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REVIEW ESSAY

The Question of Form: Methodological Notes on Dialectics and International Law

UMUT ÖZSU*

Susan Marks (ed.), *International Law on the Left: Re-examining Marxist Legacies*, Cambridge University Press, 2008, ISBN 9780521882552, 326 pp. (hb), US$105.00.

Such a contradictory characterization may horrify the dogmatists and scholastics; we can only offer them our condolences.

Trotsky[1]

1. Introduction

Emil Cioran often likened the experience of abandoning his native Romanian for French to submitting to a straitjacket.[2] Indeed, the language in which he would go on to secure his reputation was itself, he wrote, best understood as 'the combination of a straitjacket and a salon'.[3] It was only by undergoing an 'exercise in ascesis',[4] suspending his commitments to what he regarded as an earthier, less regimented tradition, that he had been able to don the garb of a French author, if still only as a 'Balkan reject'.[5] The rigour and crispness of his adopted tongue flew in the face of his desire. The severity of its lucidity stifled his passions, or simply channelled them along directions deviating from their natural path. '[Y]et', Cioran went on to observe, 'it is precisely on account of this incompatibility that I have attached myself to this language'.[6] So much so that what caused him the greatest grief of all was to see that '[t]oday, when this language is in full decline, . . . the French themselves do not seem to mind.'[7]

Approaching international law with what has customarily, if somewhat loosely, been labelled a 'critical' eye is frequently said to engender similar discomfort. Lift the

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* S.J.D. candidate, University of Toronto Faculty of Law [umut.ozsu@utoronto.ca]. My thanks to Akbar Rasulov and one anonymous reviewer for rich comments, and to Susan Marks for kindly providing an early copy of her article. Thanks also to Nehal Bhuta, Bill Bowring, B. S. Chimni, and China Miéville for conversations on related issues. The usual caveats apply.

1 L. Trotsky, *The Revolution Betrayed: What is the Soviet Union and Where Is It Going?*, trans. M. Eastman (1937), 54.
2 See, e.g., E. M. Cioran, *The Fall into Time*, trans. R. Howard (1970), 186.
3 E. M. Cioran, *Anathemas and Admirations*, trans. R. Howard (1991), 256.
4 Ibid.
5 Ibid.
6 Ibid.
7 Ibid.

cover off any of the discipline's standard texts, from Vitoria through to the present day, and one is immediately confronted with a mass of rules, principles, standards, and norms. Strung together between the covers of one or several volumes, usually with extraordinary care, occasionally as so many leaps in the dark, these texts – nearly always enterprises on a mammoth scale – strike even sympathetic readers as lacking the kind of consistency to which they aspire. Try as one might, one finds it exceptionally difficult, if not altogether impossible, to shake the feeling that little of this gels as firmly as it should – and, further still, one feels that it is precisely on account of its attempt to achieve coherence that international law remains as vulnerable to doctrinal and theoretical fissures as it does. One does not need to revive the old legal realist bogeyman of 'indeterminacy' to recognize as much. The facts speak for themselves. International law is an aggregation of discrete elements – of doctrines developed, argumentative patterns refined, and institutions spawned on the basis of widely divergent, often conflicting, experiences. As much a 'bramble bush', to borrow Llewellyn's felicitous phrase,[8] as municipal law ever was.

Yet this is by no means all that one finds. Yes, the canon of international law is riddled with lacunae, tensions, and so on, its armature not nearly as stable or self-standing as is still sometimes assumed. This much is evident enough from any examination of the traditional – not to mention the not-so-traditional – sources. But not only does international law strike one as having a dynamic very much its own, this dynamic clearly derives a great deal of its force from a commitment to formal consistency. International law may fall short of this or that standard of rationality. It cannot, for example, lay claim to the Herculean drive for ever greater levels of 'integrity' claimed by Dworkin for a judiciary-driven common law,[9] even when this model is reconstructed in line with a theory of discourse ethics that prides itself on its proceduralist account of inter-subjectivity.[10] But international law is not for that reason any less compelling. Indeed, to the extent that one takes it on its own terms rather than assessing it in accordance with some pre-existing criterion of rationality, to the extent, that is, that one is willing and able to enter into its own practice instead of evaluating it in relation to an ideal which one has posited or imagined in its stead, one discovers rather quickly that one's intuitions and opinions have come to be steered along particular avenues – that one has, in fact, internalized international law's basic 'grammar' as a kind of second nature.[11]

It is here that there comes to the fore the central problematic around which circles both this essay and the volume it reviews, *International Law on the Left*. In a nutshell, what a critique struggles with most incessantly when confronted with the international legal canon is arguably the most basic question of all that can be posed about international law, and perhaps law generally: what exactly is one to make of its insistence on *form*? Of, say, the fact that it supplies formal standards for assessing claims to statehood, as in the Montevideo Convention, but hesitates to broach the

8 K. Llewellyn, *The Bramble Bush: On Our Law and Its Study* (1930).
9 See, famously, R. Dworkin, *Taking Rights Seriously* (1977), ch. 4.
10 J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. W. Rehg (1998), 211–33.
11 M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005), 615–16.

substantive roots of those claims, a messy amalgam of disparate social, political, and economic factors no criteriology could ever fully capture? Or the fact that it attempts to regulate the conduct of war, down to the wearing of badges by prisoners,[12] but allows inquiry into the grounds and possible justifications for war only in the most oblique and roundabout sense – and even then only by way of Chapter VII of the UN Charter? Or, more generally, and to borrow a famous distinction from constitutional theory, the fact that it prioritizes the *pouvoir constitué* of inter-state relations (complex procedures governing diplomatic intercourse, the treaty-making power, the exercise of jurisdiction, etc.) over the *pouvoir constituant* that drives them (the even more complex social, political, and economic processes by which such procedures are formulated, disseminated, transformed, etc.)? To use Cioran's term, is international law's prioritization of form over substance a straitjacket? If so, how tight is it? How exactly does it bind? And what does it mean for one to be so bound? Does immersion in international law's formal structures result in a failure to engage with their substantive distributive consequences? What implications, if any, does such immersion have for the political projects to which international lawyers commit themselves? Should one try to break loose from the jacket, throwing one's weight behind a 'purely extra-legal' alternative of some sort? Something smacking of 'the political', perhaps, a constituent power Schmittians like to see as rooted in concrete, normatively incalculable decisions?[13] Or should one instead turn and embrace the international legal form? And not because one feels compelled to, or grudgingly accepts the prudential advantages of doing so in this or that set of circumstances, but because one is, 'on balance', so to speak, convinced of the merits of adopting this approach?

Considered superficially, the question of form seems irrelevant, even nonsensical. What, after all, would law be were it not, in some sense, formal? Is not formality a necessary condition of what it means for law to be law in the first place? Is law's very existence not dependent on its opposition to the informal, the inchoate – that which it codifies, enshrines, rationalizes? The real concern, though, the concern which animates most 'critical' international lawyers today, relates not so much to the philosophical foundations of formalism in international law, and even less to the normative 'sources' of formal obligation in international law,[14] as to the *specifically political* implications of the international legal form. What does international law's inveterate insistence on the formal entail from a *strategic* standpoint? Does the fact that international law's formal structures guide one's thought and action as stringently as they do mean that they present one with viable means of waging

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12 Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 75 UNTS 135, Art. 40, at 168–9.

13 C. Schmitt, *The Concept of the Political*, trans. G. Schwab (1996), especially at 26–7, 37. Such a strategy is naturally fraught with difficulty: against a depoliticized functionalism he saw as symptomatic of nihilism, Schmitt often resorted to a neo-romantic irrationalism that mythologized 'the people' as the driving force of 'the political'. See, e.g., C. Schmitt, *Constitutional Theory*, trans. J. Seitzer (2008), 125–35, 140–6. Even so, Schmitt's account of the constituent power of 'the people' can be read in the light of radical democratic theory; from a voluminous literature, see especially the spirited reconstruction in A. Kalyvas, *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt* (2008), ch. 4.

14 A notorious quandary, and one that has invited a barrage of 'solutions': for a famous list see O. Schachter, 'Towards a Theory of International Obligation', (1967–8) 8 *Virginia Journal of International Law* 300, at 301.

political struggles? Or does this fact instead show up international law's complicity in the production and reproduction of relations of domination? Most importantly of all, is it even remotely helpful to countenance such questions *in abstracto*? Must any attempt to answer them not call forth socio-historically grounded explanations of international law's *actual operation* in particular contexts informed by significant power differentials?

It hardly needs mentioning that this essay cannot hope to answer such sweeping questions. Even so, the following notes, tentative and fragmentary though they may be, will hazard something of a response to the question of international legal form. This response may strike the reader as evasive, even metaphysical in its implicit indebtedness to Hegel,[15] but is, I think, the most honest one possible: simply put, international law's formal structures are both constraining and enabling, both limiting and empowering. Inasmuch as international law confines and conducts, it surely blocks certain paths and cancels certain opportunities. Some claims, as we all know, simply cannot be articulated and advanced with the imprimatur of legal legitimacy. Many arguments (often dubbed 'moral' or 'political' for want of more precise descriptors) just cannot be put forward with a properly legal mandate. And yet, alongside this limiting function, international law also equips its wielder with an enormous range of armaments. From self-determination's appropriation by national liberation movements in Asia and Africa in the heady days of decolonization – when the very meaning of sovereignty was contested as part of wide-ranging debates on the applicability of state succession rules[16] – to the time when it was still possible to see in human rights something apart from a nefarious collaboration with 'good governance' and 'democracy promotion', competence in international law has always been a prized asset for counter-hegemonic action. Mohammed Bedjaoui's proposals for a 'new international economic order' in the 1970s – a somewhat tired point of reference, admittedly, but still an astoundingly illuminating one – reveal both sides of the coin well. For Bedjaoui, writing at a time when the Third World sought to renegotiate the international legal system's constitutive rules,[17] international law supplies just the sort of weaponry one needs for an analysis of existing institutional hierarchies and configurations of power. Just as self-determination bolstered the Algerians' 'fundamental sociological unity' during the war against France, rendering *divide et impera* tactics all but toothless in the process,[18] UN resolutions offered avenues for circumventing great power influence, and 'common heritage of mankind'-type doctrines promised to work wonders for the entire 'international community'.[19] But international law also restrains one's hand at several key points, evidenced, as Rajagopal has recently stressed, in Bedjaoui's own residual commitment to institution-building and his by-and-large teleological

15 See especially R. B. Pippin, *Modernism as a Philosophical Problem: On the Dissatisfactions of European High Culture* (1999), 163–7, 176–9.
16 M. Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (2007), 21.
17 G. Abi-Saab, 'The Third World and the Future of the International Legal Order', (1973) 29 *Revue égyptienne de droit international* 27, at 38–9.
18 M. Bedjaoui, *Law and the Algerian Revolution* (1961), 245.
19 M. Bedjaoui, *Towards a New International Economic Order* (1979), 138–40, 236–40.

understanding of 'development', both part and parcel of his vision of international law's 'progressive mission'.[20] The dynamism conferred on international law by its internal contradictions – a dynamism that is institutional no less than discursive, material no less than symbolic – is an intense and far-reaching one.

Intriguingly, it is those international lawyers who have displayed the greatest sensitivity to this structural ambivalence who have generally attended most closely to the travails of their discipline. In an age in which international law finds itself having to compete with any number of other disciplines, it has become commonplace to denounce international relations, say, as an illustration of what international law is not (or *ought* not to be) about. Think of Koskenniemi's indictment of recent attempts to integrate international law and international relations as a pragmatic 'academic project that cannot but buttress the justification of American empire'.[21] Or of Klabbers's argument to the effect that the felt need for such scholarship betrays a willingness to 'succumb to the position that political science is, somehow, more insightful than the science of law'.[22] There is, of course, much to such charges. For one thing, it is undeniable that some nine decades after its emergence as an autonomous discipline, international relations remains as wedded to trends in leading US political science circles as it was in the 1950s, when it received support from caricatured portrayals of interwar international law as a 'phantasmagorical legalist-moralist straw man warranting condemnation for the Machiavellian "sins of princes" supposed by the realists'.[23] A variety of alternative methodologies, some of remarkable power, have proliferated since then,[24] but the instrumentalism of international relations scholarship, emblematic of the 'managerial vocabulary'[25] that marks so much US social science,[26] has not been deprived of its supremacy. Nor can there be much doubt that the rumours of interdisciplinarity's benefits are frequently exaggerated. Mining 'cognate disciplines' for homologous insights or contextual considerations is one thing; ransacking them because one believes that international law 'is like the thin crust of a thermal region of the earth's surface – it cracks easily and when cracked exposes the seething and hissing and bubbling and bursting interior which all land

20 B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2003), 89–94. Consider the following passage: 'If we venture to sketch out the future trend of this system of norms, we could say that international law will probably no longer be the expression of relations of domination which are inegalitarian or hegemonistic ... The principles of equity and solidarity will increasingly be the basis for the elaboration and observance of norms which allow room for corrective or compensatory inequality to enable the Third World States to grow.' Bedjaoui, *supra* note 19, at 249.

21 M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001), 484.

22 J. Klabbers, 'The Relative Autonomy of International Law or the Forgotten Politics of Interdisciplinarity', (2005) 1 *Journal of International Law and International Relations* 35, at 47.

23 F. A. Boyle, *World Politics and International Law* (1985), 17.

24 One could point to any number of developments, perhaps most influentially constructivism, but here I have in mind recent efforts to rewrite the history of international relations – both as a discipline and as an object of analysis – on the back of historical materialism and critical social theory. See especially B. Teschke, *The Myth of 1648: Class, Geopolitics and the Making of Modern International Relations* (2003); N. Guilhot, 'The Realist Gambit: Postwar American Political Science and the Birth of IR Theory', (2008) 2 *International Political Sociology* 281.

25 M. Koskenniemi, 'Miserable Comforters: International Relations as New Natural Law', (2009) 15 *European Journal of International Relations* 395, at 406 ff.

26 And US *legal* scholarship too. For one recent discussion, see J. R. Hackney Jr, *Under Cover of Science: American Legal-Economic Theory and the Quest for Objectivity* (2007), especially chs. 2, 3.

(and all law) at some depth or other encases'[27] – is another thing entirely. What is most interesting in all this, though, is that it is often the most penetrating scholars of international law (Koskenniemi and Klabbers are representative, but only the tip of the iceberg) who should come to international law's 'rescue' with greatest zeal. One encounters here something of the fiery dedication of the newly reconverted: originally stripped of one's naive faith in international law, one re-embraces it on a radically different footing and subsequently goes on to claim it as one's own, often with a fidelity whose intensity is unmatched by even the most steadfast among its conventional supporters. Those who self-identify as 'critical' scholars of international law are often more devoted to shielding such law from superficial denunciation than their rivals – partly, no doubt, because they have a strong scholarly and professional interest in determining what does and does not constitute legitimate critique, but partly, and far more importantly, because they have a sharper sense of the fragility and uniqueness of that odd phenomenon that is the international legal form. And the point holds generally. If it is true that programmatic politics concentrates merely passive debates into real interventions,[28] that it foregoes vague, mystificatory talk of 'justice' in favour of forensic analysis and committed engagement with concrete problems,[29] it is no less true that it is *within*, and not *without*, the international legal form that such a politics is to be found for the international lawyer.

2. A DIVIDED FRONT

Some time ago, Slavoj Žižek cobbled together something of an ideal-typical taxonomy of the various modalities of struggle to which '[t]oday's Left' feels compelled to have recourse in response to 'the hegemony of global capitalism and its political supplement, liberal democracy'.[30] To call the list a motley aggregation would be generous, if not ridiculous. Among other things, Žižek catalogued welfarism, Third Way reformism, 'interstitial' resistance *à la* Foucault, Frankfurt School-inspired critiques of post-industrial technology, direct democracy via the latest products of the 'information age', and Heideggerian resignation before the levelling banality of an 'epoch' whose 'new gods' have yet to arrive.[31] If the left has always suffered from 'heresies' and 'deviations', it is now, Žižek was reminding us, even more confused than before.

The book under review may not offer quite the same range of alternatives. But the variety is anything but paltry. At one end of the scale, one finds Miéville's denunciation of international law as a gloss on inter-state rivalry, ultimately little more than a reflection of commodity exchange (pp. 92–132). At the other, one has

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27 From Julius Stone's hyperbolized presentation of Max Huber's sociological jurisprudence: see J. Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes and War-Law* (1954), 40 (note reference omitted).

28 A. Badiou, 'Against "Political Philosophy"', in *Metapolitics*, trans. J. Barker (2005), 10, at 15.

29 Cf. R. Geuss, *Philosophy and Real Politics* (2008), 99.

30 S. Žižek, 'Resistance is Surrender', *London Review of Books*, 15 November 2007, 7, available at www.lrb.co.uk/v29/n22/zize01_.html (last accessed 1 March 2010).

31 Ibid. For a fuller exposition see S. Žižek, *In Defense of Lost Causes* (2008), 337–8, and ch. 7 generally.

Roth's attempt to outline Marxism's continuing 'relevance' for liberal human rights advocacy (pp. 220–51). Between the two are a number of other approaches – some seeking to engage the Marxian tradition *in toto*, others interrogating this or that aspect of the tradition with a view to grappling with specific quandaries, and still others toying with proposals to renew or reconstruct it from less canonical, even explicitly anti-Marxist, perspectives. Rather than examining each of these in great detail, let me attempt something of a cross-section, concentrating on what is without a doubt the most significant of the various questions they raise – that of Marxism's relation to the international legal form. I begin by contrasting the chapters authored by Miéville and Roth.

Miéville's chapter is far and away the most combative. Drawing on the work of the Bolshevik legal theorist Evgeny Pashukanis, he develops a classic Marxist critique of international law as the formal veneer of politico-economic imperialism. Pashukanis devoted the bulk of his considerable energy to private law, maintaining that property and contract presupposed relations between equal and autonomous rights-bearers strictly homologous in form to those obtaining between commodities in capitalist exchange and circulation.[32] Amplifying Pashukanis's own attempt to extend this model to questions of world public order,[33] Miéville presents international law as an abstract, de-socialized outgrowth of the struggle among states to secure control over increasingly large quantities of territory and resources. His point is not to deny international law's 'properly legal' credentials, nor to denounce it as a 'primitive' body of law, one that lacks robust normative foundations, functional enforcement mechanisms, and so on. Instead, his claim is that while international law is indeed law, and while it clearly exerts significant influence over a wide range of social and political processes, it cannot provide a home for projects aiming to revolutionize the existing international order *systemically*.[34] This is so because international law is grounded in the same social and political relations as those that produce imperialism, and can therefore do little to check the coercive power of dominant states: doctrines of sovereign equality nearly always mystify the asymmetricality inherent in international relations; talk of self-determination obfuscates the violence of these relations almost without exception (pp. 121–7). Miéville's across-the-board condemnation follows shortly thereafter: since there is 'no prospect of any systematic progressive political project or emancipatory dynamic coming out of international law', our 'best hope

32 This is a point about law's *operational* form and not its 'formal ideal', as even sympathetic readers sometimes took it to be; see, e.g., L. L. Fuller, 'Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory', (1949) 47 *Michigan Law Review* 1157, at 1161 (arguing that, for Pashukanis, '[t]he ideal of law is realized at the same time as the ideal of the market'). For Pashukanis's own exposition, see E. Pashukanis, 'The General Theory of Law and Marxism', trans. P. B. Maggs, in Pashukanis, *Pashukanis: Selected Writings on Marxism and Law*, ed. P. Beirne and R. Sharlet (1980), 37.

33 'Sovereign states co-exist and are counterposed to one another in exactly the same way as are individual property owners with equal rights.' See 'International Law', trans. P. B. Maggs, in Pashukanis, *Selected Writings*, *supra* note 32, at 168, 176.

34 Miéville offers a succinct explanation of this point elsewhere: 'It is possible to accept that international law is law, that it is always part of the international political process, *and yet argue that it cannot and will not act to further a "just world order".*' C. Miéville, *Between Equal Rights: A Marxist Theory of International Law* (2006), 25 (emphasis in original).

for global emancipation' lies in a 'political project' that would 'eradicate the forms of law' (pp. 130–1).

Roth toes a very different line. Setting out, as he puts it, to rescue 'Marxian thought from the dustbin of activist history' (p. 221), he argues that a 'human-rights-friendly reading of Marx' (ibid.) is available and can do much to further the liberal human rights project's core aspirations. One dimension of this revivified project would seek to enhance equality in political decision-making processes by orienting electoral procedures towards the 'substantive social empowerment of the resource-deprived' (p. 244). Another would aim to show that liberalism's attempt to justify as 'neutral', 'non-coercive', or even 'natural' its prioritization of civil society over the state warps appreciation of the fact that 'private' relations in liberal societies are always already shot through with a dominant 'logic of market rationality' (p. 249). Indeed, Roth notes, '[t]o abjure "non-neutral" collective decisions is . . . to impose by default a determinate collective view of what individuals ought to be free to do', surreptitiously marshalling a conservative and oddly idiosyncratic teleology even when explicit appeals to 'individual choice' and 'aggregated interests' have been problematized (p. 250). In these and other ways, Roth explores the interpenetration of Marxism and liberalism, seeking to demonstrate that the former was always embedded in and intended as an internal refinement of the latter. 'Marxism retains its relevance in the current period', he writes, 'not as a comprehensive replacement for liberal human rights theories, but as a source of critique that challenges those theories on the basis of the very values of human freedom and dignity that they espouse' (pp. 221, 250).

Miéville positions himself to the left of – and, arguably, exterior to – received international law, seeing in it little which escapes the logic of liberalism and which might be salvaged for a programme of emancipatory politics. Roth takes his lead from the liberal tradition itself, bringing Marx to bear on what he sees as some of the human rights project's less attractive features. Most schools of Marxism would characterize the distinction as one between clear-sighted 'revolution' and opportunistic 'reform'. Conversely, some liberals would be tempted to see in it an unbridgeable gap between pathological messianism and responsiveness to the needs of human 'liberty'.

Each of the other contributions falls between these two poles. Chimni (pp. 53–91) enlists a wide range of international legal materials to outline an explicitly Marxist course on international law, arguing that while international law 'is constrained by the interests of the dominant actors and classes' (p. 65),[35] it commands a certain measure of 'relative independence' and is therefore capable of lending itself to both diagnostic and rehabilitatory projects on the left (p. 65). (This is a crucially important argument, and one to which I shall return later.) Taking issue with Miéville, for whom 'the germ-seed of self-determination and sovereignty' was '[e]mbedded even in colonialist international law doctrines' (p. 123), Bowring (pp. 133–68) argues

35 Including, as he has stressed elsewhere, co-opted elites on the politico-economic periphery: B. S. Chimni, 'Third World Approaches to International Law: A Manifesto', in A. Anghie et al. (eds.), *The Third World and International Order: Law, Politics and Globalization* (2003), 47, at 61.

that close examination of the terms under which Soviet jurists and policymakers engaged with the international law of self-determination reveals that even 'bourgeois legal norms' are open to 'subversion and appropriation' (p. 168). Carty offers a critical reading of Hardt and Negri en route to sketching elements of an updated Marxist theory of imperialism that would offer guidance as to how respect for sovereign equality might be regenerated (pp. 169–98). Cutler (pp. 199–219) pursues a neo-Gramscian argument to the effect that international economic law is 'an historically effective social force with both oppressive and emancipatory potential' (p. 202); since such law is an outgrowth of human struggle, of 'law-making' in the strong sense of praxis,[36] it can be unmade or remade in ways less submissive to dominant forces. Okafor (pp. 252–80) finds both a 'politics of domination' and a 'politics of insurrection' in Baxi's work on international human rights law: far from succumbing to a deflationary scepticism that would simply cast aside the human rights movement, Baxi demonstrates that this movement is not reducible to bourgeois legal structures (pp. 274–5). Marks's chapter (pp. 281–307) offers an original and incisive analysis of exploitation as an international legal concept that foregrounds the 'question of beneficiaries', i.e. the distributive consequences of the international legal system's architecture and operation (p. 305). Marks argues that developing a critical international legal scholarship of exploitation would go a long way to demonstrating that 'injustice' is not 'arbitrary or accidental' but rooted in the 'systemic logics' that inform the international legal order (p. 302). She also stresses that the kind of position Miéville adopts 'fails to take sufficient account of the contradictoriness that defines our world, and of the immanence of counter-logics, obscured through ideology, but nonetheless available for reactivation in the service of emancipation through critique' (p. 305).[37]

In a powerful contribution that bears a family resemblance to the stance I adopt in this essay and also positions itself between the poles occupied by Miéville and Roth, Koskenniemi (pp. 30–52) argues that international law 'might support just causes in the international world and become an object of progressive political commitment' if it is situated 'in an historical continuum that recognises its being part of modernity and of a critique of modernity simultaneously' (pp. 31–2). Marx comes into the picture inasmuch as Koskenniemi regards this double manoeuvre as involving a form of dialectics. Only, in his variant, dialectics is not understood as a 'scientific' method for deciphering the basic 'mechanics' of historical change. Instead, it is conceived as a theory of hegemony in which regimes of practice grow out of conflict between particular social forces striving to articulate themselves in universalistic terms. Inspired by Laclau and Mouffe,[38] this understanding of dialectics would

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36 A classic touchstone – to which Cutler also refers (p. 218) – being the analysis offered by Klare, for whom '[a] view which treats legal practice as inherently coercive and instrumental, as an alienated "otherness," cannot ground a theory of the institutional forms of an emancipated society.' K. Klare, 'Law-Making as Praxis', (1979) 40 *Telos* 123, at 135.

37 This can be read as a radicalization of her earlier call for 'an alliance between international law and democracy *against* neo-colonialism', a reactivation of the drive for enhanced inclusiveness as against 'low-intensity democracy'. S. Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (2000), 102 (emphasis in original).

38 Who offer a post-Marxist theory of the constitution of hegemony as 'an *articulatory practice* which constitutes and organizes social relations' in an effort to demonstrate that '[t]he task of the Left . . . cannot be to renounce

'enable international lawyers to interpret the dichotomies of international law in light of the historical tensions in the international world' (p. 39). Tensions as essential to international law as those between consent and 'justice', voluntarism and naturalism, and realism and idealism would appear not as elements of a conceptual edifice to which only a de-historicized reason has access, but as live and actual contradictions – contradictions that crystallize into integrated regimes of practice only after this or that social force succeeds in establishing itself as a source of regularity for the larger social system of which it is a part (pp. 40–4). And given the frailty of all such regimes, it would also allow international lawyers '[t]o make a distinction between real and false universalism, transformative promise and institutional realisation' (p. 35). After all, that different claims to universality may be advanced certainly does not mean that each is equally persuasive or desirable. At its best, as in widespread condemnation of the Second Gulf War, international law's ability to serve 'as an instrument through which particular grievances may be articulated as universal ones' can, 'like myth, construct a sense of universal humanity through the act of invoking it' (p. 51).[39]

International law has always maintained an uneasy relationship with the left (however exactly this may be understood). On the one hand, Lenin's involvement in the development of a specifically proletarian vision of self-determination is well known.[40] Equally well-documented are the efforts of the Group of 77 and other, more recent, blocs to develop a new – and, at its strongest, avowedly anti-capitalist – international legal and economic system.[41] On the other hand, international law's heroic pretensions have for centuries found a home in humanitarian intervention; its ambition to craft a new world order, one premised upon 'co-operation' rather than mere 'coexistence', has resonated with critics of domestic jurisdiction time and again. Worse still, even the crassest forms of colonialism and imperialism, both international legal phenomena, received intermittent support from Marx and Engels themselves – often in terms indistinguishable from the support they received from their liberal apologists. Kant may have synthesized Eurocentric assumptions about state formation and international order common to various strands of the *Aufklärung*,[42] and the Mills are rightly infamous for sponsoring a 'civilizational'

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liberal-democratic ideology, but on the contrary, to *deepen* and *expand* it in the direction of a radical and plural democracy'. E. Laclau and C. Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (2001), 96, 176 (partly de-emphasized from original).

39 This is not far from that combination of partisanship and ethical absolutism so often found in Marxian theory; see, e.g., A. Callinicos, 'Leninism in the Twenty-First Century? Lenin, Weber, and the Politics of Responsibility', in S. Budgen, S. Kouvelakis, and S. Žižek (eds.), *Lenin Reloaded: Toward a Politics of Truth* (2007), 18, at 36.

40 For original materials see, e.g., V. I. Lenin 'The Right of Nations to Self-Determination', in *Lenin: Collected Works*, Vol. 20, trans. B. Isaacs and J. Fineberg (1972), 393; Lenin, 'The Revolutionary Proletariat and the Right of Nations to Self-Determination', in ibid., Vol. 21, trans. D. Walters and R. Cymbala (1974), 407. And for a powerful, if heterodox, illustration, see S. Galiev, 'The Social Revolution and the East', in A. A. Bennigsen and S. E. Wimbush (eds.), *Muslim National Communism in the Soviet Union: A Revolutionary Strategy for the Colonial World* (1979), 131.

41 See, e.g., B. Rajagopal, 'Counter-hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy', in R. Falk, B. Rajagopal, and J. Stevens (eds.), *International Law and the Third World: Reshaping Justice* (2008), 63.

42 See, e.g., J. Tully, 'On Law, Democracy and Imperialism', in *Public Philosophy in a New Key* (2008), II, 127, at 143–9; B. Bowden, *The Empire of Civilization: The Evolution of an Imperial Idea* (2009), 84–6, 146–7.

vision of juridico-political 'maturation'.[43] But was it not Marx himself who defended Britain in India as 'the unconscious tool of history in bringing about' a 'social revolution' that had shaken the otherwise 'solid foundation of Oriental despotism'?[44] And was it not Engels who described Europe's national minorities as 'residual fragments' and 'fanatical standard-bearers of counter-revolution', destined to be 'mercilessly trampled under foot in the course of history'?[45]

Given such an ambiguous relationship, it is not in the least surprising that a variety of divergences – some epistemological, others methodological, still others strategic – should inform a volume whose very title speaks to a desire to map Marxism's multiple legacies in, and implications for, international law. Nor is it shocking that some of these contributions should depart from the mainstream of the Marxian tradition. What one encounters here is a reflection of Marxism's range and diversity rather than an attempt to determine what an 'authentic' Marxist theory of international law might have to look like in order to reflect current conditions adequately.

3. The dialectics of international law

The problem of determining whether to locate oneself inside or outside the formal armature of international law is sometimes taken to demand a *via media* solution of sorts: international law, it is said, is fundamentally Janus-faced – one side insurgent, the other suppressive. Marks explored this avenue in earlier work, demonstrating through sustained analysis of post-1989 'democratic governance' initiatives that 'critique seeks to show how international law can serve to stabilize oppression but also to unsettle it, to obstruct emancipation but also to enable it'.[46] Some on the left have objected to this view on the grounds that it rests on an exaggerated claim of even-handedness: international law may not be bourgeois artifice through and through, but it is not for that reason *just* as receptive to counter-hegemonic manoeuvres as it is to hegemonic ones. In a refreshing analogy, Rasulov, for instance, invites his reader to think of the case of a buttered piece of toast in free fall: the toast has two sides, but will, on release, tend to fall on one rather than the other of these sides. So, the argument goes, if it is true that the formal structures of international law face both ways, it is no less true that they are also inclined at a certain angle, tilted *ab initio* to favour the more over the less powerful in a contest 'between equal rights'.[47] More recently, Marks herself has come to espouse a similar position: it is not enough, she now stresses, to show that democracy is an essentially contested concept, and therefore far less tightly bound to the liberal tradition than imagined by theorists of 'democratic governance'. This first move, problematizing the 'false

43 U. S. Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (1999), ch. 3.

44 K. Marx, 'The British Rule in India', in K. Marx and F. Engels, *Pre-capitalist Socio-economic Formations: A Collection* (1979), 69, at 75–6. But see the 'clarification' in A. Ahmad, *In Theory: Classes, Nations, Literatures* (1992), ch. 6.

45 F. Engels, 'The Magyar Struggle', in K. Marx and F. Engels, *The Collected Works of Karl Marx and Frederick Engels*, Vol. 8 (1977), 227, at 234 (emphasis removed).

46 Marks, *supra* note 37, at 144 and similarly 118.

47 'Formalism *does*, as a rule, harm the weak more than it harms the strong.' A. Rasulov, 'International Law and the Poststructuralist Challenge', (2006) 19 LJIL 799, at 806 (emphasis in original).

necessity' of a formal liberal conception of democracy, was – and remains – crucially important. But it is now in need of being supplemented with a second, further move – namely that of providing an explanation of why it is that the thin conceptions of democracy favoured by such theorists came to be accorded the authority they were in the 1990s by unearthing the systemic logics at work beneath and within them.[48]

As the above discussion shows, many of the contributors to *International Law on the Left* adopt a variant of the 'Janus' thesis, although most make concessions of one sort or another to address the kind of point that Rasulov raises and Marks develops. Consider Chimni's conclusion that '[t]he characterisation of CIL [contemporary international law], as bourgeois imperialist does not, however, mean that it therefore offers no advantage to the dependent and dominated states and the subaltern classes in the international system' (p. 64). Much could be said about this important and provocative statement, fully within the purview of the 'Janus' thesis and reflective of a good deal of *International Law on the Left*'s spirit. What is of greatest interest for present purposes, though, is the significance that Chimni ascribes to the term 'however'. Functioning as a kind of hinge, it opens the door to critique and reconstruction even as it closes it on a naively simplistic endorsement of existing law. This is a powerful move, at least potentially, and one to which I, as hinted earlier, am sympathetic. Nonetheless, what the reader is left wondering is whether it is possible to offer an explanation of *how* it is that international law might be a hinge. That is to say, what still needs to be developed in order to make this argument stick is a properly dialectical theory, one capable of explaining how international law is hardwired in ways that systemically disempower less resourceful actors while permitting these same actors to wage struggles of emancipation in its name. Such a theory would go a long way to elucidating the extent to which what Chimni refers to as 'a creative and imaginative use of existing international laws and institutions to further the interests of the "wretched of the earth"' (p. 91) is actually feasible.

At a minimum, any theory of international law that hopes to capture this dialectic would need to depart both from the sort of crude instrumentalism which has so frequently undergirded 'vulgar' Marxism and from the kind of rote, pre-reflexive formalism which remains curiously pervasive in international legal scholarship. That neither instrumentalism nor formalism is able to account for law's concurrent claims to freedom and necessity, pliability and firmness, is a lesson many of the 'relative autonomy' Marxist legal theorists of the 1970s understood quite well.[49] But it has received arguably its most sophisticated expression in the work of Pierre Bourdieu. For Bourdieu, law is to be understood neither as an epiphenomenal superstructure, erected on the back of 'deeper' relations of domination, be these economic or otherwise, nor as a citadel of pristine rules and principles, essential ingredients of a closed order whose objectivity flows from a reason both ahistorical and apolitical.[50]

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48 S. Marks, 'False Contingency', (2010) 62 *Current Legal Problems* 1, at 13 and generally.

49 See, e.g., I. D. Balbus, 'Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law', (1977) 11 *Law and Society Review* 571, especially 571–3.

50 'A rigorous science of the law . . . frees itself from the dominant jurisprudential debate concerning law, between *formalism*, which asserts the absolute autonomy of the juridical form in relation to the social world, and *instrumentalism*, which conceives of law as a reflection, or a tool in the service of dominant groups.'

At its best, instrumentalism may give rise to calculated reliance on international law – what one Marxist has recently termed a form of 'principled opportunism' in which 'international law is consciously used as a mere tool, to be discarded when not useful'.[51] At its worst, it misses the specificity of international law altogether, according it little more than a vague capacity for 'mirroring' some set of extra-legal phenomena. For its part, formalism mistakes a particular matrix of structures, highly idiosyncratic in character, for necessary and universal features of international law as such, conveniently papering over law's murky origins in a violence which can never be laid aside,[52] least of all with a 'closure of convenience' like the *Grundnorm*.[53] It is not hard to see how this would provoke denunciation of international law as irredeemably bourgeois. If international law is never 'this or that' law, but 'the law' as such, a closed order with a wholly autochthonous logic, then it is unlikely, to say the least, to unfold dialectically into a state of liberation. In such a case, the ultra-leftist refusal to take international law seriously would seem less an instance of revolutionary immaturity, a fruitless attempt to 'land with one jump in a completely new world',[54] and more a case of realism in the face of yet another manifestation of 'transcendental nonsense'.[55]

To be sure, like any other form of law, international law is capable of being utilized as a 'tool'. (Tunkin, for example, liked to point out that the UN would have become 'an instrument by states of one social system against states of another social system' had it not been for the Soviet Union's permanent membership in the Security Council.[56]) Similarly, it may lend itself to analysis as an abstract system distinguished by internal coherence and imminent rationality. (The same Tunkin wondered whether international law comprised an 'integrated whole'.[57]) But if one's aim is to explain international law's actual operation, to shed light on both its enabling and its constraining dimensions, what one needs is an account of law as what Bourdieu calls a 'field of power' – a kind of 'gaming space in which those agents and institutions possessing enough specific capital (economic or cultural capital in particular) to be able to occupy the dominant positions within their respective fields confront each other using strategies aimed at preserving or transforming . . . relations of power'.[58] Such an account would see international law as a social 'field' whose

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P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field', trans. R. Terdiman, (1987) 38 *Hastings Law Journal* 805, at 814 (emphases in original). It should be noted that Bourdieu distinguishes his project from 'relative autonomy' Marxism, and Althusserianism in particular, which he regards as a species of instrumentalism. Ibid., at 814–15.

51 R. Knox, 'Marxism, International Law, and Political Strategy', (2009) 22 LJIL 413, at 433.

52 'Thus the only possible foundation of law is to be sought in history, which, precisely, abolishes any kind of foundation.' P. Bourdieu, *Pascalian Meditations*, trans. R. Nice (2000), 94.

53 N. Bobbio and D. Zolo, 'Hans Kelsen, the Theory of Law and the International Legal System: A Talk', (1998) 9 EJIL 355, at 358.

54 G. Lukács, *Lenin: A Study on the Unity of His Thought*, trans. N. Jacobs (2009), 73.

55 See, famously, F. Cohen, 'Transcendental Nonsense and the Functional Approach', (1935) 35 *Columbia Law Review* 809.

56 See, e.g., G. I. Tunkin, *Theory of International Law*, trans. W. E. Butler (1974), 355.

57 G. Tunkin, 'Politics, Law and Force in the Interstate System', (1989-VII) 219 RCADI 227, at 250–1 ff.

58 P. Bourdieu, *The State Nobility: Elite Schools in the Field of Power*, trans. L. C. Clough (1996), 264–5. This follows from a general relationship Bourdieu establishes between *fields*, matrices of action relationally structuring different social positions, and what he terms *habitus*, the internalized dispositions with which

constitutive 'logic is determined' largely by 'the specific power relations which give it its structure' but is not so thoroughly determined by these relations as simply to do away with 'the internal logic of juridical functioning'.[59] In other words, it would offer an explanation of international law that, on the one hand, roots it in relations of domination without reducing it to them, and, on the other hand, illuminates the force of its formal structures without absolutizing them. Law, for Bourdieu, is best examined neither as a policy instrument nor as a purely formal system but as a 'social space'[60] which both defines and is defined by competition between different actors wielding different qualities and quantities of social capital. Although equipped with its own patterns of practice (its own 'rules of the game', if you will, for which every 'player' is endowed with an ordinarily unthematized 'feel'[61]), it is structured by conflict between agents whose capacity for strategizing and manoeuvring remains considerable. These agents internalize many of the discursive and normative structures with which the legal field is buttressed, embodying them in new dispositions. Such inculcation is rarely, however, so exhaustive as to extinguish subjectivity *tout court*.[62]

As an illustration of what I have in mind, think of the recent resurgence of 'constitutional talk' in international legal scholarship. In itself, there is little new in the attempt to conceive the international legal order in 'constitutional' terms. More than a hundred years ago, at the turn of the twentieth century, a paper read at a meeting of the International Law Association tried to demonstrate that arbitration agreements were fast 'crystallising into a code', and that denouncing international law on the ground that it had yet to reach its 'final phase of complete development' was therefore akin to 'reproach[ing] a child for not being a grown-up man'.[63] After 1945, describing the UN system in these terms became increasingly common: in a famously open-ended turn of phrase, de Visscher referred to the Charter as a treaty of 'a constitutional character',[64] and even critics of US exceptionalism have repeatedly had recourse to constitutional theories of checks and balances to conceptualize the

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agents manoeuvre within these fields. Bourdieu introduces this terminology to overcome the conventional social-scientific divide between structuralism and phenomenology: 'the opposition between the structure and the individual against whom the structure has to be won and endlessly rewon stands in the way of construction of the dialectical relationship between the structure and the dispositions making up the habitus'. P. Bourdieu, *Outline of a Theory of Practice*, trans. R. Nice (1977), 84.

59 Bourdieu, *supra* note 50, at 816.

60 Ibid., at 828, 831, 852.

61 P. Bourdieu, *The Logic of Practice*, trans. R. Nice (1990), 66–7.

62 Bourdieu generally places a premium on the constraining power of social structures, largely on account of his commitment to a sharp break with pre-reflexive notions of 'free action' and 'full consciousness'. See P. Bourdieu, J. C. Chamboredon, and J. C. Passeron, *The Craft of Sociology: Epistemological Preliminaries*, trans. R. Nice (1991), 15, 17; P. Bourdieu and L. J. D. Wacquant, *An Invitation to Reflexive Sociology* (1992), 10–11, 123–40. Although this is sometimes taken to mean that he lacks a persuasive account of self-understanding (see, e.g., R. Celikates, 'From Critical Social Theory to a Social Theory of Critique: On the Critique of Ideology after the Pragmatic Turn', (2006) 13 *Constellations* 21, at 23–6), it is quite a stretch to embed his theory, as some have, in the structuralist tradition pure and simple.

63 W. E. Darby, '"Permanent Arbitration" in Modern International Law', in International Law Association, *Report of the Twentieth Conference, Held at Glasgow, August 20th–23rd, 1901* (1901), 22, at 24–5.

64 *International Status of South-West Africa*, Advisory Opinion of 11 July 1950, [1950] ICJ Rep. 128, at 187 (Judge de Visscher, Dissenting Opinion).

post-Second World War order.[65] Nevertheless, there has undoubtedly been something of a resurgence of interest in this kind of thinking of late. We are becoming ever more accustomed to hearing that '[f]or lack of a better alternative, the idea of constitutionalism encapsulates much of what contemporary international law, guided by the UN Charter, is striving for'.[66]

What is most interesting about this is not the question of whether this 'turn to constitutionalism' reflects a growing appreciation of something inherent within international law's very architecture – something which, in one sense or other, has always informed its 'essence', but which, for whatever reason, has hitherto been under-appreciated. Nor is it the question of whether the 'constitutional lens' sheds new light on the way in which this or that rule of international law can be utilized for the attainment of this or that policy objective. Rather, what is of paramount interest here is why a particular species of constitutional discourse should have been adopted (or, perhaps, readopted) by particular groups of international lawyers occupying particular positions in the profession at a particular point in time. What are the conditions of the possibility of 'constitutional talk' in international legal scholarship today? Why should it be here and now that the international legal order is (once again) imagined as a unified system – one whose 'constitutional apex' is perched atop Chapter I of the UN Charter, whose 'executive will' manifests itself in Security Council resolutions, whose 'legislature' finds a home in the General Assembly, whose principal 'judicial organ' resides in the Peace Palace, whose administrative machinery is grounded in an international civil service headquartered in Geneva and Manhattan? What are the causes and consequences of this renewed interest in 'constitutionalizing' the international legal order? Who benefits from the 'constitutional turn', and how? An inquiry that sets its sights on such questions aims neither to lionize international law (as, at its most extreme, the linchpin of a 'perpetual peace' that is '*guaranteed* by no less an authority than the great artist *Nature* herself'[67]) nor to reduce it to realpolitik (as 'rule by law',[68] or, what is supposedly its Third World flipside, 'lawfare'[69]). Rather, it aims to describe international law's actual working with a view to explaining why it is that one mode of researching, theorizing, and practising such law – call it the 'constitutional mode' – comes to displace, or at least gain ground on, its rivals at a particular juncture.[70] It is not hard to appreciate the possible political implications of this move.

Adopting this dialectical approach rests less on a Frankfurt School-influenced reconstruction of Marxism (although there is more than a touch of the Frankfurt School

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65 See, e.g., C. Tomuschat, 'Multilateralism in the Age of US Hegemony', in R. S. J. Macdonald and D. M. Johnston (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (2005), 31, at 74.

66 B. Fassbender, 'Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order', in J. L. Dunoff and J. P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009), 133, at 145.

67 I. Kant, 'Perpetual Peace: A Philosophical Sketch', in Kant, *Political Writings*, ed. H. S. Reiss and trans. H. B. Nisbet (1991), 93, at 108 (emphases in original).

68 See, e.g., B. Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004), ch. 10.

69 See, e.g., J. Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* (2007), 58–9.

70 Cf. M. Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization', (2007) 8 *Theoretical Inquiries in Law* 9, at 12 (distinguishing analysis of 'the spirit or, better, *the mindset*, of the legal profession' from 'legalism' and 'instrumentalism' (emphasis in original)).

in all this) and more on a recognition of the complexity of any truly adequate account of law that the Marxian tradition has put on the table.[71] Consider Bob Fine's suggestion that law, seen from the standpoint of Marx's own writings, has two primary 'functions' – the one a 'measure of right' that 'refers outside itself to convert the labour of commodity producers into legal entitlements', the other a 'normative standard' that 'refers internally to its own codification, derivation and systematization'.[72] It seems clear that any attempt to totalize either dimension is bound to result in explanatory failure. The instrumentalist – the limiting case of Fine's 'measure of right' approach – simply reduces international law, and law generally, to a pale reflection of extra-legal forces. The conventional formalist – an extreme variant of the 'normative standard' approach – naturalizes existing allocations of power and privilege, presenting what is substantively unequal as formally equal. What is needed is neither of these, but an account of international law that sets its sights firmly on its *social* operation – its embeddedness in relations of domination *and* its specificity as a distinct mode of regulation with a distinct constitutive logic of its own. A dialectical social theory of international law of this sort would not fetishize international law, but clarify how it is that such law, while not commanding an absolutely autonomous logic of its own, is certainly not a 'sham', and how this double-sightedness, this 'relative autonomy', endows its practitioners with the power to contest, and not simply retrench, regimes of subordination. Only such a theory could explain why states (and not only states[73]) on the world's periphery and semi-periphery continue in their efforts to turn international legal structures to their advantage in order to safeguard or strengthen their politico-economic independence.[74] And unlike other, broadly comparable forms of international legal scholarship, this would be a theory which would foreground questions of power, seeing conflict and (often gross) disparities in resource distribution where they see dialogue and (more or less) free and equal exchange. More concisely still, it would be a genuinely Marxian social theory of international law.

4. Between discourse analysis and political economy

Let me take a step back for a moment and approach the question of the international legal form from a slightly different direction. Perhaps the most widespread source of friction in those strands of international legal scholarship from which *International Law on the Left* draws is that between those modes of thinking which trace their ancestry to discourse analysis (Koskenniemi being an exceptionally nuanced case) and those which take their lead, directly or indirectly, from political economy (Carty and Cutler being the most explicit in this respect). As a general matter, the

71 Cf. G. Therborn, *From Marxism to Post-Marxism?* (2008), 69.

72 B. Fine, *Democracy and the Rule of Law: Liberal Ideals and Marxist Critiques* (1984), 140.

73 See F. Mégret, 'Le droit international peut-il être un droit de résistance? Dix conditions pour un renouveau de l'ambition normative internationale', (2008) 39 *Études internationales* 39.

74 A strategy whose importance is highlighted forcefully in B. Kingsbury, 'Sovereignty and Inequality', (1998) 9 EJIL 599; and M. Koskenniemi, 'International Law and Imperialism: The Josephine Onoh Memorial Lecture 1999', in D. Freestone, S. Subedi, and S. Davidson (eds.), *Contemporary Issues in International Law: A Collection of Josephine Onoh Memorial Lectures* (2002), 197, at 207, 217.

post-structuralist assault on 'binary regimes' continues unabated, with its most committed advocates insisting that class analysis cannot capture the multifariousness of a world in which stable subjects have given way to 'rhizomatic' flows and commercial and communicative networks have taken up the mantle of transnationalism.[75] On the other hand, neo-Marxist critics of late capitalism continue to target the smugness of the putatively liberatory repudiation of 'grand narratives', dismissing calls for a new order that would respond to the demands of a de-centred 'multitude' as symptoms of delusion and defeatism.[76]

This tension both tracks and exacerbates international legal theory's most deeply entrenched antinomies. And in one way or another, it feeds into nearly all of the concerns with which the contributors to *International Law on the Left* grapple. In fact, what one is left with after reading and re-reading the volume at hand is a set of questions – again, at once epistemological and methodological and strategic – about the possibility of theorizing international law in a way that engages questions of distribution without leaving one open to charges of determinism. Even if one does not aim for the sort of integrated theory of 'justice' that would harmonize considerations of status with those of class, recognition with those of redistribution,[77] could one not develop a theory that explains the production of international economic structures without stripping one of an appreciation of the force of ideology in the constitution of international legal norms? And how exactly should one situate oneself in relation to the international legal form when engaging in this enterprise?

However one frames it, any such effort would need to square Marx off against Foucault . . . again.[78] And this, of course, would give rise to a slate of well-known problems. Foucault's arm's-length relationship with class analysis,[79] his severely under-developed account of resistance,[80] his attempt to dispense with ideology critique,[81] the doubt he casts on the notion of a distinctively socialist mode of

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75 The chief 'theoretical opposition' lies not between bourgeoisie and proletariat, one is told, but 'between, on the one hand, the decoded flows that enter into a class axiomatic on the full body of capital, and on the other hand, the decoded flows that free themselves from this axiomatic'. G. Deleuze and F. Guattari, *Anti-Oedipus: Capitalism and Schizophrenia*, trans. R. Hurley, M. Seem, and H. R. Lane (1983), 255. At most, classes are 'assemblages of interpersonal networks and institutional organizations' whose identity and composition are always 'contingent and precarious'. M. de Landa, *A New Philosophy of Society: Assemblage Theory and Social Complexity* (2006), 66–7.

76 'The possibility of other social orders was an essential horizon of modernism. Once that vanishes, something like postmodernism is in place . . . A capsule comparison with modernism might run: postmodernism emerged from the constellation of a *déclassé* ruling order, a mediatized technology and a monochrome politics.' P. Anderson, *The Origins of Postmodernity* (1998), 92.

77 N. Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation', in N. Fraser and A. Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (2003), 7, at 26, 50.

78 See, e.g., A. Hunt, 'Getting Marx and Foucault into Bed Together!', (2004) 31 *Journal of Law and Society* 592.

79 See, e.g., M. Foucault, 'The Confession of the Flesh', trans. Alain Grosrichard, in Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977*, ed. C. Gordon (1980), 194, at 203–4.

80 Foucault would accord greater weight to resistance over time. But this would yield not so much a cogent theory as a series of bald assertions, as in his claim that '[a]t the very heart of the power relationship, and constantly provoking it, are the recalcitrance of the will and the intransigence of freedom.' M. Foucault, 'The Subject and Power', in Foucault, *Essential Works of Foucault, 1954–1984*, ed. J. D. Faubion, trans. R. Hurley et al., Vol. 3: *Power* (2000), 326, at 342. The absence of a comprehensive theory of resistance in Foucault stems largely from the vigour of his assault on humanism: see, e.g., M. Foucault, 'Politics and the Study of Discourse', in G. Burchell, C. Gordon, and P. Miller (eds.), *The Foucault Effect: Studies in Governmentality* (1991), 53, at 70–2.

81 See, e.g., M. Foucault, 'Truth and Juridical Forms', in Foucault, *Power*, *supra* note 80, at 1, 15.

governmentality,[82] and his insistence on dispersing power among a multitude of forces, the bulk of which would operate at the 'capillary' level, far 'below' that of the state[83] – each of these moves is unacceptable, or at the very least questionable, from a Marxian standpoint. While offering an invaluable analytic for mapping the emergence and development of new governmental technologies, Foucault's 'microphysics of power' can degenerate into a 'suspect rhetoric of complexity'[84] that fails to explain the (past, present, and, in all likelihood, future) centrality of the state. The thinness of his account of resistance, premised as it is on an amorphous 'challenge directed to what is',[85] is no less troubling: lacking a cogent theory of what this 'challenge' might actually entail, Foucault risks condemning agents to a docility that would obliterate the possibility of even a modestly effective form of the 'counter-conduct'[86] of which he speaks so highly.[87] Little needs to be said about his ambivalence in regard to the concept of class. Any halfway consistent Marxist would, by definition, have to characterize and prioritize this concept with a strictness that Foucault is not willing to do, although the baggage it brings in its train could, of course, be sifted through in more than one way.

Yet there is clearly a need to grapple with the kind of discourse analysis Foucault exemplifies. For one thing, engagement with Foucault would go some way to generating a more nuanced understanding of international law's role in identity formation, long a source of anxiety for Marxists seeking to counter the charge that they have no means of proving that class, and not race, gender, or some other 'category', is the determinative source of human association.[88] Foucault's analyses of the discursive practices through which socialization actually unfolds, of the manifold techniques of surveillance and regimentation through which identities are constituted and reconstituted, would be of great importance here. After all, if it is true that international law is, to borrow David Kennedy's apt expression, about 'people pursuing projects',[89] both a thick description and a rigorous explanation of how these 'people' come to be who they are, and how they come to fashion and attach themselves to particular 'projects', would seem to be in order. For another thing, questions of 'global governance' increasingly call for a degree of social-theoretical sophistication not matched by classic Marxian theory. As one of the first theoreticians of the

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82 M. Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978–1979*, ed. M. Senellart, trans. G. Burchell (2008), 94.

83 See, e.g., M. Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977–1978*, ed. M. Senellart trans. G. Burchell (2007), 247–8.

84 S. Žižek, 'The Spectre of Ideology', in S. Žižek (ed.), *Mapping Ideology* (1994), 1, at 13.

85 M. Foucault, 'Questions of Method', in Burchell, Gordon, and Miller, *supra* note 80, at 73, 84.

86 See, e.g., Foucault, *supra* note 83, at 201.

87 This is a point on which critics have long focused; see, e.g., P. Dews, 'Power and Subjectivity in Foucault', (1984) 144 *New Left Review* 72, at 86–8, 94–5; S. Lukes, *Power: A Radical View* (2005), 95–6. But see also P. Hallward, 'The Will of the People: Notes towards a Dialectical Voluntarism', (2009) 155 *Radical Philosophy* 17, at 20.

88 For instance, it is sometimes claimed that absent an account that locates the 'mechanism' responsible for making 'the bond between rich and poor capitalists . . . stronger than regional bonds between workers and capitalists', any anti-Marxist can 'equally well turn the argument around and say that class is the imperfect expression of the more fundamental cultural conflicts'. J. Elster, 'Three Challenges to Class', in J. Roemer (ed.), *Analytical Marxism* (1986), 141, at 160.

89 D. Kennedy, 'The Disciplines of International Law and Policy', (1999) 12 LJIL 9, at 83.

left to recognize Foucault's significance, Poulantzas believed that the disciplinary institutions whose historical transfigurations Foucault studied (hospitals, prisons, schools, etc.) had been bolstered with 'new circuits of "social control"' in the late twentieth century.[90] These new 'circuits' were far less amenable to manipulation by and through state apparatuses than their less unwieldy predecessors, and could, he argued, be understood only using methods of the sort that Foucault had refined. None of this, however, meant that one needed to jettison the Marxian commitment to analysing state formations. On the contrary, changes to state structures wrought by 'globalization' could be appreciated only insofar as the classical model of an indivisible sovereign gave way to a vision of the state as a field traversed by different forces. Indeed, Poulantzas wrote, there was, at root, no great difference between Foucault's research programme and those to which most Marxian political sociologists subscribed: he may have wanted to have less truck with 'the state as such' and more with the forces that criss-crossed its constituent apparatuses, but his putative 'anti-Marxism' was 'by and large not related organically to his intellectual conclusions', giving instead 'the impression of something tacked on'.[91] Insights such as these, gleaned through the confrontation of discourse analysis with political economy, remain hard to come by in international legal scholarship,[92] even when ongoing dedication to more conventional methods has been recognized as little more than nostalgia for a past that has receded into the background.[93]

It is not hard to see how the kind of dialectical social theory of international law outlined above comes into the picture here. If one's aim is to understand international law's *actual* operation, one must confront both the constitutive force of the discursive frameworks it secretes and the institutional vitality of the politico-economic orders it helps to forge. Put differently, if one takes international law's formal structures seriously, and not because of some misplaced sense of romanticism but because of a commitment to comprehending their unique social power, one cannot turn a blind eye either to the ideological constructs they fuel or to the distributive regimes they sustain. And once one takes this first step, agreeing to approach international law as a social practice with rhetorical as well as institutional dimensions, it is but a short further step to seeing international law as a field of power. This field limits the opportunities available to those operating within it by favouring prevailing configurations of power, but it also arms them with means of resisting, and even

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90 N. Poulantzas, 'The Political Crisis and the Crisis of the State', trans. J. W. Freiburg, in Poulantzas, *The Poulantzas Reader: Marxism, Law and the State*, ed. J. Martin (2008), 294, at 321–2.

91 N. Poulantzas, 'Is There a Crisis in Marxism?', trans. S. Kafatou, in Poulantzas, *Poulantzas Reader*, *supra* note 90, at 376, 385. Andreas Kalyvas has since taken the point further, arguing that Foucault's analyses presuppose the state as their organizing principle – something which Foucault, brusque dismissals of Marxism aside, partly conceded with his sporadic attempts to link disciplinary power to the development of the bourgeoisie and the emergence of new modes of capital accumulation. See A. Kalyvas, 'The Stateless Theory: Poulantzas's Challenge to Postmodernism', in S. Aronowitz and P. Bratsis (eds.), *Paradigm Lost: State Theory Reconsidered* (2002), 105, at 115–20.

92 One exception being A. T. F. Lang, 'Legal Regimes and Regimes of Knowledge: Governing Global Services Trade', LSE Law, Society and Economy Working Paper Series, 15–2009, available online at www.lse.ac.uk/collections/law/wps/WPS2009–15_Lang.pdf (last accessed 1 March 2010).

93 See, e.g., P. Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization', (1997) 3 EJIL 435, at 447.

revamping, these same configurations. It may, for instance, permit Carla Del Ponte to reject calls for criminal investigations into NATO personnel involved in the bombing of Kosovo,[94] and to tell Goldman Sachs that 'international justice is cheap' and can yield 'high dividends for a low investment'.[95] But it also allows Richard Falk to denounce the invasion of Iraq, decry the dilution of the UN General Assembly's influence, and advance proposals for a more egalitarian international order – all *in the name of* international law.[96] If Bourdieu's theory of law is well positioned to explain how differently situated actors wielding different forms and amounts of symbolic and material capital manoeuvre in a legal field that both defines and is defined by their behaviour, it is no less well positioned to explain how this field's infrastructure can lend itself to something more than a simple retrenchment of existing relations of domination.

Students of 'democracy and human rights promotion' writing from a Bourdieusian perspective have examined the exportation of US legal and economic reforms to Latin America.[97] They have also looked at the way in which US foreign policy and the agendas of US-centred human rights organizations have been formulated through intense competition between different groups of lawyers, politicians, and powerbrokers – some established, others upwardly mobile.[98] Still others influenced by Bourdieu have studied the transnational governance instruments produced by the post-1989 wave of legal transplants,[99] or focused on changes to criminal jurisdiction and the legal definition of terrorism after 11 September 2001.[100] At a juncture in which the ideology of 'globalization' still seems to reign supreme, fed (as much as hampered) by economic crisis and environmental catastrophe, one cannot help but wonder whether the time has come for a new international legal scholarship, one which would marry discourse analysis to political economy in an effort to explain the empowering no less than the limiting dimensions of the international legal form. *International Law on the Left* offers a raft of insights as to how such scholarship might be fostered. Needless to say, though, its precise content remains to be determined.

5. Concluding unscientific postscript

This brings us full circle. Cioran struggled to accommodate himself to a language that struck him as jarringly frosty but whose relentless pursuit of formal rigour he found captivating. He struggled with it, alongside it, and also against it. Ultimately, though,

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94 For a good discussion see D. Zolo, *Victors' Justice: From Nuremberg to Baghdad*, trans. M. W. Weir, (2009), 32–3.

95 Quoted in C. Miéville, 'Multilateralism as Terror: International Law, Haiti and Imperialism', (2010) 18 *Finnish Yearbook of International Law* 1, at 49–50, available at http://eprints.bbk.ac.uk/783/ (last accessed 1 March 2010).

96 See, e.g., R. A. Falk, *The Declining World Order: America's Imperial Geopolitics* (2004), ch. 9.

97 Y. Dezalay and B. G. Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (2002).

98 N. Guilhot, *The Democracy Makers: Human Rights and the Politics of Global Order* (2005). See also A. L. Escorihuela, 'Cultural Relativism the American Way: The Nationalist School of International Law in the United States', (2005) 5 *Global Jurist Frontiers* 1, at 17–21.

99 D. M. Trubek et al., 'Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas', (1994) 44 *Case Western Reserve Law Review* 407.

100 See the articles in (2008) 173 and 174 *Actes de la recherche en sciences sociales*.

he threw in his lot with it. And not because he was fatigued, or had simply resigned himself to his fate, but because it was precisely from the difficulties engendered by his engagement with this language that he felt he had the most to gain. The crispness of its form restricted him, true, but it also furnished him with newer avenues of expression.

As an international lawyer with a penchant for something called 'critique', one finds oneself in much the same position. While the canon one has in one's hands is nowhere near as coherent, as comprehensively underwritten by *jus cogens* norms and obligations *erga omnes*, as the conventional liberal-internationalist schemata make it out to be, it is clearly marked by a powerful ongoing commitment to amplifying its formal reach. One may well not be entirely comfortable with this. But the very fact that one continues to work within the doctrinal and theoretical formations it fosters – indeed, that one tends to extract one's most incisive insights precisely from one's strained association with these formations – is anything but accidental. A ruthlessly extra-legal programme of struggle may be appealing, but the politics it occasions is frequently reckless and self-defeating. To expose law's 'shams and inequities', E. P. Thompson famously wrote, is both noble and necessary, but to 'deny or belittle' it from head to toe is a 'desperate error of intellectual abstraction', an all too quick-and-easy means of 'disarm[ing] ourselves before power'.[101] Better far the mute intransigence of a legal form that is lax with its promissory notes but still resilient enough to offer a terrain for concerted struggle than the deus ex machina myth of a 'purely political' force that would enter on the scene to destabilize or reconstitute entire legal orders as if by way of some supernatural *force majeure*. Better far a war of position proceeding from a sober, disenchanted formalism than a war of manoeuvre that would pin its hopes on a pristine act of defiance, refusing to dirty its hands with anything so mundane as law.[102] Planting oneself firmly in the international legal form need not extinguish the unruly impulses of 'the political', leaving one with no choice but to adopt the kind of default liberalism favoured by Roth and to submerge 'the event of rupture' that critique enacts in 'the context in which [it] registers'.[103] If executed skilfully, it will, in fact, have very much the opposite effect, intensifying and radicalizing the international legal form from within. The only alternative is a condition in which, having cast international law aside on grounds of structural bias, the dominated are left with little more than 'private' acts of nonconformity[104] with which to counter the violence to which they are subjected[105] – in other words, with a mirror image of liberalism's own 'utopia of impotence'.[106]

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101 E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (1975), 266.

102 The *loci classici* of both strategies are, of course, in Gramsci: see, e.g., A. Gramsci, 'State and Civil Society', in Gramsci, *Selections from the Prison Notebooks*, ed. and trans. Q. Hoare and G. N. Smith (1971), 206, at 229–39.

103 E. Christodoulidis, 'Against Substitution: The Constitutional Thinking of Dissensus', in M. Loughlin and N. Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2007), 189, at 194.

104 Such as foot-dragging and behind-the-scenes ridicule, telltale examples of subaltern resistance. J. C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (1990), 87, 114–5.

105 '[F]or if the powerful can't criticize the oppressed, because the central epistemological categories are inexorably tied to particular perspectives, it also follows that the oppressed can't criticize the powerful.' P. A. Boghossian, *Fear of Knowledge: Against Relativism and Constructivism* (2006), 130.

106 V. I. Lenin, 'Two Utopias', in *Lenin: Collected Works*, Vol. 18, trans. S. Apresyan (1979), 355, at 356.