

# ‘The Nameless Rapture of the Struggle’: Towards a Marxist Class-Theoretic Approach to International Law

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*ABSTRACT:* We live in a time of extraordinary challenges, but also a time of great opportunities. The Washington consensus is dead. The global liberal empire is cracking under the weight of its own monstrous pretensions. The economic and ideological bankruptcy of New Finance Capitalism has been exposed so many times and in so many contexts that even its most ardent proponents no longer seem able to believe their own mantras. What can the forces of the Global Left offer by way of a new programmatic alternative in this context? How can they best contribute to the new processes of ideological and political contestation? This article attempts to answer these questions from the perspective of the leftwing international law project. As even its most passionate supporters would have to accept, one of the greatest weaknesses of the critical legal project historically has been its inability to move from the critical to the reconstructive stages of leftwing action. How can this weakness be best overcome? The answer offered in these pages begins with Marxism – in particular, the Marxist class-theoretical approach. The goal of leftwing international law scholars is to help the critical legal movement break out of its prison-house of conspicuous theoreticism and establish a system of durable political connections with the worlds of legal activism and diplomatic action. This article argues in favour of constructing a Marxist-style class-focused approach to international law and by way of a practical illustration offers a critical outline of how this project can be best accomplished. It explains what conditions need to be satisfied on the analytical and the ideological fronts for this enterprise to be successful and details a series of tenets and premises from which it must start.

*KEYWORDS:* international legal theory, Marxism, critical legal studies, international law and capitalism, interdisciplinary approaches to the study of international law

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## 1. Introduction

Marx was right. Let this not upset you. The history of all known human societies *is* a history of class struggle.<sup>1</sup> As the heavy dust clouds raised by the self-delusionary triumphalism of New Finance Capitalism slowly begin to settle, the basic truth of this fundamental insight comes to be realized once more, in all its stark simplicity.

Marx was right, and the times we live in as never before confirm the great historic promise of his theoretical legacy for the international law profession. The global capitalist empire under whose ever-expanding umbrella the international legal order evolved over the last 150 years has entered its deepest systemic crisis of the last half-century. The once seemingly bottomless toolbox of clever ideological devices by which it had secured its dominance has turned out to be filled with cheap dysfunctional gimmicks and random debris. The virtually unchallengeable hegemony which the neoliberal right asserted over the terms of the global political debate at the end of the Cold War has abruptly disintegrated, and Minerva's favourite wildbird, at long last, is again breaking out of her golden cage.

The greater the spontaneous unfolding of historical events, wrote Lenin famously, the more pressing becomes the 'demand for greater consciousness in the ... work of social democracy.'<sup>2</sup> In these times of extraordinary openings, what can the Global Left offer by way of a new programmatic agenda? How can it take advantage of this newly formed historical conjuncture? How can it realize its historic mission of laying out the path from the ever-dreadful 'realm of necessity' into the ever-utopian 'realm of freedom'?<sup>3</sup> How can it contribute its voice to the newly revived processes of rethinking and ideological struggle? What can it do – what *should* it do – in order to accomplish these aims? What sort of a new critical project and what kind of a new utopian vision ought it try to develop?

I do not claim I can answer any of these questions in full. The subject that I cover in these pages is much more modest in scope. It comprises, essentially, two main issues. First, how should leftwing international lawyers respond to the challenges of our times? Second, what sort of political posture and vocabulary should they develop in their day-to-day practices? Will it be better for the leftwing international law project to ally itself with some part of the UN technocracy? Or

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1. Karl Marx and Frederick Engels, *The Communist Manifesto* (Verso: London, 1998) at 34.
2. V. I. Lenin, *What Is To Be Done?* (Penguin: London, 1988) at 119.
3. See Karl Marx, *Capital*, Vol. III (Foreign Languages Publishing House: Moscow, 1959) at 799-800.

should it reach out instead to some segment of the 'global civil society'? Will it be more effective to formulate the radical international law agenda in terms of a North-South divide or translate it into the language of the international human rights project?

In the pages ahead, I try to outline *one* possible way of resolving these and a number of other related questions. Needless to say, I do not assert this to be the only answer one can imagine in the present circumstances. I do, however, believe that as far as programmatic visions go, the one I advocate here deserves at least to be given some serious theoretical attention.

The remarks which I offer below purport to expound *one* particular version of a Marxist theory of international law. They are not intended to provide a comprehensive overview of everything that can or, indeed, needs to be said today about the general significance of the broader Marxist theoretical tradition for contemporary international legal studies.<sup>4</sup> My objective in these pages, rather, is limited to a much narrower task – the articulation of the most *basic constituent elements* of what can eventually be developed into a workable analytical framework for *leftwing international law practitioners* derived from what can be roughly described as the *classical Marxist tradition*. I do not claim – nor would I believe anyone who does – that we can yet know for sure what this analytical framework ought to be in each one of its numerous dimensions. Much more theoretical work needs to be done before we arrive in that position. But every journey must begin somewhere.

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A few words about what comes below. Section 2 provides a brief overview of what I understand to be the most important *theoretical challenge* confronting the leftwing international law project today. It describes the general ideological context which frames this theoretical challenge and on this basis sets out the general case in favour of constructing an explicitly Marxist approach to international law.

Building on the foundations thus laid, Section 3 then offers a general synopsis of the three main analytical blocks from which the particular kind of Marxist approach to the study of international law which I advocate in these pages can be constructed. One does not have to agree with every step of the argument that I make in Section 3 to be able to grasp the general programmatic vision which comes after it in Sections 4 and 5, but it would certainly help to have at least followed its basic sequence. If Section 5 is this article's main programmatic statement, Section 3 is its essential theoretical foundation.

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4. A much better starting point for that can be found in Susan Marks (ed.), *International Law on the Left* (Cambridge University Press, 2008).

To make the argument more accessible, each section presents a relatively self-contained series of theses. That said, to go straight to Section 5 without even looking, say, at Section 2, would probably be a mistake.

One last point: a few paragraphs earlier I described my project in terms of a 'classical Marxist tradition'. What precisely should one understand by that?

Briefly, the idea of there being more than one Marxist traditions has long enjoyed a certain degree of popularity among leftwing legal scholars.<sup>5</sup> Susan Marks's recent assertion in the opening essay of *International Law on the Left* that '[a]ny effort to take stock of what Marxism has to offer today must [necessarily] reckon with a tradition that ... is ... persistently plural', in this context, can be said to represent a certain orthodoxy.<sup>6</sup> One may agree with the ideological aspirations which it represents. But one may also question them.<sup>7</sup> Pluralism, like syncretism, is hardly a self-evident virtue. One man's diversity of opinion could well be another man's Tower of Babel. To treat the phenomenon of pluralism as necessarily beneficent is, as Terry Eagleton observed, after all, an 'industrial chaplain view of reality'.<sup>8</sup>

The view that I take here, while not necessarily in conflict with Marks's position, holds, nevertheless, that however wide this 'sea of Marxisms' may be, one can still distinguish within it with a sufficient degree of analytical precision what historically constitutes the *classical* strand of the Marxist tradition.

What are the principal features of this classical strand? To put it in a somewhat telegraphic form, the primary conceptual categories around which it arranges its analytical framework are the concepts of 'class struggle', 'exploitation', and 'mode of production'. The principal critical operations in terms of which it organises its analytical work are the 'commodity fetishism' argument and the 'derivation of the superstructure' argument. The main 'fields' on which it concentrates its attention are 'economics' and 'politics'. The primary epistemological assumption on which it bases all its discourse is 'external realism'.<sup>9</sup>

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5. See, generally, B. S. Chimni, *International Law and World Order* (Sage: New Delhi, 1993); David Kennedy, 'Critical Theory, Structuralism and Contemporary Legal Scholarship', 21 *New England Law Review* (1986) 209-89.

6. Susan Marks, 'Introduction', in Marks, *International Law on the Left*, supra note 4, at 1.

7. On the ideological importance of the many-Marxisms thesis, for instance, in the context of the institutional development of the US CLS movement, see John Henry Schlegel, 'Notes towards an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies', 36 *Stanford Law Review* (1984) 391-411 at 393-8.

8. Terry Eagleton, *After Theory* (Verso: London, 2003) at 136.

9. Although not necessarily expressed in exactly the same terms, this view has been generally espoused in most Marxist accounts of Marxism's own intellectual history. See, e.g., Göran Therborn, 'Dialectics of Modernity: On Critical Theory and the Legacy of Twentieth-Century Marxism', 215 *New Left Review* (1996) 59-81; Alex Callinicos, *Is There a Future for Marxism?* (Macmillan: London, 1982); Perry Anderson, *Considerations on Western Marxism* (Verso: London, 1976).

An archetypal illustration of a work produced in the classical tradition would be *Das Kapital* itself. Among the more recent examples, one can point variously to the writings of Evgeniy Preobrazhensky<sup>10</sup> and Nicos Poulantzas,<sup>11</sup> Ellen Meiksins Wood<sup>12</sup> and Gerald Cohen,<sup>13</sup> Robert Brenner<sup>14</sup> and Susan Watkins,<sup>15</sup> Hillel Ticktin<sup>16</sup> and David Harvey,<sup>17</sup> Göran Therborn<sup>18</sup> and Stephen Resnick and Richard Wolff.<sup>19</sup> Whatever impression the language of classicism may imply, the classical tradition in Marxism is, thus, a rather catholic field. It is not a species of dogmatism or theoretical fundamentalism.

## 2. The Nature of the Challenge

We live at the end of an era. The Washington Consensus is dead. So, too, are the ‘Bush doctrine’, the Fukuyamian ‘end of history,’ and the buzzing Thatcherite culture of ‘there is no alternative’. With the global food crisis steadily escalating on an ever-greater scale, the golden age of the unquestioning faith in free-market deregulationism is dissolving as fast as the vulgar ideological order that propped it up all these years from Reagan and Thatcher to NAFTA and George Bush Jr.<sup>20</sup>

10. See, e.g., Evgeniy Preobrazhensky, *The New Economics* (trans. by Brian Pearce; Clarendon Press: Oxford, 1965).
11. See, e.g., Nicos Poulantzas, *Political Power and Social Classes* (trans. by Timothy O’Hagan et al.; NLB: London, 1973).
12. See, e.g., Ellen Meiksins Wood, *Democracy against Capitalism* (Cambridge University Press, 1995).
13. See, e.g., G. A. Cohen, *Karl Marx’s Theory of History* (Clarendon Press: Oxford, 1978).
14. See, e.g., Robert Brenner, ‘The Social Basis of Economic Development’, in John Romer (ed.), *Analytical Marxism* (Cambridge University Press, 1986) 23-53.
15. See, e.g., Susan Watkins, ‘Shifting Sands’, 61 *New Left Review* (2010) 5-27.
16. See, e.g., Hillel Ticktin, ‘The Nature of an Epoch of Declining Capitalism’, 26 *Critique* (1998) 69-93.
17. See, e.g., David Harvey, *The New Imperialism* (Oxford University Press, 2003).
18. See, e.g., Göran Therborn, ‘The Prospects of Labour and the Transformation of Advanced Capitalism’, 145 *New Left Review* (1984) 5-38.
19. Stephen Resnick and Richard Wolff, *Class Theory and History* (Routledge: New York, 2002).
20. See Pedro Conceição and Ronald Mendoza, ‘Anatomy of the Global Food Crisis’, 30 *Third World Quarterly* (2009) 1159-1182; Jennifer Clapp, ‘Food Price Volatility and Vulnerability in the Global South: Considering the Global Economic Context’, 30 *Third World Quarterly* (2009) 1183-1196; Gopal Balakrishnan, ‘Speculations on the Stationary State’, 59 *New Left Review* (2009) 5-26; Jack Rasmus, ‘Speculative Capital, Financial Crisis and Emerging Epic Recession’, 37 *Critique* (2009) 31-49; Gary A. Dymski, ‘Racial Exclusion and the Political Economy of the Subprime Crisis’, 17 *Historical Materialism* (2009) 149-179; David McNally, ‘From Financial Crisis to World-Slump: Accumulation, Financialisation, and the Global Slowdown’, 17 *Historical Materialism* (2009) 35-83; Robert Wade, ‘Financial Regime Change?’, 53 *New Left Review* (2008) 5-21; Raghu Krishnan and Adrien Thomas, ‘Resistance to Neoliberalism in France’, 45 *Socialist Register* (2008) 295; Perry Anderson, ‘Jottings on the Conjunction’, 48 *New Left Review* (2007) 5-37. See also more generally Hugo Radice,

To be sure, that wild sense of an impending economic apocalypse that surfaced in some quarters, on the left as well as on the right, during the ‘*grandes journées* of September 2008’ has proved to be essentially unwarranted. The domino-style meltdown of Wall Street powerhouses has since been halted, the global financial system re-stabilised, and the international monetary crisis, for the most part, averted. Already by August 2009 a number of leading Western economies began officially ‘exiting recession’.<sup>21</sup> Soon after, the IMF confirmed the resumption of global economic growth, predicting world output levels to grow by at least 4% over the following year.<sup>22</sup> A little more than 15 months after the avalanche implosion of the asset bubbles in the international financial markets seemed poised to upend the whole of the world economic system, global production and trade levels started ‘bouncing back’, safely forestalling a full-scale repeat of the Great Depression.

Or at least that is what made the IMF news headlines. A slightly more attentive reading of the underlying economic indicators suggests a much more ambivalent image: not so much a bottoming-out of the global crisis as a complex redistribution of the crisis trends from one region of the world to another; not so much a reversal of the epic recessionary trends as a transmission of the recessionary momentum from one sector of the economy to another.

To be sure, the larger banks did in the end manage, as Susan Watkins puts it, to ‘get away with it, politically’.<sup>23</sup> In some cases, indeed, their shares have now risen higher than they had been before the crisis. But outside the banking industry the story seems much grimmer. Even in the North Atlantic region, the historical heartland of global capitalism, the patterns of economic recovery have at best remained patchy. In the wake of the collapse of all three of its major banks, Iceland – the whole *economy*, not just the ‘government’ – barely escaped bankruptcy.<sup>24</sup> As

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‘The Developmental State under Global Neoliberalism’, 29 *Third World Quarterly* (2008) 1153-1174; Gérard Duménil and Dominique Lévy, *Capital Resurgent: Roots of the Neoliberal Revolution* (trans. by Derek Jeffers; Harvard University Press, 2004).

21. ‘France and Germany Exit Recession’, *BBC News*, 13 August 2009, <news.bbc.co.uk/1/hi/8198766.stm> (visited 22 February 2010).
22. ‘World Economic Outlook Update’, International Monetary Fund, 26 January 2010, <www.imf.org/external/pubs/ft/weo/2010/update/01/pdf/0110.pdf> (visited 22 February 2010).
23. Watkins, ‘Shifting Sands’, *supra* note 15, at 10. In assessing this remarkable turn of fortune for the banking industry, however, one must bear in mind that the rising tide, as it were, lift all boats: in 2009, more than 140 smaller-size banks ‘failed’ in the US alone. See ‘Notes from Editors’, 61/9 *Monthly Review*, February 2010, <monthlyreview.org/nfte100201.php> (visited 22 February 2010).
24. Eric Pfanner, ‘Iceland is All But Officially Bankrupt’, *The New York Times*, 9 October 2008. Editorial, ‘Timeline: Iceland Economic Crisis’, *BBC News*, 2 February 2009, <news.bbc.co.uk/1/hi/7851853.stm> (visited 22 February 2010).

of the early 2010, Greece seemed to be fast progressing down the same tracks.<sup>25</sup> Britain, at least by some accounts, was hardly that far behind.<sup>26</sup>

Neither development, naturally, boded well for the stability of international currency markets,<sup>27</sup> and the spectre of a comprehensive global financial melt-down – this time caused by sovereign defaults – has once again returned to the horizon.<sup>28</sup> Slightly further afield, every second government in Central and East European region has been forced to take out emergency loans from the IMF.<sup>29</sup> Official unemployment figures, in the meantime, steadily reached into the double digits not only in the US, but also across many parts of the Eurozone, reaching the staggering 20% in Spain by November 2009.<sup>30</sup> Characteristically, increase in female and youth unemployment rates in many cases conspicuously exceeded those for adult males, and overall more than 60% of all those who qualified as ‘employed’ for the purposes of the International Labour Organisation’s statistics in 2008 earned wages at the rate of two US dollars a day or less.<sup>31</sup>

Taking a few steps back, the IMF’s concept of the global economic recovery itself perhaps requires to be taken with a certain degree of scepticism. To be sure, the world output levels in 2010 may well rise by those 4% which the Fund promises. But decontextualised global projections of such kind often tend to hide more than they reveal. Take for instance Russia. In the first half of 2009 alone, the Russian GDP levels shrank by almost 10%, domestic demand fell by half, and industrial production levels by 40%.<sup>32</sup> In the European Union, in the same year total output levels decreased by 10%; in Japan, by 12%; in the Baltics, by

25. Editorial, ‘Timeline: Greece’s Economic Crisis’, *Reuters*, 3 February 2010, < [www.reuters.com/article/idUSTRE6124EL20100203](http://www.reuters.com/article/idUSTRE6124EL20100203) > (visited 22 February 2010); Ambrose Evans-Pritchard, ‘Greece Loses EU Voting Power in Blow to Sovereignty’, *The Daily Telegraph*, 16 February 2010.

26. Editorial, ‘On Borrowed Time’, *The Times*, 19 February 2010; Ian King, ‘Worried about National Debt?’, *ibid.*

27. Larry Elliott, ‘Greece’s Financial Crisis Puts the Future of the Euro in Question’, *The Observer*, 7 February 2010; Steven Erlanger, ‘Euro Debt Crisis Is Political Test for Bloc’, *The New York Times*, 5 February 2010; Angela Monaghan, ‘Markets in Retreat after Britain Posts First-ever January Deficit’, *The Daily Telegraph*, 18 February 2010.

28. James Quinn, ‘Greece to Start “Spate of Sovereign Defaults”’, *The Daily Telegraph*, 24 February 2010.

29. Editorial, ‘The IMF Helps to Bail-out Stricken Countries in Eastern Europe’, *The Economist*, 27 October 2008.

30. Global Employment Trends’, International Labour Organisation, January 2010, < [www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_elm/---trends/documents/publication/wcms\\_120471.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_elm/---trends/documents/publication/wcms_120471.pdf) >, at 38 (visited 22 February 2010).

31. *Ibid.*, at 15- 22.

32. Watkins, ‘Shifting Sands’, *supra* note 15, at 11.

14%.<sup>33</sup> In Ukraine, total growth levels for 2009 registered at -14%; in Moldova, at -9%; in Mexico, at -7.3%; in Armenia, at -15.6%.<sup>34</sup>

To be sure, the People's Republic of China (PRC) and the so-called 'poorer countries across the global South' that had been less integrated into the global markets did not, as many observers remarked, witness the same levels of output contraction in the wake of the global financial crunch.<sup>35</sup> But the real meaning of this 'decoupling' has to be approached against the background of the much broader trends. Between March 2007 and March 2008, according to the UN Food and Agriculture Organization, the global price of traded wheat rose by more than 130%; rice, by more than 70%; soya, by more than 80%.<sup>36</sup> And while in the eyes of some observers the PRC's economy yet again seems to have proved itself invulnerable to whatever maladies afflict the global economic system otherwise, this impression is set to hold, at best, only for so long as the delayed effects of the shrinking markets for Chinese commodities are not absorbed in full. For, indeed, even if China's share of the global export markets may have grown in relative terms, in absolute terms the levels of Chinese export trade have undoubtedly taken a plunge,<sup>37</sup> a trend that has already left a strong impact on domestic labour markets.<sup>38</sup>

In the meantime, the mountain of global debt generated as finance ministers and central bankers around the world frantically shuffle through every trick in the neo-Keynesian book to help resuscitate global production and trade, has continued to grow at such a staggering rate that the idea of an inter-generational fiscal burden increasingly loses its metaphoric quality.<sup>39</sup> And in exchange for what short-term benefits? Whatever the scale of the fiscal and monetary stimuli thrown at it by the public decision-makers, the global private sector seems to have simply absorbed everything that came its way. As the most recent OECD figures indicate, in high-income countries as well as in the big emerging markets, at the start of 2010, private sector financial balances stood to run up a surplus income

33. 'Global Employment Trends', supra note 30, at 38; Watkins, 'Shifting Sands', supra note 15, at 10.

34. 'Global Employment Trends', supra note 30, at 30 and 37.

35. Ibid., at 27-35; Watkins, 'Shifting Sands', supra note 15, at 11.

36. See Conceição and Mendoza, 'Anatomy of the Global Food Crisis', supra note 20, at 1159-60.

37. Editorial, 'Fear of the Dragon', *The Economist*, 7 January 2010.

38. Keith Bradsher, 'China's Unemployment Swells as Exports Falter', *The New York Times*, 5 February 2009.

39. At the start of 2010, the level of public debt in Britain, for example, reached 170% of the projected government income for the coming fiscal year, or more than 60% of the GDP. See King, 'Worried about National Debt?', supra note 26. In Japan, the gross government debt figure registered at more than 200% of GDP. See Editorial, 'Japan Is a Beacon of Hope to West', *The Daily Telegraph*, 24 February 2010. For comparable US figures, see Michael Mackenzie and Gillian Tett, 'Moody's Warns US of Credit Rating Fears', *The Financial Times*, 3 February 2010.

at the rate of 7.4% of the corresponding GDP figures. Or, to put it more bluntly, despite whatever fiscal and monetary stimuli it receives, 'the private sector is now spending far less than its aggregate income' – a scenario which, if it continues to run for any longer, can only lead to a potentially uncheckable succession of sovereign debt crises.<sup>40</sup>

Has New Finance Capitalism finally lost all its political and economic purchase? However one looks at it, one thing seems to be certain: its ideological credibility as a model of ordering global economic and political affairs has entered a period of terminal decline. To continue in such circumstances to rely on the same intellectual framework which had enabled this model to emerge in the first place, it seems, would be, at best, highly imprudent. Even those who write op-ed pieces for *The Financial Times* have come to realize that.<sup>41</sup> Whether one likes it or not, it appears, the time has arrived for international lawyers to do the same.

For, indeed, however much it may seem to be 'only' an economic theory, in truth, free-market liberalism has never been just that. The teachings of Adam Smith are not a discretionary add-on attachment grafted onto a philosophically independent theoretical platform constructed from the combined legacies of Hobbes, Bentham, and Locke. They are part and parcel of the same general order of thought. Just like the Smithian theory of economics cannot make much sense without the Lockean theory of society, so too the latter cannot, in the final analysis, make much sense without the former.<sup>42</sup> If one of the two has to be dropped, then so too must the other.

What does it mean, though, to say that the Lockean theory of society must be discarded? The scale of the theoretical challenge presented to the international law profession by the current historical conjuncture, in the end, is as simple as it is monumental. A completely new theoretical consciousness needs to be created for the international law field, to help it transcend the bleak old horizons carved out by the founding fathers of liberal thought. It has to be created, rigorously and painstakingly, but not just on the level of the self-conscious theoretical discourse itself. It is the system of what Diego Lopez Medina has dubbed 'pop jurisprudence' – the spontaneously sustained common juristic sense, the professional *doxa* of the international law community – that ultimately matters far more.<sup>43</sup> For, let us make no mistake about this: it is only through the intellectual and ideological

40. Martin Wolf, 'The World Economy Has No Easy Way Out of the Mire', *The Financial Times*, 24 February 2010.

41. See, e.g., Jean-Louis Beffa and Xavier Ragot, 'The Fall of the Financial Model of Capitalism', *The Financial Times*, 22 February 2008; Martin Wolf, 'The End of Lightly Regulated Finance Has Come Far Closer', *The Financial Times*, 16 September 2008.

42. For further elaboration of this argument, see Roberto Unger, *Knowledge and Politics* (Free Press: New York, 1975).

43. See Diego Lopez Medina, *Comparative Jurisprudence: Reception and Misreading of Transnational Legal Theory in Latin America* (SJD Thesis, Harvard Law School, 2001) [a copy on file with

materials that circulate within the plane of 'pop jurisprudence' that the logic of international law's practical reality – its 'living law', to use Eugen Ehrlich's expression<sup>44</sup> – receives its full articulation. And it is only via this articulation that all the various segments of the international law profession are able to give meaning to the terms by which they learn to situate themselves vis-à-vis each other and their day-to-day professional realities.

Like all categories of university-based intellectuals, leftwing international law scholars – and most leftwing international lawyers today *are* university academics, a fact whose practical-social significance I will return to shortly – tend to underestimate the fact that the reality of every collective practice, be it international law scholarship or international law itself, is defined, in the end, far less by the contents of the collective self-consciousness that accompanies it than by the interpellative effects of its 'stylized performative patterns'<sup>45</sup> If the international law left does not succeed in changing the structures of international law's *habitus* – the contents of its 'pop jurisprudence' – there will be no point in scoring any victories on the plane of the 'high' legal-theoretic debate.

But where should one turn now in search for this new jurisprudential system? Where should one look for those basic building blocks from which one could assemble not simply a new way of abstract thinking about international law but a whole *new analytical framework* that would enable its users to produce concrete practical responses to concrete practical problems? As the title of this essay suggest, my answer to this question is: Marxism; in particular, the Marxist class-theoretic tradition. And here is why.

Firstly, as even its fiercest opponents would readily admit, the leftwing international law project over the last thirty years has developed a truly remarkable track record when it comes to the practice of ideology criticism.<sup>46</sup> It has debunked and demystified numerous areas and sub-areas of international legal relations and exposed countless ruses and biases permeating the contemporary international

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Harvard Law School library]. A later Spanish edition came out as Diego Lopez Medina, *Teoría Impura del Derecho* (Legis: Bogotá, 2004).

44. See Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (trans. by Walter Moll; Harvard University Press, 1936) at 493-506.

45. See Judith Butler, 'Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory', 40 *Theatre Journal* (1988) 519-531.

46. Variouslly dubbed 'critical international legal studies,' 'newstream,' and the 'new approaches to international law,' the academic side of this development has attracted considerable commentary in international law literature in the last two decades. See, e.g., Nigel Purvis, 'Critical Legal Studies in Public International Law', 32 *Harvard International Law Journal* (1991) 81-127; Deborah Cass, 'Navigating the Newstream: Recent Critical Scholarship in International Law', 65 *Nordic Journal of International Law* (1996) 341-383; David Kennedy, 'When Renewal Repeats Itself: Thinking against the Box', 32 *NYU Journal of International Law & Policy* (2000) 335-500 at 483-97; B. S. Chimni, 'Towards a Radical Third World Approach to Contemporary International Law', 5/2 *ICCLP Review* (2002) 14-26 at 21-3.

legal order and the corresponding sets of social practices that sustain them. It has brought to light and painstakingly documented a whole range of conveniently forgotten inconvenient facts about international law's past, distant and near. But it has not, as we all know perfectly well, achieved nearly as impressive a set of results when it came to the 'constructive side' of its political enterprise.

There has been a great deal of brilliant critical writing on various international law subjects coming from the leftist quarters in recent years. But there have been no serious large-scale programmatic statements. Many sceptical voices, but no constructive visions. Many subversive questions, but no utopias.<sup>47</sup>

The unique power of the Marxist tradition, seen against this background, I think, lies precisely in its long-proven potential to overcome exactly such kind of dead-end-street dynamics.

Time and time again, from Georgi Plekhanov<sup>48</sup> to Kwame Nkrumah,<sup>49</sup> from Rosa Luxemburg<sup>50</sup> to Catharine MacKinnon,<sup>51</sup> it has been the classical Marxist tradition that has helped to inspire every grand political enterprise undertaken by the secular left anywhere in the world in the last one hundred years.

True, the idiom of class studies has not been exceptionally popular in the broader tradition of critical legal writing in recent times.<sup>52</sup> But forging weapons is never a popularity contest, and every explanatory theory that is designed to serve also as a practical guide for political action is inevitably going to be a weapon – theoretical, critical, ideological.

True, a rather significant number of 'programmatic visions' that had been produced over the course of the last century under the rubric of the Marxist tradition have led to what at best can only be described as deeply regrettable outcomes. But the same could also be said of every other theoretical tradition, not least free-market liberalism.<sup>53</sup> Only a very naïve person could seriously believe that the course of history can be pre-determined by an analytical tradition. To lay the responsibility for the emergence of the Gulag or the crushing of the Prague Spring at the doors of the Marxist tradition would be no less dubious than to

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47. For (partial) exceptions, see David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, 2004) at 327-57; B. S. Chimni, 'Alternative Visions of Just World Order: Six Tales from India', 46 *Harvard International Law Journal* (2005) 389-402.

48. Georg Plekhanov, *In Defence of Materialism: The Development of the Monist View of History* (trans. by Andrew Rothstein; Lawrence & Wishart: London, 1947).

49. Kwame Nkrumah, *Neo-Colonialism: The Last Stage of Imperialism* (Heinemann: London, 1968).

50. Rosa Luxemburg, *The Mass Strike* (trans. by Patrick Lavin; Bookmarks: London, 1986).

51. Catharine MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press, 1989).

52. See Paddy Ireland, 'History, Critical Legal Studies and the Mysterious Disappearance of Capitalism', 65 *Modern Law Review* (2002) 120-140.

53. See John Newsinger, *The Blood Never Dried* (Bookmarks: London, 2006) at 34-6.

blame the occurrence of the Opium Wars on the theory of free trade and the concepts of supply and demand.

True, many canonical class-theoretic writings do not read very easily, even today, and the ideas advanced in them do not always seem to have a clearly identifiable practical dimension. But simplicity makes for an unqualified virtue only among the demagogues, the lazy, and the poor in imagination.

True, in the field of contemporary international law theory the Marxist class-theoretic tradition for the most part has not even been tapped yet, and that, in the end, may be considered a cause not only for a profound hope, but also for a profound anxiety. For, of course, one might say, should it be performed 'correctly', a Marxist-style class-focused re-orientation of international legal studies can equip progressive international lawyers not only with a whole new meta-theoretical framework, but also a highly practicable conceptual apparatus that includes *both* an extensive toolbox of micro-level analytical instruments *and* a highly reliable macro-level theoretical platform on which one can construct any number of counter-hegemonic strategies.

Performed 'correctly', a class-analytic re-theorization of international law can supply the leftwing international law project with a virtually endless stock of new programmatic suggestions. It can grant it access to ideological horizons that hitherto its participants could only have dreamt about, breathing life back into the idea of a 'radicalism with rules' and making possible once again the vision of a radical international law theory that is neither despairingly nihilist in its general outlook, nor hopelessly utopian.

But every successful performance requires a certain degree of training and experience. Without any previous practice in constructing an all-encompassing Marxist-theoretical project, what guarantees do we have that the journey we are about to set out on as international law theorists will not end in total disaster? What guarantees do we have that the tiniest mis-estimation of our institutional or intellectual potential will not irretrievably ruin everything we cannot afford today to have ruined, alienate at once all those potential allies and target communities without whom any idea of a practical reform becomes a meaningless fiction?

I am afraid I do not have any better answer to this than that if these should indeed be our worst fears, then, I suppose, we have nothing to fear, really. The disaster has already happened. For, let us be honest with ourselves: where some three or four generations ago most of the practical momentum in the leftwing international law project was concentrated in the fields of international diplomacy and political activism, the vast majority of all leftwing efforts in international law today are limited to the field of academic practice. The ships of the New International Economic Order had ran aground in the early eighties, and the only notable achievement the international law left has managed to produce since then was an academic rebellion.

Please do not get me wrong. None of this is intended to belittle what that generation has done or attempted to do – quite the contrary. Everything that I know about being a progressive international law scholar I have learned from them. Chances are, the same goes for all of us..

But the situation in which the leftwing international law project finds itself today is not made any better by this recognition. If we are to regard ourselves as the direct heirs of any one of those great political projects that unfolded in the past under the banner of the international law left, the basic truth we will have to confront before we move anywhere further with our work is that, quite simply, we have lost every connection our predecessors' predecessors had had with the world of practical diplomacy and international activism.

Every activist community, which four decades ago would have normally mobilized itself in terms of a leftwing vocabulary, has switched today to the language of 'good governance' and 'human rights'. Where a mere thirty years earlier one would have found a whole array of different international trade union movements and anti-colonial coalitions, all seeking in one way or another to deploy concepts and arguments of an essentially international *legal* provenance, today one can only see a loose network of identitarian groups flanked by every shade of the neo-hippyist consumer-power movement.

Things can no longer continue the way they are going today. The leftwing international law project needs to establish a network of durable political connections with the non-academic segments of international law's 'invisible college',<sup>54</sup> and it needs to do this fast.

The Marxist class-theoretic tradition, while it cannot in itself guarantee the achievement of this goal, can equip the leftwing international law project with invaluable practical and theoretical insights as to how exactly it can proceed on this front. A considerable part of this, to be sure, comes from the fact that from its very inception the classical Marxist tradition has concentrated on developing only those kinds of theoretical knowledges, which could be immediately converted into practical instruments.<sup>55</sup> But it is also true, that the classical Marxist tradition has also been simply 'unmatched in its resources for self-reflection and self-correction,' especially in what concerns the development of such practice-oriented knowledge-instruments.<sup>56</sup>

One does not need to go far to obtain a basic sense of what a Marxist-style re-conceptualisation of international law would look like. A series of groundbreaking

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54. Oscar Schachter, 'The Invisible College of International Lawyers', 72 *Northwestern University Law Review* (1977) 217-226.

55. That is to say that kind of theoretical knowledge that 'is essential to practice, to the forms of practice that it helps bring to birth or to grow, as well as to the practice it is the theory of.' Louis Althusser, *For Marx* (trans. by Ben Brewster; NLB: London, 1969) at 166.

56. Chimni, *International Law and World Order*, supra note 5, at 17.

works that started to emerge over the last few years – from China Miéville’s *Between Equal Rights*<sup>57</sup> to Hillel Ticktin’s ‘Political Economy and the End of Capitalism’,<sup>58</sup> William Robinson and Jerry Harris’s writings on the transnational capitalist class,<sup>59</sup> and Benno Teschke’s *The Myth of 1648*<sup>60</sup> – have accumulated a whole range of insights from which already now one can begin to develop the basic foundations of a Marxist-style class-theoretic approach to international law.<sup>61</sup>

How should this task be resolved in practice? What sort of theoretical stance should we take towards these insights? Should we simply combine them into one single whole? Or should we subject them to further theoretical ‘processing’? If the latter, on what terms and under the guidance of what ‘first principles’ should this processing be organised?

Again, what I can offer on this count is at best only a provisional answer. But it appears to me that from the general Marxist point of view the development of a consistently Marxist approach of international law presupposes a certain number of basic theoretical conditions.<sup>62</sup> The most important of them, in systemic terms, is the acceptance of the following general thesis as the principal point of all theoretical departures:

In the social production of their existence, men inevitably enter into definite ... relations of production appropriate to a given stage in the development of their material forces of production. The totality of these relations of production constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of material life conditions the general process of social, political and intellectual life. ... At a certain stage of development, the material productive forces of society come into conflict with the existing relations of production or – this merely expresses the same thing in legal terms – with the property relations within the framework of which they have operated hitherto. From forms of development of the productive forces

57. China Miéville, *Between Equal Rights* (Brill: Leiden, 2005).

58. Hillel Ticktin, ‘Political Economy and the End of Capitalism’, 35 *Critique* (2007) 67-77.

59. William Robinson and Jerry Harris, ‘Toward a Global Ruling Class? Globalization and the Transnational Capitalist Class’, 64 *Science & Society* (2000) 11-54.

60. Benno Teschke, *The Myth of 1648* (Verso: London, 2003).

61. For other important recent contributions, see Umut Özsü, ‘The Question of Form: Notes on Dialectics and International Law’, 23 *Leiden Journal of International Law* (2010) (forthcoming); Robert Knox, ‘Marxism, International Law, and Political Strategy’, 22 *Leiden Journal of International Law* (2009) 413-436; Bill Bowring, *The Degradation of the International Legal Order?* (RoutledgeCavendish: London, 2008); B. S. Chimni, ‘International Institutions Today: an Imperial Global State in the Making’, 15 *European Journal of International Law* (2004) 1-37.

62. See Evgeny Pashukanis, ‘The General Theory of Law and Marxism’, in Piers Beirne and Robert Sharlet (eds.), *Pashukanis: Selected Writings on Marxism and Law* (trans. by Peter Maggs; Academic Press: London, 1980), 37-131 at 40-54. See also, more generally, Louis Althusser, *Essays in Self-Criticism* (trans. by Grahame Lock; NLB: London, 1976) at 163 *et seq.*

these relations turn into their fetters. Then begins an era of social revolution. The changes in the economic foundation lead sooner or later to the transformation of the whole immense superstructure.<sup>63</sup>

Put differently, the development of a *consistently* Marxist approach to international legal studies must begin, in effect, with the production of a general systematic account explaining the basic inter-relationship between the historical patterns structuring the global division of labour (and the corresponding extraction of surplus value) and the corresponding institutional forms of the international legal order – in particular, with a view to establishing the latter's causative contribution to the burgeoning contradiction between the immanent logic of the global productive forces and the corresponding system of the global relations of production.<sup>64</sup>

To account for the general patterns of this basic inter-relationship in the present historical conjuncture from a specifically Marxist-*jurisprudential* point of view, however, requires the development of a certain set of analytical instruments whose function should be to enable not only the generation of 'empirical descriptions', but also full, theoretically comprehensive explanations of the broader structural inter-linkages between the *general formal fragmentation* of the international political arena (multiplicity of states, plurality of adjudicatory procedures, etc.) and the *ever-increasing substantive integration* of the global economic domain.<sup>65</sup> How exactly have these two apparently so dissimilar patterns arisen? What sort of a historical logic has necessitated their emergence in that particular form in which they exist today? Most importantly, how do they relate to, reinforce, and condition one another?

Put differently, how does the geopoliticization of the international 'political' processes help to displace, and in some cases palliate, the various kinds of social tensions that arise out of the objective 'economic' logic of the global class conflict? How does the particular form which this geopoliticization has taken in the last several decades, not least through the medium of the international law discourse, impact on the systemic manageability of the corresponding regimes of 'economic' exploitation between classes, nations, and regional groupings?

63. Karl Marx, *A Contribution to the Critique of Political Economy* (Progress Publishers: Moscow, 1977), at 20-1. The logical implications of this extremely dense statement commonly regarded as the nutshell summary of the whole of theory of historical materialism have been traced out by many different commentators. For a classical starting point, see Georgi Plekhanov, *Selected Philosophical Works*, Vol. II (Progress Publishers: Moscow, 1976) at 231-2.

64. 'A Marxist analysis of law [must show] that a reasonably systematic relation exists between the law and the relations of production, with the latter more or less determining the former.' Mark Tushnet, 'Marxism as Metaphor', 68 *Cornell Law Review* (1983) 281-90 at 281.

65. See B. S. Chimni, 'An Outline of a Marxist Course on Public International Law', 17 *Leiden Journal of International Law* (2004) 1-30 (observing the fundamental significance of the constraining effect of the former logic on the historical development of the latter).

To resolve a task of such magnitude in an analytically rigorous manner, the first job, it appears to me, that will have to be completed *by way of theoretical production* should be a systematic re-calibration of those general legal and legal-theoretical concepts that lie at the core of the *common ideational framework* behind the orthodox international legal discourse – ‘state’, ‘international organization’, ‘customary law’, ‘global civil society’, ‘foreign direct investment’, ‘transnational corporation’, and so on and so forth. The central point behind the exercise is to preempt the strategic disadvantages of counter-disciplinarity. Taken in its ‘standard’ form, the Marxist theoretical tradition does not connect well with the analytical *habitus* of the international law profession. It fails to map onto the system of conceptual spaces lined up within the latter’s framework in such a violent fashion that, at best, it tends to miss the logic of what in Foucaultian terms we could describe as its fields of ‘presence’, ‘concomitance’, and ‘memory’;<sup>66</sup> at worst, to break this framework completely.

As the history of various critical-legal-theoretical enterprises repeatedly shows, prospects like this should not be taken lightly. International law has a remarkable capacity to discipline its purported challengers in the cruellest possible way when they stop taking its enunciative traditions seriously.<sup>67</sup>

The task facing the Marxist theoretical project with regard to these general legal and legal-theoretical concepts, consequently, appears to be essentially two-fold. In the first place, the corresponding elements of the Marxist ‘indigenous’ theoretical apparatus need to be re-organised and fine-tuned so as to facilitate the effective transplantation of the relevant concepts in question. In the second place, the concepts themselves need to be recalibrated in such a way as to enable their analytical accommodation within the broader Marxist epistemological framework, constructed as it has been on the basis of a completely different ontological theory.<sup>68</sup>

66. See Michel Foucault, *The Archaeology of Knowledge* (trans. by A. M. Sheridan Smith; Routledge: London, 2002) at 64-5: ‘The configuration of the enunciative field also involves forms of coexistence. These outline first a *field of presence* (by which is understood all statements formulated elsewhere and taken up in a discourse, acknowledged to be truthful, involving exact description, well-founded reasoning, or necessary presupposition) ... Distinct from this field of presence one may also describe a *field of concomitance* (this includes statements that concern quite different domains of objects, and belong to quite different types of discourse, but which are active among the statements [included in the given discursive formation], either because they serve as analogical confirmation, or because they serve as a general principle and as premises accepted by a reasoning, or because they serve as models that can be transferred to other contents, or because they function as a higher authority ...) ... Lastly, the enunciative field involves what might be called a *field of memory* (statements that are no longer accepted or discussed, and which consequently no longer define either a body of truth or a domain of validity, but in relation to which relations of filiation, genesis, transformation, continuity, and historical discontinuity can be established)’.

67. Kennedy, ‘Thinking against the Box’, *supra* note 46, at 460.

68. For a brief overview of the latter, see Althusser, *Essays in Self-Criticism*, *supra* note 62, at 40-

What sort of a practical attitude should guide this process of recalibration? The new analytical apparatus that will be built as a result of this re-calibration will become one of the most important practical instruments in the hands of the leftwing international law community. Whatever knowledge-generative exercise in which the leftwing international lawyers will engage – be it the explanation of the basic distributive impact of the broader TRIPS regime on the development of Third World economies or the disciplining power of the various ‘quality assessment exercises’ on the politics of the international law academia<sup>69</sup> – whether or not it will be performed effectively to a large degree will depend on the internal consistency of this apparatus. At the same time, and precisely for the same general reason, the new conceptual framework will need to be made not only internally stable in abstract theoretical terms but also easily masterable in terms of its everyday practical potential. Without this, the scale of discursive output will become so modest as to make the political effects of the leftwing international law discursive interventions effectively negligible.

### 3. Re-Theorizing International Law through the Prism of the Marxist Class-Theoretic Approach

How do class relations influence the development of international law? How should the phenomenon of the global class struggle be understood in the context of the contemporary international relations? There are three sets of basic theoretical insights which the classical Marxist tradition provides about this subject. The first set centres around the idea of *structural overdetermination*; the second, around the question of *the transnational class formations*; and the third, around the notion of *international law as a site of class struggle*.

#### 3.1. Structural Overdetermination

A good way to understand the general idea behind the concept of structural overdetermination is to start with the following quote from Nicos Poulantzas:

*[R]elations of power do not exhaust class relations and may go a certain way beyond them. Of course, they will still have class pertinency, continuing to be located, and to have a stake, in the terrain of political domination. But they do not rest*

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93; Poulantzas, *Political Power and Social Classes*, supra note 11, at 12-33.

69. For an introductory overview of the latter question in the context of British academia (the only one with which I happen to be sufficiently well acquainted in practice), see Anthony Bradney, ‘The Quality Assurance Agency and the Politics of Audit’, 28 *Journal of Law and Society* (2001) 430-442; Douglas W. Vick et al., ‘The Perceptions of Academic Lawyers Concerning the Effects of the United Kingdom’s Research Assessment Exercise’, 25 *Journal of Law and Society* (1998) 536-561.

on the same foundation as the social class division of labour, and are neither a mere consequence nor homologues or isomorphs of that division; this is so most notably in the case of relations between men and women. [C]lass division is not the exclusive terrain of the constitution of power, [however] in class societies all power bears a class significance.<sup>70</sup>

At first look, the basic notion behind the concept of structural overdetermination resembles the general idea of intersectionality made popular in recent years by a number of feminist critical scholars.<sup>71</sup> In fact, though, the two concepts are fundamentally different.

To begin with, it is a general tenet of the Marxist tradition that in order to understand the deeper historical meaning of any given social phenomenon one must always seek to understand it in terms of its causal determination by the dynamics of the underlying class struggle. Whatever role other elements of the social reality may play, for Marxists, it is class struggle which constitutes the fundamental 'motor of history'.<sup>72</sup> 'The history of all hitherto existing society is the history of class struggle.'<sup>73</sup>

To say that every historically existing social phenomenon is informed by the logic of the underlying class struggle, however, does not mean, as the Poulantzas quote above shows, that from the point of view of the Marxist theory of history and society all social events have to be understood to have been shaped solely by the terms of their respective class struggle components. Race relations, gender relations, cultural traditions, territory, ideological constructs, institutional regimes all play an important causative role in complexifying the event-determinative effects of class struggle. In many cases, they also help to determine the immediate forms which this struggle takes and thus unquestionably contribute to the formation of the broader patterns of historical development and social reality. The terms on which they do so, however, are, from a systemic point of view, neither arbitrary nor historically contingent. Unlike in the theory of intersectionality, in the Marxist tradition of structural overdetermination the 'overlapping' of the event-formative pressures issuing from race, gender, and class logics does not proceed in an unstructured, random fashion. The degree of influence that can be expected to be shown by the non-class factors is itself understood to be a precisely determined social event – determined, that is, by the current state of the corresponding class relations.

Put differently, unlike intersectionalists, overdeterminist Marxists do not simply hold that everything is determined by everything else. Their claim, rather, is that

70. Nicos Poulantzas, *State, Power, Socialism* (trans. by P. Camiller; Verso: London, 2000) at 43.

71. For a *locus classicus* on this topic, see, e.g., Kimberle Crenshaw, 'Mapping the Margins: Identity Politics, Intersectionality and Violence against Women', 43 *Stanford Law Review* 1241-1299.

72. See Althusser, *Essays in Self-Criticism*, supra note 62, at 47-51.

73. Marx and Engels, *The Communist Manifesto*, supra note 1, at 34.

the terms on which *other* social factors overdetermine the effects of class struggle are themselves determined, in the last instance, by the logic of class struggle.<sup>74</sup>

More abstractly, the basic thrust behind the Marxist concept of structural overdetermination can be described as the principled rejection of any theory which suggests that any given social object, event, or process can be legitimately reduced in analytical terms to some other ontologically distinct object, event, or process lying at its core.<sup>75</sup> The task of a Marxist commentator from the point of view of the structural overdetermination theory, thus, is never to treat any part, domain, or aspect of social reality as a mere symptom or homological reflection of some other, more ontologically privileged part, domain, or aspect, be it class struggle, economic relations, or the dialectical march of the *Weltgeist*. The idea, rather, is in all situations to seek to explain the given object in such a way that does not flatten out its irreducible historical complexity, while at the same time recognising that the terms on which this complexity has come to be formed – the conditions, that is, of its historical possibility and sustainability – are ultimately themselves determined by the logic of the underlying patterns of global class struggle.

What exactly the idea of making such a recognition may mean in practice I will return to in Section 3.3. For now, let me just reiterate two basic theses: (i) for Marxists history and society are causally overdetermined fields; (ii) the exact pattern of this overdetermination itself is not a random historical occurrence, but one that is fully determined, in the last instance, by the logic of the underlying class struggle.

### 3.2. Transnational Class Formations

In most Marxist circles today it is taken to be essentially self-evident ‘that capitalism has always been a transnational system.’<sup>76</sup> One only needs to turn to *The Communist Manifesto* to see the strength of the authority behind this view:

The need of a constantly expanding market for its products chases the bourgeoisie over the whole surface of the globe. It must nestle everywhere, settle everywhere, establish connections everywhere. [T]hrough its exploitation of the world market [it has] given a cosmopolitan character to production and consumption in every country.<sup>77</sup>

74. More generally on this subject, see further Althusser, *For Marx*, *supra* note 55, at 100-16; Poulantzas, *Political Power and Social Classes*, *supra* note 11, 13-15; J. K. Gibson-Graham et al., ‘Towards a Poststructuralist Political Economy’, in J. K. Gibson-Graham et al. (eds), *Re/Presenting Class: Essays in Postmodern Marxism* (Duke University Press, 2001) 1.

75. Stephen Resnick and Richard Wolff, *Knowledge and Class* (University of Chicago Press, 1987) at 2-3.

76. W. Tabb, ‘Globalization Today: At the Borders of Class and State Theory’, 73 *Science & Society* (2009) 34-53 at 35.

77. Marx and Engels, *The Communist Manifesto*, *supra* note 1, at 39-40.

And yet what does it mean exactly to say that capitalism, by its very nature, has always been a *transnational* system? What impact does this idea have when it comes to explaining the logic of the formation of social classes as a *historical process*? If the capitalist mode of production by its very design is supposed to have always been cosmopolitan in scope, so too, by definition, it follows, must be the ontological basis underlying its general class structure. And yet what does it actually mean to speak of the subject of class formation in cosmopolitan and transnational terms?

According to the general Marxist theory of class, there are three basic points, I think, that need to be borne in mind in order to start answering such questions.

### 3.2.1. *The Conditions for the Emergence of Class Divisions*

Every class, according to the general Marxist tradition, constitutes, ultimately, a *purely historical phenomenon*. That is to say, social classes do not come into existence spontaneously ‘of their own accord’ or as a result of some transcendental ontological inevitability. It is an important element of the broader Marxist doctrine that human societies have not always been divided into classes, nor do they necessarily have to be. What creates the objective conditions required for the emergence (and continuous sustainability) of class divisions, from the Marxist point of view, is the establishment within the respective social context of a general system for the *social division of labour* based on the principle of extending the *logic of private property relations* to the ownership of the primary *means of production*. The three elements are analytically independent from one another – one can have a system for the social division of labour that has nothing to do with property relations or is not articulated in terms of who owns what means of production – which means that it is their simultaneous emergence in the same socio-historical context that provides the necessary impulse for the emergence of class relations.

The moment the logic of private property relations comes to be extended to the ownership of the primary means of production and a corresponding system for the social division of labour takes form on that basis, what follows from a Marxist theoretical point of view is the emergence of a regime of *economic exploitation* – that is to say, one part of the society, the exploiters, starts to live off another part of the society, the exploited, and what differentiates the one from another takes place primarily in the field that Marxists call the ‘economy’. (I will explain the meaning of putting the quotation marks around the word ‘economy’ in Section 3.3.) It is this sort of division – between the exploited and the exploiters – that in the Marxist tradition provides the archetypal context for the understanding of the idea of *class*.

Without the privatization of the primary means of production, there would be no economic exploitation.<sup>78</sup> Without economic exploitation, there would be no exploiters and no exploited – and, thus, no classes. The moment, consequently, the rule of private property is abolished in the domain of *productive relations*, the central historical precondition for the existence of class divisions – in the Marxist sense of the word – disappears.

### 3.2.2. *The Primacy of Class Struggle over Class Identities*

As Marx observes in *The German Ideology*, '[t]he separate individuals form a class only insofar as they have to carry on a common battle against another class.'<sup>79</sup> Put differently, from the traditional Marxist point of view, 'classes do not firstly exist as such and only then enter into a class struggle' – they arise in the very process of that struggle itself.<sup>80</sup>

As in Saussurean semiotics (and to a lesser extent Schmitt's theory of the political), the logic of the relation, in other words, always remains ontologically primary vis-à-vis the participant elements of that relation.<sup>81</sup> It is the process of the class struggle, which creates the corresponding classes and sub-classes, not the other way around.<sup>82</sup> People do not obtain their collective identities independently from their intercourse with one another, and the latter is always determined by the logic of their productive relations. Or, to phrase it somewhat more generally, we become what we are in terms of our class membership solely because of those objective positions which we come to occupy in the context of our productive relations with one another, not for any other reason, be it our education, descent, or size of disposable income.<sup>83</sup>

### 3.2.3. *Class Structure as a Product of the Material Objectivity of Economic Relations*

In the light of everything that has been said so far, it follows that from a Marxist point of view the question of the objective existence of any given class formation depends ultimately neither on the immediate contents of its members' shared

78. See Roemer's argument in *infra* n.55.

79. Karl Marx and Frederick Engels, *The German Ideology* (ed. by C.J.Arthur; Lawrence & Wishart: London, 1999) at 82.

80. Nicos Poulantzas, *Classes in Contemporary Capitalism* (trans. by David Fernbach; NLB: London, 1978) at 14.

81. See Jonathan Culler, *The Pursuit of Signs* (Routledge: London, 2002), 44-5; Carl Schmitt, *The Concept of the Political* (trans. by G. Schwab; University of Chicago Press, 1996).

82. 'Class identity becomes legible as a potential effect of [class struggle], rather than merely its origin or ground. Commonality and community [are] produced, not simply expressed, through political mobilization.' Gibson-Graham, 'Towards a Poststructuralist Political Economy', *supra* note 74, at 19.

83. See Cohen, *Karl Marx's Theory of History*, *supra* note 13, at 73-6.

consciousness, nor on their capacity for undertaking coherent group action, but solely and exclusively on the objective structure of the historically created system of productive relations in which they participate.<sup>84</sup> ‘It is not the consciousness of men that determines their existence, but their social existence that determines their consciousness.’<sup>85</sup> There exists, in the end, ‘no need for there to be [any] “class consciousness” or autonomous political organizations for the class struggle to take place.’<sup>86</sup> What brings the disparate social actors together into a single class formation, thus, is not their ‘collective spirit’ or their inclination towards obtaining a common institutional framework, but the material objectivity of their shared economic positions.<sup>87</sup>

How exactly should one understand this last sentence? According to the basic Marxist theory, the essential character of every historically given class-centred system for the social division of labour derives ultimately from the corresponding system of the *practically implemented relations of ownership* dominant within that society – that is to say, relations of ownership in the sense of Eugen Ehrlich’s concept of the ‘*living law*’,<sup>88</sup> rather than the classical formalist-positivist concept of legality – the actually observed ‘customary’ law-in-action, if you will, rather than the formally posited system of legislative ordinances.<sup>89</sup>

84. See Erik Wright, ‘Rethinking, Once Again, the Concept of Class Structure’, in Erik Wright (ed.), *The Debate on Classes* (Verso: London, 1998), 269-348 at 278-300.

85. Marx, *A Contribution to the Critique of Political Economy*, supra note 63, at 21.

86. Poulantzas, *Classes in Contemporary Capitalism*, supra note 80, 17.

87. See Wright, ‘Rethinking, Once Again’, supra note 84, 280-8. The word ‘objectivity’ in the last phrase signifies that the position in question has to be understood in the strictly functionalist sense, not psychologically. See Cohen, *Karl Marx’s Theory of History*, supra note 13, at 278-96.

88. ‘This then is the living law in contradistinction to that which is being enforced in the courts and other tribunals. The living law is the law which dominates life itself even though it has not been posited in legal propositions. ... Who would judge our family life or the life of our societies by the law-suits that arise in the families or in the societies? ... The living law is not the part of the content of the document that the courts recognize as binding when they decide a legal controversy, but only that part which the parties actually observe in life.’ Ehrlich, *Fundamental Principles of the Sociology of Law*, supra note 44, at 493-7. For a general overview of the concept of ‘living law,’ see also David Nelken, ‘Law in Action or Living Law? Back to the Beginning in Sociology of Law’, 4 *Legal Studies* (1984) 157-174.

89. The distinction suggested here is important insofar as it helps reveal the essential source of that infamous ‘problem of law as a constitutive factor’ (see Tushnet, ‘Marxism as Metaphor’, supra note 64, at 281; Cohen, *Karl Marx’s Theory of History*, supra note 13, at 217-8) which has occupied Marxist scholars for such a long time. In its simplest form, the problem can be formulated as follows. According to the classical Marxist tradition, law constitutes an integral element of the social superstructure. Its internal structure and content are, therefore, determined by the corresponding structure and content of the economic base, i.e. by the systemic logic of productive relations. The systemic logic of productive relations, in its turn, however, is determined ultimately by who owns the primary means of production. Ownership is a legal category. If a legal regime is thus ultimately determinative of the fundamental structure of productive relations, how can one say then that the economic logic determines the legal order?

Put differently, every class-centred system for the social division of labour is defined, in the final analysis, by the general manner in which the different members of that society relate, firstly, to the corresponding totality of the various means of production (including land) distributed across that society; and, secondly, to the various forms of material output produced through the deployment of these means of production.<sup>90</sup>

Seen through the prism of these two relational structures, every historically known human society, it follows, can be divided, roughly, into three basic parts or groups of economic actors. The first group includes all those members of the given society who through their direct labour *actually produce* the basic material foundations required to ensure the physical survival and reproduction of that social unit as a whole (food, shelter, roads, etc.). The second group, in contrast, includes all those who, while existing side by side with the labouring producers, contrive to live off the latter's productive activities by systematically *expropriating* some part of the total material output they produce. (In some social scenarios, such expropriations tend to proceed violently; in others, the violent element remains generally sublimated. What matters, ultimately, however, is the fact of the systematicity of the expropriative act rather than its immediate outward form.) Finally, the third group includes all those remaining members of the given social unit who without engaging in any immediately *productive labour* do not at the same time appropriate any part of the total material output for themselves but only help the second group to organize and continually reproduce the established state of affairs between it and the first group in return for a certain payout.<sup>91</sup> In standard Marxist usage, the third group is traditionally described as the *middle class*.

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As the distinction suggested above shows, this sense of circularity which so troubles Cohen and Tushnet derives, ultimately, from the simple lack of conceptual precision in distinguishing between what in reality are two radically different social phenomena. It is only if we understand 'law' in its Ehrlichian sense that it will have to be recognized, as Tushnet insists, as ontologically constitutive vis-à-vis the economic base. Taken in the more traditional formalist-positivist sense, 'law' remains, just as the classical Marxist tradition has always insisted, a completely superstructural phenomenon. (For a similar explanation, but couched in terms of a differentiation between 'real economic ownership' and 'legal ownership,' see also Poulantzas, *Classes in Contemporary Capitalism*, supra note 80, at 18-9.)

90. The theoretical foundations of this argument are further elaborated in Resnick and Wolff, *Class Theory and History*, supra note 19, at 8-10 and Erik Wright, *Classes* (Verso: London, 1985) at 64-98.
91. '[I]n all societies, one part of the population interacts with nature to produce a quantity of output. The total quantity of output always exceeds the portion that is returned to this part of the population (the workers) for its consumption and reproduction. This excess is the 'surplus'. A second part of the population immediately receives this surplus from the producers. Finally, a third part of the population obtains distributions of portions of the surplus from the second part.' Resnick and Wolff, *Class Theory and History*, supra note 19, at xi.

Generally, the more sophisticated the level of the *productive forces*<sup>92</sup> employed in the given productive context becomes, the greater also tends to become the general gap between what the labouring producers ultimately end up producing and what they practically require to retain as a group to enable their own immediate physical survival and reproduction. In Marxist usage, the name which is normally given to this gap is '*surplus value*' or '*surplus product*'. The logic by which the surplus product comes to be separated from the labouring producers and becomes distributed across the rest of the society forms accordingly, in Marxist understanding, the chief defining criterion by which the corresponding system of productive relations is characterized in terms of its basic *mode of production*.<sup>93</sup>

Seen from this angle, the principal defining characteristic of the *capitalist mode of production* lies in the fundamental separation in terms of the practical legal reality (Ehrlich) of the general right of ownership over *all socially distributed* means of production from the actual regime of their physical use and possession by the labouring producers. Insofar as this separation comes to be successfully enforced in practice, it becomes possible, as Marx shows in the third volume of *Capital*, for the various participants of the given productive system to start treating the removal of the surplus product from the labouring producers as if it were some form of a *rent* payable by the non-owning labourers to the non-labouring owners of the corresponding means of production for the right to use the latter's property.<sup>94</sup> In time, as the degree of the specificity of the produced output reaches ever higher levels – computer chips, not bread; mobile telephones, not boots – and the in-

92. That is to say, the historically produced combination of the existing instruments and means of production and the corresponding technological knowledge and what today is called human capital.

93. In practical terms, the idea of the mode of production represents, of course, an entirely abstract category. None of the historically known human societies has ever organized its productive processes solely in terms of one single mode of production. All of them have rather tended to adopt more than one distinct modes of production across different areas of their life. The particular combination of productive modes which each historically given human society has adopted in its corresponding system of production in Marxist usage is called the *social formation*. For further elaboration, see, e.g., Callinicos, *Is There a Future for Marxism?*, supra note 9, at ix; Poulantzas, *Political Power and Social Classes*, supra note 11, at 15 'The social formation itself constitutes a complex unity in which a certain mode of production dominates the others which compose it. ... The dominance of one mode of production over the others in a social formation causes the matrix of this mode of production ... to mark the whole of the formation.' The immediate practical implication of this distinction for the purposes of the present analysis can be found in Poulantzas, *Classes in Contemporary Capitalism*, supra note 80, 22: '[A] concrete society (a social formation) [always] involves more than two classes, in so far as it is composed of various modes and forms of production.' For further investigation of the relationship between the concepts of the mode of production and social formation, see also Erik Olsen, 'Social Ontology and the Origins of Mode of Production Theory', 21 *Rethinking Marxism* (2009) 177-195.

94. Marx, *Capital*, Vol. III, supra note 3, at 770-92.

ability of the individual labourers to exchange effectively the retained segment of the final product they produced for whatever other products they may need in order to satisfy their physical and social needs reaches an ever greater intensity, the vector of the transactional relationship switches. The whole of the material output produced by the labouring producers becomes now appropriated by the non-labouring owners en bloc in exchange for a modest monetary compensation roughly equivalent in abstract terms to the size of that original segment of the final output that the labourers required to retain in the first place. Thus is born the mechanism of *waged labour* and the basic algorithm of the capitalist mode of production is completed.

At what stage does exploitation enter the picture? So long as the labouring producers do not themselves acquire the right of ownership over the socially-distributed means of production, i.e. those means of production which, unlike their labour-power, exist 'outside their own bodies,' it becomes possible for the non-labouring owners not simply to disengage en masse from the actual productive process, but to start earning their livelihood essentially as *rentiers*.<sup>95</sup> To the extent to which the *material well-being* of this rentier elite comes then to depend on its ability to prevent the labouring producers as a group from terminating this state of affairs, one can speak in this context of the emergence of a regime of economic exploitation.<sup>96</sup> Insofar as the practical operation of this regime of exploitation requires the rentier elite to resort to the services of another group of people who are neither rentiers themselves nor part of the productive labour force, one can also speak in such conditions of the corresponding emergence of the middle class.

#### 3.2.4. *Marxist Theory of Class Formation*

In sum, according to the classical Marxist tradition, the general logic of class formation is ultimately driven by two factors: (1) the state of the disparities in

95. See Poulantzas, *Political Power and Social Classes*, supra note 11, at 26-7.

96. 'In Marxian exploitation one class appropriates the surplus labour performed by another class through various mechanisms. The income of the exploiting class comes from the labour performed by the exploited class. There is thus a straightforward causal link between the poverty of the exploited and the affluence of the exploiter. The [latter] benefits at the expense of the [former].' Wright, *Classes*, supra note 90, at 65. 'If producers have differential ownership of the means of production then a regime of competitive markets is sufficient to produce exploitation ... as predicted by classical Marxism. ... In this analysis, coercion is still necessary to produce Marxian exploitation and class. However, it suffices for the coercion to be at the point of maintaining property relations and not at the point of extracting surplus labour directly from the worker.' John Roemer, 'New Directions in the Marxian Theory of Exploitation and Class,' in John Roemer (ed.), *Analytical Marxism* (Cambridge University Press, 1986) at 81-113 at 93.

the practical-legal ownership of the primary means of production and (2) the corresponding modality of the extraction of surplus value.

Under capitalism, the members of one part of society – the *working class* – get to retain full practical-legal ownership only over their own ‘intrinsic’ labour power. The ownership of all the other primary means of production is assumed by another part of society – the *bourgeoisie*. Whatever socially valuable product the working class ends up producing invariably gets appropriated by the bourgeoisie in return for wage-like payments generally set at the level required to ensure the basic survival and reproduction of the working class as a social entity. To enforce and organize this regime of productive relations, a third part of the society – the middle class – is ‘hired’ in return for a certain segment of the extracted surplus value which also regularly takes the form of wage-like payouts but which does not for all that put the middle class on the same social board as the working class.

Considering that whatever disparities in the material well-being between the three groups come to arise in such conditions all derive from the uninterrupted continuation of the private regime of ownership over the socially distributed means of production, the basic relationship between the three groups can be said, in Marxist terms, to be economically exploitative in nature and each one of the three groups concerned, furthermore, can be said to constitute a social class, that is to say, a relatively stable social entity whose members are objectively endowed with a common set of economic interests even if in some cases they may not necessarily be aware of it.

### 3.2.5. *Transnational Class Formations*

The existence of a wide-ranging system of the worldwide division of labour based on the underlying disparities in the practical-legal ownership of the socially distributed means of production is a fact which today hardly requires any extensive demonstration. The same goes for the corresponding patterns in the appropriation of surplus value and the basic dependence of this state of affairs on the continuous preservation of a necessarily *globalized* regime of exploitation and waged labour.<sup>97</sup> Seen from this perspective, the basic reality of the structural

97. See further Walden Bello and Mara Baviera, ‘Food Wars’, 61/3 *Monthly Review* (2009), <[www.monthlyreview.org/090706bello-baviera.php](http://www.monthlyreview.org/090706bello-baviera.php)> (visited 22 February 2010); Hillel Ticktin, ‘A Marxist Political Economy of Capitalist Instability and the Current Crisis’, 37 *Critique* (2009) 13-29; Sanjay Reddy and Camelia Minoiu, ‘Real Income Stagnation of Countries 1960-2001’, 45 *Journal of Development Studies* (2009) 1-23; Jennifer Jihye Chun, ‘Legal Liminality: The Gender and Labour Politics of Organising South Korea’s Irregular Workforce’, 30 *Third World Quarterly* (2009) 535-550; Gay Seidman, ‘Labouring under an Illusion? Lesotho’s “Sweat-free” Label’, 30 *Third World Quarterly* (2009) 581-598; Kathy Le Mons Walker, ‘Neoliberalism on the Ground in Rural India: Predatory Growth, Agrarian Crisis, Internal Colonization, and the Intensification of Class Struggle’, 35 *Journal of Peasant Studies* (2008) 557-620; Pem Davidson Buck, ‘Keeping the Collaborators on Board as the Ship Sinks: Toward a Theory of

separation of the global economic arena into the transnational capitalist class (TCC), the transnational working class (TWC), and the transnational middle class (TMC) can hardly be put into question.

But how exactly should one understand the ontological status of each of these class formations in more practical terms? Have the TCC and the TMC replaced the historically much more familiar phenomena of national bourgeoisie and national middle class? Does the emergence of the TWC suggest that the workers of all countries have at long last united and now rattle their chains in unison?

To turn to the first question first, the main thing which needs to be established about each of these three class formations is that, firstly, none of them exists as a self-enclosed, reified social entity. Secondly, none of them, furthermore, exists to the exclusion of, or in an opposition to, the corresponding national or regional class formations.

Take the TCC, for instance. Judging by the trajectory of the underlying evolution in the class relations dynamics worldwide and the respective patterns of surplus value extraction, the TCC, in the Marxist sense of the term, represents a fully verifiable social phenomenon. It consists, in the first instance, of the owners of the various socially distributed means of production employed in transnational productive contexts, and it is embodied, as a rule, in the form of various transnational corporations and private financial institutions.<sup>98</sup> Inasmuch as the transnational productive process, however, does not in itself automatically supplant all other types of productive processes occurring on a smaller scale (and transnational corporations do not automatically replace all other forms of corporate entities), the TCC, being a structural object-effect only of the transnationally organized system of productive relations, does not automatically replace national or regional-based capitalist class formations. From the point of view of productive relations, it takes shape on a somewhat different level of organizational abstraction. And while it would certainly not be incorrect to infer that to the extent to which differently scaled organizational models (versions of capitalism) are bound sooner or later to come into conflict with one another thus leading inevitably to the differently scaled capitalist class formations getting into one another's way, it most certainly does not follow, as some of the writing on the subject seems to imply, that the concept of the TCC represents a physically distinct group of social forces which necessarily exists 'in competition with na-

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Fascism and the U.S. "Middle Class", 20 *Rethinking Marxism* (2008) 68-90; Kim Moody, 'Harvest of Empire: Immigrant Workers' Struggles in the USA', 45 *Socialist Register* (2008) 315; Stephanie Barrientos and Sally Smith, 'Do Workers Benefit from Ethical Trade? Assessing Codes of Labour Practice in Global Production Systems', 28 *Third World Quarterly* (2007) 713-729; Mike Davis, *Planet of Slums* (Verso: London, 2006); John Crabtree, 'The Impact of Neo-liberal Economics on Peruvian Peasant Agriculture in the 1990s', 29 *Journal of Peasant Studies* (2002) 131-161.

98. Robinson and Harris, 'Toward a Global Ruling Class?', supra note 59.

tionally based capitals.<sup>99</sup> The same group of people who form a national-based capitalist class formation – say, the shareholders in a medium-sized supermarket chain – can as easily also become active members of the TCC by investing in Nike, Nestle, or the Barclays Bank. That they may thus end up occupying what Erik Olin Wright dubbed ‘contradictory class locations’<sup>100</sup> is an entirely separate issue. One thing which they would not be in this case is members of a materially distinct social collectivity.

The same logic *mutatis mutandis* holds also for the TMC and the TWC. Every empirically observable pattern of surplus value extraction worldwide increasingly confirms the formation of these two classes in the global economic arena. None of these patterns, nevertheless, suggests in any meaningful sense that either of them comprises a collection of the ‘transnationally oriented fractions’<sup>101</sup> of the respective national class formations.

For, indeed, the idea of identifying class structures on the basis of the underlying ‘transnational orientations’, in the final analysis, represents nothing other than a return of the essentially idealist habit of prioritizing consciousness over objective social dynamics. From the point of view of historical materialism, however, the causal relationship between the two is supposed to be exactly the opposite.

The forms of collective consciousness carried by a typical investment consultant in New York or Dubai or an oil baron in Moscow may be overlaid with any number of nationalist, quasi-nationalist, or cosmopolitan patterns. None of this, in the end, from the Marxist point of view, is going to settle the question of their class membership. Just as one cannot, in Marx’s words, ‘judge an individual by what he thinks of himself,’ so, too, one cannot judge the objective character of the relations into which social agents enter by the ‘ideological forms in which [they] become conscious’ of them.<sup>102</sup>

It is solely by virtue of the objective position they come to occupy within the general system of economic production that lawyers, bankers, media magnates, illegal migrant workers, agricultural labourers, and even high-profile oil barons ‘obtain’ their class identity in the Marxist sense of the term. One does not need to reside in London or Monaco, to speak fluent English, or to interact constantly with partners living abroad to become a member of a transnational class formation. Insofar as one’s *contribution* to the historically existing processes of socio-economic production in which one currently participates creates *effects*, however minuscule, beyond one’s immediate geo-economic vicinity, one ineluctably becomes part of one or the other of the three transnational classes.

99. William Robinson, ‘Global Capitalism: The New Transnationalism and the Folly of Conventional Thinking’, 69 *Science & Society* (2005) 316-328 at 318.

100. Erik Wright, ‘A General Framework for the Analysis of Class Structure’, in Wright, *The Debate on Classes*, supra note 84, 3-43 at 24-8.

101. Robinson, ‘Global Capitalism’, supra note 99, at 318.

102. Marx, *A Contribution to the Critique of Political Economy*, supra note 63, at 21.

The words ‘contribution’ and ‘effects’ are, of course, the key words here. As the extent of one’s contribution to the system of global economic production changes, so, too, does the ‘degree’ of one’s participation in the respective transnational class formation. It would be difficult for an average independent barber in a small village in India to become anything but a member of the local petty bourgeoisie. But his neighbour working in a local call centre can as easily turn out to be a member of the national middle class as of the TMC: the more foreign businesses outsource their customer support services to that call centre, the more pronounced his participation in the TMC structures becomes.<sup>103</sup>

Still, one should be careful not to over-emphasize too much this sense of socio-ontological relativity. Most economic agents’ relationship to the class formations in which they participate is essentially stable. All media magnates and hedge fund investors are virtually invariably members of the TCC. All sweatshop labourers are virtually invariably members of the TWC. All policy advisers and analysts working in the banking and financial sectors virtually always belong in the TMC. Where things start getting a little messy is when one starts dealing with that ‘contradictory class positions’ phenomenon mentioned earlier – a mid-level manager in a supermarket chain moonlighting as a small-time investor in the stock market – but even this, ultimately, only requires a series of essentially minor analytical adjustments.<sup>104</sup> The primary patterns themselves remain fundamentally clear.

Neither the TCC, nor the TMC, nor, especially, the TWC represents a formally organized social entity. None of them is ideologically fully self-conscious. None of them is internally coherent in organizational terms. The TCC alone is split in a whole variety of different ways, the classic divide between the transnational industrial capital and the transnational finance capital being only the most prominent one. In the final analysis, nevertheless, for the purposes of our present discussion, none of this ultimately matters. Why? Because, as I have mentioned earlier, to build a genuinely consistent Marxist theory of international law we need to develop ‘only’ a general account explaining the systemic inter-relationship between the internal logic of the international legal domain *and* the corresponding logics of global productive relations, the global division of labour, and the worldwide extraction of surplus value. We do not need to do any of this by re-imagining everything that happens in the field of international relations as if it were produced by the actions of the transnational class formations themselves.

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103. For a fundamentally different take on the concept of the transnational classes, see Leslie Sklair, *The Transnational Capitalist Class* (Blackwell: Oxford, 2001); Robinson and Harris, ‘Toward a Global Ruling Class?’, *supra* note 59.

104. The debate on peasantry in the late 19th-early 20th century Marxism provides a good indication of the actual scale of the underlying theoretical problematic and its possible solution. See, e.g., Georg Lukacs, *A Defence of History and Class Consciousness* (trans. by Esther Leslie; Verso: London, 2000) at 86-93.

A Marxist theory of international law cannot be created by simply replacing one set of allegedly primordial actors, Westphalian nation-states, from whose interactions all international legal phenomena are imagined to derive with another such set, be it the transnational class formations or North/South-style geopolitical camps. The basic, most fundamental objective underlying the Marxist class-theoretic enterprise in contemporary international law, thus, is not limited simply to cancelling out the ontological centrality of the Westphalian statal form in the broader international legal-theoretical discourse. The ultimate aim, rather, is to undo the idea of an ontologically central subject in international legal theory altogether.

Recall once more the second principal tenet of the general Marxist theory of class reviewed earlier. It is the logic of the social intercourse which produces collective (including corporate) formations. All social intercourse, in the final analysis, is an intercourse between *people*. To construct a genuinely consistent Marxist-theoretical account of international law, it follows, we must construct it in terms of a cast list which includes ultimately only human individuals – not classes, not families, not states, nor any other type of hypostatized social entities, but only disparate human individuals whose actions and motivations, to be sure, will always be informed and overdetermined by any number of broader socio-historical factors and collective processes, but who, in the end, still always remain nothing more and nothing less than human individuals.

That said, let us be clear about this: the idea of rethinking international law as a phenomenon created between *people* should not in the present context be taken as an invitation to return to subjective voluntarism, liberal humanism, or any other form of idealist philosophy. As numerous Marxist and non-Marxist commentators have repeatedly pointed out, ‘Man himself,’ in the end, constitutes nothing more than a purely historical phenomenon, an ontological category that is neither self-evident nor self-sufficient, but which requires, therefore, always to be explained not only in terms of what conditions were necessary to enable its emergence but also in terms of what conditions enable its analytical sustainability.<sup>105</sup>

105. See Louis Althusser, *The Humanist Controversy and Other Writings* (trans. by G. M. Goshgarian; Verso: London, 2003) at 259: ‘[For Marx, already in *The German Ideology*] Man has ceased to be a fundamental rational category that renders History intelligible; on the contrary, Man is [a] hollow notion which ... is by its very nature incapable of explaining anything whatsoever, but has itself to be explained, that is, reduced to what it is: the religious impotence of a ridiculous “wish” to take part in a History that does not give a damn about the petty bourgeois who want to lay down the law in it. A vain, empty discourse, Man is, in essence, the diversionary tactic of a reactionary ideology.’ See also Michel Foucault, *The Order of Things* (Routledge: London, 2002) at 422: ‘[The concept of] man is a recent invention ... which began a century and a half ago and ... has made it possible for the figure of man to appear [as] the effect of a change in the fundamental arrangements of knowledge.’

But let us leave this question aside for now. The role of the ‘human element’ in the constitution of the international legal process is a subject covered in Section 4 below. For the time being, let us simply register this thought and put it on the proverbial table alongside the concomitant distinction between *analytical categories* – the instruments of cognition – and *ontological facts* – the objects that require to be cognized. As an analytical category, classes represent a primary heuristic instrument in Marxist-theoretical discourse. As ontological facts they represent only a particular way in which people relate to one another. That is to say, they constitute the object-effects of a certain form of socialization, but not intrinsically existing transcendentally guaranteed social entities.<sup>106</sup>

### 3.3. International Law as a Site of Class Struggle

There has been a great deal of discussion so far that involved the use of the term ‘economic’: ‘economic exploitation,’ ‘shared economic positions,’ ‘economic interests’, etc. Any reader, however sympathetic or inattentive, in such circumstances should be tempted to conclude that, however gratuitous or baseless the various Marxist luminaries may have claimed it to be, the classical charge of vulgar economism which its opponents have so regularly raised against the Marxist tradition is most probably fundamentally justified.<sup>107</sup> To what extent would this be a correct conclusion?

To be sure, it would be effectively impossible to deny that from the traditional Marxist point of view every class formation represents, first and foremost, an essentially economic phenomenon, and that the process of class struggle, therefore, must, by definition, be understood as an essentially economic process. Nevertheless, as every attentive student of Marxism would be able to confirm, the concept of the Economic which underlies the general Marxian theory does not, in fact, carry the same ideational content as the similarly labelled concept that is commonly used in mainstream liberal discourse. Put differently, what Marx and his (more intelligent) followers have in mind when they use the term ‘economic’ is not at all identical with what the likes of Paul Samuelson and John Maynard Keynes speak about when they deploy the same label.<sup>108</sup> The terminological patterns may be the same, but the ideational constructs are not.

In a nutshell, from the general Marxian point of view, the basic ontological horizon within which the reality of economic relations takes place is not – unlike in the liberal economic usage – understood to be limited only to the areas

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106. For further development, see also Althusser, *The Humanist Controversy*, supra note 105, at 263-4.

107. See, e.g., Plekhanov, *Selected Philosophical Works*, supra note 63, at 251-82; Althusser, *For Marx*, supra note 55, at 201-13.

108. For a good summary of that conception, see, generally, Paul Samuelson, *Economics* (10th edn) (New York: McGraw-Hill, 1976).

of commodity manufacturing, circulation, distribution, and finance. Rather, it is conceived to be fully coextensive with the whole totality of *all* social relations arising in the process of production and reproduction of social formations, i.e. the process by which ‘the means of existence of these social formations’ – the material conditions for the continuation of social life – are created and recreated. In practical terms, what this includes is not only those productive relations that surround the production and consumption of food, clothes, and the means of transportation, but also those relations which arise in the process of the production and reproduction of the labour force itself, including its educational capital and skills – as well as, by logical implication, all those relations which determine how different members of the given society become divided into – or as Marx put it, ‘subsumed under’ – different sets of productive relations.<sup>109</sup>

Proceeding from this basic premise, it follows then that to propose from a Marxist point of view that the process of class struggle constitutes in its essence a fundamentally economic process is effectively tantamount to asserting that the reality of the global class struggle extends ultimately to *every* dimension and field of the global social intercourse – since, unlike in the sphere of intimate life, all social relations which take place in the global social arena are inevitably rooted in the processes of material production.

‘No matter how valid and useful the theory of [socio-historical] factors may have been in its time, it [simply] does not stand up to any criticism today,’ wrote Plekhanov already as far back as the end of the 19<sup>th</sup> century.<sup>110</sup>

Not only is it the case, that the classical Marxist tradition has never aimed to reduce the phenomena of politics, law, ethics, art, etc. to just so many formal projections of some hidden ‘original substance’ called the ‘economy,’ but it has actually always considered the whole ontology of social life, from which the liberal-bourgeois tradition has extrapolated these conceptual categories, through the prism of a *completely different set of ontological taxonomies and epistemological historiographic assumptions*.

Every set of social relations which is anyhow related to the processes of material production belongs, according to the classical Marxist tradition, firmly in the domain of the ‘economic life’. The same set of social relations, when viewed from an epistemic perspective which privileges the examination of its immanent power-domination elements, however, can be considered also as part of the general domain of politics. If any one of these power-domination elements entails the active use of any socially sustained system of beliefs or truth-propositions, it

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109. See Karl Marx, ‘Introduction to a Critique of Political Economy’, in Marx and Engels, *The German Ideology*, supra note 79, at 124-39. See also Poulantzas, *Classes in Contemporary Capitalism*, supra note 80, at 18-21.

110. Plekhanov, *Selected Philosophical Works*, supra note 63, at 227.

can also be further conceptualised as part of the general domain of ideological production – and so on and so forth.<sup>111</sup>

Put differently, from the point of view of the classical Marxist tradition, every social relationship can – and, indeed, if we take the idea of structural over-determination to its logical conclusion, needs to – be analyzed and categorized from a whole multiplicity of different perspectives. Being an ‘economic fact’ or a ‘political fact’ represents, thus, nothing more than an *analytical condition*. It is certainly not an ontological state.

What exists in empirical reality, from the Marxist point of view, is only one single undifferentiated totality of the social intercourse. In fact, that is precisely what the idea of the *dialectical approach* – or as Slavoj Žižek calls it, the *parallax view* – reflects.<sup>112</sup> ‘In dialectics’, writes Lukacs, ‘as opposed to “metaphysics” ... the definite contours of concepts (and the objects they represent) are dissolved’ because the very notion of the dialectical cognition of reality implies that the ontological constitution of the latter represents, in the end, not some pre-existing ‘one-sided and rigid’ Cartesian-style causality but a *historical interaction* between the cognising subject and the cognised object.<sup>113</sup>

Unlike liberal-bourgeois thought, the Marxist tradition does not, thus, treat the ideas of ‘economy’, ‘politics’, ‘law’, ‘art’, etc., as though they were somehow reflective of some objectively verifiable essences. The only objectively verifiable essences that can be said to exist from the Marxist-theoretical point of view are what Marcel Mauss used to call ‘total social facts’,<sup>114</sup> i.e. facts which in the final analysis have neither a primarily economic nor a primarily political, legal, cultural, libidinal, etc., character. ‘Economy’, ‘politics’, ‘law’ – all these terms, from the classical Marxist point of view, ultimately represent nothing more than just so many *historically convenient labels of description*, symbols that in the end say far less about the inherent objective characteristics of those phenomena which they purport to describe than about the various historically determined analytical focuses which the describers in question have brought to their studies of those phenomena.

111. See Poulantzas, *State, Power, Socialism*, supra note 70, at 36: ‘It is not true, as Foucault or Deleuze would have it, that relations of power are, for Marxism, “in a position of exteriority vis-à-vis other types of relation: namely, economic processes ...” The economic process *is* class struggle, *is* therefore relations of power.’

112. Slavoj Žižek, *The Parallax View* (MIT Press: Cambridge MA, 2006).

113. Georg Lukacs, *History and Class Consciousness* (trans. by R. Livingstone; Merlin Press: London, 1971) at 3.

114. See Marcel Mauss, *The Gift* (trans. by W. D. Halls, Routledge: London, 2002), at 3-4: ‘In these “total” social phenomena, as we propose calling them, all kinds of institutions are given expression at one and the same time – religious, juridical, and moral, which relate to both politics and the family; likewise economic ones, which suppose special forms of production and consumption.’

Or, to quote Lukacs again:

The intelligibility of objects develops in proportion as we grasp their function in the totality to which they belong. This is why only the dialectical conception of totality can enable us to understand *reality as a social process*. For only this conception dissolves the fetishistic forms necessarily produced by the capitalist mode of production and enables us to see them as mere illusions which are not less illusory for being seen to be necessary. ... They can all be seen as ideas necessarily held by the agents of the capitalist system of production. They are, therefore, objects of knowledge, but the object which is known through them is not the capitalist system of production itself, but the ideology of its ruling class.<sup>115</sup>

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A question inevitably arises at this point: to be sure, all this sounds like a fine piece of theoretical argument, but what does it have to do with the leftwing international law project? What is the immediate practical significance of all these ideas from the point of view of international legal practice? The answer, if you have come thus far in the argument, I hope, should not be very difficult to identify.

If we take all these ideas that are outlined above seriously, if, that is, we put them all together and articulate them as parts of one single, internally coherent framework, it seems to me that the most obvious conclusion that will flow will be the following: even though classes do not themselves possess the quality of social agency, even though in the eyes of the positivist legal analysis they cannot be regarded as subjects of international law, from the Marxist point of view, international law still represents one of the main arenas for the conduct of the global class struggle – and thus, by implication, for the constitution of the global class structure and the formation of the respective transnational class configurations.

Furthermore, if this line of reasoning should on any, even the most general level prove correct, it would follow then that every categorical proposal for an across-the-board elimination of the external autonomy of the international legal practice must, as a matter of general strategic consideration, be unreservedly rejected and dismissed as fundamentally misguided. If the domain of international law constitutes an arena of class struggle, then it has to be treated exactly the same way in which every other domain of such nature is treated: not under the rubric of any ‘principled’, aprioristic, sweeping postulates, but on the basis of purely pragmatic, utterly contextual determinations.

As Lukacs famously observed, from the Marxist point of view, the whole problematic of legal action ultimately comes down to ‘*a mere question of tactics*,

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115. Lukacs, *History and Class Consciousness*, supra note 113, at 13-4.

... a question to be resolved on the spur of the moment, one for which it is scarcely possible to lay down general rules as decisions have to be taken on the basis of *immediate expediencies*.<sup>116</sup> Or, as a more recent commentator puts it, the only general prescription which holds true across the board for a Marxist legal professional is the principle of 'principled opportunism'.<sup>117</sup>

Let there be no ambiguity about this: the argument that I advance here is not that the leftwing international law project should adopt the stance of liberal legalism. It certainly goes without saying that any call for a categorical juridification of the global normative standards which in terms of their substantive effects are more likely to benefit the TCC than the TWC should be actively rejected on strategic grounds. That much is beyond doubt. What is also beyond doubt, however, is the 'brute historical fact' that the forces of the Global Right today possess far greater stocks of general political capital than do their counterparts on the Global Left. They have access to considerably larger cadre pools, exercise much more effective control over the transnational ideological apparatuses, and can afford to commit much greater organizational and institutional resources to every ideological struggle they get involved in. Any *categorical* merger between the 'legal' and the 'openly political' forms of social intercourse in the international arena, under such circumstances, it follows, will inevitably enable them to capitalize on their 'extra-legal' advantages much more effectively than their leftist rivals, which means that over a long enough time line it is going to benefit their interests far more than it will the interests of the Global Left. If only for this reason alone, advocating a posture of international legal nihilism at this stage in the world-historical development, it seems, should be regarded as an essentially reactionary political enterprise.

That said, one must also show caution not to slip at this point uncritically into a culture of vulgar juridical instrumentalism. The idea that international law can and should be regarded as a site/medium for the conduct of the global class struggle, correct as it is on its own terms, should not be allowed to conceal the fact that the *use* of the legal form itself can have far-reaching ideological effects, not all of which are progressive in nature.

As numerous commentators from Pashukanis<sup>118</sup> to Poulantzas<sup>119</sup> observed, the 'abstract, formal and general character' of the legal process (and the modern legal discourse in general) not only helps its participants to learn to imagine their lives as unfolding in an essentially 'continuous and homogeneous space-time' – it

116. *Ibid.*, at 264.

117. Knox, 'Marxism, International Law, and Political Strategy', supra note 61, at 433.

118. See Pashukanis, 'The General Theory of Law and Marxism', supra note 62. In its more general formulation, the argument can also be glimpsed in Lukacs's seminal exploration of the 'commodity structure' modality of social intercourse. See Lukacs, *History and Class Consciousness*, supra note 113, at 83ff.

119. See Poulantzas, *Political Power and Social Classes*, supra note 11, at 130-1.

also helps to interpellate<sup>120</sup> them as abstract individuals formally free and equal to one another:

It consecrates, and thus helps to establish, the differential fragmentation of agents (individualization) by elaborating the code in which these differentiations are inscribed and on the basis of which they exist without calling into question the political unity of the social formation. [It helps] the agents 'loosen' and 'free' themselves from their territorial-personal bonds [thus] fulfilling the key function of every dominant ideology: namely, that of cementing together the social formation under the aegis of the dominant class.<sup>121</sup>

#### 4. The International Law Profession: The Cadres and What They Decide

To accept that it is the course of the global class struggle which ultimately determines the trajectory of global politics does not, of course, require one to deny the importance of what the writers of old used to call the 'human element'. Indeed, inasmuch as it is always human activity which in the final analysis provides the basic 'material' from which History is 'made', it follows inevitably, as Plekhanov famously put it, that the human element cannot but take the central place in the Marxian analytical framework.<sup>122</sup> Class struggles are never initiated or sustained of their own accord. It is always concrete living men and women who wage them and give them their material reality through their actions. No historical circumstances, however general they may be, can be realised without being created and maintained by human activities.

If a Marxist-style class-analytic re-theorization of international law is to become a successful enterprise, it follows then, one of the primary theoretical elaborations that it will have to develop will have to be a lucid, practically viable account of the general role of the 'human element' in the production not only of the broader international legal discourse as a whole, but also of the various specific international legal regimes.

What are the main conditions that will have to be satisfied in the pursuit of this enterprise? In the first place, quite clearly, one would have to bear in mind the traditional dangers of vulgar voluntarism. International law is *not* what international lawyers make it.<sup>123</sup> It is not the end-product of what international

120. On the concept of interpellation, see the sources listed in *infra* n. 135.

121. Poulantzas, *State, Power, Socialism*, *supra* note 70, at 86-8.

122. Plekhanov, *Selected Philosophical Works*, *supra* note 63, at 293.

123. Cf. Martti Koskenniemi, 'Between Commitment and Cynicism: Outline for a Theory of International Law as Practice', in *Collection of Essays by Legal Advisers of State, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (United Nations: New York, 1999) 495-523 at 523.

lawyers want it to be, nor even of what they teach others to believe it to be. Each of these factors may under some circumstances play a certain contributory role, but none of them, in the end, can be regarded as primarily determinative of international law's substantive and formal development. International lawyers do, quite obviously, produce the history of their own profession and its collective imaginary constructs. But they do not do this through the means of their own choosing and normally they do not do it consciously.<sup>124</sup>

As Marx himself repeatedly pointed out, there can be, ultimately, no such thing as 'pure human will' – if only because there can also be no such thing as an 'abstract human individual'.<sup>125</sup> All human beings in history have belonged to one or another definite social setting, a setting in which they have been grounded and by which they were conditioned, disciplined, and psychologically moulded. To understand the historical role and significance of any given individual from a Marxist-theoretical point of view, it is necessary, thus, to elucidate first the general social position which this individual occupies in their immediate social setting. And the essential logic of all large-scale social settings, according to the Marxist theory, derives, as explained earlier, from the underlying pattern of class relations.

As a question of its *principal practical priorities*, it follows, therefore, that the Marxist class-theoretic approach to international law, before it proceeds to any other large-scale programmatic projects, must develop first some form of a general class-theoretic account of the international law profession itself, that is to say, a basic characterization of the typical distribution (subsumption) of the various segments of the broader international law profession across the existing global class structures, *including not least the practitioners of the Marxist class-theoretic approach themselves*.

For let us not turn away from this fact: a vast majority of those who would describe themselves today as 'leftwing international lawyers' firmly belong in the world of professional academia. No movement could ever have had such a strongly pronounced socio-institutional bias in its composition and not become influenced by the corresponding class-positional practices.

The longer you wear the same mask, the more it becomes a part of your face. The longer the leftwing international law movement remains confined to the professional quarters of academic life, the more fundamentally the logic of its political practices will be deformed by that most classical academicist vice of all, the culture of self-lionization – that peculiarly middle-class Napoleonic-style neurosis which commonly manifests itself in the form of a vulgar liberal-humanist delusion declaring that in the end it is always the theories expounded by university professors which somehow determine the score line in every grand historical

124. See Kennedy, 'Thinking against the Box', supra note 46, at 420-41.

125. See Marx and Engels, *The German Ideology*, supra note 79, at 122.

struggle. If only one managed to articulate the right theories on the right pages at the right time, a single stroke of the pen would suffice to make up for all the countless setbacks suffered in other fields of political struggle.

Needless to say, an attitude of such kind is not only profoundly dubious in general socio-theoretical terms. It is also profoundly counterproductive. We live today in a time of extraordinary challenges, but also a time of extraordinary opportunities. If the leftwing international law project is to prove itself in any meaningful sense worthy of them, it must find a way to break out from its prison-house of professional academicism. The first and the most obvious step in this enterprise should be a reversal of its long-established culture of conspicuous theoreticism.

Even if we could agree on nothing more at the moment, our first common goal today should be to bring an end to the tradition of writing in an unnecessarily inaccessible style that has spread like wildfire in some segments of the purportedly leftwing legal-scholarly discourse in recent years.<sup>126</sup> For let us make no mistake about this: the only scenario under which the leftwing international law project is going to make a difference outside its own narrow circle is if it finds a way to connect to the world of non-academic practitioners and activists. Politics is a game that requires Luthers and Lenins, not Heideggers and Hegels.

Hegel wrote *Phenomenology of Spirit*.<sup>127</sup> Lenin produced 'What Is to be Done?'<sup>128</sup> and 'April theses'.<sup>129</sup> The way forward does not lie with ruminating on the imponderable wonders of the ineffable, but with the production of easily communicable, analytically accessible statements that will enable the forging of durable coalitions with the most practically active segments of the broader international political arena.

And yet as the search for our new 'April theses' begins, let us remind ourselves once more that a vast majority of leftwing international lawyers today are professional academics. For however unflattering this idea may seem to our sense of self-esteem, legal academics are not on the whole any good at fighting what Antonio Gramsci called the 'wars of manoeuvre'. Even on those ideological fronts which

126. The examples are numerous, but as typical representations consider, *inter alia*, Thanos Zartaloudis, 'Notes on the General Economy of International Law and Governance', 31 *NYU Review of Law & Social Change* (2007) 679-694 ('in a general economy [of] law and politics ... difference becomes de-differentiated, always in order to avoid answering the question of what is actually different in difference'); Patrick Hanafin, 'Constitutional (U)Topology: the (Dis)Appearance of Ireland', in Peter Fitzpatrick and Patricia Tuit (eds.), *Critical Beings: Law, Nation and the Global Subject* (Aldershot: Ashgate, 2004) 101-118; Ed Morgan, 'The Other Death of International Law', 14 *Leiden Journal of International Law* (2001) 3-24.

127. G.W.F. Hegel, *Phenomenology of Spirit* (trans. by A.V. Miller, Clarendon Press: Oxford, 1977).

128. See *supra* note 2.

129. See Vladimir Lenin, 'The Tasks of the Proletariat in the Present Revolution' (1917), <[www.marxists.org/archive/lenin/works/1917/apr/04.htm](http://www.marxists.org/archive/lenin/works/1917/apr/04.htm)> (visited 22 February 2010).

we ourselves have historically helped to create, we only ever tend to be good at conducting the 'wars of position', which basically means 'cold wars' and 'trench warfare'.<sup>130</sup> In everything else, we are virtually universally hopeless, which is to say, in effect, that if the leftwing international law project as it exists today should proceed about its business in a reasonably successful fashion – if, in other words, it is to attempt what all other strategically-motivated movements do, namely, take advantage of its principal strengths while neutralizing its principal weaknesses – one of the first things its members should begin considering is shifting their attention away from the 'hot topic' manoeuvre games and embracing the art of positional ideological warfare.

Put differently, if our intention today is to achieve any form of lasting political success, then our first and most basic goal as *scholarly agents* must be to start producing writings which will engage directly with every fundamental doctrinal question in contemporary international law; writings, that is, which are not expected to become remarkable as individual pieces, but only as parts of a general system, a library, a canon of integrated knowledge, a single overarching framework, if you will. Writings, to put it differently, that will communicate to their readership the availability of a stable leftwing alternative on *every leading doctrinal problem*. Writings, in other words, from which one will be able to draw one day nothing less than a full-fledged system of ideological trenches cutting across the whole battlefield of the international legal struggle, rather than just a random collection of peculiarly shaped foxholes smattered across its discursive hinterland.

But let us not forget also what was said earlier about the logic of class formation. Every historically known human society tends to divide into three main class categories: the class which produces the material foundations of that society's life; the class which expropriates most of the produced material output in its favour; and the class which is 'hired' to help ensure the continuation of this state of affairs. All professional academics, whether or not they are ready to admit this in the open, ultimately fall in the third category.

To be sure, Oliver Wendell Holmes was right: general patterns never decide concrete outcomes.<sup>131</sup> Whoever has any doubts that this rule also extends to class politics should look again at Marx, Engels, and Lenin's own examples. Still, *most* middle class intellectuals, directly or indirectly, tend to become the ideological footsoldiers of the dominant class. Ignoring this fact and the structural limits it imposes on the range of strategic possibilities open to the leftwing international law project today cannot, however we are going to look at it, be a very wise strategy.

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130. Further on the ideas of the warfare of manoeuvre and positional warfare, see generally David Forgacs (ed.), *A Gramsci Reader* (Lawrence & Wishart: London, 1988), at 222-30.

131. *Lochner v. New York*, 198 U.S. 45 (1905), at 76 (Holmes J, dissenting).

History is neither a time-bomb, nor a clockwork mechanism, nor even a miserly pendulum. It has no *telos* and whenever it moves it does so only unevenly and not at all smoothly. Marx was definitely right when he suggested historical materialism as the most fitting theoretical framework for explaining the general logic of socio-historical development. The events of 1989 may have cast a deep shadow over this insight, but even the deepest shadows can dissolve over time – that much is certain. What is *not* certain is how soon this is going to happen in any given case, and at how high a price.

What can leftwing international law scholars do today to help speed up this process in the domain of the international law discourse? By joining every major ideological front within their reach by producing policy statements, textbooks, and beginners' guides; by intervening in every area of the doctrinal legal debate (not just the 'hot topic' ones); by reshaping the landscape of 'pop jurisprudence' and 'pop political theory' not only among the readers of various esoteric peer-reviewed journals, but also among the broader international law-minded public.

True, to accomplish a task of such magnitude can never be an easy affair. The best we can count on is hardly more than a slim chance. But, realistically, could one ever expect anything more? True, we are neither – to use Duncan Kennedy's famous line – the 'Trotskyes of Tort,' nor the 'Castros of Contract'.<sup>132</sup> We have no army of well-disciplined supporters to rely on and no larger-than-life charismatic organisers to help create it. The leftwing international law project today for the most part consists of a loose network of fairly marginalised (in socio-professional terms) academics scattered between various centre-left universities across a handful of metropolitan locations. Its resources are meagre. Its political weight outside the close quarters of the 'new stream of international law scholarship' borders on negligible. But sometimes a single straw can break a camel's back. One only needs to know where to place it.

## 5. In Lieu of a Conclusion: Where to from Here?

An easily identifiable assumption, popular in fact, if not in explicit pronouncement, has come to shape the common theoretical horizon of international legal studies over the last century. Constructed around a fetishistic hypostasis of what is alleged to be the Westphalian statal form, it proposes that the analytical apparatus of Marxist class theory has nothing of value to contribute to international law.

To be sure, on the national level, it is conceded sometimes, the Marxian class analytic may still occasionally prove useful. 'Inside the state' one can still find some traces of class antagonisms, and the lions can still be told apart from the

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132. Duncan Kennedy, 'First Year Teaching as Political Action', 1 *Law and Social Problems* (1980) 47-58 at 53.

lambs. But ‘outside the state’, on the murky parched planes of the international arena, no such traces are to be found. The jukebox of international politics can only ever play tunes written by one tribe of tunesmiths – sovereign states and their faceless technocratic proxies, international organizations.

This assumption, I am sure you understand, is completely and utterly groundless. But it is not, for all that, politically inconsequential or ideologically innocent.

It helps to obfuscate the historical nature of the global political process and to divert our attention away from its ultimate origination in the global division of labour. As we set out to investigate the complex system of causal inter-relationships between international law and the structure of the broader international political system, it serves to occlude our sight of the long-term historical processes that structure the field of global economic production and determine the general range of the corresponding juridical forms in terms of which this field is organized and the system of institutional regimes and processes by which its exploitative dynamics is maintained. As a result, it helps to dilute our awareness not only of the essential historicity of international law’s past but also of the essential artificiality of its present; to naturalize what is, in effect, a fundamentally contingent system of global social relations, and through that to deceive every man and woman who has ever felt in any way short-changed by it about their collective capacity for emancipatory struggle.

What can we do to overturn this reactionary ideological trend? At an earlier point in this article, I mentioned Marxism’s remarkable track record in bridging the gap between the critical and the reconstructive projects and promised I would say more about it when I got to the conclusion. I will be frank. I do not know everything that needs to be done to complete this bridging exercise in the context of the contemporary leftwing international law project. But I have a few suggestions. The list is not comprehensive and there is no immediate sequence or hidden hierarchy between the different entries. But here they are. See what you make of them.

### 5.1. Internal Front: Theoretical Work

If only for the purposes of developing its own internal self-understanding, it seems to me that the leftwing international law project must begin today by developing a new account of the historical place of the international law profession in the reproduction of the existing global social formation. Why? In order to help understand our own ideological and social context so as to be able to identify more effective and more efficient future strategies.

The starting objective is to locate the international law profession within the existing global class structure, explain its socio-political function in terms of its role as a particular species of TMC technocracy, and to the extent possible uncover the whole logic of its complex relationship with the different factions

of the global hegemonic bloc – a logic which both expresses the international law profession's overall dependence on the hegemonic bloc and at the same time helps to mediate its contradictions with it.

Foucault's work on the relationship between truth and power<sup>133</sup> – but also the logic of governmentality<sup>134</sup> – and Bourdieu's work on symbolic capital<sup>135</sup> and the logic of practices within structured fields of cultural production<sup>136</sup> offer a number of useful points of departure in this task. So do David Kennedy's *Thinking against the Box*<sup>137</sup> and Anne Orford's *Embodying Internationalism*.<sup>138</sup>

For reasons already mentioned above (see the end of Section 2), it seems to me we must also develop a new epistemological attitude towards the phenomena of statehood, treaty-making, international organizations, and customary international law. It is important to do so not only because the discourse of international law is still primarily conducted in terms of these categories – which means that if one wants to be heard by the rest of the international law community one needs to master this language – but also because a truly dialectical approach to international law, as already indicated (see Section 3.3), cannot resolve simply to replace one set of allegedly primordial actors (states) with another equally mystified set (classes) (see Section 3.2.5).

The point, in other words, is to develop a theoretical framework which, while still enabling its practitioners to 'speak', if need be, in terms of a subject-centric conception of international law, will also allow them, for the purposes of their own 'internal' understanding, to conceptualize the existing international legal system in terms of a higher-order structure of *social relations*. States, international organizations, courts, NGOs, 'peoples' – each of these phenomena, from a Marxist point of view, ultimately constitutes a particular condensation of social relations, a mediation of the underlying political contradictions all of which have ultimately a strongly pronounced class basis, rather than a reified self-enclosed static entity. To understand international law as a system of relations involving these phenomena *taken as actors*, consequently, requires us to be able to conceive of it as a structure of higher-order relations occurring between lower-order systems of relations. Put differently, it requires us not only to grasp the historical meaning of international law as a semantic order of reification (in the Lukacsian sense of the word), but

133. See Michel Foucault, *Power/Knowledge* (translated by Colin Gordon et al.; Harvester Press: Brighton, 1980).

134. See Michel Foucault, *Security, Territory, Population* (translated by Graham Burchell; Palgrave Macmillan: New York, 2007).

135. See Pierre Bourdieu, *Language and Symbolic Power* (translated by Gino Raymond and Matthew Adamson; Harvard University Press: Cambridge, MA, 2001).

136. See Pierre Bourdieu, *The Field of Cultural Production* (translated by Richard Nice et al.; Columbia University Press: New York, 1993).

137. See Kennedy, 'Thinking against the Box', supra note 46.

138. See Anne Orford, 'Embodying Internationalism: The Making of International Lawyers', 19 *Australian Yearbook of International Law* (1998) 1-34.

also to identify the exact internal structure by which the constituent reificatory acts behind it operate and express the general mechanics by which the resultant imaginal outcomes take hold.

Alongside the general theory of the commodity structure,<sup>139</sup> an important intellectual instrument that can help us in developing this kind of understanding can be found in the theory of *structural causality*, that is to say, the theory which tries to operationalize in the context of the contemporary global political conjuncture not only the concept of structural overdetermination but also the ideas of ‘historical contingency’, the ‘derivation of the state’, and the ‘relative autonomy of the law’.<sup>140</sup> Very little work has been done on this front so far, especially in the area of international law. Yet, any suggestion that a significant knowledge-productive progress can be possible in the absence of such a theory, it seems to me, is simply unsustainable.

We must begin to rewrite the history of international law by tying it in with the history of the underlying patterns in the evolution of the global relations of production.

Consider, for example, the whole series of doctrinal debates and contestations that erupted on the eve of the 2003 invasion of Iraq.<sup>141</sup> From a Marxist class-theoretic point of view, the primary goal in deciphering the historical significance of these contestations as phenomena of international legal practice would be to explain them not as a series of ‘pure legal facts’ generated by, for instance, the inherent indeterminacy of the corresponding legal materials or the ambiguity of the traditional interpretative processes, but as an overdetermined superstructural manifestation of the general state of the global relations of production and the various contradictions that shook the global hegemonic bloc from bottom to top in the late 1990s and early 2000s.

As Robert Brenner and Giovanni Arrighi have argued, the principal source behind these contradictions can be traced to the steady build-up of productive overcapacity in the manufacturing sectors of the leading capitalist economies since the end of World War II and the resulting system-wide over-accumulation of capital which triggered the onset of a prolonged economic downturn across most of the capitalist world.<sup>142</sup> The way in which the problem of over-accumulation was resolved by the turn of the century – essentially, through an ever-increasing financialization of the global-economic space driven in part by an attempt to induce a system-wide rise in consumption levels absent a corresponding rise in

139. See Lukacs, *History and Class Consciousness*, supra note 113, at 83-110.

140. Further on the concept of structural causality, see Fredric Jameson, *The Political Unconscious* (Routledge: London, 2002) at 8-42.

141. For a good starting point on this front, see, e.g., Matthew Craven et al., “We Are Teachers of International Law”, 17 *Leiden Journal of International Law* (2004) 363-374.

142. See Robert Brenner, *The Economics of Global Turbulence* (Verso: London, 2006); Giovanni Arrighi, *Adam Smith in Beijing* (Verso: London, 2007).

real wages – inevitably led to a profound split and conflict between the industrial and the financial fractions of the TCC.

Having co-opted the international political agenda in the late 1980s, the much more cosmopolitan and mobile financial fraction entered a period of spectacular institutional advancement in the 1990s. This led to a considerable strengthening of its relative power position *vis-à-vis* all the other segments of the global hegemonic bloc, but in particular its primary partner-rival, the forces of transnational industrial capital.

The latter, on the other hand, over the same period not only witnessed a comparatively much less impressive rate of institutional and political advancement, but also suffered a series of very significant setbacks in terms of its economic performance that only further highlighted its fundamental susceptibility to a much more territorialized logic of power relations as well as vulnerability to pressure from organized labour. The combination of these three factors, predictably enough, led the industrial fraction to develop a much more pronounced pattern of reliance on the respective nation-state apparatuses.

The resulting divergence of trajectories inevitably led to a gradually intensifying conflict of interests with regard to the most optimal model of geopolitical structuration<sup>143</sup> that was only partially mediated by the deployment of various administrative apparatuses on the national level and the decentralized quasi-Westphalian institutional structures on the international level. If profit is to be understood as a function of the strength of one's power bases, then what essentially happened in the late 1990s in this context can be explained in terms of a gigantic scramble for power bases, 'hard' and 'soft', institutional and ideological alike, between the two primary fractions of the TCC, the various elements of the TMC - in particular the technocratic elites behind the international financial institutions and the latter-day clergymen of the global civil society, the international human rights NGOs - and the various elements of the TWC.

As on so many other occasions in modern history, the conflict over the determination of the general rules for the transboundary use of armed force became at this point one of the principal indices of the course of global class struggle. The rapid re-legitimization of the culture of armed interventionism and the concomitant switch to a much more militarized version of the globalization project that took place around the turn of the millennium – the switch that gave international lawyers not only the infamous neo-Reaganite 'Bush doctrine', but also the Kosovo-inspired 'responsibility to protect' doctrine – appear, in other words, to have derived far less from the surface patterns of the essentially contingent historical events such as the attacks of 11 September 2001 or the election of George Bush, Jr., than from the much deeper underlying processes that threatened

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143. See Harvey, *New Imperialism*, supra note 17, at 118-9.

a comprehensive destabilization of the global hegemonic bloc at the start of the new century: a *global economic stagnation* produced as a consequence of the general over-accumulation of capital across the advanced economies; the *redistribution of economic control points* from the North Atlantic region to the newly emerging East Asian financial and industrial centres; *an ever-intensifying pauperization of an ever-increasing proportion of humanity* outside the North Atlantic region; the inevitable switch from the 'economic growth is always also an economic struggle' model of expansion to the 'economic struggle is the only way to economic growth' alternative; a rapidly snowballing *governance legitimation deficit* created in large measure thanks to the various technological breakthroughs from mobile telecommunications to the world wide web, whose combined effect was to lower the previously prohibitive entry costs to the 'marketplace of public discourse and informational messages'.<sup>144</sup>

Faced with a pattern of rapidly intensifying competition and a concomitant crisis of profitability, different segments of the global hegemonic bloc resorted to mutually contradictory political strategies, aimed invariably not so much at finding a general resolution to the challenges confronting the global hegemonic bloc as a whole as at discovering a more or less effective way of resolving the immediate problems confronting the given segment of the bloc, if need be, at the expense of all the other segments. The resulting process found by the start of the new century the emergence of a relatively consistent systemic split between, on the one hand, the forces of transnational industrial capital supported in their endeavours by the national military-industrial complexes of the North Atlantic region and the transnational oil corporations and, on the other hand, the forces of the transnational finance capital supported to a large extent by the Bretton Woods technocracy. The latter consistently encouraged a complete dismantling of all domestic and international regulatory measures that could produce any form of protectionist dynamics in the global markets, thus inevitably pushing for a systematic downgrading of the nation-state as a site and instrument of governance processes. The former, by contrast, turned out generally to be much less opposed to the idea of a strong state – so long, of course, as the states in question would be thoroughly 're-educated' in the ways of the inalienable investor rights.

The conflict between the two trajectories, naturally, was not absolute. No one supported the deregulationist project pure and simple. After all, the forces of the transnational finance capital also had a certain residual interest in maintaining the nation-states' general law-enforcement capacity, if only for the sake of safeguarding whatever anti-protectionist regimes would then be created to suit their interests. Similarly, most elements of the industrial fraction found that their immediate economic interests would be much more effectively served by

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144. See further Robinson, 'Global Capitalism', supra note 99.

the weakening of the government interventionist potential in those markets into which they sought entrance.

But the trend, nonetheless, was still there. And, like most such trends, unless counteracted, sooner or later, it was bound to produce a policy explosion. In the domain of international law, that explosion was reflected in connection with two major events. First, the 2003 invasion of Iraq and the subsequent failure to produce an even remotely coherent international legal remedial action in response to what has been widely understood as an unambiguous violation of the pre-existing legal rules. Second, the collapse of the Doha round at the WTO. The catalyst in both cases appears to have come from the increasingly crude attempts by the US governmental elites, acting against the background of the gradually growing rift between the financial and the industrial fractions, to extract what, in effect, were racketeer-style 'protection payments' from their West European, Middle Eastern, and East Asian allies.<sup>145</sup>

What role did international legal concepts, doctrines, and discourse play in all of this? How did the political splits between the Western and the non-Western states generated by the intra-imperialist contradictions between the different segments of the global hegemonic bloc translate into a corresponding split within the domain of the international legal process? Which rhetorical tropes became proxies for which political projects? Which doctrines and concepts – 'sovereignty,' 'the right to democracy,' 'the United Nations,' 'imperialism' – became attached to which agendas? Which segments of the international law profession were drafted in by the opposing elements of the historical bloc more regularly and why? These are the questions that stand most prominently today before the Marxist theoretical project in the field of international legal history.

## 5.2. External Front: Ideological Work

On the front of external policy intervention, it seems to me, our first task today should be to induce a systematic reorientation of every debate related to matters of international law towards the glaring class inequalities in the distributional consequences of various international legal regimes. Did the decision of the WTO panel in the Biotech Products case<sup>146</sup> make it more difficult for governments around the world to maintain protective measures against foreign trade in genetically modified organisms? What sort of general distributional consequences did this produce across the various elements of the global class structure? Considering the disparities in political/informational access capacities, what meaning can be attributed in this context to the fact that in formal political terms the decision

145. Arrighi, *Adam Smith in Beijing*, supra note 142, at 254-9.

146. *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WTO Panel, 29 September 2006, WT/DS291/R, WT/DS292/R, and WT/DS293/R.

was articulated on the supranational level? And how in the same context can we then interpret the fact that the losing party to the case – the European Communities – chose not to appeal the panel's decision?

Most agents sympathetic to the leftwing international law cause will generally agree that most international legal regimes most of the time are biased in favour of one or another element of the global hegemonic bloc in a way which can hardly be dismissed as insignificant. The challenge confronting the leftwing international law project, therefore, is to show why exactly these biases are not, in fact, insignificant, but much more importantly how exactly they tend to manifest themselves, or, in other words, how the 'tilt' mechanism generally works.<sup>147</sup> As of yet, the Marxist tradition has developed no analytical instruments tailor-fitted for this task. See, however, Section 5.3 below.

To facilitate a more effective articulation of these tilts as well as to help communicate their essential illegitimacy more effectively, another important element that needs to be developed by the leftwing international law theorists is a new *non-liberal* (asymmetric) conception of global justice – that is to say, a conception of justice that is derived not from some ill-informed quest for 'neutral bi-partisanship', but from the 'biased' perspective of the TWC.

Several decades ago, the anti-colonial movement managed to achieve an essentially similar goal in the context of the colonialism debate by arguing that between the exploiting and the exploited nations it is the latter that, by 'justice', ought to be given more rights (not least the right to use military force) and that putting the metropolitan powers and the colonial peoples on the same level in this context would be the highest form of injustice.

How difficult should it be to achieve the same in the context in which the interests of the foreign investors clash with those of the exploited labourers?

As a continuation of the same enterprise, it follows that we must also begin deconstructing every fuzzy universalist category – such as 'peoples' rights,' 'international community,' or 'good governance' – with a view to exposing the pervasive class bias encoded into their construction and practical deployment by various international institutions. Proudhon: whoever invokes humanity, cheats. Schmitt: behind the most ardent appellations to universalism, one will always find the most inhumane forms of political violence.<sup>148</sup> Nietzsche: a penchant for transcendentalism is the way of deception and an indispensable condition for the rule of clergy.<sup>149</sup>

Still, it is living human individuals who 'make' history. In the context of our interaction with other schools and movements within the international law

147. Wythe Holt, 'Tilt', 52 *George Washington Law Review* (1984) 280-288.

148. Schmitt, *The Concept of The Political*, supra note 81, at 54.

149. See Friedrich Nietzsche, *Twilight of the Idols and The Anti-Christ* (trans. by R.J. Hollingdale; Penguin: London, 2003), at 49, 149-50. More generally, see also Friedrich Nietzsche, *On the Genealogy of Morality* (translated by Carol Diethe: Cambridge University Press, 1994).

profession, we must also apply the Marxist class analytic to further drive home the point about the profoundly elitist nature of the international lawmaking process – but also to uncover the ideological biases of what Myres McDougal called the community of authoritative decision-makers. If only for the sake of injecting a healthy dose of scepticism into the general image of the international law profession held by the lay public, it may be a good idea to start documenting the various mechanisms of political co-optation of international civil servants, foreign office diplomats, international law publishing houses, and even international law textbook-writers.<sup>150</sup>

### 5.3. External Front: Doctrinal Work

In what direction should our discursive interventions proceed in the context of the contemporary international legal *doctrinal* debate? In the first instance, it seems to me, the idea of international law as an active constitutive site for the reproduction of the global social formation suggests that we should turn our attention in the direction of the traditional *distributive impact analysis* of the kind once advocated by Duncan Kennedy under the heading of ‘leftwing law and economics’.<sup>151</sup> ‘Each rule of the game, even if stated in a way that “applies to all players,” can be analyzed for its impact on the chances of all players. ... Lowering the height of the [basketball] hoop ... affect[s] the relative “ability” of each player.’<sup>152</sup> It is not that no other factor is relevant in determining the ‘outcome of the game’. Rather, ‘the point is that each [factor] has significance in practice only within the [background] framework of legal rules. If you can’t strike at all (public employees), the size of the strike fund is irrelevant.’<sup>153</sup>

How do international legal regimes affect the distribution of power, welfare, and income in the global political arena? The most self-evident way in which international law becomes implicated in such distributions is by outlining which *tools, tactics, and techniques of violence, coercion, and intimidation* the ‘international community of states’ is going to allow different actors to use against one another at different stages within their interactive trajectory. Think Paragraph 4 of the Decolonization Declaration (no armed force is to be used against colonial peoples when they struggle for independence)<sup>154</sup> or Article 50(1)(c) of the 2001

150. A number of important insights have been made on this front in Kennedy, ‘Thinking against the Box’, supra note 46; Koskenniemi, ‘Between Commitment and Cynicism’, supra note 123; and Orford, ‘Embodying Internationalism’, supra note 138.

151. See Duncan Kennedy, ‘The Stakes of Law, or Hale and Foucault!’, XV *Legal Studies Forum* (1991) 327-366; Duncan Kennedy, ‘Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power’, 41 *Maryland Law Review* (1982) 563-658.

152. Kennedy, ‘The Stakes of Law’, supra note 151, 328.

153. *Ibid.*, 331.

154. *Declaration on the Granting of Independence to Colonial Countries and Peoples*, UN GA Resolu-

ILC Articles on State Responsibility (resort to countermeasures may not involve the application of reprisals prohibited by humanitarian law).<sup>155</sup>

A far less obvious way is by determining the structure of strategic alternatives (the list of trajectories) made available to each subject in each given situation. Think, as an illustration, of Principle VI in the UN GA's Resolution 1541 (a colonial people can have only three scenarios in its pursuit of the 'full measure of self-governance').<sup>156</sup> An even less obvious way is by addressing the various background factors that affect the construction of the relative power positions occupied by each subject. Think, for example, of the way in which Principle III of the Helsinki Final Act affects the relative chances of secessionist movements in Eastern Europe by depriving them of any access to external military help.<sup>157</sup>

In the second instance, the idea that the main object of the class-analytic approach must be to reveal the logic by which the global social formation maintains the conditions necessary for its reproduction implies that we must also focus on what, after Althusser and Foucault, could be called the *subjectivizational-interpellatory* analysis,<sup>158</sup> that is to say, the analysis of the various ways in which international legal regimes, institutions, doctrines, and practices help men and women around the globe to 'arrive,' so to say, into certain positions within the global class structure and not others.

Through its discursiveness and characteristic texture, law-regulation obscures the politico-economic realities, tolerating structural lacunae and transposing these realities to the political arena by means of a peculiar mechanism of concealment-inversion. It ... gives expression to the imaginary ruling-class representation of social reality and power [but also] assigns the places [that different social actors] must occupy.<sup>159</sup>

tion 1514 (XV), 14 December 1960.

155. Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, 2001, <[untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf)> (visited 22 February 2010).

156. *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter*, UN GA Resolution 1541 (XV), 15 December 1960.

157. *The Final Act of the Conference on Security and Co-operation in Europe, Declaration on Principles Guiding Relations between Participating States*, 1st CSCE Summit of Heads of State or Government, 1 August 1975, <[www.osce.org/documents/html/pdftohtml/4044\\_en.pdf.html](http://www.osce.org/documents/html/pdftohtml/4044_en.pdf.html)> (visited 22 February 2010).

158. See Louis Althusser, *Lenin and Philosophy, and Other Essays* (translated by B. Brewster; NLB: London, 1971), at 127 *et seq.*; Michel Foucault, *Discipline and Punish* (translated by A. Sheridan; Vintage: New York, 1995). See also Warren Montag, "The Soul is the Prison of the Body": Althusser and Foucault, 1970-1975', in Jacques Lezra (ed.), *Depositions: Althusser, Balibar, Macherey and the Labor of Reading* (Yale University Press, 1996) 53-77.

159. Poulantzas, *State, Power, Socialism*, *supra* note 70, at 83.

As a phenomenon that simultaneously belongs in the order of economic relations, politics, and ideology, law, like all other ideological constructs, in many cases functions less by prescription and proscription than ‘by moulding personality’:

it *subjects* the amorphous libido of new-born human animals to a specific social order and *qualifies* them for the differential roles they will play in society. [It teaches people about] *what exists*, who they are, how the world is, how they are related to that world. [It also teaches them about] *what is possible*, providing varying types and quantities of self-confidence and ambition, and different levels of aspiration. [It teaches them] *what is right* and wrong, good and bad, thereby determining not only conceptions of legitimacy of power, but also work-ethics, notions of leisure, and views of interpersonal relationships, from comradeship to sexual love. [Finally, it teaches them to accept as inevitable] *harassment and terror* [but also the] *isolation* of grievances and conflicts.<sup>160</sup>

What sort of theoretical resources can we draw on in pursuit of this enterprise? In the area of the distributive impact analysis, the most promising way forward I think lies with the work of John Commons, Robert Hale, and Wesley Hohfeld.<sup>161</sup> To be sure, none of these scholars operated within an explicitly Marxist frame of reference (least of all Hohfeld). But this does not in any way undermine the relevance of their insights into the ‘inner workings’ of the legal form.

True, neither Hale, nor, moreover, Hohfeld, had an exceptionally well-developed theory of society. But trying to learn from someone does not mean lionising every one of their achievements. When it comes to developing a micro-level juridical theory, the Halian tradition, especially in Duncan Kennedy’s adaptation of it, offers, to my mind, a far more effective analytical toolbox than any other jurisprudential theory.<sup>162</sup> And Hohfeld’s investigations into the logic of legal entitlements to this day provide the best decoding tools for deciphering the objective regulatory potentials of every positively existing legal regime, domestic or international.

Which particular doctrinal questions should the leftwing international law project focus its attention on in the first order? Once again, I do not have all the answers. But the five topics offered below can be used as a quick sketch of an initial roadmap:

— *The general formative logic behind the transnational spread of national legal forms, especially in the fields of corporate law, labour law, and the law of property.*

160. Göran Therborn, *What Does the Ruling Class Do When It Rules?* (Verso: London, 2008) at 172 and 222-5.

161. See John Commons, *Legal Foundations of Capitalism* (Macmillan: New York, 1924); Robert Hale, ‘Force and the State: a Comparison of “Political” and “Economic” Compulsion’, 35 *Columbia Law Review* (1935) 149-201; and W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, 1919).

162. See sources cited in supra note 151.

Although he is certainly not a Marxist theorist, Diego Lopez Medina's recent work in the area of what he calls 'international general jurisprudence,' it seems to me, offers the most helpful starting point on this front.<sup>163</sup>

- *The class politics of the recent collapse of the Doha round considered as a super-structural manifestation of the intra-imperialist contradictions within the global hegemonic bloc.* Which elements of the bloc backed which parts of the reform agenda? What was the basic distributive impact of the failure of the new round of negotiations?
- *The basic socio-political reality of various international organizations and the so-called 'global civil society' taken as the institutional manifestations of the global imperial state apparatus.* Nicos Poulantzas's later writings, but also B. S. Chimni's work on the subject as well as the various writings by James Gathii and Antony Anghie, offer a very helpful starting platform on this question.<sup>164</sup>
- *The progressive degradation of the systemic ideological potential within the contemporary international legal discourse.* A number of recent studies have explored several aspects of this question.<sup>165</sup> Much more work, however, still remains to be done, not least with regard to investigating the 'fate' of the 'customary ideological terrains' occupied by the Marxist tradition.
- *The idea of neo-decolonization.* If there can indeed exist such a phenomenon as phenomenon of neo-colonialism, there must, by implication, also exist some space for a neo-decolonization. How should this concept be understood in practice? What sort of an operative logic should be given to the project of neo-decolonization in contemporary international law? What should it focus its efforts on and how should it articulate its agenda?

Here are, then, my starting theses – my basic programmatic vision of where the Marxist class-theoretic approach to international law should proceed to and how.

163. See Lopez Medina, *Comparative Jurisprudence*, supra note 43. See also Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000', in David Trubek and Alvaro Santos (eds.), *The New Law and Economic Development* (Cambridge University Press: 2006), 19-73.

164. See Poulantzas, *State, Power, Socialism*, supra note 70; Chimni, 'International Institutions Today', supra note 61; James Gathii, 'Good Governance as a Counter-Insurgency Agenda to Oppositional and Transformative Social Projects in International Law', 5 *Buffalo Human Rights Law Review* (1999) 107-174; and Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions and the Third World', 32 *NYU Journal of International Law & Policy* (2000) 243-290.

165. See, e.g., Susan Marks, *The Riddle of All Constitutions* (Oxford University Press, 2000); Kennedy, *Dark Sides of Virtue*, supra note 47; Gathii, 'Good Governance', supra note 164; Balakrishnan Rajagopal, *International Law from Below* (Cambridge University Press, 2003); Scott Newton, 'The Dialectics of Law and Development', in Trubek and Santos, *The New Law and Economic Development*, supra note 163, 174-202.

Here is, in other words, where the struggle for the future of the leftwing international law project can be started. Here is where the trenches can be dug. Let us begin if you are not afraid.