounce’.³⁶ The transformation of international law since 1989 into ‘cosmopolitan law’ is a barometer of our times. It is a distinctive legal expression of the current stage of development of capitalist society or to use Hegelian language of the modern system of right as a whole. Today the expanded scope of international law proceeds on the basis of many pre-existing forms of right: rights of property, contract, exchange and punishment; rights of moral judgment and family life; rights of welfare, free association and political participation; rights of national self-determination, sovereignty and non-intervention. The rise of human rights and

³³ Costas Douzinas makes this case forcibly in *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (London, Routledge, 2007). He decries the ‘American’ assertion that the Guantanamo Bay prisoners have no rights because, in Bush’s words, they are ‘evil murderers’. Douzinas comments that ‘human rights with their principles and counter-principles ... are much easier to manipulate than clear proscriptions of state action’ (p. 59).

³⁴ ‘The gratuitous connection between culture and violence is almost invariably brought up in relation to the Third World’. See Kapur, R, ‘The tragedy of victimisation rhetoric: resurrecting the “native” subject in international / postcolonial feminist legal politics’ (2002) 15 *Harvard Human Rights Journal*, pp. 1-31 at 8, 2002. Kapur is perceptively critical, for instance, of those who would depict ‘dowry murder’ as an Indian ‘cultural practice’ rather than as a form of domestic violence.

³⁵ ‘Year after year, the UN Commission on Human Rights spent far more time specifically criticizing Israel than any other country. Genocide in Cambodia, Indonesia, Rwanda, Congo, Algeria, Lebanon, and Sudan; slavery in Saudi Arabia, Mauritania, Western Sahara, Mali, and Sudan; and, starvation in North Korea, Burundi, Liberia, Ethiopia, Niger, Angola, and Sudan, did not merit much attention in comparison.’ Habibi, D, ‘Human Rights and Politicized Human Rights: A Utilitarian Critique’ (2007) 6 *Journal of Human Rights*, pp. 3-35.

³⁶ Kennedy, D, *The Dark Side of Virtue: Re-assessing International Humanitarianism* (Princeton, Princeton University Press, 2005), pp. 124-125.

humanitarian law is beset by the same kinds of social conflict and conceptual abuse that enter into these preceding forms of right. In facing up to the violence of modern capitalist society it is now as tempting to idealise human rights and humanitarian law as it was in the past to idealise the state (or parts of the state such as the executive or representative assembly) or to idealise civil society (or parts of civil society such as its civic associations). This temptation is understandable enough but it is liable to feed the disillusionment we observe when the practice of human rights and humanitarianism falls short of the ideal it can never reach. If we expect too much of human rights, we prepare the ground for a politics of disillusionment. The politics of disillusionment threatens to turn genuine legitimisation problems into a full-blown crisis of legitimisation.

To my mind it is immeasurably valuable that the vocabulary of human rights and humanitarian law has entered into political argument. How in the modern world can we be responsible political actors if we don't have available to us linguistic terms like 'genocide', 'crimes against humanity', 'disproportionate response', 'collective punishment', 'torture' and 'terrorism' or on the other side terms like 'responsibility to protect', 'international criminal law' and 'humanitarian intervention'? The difficult task we face, however, is to learn how to use these terms, to make distinctions between them, to make judgments about their appropriate and inappropriate applications, to develop our understanding of what it is that they refer to. The difficult task, as I see it, is in short to develop a human rights culture. Making distinctions is the stuff of politics as well as law. It requires, to cite the instances provided by Gilbert Achcar, that we recognise the 'magnifying effect of TV broadcasts' on our perception of certain crimes (like the deliberate targeting of civilians in the twin towers) and not others, the potentially dehumanising effect of simply labelling an amorphously defined enemy as 'evil', and the importance of distinguishing between a 'pretty ordinary massacre' in which 3300 lives are taken and major massacres in which hundreds of thousands or even millions of civilians are targeted.³⁷ I would add that we add the importance of observing a consistency of judgment between those instances of human rights violation in which we have sympathy or at least understanding of the motives that lie behind it and those instances in which we have less sympathy and resist understanding. The particular temptation I have sought to confront in this paper is that which places international law in the service of dehumanising the collectivities we hold especially or uniquely responsible for the violence we abhor whilst at the same time promoting the image of the merely helpless or merely resistant 'victim subject' for the collectivities against whom the violence is committed.³⁸

³⁷ Achcar, G, *The Clash of Barbarisms: The Making of the New World Disorder* (London, SAQI, 2006), pp. 27-33.

³⁸ Ratna Kapur at note 34, p.1

The question of what factors motivate the displacement of international law from a form of political and legal coordination of a global community subject to norms of political contestation into an ideal standard akin to natural law is a difficult one to address. The observation I wish to end with is only that this displacement may be related, paradoxically, to the delegitimation of the institutions that embody the principles of international law. The more institutions like the UN or the International Criminal Court or the UN Human Rights Council are questioned in their practical capacity to mediate or solve disputes, the more the abstract ideal of international law may be invoked. If this is so, it might indicate that it is in the failure of international institutions that the idealisation of international law finds its ground.³⁹ Be this as it may, the deformation of international law in the public sphere may be understood as a distorted form of modernisation that results from the separation of law and politics. It is an expression of the uneven development of the legal form of human rights and the human rights culture in which this form is set.

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³⁹ ‘As a citizen, one would be more secure in knowing that international law is not about “infinite justice,” but instead about the legally secured restoration of a legal peace that has been disrupted.’ Brunkhorst at note 15, p. 150. Thanks to Rodrigo Cordero for alerting me to this possibility and the connection between my argument here and that put forward by Brunkhorst.