
International Law as Primitive Accumulation; Or, the Secret of Systematic Colonization

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Abstract

This article aims to bring the category of 'primitive accumulation' into the vocabulary of critical and Marxist international legal theory. It does so by first elaborating the critique of international law that has recently developed through the lens of colonialism, by bringing to bear on the issue Marx's thinking about colonization and thus his arguments concerning accumulation. In so doing the article also seeks to be an immanent critique of critical international legal theory itself, by suggesting that critical international legal theory is limited by its failure to properly use and think through what Marx might offer. The bulk of the article involves some historical claims, but the central argument is theoretical: offering a category to consolidate the connections that have been made among capital, colonization and international law. This requires a revelation of the secret of Marx's Capital; the secret of capital and the secret of systematic colonization, all of which takes us to the secret of international law.

Writing in 1996 in a book called *Was Ireland Conquered?* Anthony Carty suggested that one of the major deficiencies in the analysis of international law is that 'no systematic undertaking is usually offered of the influence of colonialism in the development of the basic conceptual framework of the subject'.¹ Carty was highlighting the fact that in mainstream studies of international law, colonialism was for a very long time – indeed, since the inception of international law – either ignored or figured only as a problem, a phenomenon about which international law must have some rules or would have to develop some even better rules. As David Kennedy put it in the same year, when colonialism *had* been tackled as an issue in international law it was treated as either a rare and aberrational feature or as part of a mythical 'pre-legal' world of

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¹ A. Carty, *Was Ireland Conquered? International Law and the Irish Question* (1996), at 5.

war and ideology.² Neither claim was entirely true, in that there had already been a number of works seeking to identify the centrality of colonialism to international law: B. S. Chimni, for example, explored at length the colonial question in his book *International Law and World Order*, published in 1993, and Anthony Anghie had honed in on the general significance of colonialism in international law in his extended treatment of the *Nauru Case* in an article published the same year as Chimni's book.³ Yet notwithstanding these works, the overall thrust of Carty's and Kennedy's comments rings true.

This was a situation that was to quickly change, in that the remarkably small amount of work on this issue prior to the mid-1990s was dwarfed by the enormous body of literature which then emerged. Writing in the same year as Carty and Kennedy, for example, Anghie pressed home the centrality of the colonial to international law,⁴ and since then, a huge and generally impressive body of work has reasserted and extended the argument.⁵ It is now fair to say that colonialism is seen, at least among the *critical* wing of the international legal community, as 'continuing, systematic, and ingrained in international law'.⁶ The 'vocabulary of international law' is now accepted (again, at least among critical international lawyers) to be deeply connected to the 'grammar of colonization'.⁷ Indeed, the most insightful work in this field has shown at length that far from being merely a particular problem to be dealt with, international law in fact *assumes colonialism*. In his extended treatment of this subject, China Miéville suggests that it is not that international law has been obscured by colonialism, or even that international law is a result of colonialism, but that international law *is* colonialism; colonialism is a constitutive part of international law.⁸ Colonialism is achieved

² Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', 65 *Nordic Journal of International Law* (1996) 385, at 397.

³ B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (1993), at 223–226; Anghie, "'The Heart of My Home": Colonialism, Environmental Damage, and the Nauru Case', 34 *Harvard International Law Journal* (1993) 445.

⁴ Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law', 5 *Social and Legal Studies* (1996) 321.

⁵ S. N. Grovogui, *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (1996); Gathii, 'Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy', 8 *Michigan Law Review* (2000) 1996; E. Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (2002); Chimni, 'Third World Approaches to International Law: A Manifesto', in A. Anghie, B. Chimni, K. Mickelson and O. Okafor (eds), *The Third World and International Order: Law, Politics and Globalization* (2003) 47; P. Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (2003); Berman, "'The Appeals of the Orient": Colonized Desire and the War of the Riff', in K. Knop (ed.), *Gender and Human Rights* (2004) 195; A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005); C. Miéville, *Between Equal Rights: A Marxist Theory of International Law* (2005); Chimni, 'An Outline of a Marxist Course on Public International Law', 17 *Leiden Journal of International Law* (2004) 1; Koskenniemi, 'Empire and International Law: The Real Spanish Contribution', 61 *University of Toronto Law Journal* (2011) 1.

⁶ Gathii, *supra* note 5, at 2020.

⁷ On the 'vocabulary' see Anghie, *supra* note 5, at 9, 38, 41, 110, 113, 193, 296. On the 'grammar' see P. C. Mancall, *Hakluyt's Promise: An Elizabethan's Obsession for an English America* (2007), at 129.

⁸ Miéville, *supra* note 5, at 169, 226; Grovogui, *supra* note 5, at 3.

most effectively not simply through violence, but through law – that is, through the violence of law – and in this very same process international law has been shaped.⁹

So if there is one abiding achievement of critical international legal thought in the last 20 years it has been to make international law take seriously the question of the colonial.

And yet, within this body of work, accumulation often goes unmentioned, and, more specifically, the concept of primitive accumulation is nowhere to be found. By ‘primitive accumulation’ I mean the category Marx used to describe the use of force and violence in separating people from a means of subsistence other than the wage, and I am highlighting it here for reasons that will become clear.

Take a few recent examples: first, the set of critical essays edited by Fleur Johns, Richard Joyce and Sundhya Pahuja, entitled *Events: The Force of International Law*.¹⁰ One has to get through close to 200 pages before one gets any mention of accumulation of any sort, and then it really is only a mention, made almost in passing. Note too that despite the various historical ‘events’ in the book, from the debate at Valladolid in 1550, the Peace of Westphalia, the *levée en masse* in France in 1793, the Paris Commune of 1871, the moment of decolonization and so on, accumulation gets mentioned only in the two essays on the recent/current place of the WTO. Accumulation in general gets in, then, but not as history, and it seems to barely count as part of international law. And thus ‘primitive accumulation’, as a critical concept, is nowhere. I do not wish to sound too negative about what is, after all, a collection of very good essays. But did the debates at Valladolid have absolutely nothing to do with accumulation? Was Westphalia really only about sovereignty and not dominion and therefore accumulation? Was there really no space for any other historical ‘events’ that might raise the question of accumulation more directly? The index is itself rather telling: an entry for ‘actually existing socialism’, but not ‘accumulation’ and certainly not ‘primitive accumulation’; ‘exploration’ but not ‘exploitation’; plenty of ‘Badiou’, but no sight of ‘Marx’.

Similarly, Anne Orford’s edited text on *International Law and its Others* also contains some very good essays but mentions accumulation *even less* than *Events*; which is to say: *not at all* – not one reference to accumulation, let alone primitive accumulation. The themes of ‘responsibility, desire, violence’, ‘conflict’, the ‘liberal individual’ and the ‘sovereign state’ are all there, and there is much talk of ‘others’ – savages, barbarians, mobs, races, subalterns – but not accumulation. We get plenty of references to Schmitt and even his description of ‘land appropriation as a constitutive process of international law’¹¹ but very few to Marx and his description of land appropriation as central to capitalist accumulation. The desire to situate the collection at the

⁹ Hence Matthew Craven’s suggestion that *decolonization* had to simultaneously put into question the very basis on which international law itself had been constructed; M. Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (2007), at 16.

¹⁰ E. Johns, R. Joyce and S. Pahuja (eds), *Events: The Force of International Law* (2011).

¹¹ C. Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (1950), trans. G. L. Ulmen (2003), at 80–83.

‘disruptive edges’ of the discipline are expressed,¹² and the logic of critique is asserted as the key method, but it is Kant rather than Marx who gets cited as the authority in this regard. Likewise, Anthony Anghie’s excellent book on imperialism and international law again stars savages and races, but primitive accumulation fails to appear on the stage of world history in even a walk-on role (as is the case with Anghie’s earlier essays).¹³ Even China Miéville’s extended analysis of international law from a Marxist perspective avoids using the category apart from in one fleeting reference. ‘Fleeting’ is also the way one might describe the one occurrence of ‘primitive accumulation’ in *Law and Globalization from Below*, in which colonial exploitation figures widely.¹⁴

Finally, we might note that the set of essays edited by Susan Marks as *International Law on the Left*, a book dealing explicitly with Marxism and international law (the book’s subtitle is ‘*Marxist Legacies*’; some of the chapters are developed from a symposium on Marxism and international law held at The Hague in 2003 and then published by the *Leiden Journal of International Law* under the heading of ‘Marxism and international law’), has next to nothing to say about primitive accumulation. Anthony Carty’s contribution to the book cites David Harvey on the need for a general re-evaluation of the role of primitive accumulation in the long historical geography of capital, but not much is made of it there and next to nothing is said about it in the rest of the book.¹⁵ Thus even a major collection bringing specifically Marxist analyses to bear on the question of international law appears uninterested in the idea of ‘primitive accumulation’.

This last example points us to a broader issue in critical international legal thought during the period in which critical international law has highlighted the colonial: Marx appears, but in a strangely mute form. This muteness is most obvious concerning one of the central categories through which he spoke about ‘the colonial’ as capital and capital as colonization, namely ‘primitive accumulation’. Let me give two examples of attempts by key figures within critical international legal studies to insist on the relevance of Marx and the possibility of a class approach to international law to illustrate the point. First, Martii Koskeniemi’s article ‘What Should International Lawyers Learn from Karl Marx?’, reprinted as a chapter in the collection of essays edited by Marks. The discussion there is centred on a demand for ‘international justice’ that Koskeniemi thinks can be developed out of Marx’s work, with no mention of primitive accumulation. This is despite the fact that Marx has absolutely nothing to say about ‘international justice’, yet devotes a fair amount of *Capital* to primitive

¹² Orford, ‘A Jurisprudence of the Limit’, in A. Orford (ed.), *International Law and its Others* (2006), at 4, 5.

¹³ Thus, for example, his essay ‘The Heart of My Home’ highlights dispossession and self-determination rather than accumulation, *supra* note 3.

¹⁴ Anghie, *supra* note 5; Miéville, *supra* note 5, at 207; de Sousa Santos, ‘Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality’, in B. de Sousa Santos and C. A. Rodriguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (2005) 29, at 40. I am grateful to Hayley Gibson for drawing my attention to the third of these texts.

¹⁵ Carty, ‘Marxism and International Law: Perspectives for the American (Twenty-first) Century’, in S. Marks (ed.), *International Law on the Left: Re-examining Marxist Legacies* (2008) 169, at 184, citing D. Harvey, *The New Imperialism* (2003), at 144.

accumulation. However, by connecting the 'international justice' he thinks underpins international law to Marx's argument concerning a universal class which can redeem itself only through the total redemption of humanity, Koskenniemi performs a remarkable feat in which international law is said to offer an 'emancipatory promise' of the very kind Marx thought needed to be brought about by a revolutionary class. This perverse treatment of Marx is compounded in a recent article on empire and international law in which the latter's role in creating 'a structure of human relationships that we have been accustomed to label "capitalism"' is outlined, yet which ignores Marx entirely despite the fact that Marx's life work concerns the very same structure of human relationships called 'capital', despite the fact that he analyses these relationships through the lens of colonization, and despite the fact that he uses the category 'primitive accumulation' to do so.¹⁶

The second example is the recent work of B. S. Chimni. In his earlier book *International Law and World Order* Chimni mentions Marx on primitive accumulation, yet does so only in passing and solely with reference to a historical period he calls 'old colonialism', from 1600 to 1760. There is thus no attempt to integrate the category into the wider attempt to 'clarify and articulate a Marxist theory of international law' in the book. Indeed, his description of a period of primitive accumulation during 'old' colonialism more or less limits the category to understanding 'the emergence of the capitalist order';¹⁷ but as we shall see, there is far more to the category than this. More recently, Chimni has published an article, 'Prolegomena to a Class Approach to International Law', in the *European Journal of International Law*,¹⁸ and 'An Outline of a Marxist Course on International Law' in the *Leiden Journal of International Law* and reprinted in *International Law on the Left*.¹⁹ Yet in 'Outline of a Marxist Course' no discussion of primitive accumulation occurs; indeed, accumulation itself barely gets mentioned.²⁰ By the time of the 'Prolegomena to a Class Approach' the possibility of using Marx for the purposes of critical international legal theory diminishes even further. Chimni suggests that 'a central feature of capitalism is ... its inherent tendency to spatial expansion', but 'this fact was not integrally factored into Marx's understanding of capitalism'²¹. This is a bizarre claim, since capital's tendency to spatial expansion was a main theme of Marx's work.²² However, Chimni makes his point in order to

¹⁶ M. Koskenniemi, 'What Should International Lawyers Learn from Karl Marx?', 17 *Leiden Journal of International Law* (2004) 229, reprinted in Marks, *supra* note 15, at 30–52; Koskenniemi, *supra* note 5, at 32.

¹⁷ Chimni, *supra* note 3, at 224, 295.

¹⁸ Chimni, 'Prolegomena to a Class Approach to International Law', 21 *EJIL* (2010) 57.

¹⁹ Chimni, 'An Outline of a Marxist Course on Public International Law', 17 *Leiden Journal of International Law* (2004) 1, reprinted in Marks, *supra* note 15, at 53–92.

²⁰ The same may be said of Chimni, 'International Institutions Today: An Imperial Global State in the Making', 15 *EJIL* (2004) 1, where 'accumulation' gets a brief mention but primitive accumulation none at all.

²¹ Chimni, *supra* note 18, at 66.

²² For example, from the *Manifesto of the Communist Party*: 'Modern industry has established the world market, for which the discovery of America paved the way.' And: 'the need of a constantly expanding market for its products chases the bourgeoisie over the entire surface of the globe. It must nestle everywhere,

claim that because of this gap in Marx's work, 'the interaction between capitalism and the colonies remains an area of silence for Marxist theory'.²³ This claim is even more bizarre, since it requires that we ignore several hundred pages in Marx's work (and several thousand pages of Marxist work) on precisely that issue.

Set alongside each other, the claims made by Koskeniemi and Chimni suggest something deeply troubling about how international law – including and especially its *critical wing* – wants us to think about Marx. So there is a general issue which underpins this article: the inability of critical international legal theory to use Marx properly, fully, coherently, in a way which might strengthen and deepen some of the political claims made by critical international legal theory – which is to say: to use Marx in a way that might allow us to develop a genuinely Marxist critique of international law.

In this article I therefore attempt several things, which overlap in different ways through the pages which follow. The first is to develop the critique of international law that has reconsidered international law's underlying politics through the lens of the colonial. This is done by bringing to bear on the issue Marx's own thinking about colonization and thus his arguments concerning primitive accumulation. The second is a more immanent critique of critical international legal theory itself, in that despite the obvious qualities of the body of work that has recently emerged on the colonial and international law, the body as a whole is somewhat limited by its failure to properly use and think through what Marx might offer. Put bluntly, I want to argue that critical international legal theory needs the category 'primitive accumulation'. In other words, although the idea that 'international law embodies the violence of colonialism and the abstraction of commodity exchange'²⁴ is now widely accepted in critical international legal theory, I suggest that for the argument to really hold it requires the category of primitive accumulation. In the process I also suggest, third, that until critical international legal thought gets to grips with this idea it will remain theoretically limited and constrained by the master discipline; worse, it is in danger of aping the master discipline in misrepresenting Marx. This set of overlapping arguments requires a certain amount of historical work – though I turn at the end to the question of international law's colonial present – but the central argument is a theoretical one: offering a category to consolidate the connections that have been made among capital, colonization and international law. This requires a revelation of the secret of Marx's *Capital*, the secret of capital and the secret of systematic colonization, all of which takes us to the secret of international law.

settle everywhere, establish connexions everywhere'. And: 'the bourgeoisie has through its exploitation of the world market given a cosmopolitan character to production and consumption in every country'. And: 'the bourgeoisie ... draws all, even the most barbarian, nations into civilisation ... It compels all nations, on pain of extinction, to adopt the bourgeois mode of production; it compels them to introduce what it calls civilisation into their midst, i.e., to become bourgeois themselves. In one word, it creates a world after its own image'. I could go on. K. Marx and F. Engels, 'Manifesto of the Communist Party' (1848), in K. Marx and F. Engels, *Collected Works*, vol. 6 (1976) 479, at 485–489.

²³ Chimni, *supra* note 18, at 67.

²⁴ Miéville, *supra* note 5, at 169.

1. *Capital's Secret*

It is not often noticed that Volume 1 of *Capital* ends with the revelation of a secret. The final chapter is called 'The Modern Theory of Colonization' and, after several pages discussing colonization, the final paragraph of the chapter, and therefore the final paragraph of the book as a whole, ends as follows:

However, we are not concerned here with the condition of the colonies. The only thing that interests us is the secret discovered in the New World by the political economy of the Old World, and loudly proclaimed by it: that the capitalist mode of production and accumulation, and therefore capitalist private property as well, have for their fundamental condition the annihilation of that private property which rests on the labour of the individual himself; in other words, the expropriation of the worker.²⁵

Note that Marx is interested less in 'the colonies' as such and more in the process of colonization and thus the secret which the colonies reveal. These are points to which we will return at the end.

To understand the importance of Marx's rhetorical device in this final paragraph, we may first want to note the role of secrets in *Capital* as a whole. For it might be said that *Capital* is, in fact, a book of secrets. Several minor secrets are revealed through the pages of the book: the 'secret history' of the Roman Republic, the 'secret purpose' of the Chinese *assignats*, the 'secret foundations of Holland's wealth in capital', the 'secret dungeons' on Celebes, 'the secret of the flourishing state of industry in Spain and Sicily under the rule of the Arabs', the 'secret' of Henry VII's lack of success, the 'secret of [bourgeois] "sympathy" for widows, poor families and so on', 'the secret of the capitalists complaints about the laziness of the working people'.²⁶ There is clearly something that animates Marx about letting us in on a secret. This might explain why Marx's famous discussion of the fetishism of the commodity in Chapter 1 is in fact a revelation of the fetishism '*and its secret*'.²⁷

Yet the secret of the fetish is but one part of the really big secret revealed in the whole book, and it is letting us in on this ultimate secret that is the purpose of the book. This is the 'secret which vulgar economics has so far obstinately refused to divulge' and thus 'the secret source of the harmonious wisdom of ... free-trade optimists'. Or, in other words, it is 'the secret of profit-making [that] must at last be laid bare'.²⁸ What is it? What is the secret?

Marx tells us: 'The secret of the expression of value', he says – that is, the 'secret hidden under the apparent movements in the relative values of commodities' – lies in how capital manages labour. And that, at its core, reveals 'the secret of making a profit', namely 'the appropriation of unpaid labour'.²⁹ In other words, 'the secret of the self-valorization of capital resolves itself into the fact that it has at its disposal a

²⁵ K. Marx, *Capital: A Critique of Political Economy, Vol. 1* (1867), trans. B. Fowkes (1976), at 940.

²⁶ In order, these are Marx, *ibid.*, at 176, 224, 920, 916, 649–50, 880, 631, 388.

²⁷ *Ibid.*, at 163, emphasis added.

²⁸ In order, these are *ibid.*, at 745, 706, 280.

²⁹ In order, these are *ibid.*, at 152, 168, 743.

definite quantity of the unpaid labour of other people'.³⁰ Hence 'the innermost secret of English capital ... is to force down English wages' and 'the secret of why it happens that the more they [workers] work, the more alien wealth they produce'. This is 'the true secret of producing efficient workpeople'.³¹ Then again, he also says that 'the formation of surplus-value by surplus labour is no secret'.³² Well, no, it is certainly no secret now that Marx has spent a thousand pages exposing it. But then at least he has done so in the hope that human beings can decipher the hieroglyphic of value and 'get behind the secret of their own social product'.³³

So the revelation of the secret of the colonies in the final paragraph of the final chapter of the book is significant for our understanding capital *as a whole*, so to speak, as well as capital in the colonies themselves. Contra Chimni's claim that colonialism had 'no impact' on Marx's analysis of capitalism,³⁴ it turns out to be at the very heart of Marx's argument.

The chapter called 'The Modern Theory of Colonization' is the eighth chapter of Part Eight of the book. Part Eight as a whole is called 'So-Called Primitive Accumulation', and it begins with a chapter entitled 'The Secret of Primitive Accumulation'. Primitive accumulation is the process that constitutes capitalist social relations as the separation of the bulk of the population from the means of production.³⁵ This process is of obvious crucial historical importance, since without separating workers from the means of production capital could not have come into being; without such separation there could be no capitalist accumulation.

Marx begins his analysis of 'so-called primitive accumulation' by claiming that it plays the same role in political economy as primitive sin does in theology.

Adam bit the apple, and thereupon sin fell on the human race. Its origin is supposed to be explained when it is told as an anecdote about the past. Long, long ago there were two sorts of people: one, the diligent, intelligent and above all frugal elite; the other, lazy rascals, spending their substance, and more, in riotous living ... Thus it came to pass that the former sort accumulated wealth, and the latter sort finally had nothing to sell but their own skins. And from this primitive sin dates the poverty of the great majority who, despite all their labour, have up to now nothing to sell but themselves.³⁶

Marx's ironic turn of phrase is designed to open up the important move he makes, one in which he shifts from mocking the concept as used by Smith to using it as a serious concept in its own right,³⁷ in a way that enables him to avoid the story told in the

³⁰ *Ibid.*, at 672.

³¹ In order, these are *ibid.*, at 748, 793, 613.

³² *Ibid.*, at 352.

³³ *Ibid.*, at 167.

³⁴ Chimni, *supra* note 18, at 67.

³⁵ K. Marx, *Grundrisse*, trans. Martin Nicolaus (1973), at 489.

³⁶ Marx, *supra* note 25, at 873. One might want to compare Marx's debunking of the myth of primitive sin with Schmitt's absurd reliance on it for the 'fundamental theological' distinction between good and evil and thus friend and enemy; C. Schmitt, *The Concept of the Political* (1932), trans. George Schwab (1996), at 65.

³⁷ R. Halpern, *The Poetics of Primitive Accumulation: English Renaissance Culture and the Genealogy of Capital* (1991), at 61–62.

tender annals of political economy, where primitive accumulation is simply assumed and in which 'the idyllic reigns from time immemorial', and to instead argue that in actual history, violence is integral to the process, its history 'written in the annals of mankind in letters of blood and fire'.³⁸

Marx writes about this violence through the whole of *Capital* – Balibar has rightly suggested that Volume 1 of *Capital* might be read as 'as a treatise on the structural violence that capitalism inflicts'³⁹ – but addresses it at length in the chapter on 'the genesis of industrial capital', the sixth chapter of Part Eight on primitive accumulation:

The discovery of gold and silver in America, the extirpation, enslavement and entombment in mines of the indigenous population of that continent, the beginnings of the conquest and plunder of India, and the conversion of Africa into a preserve for the commercial hunting of black skins, are all things which characterize the dawn of the era of capitalist production. These idyllic proceedings are the chief moments of primitive accumulation. Hard on their heels follows the commercial war of the European nations, which has the globe as its battlefield ... These different moments are systematically combined together at the end of the seventeenth century in England; the combination embraces the colonies, national debt, the modern tax system, and the system of protection. These methods depend in part on brute force, for instance the colonial system. But they all employ the power of the state, the concentrated and organized force of society, to hasten, as in a hothouse, the process of transformation of the feudal mode of production into the capitalist mode, and to shorten the transition. Violence is the midwife of every old society which is pregnant with a new one. It is itself an economic power.⁴⁰

Marx here highlights the fact that capitalism is not a spontaneous order, and that, in contrast to the myth of an idyllic origin of private property, capital comes into the world 'dripping from head to toe, from every pore, with blood and dirt'.⁴¹ In actual history 'conquest, enslavement, robbery, murder, in short, force, play the greatest part'.⁴² Note that the mere expropriation of the land and resources was not enough to create the proletariat, since many preferred vagabondage and 'crime' to the misery of wage-labour. This became the basis of the 'bloody legislation' in which 'the fathers of the present working class were chastised for their enforced transformation into vagabonds and paupers'.⁴³ The 'bloody legislation' thus refers to Acts outlawing vagabondage, begging, wandering, and myriad other 'offenses', but it also refers to the Acts of enclosure in which laws were passed separating people from subsistence on the land and its resources, an important point for what is to follow. The 'freeing' of the peasantry into wage labour is the *forcing* of the peasantry into wage slavery; liberation is subjugation.

The references to violence in these passages remind us of the power organized in and through the state and, conversely, that violence is itself an economic power. Capitalism must always and everywhere fight a battle of annihilation against every non-capitalist form that it encounters.⁴⁴ We need to be clear about what is at stake

³⁸ Marx, *supra* note 25, at 874–875.

³⁹ Balibar, 'Reflections on *Gewalt*', 17 *Historical Materialism* (2009) 99, at 109.

⁴⁰ Marx, *supra* note 25, at 915–916.

⁴¹ *Ibid.*, at 926.

⁴² *Ibid.*, at 874.

⁴³ *Ibid.*, at 896.

⁴⁴ R. Luxemburg, *The Accumulation of Capital* (1913), trans. A. Schwarzschild (2003), at 349.

here, especially so given that the early law of nations was centrally concerned with the question of war. For what Marx is suggesting is that the mechanism by which people were made to work within the conditions posited by capital is a *form of war*. That is: class war. And what is at stake in this war is the constitution of bourgeois order through the violence of primitive accumulation. Law in general was (and is) central to this war and, I will suggest, so too was (and is) international law.

2. Bloody Law

It is significant that throughout his discussion of primitive accumulation in Volume 1 of *Capital*, Marx spends a large amount of time discussing law. In particular, he outlines, in a chapter called ‘Bloody Legislation Against the Expropriated’, the ‘police methods’ used from the late-15th century to accelerate accumulation.

Henry VIII, 1530: Beggars who are old and incapable of working receive a beggar’s licence. On the other hand, whipping and imprisonment for sturdy vagabonds. They are to be tied to the cart-tail and whipped until the blood streams from their bodies, then they are to swear on oath to go back to their birthplace or to where they have lived the last three years and to ‘put themselves to labour’... By 27 Henry VIII the previous statute is repeated, but strengthened with new clauses. For the second arrest for vagabondage the whipping is to be repeated and half the ear sliced off; but for the third relapse the offender is to be executed as a hardened criminal and enemy of the common weal.

Edward VI: A statute of the first year of his reign, 1547, ordains that if anyone refuses to work, he shall be condemned as a slave to the person who has denounced him as an idler. The master shall feed his slave on bread and water, weak broth and such refuse meat as he thinks fit. He has the right to force him to do any work, no matter how disgusting, with whip and chains. If the slave is absent a fortnight, he is condemned to slavery for life and is to be branded on forehead or back with the letter S; if he runs away thrice, he is to be executed as a felon. The master can sell him, bequeath him, let him out on hire as a slave, just as any other personal chattel or cattle. If the slaves attempt anything against the masters, they are also to be executed. Justices of the peace, on information, are to hunt the rascals down. If it happens that a vagabond has been idling about for three days, he is to be taken to his birthplace, branded with a red-hot iron with the letter V on the breast and be set to work, in chains, in the streets or at some other labour. If the vagabond gives a false birthplace, he is then to become the slave for life of this place, of its inhabitants, or its corporation, and to be branded with an S. All persons have the right to take away the children of the vagabonds and keep them as apprentices, the young men until they are 24, the girls until they are 20. If they run away, they are to become, until they reach those ages, the slaves of their masters, who can put them in irons, whip them, etc. if they like. Every master may put an iron ring round the neck, arms or legs of his slave, by which to know him more easily and to be more certain of him. The last part of this statute provides, that certain poor people may be employed by a place or by persons who are willing to give them food and drink and to find them work. Slaves of the parish of this kind were still to be found in England in the mid nineteenth century under the name of ‘roundsmen’.

Elizabeth, 1572: Unlicensed beggars above 14 years of age are to be severely flogged and branded on the left ear unless some one will take them into service for two years; in case of a repetition of the offence, if they are over 18, they are to be executed, unless some one will take them into service for two years; but for the third offence they are to be executed without mercy as felons. Similar statutes: 18 Elizabeth, c. 13, and another of 1597.

Remaining with the English case, Marx goes on:

James I: Any one wandering about and begging is declared a rogue and a vagabond. Justices of the peace in Petty Sessions are authorised to have them publicly whipped and to imprison them for six months for the first offence, and two years for the second. Whilst in prison they are to be whipped as much and as often as the justices of the peace think fit ... Incurrible and dangerous rogues are to be branded with an R on the left shoulder and set to hard labour, and if they are caught begging again, to be executed without mercy. These statutes, legally binding until the beginning of the eighteenth century.

And in case his reader thinks this is peculiar to England, Marx adds that 'there were similar laws in other European states'.

By the middle of the seventeenth century a kingdom of vagabonds (*royaume des truands*) had been established in Paris. Even at the beginning of the reign of Louis XVI, the Ordinance of 13 July 1777 provided that every man in good health from 16 to 60 years of age, if without means of subsistence and not practising a trade, should be sent to the galleys. The statute of Charles V for the Netherlands (October 1537), the first Edict of the States and Towns of Holland (10 March 1614), the *Plakaat* of the United Provinces (26 June 1649) are further examples of the same kind.

And on it goes through a series of 'terroristic laws' perfected through four centuries of capitalist development, through which 'agricultural people [were] first forcibly expropriated from the soil, driven from their homes, turned into vagabonds, and then whipped, branded, tortured by laws grotesquely terrible, into the discipline necessary for the wage system'.⁴⁵

This creation of 'free proletarians' through legal force has its historical parallel in a process discussed by Marx in the previous chapter: the 'theft of the common lands'. For Marx the creation of the proletariat is only possible because of the concomitant process through which 'the people's land is stolen' through 'the Parliamentary form of robbery' known as Acts of enclosure. That is, 'decrees by which the landowners grant themselves the people's land as private property'.⁴⁶ Marx cites text after text from the economic literature of the time acknowledging that, as one pamphlet put it, 'the circumstances of the lower ranks of men are altered in almost every respect for the worse', in that 'they are reduced to the state of day-labourers and hirelings ... [and] their subsistence in that state has become more difficult'.⁴⁷

Now, the enclosures movement was historically one of the areas in which classical political economy most obviously overlapped with classical legal theory, which is a way of saying: the question of enclosures was a fundamental issue in the law of property. The 16th through to the 18th centuries might also be described as the period in which property law was being perfected (the very reason that some have sought to locate 'primitive accumulation' there and restrict its meaning to a historical period). Notwithstanding the development of the joint-stock company in the 19th century and changes brought about with new technologies in the 20th, the essence

⁴⁵ Marx, *supra* note 25, at 896–898.

⁴⁶ *Ibid.*, at 885.

⁴⁷ *Ibid.*, at 887–888.

of property law was developed during the period of the rise of capital in which enclosures were crucial. The same period also saw the development of international law, in the form of the ‘law of nations’ and in terms of the legal justification for the exercise of force linked to a right. This combined (if uneven) historical development was of huge political importance, and I want to suggest that the key categories through which enclosures came to be justified legally were key categories of bourgeois ideology and political economy, and that *these same categories were central to international law*.

In Volume II of his *Commentaries on the Laws of England* (1765–1769), a volume which opens with the claim that ‘there is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property’, William Blackstone comments that the term used in law to signify enclosure, ‘improving’, is an ancient expression ‘signifying the same as “improving”’. On the basis of improving, Blackstone argues that the lord of the manor ‘may enclose so much of the waste as he pleases’.⁴⁸ The comment has been largely ignored in legal thought and history. Yet there is a sense in which it takes us to the heart of the question at stake in primitive accumulation and, thus, in a roundabout way, to the heart of international law. It takes us to the point, that is, where property law, colonial law and international law come together.

When Blackstone speaks of waste he refers to uncultivated land, and in so doing he builds on a long debate about the ‘improvement’ of ‘waste’ in political economy and among the ruling class. These two categories take us to the heart of the property issues surrounding enclosures and the creation of the modern proletariat.⁴⁹ The ‘gentleman’s desire’, noted the House of Lords in 1607, was ‘improvement’,⁵⁰ and the century which followed proved the Lords right. Francis Bacon had set the scene in *The Advancement of Learning* (1605) with the idea of learning being ‘improved and converted by the industry of man’,⁵¹ which kick-starts a whole ‘improvement industry’: Walter Blith’s *The English Improver, Or a New Survey of Husbandry* (1649), which then became *The English Improver Improved* (1652); an anonymous tract called *Waste Land’s Improvement* (1653); Andrew Yarranton’s *The Improvement Improved* (1663); Samuel Fortrey’s *England’s Interest and Improvement* (also 1663); William Carter’s *England’s Interest Asserted, in the Improvement of its Native Commodities* (1669); John Smith’s *England’s Improvement Revived* (1670); Carew Reynell’s *The True English Interest, or An Account of the Chief National Improvements* (1674); Roger Coke’s *England’s Improvements* (1675); another work by Yarranton called *England’s Improvement by Sea and Land* (1677); John Houghton’s *A Collection of Letters for the Improvement of Husbandry and Trade* (1681), and so it goes on, well into the 18th century. According to

⁴⁸ Sir W. Blackstone, *Commentaries on the Laws of England*, Vol. II (1765–1769), ed. W. Morrison (2001), at 7, 12, 27, 74.

⁴⁹ I have argued this at greater length in Neocleous, ‘War on Waste: Law, Original Accumulation, and the Violence of Capital’, 75 *Science and Society* (2011) 506. I here simultaneously précis, extend and reframe the argument in that article.

⁵⁰ ‘A Consideration of the Cause in Question before the Lords touching Depopulation’, 5 July, 1607, in J. Thirsk and J. P. Cooper (eds), *Seventeenth-Century Economic Documents* (1972) 109.

⁵¹ F. Bacon, *The Advancement of Learning* (1605), ed. G. W. Kitchen (1973), at 68.

Paul Slack, the British Library catalogue reveals that the number of holdings including 'improve', 'improvement' and related terms in their titles rises from nine published before 1641, to 55 published between 1641 and 1660, 72 published between 1661 and 1680, 109 published between 1681 and 1700, 139 published between 1701 and 1720, and then 185 published between 1721 and 1740.⁵² 'Improvement' in its original meaning, according to the *Oxford English Dictionary*, referred to 'the turning of a thing to profit or good account' and 'making the most of a thing for one's own profit', and the main connotation was in agricultural innovations to increase productivity. Some of the meaning was therefore a reference to technology, but some of it was a reference to the enclosure of waste land: the *OED*'s second definition of 'improvement' is 'the turning of land to better account, the reclamation of waste or unoccupied land by inclosing'. 'Improvement of wastes and forests' became the slogan of the age, notes Joan Thirsk.⁵³

As the slogan of the age, it underpinned the whole enclosures movement, which was argued for on the grounds that if left unimproved the wasted commons would generate a masterless, idle and disorderly mass. For Timothy Nourse, in *Campania Fœlix, or, a Discourse of the Benefits and Improvements of Husbandry* (1700) the argument to 'uncommon wast grounds' was based on the fact that the 'common people' are 'rough and savage ... and refractory to Government, insolent and tumultuous', while for Adam Moore, in *Bread for the Poor ... Promised by Enclosure of the Wastes and Common Grounds of England* (1653), the commons led the poor to 'Begging, Filching, Robbing, Roguing, Murthering, and whatsoever other Villaines their unexercised brains and hands undertake'. The anonymous tract *Waste Land's Improvement* (1653) compares the order that would come from enclosures with the disorderly wastes and warns that unless Parliament divides the wastes and provides work for the poor they 'may in time make England's wastes a receptacle and harbour for troops of assassinating rogues'. For the ruling class, wasted land, wasted labour and wasted time went hand in hand.

At stake in these debates was the subsistence economy of the propertyless commoners, for whom 'waste' meant access to a variety of things and opportunity to acquire the raw materials to make others: catching wild animals, grazing animals, gleaned crops leftover after harvest, gathering wood and dung, picking materials to make into baskets or mats, acquiring herbs, nuts, fruit and berries, taking loose wool caught on bushes, and so on. J. D. Chalmers has described the impact of what he calls the 'attack on waste': 'The appropriation to their own exclusive use of practically the whole of the common waste by the legal owners meant that the curtain which separated the growing army of labourers from utter proletarianization was torn down'.⁵⁴ The prolonged campaign to suppress traditional use-rights in common by separating supposedly idle workers from any means of subsistence other than the wage, enclosing the otherwise 'wasted' land and restricting their wandering tendencies by rooting them in a particular

⁵² P. Slack, *From Reformation to Improvement: Public Welfare in Early Modern England* (1999), at 96 note 89.

⁵³ Thirsk, 'Seventeenth-Century Agriculture and Social Change', in J. Thirsk (ed.), *Land, Church and People: Essays Presented to Professor H. P. R. Finberg* (1970) 148, at 167.

⁵⁴ Chalmers, 'Enclosure and Labour Supply in the Industrial Revolution', 5 *Economic History Review* (1953) 319, at 333, 335 and 336.

space, was crucial to the proletarianization of the people. In other words, what was at stake was the key issue Marx is trying to address in his account of primitive accumulation: the violent separation of the bulk of the population from the means of subsistence outside the wage and the centrality of law to this violence. In other words, the act of violence that constitutes accumulation is always already a politico-judicial act.

This set of ideas about property and its legal foundation was also fundamental to international law. Here we have to accept the general thrust of the argument which demands that we place colonialism at the heart of international law. This argument has shown that the attempt to create a modern legal regime governing the relations between emerging nation-states occurred in the context of the ‘settlement’ of the New World, in that as well as encountering other nascent states as enemies the newly emerging sovereign entities were also encountering other peoples in overseas territories. Indeed, they were encountering other states often via their encounter with other peoples in these territories, an encounter in which they sought to conquer the peoples in question and which was thought to require a set of legal arrangements to ‘govern’ these relations.⁵⁵ However, we need to add to this argument the idea that this encounter concerned not just questions of sovereignty or legal title by conquest, as per mainstream international law, or imperialism and racial supremacy over ‘the other’, as per critical international law (which is of course not to say that these questions and processes were not operative), but was in fact centrally concerned with the violent enclosure of land and resources for capital accumulation and the forceful separation of the people from any means of subsistence beyond capital; that is, with the process of primitive accumulation. In this context, the same ideas about ‘improving’ the waste lands of the Old World were applied to the waste lands of the New World, as the analogy between expropriating idle and unproductive workers and idle and unproductive Indians became standard in political discourse: ‘we have *Indians* at home, *Indians* in Cornwall, *Indians* in Wales, *Indians* in Ireland’, claimed leading Puritan colonist Roger Williams in 1652.⁵⁶ Thus we find claims such as that the Indians are ‘a hindrance to Industry’ and their waste lands ‘Nurseries of Idleness and Insolence’ (John Bellers); that there can be no argument against a ‘peaceable colony, in a Wast country, where the people do live but like Deere in heards’ (William Symonds); that the Lord gave the earth to man to be ‘tilled and improved’, but ‘savage people ramble over much land without title or property’, meaning that ‘they inclose no ground’ (John Winthrop); that Indian ‘land is spacious and void, and there are few, and do but run over the grass’ leaving the land ‘idle and waste’ (Robert Cushman); that ‘the wast and vast uninhabited growndes’ of Virginia need improving (William Strachey); or that the ‘waste firme of America’ needs planting (Richard Hakluyt).⁵⁷ In the eyes of the colonists,

⁵⁵ J. Muldoon, *Empire and Order: The Concept of Empire 800–1800* (1999), at 8; Anghie, *supra* note 5, at 15.

⁵⁶ R. Williams, *The Hireling Ministry None of Christs, or A Discourse Touching the Propagating the Gospel of Jesus Christ* (1652), at 13.

⁵⁷ Bellers, *Proposals for a Profitable Employing of the Poor*, in A. R. Fry, *John Bellers, 1654–1725: Quaker, Economist and Social Reformer* (1935), at 128; W. Symonds, *Virginia: A Sermon Preached at White-Chapel* (1609), at 15; Winthrop, ‘General Observations for the Plantation of New England’ (1629), in *Winthrop Papers Vol. II: 1623–1630* (1931), at 112–113, 120; Cushman, *Reasons and Considerations Touching*

property comes through the improvement which follows cultivation. The colonizing impulse simply assumes that land and its resources belong to those who are best able to improve rather than waste them, and who therefore avoid idleness (of either land or labour). The 'Indian', like the peasant, was thought essentially incapable of occupying land and possessing private property; the land in question could thus be appropriated and the customary rights and usage of communal property abolished. 'In both cases', notes Christopher Hill, 'the argument for expropriation was legitimized on the grounds of improvement.'⁵⁸

I am suggesting that this set of beliefs underpinned the rise of international law: that the ideological charge carried by the concepts of waste and improvement underpinned not only political economy and property law but international law as well. John Locke, for example, organizes his argument for enclosures around the question of waste: 'Land that is left wholly to Nature, that hath no improvement of Pasturage, Tillage, or Planting, is called, as indeed it is, *wast*'. This supplies the basis for the argument for property, in that those who labour, appropriate and cultivate in order to avoid waste and improve the earth can lay claim to those things as property. But this argument applies to the Indians as well as the poor of England: 'there are still *great Tracts of Ground* to be found, which (the Inhabitants thereof not having joined with the rest of Mankind, in the consent of the Use of their common Money) *lie waste*', he says, with reference to the Indians.⁵⁹ Note, also, that his comments on the colonial situation in America are elaborated through the problematic at the heart of the law of nations: just war. 'A Planter in the *West Indies* ... might, if he pleased' muster up soldiers and 'lead them out against the *Indians*, to seek Reparation upon any injury received from them'. Locke is suggesting that the European planters possess a right to execute the law of nature and that Indian resistance to the use of land by the planters is a *crime* and an act of *war*. Central to this claim is the belief that land which is not being 'improved' is, in effect, being 'wasted'. By 'wasting' land the Indians in the colonies occupy a political space similar to the workers back home: standing in the way of improvement and private property. Mobilizing against what is simultaneously a form of crime and an act of war, the colonial powers have a right to seek 'reparations'. The violence of war and punishment are thus rolled together on the grounds of the political economy of land and labour.

Where might Locke have taken these ideas from? On the one hand: the colonists themselves; Locke was an avid reader of accounts of the colonies such as the works cited above. On the other hand: Locke was also an avid reader of that key thinker in international law, Hugo Grotius. In his recommendation of reading matter to anyone who wishes to be 'instructed on the natural rights of men, and the original and

the Lawfulness of Removing Out of England into the Parts of America (1621), in A. Young (ed.), *Chronicles of the Pilgrim Fathers of the Colony of Plymouth From 1602 to 1625* (1844), at 243–244; W. Strachey, *The Historie of Travaile into Virginia Britannia* (1612), at 19; R. Hakluyt, *A Discourse Concerning Western Planting* (1584), ed. C. Deane (1877), at 154.

⁵⁸ C. Hill, *Liberty Against the Law: Some Seventeenth-Century Controversies* (1996), at 156.

⁵⁹ J. Locke, *Two Treatises*, ed. P. Laslett (1988), at 295, 297 and 299.

foundations of society, and the duties resulting from these', Locke offers us Grotius as a prime source.⁶⁰ That he does so is telling. For we find that the political economy of waste and improvement underpins the foundation text of the early law of nations. In a text written just a few years before his major work on the laws of war and peace, Grotius comments that if God has granted us something 'we are not commanded to cast it into the sea ... ; nor to let it lie useless by us, nor yet to lavish it away'.⁶¹ Appropriation, in Grotius's view, is justified where there is 'waste or barren Land'. This view then runs through *De Iure Belli ac Pacis* (1625). That book is founded on the idea that Locke will eventually take from Grotius, namely that although God 'gave to mankind in general a Dominion over Things', God also allowed that 'every Man converted what he would to his own use'. For Grotius, *common* property ownership is 'no longer approved of'. 'As soon as living in common was no longer approved of, all Men were supposed, and ought to be supposed to have consented, that each should appropriate to himself, by Right of first Possession, what could not have been divided'. This generates an exclusive right, and this exclusive right in turn allows for the appropriation of anything that might be 'waste'. Things which are 'uncultivated' or 'untilled' become central, for they become open to appropriation in order that they might be cultivated, tilled and thus *not wasted*.⁶²

If there be any waste or barren Land within our Dominions, that also is to be given to Strangers, at their Request, or may be lawfully possessed by them, because whatever remains uncultivated, is not to be esteemed a Property.⁶³

Jurisdiction over land may be alienated by a People should that land be 'uninhabited and waste'.⁶⁴ In Volume III of the book Grotius returns to the theme, insisting that there shall be no recompense for those losing possessions which they had 'either wasted or alienated'.⁶⁵ And Grotius's criticism of appropriation concerns those who appropriate and accumulate lands which 'were *not* waste and desolate'.⁶⁶

We find this very same idea running through perhaps the next most significant and influential text in international law, Vattel's *Law of Nations* (1758). For Vattel, repeating both Grotius and Locke, there exists by nature 'an equal right to things that have not yet fallen into the possession of any one; and those things belong to the person who first takes possession of them'. Thus a nation may lawfully take possession of a country it finds uninhabited. Yet the issue is not just whether the land is inhabited. Rather, and again repeating the point of the thinkers before him, the issue is whether any peoples found there are improving instead of wasting the land and resources. This is because cultivation is 'an obligation imposed by nature on mankind'. And this obligation falls on nations: 'every nation is ... obliged by the law of nature to cultivate the

⁶⁰ J. Locke, *Some Thoughts Concerning Education*, ed. John William Adamson (2007), at 152.

⁶¹ H. Grotius, *The Truth of the Christian Religion* (1622), trans. John Clarke (1819), at 107.

⁶² H. Grotius, *The Rights of War and Peace*, ed. R. Tuck (2005), at 432.

⁶³ *Ibid.*, at 448.

⁶⁴ *Ibid.*, at 572.

⁶⁵ *Ibid.*, at 1419.

⁶⁶ *Ibid.*, at 449, emphasis added.

land that has fallen to its share'. It follows that 'those nations [which] inhabit fertile countries, but disdain to cultivate their lands, and choose rather to live by plunder, are wanting to themselves', as are peoples who 'to avoid labour, live by hunting, and their flocks'. Such 'unsettled habitation ... cannot be accounted a true and legal possession'. For Vattel this justifies colonization:

It is asked whether a nation may lawfully take possession of some part of a vast country, in which there are none but erratic nations whose scanty population is incapable of occupying the whole? We have already observed, in establishing the obligation to cultivate the earth, that those nations cannot exclusively appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate; and the people of Europe, too closely pent up at home, finding land of which the savages stood in no particular need, and of which they made no actual and constant use, were lawfully entitled to take possession of it, and settle it with colonies.

This colonizing process is an act of war, and a just one at that: nations which choose not to cultivate their lands, despite those lands being fertile, are 'injurious to all their neighbours' and, as such, 'deserve to be extirpated as savage and pernicious beasts'.⁶⁷

What we find in these key texts of international law is an overlap, a reiteration and a juridical underpinning of arguments found in colonial thinking and major works of bourgeois political philosophy. Despite their differences – it has been claimed that whereas Grotius wrote the international law of absolutism, Vattel wrote the international law of political liberty⁶⁸ – Grotius and Vattel are discussing not just the relationship between states but also the relationship between states and other carriers of sovereignty, such as corporations on the one hand and peoples operating with a different form of subsistence on the other, and they do so in categories taken from bourgeois political economy and the logic of enclosures.

Notwithstanding the specificities of this argument concerning 'waste' and 'improvement', I am arguing that the ways in which the international order and its legal regime were violently constituted through the 16th and 17th centuries can be understood as part and parcel of the process Marx calls 'primitive accumulation'. To the extent that international law *embodies* the violence of colonialism, it also embodies the violence of primitive accumulation.⁶⁹ This is why the central theme that so animated the early law of nations, the question of *just war*, is shot through with the categories of the war on the commons and the language of enclosures. In the bourgeois mind, *the global war of primitive accumulation was the archetypal just war*. To put that another way: in the bourgeois mind, the class war was historically a just war. International law was a key weapon used in the global class war.

⁶⁷ E. De Vattel, *The Law of Nations: Or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (1758), ed. Joseph Chitty (1853), Book I, Chaps. VII, VIII, XVIII.

⁶⁸ Yasuaki, 'Appendix: Eurocentrism in the History of International Law', in O. Yasuaki (ed.), *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius* (1993), at 380.

⁶⁹ Miéville, *supra* note 5, at 169, 207.

3. Systematic Colonization ... and its Secret

In a recent essay on developments in Iraq, international law and the ‘war on terror’, Anthony Anghie has suggested that the war on terror illustrates ‘the enduring impact of imperialism in the international system’.⁷⁰ He is far from alone, as terms such as ‘empire’, ‘imperial power’ and the ‘colonial’ are now in the foreground of political and legal analyses of international order and ‘an imperial global state in the making’.⁷¹ The argument as I have developed it here suggests that to properly make sense of this we need to grasp it as part of the logic of primitive accumulation.

To do so we need to distance ourselves from the tendency in commentaries on Marx’s work to treat primitive accumulation as either a period of transition from feudalism to capitalism or as pertaining to the early history of the colonies.⁷² Both views are encouraged by the convention of translating ‘*ursprüngliche*’ as ‘primitive’ rather than ‘original’ or ‘previous’. ‘*Ursprüngliche*’ was Marx’s translation of Smith’s ‘previous’, which those translating Marx’s work into English rendered as ‘primitive’. The fact that the discussion of primitive accumulation requires a discussion of enclosures as well as colonization encourages this view, since the tendency has been to view both enclosures and colonization as historical acts. The general tendency runs: *before* capitalism there is colonization and enclosures – in other words, there is ‘primitive’ accumulation – which forms the preconditions of capitalism by creating and developing markets (Chimni’s ‘old colonialism’), but that once the job is done we can stop talking about enclosures or colonization (and thus we can stop talking about primitive accumulation).⁷³ In fact, *contra* this tendency, we need to understand primitive accumulation as the foundation of capital not just historically but *permanently*. Marx notes:

The capital-relation presupposes a complete separation between the workers and the ownership of the conditions for the realization of their labour. As soon as capitalist production stands on its own feet, it not only maintains this separation, but reproduces it on a constantly extending scale. The process, therefore, which creates the capital-relation can be nothing other than the process which divorces the worker from the ownership of the conditions of his own labour; it is a process which operates two transformations, whereby the social means of subsistence and production are turned into capital, and the immediate producers are turned into wage-labourers. So-called primitive accumulation, therefore, is nothing else than the historical process of divorcing the producer from the means of production. It appears as ‘primitive’ because it forms the pre-history of capital, and of the mode of production corresponding to capital.⁷⁴

Marx’s use of ‘pre-history’ here is misleading, since it does indeed suggest that the process is somehow ‘over’. But the gist of the passage suggests that Marx is interested in capital in terms of the historical presuppositions of capital’s becoming:

⁷⁰ Anghie, ‘The War on Terror and Iraq in Historical Perspective’, 43 *Osgoode Hall Law Journal* (2005) 45, at 46.

⁷¹ Chimni, *supra* note 20, at 1.

⁷² For example, see M. Dobb, *Studies in the Development of Capitalism* (1946), at 178–186.

⁷³ I am here paraphrasing and extending a comment made by M. De Angelis, *The Beginning of History: Value Struggles and Global Capital* (2007), at 134.

⁷⁴ Marx, *supra* note 25, at 874–875.

capital *presupposes* the divorce of workers from the conditions of the realization of their labour, and as soon as capital is able to stand on its own two feet it not only maintains this divorce but *reproduces it on a constantly extending scale*. Hence Marx's comment elsewhere that 'accumulation merely presents as a continuous process what in primitive accumulation appears as a distinct historical process'.⁷⁵ The presuppositions of capital 'primitively appeared as conditions of its becoming' but 'now appear as results of its own realization, reality, as *posited by it – not as conditions of its arising, but as results of its presence*'.⁷⁶ Or as he puts it in Volume 3 of *Capital*, it is the 'divorce between the conditions of labour on the one hand and the producers on the other that forms the concept of capital, as this arises with primitive accumulation', adding that this 'subsequently appear[s] as a constant process in the accumulation and concentration of capital'.⁷⁷

In other words, as a number of writers have suggested following Rosa Luxemburg's argument in *The Accumulation of Capital*, 'primitive accumulation' refers not to an early period of historical enclosures, early colonialism or international law – not, that is, to a period in the emergence of capitalist relations or a transitory phenomenon characteristic of the 'prehistory' of capital prior to its 'developed' or 'civilized' stage – but, rather, to capitalism's need to permanently form markets and recreate labour supplies. Because primitive accumulation is a *permanent* process in the colonization of the world by capital, the term refers to the historical process that constitutes capitalist relations as a whole.⁷⁸ As Balibar puts it, the analysis of primitive accumulation is '*the genealogy of the elements which constitute the structure of the capitalist mode of production*'.⁷⁹ As the presupposition of capital, primitive accumulation 'is not just the historical starting point of capital but, qua coercive proletarianization, central to its essence'.⁸⁰ Indeed, as Perelman points out, the material in Part Eight of *Capital* does not appear to be qualitatively different from the argument found in the previous chapter called 'The General Theory of Capitalist Accumulation', and one might argue that the chapters on 'so-called primitive accumulation' with which *Capital* ends form a decisive overview of the entire set of problems concentrated in the relation called 'capital' itself.⁸¹ But if that is the case then we need to understand enclosures not as a

⁷⁵ K. Marx, *Theories of Surplus Value, Vol. III* (1972), at 272.

⁷⁶ Marx, *supra* note 35, at 460.

⁷⁷ K. Marx, *Capital, Vol. III*, trans. David Fernbach (1981), at 354.

⁷⁸ Luxemburg, *supra* note 44, at 345, 348–51.

⁷⁹ Balibar, 'The Basic Concepts of Historical Materialism', in L. Althusser and E. Balibar, *Reading Capital* (1968), trans. B. Brewster (1970), at 279 (emphasis in the original).

⁸⁰ Bonefeld, 'Primitive Accumulation and Capitalist Accumulation: Notes on Social Constitution and Expropriation', 75 *Science and Society* (2011) 379, at 379. Also Bonefeld, 'The Permanence of Primitive Accumulation: Commodity Fetishism and Social Constitution', 2 *The Commoner* (2001); Balibar, *supra* note 39, at 111–112.

⁸¹ M. Perelman, *The Invention of Capitalism: Classical Political Economy and the Secret History of Primitive Accumulation* (2000), at 28–29, 33–34. Also see Mezzadra, 'The Topicality of Prehistory: A New Reading of Marx's Analysis of "So-called Primitive Accumulation"', 23 *Rethinking Marxism* (2011) 302; Walker, 'Primitive Accumulation and the Formation of Difference: On Marx and Schmitt', 23 *Rethinking Marxism* (2011) 384.

historical process exhausted at the consolidation of capitalism but, rather, as a *permanent feature of accumulation* and an *integral component of class struggle*.⁸²

The point is that primitive accumulation is the foundation of capital not just historically but *permanently*: the separation of labourers from the conditions of labour independent of capital *is* (not just *was*) the social constitution of capitalist social relations. And this helps us make sense of the permanence of colonization, for at the heart of the colonial moment is the accumulation of capital and not merely one powerful ‘imperial’ state.

Thus to criticize the ‘war on terror’ for violating international law, as critical legal thinkers tend to do, is to miss the point completely, for what is most obvious about the war is not the violation of this or that human right or prohibition on certain forms of violence (and I say that not to dismiss such things as irrelevant but to identify them as epiphenomenal to the real issue). Rather, what should be most obvious (at least for critical international legal thought) is the brutality with which resources have been appropriated and peoples proletarianized, in a way which situates the war on terror within the wider frame of neoliberalization. The privatization of anything that looks remotely like ‘the commons’, the separation of workers from the resources for anything like an alternative mode of being beyond capital, the forceful displacement of millions of peasants from the land, divorcing workers from the terrain on which their organizational power might be built, ending anything that looks like communal control of the means of subsistence, seizing land for debt (to satisfy the IMF) and enforcing mobility on the labour force (albeit within the requisite security measures), the *New Enclosures* are permanently enacted as a process essential to the accumulation of capital.⁸³ This is the lens through which what is taking place across the globe in the name of ‘peace and security’ needs to be seen, a lens which might help us focus on, to give just one example, the fact that Article 25 of the Iraqi Constitution passed in October 2005 requires that the ‘the State shall guarantee the reform of the Iraqi economy in accordance with modern economic principles to insure the full investment of its resources, diversification of its sources, and the encouragement and development of the private sector’; a commitment to capitalist accumulation is now a constitutional requirement for Iraq. The only term which properly describes this complex re-articulation of imperial war and international law in the global security project is ‘primitive accumulation’.⁸⁴ That is to say: this violent dispossession and proletarianization of peoples in this war might be understood as *systematic colonization*.

⁸² Midnight Notes Collective, ‘The New Enclosures’ (1990), reprinted in Midnight Notes, *Midnight Oil: Work, Energy, War, 1973–1992* (1992), at 318; De Angelis, *supra* note 73, at 135–142.

⁸³ Midnight Notes Collective, *supra* note 82, at 321–4.

⁸⁴ RETORT, *Afflicted Powers: Capital and Spectacle in a New Age of War* (2005). The argument here lines up with David Harvey’s account of the permanence of accumulation by dispossession in *New Imperialism*, at 137–182, *A Brief History of Neoliberalism* (2005) and *The Enigma of Capital: And the Crises of Capitalism* (2010). Harvey notes, *Brief History*, at 159, that by ‘accumulation by dispossession’ he means the process which Marx understood as ‘primitive accumulation’.

'Systematic colonization' is a term taken by Marx from Edward Gibbon Wakefield's influential studies of colonization.⁸⁵ Wakefield was the key figure in a movement of the 1830s which sought to revive the 'lost art of colonization', hence the title of Wakefield's 1849 text: *A View of the Art of Colonization* (1849).⁸⁶ This art is rooted in the need to use and improve 'waste land' and 'waste countries'⁸⁷ and presupposes that, as Wakefield puts it in his commentary on Smith's *Wealth of Nations*, 'it is in the power, and seems to be within the province of legislation, to interfere with the operation of political economy'.⁸⁸ Wakefield makes the point in order that the English better manage their colonies,⁸⁹ but Marx is keen for us to grasp this as the very secret at the heart of the art of colonization. Why? Because it turns out to be the fundamental secret of primitive accumulation.

'The great secret of "systematic colonization"', Marx reveals, following Wakefield, is that 'the supply of labour *must* be constant and regular'. In other words, the point of systematic colonization is the use of political and legal power to 'manufacture wage-labourers'. This argument, 'prescribed by Mr Wakefield expressly for use in the colonies', has in fact been perfected by England: 'the English government for years practised this method of "primitive accumulation"'.⁹⁰ Thus Marx: 'It is the great merit of E. G. Wakefield to have discovered, not something new *about* the colonies, but, *in* the colonies, the truth about capitalist relations in the mother country ... This is what he calls "systematic colonization"'.⁹¹ The secret, then, is that colonization does not happen over there, in other places and to other people, but is something that happens wherever capital might be found: it is systematic, and its systematic nature is crucial for understanding the barbarity of capital. The secret, then, is that the bourgeois colonization of the world is a process that occurs both domestically and internationally. I am suggesting that to think of international law as fundamental to the dispossession of peoples and to the accumulation of capital that lies at the heart of colonization is to help us better grasp international law's centrality to the global violence of capital.

Evgeny Pashukanis once pointed out that international law has always sought to hide its class character.⁹² Perhaps the real challenge for international legal theory that seeks to be genuinely critical of its master discipline is to take this on board and spell it out both historically and theoretically. It has made some headway, now that the

⁸⁵ Marx, *supra* note 25, at 939, cites Wakefield's *England and America* (1833) on systematic colonization, but in fact this idea is developed by Wakefield more fully in other works.

⁸⁶ D. Winch, *Classical Political Economy and Colonies* (1965), at 73.

⁸⁷ E. G. Wakefield, *A Letter from Sydney, the Principle Town of Australasia, Together with the 'Outline of a System of Colonization'* (1829).

⁸⁸ Wakefield, 'Note on Chapter I, Book I', in A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1835), at 37.

⁸⁹ 'Their [England's] economists, in treating of colonies, have worked with no other tools than those which they were accustomed to use in explaining the phenomena of an old country' – E. G. Wakefield, *England and America: A Comparison of the Social and Political State of Both Nations, Vol. II* (1833), at 121.

⁹⁰ Marx, *supra* note 25, at 932, 939.

⁹¹ *Ibid.*, at 932 (emphasis in the original).

⁹² Pashukanis, 'International Law' (1925–1927), reprinted in P. Beirne and R. Sharlet (eds), *Pashukanis: Selected Writings* (1980), at 169, 172.

fundamental links between colonialism and international law have been understood, the class nature of that relationship has been spelt out and the problem of legal form identified.⁹³ But it has systematically ignored what could be – what *should* be – Marx’s contribution to this understanding. Marx was interested in the secret of systematic colonization as the secret of accumulation. Might this also be the secret of international law? Perhaps the class war is the secret of international law.

⁹³ The last point being the strength of Miéville’s work.