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INTERNATIONAL LEGAL THEORY

SYMPOSIUM ON FOUCAULT

On the Uses of Foucault for International Law

TANJA AALBERTS AND BEN GOLDER*

This symposium concerns the utility of the work of the French philosopher and social theorist, Michel Foucault (1926–84), for international law as an academic discipline. It almost goes without saying that there are several different ways to approach this question of *utility*. We want to introduce the symposium by sketching just a few of the different avenues by which one could approach the question of Foucault's utility for theorizing international law. One dominant understanding within the extant legal literature on Foucault is essentially to ask after his own legal-theoretical credentials. This approach is based on the seemingly straightforward and widely shared presupposition that if his 'work offers no plausible account of law, why should legal scholars take him seriously? If we seek to bring Foucault into law, must we not first seek to bring law into Foucault?'[1] Here, a precondition to being taken seriously within the discourse of law is precisely the plausibility of one's fidelity to existing conceptions of what law *is*. Somewhat solipsistically, then, from this perspective, one must first adduce a plausible theory of law in order to be taken seriously within law.

This way of ascertaining Foucault's utility for theorizing law hence takes its bearings from what Foucault had to say about law itself throughout his written and spoken work. It calls for an exegesis of all Foucault has said, looking for (in)consistencies and distilling the 'truth' of, or behind, his remarks. The utility question in this context conventionally is answered in the negative, based on the observation that, whilst he may have 'had a great deal to say about law'[2] and whilst this might have included the odd promising insight, nevertheless the sum total of Foucault's comments on law do not amount to the necessary 'theory of law'.[3] Matters are even worse, however, for not only does Foucault fail the requisite test of legal theory, but the effect of his various pronouncements on law and legal issues was

* Tanja Aalberts is a senior research fellow at the Faculty of Law, VU University, Amsterdam [t.e.aalberts@vu.nl]. Ben Golder is a senior lecturer in the Faculty of Law at the University of New South Wales [b.golder@unsw.edu.au].

1 H. Baxter, 'Bringing Foucault into Law and Law into Foucault', (1996) 48 *Stanford Law Review* 449, at 450.

2 A. Hunt and G. Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (1994), viii.

3 Ibid., at viii. The assertion that Foucault lacked a theory of law has been contested by, inter alia, B. Golder and P. Fitzpatrick, *Foucault's Law* (2009); and P. Fitzpatrick, 'Foucault's Other Law', in B. Golder (ed.), *Re-Reading Foucault: On Law, Power and Rights* (2012).

allegedly to 'expel' law from any integral or impelling role in the constitution of modernity. This so-called 'expulsion thesis' is based on Foucault's remarks on the demise or decreasing importance of what he calls juridical or sovereign power in modernity.[4] This sovereign power is characterized as a formal and institutionalized modality of power, which is executed through the instruments of laws, decrees, and constitutions. Law in this regard is presented by Foucault as the command of the sovereign backed up by sanctions, coercion, and, ultimately, 'the right to decide life and death'.[5] Together, they represent a negative form of power – 'a power to say no; . . . capable only of posting limits',[6] with law functioning in this context merely as a system of rules of constraint and prohibition. It is this negative conception of law and power that Foucault objects to, suggesting that:

> we must construct an analytics of power that no longer takes law as a model and a code . . .. [That] [w]e shall try to rid ourselves of a juridical and negative representation of power, and cease to conceive of it in terms of law, prohibition, liberty, and sovereignty.[7]

According to Foucault, this focus on power in its negativity blinds us to power's other more subtle, yet more far-reaching, 'productive' dimensions: 'In fact, power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production.'[8]

Here, we encounter what is perhaps Foucault's best-known contribution to social and political theory – or, at any rate, the 'analytics' of power, as he termed it.[9] Steadfastly refusing to answer the ontological question of 'what is power', Foucault insists instead upon the strategic and 'analytic' question of 'how' power operates, how it is rationalized, and daily put into practice. And what is distinctive about his answer to this question is that power functions not by repressing or disavowing its object, but rather (via the instrumental deployment of a whole range of knowledges) through constituting it, fabricating it, regulating it. This productivity of power operates through the modalities of what Foucault calls disciplinary power (operating as a 'microphysics'[10] in localized institutions, such as schools, psychiatric institutions, and prisons) and governmentality or biopolitics (operating at the level of society as a whole, governing its population). These modalities of power are further explored in various ways by the contributors to this symposium.

In any case, it is Foucault's theoretical rejection of juridical and negative power (with law as its instrument) that forms the foundation of the expulsion thesis, and hence the alleged irrelevance of Foucault for theorizing (international) law. The

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4 Hunt and Wickham, *supra* note 2; see also A. Hunt, 'Foucault's Expulsion of Law: Toward a Retrieval', (1992) 17 *Law & Social Inquiry* 1; A. Hunt, 'Getting Marx and Foucault into Bed Together!', (2004) 31 *Journal of Law and Society* 592; G. Wickham, 'Foucault and Law', in R. Banakar and M. Travers (eds.), *An Introduction to Law and Social Theory* (2002), 249–65; and G. Wickham, 'Foucault, Law, and Power: A Reassessment', (2006) 33 *Journal of Law and Society* 596.

5 M. Foucault, *History of Sexuality*, Vol. 1: *The Will to Knowledge* (1990), 135; M. Foucault, *'Society Must Be Defended': Lectures at the Collège de France, 1975–76* (translated by D. Macey) (2003), 240–1.

6 Foucault, *History of Sexuality*, *supra* note 5, at 85.

7 Ibid., at 90.

8 M. Foucault, *Discipline and Punish: The Birth of a Prison* (1978), 194.

9 Foucault, *History of Sexuality*, *supra* note 5, at 82.

10 Foucault, *supra* note 8, at 26.

parentheses here are not coincidental. For, when it comes to the more specific question of *the international* and of *international law*, again, Foucault's utility is limited if one appreciates this in terms of what he directly said about these matters. Undoubtedly, Foucault's main focus was on the intra- (or sub-)state realm – and neither the relations across states nor the relations between states mediated by international law or diplomacy formed the explicit objects of his inquiry. Recently, there have been various and productive attempts within international relations (IR) theory and global political theory more generally to 'upscale'[11] the Foucauldian concepts of, for example, governmentality[12] and biopolitics.[13] Yet, if one necessarily confines oneself to Foucault's own concerns, then it is only the odd paragraphs on European military-diplomatic practices in the 1977–78 lecture series *Security, Territory, Population* (discussed here in the contribution from Matt Craven) in which he addresses the international as such. Altogether, this is hardly propitious material for affirmatively answering the question of Foucault's utility for international legal theory.

One popular way of refuting the expulsion thesis is to juxtapose the claims made by Foucault that tend to imply the diminution of law in modernity with potentially contradictory statements throughout his work. This means not only that different modalities of power are not mutually exclusive and can coincide (in this context, Foucault famously speaks of a triangle of sovereignty—discipline—governmentality[14]), but also that law is not only confined to sovereign power. In a different modality, it operates in conjunction with productive forms of power, too.[15] In his contribution to this symposium, Stephen Legg makes a similar argument by exploring how the League of Nations indeed exercised both sovereign power and biopolitics, and combined conventional legal instruments, such as binding treaties, with more informal instruments like resolutions and recommendations, questionnaires, and campaigns to manage trafficking.

Apart from thus countering Foucault with Foucault, so to speak, there are indeed other ways to conceptualize Foucault's possible utility for international legal theory. One profitable way of using his work, and perhaps more in line with Foucault's own perspective on the work of the critic,[16] is precisely not to focus upon the specifics of what he had to say about law (or, indeed, any given topic), but to reflect upon

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[11] A. W. Neal, 'Rethinking Foucault in International Relations: Promiscuity and Unfaithfulness', (2009) 23 *Global Society* 539, at 539.

[12] See, e.g., the collection by W. Larner and W. Walters (eds.), *Global Governmentality: Governing International Spaces* (2004) and I. B. Neumann and J. O. Sending, *Governing the Global Polity: Practice, Mentality, Rationality* (2010).

[13] See A. Negri and M. Hardt's trilogy of *Empire, Multitude* and *Commonwealth*, although this is not simply an 'upscaling' or an 'updating' of the Foucauldian analytic, but also a theory of empire drawing upon Deleuze, autonomist traditions of Italian Marxism, and so forth. See A. Negri and M. Hardt, *Empire* (2000); A. Negri and M. Hardt, *Multitude: War and Democracy in the Age of Empire* (2004); A. Negri and M. Hardt, *Commonwealth* (2009).

[14] M. Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977–78* (2007), 107.

[15] For critical analyses of the expulsion thesis, see V. Tadros, 'Between Governance and Discipline: The Law and Michel Foucault', (1998) 18 *Oxford Journal of Legal Studies* 75; F. Ewald, 'Norms, Discipline, and the Law' (translated by M. Beale), in R. Post (ed.), *Law and the Order of Culture* (1991), 138–61; Golder and Fitzpatrick, *supra* note 3.

[16] See, e.g., the comments in M. Foucault, 'Prisons et asiles dans le mécanisme du pouvoir', in D. Defert and F. Ewald (eds.), *Dits et écrits*, Vol. 11 (1994 [1974]), 523–4.

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how he said it; that is to say, to focus upon the different ways in which Foucault approached and problematized the very question of law and the ways in which law has traditionally been thought of. Rather than bringing a theory of law into Foucault, to paraphrase Baxter, it is on the level of methodology that Foucault has most to offer for understanding and analysing international law. This task can itself be understood in a number of different but interrelated ways. These in turn inform the different approaches that the contributors to this symposium reflect upon and deploy in order to explore Foucault's utility for theorizing international law.

One such avenue concerns Foucault's particular methodologies of *archaeology* and *genealogy*, as historical methods to explore the contingency and discursive conditions of possibility of knowledge, truth, and ways of thinking. By now well-known approaches in the theoretical humanities and the social sciences, these methodological orientations have themselves found some purchase in international legal scholarship.[17] Such an analysis may involve critiquing the presuppositions and claims of normative universality (as made, for instance, by and on behalf of international human rights law),[18] which are susceptible to Nietzschean-inspired *counterhistories*, and the genealogical 'insurrection of subjugated knowledges'.[19] In so doing, one may expose the repressed, disavowed political deployments of colonialism, empire, great-power politics, and so forth in the production of international law. This rejection of 'absolute truth' and 'universal justice' is indeed the drift of Anne Orford's lecture in this symposium. She calls for a turn to description as a mode of legal writing. Criticizing the popular reliance on philosophy as the authoritative source of truth in many contemporary critical engagements with law, she refers to Foucault's different take on the task of philosophy. Rather than the deployment of 'absolute knowing', philosophy is (or should be) about analysing and exposing the politics behind knowledge claims. Description in this context seeks to make intelligible (international) practices, by understanding them as historically situated, and acknowledging the inherent link between facts and values. It is an alternative to the search for universal truth and absolute causalities. Indeed, as Craven explains in his contribution, a genealogical enquiry rather explores the 'condition of possibility' of universals, by inquiring how it is possible that people behave as if universal values and categories exist 'out there'.

This also relates to a second aspect of Foucault's methods. For, as 'histories of the present', archaeologies and genealogies work to denaturalize and de-essentialize conventional and allegedly given and universal categories and phenomena, exposing how they too are contingent, singular, and dependent upon particular, historically situated, discursive formations. In different ways, all the articles in this symposium unravel one foundational category of international law, the sovereign state. In this

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17 See B. Golder and P. Fitzpatrick, 'The Laws of Michel Foucault', in B. Golder and P. Fitzpatrick (eds.), *Foucault and Law* (2010), xi–xxvi.

18 D. Otto, 'Everything Is Dangerous: Some Post-Structural Tools for Rethinking the Universal Claims of Human Rights Law', (1999) 5 *Australian Journal of Human Rights* 17; M. Olmsted, 'Are Things Falling Apart? Rethinking the Purpose and Function of International Law', (2005) 27 *Loyola of Los Angeles International and Comparative Law Review* 401.

19 Foucault, '*Society Must Be Defended*', *supra* note 5, at 7.

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context, Orford analyses the 'Responsibility to Protect' paradigm as a way of consolidating and rationalizing the expansion of executive action and governmental practices by the United Nations to maintain order and protect life in the post-colonial world.[20] While she adeptly links the contemporary paradigm of 'R2P' to ongoing practices of biopolitics initiated by Dag Hammerskjöld during the process of decolonization, Legg addresses how the League of Nations, too, was much more than an international or inter-state framework based on institutionalized co-operation between its sovereign members. In this context, Legg explores how League governmentalities targeted two different populations, with both individuals and states being the object of governmentality. By focusing on governmental practices, both analyses imply a rereading of the (post-colonial) state as not just the original and given subject of international law, and the source of power in the international realm, but at once the outcome of a governmental project of rationalization and, as such, an object of regulation. To put it differently, the state is not ontologically independent of or prior to 'the international', but itself represents the correlative of multiple governmentalities.[21] In his contribution, Matt Craven, too, rereads the state by using Foucault's epistemic histories to contextualize the work of one of the pillars in the historiography of international law, Christian Wolff. More specifically, Foucault's discussion of the emergence (or rather transformation) of governmental power in the eighteenth century leads him to reveal Wolff's exposé of the duties of the nation to itself. By thus rereading Wolff through Foucault, Craven presents a richer and historicized insight into Wolff's work than the more established yet confined characterization of his *Jus Gentium* as a treatise about natural law. In this context, Craven convincingly shows how Foucault's work sheds a new light upon disciplinary narratives and international legal history, and invites us to explore new ways of thinking about international law in relation to its social and historical environment.

This, finally, brings us to yet another, but related, way to understand Foucault's methodological enterprise, namely in terms of the project of thinking otherwise – *penser autrement*, as he puts it in several places. This relates to another function of contemporary philosophical discourse:

> But, then, what is philosophy today – philosophical activity, I mean – if it is not the critical work that thought brings to bear on itself? In what does it consist, if not in the endeavor to know how and to what extent it might be possible to think differently, instead of legitimating what is already known?[22]

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[20] The current lecture notably reflects on the research process of her project on the Responsibility to Protect as an illustration to the utility of Foucault for international legal theory. For the full substantial argument, see A. Orford, *International Authority and the Responsibility to Protect* (2011), as well as the other references in her lecture.

[21] This is what Foucault has cursorily referred to as *étatisation* or the governmentalization of the state; see Foucault, *supra* note 14, at 109–10, 389; and M. Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978–1979* (translated by M. Senellart and G. Burchell) (2010), 77; cf. M. Dillon, 'Sovereignty and Governmentality: From the Problematics of the "New World Order" to the Ethical Problematic of the World Order', (1995) 20 *Alternatives* 323; M. Dean, *Governing Societies: Political Perspectives on Domestic and International Rule* (2007).

[22] M. Foucault, *History of Sexuality, Volume 2: The Use of Pleasure* (translated by R. Hurley) (1992), 8–9.

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Applied to law, this self-distancing, reflexive mode of philosophy functions not so much at the level of what is actually said about law, but rather at the level of what enables that saying – at the level, that is, of the discursive conditions of possibility, the very 'historical *a priori*'[23] that conditions and delimits the ways in which we customarily think of law. What are the organizing schema, the grids of intelligibility, the discursive frames of reference, that allow us to speak of law? What kinds of legal objects does this way of thinking and speaking about law produce (and, more to the point perhaps, occlude and elide)? What kinds of legal subjects do such modes of discourse necessarily rely upon and (re)produce? And with what political effects, and so forth? What happens, that is, when we speak (of) law? Here, the contribution by Susan Krasmann on 'targeted killing' moves very much within the orbit of this style of Foucauldian questioning. Far from conceptualizing law as that which can unproblematically be opposed to power, as a set of formalist and disinterested constraints on political action or as representing some kind of moral cosmopolitanism or ideal of justice, law emerges in her account as a thoroughly interested creature, invested in the production and regulation of objects, constantly legitimizing and inscribing practices within the realm of the legal. In other words, from a Foucauldian perspective, law is not the vis-à-vis of power, speaking absolute truth or universal justice to power, but in fact a form of power itself that produces a truth regime through legal knowledge claims, as both Orford and Craven also argue in their contributions. A Foucaultian analytics hence also puts a spin on the popular debate on the 'politics of international law'[24] by drawing our attention to how boundaries are drawn and redrawn between domains of international law and international politics (and IL and IR as disciplines, too).

These are, then, some of the questions that Foucault enables and invites us to ask when exploring the workings of (international) law. In this light, Foucault emerges not so much as a thinker who had – or, who pointedly failed to have – particular theses about the nature of law or even about its relative importance in modernity, but rather as a thinker who equips us with a certain style of thinking, a certain manner of discourse, a certain orientation towards law. Returning to the presupposition articulated at the beginning of our introduction, a paradox emerges. For, whereas Foucault's refusal to think of law in the customary ways has previously resulted in a process of disciplinary policing and marginalization, whereby he is adjudged not to have taken law seriously enough, we would like to argue that it is, paradoxically, precisely this capacity to think of law differently, to step outside the usual frameworks, and to problematize given categories and universalist claims that makes his work so productive for international legal theorizing. In their very different ways, all the articles in this symposium put this into practice.

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23 M. Foucault, *The Order of Things: An Archaeology of the Human Sciences* (1994), xxiv.

24 See M. Koskeniemmi, 'The Politics of International Law', (1990) 1 EJIL 4; and C. Reus-Smit (ed.), *The Politics of International Law* (2004).

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