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Beyond Particularism: Remarks on Some Recent Approaches to the Idea of a Universal Political and Legal Order

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Daniele Archibugi. ***The Global Commonwealth of Citizens: Toward Cosmopolitan Democracy***. Princeton: Princeton University Press, 2008. Pp. 298. $29.95. ISBN: 9780691134901.

Anthony Carty. ***Philosophy of International Law***. Edinburgh: Edinburgh University Press, 2007. Pp. 255. $80.00. ISBN: 9780748622559.

Andrew Hurrell. ***On Global Order: Power, Values, and the Constitution of International Society***. Oxford: Oxford University Press, 2007. Pp. 354. £65.00. ISBN: 9780199233106.

Peter Niesen, Benjamin Herborth (eds.). ***Anarchie der kommunikativen Freiheit***. Frankfurt a. M.: Suhrkamp, 2007. Pp. €16.00. ISBN: 9783518294208.

Mortimer N. S. Sellers. ***Republican Principles in International Law: The Fundamental Requirements of a Just World Order***. New York: Palgrave Macmillan, 2006. Pp. 266. £65.00. ISBN: 9781403997449.

Helen M. Stacy. ***Human Rights for the 21st Century: Sovereignty, Civil Society, Culture***. Stanford (California): Stanford University Press, 2009. Pp. 260. $21.95. ISBN: 9780804760959.

Abstract

Theories of global order are traceable back to two main paradigms, particularism and universalism, the first of them asserting that true global order is a chimaera, the second affirming that a worldwide political and legal system securing peace and human rights protection is

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both desirable and feasible. Against this background, the article analyses some recent contri-butions to the question of the conditions for the establishment of a worldwide system guaran-teeing peaceful and cooperative interaction. The authors of the books under review share the commitment to the universalistic view, but substantiate it by resorting to distinct theoretical presuppositions. By outlining the different frameworks, the article presents the books being discussed as inspiring inputs on the way to the renewal of universalism at the beginning of the 21st century.

Every discipline of human knowledge, regardless of whether it concerns the theoreti-cal understanding of the world or the rules of our action, is always based on a set of fundamental concepts. Following a successful, albeit not uncontroversial, con-ceptualization,[1] I propose to define these sets of fundamental concepts, standing as the founding elements of different disciplines, as 'paradigms'. In quiet times, when the theoretical knowledge of the world expands on the basis of existing principles acknowledged as valid and human interaction seems to be able to develop follow-ing traditional patterns and without major adjustments, no deep reflection on the fundaments of theory and praxis appears to be necessary. Knowledge increases and sciences are developed on the ground of widely accepted theories while social interac-tion in general works according to recognized rules. The situation is different in times of change. When phenomena can no longer be explained by resorting to established theo-ries, or dominant rules become unable to organize a successful social interaction as well as to meet social challenges at any level, then it is time to reflect more deeply on the fundamentals of prevailing theories and rules of action. The beginning of the 21st cen-tury seems to be one of these times of change, at least in the disciplines – international law and international relations – concerning nature and limits of global order.

In the course of history the understanding of global order and the disciplines com-mitted to its analysis have been dominated by two concurrent paradigms: particu-larism and universalism.[2] Although characterized by different persistence[3] and by a

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[1]   With regard to the natural sciences the use of the concept of 'paradigm' has been introduced into the wider debate by T. Kuhn, *The Structure of Scientific Revolutions* (1st ed., 1962; 2nd ed., 1996). The application of the concept within the social sciences, although quite frequent, has never been – as far as I know – precisely theorized. Elements of a theoretical reflection on the translation of the concept from the epistemology of natural sciences to social sciences can be found in J.A. Vasquez, *The Power of Power Politics. A Critique* (1983). The utilization of the concept of 'paradigm' made in this contribution has been developed, together with Armin von Bogdandy, within the 'Paradigms of Order' research project of the Max-Planck-Institute of Comparative Public Law and International Law in Heidelberg. More details on the research project are available at: www.mpil.de/ww/en/pub/research/details/projects/public_int_law/philosophie_voelkerrecht.cfm.

[2]   On the application of these paradigms to the doctrine of international law see von Bogdandy and Dellavalle, 'Universalism and Particularism as Paradigms of International Law', IILJ Working Paper 2008/3.

[3]   While particularism can be traced back to the most ancient reflections on the essence of politics in the Western world, universalism arose many centuries later, specifically with Stoicism, and did not become powerful before the spread of Christianity.

certain evolution as regards the concepts used in order to substantiate their respective approaches to the question of order,[4] both paradigms have shown a remarkable continuity in delivering the main frameworks in order to explain the characteristics and constraints of global order. Specifically, the concepts adopted are grouped around two opposite and essential assertions, the one determining the core principle of particularism, the other that of universalism. Concretely, the supporters of the particularistic approach to the question of order state unanimously – although sometimes giving diverging reasons for it – that order[5] is possible only within single and relatively homogeneous communities, whereas merely a modest and unstable containment of disorder is feasible between them.[6] On the other hand, the supporters of universalism always claim that a global order comprehending the normative guarantee for peace and for the protection of human rights as well as, in the most favourable case, also a kind of cooperation and even a germinal solidarity between peoples is both advisable – if not rather an absolute commandment of reason – and possible.[7] The remaining question in this second case – a question, surely, which is far from being easily settled – concerns the instruments of the realization of the ambitious vision.

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[4] For a short overview and an essential bibliography see von Bogdandy and Dellavalle, 'Universalism Renewed. Habermas' Theory of International Order in Light of Competing Paradigms', 10 *German LJ* (2009) 5; A. von Bogdandy and S. Dellavalle, *Paradigmi dell'ordine* (2010).

[5] I understand 'order' as the condition in which social interactions are regulated by rules able to guarantee a peaceful settlement of conflicts through their procedural formalization as well as, to a certain extent, cooperation among social actors. According to this interpretation, the mere containment of the worst consequences of non-procedurally-formalized conflicts cannot be seen as 'order' in the full sense of the word, but rather as a temporary and unstable inhibition of disorder.

[6] We can find several prominent witnesses of this understanding across the history of political thought, from Thucydides (*The Peloponnesian War* (1951), at v, 86) – to remember only some of the most relevant – to H. Morgenthau (*Politics Among Nations. The Struggle for Power and Peace* (1954)), passing through N. Machiavelli (*Il Principe* (1513), trans. as *The Prince* (1992) and *Discorsi sopra la prima deca di Tito Livio* (1513–1519), trans. as *The Discourses* (1983)), J. Bodin (*Six livres de la république* (1576), trans. as *Six Books of the Commonwealth* (1955)), the political Romanticism (in particular A. Müller: *Die Elemente der Staatskunst* (1922) (1st edn, 1809), and C. Schmitt (*Der Begriff des Politischen* (1932), trans. as *The Concept of the Political* (2007) and *Der Nomos der Erde im Völkerrecht des Jus Publicum Europeum* (1950), trans. as *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (2003)).

[7] The universalistic approach, albeit in different shapes, is shared – to name only some of the most influential thinkers – by the Stoics Zeno of Citium and Chrysippus (J. von Arnim, *Stoicorum veterum fragmenta* (1905)), by F. Suarez (*De legibus, ac Deo legislatore* (1612); partially trans. in F. Suarez, *Selections from three Works* (1944)) and H. Grotius (*De Jure Belli ac Pacis* (1625) (1995)), by C. Wolff (*Institutiones juris naturae et gentium* (1750)) and Kant (*Zum ewigen Frieden. Ein philosophischer Entwurf* (1795), in I. Kant, *Werkausgabe* (ed. W. Weischedel (1977), xi, at 191, trans. as *Perpetual Peace* (1957) and *Die Metaphysik der Sitten* (1797), in *ibid.*, viii, at 309, trans. as *The Metaphysics of Morals* (1991)), as well as, lastly, by H. Kelsen (*Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* (1934), *Peace through Law* (1944), and *General Theory of Law and State* (1949)), A. Verdross (*Die Verfassung der Völkerrechtsgemeinschaft* (1926)) and the exponents of the theory of the 'international community' (on the theory of the 'international community' in international law see A.L. Paulus, *Die internationale Gemeinschaft im Völkerrecht. Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung* (2001)).

The present analysis is mainly centred on some recent contributions on the question of the possibility and the features of global order, all of which share the rejection of particularism and a strong commitment to universalism.[8] By outlining the distinct nuances between the authors, which concern both the essential concepts on which a feasible universalism should be based as well as the legal, political, and institutional instruments which should realize its aims, it will be easier to figure out the ways available at the beginning of the 21st century to give shape and concreteness to the universal aspiration. The first move will therefore consist in presenting the reasons given by the authors to substantiate the assertion that the particularistic approach does not provide any acceptable solution for the challenges which we are facing now in the international arena and will face even more urgently in the future (section 1 below). The second section will then concentrate on the nuances which distinguish the proposals, dividing them into two major strands: on the one hand the 'postmodern', on the other the 'neo-Kantian' understanding of universalism in section 2 below. At the end of the inquiry some conclusions will be proposed concerning the common features of contemporary universalism as well as chances and limits of the concrete proposals (section 3 below).

I The Inadequacy of Particularism at the Dawn of the 21st Century

Particularism is generally seen, from the perspective adopted by the authors of the books here presented, as an approach affected by severe insufficiencies. These are spelled out, depending on the specific competences of the authors, as (i) political, (ii) juridical, and (iii) moral deficits.

A *The Rejection of the Particularistic Approach from the Standpoint of the Political Scientist*

In his accurate analysis *On Global Order*, Andrew Hurrell analyses, using the instruments of the political sciences, the most significant issues with which international

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[8]   It is necessary here to point out that no author included in this contribution explicitly uses the concepts of 'particularism' or 'universalism' in the works discussed. The notions with which they operate, albeit different in their denomination from each other as well as from the conceptualization proposed here, show, however, sufficient homogeneity in contents and claims, at least as regards the fundamental options, to make an approach in terms of 'paradigms' both possible and useful. Concretely, the application of the paradigms of universalism and particularism to the analysis aims at a threefold contribution to the debate: first by focusing on one of the most relevant alternatives we are facing, namely that between the idea that no global order is possible and the claim that global order is both necessary and feasible; secondly, by facilitating the link between the contemporary contributions to the matter and its most powerful historical presentations; and thirdly by favouring the interpretation of the diverging preferences within the common universalistic aim as a discussion on different strategies of its realization.

relations have to deal at the beginning of the new century.[9] At the end of his investigation he concedes that there are some important factors which make particularism – described by Hurrell as the 'pluralistic view of the international society'[10] – still powerful. To mention just the most relevant ones,[11] in a world in which the idea of a universal order, as well as the international organizations which should realize it, is not immune to being captured by the interests of the big powers, the perspective of a less ambitious coexistence between self-affirming, if not completely sovereign, states against a background of a confirmed commitment to non-intervention seems to be the most feasible solution. Secondly, in the age of globalization – and often as an open reaction to it – the demand for national self-determination did not disappear, but rather found new forms of resistance to alien rule. Thirdly, the importance of power, as well as the need to contain it, instead of vanishing during recent decades, has become even more evident, along with the necessity to resort again to the classic means of diplomacy. Fourthly, despite the attempts to spread Western political culture, sometimes by force, the world remains deeply divided as regards values, and while postmodernists argue for an ironic distance to absolute principles, most of our fellow humans are still certain that values are God-given: facing this profound cultural and ethical division, the perspective of a universal order looks like a self-defeating chimera.

Notwithstanding the arguments which still support the particularistic – or 'pluralist' – vision of international order, Hurrell concludes that definitively more substantial considerations actually speak for the inadequacy of particularism.[12] First of all, challenges like 'economic development, environmental protection, human rights, the resolution of refugee crisis, the fight against drugs, or the struggle against terrorism'[13] call for global governance, the complexity of which necessarily involves institutions capable of interacting not only with state actors but also – admittedly, in a somehow 'intrusive' way – with social players at the infra-state level. Furthermore, the resources necessary to tackle the problems on a worldwide scale need to be 'socialized', in the sense that the coordinated intervention of a plurality of global actors – and in particular of the big powers – is the inescapable condition for success. Thirdly, precisely the above-mentioned intensification of identity politics in the globalized world has made the old-fashioned nation states largely obsolete in their attempt to guarantee social cohesion. Fourthly, there is the growing question of global inequality, including poverty and 'the perceived illegitimacy of a system of global governance that creates new patterns of inclusion and exclusion'.[14] Lastly, order cannot be separated, in the long run,

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[9]   Among the issues of international relations analysed by Hurrell are: nationalism and the politics of identity; human rights and democracy; war and collective security; economic globalization; and the ecological challenge.

[10] Hurrell (2007), at 292.

[11] *Ibid.*, at 288.

[12] *Ibid.*, at 292.

[13] *Ibid.*, at 292.

[14] *Ibid.*, at 295.

from justice: so as to be stable and legitimate, order should also be ethically qualified – which does not mean, however, endorsing the sometimes hypocritical Western policy of liberal solidarism and support for democracy.

Therefore – Hurrell concludes – the idea that our societies could adequately deal with political problems of global range simply by entrenching themselves within the old patterns of particularistic identities is likely to fail in front of 'conditions . . . which require the identification of substantive collective goals and the creation of institutionalized structures of governance to implement them'.[15]

B *The Inadequacy of the 'Statist' Discourse in International Law*

Anthony Carty dedicates the first part of his *Philosophy of International Law* to an intriguing deconstruction of the language of international law as it is influentially expressed in the judgments of the International Court of Justice (ICJ).[16] So as to unveil the negative effects of the particularistic discourse on the argumentative priorities of the ICJ, Carty resorts to the reconstruction of the origin of state sovereignty at the beginning of modernity developed by Antonio Cassese.[17] According to Cassese, after the loss of power legitimacy due to the decline of Church and Empire the paramount basis for political authority was then sought and found in the capacity of the monarch to obtain absolute obedience from the subjects living within a precisely circumscribed territory. The traditional justification of power, which became obsolete at the dawn of modernity, was then substituted by a firm control over individuals and territory. Lacking higher sources for legitimacy, the power of modern territorial – and later nation – states had to be at least effective: no challenge could thus be tolerated, and security against internal and external threats was declared to be the main goal of the sovereign state.

Carty endorses Cassese's historical interpretation and applies it to the legal discourse of the ICJ. In particular, he analyses some landmark rulings of the Court, such as *Nicaragua v. United States of America* of 1986,[18] the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*,[19] the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*,[20] and the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*.[21] With regard to these judgments and advisory opinions – taken as examples of the general attitude of the Court – Carty does not criticize primarily the legal findings of

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[15] *Ibid.*, at 298.

[16] Carty (2007), in particular Chap. 2, at 26.

[17] A. Cassese, *International Law* (2001), at 81.

[18] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment [1984] ICJ Rep 14.

[19] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226.

[20] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment [2002] ICJ Rep 3.

[21] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136.

the ICJ, but rather concepts and vocabulary used by the Court as well as the rationale developed to justify the rulings. The ICJ – he argues – always resorts to justifications like the security and the sovereignty of the state as well as of its representatives, or to its defence against attacks from outside by another sovereign state. The barycentre of the language and of the reasoning of the ICJ is thus firmly collocated in the 'state' as the political and legal unity characterized by the monopoly on the use of force and by a defined population and territory, which has the right acknowledged by international law – and in most cases also the means – to defend its existence and identity. The reason for the Court's approach is easy to detect: 'the Court is an inter-state institution, only states and UN bodies can appear before it, and its judges are state-nominated'.[22] However, such a 'statist' attitude is not able – as Carty asserts, adopting an interpretation which is not far from that proposed by Hurrell – to address effectively questions like 'democracy, political independence, equality of peoples, human rights, freedom from arbitrary violence, the right to life of non-combatants, etc.',[23] which go beyond the borders of states as well as of traditional inter-state relations. The consequence drawn by Carty is clear: if international law wants to deliver a proper contribution to the solution of the most urgent problems, it has finally to abandon in all its dimensions – the positive-legal, the jurisdictional, and the philosophical-doctrinal – the narrow perspective of state centrality. Which new approach should substitute for this old one will be analysed in what follows;[24] but, before this, the third aspect – namely the moral dimension – of the inadequacy of the particularistic approach to global order will briefly be discussed.

C *Moral Deficits of Particularism*

When introducing the contributions of Hurrell and Carty it has already been said that global justice, concerning primarily the fair distribution of resources on a worldwide scale, and the legitimacy of a power extending its authority – regardless of whether the instruments of this power are 'soft' or 'hard' – beyond the borders of the single state are issues which cannot be properly addressed within the conceptual and practical scope of the particularistic paradigm of order. This insufficiency not only involves the political and legal dimensions – as pointed out by Hurrell and Carty – but is also characterized by an eminently moral facet, insofar as justice deficits affect human dignity and the legitimacy shortfall concerns autonomy understood as the capability of humans to shape the rules that they have to follow. This is at the centre of some of the contributions contained in the book edited by Peter Niesen and Benjamin Herborth on the *Anarchy of the Communicative Freedom*.

In general, this book deals with the influence of the theory of communicative action – which was first elaborated by Karl-Otto Apel and Jürgen Habermas as a discursive

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[22] Carty (2007), at 55.

[23] *Ibid.*, at 54.

[24] See *infra*, sect. 2A1a.

approach to morals, and then applied to the political and juridical institutions of the democratic state – on the idea of order beyond the state, namely on the theory of international relations. Since the theory of communicative action is deeply rooted in the methods and contents of the discourse on moral issues, it is not surprising that the way to address questions of international law and policies adopted by the supporters of the application of the communicative understanding of society also to this area turns out to be more sensitive than the previously mentioned approaches to the centrality of the specific moral quality of the issues involved in global order. Although the origins of the discursive approach to international law and international relations can be clearly situated in the German cultural and philosophical tradition and its exponents have hitherto been mainly Germans,[25] the relevance of this interpretation cannot be limited to the political culture of continental Europe, and even less to its expression on the right side of the Rhine.

Certainly, the inequality in the distribution of resources between nations and peoples and, within these, between different classes is not a new phenomenon. Rather, it is likely to have accompanied the most part – if not the whole – of human history. Nevertheless, the recent globalization has introduced two new aspects: on the one hand, it makes every one of us more responsible not only for the injustice occurring next door – which was thought to have been partially 'domesticated', at least in the Western world, in the decades around the middle of the 20th century – but also for the even more outraging and almost completely 'undomesticated' forms of injustice which take place outside the First World. On the other hand, the globalization of the information media has made us more aware of this morally hardly acceptable matter of fact as well. The reaction by the assertors of the particularistic view of order has been twofold: either by resorting, as it is criticized by Thomas Pogge,[26] to a kind of 'explanatory nationalism', i.e., by asserting that inequality and therefore also poverty are consequences primarily of the disorganization of the poor themselves; or claiming that solidarity is a duty that binds in particular – if not exclusively – the members of the same social and political community.[27] Both strategies are rejected by the supporters of the universalistic view of order.

The second main question with moral implications deriving from the particularistic view of the globalized world concerns the legitimacy of the exercise of public power beyond the state. Habermas describes it as the dilemma between the necessity to endow the international institutions with sufficient authority and capacity to act so as to enable transnational governance, and the legitimation shortfall which

[25]   The application of the communicative paradigm to the theory of international relations was developed mainly in the German journal *Zeitschrift für Internationale Beziehungen*.

[26]   T. Pogge, *World Poverty and Human Rights* (2002), quoted by Forst, 'Dialektik der Moral', in Niesen and Herborth (2007), at 254.

[27]   This position is, e.g., asserted, although in a very differentiated way, by Nagel, 'The Problem of Global Justice', 33 *Philosophy & Public Affairs* (2005) 113.

derives from the consequent loss of sovereignty which strikes the individual democratic states, along with the particularism-biased failure – or sheer unwillingness – to transfer comparable legitimacy standards to the supra-state institutions.[28] So as to overcome this dilemma, it is indispensable – as Habermas argues – to conceive of a feasible multi-level public law system in which legitimacy is no longer seen as a specific feature of the sovereign state, so that supra-state institutions can be provided with sufficient legitimacy without resorting to the chimerical idea of a world state. In order to reach this goal, however, the narrow horizon of particularism has to be overcome.

2 Which Universalism for the Future?

After having briefly depicted the insufficiencies of the particularistic view of order, the question now arises what kind of universalism may be seen as at the same time practicable and consistent so as to provide a convincing alternative to particularism. In general, two strands of universalism are present in the current debate: the more traditional one grounds the perspective of universalism on the idea of the – transcendental rather than ontological – existence of a universal reason, common to all humans (section B below); the more recent strand on the contrary, moving from the logical, political, and juridical difficulties arising from the assumption of universally shared rational principles, seeks to draw a picture of global order which arises from the acknowledgement of non-reducible differences (section A below).

A *The Postmodern Rejection of the Assumption of a Universal Reason*

The idea that universal order is possible always depended largely on the assumption that all humans share the same rational principles. Therefore, the only condition for making universalism real consisted in the correct acknowledgement of the common contents of that reason which is shared by every one of us. In premodern universalism the principles of reason were thought to be rooted in a holistic ontology bringing together men, nature, and the entire cosmos. In modern philosophy, on the contrary, universalism has been located in the mental processes of subjectivity which are common to all individuals. Regardless of these differences, postmodernism has frontally challenged the very assumption of a universal reason. First, postmodern thinkers claim that the belief in the existence of principles which every human should accept for the very and evident fact of their rationality, allegedly embedded in the human mind as well, is simply an illusion. Secondly, insofar as we suppose that a universal subjectivity gives order to our knowledge, moral life, and society, this subjectivity is nothing but a construction of power so as to control – and actually oppress – concrete

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[28] Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik: eine Replik', in Niesen and Herborth (2007), at 406, 430.

individuals.[29] Thus, when authors influenced by postmodern thought address the question of global order, they have to explain, primarily, how such a global order can be established and which features it has after the giving up of the perspective of a universal and rational subjectivity (section 1 below). The difficulties that can arise from this approach become evident in particular when we concentrate on the probably most 'universal' issue concerning global order, namely human rights protection (section 2 below).

1 The Order of Recognition

In his criticism of the language of international law, Anthony Carty distances himself, at least initially, from 'poststructuralism' or, as we could also say, from 'postmodernism'.[30] What he misses, in particular in the theory of the postmodern 'Empire',[31] is a valid basis in the political, sociological, and economic analysis, capable of bringing the phenomenon of an all-permeating power back to the real interests of those social and political groups which take advantage from it. In order to overcome this deficit, Carty resorts to a neo-Marxist approach which, moving from analysis carried out by different authors, points out the relationship between late capitalism, mainly based on financial markets, and the concrete interests of the few states which control most financial resources.[32] The consequence that Carty draws from this investigation is that the enduring emphasis on state sovereignty, which he considers as the origin of the conceptual and linguistic deficits of contemporary international law, is deeply connected with the very nature of financial capitalism. In other words, the 'particularistic' or 'statist' character of international law originates, at least at present, from the fierce defence of specific economic interests which, albeit becoming increasingly global, nevertheless covers with dust the perspective of a universalistic view of mutual recognition.

   The conceptual solution which Carty proposes as a response to the 'statist' deficiencies of international law and to the particularistic globalism of neo-imperialistic capitalism does not derive, however, from the classic tools of the Marxist theory. Traditional Marxist theory, indeed, did not reject the idea of universal reason; it simply sought the basis for a new kind of universal order outside the capitalistic rationality, namely in the social structure originating from a radical reversal – from a 'revolution' in the very sense of the word, or at least from a thorough-going reform. Carty's proposal is in fact very different; here, the indirect influence of the postmodern thought becomes evident. No idea of a universal reason, objectively rooted in history and

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[29] Both elements – the scepticism about the possibility of a universal reason, and the criticism of the oppression of concrete individuals due to the construction of a universal subjectivity – are brillantly outlined in the works of Michel Foucault. See M. Foucault, *Les mots et les choses* (1966), trans. as *The Order of Things* (2002), *L'ordre du discours* (1971), *Histoire de la sexualité, I : La volonté de savoir* (1976), trans. as *The History of Sexuality* (1978), 'The Subject and Power', in H.L. Dreyfus and P. Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (1982), at 208.

[30] Carty (2007), at 164.

[31] M. Hardt and A. Negri, *Empire* (2001).

[32] Carty (2007), at 171.

society and thought to be realized in law and politics, is depicted here. Rather, the objective universality of traditional Marxist theory is substituted by an order which has to be created, at first, through inter-subjective dialogue and 'respect':[33]

> It is a matter of reorienting Machiavelli's and Hobbes's struggle for survival, based on fear, into a struggle for recognition based on respect.[34]

The 'fear' centred on a 'radically subjectivist, individualist' anthropology of international law, which has characterized modernity, should give way, therefore, to a new philosophy for which, however, it is difficult 'to provide final ontological proof'.[35] Postmodern indeterminacy thus makes its entrance into neo-Marxist theory.[36] For the 'other' deserves – Carty argues – to be respected, but remains nevertheless 'opaque',[37] and no universal morals in a Kantian or Habermasian sense can help us to escape from the inevitable labyrinth.[38] As a consequence, the 'restoration of political space' has to favour 'a more agnostic return to mutual distancing in international relations',[39] and 'international public law must somehow be reconceived to reflect an acceptable level of mutual distance and unknowing'.[40]

Like Carty, Hurrell also at first criticizes postmodern authors, in particular their 'celebration of difference and diversity'.[41] Nevertheless, he shares their scepticism about the very existence of a universal reason, 'capable of producing compelling global principles of justice and of providing guidance as to how these global principles should be translated into reasons for or against particular policies in particular and very diverse places'.[42] Thus, we should find a way to achieve the three key elements of a just and feasible global order, namely 'moral accessibility, institutional authority, and political agency',[43] without resorting to 'the grand imaginative exercises of reason'.[44] Concerning the first key element, moral principles have to be acknowledged as the product of particular historic and cultural conditions. This diagnosis should not lead us, however, to conclude that no global moral community is thinkable, but rather to relativize the moral contents of the Western tradition. As a consequence, a possible agreement on the idea of a global moral community does not stem from the hypostatization of a specific approach – in particular of the one elaborated within the Western world – nor from a mental assumption, but rather from 'shared practices' and 'shared understandings'.[45] Analogously, also institutional authority, the organization of which includes

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[33] *Ibid.*, at 221.

[34] *Ibid.*, at 223.

[35] *Ibid.*, at 221.

[36] For a similar approach see C. Miéville, *Between Equal Rights* (2005).

[37] Carty (2007), at 244.

[38] *Ibid.*, at 242.

[39] *Ibid.*, 237.

[40] *Ibid.*, at 240.

[41] Hurrell (2007), at 298.

[42] *Ibid.*, at 301.

[43] *Ibid.*, at 299.

[44] *Ibid.*, at 301.

[45] *Ibid.*, at 303.

a significant justice issue, 'is not something that can be deduced from abstract rational principles, nor can it be reflective of a single world view, religious or secular; it is, rather, a negotiated product of dialogue and deliberation and therefore always subject to revision and re-evaluation'.[46] Lastly, the conditions of political agency should include, in a way that reminds us of Habermas,

> some acceptance of equality of status, respect, and consideration; some commitment to reciprocity and to the public justification of one's action; some capacity for autonomous decision-making on the basis of reasonable information; a degree of un-coerced willingness to participate; a situation in which the most disadvantaged perceive themselves as having some stake in the system; and some institutional processes by which the weak and disadvantaged are able to make their voice heard and to express claims about unjust treatment.[47]

Hurrell avows himself explicitly to the tradition of neo-Grotianism established in particular by Hedley Bull and, more generally, by the English School of International Relations. He delivers, however, an essential contribution to the overcoming of a conceptual shortcoming which affected Bull's theory of the 'international society'.[48] In fact, Grotius grounded his theory of the international community, on which his concept of a modern international law was based, on the ontological assumption of a natural sociability of all humans. Bull did not endorse Grotius's, admittedly hardly convincing, metaphysical postulation with the consequence that his own proposal had a largely insufficient epistemological basis. Linking Bull's intuition with the post-structuralistic rejection of a universal reason and the pledge for a culture of horizontal dialogue, Hurrell consistently improves and substantiates the conceptual instruments traditionally used by the English School of International Relations. After having reaffirmed his commitment to the legacy of the Grotian approach to international law,[49] he stresses the originality of his interpretation:

> the idea of an objective community interest or of the common interest of global society [. . .] is not best viewed in terms of the surreptitious return of natural law ideas but should rather be understood as a philosophical anchorless, but nevertheless reasonably solid pragmatic consensus.[50]

2 The Global Protection of Human Rights and the Respect for Diversity

The rejection of the idea that any theoretical, moral and even legal proposition always contains an element of truth, at least implicitly and in a perfectable form, is no obstacle for the personal commitment to the realization of justice.[51] However, insofar as we admit that – at least for the social sciences – no valid and universal criterion exists

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46   *Ibid.*, at 308.
47   *Ibid.*, at 316.
48   H. Bull, *The Anarchical Society. A Study of Order in World Politics* (1977), at 53.
49   Hurrell (2007), at 313.
50   *Ibid.*, at 304.
51   As for the commitment of the lawyer by rejection of the idea of a universal reason see M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989), at 479.

to enable us to distinguish, at an epistemological level, between true and false propositions, it becomes difficult to justify why norms can be reasonably expected to be generally followed, or why the existence of universal rights with which all humans are endowed can be assumed. Therefore, it is not surprising that Helen Stacy, in her proposal for a human rights theory for the 21st century, concentrates first on the defence of universalism, in particular as it has been developed within the Western tradition of enlightenment.[52] Yet, she is aware that Western understanding and defence of human rights went and often goes along – as it is pointed out 'by both scholars and grassroots organizations' – with a real oppression of non-Western peoples and cultures. Moving from this ascertainment, some analysts argue that the idea of universal human rights is strictly based on Western individualism and can thus hardly be applied to non-Western societies; some others claim that the human rights policies, intertwined as they were and are with colonialism and imperialism, have definitively lost their innocence.[53] Stacy takes this criticism very seriously and, as a consequence, develops an attempt to conciliate a renewed universalism with a stronger sensibility for diversity.

According to Stacy's analysis, three elements in particular unveil the conceptual and institutional framework proposed by classic, unitary universalism in the Kantian or Kelsenian tradition:[54] the refusal to give up state sovereignty; the conviction that the protection of individual and group rights can be better realized by *ad hoc* mobilizations of civil society, mainly carried out in a spontaneous way, than by abstract norms; lastly, the growing relevance of multiculturalism. Universalism is likely to have a future only if it can cope with these three challenges, integrating some ingredients of them in its own tradition. Concretely, Stacy proposes thus to understand sovereignty as 'relational', in the sense that it has to abandon its traditional intransigence in favour of 'a practice that binds global players together in a process of recognition and self-declaration'.[55] In this view, the sovereignty maintained by the states is no longer identified with the mere defence of self-determination and authority, but becomes an essentially more complex phenomenon in which the traditional features are moderated by both mutual assessment at the inter-state level and obligations towards citizens, in particular as regards the protection of their rights.[56] Considering then the role of the 'globalized civil society' in improving respect for human rights, Stacy argues that legal institutions,[57] far from being obsolete, are more indispensable than ever in order to provide 'the language, the procedures, and the structures through which these claimants reliably can enunciate their differences'.[58] In other

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[52] Stacy (2009), at 14.

[53] *Ibid.*, at 4.

[54] For a clarification of this concept see *infra*, sect. 3B.

[55] Stacy (2009), at 30.

[56] *Ibid.*, at 76.

[57] *Ibid.*, at 109.

[58] *Ibid.*, at 139.

words, the claims presented by human rights organizations should be processed by an institutional framework of courts, both at the national and at the international level, which by applying a well-balanced 'margin of appreciation' can connect the requests to social and political context. Finally, the issue of multiculturalism can be best addressed through the establishment or improvement of regional human rights courts.[59]

Summing up, Stacy considers the international institutionalization of human rights standards as a significant improvement as regards the establishment of conditions favourable to their effective protection.[60] A further enhancement is nevertheless needed, and can be achieved in particular by giving up the claim for absoluteness: not only has state sovereignty to be relativized – which is quite self-evident if international standards of human rights protection are to be guaranteed – but human rights courts also have to abandon the ivory tower of an understanding of international law still too insensible to the specificity of contexts, adapting themselves to the concrete realities in the form of regional courts. Relatively successful examples of this kind of adaptation are – according to Stacy's interpretation – the 'hybrid courts' in international criminal law which 'have been established as a collaboration between the UN and national courts', such as those in Kosovo, East Timor, Sierra Leone, Cambodia, and Bosnia-Herzegovina.[61]

B *The Case for a Universal Reason in Front of the Postmodern Challenge*

Stacy's analysis of human rights law and adjudication at the international level reveals the ambiguity of politics aiming primarily or even exclusively at the recognition of difference: universal standards, even when they are embedded in specific situations, can hardly forgo a universal basis, as becomes evident in Stacy's cautious rehabilitation of the Western enlightenment. And the necessity for a universal basis reintroduces – surely in a new fashion – the old question concerning the existence of a universal reason. The second strand in the contemporary theories of global order does not reject the idea of a universal reason. However, this general idea is articulated in the books under review in different ways: from the reissue of the Kantian project of a worldwide republicanism (section 1 below), passing through a multi-level conception of global order on the basis of the communicative understanding of society (section 2 below), to the ambitious depiction of a cosmopolitan democracy (section 3 below).

1 *A Worldwide Kantian Republicanism?*

Immanuel Kant was the first philosopher to conciliate the perspective of a global order of peace with a conception of the legitimacy of public power based on the free will and participation of the citizens. Some central aspects of Kant's vision are re-proposed by Mortimer Sellers in his study on *Republican Principles in International Law*. In this

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[59]   *Ibid.*, at 141.

[60]   *Ibid.*, at 37.

[61]   *Ibid.*, at 67.

contribution – remarkable for its coherence and for its courageous, sometimes even uncompromising, attitude – Sellers expands his 'republican legal theory' which he has already exposed in previous publications,[62] to the question of international order.

Mixing Kant with a tasty dash of American federalism, Sellers defines republicanism as the government form characterized by 'popular sovereignty, the rule of law, the separation of powers, and a basic commitment to fundamental human rights'.[63] In particular, according to the republican principle, laws are morally valid only if they serve the common good, the best guarantee of which is political participation by the people.[64] Moving from the domestic to the international law level, Sellers endorses Kant's famous assertion that, to have a peaceful international order, 'the civil constitution of every state should be republican',[65] drawing from this idea consequences which go even further than what was proposed by Kant.

In Sellers' understanding – other than in Kant's conception – there is but one single guarantee, not only feasible but also desirable in principle, for a peaceful and just world order. This resides in the domestic constitutional system, which has to endorse republican tenets. Therefore, international law is not understood as a compelling inter-state normative system, but rather as a law which supports 'the world's various states' in developing 'their separate nations through their own internal self-determination'.[66] The perspective of a world republic is rejected not only as chimerical but also as tyrannical, oppressing the identities of self-determined peoples.[67] International law is thus necessarily weak, deriving its authority and legitimacy exclusively from the republican governments of the countries which create international norms by consensus. In other words, international law is legitimate and deserves respect if it is republican, and it is republican when it is established by republican states – and only by them. Sellers leaves no doubts about his view that no obedience is due to international law norms imposed by a majority of non-republican states:

> Governments that disregard the voices and interests of their subjects deserve no voice themselves in international affairs. . . . International law depends on republican principles for its content and moral validity, and supposed international laws and institutions bind and should influence republican governments only to the extent that they reflect republican procedures of politics and legislation. . . . Because they disregard popular sovereignty, the opinions of despots and non-republican governments never legitimately play a role in determining international law, and provide no valid insights into justice or the common good of humanity.[68]

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[62] M.N.S. Sellers, *Republican Legal Theory: The History, Constitution and Purposes of Law in a Free State* (2003).

[63] Sellers (2006), at 4.

[64] *Ibid.*, at 23.

[65] Kant, *Zum ewigen Frieden*, *supra* note 7, Zweiter Abschnitt (Sect. II), Erster Definitivartikel (1st Definitive Art.), at 204.

[66] Sellers (2006), at 23.

[67] *Ibid.*, at 14. Here Sellers reissues, in fact, Kant's arguments against the vision of a world republic, but avoids recalling the reasons also presented by Kant in favour of it, or at least of a compelling supra-state normative system, as the only solid basis for world peace.

[68] Sellers (2006), at 2, 8, and 25.

Coherently, in Sellers' view humanitarian intervention should be seen as an obligation for republican states since 'the question for lawyers and philosophers cannot be *whether* intervention is legitimate . . . but rather *when* intervention is legitimate and when it is not',[69] and the authority and legitimacy of the ICJ, insofar as it includes judges nominated by despotic states, is considered quite weak.[70] In the form of an apodictic conclusion, Sellers states that 'republics are the only safe and stable basis for a just law of nations. Without justice, there will be no peace.'[71]

Sellers' book stands out because of an argumentative straightforwardness which is unusual in legal theory. Indeed, he pronounces clearly a fact which can hardly be rejected, namely that international peace depends largely on the domestic constitutions of states; thus, it will always be difficult to achieve as long as many governments are not accountable to their citizens. Nonetheless, at least two main critical points arise from Sellers' approach. First, insofar as many states in the international arena are not characterized by a republican (or democratic) form of government and this condition is likely to persist at least for many years (or decades) to come, the question comes up what should be done – in a meanwhile which risks being worryingly long-lasting – with non-republican states. Sellers' approach ends in a substantial exclusion,[72] which, however, runs against the inclusive tradition of international law. In fact, an international law understood primarily as a platform for confrontation between republican and non-republican states would provide a modest support for world peace. Therefore, some kind of inclusion of non-democratic societies should be provided for, whereas Sellers also rejects the possibility that international civil society could play a putative role in representing societies oppressed by despotic governments.[73]

Secondly, Sellers' vision does not encompass a supra-state level of compelling law,[74] situated above the inter-state relations so as to guarantee peace and universal human rights, which was anticipated, albeit only in a germinal way, in Kant's idea of a 'cosmopolitan law'.[75] As a consequence, Sellers maintains a quite traditional idea of absolute state sovereignty, albeit moderated by its transformation into popular sovereignty.

2 The Perspective of a Multilevel World Order

In the Kantian perspective, order – like the subjectivity on which it is based – is always characterized as unitary. For that reason, it can be realized either within the individual sovereign state (and then, in the best case, in a world confederation of free and republican nation states), or in a world republic, itself sovereign against the smaller unities contained in it. In order to guarantee peace, however, the first solution is too

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[69]   *Ibid.*, at 130.
[70]   *Ibid.*, at 140.
[71]   *Ibid.*, at 29.
[72]   *Ibid.*, at 204.
[73]   *Ibid.*, at 37.
[74]   *Ibid.*, at 209.
[75]   Kant, *Zum ewigen Frieden*, *supra* note 7, at 203.

unstable, and the second rather chimerical and too far from control exercised by the citizens. So as to overcome this contradiction, a conception is needed in which the identity of the many individual peoples and citizenries is maintained, together with the establishment of a specific level of supra-state law and institutions, created through the transfer of sovereignty by the individual states and responsible for peace and the protection of human rights. As a possible solution, Habermas proposes a multilevel conception of order based on the communicative understanding of society. Specifically, in Habermas' view society is seen as being made of different kinds of interaction, each of them characterized by a specific use of practical reason. Political interaction within the individual polity, inter-state relations, and supra-state norms and institutions are themselves distinct kinds of interaction which must be acknowledged in their mutual interdependence, but also in their autonomy.[76] This way, Habermas' philosophy paves the way for a consistent epistemological foundation of a multilevel understanding of public law.

A second element of Habermas' conception is particularly important in this context. In his understanding social interaction, in particular linguistic interaction, cannot develop exclusively on the basis of the use of purely strategic reason, aiming at identifying the best instruments for achieving predetermined goals; rather, linguistic interaction works only because of the essential role played by communicative reason, aiming at achieving consensus on shared goals.[77] Therefore, international relations – themselves a social interaction essentially shaped by linguistic communication, taking form in norms and negotiations – are not to be seen as the realm of mere strategic reason, but as a context itself characterized by a fundamental presence of the communicative use of reason.

Moving from Habermas' philosophy, the contributions presented by Niesen and Herborth concentrate on the many aspects of an interpretation of international relations not centred exclusively on the 'realistic' view according to which international relations are the dominion of strategic reason. The volume closes with a reply by Habermas. I will stress here only two of the issues discussed: the role of argumentation as well as of consensus in international relations, and the multilevel institutional proposal for a world order of peace and respect for human rights.

As regards the first issue, many contributions to this volume point out that the development and results of international negotiations cannot be exhaustively interpreted in terms of power politics resulting from a strategic use of reason.[78] Rather,

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[76] J. Habermas, *Erläuterungen zur Diskursethik* (1991), at 100, *Die Einbeziehung des Anderen. Studien zur politischen Theorie* (1996), at 237, *Der gespaltene Westen* (2004), and Habermas, 'Eine politische Verfassung für eine pluralistische Weltgesellschaft', 38 *Kritische Justiz* (2005) 222.

[77] J. Habermas, *Theorie des kommunikativen Handelns* (1981) and *Nachmetaphysisches Denken* (1988), at 63.

[78] See, in particular, Deitelhoff, 'Was vom Tage übrig blieb. Inseln der Überzeugung im vermachteten Alltagsgeschäft internationalen Regierens', in Niesen and Herborth (2007), at 26; Risse, 'Global Governance und kommunikatives Handeln', in *ibid.*, at 57; Müller, 'Internationale Verhandlungen, Argumente und Verständigungshandeln', in *ibid.*, at 199.

international actors – i.e., here, delegations of sovereign states – seem to change their minds as a consequence of arguments introduced by other parties to the negotiation. The authors deliver some empirical evidence in support of their approach. Nevertheless, as regards the way in which interaction connected with the use of communicative reason occurs in international relations, the positions of the supporters of this research approach diverge in one central aspect. Indeed, at first the presence of communicative contents in international relations was sought to be proven on the basis of empirical evidence that some kinds of international negotiations follow the principles of arguing and not those of bargaining.[79] In doing that, it was assumed that communicative action could be empirically clearly distinguished from strategic action. Yet, the intentions of action, being essentially mental processes with little external evidence, can hardly be empirically proven; furthermore, in many contexts divergent uses of reason melt together in a convolute in which the individual components are difficult to single out: in other words, we have plenty of social interactions – and international negotiations are surely one of these – in which strategic and communicative reason are copresent and often deeply intertwined. Due to these difficulties, this research strand has been largely abandoned, with the consequence of two possible re-orientations of the conceptual setting: on the one hand, communicative reason is reinterpreted in the sense that both arguing and bargaining are embedded into a framework of shared values and practices, so that even strategically oriented reason would be related to a non-strategic background.[80] Habermas, on the other hand, rejects the necessity of such a conceptual reframing of the theory of action,[81] which would significantly reduce or even annihilate the transcendental – and therefore universal – content and scope of communicative reason. Rather, he proposes to stress even more the universal dimension implicitly contained in language, outlining that every linguistic interaction contains a truth presupposition which creates a horizon of expectations that can hardly be bypassed even by those parties to the interaction who actually pursue egotistic interests. Thus, the arguments presented during negotiations, even when the intents are merely strategic, bind their authors and mobilize other actors – in particular of international civil society – urging the strategic participant to reconsider its position, at least so as not to lose influence and credibility.

Considering now the multilevel setting of international order, Habermas specifies the proposal already put forward in earlier publications.[82] Rejecting the arguments of both those who claim that international order can only be based on treaties between sovereign states – whereas, if the order is to be just, sovereignty should be grounded on the will of the people –[83] and of those who assert that global order is impossible

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[79]   Herborth, 'Verständigung verstehen. Anmerkungen zur ZIB-Debatte', in *ibid.*, at 147.

[80]   Müller, *supra* note 78.

[81]   Habermas, *supra* note 28, at 422.

[82]   Habermas, *Westen*, *supra* note 76; Habermas, 'Politische Verfassung', *supra* note 76.

[83]   Maus, 'Verfassung oder Vertrag. Zur Verrechtlichung globaler Politik', in Niesen and Herborth (2007), at 350.

without a world state,[84] Habermas confirms his proposal centred on a two-level system of world order: an inter-state – or 'transnational' – level at which states characterized by significant impact on world politics (i.e., 'global players' like the USA, China, India, and Russia, together with supranational powers like an effective EU) coordinate their policies with transnational effect, and a supra-state – or 'supranational' – level with institutions endowed with normative authority as regards the protection of peace and essential human rights.[85] This set of institutions, which derives its capacity to implement norms from the effective power of 'willing' member states, coincides largely with a consistently reformed UN.

3 From Chimaera to a Possible Reality: The Prospect of a Cosmopolitan Democracy

One of the most relevant problems which affects a possible institutional setting for world order lies in guaranteeing adequate legitimacy. After a rather cautious beginning, in which cosmopolitan parliamentarism was seen rather sceptically,[86] Habermas has developed in his more recent writings the conviction that only a democratic world parliamentary assembly can secure proper legitimation.[87] This position is also put forward in his contribution to the book edited by Niesen and Herborth. Specifically, he depicts here – in only a few but inspiring paragraphs – the perspective of a supra-state world organization legitimated by a General Assembly consisting of representatives delegated by the national parliaments.[88] The legitimacy coming from this institutions should then be adequately supported by a robust system of checks and balances between the General Assembly itself, a reformed Security Council, and the ICJ on the one hand, and by the significant involvement of the international civil society on the other hand.[89]

Habermas presents the perspective of cosmopolitan democracy, in quite general terms, as a normative 'must', leaving its concrete conditions largely aside. By contrast, the discussion of its specific features and factual prerequisites constitutes the core element of Daniele Archibugi's contribution. He explicitly commits himself to demonstrating that the cosmopolitan understanding of democracy is not just a philosophical dream. In his reasoning, Archibugi moves from a taboo break as regards the alleged link between the democratic form of state government and its peaceful attitude.[90] This link is traceable back to Kant's assertion that one of the unavoidable conditions for world peace, if not its only requirement, is the republican (or we could also

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84   Schmalz-Bruns, 'An den Grenzen der Entstaatlichung', in *ibid.,* at 269.

85   Habermas, *supra* note 28, at 439.

86   J. Habermas, *Die postnationale Konstellation* (1998), at 156.

87   See in particular Habermas, 'Konstitutionalisierung des Völkerrechts und die Legitimationsprobleme einer verfassten Weltgemeinschaft', in W. Brugger, U. Neumann, and S. Kirste (eds.), *Rechtsphilosophie im 21. Jahrhundert* (2008), at 360.

88   Habermas, *supra* note 28, at 450.

89   *Ibid.*, at 454.

90   For a recent, quite resolute upholding of the 'democratic peace thesis' see Delahunty and Yoo, 'Kant, Habermas and Democratic Peace', 10 *Chicago J Int'l L* (2009–2010) 437.

carefully say: democratic) constitution of the individual states – a statement recently reformulated *inter alia* by Mortimer Seller in his work discussed above. The empirical analysis, however, does not support this argument: 'democracies are', Archibugi argues, 'as belligerent as non-democracies'.[91] Although rather fierce toward their neighbours or, in general, against those who are not identified as members of the community, democracies nevertheless guarantee significant advantages to their citizens as regards quality of life.[92] The decisive question is thus how these advantages can be extended to the whole of humanity. A first measure is realized by the expansion of democracy as the domestic form of government. Archibugi points out that democracy cannot be exported by force and the means of democratic spreading out should resemble a 'carrot' rather than a 'stick'.[93] Nevertheless, even a peaceful increase in the number of democratic states is not considered to be sufficient, due to the sometimes predominant warlike attitudes of democratic countries, often as a consequence of the 'particularistic' interests of their citizens. According to Archibugi, whose claim is here quite similar to Habermas', it is therefore necessary to move on to a second measure, namely the establishment of a supra-state universal order, concretely a democratic institutional setting of a 'global commonwealth of citizens', in which democratic government is coordinated at different levels[94] and absolute sovereignty is substituted by multilevel constitutionalism.[95]

Cosmopolitan democracy is different from both the confederal and the federalist models of political order.[96] While the confederal system is based on agreements between states still maintaining normatively unrestrained decisional authority, within the horizon of cosmopolitan democracy sovereignty has been transferred – albeit only in a few, clearly delimited fields[97] – to supra-state institutions. And whereas global federalism draws a picture of a world state deemed to supersede the national identities, Archibugi's conception of democratic cosmopolitanism always grounds its legitimacy on two pillars: the world citizens and the states. The two pillars of legitimacy take concrete shape in different institutions in a way which reminds us of the institutional architecture of the European Union. Specifying the conceptual horizon which also characterizes Habermas' proposal, Archibugi claims that the legitimacy of the cosmopolitan order deriving from individual states, insofar as they express the unreduceable identities of distinct peoples, is conveyed by UN institutions such as the General Assembly,[98] the Security Council, and the UN specialized agencies which,

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[91]   Archibugi (2008), at 43.

[92]   *Ibid.*, at 41.

[93]   *Ibid.*, at 206.

[94]   *Ibid.*, at 89.

[95]   *Ibid.*, at 97.

[96]   *Ibid.*, at 101.

[97]   *Ibid.*, at 88.

[98]   Considering the differences between Archibugi's and Habermas' conceptions, it may be interesting to point out that Habermas does not rule out that the UN General Assembly, in an accomplished cosmopolitan world order, could be replaced by a World Parliament, while in Archibugi's proposal the General Assembly clearly maintains its up-to-date inter-state features. See: Habermas, *supra* note 28, at 450.

although reformed, are thought to retain their present inter-state character. On the other hand, the legitimacy coming from the world citizens has to be concretized in a World Parliamentary Assembly, endowed with limited but fundamental competences, such as the protection of fundamental rights and the decision about humanitarian interventions.[99]

Habermas asserts that his proposal of a World Parliament is based on a counterfactual assumption, namely that all states have a democratic constitution and respect the principle of the rule of law.[100] By maintaining the gap between normative 'ought' and politic realization he therefore avoids addressing openly the uncomfortable question of the concrete form of the proposed institution. On the contrary, Archibugi engages directly and courageously in the discussion; this way he runs the risk, on the one hand, of depicting in detail what many consider a mere chimaera, but also capitalizes on the opportunity, on the other hand, to prove that the proposal is considerably less chimerical than usually considered. Two elements are decisive so as to free the idea of a World Parliament from its traditionally utopian aura. The first consists in presenting a feasible suggestion as regards its institutional shape: here Archibugi, having discussed the conceptions presented by other authors, concludes that the most valid idea sees the World Parliament as 'comprising some six hundred deputies, . . . in which a more than proportional representation [is] accorded to the smaller countries and a less than proportional one to the larger countries'.[101] Obviously this Assembly, in order to be adequately legitimated, should be elected by the peoples of the individual states in their quality as world citizens, or at least it should be composed of deputies sent to the World Assembly by democratically legitimated national parliaments. For the time being, in a world in which many governments are still autocratic, the implementation of this legitimation chain is, however, unrealistic. The question thus arises how the idea of a World Parliament could be approached through transitional, increasingly ambitious steps.[102] The first step could be taken by establishing a symbolical Assembly 'with the resources of the global civil societies',[103] which means outside the UN institutions. The second one would be made by formalizing the role played by NGOs, possibly by creating, under the authority of the UN, an assembly composed of the NGOs recognized by the UN, although the representativeness of such organizations remains – as Archibugi admits – an unresolved problem.[104] The third step would finally consist in organizing a World Assembly composed of deputies sent by democratic states, whereas the peoples of non-democratic states could be represented by organizations of civil society invited by the deputies endowed with democratic legitimation.[105]

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[99]   Archibugi (2008), at 173.

[100] Habermas, *supra* note 28, at 448.

[101] Archibugi (2008), at 174. The proposal is explicitly taken from Segall, 'A UN Second Assembly', in F. Barnaby (ed.), *Building a More Democratic United Nations* (1991), at 93.

[102] Archibugi (2008), at 175.

[103] *Ibid.*, at 177.

[104] *Ibid.*, at 176.

[105] *Ibid.*, at 173.

Surely, the proposals made by Habermas and Archibugi in order to depict the normative traits and the institutional features of a cosmopolitan democracy are all but free from criticism. However, they are also far from being simply escapist, nor are they absurd. Rather, they identify the fertile field on which rational proposals, moving from the ascertainment of a deficit in the experienced reality, can grow to concreteness.

3 Analogies and Differences on the Way to a New Understanding of Universalism

Common to all the works under review is the rejection of the idea that political and legal order applies, as an unavoidable matter of fact, exclusively to the internal structure of individual, relatively homogeneous communities, whereas the relations among them cannot be more than a mere restraint of disorder. The general endorsement, repeatedly expressed in the contributions, of universalism as the theory which considers global order not only as desirable but also, in spite of the undeniable difficulties of implementation, as feasible, is concretized however in different ways. These manifest at least two shared elements outlining a new direction for the perspective of universalistic order in the 21st century ((1) and (2) below), as well as a point at which the path leading to the conceptualization of a universalism fit for the future may bifurcate ((3) below).

(1) Traditionally, particularism and universalism have been seen as dichotomic. In other words, theories were considered to fit *either* into the one conceptual category *or* into the other, and neither the particularistic paradigm nor its universalistic antagonist were sufficiently open to incorporate in their respective theoretical structures elements coming from the other side. This pattern is useful to establish a general taxonomy of the conceptions of international order developed up to the middle of the 20th century;[106] yet, it seems to be rather short-sighted as far as the understanding of order elaborated in some of the most influential of the recent theories is concerned. Indeed, although the preferences for either the particularistic or the universalistic view in general remain, nevertheless the authors endorsing particularism and even more those who are committed to universalism are increasingly prone to inserting into their theoretical framework claims usually raised by their opponents. This is the case for the systems theory of global order, for postmodern thinking, as well as for Habermas' communicative paradigm. Indeed, authors committed to universalism have largely abandoned the idea that global order could be achieved by the establishment of a *unitary* world state, recognizing

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[106] An exception may be identified in the theory of the *jus inter gentes* elaborated by Francisco Suarez (*De Legibus, supra* note 7), in which the overarching universalistic framework concedes sufficient space to the development of subsidiary political identities by the individual polities, somehow anticipating in this way the overcoming of the strict dichotomy between the universalistic and the particularistic approaches.

the good reasons contained in some particularistic assertions, such as for instance the insistence on the indelible importance of individual political and cultural identities. This approach is expressed, considering the authors here analysed, in Carty's 'order of respect' as well as in Hurrell's pleading for a culture of dialogue in international relations, in Stacy's proposals for a protection of human rights which should be more sensitive to difference as well as in Archibugi's subsidiary cosmopolitan democracy, in Habermas' multilevel constitutionalism as well as in Sellers' view of a conceptual bridge bringing together parochialism and cosmo-politanism. The recent evolution does not imply, however, the melting together of the two paradigms: they remain separated, and the different theories can still be distinguished on the basis of whether they claim that cosmopolitan order is pos-sible, or are rather sceptical about it. Their conceptual horizons are simply becom-ing progressively more permeable to each other, with the consequence, for the universalistic vision, of a significant increase as regards its conceptual flexibility and factual feasibility.

(2) The 'unitary' cosmopolitanism, based on the Kantian vision of a 'world republic' and on Kelsen's understanding of international law, was characterized by a pyrami-dal institutional and legal architecture. For that reason, the superior, more inclusive institutions – in particular those of global, supra-state rank – were thought to be endowed, in order to work properly, not only with normative priority but also with sovereign authority over the lower ones (explicitly, over the individual polities). Con-temporary cosmopolitanism, on the contrary, has abandoned almost completely the hierarchical understanding of global order, replacing it with a more horizontal idea of interaction. Without rejecting the claim to normative superiority made by the more inclusive political and legal institutions, the conception of a non-hierarchical univer-salism transfers the claim into reality more through inter-institutional and inter-legal dialogue than through authoritative command.

(3) The point at which the different visions of contemporary universalism diverge emerges with the question whether the idea of global order presupposes, as its con-ceptual precondition, the assumption of a universal reason. This question builds the epistemological background of the discussion on possibility and limits of the global order with which Western thought has been engaging in manifold forms for more than 2,000 years. Besides the theoretical dimension, however, the *querelle* concern-ing the assumption – or the rejection – of the existence of a universal reason lying behind global order has institutional consequences as well, which are especially relevant for the issues here discussed. Indeed, while those authors who deny the positive impact or even the reality of universal reason rather prefer to rely on extra-institutional dialogue among the parties, their opponents place more emphasis on the institutional architecture which should implement the universal principles of reason, considered by them as the core element of a global order of peace and human rights protection. Within the horizon of their conceptual frameworks, the books reviewed can be thus seen – and read – in a particularly fascinating perspective: that of a kaleidoscope of the responses that universalism can give to the challenges of the 21st century.

Individual Contributions

Peter Niesen, Benjamin Herborth (eds). *Anarchie der kommunikativen Freiheit*
Peter Niesen, Anarchie der kommunikativen Freiheit – ein Problemaufriss;
Nicole Deitelhoff, Was vom Tage übrig blieb. Inseln der Überzeugung im vermachteten Alltagsgeschäft internationalen Regierens;
Thomas Risse, Global Governance und kommunikatives Handeln;
Patrizia Nanz/Jens Steffek, Zivilgesellschaftliche Partizipation und die Demokratisierung internationalen Regierens;
Thomas Saretzki, Argumentieren, Verhandeln und Strategie. Theoretische Referenzen, begriffliche Unterscheidungen und empirische Studien zu arguing und bargaining in der internationalen Politik;
Benjamin Herborth, Verständigung verstehen. Anmerkungen zur ZIB-Debatte;
Antje Wiener, Demokratischer Konstitutionalismus jenseits des Staates? Perspektiven auf die Umstrittenheit von Normen;
Harald Müller, Internationale Verhandlungen, Argumente und Verständigungshandeln. Verteidigung, Befunde, Warnung;
Nancy Fraser, Die Transnationalisierung der Öffentlichkeit. Legitimität und Effektivität der öffentlichen Meinung in einer postwestfälischen Welt;
Rainer Forst, Dialektik der Moral. Grundlagen einer Diskurstheorie transnationaler Gerechtigkeit;
Rainer Schmalz-Bruns, An den Grenzen der Entstaatlichung. Bemerkungen zu Jürgen Habermas' Modell einer 'Weltinnenpolitik ohne Weltregierung';
Erik Oddvar Eriksen, Deliberation und demokratische Legitimität in der EU – Zwischen Konsens und Kompromiss;
Hauke Brunkhorst, Zwischen transnationaler Klassenherrschaft und egalitärer Konstitutionalisierung. Europas zweite Chance;
Ingeborg Maus, Verfassung oder Vertrag. Zur Verrechtlichung globaler Politik;
Christoph Humrich, Faktizität ohne Geltung? Oder: Hat die Konstitutionalisierung des Völkerrechts eine diskurstheoretische Chance?;
Jürgen Habermas, Kommunikative Rationalität und grenzüberschreitende Politik: eine Replik