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## Exploitation as an international legal concept

SUSAN MARKS

In critical commentary on South Africa's Truth and Reconciliation Commission, Mahmood Mamdani advanced an argument that became known as the 'beneficiary thesis'. At stake was the question of whom the truth and reconciliation process should engage. The Commission's work rested on the idea that 'key to the injustice of apartheid [was] the relationship between perpetrators and victims'.<sup>1</sup> According to Mamdani, however, the pivotal relationship should rather have been that between those who benefited and those who suffered from the system itself. For the perpetrators were a relatively small group, when compared to apartheid's many beneficiaries, and so too were the perpetrators' victims when compared to the vast majority of the population victimised by the system's indignities, hardships and oppressions on a daily basis. 'To what extent', Mamdani wondered, 'does a process that ignores the aspirations of the vast majority of victims risk turning disappointment into frustration and outrage . . .?'<sup>2</sup> Since apartheid was fundamentally a 'program for massive redistribution', post-apartheid justice had to be 'social justice . . . systemic justice' and, accordingly, what was called for was systemic change.<sup>3</sup>

In effect, though he does not use the term, Mamdani is speaking here of exploitation. He is saying that the TRC failed to grapple with the extent to which, and the ways in which, one section of society had prospered at the expense of another. It failed to grapple with apartheid as a system for using some people as a means for securing the advantage of others. And, if its diagnosis was inadequate, then inevitably its prescription also fell short. Of course, Mamdani does not suggest that South African history is unique in this respect. Exploitation is by no means a feature only of apartheid, and the TRC is by no means alone in choosing not to see it.

<sup>1</sup> M. Mamdani, 'Reconciliation Without Justice' in H. De Vries and S. Weber (eds.), *Religion and Media* (Stanford: Stanford University Press, 2001), p. 377 at p. 385.

<sup>2</sup> *Ibid.*      <sup>3</sup> *Ibid.*, p. 387.

From a Marxist perspective, exploitation is indeed a structural feature of capitalism. Capital accumulation depends on labour exploitation, in turn made possible by the inequalities of bargaining power that arise from class divisions. In other accounts, the focus is on forms of exploitation that are linked to other social divisions, such as those based on gender, race and ethnicity. Exploitation is also, of course, a key preoccupation in histories of imperialism, and in analyses of the global distribution of power and wealth in the contemporary world.

In this chapter, I want to consider international law from the standpoint of an interest in exploitation. In doing so, what is most immediately striking is that, as in the case of the TRC, this is a phenomenon that goes to a large extent unremarked. There is much discussion of discrimination, injustice, exclusion, violence, indignity and abuse. There is a great deal of talk about victims, vulnerable groups, marginalised communities, disempowered populations and less developed countries. But there is very little mention of those on the other side of the equation, those advantaged in these processes and relations. The beneficiaries seem to pass largely unnoticed, or at any rate without comment. To be sure, exploitation is not entirely absent from the vocabulary of international law. The exploitation of children is prominent on the international legal agenda, as is the sexual exploitation of women and, more generally, human trafficking. There is also a long history of international law-making with regard to slavery, forced labour and child labour, while sweatshop working conditions are addressed in international legal instruments that stretch back to the early activity of the International Labour Organization.

Clearly those are all important and very serious forms of exploitation. However, it is equally clear to many of us, I think, that exploitation goes considerably further and deeper than them. In what follows I want to explore something of how much further and deeper it goes. What are the character and proportions of exploitation as a problem in the world today? That is obviously a very big question, which could be investigated in a number of different registers. My investigation will be theoretical, and my guide will be a literature that begins with Marx's analysis of the workings of capitalism, and includes some of the many and varied treatments of the topic by later scholars building on his insights. Against this background, I want to re-focus on international law. What ideas about exploitation inform its engagement in this sphere? What limitations and further potentials are associated with those ideas? The thrust of my discussion will be that there is both the need for, and the possibility of,

a new kind of international legal engagement with exploitation, more adequate to the realities of our rapacious world. But, since exploitation is not only an analytical concept but also a term of everyday speech, I should start by reviewing some of its many connotations.

### 1. Exploitation

What is it to exploit someone? Dictionaries commonly distinguish between a positive or neutral meaning and a pejorative meaning. To exploit in the positive or neutral sense is to make use of, or derive benefit from, resources, assets, skills or opportunities. So, for example, I may exploit a patent, an oil field, or indeed my own talents. To exploit in the pejorative sense is to take wrongful advantage of another person for one's own ends, to pursue one's own gain at another's unfair expense. This, of course, is the sense in which I have been using the term so far. On closer inspection, however, the distinction between these two meanings may not be so stable. Concerns about the impact of intellectual property protection for control over essential medicines, food seeds and indigenous knowledge, and about the social costs of natural resources extraction, both for immediately affected communities and for the planet as a whole, remind us that exploitation in the positive or neutral sense may not always be positive or neutral. It too may involve the pursuit of one person's or collectivity's gain at another's unfair expense.

The term 'exploitation' is a relatively recent addition to the English language. Etymologically it is obviously linked with the word 'exploit', which itself goes back a very long way. The *Oxford English Dictionary* includes citations from the fifteenth and even late fourteenth centuries. As a noun, exploit was initially synonymous with success, progress or, in some usages, command. By the sixteenth century, however, an exploit had come to denote, as it still does, a feat, a marvellous deed, or an achievement displaying exceptional bravery and skill. The word derives from the Latin *explicitum* (that which is unfolded), alluding presumably to the unfolding of events or perhaps (as the related verb 'explicate' may suggest) to the unfolding – in the sense of narrating and interpreting – of adventures. As a verb, exploit had a broadly corresponding meaning. From the fifteenth century to the early nineteenth century, to exploit meant to accomplish, succeed, achieve or act with effect. It was only during the mid- and later nineteenth century that the modern meanings, and particularly the pejorative modern meaning, began to develop, in tandem with the 'process' noun exploitation.

Exploitation, then, entered the English language during the epoch which Eric Hobsbawm has dubbed the ‘age of capital’.<sup>4</sup> These were the years when the expansion of the bourgeois economic mode accelerated dramatically and began to seem boundless and unstoppable. And if industrial capitalism shifted into a new gear at this time, so too did reflection on it. For this was also the time when the term ‘capitalism’ came into currency.<sup>5</sup> The concept of exploitation thus emerged in English concurrently with the emergence of capitalism as a concept and problematic. According to the *Oxford English Dictionary*, the use of the verb ‘exploit’ in its pejorative inflection was initially heard as a Gallicism. It seems likely, however, that alongside French, German (*ausbeuten*: to exploit) was an important influence, since it was above all in the debates and writings which culminated in the publication of Karl Marx’s *Das Kapital* in 1867 that the new concept took off. Maybe there was still some trace, too, of the word’s etymological affinities with ‘explicate’. Exploitation, perhaps, is a form of unfairness or oppression that requires to be unfolded, told about, and scrutinised for its significance and implications. That, at any rate, is the understanding which Marx and his translators helped to foster.<sup>6</sup>

### 1.1. Marx’s analysis

Marx’s account of exploitation appears in the first volume of *Capital*, in the context of his discussion of how capital produces and is produced. Having considered market relations, the sphere of exchange, Marx announces that he will now take his readers down into the gloomier, less edifying domain of production. He had earlier explained how in the market the worker and capitalist meet as equals. The one sells productive capacity – ‘labour-power’ – and the other buys it, on the basis of a freely concluded contract in which equivalent is exchanged for equivalent. Money is paid for labour-power provided, and everyone seems to ‘work together, to their mutual advantage, for the common weal, and in the common interest’.<sup>7</sup> As we descend into the sphere of production, however, things immediately begin to change. As Marx famously describes it, the capitalist now ‘strides out in front . . . smirk[ing] self-importantly and . . . intent on business’, while the

<sup>4</sup> See E. Hobsbawm, *The Age of Capital* (London: Abacus, 1975).

<sup>5</sup> On this, see *ibid.*, at p. 13.

<sup>6</sup> The first English translation of *Das Kapital*, by Samuel Moore and Edward Aveling, appeared in 1887. It was based on the third German edition of volume 1, and was edited by Friedrich Engels.

<sup>7</sup> K. Marx, *Capital*, Vol. 1, B. Fowkes (trans.) (London: Penguin, 1976), p. 280.

worker 'is timid and holds back, like someone who has brought his own hide to market and now has nothing else to expect but – a tanning'.<sup>8</sup> For it is in the production process that the secret of capitalist accumulation is to be found: the extraction of profit out of labour.

How is profit produced? Marx's explanation rests on a distinction between necessary labour and surplus labour. Necessary labour is that which is needed for the worker's own subsistence. Surplus labour is that which goes beyond what is needed for the worker's own subsistence. Marx imagines the worker's day being divided into two. In the first part the worker undertakes necessary labour. During this time, she is working, in effect, for herself. She is covering her own costs, quantified in her wages, that is to say, in the price which the capitalist has had to pay for her labour-power. In the remaining part of the day, the worker undertakes surplus labour. During this time, she is no longer working for herself, but for the capitalist. What she produces belongs to her boss. In the production process, Marx considers that all labour is geared to the creation of 'value'. But while necessary labour reproduces its own value, surplus labour generates profit, or what he calls in this context 'surplus-value'. The proportion of necessary labour to surplus labour determines what he terms the 'rate of surplus-value'. In Marx's analysis, exploitation is the extraction – or, as he also puts it, the 'extortion' – of surplus labour. And the degree of exploitation in any given situation is expressed in the rate of surplus-value.<sup>9</sup>

In his celebrated discussion of the limits of the working day, Marx draws out some of the implications of this analysis. In the first place, capital accumulates by absorbing surplus-value, that is to say, in his terms by exploiting labour. With this in mind, Marx proposes that there is something uncanny about capital, something we intuitively feel is not right. In his memorable image, capital has a vampiric quality, and exhibits a strange kind of living death: '[c]apital is dead labour [i.e. accumulated surplus-value reaped from labour in the past] which, vampire-like, lives only by sucking living labour, and lives the more, the more labour it sucks.'<sup>10</sup> Further, as the last part of this passage suggests, the logic of capital accumulation is that it is always in the interests of the capitalist to exploit workers more, so as to raise the rate of surplus-value. The higher the rate of surplus-value, the more capital can be accumulated. One aspect of this concerns the length of the working day: the longer the working day, the more the rate of surplus-value will rise. But just as

<sup>8</sup> *Ibid.*, p. 280.      <sup>9</sup> See *ibid.*, pp. 320 *et seq.*      <sup>10</sup> *Ibid.*, p. 342.

the capitalist is driven to push for the addition of more hours, so too the worker will want to resist that. Faced with the prospect of having her labour not simply used, but abused or ‘despoiled’, the worker will want to demand fair limits to the working day.<sup>11</sup>

Marx considers that exploitation is a feature of all modes of production based around a social division of classes. Thus, under capitalism, it is the fact that the ruling class owns the means of production, while the working class owns nothing but its own labour-power, that enables the ruling class to extract surplus-value. Workers are induced to undertake surplus labour for their employers because they know that if they don’t, there are others waiting on the sidelines – the ‘reserve army’ of the unemployed – who will. What, for Marx, is distinctive about capitalism compared to other class-based modes of production, such as slavery and feudalism, is that in the capitalist mode of production exploitation is masked. As economist Anwar Shaikh explains, the ‘historical specificity of capitalism arises from the fact that its relations of exploitation are almost completely hidden behind the surface of its relations of exchange’.<sup>12</sup> Whereas in slave-owning and feudal societies the exploitation of labour is readily apparent, in capitalist society labour is paid for and regulated according to a contract negotiated between two seemingly free and equal parties. It is only when we look behind, or beneath, that contract at the relations of production that we find ‘a world of hierarchy and inequality, of orders and obedience, of bosses and subordinates’.<sup>13</sup> We find a world in which the working class works to support the ruling class, and hence ‘to reproduce the very conditions of their [the former’s] own subordination’.<sup>14</sup>

The account of exploitation I have just described obviously aims at explaining the exploitation of labour as an aspect of capitalism. Some scholars have drawn a distinction between this ‘technical’ sense of exploitation and the ‘general’ or everyday sense of exploitation which I sketched out at the beginning of this discussion. The point is commonly made that, in his various writings, Marx used the term in both of these senses. On the other hand, one may equally argue that, even when he was using the term in its technical sense, Marx was referring to the general idea that the gain of some is being pursued at the unfair expense of others. In his chapter on the working day, Marx imagines what a worker protesting the excessive lengthening of the working day might say to his

<sup>11</sup> *Ibid.*, p. 343 (‘Using my labour and despoiling it are quite different things’).

<sup>12</sup> A. Shaikh, ‘Exploitation’, in K. Nielsen and R. Ware (eds.), *Exploitation* (Atlantic Highlands, NJ: Humanities Press, 1997), p. 70 at p. 73.

<sup>13</sup> *Ibid.* <sup>14</sup> *Ibid.*, p. 71 (emphasis omitted).

employer: ‘the thing you represent when you come face to face with me [i.e. capital] has no heart in its breast. What seems to throb there is my own heartbeat.’<sup>15</sup> Exploitation in Marx’s account is expressed in this conceit. Capitalism is an exploitative system because the ruling class *lives off* the working class; it draws its life (or rather its strange, undead existence) from the working class. And the more the ruling class flourishes, the more the working class is debilitated. As Marx put it in an earlier work, ‘in the same relations in which wealth is produced, poverty is produced also’.<sup>16</sup>

### 1.2. *Exploitation today*

Marx wrote in the milieu of nineteenth-century Europe and, specifically, in the case of *Capital*, of Victorian England. This affects the way he writes. His terminology draws on intellectual traditions that were once part of the general public culture and, as such, familiar to all educated readers, but that is no longer the case. At the same time, we no longer speak of people getting their hides tanned, and much of his humour seems quaint to us now. More importantly, Marx’s historical context also affects what he writes, his description and analysis. Of course, the smirking capitalist and cowering worker were always caricatures, but a caricature only exaggerates realities; it does not invent them. Nearly 150 years later, brutal, abusive labour conditions and arrogant, pitiless bosses certainly still exist, but in most legal systems, as well as under international law, workers have rights. More than that, today’s capitalists are commonly employers of a caring, sharing sort. Since Victorian times, the organisation of work has gone through many transformations, and social theorists now speak of productive processes in terms of post-Fordism. In their book, *The New Spirit of Capitalism*, Luc Boltanski and Ève Chiapello describe how in France, for example, approaches to management altered in the mid-1970s, abandoning the hierarchical Fordist model and developing a new network-based form of organisation, founded on employee initiative, issue ownership, and relative work autonomy.<sup>17</sup> Chastened by the criticisms of the 1960s and early 1970s, capitalism took on a new spirit, more sensitive than in earlier times to the dangers of alienation, commodification, disempowerment and unfreedom.

<sup>15</sup> *Capital*, Vol. 1, p. 343.

<sup>16</sup> *Ibid.*, p. 799, n. 23. Marx quotes here from his own earlier work, *Poverty of Philosophy*.

<sup>17</sup> L. Boltanski and E. Chiapello, *The New Spirit of Capitalism*, G. Elliott (trans.) (London and New York: Verso, 2005).

Boltanski and Chiapello do not suggest that this meant that exploitation disappeared; rather, it took on new forms. Shaping these new forms is another great change affecting productive processes in our own time: globalisation. Of the many accounts that have been written of this, one of the most vivid is Naomi Klein's *No Logo*.<sup>18</sup> Klein describes there how the focus of commercial activity in many countries of the global North shifted during the second half of the twentieth century from production to distribution. Instead of making things themselves, companies increasingly preferred to concentrate on marketing. In today's world, clothes, shoes, computers and other manufactured goods are 'sourced', just like natural resources. And just like natural resources, they are mostly sourced from countries of the global South. As Klein points out, the change is not just about where goods are produced. It is also about how they are produced. Manufacturing has become an affair of 'orders', placed with contractors, and through them often a long chain of subcontractors, who must continually compete to fulfil specifications while offering the cheapest possible prices. In this context, exploitation has all the complexity of globalisation itself. On the one hand, and to a greater extent than previously, relations are involved between people in different countries, often separated by many intermediaries. This makes exploitation all the more difficult to grasp. On the other hand, as indicated, it takes on new forms within countries. One contemporary form of exploitation to which Boltanski and Chiapello call particular attention is what they refer to as the exploitation of mobility. As they explain, 'some people's immobility is necessary for other people's mobility', and in today's world the capacity to move about, network and multiply the settings in which one acts and interacts, is a key element in the accumulation of social (and actual) capital.<sup>19</sup>

Just as these changes affecting productive processes have not put an end to exploitation (and may even have exacerbated it in some respects), neither has the fact that workers today have rights. This is not only because those rights are not always protected and respected. It is also because workplace rights do not overcome the structural embeddedness of exploitation, the logics that constantly push for rates of surplus-value to be raised and capital accumulated. These logics are reflected in pressures faced by managers to maximise profits for their shareholders, and by

<sup>18</sup> N. Klein, *No Logo* (London: Flamingo, 2001).

<sup>19</sup> Boltanski and Chiapello, *The New Spirit of Capitalism*, p. 362 (emphasis omitted).

governments in capital-importing states to create conditions favourable to foreign investment. Workplace rights have come under particular strain in countries where governments have vied to attract foreign investment by reducing social protections (the so-called 'race to the bottom'). As many have argued, the conditions of the Victorian factory have been not so much overcome as displaced elsewhere. Despite, then, the very different context in which we study capitalism today, Marx's account of exploitation still remains relevant. Of course, this is not to say that it is universally accepted, nor that it is accepted without qualification by those whom it broadly persuades. In particular, the 'labour theory of value' which underpins the explanation of profit is today widely doubted. This is the idea that the value of a commodity depends on the normal or 'socially necessary' amount of labour time needed to produce it. For G. A. Cohen, the basis for the charge that capitalism is an exploitative system is not that labour creates value, but that only labour creates what has value.<sup>20</sup> Beyond this, three aspects have figured in recent debates: the relation between exploitation and class, the extent to which exploitation involves coercion, and the identification of exploitation with injustice. Let us look briefly at each of these aspects in turn.

In Marx's analysis, exploitation is linked to the inequalities that arise from class divisions. What of other social divisions, such as those based on gender, race, ethnicity and location in the global economy? Relations of exploitation indexed to these kinds of asymmetries were not investigated by Marx, or not to any very significant degree, and (except where raised through the critique of imperialism) had little prominence in classical Marxist thought. In recent decades, however, feminist scholars have thrown light on some of the many ways in which relations between men and women involve exploitation.<sup>21</sup> Likewise, analysts of global political economy have shown how relations between, on the one hand, governments and big corporations and, on the other, peasant farmers in Third World countries also involve exploitation.<sup>22</sup> How are we to situate these

<sup>20</sup> G. A. Cohen, 'The Labor Theory of Value and the Concept of Exploitation', in K. Nielsen and R. Ware (eds.), *Exploitation* (Atlantic Highlands, NJ: Humanities Press, 1997), p. 94.

<sup>21</sup> See, e.g., M. Mies, *Patriarchy and Accumulation on a World Scale* (London: Zed Books, 1986).

<sup>22</sup> See, e.g., S. Amin, *Maldevelopment: Anatomy of a Global Failure*, M. Wolfers (trans.) (London: Zed Books, 1990). See also G. Omvedt, 'Capitalism, Nature, Peasants, and Women: Contemporary Problems of Marxism', in Nielsen and Ware (eds.), *Exploitation*, p. 294.

spheres of exploitation with respect to the sphere of exploitation described by Marx? Is class simply another social division, to be set alongside gender, ethnicity and so on, or does it possess some degree of pre-eminence in a theory of exploitation? Putting the case that class relations do indeed possess some degree of pre-eminence, Shaikh writes:

This does not mean that these other relations lack a history and logic of their own. It only means that within any given mode of production, they are bound to the system by the force field of this central relation, and characteristically shaped by its ever-present gravitational pull.<sup>23</sup>

The claim here is not, then, that class exploitation is more serious or worrying than other sorts of exploitation – clearly it is not. Rather, the claim is that, for example, ‘capitalist patriarchy is distinct from feudal patriarchy precisely because capitalist relations of production are characteristically different from feudal ones’.<sup>24</sup>

Does exploitation involve coercion? Marx writes of workers being ‘compelled’ to sell their labour-power, and depicts surplus labour as an instance of forced unremunerated labour.<sup>25</sup> His later interpreters have attached differing weight to this aspect. However, most are clear that what is at issue is less the action of particular individuals than the impact of general constraints and influences. It is the force of circumstances within the capitalist order that makes people consent to take part in exploitative arrangements.<sup>26</sup> In the case of wage-labourers, this is a matter, as Marx observes, of labour market pressures and the demands of physical survival. But Boltanski and Chiapello emphasise that it is not only a matter of those material constraints; ideology also plays an important part. I will return to this point in later discussion. For the moment, it is enough to observe that, through the operations of ideology, engagement in an exploitative system is made to seem justified and legitimate. Above all, it is made to seem necessary for the common good. The outcome of these processes is what Boltanski and Chiapello understand by the ‘spirit’ of capitalism – a term that refers in their account not so much to a particular ethos (as it did for Max Weber), as to an analytical category, the name for whatever

<sup>23</sup> Shaikh, ‘Exploitation’, p. 74.      <sup>24</sup> *Ibid*, p. 75.

<sup>25</sup> See further, J. Reiman, ‘Exploitation, Force, and the Moral Assessment of Capitalism: Thoughts on Roemer and Cohen’ in Nielsen and Ware (eds.), *Exploitation*, p. 154.

<sup>26</sup> See further, A. Wood, *Karl Marx*, 2nd edn, (London and New York: Routledge, 2004), p. 253.

ideological resources are used to mobilise engagement with the capitalist order in a specific time and place.<sup>27</sup>

The ideological legitimisation of exploitation obviously has social effects. Confronted with the claim that exploitation is a structural feature of contemporary socio-economic life, many people do not accept that this is the case. Others, while accepting that the accumulation of capital does or may involve exploitation, do not consider that this is an undesirable state of affairs. Most of these people presumably regret that some are prospering at others' expense, but believe that exploitation ultimately benefits everyone, including those exploited. Or they believe that there is no better alternative than our current, exploitative arrangements. For yet others, and certainly for Marx, exploitation is unambiguously undesirable. However, should it be characterised as unjust? Some Marxists have argued that it should not, inasmuch as concepts of justice are themselves rooted in specific historical circumstances.<sup>28</sup> Marx makes this point about the historicity of justice in his text published under the title *Critique of the Gotha Programme*.<sup>29</sup> Challenging the idea that socialists should denounce capitalism for its failure to achieve a just distribution of the social product, he asks: 'What is a "just" distribution? Don't the bourgeoisie claim that the present distribution is "just"? And on the basis of the present mode of production, isn't it in fact the only "just" distribution?'<sup>30</sup> From this perspective, exploitation is 'just' in capitalist conditions. However, those conditions are contingent and hence alterable, and exploitation is at the same time unjust from the standpoint of how the world could be.

### 1.3. Key features

Let me try now to draw together some of the threads of my discussion so far. As Iris Marion Young reminds us, exploitation is one of a number of different 'faces of oppression'.<sup>31</sup> What then is its distinctiveness? Based on

<sup>27</sup> See Boltanski and Chiapello, *The New Spirit of Capitalism*, p. 8; cf. M. Weber, *The Protestant Ethic and the Spirit of Capitalism* (London: Routledge, 2001).

<sup>28</sup> See, e.g., Wood, *Karl Marx*, 2nd edn, ch. 9.

<sup>29</sup> *Marx: Later Political Writings*, T. Carver (ed.) (Cambridge: Cambridge University Press), p. 208.

<sup>30</sup> *Ibid.*, p. 211.

<sup>31</sup> I. M. Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990), pp. 48 ff.

the foregoing, seven key features can be highlighted. First, the core meaning of exploitation is concerned with pursuing one's own gain at another's unfair expense. To exploit a person is to use that person as the instrument of one's own ends.<sup>32</sup> Second, in the study of capitalism, exploitation refers to the extraction of profit out of labour. Workers are exploited insofar as they are used to produce and expand capital for others. Systemic imperatives to accumulate more and more capital translate into organisational pressures for more and more exploitation. Third, the extent to which capitalism involves exploitation is not immediately visible. Exploitative relations are disavowed by law, and masked by an ideology that represents participants in the labour market as free and equal. If exploitation is to be challenged or even analysed, it therefore requires exposure; the claims that constitute the surface-level reality must be penetrated to reveal the different truth beneath. This is always difficult, but globalisation has added greatly to the difficulty, insofar as relations of exploitation involve chains of interaction spanning the globe.

Fourth, exploitation is linked to the inequalities that arise from the division of classes. In recent decades, exploitation has been rethought in connection with inequalities arising from other social divisions, such as those based on gender, race, ethnicity and location in the global economy. Marxist scholars argue that, while these latter divisions have their own history and dynamics, class relations mediate them, so that exploitation always remains impressed with the stamp of the capitalist mode of production. Fifth, exploitation may involve abusive working conditions and inhumane, bullying bosses, but it need not. Mostly, the coercion that induces wage-labourers to allow themselves to be exploited comes from the limited options open to those concerned. Ideology also has a key role in legitimating exploitation. Sixth, exploitation is a distributive issue. As Marx's discussion of the limits of the working day reminds us, capitalism is a conflictual system. The appropriate extent of the working day is not just a question of management or economics; it has distributive, and hence political, significance. To contest exploitative relations is to engage in redistributive social struggle. Seventh and finally, informing that struggle is an awareness that, while exploitation may be just by the

<sup>32</sup> This, of course, is often associated with Kant's formulation of the Categorical Imperative: 'To exploit someone is to treat that person purely as a means to your own ends, and not as an "end in themselves".' See I. Kant, 'Groundwork for a Metaphysic of Morals' in *The Moral Law*, H. Paton (ed.) (London: Hutchinson, 1948), pp. 90–1. On the relation between this and the Marxian conception of exploitation, see J. Wolff, 'Marx and Exploitation' (1999) 3 *Journal of Ethics* 105, esp. at 112 ff.

standards which contemporary society sets for itself, those standards are themselves unjust when assessed against the possibility of transformative change. This points to the need to consider exploitation as simultaneously contingent and necessary – contingent, in the sense that things do not have to be as they are, but also necessary, in the sense that exploitative relations are not simply arbitrary or accidental, but belong with the logic of a system which must itself be brought within the frame.

## 2. Exploitation and international law

My focus to this point has been on exploitation in general. Turning now to take up the question of exploitation as an international legal issue, I need to become more concrete. When activists invoke international law to challenge exploitation, when lawyers advise on rights and duties regarding exploitation under international law, and when academics discuss the theme of exploitation in international legal writing, what is it that they have in mind? What do such people talk about when they talk about exploitation? In order to explore this, we will need to move for a while into a different key from the one in which we have proceeded so far. We will need to tune in to the work of international organisations and activists, and to pay attention to the details of treaties and other standard-setting documents, themselves resonant of a variety of epochs, institutions and debates. Later on, we will take stock of this survey of international legal materials, and as we try to develop a picture of how exploitation looks when viewed from the perspective of international law, our discussion will return again to exploitation theory.

### 2.1. *International legal perspectives*

Much of the time, reference to exploitation in international legal materials is to exploitation in the positive or neutral sense indicated earlier: the exploitation of oil and gas, the exploitation of fish stocks and forests, the exploitation of patents, trade marks and copyright, and so on. As I noted then, the distinction between the positive or neutral sense and the pejorative sense of the term ‘exploitation’ may not in fact be as stable as at first appears. Certainly, concerns about the negative impacts of mining, fisheries, forestry and intellectual property rights are reflected in international law, and in writing about it. Such concerns are, of course, the stuff of international environmental law, and have a considerable

history within the law of the sea. Today they are also very much on the agenda of international trade law, international human rights law, and the international law of indigenous peoples' rights. What is important for present purposes, however, is that the issue in these arenas is almost never exploitation (in the pejorative sense) as such. Rather, it is non-sustainability, environmental degradation, expropriation of indigenous property, unfair trade, or the abuse of human rights. Thus, for instance, the TRIPs agreement has been subjected to sustained criticism for its impact on access to drugs needed to treat HIV-AIDS. But while the point is undoubtedly in the background that the shareholders of pharmaceutical companies are being enabled to prosper at the expense of – quite literally, to drain life from – people infected with this disease, this point remains in the background. Front and centre are instead questions to do with the human rights of those infected and the measures that may be taken by governments in poor countries (compulsory licensing, etc.) to make the drugs available. Those who have benefited from patent revenues remain comfortably out of view.

Beyond this engagement with exploitation in the 'positive or neutral' sense, there are also some contexts in which exploitation is used in international legal materials to name a problem, i.e. in a pejorative sense, as part of an effort to secure the redress of something considered bad. The earliest treaty in which this occurs relates to prostitution. In 1949 the United Nations General Assembly approved the text of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. The Convention was designed to supplement earlier treaties dealing with what had been successively termed the 'white slave trade' and 'traffic in women', and was now called 'exploitation of prostitution'. Under Article 1 states parties agree to:

punish any person who, to gratify the passions of another:

1. Procures, entices or leads away, for the purposes of prostitution, another person, even with the consent of that person;
2. Exploits the prostitution of another person, even with the consent of that person.

States parties further agree to punish any person who keeps, finances or knowingly rents a building for a brothel. In the years since 1949 sex has remained a key aspect of what is in issue in international legal activity addressed to exploitation. Under Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women (1979), states parties are obliged to:

take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

More recently, concerns about the heightened prevalence and scale of human trafficking led to the elaboration of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (the 'Palermo Protocol', opened for signature in 2000). The Protocol contains the first definition of exploitation in any treaty.

The Protocol deals with trafficking in persons ('paying particular attention to women and children')<sup>33</sup> where pursued transnationally, as part of organised criminal activity. Obligations are imposed on states parties to criminalise human trafficking, take preventive measures, and provide protection for victims. The Protocol proceeds from a notion of human trafficking as non-consensual recruitment or transfer for the purpose of exploitation. Accordingly, the definition of exploitation is part of the definition of trafficking in persons:

'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>34</sup>

As in the earlier treaties, then, exploitation is understood as sexual exploitation; at the same time, reference is also included to forced labour and other slave-like practices, the removal of organs, and (since the definition is non-exhaustive) other possible practices. This obviously encompasses forced domestic labour – a major element in concerns about human trafficking in many countries today. In 2005 a further anti-trafficking treaty was adopted within the framework of the Council of Europe: the European Convention on Action against Trafficking in Human Beings.<sup>35</sup>

<sup>33</sup> Article 2(a).

<sup>34</sup> Article 3(a). The Convention goes on to provide that the consent of the victim is irrelevant where coercion, fraud and the like have been used, and that, where the victim is a child, even coercion, fraud and the like are irrelevant; it is enough that the child has been recruited, transported etc. for the purpose of exploitation. See Articles 3(b) and 3(c) respectively.

<sup>35</sup> At the time of writing, the Convention had not yet entered into force.

The Convention uses the same concept of human trafficking (and hence exploitation) as the Palermo Protocol, but is somewhat broader in scope, inasmuch as it aims not only at transnational trafficking, but also at trafficking within a single country, and not only at organised criminal activity, but also at trafficking by individuals without ties to criminal organisations. The Convention is part of a wider campaign against human trafficking in the Council of Europe, promoted under the slogan ‘Human being – not for sale’.

Alongside these treaties, exploitation features most prominently in international legal provisions concerning children. In a brief reference which appears in an article dealing also with rights relating to marriage and maternity, the International Covenant on Economic, Social and Cultural Rights (1966) declares that ‘[c]hildren and young persons should be protected from economic and social exploitation.’<sup>36</sup> The Convention on the Rights of the Child (1989) has a more elaborate provision:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.<sup>37</sup>

Here then the focus is again on exploitation as a phenomenon that includes sexual abuse, while also going beyond it. Commercial sexual exploitation of children is addressed in the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, opened for signature in 2000. In preambular paragraphs it is recalled that girl children are especially vulnerable in this regard. The Optional Protocol obliges states parties to criminalise a range of acts, among them ‘offering, delivering or accepting, by whatever means, a child for the purpose of (*inter alia*) sexual exploitation of the child’.<sup>38</sup> Overall, a very considerable proportion of current writing and activism on the theme of exploitation pertains to the exploitation of children, whether that takes the form of commercial sexual exploitation, non-commercial sexual exploitation, or non-sex-based child labour. In recent years, reports have surfaced of the sexual exploitation of refugee and displaced children, and of other children in conflict or ‘post-conflict’ zones – mostly girls – by members of peacekeeping forces, officials of humanitarian agencies, and

<sup>36</sup> Article 10(3).      <sup>37</sup> Article 19(1).      <sup>38</sup> Article 3(1).

aid workers. The abuses also involve adult women, and exploitation of this kind is today a preoccupation within international refugee law and policy, the international protection of human rights, and the legal regulation of peacekeeping operations, among other domains.

With regard to child labour, the various treaties concluded on that subject within the framework of the International Labour Organization, though they do not use the term 'exploitation', are further legal reference points in debates about the exploitation of children. So too is the ILO's 1998 Declaration on Fundamental Principles and Rights at Work, designating the abolition of child labour a universal norm applicable even in the absence of treaty ratification. The earliest ILO instrument in which the term 'exploitation' does actually appear is concerned with indigenous peoples. In the Organization's Indigenous and Tribal Populations Recommendation, adopted in 1957, it is advised that ILO member states should take administrative measures to 'prevent the exploitation of workers belonging to the populations concerned on account of their unfamiliarity with the industrial environment to which they are introduced'.<sup>39</sup> A 1983 Recommendation relates the problem of labour exploitation to disability: the need is highlighted for member states to lend support to initiatives designed to 'eliminate the potential for exploitation [of people with disabilities] within the framework of vocational training and sheltered employment'.<sup>40</sup> A further Recommendation in the following year extends the concern to migrant workers: member states in the position of both countries of employment and countries of origin are enjoined to take measures to 'prevent the exploitation of migrant workers'.<sup>41</sup> The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, opened for signature within the framework of the UN in 1990 and in force since 2003, sets out the rights of migrant workers across a wider range of spheres than those touched

<sup>39</sup> Indigenous and Tribal Populations Recommendation, 1957, ILO Recommendation No. 104, para. 36(g). The later Convention on Indigenous and Tribal Peoples in Independent Countries, 1989 (ILO Convention No. 169) is more demanding with respect to the guarantee of fair working conditions for indigenous employees. However, it does not use the term 'exploitation'. See Article 20.

<sup>40</sup> Vocational Rehabilitation and Employment (Disabled Persons) Recommendation, 1983, ILO Recommendation No. 168, para. 11(m).

<sup>41</sup> Employment Policy (Supplementary Provisions) Recommendation, 1984, ILO Recommendation No. 169, para. 43(b). Exploitation of workers in the maritime sector is also touched on in the ILO Maritime Labour Convention, 2006: see Guideline 1.4.1, para. 2(d) and (e).

on in the ILO Recommendation. In that treaty, however, the only reference to exploitation is to exploitation in the sphere of housing. Certain categories of migrant workers are said to have the right to equality of treatment with nationals of the state of employment with respect to (*inter alia*) ‘access to housing, including social housing schemes, and protection against exploitation in respect of rents’.<sup>42</sup>

A final category of international norms and standards which is widely understood to touch on issues of exploitation, even if (as with child labour) the term is not actually used, has to do with slavery, forced labour and pay and conditions at work. Slavery is a longstanding topic within international law, and the prohibition of forced labour and other similar practices is well established within international human rights and labour law. Beyond this, the Universal Declaration of Human Rights proclaims the right of everyone to ‘just and favourable conditions of work’, ‘equal pay for equal work’, and ‘just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity’.<sup>43</sup> The Declaration also proclaims the right of everyone to ‘form and to join trade unions’ and to ‘rest and leisure, including reasonable limitation of working hours and periodic holidays with pay’.<sup>44</sup> State obligations with regard to these matters are specified further in provisions of the International Covenant on Economic, Social and Cultural Rights (1966) and other human rights treaties, where protection is given as well to the right to safe and healthy working conditions.<sup>45</sup> State obligations are also specified in the many treaties and other non-binding instruments that have been adopted within the framework of the ILO, on topics ranging from the eight-hour day and forty-eight-hour week (the ILO’s first convention, adopted in 1919) to the rights and protection at work of seafarers (the Maritime Labour Convention, adopted in 2006).<sup>46</sup> It is notable, however, that the online ‘ILO Thesaurus’ – ‘a compilation of more than 4,000 terms relating to the world of work . . . in English, French, and Spanish . . . [which] covers labour and employment policy, human resources planning, labour standards, labour administration and labour relations, vocational training, economic and social development, social security, working conditions, wages, occupational safety and health and enterprise promotion’ – does not include the word ‘exploitation’.<sup>47</sup>

<sup>42</sup> Article 43(1)(d).      <sup>43</sup> Article 23(1), (2) and (3).      <sup>44</sup> Articles 23(4) and 24.

<sup>45</sup> E.g., International Covenant on Economic, Social and Cultural Rights, Article 7(b).

<sup>46</sup> See Hours of Work (Industry) Convention, 1919, ILO Convention No. 1, and Maritime Labour Convention, 2006.

<sup>47</sup> See [www.ilo.org/public/libdoc/ILO-Thesaurus/english/](http://www.ilo.org/public/libdoc/ILO-Thesaurus/english/).

## 2.2. *False contingency*

We now have some elements towards an answer to the question: what do people engaged with international law talk about when they talk about exploitation? Of course, the materials I have reviewed are only indicative, not conclusive, and ultimately no available meaning is foreclosed. With that caveat, a few points emerge. It is clear that what is in question is very often sexual exploitation, affecting primarily women and girls. Here exploitation is a form of violence against women or child abuse. Where trafficking is involved, it is also a large and lucrative domain of transnational crime. The focus of international legal initiatives is accordingly on the creation of an adequate regime of crime control, and on the implications for human rights, the rights of refugees, the legal regulation of peacekeeping, and so on. A further point is that these initiatives are linked through the concept of exploitation to a history of international law-making that goes back to the moral panics about prostitution and 'white slavery' of the first half of the twentieth century in parts of Europe and the United States. To note this link is not to suggest that contemporary concerns about human trafficking are merely moral panics. It is, however, to contemplate the possibility that there remain traces of the earlier thinking within the international legal imagination, and that one aspect of these traces may be to place morality at the centre of what is at stake. I will return to this point in a moment.

Additionally, and alongside these concerns, exploitation is associated in international law with slavery, forced labour and other slave-like conditions. More generally, it is associated with the denial of decent working conditions and of fair pay. On the other hand, the fact that the word 'exploitation' is not normally part of the 'official', formal discourse of the ILO and other organisations on these matters may suggest a perception that the concept of exploitation does not belong in the sphere of labour regulation, perhaps because it is too political, or too divisive, or simply too embarrassing. A final observation relates to the exceptional contexts in which the word 'exploitation' has been used. Labour standards in these contexts are hard to detach from the long history of paternalism towards indigenous peoples, people with disabilities, and other groups represented by the authorities as incapable, helpless, and touchingly innocent of the ways of the world. Needless to say, this is a posture more conducive to justifying exploitation than to curbing it. The ILO's 1957 Indigenous and Tribal Populations Recommendation illustrates something of the problem when it manifests concern that indigenous workers may be exploited 'on account of their unfamiliarity with the industrial environment to

which they are introduced' – but not concern that, through this industrial environment, the individuals in question have been left with no means of subsistence other than exploitative wage-labour. As with sexual exploitation, so too in the sphere of labour exploitation, the supersession of this earlier phase of international legal activity may not be complete.

If we compare all this with the account of exploitation which I outlined earlier, and resolved eventually into seven key features, it is obvious that there are some commonalities, but also some important differences. To begin with the commonalities, all the international legal materials we have reviewed exhibit the first feature of exploitation in my list. Whatever the specific concern, exploitation is always understood as a matter of pursuing gain at another's unfair expense. While greater emphasis is placed in some contexts than in others on taking wrongful advantage of another person's vulnerability, the core idea of treating someone as the instrument of one's own ends is invariably there. The differences start to appear as soon as we come to the question of what that entails. The second feature of exploitation I highlighted concerns the extraction of profit out of labour. Systemic imperatives within capitalism generate organisational pressures for more and more exploitation. Marx illustrates this point with reference to the struggle in Victorian England over the length of the working day. In our own time, the most striking illustrations come perhaps from the world of the 'export processing zone', where order-driven manufacturing has fostered employment that in some places again involves unconscionably long hours, intermittent pay, poor health and safety standards, and only the barest rest and leisure.<sup>48</sup> As we have seen, international law insists that workers have rights to fair pay and decent conditions. In doing so, however, its implicit message is that exploitation is work gone wrong. Exploitative employment appears as a kind of pathology of the labour contract. What the Marxian analysis brings out is that, on the contrary, exploitation belongs with the normal functioning of a system in which capital accumulation depends on labour exploitation. In Marx's language, capital is dead labour reanimated by sucking living labour 'and lives the more, the more labour it sucks'.<sup>49</sup> There is a systemic impetus, a momentum and an orientation, towards practices and relations that are more and more exploitative.

<sup>48</sup> See, e.g., Oxfam, *Trading Away Our Rights: Women in the Global Supply Chain* (Oxford: Oxfam, 2004).

<sup>49</sup> *Capital*, Vol. 1, p. 342.

I pass over my third key feature of exploitation and return to it later. As for the fourth, regarding the link between exploitation and social inequalities, international legal engagement with human trafficking and child exploitation has made vivid the relation between exploitation and inequalities in the sphere of gender. It has also highlighted the important point that these inequalities affect not only the extent, but also the forms of exploitation. Most obviously, women and girls are disproportionately exposed to exploitation for sex and domestic work. But which women and girls are disproportionately exposed? While the question of the 'root causes' of human trafficking is part of the debate, it cannot dispose of the much larger question of the socio-economic conditions in which this activity becomes possible and develops – not just as a category of transnational crime, but also, of course, as a branch of business. The fifth key feature to which I called attention relates to the issue of coercion. Some forms of exploitation are manifestly based on duress. More commonly, however, what is involved is voluntary employment. 'Human being – not for sale' is a good slogan for an anti-trafficking campaign, but from another perspective, the sale of people compelled through the force of circumstances to alienate their own energy, time, and hence life – their 'labour-power' – is the quintessential capitalist transaction. To be sure, the system depends on their not giving up all of this at once: as Marx explains, for labour-power to remain a saleable commodity, its owner must retain ultimate ownership over it. He must give it up only 'for a definite period of time, temporarily'.<sup>50</sup> On the other hand, for the capitalist to find labour-power in the market, the worker, 'instead of being able to sell [things produced with his labour], must rather be compelled to offer for sale as a commodity that very labour-power which exists only in his living body'.<sup>51</sup> The point here is not that wage-labour is indistinguishable from forced or trafficked labour, still less that the degree and nature of labour exploitation remain always the same, and always objectionable in the same measure. The point is simply that account must be taken of the compulsion that comes not from violence, threats or deceit, but from the limitation of options and the denial of opportunities.

At stake in the sixth feature I enumerated is the character of exploitation as a distributive and hence inescapably political issue. In exploitative relations, a redistribution occurs, such that the advantage of some is bought at the cost of the disadvantage of others. Some gain, while others lose. Thus, for Marx, the exhaustion of the worker corresponds to the enrichment of

<sup>50</sup> *Ibid.*, p. 271.      <sup>51</sup> *Ibid.*, p. 272.

the capitalist. More generally, privilege is linked to deprivation. It follows that challenge to exploitation is itself a redistributive demand, a demand for a new allocation of what is collectively available – in effect, a new political settlement. In the international legal materials we have surveyed, relatively little is evident of this ‘political’ aspect. The problem and its solution seem to lie in the domain of morality, culture, expertise, administration, or law. Anti-trafficking initiatives aim at the implementation and enforcement of criminal sanctions, along with preventive measures and victim protection. Likewise, the focus of efforts concerning child labour, forced labour and unfair employment is on regulatory action, backed up by public education. Antedating the current campaign against human trafficking, we have seen, is an earlier episode of international law-making pursued under the signature of moral rectitude and patriarchal power. Whatever the place of morality and patriarchy in contemporary debates, the impression is of exploitation as a local dysfunction, and something which we may look to the state and civil society to correct. This brings me to the final feature of exploitation in my list, the insight that exploitation is contingent, but also, at another level, necessary. That exploitative arrangements should, and could, be different is an important theme of critical international legal scholarship.<sup>52</sup> This is also, of course, the premise from which activism for global justice proceeds. What is less frequently observed is the Marxian point that these arrangements are not simply random facts, but coherent elements within the dynamic totality of the world as a whole. While assuredly unjust from the standpoint of transformative change, exploitation must be recognised as functional to – and hence, in another sense, just within – current conditions. Against the false contingency that leaves us to think of injustice as arbitrary or accidental, exploitation theory invites us to see that there are instead systemic logics at work. The silence of international law’s interlocutors about these systemic logics is their silence about capitalism.

### 2.3. *The ideology of mutuality*

If exploitation as an international legal issue maps only inadequately onto the much more pervasive reality described by Marx and later analysts, why is this so? How are we to account for such a disjuncture between

<sup>52</sup> Perhaps more than any other international legal scholar, David Kennedy has thematised this issue of winners and losers. See, e.g., D. Kennedy, *Dark Sides of Virtue* (Princeton, NJ: Princeton University Press, 2004).

international law and material reality? Quite obviously the explanation is to be sought in the play and interplay of many different phenomena. Of these I am interested now in just one: ideology. I use the term ‘ideology’ to refer to the rhetorical and other symbolic processes that help to sustain prevailing privilege by making it seem justified and legitimate. These processes can work in a wide – indeed infinite – variety of ways, but in broad terms we may note two principal patterns. On the one hand, privilege may be rationalised or ‘spun’. For example, it may be made to seem desirable, natural, essential or inevitable. On the other hand, privilege may be masked. That is to say, it may be concealed behind something more acceptable. While ideology is often associated with the notion of false consciousness, neither of these patterns involves falsehood insofar as both partly constitute the truth of the privilege at stake. In earlier discussion I recalled something of the legitimating ideology of capitalism. What is distinctive about capitalism compared to other class-based modes of production, I recalled, is that in the capitalist mode exploitation is masked. (This was the third in my enumeration of key features of exploitation, put to one side earlier on.) Whereas in slave-owning and feudal societies exploitation is entirely patent, in capitalist society it gets concealed behind the formal freedom and equality of the labour market. Hence Marx’s spatial image of surface and depths. On the surface is a ‘very Eden of the innate rights of man . . . [in which the capitalist and the worker] contract as free persons, who are equal before the law’.<sup>53</sup> It is only when we move from the glare of exchange down into the depths of production that a different picture of wage-labour begins to emerge.

This analysis remains pertinent, but in reflecting on the engagement of international law with exploitation, I want additionally to consider another aspect of what legitimates privilege in the contemporary world. This aspect might be called the ideology of ‘mutuality’. Marx in fact touches on it in a passage I have already cited, but which is worth repeating here. In the ‘very Eden’ that is the surface-level in capitalist society, not only are the parties to the labour contract free and equal; they also ‘work together to their mutual advantage, for the common weal, and in the common interest’.<sup>54</sup> If this idea could serve as ideology in Marx’s day, it has become absolutely central to legitimation processes in the twenty-first century, when the *Zeitgeist* is surely all about mutual advantage. Our talk is of ‘win-win’, ‘good for the planet, good for you’, and ‘a rising tide lifts all boats’. We study techniques of ‘principled negotiation’, ‘mutual gains

<sup>53</sup> *Capital*, Vol. 1, p. 280.      <sup>54</sup> *Ibid.*

bargaining', and 'creative collaboration'. Synergies, interdependence, and teamwork are our abiding preoccupations, and when someone claims to discern a 'zero-sum' game, we say: try harder, there is always some angle from which everyone can be shown to be better off. In many ways we are actually quite aware of inequalities today. To a much greater extent than in Marx's time, we confront discrimination (albeit, of course, still very partially and inadequately) – even its subtle forms, like institutional racism. What we seem to find much more difficult to contemplate is exploitation. Fortunately, when the going gets tough, there are always economists, policy analysts and even philosophers on hand, ready to allay our fears by explaining that those who lose actually also win. What exploitation theory reminds us is that this is ideology. Concealed behind the veneer of mutuality is a reality in which (to speak again with Marx) 'in the same relations in which wealth is produced, poverty is produced also'.<sup>55</sup>

I referred earlier to the account of the 'new spirit of capitalism' put forward by Boltanski and Chiapello. I explained that, for them, capitalism's 'spirit' is comprised of the ideological resources used to mobilise engagement with it in specific circumstances. Ideological resources dialectically generate critical resources – more concretely, they generate critiques. At one level, the history of modernity can be told as a story of episodic moves to disarm these critiques, followed by their re-arming in connection with the renewal of ideology. Boltanski's and Chiapello's story about post-Fordism in France is an instance of this.<sup>56</sup> The new network-based form of organisation disarmed the earlier critiques of alienation, commodification, disempowerment and unfreedom. In doing so, however, it brought with it fresh ideology, and hence the necessity, and ground, for fresh critique. It is here that the ideology of mutuality assumes importance – not, as indicated, because it is novel, but because within expert discourses, everyday talk and indeed unspoken 'common sense' it has acquired new significance and new centrality. And if mutuality has become central to the legitimating ideology of capitalism today, then equally, exploitation must become central to the critique of that ideology. Against the ideology that asserts that 'a rising tide lifts all boats' etc. must be counterposed the critique of a distribution of advantages and disadvantages which is systematically asymmetrical. It bears some emphasis that the claim here is not that ideology involves falsehood. Perhaps a rising tide does actually

<sup>55</sup> See n. 16 above.

<sup>56</sup> On the 'disarming' and 're-arming' of critiques, see Boltanski and Chiapello, *The New Spirit of Capitalism*, pp. 27 ff., pp. 483 ff., and *passim*.

lift all boats. I am not sure that I fully understand the implications of this phrase as it is used by economists and others, but I am willing to accept that it may be true. Rather, the claim is that ideology masks, conceals, or screens off other important aspects of reality; in effect, it takes up too much space and prevents us from seeing oppression. To return to the ideological phenomena with which Marx was concerned, the parties to the labour contract really do contract as formally free agents, and they really are equal before the law. But just as the freedom and equality of the labour market masks the unfreedom and inequality that prevails in productive relations, so too mutuality (however real) masks exploitation.

### 3. Conclusion

Let me briefly recapitulate before concluding. I began by observing that the problem of exploitation goes largely unremarked in international law. Insofar as this problem is remarked, I have argued that international legal discussions do scant justice to the much richer concept explicated by Marx and later analysts. I have suggested that this may have something to do with what I have called the ideology of mutuality, inasmuch as that tends to obscure the extent to which enhancements of the life-chances of some are linked to limitations of the life-chances of others. The thrust of my analysis is that international law needs to develop a new kind of engagement with the problem of exploitation. In drawing this chapter to a close, I will outline in a moment some possible aspects of this. But first, the question arises, *could* this occur? On one view, international law is enmeshed at a fundamental structural level with the exploitative logics of capitalism in a way that removes all emancipatory potential.<sup>57</sup> However valid the premises of such an argument, to my mind the conclusion does not follow. It fails to take sufficient account of the contradictoriness that defines our world, and of the immanence of counter-logics, obscured through ideology, but nonetheless available for reactivation in the service of emancipation through critique.<sup>58</sup>

What then would this new engagement with the problem of exploitation entail? It would place at the centre of international law the question of beneficiaries. International law has long been preoccupied with

<sup>57</sup> This view has received eloquent expression in the work of China Miéville. See C. Miéville, 'The commodity-form theory of international law', Chapter 3 in this volume, and *Between Equal Rights* (Leiden and Boston: Brill, 2005).

<sup>58</sup> I elaborate on this in 'International Judicial Activism and the Commodity-Form Theory of International Law', (2007) 18 *European Journal of International Law* 199.

victims – victims of human rights abuse, victims of discrimination, victims of war crimes. In recent years, with developments in the sphere of international criminal law, it has also become much preoccupied with perpetrators. But, as Mahmood Mamdani observes in comments recalled at the beginning of this chapter, beyond victims and perpetrators there are also beneficiaries. We should not be simplistic about this. If perpetrators are often also in some sense victims (not least, as in the case of apartheid, victims of a brutalising, militarist, hypermasculine culture), and if victims are apt themselves to become perpetrators (as Mamdani himself showed in later work on Rwanda),<sup>59</sup> so too beneficiaries may be advantaged in some contexts, while being disadvantaged in others. The category of ‘beneficiary’ refers less to a particular group of people than to a particular facet of human experience. To place the question of this facet of experience at the centre of international law is to move onto the international legal agenda issues that include, but also go far beyond, those currently subsumed under the topic of exploitation.

At the same time, a more adequate engagement with the problem of exploitation would also bring out the connections between these issues, and orient international law to a vision of the world as a structured totality. Quite obviously, exploitation is only one of many critical concepts that can be deployed to throw light on the asymmetrical distribution of advantage within countries and across the globe. Social exclusion and human rights are two alternative concepts that have particular currency today. Social exclusion is useful in pointing to the forms which deprivation can take – its phenomenology and at least some aspects of its sociology. But, as Boltanski and Chiapello observe, since no one seems to profit from social exclusion, ‘no one can be deemed responsible . . . unless out of negligence or error’; the focus is on easing personal misfortune.<sup>60</sup> Human rights do fix responsibility: the state has the obligation to respect and ensure rights. But the obligations of the state are largely exhausted by regulatory measures. Since, once again, no one seems to profit, no need appears to arise for systemic change; the focus is on remedying official misconduct or inadvertence. What is distinctive about the concept of exploitation is that it re-specifies deprivation, not just as a matter of personal misfortune, and not just as an instance of official misconduct or inadvertence,

<sup>59</sup> M. Mamdani, *When Victims Become Killers* (Princeton, NJ: Princeton University Press, 2002).

<sup>60</sup> Boltanski and Chiapello, *The New Spirit of Capitalism*, p. 354.

but as a relational, redistributive, and ultimately systemic, problem, with necessarily systemic solutions.

Of course, simply grasping exploitation can itself be hard. This is especially the case in our own time, when what is in question is so often, and perhaps to a greater extent than ever before, less a matter of face-to-face relations than of long and complex chains of interaction. Exploitation today frequently involves people at distant locations, acting in ignorance of one another and through many intermediaries. How is one to 'relate the activity of a dealer in a trading room in London to the poverty of street-children in the shantytown of an African city'?<sup>61</sup> Boltanski and Chiapello call attention here to the difficulty, yet, in doing so, exemplify its evasion: the dealer is in London, while the street-children are somewhere in 'Africa'. Finally, then, a more adequate kind of engagement with the problem of exploitation would point up the enormity and complexity, but also the irreducible specificity, of this facet of contemporary life.

<sup>61</sup> *Ibid.*, p. 373.