

The London School of Economics and Political Science

*A Critical Examination of the Concept of Imperialism in
Marxist and Third World Approaches to International Law*

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DECLARATION

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ABSTRACT

During the 2000s the terms ‘imperialism’ and ‘empire’ made a reappearance. This reappearance followed ‘unilateral’ military interventions by the United States and its allies. Because these military interventions were all justified using international legal argument that the international legal discipline also became increasingly concerned with these terms.

Given this, it is unsurprising that there also arose two critical schools of thinking about international law, who foregrounded its relationship to imperialism. These were those working in the Marxist tradition and the Third World Approaches to International Law (TWAIL) movement. Both of these intellectual movements are contemporary examples of older traditions.

Despite this popularity, there has been little sustained attention to the specific concepts of imperialism that underlie these debates. This thesis attempts to move beyond this, through mapping the way in which Marxist and TWAIL scholars have understood imperialism and its relationship to international law.

The thesis begins by reconstructing the conceptual history of the terms ‘colonialism’, ‘empire’ and ‘imperialism’, drawing out how they are enmeshed in broader theoretical and historical moments. In particular it pays close attention to the historical and political consequences of adopting particular understandings of these concepts.

It then examines how these understandings have played out concretely. It reconstructs earlier Third Worldist thinking about imperialism and international law, before showing how contemporary TWAIL scholars have understood this relationship. It then looks at how the Marxist tradition has understood imperialism, before turning specifically to Marxist international legal theory

Finally, it turns to the interrelationship between Marxist and Third Worldist theory, arguing that each tradition can contribute to remedying the limitations in the other. In so doing it also attempts to flag up the complex historical inter-relation between these two traditions of thinking about imperialism and international law.

Dedicated to my family, without whose love and support I would have gotten nowhere.
To Dad, who I love and miss every day and to Mum and Andrew.

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INTRODUCTION

1. Of Empires and Emptiness

In March 2010, the London School of Economics held a workshop as part of the ‘Kelsen-Schmitt-Arendt’ series. Despite the many issues discussed throughout the day, one topic remained conspicuously absent from the programme – that of imperialism. Given that imperialism played a central role in one of Arendt’s most important books – *The Origins of Totalitarianism* – and how important ‘land appropriation’ was to Schmitt’s work,¹ this was odd. The word was only mentioned once, when one participant noted: ‘when we talk about imperialism, we forget the real reason that we are in these countries – to help people’.

One might ask: is this really surprising? If one looks back at the history of the international legal discipline, questions of empire and imperialism have not been a particular preoccupation. As Koskeniemi notes, historically ‘there is an almost complete silence’² on imperialism. Yet since the beginnings of the 21st century this has changed somewhat. In fact, as one critic notes, ‘charges of US empire’ are ‘a dime a dozen these days’.³ This critic (Stephen Humphreys) draws attention to the fact that, throughout the past decade and a half, the terms ‘empire’ and ‘imperialism’ have made a comeback.⁴ What has been true in the other social sciences has, eventually, been true of international legal scholarship. Particularly in the wake of the Iraq war, and the role that international law played in contesting and constructing its legitimacy, international lawyers have used terms like ‘imperialism’, ‘hegemony’ and ‘empire’ to characterise the relationship between the United States (US) and international law.⁵

Alongside these developments within the mainstream of the discipline, there has also been the rise to prominence (more accurately resurgence) of two critical schools of thinking about international law, both of which foreground its relationship to imperialism. On the one hand, there have been a number of scholars from the Marxist tradition who have attempted to grapple with international law. On the other hand, we

¹ Schmitt 2003.

² Koskeniemi 2002, 99, fn 6.

³ Humphreys 2008, 232.

⁴ Chibber 2004.

⁵ Bartholomew 2006; Byers and Nolte 2003; Koskeniemi 2004; Krisch 2005; Simpson 2004.

have witnessed the rise of the *soi-disant* Third World Approaches to International Law (or TWAIL) movement.

If, on this basis, the absence of imperialism is surprising, what is *less* surprising is the statement ‘when we talk about imperialism, we forget the real reason that we are in these countries – to help people’. Although there is a temptation to dismiss this statement, it in fact reflects something important. To begin with, it advances a very specific understanding of imperialism. If imperialism can be counterposed to ‘helping people’, it implies an idea of imperialism whose defining feature is *self-interest*. Such a definition misses the fact that one of the targets of theorising about imperialism has been its appearance in the guise of ‘humanitarianism’. Indeed, if one were to examine the whole history of the term, one would find that the simple equation of imperialism with ‘self-interest’ has been a rare and quite conservative position.

What this reflects is that, whilst imperialism may have gained greater *prominence* in international legal debates, this prominence has not necessarily been matched by a systematic rigour in the usage of the term. Generally, the term has been invoked in a manner almost entirely divorced from its own history, serving at best to denounce the actions of the US. It is against such conceptual sloppiness that Humphreys turns his ire. Focusing specifically on the argument of Leo Panitch and Sam Gindin,⁶ he argues that they do not specify why they use the term ‘empire’ and not ‘hegemon’ or ‘superpower’.⁷ For Humphreys, such terms would be more appropriate because they are more popularly understood and carry with them less specific meanings than the term ‘empire’.

According to Humphreys, ‘the mere fact of unilateral US military activity is hardly in itself sufficient evidence of *imperium*’.⁸ He notes that the US may be ‘at liberty’ to invade other countries or be immune from sanction, but it does not have the *right* to do so.⁹ On the contrary, what is most evident from the war in Iraq, is the United States’ *inability* ‘to assert direct jurisdiction’ over the rest of the world and to constrain

⁶ Who it ought to be said are not international lawyers, and in fact are theorists of Empire generally of some renown. That their analysis falters most when attempting to deal with international law might tell us something important about the discipline’s relationship to theories of empire and imperialism.

⁷ Humphreys 2008, 233.

⁸ Ibid.

⁹ Ibid.

violence. These facts all illustrate that ‘empire’ is an inappropriate term, since it conflicts with the ‘classical notions of empire as zones of enforced peace’ and the fact that capitalism ‘thrive[s] on peace and trade, rather than violence and insularity’.¹⁰ Ultimately, for Humphreys, this is a weakness with the concept of empire itself, which he argues is ultimately ‘empty’ because:

[E]mpire has, since mid-century, become a term rather of moral censure than of descriptive precision. It is also far too user-friendly: it is difficult, after all, to see how *any* universalizing project ... could escape the label’s looser applications ... Earlier empires have not merely been States in metastasis. How do they differ from States? Perhaps empires lack the sense of a shared ‘public’ we think of as necessary to the State. Perhaps empires can sustain legal pluralisms that states struggle with. Perhaps empires embed notions of transcendental authority that states refute ... But if so, this is not captured in *Empire’s Law*, where empire is instead elided with mere national self-interest ... and political power is confused with economic (empire ‘is’ capitalism).¹¹

In Humphreys’ discussion of why what Pantich and Gindin describe is *not* an empire, there is necessarily a vision of what an empire *is*. Clearly, he imagines ‘empire’ to describe a large, multinational political unit that has formal legal control (or ‘jurisdiction’) over its constituent territories. Such an empire, it seems, maintains peace within those areas.

Beyond this, Humphreys argues, the term is too loose for any real deployment. In this respect, it is interesting to note that one of the figures most responsible for popularising the term ‘imperialism’¹² expressed similar sentiments. V.I. Lenin argued that imperialism was quite frequently ‘reduced to the level of a cuss-word addressed to ... [one’s] immediate competitors, rivals and opponents’.¹³ For him, the only way to avoid this was to have a coherent and systematic theory of imperialism, which linked it to broader reflections about the nature of capitalism on the world stage. In this sense, then, Lenin anticipates Humphreys’ statement that there is ‘demand for a sustained analysis’ of the ‘precise reference and utility’ of terms like empire and imperialism.¹⁴

¹⁰ Ibid., 234.

¹¹ Ibid., 235.

¹² For Humphreys there seems to be no distinction between the terms ‘empire’ and ‘imperialism’, with the latter essentially being the active form of the former. As will be discussed in Chapter 1, the terms *actually* have very different historical origins and functions, and this difference has important consequences.

¹³ Lenin 1972a, 10.

¹⁴ Humphreys 2008, 232.

At least in relation to the international legal scholarship, Humphreys is largely correct. There has been a swath of work which deploys the language of empire and imperialism without thinking through the complicated history of these terms. However, the above invocation of Lenin should also make us doubt – at least partly – that this sloppiness is an *intrinsic* feature of the terms ‘empire’ and ‘imperialism’. Humphreys argues that, since the term ‘imperialism’ was coined ‘late’ in the careers of the European empires, it was primarily a *rhetorical* device to justify their expansion. What Lenin signals is that, whilst the terms ‘empire’ and ‘imperialism’ may have been sloppily applied by those in power, this was not so with *everyone* who used them. In particular, *imperialism* was a structuring concept of the Marxist and Third Worldist traditions and movements. Whilst, like any term, its usage has not been entirely coherent, these movements *did* self-reflexively and rigorously define it.

On this basis, it will be no surprise that of all the contemporary schools in the international legal discipline, Marxists and TWAIL scholars have been the most forthright in situating their understandings of imperialism within wider traditions. Yet even here, the reflection has been quite scattered and unsystematic. This has also meant that, despite a shared interest in the relationship between imperialism and international law, there has been very little sustained reflection on the relationship *between* TWAIL and Marxist scholarship.

This thesis represents an attempt to intervene in and remedy this situation. It aims to examine, in a sustained and critical way, how Marxist and Third Worldist scholars have understood imperialism and its relationship to international law. In so doing, it also offers a historical survey of the way in which ‘colonialism’, ‘empire’ and ‘imperialism’ have been understood by scholars, activists, movements and parties in the global arena and how this has impacted upon their understanding of international law.

2. The Importance of ‘Imperialism’

In essence, this thesis is composed of two interrelated tasks. The first is a kind of exercise in ‘conceptual mapping’ which attempts to understand, historically, how imperialism has been theorised and understood. This exercise will also show the way in which different understandings of imperialism have been linked to different political

movements and moments. When international lawyers invoke the language of ‘colonialism’, ‘empire’ or ‘imperialism’ they are also invoking this history. The second task, inseparable from the first, is to understand how this has played out specifically in terms of the Marxist and Third Worldist traditions, tracing how the initial elaboration of the term in various political and economic analyses has been deployed to understand international law.

Whilst there have been some attempts to attend to these tasks,¹⁵ they have not been systematic. Indeed one is hard pressed to think of *any* systematic reconstruction and analysis of either Marxist or TWAIL scholarship. Even the authors working in these traditions have very rarely attempted to concretely situate themselves within their own historical trajectories and there have been few attempts to understand how these two traditions relate to each other.¹⁶ In particular, although both Marxist and TWAIL scholars have been much more explicit than other scholarship in their accounts of what imperialism means, they ultimately have not reflected upon the wider history of this concept.

In this sense, then, this thesis does aim to fill several ‘gaps’. However, novelty or originality are not necessarily indicators of *importance*. After all, just because no one has ever written an international legal reflection on pancakes, it does not follow that one *ought* to do so. However, imperialism is plainly a more important topic than pancakes.

Most obviously, imperialism is important because *people are talking about it*. As above, in both the social sciences in general and international law in particular, there has been a resurgence of the language of ‘empire’ and ‘imperialism’. Equally, there has been a proliferation of *historical* works that seek to chart the relationship between colonialism, empire and the birth and consolidation of international law.¹⁷ Yet these invocations of empire tend to either be deployed in a haphazard fashion, or be unreflexive ‘historical’ categories. This ignores the fact that the concepts of ‘colonialism’, ‘empire’ and ‘imperialism’ are embedded within larger theoretical and political debates. These

¹⁵ Marks 2003a; Marks 2003c.

¹⁶ Obiora Okafor’s chapter in *International Law on the Left* is concerned with the role of Marxism in Upendra Baxi’s work, see Okafor 2008b. Aside from this, within the main works themselves there is some engagement. Miéville briefly engages with Antony Anghie’s work (Miéville 2005, 239). Rajagopal makes a slightly more sustained engagement with Marxism, arguing that it embeds a Eurocentric development narrative (Rajagopal 2003, 58, 242–257).

¹⁷ Anaya 2004; Bowden 2005; Fassbender and Peters 2012; Koskenniemi 2011; Lorca 2010.

debates mean that invoking particular understandings are not simply ‘neutral’ affairs. On a basic level, it is important to chart these consequences so as to sharpen what is at stake in particular invocations of the terms. This will also have important consequences for any ‘empirical’ or ‘historical’ work, since one’s choice of when to study, how to characterise what is studied etc. cannot be carried out in isolation from the ‘theoretical’ arena.

Insofar as imperialism is important, so too are those schools that have been most prominent in popularising its use: namely Marxism and TWAIL. In scholarly terms, both have been increasingly intellectually productive. This fits more generally with the resurgence of approaches which emphasise the instability and violence of capitalism. Equally, those working, writing, thinking and acting within the Marxist and Third Worldist traditions have *historically* been at the forefront of analysing and contesting imperialism. In this respect, they have been perhaps the most important radical movements to interact with international law.

From the perspective of the international legal discipline, a systematic examination of these two movements is important. It helps shed light on aspects of international law’s history in terms of the relationships it mediated and the movements that attempted to shape it. Perhaps more importantly, since these are both schools that seek to understand imperialism in its *contemporary* guise, they can help shed light on international law’s current enmeshment with relations of exploitation and domination. This last observation also raises another important point. One of the vital things about both the Third Worldist and Marxist traditions is that they are not simply movements that seek to ‘understand’ the world in a neutral sense. Instead, both seek to analyse the world with an eye to *transforming* it. As Selma James put it:

Marx’s analysis of capitalist production was not a meditation on how the society ‘ticked’. It was a tool to find the way to overthrow it, to find the social forces which, exploited by capital, were subversive to it. Yet it was because he was looking for the forces that would inevitably overthrow capital that he could describe capital’s social relations, which are pregnant with working-class subversion.¹⁸

Very simply, to raise the question of imperialism is – by definition – to raise the question of *anti*-imperialism, of whether it is possible to live in a world free from

¹⁸ James 2012, 51.

international inequality, domination and exploitation. In this respect, both Marxist and TWAIL scholars understand their work as contributing to the movement to end imperialism. On a very basic level, the act of raising awareness of the historical and continued presence of imperialism is a contribution towards this project. Yet James alludes to a deeper connection. Insofar as one wishes to contest, attack and overthrow any phenomenon, one must understand *how it works*, making a *theory* of imperialism indispensable. Only with a ‘theory’ of imperialism is it possible to identify whether imperialism still exists, what its weak points are and whether we might move beyond it. As Neil Lazarus puts it, anyone attempting to radically transform the world has to ‘get imperialism right’.¹⁹

If this is true in general, it is particularly true in the context of international law. Historically, international law has been a vital arena in the struggle against imperialism. It played a key role in ending formal European colonialism, and discussions of ‘self-determination’ continue to this day.²⁰ Equally, the socialist and Third Worldist movements sought to leverage international law to mount legal challenges to the international economic order.

The language of legalism continues to suffuse attempts to contest imperialism and its effects. One can reel off a few examples here. The war in Iraq was criticised for its illegality,²¹ as has been the war on terror, and attendant drone programme.²² Similarly, anti-globalisation scholars and activists have sought to contest globalisation by defending socio-economic rights.²³ Palestinians and Palestine solidarity activists have consistently argued that Israel’s actions violate international law, and indeed have obtained international legal rulings to that effect. One could go on with this almost indefinitely. This is particularly true after the collapse of the great movements fighting for capitalism’s overthrow. Absent such systematic *political* movements, law has become one of the few viable tools left.

¹⁹ Lazarus 2002, 54.

²⁰ One need only think of Canadian Supreme Court’s discussion in *Reference Re the Secession of Quebec*. See Knop 2002.

²¹ The Guardian 2003.

²² Amnesty International 2013, 43–55; Columbia Law School Human Rights Clinic and Center for Civilians in Conflict 2012, 51–77; Human Rights Watch 2013, 81–93.

²³ O’Connell 2007; Wills 2014.

What this reflects is an implicit assumption that international law is, or at least can be, opposed to imperialism. Yet this is hardly an unproblematic assumption. A crucial aspect of ‘getting imperialism right’, therefore, is understanding its relationship to international law. It is only in so doing that we can ask how (or whether) international legal mobilisations can play a part in any struggle for global justice.

3. Structure

The problem of embarking on the tasks outlined above is that each of them is almost inextricably intertwined with the others. One cannot talk of imperialism ‘in general’ without mentioning the contribution of Marxist and Third Worldist theorists. Equally, it is nigh on impossible to talk about the history of Third Worldism without also understanding the Marxist tradition. The converse is also true. To represent developments in this way would be very complex, not to mention incomprehensible. Instead, this thesis adopts a more conventional structure, dealing with each subject distinctly, whilst always keeping in mind the ways in which they overlap. At certain points this will lead to some repetition but this seems unavoidable.

Chapter 1, ‘Two, Three, Many Imperialisms’ seeks to map the history of the use of the terms ‘empire’, ‘imperialism’ and ‘colonialism’. In each case, it starts by tracing the etymological origins of the terms, describing the historical moments in which they were first deployed. In every case, their original meaning referred to something quite different from what they eventually came to mean. Part of the aim of tracing the evolution of these terms is to demonstrate the political and theoretical disagreements around the concepts. One of the most important tasks of this chapter is to outline the particular circumstances of the emergence of *imperialism* (as distinct from ‘empire’) and *colonialism* (as distinct from ‘colonial’ or ‘colonies’). These are both tied up with particularly bloody capitalist scrambles for colonies, and the movements these threw up. In both cases, it is the expansionary and transformative aspects of international intercourse that are foregrounded. The ‘ism’ is seen to denote the *systemic* logic of imperialism and colonialism.

The chapter draws attention to the way in which the concept of ‘colonialism’ has been contested. Especially important is how a ‘conservative’ concept of colonialism was

articulated, which downplayed the systemic and economic nature of colonialism in favour of a vision centred around formal legal control and political domination. It was against such a vision that the concept of *neo-colonialism* was articulated. This evolution is tracked through to the debates around the idea of post-colonialism. Finally, the Chapter argues that the disputes as to the nature of imperialism are disputes about its place in history and political character, which have consequences for our understanding of international law.

Chapter 2, 'Imperialism, Third Worldism and International Law' examines how Third Worldist jurists have understood imperialism and its relationship to international law. It begins by examining some of the original Third Worldist jurists. Drawing on the arguments of Chapter 1, it argues that the legal analysis of these jurists was rooted in particular understandings of colonialism. Those who situated their understanding within the radical tradition understood international law and colonialism as *structurally related*, with international law continuing to mediate neo-colonial relations. For them, international law could only be turned to the anti-imperialist cause through its radical upheaval.

There were also those who drew on the conservative understanding of colonialism. For them, the Eurocentrism of international law lay not so much in its structural complicity with imperialism, but in the fact that non-European states had not participated in its formation. Since they did not understand colonialism as part of a wider system of imperialism, they did not see colonialism as giving way to neo-colonialism. On their reading, international law could be turned to anti-imperialism through inviting the participation of the former colonies. The chapter argues that these Third Worldist jurists all shared a commitment to a 'sociological functionalism', in which international law was a neutral vessel that 'expressed' the state of the social world.

The chapter argues that the *failure* of the international law reform projects is one of the main planks around which contemporary TWAIL scholarship is organised. These scholars are first surveyed in terms of their 'general' approach to the nature of imperialism and its relationship to international law. A distinction is drawn between those who work within the Marxist tradition and those more influenced by post-colonial theory. The chapter goes on to examine how these theories have been deployed to

explain given historical moments. Finally, the chapter turns to the *political* implications of these theories. It traces a pattern whereby all TWAIL scholars ultimately return to a 'faith' in international law.

Chapter 3, 'Marxism and the Critique of Imperialism' attempts a similar manoeuvre for the Marxist tradition. It begins with an examination of Marx and Engels' reflections on the international dimensions of capitalism. It then turns to the classical Marxist theorists of imperialism, all of whom argued that imperialism was rooted in the limitless expansion born of capitalism at a certain stage of development. This stage of development required the transformation of the rest of the world in line with capitalist imperatives and the extension military and political power. For these theorists imperialism was an *epoch* and a system. The chapter then turns to consider how these figures understood international law, arguing that for them it was largely a passive vessel which gives way to the 'real' force of economics.

The chapter then examines Marxist theories of international law. It begins by reconstructing Marx and Engels' positions, before examining three key Marxist critiques of international law: the commodity-form theory, ideology critique and the class struggle approach. In each of these, international law serves to consolidate the practices of imperialism. Having done this, the chapter examines how these understandings have been deployed to understand the changing conjunctures of imperialism. Finally, the chapter turns to how Marxists have understood the political potential of international law.

The final chapter, 'Towards Stretched Marxism' attempts to draw all of this together. Its main aim is to tease out the historical and political consequences of the adoption of particular understandings of imperialism by Marxist and TWAIL scholars. It begins by re-examining the phenomenon outlined in Chapter 2, whereby TWAIL scholars ultimately return to a faith in international law. It argues that one can distinguish between the Marxist and postcolonial wings of TWAIL, since whilst both arrive at positive conclusions for international law, they do so in different ways. In the Marxist account, the conclusion flows logically from the analysis. By contrast, in the postcolonial accounts one sees a pessimistic *analysis* of international law, followed by an overly positive conclusion.

The chapter demonstrates that this particular argument holds because the postcolonial wing of TWAIL scholarship operates with two completely opposed *concepts* of imperialism. On the one hand, they understand imperialism as being driven by a transhistorical process of ‘othering’, and on the other they understand it as a contingent historical moment of territorial control. This leads to two different models of the relationship between international law and imperialism: in one, imperialism is an untranscendable horizon for all action; in the other, imperialism and international law have a contingent, *historical* relationship.

This leads to a situation of both false necessity and false contingency, leaving these scholars unable to properly articulate a theory of social change. Against this, the chapter proposes a *materialist* theory of the dynamic of difference, in which its characteristics are traced back to the social relations of imperialism described by Marxists in Chapter 3. Finally, the Chapter argues that it is not enough to ‘incorporate’ TWAIL concerns into a Marxist framework. Turning to Fanon, it argues instead for a ‘stretched Marxism’ in which concerns of racialisation and subjectivity are understood as being at the heart of imperialist capitalism.

Chapter 1: Two, Three, Many Imperialisms

1. Introduction: Opaque Imperialism

In an article from April 2012 entitled ‘Imperialism didn’t end. These days it’s known as international law’, George Monbiot argues that the international legal order is one that reproduces imperialist patterns of domination and exploitation.²⁴ Using the conviction of Charles Taylor as an example of the unequal application of international criminal law, Monbiot proposes that ‘it sent two messages: if you run a small, weak nation, you may be subject to the full force of international law; if you run a powerful nation, you have nothing to fear’.

Monbiot proceeds to enumerate the ways in which international law embeds imperialism – focusing on the International Criminal Court’s inability to prosecute the crime of aggression, unequal voting powers in the International Monetary Fund and the World Bank and the legal architecture of the war on terror. From this he concludes that international law ‘remains an imperial project, in which only the crimes committed by vassal states are punished’.

Contrary to typical liberal accounts of international law, Monbiot does not argue that it is *ineffective* in the face of imperialism, or that it is being manipulated or ignored by great powers like the US. Instead, his claim is that international law is itself part and parcel of imperialism. Interestingly, however, Monbiot never defines imperialism explicitly, treating it as if its meaning should be obvious. Yet even a brief perusal of the piece shows that this is simply not the case. Despite being less than a thousand words, it is possible to count at least five broad senses in which the term is invoked.

To start with, there is a ‘general’ understanding of imperialism as ‘powerful’ nations dominating ‘small, weak’ nations. Linked to this is another general understanding in which imperialism concerns great powers seeking ‘spheres of influence’. Alongside these general understandings is a more geographically inclined one, in which imperialism is specifically seen as the *Western* or *European* domination of non-European societies. There is also a *historically* inflected understanding, where European

²⁴ Monbiot 2012.

domination is understood specifically in relation to the history of European colonial expansion.

Together with these nation-centric ideas of imperialism, Monbiot also deploys an idea of imperialism rooted in ‘private interests’, namely those of financiers. He likens the ‘attacks’ of financial speculators on Asian countries to the Opium Wars and sees the British government not as ‘imperialist’ in itself but rather ‘[w]orking ... for ... the financial sector ... act[ing] as capital’s district commissioners’.

2. What’s in a Word?

What these multiple senses of the term ‘imperialism’ tell us is that it is a difficult term to pin down. Intuitively it seems relatively easy to come up with a broad definition: we might say that imperialism is a situation in which stronger countries or societies dominate weaker ones. However, such a definition gives us no idea about how imperialism is distinctive from international relations *in general*. If imperialism is to have any analytical value, it must be understood to refer to a more specific phenomenon. This task is fraught with difficulties.

As Alejandro Colás notes, ‘like other key concepts in the social sciences’ imperialism ‘is a category of meaning which carries considerable historical baggage’ that ‘is constantly contested and reaffirmed’.²⁵ One can go further than this: along with the words ‘capitalism’, ‘class’, ‘socialism’ and ‘revolution’, imperialism is one of the defining political terms of the twentieth century. It became central to a series of political and economic struggles and, in particular, was taken up by the international communist movement, the anti-colonial movement and those within Europe who wished to assert their independence against the US.²⁶

Such was the power of the word that it was frequently turned against those movements who pioneered its use, hence the description of the Soviet Union as an ‘evil Empire’ by Ronald Reagan,²⁷ or the Chinese denunciation of the USSR for ‘collaborating’ with

²⁵ Colás 2006, 3; see also Howe 2002, 9.

²⁶ Koebner and Schmidt 1964, 279; Toscano 2008, 427.

²⁷ West 2001, 276; Ferguson 2008, 273.

imperialism.²⁸ What this tells us is that imperialism is not simply a social scientific concept; it is a word that is imbued with a great deal of rhetorical and political significance.²⁹ Moreover, given its involvement in so many political struggles, it is a term of vital *strategic* importance.³⁰

Given this, it is unsurprising that the meaning of the term imperialism is by no means settled or fixed. Writing in the 1960s, Koebner and Schmidt argued that, since 1840, imperialism had ‘changed its meaning no less than twelve times’.³¹ One can only assume that this number has increased since then. Historians have frequently decried the confusion and looseness of the term, declaring that it has become so broad as to be essentially meaningless.³² This is further complicated by the fact that even within specific political traditions there have been disagreements over the nature and scope of the term, such that one cannot even talk of any single ‘liberal’, ‘conservative’ or ‘Marxist’ theory of imperialism.³³ Worse still, frequently ‘the same writer uses the word to mean different things in different part of his argument’.³⁴ From Monbiot’s article one can also see that imperialism is part of a ‘family’ of concepts, all of which deal with a similar subject matter, and whose interconnections are difficult to disentangle. One cannot define ‘imperialism’ without also accounting for the terms ‘empire’ and ‘colonialism’.³⁵

In the face of these difficulties, it is tempting to follow Giovanni Arrighi and argue that imperialism has ‘come to mean everything and therefore nothing’.³⁶ In its place, Arrighi proposed the use of the term ‘hegemony’, which could be used ‘in a way that has some special meaning as opposed to ... terms like “dominance” and “supremacy”’.³⁷ Alternatively, there is a temptation to follow the advice of historians and replace the ‘theoretical’ concept of imperialism with grounded, empirical accounts of historical periods of empire and imperialism.³⁸

²⁸ Communist Party of China 1965b, 295–301.

²⁹ Ferguson 2008, 277.

³⁰ Colás 2006, 188; Doyle 1986, 12; Koebner and Schmidt 1964, 282.

³¹ Koebner and Schmidt 1964, xiii.

³² Kiernan 1974, 24; Robinson 2001, 334.

³³ Brewer 1990.

³⁴ West 2001, 276.

³⁵ Howe 2002, 9.

³⁶ Chase-Dunn et al. 1994, 365.

³⁷ Ibid.

³⁸ Hart 2003.

However, there are good reasons to resist these temptations. Firstly, one's understanding of the term 'imperialism' necessarily delimits what subject matter is under consideration. There can be no 'empirical' solution to this question, because any empirical study already presupposes a theoretical classification of the types of actions, relations and periods that are to be studied.³⁹ Equally, as Arrighi himself acknowledges, the term 'hegemony' will also have to grapple with the question of its precise definition and domain. Secondly, as Victor Kiernan remarked, imperialism is a theme which 'offers more glimpses than almost any other of the nature of man and of human society'.⁴⁰ The use of the term 'hegemony' – with its purely international connotations⁴¹ – seems to abstract from the fact that 'imperialism' has usually been a term that traversed the division between the domestic and the international.

Thirdly, it seems unwise to abandon a word with such a long history. Although this history brings with it problems, one ought not to lightly abandon the *actual term* that historical actors have used to describe the system they live in and struggle against.⁴² Finally, the changing uses of the term 'imperialism' may prove to be interesting in their own right. The ways in which it has changed its meaning reflect the changing historical and material conditions in which it was deployed.⁴³

Ultimately, many of the criticisms of the term 'imperialism' seem to stem from the fact that it is a word with *stakes*. Owing to its entanglement in vast political and economic struggles, it has acquired an emotional and political charge which renders it unsusceptible to easy definition. Yet surely this emotional and political charge results from the fact that imperialism has been so important. As such, to abandon imperialism because it is difficult to define is tantamount to abandoning it *precisely for the reasons that it is important*. This seems perverse. Moreover, the controversy around the word imperialism does not simply stem from its semantic character. Rather, it stems from the controversial and contested nature of the relationships and processes the term seeks to capture and describe. Any concept that 'replaced' it would surely be subject to these same pressures.

³⁹ Hunt 1981, 48; Robinson 2001, 334.

⁴⁰ Kiernan 1974, vii; Colás 2006.

⁴¹ Doyle 1986, 40.

⁴² Cohen 1973, 9–10.

⁴³ Koebner and Schmidt 1964, xiii.

From the foregoing we can draw two conclusions. The first is that – as a concept – imperialism should not simply be discarded, it is too important for that. The second is that any attempt to pin down an exact ‘definition’ of the concept is likely to prove futile.⁴⁴ This chapter will proceed along these assumptions. The aim will be to map the various tendencies and issues at play in invoking the terms ‘empire’, ‘imperialism’ and ‘colonialism’. This will involve historical reflection on the ways in which these concepts have been deployed in broadly changing circumstances, as well as a description of the axes around which debates have been constructed. Finally, there will be a reflection on the inter-relation between the terms.

3. Empire

As is traditional to note, ‘empire’ derives from the Latin *imperium*. Although one cannot translate this word exactly, it denotes the attributes of command, authority or rulership.⁴⁵ More specifically, the term was a technical one, derived from Roman public law. It described the legal authority – granted by the ‘Roman people’ (the *imperium populi Romani*) – which attached to specific offices such as consuls, proconsuls and praetors or supreme military commands.⁴⁶ Whilst *imperium* was connected with administration, it initially was concerned with ‘the legal power to enforce the law’, as opposed to any vision of territorial domination or rule. Territory was not invoked directly, but rather insofar as it might be subject to the jurisdiction of one of these specific offices.⁴⁷ The term *imperator* (the root of ‘emperor’) was also derived from this word, referring to an individual who had been granted *imperium*.

As evidenced by the term *imperium populi Romani*, this conception of *imperium* was bound up with the Republican institutions of early Rome, and as these institutions were dismantled, its meaning began to shift. This process began with the rise of Julius Caesar, who, whilst formally remaining within the institutions of Republican Rome, pushed them to their limits. In 48 BC, during the Civil War between those loyal to Caesar and those loyal to Pompey, Caesar was appointed to the position of Dictator. Traditionally the Dictator was a type of magistrate granted an extremely wide *imperium*

⁴⁴ Loomba 2005, 10.

⁴⁵ Colás 2006, 5; Hart 2003, 3.

⁴⁶ Koebner 2008, 6; Richardson 2009, 8.

⁴⁷ Richardson 2009, 66–67.

in order to defend the Republic for a limited time.⁴⁸ In 45 BC, following his final victory over Pompey, Caesar returned to Rome. His dictatorship became *permanent*⁴⁹ and was granted the hereditary title of *imperator*.⁵⁰ Following Caesar's assassination, another civil war erupted, with various factions vying for his mantle. Octavian, Caesar's adopted son, won out, eventually renaming himself Augustus. When Augustus came to power he claimed to have inherited the title of *imperator* from Caesar, and consolidated the various consular positions.

In order to build up support for this new Rome, supporters of Augustus sought to disassociate the idea of *imperium* from an administrative and legal vision to one in which the *imperium* was embodied directly as a *cause* to which one would pay obedience. There were two consequences to this. Firstly, the conception of the *imperium populi Romani* – which rooted *imperium* in the authority of the Roman people – was replaced by the notion of *Imperium Romanum*. In this vision, *imperium* was embodied territorially in the city of Rome.⁵¹ At the same time, the title of *imperator* was disconnected from its old consular roots and reconceived as belonging to the ruler of Rome. What was arrived at was a conception of *imperium* based on the dominance of an emperor, rooted in territorial dominance and control.⁵² Although *imperium* still maintained a loose relationship to the older, technical term, it had become less about legal office and much more *domination*. This was also the period that saw the Roman Empire make greater efforts to expand its rule.

For centuries the Roman experience was *the* reference point for understanding 'empire'. As Koebner notes, there were two essential concepts of *imperium* which served to structure the expansion of European powers. On the one hand, there was the *singular* notion of the *Imperium Romanum*. Here, *imperium* was taken to denote the specific collective personality of the Roman Empire and its successors. In this case, the term was not simply descriptive, but had real organisational consequences, as those regimes which could trace themselves to the *Imperium Romanum* claimed the right to rule its former territory. On the other hand, there was a more general understanding of *imperium*, describing any power based upon territorial domination and expansion. In

⁴⁸ Agamben 2005, 47.

⁴⁹ Kamm 2006, 142.

⁵⁰ Ibid., 140.

⁵¹ Richardson 2009, 145.

⁵² Koebner 2008, 17; Colás 2006, 6.

this understanding, there could be a plurality of empires. A consequence of this would be that *imperium* did not have the same *organisational* power. The period between the fall of the Western Roman Empire and the 1500s was characterised by a shift from the ‘singular’ understanding to the ‘pluralistic’ one.

The Holy Roman Empire was an example of the strict adherence to the specificity of the *Imperium Romanum*. In 800AD Pope Leo III crowned Charlemagne as Emperor of the Romans. The Holy Roman Empire was understood as the successor to the Western Roman Empire, taking on its direct and singular meaning. However, this Empire was much less stable than the Roman Empire. A number of different powers exercised rule and laid claim over territories which had historically comprised it, and the power of the Emperor was continually challenged by his supposed subordinates. Owing to this, scholars began to think more carefully about the meaning of ‘empire’. Leonardo Bruni, for example, put forward an understanding of *imperium* as embracing the notion of territorial power as well as legitimate authority. Accordingly, he understood any state which characterised by territorial expansionism as deserving of the title *imperium*.⁵³

At the same time, European monarchs and their advisors sought to understand how their own territorial rule related to the broader Empire to which they were nominally subject. In the case of England, this came to a head when Henry VIII sought to legitimise the annulment of his marriage, had himself declared an Emperor, and so not subject to the dictates of any other empire. However, it was not until the ‘unification’ of Scotland and England to form Great Britain that its claims to an empire could be taken seriously. These claims were only given substance by the growth of British sea power and its acquisition of territory abroad.

Britain’s example is illustrative of the broader process at work in Europe. In the period of the 1400s-1600s a number of European nations (in particular Portugal, Spain, the Netherlands and Britain) began programmes of overseas territorial expansion. Whilst the configuration of *which* European powers were dominant changed, what did not change was the general European claim to rule non-European territory. It was only in the mid- to late-20th century that these claims were given up. This experience has

⁵³ Koebner 2008, 47.

provided the paradigm for the understanding of empire, disconnecting it from the specifically Roman notion of *imperium*.

Empire came to be identified with the subjugation and domination of one society by another, with particular reference to the European experience. Although there have been many attempts to formalise a precise definition along such lines, one of the most influential has been that of Michael W. Doyle, who argued that:

Empire ... is a system of interaction between two political entities, one of which, the dominant metropole, exerts political control over the internal and external policy – the effective sovereignty – of the other, the subordinate periphery⁵⁴

Doyle's definition reflects a basic understanding of empire shared across the scholarly community. Stephen Howe, for example, characterises empire as 'composite, multi-ethnic or multinational political unit, usually created by conquest, and divided between a dominant centre and subordinate, sometimes far distant, peripheries'.⁵⁵

Importantly, by insisting that empire involves the interaction of two different political entities, this definition is able to distinguish between empires and states. In practice such a distinction can be messy, as empires such as the French incorporated overseas territories into a broader 'nation' of France.⁵⁶ Moreover, the settler-colonialism that resulted from the expansion of empires involved the constitution of 'nations' on territory previously occupied by indigenous peoples. This points to a more general issue that has dogged attempts to define empire. Whilst there may be agreement that an empire involves the domination of a periphery by a metropole, there have been disagreements over three issues: 1) what *type* of 'political entities' are interacting; 2) what level of intensity of domination is necessary and, 3) what particular *form* this relationship needs to take.

The contours of this debate can be illustrated by examining the controversy over the project of 'Anglo-Saxon union'. Throughout the 1880s there was a debate over the form of the British Empire. The Federalists around Seeley argued that the British Empire could only be properly characterised as an empire insofar as it operated as a federated

⁵⁴ Doyle 1986, 45.

⁵⁵ Howe 2002, 30.

⁵⁶ Crowder 1967.

political unit, linked by an overarching legal and political structure.⁵⁷ To further this end, they participated in the creation of the Imperial Federation League, an organisation which agitated for greater constitutional connection between Britain and its colonies.

Although these debates hinged on very specific questions, they shed light on the broader problem of the legal and constitutional dimensions of ‘empire’. In line with the historical experience of Europe many have argued that ‘empire’ is not simply a relationship of *dominance* but rather one in which this dominance is juridically or constitutionally recognised. For example, Arendt argued that in ‘true imperial structures ... the institutions of the mother country are in various ways integrated into the empire’.⁵⁸

Although such a position reflects various aspects of the European experience, it has been argued that it is unable to inadequately account for the entirety of this experience, as well as those of other empires. In particular, it downplays the degree to which an empire may be maintained through ‘informal’ methods of control. As early as 1899, the pseudonymous author ‘RITORTUS’ argued against the idea that empire was confined ‘to the red lines of the world’s map’.⁵⁹ Against this, he maintained that Britain had established a ‘species of World Empire’⁶⁰ through its commercial prowess, that ‘commands the productive forces themselves of other nations’ that ‘develop[s] or help to develop them ... draw[s] them into ... [its] orbit and bind[s] up their interests inseparably with ... [its] own’.⁶¹

These debates became more pointed in the mid-twentieth century, when formalised empires were no longer the norm. In response to these developments, scholars increasingly turned to the idea of a division between formal and informal empire, with the former being ‘rule by annexation and government by colonial governors supported by troops’ and the latter ‘control by manipulation of collaborating elites over the domestic and external policies of legally independent regimes’.⁶² The classic statement

⁵⁷ See also, Nicholson 1910, 158.

⁵⁸ Arendt 1962, 131.

⁵⁹ RITORTUS 1899, 145.

⁶⁰ Ibid., 137.

⁶¹ Ibid., 145.

⁶² Richardson 2009, 5.

of such a position was perhaps that of Gallagher and Robinson, who in their landmark 1953 article 'The Imperialism of Free Trade' argued:

It ought to be a commonplace that Great Britain during the nineteenth century expanded overseas by means of 'informal empire' as much as by acquiring dominion in the strict constitutional sense. For purposes of economic analysis it would clearly be unreal to define imperial history exclusively as the history of those colonies coloured red on the map ... The conventional interpretation of the nineteenth-century empire continues to rest upon study of the formal empire alone, which is rather like judging the size and character of icebergs solely from the parts above the water-line.⁶³

For Gallagher and Robinson, any legalistic notion of empire failed to grasp the way in which the British Empire had expanded, which was through a combination of different methods. Whilst there is controversy over the particularities of Gallagher and Robinson's account, some idea of 'informal empire' is widely accepted.

However, whilst there may be agreement on the importance of 'informal empire', there is a great deal of disagreement as to what might constitute this. Gallagher and Robinson appear to collapse the idea of empire into that of an 'expanding economy'.⁶⁴ More specifically, they see empire as being driven by 'commercial penetration', in which 'economic expansion ... [is] aided and abetted by political action in one form or another'.⁶⁵ In this vision, informal empire can be constituted through treaties of free trade and friendship made with weaker states.⁶⁶

For many scholars, *any* sound understanding of empire requires a higher level of control than this. William L. Langer, for example, argued in 1935, that unless empire was concerned specifically with territorial appropriation, 'you will soon be lost in nebulous concepts and bloodless abstractions' with a result that 'you may as well extend it to cover any form of influence'.⁶⁷ Whilst Langer's particular focus on territorial control is not widely shared, his concern that a concept of empire had to be undergirded by *effective* control is.⁶⁸

⁶³ Gallagher and Robinson 1953, 1.

⁶⁴ Ibid., 5.

⁶⁵ Ibid., 11.

⁶⁶ Ibid.

⁶⁷ Langer 1935, 107.

⁶⁸ Cohen 1973, 15.

Thus, in the previously cited Doyle definition, an empire requires that the metropole exerts control over the ‘effective sovereignty’ of the periphery⁶⁹ which involves ‘controlling its political decision making’.⁷⁰ Similarly, Colàs holds that empire involves ‘political control’ and ‘domination’⁷¹ and for Stephen Howe empire involved the metropolitan state taking ‘complete power over the government of the territory it had annexed’.⁷²

Whilst such debates may occasionally take on the character of discussions about the number of angels that can dance on the head of a pin, they have become politically salient following the end of the Cold War. Two of the main features of this epoch have been the increasingly intense phenomenon of ‘globalisation’, and the ‘unipolar moment’, where an increasingly unopposed US flexed its military muscles in a series of conflicts. Partly as a result of these developments, debates about ‘empire’ re-emerged. Perhaps the most high-profile example of this was Hardt and Negri’s *Empire*. Hardt and Negri’s definition of ‘empire’ is rather idiosyncratic. Eschewing territorial control, they state that Empire is ‘a *decentred* and *detrterritorializing* apparatus of rule that progressively incorporates the entire global realm within its open, expanding frontier’.⁷³

Whilst few have followed Hardt and Negri’s account, there *has* been a great deal of attention paid to the question of whether the US can be characterised as an empire. Whilst the US does exercise control over the political life of some peripheral states, its role is primarily achieved through its dominant position in the global economy and collaboration with local elites. As illustrated by a 2008 symposium on American power and empire in *International Studies Perspectives*, the predominant response has been to argue that the US cannot be seen as an *empire* because it is embedded in an ‘organization of political space that rests on upholding the legal-constitutional and political autonomy of states’.⁷⁴ However – against Hardt and Negri – this ‘denial of empire ... does not mean that the United States is not imperial or imperialist’.⁷⁵

⁶⁹ Doyle 1986, 12.

⁷⁰ Ibid., 33.

⁷¹ Colàs 2006, 27.

⁷² Howe 2002, 125.

⁷³ Hardt and Negri 2001, xii.

⁷⁴ Saul 2008, 310.

⁷⁵ Ibid., 311.

This of course begs the question of how it is possible to distinguish between ‘empire’ and ‘imperialism’ and it is to such a distinction that we now turn.

4. Imperialism

In many treatments of the subject, ‘imperialism’ and ‘empire’ are collapsed into each other. In purely logical-semantic terms this makes sense. Imperialism is also derived from *imperium*. It is the addition of the ‘ism’, derived from the ancient Greek suffix ‘ismos’, which creates the word ‘imperialism’. On this reading, imperialism is *derivative* of empire. Despite this, it is worth considering imperialism and empire separately. Whereas *imperium* and empire are words that have a long provenance, the term ‘imperialism’ is a relatively recent addition to the global lexicon, emerging in Europe only in the 1840s.⁷⁶ Similarly to empire, it was not initially a general term; instead it referred to quite a singular regime. Specifically, the first uses of the term ‘imperialism’ were as a derogatory description of the Second French Empire, established by Louis Napoleon Bonaparte from 1852-1870.⁷⁷

4.1. From Bonaparte to Lenin

Louis Napoleon was the first President of the French Republic. He won a landslide victory in 1848, appealing to the values he argued were embodied in the First French Empire. However, under the constitution he was ineligible to run for a second term. In defiance of this, he dissolved the National Assembly in December 1851 and one year later the Second French Empire was declared, with Louis as its Emperor – Napoleon III. Whilst this regime maintained democratic trappings, executive power was concentrated in the hands of Napoleon III.⁷⁸ After the coup, the word ‘imperialist’ began appearing as a term of abuse, describing those who supported Louis’ regime, and the term ‘imperialism’ appeared soon after. In this respect, ‘imperialism’ referred less to domination in the international sphere and more to ‘the internal conditions of a foreign country’,⁷⁹ denoting the autocratic rule of an Emperor.

Interestingly – given the later meaning of imperialism in the Marxist tradition – this was the only sense in which Marx ever referred to it (rendered *Imperialismus*), stating that

⁷⁶ Koebner and Schmidt 1964, xiii.

⁷⁷ Ibid., 1; Young 2001, 34; Cain and Harrison 2001, 1.

⁷⁸ Hobsbawm 2010, 125–126.

⁷⁹ Koebner and Schmidt 1964, 20.

‘[i]mperialism is the most prostitute and the ultimate form of the State power which nascent middle-class society had commenced to elaborate as a means of its own emancipation from feudalism’.⁸⁰ However, Bonapartism was not simply characterised by an internal autocracy. The Second French Empire also embarked on a policy of militant external expansion, attempting to acquire new colonial territories, as well as engaging in rivalry with other European powers – culminating in the Franco-Prussian War of 1870.⁸¹ Quite rapidly, the term imperialism began to take on an international dimension.⁸²

However, imperialism was not understood as a quality that inhered in *all* empires; rather, it was understood as a specific policy towards empire. This distinction is best illustrated through examining the dispute between Gladstone and Disraeli over the question of the British Empire. Disraeli had been intent on expanding the British Empire eastwards, focusing particularly on India. Since 1858 – following the 1857 Indian Mutiny – the East India Company had been dissolved and the British Crown ruled directly. In 1876 this was ratified officially when Queen Victoria was crowned Empress of India.

These ambitions were denounced by Gladstone as being ‘imperialist’. For Gladstone, ‘imperialism’ did not refer to the British Empire *per se*, but rather to a particular conception of empire which was based ‘based on ostentatious splendour and militarist rule of force’.⁸³ This form of empire was said to closely resemble the French and German Empires. Imperialism, then, was understood as a particular policy or attitude towards empire, which, as Robert Lowe – Chancellor of the Exchequer between 1868 and 1873 – held, meant international rule involving ‘absolute force’⁸⁴ and ‘fraud’.⁸⁵

In response to these kinds of attacks, there was an attempt by defenders of increased expansionism to ‘reclaim’ imperialism. From their time in government, Gladstone and the Liberals had gained a reputation for incompetence concerning the management of Britain’s colonies. Contemporaneously, there was an increasing amount of sympathy

⁸⁰ Marx 1978e, 631.

⁸¹ Young 2001, 30.

⁸² Koebner and Schmidt 1964, 118.

⁸³ *Ibid.*, 147.

⁸⁴ Lowe 2001, 40.

⁸⁵ *Ibid.*, 44.

towards ‘empire sentiment’. Publicists such as the aforementioned Seeley and Roseberry gained a great deal of traction by advocating greater union between the colonies and Britain. Similarly, throughout the 1880 and 1890s there was increasing interest in commercially expanding into the African colonies (the beginning of the Scramble for Africa’). Indeed, despite Gladstone’s rhetorical opposition to Disraeli, his government invaded and occupied Egypt in 1882.⁸⁶

Consequently, by the late 1890s, ‘imperialism’ had become a more neutral term. Essentially, it now referred the *sentiment* of those in favour of empire, which could be either bad or good. Those who strongly defended the British Empire maintained that it was founded on freedom and justice, meaning that imperialism too embodied these virtues. It was in this sense that Lord Curzon referred to himself as a ‘convinced and unconquerable Imperialist’ in 1908.⁸⁷

However, these developments did not occur without criticism. At the height of popular enthusiasm for the British Empire, a critical tradition was developing in which the name and concept ‘imperialism’ were to become central. The ‘Scramble for Africa’, clashes over spheres of influence in China (following its 1895 defeat by Japan), and the Boer War of 1899, led a number of radicals to posit that a new, aggressive phase of international expansion was beginning.⁸⁸ These critics sought to link these changes in foreign policy to transformations in the European capitalism.

The most famous of these critics was John A. Hobson, a radical liberal whose theories provided the bedrock for much later thinking about imperialism.⁸⁹ In his 1902 book *Imperialism: A Study*, Hobson maintained that this new imperialism differed very much from the old visions of empire:

[F]irst in substituting for the ambition of a single growing empire the theory and practice of competing empires, each motivated by similar lusts of political aggrandisement and commercial gain; secondly, in the dominance of financial or investing over mercantile interests.⁹⁰

⁸⁶ Harrison 1995.

⁸⁷ Lord Curzon 2001.

⁸⁸ Cain 2002, 67.

⁸⁹ Brewer 1990, 73.

⁹⁰ Hobson 1975, 304.

Hobson argued that the internal conditions of European capitalism had resulted in a class of economic ‘parasites’ coming to prominence, centred mainly in the finance sector.⁹¹ This class had accumulated a vast amount of profits. Since it was not based in the productive sector, it did not invest its profits, instead primarily *saving* them.⁹² This led to *under-consumption* and *over-production*, leading to a squeeze on profits.

In order to offset this, whilst maintaining the wealth of the financial class, it was necessary to turn abroad.⁹³ If capital was exported, it would be possible to take advantage of foreign demand and therefore maintain profits. Such demand was most readily found in undeveloped nations that had not yet acquired a large class of ‘parasites’.⁹⁴ However, in order to secure this, it was necessary for the state to forcefully open up such nations to this ‘investment’. Hobson characterised the period as one defined by attempts to annex and transform ‘backward’ territory through military force, ‘diplomacy’ and economic measures as well as heightened competition between imperial powers.⁹⁵ This was imperialism.

As a liberal, Hobson thought that it was possible to remain within the coordinates of capitalism without succumbing to imperialism, by distributing wealth to the working classes, who were less likely to save.⁹⁶ Although Hobson’s *solution* was not shared by all, his analysis was very influential. A whole host of radical commentators adopted Hobson’s ‘under-consumptionist’⁹⁷ approach and all used the language of ‘imperialism’.⁹⁸

Equally, *defenders* of the new expansionism advanced arguments similar to those of Hobson.⁹⁹ For example, Charles Conant argued that if the US was to prosper it would need to deploy its excess capital in ‘countries which have not yet felt the pulse of modern progress’, in particular Asia and Africa.¹⁰⁰ However, unlike Hobson, he viewed this resulting not from distribution, but from ‘a natural law of economic and race

⁹¹ Ibid., 46–63.

⁹² Ibid., 80–90.

⁹³ Ibid., 94.

⁹⁴ Ibid., 366–367.

⁹⁵ Ibid., 19–22.

⁹⁶ Ibid., 86–90.

⁹⁷ Shaikh 1978.

⁹⁸ Barnes 1939; Brailsford 1918. See Day and Gaido 2011, 13–16 for an account of the influence of Hobson on Social Democracy.

⁹⁹ Cain 1985; Etherington 1983.

¹⁰⁰ Conant 1898, 338.

development'.¹⁰¹ For Conant, the expansion of capital exports was the only way for 'the entire fabric of the present economic order ... not to be shaken by a social revolution'.¹⁰²

Whilst Hobson's theory was extremely influential, it has been the Marxist tradition that 'has been the dominant idiom in the analysis of modern imperialism'.¹⁰³ Although Hobson was not a Marxist, his thinking on the question of imperialism bore a close affinity with the Marxist tradition and Marxists frequently cited him.¹⁰⁴ The intellectual grandfather of Marxist theories of imperialism is undoubtedly Rudolf Hilferding. Hilferding was an Austrian Marxist and one of the most important figures in the German Social Democratic Party (SPD). In 1910 he wrote *Finance Capital*. In this work, he sought to analyse the transition from a liberal, competitive capitalism to a monopolistic capitalism and trace its attendant effects.

Hilferding argued that Marx's predictions as to the concentration of capital¹⁰⁵ had proved correct, with the development of capitalist industries leading to the formation of economic cartels. Most importantly, it had led to the concentration of the banking sector.¹⁰⁶ Large industrial cartels require continuous lines of credit in order to expand their production, which encourages the formation of bank cartels. These cartels are attracted to the higher profits and stability that come from industrial cartels and so encourage and participate in mergers.¹⁰⁷ For Hilferding, contemporary capitalism was characterised by *finance capital* – a situation in which financial and industrial capital had merged into large monopolistic blocs.

Hilferding argued that this had turned capitalists against free trade.¹⁰⁸ Cartels pushed for tariff walls around their economic territory, within which profit could be assured. However, protectionism is obviously also problematic, since it limits potential markets. There were two ways to offset this. The first was to expand the territory contained within the tariff wall, through the acquisition of colonies. The second was the export of capital – whereby a subsidiary company would be set up abroad, which would transfer

¹⁰¹ Ibid., 326.

¹⁰² Ibid., 327.

¹⁰³ Colás 2006, 110.

¹⁰⁴ Koebner and Schmidt 1964, 264; see Shaikh 1978 for an account of the ways in which Hobson's thinking on under-consumption has been reflected in later Marxist theories of crisis and imperialism.

¹⁰⁵ Marx 1999, 337–362.

¹⁰⁶ Hilferding 1981, 223.

¹⁰⁷ Ibid., 224.

¹⁰⁸ Ibid., 312.

profits back to the mother country. Since capital tended to flow into regions in which a higher rate of profit could be achieved, the export of capital would tend to take place in less developed regions.

Both of these solutions required a policy of continuous state expansion. Additionally, the peasant-based social systems of the under-developed countries would have to be forcibly transformed so as to create a working class. Hilferding therefore maintained that ‘the export of capital ... encourages an imperialist policy’¹⁰⁹ whereby ‘[t]he ideal now is to secure for one’s own nation the domination of the world, an aspiration as unbounded as the capitalist lust for profit from which it springs’.¹¹⁰

As Brewer notes, Hilferding did not develop a systematic theory of imperialism. Whilst he had laid the elements for the dominant understanding of the term, he was primarily concerned with the *internal* dimensions of capitalism and lacked ‘any clear concept of imperialism’.¹¹¹ It was only when Bukharin and Lenin drew together the threads of this theory, that the concept of ‘imperialism’ assumed its prime theoretical and political role.¹¹² Bukharin’s *Imperialism and World Economy* and Lenin’s *Imperialism: The Highest Stage of Capitalism* are perhaps the most important texts in the development of the concept of imperialism. Lenin and Bukharin both accepted Hilferding’s description of the centrality of monopolistic finance capital. They agreed that this meant the export of capital became central and that advanced capitalist states were compelled to dominate and control territory.

What was distinctive about Bukharin’s and Lenin’s approach was the argument that these developments taken together represented a qualitatively distinctive stage of capitalism.¹¹³ For them, as will be expanded below (see Chapter 3, Section 1.2.2.), imperialism was not simply the contingent outcome of national aggression, or competing national interests. Rather these actions were part of a wider imperialist world system, and were determined by the economic imperatives of capitalist exploitation, expansion and accumulation.¹¹⁴ In their accounts, imperialism was thus not a result of

¹⁰⁹ Ibid., 322.

¹¹⁰ Ibid., 335.

¹¹¹ Brewer 1990, 107.

¹¹² Chapter 3 will describe the development of these position in more detail.

¹¹³ Bukharin 1979, 29.

¹¹⁴ Brewer 1990, 121.

arbitrary or selfish preferences, but was rather the product of tendencies generated by capitalist social relations. Thus, and driving imperialism was a pattern or *logic* – that of capitalism – which drove and determined those actions which took place within it.

This understanding of imperialism did not become important simply because of its intellectual strength. Instead it gained in importance for profoundly *political* reasons. Lenin and Bukharin initially articulated their theories of imperialism in response to the growing competition between European powers. They predicted that one of the consequences of this rivalry would be a war between them for control of the rest of the world. In the 1910s this was the central debate in discussions about imperialism.¹¹⁵ The Bolsheviks, as well as a number of their left-wing allies, predicted increased rivalry and war. Others thought that imperialism was headed towards a ‘combination’ of various powers that would ‘peacefully’ exploit the world together.¹¹⁶ These disputes had political consequences. If war was a structural feature of imperialist capitalism, then *opposition* to war needed to be part of any revolutionary programme. This entailed ignoring any justifications of ‘self-defence’ and transforming imperialist war into civil war.¹¹⁷

The First World War seemed to confirm this analysis. The Social Democratic movement split, with some voting to support their own countries and the ‘Zimmerwald Left’ adopting the political line of Lenin and Bukharin.¹¹⁸ The bloodshed occasioned by that war, as well as the various revolutionary moments that arose in its aftermath¹¹⁹ lent the Lenin-Bukharin theory of imperialism a great deal of credence. A further result of this was that ‘imperialism’ essentially became a negative word. The examples of individuals, movements or states to *declare* themselves as ‘imperialist’ became increasingly rare. In this way, the Marxist usage of the term imperialism came to predominate.

As a result of the ‘betrayal’ of the European Social Democratic parties, the Bolsheviks also looked to other political allies in the struggle against capitalism. They argued that if imperialism was a necessary aspect of capitalism, the struggle *against* imperialism was vital to any global socialist project. They made overtures to the non-European, anti-

¹¹⁵ Magri 2011, 23–25.

¹¹⁶ Kautsky 2011, 774.

¹¹⁷ Lenin 1974; Lenin 1964c.

¹¹⁸ Day and Gaido 2011, 860.

¹¹⁹ Hobsbawm 1995, 54–84.

colonial movements, and enshrined self-determination in their international political programme.¹²⁰

The alliance between the Marxist tradition and the anti-colonial movement was important for a number of reasons, but what is vital for this story is that it meant that something approximating a Leninist theory of imperialism was at the core of the anti-colonial movement.¹²¹ This was further strengthened by the Chinese Revolution and the aftermath of the Second World War, where the Communist strand in the anti-colonial movement was strong and the Soviet Union made ‘anti-imperialism’ and ‘self-determination’ a centrepiece of its international policy.¹²² As Koebner and Schmidt point out, during the interwar period and afterwards, ‘an international *communis opinio*’ had formed for which ‘economic imperialism had become an accepted fact’.¹²³

The Cuban Revolution of 1959, as well as the wave of Third Worldist Marxist movements throughout the 1960s and 1970s all ensured the continued centrality of this alliance. This was also reflected in the centrality of anti-imperialist politics to radical movements *within* the metropolis.¹²⁴ The theoretical consequences of these political developments meant that throughout the 20th century, imperialism was primarily understood in the sense tentatively articulated by Hobson and concretised by the Marxist tradition. Essentially, it was seen to refer to an international capitalist economic system, in which an economic logic of exploitation predominated, occasioning political and military intervention.

The Third World had always been characterised by a split between its more radical and more moderate elements. This was partly reflected in attitudes towards the Soviet Union or the People’s Republic of China, but also manifested in terms of the domestic and international political programmes pursued upon independence. Whilst a basic ‘lowest common denominator’ unity had been guaranteed in conferences like 1955 Afro Asian Conference in Bandung,¹²⁵ more radical states constantly attempted to create alternative Third World blocs and associations. These states advocated armed struggle against

¹²⁰ Brennan 2002, 193; Young 2001, 127–157.

¹²¹ Young 2001, 159–317.

¹²² Bowring 2008a, 9–38; Bowring 2008b; Prashad 2007.

¹²³ Koebner and Schmidt 1964, 272.

¹²⁴ Ahmad 2008, 33. See Elbaum 2006 for an account of how Third Worldist Marxism became dominant in the US ‘New Left’.

¹²⁵ Larsen 2001, 14.

imperialism and solidarity with other radical anti-imperialist movements. These radical states were proponents of a socialist programme, insisting that only a global overthrow of capitalism would liberate the Third World. As such, they also had occasion to condemn those Third World regimes who they claimed were acting to further the interests of imperialism.

By the late 1970s these tensions began to concretise. There was now a much clearer divide between the more radical states (such as Algeria and Cuba), who sought to oppose imperialism *tout court*, and more moderate states (such as Singapore or India) who cast their project in terms of development and modernisation. This division shaped Third World efforts to act in common, making their actions vulnerable to co-optation by the major powers. By the end of this period, the Third World bloc had splintered along these political and economic lines.¹²⁶ This was underlined by the debt crises experienced by numerous countries in the Third World towards the end of the 1970s, which opened the door to intervention from the International Monetary Fund.¹²⁷

By the 1980s this situation had hardened. The USSR and the socialist bloc had entered a period of stagnation and the metropolitan radical anti-imperialist movements had been roundly defeated. Thus, even before the fall of the USSR, there were powerful forces that had undermined the strength of movements invoking ‘imperialism’. This particular confluence of events was part of the broader arc of neo-liberal economic restructuring in both the metropolitan and peripheral states.¹²⁸ As alternatives to neo-liberalism became increasingly rare, so too did explicitly anti-imperialist movements. The decline of these movements and the fall of the USSR (with the concomitant discrediting of Marxism) meant that usage of the term ‘imperialism’ both fragmented and decreased.¹²⁹ Such was the situation in 1990 that Prabhat Patnaik could justifiably ask ‘whatever has happened to imperialism?’¹³⁰

However, the situation has undergone something of a reversal. Just as in the late 1800s a wave of militarism stimulated thinking about imperialism, so too did a similar wave in

¹²⁶ Prashad 2007, 211.

¹²⁷ Ibid., 207–259.

¹²⁸ Harvey 2005.

¹²⁹ Gamble 1999, 134–139.

¹³⁰ Patnaik 1990.

the 1990s and 2000s.¹³¹ To some degree, this began with the 1999 NATO intervention in Kosovo, which split the forces of the left, with some describing it as a necessary war against tyranny, but others invoking the language of imperialism.¹³² However, this language remained marginal. It was not until the combination of the War on Terror and the invasion of Iraq that the language of ‘empire’ and ‘imperialism’ made a comeback to public, academic and activist spheres.

The aggressive ‘unilateralism’ of the George W. Bush Presidency, culminating in the invasion of Iraq, led to ‘a virtual cascade’¹³³ of mainstream commentators reviving the language of *empire* to both endorse¹³⁴ and denounce US policy.¹³⁵ Although these commentators have not generally used the language of imperialism, it too has made something of a comeback. This has been reinforced by the revival of peripheral regimes utilising the language of ‘imperialism’ to condemn advanced capitalist countries, particularly Latin American left-wing governments.

In popular and political parlance, imperialism has had a long journey. A large part of this journey has been the shift from ‘sentiment to theory’,¹³⁶ with ‘imperialism’ increasingly coming to denote a systematic world order. However, this history also highlights a range of issues around which there have been huge debates.

4.2 *Imperialism or Empire-ism?*

One of the prime controversies around the term ‘imperialism’ has been its relationship to the idea of ‘empire’. As previously noted, on a purely linguistic level, imperialism is derived from *imperium*. A number of scholars have followed this linguistic priority in essentially treating ‘imperialism’ as the ‘ism’ of ‘empire’. In some instances, such as Curzon’s description of imperialism as ‘the essence or spirit of Empire’,¹³⁷ imperialism is taken to mean a kind of ‘ideology’ of empire. However, in most instances of ‘empire-ism’, imperialism is treated as the ‘more active cognate’¹³⁸ of empire. In such a vision, imperialism is essentially empire-in-action, referring to the ‘actual process by which

¹³¹ Chibber 2004, 428.

¹³² Chandler 2005; Chomsky 2002; Žižek 2005; Zolo 2002.

¹³³ Spruyt 2008, 290.

¹³⁴ Ferguson 2005.

¹³⁵ Bacevich 2004; Johnson 2005; Mann 2005.

¹³⁶ Koebner and Schmidt 1964, 250.

¹³⁷ Lord Curzon 2001, 149.

¹³⁸ Colás 2006, 71.

empires are formed and maintained',¹³⁹ or the 'actions ... which create or uphold',¹⁴⁰ empires. Yet, as is evidenced from the foregoing account, imperialism emerged in a very different historical context and was actually counterposed to empire.

The particular historical context in which 'imperialism' emerged illustrates imperialism's distinctiveness. Imperialism's popularity as a term solidified following the 'Scramble for Africa'. The two factors that were seen to mark this period out from those which preceded it were a newly *unlimited* desire for expansion into peripheral territories, and mission of fundamental transformation that this expansion now undertook.

In the first instance, then, imperialism is understood as denoting an *endless* drive towards expansion. Schumpeter, for instance, was at pains to distinguish between a state pursuing 'concrete interests of its own' and imperialism. In the case of imperialism 'there is always the implication ... of an aggressiveness that is only kindled anew by each success; of an aggressiveness for its own sake'.¹⁴¹ Similarly, Hannah Arendt, went so far as to state that '[e]xpansion as a permanent and supreme aim of politics is the central political idea of imperialism'.¹⁴² Arendt contrasted this directly with conceptions of empire-building, in which expansion was *not* conducted for expansion's sake, and which required stability.¹⁴³

As indicated by Arendt's invocation of 'stability' and 'institutions', the term imperialism has also concerned the *manner* of the expansion undertaken by metropolitan powers. Whilst international expansion has always had some kind of economic basis, it had not historically been bound up with *transforming* other territories. Prior to the 1800s, European expansion had generally been concerned with trade, the extraction of raw materials and the levying of tribute. Whilst all of these necessitated *control* of peripheral territories, they did not require massive social transformation. Instead, pre-existing social forms were used to enforce discipline or were taxed for tribute.¹⁴⁴

¹³⁹ Doyle 1986, 12.

¹⁴⁰ Howe 2002, 30.

¹⁴¹ Schumpeter 1972, 5.

¹⁴² Arendt 1962, 125.

¹⁴³ *Ibid.*, 127.

¹⁴⁴ Wood 2003.

However, for those scholars who argue for a distinctive idea of imperialism, something specific happened in the 1800s. In this period expansion also involved massive transformation. This was both physical, in the case of building factories, roads and railways, and social, with peasants being transformed into workers, and internal forms of governance transformed to facilitate this. For many commentators at the time this was indicative of a transformation from the export of *commodities* to the export of *capital*. Once capital was exported directly, it was necessary to export *capitalism* (as a form of social organisation) as well. This also fundamentally altered the methods through which economic extraction would occur, with the role of finance and loans becoming more prominent. Brailsford described well the essential features of imperialism as ‘the epoch of concession hunting, of coolie labour, of chartered companies, of loans to semi-civilised Powers, of the “opening up” of “dying empires”’.¹⁴⁵

Taken together, these two features were seen to represent a fundamental break with the concept of ‘empire’. As A.P. Thornton proposed, imperialism was:

[E]nergy. It was dynamic, a “happening” – as the spread of railways in India and the discovery of oil in the Persian Gulf, in the North Sea, and on the Arctic slope were and are happenings. Imperialism infiltrates and invades ... Larger than any one territory, it relates this territory to an outside and unheard of world whose purposes can only be conjectured. But the wish to know, rather than to guess, how all these things are done, is almost at once implanted. Imperialism thus creates new kinds of thinking and new states of mind ... It sets up new social and economic structures and, quite literally, dislocates and disorients those who had their place in the old social and economic structures ... Imperialism is therefore like the old-time religion: it is a mover and a shaker.¹⁴⁶

For Thornton, this is directly contradictory to ‘empire’, the essence of which ‘is not motion ... [i]t is control’. Empires are composed of ‘fixed structures’ and ‘organized institution[s], run by a bureaucracy, with set routines within stated territorial bounds’.¹⁴⁷ Here Thornton manages to capture the key issue that is said to distinguish imperialism from ‘empire-ism’. As noted previously, even with the concept of ‘informal empire’, empire has generally hinged on some vision of effective territorial control. Whilst this control may be achieved through formal or informal means, the element of control itself

¹⁴⁵ Brailsford 1918, 64.

¹⁴⁶ Thornton 1977, 49.

¹⁴⁷ Ibid., 51.

is generally seen as vital. By contrast, for those using imperialism as a distinct term control is not vital. The focus is shifted to expansion, transformation and exploitation.¹⁴⁸

4.3. *Capitalism, Atavism and the 'Taproot' of Imperialism*

What initially looks like a merely semantic disagreement, then, is actually one about the specificity of 'imperialism'.¹⁴⁹ As will be discussed in Chapter 3, for those following Lenin and Bukharin this specificity was rooted in *monopoly capitalism*. However, there have been other thinkers who, whilst holding to a concept of 'imperialism' as historically distinctive, did not link it to capitalist social relations alone. Perhaps the most prominent exponent of such a view was Schumpeter. According to Schumpeter, a 'purely capitalist world' could not offer 'fertile soil to imperialist impulses'.¹⁵⁰ This was because capitalist competition had an individualising and rationalising effect, such that all warlike impulses would be absorbed into non-violent capitalist competition¹⁵¹ and free trade allowed goods to flow across the globe.¹⁵²

Accordingly, there must be *something else* that drives imperialism. For Schumpeter, this something else is the 'living conditions of the past'.¹⁵³ He argued that the bourgeoisie came into a world that had already been formed by absolutist monarchies. These monarchies had co-opted the rising bourgeoisie in order to pre-empt any possibility of a bourgeois revolution. What this meant was that when capitalist social relations finally established their dominance in Europe, they were saturated in autocratic militarism and nationalism. Hence, whilst not 'creatures of capitalism', nationalism and militarism became 'capitalized' and drew 'their best energies from capitalism'.¹⁵⁴

Rather than understanding imperialism as modern, Schumpeter saw it as a kind of feudal hangover, which would be undermined by a 'purer' capitalism. Thorstein Veblen mounted a similar argument in respect of Germany in 1915, stating that German imperialism resulted from the combination of an industrial revolution brought about by

¹⁴⁸ Morgenthau wrote that '[n]ot every foreign policy aiming at the preservation of an empire that already exists is imperialism' because it may lead to 'international policies of an essentially static and conservative power' as opposed to the 'dynamic connotation' of imperialism. See Morgenthau 1948, 27.

¹⁴⁹ Indeed, it is telling to note that many of those who held to the idea of imperialism as 'empire-ism' do so in part to specifically oppose a conception of imperialism as monopoly capitalism. See, Cohen 1973, 118; Doyle 1986, 33; Galtung 1971, 81.

¹⁵⁰ Schumpeter 1972, 70.

¹⁵¹ *Ibid.*, 69.

¹⁵² *Ibid.*, 76.

¹⁵³ *Ibid.*, 65.

¹⁵⁴ *Ibid.*, 96.

capitalism, and the dynastic ‘Prussian’ state bequeathed to Germany by its ‘late’ political development. Owing to this, the militaristic ambitions of feudal political organisation and culture were combined with modern methods of warfare.¹⁵⁵

Schumpeter and Veblen were part of a small number of scholars who both held onto a conception of imperialism as distinct from ‘empire’ but did not understand it as related to inherent tendencies in capitalism.¹⁵⁶ In their accounts, imperialism is about the collision of an economic logic of modern capitalism with the cultural and political dimensions of pre-capitalist modes of governance. Although these approaches are different from Marxist explanations, they nonetheless did understand the importance of (capitalist) economic logic to imperialism, even if imperialism did not spring directly from *inherent* tendencies within this logic. What they underline is the number of debates about the *causes* and *motives* driving imperialism, what Hobson called imperialism’s ‘taproot’.¹⁵⁷

Other, non-Marxist, historians have focused on the expanding needs of Britain’s economy to explain British imperialism.¹⁵⁸ However, these scholars have also paid close attention to the ‘official mind’¹⁵⁹ of imperialism, seeking to explain the ways in which state actors came to promote policies of imperial expansion. For many historians such an approach is necessary because imperialism *cannot* be explained by economic motives.¹⁶⁰ David Landes, for example, insisted that the British Empire was generally unprofitable, and that ‘[f]ormal imperialism ... rarely paid’.¹⁶¹ For Landes, this did not mean that some individuals did not profit from imperialism.¹⁶² However, he argued that looking at these specific individuals would necessarily involve constructing a theory of how they were able to ‘gain the ear’ of officials. In assessing the motives for imperialism, he suggested, it was vital to look at those factors which propelled officials and the general public into imperialist adventures, such as ‘*amour propre*’¹⁶³ and ‘lofty sentiments of prestige and humanity’.¹⁶⁴

¹⁵⁵ Veblen 1915a; he made a similar argument with respect to Japan in Veblen 1915b.

¹⁵⁶ Mommsen 1982, 80–86.

¹⁵⁷ Hobson 1975, 71.

¹⁵⁸ Cain and Hopkins 1986; Cain and Hopkins 1987; Gallagher and Robinson 1953.

¹⁵⁹ Robinson, Gallagher, and Denny 1982.

¹⁶⁰ Cohen 1973, 49–70; Davis and Davis 1988; Fieldhouse 1961.

¹⁶¹ Landes 1961, 505.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid., 506.

Such an approach has been important to those scholars who subscribe to a view of imperialism as ‘empire-ism’. Given that ‘empires’ have existed for as long as ‘civilisation’,¹⁶⁵ the forces that drive it must necessarily be broad. One response to this – common in International Relations – is to root imperialism in *power politics*. As Hans Morgenthau put it:

What the precapitalist imperialist, the capitalist imperialist, and the “imperialistic capitalist” want is power, not economic gain. The captain of industry is no more driven toward his “imperialistic goal” by economic necessity or personal greed than was Napoleon I. Personal gain and the solution of economic problems through imperialistic expansion are for all of them a pleasant afterthought, a welcome by-product, not the goal by which the imperialistic urge is attracted.¹⁶⁶

Morgenthau located international behaviour in the categories of ‘power’ and ‘interest’. States act in order to acquire power and further their national interests. For Morgenthau, imperialism was simply a special subset of this, where particularly glaring imbalances of power encouraged more powerful states to engage in expansive foreign policies that threatened the *status quo*.¹⁶⁷ This argument – that there is an inherent drive towards imperialism which is actualised in situations of extreme imbalance – forms the structure of a number of ‘political’ interpretations of imperialism.

Benjamin Cohen, for example, proposed that in an ‘anarchical’ international system of sovereign states, imperialism is essentially inevitable. In a formulation reminiscent of Hobbes,¹⁶⁸ Cohen stated that ‘in an anarchy there can be no such thing as absolute security’ since all states ‘are free to use force at any time to achieve their national objectives’.¹⁶⁹ This means that *any* state, even a non-aggressive one ‘must be constantly prepared to counter force with force, or pay the price of weakness’.¹⁷⁰ In such a situation, he continued, it is rational for states to have several strategic options open at any one time. But the only way in which several options can be kept open is through the

¹⁶⁵ Kiernan 1974, 1.

¹⁶⁶ Morgenthau 1948, 32.

¹⁶⁷ Ibid., 34–35.

¹⁶⁸ As Arendt noted, there is a close link between Hobbes’ philosophy and an imperialism rooted in endless expansion. For Arendt, the central element of the political philosophy of the bourgeoisie (who drove imperialism) was that of power for power’s sake. For Arendt such a position was in complete accordance with Hobbes, see Arendt 1962, 135–150.

¹⁶⁹ Cohen 1973, 234.

¹⁷⁰ Ibid.

maximisation of power.¹⁷¹ For Cohen, ‘imperialistic behavior is a perfectly rational strategy of foreign policy’¹⁷² in a world structured around competing sovereignties and international anarchy.¹⁷³ One could multiply infinitely the number of examples of scholarship making similar arguments.¹⁷⁴

What marks out many of the ‘political’ theories of imperialism is that they place stress on its ‘rationality’. In this, some have suggested, they share a ‘defect’ with the Marxist tradition, since imperialism in fact stems from ‘irrational’ drives. Max Weber stressed the role of ‘prestige’ in generating conflicts, rivalries and expansionism between Great Powers.¹⁷⁵ Great powers sought ‘the glory of power over other communities’ through ‘the expansion of power’.¹⁷⁶ This striving for prestige in turn came up against the striving of other Great Powers, leading to rivalry and conflict. This ‘irrational element’ had a ‘prominent effect’ in ‘all political foreign relations’,¹⁷⁷ particularly those of imperialism.

When such ‘irrational’ factors are seen as driving imperialism, the focus has tended to shift from questions of politics and economics to those of culture, ideology and psychology.¹⁷⁸ Langer, for example, contended that ‘Neo-Marxian critics have paid ... too little attention to the imponderable, psychological ingredients of imperialism’.¹⁷⁹ Like Weber, Langer argued that ‘feudalistic ideas of honor and prestige’ structured how ‘men ... interpret international relations’.¹⁸⁰ However, unlike Weber, Langer sought to root this drive in the specific transformations of European culture and society. He suggested that the drive to imperialism had to be interpreted in the light of the newly enfranchised working classes. The ‘industrial and white-collar classes’ had a ‘craving

¹⁷¹ Ibid., 241.

¹⁷² Ibid., 242.

¹⁷³ Ibid., 245.

¹⁷⁴ See Mommsen 1982, 3-9 and 70-76 and Münkler 2007, 28-34 for broad overviews on political theories of imperialism. Classical statements of this position include Bull 2002 and Waltz 2001. Such accounts are not just limited to International Relations scholarship, Weber for example, articulated a similar position arguing that ‘every big political community is a ... potential threat to all its neighbors’ (Weber 1958, 160).

¹⁷⁵ Weber 2009, 159.

¹⁷⁶ Ibid., 160.

¹⁷⁷ Ibid., 161.

¹⁷⁸ West 2001.

¹⁷⁹ Langer 1935, 110.

¹⁸⁰ Ibid.

for excitement' and 'spectatorial lust' which the media was able to satisfy through stories of '[c]olonial adventure and far-away conflict'.¹⁸¹

At the same time, European political thought had come to be dominated by ideas of 'Social Darwinism' and 'the biological conception of political and international relations'.¹⁸² It was believed that the 'Great Powers' were biologically destined to supplant the 'weaker races'.¹⁸³ This was reflected in theories of 'divine will' and 'manifest destiny', which drove forward processes of imperial expansion. The combination of these two factors leads to Langer's *main* conclusion about the driving force behind imperialism – *nationalism*. For Langer, imperialism was 'a projection of nationalism beyond the boundaries of Europe',¹⁸⁴ with this nationalism rooted in social Darwinism and a lust for aggressiveness. Many historians have followed this argument,¹⁸⁵ with D.K. Fieldhouse, for instance, claiming that imperialism was the outcome of 'fevered nationalism' and 'irrational concepts' which held 'inherent attractions for the masses'.¹⁸⁶

Implicit (and explicit) in such theories is a *condemnation* of imperialism. Yet there have been those who have held to a cultural and psychological theory of imperialism without opposing it. Thus, Curzon rooted the rise of the British Empire in the 'instinct' to spread progress¹⁸⁷ and Koebner and Schmidt opined that 'the savage customs of African tribes could not leave Victorian Englishmen indifferent'.¹⁸⁸ In this vision, the emphasis is shifted from the compulsion to *dominate* other societies to one of 'tutelage'.

4.4. *From Rivalry to Development and Back Again*

As will now be clear, there has been a great deal of disagreement over imperialism's particular place in history, and the forces which drive it. However, some of the most important disagreements have concerned imperialism's relation to the violence occasioned by rivalry *between* imperialist powers. For the classical writers of

¹⁸¹ Ibid., 108.

¹⁸² Ibid., 109.

¹⁸³ Ibid.

¹⁸⁴ Ibid., 112.

¹⁸⁵ Mommsen 1982, 71–73.

¹⁸⁶ Fieldhouse 1961, 209. In some respects Arendt's argument in *The Origins of Totalitarianism* mirrors this, particularly her account of the 'alliance between mob and capital'. However, Arendt also held to the essentially Marxist view that '[i]mperialist expansion had been touched off by a curious kind of economic crisis' (Arendt 1962, 135).

¹⁸⁷ Lord Curzon 2001, 144.

¹⁸⁸ Koebner and Schmidt 1964, 210.

imperialism, rivalry was an absolutely *central* aspect of imperialism. Hobson argued that ‘the competition of rival Empires’ was the ‘leading characteristic of ... modern Imperialism’.¹⁸⁹ Similarly, for Lenin, what made imperialism distinct was that the world was marked by ‘intense ... competition’ and a ‘desperate ... struggle for the acquisition of colonies’.¹⁹⁰

So important was this element of rivalry, that some have argued the concept of imperialism articulated by the classical theorists bears very little resemblance to subsequent accounts. Brewer, for instance, notes that ‘[f]or the classical Marxists [imperialism] meant, primarily, rivalry between major capitalist countries’ where ‘the less developed countries figure mainly as passive battlegrounds, not as active participants’.¹⁹¹ Others have gone further than this, Eric Stokes held that Hilferding, Lenin and Bukharin were ‘concerned not to provide a theoretical analysis of the scramble for colonies ... but for the genesis of war in Europe’.¹⁹² Echoing this argument, but going further, Norman Etherington claimed that *all* of the major classical theorists had understood imperialism in these terms.¹⁹³ Ultimately, such arguments are probably an exaggeration.¹⁹⁴ But issues of rivalry certainly did occupy the locus of the early debates.

The most important debate in this respect was the response to Kautsky’s claim that all of the imperialist powers would united together in an ‘ultra-imperialist’ bloc, which would collectively exploit the world. Kautsky rooted imperialism in the relationship between agriculture and industry.¹⁹⁵ For Kautsky, it is necessary that the output of each these sectors must match the demand of the other.¹⁹⁶ Under capitalism, this is a problem because industrial production is much more dynamic.¹⁹⁷ Accumulation occurs much more rapidly in industry than in agriculture, leading to the *overproduction* of industrial

¹⁸⁹ Hobson 1975, 19.

¹⁹⁰ Lenin 1970a, 98.

¹⁹¹ Brewer 1990, 88–89.

¹⁹² Stokes 1969, 291. Here Stokes sought to defend Lenin and Bukharin against the attacks against the economic theory of imperialism described above, by arguing that they did not in fact advance an economic explanation for colonial expansion.

¹⁹³ Etherington 1982.

¹⁹⁴ Eckstein 1991.

¹⁹⁵ Kautsky 2011.

¹⁹⁶ *Ibid.*, 761.

¹⁹⁷ *Ibid.*, 765.

commodities destined for agriculture and *underproduction* of ‘foodstuffs and raw materials’ needed for industry.¹⁹⁸ This causes crises.

To stave off these crisis tendencies, industrial capitalist nations are driven ‘to conquer and annex an ever-greater agrarian zone’.¹⁹⁹ In order to do so on a greater scale, it was necessary to create a modern transport infrastructure, which required the export of capital.²⁰⁰ Equally, the advanced industrial states wanted to secure the continued supply of agricultural production, and so sought to prevent the agrarian countries from developing into independent industrial centres.²⁰¹ Kautsky argued that this did occasion rivalry between advanced industrial states, but that there was no economic necessity for this rivalry.²⁰² Instead, he suggested that capitalism was *threatened* by this rivalry, and so cooperation was the rational response. He prophesied that advanced industrial powers might unite in an ‘ultra-imperialist’ bloc.²⁰³

Lenin insisted that the only function of Kautsky’s conception of ultra-imperialism could be ‘a preamble to propaganda for peace and unity with the opportunists and the social-chauvinists’ because it ‘obscures the very profound and fundamental contradictions of imperialism’.²⁰⁴ Following Hobson, Lenin argued that ‘competition between several imperialisms’²⁰⁵ was the defining feature of imperialism. For Lenin, imperialists were not simply driven to annex agriculture but *all* territory. Hence, rivalry was not simply a policy but was driven by an unceasing economic imperative to expand, which could only give way to occasional truce periods.²⁰⁶

To some degree, the Second World War could be analysed through the rubric of inter-imperialist rivalry, but this was complicated by the difference between the ‘democratic’ and fascist countries and the involvement of the USSR in the conflict.²⁰⁷ The Cold War seemed to lend credence to a Kautskyian account of ultra-imperialism, since the world

¹⁹⁸ Ibid., 768.

¹⁹⁹ Ibid., 758.

²⁰⁰ Ibid., 770.

²⁰¹ Ibid., 771.

²⁰² Ibid., 772.

²⁰³ Ibid., 774.

²⁰⁴ Lenin 1970a, 141.

²⁰⁵ Ibid., 110.

²⁰⁶ Ibid., 144.

²⁰⁷ Prior to the invasion of the USSR, the various Communist Parties had view the Second World War as an inter-imperialist conflict, later the struggle against fascism and defence of the USSR were brought to the fore, see Zinn 2010, 407. Trotsky saw the conflict as one involving rivalries between imperialism, see Trotsky 1938; Trotsky 1939. Hobsbawm's position was ambivalent, see Hobsbawm 1995, 36–53.

was dominated by ‘two super powers, only one of which was capitalist’.²⁰⁸ This was reinforced by the rise of the US to a position of unparalleled economic, political and military dominance. At this point it was plausible to suggest that imperialism in general could be identified with the US.²⁰⁹ Some Marxists, arguing that the Soviet Union was state capitalist²¹⁰ or ‘social-imperialist’,²¹¹ characterised the Cold War as a new form of inter-imperialist rivalry. Others pointed to the growth of European and Japanese economies as a challenge to the power of the US.²¹² Even in these accounts, though, making rivalry the prime locus of an account of imperialism was untenable.

While imperialism still remained a term for the capitalist world system, the focus was now on the relationship between the ‘advanced’ and ‘backward’ parts of this system. Military violence was still an important consideration. However, rather than the violence *between* imperialist powers, it was the violence deployed by these powers *against* peripheral states which was foregrounded. This was evident in the use of the language of anti-imperialism in radical opposition to the Vietnam war.²¹³ This led to a shift in attention to questions of growth and development. Whereas the classical accounts focused on the economic pressures generating rivalry, the Cold War accounts ‘present capitalism as a system of exploitation of one area by another, so development in a few places is at the expense of the ‘development of underdevelopment’ in most of the world’.²¹⁴

This was evident across a number of traditions. In the Marxist tradition, Paul Baran argued that the underdevelopment of certain regions of the world was not simply a ‘matter of fortuitous accident or of some racial peculiarities of different peoples’, but was determined by ‘the nature of Western European development itself’.²¹⁵ He continued that Western colonisation of the non-European world had smothered their infant industries and created lopsided forms of economic development specialising in

²⁰⁸ Etherington 1982, 29.

²⁰⁹ Gareth Stedman Jones underlined the necessity for understanding the specific nature of US imperialism, see Stedman Jones 1970. More or less contemporaneously, Michael Hudson (2003) argued that the US needed to be seen as a ‘super-imperialist’. See Gindin and Panitch 2012 and Wood 2003, 129 for recent accounts.

²¹⁰ Cliff 1974; Kidron 1970; see Callinicos 2009, 169 for a contemporary restatement.

²¹¹ This was the preferred Maoist nomenclature for the Soviet Union, and influenced much radical analysis in the US in the 1970s, see Elbaum 2006, 136 and Nicolaus 1975.

²¹² See Rowthorn 1971 for a survey of attempts to theorise US imperialism; see Kidron 1970 and Mandel 2011 for attempts to argue that the Europe and Japan were emergent rivals.

²¹³ Elbaum 2006, 42.

²¹⁴ Brewer 1990, 16.

²¹⁵ Baran 1962, 273.

primary commodity exports.²¹⁶ The majority of the ‘economic surplus’ from these activities was appropriated by the Western capitalists and transferred elsewhere, meaning it could not be reinvested in the underdeveloped state.²¹⁷ This created a tiny class of ‘wealthy compradors, powerful monopolists, and large landowners’ that profited from the situation and would be displaced should any more extensive development occur.²¹⁸ Consequently, this elite would block any form of social or economic progress.

Baran’s work, and that of the *Monthly Review* School, were both influential and reflective of broader trends.²¹⁹ World Systems theorists similarly located the dynamics of imperialism in the transfer of value from the periphery to the core. This transfer of value means that the accumulation of capital (investment) could therefore not occur in the periphery, leading to a structure of dependency. This was said to lead to, in Frank’s memorable words, was the ‘development of underdevelopment’,²²⁰ whereby the development of the core was dependent upon and *caused* underdevelopment in the periphery.²²¹

In a similar vein, the ‘dependency theory’ school maintained that terms of trade in the world economy disadvantaged primary commodity exports, such that countries reliant on these exports would face ever more unfavourable returns on their exports. Accordingly, they would be unable to invest sufficiently to secure domestic development, occasioning dependency.²²² This had real policy impact in Latin America, where the economic regime of import-substitution-industrialisation was deployed in an attempt to reverse the effects of underdevelopment.²²³ All of these accounts were not *identical* but what is remarkable is the degree to which, by the 1960s, a concern with rivalry had been replaced by one of development.²²⁴

²¹⁶ Ibid., 313–317.

²¹⁷ Ibid., 329.

²¹⁸ Ibid., 338.

²¹⁹ Sweezy 1970, 287–389; Magdoff 1980; Magdoff 2000; Magdoff 2003; Rodney 1982.

²²⁰ Frank 1967.

²²¹ For some examples see: Amin 1974; Amin 1976; Amin 1977; Frank 1967; Frank 1979; Wallerstein 1974.

²²² Cardoso and Faletto 1979; Larraín 1989, 102–110; Roxborough 1979, 27; Tandon 1985.

²²³ Yaffe 2009, 9.

²²⁴ Hodgkin 1972, 95.

However, as with much of thinking about imperialism, the situation changed somewhat following the collapse of the USSR, when the nature of US imperialism was once again called to the fore. The interventions in the 2000s met with opposition from other powerful states such as Russia, China and some European states. Excluding perhaps China, the capitalist credentials of these states are not in doubt, making an account of rivalry between capitalist powers once again much more plausible. Consequently, a number of works were published which sought to understand imperialism in terms of geo-political *competition* and inter-imperialist rivalry.²²⁵ This has been accompanied by a number of works charting the rise in economic and political importance of Brazil, Russia, India, China and South Africa (the so-called BRICs).²²⁶ In this way, the debate has come full circle. Whilst issues of development clearly remain, the debate over rivalry has made a return. Moreover, in the debates as to the nature of the BRICS questions of development and rivalry have become inextricably intertwined.

Even if the classical theorists of imperialism reserved that term ‘imperialism’ for the rivalry between advanced capitalist powers, they nonetheless dealt with many issues of ‘development’ under the rubric of *colonialism*. This points to the need to understand the relationship between imperialism and colonialism.

5. Colonialism

Colonialism has received relatively little sustained theoretical attention. In 1972, Ronald Horvath went so far as to declare that ‘Western scholars have not really come to grips with the phenomenon’.²²⁷ Some twenty five years later, Jürgen Osterhammel was to repeat this, characterising colonialism as a ‘phenomenon of colossal vagueness’.²²⁸

5.1. *The Roman Inheritance*

As with empire and imperialism, colonialism finds its root in Latin. It is derived from the term *colonia*, which itself was derived from the term *colonus*. *Colonus* was the Roman word for a farmer or planter, referring to tenant farmers who worked on imperial estates.²²⁹ The attributes of farming and cultivation also gave rise to a second meaning

²²⁵ Callinicos 2009; Knox 2013.

²²⁶ Amin 2006a.

²²⁷ Horvath 1972, 45.

²²⁸ Osterhammel 2005, 4.

²²⁹ Bunson 2009, 607.

of *colonus* – the settler. In this meaning, the *colonus* was an individual who would settle upon previously ‘uncultivated’ land and ‘improve’ it.

Consequently, *colonia* had the general meaning of a farm and a more technical meaning, referring to the public settlement of Roman citizens in hostile, newly conquered or ‘virgin’ territories. A group of Roman citizens would receive a grant of land from the Senate, allowing them to settle and work. Settlers were primarily composed of the lower orders of Roman society and military veterans. In the former case, *coloniae* operated as a ‘safety valve’ for overpopulation and, in the latter case, land was conceived as a reward for faithful military service. In both instances ‘[t]he creation of *coloniae* allowed Rome to extend its people, culture, and control over the hostile, foreign, or desired territories’.²³⁰

The settlers ‘carried’ their Roman citizenship with them, retaining its privileges and benefits. Consequently, *coloniae* attained the legal status of *ius Italicum*, meaning that they were legally considered part of Italian soil. Vitally, this legal status meant that the colonies were not subject to the legal jurisdiction of provincial governors and were also not subject to direct taxation.²³¹ With the spread of Roman influence, this juridical aspect came the fore. Across Italy a number of cities had been created by ‘foreigners’ which were later incorporated into the Roman system. Such cities were governed by the *ius Latii*, a system of less-extensive rights granted to ‘Latin’ peoples. These cities came to perform a vital role in Roman society and clamoured to be able to gain *colonia* as a status, so as to be subject to the *ius Italicum*.

The establishment of the Roman Empire under Augustus solidified this. *Colonia* came to refer to a juridical status assigned to certain territories in the Empire, which would be entitled to the legal privileges of the *ius Italicum*. This meant that it could be extended to territories that had not been previously settled by Roman citizens.²³² In this brief examination of the history of the term *colonia* one can observe a certain tension. On the one hand, *colonia* referred to the specific phenomenon settling Roman citizens in territory. On the other hand, it was a more general juridical status denoting the

²³⁰ Ibid., 135.

²³¹ Ibid., 280.

²³² Ibid., 135.

relationship between an Empire and its foreign territories. This tension never went away.

5.2. *Settlement or Domination?*

The Roman system was perhaps the most developed example of a ‘phenomenon is as old as human settlement itself’ – the migration of settlers.²³³ Ancient Great Powers all engaged in projects of colonisation.²³⁴ In fact, as Olufemi Taiwo points out, such colonisation was not simply a prerogative of Great Powers, but was common within smaller societies, where fluctuations in population and food supply would regularly lead to migration.²³⁵ Etymological accounts of colonialism have therefore tended to identify the presence of settlers as the distinguishing feature of colonialism. For instance, in 1900 Henry Morris insisted that:

[T]he essential characteristic of a colony is the common nationality of the original settlers; these latter must recognize one flag, must have emigrated in some considerable numbers from the same fatherland, and must have been strong enough to transport with themselves their language, customs, and laws, transplanting them to the foreign soil.²³⁶

Morris’ position reflects the general understanding of colonies and colonisation that prevailed until the late 1800s. As Moses Finley noted, ‘for more than three hundred years ... there was complete agreement that a colony was a plantation of men, a place to which men emigrated and settled’.²³⁷ Whilst Canada or the United States might be understood as colonies, India would not. However, as previously noted, this was only part of the story. Even in the canonical Roman example, the *colonia* was eventually distinguished not by the presence of settlers but through juridical *fiat*. In such a definition, the salient factor was not so much settlement, as the power dynamics of the Roman Empire.

Analytically, the absence of power and domination from a definition of colonisation is highly problematic. As Ania Loomba notes, a focus purely on the question of settlers ‘avoids any reference to people other than the colonisers, people who might already

²³³ Taiwo 2010, 27.

²³⁴ Tsetskhladze 2006.

²³⁵ Taiwo 2010, 27.

²³⁶ Morris 1900, 27.

²³⁷ Finley 1976, 171.

have been living in those places where colonies were established'.²³⁸ Except in a small number of cases, the land that was to become a settler-colony was not empty of pre-existing inhabitants. A vital aspect of colonisation was *dealing with these inhabitants*. In some cases this involved exterminating the majority of the native populations, but often European powers had to live with and 'manage' them.

Whereas a vision of colonies focused on settlers tended to be romantic, one which focused on native populations tended to be more critical. As the radical theorists from Hobson onwards deployed the critical concept of imperialism, colonies became more associated with domination. Hobson himself represents something of a transitional figure. He frequently alluded to 'true' or 'genuine' colonies, based on settlement and the retention of citizenship by the settlers.²³⁹ These colonies had 'responsible self-government' and could be considered 'a genuine expansion of nationality'.²⁴⁰

This genuine colonialism had to be contrasted with imperialism. Although a number of colonies had been established at the end of the 1800s, Hobson claimed that these were 'representative of the spirit of Imperialism rather than of colonialism'.²⁴¹ Imperialism required the export of capital to under-developed regions. Consequently, the new 'colonies' were established in tropical regions. Since the natives of these societies were also necessary to serve as the labour for the exported capital, they could not be exterminated. Accordingly, extensive migration and settlement of Europeans would not be possible. This meant these societies could not be subject to 'free representative government' whilst simultaneously 'preserv[ing] good order in external affairs'.²⁴² Such colonies were characterised by 'small minority [of Europeans] wielding political or economic sway over a majority of alien and subject people'.²⁴³

While Hobson insisted that these imperialist colonies were not 'genuine', he continued to use the word 'colonies' to describe them. In this respect Hobson both described and presaged a transformation in the use of the term 'colony'. In this vision, the essence of a colony did not so much lie in the presence or absence of settlers, but rather on the fact

²³⁸ Loomba 2005, 8.

²³⁹ Hobson 1975, 6, 36, 38.

²⁴⁰ Ibid., 6.

²⁴¹ Ibid., 7.

²⁴² Ibid., 122.

²⁴³ Ibid., 7.

that a dominant metropolitan power exercised *political control* over a subjugated population.

The radicals who followed Hobson all adopted this understanding. Rather than *counterposing* colonies to imperialism, they understood them as closely linked. This was especially important because during this period, radical writers generally understood imperialism in the context of the rivalry between major powers. Where imperialism referred to the system of rivalry as a whole, colonies referred to the regions that were the subject of these rivalries. This understanding mirrors the broader changes brought about by the 'New Imperialism' of the late 1800s. Although the primary form of the colony was still that of the settled territory, increasingly the term 'was used to indicate the general condition of overseas dependency'.²⁴⁴

5.3. *The anti-colonial legacy*

This, however, is not the whole story. Right up until the middle of the 1900s one can find frequent reference to colonies, or colonial policy, but very little mention of the term 'colonialism'. Hobson occasionally used the term, but only in referring to the 'ideology' of 'genuine' colonies. This was true more broadly, with colonialism 'most likely to be heard in a different sense as "a colonialism", meaning a turn of speech or an aspect of life typical of British settler societies'.²⁴⁵ This was in part because there was no need for an independent 'ism' of colonial policy, since by the 1900s it had come to be seen as the flipside to *imperialism*. Ironically, it was not until the 1950s – during the twilight of the colonial system – that the term 'colonialism' came into wide use.²⁴⁶ During this period, the anti-colonial movement was becoming an important political force *in its own right*. This movement, gathering momentum in the period following the Second World War, and supported by the Soviet bloc, had achieved numerous successes.

As the 1950s progressed, the movement also began to generate a sense that current and former colonies had a set of distinct interests. It was in this context, that the term 'Third World', as opposed to the First (capitalist) and Second ('socialist') worlds emerged. This was best exemplified by the 1955 Bandung Conference. The purpose of the conference was to set out an agenda for the cooperation of Asian and African countries

²⁴⁴ Fieldhouse 1981, 6.

²⁴⁵ Ibid.

²⁴⁶ Fieldhouse 1961, 6; Koebner and Schmidt 1964, 320.

and opposition to the domination of the old colonial and advanced capitalist powers. The Conference was split by political differences between the 'Left (China), the center (India and Burma)' and 'the Right (Turkey and the Philippines)',²⁴⁷ with some states remaining allied with the US and Britain.²⁴⁸ Nonetheless, the Conference made some significant steps, it signalled the entry of the Third World as a player on the international stage, called for opposition to racism and colonialism, an end to nuclear proliferation and outlined a strategy of economic cooperation and development.

The Conference is generally understood to have served as the basis for the institution of the Non-Aligned Movement, and the beginning of the broader 'Third World' movement.²⁴⁹ Tellingly, there was no use of the term 'imperialism' in the Final Communiqué. Instead, it proclaimed that 'the existence of colonialism ... prevents cultural co-operation [and] suppresses the national cultures of the people'²⁵⁰ and declared that 'colonialism in all its manifestations is an evil which should speedily be brought to an end'.²⁵¹ This reflects the fact that for the anti-colonial movement, the word 'colonialism' essentially stood in for 'imperialism'. As Koebner and Schmidt noted, '[a]mong the Arabs and other colonial peoples those two expressions became synonymous'.²⁵² Specifically, they point out that, when asked to translate the word *Ista'amar*, 'educated Arabs' would translate it interchangeably as 'imperialism' or 'colonialism'.

This interchangeability is significant. The metropolitan radical theorists of imperialism used 'imperialism' to refer to the system as a whole, with an emphasis on rivalry. Colonies were not the primary lens through which the system was viewed. The deployment of the term 'colonialism' by the anti-colonial movement can perhaps best be understood as an attempt to view imperialism *from the perspective of the colonised*. As Robert Young put it, the variance in terminology is 'largely the result of identification with the different subject-positions'.²⁵³ From the 'subject-position' of those living in colonies, the main aspect of the imperialist system *was* colonial policy

²⁴⁷ Prashad 2007, 34.

²⁴⁸ Ibid., 38.

²⁴⁹ Lee 2010, 17.

²⁵⁰ Zhou 1955, 38.

²⁵¹ Ibid., 40.

²⁵² Koebner and Schmidt 1964, 320.

²⁵³ Young 2001, 19.

and exploitation. Vitaly, this meant focusing on how imperialism played out within the colonies themselves.

As with the metropolitan radicals, the defining feature of colonialism itself was taken to be *political control*.²⁵⁴ As Kwame Nkrumah put it '[c]olonialism is that aspect of imperialism' where an alien 'government controls the social, economic and political life of the people it governs'.²⁵⁵ The difference from the metropolitan radicals lay in granting colonialism the status of an 'ism'. In so doing, the anti-colonial movement emphasised that, despite the manifold differences in specific colonial situations, they could be subsumed under a more general category.

Understanding colonialism as an 'ism' had two analytic consequences. The first was that it meant – in Jean-Paul Sartre's words – 'colonialism is a system'.²⁵⁶ For Sartre, colonialism was not simply 'a series of chance occurrences nor the statistical result of thousands of individual undertakings' but was instead a system 'put in place around the middle of the nineteenth century'²⁵⁷ with a logic. This logic was understood as the same logic identified by the metropolitan theorists of imperialism, that of *capitalist expansion*.

However, the theorists of anti-colonial movement went further than this, insisting that this logic was not simply 'economic'. They stressed that colonialism was also structured by a racial, cultural and psychic logic, which posited natives as inferior and incapable of self-government. In what Frantz Fanon dubbed the 'Manichaeism of the colonist',²⁵⁸ it was argued that colonialism necessarily gave rise to complex systems and hierarchies of racialisation, designed to set natives against one and other, and legitimise the domination of natives by the metropolitan countries.²⁵⁹ To put it bluntly, in invoking colonialism as a system, the anti-colonial movement also understood that a 'colonial country is a racist country'.²⁶⁰

²⁵⁴ FRELIMO 1982, 3.

²⁵⁵ Nkrumah 1973, 172.

²⁵⁶ Sartre 2001.

²⁵⁷ Ibid., 129.

²⁵⁸ Fanon 1963, 50.

²⁵⁹ Fanon 1986, 103.

²⁶⁰ Fanon 1988, 40–41.

The role of race and culture also signals the second aspect of the ‘ism’ of colonialism, namely its specificity. The anti-colonial movement’s concept of colonialism as a system was not timeless. Despite the Latin origins of the term *colonia*, the movement did not tend to invoke the Roman experience. Instead, it focused on the commercial expansion which had begun – in a scattered way – with mercantilism in the 1500s, and was solidified as colonialism in the late 1800s. Such an understanding located colonialism firmly within the dynamics of capitalist expansion. However, this was not just a ‘capitalist’ expansion. It was also one rooted in a very specific geographical and racial context. That is to say, the capitalist expansion that gave rise to colonialism was a *white, European* capitalist expansion.

The system of formal political domination against which the anti-colonial movement had mobilised was essentially one of the *European* control of non-European territories. Pointedly, this did not include generally include the US. A simple perusal of any of the major theorists of anti-colonialism bears this out, where the enemy is ‘the European’²⁶¹ and the focus is on Europe’s actions.²⁶² This is best captured in the opening to Aimé Césaire’s seminal *Discourse on Colonialism*, which bluntly declared ‘*Europe is indefensible*’.²⁶³

Accordingly, alongside the presence of a systemic economic, cultural and racial logic, the term colonialism denoted a specifically European system. As Fieldhouse notes ‘[c]olonialism ... emerged as a general description of the state of subjection ... of a non-European society which was the product of imperialism’.²⁶⁴ However, just as the original meanings of ‘colony’ were structured by a tension, so too was ‘colonialism’. Whilst the various elements brought together under the concept could be put to radical use, it was also possible to disassemble and de-radicalise the concept. In particular, those movements associated with the more ‘moderate’ elements of the Third World project – such as the ‘right’ and ‘centre’ at Bandung – sought to foreground political domination as the defining feature of colonialism.²⁶⁵ In so doing, colonialism was seen as being embodied entirely by the existing European system. Decolonisation was identified solely with the dismantling of this system.

²⁶¹ Fanon 1986, 82, 93, 97, 108.

²⁶² Rodney 1982.

²⁶³ Césaire 2000, 32.

²⁶⁴ Fieldhouse 1981, 6.

²⁶⁵ Ahmad 2008, 20; Mortimer 1970, 363.

Whilst this was no mean achievement, it nonetheless eclipsed the broader challenge to capitalist imperialism embedded in the anti-colonial concept of colonialism. This was so in two senses. Firstly, it made the target of the decolonisation the European powers, whose global economic and political reach was at that very moment being outstripped by that of the US. The US had not tended to engage in the direct political domination of states, but had instead utilised various ‘indirect’ methods. Indeed, given the US’s own historical beginnings as a British colony, some form of anti-colonialism was a crucial aspect of its self-identity. The tenacity of this idea, even to this day, can be gauged by the fact that an episode of the US political drama *The West Wing* had the American President utter the line ‘[e]very time he talks about colonial Western imperialism, I always want to remind him that the United States is also a revolutionary country that threw off its colonial masters’.²⁶⁶

This also sheds light on the second way in which the concept of colonialism was domesticated. In foregrounding political domination, but not its *location* in an economic and racial logic, the global economic system was cast as ‘neutral’. On this reading, the problem was that the colonies had been unable to participate ‘fairly’ because of political domination and exclusion. Whilst the more conservative elements of the Third World movement did not think that dismantling formal colonialism had *ended* all their problems, they did not cast these problems as being rooted in a wider system of exploitation. Rather, these problems were understood as generated by the unfair *legacy* of colonialism, which – once remedied – would enable the Third World to participate ‘fairly’ in the global economy and achieve development.²⁶⁷ If, following Young, we understand the radical concept of colonialism to be an engagement with the Marxist theory of imperialism from the ‘subject-position’ of the Third world, then we can understand this conservative concept as similarly corresponding to the ‘empire-ism’ described in Section 4.2.

As Sundhya Pahuja notes, such a vision of decolonisation was intimately linked to the rise of Cold War politics. The rivalry between the Soviet bloc (and China) and the advanced capitalist powers was often expressed through the colonies and former colonies. Whilst the US had ‘initially tempered its anti-imperial stance’ in order to win

²⁶⁶ Sullivan 2000.

²⁶⁷ Prashad 2007, 245–259.

over its European allies, this changed as the anti-colonial movements grew in strength. Since the Soviet bloc had a formal commitment to decolonisation, the advanced powers sought to break the link between ‘communism’ and decolonisation. The aim of this vision of decolonisation and ‘development’ was to *insulate* the global system as much as possible from the challenge of the anti-colonial movement. This meant supporting the more narrowly nationalist elements of the anti-colonial movement and sidelining its radical elements.²⁶⁸

It was ultimately such an understanding of colonialism which came to prevail in international institutions and international law. Hence, General Assembly Resolution 1514, the Declaration on the Granting of Independence to Colonial Countries and Peoples (the Colonial Declaration), defined colonial countries as those subject to ‘alien subjugation, domination and exploitation’. It stated this *political domination* ‘prevents the development of international economic co-operation, impedes the social, cultural and economic development of dependent peoples’.

However, the fate of the former colonial countries following this type of decolonisation could hardly be said to have marked a transition to ‘normal’ development in either the political or economic field. Instead, many of the problems ascribed to colonialism persisted after the system had been dismantled. In order to grapple with this, it was necessary to go beyond even the radical vision of colonialism. Insofar as theorists and activists continued to adopt a subject-position that entailed viewing the system through the lens of the ‘colonial’ they turned to the concept of *neo-colonialism*.

5.4. *From colonialism to neo-colonialism*

Scholars generally date the term ‘neo-colonialism’ to the 1960s, with Kwame Nkrumah’s *Neocolonialism: The Last Stage of Imperialism*.²⁶⁹ In fact, the earliest usages of the term date back to the 1950s,²⁷⁰ when the colonial system was still in existence but under threat. As with ‘colonialism’, in its original invocation, neo-colonialism did not so much refer to a system as an ideology. Essentially, neo-colonialist was a term used to describe those who sought to defend or reform the existing European colonial system. Thus, in 1956, Sartre warned people to be on their

²⁶⁸ Pahuja 2011, 44–45.

²⁶⁹ See Young 2001, 46.

²⁷⁰ Killen 1952, 139.

‘guard against ... “neo-colonialist mystification”’ which involved thinking ‘that there are some good colonists and some very wicked ones, and that it is the fault of the latter that the situation of the colonies has deteriorated’.²⁷¹

Over the course of the early 1960s the term began to be deployed in a different manner. Whilst it retained the vestiges of Sartre’s meaning, it increasingly came to be used to denote the continued presence of colonial patterns after independence. During this period, the term ‘neo-colonialism’ began appearing in two distinct contexts. Firstly, it became popular amongst metropolitan radicals and intellectuals.²⁷² The second, more important, group using the term in the early 1960s were the activists, leaders, politicians and theorists of the ‘Third World’.

By the 1960s, the anti-colonial movement had morphed into the Third World movement. From its genesis ‘[t]he Third World was not a place. It was a project’.²⁷³ In this project ‘the peoples of Africa, Asia and Latin America’ articulated a collective political set of ‘grievances and aspirations’ for dignity and ‘the basic necessities of life’.²⁷⁴ As with the anti-colonial movement, in order for this collective political project to achieve coherence, it required an analysis of the system it opposed and some factor which unified its diverse elements. For the more radical wing of the Third World project ‘neo-colonialism’ served this function.²⁷⁵

Underscoring the Cold War context of the term, one of the first sustained descriptions of neo-colonialism was not directly asserted against the former colonial powers. Instead, it emerged as part of the dispute between the Communist Parties of the People’s Republic of China (CPC) and the USSR (CPSU). In March 1963, the Central Committee of the CPSU drafted a letter to the CPC. The CPSU contended that ‘[t]he national-liberation movement has entered the final stage of the abolition of colonial regimes’.²⁷⁶ This was located in a broader series of arguments about the nature of the conjuncture, in which violent confrontation was to be replaced by ‘peaceful co-existence’. The issue of ‘colonialism’ had been superseded. Instead, since ‘political independence has been won,

²⁷¹ Sartre 2001, 128.

²⁷² Anderson 1962; see also Buchanan 1963; Ross 1961; Worsley 1961.

²⁷³ Prashad 2007, xv.

²⁷⁴ Ibid.

²⁷⁵ Shohat 1992, 111.

²⁷⁶ Communist Party of Soviet Union 1965, 511.

the struggle of the young sovereign states against imperialism, for their ultimate national revival, for economic independence, comes to the forefront',²⁷⁷ which meant relying on the USSR for economic aid and support.²⁷⁸

The CPC challenged this analysis, accusing the CPSU of 'whitewash[ing] the aggression against and plunder of Asia, Africa and Latin America by neo-colonialism'.²⁷⁹ The CPC declared that despite their formal independence, the ex-colonies had 'not completely shaken off imperialist and colonial control'.²⁸⁰ The imperialists had 'been forced to change their old style of direct colonial rule in some areas and to adopt a new style of colonial rule and exploitation by relying on the agents they have selected and trained'.²⁸¹ Consequently, neo-colonialism was characterised by various forms of indirect political control. The CPC argued that the imperialists did this through:

[O]rganizing military blocs, setting up military bases, establishing "federations" or "communities", and fostering puppet regimes. By means of economic "aid" or other forms, they retain these countries as markets for their goods, sources of raw material and outlets for their export of capital, plunder the riches and suck the blood of the people of these countries. Moreover, they use the United Nations as an important tool for interfering in the internal affairs of such countries and for subjecting them to military, economic and cultural aggression. When they are unable to continue their rule over these countries by "peaceful" means, they engineer military coups d'état, carry out subversion or even resort to direct armed intervention and aggression.

The CPC's conception of neo-colonialism demonstrates how the Third World movement attempted to combat the conservative appropriation of colonialism. It represented an attempt to delink the idea of colonialism from the European colonial system and think through a world order dominated by the US. Indeed, the US was central to elaborations of the concept because it was generally seen as being a neo-colonial state *avant la lettre*, through its policies in Latin America. This should alert us to the fact that neo-colonialism was *not* simply a temporal theory about what came after

²⁷⁷ Ibid., 512.

²⁷⁸ Interestingly, the distinction previously mentioned between the radical and conservative elements of the anti-colonial movement did not simply pitch the socialist bloc against the capitalist powers. It also played out in the context of the Sino-Soviet split, with the Chinese – rhetorically at least – backing the armed struggle against imperialism and the more radical elements of the Third World movement. See, for example, the denunciation of the USSR by the PRC in the context of the Tricontinental Conference, Hsinhua Correspondent 1966.

²⁷⁹ Communist Party of China 1965a, 192.

²⁸⁰ Ibid., 198.

²⁸¹ Ibid., 190.

colonialism. Rather, as Nkrumah insisted, neo-colonialism is a specific ‘tactic’ adopted by imperial powers which became predominant after the anti-colonial movement won independence.²⁸²

Although the CPC captured the thrust of neo-colonialism as a system of colonial oppression and exploitation that co-existed with formal independence, the emphasis was placed more upon methods of political control than economic exploitation. This position might appear to share in the disconnect between colonial domination and the capitalist system. In part this was because the debate was conducted *between* self-identified Marxist-Leninists, who took for granted a Leninist theory of imperialism. More importantly, since the CPSU had connected economic competition to peaceful coexistence, the CPC downplayed this.

Other accounts from the Third World stressed economic ‘control’ and ‘dependence’. The neo-colonial character of contemporary imperialism lay in the fact that although former colonies had achieved political independence, they remained tied to the imperial powers through the world economy. As Nkrumah, put it ‘[n]eo-colonialism is the granting of political independence minus economic independence ... a [neo-colonial] State [is] politically free but dependent upon the colonial power economically’.²⁸³

Because this was an analysis of neo-*colonialism* the emphasis was not just placed on the ‘external’ world market, but also on the ‘internal’ economic life of the former colonies. Theorists of neo-colonialism insisted that the capitalist development that had taken place under colonial conditions meant that the former colonies could not simply follow the same economic path as Europe. There were many variants of this account, but one of the most enduring was Fanon’s in *The Wretched of the Earth*. Fanon argued that the development of the advanced capitalist countries had resulted from their early adoption of capitalism. In these countries, a young, vigorous bourgeoisie had come to power and rapidly developed the productive forces.

In the age of imperialism this progressive function had ceased. For Fanon, the colonial bourgeoisie had never had a chance to pass through a progressive phase. Under formal colonialism there was no native industrial bourgeoisie. Productive activities were

²⁸² Nkrumah 1973, 324.

²⁸³ Ibid., 172.

carried out by foreign firms linked to the colonial power, or the colonial state itself. The native bourgeoisie was confined primarily to ‘activities of the intermediary type’ such as trade, small enterprise and securing commissions.²⁸⁴ At the same time, colonial industrial development was highly uneven, focused mainly on the export of primary commodities and resource extraction.²⁸⁵

As a result of this, the native bourgeoisie that emerges at the end of the period has ‘practically no economic power’ and does so in a situation of extremely uneven development.²⁸⁶ This is a bourgeoisie that is quite different from the classical European one. However, what it shares with all bourgeoisies is a need for *profit*. Whereas in the European case this need for profit (unintentionally) created economic development, the peculiarities of colonial development mean that the native bourgeoisie seeks to ‘transfer into native hands of those unfair advantages which are a legacy of the colonial period’.²⁸⁷ The quickest route to profit was to continue with the old forms of export-oriented production, with the national bourgeoisie serving as middlemen for the advanced capitalist countries. The national bourgeoisie thus turned towards the capitalists of the old mother countries and ‘[t]he economic channels of the young state sink back inevitably into neo-colonialist lines’ with the economy ‘literally controlled’.²⁸⁸

This national bourgeoisie was so weak that it could not distribute material incentives and political rights in the same way as the European bourgeoisie. This meant it needed to resort to a combination of political authoritarianism and a stoking of racial, cultural and regional differences within the new state in order to secure its rule.²⁸⁹ For Fanon, this explained the politically dysfunctional nature of the decolonised state, as well as the continued presence of racism after independence (as well as its continued use by the metropolitan powers). Thus, the emergence of what was generally dubbed the ‘comprador bourgeoisie’ is a focal point of the concept of neo-colonialism. It was the figure through which the political control and the economic exploitation that the concept attempted to embody were brought together.

²⁸⁴ Fanon 1963, 179.

²⁸⁵ Ibid., 152, 159.

²⁸⁶ Ibid., 150.

²⁸⁷ Ibid., 152.

²⁸⁸ Ibid., 166–167.

²⁸⁹ Fanon 1986, 167.

Essentially, then, the concept of neo-colonialism carried through the radical concept of colonialism to a new situation. It continued to focus on the systematic character of its economic, cultural and racial logic, and located it inside of a broader capitalist imperialism. However, it stressed that these had taken on new forms. It provided a new *political* programme which prioritised political unity against external intervention; state-led development at home and an attempt to undermine the unequal character of the international division of labour. Equally, it provided an agenda for internal political reform focused on building non-tribal, non-ethnic states and attempting to articulate and valorise a distinctive *national*-cultural identity.

Consequently, the concept of neo-colonialism was heavily bound up with the political project of the Third World, especially its radical wing. With the defeat and decline of this movement, its usage began to decline. It was in this context that saw the rise of postcolonialism.²⁹⁰

5.5. *To Hyphenate or not to Hyphenate?*

5.5.1 After Colonialism

In a pattern that will at this point be very familiar, the concept of the ‘post-colonial’ began life with rather a different meaning to its current one. Most initial references to the term are from the 1800s. Its original meaning was straightforward, referring that which *follows* colonial rule. In the late 1800s and early 1900s it was not generally applied to *societies* or *states*. It was either used to describe some object, practice or phenomenon which had come after a colonial period – such as ‘post-Colonial houses’²⁹¹ or ‘a post-colonial poet’²⁹² – or was used to characterise the time period following the end of colonial rule.²⁹³ It is telling that in these examples, the post-colonial is not taken as a common characteristic or shared condition, rather it is a purely temporal description. It is also important to note that its main circulation was in academic writing.

Decolonisation made the term more important. It was now applied to political and social phenomena connected to the newly decolonised states. In particular, the term post-

²⁹⁰ Lazarus and Varma 2008, 311.

²⁹¹ King and Thompson 1895, 135.

²⁹² Allen 1910.

²⁹³ Crandall 1893, 756.

colonial was applied *directly* to the newly decolonised entities. The primary meaning, then, of post-colonial in the 1950s and 1960s was a concrete political, social and economic one. The term was generally appended to the words 'state' or 'society'.

In this respect, the term covered similar ground to 'neo-colonialism' or the 'Third World'. Unlike these terms, post-colonial was unattached to any political movement. Post-colonial became the term of choice for policy-oriented academic figures and policy-makers, as a description for the newly decolonised states. This reflects something of the politics of the term. It carried no radical connotations because it was not connected to any political movement and was seemingly more 'neutral' in its description, with 'post' not denoting any necessary or common condition following colonialism.

However, this apparent formal neutrality carried substantive connotations. When using the term *post-colonial* '[t]he "colonial" in the "post-colonial" tends to be relegated to the past and marked with a closure'.²⁹⁴ Unlike the term 'neo-colonial', then, 'post-colonial' tended to emphasise the *discontinuities* between colonial and decolonised states. Similarly, insofar as the post-colonial was presented as *beyond* colonialism, it downplayed the notions of agency entailed by concepts of colonialism and neo-colonialism. As Ella Shohat noted:

While one can posit the duality between colonizer/colonized and even neo-colonizer/neo-colonized, it does not make much sense to speak of post-colonizers and post-colonized ... Transcending such dichotomies, the term "post-colonial" posits no clear domination, and calls for no clear opposition.²⁹⁵

The cumulative effect of this was that the concept of the post-colonial was a *depoliticised* one. It recognised that there were distinctive problems of formerly colonised societies, but it did so without entailing any broader theoretical and political commitment. In so doing, it removed any notion of the idea that the post-colonial situation was one necessarily characterised by domination or exploitation. In positing the 'post-colonial' as a neutral situation, the concept also drew attention away from who gained and who lost from this exploitation and domination. Like the conservative concept of colonialism, it divorced the problems of post-colonial societies from a

²⁹⁴ Shohat 1992.

²⁹⁵ Ibid., 107.

broader capitalist system. In so doing, it posited these problems as accidental *aberrations*, often claiming they were caused purely by internal failings of postcolonial societies. Once again, therefore, it eclipsed the broader challenge to the capitalist system as represented by the concept of neo-colonialism.

Over time, however, the term did become one used by radicals. Aijaz Ahmad traces the ‘first major debate [on the left] on the idea of postcolonialism’ to the debates in the 1970s. In particular he locates its genesis in Hamza Alavi’s article ‘The State in Post-Colonial Societies: Pakistan and Bangladesh’. In this piece, Alavi argued that the social formations in post-colonial societies were fundamentally different from classical European ones, meaning that Marxist theory could not be unproblematically applied.²⁹⁶

Alavi’s article was the first salvo in a long debate,²⁹⁷ the particulars of which are not as important as what it illustrates about the term post-colonial. Rather than being *counterposed* to neo-colonialism, it was as an adjective used to refer to certain particular phenomena that occurred under neo-colonialism.²⁹⁸ This usage of the term post-colonial had two important features. The first was that it denoted formerly colonised societies as being *distinct* from other societies. The second was that this concept of the post-colonial denoted a *common* set of experiences. ‘Post-colonial’ was not simply a temporal claim about what came ‘after’ colonialism, but a structural description of the common issues such societies would face. Taken together, this indicates that in these debates ‘post-colonial’ began to function as a kind of *problématique*.

5.5.2 Colonial Discourse Theory

It was this idea of the post-colonial as a *problématique* that played a key role in the emergence of post-colonialism. Essentially, ‘from the late 1970s the term has been used by literary critics to discuss the various cultural effects of colonization’.²⁹⁹ Under the rubric of ‘post-colonial literature’, scholars suggested that a distinctive literary form had been thrown up through the colonial experience.³⁰⁰ In this sense, the term post-colonial was identical to Alavi’s usage. However, this work both prefigured, and was part of, the rise of postcolonialism as a more distinct concept.

²⁹⁶ Alavi 1972, 59.

²⁹⁷ Ahmad 1995, 5.

²⁹⁸ Alavi 1972, 62.

²⁹⁹ Ashcroft, Griffiths, and Tiffin 2001, 168.

³⁰⁰ Ashcroft, Griffiths, and Tiffin 2002, 1–6.

The most influential current in the development of postcolonialism was what came to be known ‘colonial discourse theory’.³⁰¹ The founding document in this regard was Edward Said’s 1978 book *Orientalism*. The aim of *Orientalism* was ‘to expose the degree to which Western systems of knowledge and representation have been involved in the long history of the West’s material and subordination of the non-Western world’.³⁰² In order to do this, Said elaborated a concept of ‘Orientalism’. By this he meant both the discipline of that name and a broader collective way of thinking about ‘the Orient’ by the West. In basic terms, it was:

[T]he corporate institution for dealing with the Orient – dealing with it by making statements about it, authorizing views of it, describing it, by teaching it, settling it, ruling over it: in short, Orientalism as a Western style for dominating, restructuring, and having authority over the Orient.³⁰³

Orientalism ‘is a style of thought based upon an ontological and epistemological distinction between “the Orient” and ... “the Occident”’.³⁰⁴ Its role is to constitute and represent ‘the Orient’ as inferior, so as to be compatible with Western domination of the East. Throughout *Orientalism*, Said is concerned to trace how the discourse of Orientalism produces a reality ‘on the ground’, and so transforms the ‘real’ Orient.³⁰⁵

This discursive framework is composed of ‘latent Orientalism’ and ‘manifest Orientalism’. Latent Orientalism is a basic set of ideas about the Orient, associating it with backwardness, despotism, sensuality and inaccuracy, which operate with an ‘almost unconscious positivity’.³⁰⁶ Manifest Orientalism refers to the various ‘stated’ views about the Orient. Changes in discourse tend only to occur at the level of manifest Orientalism, with latent Orientalism remaining ‘more or less constant’.³⁰⁷ Ultimately, Orientalism posits that ‘[o]n the one hand there are Westerners, and on the other there are Arab-Orientals; the former are ... rational, peaceful, liberal, logical, capable of holding real values ... the latter are none of these things’.³⁰⁸ *Orientalism* traces the way

³⁰¹ Ashcroft, Griffiths, and Tiffin 2001, 36–37.

³⁰² Moore-Gilbert 1997, 38.

³⁰³ Said 2003, 3.

³⁰⁴ Ibid.

³⁰⁵ Moore-Gilbert 1997, 37.

³⁰⁶ Said 2003, 205–206.

³⁰⁷ Ibid., 206.

³⁰⁸ Ibid., 49.

in which this was reproduced throughout the colonial period, arguing that it has survived in the contemporary world.³⁰⁹

This expansive definition of Orientalism is extremely important because Said made broad claims about the role of the imperial and colonial experience in the formation of Europe's identity.³¹⁰ He argued that the psychic and cultural dimensions of Orientalism are in fact a manifestation of a broader need of all identities to construct themselves through positing their opposite:

[T]he development and maintenance of every culture requires the existence of another competing *alter ego*. The construction of identity... while obviously a repository of distinct collective experiences *is* finally a construction – involves establishing opposites and “others” whose actuality is always subject to the continuous interpretation and re-interpretation of their differences from “us”. Each age and society re-creates its “Others”.³¹¹

For Said, therefore, Orientalism is less about the Orient on its own terms, than about creating the Orient in order to stabilise Western identity. More than this, at various points in the *Orientalism*, Said states that it was this need that in fact *drove* the process of colonial and imperial expansion.³¹² The net result of this is that imperial and colonial expansion is rooted in a wider set of psychological and cultural imperatives.

According to Moore-Gilbert, these two positions are a contradictory tension. He thinks that Said ‘never quite solves the problem of how to conceptualize the relationship between the ‘latent’ and ‘manifest’ aspects of Orientalism’.³¹³ When talking about ‘manifest’ Orientalism, Said tends to trace it back to specific historical events, generally arguing that it came in the wake of European colonial ambitions and tended to justify and legitimate them. Yet when talking about manifest Orientalism he saw deep-rooted psychic structures *driving* the colonial experience, for which the state serves as a ‘*support system* of staggering power’.³¹⁴

These contradictions represent a transitional moment for the ‘post-colonial’. On the one hand, the concept and Said’s analysis can be read as essentially continuous with the

³⁰⁹ Ibid., 322.

³¹⁰ Ibid., 11.

³¹¹ Ibid., 332.

³¹² Ibid., 39. 307.

³¹³ Moore-Gilbert 1997, 43.

³¹⁴ Said 2003, 307 (emphasis added).

anti-colonial movement's work. Here, what we see is an account that stresses the centrality of colonial experience, and the importance of culture therein. Building on the work of earlier anti-colonial scholars, it reasons that since colonialism was a *common* and *shared* experience, so too is the post-colonial. Because of this connection with the earlier anti-colonial tradition it also shares its concepts of imperialism, colonialism and neo-colonialism.

On the other hand, there is a vision which largely breaks from the above. It shares the focus on the cultural and psychological aspects of colonialism, as well as the line of continuity between the past and the present. However, it grants these aspects a radically more privileged role. The psychic and cultural dimensions are seen as *driving* the broader material processes of expansion and domination. Such claims *cannot* be confined to any particular historical period. Such a vision no longer sits in the tradition of the materialist concept of the post-colonial. Theoretically, it has much in common with poststructuralist theory and philosophy.

These tensions can be found throughout Said's work. Even in later accounts like *Culture and Imperialism* – which Moore-Gilbert characterises as more 'materialist'³¹⁵ – one can find statements such as 'empire depends upon *the idea of having an empire*'.³¹⁶ Said muses that imperialism and colonialism are 'perhaps even *impelled* by impressive ideological formations' and that '*all* nationally defined cultures' have 'an aspiration to sovereignty, to sway, and to dominance'.³¹⁷

However, Said was a transitional figure because what was a *tension* in his work led the way to a wholesale *re-envisioning* of the 'post-colonial'.³¹⁸ A distinctive concept of postcolonialism was only constituted in the late-1970s, and consolidated throughout the 1980s and 1990s.³¹⁹ This was concurrent with the end of the post-war 'boom' in the advanced capitalist countries, the end of the Bandung era, and the rise of neoliberalism.³²⁰ In other words, this period saw the utter failure of the Third World project.

³¹⁵ Moore-Gilbert 1997, 71.

³¹⁶ Said 1994, 10.

³¹⁷ Ibid., 15.

³¹⁸ Larsen 2001, 27.

³¹⁹ Lazarus and Varma 2008.

³²⁰ Ibid., 312.

Since Said's work, the number of writers and works identifying themselves in the broad field of 'postcolonialism' has multiplied tremendously. As with any intellectual field, it is extremely heterogeneous, but its 'leading lights' are Said himself, Homi Bhabha and Gayatri Spivak.³²¹ Despite the heterogeneity, there are certain elements that mark out 'postcolonialism' as a distinctive approach. The first element is taken directly from Said, namely the prominence of 'othering'. In the key postcolonial texts, it is argued that the 'West' or Europe is only able to constitute its identity through defining itself as against its 'other'. Although there are different variants regarding how precisely this process comes about, it is stressed that one of the driving forces behind the expansion of the 'West' is its need to consolidate the image of its 'Self' through creating colonial subjects as 'others'.³²²

However, this more general process of 'othering' finds its specific content in the experience of *European* expansion throughout the world. Consequently, the values which need to be consolidated in the self are those of the *European Enlightenment*. On a political level, these values are those of bourgeois liberalism: private property, liberal democracy and secularism. These values were framed by a set of more abstract concerns about history and human nature. European Enlightenment values were grounded on a form of universal reason, said to be property of all civilised societies. This was contrasted with the inhabitants of the non-European world, who lacked reason, and therefore also lacked the social mores of European modernity.³²³

In order to consolidate European Enlightenment values, non-European societies were interpellated as savage or uncivilised. This interpellation was often achieved through 'science': in positing that non-Europeans were innately racially or culturally inferior. At the heart of European expansion, therefore, was a process of *racialisation*, whereby 'universal reason' was consolidated through the exclusion of non-Europeans. Although it was in theory possible to hold that non-Europeans were incapable of reaching enlightenment, this conflicted with the Enlightenment focus on the *universality* of

³²¹ McLeod 2000, 30.

³²² Bhabha 2004, 63; Spivak 1999, 200; Ashcroft, Griffiths, and Tiffin 2001, 154–158; Loomba 2005, 139.

³²³ Spivak 1999, 27.

reason. It is for this reason that *culture* became vitally important, insofar as backwardness was a result of culture, it was subject to potential *transformation*.³²⁴

This was mediated through another feature prominent in European thought – historicism. Essentially, European thinkers understood societies as entities that existed and developed over time. All societies were understood to progress towards some eventual state. Thus, although the ‘universal’ Enlightenment had started in a particular location, it would spread elsewhere.³²⁵ This historicist narrative was coupled with forms of ‘stadial’ thinking, in which societies were said to pass through distinct stages. Non-European societies were seen as in an earlier stage of development than European ones. This provided the impetus – in the name of historical progress – for Europe to remake non-European societies in its own image. Such thinking was so widespread in European ideas that even radicals succumbed to it.³²⁶

Concretely, the process of ‘othering’ was not simply a one-sided process of the positing of Self and Other. Rather, because of the universalising and transformative aspects of Eurocentric thinking, ‘the otherness of the Self [is] inscribed in the perverse palimpsest of colonial identity’.³²⁷ This signals another related theme of postcolonialism, that of *ambivalence*. Although the thinkers of the European Enlightenment sought to transform non-European populations, a full transformation of their identity would make them identical to the European Self. This would leave European identity with nothing to consolidate itself against. This meant that colonial discourse was structured around ‘the desire for a reformed, recognizable Other, *as a subject of difference that is almost the same, but not quite*’.³²⁸ Consequently, colonial discourse has to ‘continually produce its slippage, its excess, its difference’.³²⁹

Rather than coloniser and colonised confronting each other directly, then, their relationship is structured around a ‘complex mix of attraction and repulsion’.³³⁰ This ambivalence did not just occur at the level of the coloniser, but also in the consciousness of the colonised through ‘mimicry’. Mimicry refers to the colonised

³²⁴ Ibid., 30.

³²⁵ Chakrabarty 2009, 23.

³²⁶ Ibid.; Said 2003, 154.

³²⁷ Bhabha 2004, 63.

³²⁸ Ibid., 122.

³²⁹ Ibid.

³³⁰ Ashcroft, Griffiths, and Tiffin 2001, 110.

making use of the ambivalence of colonial discourse. In positioning themselves as almost the same as the coloniser, but not quite, the colonised are able to disrupt and menace colonial discourse by revealing its indeterminacy and limits.³³¹

What ambivalence and mimicry also indicate is that although Enlightenment universalism predicted all societies would develop along a similar path, it met a very different reality. European political modernity was inserted into societies that were radically different, with their own histories, traditions cultures and practices. The result was that throughout the colonial world, rather than the reproduction of some distinctively 'native' or 'European' subject, there were a whole number of *hybrid* entities. This hybridity is a key aspect of postcolonial theory.

The totality of these observations constitute a distinct theoretical position, which demarcates postcolonialism. The fluidity, contingency and ambivalence of colonial discourse illuminate flaws in Enlightenment universalism. Far from societies developing along predictable paths, the colonial demonstrates that contingency is the *norm* of social development.³³² This had important political consequences. In *Elementary Aspects of Peasant Insurgency in Colonial India* Ranajit Guha argued that to characterise the peasants as 'pre-political' was to incorrectly apply European categories to non-European development.³³³ Instead, he maintained, the politics of the non-European peasantry had to be located in the superstitions, rituals and practices that they practised in *resistance* to the domination of the colonial state. For other postcolonial theorists, this is a vital starting point. Insofar as colonialism is driven by hybrid, contingent and ambivalent discourse, the grand political gestures associated with European historicism are not viable. Instead, attention must be paid to the practices and rituals of the marginalised and the oppressed, as they seek to negotiate and contest structures of power.³³⁴

This is also how the more traditional concerns of the 'post-colonial' enter into the picture. Postcolonial theorists note that the discourse of nationalism was central to the European Enlightenment. This meant that the anti-colonial movement's embrace of the nation-state as the form of decolonisation was profoundly problematic. This grand

³³¹ Bhabha 2004, 126–130.

³³² Ibid., 248; Spivak 1999, 96.

³³³ Guha 1999, 6.

³³⁴ Bhabha 2004, 246.

narrative of nationalism ‘left behind’ a whole host of marginalised, subaltern actors.³³⁵ Postcolonial scholarship is marked by a close focus on the practice of these marginal groups, particularly the ways in which they cross boundaries and borders through their hybrid identities.

As should be clear, examined in this way, the concept of the post-colonial has undergone several metamorphoses. Initially, it designated that which contingently followed the ‘colonial’. It then shifted in meaning, indicating that the period after colonialism might constitute a distinct *problématique*. With postcolonialism this idea of the *problématique* is taken to its logical conclusion. As an attentive reader may have noticed, in talking of postcolonialism, the hyphen originally present in ‘post-colonial’ has been dropped. The question of whether or not the term should be hyphenated generated a great deal of debate in postcolonial circles. Although it may seem trivial, the position of the hyphen *does* shed light upon the nature of the concept. As McLeod has noted, the hyphen tends to denote a *temporal* concept, whereas postcolonialism refers to ‘disparate forms of *representations, reading practices and values*’.³³⁶ As Ahmad puts it, postcolonialism denotes a genre or a condition of ‘postcoloniality’ as opposed to a periodisation.³³⁷

What we might say is distinctive is that, as an ‘ism’, postcolonialism denotes a set of theoretical propositions about understanding colonialism, imperialism and the wider world. In this respect, many have noted that the ‘post’ in ‘postcolonialism’ might be said to stand for ‘post-structuralism’. Ahmad goes so far as to characterise it as ‘postmodernism’s wedge to colonise literatures outside Europe and its North American offshoots’.³³⁸ Such a position is not quite fair: whilst many postcolonial theorists admit their debt to post-structuralism, they have also frequently criticised it as Eurocentric.³³⁹ The claim being made is actually a more subtle one, namely, that the experience of colonisation produces and pre-empts the kind of fluid, contingent and hybrid forms posited by post-structuralists. As such, postcolonial scholars claim that anti-colonial theorists – with their focus on questions of culture and identity, and their

³³⁵ Ibid., 248; Chatterjee 1993; Spivak 1990, 41.

³³⁶ McLeod 2000, 5.

³³⁷ Ahmad 1995, 7–9.

³³⁸ Ibid., 2.

³³⁹ Spivak 1988.

problematism of European universalism and historicism – were post-structuralists ‘long before’ that was even a term.³⁴⁰

Crucially, postcolonial theorists were writing in the shadow of the failure of the Third World movement. They claim that this movement was insufficiently attentive to the deep-rooted Eurocentric nature of modernity, its institutions (the nation-state, property) and its concepts (development). This turn to ‘post-structuralism’ – *contra* some of the more aggressive critiques – represents a genuine attempt to grapple with these issues. This has also meant that one of the key manoeuvres of postcolonialism has been to construct a *canon* whereby certain figures (such as Fanon and Césaire) are posited as anticipating its critique.

Importantly, this has involved uprooting those figures from the (Marxist) tradition in which they situated themselves.³⁴¹ This sheds light on how postcolonial theory has dealt with the concepts of imperialism, colonialism and empire. Given the centrality of the European enlightenment, the main focus has been upon the experience of colonialism narrowly considered. This is framed by a more general identity-based account. Against this, the terms imperialism, and neo-colonialism do feature but are *subordinated* to the broader postcolonial condition.

6. A Rose By Any Other Name

Invoking ‘imperialism’ is a complicated matter. The aim of this chapter has been to map the use of the term, as well as ‘empire’ and ‘colonialism’. It has sought to demonstrate that these are not simply words. Instead they are theoretical and political objects, associated with long histories of debate and struggle. In choosing to invoke ‘colonialism’, ‘empire’ or ‘imperialism’ one is also situating oneself inside of these histories and debates.

On one level this is obvious. The historical evolution of the terms means that they have become more or less directly associated with certain political movements. Although these histories are complex, some terms *have* become firmly associated with different

³⁴⁰ Bhabha 2004, 252; Chakrabarty 2009, xv.

³⁴¹ Moore-Gilbert (1997) describes Bhabha’s use of Fanon as not so much ‘remembering’ as ‘dismembering’ (at 138). See also Robinson 1993.

political currents. Hence imperialism has generally been associated with political radicalism, in particular the Marxist tradition. Insofar as this has *not* been the case, it has been when scholars have attempted to recast ‘imperialism’ as ‘empire-ism’, in which case they have conceived themselves as engaging directly with Marxist analyses. This is probably even more true of the term neo-colonialism. The term ‘colonialism’ is more problematic. Although its initial rise to prominence was as a part of a radical movement, the success of this movement was paradoxical. The conservative appropriation of the term meant that to articulate an idea of colonialism did not necessarily mean placing oneself inside of a radical tradition. Similarly, ‘empire’ has never really been associated with *any* political movement.

This leads on to a second point about the politics of invoking these concepts. Robert Young has proposed that ‘imperialism’ needs to be fundamentally distinguished from ‘colonialism’ and ‘empire’. This is because both ‘empire’ and ‘colonialism’ have been ‘widely used for many centuries’, whereas imperialism is a relatively recent word. This, he argues, reflects something broader about the nature of the phenomena. For Young, imperialism ‘operated from the centre as a policy of the state, driven by the grandiose projects of power’ meaning it was ‘susceptible to analysis as a *concept*’. By contrast, colonialism ‘functioned as an activity on the periphery, economically driven’ meaning it should be ‘analysed primarily as a practice’.³⁴² This chapter has attempted to show that this was *not* the case, and that in fact the specific articulation of colonialism was an attempt to understand these ‘practices’ as systematically related and driven by a common logic.

However, Young *does* flag up an important issue. The choice of a particular term does not just bring into play a political movement, it also invokes a number of *theoretical* positions. Thus, to state the obvious, invoking ‘imperialism’ or ‘neo-colonialism’ will generally bring to mind the Marxist tradition. ‘Colonialism’ again is more complicated than this, but it is probably true to say that whilst many still hold to a radical account of colonialism it is now not associated with any theoretical tradition. One can say similar things about the word ‘empire’.

³⁴² Young 2001, 17.

More importantly, it is indisputable that empires have existed for almost as long as human history. Therefore to invoke 'empire' as one's primary theoretical reference point often means holding that oppressive international relations will be a permanent feature of human history. This is the final and most important sense in which the above debates matter. The theoretical and political aspects of a concept have implications for *historical specificity* of the phenomena under consideration, and, consequently, how they interrelate.

This rather abstract proposition is best illustrated by a quote from Nkrumah as to the relationship between imperialism, colonialism and neo-colonialism:

Colonialism is that aspect of imperialism which in a territory with an alien government, that government controls the social, economic and political life of the people it governs. Neo-colonialism is the granting of political independence minus economic independence, that is to say, independence that makes a State politically free but dependent upon the colonial power economically. Imperialism is nothing but finance capital run wild in countries other than its own.³⁴³

What Nkrumah shows is the consequences of adopting a *Marxist* theory. Such a vision involves first understanding imperialism as driven by the logic of finance capital. He then understands both colonialism and neo-colonialism as *aspects* of this broader phenomenon. Consequently they are transformed through their integration into an imperialist system. Imperialism, colonialism and neo-colonialism are therefore understood as part of a historically specific system, with a logic that can be analysed. To invoke imperialism, colonialism or neo-colonialism in this sense, is to think of them as social relationships with beginnings and possible *endings*. At the same time, by insisting that imperialism is linked to *capitalism*, this approach imperialism as broader than its particular expression in any given moment. This historical specificity therefore provides a programme of anti-imperialist politics.

This can be contrasted with the vision centred around 'empire'. This is particularly prominent in mainstream scholarship, of both the 'empirical historical' and theoretical variety. Here, imperialism is cast as 'empire-ism', with empire being identified with political control. Since empires have always existed, imperialism is either an irreducible fact of 'human nature', or an inevitable outcome of power politics. Subsequently, the

³⁴³ Nkrumah 1973, 172.

best that any ‘anti-imperialism’ can do is limit the consequences of these inevitabilities. There is another, closely related strand to this type of theorising. Insofar as empire is identified with domination, what is foregrounded is the conservative concept of colonialism. In these accounts, empire *ended* with the dismantling of the European system and – as a result – the present order is one built on anti-imperialism.

These historical, theoretical and political issues also have important consequences for international law. This is true on a simple level: international lawyers became *partisans* for the movements described above. Equally these movements frequently made use of international law. As a consequence of this, international law and international legal institutions have dealt openly and directly with colonialism.

It is not just that international lawyers have talked about empire, colonialism and imperialism. The theorists of these concepts also grappled with juridical issues. Many of the debates around empire and colonialism turned on whether they needed to be juridically formalised. Even when this formalisation was regarded as unnecessary, those who write about colonialism, empire and imperialism have constantly invoked international law. Indeed, it is telling that theorists of neo-colonialism have emphasised international legal institutions and instruments as the vectors of domination, despite the absence of any directly juridified colonial relationship.

These observations point to a more fundamental issue. In a 2003 intervention, Susan Marks argues that in talking about ‘empire’ one can trace three distinctive modes of theorising. The first is ‘empire as colonialism’, in which Europe’s formal political control over the non-European world is seen as paradigmatic. The second is ‘empire as hegemony’, here, empire is identified with the overweening power of a particular state in the international order and its ability to act outside of its ‘normal’ channels. The third is ‘empire as globalisation’, in this vision – essentially Marxist – empire is viewed as ‘particular stage in the development of capitalism’.³⁴⁴

This chapter has attempted to show that things are more complicated than this. But what is important is that Marks demonstrates that each of these particular concepts of empire comes with a particular theory about its relationship to international law. Insofar as

³⁴⁴ Marks 2003c, 903.

empire is understood as colonialism, international law is *against* empire, since ‘international law has set its face against colonialism’.³⁴⁵ By contrast, if empire is understood as hegemony, empire is seen to oppose international law, since the hegemon is constantly trying to circumvent the will of the ‘international community’. In this understanding, ‘international law and institutions are casualties of empire, flung aside and trampled down as surplus to imperial requirements’.³⁴⁶ Finally, when we conceive of empire as ‘the political order associated with contemporary globalization, it becomes clear that ... *empire and international law are institutions for one another*’ because international law is heavily implicated in the constitution and reproduction of this order.³⁴⁷

What Marks draws our attention to is that every theory of colonialism, empire or imperialism is *also* a theory of international law. Even if this is not explicitly stated, all theories will have implications for the understanding of the international legal order and its relationship to power, oppression, exploitation and domination. Given the complex political and theoretical debates outlined in this chapter, we can further understand that the consequences of a particular conception of imperialism for understanding international law will be equally complex.

Finally, if every theory of imperialism is also a theory of international law, the contrary must also be true. Implicitly or explicitly, international legal scholarship will rely on *some* concept of colonialism, empire or imperialism. Whether international lawyers like it or not, they are always and already embedded in the debates described in this chapter and, consequently, these debates are absolutely vital to understanding the international legal discipline.

³⁴⁵ Ibid., 902.

³⁴⁶ Ibid., 903.

³⁴⁷ Ibid.

CHAPTER 2: IMPERIALISM, THIRD WORLDISM AND INTERNATIONAL LAW

1. It is Good if we are Attacked by the Enemy

In 2006, Christian Tomuschat – the German jurist and academic – wrote a piece responding to two articles in the *International Community Law Review*.³⁴⁸ One article, by Yasuaki Onuma, was the recipient of good deal of praise. Tomuschat described it as ‘inspiring’,³⁴⁹ declaring that many of its points were ‘interesting and absolutely correct’.³⁵⁰ Of course, as with any scholar, Tomuschat had his disagreements, yet these remained respectful, and well within the bounds of scholarly discourse. The same cannot be said for the other article.

Tomuschat claimed that its author ‘does not make any great effort to prove his main contentions’,³⁵¹ describing the argument as ‘astounding’ and ‘disturbing’.³⁵² He stated the author was ‘a bad observer of realities’ who ‘errs ... grossly’.³⁵³ Furthermore, the author dared to ‘portray Che Guevara as a hero’, when he ‘had embraced terrorist methods to enforce his confused revolutionary agenda’.³⁵⁴ Tomuschat allowed that ‘[h]ere and there, the reader will find some useful ideas’ but immediately qualified this to the effect that ‘no useful insights can be gained’ for international law. Indeed, ‘[o]n the whole, the essay is of little help even in analyzing the current state of world affairs’.³⁵⁵ Most ominously of all, the piece is ‘a recipe for classs [sic] struggle on a worldwide scale’.³⁵⁶

The piece in question was B.S. Chimni’s ‘Third World Approaches to International Law: A Manifesto’. In this piece, Chimni – Marxist and TWAIL scholar – argued that ‘[t]he threat of recolonisation is haunting the third world’.³⁵⁷ In this trenchant critique of the newly emerging international order, Chimni put forward the proposition that globalisation and international law had come together in a configuration which

³⁴⁸ Tomuschat 2006.

³⁴⁹ Ibid., 76.

³⁵⁰ Ibid., 77.

³⁵¹ Ibid., 72.

³⁵² Ibid., 75.

³⁵³ Ibid.

³⁵⁴ Ibid., 76.

³⁵⁵ Ibid.

³⁵⁶ Ibid., 79.

³⁵⁷ Chimni 2006, 3.

threatened to remove the veneer of autonomy Third World states had gained during decolonisation.

Whilst Chimni's argument is clearly a radical one, it still seems necessary to ask – why the ire? Certainly, this response seems out of the normal bounds of the normal rules of intellectual engagement. So what is the explanation? Given Tomuschat's outrage at the mention of Guevara, one is tempted to quote another anti-colonial Marxist, one who is rather more controversial, and features on comparatively fewer t-shirts:

It is good if we are attacked by the enemy, since it proves that we have drawn a clear line of demarcation between the enemy and ourselves. It is still better if the enemy attacks us wildly and paints us as utterly black and without a single virtue; it demonstrates that we have not only drawn a clear line of demarcation between the enemy and ourselves but achieved a great deal in our work.³⁵⁸

Here, Mao contends that to be the subject of an attack, particularly a vicious attack, is a good thing. It shows that your analysis has shaken your opponent. Reading Tomuschat's piece certainly lends this argument some credibility. Alongside the aggressiveness, there is also a tone of *defensiveness*. Tomuschat was adamant that 'general international law has had a tremendous emancipatory effect' and reproached Chimni for failing to differentiate between legal and illegal military interventions.³⁵⁹

Following Schmitt, we might say that this is not surprising. For Schmitt, to consider someone as an *enemy* means to think of them as 'different and alien, so that in extreme cases [violent] conflicts with him are possible'.³⁶⁰ Of course, disputes in law journals rarely bubble over into armed struggle. But what Schmitt does draw our attention to is another aspect of the friend-enemy distinction: *fear*. We designate someone an enemy, and attack them viciously *because we fear them*. Why might Tomuschat 'fear' Chimni? What does Chimni threaten? This seems clear enough, Tomuschat felt that Chimni was threatening the international legal order. But *why* had this threat reached such a level?

Here, it is useful to turn to Marks' piece 'State-Centrism, International Law, and the Anxieties of Influence'.³⁶¹ In this article, fortuitously written in the same year as Tomuschat's, Marks argues that international lawyers labour under an 'anxiety of

³⁵⁸ Tse-Tung 1966, 15.

³⁵⁹ Tomuschat 2006, 75.

³⁶⁰ Schmitt 1996, 27.

³⁶¹ Marks 2006.

influence'. At first sight – and with the looming legal arguments over the legality of the invasion of Iraq – this anxiety might be a fear of how *ineffective* international law seems in the face of power.³⁶² Yet surely if one was anxious about international law's *weakness*, one would respond by showing it was in fact *strong*. Instead, in response to Iraq, the war on terror and other events, international lawyers were keen to point out that international law had in fact been broken, or trampled on, or ridden over. Perhaps, Marks states:

[T]he anxiety of influence felt by international lawyers is a not just a fear of irrelevance but a fear of relevance ... not just a shock at the recognition of politics in law, but a shock at the recognition of law in politics. If this is right, then what is troubling is not only belatedness, but also primordality, and not only indebtedness, but also responsibility. John Bolton and Richard Perle may like to think ... that international law is irrelevant to the US administration, but John Yoo and Jay Bybee know better ... [T]heir intricately argued 'torture memos' only really confirm what historians can tell us anyway: that empire is a legal construct – not only encumbered by international law, but also partly constituted by it.³⁶³

Read in this light, Tomuschat's vitriolic response is part of a broader process. The international legal discipline has rarely confronted the question of imperialism. Whilst early international lawyers were heavily involved in the projects of colonialism and imperialism, they did not understand their involvement in those terms. Insofar as they engaged with the concept of empire, it was simply because that was the word used to describe the European polities engaged in colonial and imperial projects. Whereas the events around the Scramble for Africa had inspired Hobson and those who followed him to think critically about 'imperialism' as a category, international lawyers had been vital in ensuring its 'success'. This 'insider' character of the international legal profession to the processes of imperialism meant international lawyers had little to do with the critical analysis of it.³⁶⁴

The Russian Revolution was harder to ignore. Following that Revolution, a party formally committed to anti-imperialism held power. This was reflected in the Bolsheviks' approach to international law. Very early on, they 'denied the universality of international law', claiming that the categories of 'civilised' and 'uncivilised' were a

³⁶² Ibid., 346.

³⁶³ Ibid., 347.

³⁶⁴ Anaya 2004, 1–31; Bowden 2005, 13–20; Koskeniemi 2002, 98–166; Simpson 2004, 227–253.

legal codification of capitalist imperialism.³⁶⁵ As a result, they engaged in a number of practices which prefigured the anti-colonial movement's international legal stance – they rejected secret and 'unequal' treaties; promoted the right to self-determination and denounced extraterritorial capitulations.³⁶⁶

The Russian Revolution, therefore, fundamentally changed how the international legal discipline related to imperialism. It threw up a number of practical problems with which the discipline had to deal. Equally, those jurists who were part of the revolution put forward their own Marxist accounts of international law, which produced a response from the wider discipline.³⁶⁷ In a real sense, 'Soviet Russia was perhaps the main power that made possible the demise of the international law of the era of European colonialism'.³⁶⁸ These events finally forced the international legal discipline to respond to the intellectual and political ferment around the concept of imperialism that had been growing since the 1890s.

The great wave of decolonisation from 1950-1970 was the highpoint of international legal dealings with imperialism. The rising tide of Third World jurists forced the discipline as a whole to confront international law's relationship with colonialism and imperialism, both theoretically and practically.³⁶⁹ In this context, the division between the radical and moderate wings of the anti-colonial movement became hugely important, with international law and lawyers tending to favour the conservative element and their understanding of colonialism.

The decline and fall of the Marxist and radical Third World movements throughout the 1970s and 1980s saw the victory of the conservative concept of colonialism. Since international lawyers were no longer *forced* to interrogate the relationship between their discipline and imperialism, the question of colonialism could be safely parcelled off as part of the 'history' of the field. Matthew Craven is correct to note that to talk of the colonial *origins* of international law 'is arguably no longer a standpoint of dissent, or of

³⁶⁵ Mälksoo 2012, 781.

³⁶⁶ Quigley 2007, 47–52.

³⁶⁷ Hazard 1938; Taracouzio 1935.

³⁶⁸ Mälksoo 2012, 784.

³⁶⁹ Röling 1960.

a radical revisionism³⁷⁰ but this is only the case insofar as colonialism remains part of the discipline's *history*.

What Tomuschat's article reflects is the changed context since the turn of the 21st century. As has been repeatedly noted, this has seen a resurgence in theorising about empire. This resurgence was 'inspired' by three military 'moments' – the 'humanitarian intervention' in Kosovo, the war in Afghanistan and the wider war on terror, and the second Iraq War. In each of these conflicts international law and legal arguments were directly foregrounded, with lawyers playing a prominent role in criticising³⁷¹ or defending them.³⁷² Once again, then, lawyers were *forced* to analyse the relationship between unequal global power relations and their own discipline.³⁷³ Labouring under an anxiety of influence, they have generally adopted the position described by Marks as 'empire as hegemony', insisting that the US is *against* international law.

However, mirroring the development of postcolonialism, throughout the 1990s a more critical trend developed in the international legal academy. Under the rubric of Third World Approaches to International Law (TWAIL) a number of scholars sought to understand the deeper connections between international law, colonialism and imperialism.³⁷⁴ They contend that international law was *born* in the 'colonial encounter' and that this encounter had enduring consequences for international law. These scholars, and the themes they have raised, have become more and more prominent.³⁷⁵

Tomuschat's response is indicative of the resonance these scholars have had. At a moment of profound anxiety for the discipline, they insisted that *everything it feared was secretly true*. In this respect, in Tomuschat we observe to re-enacting of the attempt to separate the conservative and radical Third Worldists. More than that, we see him declaring that Chimni's prescriptions are in fact *harmful* to the Third World. Tomuschat

³⁷⁰ Craven 2012, 862.

³⁷¹ Sands 2005.

³⁷² Holder 2012; Koh 2010; Brennan 2012.

³⁷³ Bartholomew 2006; Byers and Nolte 2003; Krisch 2005; Zolo 2002; Zolo 2009.

³⁷⁴ Gathii 2011, 28–39; Mickelson 2008, 356.

³⁷⁵ For instance, B.S. Chimni and Antony Anghie have given the Grotius Lecture at the American Society of International Law. However, that both of these talks were concerned with how international law might *facilitate* the construction of a fairer world, so we might think of them as functioning to *ease* the anxiety of influence, see Chimni 2007; Anghie 2010b.

declares that by insisting on international law's connection with imperialism and colonialism, Chimni is depriving the Third World of a vital shield against oppression.³⁷⁶

However, despite this prominence, there has been very little *systematic* unpacking of the way in which this scholarship relates imperialism to international law, and how this is situated within the broader history of thinking about colonialism, empire and imperialism. This chapter attempts to fulfil this task. Section 2 examines the 'first wave' of Third Worldist jurists. It argues that their theoretical positions can best be understood in light of their commitment to different understandings of colonialism and imperialism. Following this, it argues that contemporary scholarship emerged in the wake of the Third World's failure to fully problematise their engagement with international law, and the unsuccessful character of this engagement. Part of this failure owed to an insufficiently deep theory of the relationship between imperialism and international law. Section 3 examines the contemporary scholars who have attempted to remedy this. Having done this, Section 4 looks at how these accounts understand three 'moments': decolonisation, globalisation and military interventions. Finally, the Conclusion (Section 5) examines the emancipatory potential that these scholars have ascribed to international law.

2. Anti-colonialism, Anti-imperialism and International Law

2.1. Towards a Third Worldist Approach

International law was a crucial component of the anti-colonial movement. It served as the vessel through which colonial independence was initially recognised, and was one of the prime mechanisms that integrated the new states into the world order. Accordingly, the anti-colonial movement developed its own cadre of jurists. These jurists attempted to relate international law to the broader issues of colonialism and imperialism against which the movement mobilised, with the aim of formulating strategic and tactical perspectives for the Third World. This became increasingly important in the 1960s and 1970s, when more and more former colonies won their independence and entered the United Nations (UN). At this point, the Third World was potentially in a position to articulate an anti-imperialist international legal programme.

³⁷⁶ Tomuschat 2006, 72. In a similar vein, Brad Roth attacks James Gathii for advocating 'a fantasized radicalism that will lead scholars to abandon the defense of the very devices that give the poor and weak a modicum of leverage', Roth 2000, 2056–2057.

As a result, a number of works were published that attempted to understand how the ‘new states’ could relate to international law.

There were a large number of writers in this vein, of course, but some of the most important and influential were R.P. Anand, Mohamed Bedjaoui, S. Prakash Sinha, J.J.G. Syatauw and U.O. Umozurike. Because the perspectives of these jurists were directly informed by the anti-colonial and Third World struggles, their work fully embodied its political cleavages and contradictions. Vitally important in this respect was the division identified in Chapter 1 between radical and moderate Third World states. Some of these jurists were directly involved in implementing the Third World’s legal agenda and others sought simply to analyse it. In so doing, they internalised the distinct understandings of imperialism generated by the different wings of the Third World movement, with these understandings fundamentally shaping their work.

2.2. *Radical Third Worldism*

Algeria was one of the states that most exemplified the ‘radical’ wing of the anti-colonial and Third World movements described in Chapter 1 (Section 5.3.).³⁷⁷ On 1 November 1954, the Algerian Front de Libération Nationale (FLN) officially announced its existence, proclaiming its goal to be the ‘restoration of the Algerian state’ and independence from France.³⁷⁸ Its military wing – the Armée de la Libération Nationale (ALN) – conducted a sustained campaign of guerrilla violence against French forces and colonists, provoking brutal reprisals.³⁷⁹ In so doing, the ALN consciously borrowed from the ‘era’s Marxist-Leninist tropes’, conferring with Chinese and Vietnamese revolutionaries and adapting their tactics to Algeria.³⁸⁰ Politically and economically, Ahmed Ben Bella, one of the FLN’s leaders, was an admirer of the Cuban and Yugoslavian systems.³⁸¹

However, the French government did not simply attempt to suppress uprisings in its colonies. In 1956 the ‘*loi-cadre*’ were passed, which ‘granted increased internal autonomy’ to France’s colonial territories. A number of these territories took advantage of this law, which the FLN condemned as a ‘reformist manoeuvre to undermine African

³⁷⁷ Mortimer 1970, 363.

³⁷⁸ Naylor and Heggoy 1994, 310.

³⁷⁹ Ibid., 20–21.

³⁸⁰ Byrne 2009, 430.

³⁸¹ Ibid., 431.

anti-colonial solidarity'.³⁸² Such was the strength of this reformist bloc, that they took a long time to recognise the Provisional Government of the Algerian Republic (GPRA) and, at the UN, did not endorse an FLN-backed referendum on independence. The FLN was thus forced to look further afield than French Africa for allies, with the 'revolutionary unity of combat against the colonial situation' *in general* becoming 'a major theme of Algerian nationalism'.³⁸³

This heady brew came together in 1962 Evian Accords, where – under de Gaulle – the French government attempted a negotiated settlement, granting independence and economic aid, on the basis of a guarantee that the rights of French colonists would be respected and that key sectors of the Algerian economy would be leased to the French.³⁸⁴ This deal had been concluded by the GPRA, and was opposed by the more radical elements of the FLN – led by Ben Bella and Colonel Houari Boumedienne of the ALN. Forming an alternative power bloc, they denounced the Accords as a 'surrender to "neoimperialism" because they perpetuated European ownership of Algeria's economic assets' and articulated an alternative programme of '*economic* decolonization' involving wholesale nationalisation. A protracted power struggle followed, in which the GPRA was defeated and the FLN's 'Political Bureau' won out.³⁸⁵

In power, Ben Bella's regime adopted radical domestic measures. The French colonists had abandoned Algeria *en masse*, leaving vital administrative positions unstaffed. In response, Algerian workers took over their own industries. The Algerian government recognised this as a *fait accompli*, incorporating self-management into its economic programme. This was matched by a wider programme of nationalisation and planning, driven by 'a circle of leftist advisers' both from Algeria and abroad.³⁸⁶

This domestic radicalism also saw a deepening of the FLN's internationalism. Leading members argued that the unity of the Third World lay in its 'the common political experience of colonialism' and the 'continuing influence of the west' in the form of neo-colonialism.³⁸⁷ These members thought that Algerian anti-colonial movement served as

³⁸² Mortimer 1970, 365.

³⁸³ Ibid.

³⁸⁴ Byrne 2009, 432.

³⁸⁵ Naylor and Heggoy 1994, 28.

³⁸⁶ Byrne 2009, 433.

³⁸⁷ Mortimer 1970, 363.

a vanguard for the anti-colonial struggle and ‘spoke of a “vocation” to lead the post-colonial movement from economic and political exploitation to economic sufficiency and political dignity’.³⁸⁸ The fight against imperialism was therefore central to Algerian foreign policy. Under Ben Bella, national liberation movements were given material and ideological support, and Algeria constantly attempted to radicalise bodies like the Organisation of African Unity. Accordingly, Algerian foreign policy attempted to go beyond the simple anti-interventionism which characterised ‘moderate’ states. It was Ben Bella’s flamboyant style in this respect that earned his disfavour among some elements of the FLN. This was one of the stated reasons for Boumedienne’s 1965 *coup*. The Boumedienne regime positioned itself as continuing the FLN’s radical programme but in a less haphazard way.

Internationally, even after the coup, Algeria continued to chart a radical path. It retained friendly relations with the socialist bloc,³⁸⁹ cooperated closely with Cuba ‘in supporting revolutionary movements in Africa’³⁹⁰ and expanded its remit to those fighting imperialism and racism not in Africa, such as the Black Panthers and Palestinian militants.³⁹¹ This was matched by a continuing emphasis on occupying the radical vanguard of the Third World.³⁹² A fundamental element of this attempt to contest imperialism was the attempt to push for a programme of ‘economic liberation’.³⁹³ Under Boumedienne, Algeria called for the Third World to undermine imperialism through controlling the prices of raw materials. One can see then, that the FLN’s practice was driven by a radical understanding of colonialism. It was seen as a worldwide system driven by a capitalist logic which went beyond simple political control. Accordingly, it survived independence in the form of neo-colonialism and could only be undermined by ‘socialist’ measures domestically and internationally.

As noted in Chapter 1 (Section 5), this radical anti-imperialism – both in theory and practice – had unavoidable international legal consequences. Initially, there were questions concerning the legal *status* of the FLN and its actions under the laws of war. These gave way to wider foreign policy considerations: Algeria’s actions in

³⁸⁸ Ibid., 364.

³⁸⁹ Byrne 2009, 444–445.

³⁹⁰ Ibid., 444.

³⁹¹ Mortimer 1970, 383.

³⁹² Ibid., 381.

³⁹³ Byrne 2009, 444.

international institutions, its support for national liberation movements and its attempt to construct new economic arrangements all involved questions of international law.

Bedjaoui was the most prominent jurist to emerge from this milieu and this radicalism deeply penetrated his understanding of imperialism and its relationship to international law. In a way, Bedjaoui's legal career almost perfectly mirrors the material conditions in which the FLN found itself. He was a legal advisor to the GPRA during the struggle for independence and, once independence was achieved, was briefly the Dean of the Law Faculty at Algiers University, before becoming Minister of Justice between 1964 and 1970.³⁹⁴ In this capacity, he embodied the revolutionary spirit of the FLN, seeing the law as a tool for social transformation, with the role of the judge to create 'the most suitable conditions permitting our community to attain its objectives rapidly and easily'.³⁹⁵

Again mirroring the direction of the FLN, he embarked on a diplomatic career, becoming ambassador to France in 1969 and UN delegate in 1979. He also represented the Polisario Front at the ICJ, before becoming a judge in 1982.³⁹⁶ Bedjaoui's understanding of international law very much reflected his embeddedness within the political struggles of the FLN, sharing in the FLN's radical understanding of colonialism and imperialism. His work also reflects the changing political priorities that flowed from this understanding. In 1961, during the war for independence he published *The Algerian Revolution and the Law*³⁹⁷ which attempted to articulate legal justifications for the Algerian national liberation struggle. After this struggle was successful Bedjaoui turned his attention to building an international legal front for the Third World.

In so doing, Bedjaoui drew on the radical understanding of imperialism that the Third World movement had articulated. This was most evident in his book: *Towards a New International Economic Order*. This book was Bedjaoui's contribution to Algeria's attempt to enact an international policy of 'economic decolonisation'. Such decolonisation was to be achieved through a Third World front in which an ambitious legal reform project would be carried out under the umbrella term 'The New

³⁹⁴ Naylor and Heggoy 1994, 94.

³⁹⁵ Cited in Hazard 1970, 205.

³⁹⁶ Naylor and Heggoy 1994, 94.

³⁹⁷ Bedjaoui 1961.

International Economic Order'. This agenda had been pursued throughout the 1970s in a number of UN General Assembly Resolutions, eventually codified in Resolution 3202 (1974) as the 'Programme of Action on the Establishment of a New International Economic Order'. This programme aimed at securing 'conditions under which the developing countries could grow toward collective self-reliance and take care of their own basic needs'.³⁹⁸ This was to be achieved through enabling Third World control of corporations, allowing Third World states to nationalise property on their own terms, guaranteeing the Third World's ability to set up associations of primary commodity producers (such as OPEC) and reforming international trade to be more equitable.³⁹⁹

Writing in the midst of the economic crisis of the 1970s, Bedjaoui argued that the various problems facing the world could not be considered as the *causes* of this crisis. Instead, they were 'mere indicators of the crisis', which was instead rooted in 'the laws of profit, unequal trade' and 'imperialist dependence'.⁴⁰⁰ Hence, for Bedjaoui:

The historical and political reasons for the present disorder can be mainly expressed in terms of imperialism, colonialism and neo-colonialism. Dependence, exploitation, the looting of the resources of the Third World, and the introduction of zones of influence, have marked international relations with 'organized' or 'institutionalized' disorder. The cruel, inhuman law of maximum profit has finally succeeded in establishing disorder, with the Faustian power of multinational firms, the gigantism of military-industrial complexes, and the ecological disaster.⁴⁰¹

As should be evident, Bedjaoui's understanding of imperialism was situated quite explicitly within the radical, Marxist-influenced, tradition. Drawing on Marxist theorists like Samir Amin, he understood the '[t]he world economy' as 'organized on the basis of asymmetrical relationships between the dominant "centre" and the dominated "periphery"', with 'the exploiting and the exploited countries being integrated in this inequitable system'.⁴⁰² Although Bedjaoui did not focus extensively on colonialism, it is clear that he understood it as related to this broader system. He argued that Europe had first acquired colonies in the sixteenth century 'under the pretext of combating the

³⁹⁸ László 1978.

³⁹⁹ Prashad 2012, 27.

⁴⁰⁰ Bedjaoui 1979, 20.

⁴⁰¹ Ibid.

⁴⁰² Ibid., 23–24.

infidels and evangelizing them, whereas it was in actual fact to reduce them to slavery and exploit their wealth'.⁴⁰³

For Bedjaoui, each different phase of the world economy was matched by a distinctive international legal order. Following the Peace of Westphalia, international law was the law of the European state system. This system was largely uncomplicated by the European expansion into the 'New World' which was to be 'europeanized and evangelized'. Since Asian states were strong and organised, they could not be subject to direct European domination; accordingly, 'the relations between Asia and Europe were systematized in a sort of minor and marginal form of international law'.⁴⁰⁴

The growth of colonialism and imperialism in the 19th century changed this. Drawing on the classical theories of imperialism,⁴⁰⁵ Bedjaoui saw this period as one in which 'domestic' developments in European capitalism had compelled it to expand at an aggressive rate, assuming direct control over Asian and African states, in order to export capital. This gave rise to a rather different legal order. Bedjaoui argued that the international law of colonialism was composed of three elements: '(a) an oligarchic law governing the relations between civilized States members of an exclusive club; (b) a plutocratic law allowing these States to exploit weaker peoples; (c) a non-interventionist law ... carefully drafted to allow a wide margin of *laissez-faire* and indulgence to the leading States in the club'.⁴⁰⁶

These elements were mediated through the legal concept of 'civilisation'. Essentially, the 'exclusive club' of members of the international community were those states said to be civilised, which meant being organised 'in conformity with the canons and models of nineteenth century Europe'.⁴⁰⁷ States which did not conform to this model were uncivilised, and hence lacked legal personality, meaning that 'the right of conquest or occupation' could apply to them.⁴⁰⁸ For Bedjaoui, this was a fundamentally Eurocentric legal order. It was Eurocentric both because it directly embedded prevailing European forms of social organisation, that is to say 'the laws of the capitalist economy and the

⁴⁰³ Ibid., 56.

⁴⁰⁴ Ibid., 51.

⁴⁰⁵ See Chapter 1, Sections 4.1 and 5.3.

⁴⁰⁶ Bedjaoui 1979, 50.

⁴⁰⁷ Ibid., 53.

⁴⁰⁸ Ibid., 57.

liberal political system',⁴⁰⁹ and because, in so doing, it permitted European colonial exploitation.

'Classical' international law, therefore, was deeply imbricated with colonialism. There were two ways in which this was the case. The first was ideological, with the role of international law to *disguise* colonial exploitation.⁴¹⁰ This was linked to the second – more expansive – vision. Bedjaoui held that '[t]he law itself does not create' relationships of 'exploitation domination, alienation or inequality', but instead 'merely translates and expresses them'.⁴¹¹ The problem, therefore, was that international law had a 'laissez-faire and easy-going attitude' which led to 'legal non-intervention, which favoured the seizure of the wealth and possessions of weaker peoples'.⁴¹² The safeguards which European states had applied to themselves did not apply to non-European states.

Bedjaoui's understanding of colonialism, therefore, was in line with the radical anti-colonial movement's. He understood it as part and parcel of a world system of capitalist exploitation, which threw up a *systematic* logic of Eurocentrism. This understanding carried through into his assessment of decolonisation. Bedjaoui insisted that the dismantling of the formal European system had not ended imperialism as a whole because 'decolonization comes up against something even more powerful – the persistence of domination in the form of neo-colonialism'.⁴¹³ Again appealing to the radical anti-colonial movement, he characterised neo-colonialism as a situation in which 'multinational firms show a definite propensity to run the national affairs of the younger States'.⁴¹⁴

For Bedjaoui, international law reflected this. Following World War 2, there 'had been no radical change in international law'. It 'had ceased to be a European law only to become a law of the great powers' and whilst it no longer served 'political colonization, it did not cease for all that to be a means of economic domination'.⁴¹⁵ Very directly, therefore, this analysis of international law embedded a concept of neo-colonialism: it

⁴⁰⁹ Ibid., 49.

⁴¹⁰ Ibid., 57.

⁴¹¹ Ibid., 112.

⁴¹² Ibid., 49.

⁴¹³ Ibid., 76.

⁴¹⁴ Ibid., 37.

⁴¹⁵ Ibid., 60.

tracked a shift in the geographical centre of exploitation (from Europe to the USA), and flagged up the importance of economic domination.

Once again, Bedjaoui argued, this was facilitated by the veneer of ‘indifference’ of international law. International law’s ‘neutrality’ and focus on formal equality were artificial, and behind them one could discern ‘forms of real dependence, based on organized economic subordination’.⁴¹⁶ He likened this to the role of law in a liberal state, where formal equality between citizens masked forms of domination and exploitation.⁴¹⁷ This echoes Nkrumah’s definition of the neo-colonialist state as one that has ‘all the outward trappings of international sovereignty’, but whose ‘economic system and thus its political policy is directed from outside’.⁴¹⁸

On Bedjaoui’s reading, the prime problem was the ‘dichotomy between law and reality’.⁴¹⁹ Legally, states were independent, but in reality they were dominated and controlled. At first sight, Bedjaoui’s argument might appear to be identical to ‘liberal’ arguments about the relationship between law and power.⁴²⁰ In such accounts, the two are sharply opposed, with the world’s problems stemming from a *lack* of legal regulation. Certainly there is some of this in his account. At the same time, Bedjaoui quite specifically insisted that law was not *missing* from the colonial situation. Instead, the ‘permissive’ attitude of law, and the exclusion of certain issues from legal consideration, was *a legal assertion in and of itself*. Thus, rather than arguing that law is ‘absent’, Bedjaoui can be read as saying that law embeds the systematic Eurocentrism of imperialism, *through* its exclusion of certain issues. These two readings represent a source of some tension in Bedjaoui’s work; at points he seems to suggest that colonialism itself might have involved ‘distortion’ of the law,⁴²¹ whereas elsewhere he clearly states that legal ‘formalism’ is a *per se* ‘imperialist international law’.⁴²²

This analysis of international law conditioned Bedjaoui’s call for legal reform. In his account, the arrival of the anti-colonial movement had fundamentally called into question the old ‘indifferent’ law. He pointed out that one of the great achievements of

⁴¹⁶ Ibid., 81.

⁴¹⁷ Ibid., 114.

⁴¹⁸ Nkrumah 1973, 314.

⁴¹⁹ Bedjaoui 1979, 63.

⁴²⁰ Knox 2010b, 203.

⁴²¹ Bedjaoui 1979, 57.

⁴²² Ibid., 114. The latter is how Chimni interprets this, see Chimni 1999, 338.

the anti-colonial movement had been to undermine the formal equality, neutrality and indifference of international law by recognising the specificity of national liberation, colonialism and racism.⁴²³ For him, decolonisation would have to take this further, ridding the principle of sovereign equality of ‘all its illusions’. The Third World’s call for a New International Economic Order would have to reframe sovereignty to take account of the ‘economic and political context’ in which it existed.⁴²⁴ If neo-colonialism rested on formal, legal independence and economic domination, then the Third World could undermine this through elaborating principle of ‘economic independence’, which would involve fundamentally restructuring the global economy.⁴²⁵

As previously noted, Bedjaoui did not focus heavily on the relationship between international law and *colonialism*. Insofar as he did, it was as illustration for his reflections on neo-colonialism. In this sense, Umozurike provides an interesting counterpoint. Umozurike – a Nigerian – was less heavily involved in the anti-colonial and Third World struggles. He taught at several universities. In the 1970s he lectured at the University of Dar Es Salaam, Tanzania.⁴²⁶ Like Algeria, Tanzania was one of the more radical African states, and its governing party had committed itself – through the Arusha Declaration⁴²⁷ – to a form of ‘African socialism’, which would mobilise African unity against neo-colonialism.⁴²⁸ It was during this period that Umozurike wrote his most systematic account of the relationship between international law and colonialism – *International Law and the Colonisation of Africa*.

In this book Umozurike articulated a radical, Marxist-inflected understanding of colonialism. He understood slavery and early colonisation as rooted in the need to consolidate capitalism, initially through the acquisition of raw materials for the industrial revolution, and later owing to the need of a market for manufactured goods.⁴²⁹ Following Lenin, he located the genesis of *imperialism*, and its attendant systematic form of colonialism, in the period when ‘[c]apitalism in Europe reached a monopoly stage and became aggressively outward looking’.⁴³⁰

⁴²³ Ibid., 62.

⁴²⁴ Ibid., 99.

⁴²⁵ Ibid., 87. Mickelson 1998, 368–374.

⁴²⁶ Umozurike 1970.

⁴²⁷ Prashad 2007, 191–203.

⁴²⁸ Ofcansky and Yeager 1997, 21–22.

⁴²⁹ Umozurike 1979, 18.

⁴³⁰ Ibid., 24.

For Umozurike, this systematic European subordination of Africa played a crucial role in the formation of international law. He argued that international law ‘in its present form developed around the 16th century when the African Slave Trade was growing roots’. Since this law was ‘directed towards the promotion of European interests’, and the slave trade was vital to those interests, it recognised and legitimised slavery.⁴³¹ Emphasising the centrality of economic relationships to imperialism, Umozurike stated that international law only turned its face against slavery once it became *unprofitable*.⁴³²

At this point, the slave trade was giving way to colonialism. This required the wholesale subordination and transformation of African societies, for which the legal justifications of slavery were not enough. In common with most Third World jurists, Umozurike thought that the doctrine of ‘civilisation’ was vital. Whereas this doctrine had been somewhat controversial during the early ‘colonization of the Americas’, he argued, by the time colonialism was being established in Africa, the debate was over. African polities were not to be regarded as legal subjects, and so were denied any sovereign rights, opening the door to wholesale European colonisation.

Unlike Bedjaoui, Umozurike emphasised the *active* role of international law in colonialism. He noted that the spread of European domination was achieved through the use of commercial treaties or treaties of protection. These treaties facilitated the process of colonialism in a double sense. Firstly, they were a function of rivalry between imperialist powers. This was particularly true of the treaties which created protectorates, which generally gave the European power some form of ‘external’ control over the protected.⁴³³ In so doing, they excluded rival foreign powers from being able to interfere in the protectorate. Secondly, and more generally, treaties were one of the means through which European states were able to secure territory for commercial exploitation.⁴³⁴

These individual treaties were conducted in the shadow of the larger General Act of the Berlin Conference, which represented ‘a collective European decision to appropriate

⁴³¹ Ibid., 7.

⁴³² Ibid., 14.

⁴³³ Anghie 2005a, 89.

⁴³⁴ Umozurike 1979, 45.

Africans and Africa for themselves'.⁴³⁵ Again underscoring the Leninist inflection of Umozurike's understanding of imperialism, he viewed the Conference as an attempt to smooth out the growing inter-imperialist rivalries that had been generated by the 'scramble for Africa'. In this sense, then, Umozurike gave a detailed account of the way in which the distinctive economic logics of imperialism were realised in international legal form.

At the same time, however, these international legal principles also embedded a *racial* logic. For Umozurike, this represented an issue of fundamental continuity between slavery and colonialism. In both instances, international law was embedded 'with white racism', insofar as it created distinctions between the (white) colonisers, and the (black) colonised in order to promote the interests of the former.⁴³⁶ Although the precise legal nature of this changed, it remained a 'fundamental element'. This survived through to the League of Nations Mandate System, which, Umozurike held, reproduced colonialism in a new form.

Umozurike's radical approach also led him to characterise the period following decolonisation as neo-colonial.⁴³⁷ However, he was rather more sanguine in his appreciation of international law's possibilities than this would suggest. For Umozurike, despite the continuing presence of colonial patterns in the form of neo-colonialism, '[t]here has been a radical change in international law in relation to colonialism since the founding of the United Nations in 1945'.⁴³⁸ The anti-colonial movement had forced the UN to 'outlaw' colonialism and embed the principle of self-determination. Because of this, he continued, it might be turned against neo-colonialism. Echoing Bedjaoui, he believed that the 'different aspects of the principle of self-determination can be effectively used to minimise or eradicate neo-colonialism'.⁴³⁹

Despite their critical orientation towards international law, both Bedjaoui and Umozurike ultimately advocated the *reform* of international law. The reforms they proposed however were wholesale. This 'radical reformism' can be contrasted with the more timid accounts of Sinha and Syatauw.

⁴³⁵ Ibid., 26.

⁴³⁶ Ibid., 36.

⁴³⁷ Ibid., 126–127.

⁴³⁸ Ibid., 79.

⁴³⁹ Ibid., 133.

2.3. *Conservative Anti-Colonialism*

In terms of the distinction between radical and moderate forms of Third Worldism, South and East Asia offer an especially stark example. On the one hand, there were a number of states that fully embraced ‘communism’ of the Soviet or Chinese variety, including China, (North) Vietnam and North Korea. On the other hand, there were a number of more ‘moderate’ states, whose internal and external policies were much less radical. It was from these states – India and Indonesia respectively – that Sinha⁴⁴⁰ and Syatauw⁴⁴¹ hailed. Both India and Indonesia were important members of the Non-Aligned Movement, with the latter hosting the original Bandung Conference in 1955. They exemplified the spirit of Bandung, with its cautious line of maximum unity, oriented around the respect for territorial sovereignty. Sukarno (then President of Indonesia), for example, in at one of the most famous speeches of that conference, urged the Third World to ‘inject the voice of reason into world affairs’ and ‘mobilize all the spiritual, all the moral, all the political strength of Asia and Africa on the side of peace’.⁴⁴² This is a far cry from the fiery rhetoric of the FLN.

Both the Partai Nasional Indonesia (PNI) and the Indian National Congress Party had ‘a grab bag ideology, rooted in an anticolonial ethos, but in favor of a vague nationalism that attracted all social classes’.⁴⁴³ This was reflected in their domestic politics, which lacked a ‘clear agenda for the social development of their people’ and avoided mounting any attack on the old social classes.⁴⁴⁴ In both cases – in contradistinction to other anti-colonial struggles – Marxist and Communist movements did not play a decisive role in the struggle for independence.⁴⁴⁵ After independence, Congress in India had a very strained relationship with the – flourishing but very orthodox – Indian Communist movement, with Nehru ejecting a Communist state government from Kerala in 1959.⁴⁴⁶ Similarly, Sukarno and the PNI repeatedly repressed the Indonesian Communist Party.⁴⁴⁷ Over time, Sukarno grew closer to the Party, yet this was not reflected in the general attitude of the ruling elite. Following an unsuccessful *coup* by the Communists

⁴⁴⁰ Chimni 2010b, 27.

⁴⁴¹ Lorca 2012, 1037.

⁴⁴² Cited in Prashad 2007, 34.

⁴⁴³ Ibid., 35.

⁴⁴⁴ Ibid., 36.

⁴⁴⁵ Ibid.; Young 2001, 308–315.

⁴⁴⁶ Prashad 2007, 162.

⁴⁴⁷ Ibid., 36, 110.

in 1965, the military – under Suharto – massacred the Party, killing as many as 1.5 million people in the process. Sukarno's own association with the Party was the pretext for Suharto consolidating his power and deposing Sukarno in 1966.

These domestic peculiarities were reflected internationally. Both India and Indonesia's idea of non-alignment was one centred on peaceful co-existence and 'development'.⁴⁴⁸ Insofar as they sought to oppose imperialism, it was to be done through development and modernisation, at the expense of attending to the social and political forces that dominated and shaped international institutions and a 'deep understanding of the changing forms and modes of imperialism'.⁴⁴⁹ Whilst, like Algeria, these states sought to utilise international law and international institutions to further the interests of the Third World, their conception of how this would come about was quite different. Thus, they understood the New International Economic Order as a device to make the Third World more able to compete in the global economy, rather than an attempt to fundamentally undermine imperialist social relations.⁴⁵⁰

Consequently, it was the conservative concept of colonialism which animated much of the analysis of those scholars, theorists and activists in these countries who were not affiliated with the Communist movement.⁴⁵¹ This was reflected in the work of their jurists.⁴⁵² Sinha, in his *New Nations and the Law of Nations*, understood colonialism in a rather benign and unsystematic way. As with most of the authors of the period, he argued that the relationship between Europe and the non-European world had gone through a number of phases. The first was from the 16th and 18th century, where there was some colonisation, but not in Asia. In the second, occurring in the 19th and 20th centuries, these lands 'became colonial domains of western powers'. The final phase was that of decolonisation, 'when increasing rights are given to the peoples of these lands under international law, culminating, ultimately, in their emergence as states with full sovereignty'.⁴⁵³

⁴⁴⁸ Chimni 2010b, 25; Lee 2010, 12–15.

⁴⁴⁹ Chimni 2010b, 36.

⁴⁵⁰ Rajagopal 2003, 72. For a survey of Third World positions on the NIEO, see László 1978.

⁴⁵¹ Interestingly, those countries where the national liberation movement did not adopt some form of Marxism tended to have a strong ultra-orthodox Communist movement, which generally distanced itself from nationalism. In respect of India, see Young 2001, 308–315.

⁴⁵² Chimni 2010b, 39–41.

⁴⁵³ Sinha 1967, 12.

However, the way in which Sinha described these stages is very different from the more radical accounts. This is most evident in his account of the economics of the colonial period. Sinha stated that ‘private economic initiative of entrepreneurs in the developed countries brought their trade and investment in the underdeveloped areas of the world’. The problem was simply that ‘considerations of economic development of the country or investment were incidental’.⁴⁵⁴ Thus, rather than stress that colonialism was a system founded on systematic *exploitation*, it was understood in more neutral terms. Underdevelopment was just an accident that came about because the regime of ‘private investment’ was not geared towards developing the colonies. Colonialism had no underlying logic.

Consequently, Sinha focused much more heavily on the *political* aspects of colonialism. For him, what made the colonial period distinct was that ‘national units’ had all the power in world affairs, force was allowed to achieve national purposes, and only a limited number of political entities counted as ‘national units’.⁴⁵⁵ Thus, whereas the classical notion of colonialism meant viewing imperialism from the subject-position of the colonised, Sinha’s account focused on the interactions *between* European states. In this way, whilst he did recognise colonialism, it was only as a peripheral concern. This was in sharp contrast to the radical vision, which understood colonialism as a *necessary* accompaniment to European capitalism.

This understanding of colonialism extended to Sinha’s considerations of international law. Like many Third World jurists, Sinha foregrounded the Eurocentric nature of classical international law. He characterised this international law as:

[T]he law of a “compartmentalized society.” It corresponded to the characteristics and needs of a society which existed up to the time of the two world wars, in which a limited number of sovereign states maintained constant and close relations with each other. International law governed those relations, which were purely external relations between independent and sovereign powers. Thus limited to the indispensable minimum requisite for the functioning of the international society, the corpus of international law was relatively small. Its principal concern was to guard the independence of states ensuring their mutual non-interference.

⁴⁵⁴ Ibid., 43.

⁴⁵⁵ Ibid., 24.

It is interesting to note that this description does not in fact contain any mention of colonialism. Insofar as ‘colonialism’ is present, it is only through its absence, i.e. the fact that international law governs relations between ‘independent and sovereign powers’ must mean that it does not govern the colonies. This is important because it carries through into Sinha’s argument as to the *basis* of the Eurocentrism of classical international law. For him, the problem is that the ‘dominating influence in the formative process of international law’ was European.⁴⁵⁶ This was because it ‘grew out of usages of European state system’ and so ‘Asian and African peoples were excluded from the process of formulation of its rules’.⁴⁵⁷ The issue is not so much that international law helped create colonialism, but rather that its content was decided amongst European states.

Superficially, there is some similarity with Bedjaoui’s position. Yet Bedjaoui’s position was that the ‘laissez-faire’ nature of international law was designed to *support* European expansion. For Bedjaoui and Umozurike, colonialism was not an accident of European capitalist development, but absolutely central to it. Accordingly, any ‘European’ international law was *necessarily* colonial. By contrast, Sinha treated colonialism as a peripheral concern and consequently treated the relationship between international law and colonialism as largely contingent.

The foregoing considerations have important consequences for how Sinha viewed the post-colonial period. He admitted that the majority of new states were opposed to capitalism, and that this ‘stem[med] from the Leninist theory of imperialism’.⁴⁵⁸ He further acknowledged that many of the Third World states understood the post-colonial situation as one of ‘neo-colonialism’.⁴⁵⁹ Sinha, however, demurred from such an analysis. For him, the problem facing the post-colonial state was not neo-colonialism but ‘survival of their own economic position in a competitive world’.⁴⁶⁰ Since he identified colonialism with the formal European exclusion of the non-European world, the new order could not be neo-colonial, the new challenge was simply how to survive in a neutral ‘competitive’ space. Any residual ‘post-colonial attempts for retention of

⁴⁵⁶ Ibid., 23.

⁴⁵⁷ Ibid., 24.

⁴⁵⁸ Ibid., 56.

⁴⁵⁹ Ibid., 57–58.

⁴⁶⁰ Ibid., 79.

control are not so much the production of capitalism ... as of the rivalries of powerful states'.⁴⁶¹

Of course, as with most Third Worldists, Sinha did not think that things could go on as they were. He contended that '[t]he economies of the Asian and African states must be rapidly expanded to achieve good life [sic] for their people', which would require 'foreign capital to provide investment funds'.⁴⁶² Whilst he admitted that developing countries would have to consider the impact of assistance 'on their economic and political freedom of choice',⁴⁶³ he in no way saw this as bound up in a broader system of exploitation. For Sinha, there was no neo-colonialism, only a much more neutral global competitive system in which development needed to take place. Given this, it is unsurprising that, for him, international law simply had to become more oriented towards development⁴⁶⁴ and more inclusive of the Third World.

In *Some Newly Established Asian States and International Law*, Syatauw, like Sinha, argued that political rivalries between powerful states were the closest thing to 'imperialism' in the world. For Syatauw, the most significant feature of the post-colonial epoch was that 'the entire world has come under the spheres of influence of only two nation-states, the U.S.A and the U.S.S.R'. Adopting a strikingly realist pose, he argued that in the 'world power process', all other nations were ancillary to this struggle.⁴⁶⁵ This reflected his broader thinking about international relations. Essentially, Syatauw traced the problems of 'colonialism' and 'imperialism' to the general issue of 'inter-dependence'. As he saw it, international developments had led to 'more intensive contact' between societies, which would lead to 'more international tension'.⁴⁶⁶

This general account of international relations framed his reflections on the relationship between colonialism and international law. Syatauw partly agreed with the Bukharin-Lenin account of colonial expansion. For him, until the end of the 18th century, the West had interests that were primarily commercial, and so 'could be achieved chiefly by peaceful means of negotiations and agreements'. However, decreasing profits 'soon

⁴⁶¹ Ibid., 60.

⁴⁶² Ibid., 30.

⁴⁶³ Ibid., 47.

⁴⁶⁴ Ibid., 36–40.

⁴⁶⁵ Syatauw 1961, 5.

⁴⁶⁶ Ibid., 11.

made the Europeans aware that it would be more profitable to have one's own establishments in these areas rather than to depend ... on the good will of the Eastern princes and chiefs'.⁴⁶⁷

As with most of the scholars previously surveyed, Syatauw argued this had the legal consequence that Asian states were initially recognised as sovereign in a limited sense, whilst later being cast as uncivilised. Echoing Bedjaoui and Umozurike, he maintained that 'Western theories on East-West relations ... represented in large parts an ex post facto rationalization of and justification for the establishment of a colonial empire'.⁴⁶⁸ However, he immediately qualified this. Firstly, he stated that these developments had 'little actual relevance to international law proper', since the colonial territories were governed by the 'municipal law of their European motherlands'.⁴⁶⁹ Secondly, he argued that in exploring East-West relations 'theories often made use of *non-legal* terms like "civilization" which were inadequately defined'.⁴⁷⁰

The first point brings Syatauw very close to Sinha. Like Sinha, he argued that modern international law was not to be understood as shaped by the colonial experience; rather it 'came into being as the product of frequent interactions among the nations of Western Europe' who 'shared a common cultural background'.⁴⁷¹ The second point is more interesting. He argued that prior to the European contact with Asia 'the area was already occupied by several kingdoms and other states', which had their own international rules and customs, and had been dealt with by the Europeans on the basis of some equality. Consequently, this was an area 'to which international law is not foreign at all'. This meant that to 'many Asians ... European domination was just another illegal occupation'.⁴⁷²

Accordingly, Syatauw sought to reconstruct Asian societies' systems 'of rules ... considered to be binding in their mutual relations', claiming that such rules 'may well have been quite similar in nature to the body of rules existing in Europe'.⁴⁷³ What this meant was that the claims as to Asia's lack of civilisation could be proved untrue. In

⁴⁶⁷ Ibid., 42.

⁴⁶⁸ Ibid., 51.

⁴⁶⁹ Ibid., 53.

⁴⁷⁰ Ibid., 51 (emphasis added).

⁴⁷¹ Ibid., 20.

⁴⁷² Ibid., 18.

⁴⁷³ Ibid., 35.

practice, Syatauw was ambivalent about what effect this could have. He freely admitted that ‘the question whether Asia had a system of international law in the pre-colonial time is academic and irrelevant to modern international law’.⁴⁷⁴ Nonetheless, he insisted that it was essential to avoid looking at Asian states from a ‘Europe-centric point of view’ and instead to ‘see them through Asian eyes’.⁴⁷⁵

2.4. *The Politics of ‘Colonialism’*

At this point, it is worth reflecting more broadly on the way in which particular understandings of colonialism and imperialism play out in legal scholarship, and the political and theoretical consequences that flow therefrom.

Essentially, on the one hand there was a radical understanding of colonialism, rooted in the Marxist-inspired wing of the Third World movement. This view understood colonialism as part of a wider system of imperialism, rooted in a particular stage of capitalist development. In this account, European expansion into non-European societies was systematically driven by a need to increase profits. Colonialism, therefore, was not simply a peripheral activity in which Europe engaged, but rather was *vital* to its continued wealth and prosperity. If colonialism was central to European development, and racism was central to colonialism, then insofar as international law is ‘European’ it is also both of these things. Rather than understanding international law as Eurocentric because Europeans developed it, it was *structurally* Eurocentric. Furthermore, since imperialism is broader than colonialism, it was seen to *persist* in the form neo-colonialism. This meant that international law continued to mediate neo-colonial relations after decolonisation.

This had consequences for the politics of international law. If the above positions are held, then it is not enough to simply ‘universalise’ international law and ensure that all states are able to participate in its ‘formation’. Instead, it needs to be radically restructured, so as overcome its colonial content and to take into account the reality of neo-colonialism. All of this characterised Bedjaoui and Umozurike’s work.

In Sinha and Syatauw we can observe accounts which drew on the more conservative conception of colonialism (and on elements of the ‘political’ and ‘empire-ist’ accounts

⁴⁷⁴ Ibid., 44.

⁴⁷⁵ Ibid., 30.

of imperialism). Here ‘imperialism’ is seen as resulting from a generic form of ‘power politics’ or inter-dependence, with colonialism referring to formal European *political* domination. In this account, colonialism is largely *contingent* to European development. Insofar as colonialism is therefore *separable* from European development, what is at issue is not the (necessary) exploitation of non-European states, but their *exclusion*. Eurocentrism is not a practice internal to colonialism, but rather the intellectual product of a common European culture.

If Eurocentrism is understood in this way, it is not deeply embedded in the international legal project. From this, two approaches follow. The first is to *universalise* international law. If Eurocentrism is just about ‘excluding’ the voices of the non-European, then including them will change things. The second is to argue that Eurocentrism resulted from a *distortion* or *mistake* about non-European cultures. This involves giving an account of the fact that non-European social formations were *in fact* sovereign entities, with their own systems of international law. These two positions then come together in the assertion that the non-European world is now making its own distinct contribution to international law. Since colonialism is simply about European political domination international law *ended* it. Any residual Eurocentrism, therefore, is the *legacy* of colonialism, and can be overcome without radically transforming international law.

Oscillation around these positions tended to structure the thought of the original Third Worldist jurists.⁴⁷⁶ Of course, it is better to view these positions as *tendencies* rather than outright positions as, in practice, many scholars hold multiple understandings of colonialism and imperialism. This is clear, for instance, in the work of Anand, another Indian scholar. At times Anand seems to adopt a directly Marxist inspired understanding of imperialism, yet at other times, he adopts a vision centred on the idea of White Man’s Burden.⁴⁷⁷ The consequence of this is that whilst he was clear that international law was deeply implicated in colonialism, he also thought colonialism had *ended*. Consequently, he locates the problems in the ‘lingering remnants of

⁴⁷⁶ Gathii 2012 argues that African international legal thinkers can be divided into ‘contributionists’ and ‘critical theorists’, with the former attempting to argue for Africa’s distinctive contribution to international law, and the latter arguing for international law’s complicity in colonial and imperial exploitation. He does not locate this in wider traditions of thinking about imperialism.

⁴⁷⁷ Anand 2008, 27.

colonialism’⁴⁷⁸ and the ‘legacy ... of certain rules and rights which are considered to still be valid today’.⁴⁷⁹

2.5. *International Law and Sociological Functionalism*

Despite their quite radically different visions of colonialism and imperialism, the above jurists shared some fundamental similarities. In order to unpack this it is useful to turn to the work of Jacques Vergès. Vergès is not generally mentioned in relation to Third World jurists. However, during the 1950s and 1960s, he was exemplified the radical Marxist Third Worldist tradition. He was both a Communist Party militant and a Third Worldist who formulated his legal perspectives reflecting upon his work defending the Algerian FLN. In this way, then, he represents an interesting counterpoint Bedjaoui. Both converge in holding to a Marxist-inflected Third Worldist account of imperialism, yet Vergès was a *Communist* whose political and theoretical priorities led to him fight for national liberation, whereas Bedjaoui was a nationalist, whose political priorities led him to adopt Marxism in order to understand his own situation.

Focusing specifically on criminal law, Vergès maintained that the role of law was to resolve social contradictions in favour of the ruling class.⁴⁸⁰ This meant that to engage in legal argument on its own terms was to ultimately collude with and reinforce the existing order.⁴⁸¹ In winning a legal argument, one might escape the wrath of the state, but it would be at the expense of legitimating the *status quo*. Against this, Vergès advocated the trial of *rupture*, where the ‘accused’ refuses to accept the *status quo*, using the trial as a platform to mount a direct attack on the *status quo*.⁴⁸² In ‘legal terms’, such a defence will often not be successful, hence in the ‘normal’ ruptural trial ‘the goal of the defence is less to acquit the accused than to illuminate its ideas’.⁴⁸³

However, Vergès argued that in the wider context of the Russian, Chinese and anti-colonial revolutions,⁴⁸⁴ it had become possible to spread one’s ideas *and* win a legal victory. These worldwide movements would mobilise ‘outside’ of the court in such a way that even if one lost in legal terms, political pressure could secure a victory. Vergès

⁴⁷⁸ Ibid., 86.

⁴⁷⁹ Ibid., 44.

⁴⁸⁰ Vergès 1968, 18.

⁴⁸¹ Ibid., 19.

⁴⁸² Ibid.

⁴⁸³ Ibid., 104.

⁴⁸⁴ Ibid., 183.

focused closely on the example of the FLN, who ‘practised total rupture’, using the courtroom to stage a struggle for national independence.⁴⁸⁵ In particular, the FLN raised the question of torture not in order to vindicate a liberal prohibition against it, but rather to show that colonialism – by its very nature – aimed at destroying the Algerian people.⁴⁸⁶ We might say that this is the most *direct* example of how the radical concept of colonialism and imperialism played out in legal terms. If imperialism and international law are ‘institutions for each other’, then to inhabit international law on its own terms will only ever legitimise and consolidate imperialism. At best, for Vergès, the law could be temporarily ‘inhabited’ and used to directly attack colonialism, but could never serve as a vehicle to *systematically* challenge imperialist social relations.

In Vergès, then, we see an account which analyses law as being structurally tied to capitalism and imperialism. This limited its ability to directly challenge these social relations. By contrast, the jurists previously considered, whatever their differences, all ultimately saw international law as part of the solution to neo-colonialism. This conclusion rested on a broader shared theoretical position as to the nature of international law. Essentially, all of the above jurists understood law in a ‘sociologically functional’ way.⁴⁸⁷ For them, international law was an essentially neutral vessel that performed a given set of social functions depending on its social context.⁴⁸⁸ As Onuma put it in 2003:

[I]nternational law has conducted, and continues to conduct, distinct societal functions based on a general understanding and perception of law There are a variety of international laws, depending on forms or ‘sources’, the particular area they are supposed to regulate, the way they are understood and perceived in different countries and in different historical periods, and so on. The functions of international law differ in relation to different conditions and circumstances.⁴⁸⁹

⁴⁸⁵ Ibid., 185.

⁴⁸⁶ Vergès 1968.

⁴⁸⁷ Whilst these accounts bear some superficial similarity to the ‘functionalist’ school in sociology they do not draw explicitly upon sociological theory. Here the ‘functionalism’ is at a much more undertheorised and ‘spontaneous’ level. The term is used here because it descriptively captures a vital aspect of Third Worldist international legal theorising.

⁴⁸⁸ In this respect, their accounts bore a great deal of similarity to the Austro-Marxist jurist Karl Renner, who essentially saw law as a series of norms whose role was to fill certain social functions in *every* society. For him, when the economy changed, law would change with it, continuing to fulfil the social functions in new contexts. See Renner 2009 and Kamenka 1981, 33–43.

⁴⁸⁹ Yasuaki 2003, 107.

For the above authors, international law was seen to ‘express’ social and economic relations;⁴⁹⁰ develop ‘to meet the challenges of the times’;⁴⁹¹ reflect ‘the impact of world developments’⁴⁹² or be ‘determined’ by ‘sociological factors of a society’.⁴⁹³ As Onuma acknowledges, this functionalism could take on more or less critical variants. Thus, some of the above authors argued ‘a major function of international law is to provide a tool for achieving international justice’, whereas others understood international law’s function ‘as that of justifying global dominance and exploitation by the powerful developed countries’.⁴⁹⁴

Crucially, however, since international law’s function reflected and expressed social and economic relations, it would also *change* with those relations. This was particularly important in the context of decolonisation. Both the radical and more conservative scholars shared the idea that if the forces of decolonisation were changing the world, then international law would also change. In this way, international law’s function could become one of securing national liberation.

Here the contrast with Vergès is apposite. If, to greater and lesser degrees, these jurists were able to trace the impact that imperialism and colonialism had on international law, there was no account of why international law specifically served this role, and *what* made it so suited to perform the task of mediating imperialist social relations. Insofar as law ‘expressed’ social and economic relations, it was the same as any other social phenomenon. There is little sense of law as specific social relation beyond its ‘functions’, and hence the specificity of the relationship between law and colonialism (and imperialism) was left untheorised.

As the Bolshevik jurist Evgeny Pashukanis said in another context, one is left with ‘a history of economic forms with a more or less weak legal colouring’.⁴⁹⁵ This meant that, despite the long history of intertwining between international law and colonialism, it was ultimately understood as a *contingent* relationship. It was this aspect that some scholars in the later Third World tradition sought to address.⁴⁹⁶

⁴⁹⁰ Bedjaoui 1979, 106.

⁴⁹¹ Umozurike 1979, 138.

⁴⁹² Syatauw 1961, 1.

⁴⁹³ Anand 2008, 25.

⁴⁹⁴ Yasuaki 2003, 107.

⁴⁹⁵ Pashukanis 1980c, 42.

⁴⁹⁶ Anghie and Chimni 2003, 84.

3. Third Worldism After the Third World

3.1. *Beyond Sociological Functionalism*

One of the most striking features about the ambitious programmes of international legal reform proposed by the Third Worldist movement is just how comprehensively they failed. It is telling that both Bedjaoui's and Umozurike's books were published in 1979. Whilst '[f]uture historians may well look upon the years 1978–80 as a revolutionary turning-point in the world's social and economic history',⁴⁹⁷ it was not because of the Third World's call for a New International Economic Order. One might plausibly claim that a 'new international economic order' *was* born in these years, but it was not the vision promoted by the Third World. Instead, the period gave rise to neo-liberalism, an aggressive strategy of capitalist accumulation which broke the back of the Third Worldist movement.⁴⁹⁸

How, then, to deal with this? As noted in Chapter 1, one of the reasons that postcolonialism came into being was because of this failure. In its attempts to utilise 'institutions' like the nation state, or the UN, the Third World movement seemed to be casting these as 'neutral' empty vessels through which any political project could be expressed. Yet given the persistent and comprehensive failure of these institutions to advance the interests of the Third World, this belief seemed fundamentally misplaced. Given the centrality of international law to these institutions, doubts had to be cast on its neutral character as well. This need was reinforced by the fact that these institutions did not simply fail to advance the interests of the Third World, but rather were crucial in the creation and expansion of neoliberalism.⁴⁹⁹

Accordingly, subsequent analysis *had* to go beyond the sociological functionalism of the original Third Worldist jurists, and ask whether there was something about international law in particular that steered it towards this fate.⁵⁰⁰ As Luis Eslava and Sundhya Pahuja note, 'the project became less about trying to use international law to remedy the social and economic domination of the postcolonial world by the former imperial powers ... and more about how colonialism and imperialism and their ways of

⁴⁹⁷ Harvey 2005, 1.

⁴⁹⁸ Prashad 2012, 47–83.

⁴⁹⁹ Harvey 2005, 29.

⁵⁰⁰ Anghie and Chimni 2003, 79–83; Mutua 2000, 132.

knowing have been crucial to the formation and practice of international law as a discipline'.⁵⁰¹

This contemporary movement has come to be identified under the self-appellation 'Third World Approaches to International Law', or TWAIL.⁵⁰² In a move strongly reminiscent of scholars associated with postcolonialism, TWAIL scholars reach back historically and cast the older generation of Third World jurists as a 'TWAIL I' to their 'TWAIL II'.⁵⁰³ As such, TWAIL scholars tend to describe 'TWAIL' as a broad and longstanding 'political' project.

On this basis, Anghie and Chimni state that the core insight of 'TWAIL' is that 'international law only makes sense in the context of the lived history of the peoples of the Third World'.⁵⁰⁴ The fundamental experiences of these peoples have been colonialism and neo-colonialism, meaning that attending to the 'power relations among states and ... the ways in which any ... international rule ... will actually affect the distribution of power' is the defining feature of 'TWAIL' scholarship.⁵⁰⁵

Broadly speaking then, TWAIL scholars understand themselves as operating within 'a political project'⁵⁰⁶ which emerged after the 'moment' of decolonisation.⁵⁰⁷ Makau wa Mutua has enumerated three elements to this project:

The first is to understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialized hierarchy of international norms and institutions that subordinate non-Europeans to Europeans. Second, it seeks to construct and present an alternative normative legal edifice for international governance. Finally, TWAIL seeks through scholarship, policy, and politics to eradicate the conditions of underdevelopment in the Third World.⁵⁰⁸

⁵⁰¹ Eslava and Pahuja 2011, 117.

⁵⁰² A note on terminology: although these scholars have attempted retrospectively construct a TWAIL canon, such a canon does not really capture the complex political alliances of the first generation of Third Worldist jurists. Moreover, it may actually serve to *obscure* real political and theoretical differences that existed *amongst* these jurists and *between* these jurists and contemporary scholars. As such, and given that 'TWAIL' was not a label chosen by those jurists, the use of the term TWAIL will here be reserved exclusively for contemporary scholars.

⁵⁰³ Anghie and Chimni 2003; Mickelson 2008, 361.

⁵⁰⁴ Anghie and Chimni 2003, 78.

⁵⁰⁵ Ibid.

⁵⁰⁶ Anghie 2008, 480.

⁵⁰⁷ Mutua 2000, 31.

⁵⁰⁸ Ibid.

The result of these quite broad political objectives is that TWAIL scholars have generally understood TWAIL as an umbrella label, which does not necessitate any particular *theoretical* position. Instead, TWAIL scholars adopt a diversity of theoretical approaches.⁵⁰⁹ However, this diversity is not unlimited and there are several points of unity. Firstly, insofar as TWAIL is positioned as a ‘political project’ oriented to fighting colonialism, imperialism and Eurocentrism, this implies understanding the world in these terms. Secondly, these positions are already situated within the debates described in Chapter 1, as well as those discussions described in the previous section. Finally, insofar as contemporary TWAIL scholars see themselves as ‘going beyond’ the original Third World jurists, they share a common interest in exploring the historical and structural connections between international law, colonialism and imperialism.

By consequence, certain distinct theoretical patterns emerge from a close examination of TWAIL scholarship. The focus in the next section will be on some of the main contemporary figures, chosen for their influence as well as their representative nature of trends within contemporary theorising.

3.2. *Civilising Missions*

In 2007, David Kennedy stated that ‘TWAIL ... was forged in Anghie’s encounter with the history of international law’.⁵¹⁰ Whilst this may be an exaggeration, it remains true that Antony Anghie’s work has been one of the main reference points for TWAIL scholarship.⁵¹¹ Interestingly, although Anghie’s major work is entitled *Imperialism, Sovereignty and the Making of International Law*, the book is not overtly concerned with thinking through the concept of ‘imperialism’. There are brief references to Hobson and Lenin⁵¹² and mention of World Systems theory⁵¹³ but much of the wider theoretical framework remains implicit. Anghie *does* offer a description of imperialism at the beginning of the book, where, following Doyle (see Chapter 1 Section 3), he states that “[c]olonialism” refers, generally to the practice of settling territories, while ‘imperialism’ refers to the practices of an empire’.⁵¹⁴ Despite this, he uses the terms ‘interchangeably because of their close relationship to each other’.⁵¹⁵ However, he also

⁵⁰⁹ Gathii 2011, 37; Okafor 2008a, 375–376.

⁵¹⁰ Kennedy 2007.

⁵¹¹ Gathii 2011, 31.

⁵¹² Anghie 2005a, 142–143.

⁵¹³ *Ibid.*, 182.

⁵¹⁴ *Ibid.*, 11.

⁵¹⁵ *Ibid.*

notes that imperialism exceeds and survives colonialism, in ‘the practices of powerful Western states in the period following the establishment of the United Nations’.⁵¹⁶

That being said, this quite narrow definition of imperialism is matched by a broader vision of imperial and colonial relations. In this respect Anghie is similar to Said, who articulated a rather modest account of imperialism and colonialism alongside his theory of Orientalism.⁵¹⁷ In Anghie’s account, colonialism is central to the birth and development of international law. He argues that the standard narrative of international law has tended to treat colonialism as a peripheral or side issue. In such accounts, ‘international law came to the colonies fully formed and ready for application’, with the role of international law to simply assimilate different societies into an already existing ‘European’ system.⁵¹⁸ Here, there is no real ‘problem of difference’ because international law has pre-empted it. Colonialism was simply an issue that an already-formed international law had to confront.

For Anghie, these ‘traditional’ accounts are premised upon a particular way of thinking about international law. In this way of thinking, the task of international law is creating ‘order’ among sovereign states. However, this cannot adequately answer a logically *prior* question, namely, how it is that certain social formations are *excluded* sovereignty? Before one can talk about ‘order among sovereign states’, one has to know what *counts* as a sovereign state.⁵¹⁹ Anghie insists that unless such an approach is taken, we will inevitably arrive at a Eurocentric account of international law, which abstractly universalises the European experience. Such an account fails to capture the reality of the situation, since the transformation of non-European societies into sovereign states was not simply the abstract extension of ‘order’. Rather, it was bound up with the violence of colonial expansion.

Anghie does not simply think that we have to pay attention to the history of those who were not international legal sovereigns. This would still imply that an international law concerned with ‘order among sovereign states’ came fully formed to the non-European world. Rather, he claims that international law has always been concerned with the

⁵¹⁶ Ibid., 12.

⁵¹⁷ Said 1994, 8.

⁵¹⁸ Anghie 2005a, 5.

⁵¹⁹ Ibid., 6.

management of ‘cultural difference’.⁵²⁰ As a consequence of this, sovereignty actually *emerges* from the colonial experience. It was only through the management and confrontation of cultural difference that sovereignty as we know it today was born. Hence, for Anghie, developments of international law ‘cannot be understood simply and always as logical elaborations of a stable, philosophically conceived sovereignty doctrine’⁵²¹ rather they were *generated* by colonialism.⁵²²

In this way, Anghie directly addresses the issue of sociological functionalism. For him, international law is not simply a neutral receptacle which reflects a given balance of forces at any given point in time. Rather, ‘the colonial encounter, with all its exclusions and subordinations, shaped the very foundations of international law’.⁵²³ As Craven puts it, in Anghie’s account, international law was ‘profoundly shaped by ... [the colonial] encounter, encoding within its disciplinary structures ... the discriminatory features of cultural difference’.⁵²⁴ This has implications for any attempt to use international law for the purposes of liberating the Third World.

Whilst Anghie may not explicitly situate himself within theoretical debates about the nature of imperialism and colonialism, his work shares in the problematic of postcolonialism.⁵²⁵ This is evident in his insistence that we move beyond Eurocentric, historicist accounts of the extension of sovereignty and recover a subaltern perspective. More importantly, his account of sovereignty is structurally analogous to Said’s account of ‘othering’. Thus, where Said argued ‘neither the term Orient nor the concept of the West has any ontological stability; each is made up of human effort, partly affirmation, partly identification of the Other’,⁵²⁶ one can substitute ‘sovereign’ and ‘non-sovereign’ to encapsulate Anghie’s argument. The ‘self’ of ‘sovereignty’ was created through the positing the ‘other’ of the non-sovereign.

Further mirroring postcolonialism, Anghie contends that this process is an endless one, embedded in international law in a ‘dynamic of difference’:

⁵²⁰ Ibid.

⁵²¹ Ibid.

⁵²² Ibid., 7.

⁵²³ Ibid., 8.

⁵²⁴ Craven 2012, 863.

⁵²⁵ He does acknowledge this debt, see Anghie 2005a, 9, fn14.

⁵²⁶ Said 2003, xii.

International lawyers over the centuries maintained this basic dichotomy between the civilized and the uncivilized, even while refining and elaborating their understanding of each of these terms. Having established this dichotomy, furthermore, jurists continually developed techniques for overcoming it by formulating legal doctrines directed towards civilizing the uncivilized world. I use the term ‘dynamic of difference’ to denote, broadly, the endless process of creating a gap between two cultures, demarcating one as ‘universal’ and civilized and the other as ‘particular’ and uncivilized, and seeking to bridge the gap by developing techniques to normalize the aberrant society ... The dynamic is self-sustaining and indeed, as I shall argue, endless; each act of arrival reveals further horizons, each act of bridging further differences that international law must seek to overcome.⁵²⁷

We might say that for Anghie, just as for Bhabha, international law is structured around ‘the desire for a reformed, recognizable Other, *as a subject of difference that is almost the same, but not quite*’.⁵²⁸ The key moments in this process are when European expansion first confronts the non-European world. Two particular instances are especially important to his story: firstly, Francisco de Vitoria’s mediations on Spanish dealings with Native Americans (‘Indians’) in the 1500s, and, secondly, the reflections of the 19th century international legal positivists

Vitoria was a 16th century Spanish jurist and theologian who is seen as one of the forerunners of international law.⁵²⁹ Anghie argues that in orthodox accounts Vitoria is seen as applying or extending a pre-existing European legal framework to the Americas. By contrast, Anghie suggests that, in fact, Vitoria was only able to articulate ‘international law’ *because* of the ‘unique issues generated by the encounter between the Spanish and the Indians’.⁵³⁰ Prior to Vitoria, the relationship between the Spanish and the Indians was understood to be mediated through divine law. Essentially, the ability to hold property was said to be dependent upon divine law, and therefore upon Christian belief. As a result, the Indians could have no right to ‘their’ property, and so the Spanish could freely appropriate their land.⁵³¹ Vitoria disputed this, holding that divine law had to be separated from human law, and that clearly it was human law that determined whether or not one could hold property.

⁵²⁷ Anghie 2005a, 4.

⁵²⁸ Bhabha 2004, 112.

⁵²⁹ Anghie 1996, 321.

⁵³⁰ Anghie 2005a, 15.

⁵³¹ Ibid., 17.

Thus, rather than interacting within a single overarching framework of divine law, the Indians and the Spanish interacted through two separate systems of ‘human’ law. The confrontation was thus recast as one of jurisdiction.⁵³² However, Vitoria then declared that alongside divine and human law is the *jus gentium* (the law of nations). This law was arrived at through the use of human reason, and since the Indians possessed this, they too were bound by it. For Vitoria, the content of this *jus gentium* was a kind of secular state of nature, which created a series of reciprocal rights and duties. Chief among these were the rights to ‘sojourn’ in other territories, and engage in trade. Insofar as these norms were violated, they would enable redress.

Anghie holds that, whilst this appeared ‘to promote notions of equality and reciprocity’,⁵³³ the practices contained within the *jus gentium* were in fact an abstract universalisation of the commercial practices of Spanish society. When this was combined with the fact that it was the Spanish who were present in the New World (and not the other way round), the practical effect of this ‘universality’ was to allow the Spanish to impose their models of trade and commerce on Indian society. Because violations of the *jus gentium* could be met with reprisals, the Spanish were entitled to engage in almost constant war against the Indians insofar as they resisted this economic penetration.⁵³⁴

In this way, Vitoria exemplifies the dynamic of difference. He initially posited the Indians as belonging to the realm of universal reason, and therefore as being ‘like’ the Spanish. However, the practices of the Indians make them diverge from this ‘universal’ reason. Consequently, the ‘Indian is schizophrenic, both alike and unlike the Spaniard’, and can only be made perfect ‘by the adoption or the imposition of the universally applicable practices of the Spanish’.⁵³⁵ For Anghie, therefore, the birth of a secular *jus gentium* was tied up with the Spanish expansion into the ‘New World’.

However, Vitoria is only a prelude for what is the most important element in Anghie’s story – the role of positivist jurists in 19th century colonial expansion. For Anghie, the experience of colonialism is especially vital because, bluntly put, ‘[i]t was only because

⁵³² Ibid., 19.

⁵³³ Ibid., 21.

⁵³⁴ Anghie 1996, 330.

⁵³⁵ Anghie 2005a, 22.

of colonialism that international law became universal'.⁵³⁶ In a direct sense, once European states controlled most of the globe so too did European international law.

As noted above, the shift to 19th century colonialism was matched by a shift in the discipline. Whereas previously it had primarily taken a natural law approach, it now took an increasingly a positivist one, as exemplified by jurists such as Westlake, Lawrence and Oppenheim. Whereas natural lawyers understood law as existing 'objectively' as a system above states, positivists understood law as being rooted in and resulting from sovereign will.⁵³⁷ At first sight, therefore, their theoretical position seemed to embed the 'order among sovereign states' perspective. It might appear that for positivists '[c]olonialism features only very incidentally', because colonisation necessarily involves the action of a sovereign state *as against a non-sovereign entity*.⁵³⁸

Anghie argues that this was not the case. This was true in a double sense. Firstly, because the positivists were compelled by the internal logic of their doctrine to define sovereignty as against an 'other', and secondly, because they needed to account for the fact that European colonial expansion had been conducted via international law. In the former, internal, case, positivists had to deal with the fact that one of the most important theorists of positivism – John Austin – believed that international law could not be law properly so-considered because it lacked an overarching sovereign to effectively enforce it. Instead, he stated it was a species of 'positive moral rules'.⁵³⁹ This reflected a more general anxiety about the legal character of international law, which has plagued it to this day. The 19th century positivists attempted to negotiate this by challenging the idea that the presence of an overarching sovereign was the defining feature of law. In particular, they claimed that law was present where participants regularly dealt with each other, regarded themselves as being bound by norms and where some punishment would follow a breach of these norms.⁵⁴⁰ In place of a sovereign, then, the law required a *community*.

In this positivist vision a close link was established between law and social institutions. But this raised the question: what type of institutional arrangements gave rise to law?

⁵³⁶ Anghie 2006b, 742.

⁵³⁷ Anghie 2005a, 41.

⁵³⁸ Ibid., 34.

⁵³⁹ Austin 1995, 123.

⁵⁴⁰ Anghie 2005a, 48.

By extension, it also raised the question of what type of institutional arrangements *did not* give rise to law. This left the door wide open to allow the ‘racialization of law by delimiting the notion of law to very specific European institutions’.⁵⁴¹ Very quickly, it was decided that the mere fact of obedience would not signal the presence of law, since ‘primitive tribes’ could compel obedience through the club. This then shifted attention to a notion of effective territorial control, which would exclude nomadic tribes. However, European jurists still had to account for the fact that many African and Asian social formations exercised a high degree of territorial control. What was settled upon was the idea of *society*. Asian and African societies might have appeared sovereign; they may have even had a number of superficially similar features to European societies; but they *simply could not be the same*. This was because they lacked ‘civilised’ society, and so could not be members of the Family of Nations.⁵⁴²

This meant that a dichotomy between the ‘civilised’ and ‘uncivilised’ became crucial to the self-constitution of the positivist enterprise. Although other societies might appear to have law, ‘any tendency to affirm this similarity must be immediately repulsed as it could result in the collapse of the language of sovereignty and therefore of international law itself’.⁵⁴³ However, such assertions seemed to contradict actual state practice in the 19th century, which involved treating the natives as if they had some form of legal personality. Many European states derived their titles from treaties with tribal chiefs, or local polities. This ‘contradiction’ was easily ‘resolved’ through colonisation, whereby Europeans would extend *their* sovereignty over native territories, but European powers often did not wish to engage in the costly action of doing so.

Positivists negotiated this through the ideas of quasi-sovereignty and recognition.⁵⁴⁴ Essentially, if a non-European state had attained *some* element of ‘civilisation’, it could be recognised by a civilised state, and brought partially into international legal relations.⁵⁴⁵ An entity might, for instance, have sufficient international legal personality to hand over its lands to a European power. But here the law came up against inter-imperialist rivalry. Recognition was a largely unilateral, ‘political’ act and might be challenged by other states eager to gain colonial title. In order to combat this, the

⁵⁴¹ Ibid., 55.

⁵⁴² Ibid., 60.

⁵⁴³ Ibid., 62.

⁵⁴⁴ Ibid., 75.

⁵⁴⁵ Ibid., 77.

positivists attempted to develop a rigid taxonomy of degrees of civilisation, which would make it possible to judge whether or not a state had reached sufficient proximity to European civilisation to be able to engage in a given action.⁵⁴⁶

Once again, a transformative dynamic was opened up. The ‘standard of civilisation’ could now operate as a *goal* for non-Europeans. This was the case with Turkey, which was admitted to the European system in 1856, and with Japan and Siam, which maintained ‘nominal independence’.⁵⁴⁷ However, the standard of civilisation that had to be reached ‘amounted ... to idealized European standards in both their external and, more significantly, internal relations’.⁵⁴⁸ Non-European states had to undertake to protect the ‘liberty’ and ‘property’ and transform their legal systems in line with European standards.⁵⁴⁹

Legal positivism, then, with its putative focus on creating order among sovereign states, came full circle. Since all law must emanate from sovereign will, the positivists made *recognition* the fundamental criterion for the emergence of a sovereign state. This created a vicious circle of Eurocentrism. In putting forward a pure theory of ‘state recognition’, once again the question of *who counted* as a state was obscured. In this way, the operative role of a Eurocentric criterion of ‘society’ was obscured. This allowed sovereignty to be presented as ‘self-contained, coherent, comprehensive and all-encompassing’.⁵⁵⁰ By consequence, the European experience was naturalised, creating a ‘conceptual framework within which the only history of the non-European ... is the history of its absorption into the European world in order to progress towards the ultimate point of acquiring sovereignty’.⁵⁵¹

Ultimately, this naturalisation allowed the identity of the European state to be solidified. Europe’s legal identity was constructed as against the ‘other’ of the non-European world. The positivist international lawyers engaged in a form of historicist universalism which allowed them to posit European-derived sovereignty as the *telos* of historical

⁵⁴⁶ Ibid., 78.

⁵⁴⁷ Ibid., 84.

⁵⁴⁸ Ibid.

⁵⁴⁹ Ibid., 86.

⁵⁵⁰ Ibid., 99.

⁵⁵¹ Ibid., 102.

development. At the same time, this manoeuvre proved crucial to the constitution of European identity itself.

It has been necessary to describe this process in some detail because this is *the* crucial moment for Anghie in the formation of a Eurocentric legal order. Anghie argues that ‘the nineteenth century is very much an integral part of contemporary international law’. Many of the inequalities created during the colonial period remain, and it would be highly unlikely that ‘simple expedient of excising or reformulating the offending terminology’ of sovereignty and law could really alter a discipline ‘whose fundamental concepts ... had been so explicitly and clearly formulated in ways which embodied within them the distinctions and discriminations which furthered colonialism’.⁵⁵² The conceptual ‘heart’ of the international legal discipline was in fact a heart of darkness. For Anghie, the consequences of this ‘primordial’⁵⁵³ relationship would play out consistently in future international legal episodes.

Anghie’s emphasis on the civilising mission as the core dynamic of international law has found broader resonance. Makau wa Mutua, for example, connects the spread of human rights to ‘the impulse to universalize Eurocentric norms and values by repudiating, demonizing, and “othering” that which is different and non-European’.⁵⁵⁴ For Mutua, international legal thought embeds Eurocentrism because it is founded on a abstract, universalising vision of *liberalism*.⁵⁵⁵ This is in sharp contradiction to what he sees as the historical tradition of non-European societies.⁵⁵⁶

3.3. *Developing Resistance*

One of the criticisms levelled at Said’s *Orientalism* was that at times he was overly pessimistic, putting forward ‘a model of colonial political relations in which all power lies with the with colonizer’.⁵⁵⁷ To some degree, the same might be said of Anghie. Although he does deal resistance in his work, it is clearly not his main concern. For Balakrishnan Rajagopal, by contrast, resistance – and the international legal response to it – is vital.

⁵⁵² Ibid., 111.

⁵⁵³ Anghie 2006b, 750.

⁵⁵⁴ Mutua 2001, 210.

⁵⁵⁵ Mutua 1995.

⁵⁵⁶ Mutua 1994b, 346. Interestingly, this latter position does not have a great deal of traction in TWAIL scholarship, despite its historical appeal to the radical Third World movement, as in the case of Negritude.

⁵⁵⁷ Moore-Gilbert 1997, 51.

In *International Law From Below*, Rajagopal holds that ‘development’ and ‘resistance’ are the key phenomena for understanding international law. The aim of Rajagopal’s scholarship is, in a sense, quite straightforward. What he seeks to do is understand the history of international law by foregrounding the question of Third World resistance, which is a history of resistance to *development*. Like Anghie, Rajagopal does not explicitly deal with theories of imperialism. However, he does situate his work explicitly within the terrain of postcolonialism. Following Subaltern Studies, he seeks to ‘write resistance into international law and make it recognize subaltern voices’.⁵⁵⁸

Rajagopal’s theory of resistance draws from several diverse sources, in particular: Foucault, Fanon, Gramsci and Chatterjee. From Foucault, Rajagopal takes the idea that that one cannot simply regard the ‘power emerging from the state as the principal one’ instead, power is *diffused* to apparatuses of government.⁵⁵⁹ From Gramsci, he draws on the idea of hegemony, which suggests that controlling a social formation involves the ‘production, reproduction, and mobilization of popular consent’.⁵⁶⁰ From Fanon, he takes the notion that symbolic and psychological practices are an essential part of Third World struggles, which cannot be reduced to ‘economic ones’.⁵⁶¹ Finally, from Chatterjee, he takes the idea that the post-colonial state is not a neutral, but in fact has a long history of enmeshment with the ideology of ‘development’.

Essentially, for Rajagopal, two points emerge. Firstly, that any ‘theory of resistance in international law must allow for the inter-penetrability of state and society, of domestic and international, and of law and politics’.⁵⁶² Secondly, that institutions always develop through the struggle to manage and co-opt resistance. Adopting an explicitly ‘Saidian’ lens, he argues that when international law ‘encounters resistance, it can engage with it only by adopting certain unchanging essences of western or Third Worldness, as well as images of legitimacy and redemption’.⁵⁶³ What this means is that the Third World, and specifically its *resistance*, has been a kind of ‘other’ through which international law has been able to establish and consolidate its existence. Consequently:

⁵⁵⁸ Rajagopal 2003, 1.

⁵⁵⁹ Ibid., 14.

⁵⁶⁰ Ibid., 18.

⁵⁶¹ Ibid., 17.

⁵⁶² Ibid., 22.

⁵⁶³ Ibid., 9.

[T]he very architecture of contemporary international law has been constituted by its continuous evocation of and interaction with the category “Third World” ... The invocation of the “Third World masses,” whether real or imaginary was essential to the expansion of international institutions.⁵⁶⁴

In this respect, Rajagopal occupies very similar intellectual ground to Anghie. In both accounts, the primary force for the consolidation and expansion of international law is its confrontation with the Third World ‘other’. Furthermore, like Anghie, Rajagopal argues that, when confronted with Third World resistance, international lawyers have attempted to *transform* it.⁵⁶⁵ However, whilst Anghie locates this dynamic in the question of sovereignty and the civilising mission, Rajagopal locates it in the – related but different – dynamic of *development*.⁵⁶⁶

For Rajagopal, development is essentially ‘the desire to advance the “primitive” to civilization in a purely cultural sense, and the attempt to develop the “backward” to well-being in a material, developmental sense’.⁵⁶⁷ He argues that there are three moments in which international law internalised this. The first was the Spanish confrontation with the ‘Indians’. This involved positing a ‘cultural’ divide between the Christians and infidels. The second moment was the ‘construction of a civilizational divide’ in the 19th century.⁵⁶⁸ In this respect, then, Rajagopal’s account is similar to Anghie’s.

However, for Rajagopal, these two moments do not give birth to a fully-fledged ideology of ‘development’. In both instances ‘it had not been the international policy objective of the imperial and colonial powers to bring economic development to the natives’.⁵⁶⁹ Instead, the natives had been seen as *incapable* of developing because of their racial or cultural characteristics. It is the *third* moment that does this. As with other critical scholars,⁵⁷⁰ Rajagopal traces the ideology proper of ‘development’ to Harry S. Truman’s 1949 inaugural address. In this speech, Truman laid out a plan which stated

⁵⁶⁴ Ibid., 43.

⁵⁶⁵ Ibid., 9.

⁵⁶⁶ Anghie *does* argue that development becomes the principle device through which differentiations are drawn between the Third World and Europe following decolonisation, however, this is a ‘new form’ of the wider dynamic of difference, see Anghie 2005a, 204–205.

⁵⁶⁷ Rajagopal 2003, 24.

⁵⁶⁸ Ibid.

⁵⁶⁹ Ibid., 29.

⁵⁷⁰ Pahuja 2011.

that the West ought to share its 'technical knowledge' with peace loving peoples so as to secure them greater production.

For Rajagopal, this represents the fullest realisation of 'development'. Now the 'objective of developing the underdeveloped was firmly placed within the progressivist parameters of the project of modernity'.⁵⁷¹ It is no accident that this occurs on the threshold of the great wave of decolonisation, since the development project was bound up with 'the development of an apparatus of management of anticolonial resistance struggles'.⁵⁷² Rajagopal insists that the relationship between the West and the Third World was no longer mediated through *colonialism* but through 'a new discipline called development'.⁵⁷³ This 'regime of representation' has now become so important that 'everything that relates to the non-western world is governed by its logic, from popular media images ... to virtually all governmental practices'.⁵⁷⁴

For Rajagopal, international law was vital to this process. He argues that the vast majority of international lawyers in the period following the First World War 'shared an essential belief in the emancipatory ideas of western modernity and progress embedded in the new discipline of development'.⁵⁷⁵ Rajagopal goes further than this. One issue that has nagged scholars of development is how it managed to emerge so suddenly. Where once there was colonialism, suddenly a fully fledged 'alternative' sprung forth; Rajagopal sees the Mandate System of the League of Nations as the crucial transition mechanism between the two.⁵⁷⁶

The Mandate System was set up under the Covenant of the League of Nations to deal with colonies of the defeated powers after the First World War. Created under Article 22 of the Covenant, the System placed the territories inhabited by people 'not yet able to stand by themselves under the strenuous conditions of the modern world' under the 'tutelage' of 'advanced nations', who, under the 'sacred trust of civilisation' would prepare these nations for independence. Whilst the system was criticised by the anti-

⁵⁷¹ Rajagopal 2003, 29.

⁵⁷² Ibid., 25.

⁵⁷³ Ibid.

⁵⁷⁴ Ibid., 50.

⁵⁷⁵ Ibid., 27.

⁵⁷⁶ Ibid., 51.

colonial movement as a ‘cowardly compromise’,⁵⁷⁷ Rajagopal sees matters as more complex.

Article 22(1) of the Covenant stated that Mandates were to be administered for ‘the well-being and development’ of their native inhabitants. For Rajagopal this ‘marked a turn from the narrow confines of European international law of the nineteenth century to the broader reaches of twentieth century cosmopolitanism’,⁵⁷⁸ because it moved beyond the exclusionary positivism of the 19th century. Whilst there had been a prior history of using the language of humanitarianism, Rajagopal argues that this was the first time it became a *central* justification, and so came to structure the governance of the territory. More importantly, it was the first time that development had been ‘formulated in terms of an international administration’.⁵⁷⁹

For Rajagopal, this is particularly important because the establishment of the League coincided with a crisis of the discipline of international law. The First World War appeared to show that international law had no ability to restrain sovereignty, fundamentally problematising the positivist emphasis on ‘rules’ and ‘consent’. As a result, international lawyers were increasingly willing to turn to *pragmatism* and take into account political, social, economic and psychological factors when formulating and applying norms.⁵⁸⁰ This became embodied in the Permanent Mandates Commission (PMC) of the League. In order to monitor whether or not states were fulfilling their obligations under Articles 21(1) and (3) of the Covenant, it was necessary to gather a huge number of statistics. The gathering of statistics had been previously carried out under colonialism. However, this was largely to secure information about the natives. In the Mandate System the data had to be ‘*compared systematically* to draw lessons and formulate standards and principles’.⁵⁸¹ Colonial administration, and with it international law, took on the characteristics of being a *science*.

This ‘scientific’ character came up against the fact that the practice of systematically observing the behaviour of sovereign states was without precedent. Added to this difficulty was the fact that the League had no ability to enforce sanctions upon its

⁵⁷⁷ Nkrumah 1973, 31.

⁵⁷⁸ Rajagopal 2003, 54.

⁵⁷⁹ Ibid., 55.

⁵⁸⁰ Ibid., 59–60.

⁵⁸¹ Ibid., 61.

members. Hence, the PMC was a kind of hybrid body, that had to engage in both cooperation and supervision. The PMC constantly had to resort to *bureaucratic* techniques in order to resolve this tension. This became an important aspect of the PMC's self-definition, leading the it to 'simply define, reproduce, and defend a field of reality as its terrain of application', rather than actually fulfil its function:

[W]hen confronted with the 'reality' of a legal violation through information from different sources, the PMC often chose to internalize the information in a series of bureaucratic maneuvers *whose main purpose was their very existence and reproduction, without any further exterior objective*. Such maneuvers included, for example, the appointment of rapporteurs and committees to study particular questions before the PMC, the consideration of on-the-spot visits, and draft resolutions for action by the Council. In other words, form, not substance, was key to supervision.⁵⁸²

Essentially, for Rajagopal, the final result of this bureaucratic positioning was that the PMC became concerned with preserving its own position as a kind of supervisory, cooperative and technocratic body, concerned with governance, rather than rigid rules. This had serious consequences for the way in which *resistance* was able to be articulated through the system.

There was a system of individual petitions to the PMC, whereby individuals could register their grievances. Yet the bureaucratic nature of the PMC meant that these complaints were mediated through a complicated process, with the PMC treating it 'as a technocratic enterprise of obtaining information rather than legal determinations as a court of appeal'.⁵⁸³ When faced with particularly confrontational submissions, the PMC would employ a number of bureaucratic tactics, such as only considering written petitions, or refusing to hear those which went against the Mandate itself. Ultimately, the mechanism converted grievances 'into questions of institutional self-preservation and identity of the PMC'.⁵⁸⁴ It thus served to de-radicalise and domesticate these grievances.

For Rajagopal, these features have been carried over into all subsequent international institutions. They are technocratic bodies of governance, operating at the institutional level, which intervene to restructure the Third World. In so doing, they become driven

⁵⁸² Ibid., 64.

⁵⁸³ Ibid., 68.

⁵⁸⁴ Ibid., 70.

by a bureaucratic logic. Resistance which is channelled through these bodies is fatally compromised and becomes fodder for their reproduction.

Rajagopal, therefore, like Anghie, moves away from the sociological functionalism of the earlier Third World jurists by arguing that international law was permanently marked through its encounter with the ideology of development. Like Anghie, his work is distinctly ‘postcolonial’ insofar as this development discourse is driven by a Eurocentric modernity marked by a ‘desire to embrace the Other’ and a desire ‘to advance the uncivilized’.⁵⁸⁵ Yet unlike Anghie, this encounter is not located in the 19th century, but rather the early 20th. It was ‘the techniques invented by the Mandate system’ which were to inform international law. Once again, this was to have profound implications for its later use by the Third World.⁵⁸⁶

3.4. *International Law and Global Capitalism*

Bhupinder Chimni’s role in TWAIL scholarship is interesting. Although his writing is clearly situated within the corpus of contemporary TWAIL,⁵⁸⁷ it actually stretches back far before that. For instance, in 1982 he authored the piece ‘Law of the Sea: Imperialism All the Way’,⁵⁸⁸ in which – as no doubt the title indicates – he alleged that the Draft Convention on the Law of the Sea ‘legitimises the loot of the seabed through a legal instrument’.⁵⁸⁹ In temporal terms, then, Chimni is much closer to the original wave of Third World jurists. This is more striking when we consider that his most systematic work, *International Law and World Order*⁵⁹⁰ was published in 1993. This means it appeared 14 years after Bedjaoui’s *Towards a New International Economic Order* but 10 years before Rajagopal’s *International Law From Below*. We might say, therefore, that Chimni is something of an intermediary figure, standing between the older and newer generations of Third Worldist theorists.

Of course, one cannot directly read theory from temporality. But this intermediary position is also borne out in Chimni’s theoretical positions. In 2010, he authored an article in which he stated the ten authors that had most inspired his work. The authors he

⁵⁸⁵ Ibid., 29.

⁵⁸⁶ Sundhya Pajhuja makes a very similar argument with respect to the central role of a universal Eurocentric narrative of ‘development’ in international law, see Pajhuja 2011.

⁵⁸⁷ Anghie and Chimni 2003; Chimni 2011.

⁵⁸⁸ Chimni 1982.

⁵⁸⁹ Ibid., 407.

⁵⁹⁰ Chimni 1993.

named were: Marx and Engels, Lenin, Gramsci, Poulantzas, Habermas, Alexandrowitz, Wittgenstein, Gandhi, Aurobindo, and Camus.⁵⁹¹ Several things stand out from this list. The first is its syncretism. The particular combination of European radicals and Third World thinkers marks Chimni out as very much belonging to the Third World radical tradition.⁵⁹² More important are the *absences*. Notably, Chimni does not cite any postcolonial theorists as influences.⁵⁹³ Finally, the list highlights the degree to which Chimni considers himself part of the *Marxist* tradition. In this respect, Chimni is much closer to the first wave of Third World jurists than many contemporary TWAIL scholars.

Chimni's Marxism is distinctively Third Worldist insofar as he attempts to analyse the question of imperialism from a peripheral subject-position.⁵⁹⁴ Given this Marxism, Chimni *explicitly* outlines his understanding of imperialism. His starting point is that there is an 'internal relationship between structures of capitalism and imperialism'.⁵⁹⁵ In his account, capitalism has always had a tendency towards expanding spatially, and so assumed a global form. This means that, for Chimni, 'capitalism has always been imperialist',⁵⁹⁶ or rather capitalism has always existed as a 'global social formation'.⁵⁹⁷

This has wider implications for the way in which the global economy functions. Chimni argues that because of this intimate interconnection between the 'domestic' and 'international' under capitalism, Marxists understand international relations as flowing from the *internal organisation* of states.⁵⁹⁸ Since every state sits atop a mode of production, with a given ruling class, '[t]he foreign policy of a state is integrally linked to its domestic policy'.⁵⁹⁹ However, because the capitalist mode of production is always and already global, it is not the case that the international economy is simply an agglomeration of various national economies. Rather capitalism produces a world market which 'functions on the basis of an international division of labour which

⁵⁹¹ Chimni 2010a.

⁵⁹² Young 2001, 10.

⁵⁹³ It is telling that when Chimni deploys the term post-colonial, it is *with* a hyphen, in the tradition represented by the scholarship of Alavi (see Chapter 1, Section 5.5.1), see Chimni 2010b.

⁵⁹⁴ Chimni 2012, 1173.

⁵⁹⁵ *Ibid.*, 1161.

⁵⁹⁶ Chimni 2010c, 66.

⁵⁹⁷ *Ibid.*, 67.

⁵⁹⁸ Chimni 1999, 337.

⁵⁹⁹ *Ibid.*

defines the relations of the parts (domestic economies/states) to the whole (the world economy)'.⁶⁰⁰

At the same time, Chimni holds to a classical Marxist account of law in which 'law and legal relations are reflective of the social relations which constitute a particular society'.⁶⁰¹ Chimni argues that these observations lead to 'a perception of international law and institutions as a device which serves sectional global interests'.⁶⁰² The dominant classes in the dominant parts of the international division of labour seek to realise their interests *through* international law.⁶⁰³

For Chimni, the international division of labour has gone through a number of distinct configurations, each of which gave rise to specific international legal orders.⁶⁰⁴ Each of these legal orders did not simply mechanically express 'economic' content. Rather, each 'possesses its own internal structure and dynamics' which shape 'its content and discourse'; they only allow certain 'sources' to count as 'law' and in so doing, 'define its boundaries'.⁶⁰⁵ In this way, it is possible to police the content of international law and prevent its transformation into a weapon used against the *status quo*. The first legal order was from 1600-1760, the period of 'old colonialism'. This was characterised by a mercantilist form of expansion, and the consolidation of states in the 'Westphalian' model. Legally, it was characterised by a transition from feudal international law to bourgeois international law.

Whereas old colonialism was based on the *backwardness* of European manufacture, and hence the need to accumulate materials and goods, new colonialism (of 1760-1875) reversed this. A greater stress was placed upon colonies as *markets* for European commodities. In this period, international law emerged on a firmer basis, more strongly structured around sovereignty. However, with the growing importance of colonies for European development, '[b]ourgeois international law shrank from a universal law of

⁶⁰⁰ Chimni 1993, 221.

⁶⁰¹ Ibid., 218.

⁶⁰² Chimni 1999, 338.

⁶⁰³ Of course, the process is actually a complicated one, with class interest not being *directly* translated into international law, because foreign policy is a 'compound expression of several factors: dominant class interests, the compromise with other social classes, national security concerns, cultural anxieties, resistance movements, and the distinctiveness of the international law-making process', Chimni 2010c, 68.

⁶⁰⁴ Chimni 1993, 223.

⁶⁰⁵ Chimni 1999, 338.

nations to ... a Christian law of nations'.⁶⁰⁶ A whole series of developments on the issue of state responsibility sprung up in order to disadvantage the non-European world.

These tendencies were exacerbated in the period of 'imperialism' (1875-1945), corresponding to that of monopoly capitalism. There was a strong push to acquire new colonial territory, particularly in Africa, and international law was key in enabling this. This period was also marked by the transformation of international law into one of 'civilised nations', a secular and purportedly 'universal' model that 'was inspired partly by the need to accommodate the rise of non-European great powers some of which were not Christian'.⁶⁰⁷ Equally, this law served the purpose of legitimising the domination of the colonies by the European powers.

For Chimni, decolonisation was a contradictory phenomenon. He characterises the beginning of the period as a progressive phase, marked by the granting of independence and the adoption of texts like the NIEO. However, from 1975 it entered into a more regressive phase, in which these developments were rolled back.⁶⁰⁸ Chimni is keen to stress that, even though there was a progressive phase, this did *not* mark the end of imperialism, but instead 'the beginning of a new phase: imperialism without colonies'.⁶⁰⁹ 1945-1980 was marked by the rise of *neo-colonialism*.

This is reflected in the character of international law. On the one hand, international law did posit the sovereign equality of all states. This was coupled with a formal universalism. A fundamental plank of the legitimacy of this order was that there was one international law, governing both the powerful and the weak. Any suggestion of a 'dual structure', as had characterised 'colonial and imperialist international law', was 'no longer acceptable'.⁶¹⁰ However, this was matched by an unequal distribution of power and wealth. Importantly, the new states acceded to a law which had been written in the colonial era. This was a 'geometrical expression of the hegemony bourgeois doctrine exercises even today'.⁶¹¹ The international law of the neo-colonial period, then,

⁶⁰⁶ Chimni 1993, 231.

⁶⁰⁷ Ibid., 233.

⁶⁰⁸ Chimni 1999, 33.

⁶⁰⁹ Chimni 1993, 235.

⁶¹⁰ Chimni 1999, 338.

⁶¹¹ Chimni 1993, 255.

can be characterised as ‘bourgeois democratic’ because under it – as in a liberal democracy – ‘[f]ormal equality goes hand in hand with material inequality’.⁶¹²

This leads to the present period. In a series of recent works, Chimni has attempted to chart the economic and legal changes that have occurred under globalisation. Following a number of theorists,⁶¹³ Chimni maintains that from the 1980s, capitalism has witnessed the birth of a ‘global imperialism’. What is distinctive about this new configuration is it that is driven by the interests of an emergent *transnational* capitalist class.⁶¹⁴ This class is a truly global one, with no particular ties to any national economy. It is composed of the owners and managers of transnational corporations and financial institutions, whose productive and investment activities take place across national borders.⁶¹⁵

In order to facilitate this, it was necessary to constitute the world economy as a ‘*functional unified global economic space*’.⁶¹⁶ This involved guaranteeing the provision of free movement of capital, the proliferation of global standards and the creation of a climate conducive to the spread of intensified capitalist accumulation.⁶¹⁷ For Chimni, international institutions have been vital in this process. In a role analogous to the state in the earlier stages of capitalism, international institutions have served to remove ‘local impediments to the process of capital accumulation’.⁶¹⁸ The WTO, IMF and World Bank have remodelled the economies of peripheral societies along lines that make them much more attractive for transnational capital. Similarly, these institutions have – through the agendas of ‘good governance’ – reshaped political life.

For Chimni, the sum total of these developments has been a fundamental transformation in state sovereignty.⁶¹⁹ He sees them as giving rise to an ‘emerging global state’. The function of this state ‘is to realize the interests of transnational capital and powerful states in the international system to the disadvantage of third world states and

⁶¹² Chimni 1999, 339.

⁶¹³ Robinson 2004; Sklair 2002.

⁶¹⁴ Chimni 2010c, 67.

⁶¹⁵ Chimni 2004a, 8.

⁶¹⁶ *Ibid.*, 9.

⁶¹⁷ Chimni 2010c, 68.

⁶¹⁸ Chimni 2004a, 7.

⁶¹⁹ Chimni 2006, 14.

peoples’.⁶²⁰ For this reason, Chimni argues, one can say that this is a global *imperial* state. The global imperial state is not a state in a traditional sense of a centralised body with a monopoly on legitimate violence. Rather, the combination of international institutions and their interventions into formally sovereign states leads to an international network performing the *functions* of a global state.⁶²¹ This marks a transition from bourgeois democratic international law – with its location of some elements of sovereignty within Third World states – to a bourgeois imperialist law.⁶²² Accordingly, Chimni speaks of the ‘threat of recolonisation’.⁶²³

Immediately, then, we can note several important differences between Chimni’s work and that of the other scholars thus far analysed. Firstly, Chimni does not generally use the optic of ‘civilisation’ or ‘development’ in his account of the relationship between imperialism and international law. Insofar as he does invoke it, it is as a subsidiary concern, tied to the larger project of the accumulation of capital. Secondly, he does not locate a particular ‘moment’ at which international law’s confrontation with imperialism fundamentally shapes its content. Rather, his argument is that, on a material level, international legal institutions mediate relationships of imperialism, and so embed their particular contents.

In this respect, Chimni is much closer intellectually to the radical wing of the old Third Worldist movement. In fact, his particular schema of the development of international law shows a degree of similarity to that outlined by Bedjaoui. The difference, however, lies in Chimni’s greater insistence on the structural interconnectedness of law and imperialism. For Bedjaoui, the *fact* of the anti-colonial movement as a social phenomenon had immediate legal consequences. Chimni is more cautious. He understands that a given legal order has a certain internal structure, meaning that it will not be equally useful for all purposes. This was reinforced by the fact that the developments Bedjaoui was celebrating were occurring under an overall system of neo-colonialism. It is perhaps for this reason that, whilst Chimni is willing to grant that there was a progressive *phase* under neo-colonialism, and that formal equality was a real advance, he is unwilling to *fully* endorse the possibility of the NIEO breaking with neo-colonialism.

⁶²⁰ Chimni 2004a, 1–2.

⁶²¹ *Ibid.*, 5.

⁶²² Chimni 2010c.

⁶²³ Chimni 2006, 3.

If so far, to simplify, we have encountered Third Worldist scholarship influenced by postcolonialism on the one hand, and Marxism on the other, it is worth briefly examining the work of James Gathii. Gathii explicitly positions himself between these two tendencies, stating that whilst he does not ‘subscribe to the idea that cultural and nonmaterial forms of oppression underplay the real dynamics of oppression in economic structures and relations’, it is also important to unpack ‘homogeneous or universal categories of representation’.⁶²⁴ However, he thinks that these two approaches ‘invariably contradict each other’.⁶²⁵

Gathii argues that the international legal discipline is structured by a ‘Euro-American hegemony’, which conditions its theory and practice.⁶²⁶ This hegemony results from the fact that ‘law does not stand outside the raw interest of states’, but exists in a constant mutual interaction with these interests, shaping and being shaped by them. For Gathii, these interests are not simply ‘political’, instead they are deeply intertwined with the world economic system.⁶²⁷ Gathii, then, ‘foregrounds the existing reality of economic hierarchy and subordination between nations’.⁶²⁸

In other words, Gathii’s work can be situated in the trajectory of radical and Marxist understandings of imperialism. Gathii explicitly defines imperialism ‘as the spread and expansion of industrial and commercial capitalism’,⁶²⁹ whereas colonialism is ‘the territorial annexation and occupation of non-European territories by European states’.⁶³⁰ These two processes were associated with different legal regimes, the former, property, contract and tort; the latter, the laws of territorial acquisition.

Gathii examines these social processes through the prism of the East African Protectorate in 1895. He argues that the ‘the project of territorial conquest and that of the expanding capitalist economy built on the extraction of surplus capital went hand in hand’.⁶³¹ International law enabled and legitimated the process of territorial expansion

⁶²⁴ Gathii 2000a, 1998.

⁶²⁵ Ibid., 2000.

⁶²⁶ Ibid., 1997.

⁶²⁷ Gathii 2000b, 2070.

⁶²⁸ Ibid., 2069.

⁶²⁹ Gathii 2006b, 1013.

⁶³⁰ Ibid., 1014.

⁶³¹ Ibid., 1066.

in order to create the preconditions for the creation and consolidation of capitalist property relations. This was a complex process that involved co-opting and transforming native hierarchies and practices.⁶³² It was this process which guaranteed the emergence of ‘contemporary Kenya’ as a capitalist state.

The internal life of the state had been so restructured that by the time of independence capitalism could be protected not ‘so much through force, but through “rights of property in the means of production and in the product and by the impersonal operation of the market”’.⁶³³ Consequently, for Gathii, the modern African state was created by international law, as part of a project to embed and entrench capitalist social relations. This close inter-relationship between international law and imperialism means that the former tends to reproduce Eurocentric ideas. This is particularly evident in the law on the title for territory, where the legacy of the colonial period continues to frame judicial accounts of the colonial past.⁶³⁴ Essentially, in these accounts non-European territories are treated ‘as mere geographical and economic sphere in respect of which colonial states entered into transactions, such as treaties, with each other’.⁶³⁵ Non-European nomadic practices are not treated as capable of generating territory, and so their experience is erased from history.

4. Imperial Law’s *Longue Durée*

As can be seen from the above, the essential characteristic of TWAIL scholarship is that its participants understand the *enduring* nature of the colonial and/or imperial character of international law. Owing to this, the consequences of this character manifest across diverse legal conjunctures. This section surveys three key ‘moments’ in the story of the Third World’s relationship with international law – decolonisation, globalisation and imperial war – to illustrate how these scholars have analysed the continuing relationship between imperialism and international law and how their different understandings of imperialism have framed this analysis.

⁶³² Ibid., 1024.

⁶³³ Ibid., 1020.

⁶³⁴ Gathii 2002, 615.

⁶³⁵ Ibid., 606.

4.1. *An Anti-Colonial International Law?*

In a way, all Third Worldist international legal analysis pivots around the ‘moment’ of decolonisation. It was central to the first wave of Third World jurists and has been no less important for contemporary scholars. However, for the latter, this importance has taken a different form. Decolonisation is no longer viewed as the ‘foundational’ moment in international law – this is located in imperial and colonial encounters. Instead, TWAIL scholars write in the shadow of the *failure* of the anti-colonial movement. Hence, they have examined decolonisation through the prism of ‘what went wrong’.

Decolonisation was a complex and contested process. However, its starting point was clearly the emergence of formerly colonial territories as independent sovereign states. Whilst this process initially seems innocuous, it has been a source of much criticism. As Mutua notes, the African states that we know today were only formed in colonial times. Prior to this, there had been a number of overlapping kingdoms and tribal territories with their own modes of social existence. During the colonial period, European concepts of sovereignty and statehood were deployed in order to occupy and divide Africa.⁶³⁶ Initially this was messy, creating overlapping claims and territories. The Berlin Conference was designed to ‘rationalise’ the process by through creating a series of rules for the acquisition of African territories. This was consolidated during the first two decades of the twentieth century. ‘New frontiers’ were drawn up based on the effective occupation of European powers and their spheres of influence. Through this process ‘[t]housands of independent pre-colonial states were compressed into some forty new states’.⁶³⁷

The colonial state, then, was erected *over* a series of pre-existing tribal and ethnic identities. In essence, Africa was treated as ‘a blank slate’.⁶³⁸ Consequently, these states lacked legitimacy; they were artificially created and existed mainly to exploit the colonies, inspiring little loyalty in their populaces.⁶³⁹ During decolonisation, international law continued to enforce these boundaries. This was first evident in the Mandate system, where ‘self-government’ had to take place within the colonial

⁶³⁶ Mutua 1994a, 1120.

⁶³⁷ Ibid., 1134.

⁶³⁸ Ibid., 1135.

⁶³⁹ Ibid., 1137.

boundaries.⁶⁴⁰ The right of self-determination also took this route, which was achieved through the principles of territorial integrity and *uti possidetis juris*. The former held that claims of self-determination were unable to alter international territorial boundaries.⁶⁴¹ This, of course, did not answer the question of what *counted* as a country for the purposes of self-determination. It was here that the principle of *uti possidetis* came in, ensuring that, for the purposes of international law, internal colonial boundaries counted as international boundaries.⁶⁴²

The upshot of this was that ‘self-determination is linked to the administrative units established by the imperial powers’ which ‘validates the colonial state, retroactively ratifies colonial borders, and sanctions the denial of sovereignty’ of pre-colonial social formations.⁶⁴³ For Mutua, independence did not result in the significant transformation of the colonial state, but rather ‘the replacement of white by black faces in the state house’.⁶⁴⁴ As such, the post-colonial state did not have any *internal* legitimacy.⁶⁴⁵ In Mutua’s account, this is crucial in explaining the authoritarianism of post-colonial states, as well as their affliction by ethnic strife.

In an analysis with echoes of Fanon, Mutua argues that self-determination ‘was not the same thing as liberation’.⁶⁴⁶ Instead, it decolonised ‘colonial state, not the African peoples subject to it’.⁶⁴⁷ Although Mutua’s precise analysis had not been followed by all, he points to an argument that has animated much of the TWAIL critique of decolonisation, namely the fact that ‘nationalist movements sought to express’ their non-European national identity ‘through the vehicle of an alien form, the nation-state which was emphatically European in its origins’.⁶⁴⁸

⁶⁴⁰ Ibid., 1139.

⁶⁴¹ Article 6 of the Colonial Declaration framed self-determination with reference to ‘territorial integrity’ and ‘national unity’.

⁶⁴² Shaw 1997.

⁶⁴³ Mutua 1994a, 1142.

⁶⁴⁴ Ibid., 1145.

⁶⁴⁵ Ibid., 1147.

⁶⁴⁶ Ibid., 1149.

⁶⁴⁷ Ibid., 1116.

⁶⁴⁸ Anghie 2006a, 455. Pahuja similarly argues that the price for being recognised in law was ‘the nation state form and, crucially, the universal historical narrative in which that form was situated’ see Pahuja 2011, 45.

The achievement of independence immediately gave rise to an intractable question: could the Third World be bound by a law in which it had no part in making?⁶⁴⁹ This was not an abstract question. Upon achieving independence, many Third World states opted for a path of state-led, industrial development. This development required the control of natural resources. However, the majority of industry and raw materials were in the hands of foreign corporations. The question became, how might Third World states implement programmes of nationalisation?

The jurists of the Third World declared that colonial international law should not be binding on the new states. In pursuance of this argument, they attempted to formulate a number of international legal arguments, particularly through the General Assembly, where the new states formed a majority. Chief amongst these was the doctrine of Permanent Sovereignty over Natural Resources (PSNR). Under this doctrine, ‘the Third World argued that the natural resources of a territory had always belonged to the people of the territory, and that this ownership continued through the colonial episode’.⁶⁵⁰ As a consequence, all concessions could be re-examined upon independence, assessing their legality and the profits they had generated. Should nationalisation then occur, compensation would be judged by domestic standards.⁶⁵¹ These positions were codified in Resolution 1803 (1962). This was further reinforced by the Resolution 3821 (1974), the ‘Charter of Economic Rights and Duties of States’ (CERDS).⁶⁵²

European states countered that the new states were bound by pre-existing international law, and so their actions were framed by state succession. This meant that any obligations accrued by the former colonial state passed to the new state. Furthermore, whilst nationalisation was permitted, it was customary international law that determined the amount of compensation which needed to be paid.⁶⁵³

These general arguments were fleshed out through specific engagements with CERDS and PSNR. With respect to PSNR, Anghie notes that the tendency was to argue that the natives of the colonial territory had not been international legal subjects and so could not have had sovereignty over their natural resources. Of course, this gave rise to the

⁶⁴⁹ Anghie 2005a, 197.

⁶⁵⁰ *Ibid.*, 212.

⁶⁵¹ *Ibid.*, 213.

⁶⁵² *Ibid.*, 222.

⁶⁵³ *Ibid.*, 213–214.

question of *how* they could have alienated them in the first place. Anghie – examining the work of Karol Gess⁶⁵⁴ – argues that this contradiction was mediated through a notion of quasi-sovereignty: the natives had *just enough* sovereignty to enable them to alienate natural resources.⁶⁵⁵ Following this, Anghie continues, analysing the *Texaco* arbitration, the focus turned to the *sources* of international law. The *Texaco* Arbitrator, René-Jean Dupuy, held that the General Assembly Resolutions could not have the status of international law because the advanced states had opposed them. As a result, they were mere statements of ‘political intent’, with customary international law remaining binding.⁶⁵⁶

For Anghie, it is at this moment that the 19th century resurfaces. Western jurists all claimed that the colonial moment had passed. At the same time, they relied on legal justifications from this period.⁶⁵⁷ Anghie sees this as a moment in the dynamic of difference: the universality of international law was asserted, yet this universality served ‘to disempower the party to which it applies’.⁶⁵⁸ These arguments return ‘inexorably to that founding moment when the Third World enters the international realm to be bound’.⁶⁵⁹ The Third World had to renounce the idea that colonialism was relevant, even at the moment that it was being reasserted. Thus, ‘[w]hatever the other freedoms and empowerments offered by sovereignty, limitations apply’ and the ‘colonial past is unredeemable in international law’.⁶⁶⁰ As Gathii notes, the best that the Third World could hope for was that its legal interventions would be translated into ‘soft law’ which could only ‘put political pressure on governments’ and so lacked any real bite.⁶⁶¹

At first sight, Rajagopal’s account seems to be more optimistic as to the Third World’s international legal achievements. Focusing on the NIEO, he argues that whilst many dub it a failure, it was actually quite successful. However, this success was precisely *the problem*. According to Rajagopal, the Third World’s economic programme was rooted in an idea of ‘development as modernisation’ with ‘no call to preserve traditional ways

⁶⁵⁴ Gess 1964.

⁶⁵⁵ Anghie 2005a, 220.

⁶⁵⁶ *Ibid.*, 222.

⁶⁵⁷ *Ibid.*, 215.

⁶⁵⁸ *Ibid.*, 238.

⁶⁵⁹ *Ibid.*, 242.

⁶⁶⁰ *Ibid.*

⁶⁶¹ Gathii 1999, 118.

of living or other ways of protecting cultural spaces'.⁶⁶² He continues that, despite the revolutionary rhetoric, the call for the NIEO arose from quite prosaic concerns. It was driven by a decrease in Western aid, the relative lack of success of political independence and OPECs strength as an oil cartel.⁶⁶³ The breadth of these reasons meant that – as noted previously– the coalition which launched the NIEO was composed of both radical and moderate states, with differing expectations.

This tension played out across the course of the NIEO. At the Seventh Special Session of the General Assembly a series of specific, quite radical demands were put forward. These floundered in the face of concessions from the West, which were gladly accepted by the more moderate states.⁶⁶⁴ Although many have argued that this was indicative of the simple 'failure' of the NIEO, Rajagopal maintains that things were more complicated. Firstly, one of the main aims of the movement was not just to implement its substantive programme, but also to create a 'common front' of the Third World.⁶⁶⁵ Secondly, this common front attempted to have its concerns institutionalised. Here, there was a relative success, as one important outcome of the NIEO was the direct politicisation of a number of international institutions such as UNCTAD.⁶⁶⁶

And herein lay the problem. Because of their commitment to the development project, these jurists all identified 'institutional proliferation as the means to bring about positive economic and social change in their countries'.⁶⁶⁷ But like the PMC, these institutions embodied a *bureaucratic* logic. Organisations like UNCTAD 'became the institutional embodiment of the political compromises struck between moderate and radical positions within the Third World coalition, and thereby proved to be inherently moderate'.⁶⁶⁸ As with the Mandate System, international institutions *channelled* the resistance of the Third World through development discourse in such a way as to domesticate this resistance and increase the power of international institutions to intervene in the Third World.

⁶⁶² Rajagopal 2003, 76.

⁶⁶³ Ibid., 77.

⁶⁶⁴ Ibid., 82.

⁶⁶⁵ Ibid., 81.

⁶⁶⁶ Ibid., 87.

⁶⁶⁷ Ibid., 82.

⁶⁶⁸ Ibid., 87.

4.2 *Bad Governance?*

International financial institutions (IFIs) – particularly the World Bank and the IMF – have been one of the prime targets of the anti-globalisation movement. Scholars, theorists and activists have traced the role that these institutions have played in the spread and consolidation of neo-liberalism. However, many criticisms of these institutions have focused on their more ‘obvious’ shortcomings. A particular target of ire has been the IMF’s Structural Adjustment Programmes, which have forced Third World countries to restructure their economies along neoliberal lines.⁶⁶⁹

Whilst TWAIL scholars have certainly couched criticisms in these terms, they have also focused on the seemingly ‘progressive’ aspects of IFIs. In particular, they have analysed how the discourse of ‘good governance’ – through which the IFIs have purported to promote democracy, transparency and human rights – has in fact embedded and articulated colonial and imperial patterns. For Anghie, it is notable that the target of ‘good governance’ is always the Third World state. Whilst the problems of the advanced capitalist states may be recognised, ‘these are rarely if ever discussed in terms of ... of “good governance”’.⁶⁷⁰ He argues that the good governance agenda serves as a ‘bridging concept’ by IFIs to enable them to reconfigure the relationship between human rights and development. As previously noted, the IFIs faced a great deal of criticism from human rights activists. The Bank responded that its policies were essential in *promoting* human rights, since human rights were founded on economic growth.⁶⁷¹

In this way, the Bank tied human rights closely to ‘development’ and its own retrogressive policies. However, it still needed an explanation for the *failure* of these policies. Having linked human rights and development, the Bank went on to claim that its development policies had failed because of bad governance. Consequently, the problem was not with the policies themselves, but with the implementation of these policies by corrupt governments in the Third World. In this way, the IFIs were able ‘to deflect criticisms ... shifting blame for the absence of development in recipient countries to those countries themselves’.⁶⁷² However, for Anghie the process was deeper than this. According to Article IV(10) of the Bank’s Articles of Agreement ‘[t]he Bank and

⁶⁶⁹ Klein 2008.

⁶⁷⁰ Anghie 2005a, 249.

⁶⁷¹ Ibid., 261.

⁶⁷² Ibid., 262.

its officers shall not interfere in the political affairs of any member ... [and] [o]nly economic considerations shall be relevant to their decisions'. In recasting economic development as *dependent* upon good governance, the Bank 'massively expanded the range of domestic issues that can be subjected to IFI management', enabling it to engage in the restructuring of the political systems of Third World states.⁶⁷³

Essentially, then, the discourse of good governance pinpoints the source of underdevelopment as internal to Third World states.⁶⁷⁴ It then legitimates the intervention of Western states into the Third World, with the aim of restructuring its internal life in furtherance of 'a particular set of economic arrangements, those prescribed by neo-liberal development policies'.⁶⁷⁵ Once again, for Anghie, this discourse 'replicates the "civilizing mission" that has been such a prominent feature of the international relations'.⁶⁷⁶ Questions of good government have always been 'connected with commerce and a "right to trade" that, in reality, legitimates the presence of foreigners in non-European territories'.⁶⁷⁷

However, for Anghie, the discourse of good governance most closely resembles the Mandate System. Like Rajagopal, Anghie argues that the Mandate System had legitimated the intervention of international institutions in order to secure 'development', creating a 'science' of colonial administration in the process.⁶⁷⁸ The 'technologies' that were developed through this system are those that underlie the language of good governance in the IFIs. Both the IFIs and the Mandate System are ultimately 'ineffective' at achieving their objectives. Since they locate the problems of the Third World purely *endogenously*, they are not able to address the international relationships which are the *real* causes of underdevelopment. But it is precisely because of this failure that 'the IFIs can propose new initiatives and new approaches to development'.⁶⁷⁹ Once again, the attempt at 'civilising' opens up a gap which necessitates further 'civilising' interventions.

⁶⁷³ Ibid., 261.

⁶⁷⁴ Ibid., 268.

⁶⁷⁵ Ibid., 263.

⁶⁷⁶ Ibid., 250.

⁶⁷⁷ Ibid., 251.

⁶⁷⁸ Ibid., 179.

⁶⁷⁹ Ibid., 268.

As should be evident from the above, Rajagopal's understanding of the role of IFIs has much in common with Anghie's. However, once again, he foregrounds 'resistance' and 'development'. Rajagopal notes that it is by no means obvious that the IFIs should be important. Both the Bank and IMF were not traditionally associated with broader 'non-economic' issues and lacked political clout.⁶⁸⁰ According to Rajagopal, the reach of these institutions grew through the attempt to mediate resistance to development in the Third World. This process of extension began with the Cold War. Rajagopal argues that throughout this period, there was an increasing link between poverty and security. The US and its allies realised that under-development was an important generator of sympathy towards the radical left. Consequently, anti-communism could be promoted by allowing flows of aid to friendly regimes.⁶⁸¹ This was one of the driving factors in the establishment – in 1961 – of the Bank's International Development Authority (IDA).

For Rajagopal, what is especially important about this development is that the IDA presaged a turn towards poverty reduction. Whereas under its old mandate the Bank had been concerned primarily with lending money for concrete projects, the focus on poverty entailed a shift to looser and more amorphous *programmes*. This meant that 'the Bank's sectoral allocation expanded dramatically to embrace health, education, rural development, and agriculture'.⁶⁸² This process was extended with the Bank's 'turn to the environment' in the 1970s. Once again, this was a response to movements from below, in particular, radical peasant movements in the Third World and the 'new social movements' in the West. In order to avoid the legitimacy problems caused by its environmentally destructive policies, the Bank made an explicit turn towards ecological thinking.

Similar issues came into play with the IMF. The IMF originally started life as an institution to deal with short term 'balance of payments' issues and prior to the 1970s it dealt primarily with the advanced capitalist countries. From the late 1970s to the 1980s there was a series of debt crises in the Third World and the IMF lent money in order to help resolve them.⁶⁸³ These engagements meant that for the first time the IMF was

⁶⁸⁰ Rajagopal 2003, 96.

⁶⁸¹ Ibid., 111.

⁶⁸² Ibid., 112.

⁶⁸³ Ibid., 127.

focused on *growth*. Consequently, it focused more on effecting *political* changes to achieve this growth.

Finally, both the IMF and the Bank come together in the drive towards ‘democratisation’. As noted above, the language of democracy has become increasingly important to both institutions. Rajagopal argues that both have adopted a ‘modernist’ understanding, in which the meaning of development is transformed to incorporate ‘democracy’ and ‘participation’.⁶⁸⁴ This is part of a broader notion of ‘development’ which includes ‘ecological and human aspects’.⁶⁸⁵ Yet even at its most progressive this idea of development embedded the perspective of modernisation theory in which ‘tradition is synonymous with backwardness, lack of technology, stagnancy, oppressive human-rights conditions, and every aspect of life found in the Third World; whereas the “modern” is seen as progressive, embracing change, and ensuring rising living standards through better technology as in the West’.⁶⁸⁶

Once again, therefore, Rajagopal argues that international institutions were driven by *development*. The IFIs confronted the Third World, and encountered resistance, this time in the form of democratic opposition. They ‘responded by embracing the democratic moment, just as they embraced the nationalistic moment at the time of decolonization’.⁶⁸⁷ Through their internal bureaucratic logic, this had the effect of increasing the scope of their own interventions and legitimating their further restructuring of the Third World.

Chimni sees the IFIs as part of the emerging global state. This means that they are driven by the interests of the transnational capitalist class. On this basis, they are ‘promoting a neo-liberal agenda at the initiative or behest of the advanced capitalist states’.⁶⁸⁸ As previously noted, therefore, Chimni sees these institutions as playing a role in removing impediments to the accumulation of capital. The discourse of ‘good governance’ has two principal aspects in this respect. The first is simply to provide ideological camouflage for the spread of neo-liberalism. The second, is that the rule of

⁶⁸⁴ Ibid., 149.

⁶⁸⁵ Ibid., 152.

⁶⁸⁶ Ibid., 150.

⁶⁸⁷ Rajagopal 2003.

⁶⁸⁸ Chimni 2004b.

law is conducive to the accumulation of capital itself, since it brings with it the stability and predictability necessary to attract investment.⁶⁸⁹

Gathii characterises good governance as a ‘counter insurgency’ agenda. Like Rajagopal, he sees its emergence as rooted in the response to challenges from popular movements. Throughout the 1950s and 1960s, these movements had contested the equation of development and growth, which Gathii considers under the rubric of the ‘basic needs’ critique. There were two ‘versions’ of this critique. The strong version questioned the whole notion of development as ‘growth’, challenging the market system and advocating widespread changes to the whole international economic system. The weak version ‘takes for granted the existing distribution of wealth, power and resources’ and simply states that better provision must be made for the poor.⁶⁹⁰

In Gathii’s telling, the advanced capitalist countries tended to favour the latter approach. Through adopting it they were able to co-opt and marginalise struggles against global capitalism. Equally, the welfare state implied by these models was important since it served as a mechanism of social control for the working classes.⁶⁹¹ This enabled the Bank to continue with the development model whilst pacifying resistance.⁶⁹² Gathii argues that this development has to be considered in the light of the growth of the international human rights movement throughout the 1970s. This movement had taken some of the insights of the basic needs movement and tried to have the ‘needs’ institutionalised as *rights*. This was a wide ranging critique, which was particularly concerned with institutionalising socio-economic rights at the level of the UN. However, one its main targets was the Bank. The movement argued that the basic needs programme was not enough, since it did not include human rights.⁶⁹³

These two basic elements came together in the 1990s. At this point, the World Bank began to promote its good governance agenda. Like Anghie and Rajagopal, Gathii notes that this manoeuvre enabled the Bank to expand its mandate, and so interfere in ‘non-economic’ issues.⁶⁹⁴ However, Gathii further holds that the reference to good

⁶⁸⁹ Ibid., 10.

⁶⁹⁰ Gathii 1999, 130–131.

⁶⁹¹ Ibid., 129–130.

⁶⁹² Ibid., 132.

⁶⁹³ Ibid., 137.

⁶⁹⁴ Ibid., 142.

government can only be only understood against the background of debates on the role of government intervention in the economy.⁶⁹⁵ Insofar as the Bank is only able to consider ‘governance’ through the lens of economic issues, it does so according to the neo-liberal theory that what impedes growth is government intervention. Accordingly, its democratisation programme embeds and buttresses neo-liberal economic theory.⁶⁹⁶

Moreover, Gathii continues, because of its Articles of Agreement, the Bank has to define certain issues as fitting ‘within this techno-economic logic’ and so re-casts ‘ostensibly political issues as neutral’.⁶⁹⁷ This agenda therefore allows a neo-liberal economic and political vision to be sold as a technocratic necessity for growth. This agenda is one of counter-insurgency because whilst it does give the human rights movement a voice, it channels this voice in such a way as to legitimate and reinforce a neo-liberal agenda.⁶⁹⁸ This agenda is specifically targeted against ‘the socialist, Keynesian-welfare, and re-distributive/social justice oriented nationalist economic policies of the post-colonial African state’.⁶⁹⁹ It frames all government interventions as *distortions* in the market, resulting from kleptocratic or clientelist regimes.⁷⁰⁰ Aside from co-opting resistance to the expansion of neo-liberalism, therefore, it also ideologically *represents* the Third World as backwards and corrupt.

As was noted by Anghie, the discourse of good governance locates the source of underdevelopment of the Third World almost purely endogenously. For Gathii this means that it performs a doubly Eurocentric function. Firstly, ‘it fails to acknowledge and take into account the external factors’⁷⁰¹ which cause underdevelopment, particularly the legacy of colonialism and unequal world system. In so doing, it helps to naturalise the way in which the advanced capitalist states have benefited and continue to benefit from the global system. Secondly, the discourse relies on ‘racist stereotyping of post-colonial, sub-Saharan African states, their politicians, and their citizens’.⁷⁰² The story of good governance represents the Third World as a ‘chaotic’ place, whose own

⁶⁹⁵ Ibid., 145.

⁶⁹⁶ Ibid.

⁶⁹⁷ Ibid., 160.

⁶⁹⁸ Ibid., 162.

⁶⁹⁹ Gathii 1998, 105.

⁷⁰⁰ Ibid., 68.

⁷⁰¹ Ibid., 105.

⁷⁰² Ibid., 107.

internal failures are responsible for its lack of development.⁷⁰³ This draws on ‘racially-coded meanings’, drawn from the long history of Western confrontations with the Third World.⁷⁰⁴ The net effect of this is to cast the Third World as a savage zone which can only be developed through the interventions of the benign, neutral West.

4.3. *War? What is it Good For?*

In one of his more famous passages, Fanon proclaimed that in the colonies ‘the agents of the government speak the language of pure force’.⁷⁰⁵ Here, Fanon draws our attention to the importance that military violence has always played in imperialism. Whilst the scholars so far surveyed would not reduce imperialism to military violence, it remains true that many of moments in the conceptual history of imperialism have arisen in relation to war.

As previously noted, this is the case with the contemporary ‘revival’, with the interventions in Kosovo, Afghanistan and Iraq setting off a wave of empire-theorising. In the case of humanitarian intervention, the analysis has been relatively straightforward. Many scholars have framed humanitarian intervention in terms of imperialism,⁷⁰⁶ often drawing connections between the language of humanitarianism and the justifications advanced historically to legitimise colonialism.⁷⁰⁷ Consequently, it has been relatively easy to link the international legal language of humanitarian intervention to that of the civilising mission.

Mutua, for example, locates humanitarian intervention in the wider context of human rights promotion, built on Eurocentric universalism. For him, humanitarian interventions are structured around the metaphor of ‘savages’ ‘victims’ and ‘saviours’. He argues that the international human rights movement emerged in response to the *European* events of the Second World War, rooted in the values of a distinctly European liberalism and based upon and funded by primarily European and American organisations.⁷⁰⁸ At the same time, the prime *targets* of this movement are Third World

⁷⁰³ Ibid., 67.

⁷⁰⁴ Ibid., 70.

⁷⁰⁵ Fanon 1963, 38.

⁷⁰⁶ Bricmont 2007; Chomsky 2002; Zolo 2002.

⁷⁰⁷ Seymour 2008; Spivak 1988, 297–300.

⁷⁰⁸ Mutua 1995, 596.

states, despite the fact that Western states are arguably responsible for numerous rights violations.⁷⁰⁹

For Mutua, this is part of a wider dynamic of Eurocentric universalism. The discourse of human rights first posits Third World cultures as ‘savage’ and therefore predisposed towards the violation of human rights. It then constructs ‘victims’. Since these victims are *constructed* rather than ‘pre-given’ they take on a number of characteristics. In particular, the victim is both oppressed by the savage culture and a participant in it, and so, is *racialised* as ‘non-white’ and posited as powerless.⁷¹⁰ This sets the stage for the final aspect of the metaphor, the saviour. Since the ‘victims’ are powerless, they require *external intervention* to be saved. This is the job of Western or international institutions.⁷¹¹ For Mutua, this mirrors the structure of Christian missionaries, with civilised Europe being sent to save the savage non-Europeans from their own culture.⁷¹²

Chimni’s response to humanitarian intervention is more straightforward. He roots military violence under imperialism in the need to ‘quell the possibility of any challenge being mounted to their vision of world order’.⁷¹³ Whilst ‘there is no rule of international law that permits unilateral armed humanitarian intervention’,⁷¹⁴ the doctrine nonetheless *legitimises* military interventions. Chimni claims that this legitimisation has managed to secure ‘much of public opinion in the imperialist world’, as well as the approval of mainstream international lawyers generally.⁷¹⁵ This is bound up with the broader growth of the global state and its concomitant undermining of ‘sovereignty’. Humanitarian intervention served the role of legitimising interventions of the ‘Western power bloc’ (acting in the interests of the transnational capitalist class) ‘against third world states’.⁷¹⁶

For Chimni, the war on terror has also been an integral part of this process.⁷¹⁷ In some respects, Chimni’s argument is reflective of the broader approach taken by other

⁷⁰⁹ Mutua 2001, 217.

⁷¹⁰ Ibid., 229–230.

⁷¹¹ Ibid., 233.

⁷¹² Vasuki Nesiah has taken a similar approach to the war in Afghanistan, arguing that liberal humanitarianism served as legitimisation for the occupation, see Nesiah 2004, 88.

⁷¹³ Chimni 2006, 19.

⁷¹⁴ Chimni 2004b, 89.

⁷¹⁵ Ibid., 88.

⁷¹⁶ Chimni 2004a.

⁷¹⁷ Chimni 2004b, 87. Similarly Gathii, argues that the US invasion of Iraq was primarily about *dispossession*. The aim was to ‘transform Iraq into a free market economy’, under the guise of the welfare

TWAIL scholars, who have proposed that the interventions carried out as part of the war on terror are illegal uses of force (since they cannot be understood as self-defence).⁷¹⁸ For these scholars, this illegality represents a fundamental *break*. They argue that the old law on the use of force had a limited sense of non-interference and sovereign equality, which is now being undermined by aggressive US unilateralism. It is this aggressive unilateral character which makes US behaviour distinctly imperial. Okafor, for instance, claims that the war on terror has seen a number of ‘imperial-style international law reforms’.⁷¹⁹ Similarly, Anghie has argued that the Bush doctrine of pre-emption constitutes an ‘imperial policy’.⁷²⁰ Gathii has perhaps been the most explicit on this front, arguing that we are witnessing a shift from a global empire based ‘on coordination of economic exchange and security guarantees’ to one based on military violence.⁷²¹

There are two important analytical moves here. The first is to say that the interventions carried out under the war of terror are illegal, and thus represent a fundamental break with the older law on the use of force.⁷²² The second is to claim that it is this unilateralism which makes these legal arguments distinctly imperial. This seems somewhat at odds with the preceding analysis. All TWAIL scholars argue that international law embeds and mediates *enduring* colonial and imperial relations. On this reading, it is not ‘illegality’ or ‘unilateralism’ that marks out a particular legal argument as ‘imperial’ but rather its reproduction of the civilising mission or its embeddedness in global capitalist relations. Equally, given the enduring character of the connection, it seems odd to characterise this as a *rupture* with that which came before.⁷²³

Notwithstanding these considerations, there have also been attempts to show that the arguments around the war on terror are not unprecedented. In particular, Anghie has demonstrated how such arguments are bound up in the dynamic of difference. The advocates of pre-emptive self-defence proclaimed that in a world of non-state, unconventional terrorist forces, the traditional doctrine of self-defence was not enough.

of the Iraqi people. He links this to a broader trend of dispossession embedded in the history of international law. See Gathii 2006a.

⁷¹⁸ Anghie 2010a, 31; Gathii 2005, 76; Mutua 2002, 10.

⁷¹⁹ Okafor 2005, 188.

⁷²⁰ Anghie 2005a, 329.

⁷²¹ Gathii 2005, 122–123.

⁷²² Anghie 2005a, 329; Mutua 2002, 2.

⁷²³ Partly this may be a tactical attempt to oppose these particular actions, see Craven et al. 2004; see Knox 2010 for a criticism of this.

Since these forces had access to dangerous biological, chemical and nuclear weapons, it was no longer sufficient to wait for threats to ‘materialise’. Instead, it was necessary to attack threats *before they emerged*.⁷²⁴ Hence the old standard of ‘imminence’ in self-defence was insufficient. Combining this doctrine with the formal equality of states could have disastrous results for the West. Since, in juridical terms, all states are allowed to act in self-defence, ‘both North Korea and Iran’ would be able to exercise a right of anticipatory self-defence against the US or its allies.⁷²⁵

A response to this could have been to deploy Bedjaoui’s ‘dichotomy between law and reality’. Whilst North Korea or Iran could ‘legally’ have attacked the US, in *reality*, inequalities in power render this unlikely to ever happen.⁷²⁶ Yet pointedly, this was not the argument advanced by the Bush administration. Instead, the arguments around pre-emption were *also* coupled with arguments about rogue states. The US administration argued that the threat against which pre-emption was articulated did not come from all states. Rather, it came from those states that harboured or gave material support to terrorist groups. As rogue states, they could not possibly possess the right to intervene pre-emptively. Instead they were the *objects* of pre-emption.⁷²⁷

Anghie argues that this doctrine ‘disconcertingly resembles the rhetoric used by Vitoria to justify the Spanish conquest of the Indians’.⁷²⁸ However, the pattern runs deeper than this. Bound up in the notion of the rogue state is also a *transformative* dynamic. Insofar as rogue states are a source of global instability, it is necessary to convert them into democratic states that no longer harbour or support terrorism. At this point, then, ‘humanitarian arguments are inextricably connected with self-defence’.⁷²⁹ In this way, the dynamic of difference again comes to the fore. Having posited the difference between the civilised and uncivilised, it proceeds to attempt to bridge that gap through the use of transformative violence. In a similar manner to humanitarian intervention, the war on terror ‘reproduces the structure of the civilizing mission’.⁷³⁰ Thus, as with other

⁷²⁴ It is worth noting that although this was initially known as the Bush Doctrine, it has not died with the Bush Presidency. John O. Brennan put forth the legal case for the drone programme by arguing a ‘more flexible understanding of “imminence” may be appropriate when dealing with terrorist groups’, see Brennan 2012.

⁷²⁵ Anghie 2005b, 49.

⁷²⁶ Ibid., 49–50.

⁷²⁷ Anghie 2004, 327.

⁷²⁸ Anghie 2006b, 750.

⁷²⁹ Anghie 2005a, 298.

⁷³⁰ Ibid., 309.

developments, the war on terror marks a return ‘to a primordial and formative structure of international law’.⁷³¹

5. Against Nihilism

Third Worldist jurists have provided an important critique of international law. Drawing on wider traditions of thinking about colonialism, empire and imperialism, they have shown that international law has been deeply imbricated with unequal and exploitative global social relations. This analysis has taken different forms. The anti-colonial movement gave rise to a number of scholar-practitioners. These jurists interrogated the relationship between colonialism and international law, in order to better understand how the Third World might deploy international law.

This chapter has argued that the analysis of these scholars must be understood in light of their theories of imperialism and colonialism. For the more conservative theorists, colonialism was a peripheral phenomenon to European development, understood primarily through the lens of political domination. Accordingly, international law’s Eurocentricity stemmed not from its involvement in colonial oppression but from the lack of non-European participation in its creation. The Eurocentric bias of international law could therefore be overcome by universalising international law.

The more radical theorists understood imperialism as a system of capitalist exploitation. For them, colonialism was an *essential* part of European capitalism and international law was *structurally* implicated in colonialism. Since colonialism was part of a wider imperialist system, they also maintained that colonialism had survived the dismantling of formal European domination in the form of neo-colonialism. International law thus continued to mediate imperialist social relations and would have to be radically transformed.

Whilst these positions appeared distinct, they ultimately came to similar conclusions. Although they differed on *how* it might occur, both groups believed that international law could be a vessel through which the anti-colonial movement could achieve its goals. This embrace of international law stemmed from a shared understanding of the

⁷³¹ Anghie 2006b, 750.

relationship between international law and the global conjuncture. Both the conservative and radical positions subscribed to a ‘sociological functionalism’, in which international law was seen to ‘express’ the global balance of forces. If there was an anti-colonial movement, it would be able to express its interests in international law.

But this did not come to pass. As a result, the next wave of Third Worldist international lawyers inhabited a world where the Third World movement barely existed. They sought to *explain* this failure. A vital part of this explanation involved going beyond sociological functionalism and grasping the more *enduring* connections between imperialism, colonialism and international law.

As with first wave of Third World jurists, this is not a heterogeneous movement, but can be seen as embodying two basic approaches. The first, drawing on postcolonial theory, argues that international law embeds a ‘civilising mission’, where the European self consolidates itself against the non-European other, through the medium of international law. This mission is acquired through an ‘encounter’ between international law and the imperial project. Attempts by the Third World to use international law to further its interests come up against this dynamic, and are subverted accordingly. These scholars argue that this dynamic is constantly reproduced in different forms throughout international law’s history. The second, drawing more on the Marxist tradition, argues that international law draws its content from the global (capitalist) economy, and struggles of the classes within this economy.

Of course, this theorising is not just idle speculation. In accounting for the failures of the Third World movement’s attempted use of international law, contemporary scholars are also giving an account of what use international law can be *today*. Thus, while Eslava and Pahuja are correct to emphasise that contemporary scholars have distinct analytical priorities, it is incorrect to characterise this as a shift away from ‘trying to use international law to remedy the social and economic domination of the postcolonial world’.⁷³²

As with the first generation of Third Worldist scholars, a common theme emerges. This theme is best illustrated through the considerations on the issue of the use of military

⁷³² Eslava and Pahuja 2011, 117.

force outlined in section 4.3. All of the scholars surveyed root contemporary legal arguments in a wider structural and/or historical interconnection between international law and imperialism and colonialism. By consequence, the imperial character of an action does not lie in its illegality and, since law is ‘part of the problem’, it would make little sense to invoke law against imperialism.⁷³³ Yet almost all of the scholars denounced the US for breaking international law, and understood its imperial character as inhering in the ‘illegality’, or the unilateral nature of its actions.

This contradiction is representative of a broader trend in TWAIL scholarship. Notwithstanding the connections they trace between international law and imperialism, all TWAIL scholars return to international law as a site of possible emancipation. Anghie, for example, states that ‘the Third world cannot abandon international law’⁷³⁴ and hopes that law might ‘play its ideal role in limiting and resisting power’.⁷³⁵ Similarly, Chimni insists that we must not ‘reach the pessimistic conclusion that it is not possible at all to create a just world under law’.⁷³⁶ In most cases, the move is linked to a defence against the ‘legal nihilist’ position that international law has nothing to offer for the Third World. Against this, it is asserted that ‘the Third World cannot abandon international law because law now plays such a vital role in the public realm’ that it structures analysis and interpretation of global events.⁷³⁷ Consequently, to refrain from using international law, it would be to lose a ‘protective shield’.⁷³⁸

However, one of the very conclusions we can draw from TWAIL scholarship is that international law has hardly functioned as a ‘shield’. Even at those moments where the acquisition of sovereignty *appeared* protective, it in fact served to reconstitute relations of exploitation and domination. As such, any attempt to formulate a ‘progressive’ international law must show what would be different ‘this time’.

In this vein, Anghie holds that we might ‘imagine and argue for very different understandings of the meaning of sovereignty ... and ... international law’⁷³⁹ and should

⁷³³ Kennedy 2002.

⁷³⁴ Anghie 2005a, 318.

⁷³⁵ Ibid.

⁷³⁶ Chimni 2007, 215.

⁷³⁷ Anghie 2005a, 318.

⁷³⁸ Chimni 2006, 26.

⁷³⁹ Anghie 2005a, 317.

‘continuously question developments in international law’.⁷⁴⁰ Yet turning to the imagination seems insufficient in the face of a tenacious, global pattern of the reproduction of colonial relations described in Anghie’s work.

Chimni’s attempt to negotiate this is more successful. He argues that since each epoch of international law is structured by a ‘*different historical and political*’ context, each epoch will have a ‘*differential social impact*’.⁷⁴¹ Thus, in the historical and political epoch of decolonisation, the anti-colonial and Third World movements were able to translate their politics into international law. Since universal applicability is such an important part of post-colonial international law, imperialist states cannot openly opt for a two-track system.⁷⁴² Given international law’s stable core of meaning⁷⁴³ this anti-colonial content can be turned against imperialist states.⁷⁴⁴ If this sounds familiar, it is because Chimni has essentially reproduced the sociological functionalism of the original Third Worldist jurists. Whilst he may characterise the connection between law and imperialism as more tenacious than was understood by the original Third World jurists, he nonetheless ultimately falls back on a similar explanation of international law’s progressive potential.

Rajagopal has gone furthest in trying to think through how international law might be turned against imperialism. He claims that the distinctive characteristics of the ‘new social movements’ create the potential to use international law in a progressive way. For Rajagopal, these social movements are important because they reject both liberal and Marxist notions of linear, progressive development. As a consequence, they exhibit a form of ‘cultural politics’ which is anti-statist, focuses on symbolic practices and is local in scope. This leads to:

[A] history from below leading to a theory of peoples, cultures, and power. This theory would need to transcend the limitations of realist statism and liberal individualism, and build on the radical cultural politics of social movements to enable alternative visions of governance that do not privilege particular social actors. This is necessary to transform international law from an international law of domination to one of resistance in the aid of marginalized communities and peoples. This project is in defense of an international law from below.⁷⁴⁵

⁷⁴⁰ Ibid., 318.

⁷⁴¹ Chimni 2004a.

⁷⁴² Chimni 1999, 338.

⁷⁴³ Chimni 1993, 272–278.

⁷⁴⁴ Ibid., 103.

⁷⁴⁵ Rajagopal 2003, 296.

Despite the tightly interwoven narrative Rajagopal writes of resistance being co-opted by international legal institutions, there is nonetheless the faith that new forms of organisation will be able to disrupt this. This is best evidenced in his later concrete proposals for a ‘counter-hegemonic international law’. Rajagopal *is* relatively pessimistic, concluding that the chances of transforming international law into ‘purely counter-hegemonic tool ... are bleak on [their] own’.⁷⁴⁶ However, he goes on to enumerate a series of possibilities for the transformation of the international legal order. The possibilities are ‘the growth of regional international law’,⁷⁴⁷ ‘a new front of Third World’,⁷⁴⁸ and ‘the emergence of coalitions of smaller states and social movements, forming tactical alliances with larger states in particular negotiations’.⁷⁴⁹ Rajagopal is most positive about the final suggestion.

What is striking is how close all of these suggestions are to the various attempts of the Third World to use international institutions, as described above and theorised by Rajagopal himself. Given the deep-rooted tendency towards channelling resistance *through* the development project that Rajagopal identifies, one is left wondering how these interventions might be ‘counter-hegemonic’ in a way that the others were not. Absent an explanation premised on sociological functionalism (i.e. that as a neutral vessel law will just reflect a new progressive consensus), one is at pains to see how the characteristics of the new social movements truly allow them to transcend international law’s tenacious resistance-renewal dynamic.

Ultimately, then, contemporary TWAIL work does seem to return to a kind of ‘faith’ in international law, often mediated through a new form of sociological functionalism. This stands in stark contrast to the rather more pessimistic message that their broader theoretical and historical approaches seem to warrant.

⁷⁴⁶ Rajagopal 2006, 780.

⁷⁴⁷ Ibid.

⁷⁴⁸ Ibid., 781.

⁷⁴⁹ Ibid., 782.

CHAPTER 3: MARXISM AND THE CRITIQUE OF IMPERIALISM

1. Marxism Colonialism and Imperialism

As discussed Chapter 1, the Marxist tradition has been central to the formation and propagation of ‘imperialism’ *as a concept* and a central player in the movements that sought to contest imperialism. As a result, all attempts to deal with colonialism and imperialism have had to situate themselves in relation to the Marxist critique, meaning that the previous chapters have of necessity engaged in some analysis of this tradition. This chapter attempts to grapple more directly with the Marxist critique of imperialism and chart how this critique has informed international legal scholarship. Section 1 begins by examining Marx and Engels’ own writings on the subject, before moving on to the wider Marxist tradition. It attempts to understand the forces and dynamics that Marxists claim drive imperialism and reflects on what is *distinctive* about their accounts.

Section 2 examines the attempts by Marxists to articulate theories of international law and the role that the concept of imperialism has played within these attempts. It begins with a brief reconstruction of Marx and Engels’ own legal theory. Following this, it details the three primary ways in which Marxists have understood international law: the commodity-form theory; ideology critique; and the class struggle approach. It then draws out the inter-relations between these approaches.

Section 3 examines how these general positions can illuminate international law’s changing relationship to a number of imperial conjunctures. It focuses firstly on colonialism and the ‘civilising mission’, before moving on to the issue of decolonisation, finally it examines how Marxists have understood the relationship between imperialism and the law on the use of force. The chapter concludes by examining what political potential Marxists have located within international law.

1.1. *Marx and Engels*

It is often asserted that Marx and Engels did not have a theory of the international as a distinct realm, and so never articulated a theory of imperialism.⁷⁵⁰ It is certainly true that

⁷⁵⁰ Linklater 1986; Rosenberg 2000, 65.

neither of them ever used the terms imperialism (except in its sense of ‘Bonapartism’)⁷⁵¹ or ‘colonialism’.⁷⁵² But although they missed the great wave of theorising about ‘imperialism’ that followed the Scramble for Africa, both evinced a great deal of interest in Ireland and India⁷⁵³ and had much to say about specific colonial situations.⁷⁵⁴ More importantly, their work engaged with a series of topics around ‘the emergence of capitalism, its spread throughout the world, the unequal development of different areas of different areas [and] the dominance of some countries over others’,⁷⁵⁵ all of which constitute the chief questions in any theory of ‘imperialism’.

Marx and Engels saw capitalism as a global system from its beginning. They argued that a significant part of its genesis lay in the accumulation of raw materials from colonisation,⁷⁵⁶ and that it had created a world market that was drawing non-capitalist social formations into its orbit. However, one ought not to overstate this. Running through their work was a tension between two different visions as to the character of the international dimension of capitalism.

On the one hand, as Brewer has shown, Marx’s *Capital* was based upon a model of ‘a closed, homogeneous, capitalist economy’. Here there was ‘no space for any differences in economic conditions between different countries’.⁷⁵⁷ In *Capital* this was largely a methodological assumption that Marx employed to analyse the ‘general laws’ of capitalism.⁷⁵⁸ However, it was also part of a broader ‘diffusionist’ vision of how capitalism operated on the world stage.⁷⁵⁹ In this diffusionist account, capitalism was seen as arising in Europe and then ‘diffusing’ throughout the rest of the world. This vision, particularly evident in the *Manifesto of the Communist Party*, placed stress upon the way in which the bourgeoisie had given ‘a cosmopolitan character to production and consumption in every country’,⁷⁶⁰ with ‘[n]ational one-sidedness’ becoming ‘more and

⁷⁵¹ See Chapter 1 Section 4.1.

⁷⁵² Ironically, in the collection of Marx and Engels’ writing *On Colonialism* the word ‘colonialism’ is never mentioned, see Marx and Engels 1968.

⁷⁵³ Kiernan 1974, 6.

⁷⁵⁴ Marx and Engels 1968.

⁷⁵⁵ Brewer 1990, 3.

⁷⁵⁶ Marx 1990, 915.

⁷⁵⁷ Brewer 1990, 26. See also Spivak 1990, 162. Although see Pradella 2013 for a contrary view.

⁷⁵⁸ In *The Grundrisse* Marx argued any fuller work of political economy would eventually need to consider ‘colonies. Emigration ... [t]he international relation of production. International division of labour. International exchange. Export and import. Rate of exchange’ and ‘[t]he world market and crises’, see Marx 1978f, 244.

⁷⁵⁹ Blaut 1993, 8–26.

⁷⁶⁰ Marx and Engels 1978a, 476.

more impossible'.⁷⁶¹ Here, the distinctiveness of capitalist development internationally was 'flattened out', with the 'cheap prices' of the commodities of the bourgeoisie serving as the beach head for the greater interconnection of the world.⁷⁶²

This was accompanied by a *celebration* of the effects of capitalism. Because the bourgeoisie had made such great advances, it was seen as providing the material prerequisites for a communist society. Pre-capitalist societies were cast as 'backward', with Marx and Engels declaring that the bourgeoisie 'has made barbarian and semi-barbarian countries dependent on the civilised ones'.⁷⁶³ This was part of a broader theory of Eastern, pre-capitalist societies in which they were analysed in terms of an 'Asiatic Mode of Production',⁷⁶⁴ marked by static and stagnant social relations, which were unable to advance without external intervention.⁷⁶⁵ It was in this context that Marx contended that the presence of British industrial capital in India was progressive, since it was transforming 'backward' social relations. In this way, 'England' was 'causing a social revolution in Hindostan' and so – despite its 'vile' motives – 'was the unconscious tool of history in bringing about that revolution'.⁷⁶⁶ This was the type of analysis that led postcolonial theorists to characterise Marx and Engels' work as Orientalist and Eurocentric.⁷⁶⁷

At the same time, Marx and Engels recognised the violent, uneven and destructive characteristics of global capitalist expansion. Nowhere was this more evident than in Marx's discussion of 'primitive accumulation'. By 'primitive accumulation' Marx referred to the processes through which the preconditions for capitalism were secured.⁷⁶⁸ This process involved two aspects: the first was the creation of conditions whereby the majority of people would only be able to survive through selling their labour-power (proletarianisation); the second was the mechanism through which capitalists acquired sufficient assets to be able to utilise this labour power.⁷⁶⁹

⁷⁶¹ Ibid., 477.

⁷⁶² Ibid.

⁷⁶³ Ibid.

⁷⁶⁴ Spivak 1999, 96–97.

⁷⁶⁵ Marx 1973, 486–487.

⁷⁶⁶ Marx 1978b, 658. Although as Jani demonstrates, his view had changed somewhat following the 1857 mutiny, see Jani 2002.

⁷⁶⁷ Said 2003, 154.

⁷⁶⁸ Harvey 2009, 290.

⁷⁶⁹ Ibid., 291.

The latter issue is where Marx came closest to articulating an account of colonialism and imperialism. Marx described the beginning of capitalist production as marked by the ‘discovery of gold and silver in America, the extirpation, enslavement and entombment in mines of the indigenous population of that continent, the beginnings of the conquest and plunder of India, and the conversion of Africa into a preserve for the commercial hunting of blackskins’.⁷⁷⁰ The colonies ‘provided a market for the budding manufactures’ and a source of wealth, whereby ‘the treasures captured outside Europe flowed back to the mother country’.⁷⁷¹ The credit and debt systems that were bound up in this colonial expansion ‘endow[ed] unproductive money with the power of creation and thus turns it into capital’.⁷⁷² This was crucial in displacing the role of merchant capital inside of Europe and strengthening the industrial capitalists who were to be at the heart of the emergence of capitalism as a fully fledged social system.⁷⁷³ Vitally, Marx did not understand this as a seamless process of purely ‘economic’ penetration. Rather, he argued, the colonial system depended on ‘brute force’ and that the expansion necessarily employed ‘the power of the state, the concentrated and organized force of society’.⁷⁷⁴

This account lent itself to a rather different understanding of capitalist development. In contradistinction to Marx’s comments on its progressive character, in an 1881 letter to Vera Zasulich, he stated that capitalist development was only historically inevitable in ‘the *countries of Western Europe*’⁷⁷⁵ and that in Russia the rural commune might serve as ‘the fulcrum of social regeneration’, provided one eliminated ‘the deleterious influences that are assailing it from all sides’.⁷⁷⁶ Indeed, many authors have suggested that the ‘late Marx’, with his reflections on indigenous societies, departed fundamentally from the ‘linear’ understanding evinced in his earlier work.⁷⁷⁷ Just how different these political conclusions were can be seen by contrasting Marx’s account of India with his account of Ireland. In an 1870 letter, Marx wrote that Ireland was ‘the cardinal means by which the English aristocracy maintain *their domination in England*

⁷⁷⁰ Marx 1990, 915.

⁷⁷¹ Ibid., 918.

⁷⁷² Ibid., 919.

⁷⁷³ Brewer 1990, 41; Harvey 2009, 299.

⁷⁷⁴ Marx 1990, 915.

⁷⁷⁵ Marx 1989, 370.

⁷⁷⁶ Ibid., 371.

⁷⁷⁷ Anderson 2010; Shanin 1983.

*itself*⁷⁷⁸ because it enabled the English ruling class to divide the Irish and English working classes. Consequently, the English workers had to realise that ‘*for them the national emancipation of Ireland is not a question of abstract justice or humanitarian sentiment but the first condition of their own social emancipation*’.⁷⁷⁹

Later thinkers in the Marxist tradition have not generally chosen to follow the ‘first path’.⁷⁸⁰ The colonial scrambles of the late 19th century, as well as the political issues leading up to the First World War, seemed to suggest that heightened international competition and intensified colonial exploitation were to be the order of the day. This made the ‘second path’ a more viable explanation of the world. Since these writings were often fragmented, scattered and unsystematic, later Marxists could not be content with Marx and Engels’ *specific* comments on the international dimensions of capitalism. Rather, these later Marxists adopted Marx and Engels’ materialist outlook, as well as their more general understandings of capitalism, and sought to develop these more fully within the context of the international situation, in the process elaborating a concept of ‘imperialism’.

1.2. Classical Marxist Theories of Imperialism

1.2.1. Reproduction, Accumulation, Expansion

Unlike Marx and Engels, later writers in the Marxist tradition thought that imperialism was of *central* importance to any understanding of the world. As Lenin stated in his introduction to Bukharin’s *Imperialism and World Economy*:

The problem of imperialism is not only a most essential one, but, we must say, it is the most essential problem in that realm of economic science which examines the changing forms of capitalism in recent times. Every one interested not only in economics but in any sphere of present-day social life must acquaint himself with the facts relating to this problem.⁷⁸¹

Placed in the context of Marx’s own writings, this is a rather startling statement. Rather than seeing imperialism as simply resulting from the founding of capitalism, or as a side effect of capitalist development, Lenin saw it as *the* main aspect of capitalism, reaching into and shaping every aspect of social life. In this respect, Lenin is reflective more generally of the wider classical Marxist tradition, all of whom thought of imperialism as

⁷⁷⁸ Marx 1998, 473.

⁷⁷⁹ Ibid., 475.

⁷⁸⁰ The exception is Warren and Sender 1980.

⁷⁸¹ Bukharin 1972, 9.

being one of the primary problems of their conjuncture. This was in part because they understood imperialism as a type of *crisis management* to counteract the tendencies of advanced capitalism. The survival of capitalism was only possible because of imperialism.

This approach is most evident in Rosa Luxemburg's *The Accumulation of Capital*. Luxemburg's main focus was on 'reproduction'. In the political-economic context, reproduction refers to the way in which a given society is able to fulfil its needs and hence 'reproduce itself'. This involves producing the requisite number of goods to both fulfil consumption needs and to recreate the conditions for continued production.⁷⁸² Reproducing society at the same level is 'simple reproduction'. Since most societies experience population increases, they need to increase production too, this is 'expanded reproduction'.

Under capitalism reproduction assumes very specific characteristics. Firstly, it does not place *directly*. Instead, it occurs through the action of many capitals, producing and competing in order to realise surplus value. Consequently, reproduction is achieved through the exchange of commodities and thus mediated through the 'anarchy' of the market.⁷⁸³ Secondly, expanded reproduction assumes a more important role. Capitalists do not produce for its own sake, but rather to increase their profits. At any given moment, they can increase profits by decreasing prices, so as to undercut their competitors. In order to do this, it is necessary to increase the scale of production and sell more units, so as to counteract the effect of a lower price. However, this compels *all capitalists* to continually cut their prices in order to compete, meaning all must also increase production. Hence this tendency assumes the characteristic of a 'coercive law'.⁷⁸⁴ In order to achieve this, capitalists have to engage in accumulation, continually reinvesting surplus value.⁷⁸⁵

In order to understand reproduction, Marx – in *Capital Volume II* – divided capitalist societies into two 'Departments'.⁷⁸⁶ Department I produces means of production and Department II produces consumer goods. Essentially, for Marx, Department I increases

⁷⁸² Luxemburg 2003, 4.

⁷⁸³ Ibid., 5–6.

⁷⁸⁴ Ibid., 13.

⁷⁸⁵ Ibid., 17.

⁷⁸⁶ Marx 1978a, 468–600.

production, meaning Department II will have to increase consumer goods to supply this, and so on, thus fulfilling consumption needs and recreating the conditions for continued production.⁷⁸⁷ For Luxemburg this approach did not work. If capitalist production always proceeds in the expectation of producing greater profit, then it needs *demand* for its products. Marx's schema was unable to explain the source of this demand. Luxemburg argued that demand 'cannot possibly come from [the consumption of] the capitalists of Departments I and II themselves' since they refrain from using all of their surplus value for consumption, reinvesting it in more production.⁷⁸⁸ Similarly, it cannot come from the workers, who only gain a wage from the production carried out by the capitalists.

As a result, Marx was unable to explain why reproduction under capitalism occurred *at all*. However, it clearly does. Luxemburg accused Marx of making a double error, both historical and logical.⁷⁸⁹ Logically, if demand could not come from inside of capitalism, then it had to come from *non-capitalist* strata. This was also historically true. Whilst Marx's analysis presumed the worldwide domination of the capitalist mode of production, this was not the case. Capitalism had always coexisted with and interacted with non-capitalist strata. At the core of the reproduction of capitalism, Luxemburg argued, was its expansion into non-capitalist social formations.

On a basic level, Luxemburg noted, capitalists necessarily have to 'to dispose ever more fully of the whole globe ... so as to find productive employment for the surplus value it has realised'.⁷⁹⁰ However, these pre-capitalist strata have very little demand for foreign goods, since their production is self-sufficient. Consequently, capitalism needed to transform these 'natural economies' into commodity economies. This could only be achieved through the continuous application of force and violence. In this way, Luxemburg directly took up Marx's arguments around the question of 'primitive accumulation', extending them beyond capitalism's initial genesis. In her account, force is deployed as a 'permanent weapon', with 'permanent occupation of the colonies by the military, native risings and punitive expeditions' serving as the 'order of the day'.⁷⁹¹ Luxemburg contended that this was true even of the apparently more 'peaceful' spread

⁷⁸⁷ Luxemburg 2003, 56.

⁷⁸⁸ Ibid., 104.

⁷⁸⁹ Ibid., 322.

⁷⁹⁰ Ibid., 339.

⁷⁹¹ Ibid., 351.

of capitalism through the medium of commerce. She noted that ‘the relations between the East India Company and the spice-producing companies were quite as piratical extortionate and blatantly fraudulent as present-day relations between American capitalists and the Red Indians of Canada whose furs they buy, or between German merchants and the Negroes of Africa’.⁷⁹²

This did not simply extend to the act of buying products and commodities. Luxemburg also argued that this applied to questions of *labour*. Since capitalism needed to ‘exploit territories where the white man cannot work’, it also needed to make use of foreign or native labour.⁷⁹³ In order to ‘free’ this labour, it was necessary to break up pre-capitalist social relations, or coerce people into working. Furthermore, the hierarchical conditions of pre-capitalist societies allowed for ‘the most peculiar combinations between the modern wage system and primitive authority’⁷⁹⁴ enabling ‘a greater drive and far ruthless measures’.⁷⁹⁵ In this way *both* aspects of ‘primitive accumulation’ were realised in global capitalist expansion.

Ultimately, for Luxemburg, it was only ‘the continuous and progressive disintegration of non-capitalist organisations makes accumulation of capital possible’.⁷⁹⁶ Were the world ever to become *fully* capitalist, capitalism would collapse. It was this tendency that generated ‘the contradictory behaviour of capitalism in the final stage of its historical career: imperialism’.⁷⁹⁷ Defining *imperialism* as specifically concerned with rivalry,⁷⁹⁸ Luxemburg predicted that, as capitalism became globally hegemonic, the advanced capitalist powers would have to fight for ‘what remains still open of the non-capitalist environment’.⁷⁹⁹

Despite Luxemburg’s predictions, there has been no terminal crisis of capitalism. Whilst there may still be pockets of pre-capitalist social relations⁸⁰⁰ it is difficult to maintain that these are the *only* thing allowing capital accumulation to keep going. Theoretically, as Brewer argues, in identifying the ‘logical’ contradictions of Marx’s reproduction

⁷⁹² Ibid., 367.

⁷⁹³ Ibid., 343.

⁷⁹⁴ Ibid., 343–344.

⁷⁹⁵ Ibid., 346.

⁷⁹⁶ Ibid., 297.

⁷⁹⁷ Ibid., 398.

⁷⁹⁸ See Chapter 1, Section 4.4.

⁷⁹⁹ Luxemburg 2003, 426.

⁸⁰⁰ See e.g. Banaji 2010; Laclau 1971.

schema, Luxemburg was operating at an overly high level of abstraction.⁸⁰¹ By consequence, she failed to recognise that *many capitals* will be engaged in processes of accumulation at different *times*, and so ‘demand’ cannot be considered as a unitary property of a given Department. However, even if Luxemburg’s larger point was insufficiently nuanced, her most important point was ‘to insist that the mechanisms of primitive accumulation, using force, fraud and state power, were not simply a regrettable aspect of capitalism’s past, but persist throughout the history of capitalism’.⁸⁰² This insight has been carried through into a host of Marxist theories of imperialism.⁸⁰³

What is most important in Luxemburg’s account is that imperialism arises from the ‘normal’ tendencies of capitalism. It is this insight that has most driven Marxist theories of imperialism. In particular, the previously mentioned approaches of Bukharin and Lenin strongly emphasised this. As stated in Chapter 1, Bukharin and Lenin’s work followed much of Hilferding’s analysis, but put it on an explicitly international plane. As Bukharin put it:

The struggle between “national” states, which is nothing but the struggle between the respective groups of the bourgeoisie, is not suspended in the air ... On the contrary, the very conflict is conditioned by the special medium in which the “national economic organisms” live and grow ... This is why the struggle between modern “national economic bodies” must be regarded first of all as the struggle of various parts of the world economy ... Thus the problem of studying imperialism ... reduces itself to the problem of analysing the tendencies in the development of world economy, and of the probable changes in its inner structure.⁸⁰⁴

Hence, his basic starting point was that capitalism has created a *world economy*, in which there is a world market and therefore world prices, which force national price convergence. Consequently, the world economy is a ‘a system of production relations and, correspondingly, of exchange relations on a world scale’,⁸⁰⁵ characterised by an international division of labour, in which given ‘national’ economies would have

⁸⁰¹ Brewer 1990, 63.

⁸⁰² Luxemburg 2003, 72.

⁸⁰³ Harvey 2003, 137–182.

⁸⁰⁴ Bukharin 1972, 17–18.

⁸⁰⁵ *Ibid.*, 26.

different levels of development and functions in the global economy. As such, Bukharin understood the world economy as marked by global flows of surplus value.⁸⁰⁶

Alongside this process of the ‘internationalisation of capital’, capitalism was also ‘nationalised’. Following Hilferding, Bukharin and Lenin argued that in advanced capitalist societies free competition had resulted in the increasing concentration and centralisation of capital. Capitalists were increasingly compelled to come together in monopolistic cartels, usually directed by financial capitalists. This gave rise to the phenomenon of *finance capital*. These tendencies towards monopoly were *intensified* by the process of internationalisation. Capitalists initially came to being in particular territorial units, and became closely integrated with particular states. As they face increasing international competition, they band more closely together in cartels and cleave ever more closely to their national states. As a result of this, there is a close connection between finance capital and the state, with capitalists demanding various forms of protection and action from their respective states, especially in the form of tariffs.⁸⁰⁷

For Bukharin and Lenin these two tendencies that produced the dynamics of imperialism. This resulted from a number of inter-related factors. Firstly, tariffs enable capitalists to make profits at home: prices can be raised in line with the price of the tariff (since foreign capitalists cannot outcompete them) and surplus products can be sold outside of the tariffs and outcompete domestic production. This is because less advanced capitalist countries have lower labour productivity, and so have to sell at higher prices in order to make profits. As with Hilferding, both Bukharin and Lenin argued that this also gave rise to a tendency towards annexing territory.⁸⁰⁸

This process is buttressed by the crisis tendencies in capitalism. Following Marx, both Bukharin and Lenin argued that mature capitalism was marked by a falling profit rate. This leads to a greater drive to expand *outwards* in search of the higher profit rates generated from selling to countries with lower labour productivity. This gives rise – as in all the classical accounts of imperialism – to the export of *capital* as opposed to

⁸⁰⁶ Ibid., 25.

⁸⁰⁷ Ibid., 74.

⁸⁰⁸ Ibid., 120.

commodities.⁸⁰⁹ This is because labour in less advanced capitalist countries is easier to exploit at higher rates, can be subject to greater discipline and made to work longer hours.⁸¹⁰ Equally, the export of capital enables one to get around the problems of tariffs by transferring surplus value.

Thus, for both Bukharin and Lenin, imperialism was concerned with an international division of labour between advanced and less advanced capitalist countries. Bukharin – ironically echoing Kautsky – argued that here the division between agriculture and industry was key. According to Bukharin, in the advanced capitalist countries there is a lopsided development in which industry develops much faster than agriculture. Since agriculture is a ‘naturally’ inelastic sector of production, the combination of these two factors leads to rapid price rises, which squeeze the profits of industrial capital.⁸¹¹ Consequently, industrial capitalists seek out new sources of raw materials. The imperialist and colonial implications are obvious. ‘Backward’ economies are subject to both a natural division of labour (owing to an abundance of raw materials) and social division labour, whereby they exist to provide cheaper raw materials. This impels advanced capitalists to dominate them.

Ultimately, this international division of labour is one of ‘a few consolidated, organised economic bodies (“the great civilised powers”) ... and a periphery of undeveloped countries with a semi-agrarian or agrarian system’.⁸¹² This is similar to Lenin’s account of capitalism as ‘world system of colonial oppression and ... the financial strangulation of the ... majority ... of the world by a handful of “advanced” countries’.⁸¹³ Finally, as noted in Chapter 1 (section 4.4.) Bukharin and Lenin held that imperialism was characterised by conflict *between the advanced capitalist powers* for control of this ‘periphery of undeveloped countries’. Since this territory was finite and exploitation necessarily involved excluding other capitalists, as the world was increasingly ‘divided up’, the struggle over what remained became more and more intense, giving rise to military violence between the advanced powers.⁸¹⁴

⁸⁰⁹ Lenin 1970a, 72.

⁸¹⁰ Bukharin 1972, 84.

⁸¹¹ Ibid., 92.

⁸¹² Ibid., 74.

⁸¹³ Lenin 1970a, 5.

⁸¹⁴ Ibid., 150.

1.2.2. Imperialism as Epoch

What emerges from the above considerations is that, for Marxists, imperialism ‘is neither a transhistorical political form nor a state policy’.⁸¹⁵ Although this sounds like a rather simple proposition, it gets to the heart of what is distinctive about Marxist understandings of imperialism. First and foremost, the Marxist tradition understands imperialism as a *distinctive* and historically specific phenomenon.⁸¹⁶ In particular, Marxists have sought to connect imperialism with *capitalism*, rooting imperialism within certain tendencies in capitalist development. In Lenin’s – highly influential – rendering, imperialism was in fact understood as a specific *stage* of capitalism.⁸¹⁷

Of course, such a position immediately raises two issues: firstly, that there have been international inequalities of power and territorial rivalry throughout human history and secondly, that capitalism has always been characterised by inequality and exploitation. Given this, how is it possible to talk about imperialism as specific or distinctive? Lenin answered these points directly, noting that:

Relations of this kind have always existed between big and little states, but in the epoch of capitalist imperialism they become a general system, they form part of the sum total of “divide the world” relations, become links in the chain of operations of world finance capital.⁸¹⁸

What singles imperialism out as historically specific is its *systemic* character. Although the constituent elements of imperialism have been present at various points in history, it is only under capitalism that they become systematically and continually impelled. It is not simply the case that there are more occurrences of actions that we might term ‘imperial’. Rather this is evidence of the fact that these actions have become a systemic, *necessary* part of the totality of the world economy.

For Marxist theorists of imperialism, then, capitalism gives rise to the specific phenomenon of ‘imperialism’ because it is the first social system to truly unify the world, and is driven by the ceaseless search for greater profits. This compels capitalists, and the states with which they are associated, to constantly expand globally, competing with each other, and transforming the world as they go. No other mode of production

⁸¹⁵ Callinicos 2009, 3.

⁸¹⁶ Bukharin 1972, 110.

⁸¹⁷ Lenin 1970a, 104.

⁸¹⁸ Ibid., 103.

has been driven by such a ceaseless logic. Whilst '[i]mperialism is a policy of conquest ... not every policy of conquest is imperialism'.⁸¹⁹

The systemic character of imperialism also draws attention to a corollary of asserting the historical specificity of imperialism, namely, *its historical necessity*. As Bukharin put it, insofar as imperialism is understood as flowing from certain 'tendencies' or 'laws' of capitalism, it cannot be viewed as 'as a mere historical accident', or 'a kind of 'sin' of capitalist development'.⁸²⁰ The classical Marxists insisted that the 'bad sides' characteristic of imperialism – war, uneven development etc. – were symptoms of the deeper structural logic of capitalism. According to Bukharin, one could only understand such events 'as the consequence of a definite historic cause or historic causes' and not as 'an "accidental entity caused by nothing'.'⁸²¹ They argued that those who treated imperialism as just as a policy would be unable to properly fight all of its effects. Predictably, in this argument, the main opponent was Kautsky, who, Lenin argued:

[D]etaches the politics of imperialism from its economics, speaks of annexations as being a policy "preferred" by finance capital, and opposes to it another bourgeois policy which, he alleges, is possible on this very same basis of finance capital. It follows, then, that monopolies in economics are compatible with non-monopolistic, non-violent, non-annexationist methods in politics. It follows, then, that the territorial division of the world, which was completed precisely during the epoch of finance capital ... is compatible with a non-imperialist policy. The result is a slurring-over and a blunting of the most profound contradictions of the latest stage of capitalism.⁸²²

For Lenin, the systemic character of imperialism was captured by the *connection between politics and economics*. This illustrates the fact that the classical Marxists understood imperialism as being structured by an *economic logic*. As Akbar Rasulov puts it, 'from the Marxist point of view every global imperial structure is supposed to be understood ... as a historical solution worked out at the 'political' level in response to the fundamental contradictions of the corresponding globally dominant mode of production occurring at the 'economic' level'.⁸²³

⁸¹⁹ Bukharin 1972, 114.

⁸²⁰ Bukharin 1979, 29.

⁸²¹ Bukharin 1972, 131.

⁸²² Lenin 1970a, 111.

⁸²³ Rasulov 2010, 469.

Here one should be careful. This position does not hold that there is a one-to-one correspondence between every imperial action and economic ‘motives’. As Brewer notes, not ‘every incident in the history of empire can be explained in directly economic terms’, since ‘[e]conomic interests are filtered through a political process ... and the whole system generates its own momentum’.⁸²⁴ Imperialism’s economic logic operates at the level of the system *as a whole*, framing the way in which individual ‘actions’ will be carried out.

One can see how this plays out in Lenin’s discussion of the question of ‘raw materials’. Lenin argued that, since ‘present-day technical development is extremely rapid, and land which is useless today may be made fertile tomorrow’, capitalists must be interested not only in ‘already discovered sources of raw materials’ but also potential ones.⁸²⁵ Capitalists are compelled ‘to seize the largest possible amount of land of all kinds in all places ... taking into account potential sources of raw materials and fearing to be left behind’.⁸²⁶ The economic logic of the system is such that capitalists in general are forced to expand, even if it may not seem to be in their immediate ‘economic’ interest.

Here, one can detect a decidedly Hobbesian inflection. Hobbes thought that the ‘state of nature’ was violent not so much because all men were predisposed to violence, but because all men had to defend themselves against the *possibility* of violent attacks.⁸²⁷ This Hobbesian connection points to the way in which Lenin’s argument is close to the ‘political’ theorists of imperialism – such as Cohen and Morgenthau – discussed in Chapter 1 (Section 4.3.), who argued the continual threat of *possible* violence in an anarchical state system compelled all states to continually maximise their power.

The difference is that Lenin did not *naturalise* this drive for endless political accumulation as an inevitable feature of international relations (or human nature), but instead *historicised* it. The tendency towards endless political expansion is rooted in a historically specific drive towards capitalist accumulation. In this way, rather than denying the insights of ‘bourgeois’ theories of imperialism, the Marxist account locates these insights *within a set of material conditions*. One might say then, that just as

⁸²⁴ Brewer 1990, 2.

⁸²⁵ Lenin 1970a, 99.

⁸²⁶ *Ibid.*, 100.

⁸²⁷ Hobbes 2008, 82–83.

Marx's critique of political economy in *Capital* sought to historicise the concepts of the bourgeois political economists,⁸²⁸ so too does the Marxist critique of imperialism historicise the insights of non-Marxist theorists of international relations. Thus, the classical Marxist concept of imperialism was opposed to those theories of 'Empire-ism'. Instead, it understood imperialism as a distinctive, historically specific phenomenon, with its 'taproot' located in the economic logic of capitalism.

1.2.3. A Materialist Theory of Eurocentrism

The importance of this materialist analysis can be seen by examining how these Marxists accounted for 'Eurocentrism'. The very concept of imperialism implies that capitalism has developed unevenly on a global scale. This unevenness gives rise to an international division of labour, comprised of an advanced capitalist core and a less developed periphery. It is clear that Marxists have also understood this international division of labour to be a geographically specific one, with the advanced capitalist countries located in Europe. For example, Lenin upbraided *Europeans* for forgetting that 'colonial peoples *too* are nations'⁸²⁹ and similarly, Luxemburg repeatedly describes the process of imperialism in terms of the expansion of *European* capital.⁸³⁰

However, geography was not the determining factor. As Luxemburg noted, this dynamic had to be understood in terms of 'social economy rather than of political geography'.⁸³¹ Although it was European capital that was exploiting the non-European world, this was not carried out because of something specifically 'European' about European culture. Instead, the connection between Europe and imperialism was – in some sense – accidental.⁸³² Europe had developed capitalism before any other part of the world. As a result, when capitalism's tendencies gave rise to global expansion and exploitation, it was in Europe that this first happened. Consequently, it was *European* capital which was imperialist, but not *because* of its European nature. Yet as Said noted, a theory of Eurocentrism cannot simply state why Europe was expansive, it also has to explain why it was that Eurocentrism 'penetrated to the core of the workers' movement,

⁸²⁸ In *The Poverty of Philosophy* Marx argued that '[e]conomists express the relations of bourgeois production ... as fixed, immutable, eternal categories' without explaining 'how these relations are produced, that is, the historical movement which gave them birth'. of which categories 'are but the theoretical expression'. The task was to locate them *within a specific historical and material context*, Marx 1977, 97–98. Or, as Fredric Jameson put it – 'Always historicize!', Jameson 2002, ix.

⁸²⁹ Lenin 1964a, 63.

⁸³⁰ Luxemburg 2003, 339, 373, 417.

⁸³¹ *Ibid.*, 347.

⁸³² Amin 2009.

the women's movement, the avant-garde arts movement, leaving no one of significance untouched'.⁸³³ In other words, why it played a vital role *within* the advanced capitalist countries.

Although the classical Marxists did not share Said's broader commitment to the structuring role of culture, they nonetheless understood this was a real problem. Even if the expansion of Europe into the non-European world could be explained by reference to capital accumulation, it was nonetheless conducted under the banner spreading European 'civilisation'. This project not only embraced the European capitalist class, but also infiltrated the European working class. Whole swathes of the European workers movement had chosen to support their own imperialisms in the First World War. Accordingly, for the classical theorists of imperialism, explaining the Eurocentrism of the workers movement was one of the most pressing political tasks.

The starting point in their accounts was the centrality of imperialism for the continued existence of European capitalism. Bukharin and Lenin understood 'Eurocentrism' as an *ideology* that arises in the context of capitalist imperialism in order to justify and solidify it. This 'grandiose ideological formulation'⁸³⁴ is so widespread because its material base – imperialism – is so important to the continued existence of capitalism. The material base was manifested in the 'natural' inter-dependence between labour and capital. Whilst there is no transhistorical necessity for capitalists; in the immediate context of capitalism, the bourgeoisie controls the means of production and provides *wages* to the working class. Thus, there can be a momentary 'solidarity' between the working class and capital, since – in a limited sense – they 'need' each other. However, this solidarity is only able to come properly to fruition where there is a *differentiation* between various sectors of the working class. If certain sectors of the working class are able to secure special advantages (such as higher wages) they may side with their 'own' capitalists against other workers.

Under imperialism this situation is writ large. The wealth of the advanced imperialist countries is in part guaranteed because of the intensified forms of exploitation in the peripheral countries. Consequently, it is 'the little peoples of the colonies' who pay the

⁸³³ Said 2003, 267–268.

⁸³⁴ Bukharin 1972.

bill for imperialism, as opposed to the European workers.⁸³⁵ In this respect, the ‘European workers, considered from the point of view of the moment, are the winners, because they receive increments to their wages due to “industrial prosperity”’.⁸³⁶ As other Marxists have later suggested, this also serves as the material foundation for the welfare state.⁸³⁷

Thus, although Eurocentrism is an ideological formulation, it is not simply a sham. Rather, it has a material basis. Indeed, Lenin went further than this. He argued that in any industry where there is an imperialist monopoly, the capitalists will be able to make *super-profits*. These super-profits enable capitalists to pay a section of the working class wages that are much higher than they might otherwise achieve and so ‘bribe *their own* workers, to create something like an alliance ... between the workers of the given nation and their capitalists *against* the other countries’.⁸³⁸

The net effect of this was the creation of a ‘labour aristocracy’ whereby to ‘a *certain degree* the workers of the oppressor nations are partners of *their own* bourgeoisie in the plundering ... of the oppressed nations’. These workers occupy ‘a *privileged* position in many spheres of political life’ and ‘[i]deologically ... are taught ... disdain and contempt for the workers of the oppressed nations’.⁸³⁹ In this way, the classical Marxist theorists of imperialism did not deny the Eurocentrism later analysed by postcolonial theorists (see Chapter 1, Section 5.5) but analysed it as an ideological formulation with real material foundations.

1.3. *Imperialism and International Law?*

Marxist theorists of imperialism did not tend to engage in *explicit* reflection on international law. However, as previously noted, any reflection on the nature of imperialism has international legal implications. On a very basic level, the theorists described above all thought that international law was one mechanism through which the advanced (imperialist) powers realised their interests. This was most obvious in the case of *treaties*. Luxemburg, for instance, was very aware of the way in which – following the Opium Wars – ‘the ambiguity of the treaty texts made a convenient

⁸³⁵ Ibid., 165.

⁸³⁶ Ibid.

⁸³⁷ Amin 2009, 268.

⁸³⁸ Lenin 1964b, 114.

⁸³⁹ Lenin 1964a, 56.

excuse for European capital to encroach beyond the Treaty Ports', with European capital making use of 'every loophole' in order to guarantee its expansion.⁸⁴⁰

Similarly, Bukharin, with his focus on trade, tariffs and the export of capital, noted the role of concession agreements and commercial treaties.⁸⁴¹ He was keen to demonstrate that one could not contrast 'peaceful' treaties on the one hand, and armed force on the other. For Bukharin, these were 'in substance the expression of the same tendencies'.⁸⁴² This is not least because the *terms* of these treaties could not be understood in isolation from the 'state power of the contracting groups of capitalists' and the 'mutual relations of these states'.⁸⁴³

What Bukharin and Luxemburg allude to is the function that international law could play in expressing, solidifying or codifying a given balance of forces at a given point in time. This could extend more broadly than individual confrontations or agreements. Lenin, for instance, understood that the Treaty of Versailles had been fundamental in creating an order 'wherein seven-tenths of the world's population are in a condition of servitude'.⁸⁴⁴ Lenin levelled similar criticisms at the international institutions of the time. Emphasising inter-imperialist rivalry, he described the League of Nations as a 'pack of wolves that are all the time at each other's throats'⁸⁴⁵ and a 'sheer fraud ... an alliance of robbers, each trying to snatch something from the others'.⁸⁴⁶ For him, 'without the revolutionary overthrow of capitalism, no international arbitration courts, no talk about a reduction of armaments, no "democratic" reorganisation of the League of Nations will save mankind from new imperialist wars'.⁸⁴⁷

Although the classical Marxist theorists of imperialism understood imperialism as being wider than European colonialism, that *was* the form of imperialism with which they were faced. This led to some rather contradictory statements on whether or not colonialism needed to assume a directly juridical form. On the one hand, Lenin did understand that colonial domination need not be directly juridified. Since, for him,

⁸⁴⁰ Luxemburg 2003, 373.

⁸⁴¹ Bukharin 1972, 99.

⁸⁴² Ibid., 108.

⁸⁴³ Ibid., 124.

⁸⁴⁴ Lenin 1966d, 326.

⁸⁴⁵ Lenin 1966c, 172.

⁸⁴⁶ Lenin 1966d, 323.

⁸⁴⁷ Lenin 1966a, 208.

imperialism was mainly centred around ‘economic annexation’, it was entirely foreseeable that states ‘enjoying the fullest political independence’ could also be subjected to the rule of finance capital, since it was ‘such a decisive force in all economic and in all international relations’.⁸⁴⁸

Imperialism was composed of ‘diverse forms of dependent countries which, officially, are politically independent, but in fact, are enmeshed in the net of financial and diplomatic dependence’.⁸⁴⁹ Similarly, both Bukharin and Luxemburg drew attention to the role that *finance* played in this domination, particularly through the medium of loans with strict conditions attached to them.⁸⁵⁰ These relationships were generally characterised as ‘semicolonial’. However, they were not seen as the *main* means through which colonial relations were expressed. Lenin argued that political annexation ‘often makes economic annexation easier, cheaper ... more convenient, less troublesome’⁸⁵¹ and stated that the ‘semicolonial’ states were merely ‘transitional forms’.⁸⁵²

Obviously, history did not bear this out. However, what is important is that Lenin argued the fundamental driving force of imperialism was its economic logic, which could manifest in many forms. He argued that ‘*forms* of the struggle’ between imperialists ‘constantly change in accordance with varying, relatively particular and temporary causes, but the *substance* of the struggle, its class *content*, positively *cannot* change’.⁸⁵³ In this way, the classical Marxist account held that formal colonialism could only be understood within the context of the wider dynamics of capitalist imperialism. Equally, imperialism was not *exhausted* by colonialism. In this way, one can see how this directly informed the Third Worldist understanding of colonialism, and paved the way for the concept of neo-colonialism.

Crucially, law served as one of the forms through which the ‘class content’ of imperialism was articulated. However, this form was essentially a contingent one. Consequently, against those legalists who thought granting dependent states political

⁸⁴⁸ Lenin 1970a, 97.

⁸⁴⁹ Ibid., 101.

⁸⁵⁰ Bukharin 1972, 98 – 100.

⁸⁵¹ Lenin 1964a, 44.

⁸⁵² Lenin 1970a, 96.

⁸⁵³ Ibid., 89.

independence would be sufficient, Lenin stressed the relative powerlessness of law *vis-à-vis* economics, arguing:

Laws are political measures, politics. No political measure can prohibit economic phenomena. Whatever political form Poland adopts ... there is no prohibiting or repealing her dependence on the finance capital of the imperialist powers, or preventing that capital from buying up the shares of her industries.⁸⁵⁴

One might note that Lenin is erecting something of a false dichotomy. It is clear that Poland's independence was 'legally' guaranteed. It is equally clear that this independence could be illusory in the face of financial or other forms of economic control. What is less clear is whether it is possible to characterise 'economic phenomena' as purely 'economic'. Lenin mentions the act of capitalists 'buying up the shares' of Poland's industries. But this is hardly an act that is *not* mediated through the law. As Marx himself acknowledged, the act of buying is always mediated through the basic juridical form of the contract.⁸⁵⁵ More importantly, to speak of 'shares of industries' is to presume the kind of disaggregation of ownership which *demands* a legal system. Once this is recognised, we can see that this is not a case of economics against law, but rather that different imperial configurations are mediated through different legal articulations and regimes.

This is indicative of a wider issue. While Lenin and the other classical theorists of imperialism did trace the way in which imperialism and international law were 'institutions for each other', this connection was understood as fleeting, conjunctural and contingent. Although international law was not understood as intrinsically opposed to or opposed by imperialism, it was nonetheless a passive vessel. This vessel would sometimes express imperialist content, but would always give way to the 'real' force of (imperialist) economics.

Consequently, although Marxist theories of imperialism were able to provide considerable 'raw material' for Marxist understandings of international law, they ultimately lacked any theory as to what might be *specific* about law and its relationship to imperialism. Here, there is a great deal of similarity between with the first wave of radical Third World jurists. Both operated with a common materialist understanding of

⁸⁵⁴ Lenin 1964a, 48.

⁸⁵⁵ Marx 1990, 178.

imperialism. However, both are ultimately limited in their understanding of what is *distinctive* about the relationship between law and imperialism.

One ought to note the differences though. The Third World jurists operated with a kind of sociological functionalism, in which international law would eventually come to ‘reflect’ the interests of a rising tide of progressive forces. This meant that it could be used to oppose imperialism. By contrast, the classical Marxist theorists of imperialism viewed international law as *weak* in the face of imperialist realities. As such, they thought that any appeals to international law would ultimately serve to obfuscate the real driving forces of imperialism. This implied its *uselessness* in opposing imperialism

It was to this kind of theorising that the previously mentioned Pashukanis quote – that older studies of law had been ‘a history of economic forms with a more or less weak legal colouring’⁸⁵⁶ – was referring. In this respect, Marxist theorists of international law were faced with a similar task to TWAIL scholars, that of unpacking the *distinct* relationship between imperialist social relations and their juridical articulations.

2. Marxism and International Law

2.1. Marxist Legal Theory

Compared to other fields, Marxists have not devoted a huge amount of attention to law. Marx and Engels only dealt with legal questions in a scattered, unsystematic way.⁸⁵⁷ One ought not to exaggerate. There have been two books written simply summarising and cataloguing Marx and Engels’ legal reflections⁸⁵⁸ and one can observe a juridical undercurrent operating throughout their work. What this reflects is the fact that issues of law are unavoidable when one is analysing social relations. This is *a fortiori* true for a political movement seeking to change the world. Questions as to the nature of law are vital components of broader questions of political transformation.⁸⁵⁹ This is why Marxists have developed specifically legal theories.

These accounts have relied both upon Marx and Engels’ comments on the law, as well as their general reflections on the relationship between economy and society.

⁸⁵⁶ Pashukanis 1980c, 44.

⁸⁵⁷ Edelman 1979, 21–26.

⁸⁵⁸ Cain and Hunt 1979; Phillips 1980.

⁸⁵⁹ See Baars 2011 and Knox 2010b. for overviews.

Consequently, a brief discussion of these positions is useful. In the *Preface to the Critique of Political Economy*, Marx most explicitly laid out his understanding of the relationship between ‘economy’ and ‘society’. He proposed that ‘legal relations ... are to be grasped neither from themselves nor from the so-called general development of the human mind’ but rather from ‘their roots in the material conditions of life’.⁸⁶⁰

Specifically, the ‘material conditions of life’ referred to relations of production. For Marx, ‘[t]he sum total of these relations of production constitutes the economic structure of society, the real foundation, on which rises a legal and political superstructure’.⁸⁶¹ Importantly, the nature of these social relations varied ‘according to the character of the means of production’. Different levels of productive forces led societies to arrive at definite stages of historical development, each of which possessed peculiar and distinctive features.⁸⁶²

Marx did not suggest that in each one of the stages, the ‘economic’ was the most visible element. Rather, he argued that specific economic configurations would give rise to specific configurations of other social phenomena. Thus, against those who argued that it was only in capitalism that ‘material interests are preponderant’ and that the Middle Ages were ‘dominated by Catholicism’, and ancient societies were ‘dominated by politics’, Marx argued that it was only ‘the manner in which they gained their livelihood’ that could explain *why* politics or Catholicism were dominant.⁸⁶³

Marx and Engels did not think of history as simply characterised by the unfolding of ‘structures’. The modes of production they described were structured by groups of individuals who were able to *exploit* other groups of individuals. That is to say, they were composed of *classes*, whose struggle formed one of the motive forces of historical development.⁸⁶⁴

These two basic facts formed Marx and Engels’ approach to questions of law. Essentially, they sought to analyse the material basis of legal relations and the way in which class struggle was carried out through law. In the *German Ideology*, Marx and

⁸⁶⁰ Marx 1978d, 4.

⁸⁶¹ Ibid.

⁸⁶² Marx 1978g, 207.

⁸⁶³ Marx 1990, 176.

⁸⁶⁴ Marx and Engels 1978a, 473.

Engels held that '[c]ivil law' had developed simultaneously with private property. In societies where property ownership was communal there was no need for law, since ownership was mediated through the customs of the community. But where there was private property and individual ownership, law was necessary. It was for this reason that in the Middle Ages, wherever trade occurred, 'the highly developed Roman civil law was immediately adopted'.⁸⁶⁵ Only with the disintegration of feudalism could the 'real development' of law could begin.⁸⁶⁶

Marx and Engels' reflections in *The German Ideology* were concerned specifically with property. In *On the Jewish Question* Marx mounted a similar analysis, but did so for the spread of law more broadly. According to Marx, 'modern' societies are built on a distinction between 'civil society', where people act as private individuals, and the 'political community', where people act as communal beings.⁸⁶⁷ This was in contradistinction to feudal and other societies, where 'civil society had a *directly political* character' and questions of ownership, production and association were mediated through status.⁸⁶⁸

Under capitalism, such questions are necessarily mediated through *the market*. This militated against the direct fusion of state and civil society. Consequently, the '*formation of the political state*, and the dissolution of civil society into independent *individuals*' were two sides of the same historical process.⁸⁶⁹ Here law entered the picture. When civil society had a directly political character, the relationships of individuals were mediated through custom and status. But once civil society was composed of independent individuals, their relations needed to instead be mediated through *law*.⁸⁷⁰ For Marx, the 'so-called *rights of man*, as distinct from the *rights of the citizen*, are simply the rights of a *member of civil society*, that is of egoistic man, of man separate from other men and from the community'.⁸⁷¹

Marx and Engels drew a structural link between the emergence of private property and the emergence of law. At the same time, they thought that law was one of the

⁸⁶⁵ Marx and Engels 1978b, 188.

⁸⁶⁶ Ibid.

⁸⁶⁷ Marx 1978c, 34.

⁸⁶⁸ Ibid., 44.

⁸⁶⁹ Ibid., 45–46.

⁸⁷⁰ Ibid

⁸⁷¹ Marx 1978c, 42.

‘ideological forms’ in which people became conscious of class conflict and ‘fight it out’.⁸⁷² In particular, Marx was concerned with the way in which struggles around *wages* and working conditions were mediated through law.⁸⁷³ Marx also focused on how law had been used by the nascent bourgeoisie to enact primitive accumulation.⁸⁷⁴ While Marx did consider primitive accumulation to be an international process, his main *legal* focus was on its domestic aspects. He drew attention to the ways in which Acts of Parliament had been passed which turned formerly common land into private property.

Marx’s lack of attention to the legal dimensions of the international process of primitive accumulation mean that he did not even leave *fragments* of an international legal theory. This is reflected in the historical record of Marxist international legal theory. Whilst Marxist domestic theory has had several ‘revivals’ through the years,⁸⁷⁵ interest in Marxist international legal theory has been less common. As explained previously, the Bolshevik and anti-colonial revolutions did throw up a number of Marxist international jurists, but always in fragmented way. This changed somewhat during the 1990s when there was something of an intellectual resurgence in Marxist scholarship on international law. This was further strengthened in the 2000s.

As Marks has noted, despite the lack of explicit engagement with international law, the Marxist tradition has ‘left a rich legacy of concepts, insights and analytical practices’ for international legal scholarship.⁸⁷⁶ This legacy includes several interconnected concepts: materialism, capitalism, imperialism, ideology and totality.⁸⁷⁷ Simply put, in attempting to understand international law, Marxists situate it within a totality of social relations. The consequence of this materialism is that international law has to be understood in relation to global capitalism, whose contemporary form is that of imperialism. As a result, the question of imperialism has been at heart of Marxist international legal theory.

⁸⁷² Marx 1978d, 5.

⁸⁷³ Marx 1990, 416.. See Knox 2010, 216–218 for an overview of Marx’s analysis of this question.

⁸⁷⁴ Marx 1990, 873–904.

⁸⁷⁵ In particular, parallel to the development of Critical Legal Studies in the US, there was a critical legal theory movement in Britain. The British movement situated itself much more explicitly within the Marxist tradition. See: Fine 1979; Sugarman 1983; Fryer 1981.

⁸⁷⁶ Marks 2008b, 2.

⁸⁷⁷ Ibid., 2–16.

2.2. *The Commodity-Form Theory*

2.2.1 Pashukanis and the Russian Revolution

As previously noted, the Russian Revolution had profound legal consequences. As revolutionary Marxists, the Bolsheviks thought that the law would wither away under communism.⁸⁷⁸ Yet, immediately upon assuming power, they were faced with a series of concrete legal challenges. Domestically, laws and decrees were vital for accomplishing a number of tasks, from nationalisation, to land reform, to political reform etc. Internationally, the nascent Russian Federated Soviet Republic faced a hostile world. The Bolsheviks had come into power in the midst of the First World War, with much of their popularity derived from their promise to *end* that War. Immediately, therefore, the Bolsheviks began negotiations to withdraw, concluding the Treaty of Brest-Litovsk in March 1918.

One might contrast this with Trotsky's initial 'diplomatic' action of November 1917, which involved the publication of all the secret treaties of the Tsarist regime and declaring that the only foreign policy of the Russian government was the overthrow of capitalism. This contrast signals that, as the hoped-for international revolution never came, questions of law became more important for the Bolsheviks.⁸⁷⁹ Given the centrality of theoretical questions to the political practice and self-identity of the Bolsheviks,⁸⁸⁰ this gave rise to a whole series of 'passionate debates' about the nature of law and what role it would play in the transition to a post-capitalist society.⁸⁸¹ In these debates Evgeny Pashukanis was one of the most important figures.⁸⁸²

Pashukanis' theory of international law cannot be separated from his theory of law *in general*. As previously noted, one of his primary criticisms of the Marxists who had preceded him was that rather than offering a theory of law, they had simply 'introduce[d] the element of class struggles'⁸⁸³ into a positivist theory of law. The particular target of Pashukanis' ire was Piotr Stuchka. Stuchka defined law as the 'general system of norms corresponding with the interests of the dominant class'.⁸⁸⁴ Pashukanis argued that such a position was flawed. Since – for Marxists – *all* social

⁸⁷⁸ Beirne and Hunt 1988, 578.

⁸⁷⁹ Bowring 2013, 48–71.

⁸⁸⁰ Cohen 1974, 83.

⁸⁸¹ Head 2007, 111–152.

⁸⁸² Bowring 2013, 54.

⁸⁸³ Pashukanis 1980c, 41.

⁸⁸⁴ Stuchka 1951, 20.

relationships might be understood as corresponding to the interests of the ruling class, on Stuchka's reading 'law as a relationship is indistinguishable from social relations in general'.⁸⁸⁵

By contrast, Pashukanis attempted to write a legal theory based on Marx's *Capital*. In *Capital* Marx began his analysis not from the totality of capitalist society, but from the 'simplest categories of price, value and, finally, commodities'. On this basis, Marx 'reconstruct[ed] the concrete totality not as a chaotic, diffused whole, but as a unity replete with internal dependencies and relationships'.⁸⁸⁶ For Pashukanis, this meant that a general theory of law was concerned with the 'basic ... most abstract juridic concepts' which would be 'equally applicable to any branch of law'.⁸⁸⁷

The key issue for Pashukanis was how can we say that law regulates social relationships. If law is itself a social relationship, then claiming that law regulates social relationships seems to amount to saying that 'social relations regulate themselves'.⁸⁸⁸ However, for Pashukanis, this position contained the germ of an answer. He pointed out that all relationships are capable 'of colouring' or giving their 'form to other social relationships'.⁸⁸⁹ One could escape from the conundrum by understanding law as 'a mystified form of some *specific* social relationship' which gives it forms to other relationship'.⁸⁹⁰

The question is, how does one understand this specific social relationship? Initially, such an approach might amount to the tautological statement that 'law assumes the form of law'. However, for Pashukanis, we ought to instead pose this solution in a historical materialist manner. This means understanding that 'under certain conditions the *regulation* of social relationships *assumes a legal character*'.⁸⁹¹ Although this might appear overly abstract, the point Pashukanis was trying to make is that it was only under certain definite material conditions that the form we know as law emerged. The task of a theory of law was to inquire into these conditions in order to comprehend the specific nature of this form.

⁸⁸⁵ Pashukanis 1980c, 61–62.

⁸⁸⁶ Ibid., 49.

⁸⁸⁷ Ibid., 39.

⁸⁸⁸ Ibid., 57.

⁸⁸⁹ Ibid., 58.

⁸⁹⁰ Ibid.

⁸⁹¹ Ibid.

Following Marx's reflections, Pashukanis located these conditions in *commodity exchange*. In *Capital* Marx noted that, in order for commodities to be exchanged, their 'guardians must ... recognize each other as owners of private property'.⁸⁹² In every exchange of commodities, each owner must recognise the other as a mutual proprietor. This involves the recognition of the other party as the possessor of an *equal right*. Accordingly, the participants in commodity exchanges must recognise each other as equal in an abstract, formal sense. However, within exchange there is always the possibility of dispute and it is these conflicts of interests that elicit the form of law. When disputes arise within commodity exchanges they must be regulated and resolved, but such regulation has to recognise and uphold the formal, abstract equality of the individuals involved. This is law: a form of social regulation between abstract, formal individuals.⁸⁹³

Thus, for Pashukanis, there was a structural link between law and capitalism. However, it is important to note that commodity exchange does in fact pre-date capitalism and so too did law.⁸⁹⁴ Since this commodity exchange was scattered, and integrated with a series of other practices, so too was law bound up with status, custom and religion.⁸⁹⁵ It was only with the rise and spread of capitalism that law became more important in governing social life. Because capitalism is structured around commodity exchange, as capitalism spread, so too did law.

However, Pashukanis did not just state that more exchange leads to more law. Following Marx, Pashukanis argued that capitalism is not simply an 'exchange' society. Instead, capitalism is a system based upon the *exploitation of labour power*. Under conditions of generalised commodity exchange, all participants become commodity owners because even the members of the working class own their *labour power*. Thus, for Pashukanis, 'simultaneously with the product of labour assuming the quality of a commodity and becoming the bearer of value, man assumes the quality of a legal subject and becomes the bearer of a legal right'.⁸⁹⁶

⁸⁹² Marx 1990, 178.

⁸⁹³ Pashukanis 1980c, 67.

⁸⁹⁴ Ibid., 79.

⁸⁹⁵ Ibid., 80–81.

⁸⁹⁶ Ibid., 76.

With ‘the full development of bourgeois relations’, value become increasingly abstract, and less concentrated in specific productive activities. In particular, *labour* becomes associated with ‘socially useful labour in general’.⁸⁹⁷ In this development, exchange value became ‘the embodiment of social production relationships which stand above the individual’.⁸⁹⁸ This increasing abstraction set the material conditions for the *fully-fledged emergence* of the legal form.⁸⁹⁹ Under these conditions the legal subject emerges as an entirely abstract category, divorced from particular legal instances, enabling ‘man to be transformed from a zoological being into an abstract and impersonal subject of law, into a juridic person’.⁹⁰⁰ As capitalist social relations fundamentally restructure the social totality, law is divorced from specific acts of exchange and *generalised*, with the legal subject becoming ‘the abstract commodity owner elevated to the heavens’.⁹⁰¹

It is only against this background that one can understand Pashukanis’ remarks on international law. If, for Pashukanis, law is intimately connected with commodity exchange, then it is also connected intimately with imperialism, which is the form that this exchange takes on a global scale. Essentially, Pashukanis’ remarks on international law were an attempt to combine the above insights with a Leninist theory of imperialism.⁹⁰² Pashukanis’ first point was that the commodity-form theory applied *a fortiori* to international law. The formal, abstract equality that Pashukanis ascribed to the legal form very closely resembles one of the key structuring elements of international law, that of ‘sovereignty’.

Pashukanis argued that ‘sovereign states co-exist and are counterposed to one another in exactly the same way as are individual property owners with equal rights’.⁹⁰³ This is because the territory of a state is functionally its private property and states engage directly in exchange.⁹⁰⁴ In fact, commodity exchange had *initially* taken place between ancient tribes and communities.⁹⁰⁵ These societies therefore developed rudimentary

⁸⁹⁷ Ibid., 81.

⁸⁹⁸ Ibid., 77.

⁸⁹⁹ Bowring 2013, 60.

⁹⁰⁰ Pashukanis 1980c, 77.

⁹⁰¹ Ibid., 81.

⁹⁰² Pashukanis 1980a, 169–170.

⁹⁰³ Ibid., 176.

⁹⁰⁴ Ibid.

⁹⁰⁵ Ibid., 175.

legal institutions. Accordingly, some form of ('primitive') international law was the *oldest* type of law.

However, it was only with the international generalisation of capitalism that international law came to full flower. This was firstly because it was only with capitalism that exchange was generalised on a world scale. Secondly, Pashukanis argued that the emergence of the independent sovereign state was premised upon the victories of the European bourgeois revolutions. These revolutions separated 'state rule from private rule, and transformed ... state into a special subject', a subject 'not to be confused with those persons who ... were the bearers of state authority'.⁹⁰⁶

These facts meant that any attempt to portray international law as a neutral 'totality of norms regulating ... regulations between states' missed the point.⁹⁰⁷ Instead, it was necessary to understand the 'historical' and 'class' basis of international law, which were the social relations of imperialism. As such, Pashukanis understood international law as '*the legal form of the struggle of the capitalist states among themselves for domination over the rest of the world*'.⁹⁰⁸ On this reading, imperialist states act *through* international law, using it to articulate their own interests and international law serves to 'concretize' economic and political relationships.⁹⁰⁹

Following the Leninist understanding of imperialism, Pashukanis essentially saw international law as mediating two inter-related aspects. Firstly, international law expresses 'the struggle between capitalist states'.⁹¹⁰ In this respect, he noted that a host of international norms concern the conduct of warfare, and directly assume a 'condition of open and armed struggle'. Following Lenin and Bukharin, Pashukanis held that even when this struggle was not directly manifested, it nonetheless continued in other, apparently peaceful, forms.⁹¹¹

For Pashukanis, therefore, competitive violence was at the heart of international law. He argued that this was the case even in those international institutions which apparently

⁹⁰⁶ Ibid., 174.

⁹⁰⁷ Ibid., 168.

⁹⁰⁸ Ibid., 169.

⁹⁰⁹ Ibid., 181.

⁹¹⁰ Ibid., 172.

⁹¹¹ Ibid., 169.

appeared to embed the ‘common interests’ of the world. These institutions allow imperialist states to protect ‘their particular interests, preventing the expansion of their rivals’ influence’.⁹¹² This was reflected in the particular *compositions* of these organisations, as well as the ways in which their participants continually attempted to secure their advantage through political manoeuvring. In this way, Pashukanis echoed Lenin’s observations on the League of Nations.

Pashukanis did acknowledge that elements of international law could function as an ‘ideal cultural community’. However, this community was not rooted in some general harmony of interests, but rather because capitalist states all had *ruling classes* with common interests. It was on this basis that Pashukanis traced a number of developments in the regulation of the law of war, which serve to protect ‘the general and basic interests of the bourgeoisie, i.e. bourgeois property’.⁹¹³

This is where the second element of Lenin’s account of imperialism – the relationship between the advanced capitalist countries and the rest of the world – came to the fore. Pashukanis noted that the strictures applied to protect ‘bourgeois property’ in Europe in no sense applied to colonial wars, where local populations were liquidated ‘without regard for age and sex’.⁹¹⁴ Thus, for Pashukanis, the class structure of international law was revealed by the concept of ‘civilisation’, which directly reflected the international division of labour between ‘backward’ and advanced capitalist countries.

For Pashukanis, therefore, international law was ‘the totality of forms which the capitalist, bourgeois states apply in their relations with each other’, with the rest of the world treated as ‘a simple object of their completed transactions’.⁹¹⁵ In this way, he understood the ‘civilising mission’ as the result of the *material* compulsions of capitalist imperialism, which were realised in the legal form. Echoing Lenin’s comments on the semi-colonial, Pashukanis maintained that this division was *not just* embodied in the ‘civilised’ and ‘uncivilised’ division. It was also a function of the fact that, while ‘in principle ... states have equal rights ... in reality they are unequal in their significance and their power’.⁹¹⁶ Since international law lacks a body to enforce and vindicate rights-

⁹¹² Ibid., 170.

⁹¹³ Ibid., 172.

⁹¹⁴ Ibid.

⁹¹⁵ Ibid., 173.

⁹¹⁶ Ibid., 178.

claims, it ‘includes a very solid dose of self-help’.⁹¹⁷ For Pashukanis, the unequal violence and power implied by imperialism play a vital role in vindicating international legal rights.

According to Pashukanis’ commodity-form theory, then, there are close structural links between international law and imperialism. This is true on an ‘ontological’ level, whereby the international legal *form* is systematically generated by commodity exchange. Because of this close connection, the *content* of international law is also provided by the social relations of imperialism, with the struggles and imperatives of imperialism playing out in international legal form.

2.2.2. From Commodity Form to Legal Form

Pashukanis’ theoretical positions are not uncontroversial. Over time the commodity-form theory has been subject to a host of criticisms. This being said, his insights – and those of commodity-form theorists more generally⁹¹⁸ – have been at the core of Marxist legal theory. This is particularly true of international law. Especially important has been China Miéville’s attempt to systematise Pashukanis’ insights into a Marxist theory of international law.

For Miéville, Pashukanis’ theory is able to resolve one of the recurring problems of the international legal discipline, namely, whether or not international law is ‘really’ law. As noted in Chapter 2 (Section 3.2.), international lawyers have frequently had to defend international law from the accusation that it is ‘not really law’ because it lacks a centralised enforcement authority. With his insistence that the ‘law-ness’ of law inheres in its *form*, Pashukanis entirely sidestepped this dilemma, arguing that ‘[s]tate power injects clarity and stability into the legal structure but it does not create its preconditions’.⁹¹⁹ Whilst the state might make law more effective, it is the form of abstract equality that signals the presence of a legal relationship.

Of course, since international law acts to vindicate rights, it does require *some* form of coercive mechanism. For Pashukanis, this could be located in the parties themselves

⁹¹⁷ Pashukanis 1980c, 90.

⁹¹⁸ Balbus 1977; Edelman 1979; Anderson and Greenberg 1983.

⁹¹⁹ Pashukanis 1980c, 68.

through '[t]he principle of inter-dependence'⁹²⁰ as embodied in acts of 'self-help' and reprisals. Although this necessarily creates an 'unstable' legal form, Pashukanis noted that this was *also* true in domestic law, since the state is unable to 'enforce' every single law or 'punish' every violation. Especially in civil law, 'a major portion of ... relationships are exercised under influence of pressures limited to the activities of subjects themselves'.⁹²¹ For Miéville, this is vital. He argues that, on occasion, Pashukanis failed to properly account for the coercive violence at the heart of the commodity form. This is most manifest at those points where Pashukanis seemed to hold that direct violence *contradicts* commodity exchange.⁹²² As a result, Pashukanis claimed that in periods of intense imperialist competition, law would simply be *discarded* in favour of military violence.⁹²³

By contrast, Miéville argues that violence and commodity exchange are intimately interrelated, and, as a result, so too are violence and law. Essentially, for Miéville, private ownership necessarily 'implies the exclusion of others'.⁹²⁴ One can only 'own' something insofar as one is able to stop others from taking it, or seek redress if they do. This is also true of exchange. In order for commodities to actually be exchanged, it is necessary that each party remain in possession of their commodities. If the commodity was simply *taken*, there would be no exchange. In order to guarantee this possession 'some forceful capacities must be implied'.⁹²⁵ Logically, therefore, coercion is implied '*in the very nature of commodity exchange and production*'.⁹²⁶ This coercion is law, since the violence that secures ownership is the vindication of legal rights.⁹²⁷

International law's indeterminacy makes this violence absolutely crucial. Miéville largely understands indeterminacy with reference to Martti Koskenniemi's work.⁹²⁸ Koskenniemi famously proposes that the international legal order is structured by a fundamental tension between 'apology' and 'utopia'. In the case of the former, the world is characterised as a collection of sovereign entities, each with their own interest and will. In the case of the latter, the world community is having some broader interest

⁹²⁰ Ibid., 108.

⁹²¹ Pashukanis 1980a, 180.

⁹²² Pashukanis 1980c, 143.

⁹²³ Pashukanis 1980a, 179.

⁹²⁴ Miéville 2004, 287.

⁹²⁵ Ibid.

⁹²⁶ Miéville 2005, 127.

⁹²⁷ Marks 2007, 204.

⁹²⁸ Miéville 2005, 50.

which manifests itself above individuals states. In legal terms, this plays out as a tension between ‘concreteness’ and ‘normativity’. The ‘legal mind’ ‘attempts ensure the normativity of the law by creating distance between it and State behaviour, will and interest’. At the same time, however, this ‘legal mind’ cannot put forward an understanding of law ‘unrelated to State behaviour’, since this understanding would be naively utopian.⁹²⁹

This tension structures international legal argument, such that, in any given instance, a legal argument could be made from either one of these positions. Since these arguments are both equally legitimate and mutually opposed, counter-claims are always available to any legal argument.⁹³⁰ Hence, international law cannot give determinate answers to given situations, it is always a matter of *argument* and interpretation. Miéville observes that Koskenniemi never shows how it is that – despite indeterminacy – legal arguments *are* resolved. Here, Miéville turns to Marx, who argued that ‘between equal rights, force decides’. Insofar as there are equally compelling legal arguments, it will be *force* which chooses between them. Domestically, this force is the state. However, as *per* the above considerations, in the international legal arena ‘[t]here is no state to act as final arbiter of competing claims’ and ‘[t]he means of violence remains in the hands of the very parties disagreeing over the interpretation of law’.⁹³¹

For Miéville, the question of what *form* this violence will take depends on the social relations of the time. Internationally, this form is that of imperialism. Drawing explicitly on Bukharin, Miéville argues ‘military competition in monopoly capitalism as an expression of the same competitive dynamic associated with capitalist economics’.⁹³² The dynamics of capital accumulation on the world stage are also dynamics of violent competition, *generated* by the tendencies of international capitalism. It is this coercive violence which resolves the interpretive conflicts generated by indeterminacy, and so secures the vindication of legal rights. This means that:

Intrinsically to the legal form, a contest of coercion occurs, or is implied, to back claim and counterclaim. And in the politically and militarily unequal modern world system, the distribution of power is such that the winner of that coercive

⁹²⁹ Koskenniemi 2005, 17–22.

⁹³⁰ Ibid., 59.

⁹³¹ Miéville 2005, 292.

⁹³² Miéville 2004, 223.

contest is generally a foregone conclusion. The international legal form assumes juridical equality and unequal violence.⁹³³

In this way, then, Miéville attempts to deepen Pashukanis' account of the *structural* relationship between imperialism and international law. Aside from the connection already foregrounded by Pashukanis, Miéville adds a further dimension. Since 'without violence there could be no international law', and international violence *takes the form of imperialism*, 'without imperialism there could be no international law'.⁹³⁴ The unfolding of international legal argument and doctrine can only be understood through the prism of the unfolding of imperialist social relations. For this reason, at the level of both form and content, international law is structurally dependent upon imperialism.

2.3. *The Critique of Imperialism and the Critique of Ideology*

Ideology has been one of the primary ways in which Marxists have sought to understand law. This has been especially true in domestic legal theory, where the last major revival of Marxism was organised concepts of ideology derived from Gramsci and Althusser. Ideology was also one of the major concepts that critical legal studies scholars took from the Marxist tradition in order to advance their own analyses.⁹³⁵

The precise nature of 'ideology' in these analyses has been the subject of much controversy. Historically, it was closely associated with what Engels dubbed 'false consciousness'.⁹³⁶ In this vision, ideology essentially connoted the misrepresentation or misunderstanding of reality. Thus, in *The German Ideology*, Marx and Engels that ideology was a problem of consciousness, whereby people perceived their circumstances 'upside-down as in a *camera obscura*'.⁹³⁷ Because of their immersion in a certain form of material life, people were prevented from understanding their own material conditions, instead granting ideas an independent and autonomous power. In this way, as Engels put it, although ideology is 'accomplished ... consciously', it is done

⁹³³ Miéville 2005, 292.

⁹³⁴ *Ibid.*, 293. One can accept much of Miéville's argument without necessarily subscribing to the idea that it is primarily *military* violence which 'decides'. In particular, given the Marxist emphasis on the importance of economic domination – particularly with the concept of neo-colonialism – one can argue that it is in fact a complex inter-relation of military, economic, political and ideological 'coercion' which resolves legal disputes, see Knox 2009.

⁹³⁵ Hunt 1985, 13.

⁹³⁶ Engels 1978.

⁹³⁷ Marx and Engels 1978b, 154.

so with ‘a false consciousness’, since the ‘real motive forces impelling [people] remain unknown to [them]’.⁹³⁸

These ideological processes mean that both oppressed and oppressor refuse to recognise the transience and exploitative nature of the dominant mode of production. As Marx and Engels put it, ‘[t]he ruling ideas of each age have ever been the ideas of its ruling class’.⁹³⁹ Many later Marxists have found such ‘epistemological’ ideas of ideology to be theoretically and politically problematic. However, some sense of the way in which ideas and practices reproduce and defend the *status quo* has remained central.

It is in this more general sense that Marxists have used the concept of ideology to understand the relationship between international law and imperialism. Particularly important in this respect has been Susan Marks. Marks explicitly disavows the Engels-inflected account of ideology as misrecognition. Instead, she operates with a *critical* notion of ideology.⁹⁴⁰ Drawing on John Thompson, she defines ideology as referring to the ‘ways in which meaning serves to establish and sustain relations of domination’.⁹⁴¹ For Marks, ‘meaning’ does not simply refer to ‘ideas’ but the ‘broad range of forms’ through which ideas are communicated. This specifically includes ‘utterances, texts, actions, and images’.⁹⁴²

There are manifold ways in which meaning can serve to establish and sustain relations of domination and exploitation. But Marks pinpoints a number of manoeuvres which are typical of ideology, each of which possesses its own particular ‘discursive strategies’. The moves that Marks identifies are ‘legitimation’, which is ‘the process by which authority comes to seem valid and appropriate’;⁹⁴³ ‘dissimulation’ whereby ‘relations of domination are obscured, masked or denied’;⁹⁴⁴ ‘unification’ through which social relations are made to seem harmonious and coherent;⁹⁴⁵ ‘reification’ which makes social relations seem as if they are not the product of human relations and therefore appear

⁹³⁸ Engels 1978, 766.

⁹³⁹ Marx and Engels 1978a, 489.

⁹⁴⁰ Marks 2003b, 11.

⁹⁴¹ *Ibid.*, 10.

⁹⁴² *Ibid.*, 11.

⁹⁴³ *Ibid.*, 19.

⁹⁴⁴ *Ibid.*, 20.

⁹⁴⁵ *Ibid.*

eternal⁹⁴⁶ and, finally, ‘naturalisation’ which makes ‘existing social arrangements come to seem obvious and self-evident’.⁹⁴⁷

Crucially for Marks, these strategies do not reflect ignorance or illusion. Although illusion may be involved in any of these, ‘it is not a simple case of error or ignorance of social reality’.⁹⁴⁸ Instead, ideology is concerned with the way in which we act, in *spite* of our consciously held beliefs or awareness. Marks cites Terry Eagleton on racism, where he notes that in sitting on a ‘whites only’ bench, even if one is consciously ‘opposed’ to racism, one supports and perpetuates racist ideology.⁹⁴⁹ In this way, then, ideology is less about people *believing* in the justice or immutability of relations of domination and exploitation and more about the impact of acting ‘as if’ they believe this. Mystification enters in terms of ‘unawareness of the extent to which actions ... and the ideas expressed through them serve to shape social reality’.⁹⁵⁰

Although the critique of ideology has generally been applied to cultural or textual forms, it has an obvious resonance for international law. International law is a medium through which ‘meaning is made and power is shaped’, it too is a form of ideology.⁹⁵¹ Since international law operates on the international plane, the ‘relations of domination’ that it establishes and sustains are those of *imperialism*. For Marks, this occurs across and throughout international law, but she focuses specifically on ‘democratic governance’.

Marks describes capitalist (imperialist) globalisation as a system of extremely uneven development, in which an advanced capitalist core exploits a periphery and semi-periphery. Following Gill and Robinson, she views the ‘promotion of democracy’ in this context. When one examines post-communist and ‘developing states’ one can observe that the democracy which is promoted for them is a ‘low intensity’ model, in which almost all the stress is placed upon the *form* of elections.⁹⁵² Marks notes that we might best view this democracy promotion – as led by the US – as a form of *intervention* into peripheral societies, designed to influence their behaviour and to

⁹⁴⁶ Ibid., 21.

⁹⁴⁷ Ibid., 22.

⁹⁴⁸ Ibid., 23.

⁹⁴⁹ Eagleton 1991, 40.

⁹⁵⁰ Marks 2003b, 23.

⁹⁵¹ Marks 2001, 118.

⁹⁵² Marks 2003b, 53.

contain any popular radicalism associated with social breakdown. In particular, she argues, low intensity democracy:

[M]eets the immediate needs of anti-authoritarian crisis, easing tensions, and restoring order. Yet it does so in a manner that forestalls far-reaching structural change in peripheral and semi-peripheral regions. Thus, the concentration in these regions of relatively low wage, low profit, less monopolized economic activities is not endangered. On the other hand, low intensity democracy is linked as well to the project of expanding the reach of global markets and eliminating the remaining barriers to the transnationalization of capital. It facilitates the penetration and consolidation of capitalist relations ... Policies of economic liberalization ... have greater legitimacy when pursued by elected governments than when imposed by unelected regimes.⁹⁵³

International law's 'democratic norm thesis' is an important ideological battleground for these developments. Essentially, the democratic norm thesis *rationalises* low intensity democracy. It does this because, for international law, 'the crucial factor is said to be that elections can be monitored by international observers'.⁹⁵⁴ Furthermore, it presents low intensity democracy as the 'general rule' of democracy, and therefore implicitly posits democracy as a 'event' which one reaches, placing it outside the space of political contestation. The ultimate result of this is that international law ideologically represents low intensity democracy as a self-evident definition of democracy, to which the only alternative is tyranny.⁹⁵⁵ Thus, In Marks' account, the expansion of advanced capitalist social formations into peripheral countries is ideologically facilitated by international law. It helps legitimate the breaking down of barriers to capitalist accumulation and contains resistance to these processes within forms compatible with imperialism.

Although in theory there are manifold ideological manoeuvres, in practice scholars of international law have stressed the particular role that international law has played in separating the *effects* of imperialism from their *causes*. Tor Krever, for example, has argued that international criminal law 'abstracts individuals from a concrete context in which they act' and so tends to 'portray the incidents at its centre as resulting from "rotten apples" and their bad behaviour, or "monsters" and their demagogic thirst for power'.⁹⁵⁶ In so doing, international law obscures the way in which the international

⁹⁵³ Ibid., 57.

⁹⁵⁴ Ibid., 62.

⁹⁵⁵ Ibid., 62–67.

⁹⁵⁶ Krever 2013a, 721.

institutions (and their interventions) have contributed to the problems that international law purports to address.⁹⁵⁷

As Marks has shown, where international law does focus on causes, it tends to recast these causes in distinct ways. In particular, ‘the investigation of causes is halted too soon’, ‘effects are treated as though they were causes’ and ‘causes are identified only to be set aside’.⁹⁵⁸ The effect of this is to divorce the poverty and violence that result from imperialism from imperialism’s *logic*. Instead, these symptoms are treated as aberrations, which are pathological from the imperialism’s normal function.⁹⁵⁹ In so doing, this obscures the fact that some groups of people *benefit* from imperialism,⁹⁶⁰ this means that ‘[t]hose who ... live off the practices and processes that victimise others have been allowed to remain comfortably out of sight’.⁹⁶¹ International law’s silence about ‘systemic logics’ is thus a ‘silence about capitalism’.⁹⁶²

Thus, a vitally important aspect of international law as an ideological form is its tendency towards ‘false contingency’.⁹⁶³ Such false contingency involves acting as if things are ‘random, accidental or arbitrary’.⁹⁶⁴ This ‘help[s] to sustain’⁹⁶⁵ the social relations of imperialism, because it occludes ‘awareness of what it will take to effect change’.⁹⁶⁶ In treating these effects as essentially ‘isolated problems, unrelated to wider processes, tendencies and dynamics at work in the world’⁹⁶⁷ international law’s ideological function *obscures* imperialism’s structural logic, and so naturalises it. In this way, international law structures resistance to imperialism, channelling this resistance into avenues which fail to challenge its broader systemic logic.

2.4. *International Law as/and Class Struggle*

At the beginning of this section, it was noted that Marx and Engels understood law both in terms of its structural connection with capitalism and in its ability to express class conflict. One might say that both the commodity-form theory and ideology critique are

⁹⁵⁷ Marks 2009b, 45; Krever 2013a, 717.

⁹⁵⁸ Marks 2011, 72.

⁹⁵⁹ Marks 2008a, 300.

⁹⁶⁰ Marks 2009b, 48.

⁹⁶¹ Marks 2011, 76.

⁹⁶² Marks 2008a, 302.

⁹⁶³ Marks 2009a; Marks 2008a, 302.

⁹⁶⁴ Marks 2011, 75.

⁹⁶⁵ Marks 2004, 377.

⁹⁶⁶ Marks 2009a, 17.

⁹⁶⁷ Ibid.

concerned with this first aspect. By contrast, other approaches have put forward more agent-driven accounts of international law. In such accounts, the connection between international law and imperialism is generally understood via the fact that the imperial class relations are expressed *through* international law. This is so because various classes are able to operationalise international law and institutions. One obvious example is Chimni's account (see Chapter 2, Section 3.4.).

Bill Bowring's account of international law is an important contribution to this account. In a similar parallel to Anghie and Rajagopal, we might say that whereas Chimni's class-based account of international law is one 'from above', Bowring's is one from 'below'. Bowring's starting point is one rooted in the classical Marxist theory of imperialism, namely, that one cannot only understand the problems in the world as part of a *systemic* process. This systemic process 'is "capitalism", of which imperialism is an inescapable feature'.⁹⁶⁸ Bowring understands capitalism as driven by the 'unceasing urge to valorise itself, in which every social relationship, every intellectual creation, and every human appropriation of the material world is reducible to money'.⁹⁶⁹

However, capitalism and imperialism are also social relations composed of classes. For Bowring it is the *struggles* between these classes that have given substance to international law. For Bowring, one cannot simply characterise law and rights as 'deracinated empty forms'.⁹⁷⁰ Instead they must be understood as 'the subjects and objects of real struggles in the real world'.⁹⁷¹ Bowring attempts to give a 'substantive account' of international law, in which it is historicised and understood as the product of human struggle.⁹⁷²

Bowring turns to Alain Badiou to examine how this takes place. For Badiou, human history is structured around 'Events'. Events are unpredictable ruptures in the *status quo* which overturn seemingly stable sets of social relations in the name of radical alternatives. Obviously, in this respect, the locus of the concept is revolution, and Badiou identifies the French and Russian Revolutions as key Events. The Event is part of a wider process of social change which he calls a 'truth procedure'. The truth

⁹⁶⁸ Bowring 2008a, 2.

⁹⁶⁹ Ibid., 3.

⁹⁷⁰ Ibid., 109.

⁹⁷¹ Ibid., 111.

⁹⁷² Ibid., 112.

procedure is composed of the ‘fidelity’ – the continuing consequences of the event – and the ‘truth’ – the overall outcome of the whole process.⁹⁷³

In *Ethics* Badiou presents ‘human rights’ as ‘blockages’ to Events, since they deny that there might be any radical alternative to the existing order.⁹⁷⁴ Bowring disagrees. For him, rights were in fact at the core of the great revolutions; far from being a ‘block’ on the Event, law and rights are part of its *fidelity*. That is to say the great struggles of particular events are concretised and embodied in law and rights. For Bowring, each of the great Events gives rise to a concomitant set of international legal principles. The French Revolution gave rise to civil and political liberties and the Russian Revolution gave rise to social and economic rights.⁹⁷⁵ Importantly, to Badiou’s two great Events, Bowring adds a third, decolonisation. Following on from the original Third World jurists, he argues that the anti-colonial movement managed to embed its legacy in international law. This was in the law around decolonisation and self-determination, the prohibition on the use of force and military intervention, and the ‘third generation’ of ‘people’s rights’, such as the right to development and doctrines such as permanent sovereignty over natural resources.⁹⁷⁶

For Bowring, the content of international law is now marked by the struggles of the various forces created by the material structures of imperialism. Imperialist powers seek to constantly roll back and undermine the gains made by the socialist and anti-colonial revolutions.

2.5. *Materialism, Imperialism and International Law*

Although the above approaches have been presented as distinct, one should not exaggerate this. It is wiser to treat each of them as constituent element in a broader Marxist understanding of international law and its relationship to imperialism. This is reinforced by the fact that all of the above-mentioned theorists explicitly invoke the other forms of analysis. Pashukanis, for instance, maintained that as long as the legal form exists ‘so too will the class struggle be conducted through the law’.⁹⁷⁷ Indeed, in

⁹⁷³ Ibid., 120.

⁹⁷⁴ Badiou 2001, 2–14.

⁹⁷⁵ Bowring 2008a, 123–124.

⁹⁷⁶ Ibid., 117.

⁹⁷⁷ Pashukanis 1980c, 117.

‘Lenin and Problems of Law’⁹⁷⁸ he explicitly attempted to show the ways in the class struggle was conducted through law, paying particular attention to the right to self-determination.⁹⁷⁹ Similarly, Miéville notes that since ‘class struggle is intrinsic to capitalism’, it will be reflected in law.⁹⁸⁰

Equally, commodity-form theorists have paid close attention to the ideological dimensions on international law. Pashukanis devoted an entire chapter of his *General Theory of Law and Marxism* to the relationship between law and subjectivity⁹⁸¹ and more generally thought that the ideology of ‘legal fetishism’ accompanied the generalisation of legal form.⁹⁸² Similarly, Miéville treats it as obvious that ‘international law ... does have an ideological function’.⁹⁸³

In this respect, it is telling that many contemporary theorists of international law’s ideological functions have endorsed the elements of the commodity-form theory.⁹⁸⁴ This is especially true in the case of Marks’ more recent work. She argues that her earlier work on democracy over-emphasised the contingency of the particular ideological form that it took. She did not sufficiently focus on *how* and *why* the idea of low-intensity democracy came to prominence.⁹⁸⁵ As a result, there has been an increasing shift in Marks’ work towards foregrounding the *abstracting* nature of legal ideology, a position that dovetails neatly with Pashukanis’ analysis of the legal form.⁹⁸⁶ Equally, Marks’ focus on the way in which law obscures *who benefits* from imperialism suggests a focus on class struggle. In the work of scholars like Chimni and Bowring we see the acknowledgement of law’s ideological role,⁹⁸⁷ as well some positive reference to the aspects of the commodity-form theory.⁹⁸⁸

⁹⁷⁸ Pashukanis 1980b.

⁹⁷⁹ Ibid., 158–162.

⁹⁸⁰ Miéville 2005, 120.

⁹⁸¹ Pashukanis 1980c, 74–90.

⁹⁸² Ibid., 79.

⁹⁸³ Miéville 2005, 81–82. Miéville 2005, 452. See also Knox 2009, 426.

⁹⁸⁴ Marks 2007, 205–206; Krever 2013a, 707; Krever 2013b, 133.

⁹⁸⁵ Marks 2009a, 12. One might pause for thought here. Whilst Marks *did* emphasise that arguing for the contingency of the democratic ideal could have a progressive political effect, she also emphasised the way in which the ideological norm was functional to capital accumulation.

⁹⁸⁶ Pashukanis himself emphasises the way in which law gives rise to an idea of ‘responsibility’ which tends to abstract individuals’ actions, see Pashukanis 1980c, 119.

⁹⁸⁷ Bowring 2008a, 100–102.

⁹⁸⁸ Bowring 1996, 223. However, he also explicitly criticises Pashukanis for being unable to grasp the significance of *political* action that is expressed through legal categories (Bowring 2008, 30). However, as noted above, both Pashukanis and Miéville *do* in fact understand political struggle to be mediated through law, the issue is that the legal form will shape this action in particular ways. See Knox 2010a.

Thus, whilst one ought not to minimise the explicit differences between these approaches, there are nonetheless important overlaps. Essentially, Marxists understand imperialism as a specific historical phenomenon, governed by a systemic logic. In this vision, imperialism is rooted in the capitalist imperative to export and accumulate capital. This generates the accompanying imperative to expand and transform the rest of the world, in a process as endless as the need to accumulate capital. This is a *complex* vision because imperialism embraces different class interests in both the advanced capitalist countries and the less advanced peripheral ones and (potentially) a series of rivalries around *competitive* accumulation.

Imperialism is the material basis on which to understand international law. As above, the particularities of this relationship are different, but essentially, international law serves as an ideological and structural field through which the social relations of imperialism are articulated.⁹⁸⁹ The playing out of various international legal doctrines has to be rooted in the expansion of capitalist social relations and their changing configurations.

Marxist international legal theory has gone beyond the more vulgar materialist treatments of international law by insisting on its *constitutive* nature. All of those surveyed above do not simply claim that international law reflects the ‘real’ life of imperialism. Instead, their analyses suggest that international law is an *inextricable* aspect of imperialism as a system, which both articulates its logic and also stabilises and justifies its particular configurations. As Miéville puts it ‘[t]he most realist, cynical, power-maximising state in the modern world system is a realist, cynical and power maximising juridical form’.⁹⁹⁰

In this vision, then, there is a close link between international law and processes of capital accumulation. The vagaries of this process are engendered through and reflected in international law. It is this fundamental insight which has guided the way in which Marxists have understood various moments in the history of international law to which this chapter now turns.

⁹⁸⁹ Rasulov 2008.

⁹⁹⁰ Miéville 2005, 284.

3. Imperialism's International Law

3.1. *Capitalism, Colonialism and the Civilising Mission*

In the Marxist account, formal colonialism is part and parcel of the broader systemic logic of capital accumulation. Insofar as this is accompanied by a 'civilising mission', it is connected to a larger project aimed at solidifying and justifying capitalist expansion. It is against this background that Marxists have understood the relationship between international law and colonialism. Thus, in one straightforward way, the international law of the colonial period can be understood as *ideology*.⁹⁹¹

Mark Neocleous, for instance, has focused on the link between law and primitive accumulation. Neocleous notes that the category of 'waste' was fundamental to classical political and legal thought. In Blackstone's *Commentaries on the Laws of England*, for example, it was stated that the lord of the manor would be allowed to enclose any land 'waste' land.⁹⁹² Here, waste took on a very specific meaning. Essentially, it referred to land which could be made 'more productive' through cultivation. Neocleous argues that this found its ideological reflection in the work of Locke and Hobbes, whose theories were underpinned by the idea of a 'state of nature' in which land constantly went to waste.

For Neocleous, the importance of this observation lies in the fact that both Hobbes and Locke did not simply treat the state of nature as an abstraction. Instead, they illustrated it with reference to 'primitive' and 'Indian' populations, whose nomadic character precluded the ability to 'improve' land and so led to waste.⁹⁹³ Since such improvement that gave rise to individual property rights, appropriation of native territories would be legitimate. Thus, Neocleous emphasises that primitive accumulation had an important *international* dimension in the form of colonial appropriation.⁹⁹⁴

These understandings were highly important to the 'founders' of international law. Neocleous points out that throughout *De Iure Belli ac Pacis* Hugo Grotius claimed that mankind only gains dominion over God's property through improving it.⁹⁹⁵ Similar

⁹⁹¹ Baars 2012, 98.

⁹⁹² Neocleous 2011, 513.

⁹⁹³ Ibid., 515–516.

⁹⁹⁴ Neocleous 2012, 949.

⁹⁹⁵ Neocleous 2011, 516–517.

considerations animated the work of Emer de Vattel. Crucially, since there was a right to appropriate ‘waste’, any resistance to this right could be met with *force*. It is for this reason that ‘the question of *just war*, is shot through with the categories of the war on the commons and the language of enclosures’.⁹⁹⁶ As such, international law served as a ‘key weapon used in the global class war’.⁹⁹⁷ For Neocleous, the categories of ‘bourgeois ideology and political economy’ – those of waste, improvement and enclosure – ‘were central to international law’.⁹⁹⁸ There is a great deal of similarity between Neocleous’ account and Anghie’s reading of Vitoria’s confrontation with the ‘Indians’. However, for Neocleous, the difference is that such confrontation was not concerned with ‘racial supremacy over “the other”’ but ‘with the violent enclosure of lands and resources for capital accumulation’.⁹⁹⁹

This is particularly important when one looks to the changing *forms* of capital accumulation. In the earlier (mercantilist) period of colonisation (from the 16th to the 18th century), European states did not interact directly with non-European societies. Instead, it was European *trading companies* – invested with legal power by the European states – that were the prime vectors of interaction.¹⁰⁰⁰ In this context, there was no need for European states to directly intervene in and transform other societies. Owing to the monopoly nature of the trading companies, European states could exercise control without the costly assertion of formal sovereignty.¹⁰⁰¹

Miéville argues that this material basis meant international law was marked by a ‘structured silence’ about colonisation.¹⁰⁰² It was a ‘structured’ silence because – in an argument reminiscent of Bedjaoui’s – it was *functional* to the form of expansion associated with mercantilism. However, with the advance of industrial capitalism at the expense of mercantilism, this was no longer possible. Miéville argues that a series of colonial crises, struggles between capitalist powers and the need to more systematically exploit colonial territory all militated in favour of direct, formal control. International law was ‘forced to *accommodate* the colonies, to recognise them as existing within the

⁹⁹⁶ Neocleous 2012, 957.

⁹⁹⁷ Ibid.

⁹⁹⁸ Ibid., 952.

⁹⁹⁹ Ibid., 954.

¹⁰⁰⁰ Baars 2012, 89; Miéville 2005, 207.

¹⁰⁰¹ Miéville 2005, 207.

¹⁰⁰² Ibid., 235.

international legal universe'.¹⁰⁰³ International law could do this in two ways, either the colony would be constituted as an independent state, or treated as part of the territory of the mother country.

It was against this background that the doctrines of 19th century positivism were articulated. European states had secured their expansion through a number of what Miéville 'ad hoc' legal measures. In particular, they made treaties with tribal leaders and non-European societies. Legal positivists had to make sense of these decisions in legal terms. Crucially, however, they had to do this in such a way as to not spread 'the bacillus of sovereignty',¹⁰⁰⁴ since imperialist exploitation required that European societies be able to exercise massive levels of control over non-European territories so as to transform them.

Miéville reads the doctrine of civilisation as a way of solving this problem. Whilst it did not 'finally answer the question of what legal capacity' flowed from imperial treaties, its main role was to 'formalise ... ad-hoc responses to the question'.¹⁰⁰⁵ In Miéville's account, the binary distinction between 'civilised' and 'uncivilised' was nowhere near as important as the intermediate category of 'semi-civilised'. This was the category which was most important because it captured the primary dynamic of imperial expansion: limited legal contact between European powers which did not grant non-European societies full legal sovereignty.¹⁰⁰⁶ For Miéville, semi-civilisation was not 'a mediating fudge between two opposites, but the *generative problematic for the taxonomy of "civilisation"*' because civilisation 'was not a discursive strategy for "othering", but a result of the paradoxes of actually-existing sovereignty'.¹⁰⁰⁷

It is not just that the need for a category of civilisation was generated by the particularities of capitalist expansion. Equally, as suggested by Neocleous, the *content* of 'civilisation' was rooted in European property and legal relations. In this way, as Baars notes, we might better understand the 'civilising mission' as a 'capitalising

¹⁰⁰³ Ibid.

¹⁰⁰⁴ Ibid., 242.

¹⁰⁰⁵ Ibid., 245.

¹⁰⁰⁶ Ibid., 248.

¹⁰⁰⁷ Ibid.

mission', through which capitalist social relations were spread and the conditions for capital accumulation perpetuated.¹⁰⁰⁸

3.2. *From Decolonisation to Neo-colonialism*

As has been repeatedly noted, Marxists have always insisted that imperialism cannot be wholly identified with formal colonialism. Instead, imperialism has to be located within the wider historical dynamics of capital accumulation, of which formal colonialism is one form. Indeed, whilst earlier theorists of imperialism thought that colonialism was the prime form of imperialism, later theorists have claimed that in fact formal colonialism was less of a 'natural' fit with capitalism. This is because formal colonial administration imposed financial and political burdens on European states and the thrust of capitalist development is towards the 'separation' between direct coercion and the extraction of surplus value.¹⁰⁰⁹ Consequently, Marxists have paid close attention to the way in which imperialism survived decolonisation.

Miéville, surveying the decolonisation which took place before the mass anti-colonial struggles, analyses how international law enabled struggles against colonialism to be instrumentalised by imperialist powers. Following the American Revolution, the question of recognition became hugely important. Independence could only prove useful insofar as other states were willing to treat the US as a fellow member of the international community.

At the time, '[t]he doctrine of effectiveness found in Vattel ... was gaining ground, with a positivism which treated facts of state control as primary'.¹⁰¹⁰ On this basis, the US could be recognised as an independent state insofar as it was 'factually independent'. But – because of international law's indeterminacy – such independence could not be 'objectively' determined. Accordingly, Miéville argues, the act of recognition was necessarily a *political* one. In this respect, it is telling that one of the first states to recognise the US was France. At the time, France was in an antagonistic relationship with Britain and the recognition 'was a political reaction to a changing situation, and an

¹⁰⁰⁸ Baars 2012, 95.

¹⁰⁰⁹ See Wood 2003 for the fullest development of this argument, although she arguably transforms a *tendency* of capitalism into its defining feature.

¹⁰¹⁰ Miéville 2005, 236.

interventionist act, designed to undermine British power'.¹⁰¹¹ Through recognition, decolonisation was directly enmeshed in the struggles between imperialist states.

This suggests that 'the defeat of formal imperialism does not mean the end of an imperialist order' since 'the very legal fabric of postcolonialism can be constitutive of such an order, in a new form'.¹⁰¹² Echoing the theorists of neo-colonialism, Miéville holds that this was evident in the relationship between the US and the countries of Latin America. The Monroe Doctrine, elaborated in 1823, stated that the US had an essentially proprietary interest in Latin America and would attempt to exclude European influence. However, this was *not* coupled with an assertion of juridical control, rather it accompanied a policy of recognising Latin American states that had declared independence from European empires.

Through recognition, the US was able to undermine and undercut its rivals. It then used its economic and political power to dominate the Latin American continent. As this system developed, it was also increasingly coupled with *specific legal conditions* for recognition, in which the US would only recognise those states with 'democratic' constitutions. In this way, the US was able to shape the internal political life of Latin America without formal juridical control. Again, in an argument reminiscent of theorists of neo-colonialism, Miéville presents Latin America as a kind of laboratory which set the scene for post-colonial imperialism. Specifically, this combination of imperialism and formal independence was where 'modern imperialism starts'.¹⁰¹³

However, Latin America in the 1800s was a very different from the 20th century. The Latin American wars of independence occurred before the development of the mass workers' movements, the radical left or the Marxist tradition that was to provide the conceptual and political basis for the later struggles.¹⁰¹⁴ As a result, whilst they may have challenged the particular make up of various empires, they did not articulate the idea of a *system* to which they were opposed. It was a result of these features that the 'strategic recognition' described by Miéville could occur. Since the independence movements opposed only specific empires, their struggles could easily be assimilated into a legalised form of inter-imperialist rivalry.

¹⁰¹¹ Ibid.

¹⁰¹² Ibid.

¹⁰¹³ Ibid., 238.

¹⁰¹⁴ Lee 2010, 5.

Things were different when it came to the right to self-determination. Although this right is now recognised in international law, it began life as a political slogan. The socialist movement had a number of debates over the question of multi-ethnic empires. Luxemburg insisted that Marxists should not support a 'right' to self-determination. She held that the tendency towards the centralisation and concentration of capital was reflected in capitalism's tendency to agglomerate disparate peoples into multi-ethnic nations. This was progressive insofar as it meant that the working class would be concentrated in greater numbers. She also argued that claims of self-determination would gloss over class divisions within particular 'nations'. Consequently, Luxemburg was opposed to the idea of making the right to self-determination a part of any socialist programme. She alleged that it would commit socialists to a universal solution to the 'national question', which could not be achieved under capitalism. Against this, she suggested that the movement agitate for equal rights for all nationalities within existing states.¹⁰¹⁵

For Lenin and the Bolsheviks, this was unacceptable. If imperialism was central to capitalism, it was necessary to fight it directly. As such, liberating the colonies had to be high on the agenda. This could only be achieved through self-determination.¹⁰¹⁶ Lenin saw this as key to building an *alliance* between the working class in the imperialist countries and the oppressed people in the colonies. In this way, self-determination would serve 'as grounds for mass action and for revolutionary attacks on the bourgeoisie'.¹⁰¹⁷ When the Bolsheviks came to power they made self-determination one of their policies, implementing it – unevenly – throughout the former Tsarist Empire.

The intricacies of this debate are important because they illustrate the changed context in which self-determination was articulated. As a principle, it was linked very closely to the radical notion of *anti-imperialism*. For this reason, as Bowring notes, the imperial powers all initially opposed the notion of a right to self-determination.¹⁰¹⁸ Often, the genesis of the modern right to self-determination is traced to Woodrow Wilson's '14 Points' speech. Although Wilson *did* address the question of national independence in this speech, it was nothing approaching a universal right. Instead, he thought that the

¹⁰¹⁵ Luxemburg 1976.

¹⁰¹⁶ Lenin 1964a, 63.

¹⁰¹⁷ Lenin 1964d, 146.

¹⁰¹⁸ Bowring 2008a, 30.

immediate right should be granted only in respect of the European territories of the defeated powers. For non-European colonial territories he suggested a 'free open-minded and absolutely impartial adjustment' weighing equally the interests of the non-European populations and the former colonial states.¹⁰¹⁹ The Mandate System largely implemented these proposals.

In many respects, Wilson's advocacy of some limited self-determination (and the system that implemented his proposals) was a response to the revolutionary energies that the Bolsheviks had attempted to mobilise. It was essentially an attempt to channel the grievances of the masses into support for an emerging order of liberal democracies.¹⁰²⁰ Similarly, although the UN Charter contained 'a statement of principles including self-determination' it did 'not proclaim a right'.¹⁰²¹ Instead, the UN dealt with the colonial question through the Trust system, which essentially reproduced the Mandate System. Bowring insists that anti-imperialist political struggle played a vital role in the transformation of self-determination to a legal right. It was the USSR that insisted self-determination be inserted into the preamble of the Charter¹⁰²² and submitted the Colonial Declaration to the General Assembly.¹⁰²³ The driving force behind this was the action of the national liberation movements.¹⁰²⁴ Their struggles compelled the USSR to support them and the Western powers to make concessions. As more and more of these states entered the UN, they were able to further transform international law.

For Bowring, the international law that emerged from the height of the anti-colonial movement was fundamentally shaped by these struggles. The juridical transformations effected by the national liberation movements impacted the nature of imperialism itself. Through the transformation of the UN, 'less powerful states' were given a chance 'to gather and speak', and so give shape a sense of their own collective interest.¹⁰²⁵ Consequently, these states were able to embed a number of principles in international law which limited imperialist interventionism. In particular, he notes that the 'principles of state sovereignty and non-interference' were 'brought to life by the hard-won legal

¹⁰¹⁹ Wilson 1999, 363.

¹⁰²⁰ Hobsbawm 1995, 67.

¹⁰²¹ Bowring 2008a, 30.

¹⁰²² Bowring 2013, 85.

¹⁰²³ *Ibid.*, 87.

¹⁰²⁴ Bowring 2008a, 33.

¹⁰²⁵ *Ibid.*, 38.

right of peoples to self-determination'.¹⁰²⁶ In this way, international law concretised the results of the struggle that occurred within imperialist social relations. Bowring situates his argument as contradicting Pashukanis and Miéville, who, he alleges, miss the political significance of these developments and the radical break with existing international law that they represented.¹⁰²⁷

Whilst Bowring does highlight the way in which international law mediated and impacted upon the struggles thrown up by imperialist social relations, he perhaps overstates his case.¹⁰²⁸ The Marxist vision to which Bowring subscribes understands imperialism as a system that exceeds its particular colonial articulation. Given this, whilst one can accept that international law did end formal colonialism, imperialism remained in place. If this is the case, then – without wishing to diminish the struggles of the anti-colonial movement – one needs to ask what is the relationship between self-determination and post-colonial imperialism. In this respect, it is interesting to note that Pashukanis did deal directly with self-determination. Engaging with Lenin, Pashukanis insisted that 'the "abstract", "negative" demand of formal equal rights [for self-determination] was, in a given historical conjuncture, simultaneously a revolutionary and revolutionizing slogan'.¹⁰²⁹ The conjuncture he referred to here was an imminent imperialist war.

However, because this was a conjunctural analysis, it was not timeless. This became especially important in the 1920s when imperialists adopted "'Wilsonian" phrases'.¹⁰³⁰ At this point, Pashukanis insisted it was necessary to abandon 'formal legal equality' and consider the concrete economic situation of imperialist exploitation. For Pashukanis, this was especially important in the context of the Russian Revolution, which had begun to materially undermine the structures of imperialism. In this context, the slogan of self-determination was of less significance, with 'overthrow the rule of the bourgeoisie on a world scale' becoming the new 'immediate practical slogan'.¹⁰³¹

¹⁰²⁶ Ibid., 43.

¹⁰²⁷ Ibid., 28–30.

¹⁰²⁸ Knox 2010a.

¹⁰²⁹ Pashukanis 1980b, 159.

¹⁰³⁰ Ibid., 160.

¹⁰³¹ Ibid., 161.

In Pashukanis' account, the Bolshevik adoption of 'self-determination' was a tactical gamble. Although the Bolsheviks understood imperialism as a system that transcended formal colonialism, in a given context the struggle against colonialism might be turned against imperialism as a whole.¹⁰³² Yet were this to fail, imperialism would itself remain ultimately compatible with formal equality. Although Pashukanis framed his analysis primarily in tactical and political terms, there is obviously a broader lesson to learn about the relationship between capitalism, imperialism and international law. This is the line that Miéville takes.

As previously noted, for Miéville, the spread of the legal form is tied up with the spread of imperialism. In international legal terms, this meant that the universalisation of independent sovereignty also marked the universalisation of imperialism. At first sight, colonial expansion, whereby capitalism universalised through positing areas as *non-sovereign*, might seem to contradict this. However, Miéville insists that even in this period, such a dynamic was at play. As previously noted, the initial mercantilist expansion of capitalism was marked by a 'structured silence' about colonialism. Yet as time progressed and exploitation intensified, there was also a trend towards juridification. The formalisation of international legal relations with the colonies after the Berlin Conference meant that those colonial territories were now either sovereign states in their own right, or 'owned' by a sovereign European state. There was a move from this 'structured silence' to one in which all territory had to be defined with reference to sovereignty. Moreover, non-European powers that wanted to participate in the international system adopted sovereignty as a form of political organisation.¹⁰³³ This was continued in the Mandate System, which was envisaged as a system through which formerly colonial territory would be able to acquire sovereignty.

In this way self-determination – the transformation of colonial territories into independent sovereign states – was part of a historical continuum. Consequently, for Miéville, whilst self-determination represented a radical change in the *content* of international law, it was 'a continuation of the universalising trend in the *form*'.¹⁰³⁴ Although decolonisation was a result of the real struggles of the national liberation

¹⁰³² Knox 2009, 434–435.

¹⁰³³ Miéville 2005, 263.

¹⁰³⁴ Ibid., 264.

movements, these struggles were articulated *through a form* that was generated by capitalism.

One can bring all of this together. For Marxists, imperialism is a system that is wider than formal colonialism. Indeed, formal colonialism may in fact be an *inefficient* form of exploitation once capitalist social relations have spread globally. As a result, the acquisition of this independence is compatible with the continuing existence of imperialism. Going still further than this, for commodity-form theorists, international law is structurally interconnected with capitalist social relations. As such, self-determination – the acquisition of juridical sovereignty – is not just simply *compatible* with imperialism, but is deeply intertwined with its spread.

3.3. *Imperialism as War*

Perhaps more than any other tradition, Marxists have emphasised the connections between imperialism and war. Both Bukharin and Lenin went so far as to maintain that the competitive pressures generated by imperialism made war an *inevitability*.¹⁰³⁵ This was reflective a broader claim that war cannot be viewed as a unitary and undifferentiated phenomenon. Instead, military violence was seen as rooted in specific material contexts, embodying and enacting the imperatives of given modes of production. As Bukharin noted, '[e]very production structure has an equivalent model of state power and hence and an equivalent model of war'.¹⁰³⁶ This owed to the fact that the *actors* in a war would be pursuing aims and interests determined by their role in the social totality.¹⁰³⁷

This materialist approach had definite consequences for questions of war. Despite the fact that both Bukharin and Lenin elaborated their theories of imperialism in anticipation of and opposition to the First World War, they were not pacifists. Lenin, for instance, wrote that it would be a 'philistine' position to oppose a war without 'without stopping to think *what issues* are at stake in the war, *which* classes are waging it, and with *what* political objects'.¹⁰³⁸ He thought it necessary to judge a war according 'the policy pursued prior to the war [and] the policy that led and to and brought about the

¹⁰³⁵ Bukharin 1972, 54.

¹⁰³⁶ Bukharin 1979, 70.

¹⁰³⁷ Ibid., 71–72.

¹⁰³⁸ Lenin 1964a, 33.

war'.¹⁰³⁹ On this basis, it was possible to distinguish between *imperialist* wars 'designed to safeguard the interests of finance capital' and wars of national liberation.¹⁰⁴⁰ As he starkly put it: 'if tomorrow, Morocco were to declare war on France, India on England, Persia or China on Russia, and so forth, those would be "just," "defensive" wars, *irrespective* of who attacked first'.¹⁰⁴¹

Vitaly, then, the imperialist character of military violence stems not from 'aggression', but from the material roots of that violence, and the social relations it embodied, stabilised and spread. Evidently, this is not an understanding compatible with the contemporary law on the use of force. Despite this, some contemporary Marxists have attempted to invoke international law against (US) imperialism.¹⁰⁴² Samir Amin, for example, praises the UN Charter as 'founded on a new principle, the illegality of war, because imperialistic rivalry and the fascists' disregard for human rights and international law had produced the horrors of World War II'.¹⁰⁴³ He continues that the US arguments around pre-emptive self-defence 'directly [eliminate] international law' and that its actions 'since 1990 are completely illegitimate and thus in principle those who are responsible are war criminals'.¹⁰⁴⁴

Of course, Amin is not an international lawyer. However, a number of Marxist scholars of international law have – in less polemical fashion – articulated a similar position.¹⁰⁴⁵ As previously noted, Bowring holds that 'the prohibition of the use of armed force except in self-defence or with the express authorisation of the Security Council' had only come about through the concerted political action of the anti-imperialist, socialist and Third Worldist movements.¹⁰⁴⁶ On this reading, the developments following the Cold War, when these principles were 'degraded', marked a *resurgence* of imperial power. Bowring likens this process to a 'vampire-bride relationship between law and power'.¹⁰⁴⁷ In this process, international lawyers willingly allied themselves with imperialism in the hope of becoming more effective.

¹⁰³⁹ Ibid.

¹⁰⁴⁰ Ibid.

¹⁰⁴¹ Lenin 1970b, 6.

¹⁰⁴² For a representative sample of authors, see Bartholomew 2006.

¹⁰⁴³ Amin 2006b, 346.

¹⁰⁴⁴ Amin 2004, 77.

¹⁰⁴⁵ For example, Chimni mounts a similar argument, see Chapter 2 (Section 4.3.).

¹⁰⁴⁶ Bowring 2008a, 61.

¹⁰⁴⁷ Ibid., 48.

The 1991 invasion of Iraq was the beginning of this process. Here imperialist power and international law appeared to be set for a mutually beneficial relationship in which law was made *effective* through power, and power was legitimised through law. However, for Bowring, even though the 1991 invasion appeared to have the trappings of legality, it was dogged with problems.¹⁰⁴⁸ Biggest among them was the wide mandate granted by Resolution 678. By allying itself with imperialism, the UN had begun to undermine its own legitimacy.

This process was deepened by the 1999 Kosovo intervention, which international lawyers legitimated through doctrines of humanitarian intervention. Following 9/11, this process reached its nadir. This was the moment at which international law was *rejected*. Bowring notes that the US and the UK did not seek Security Council authorisation for the invasion of Afghanistan, relying instead on the doctrine of self-defence against terrorism, a justification that was partly endorsed by the Security Council in Resolution 1373. This culminated in the final rejection of international law by the imperialist powers in the 2003 invasion of Iraq. For Bowring, the legal arguments around this invasion represent a rupture with the anti-imperialist international law that emerged from decolonisation. Consequently, for him, ‘the invasion and occupation of Iraq were ... illegal, and the fact of their illegality makes a difference’ given the anti-imperialist content that international law embeds.¹⁰⁴⁹ As Rasulov notes, this account is in tension with the theory of imperialism to which Bowring holds allegiance.¹⁰⁵⁰ Here Bowring’s argument seems to be rooted in a theory of ‘empire as hegemony’, in which the character of imperialism lies not in a *system* of exploitation and competitive accumulation, but rather the action of the US in ‘defiance’ of the ‘international community’. The end of the Cold War is identified as the rupture that gives rise to an imperial moment.

However, Rasulov continues, even throughout the Cold War ‘the hegemonic privilege of a global superpower to intervene at will to promote its preferred ideological vision abroad was ... as an integral ... part of the objective reality of the existing international order’.¹⁰⁵¹ Two elements stand out here. The first is that ‘hegemonic interventionism’ is in no sense a *new* phenomenon. The second is that this interventionism was never

¹⁰⁴⁸ Ibid., 47.

¹⁰⁴⁹ Ibid., 63.

¹⁰⁵⁰ Rasulov 2010, 468.

¹⁰⁵¹ Ibid., 457.

articulated *outside* of the law, but was always articulated in juridical terms.¹⁰⁵² The same is true of the 2003 invasion of Iraq and the war on terror. Although Bowring characterises the US and its allies as *rejecting* international law, both the Bush and Obama administrations expended a great deal of energy *legally justifying* them.

In the Marxist tradition, ‘unilateralism’ has never been the defining feature of imperialism. As a *system* of exploitation and accumulation, imperialism encompasses both unilateral and multilateral moments. Miéville has advanced this point in relation to the UN intervention in Haiti. In 2004 there was a *coup d’état* against Haiti’s President Jean-Bertrand Aristide. In response to a request from the interim President, the Security Council passed Resolution 1529, authorising the use of force. Pursuant to the Resolution, the United Nations Stabilisation Mission in Haiti (MINUSTAH) was created – a multi-country military force. In this respect, then, Miéville notes that – in legal terms – Haiti was ‘effectively the anti-Iraq’.¹⁰⁵³

Yet despite the impeccable multilateral credentials of this intervention, it nonetheless remained a thoroughly imperialist one. Miéville details the way in which one of the actions of MINUSTAH involved, under the rubric of ‘anti-gang’ activity, suppressing pro-Aristide militants.¹⁰⁵⁴ This is indicative of the wider imperial character of the intervention. Following Peter Hallward, Miéville holds that the main motivation for the coup was the fact that the Aristide regime had passed a raft of progressive social legislation, which had strengthened the position the Haitian working class. In particular, the Aristide government had increased the minimum wage in Haiti’s textile sector, a part of the economy in which foreign capital was heavily involved. It was not accidental that one of the first moves of the post-coup government was to reverse these social protections.¹⁰⁵⁵

The imperial character of the intervention in Haiti therefore lay in the fact that it aimed at securing the conditions for *capital accumulation*. Through propagating ‘instability’ and unleashing ‘murderous violence’ it was able to undermine a possible threat to the rate of imperialist exploitation.¹⁰⁵⁶ Given this, to think of imperialism in terms of the

¹⁰⁵² Simpson 2004.

¹⁰⁵³ Miéville 2008, 72.

¹⁰⁵⁴ *Ibid.*, 81.

¹⁰⁵⁵ *Ibid.*, 89.

¹⁰⁵⁶ *Ibid.*, 90.

contradiction between multilateralism and unilateralism is to miss the point. Neither of them are ‘drivers of state behaviour’ but rather ‘functions of underlying interests’.¹⁰⁵⁷ Unilateralism and multilateralism are particular imperial tactics deployed in different contexts in order to advance the process of the accumulation of capital.¹⁰⁵⁸ Indeed, for Miéville, far from being ‘anti-imperialist’, multilateralism may in fact be a *more effective* form of imperialism, since its veneer of legality helps to legitimate interventions.¹⁰⁵⁹

What is vital, then, is that imperialism is not *opposed* to the law on the use of force, but rather is articulated through it. The law on the use of force is one site in which the dynamics of imperialist accumulation – in all its dimensions – play out. On this basis, as previously noted, Neocleous understands the colonial legal justifications for the use of force as rooted in the need to ‘improve’ native land. Where this was blocked by resistance, it was cast as an act of war, justifying military violence which would expand capitalist social relations.¹⁰⁶⁰ Once capitalist social relations have been fully established, this continues in a different form, with international law legitimating and guaranteeing interventions by advanced capitalist states into peripheral states in order to secure better conditions for the accumulation of capital. For example, following the invasion, Article 25 of the Iraqi Constitution embedded a commitment to private enterprise and the free market.¹⁰⁶¹

In this way, Marxists have a similar understanding to TWAIL scholars as to the role of the law on the use of force, although they trace its imperial basis to a different source. However, because the source of this dynamic is different, so too is the analysis. In particular, Marxists have drawn attention to the way in which *rivalries* between different imperialist states have shaped articulations of the law on the use of force.

As Haiti demonstrates, interventions authorised under Chapter VII of the UN Charter are clearly able to secure greater international legitimacy than unilateral interventions, owing to their legally uncontroversial character. Moreover, authorisation under Chapter VII brings with it a number of *legal* advantages. It does not involve the complicated

¹⁰⁵⁷ Ibid., 83.

¹⁰⁵⁸ Ibid.

¹⁰⁵⁹ Ibid., 91.

¹⁰⁶⁰ Neocleous 2011, 520.

¹⁰⁶¹ Neocleous 2012, 960.

questions of thresholds that arise under Article 51 and the amount of force to be used is that which is necessary to restore peace and international security (as opposed to proportionate to an armed attack).¹⁰⁶²

These advantages raise the question of why other forms of legal argument have been pursued at all. Tony Carty has attempted to explain this through tracking the transformations in imperialism following the end of the Cold War. For Carty, the Cold War was marked by a specific imperial configuration in which there were ‘only two (maybe three) sovereign states in the world, i.e. states with the power to declare and wage war’.¹⁰⁶³ For Carty, the bipolar dynamics of the Cold War meant the US was able to present itself as the guardian of the imperialist system as a whole.¹⁰⁶⁴ This was buttressed by the US’s unrivalled military, political and economic power. In particular, the fact that the US had – in the 1970s – managed to impose a global credit system in which the dollar was the primary currency granted it a huge influence on other states.¹⁰⁶⁵

However, this situation was increasingly subject to the contradictions of capital accumulation. In the 1980s there was a ‘radical bifurcation of military and financial global power’, whereby the US became dependent on the manipulation of the financial markets in order to finance its military build-up.¹⁰⁶⁶ This tendency became more marked as time went on, with the US becoming increasingly financially dependent. The rise of finance also meant already unstable economy became more and more crisis prone.¹⁰⁶⁷

Hence, the US found itself in a position of ‘decline’ or weakness. At the same time, it was confronted by a reinvigorated *rivalry* with other imperialist powers. This is true both in terms of those states with which it is friendly but dependent, such as Germany or Japan, but more importantly with states like China and Russia. For Carty, the US is no longer a ‘hegemonic power which ... enjoy[s] international legitimacy’ but instead must ‘rely exclusively on its own political and military strength to force through its will’.¹⁰⁶⁸ Carty reads the Iraq war and the war on terror in this light. He claims that US

¹⁰⁶² Schachter 1991, 460.

¹⁰⁶³ Carty 2008, 182.

¹⁰⁶⁴ Ibid., 188.

¹⁰⁶⁵ Hudson 2003.

¹⁰⁶⁶ Carty 2008, 183.

¹⁰⁶⁷ Ibid., 196.

¹⁰⁶⁸ Ibid., 189.

policymakers realise the ‘economic pre-eminence [of the US] in the global system is very seriously threatened in the medium term’ and so choose to exercise ‘political power in a primarily coercive military dimension, in order to force an acknowledgment of its supremacy’.¹⁰⁶⁹

Carty argues that the contradictions of imperialism are causing the US to behave *irrationally*. This forces it to discard ‘traditional international law’ in favour of unilateral action. For him, therefore, the contradictions of imperialism explain why international law ‘is being systemically, or structurally, violated’ by the US.¹⁰⁷⁰ Like Bowring, he understands there to be a degree of rupture follow the end of the Cold War. Similarly, he understands this largely to be a case of *illegality*. Crucially, however, this rupture is not characterised as a shift from an anti-imperialist international law to an imperialist one. Rather, there is a shift in the material configuration of imperialism, whereby the dominant hegemonic state is displaced.

It is unclear why Carty characterises US unilateralism as ‘violating’ international law. As previously noted, such a position seems to presuppose a positivistic account of international law, in which its content is known and transparent. More importantly, on this basis it is difficult to explain why US administrations have gone to such lengths to legally justify their actions. In dismissing these actions as ‘violating’ international law, Carty misses the way in which the *particular* legal arguments advanced were shaped very directly by the issue of rivalry. This is true in the obvious but important sense that that the US’s arguments all allow it to circumvent the Security Council. This was necessary because in all of these cases, rival states on the Security Council were prepared to translate their economic, political and military power into a veto.

Thus, whilst the 1991 invasion of Iraq was carried out when the USSR was in political and economic turmoil and had become heavily dependent on Western aid.¹⁰⁷¹ China was absent from the vote and Resolution 678 was able to be passed without any veto. As time went on, China and Russia gained in relative power and prestige and this translated into an increasing willingness to use the veto. Hence the 1999 Kosovo intervention had to be justified in terms of ‘humanitarian intervention’ because Russia would veto any

¹⁰⁶⁹ Ibid., 191.

¹⁰⁷⁰ Ibid., 169.

¹⁰⁷¹ Brenner 1991, 132.

Chapter VII authorisation.¹⁰⁷² Similarly, although both China and Russia were favourable to an intervention in Afghanistan, both were likely to impose quite strict conditions upon any deployment of force.¹⁰⁷³ By the time of the wider war on terror, both China and Russia were running up against the interests of the US in various ways.

This background is important for understanding the *specific* legal arguments used to defend these interventions. In the case of both humanitarian intervention and claims of pre-emptive self-defence we can observe a similar pattern. The US alleges that there is a threat to the international order which the Security Council should deal with, but cannot because of the actions of ‘selfish’ or irrational states. In response, the US and its allies must act outside of the ‘normal’ channels (although tracking to them as closely as possible) to remove the threat.

Crucially, these legal arguments are *not* available to rival states. It is for this reason that in 2008, when confronted with Russia’s claim to be intervening in Georgia for humanitarian reasons, President George W. Bush declared that Georgia was a ‘sovereign nation, and its territorial integrity must be respected’.¹⁰⁷⁴ Thus, in a development which complicates Angie’s story¹⁰⁷⁵ the US did not simply hold that ‘rogue states’ did not have access to certain legal arguments. Rival states – who are not the *target* for these legal rationales – are also unable to invoke these arguments. In this respect, it is interesting to note that alongside the doctrine of rogue states, the 2002 National Security Strategy *also* had extensive denunciations of the internal regimes of China and Russia.

Thus, for Marxists, the law on the use of force is one of the sites in which the contradictions of imperialism play out. In a very real sense, it embodies the drive towards the accumulation of capital that is at the heart of imperialism. At the same time, however, it mediates the complexities that this throws up, both in terms of resistance to imperialism and inter-imperialist rivalry.

¹⁰⁷² Chinkin 1999, 842.

¹⁰⁷³ Frederking 2007, 168.

¹⁰⁷⁴ Schwirtz, Barnard, and Chivers 2008.

¹⁰⁷⁵ Chapter 2, Section 4.3.

4. The Point is to Change it

This chapter has sought to show the way in which a particular understanding of imperialism has shaped Marxist engagements with international law. It began by examining the classical Marxist understanding of imperialism as being rooted in the capitalist compulsion towards endless accumulation. This accumulation must necessarily transcend the boundaries of the nation state in order to realise greater profits and stave off crises. Advanced capitalist states expand into ‘backward’ social formations, transform them, and attempt to guarantee the continued conditions for the greater accumulation of capital.

This gives rise to an international division of labour characterised by a core of advanced capitalist countries which export capital to the less developed periphery. The ‘super profits’ accrued in this division of labour also transform the class structure of the advanced countries, with substantial sections of their working classes having a material stake in the imperialist system. At the same time, because capitalism involves competition *between* capitalists, imperialism is also characterised by rivalry. In this materialist vision, imperialism is understood as a historically specific phenomenon, rooted in certain inherent tendencies within capitalism. Formal colonial domination is just one form that imperialism may take.

Such an understanding has implications for international law. The classical Marxist theorists only touched briefly on international legal issues, but generally claimed that in the face of the economic imperatives of imperialism, international law is powerless. By contrast, Marxist international legal scholars argue that international law and imperialism have a deep interconnection. This interconnection is understood in several (sometimes conflicting) ways: as a structural connection at the level of the legal form; as an ideological relationship in which international law serves to establish and stabilise imperialist social relations; and because international law mediates the (class) conflict thrown up by imperialist social relations. At the same time, all insist that international law is crucial for the establishment and working of imperialism. If imperialism is a system driven by the endless accumulation of capital, and international law has to be understood as embedded within imperialism, then one needs to understand international legal doctrines with reference to the logic of capital accumulation. It is this process

which accounts for the continuity between colonial and post-colonial international law and conditions the imperial articulations of contemporary international law.

As with the Third Worldist scholars described in the previous chapter, Marxist scholarship is not simply an attempt to neutrally ‘describe’ the world. The early theorists of imperialism were revolutionaries, leading parties and movements that were actively contesting capitalism. Bukharin and Lenin were leaders of a party that was to take state-power and both played roles in the Soviet state and government. One can say the same of Pashukanis. By claiming an intimate link between capitalism (and imperialism) and law, he was consciously making claims as to what role law could serve in a post-capitalist society. The practical importance of this is confirmed by the fact that when the Stalin regime turned to a vision of ‘socialist legality’ Pashukanis was executed.¹⁰⁷⁶

As with TWAIL scholarship, contemporary Marxist theorists of international law cannot claim quite this level of practical commitment or effect. Nonetheless, the question of what role international law can play in progressive political struggles has been a recurrent theme.¹⁰⁷⁷ At first glance, Marxist scholars have quite divergent ‘strategic’ reflections. Probably the closest in approach to TWAIL scholarship is Bowring’s account. As previously noted, Bowring views international law as the material repository of historical struggles.¹⁰⁷⁸ He therefore sees the current imperial conjuncture as one in which the revolutionary content of international law has been ‘degraded’. However, for Bowring, this situation is not inevitable. He believes international law and human rights can be ‘re-invested with political – even revolutionary – content’ when they are deployed in struggle.¹⁰⁷⁹ Consequently, he advocates a strategy of ‘revolutionary conservatism’.¹⁰⁸⁰ This involves defending the legal gains of the anti-colonial and socialist movements, in particular ‘[s]tate sovereignty, the prohibition of the use of armed force except in self-defence or with the express authorisation of the Security Council [and] the rights of peoples to self-determination’.¹⁰⁸¹

¹⁰⁷⁶ Bowring 2013, 79–80.

¹⁰⁷⁷ Baars 2012; Knox 2009; Knox 2010b; Knox 2011; Taylor 2011.

¹⁰⁷⁸ Bowring 2008a, 208.

¹⁰⁷⁹ *Ibid.*, 143.

¹⁰⁸⁰ *Ibid.*, 61.

¹⁰⁸¹ *Ibid.*

As noted above, one might wish to question this. Security Council resolutions, the right to self-determination and ‘state sovereignty’ are all compatible with imperialism as understood by Marxists. Moreover, revolutionary movements have very frequently sought to go beyond the narrow confines of these principles in their more expansionary phases, one might think for instance of India’s invasion of Goa to liberate it from Portuguese colonialism.¹⁰⁸² What this points to is a larger issue with Bowring’s strategy, namely that it presupposes international law has a *determinate* content and that certain aspects of this content will always be anti-imperialist.

This is the starting point for Marks’ reflections. Whilst partially concurring with Bowring as to the progressive potential of international law, Marks does not locate this in a particular determinate, ‘revolutionary’ content. Rather she argues that it is in its *indeterminacy* that international law might be turned to progressive ends. Marks draws a distinction between ‘sceptical’ analysis and ‘critique’ more properly considered.¹⁰⁸³ Scepticism is exemplified by the work of critical scholars such as Martti Koskenniemi¹⁰⁸⁴ and David Kennedy.¹⁰⁸⁵ These scholars, seek to ‘put the system into question’ by showing that law is contradictory, contingent and political. Marks endorses all of these points. However, she holds that these sceptics present their criticisms of international law as a kind of ‘external’ position, simply pointing out its problems.

By contrast, ‘critique’ is concerned with *transforming* relations of oppression and domination. This necessarily involves urging participants to reflect on their own social practices. Consequently, it cannot impose external standards on these practices, but must locate emancipatory resources within the practices themselves. In the case of international law, its indeterminacy means that it can be used to articulate ‘counter-systemic logics’.¹⁰⁸⁶ In particular, Marks advocates ‘immanent critique’. For her, the most effective way to transform the existing order is to examine the principles with which that order justifies itself and ask ‘why it is that those principles do not enter more on our material circumstances’.¹⁰⁸⁷ In pointing out the contradictions between what the

¹⁰⁸² Berman 2005, 103–105.

¹⁰⁸³ Marks 2003b, 143.

¹⁰⁸⁴ Koskenniemi 2005.

¹⁰⁸⁵ Kennedy 1987; Kennedy 2004; Kennedy 2006.

¹⁰⁸⁶ Marks 2003b, 144.

¹⁰⁸⁷ Ibid., 146.

system claims and what it achieves, one can push for fundamental transformations in the system.

This position has been challenged by Miéville. He argues that it is necessary to ask why – in the face of indeterminacy – some legal arguments ‘stick’ and others do not. As previously noted, he argues that between equally valid interpretations it will be ‘force’ that resolves legal arguments. In the context of the international system, one without an overarching sovereign, Miéville holds that in the vast majority of instances it will be the powerful imperialist states who will be able to make their interpretations ‘stick’.¹⁰⁸⁸ For Miéville, the best that can be achieved is ‘occasional victories in a constant struggle over categories’ which will generally ‘be actualised in the coercive interpretations of the very states and other bodies whose interpretations and actions the radical lawyer is critiquing’.¹⁰⁸⁹

Although Miéville may be right that these contests of interpretation will be won by powerful states, he operates with an overly narrow conception of ‘force’ and fails to account for the way in which groups that are not ‘actors’ in the international legal system can ‘internally’ influence states and tribunals.¹⁰⁹⁰ However, this is ultimately unimportant. What characterises all of the approaches described so far is that they concern how international law might be deployed to defeat specific, imperial challenges. However, what has only been touched upon is whether international law could be turned against imperialism as *a whole*.

As previously noted, Marks’ position has changed somewhat on this issue. She has argued that ‘social misfortunes’ are the product of *systemic* causes. By consequence, meaningful social reform must involve systemic change, and ‘curbing the power and curtailing the privilege of those on the “winning” side of current global relations’.¹⁰⁹¹ However, in line with her focus on necessity, Marks is doubtful as to whether international law is capable of doing this. Although – as ideology – it *might* be used to promote for systemic change, in practice its tendencies towards false contingency limit this possibility. In this respect, one might read Marks as arguing that international law *structurally predisposed* towards excluding issues of systemic or structural causation.

¹⁰⁸⁸ Miéville 2005, 297.

¹⁰⁸⁹ Ibid., 304.

¹⁰⁹⁰ Knox 2009.

¹⁰⁹¹ Marks 2009b, 47.

This is the theme that Miéville ultimately picks up. For him, quite straightforwardly, since the international legal form is a *product* of the generalisation of commodity exchange, one can only ‘fundamentally change the dynamics of the [imperialist] system’ by eradicating ‘the forms of law’.¹⁰⁹² Ultimately, therefore, any project of radical anti-imperialism will have to go *beyond* international law.

Both Bowring and Marks flag up imperialism’s political and ideological *contradictions*. Since these contradictions are manifested in international law, one can push them in a certain direction. Miéville, on the other hand, maintains that the structural interconnection between international law and imperialism renders such a project self-contradictory. Ultimately, what accounts for the divergence between these approaches is the level of analysis. Both Bowring and Marks propose that international law might be deployed against specific imperial actions, or within given imperial conjunctures, but do not suggest how it might challenge imperialism itself. Given that both understand imperialism as a *system*, this is an important qualification, and it is to this issue that Miéville gives most attention. What this disjuncture means will be one of the issues that the next chapter attempts to think through.

¹⁰⁹² Miéville 2005, 318.

CHAPTER 4: TOWARDS STRETCHED MARXISM

1. Theory, History, Politics

The previous chapters have attempted to show that, as concepts, ‘imperialism’, ‘colonialism’ and ‘empire’ have had long and complex histories, and that these histories have theoretical and political consequences. The chapters have sought to demonstrate that these consequences are also of great importance for the understanding of international law, and have played a key role in some of the most important examples of radical international legal theory and practice. These complexities are neatly captured by Amílcar Cabral’s 1966 speech ‘Presuppositions and objectives of national liberation in relation to social structure’. In this speech Cabral stated that:

The ideological deficiency, not to say the total lack of ideology, on the part of the national liberation movements – which is basically explained by the ignorance of the historical reality which they aspire to transform – constitutes one of its greatest weaknesses, if not the greatest weakness of our struggle against imperialism ... To those who see this view as being theoretical, we would recall that every practice gives birth to a theory. If it is true that a revolution can fail, even though it be nurtured on perfectly conceived theories, nobody has yet successfully practised Revolution without a revolutionary theory.¹⁰⁹³

First and foremost, Cabral captures here the political importance of having a theory of imperialism. In essence Cabral is paraphrasing Lenin, who famously stated that without revolutionary theory there can be no revolutionary *movement*.¹⁰⁹⁴ Only by understanding the nature and logic of imperialism, Cabral insisted, could it be contested and overcome. Indeed, for him, it was this lack of theory that had held back the national liberation movements. A corollary of this was that different theoretical understandings of imperialism carried with them different practical and political consequences.

This led Cabral to discuss the difference between colonialism and neo-colonialism. For him, to understand colonialism as direct political domination led to ‘a nationalist situation’ where ‘the nation gains its independence and theoretically adopts the economic structure it finds most attractive’. In that account, decolonisation is ‘simply’ a matter of throwing off foreign domination. By contrast, if one understands things in terms of ‘neocolonialism’, then the ‘class of workers and its allies’ must ‘fight

¹⁰⁹³ Cabral 1979b, 122–123.

¹⁰⁹⁴ Lenin 1973, 28.

simultaneously the imperialist bourgeoisie and the native ruling class' to destroy the 'capitalist structure implanted in national soil by imperialism', which would necessitate a 'socialist solution'.¹⁰⁹⁵ It was only with the 'Weapon of Theory' that national liberation movements could properly understand the (neo-colonial) situation in which they found themselves and win real liberation from imperialism.

Whilst Cabral does not mention international law, except (elsewhere) to note its irrelevance,¹⁰⁹⁶ Chapters 2 and 3 above have attempted to illustrate how these understandings also shed light on important international legal questions. Cabral's account is particularly apt in relation to the first wave of Third Worldist scholarship examined in Chapter 2 (Section 2), whose understandings of the relationship between imperialism and international law were conditioned by whether they understood colonialism in terms of political domination, or as part of a wider system of imperialism.

Cabral's words also signal the second complexity that the previous chapters have sought to trace. Cabral was the leader of the African Party for the Independence of the Guinea and Cape Verde (PAIGC), a political organisation whose aim was to secure independence for Guinea-Bissau from Portuguese colonialism.¹⁰⁹⁷ He delivered the speech at the plenary of the First Solidarity Conference of the Peoples of Africa, Asia and Latin America (the Tricontinental). This conference, held in 1966 in Havana, was of quite a different stripe to that of Bandung. Whereas Bandung had been a broad affair of newly decolonised nations, the Tricontinental was representative of the *radical* trend within Third Worldism, and 'aligned itself with a radical anti-imperialism located firmly in the socialist camp'.¹⁰⁹⁸ In the words of assassinated Moroccan socialist leader and organiser of the Conference, Mehdi Ben Barka, the Tricontinental aimed to 'blend the two great currents of world revolution: that which was born in 1917 with the Russian Revolution, and that which represents the anti-imperialist and national liberation movements of today'.¹⁰⁹⁹

¹⁰⁹⁵ Cabral 1979b, 133.

¹⁰⁹⁶ Cabral 1979a, 143.

¹⁰⁹⁷ Gleijeses 1997.

¹⁰⁹⁸ Young 2001, 213.

¹⁰⁹⁹ Cited in Barcia 2009, 209.

The conference brought together representatives of radical Third World governments, national liberation movements that had not yet achieved state power and even leftist movements that opposed their own (Third World) governments.¹¹⁰⁰ In keeping with this radical orientation, the conference condemned imperialism, colonialism and neo-colonialism, declaring its solidarity with the Vietnam struggle against the US and denouncing the US's imperial ambitions.¹¹⁰¹ This solidarity with the Vietnamese had wider implications, with the participants in the conference calling for an intensification of the struggle against imperialism and demanding that the Third World 'take up arms'.¹¹⁰² It was at this Conference that Che Guevara's famous 'Message to the Tricontinental' was read out, in which he looked forward to a future of 'two, three or many Vietnams' challenging imperialism.¹¹⁰³

Cabral's speech therefore – both in terms of its content and its context – captures quite acutely the complex political entanglements between Marxism, national liberation and Third Worldism. As Chapter 1 demonstrated, the Marxist tradition at the core of defining and popularising the 'radical' concept of imperialism. This concept went on to play a central role in the anti-colonial and Third Worldist movements. Of course, there was not a simple 'transmission' of the Marxist concept of imperialism to the anti-colonial movement; it was *mediated* through (radical) concepts of colonialism and neo-colonialism, concepts which were challenged both from within and without the movement.

However, as time went on, not only the political but also the theoretical fortunes of Marxism went into steep decline. Equally, the Third World's radical challenge to the international order was roundly defeated. This was the particular context that saw the rise of postcolonialism. Even more so than the Third Worldist movement, postcolonialism has an ambivalent relationship to the Marxist tradition. Certain elements and figures from the Marxist tradition served as an 'inspiration' for postcolonialism, but postcolonial scholars have tended to see Marxism as embedded within a fundamentally Eurocentric problematic. This has affected the way in which

¹¹⁰⁰ For example, member of the Indonesian Communist Party called for the condemnation of Suharto's mass purge, Hsinhua Correspondent 1966, 24.

¹¹⁰¹ Barcia 2009, 211; Hsinhua Correspondent 1966, 19.

¹¹⁰² Cabral 1979b, 121; Hsinhua Correspondent 1966, 22; Prashad 2007, 107.

¹¹⁰³ Guevara 1966.

postcolonial theorists interpreted and received their own ‘canon’, with their Marxist commitments downplayed and problematised.

While these various strands have been dealt with in previous chapters, this chapter aims to bring them all together and interrogate them more fully. The aim is to draw out the theoretical and political consequences of the Marxist and Third Worldist understandings of imperialism, and see what light they can shed on one another. In Section 2, the chapter attempts to analyse the political consequences of TWAIL scholarship. Developing the argument made in Chapter 2 (Section 5), it traces the way in which TWAIL scholarship ultimately produces a *faith* in international law. Distinguishing between the Marxist and post-colonial tendencies in TWAIL, it argues that latter is structured by very specific – a contradictory – understandings of imperialism, and it traces the consequences of these understandings. Section 3 suggests that the limitations of this concept of imperialism can be highlighted by revisiting the historical and theoretical relationship between the Marxist and Third Worldist traditions. Through a reading of Fanon it proposes that many of the limitations of postcolonial theory can be remedied through a materialist account of race, culture and identity-formation. Section 4 argues that taking these issues seriously also means fundamentally recasting Marxist theory.

2. Against Culturalism

2.1. The Politics of Theory

The full complexities described above are best captured in the attempts of Third Worldist jurists to articulate an anti-imperialist legal strategy. This was particularly obvious with the case of the first wave of jurists (Chapter 2, Section 2). Here, one could see how ideas about the nature of imperialism directly influenced accounts of international law’s political potential. Equally, one could see how it was the specific relation of each author to the *Marxist* tradition which determined in large part of the character of these political accounts.

Bedjaoui and Umozurike, adopting a Marxist-inflected theory of imperialism, traced its logic to the system of international capitalism, with Eurocentrism and racism an intrinsic part of this system. At the same time, imperialism was seen as a wider

phenomenon than its embodiment in European colonialism. The consequence of this was that international law could not simply be turned towards anti-imperialism by ‘outlawing’ colonialism and inviting the participation of the non-European world, it would need to be radically transformed.

By contrast, jurists such as Sinha and Syatauw operated with a more conservative understanding of imperialism and colonialism. In their vision, colonialism was defined primarily as the direct juridical domination of subject territories, as embodied within the European experience. A logical consequence of this was that colonialism was largely understood as a *contingent* phenomenon. Since colonialism and Eurocentrism were seen as contingent phenomena, the problem was not so much that international law had enabled colonialism, as that non-European societies had been excluded from the creation of international law. Since international law had now been deployed *against* colonialism, and non-European societies could become full members of the international legal order; international law was – almost by definition – anti-imperialist.

This division illustrates quite effectively Marks’ earlier cited claim that different understandings of imperialism will produce distinct understandings of its relationship with international law. However, as was also shown in Chapter 2, the utility of this explanation is not immediately apparent with contemporary TWAIL scholarship. In their own way, *all* of these scholars sought to go beyond the failure of the jurists of the anti-colonial and Third Worldist movements. A corollary of this was an understanding of international law as more deeply intertwined with imperialism. However, despite this, a common pattern was observed, with *all* of the scholars under consideration insisting that – despite its pitfalls – international law might be used to further progressive political projects.

Thus, despite their different understandings of imperialism, both Marxist scholars and those who align more closely with postcolonial theory end up in the same place with regards to international law’s political potential. All maintain that it is too important a ‘shield’ to be abandoned, and that it might be transformed in such a way as to serve anti-imperialist ends. Although this is a well-acknowledged pattern within TWAIL scholarship, it has not generally not been the subject of much sustained attention. Those who do pay attention tend to simply view this as ‘quirk’ in their work, separate from the

broader thrust of their analysis.¹¹⁰⁴ Whilst there may be a deeper truth to this insight, it fails to account for the tenacity of the ‘faith’ in international law, and for why it has recurred amongst a number of different TWAIL scholars.

The most sophisticated attempt to grasp this phenomenon is the analysis carried out by Eslava and Pahuja.¹¹⁰⁵ They argue that this pattern can only be grasped through an understanding of the relationship between law, justice and universality. In their taxonomy, there are three primary ‘attitudes’ evinced by international lawyers towards political struggle, each of which is determined by a specific understanding of the relationship between law and justice.¹¹⁰⁶ The first position is that of the ‘conservative’. The ‘conservative’ wants to protect the current order, and will only change this order through mechanisms authorised by the order itself: in this vision, law and justice are either seen to coincide or it is believed that the world is best served by *suspending* ethical judgments when dealing with legal questions.¹¹⁰⁷

The second position is that of the ‘reformist’. Here, the ‘gap’ between law and justice is seen to be relatively small, with no better alternative system available or viable. Consequently, reformists argue that it is sometimes legitimate to break the law in the name of some higher justice, but will generally work within the system for change.¹¹⁰⁸ Finally, there is the ‘revolutionary’. The revolutionary wants to overturn the existing order, and only appeals to the law in a ‘strategic’ sense. This is because the revolutionary thinks the system is fundamentally unjust and so must be utterly transformed.¹¹⁰⁹

Eslava and Pahuja argue that the original wave of Third World jurists were in some sense reformists, since they sought to utilise the ‘promise’ of international law, calling for a ‘revolutionary re-reading of ... [its] history and tenets’.¹¹¹⁰ They cast this as a kind of ‘revolution from within’, whereby international law would be made to live up to its own

¹¹⁰⁴ For instance, Sara Kendall refers to Anghie’s ending as a ‘hopeful gesture’ (Kendall 2008, 122). Similarly, Madeleine Chiam argues that Anghie’s claims simply *contradict* his wider argument (Chiam 2006, 207).

¹¹⁰⁵ Eslava and Pahuja 2011 and Eslava and Pahuja 2012.

¹¹⁰⁶ Eslava and Pahuja 2011, 112.

¹¹⁰⁷ *Ibid.*, 112–113.

¹¹⁰⁸ *Ibid.*, 113.

¹¹⁰⁹ *Ibid.*, 114.

¹¹¹⁰ *Ibid.*, 116.

promise of justice and universality.¹¹¹¹ It was this impulse that was embodied in initiatives like PSNR and the NIEO. With the failure of these projects, the two obvious choices remaining were to become conservatives, and deny the problems of international law, or to reject international law altogether and become revolutionaries.

This is analogous to the position that Chapter 2 (Section 3.1.) described, where TWAIL scholars sought to go beyond sociological functionalism. However, Eslava and Pahuja claim that TWAIL scholars have not, in fact, shifted ‘from reformist to revolutionary [positions], not even in disguise’.¹¹¹² Instead, they have enacted a ‘secret fourth choice’.¹¹¹³ This position represents a ‘combination of hope and frustration’ which involves neither ‘remaining within the reformist page, or by committing fully to the idea ... [of] a world without or beyond (international) law’.¹¹¹⁴ TWAIL scholars adopt a position of ‘resistance’, which involves contesting international law’s problematic aspects and pushing constantly for reforms. In so doing, TWAIL scholars embody revolutionary politics whilst remaining with a ‘reformist’ frame.

For Pahuja and Eslava, the crucial element in this process is the use of the ‘universal’. Focusing on Anghie, they argue that in his account of the ‘dynamic of difference’ a particular set of European values are cast as ‘universal’, with non-European societies seen as ‘lacking’ because they fail to embody these universal values. However, this universalism also represents a source of *instability* in international law. In a manner similar to Marks’ account of immanent critique, Eslava and Pahuja argue that Anghie attempts to mobilise international law’s *promise* of universality, as against its casting of particular European values as universal.

In order to avoid being caught up in a *new* dynamic of difference, this critical universalism cannot simply assert a new set of universal values. Instead, the universal ‘as such’ is asserted. This is a ‘quasi transcendent’ idea which ‘recognises the impossibility of genuine universality, but also recognises that the impossibility of universality is precisely what makes a fruitful plurality possible’. Such a vision is structured by an ‘open ... idea of justice’ which recognises its agonistic and contingent

¹¹¹¹ Ibid.

¹¹¹² Ibid., 117–118.

¹¹¹³ Ibid., 116.

¹¹¹⁴ Ibid.

nature.¹¹¹⁵ Thus, on their reading, TWAIL scholars have articulated a project whereby continuous struggle and rebellion within the law opens it up to progressive possibilities, through the assertion that international law ought to be universal, without ever giving content to this universal.

Although Eslava and Pahuja's argument is sophisticated, it suffers from some limitations. The most apparent problem is how quickly their taxonomy breaks down. While the category of the 'conservative' is a relatively stable one, the line between 'reformist' and 'revolutionary' seems almost entirely porous. For example, the first wave of Third World jurists, whilst initially treated as the quintessential reformists, are immediately cast in a more complicated position: figures who sought to enact a 'revolution from within'.

Of course, in terms of their taxonomy, this makes a certain kind of sense. Reading the work of Bedjaoui, for instance, one can hardly suppose that he thought there was only a *small* gap between the existing order and 'justice'. Equally, it is clear that *his* version of the NIEO can be seen as 'revolutionary' since it envisages a rather radical break with capitalism and imperialism.¹¹¹⁶ Yet at the same time, the methods he proposed for this clearly are reformist. He advocated remaining within the structures of international law, and forcing through an agenda that relied on the power of the newly emerged Third World bloc. The fact that Eslava and Pahuja are forced to invent a 'new' category perhaps suggests that it is *not* the 'gap' between law and justice which best explains Bedjaoui's political attitudes. This can be seen more starkly when we compare Bedjaoui with Sinha. It seems clear that Sinha believed that there is a smaller 'gap' between law and justice than Bedjaoui did. Although he thought of colonialism as being an 'evil', he ultimately did not see it as a recurring and systemic threat. Yet both are 'reformists' in the sense of Eslava and Pahuja's taxonomy.

What then explains this? As Chapter 2 attempted to argue, the difference in the *content* of Bedjaoui's and Sinha's politics stemmed from their differing ideas as to the nature of imperialism. Yet at the same time, both shared a theoretical commitment to the idea that law essentially 'expressed' the balance of forces at a given moment, and so might give expression to a rising tide of anti-imperialist sentiment. Hence both could advocate

¹¹¹⁵ Ibid., 122.

¹¹¹⁶ Taylor 2011, 269.

reformist measures. On this reading, what is at issue was not how big a ‘gap’ each believed existed between law and justice, but rather the analysis of the nature of imperialism and its relationship to international law.

In light of the history of the terms ‘reform’ and ‘revolution’ this makes sense. The opposition between ‘reform’ and ‘revolution’ is most strongly associated with a series of debates that characterised the social democratic, socialist and communist movements throughout the twentieth century. This debate took different forms: from the dispute between Luxemburg and Bernstein,¹¹¹⁷ to that between Lenin and Kautsky,¹¹¹⁸ to debates as to the nature of the ‘dictatorship of the proletariat’,¹¹¹⁹ to the arguments around Allende’s government in Chile¹¹²⁰ and so on.¹¹²¹ What was at issue in all of these debates was whether capitalism could be gradually dismantled without the seizure of state power, or whether it would be necessary to have a violent *rupture* with the existing order.

Crucially, these debates were not centred around differences in goals. Although many avowed reformists did eventually give up the viability of transcending capitalism, many – perhaps even the majority – were committed to its transformation. However, they argued that capitalism could best be transformed through winning elections and *gradually* introducing social ownership. By contrast, revolutionaries held that such methods were self-defeating, since capitalism would ultimately undermine any reforms undertaken within it. Rather than a question of the ethical question of the relationship between law and justice, then, the division between ‘reform’ and ‘revolution’ was one based on efficacy. That is to say, the question was – given the nature of the social system, how is it that we can transcend it and achieve ‘justice’? As such, the crucial factor distinguishing ‘reformists’ from ‘revolutionaries’ was *their analysis of the nature of the system*.

This also seems to be what is at issue as regards the Third Worldist jurists. In simple terms, Bedjaoui had the goal of a radical rupture with imperialism, seeking to replace it with (at a minimum) an interventionist, egalitarian social order. Since he understood

¹¹¹⁷ Bernstein 1973.; Luxemburg 2012.

¹¹¹⁸ Kautsky 1964; Lenin 1972b.

¹¹¹⁹ Balibar 1977.

¹¹²⁰ Figueroa Clark 2013, 88–115.

¹¹²¹ See Knox 2010b, 215–222.

imperialism as structured by a systemic economic logic (of capitalism) he did not believe that this rupture could not simply be achieved through ending formal colonialism, but would have to tackle the neo-colonial economic order. At the same time, he understood imperialism as rife with contradictions, with the exploited constantly contesting and fighting against the system. Since international law was an ‘expression’ of these material forces, it could embody the goals of those fighting against imperialism. Thus, his goal was a ‘revolutionary’ one. But, since international law could express these forces, it was possible to remain within international law. Hence his political proscriptions were ‘reformist’.

2.2. *You Won’t Know the Difference Between a Cycle and a Revolution*

2.2.1. Universalisms

It seems, therefore, that we have come full circle. The above argument seems to confirm what was put forward in Chapter 2. Yet how can this explain the convergence between Marxist and postcolonial theorists within TWAIL scholarship on the question of international law’s progressive potential? Once again, Eslava and Pahuja help provide an answer. It is telling that in their account, the focus is primarily on Anghie’s work. By contrast, Chimni is only mentioned briefly. Essentially, his account is assimilated into their broader reading, understanding him as mobilising international law’s potential for universalism (‘as such’) against the particularism of the actually-existing international order.¹¹²²

Yet it cannot really be said that Chimni mobilises universalism ‘as such’. His work and political approach is very much situated within a *definite* political and theoretical tradition: that of Marxist socialism. For Chimni, the existing order is a determinate one – capitalism – with a distinctive logic. ‘Justice’ is understood in *relation* to this logic: one overcomes unjust capitalism by replacing its logic with the democratic control of production. Equally, Chimni derives the *agency* to undertake this task from his analysis of capitalism. He argues that those who can transform capitalism are those who are oppressed and exploited by capitalist social relations. As capitalist social relations have transformed and globalised, so too does the composition of this group change. In particular, he argues, the old vision of the working class has given way to a larger group of people struggling against forms of capitalist dispossession. This ‘transnational

¹¹²² Eslava and Pahuja 2011, 118, n.32.

oppressed class' includes indigenous and tribal peoples, peasants, the working class and various social movements.¹¹²³

For Chimni, in a manner similar to Bedjaoui, this transnational oppressed class will be able to make certain inroads into the international legal order. He understands international law as able to embed and express the demands of subaltern classes and projects. Since, for him, international law is determinate, this content can then be turned against imperialists, providing a context in which oppositional movements can better articulate their demands. It is precisely for this reason that Chimni characterised neo-colonial relations as 'bourgeois democratic', since they had genuinely managed to embed the results of certain progressive struggles. Thus, Chimni is not mobilising an abstract universalism, but rather articulating a concrete project.

Importantly, whilst one can *disagree* with Chimni, his political commitments flow quite directly from his broader analysis of imperialism and its relationship to international law. Thinking as he does that international law is a class project, it is feasible – given the contradictory nature of imperialist class relations – that some 'progressive' content might be expressed through it. It is here that we can see a difference between Chimni's account of international law and that of Anghie or Rajagopal. Their accounts disclose the ways in which *even* seemingly progressive invocations of international law serve to reinforce imperialism and Eurocentrism. Whereas Chimni argues that the neo-colonial period was contradictory because real advances against imperialism were coupled with attempts to undermine these advances, Anghie and Rajagopal argue that the supposed advances were themselves poisoned chalices.

Both trace this to a wider dynamic, whereby international law has internalised the civilising mission, such that it constantly reproduces a division between a 'civilised' core and an 'uncivilised' periphery (or between the developed and the undeveloped). This is a pessimistic picture and the pattern described is extensive, seeming to leave very little room for a 'progressive' international law. Unlike in Chimni, there seems nothing in the *analysis* to warrant the political conclusions they draw. In particular, they are unable to answer the question why *this* particular usage of international law would be progressive, where all the others have not been.

¹¹²³ Chimni 2010c, 79–81.

This seems especially important because the attempt to mobilise universalism ‘as such’ seems remarkably similar – in form – to the Third World’s previous attempts to challenge imperialism. In the wider ‘fronts’ of the Non-Aligned Movement (such as at Bandung) no particular political or economic model was preferred to any the others. This was in fact a *necessity* given the desire for the unity of the Third World, the ideological heterogeneity of its participants and the perceived need to avoid taking a side in the Cold War. This was one of the reasons why the ‘common programme’ of these fronts was the advocacy of non-intervention in internal affairs. In this respect, to return to Eslava and Pahuja’s taxonomy, although they claim it was *TWAIL* which enacted a ‘secret fourth choice’, by characterising the original Third World jurists as enacting a ‘revolution from within’, they seem to already be granting these jurists a similar role.

In Eslava and Pahuja’s telling, the trap of Eurocentrism can be avoided by a change in political focus. For them, concomitant to a move to ‘universalism as such’ is a shift in attention from the level of grand international politics to the smaller politics of everyday resistance to the existing order. They urge our attention to the ways in which international law shapes people’s everyday lives, and how people consequently negotiate with and subvert international legal norms in order to survive. Eslava and Pahuja propose that ‘charting the international as it unfolds in people’s lives’ will allow international lawyers to create a ‘map to resist, revolt and strategise against the effects of the regulatory proliferation of international law’.¹¹²⁴ This ‘seems to offer a way to overcome the (post)colonial biases’ of international law, since the focus is now on its subversion and redeployment.¹¹²⁵ In this way, will be possible to move beyond binaries of optimism and pessimism and instead see that ‘[t]iny revolutions are everywhere, every day’.¹¹²⁶

Yet, as above, one is uncertain *why* exactly ‘everyday’ attempts to ‘subvert’ international legal norms will be any more able to escape the trap of the civilising mission. The mere act of ‘subversion’ cannot be what is at issue, since all of the (failed) attempts by the Third World to use international law and institutions could be framed in

¹¹²⁴ Eslava and Pahuja 2011, 129.

¹¹²⁵ Eslava and Pahuja 2012, 221.

¹¹²⁶ Eslava and Pahuja 2011, 129.

those terms. Equally, one is unclear why the ‘local’ or ‘everyday’ character of these actions renders them any less vulnerable to cooptation.

Furthermore, as Owen Taylor has noted, one wonders what is at stake in dubbing these acts of resistance ‘revolutions’.¹¹²⁷ Revolution generally denotes forms of action which manage to fundamentally overturn the existing order. In proposing that any act of subversion is a ‘tiny revolution’ one ends up not ‘focusing on the consequences ... [of subversion] or the ways in which those acts form part of a complex whole that incorporates them’.¹¹²⁸ What Taylor alludes to is the fact that, insofar as this investment in subversion seems divorced from any theoretical or political moorings, there is no sense in which this practice might be directed to *overcome* the existing order, nor is there a sense of which social actors might be best placed to carry it out. Instead, the practices of certain subaltern groups are essentially selected, with the job of politics to *valorise* these practices, without stating how they might effectively undermine the existing order. In this way, politics is less a guide to action than a form of *moralism*.

2.2.2. Analysis and Politics

One can now see that there is a fundamental distinction between the different types of ‘embrace’ of international law in TWAIL scholarship. In Chimni, and other Marxist inflected approaches, the embrace of international law is directly connected to their broader theoretical analysis. One can of course disagree with the analysis itself, but there are *grounds* for arguing that international law might have some useful potential. In Anghie and Rajagopal, by contrast, there is a combination of an incredibly pessimistic analysis of the international legal order, followed by an *unexpected* embrace of international law. This embrace is unable to specify under what conditions subversive practice can work, or how such practice might be able to overcome imperialism.

Once again, therefore, it cannot simply be a ‘gap’ between justice and the law which explains one’s political attitude towards international law. But what does? The kind of account described here is not without precedent. Bhabha, for instance, insists that it is not possible to rigidly separate ‘theory’ and ‘politics’.¹¹²⁹ For him, to do so is to assume an elitist conception, whereby theory is simply ‘insulated from the historical exigencies

¹¹²⁷ Taylor 2011.

¹¹²⁸ Ibid., 277.

¹¹²⁹ Bhabha 2004, 28.

and tragedies of the wretched of the earth'.¹¹³⁰ Instead, it is necessary that 'theory' and 'politics' are understood as 'forms of discourse' existing 'side by side' with their difference lying in their 'operational qualities'.¹¹³¹ This means that theory and politics exist in a constant state of 'negotiation', with neither taking primacy. Importantly, since theory could not be taken to be all encompassing in relation to politics, the 'corollary is that there is no first or final act of revolutionary social ... transformation'.¹¹³²

What are important here are the political conclusions that Bhabha draws from this position. For him, the role of theory is to *reflect* on the practices of 'those who have suffered the sentence of history – subjugation, domination, diaspora, displacement' and 'learn our most enduring lessons for living and thinking'.¹¹³³ In a move analogous to that taken by Eslava and Pahuja, Bhabha claims that this allows theory to move beyond the opposition between 'the nihilism of despair or the Utopia of progress' and look to the 'reality of survival and negotiation'.¹¹³⁴ Bhabha sees examples of these kinds of politics in various acts of resistance to the colonial authorities, which embodied the characteristics of indeterminacy and undecidability.¹¹³⁵

Very directly in Bhabha, then, we see the combination of utter pessimism about the ability to overcome domination, with a re-valorisation of the everyday practices which take place within this domination. These positions have been subject to a number of criticisms, particularly from the Marxist tradition.¹¹³⁶ For instance, Neil Lazarus and Rashmi Varma accuse him of 'transmut[ing] ... the political project of anticolonial struggle and decolonisation into an ethical one'.¹¹³⁷ In this ethical project 'emphasis [is] placed upon the effects of globalisation ... rather than on its determinants or structures'.¹¹³⁸

This argument is not simply confined to Bhabha's work. Although his is the clearest and most explicit statement to this effect, this oscillation between despair and hope (with the claim to have displaced this oscillation) has marked a great deal of postcolonial

¹¹³⁰ Ibid.

¹¹³¹ Ibid., 32.

¹¹³² Ibid., 45.

¹¹³³ Ibid., 246.

¹¹³⁴ Ibid., 365.

¹¹³⁵ Ibid., 286.

¹¹³⁶ Chandra 2012; Parry 1994.

¹¹³⁷ Lazarus and Varma 2008, 322.

¹¹³⁸ Ibid., 323.

scholarship. Accordingly, if we combine this insight with the prior accounts of how concepts of imperialism have shaped understandings of international law, we might argue that there is something distinctive about how postcolonial theory, and work influenced by it, understands imperialism, and that this understanding produces a distinct theory of international law.

2.3. *Between Continuity and Rupture*

2.3.1. Clash of the Concepts

In her *A Critique of Post-Colonial Reason* Gayatri Spivak argued that:

Postcolonial studies, unwittingly commemorating a lost object, can become an alibi unless it is placed within a general frame. Colonial Discourse studies, when they concentrate only on the representation of the colonized or the matter of the colonies, can sometimes serve the production of current neocolonial knowledge by placing colonialism/imperialism securely in the past, and/or by suggesting a continuous line from that past to our present.¹¹³⁹

Here Spivak draws our attention to two aspects of postcolonial scholarship. On the one hand, postcolonial theorists understand European domination as rooted in and driven by the psychological and culture imperative of a European ‘self’ to consolidate itself in a non-European ‘other’, which itself is part of a broader psychological and cultural process of ‘othering’. On this reading, as Spivak notes, there is a tendency towards drawing ‘a continuous line’ between the past and the present. On the other hand, the focus of much postcolonial scholarship is on the period of formal European colonialism, taking this as the defining instance of imperialism. In this instance colonialism and imperialism are placed ‘securely in the past’.

One can observe how this plays out in Said’s work. As noted in Chapter 1, Moore-Gilbert suggested that Said’s work was structured by a tension between a ‘latent Orientalism’, which was an unchanging psychic structure, and a ‘manifest Orientalism’ which was embodied in specific imperial practices towards the ‘Orient’. On the one hand, Said argued imperial processes are driven by the ‘aspiration’ of *all* cultures to ‘sovereignty, to sway, and to dominance’.¹¹⁴⁰ This ‘aspiration’ was rooted in a

¹¹³⁹ Spivak 1999, 1.

¹¹⁴⁰ Said 1994, 15.

transhistorical psychic process in which a ‘self’ needed to be consolidated against an ‘other’, and accordingly intervening and transforming that other.¹¹⁴¹

At the same time, Said also articulated a more bounded, conservative account of imperialism, which matched the particular historical periods upon which he chose to focus.¹¹⁴² In this vision, imperialism was specifically concerned with the control and rule of *territory*, with imperialism as concerned with ‘thinking about, settling on, controlling land that you do not possess, that is distant, that is lived on and owned by others’.¹¹⁴³ For him, imperialism was ‘the practice, the theory, and the attitudes of a dominating metropolitan centre, ruling a distant territory’.¹¹⁴⁴ Said emphasised the direct *control* of territory by a ruling centre, an account of imperialism in tune with the formal colonialism of the European empires. Here, imperialism is delimited by a kind of historical ‘fiat’, whereby the European experience, and the concept associated with it, are asserted as the paradigm through which one understands imperialism. In such an account, the contemporary experience of ‘imperialism’ is in fact a historical *legacy* of formal European colonialism.¹¹⁴⁵

Importantly, these different positions are not just different ‘styles’ of argument. Looking back to Chapter 1, we can see that in fact such positions correspond with different *concepts* of imperialism. These concepts bring with them very different political and theoretical assumptions. Insofar as imperialism is seen to embody a transhistorical process of ‘othering’, it very closely resembles the realist or political account of imperialism as embodied in the work of Morgenthau or Cohen, which rooted imperialism in certain natural human drives (Chapter 1, Section 4.3). By contrast, insofar as imperialism is identified primarily with a given historical period, then the account of imperialism moves much closer to the conservative vision of colonialism outlined in Chapter 1 (Section 5.3.) and to the account of imperialism as ‘Empire-ism’, in which imperialism is simply the ‘active’ part of controlling and holding territorial empires (Chapter 1, Section 4.2.).

¹¹⁴¹ Ahmad 2008, 178.

¹¹⁴² Larsen 2001, 44.

¹¹⁴³ Said 1994, 5.

¹¹⁴⁴ Said 1994, p.8.

¹¹⁴⁵ Said 1994, 44–45, 341.

This is important. Insofar as one can locate these different approaches to imperialism in intellectual traditions with distinct ways of understanding imperialism, one cannot simply look at them as mutually complementary ways of examining the same phenomenon. As different *concepts* of imperialism, they operate with radically opposed notions of its historical specificity, and, accordingly, the particular forces that drive it. Each of these concepts also carries with it a series of limitations.

2.3.2. Transhistoricism

As Moore-Gilbert has noted, the transhistorical concept of imperialism suggests that Eurocentrism ‘was always, somehow, simply there’. It fails to account for *how* and *why* Eurocentrism arose, why it takes certain forms and how these forms were able ‘to become, and remain, dominant’.¹¹⁴⁶ Crucially, it needs to explain why *Europe* was the particular ‘self’ consolidated through an ‘other’.¹¹⁴⁷ More broadly, within this dynamic, there is little room for the various ways in which the civilising mission was negotiated and transformed. On a very basic level we might ask why ‘Eurocentrism’ has sometimes been manifested in terms of formal colonial claims, and at other times has been couched as neo-colonialism. In this way, it is unable to ‘produce its own account of change, discontinuity, differential periods’, bringing with it ‘a danger of distinctive moments being homogenized’.¹¹⁴⁸

Arguably, this points to a more general issue of the *structuralism* of the transhistorical position.¹¹⁴⁹ Since imperialism is seen as rooted in certain transhistorical cultural and psychic dynamics, there is very little room for *agency*. It is always difficult to account for changes within a basic, overarching structure, without some theory of what agents operate within it, and how their actions are mediated through the structure. Indeed, as Lazarus has pointed out, in the absence of an account of agency, the categories of ‘West’ or ‘Europe’ are frequently treated as if they are agents in themselves, despite the fact that they are supposed to be unstable products of the process of ‘othering’.¹¹⁵⁰

¹¹⁴⁶ Moore-Gilbert 1997, 49.

¹¹⁴⁷ Interestingly even Said argues that ‘not all cultures make representations of foreign cultures *and* in fact master or control them’. But did not state why ‘Western’ culture had been so successful. See Said 1994, 120.

¹¹⁴⁸ Parry 2004, 18.

¹¹⁴⁹ Moore-Gilbert 1997, 57.

¹¹⁵⁰ Lazarus 2002.

As Lazarus and Varma argue, the net result of such a transhistorical understanding of imperialism is that Eurocentrism is addressed in terms of ‘an *episteme* or intellectual atmosphere’. In such a vision, Eurocentrism serves as ‘an untranscendable horizon governing thought – its forms, contents, modalities, and presuppositions so deeply and insidiously layered and patterned that they cannot be circumvented, only deconstructed’.¹¹⁵¹ This means that it is not vulnerable to political critique or transformation.

This is not new. In *Black Skin White Masks* Fanon mounted a similar criticism against Octave Mannoni. Mannoni had rooted the problems of colonised people in a psychologically deep inferiority complex. Fanon insisted that such a position was problematic because it led to political passivity:

[I]f a society makes difficulties for him because of his color, if in his dreams I establish the expression of an unconscious desire to change color, my objective will not be that of dissuading him from it by advising him to “keep his place”; on the contrary, my objective once he motivations have been brought into consciousness, will be to put him in a position to *choose* action (or passivity) with respect to the real sources of the conflict – that is towards social structures.¹¹⁵²

For Fanon, by locating colonial psychology in inaccessible, naturalised and transhistorical processes, it was rendered invulnerable to critique or transformation. Fanon argued that such a position ultimately provided only two options – ‘*turn white or disappear*’.¹¹⁵³ Fanon’s phrasing is dramatic, and it would be unfair to ascribe such a position to those who seek to contest imperialism in the name of the Third World. However, there *is* a clear similarity. Insofar as imperialism is seen as an inevitable and transhistorical fact, rooted in certain basic psychological drives, it cannot be overcome. Either one can ‘turn white’ and attempt to become one of the beneficiaries of this system, or one can ‘disappear’ and negotiate one’s existence from within the system.

2.3.3. Historical *Fiat*

Things are different when imperialism is understood by reference to historical *fiat*. Here, imperialism is seen as related to a given historical phenomenon, that of European colonial domination, and so takes on its salient characteristic, namely the rule or control

¹¹⁵¹ Lazarus and Varma 2008, 315–316.

¹¹⁵² Fanon 1986, 100.

¹¹⁵³ Ibid.

of territory. In this aspect of the account, insofar as we continue to live with imperialism, it is because European rule has bequeathed *consequences* to the rest of the world.

The results of this understanding are almost the direct inversion of a transhistorical understanding. To begin with, then, such an account is unable to understand the unity of different moments of the imperial experience. As noted in Chapter 1 (Section 3), it fails to capture how the European experience itself often rested on very different forms of control and rule. It is also difficult to account for the experience of the US and its relationship to Latin America, which was contemporaneous with some of the periods of European colonial domination, but did not adopt that form. Since this is the case, such a position also has a hard time explaining post-colonial forms of exploitation and domination. If what is at issue is merely the legacy of colonialism, then it cannot explain the *uniformity* of the post-colonial experience, as well as its continuity with other aspects of imperial rule.

Ultimately, this stems from the fact that an account based on historical *fiat* is unable to locate the phenomenon of imperialism within a wider explanatory framework. Imperialism is presented as a very specific phenomenon, unrelated to broader processes and historically unique. Unlike the ‘unreconstructed structuralism’ of the transhistorical account, the explanation is much more agent-driven. Explanations for European expansion, and its defeat and transformation can only be sought in the *contingent* actions of different actors.¹¹⁵⁴ Crucially, the actions of these actors cannot be set within a broader historical framework, since this would involve making wider claims about those processes which drive imperialism.

Fanon also attacked this kind of position in *Black Skin, White Masks*. Addressing the politics of a theory based primarily on *description*, he noted that ‘[i]n principle ... the decision to describe seems naturally to imply a critical approach’, since in highlighting the phenomena of oppression and exploitation, one would call into question these relations and seek to combat them. This was not enough. For Fanon, the ‘real task’ was not simply to catalogue or describe a series of problems, but instead ‘disclose their

¹¹⁵⁴ Thus, the theories in Chapter 1, Section 4.3. were forced to rely on psychological theories and accounts of the ‘official mind’ of imperialism.

mechanics’ and ‘find their meaning’.¹¹⁵⁵ If colonialism was simply a catalogue or collection of abuses, it would not be possible to attack colonialism itself. One would be limited to engaging with individual abuses. Only in situating the facts within the logic of a broader system would it be possible to understand and therefore overthrow them.

2.3.4. False Necessity and False Contingency

The almost perfectly reflective nature of these two opposed concepts of imperialism tells us something important about their function in relation to one another. Because each concept points in an entirely different direction to the other it also *fills a lack*. In adopting a transhistorical account of imperialism, one is left with a number of questions as regards its *specificity*. There are questions of how it began, how it can change forms and whether it might be ended. It is therefore necessary to turn to the concept of imperialism as historical *fiat*, which is able to answer these questions through a contingent and agent-based account of imperialism. Changes can be explained by virtue of the actions of certain agents, and the specificity of imperialism delimited by reference to a given historical period.

Similarly, the account by reference to historical *fiat* raises questions about generality: *why* does imperialism occur, how can one account for its commonalities, etc.? Here a transhistorical account is able to fill in the blanks. A general tendency towards expansion serves as the background explanatory mechanism that unifies distinct historical periods and accounts for the recurrence of international expansionism throughout history.

On this reading, rather than an *accidental* juxtaposition of two opposed concepts, each is a necessary function of the other. If one adopts one position, it is also necessary to adopt the other. This enables us to discern something of an explanation for the recurrence of these two concepts of imperialism. As noted in Chapter 1 (Section 5.5.), postcolonialism was articulated in a very particular set of circumstances. Writing in the shadow of the failure of the Third Worldist movement, these theorists sought to explain why this failure was so systematic and why the national-liberation movements had collapsed into authoritarian caricatures of ‘liberation’ upon taking power.

¹¹⁵⁵ Ibid., 168.

This was rooted in an intuition that the Third World's attempt to deal with Europe on its own terms – using 'European' political forms and the language of development, modernity and progress – was doomed to failure because it failed to recognise the deep connection between these forms and Eurocentrism. In order to emphasise this deep-rootedness, postcolonial theorists turned away from colonialism and imperialism's contingent *political* aspects, and sought to focus on their deep-rooted cultural and psychological dimensions. In so doing, they insisted, one could see that the world order was not a neutral space to which the Third World could accede and then transform. Instead, it was structured around transhistorical processes of 'othering' – manifested concretely through Eurocentrism. These cultural and psychological processes went so deep that they rendered European institutional forms an inherently hostile terrain.

In a real sense, postcolonialism was a genuine attempt to address the seemingly intractable persistence of imperial and colonial relations following decolonisation. Postcolonial theorists accounted for this persistence by understanding psychic and cultural forms as the *driving force* of a universal, transhistorical process of imperialism. Yet immediately, such a position ran into the problems outlined above, both political and theoretical, and so had to be supplemented by a more bounded account. This account rooted colonialism and imperialism in the specificity of the European experience and the concepts derived from it.

Read in this light, Fanon's criticisms become especially interesting. If one was to translate his critique into a more contemporary idiom, we might state that he criticises the transhistorical account for embodying 'false necessity', and the account by historical *fiat* for embodying 'false contingency'. False necessity was a concept first articulated by Roberto Unger. It refers to the process whereby 'we surrender to the social world, and then begin to mistake present society for possible humanity, giving in to the ideas and attitudes that make the established order seem natural, necessary or authoritative'.¹¹⁵⁶ As Marks puts it:

The basic idea of false necessity ... is that things do not have to be as they are. Actuality is not destiny, and we need to search out and expose the various forms of thought which obscure that fact and lend an aura of solidity and self-evidence to what must instead be revealed as precarious and contingent.¹¹⁵⁷

¹¹⁵⁶ Unger 1986, xx cited in Marks 2009a, 3.

¹¹⁵⁷ Marks 2009a, 3.

In rooting imperialism in a transhistorical process, one is also *naturalising* it as a condition which cannot be challenged. By contrast, Unger insisted that we ought to understand the world as structured by incompleteness, conflict and choice – in other words as contingent and changeable.¹¹⁵⁸

Susan Marks departs from Unger's argument, holding that alongside false necessity, one can also observe the phenomenon of *false contingency*. As noted in Chapter 3 (Section 2.3), Marks maintains that, whilst Unger is correct that 'current arrangements can indeed be changed', it is also true that this 'change unfolds within a context that includes systematic constraints and pressures'.¹¹⁵⁹ In this sense, although Unger is right to insist that the *status quo* is contingent – i.e. could be changed – it would be incorrect to say that this contingency means things are 'random, accidental, or arbitrary'.¹¹⁶⁰ Drawing on elements of the Marxist tradition, Marks argues that we can understand social processes as being driven by a logic, without necessarily *reducing* these processes to that logic.¹¹⁶¹ In this way, we can speak of a *determination* of social processes, without falling foul of *determinism*.

Similarly to Fanon, Marks insists that it is only through disclosing the 'logics of a system which must also be brought within analytical frame' that we are able to effectively *act* in order to change the world.¹¹⁶² For Marks any genuinely 'anti-necessitarian' critique – i.e. one which seeks to change the world – will also have to be one rooted in a critique of false contingency. Here Marks is suggestive. If a thoroughgoing critique of 'false necessity' also requires the critique of 'false contingency', then the converse is also true. The *presence* of false necessity in an argument will frequently also signal the presence of false contingency.

2.4. An Anti-Imperialist International Law?

2.4.1. Presence or legacy?

The above dynamic is key in understanding the politics of those TWAIL scholars influenced by postcolonial theory. Whilst, as will be explained below, one cannot

¹¹⁵⁸ Unger 1986, xxix cited in Marks 2009a, 3.

¹¹⁵⁹ Marks 2009a, 2.

¹¹⁶⁰ Ibid.

¹¹⁶¹ Ibid., 8.

¹¹⁶² Ibid., 10.

simply say that these scholars have ‘internalised’ the limitations of postcolonial theory, an analogy can certainly be drawn. It is straightforwardly the case that one can observe a similar duality in terms of accounts of imperialism. All of these authors claim that international law is driven by a transhistorical, cultural process of imperialism, as demonstrated in Chapter 2 (Section 3.2. – 3.3.). This is most evident in Anghie’s description of the ‘dynamic of difference’ whereby international law consolidated its (and Europe’s) identity through constantly creating a ‘gap’ between the civilised and uncivilised and then attempting to bridge this gap.¹¹⁶³ Similarly, Rajagopal traces the root of international law’s relation to imperialism to a dynamic whereby international law continuously invoked the ‘Third World’ in order to consolidate its own identity.¹¹⁶⁴ In Rajagopal’s particular understanding, this is represented through the discourse of *development* which is motivated by an ‘essential belief in the emancipatory of ideas of western modernity and progress’.¹¹⁶⁵

As with postcolonial scholars, these processes appear to be transhistorical. Anghie, for example, muses that imperialism might well be rooted in ‘inequalities in power: the strong dictate and the weak must comply’, inequalities in power have – of course – been around since time immemorial.¹¹⁶⁶ It is perhaps for this reason that Anghie opines that the ‘experience of being both colonizer and colonized ... is a common one’, with Third World states too being ‘imperial in their ambitions and practices’, and with the division between ‘civilised’ and ‘barbarian’ ‘central to many of the major non-European civilizations’.¹¹⁶⁷ Similarly, Rajagopal’s account of ‘development’ is rooted in both a ‘Saidian’ account of ‘othering’ and a broader historical ‘civilising’ sweep, located back to at least 1200AD.¹¹⁶⁸

At the same time, all of these scholars also place a great deal of explanatory emphasis on European colonialism. Both Anghie and Rajagopal argue that it is a certain ‘encounter’ between international law and colonialism that ‘encodes’ the international legal discipline with the ‘the discriminatory features of colonial difference’.¹¹⁶⁹ In Anghie’s case, this is very much the particular colonial encounter of the 19th century,

¹¹⁶³ Anghie 2005a, 4.

¹¹⁶⁴ Rajagopal 2003, 43.

¹¹⁶⁵ Ibid., 27.

¹¹⁶⁶ Anghie 2005a, 317.

¹¹⁶⁷ Ibid., 319.

¹¹⁶⁸ Rajagopal 2003, 24.

¹¹⁶⁹ Craven 2012, 863.

with '[c]olonizer and colonized' forming the 'basic dichotomy that has structured the "civilizing mission"'.¹¹⁷⁰ For Rajagopal, the PMC served a similar role, embedding a 'pragmatic' idea of interventionism with international legal structures (Chapter 2, Section 3.3.). Vitally, each of these moments is connected both to the historically specific European colonial experience *and* to those particular moments that involved the formal assertion of European political control.

On this basis, the considerations described in the previous section also apply: these are essentially *opposed* concepts of imperialism. Crucially though, these considerations are not just political and historical but also – following Marks – *legal*. To put it simply, if every account of imperialism brings with it a particular understanding of its relationship to international law, then holding to two *opposed* accounts will have a distinctive legal effect.

Although Marks does not mention a 'transhistorical' concept of imperialism, one can see what kind of international legal consequences it would have. Inasmuch as imperialism is understood as being driven by a process with no determinate starting point and – seemingly – no end, it must be inextricably and inevitably bound up with international law. International law is unable to transcend imperialism because *nothing can*. This provides grounds for a pessimistic reading of international law, in which it can only serve to reproduce the civilising mission.

By contrast, when imperialism is understood as a given 'historical moment' – closely associated with the European colonial experience – things are different. This account closely resembles Marks' concept of 'empire as colonialism'. It will be recalled that in Marks' telling of this account, international law *ended* empire, since it was central to the dismantling of formal colonialism. As such, international law is anti-imperialist. It would be fatuous to allege that TWAIL scholarship – with its complex analysis of the relationship between international law and decolonisation – could subscribe to such a point. However, there *is* an ambiguity.

The corollary of understanding imperialism as embodied in formal European colonialism is that international law acquired its imperial character through an

¹¹⁷⁰ Anghie 2005a, 318.

encounter with colonialism. Thus, as Anghie puts it, what is at issue is the ‘constitutive presence of colonialism’¹¹⁷¹ which ‘shaped the very foundations of international law’.¹¹⁷² In such a vision, international law is not co-extensive with an actually-existing imperialism. Rather, the *historical* encounter between international law and colonialism fundamentally shaped international legal categories, which now exist as a *legacy* of this encounter. Thus, in understanding imperialism as confined to a given historical period, one further understands that its relationship to international law can only be *contingent*, as a result of a chance historical encounter.

It is on this basis that towards the end of *Imperialism, Sovereignty and the Making of International Law* Anghie writes that it was not his intention to ‘be deterministic, to relentlessly demonstrate that colonialism has always been reproduced by international law ... and that this will therefore inevitably continue to be the case’.¹¹⁷³ Rather, he viewed his project ‘as expressing certain historically based concerns which, if recognized, can surely be remedied’.¹¹⁷⁴

One can see how this plays out in the discussions around decolonisation (discussed in Chapter 2, Section 4.1.). Anghie, for example, argues that the limitations of decolonisation result from the fact that mainstream international lawyers continued relied on arguments that had been articulated in the period of high colonialism. As such, international law was dependent on ‘those relationships of power and inequality that had been created by [the] *colonial past*’.¹¹⁷⁵ Similarly, in Mutua’s account of decolonisation, the issue was that international law sanctified the unfair division of land brought about by (historical) colonialism.¹¹⁷⁶ In these accounts, international law *is* seen as ending imperialism, but at the same time internalising its *consequences*.

Recalling the discussion of the ‘Bush Doctrine’ and ‘war on terror’ in Chapter 2, Section 4.3 also illustrates the tenacity of this approach. It was noted that many TWAIL scholars saw that these doctrines as a fundamental *break* with the previous international law on the use of force. Whilst the section initially supposed that this might be a

¹¹⁷¹ Ibid.

¹¹⁷² Ibid., 8.

¹¹⁷³ Ibid., 317.

¹¹⁷⁴ Ibid.

¹¹⁷⁵ Ibid., 215 (emphasis added).

¹¹⁷⁶ Mutua 1994a.

‘political’ manoeuvre to contest these wars, it also fits with the general pattern described above. Essentially, these legal doctrines are treated as distinctly imperial because they draw on arguments that were articulated in the period of classical colonialism. Here, then, the imperial character of international law lies in the US invoking the *legacy* of an older international legal order in contemporary conditions.¹¹⁷⁷ It is on this basis that Anghie can talk of a ‘*recent* revival of imperial relations’.¹¹⁷⁸

It seems, then, that we can observe a similar pattern in TWAIL scholarship as we do with postcolonial theory. This is not simply because of an explicit or implicit reliance by TWAIL scholarship on postcolonial theory. Rather it is because TWAIL’s relationship with the Third Worldist jurists is *analogous* to that of the relationship between postcolonial theory and Third Worldism. As has been previously noted, one of the driving forces behind TWAIL scholarship has been the attempt to understand why it was that the Third World’s legal reform projects failed so repeatedly and systematically. At the heart of these reform projects was a sociological functionalist theory in which law was seen to be a ‘neutral’ vessel that would reflect any given balance of forces. On this basis, it was argued that the numerical strength of the Third World states would be reflected in a new international legal order. Yet this sociological functionalism proved to be disastrously wrong. Each international legal victory seemed to reinforce and re-embed imperialism.

Just as the postcolonial theorists attempted to go beyond Third Worldism, postcolonial TWAIL scholars – in their attempt to understand this pattern – have sought to go beyond sociological functionalism. In an analogous move, this involved pointing out the *enduring* relationship between imperialism and international law, by drawing attention to imperialism’s psychic, cultural and racial dimensions. As with the postcolonial theorists, this understandable desire to highlight the tenacious and deep roots of imperialism led to the articulation of a transhistorical vision, in which those dimensions are seen as *driving* imperialism. This immediately ran into all of the problems that such a vision brings: it cannot explain when imperialism started, its changing forms, whether

¹¹⁷⁷ There are numerous other examples one could draw on here. Rajagopal, for example, argues that the emergency provisions of the International Covenant on Civil and Political Rights are rooted specifically in techniques developed by the British in their colonial wars, and were then incorporated into the human rights corpus (see Rajagopal 2003, 178–182).

¹¹⁷⁸ Anghie 2005a, 12 (emphasis added).

it could be transcended etc. This is why it had to be accompanied by account of the historical ‘encounter’ between imperialism and international law.

2.4.2. Strategy and/or tactics? Structure and/or agency?

What is crucial, then, is that the two concepts of imperialism bring with them two opposed ideas of its relationship to international law. The transhistorical concept of imperialism is responsible for the pessimism as regards international law’s relationship to imperialism. It suggests that since imperialism cannot be transcended, international law will always reproduce it. Yet the concept of the historical *fiat* suggests that international law’s complicity with imperialism is the result of a specific encounter that shaped its foundations. On this reading, international law incorporates the *legacy* of the imperialism. Because this legacy is a contingent one, it is possible to throw it off and articulate a new, ‘non-imperialist’ international law.

International law’s relationship with imperialism, therefore, is *both* untranscendable horizon *and* contingent legacy. Straightforwardly, this helps explain the disjuncture between analysis and politics in TWAIL scholarship. The transhistorical account informs the overall analytical account, producing a pessimistic vision in which international law constantly reproduces Eurocentrism and European domination. Yet because this relationship is also treated as the result of a contingent historical ‘encounter’, it could simply be ended. It is this concept that gives rise to the idea that international law could be anti-imperialist.

Although this provides the bare bones of an explanation, one can go further than this. In any analysis of (radical) social change, there are two key, and distinctly inter-related oppositions. These oppositions are: structure and agency and strategy and tactics. The distinction between structure and agency is a familiar one to any social scientist. ‘Structures’ are those institutions and relationships of relative permanence in which agents conduct their lives. Agents are those individuals and groups who act within these structures. In the context of social change, the relationship between structure and agency always throws up the questions of: to what degree agents are free or able to change or challenge a given structure; to what degree the behaviour of agents is *responsible* for structural changes; and what motivates agents to challenge of change structures. A

corollary of these questions is the question of *which* agents tend to challenge or defend a given structure, and which agents are best placed to do so. As Taylor puts it:

[T]he modern concept of revolution took shape as part of a shift in the understanding and use of history as part of the development of modernism. Among the epistemological consequences of this changing concept was a conceptual separation between the ‘structures’ that define social life, and the ‘agency’ of humanity to conduct its own activities within. The ‘structure’ could contain conditions conducive to revolutionary change, and within that structure, social groups would have the agency to participate in such a process.¹¹⁷⁹

The contrast between strategy and tactics is perhaps less familiar. Schematically, one can say that *strategy* is concerned with achieving social change to relatively permanent structures, institutions or social relations. This usually – barring revolutionary situations – means that strategy concerns one’s *long term* actions and goals. By contrast, *tactics* are concerned with navigating specific *conjunctural* moments. Whereas strategy concerns social change in the grand sense of transforming social structures, tactics concerns the negotiation of moments in and effects of these structures.¹¹⁸⁰

Whilst these oppositions might seem rather abstract, their importance can be seen by examining Cabral’s account, as detailed at the beginning of this chapter. The *structure* which Cabral sought to contest is that of imperialism, which took the form of neo-colonialism. For Cabral, one could only understand agency in relationship to this structure. He saw the contending agents in neo-colonialism as the working class and its allies on the one side and the imperialist bourgeoisie and the native ruling class on the other.¹¹⁸¹

Fairly straightforwardly, these are the principal agents within the structure of neo-colonialism because of their role in imperialist capital accumulation. On the one hand, there are the exploiters and those who benefit from the system – the imperialist bourgeoisie and the native ruling class. These agents, since their interests are embodied in imperialism, will seek to preserve and protect it. On the other hand, there are the *exploited* and those who are the *victims* of the system – the working class and its allies. These actors’ interests ultimately lie against the system and so – in the right conditions – they will fight against it. Importantly, we can go further than this: for Cabral, the

¹¹⁷⁹ Taylor 2011, 271.

¹¹⁸⁰ Knox 2010b, 198–200.

¹¹⁸¹ Cabral 1979b, 133.

working class was not important simply because it was exploited. It was also the case that they occupied a vital role *within its reproduction*. Because it is their exploitation which is the motive core of the structure, their action is best placed to overthrow it.

Cabral's particular diagnosis of the structure he is fighting also framed his understanding of *strategy*. Since he understood neo-colonialism as situated within a wider structure of capitalist imperialism, the *strategic* goal had to be the overthrow of capitalism and the establishment of 'a socialist solution'.¹¹⁸² This strategic goal had to shape the particular tactical activities pursued in negotiating and contesting imperialism.¹¹⁸³

Simply put, from Cabral's account of the imperialist structure he is able to account for what agents act within it. This analysis of structure also furnishes a *strategic goal*: the overthrow of capitalist imperialism. Cabral's mode of operation has two distinct consequences. The first is that his political account flows from and is consistent with his analysis. The second is that his analysis is therefore able to *reflect* upon political practices and direct them in ways which might be more effective. Thus, certain *forms* of struggle or agents are understood as more important, not because of their 'moral' value but because of their *effectiveness* in attacking the structure which is being opposed. In this account, 'theory' is able to inform politics.

This approach was borne out in the practice of PAIGC, whose 'flexible use of tactics based on a strategic anti-imperialist program' made it one of the more successful national liberation movements.¹¹⁸⁴ Such an approach is the polar opposite to postcolonial TWAIL work. What is evident in these accounts is the *gap* between theory and politics. The outcome of this – outlined in section 2.2. of this chapter – is that one is unable to state what principles might guide a progressive international legal practice and how such a practice might avoid the pitfalls of Eurocentrism.

In Cabral's account, there is a concept of imperialism derived from the Marxist tradition, in which imperialism is rooted in a historically specific logic. Precisely because this logic is historically specific it *can* be overcome. At the same time, this

¹¹⁸² Ibid.

¹¹⁸³ As Guevara put it, '[r]egarding our great strategic objective, the total destruction of imperialism by armed struggle, we should be uncompromising', Guevara 1966).

¹¹⁸⁴ Prashad 2007, 112.

logic means that is wider than European colonialism. Very directly, on this account, imperialism can be ended, but has not yet been, because it is tenacious and possesses a deeply-rooted logic. On this level, then, there is a strategic goal – the ending of capitalism. This goal *frames* specific engagements with imperialism and provides a way of evaluating specific tactical practices. At the same, agency is framed by structure. Since imperialism is understood as a social structure, operating according to a given logic, the behaviour of agents is understood with reference to this logic. It is on this basis that we are able to understand why some will defend and some will contest imperialism. More importantly, such a theory enables us to understand *whose* resistance to imperialism might be best-placed to overthrow it.

By contrast, the dual concepts of imperialism as transhistorical ‘dynamic of difference’ or historical legacy cannot do this. Indeed, each of these concepts rigidly embodies one pole of the analysis. The transhistorical understanding of imperialism is essentially a structuralist one, in which there is no room for agency, whereas the account of the historical *fiat* is largely agent-driven. Accordingly, it is impossible to hold together structure and agency – as Cabral does – because they run in opposite directions. *Either* everything is a transhistorical structure *or* everything is the actions of agents, acting in contingent ways.

A similar problem recurs as regards the relationship between strategy and tactics. If imperialism is a transhistorical dynamic then it cannot be overthrown, meaning that ‘strategy’ simply drops out of the picture. By contrast, if imperialism was a contingent phenomenon embodied in European domination then it has already been overthrown and we simply live with its legacy. Thus, there is no ‘strategy’ which needs to be tailored to the broader goal of overthrowing the system.

The point is simple. In holding to these opposed concepts, the kind of analysis that Cabral is able to provide *cannot* occur. Indeed his analysis is essentially *inverted*. On this basis, we can explain how it is that the ‘analysis’ of international law’s relationship with imperialism bears no resemblance to the political conclusions. The structural relationship of international law to imperialism *cannot* be connected to the question of what agency might overthrow it. Equally, owing to the exclusion of any *strategic* goal, structural questions are unable to inform particular tactical actions in pursuance of this.

The net result of this is that questions of social *change* must simply be read from contingent questions of agency, and so are unrelated to the broader analysis of the relationship between international law and imperialism.

By consequence, the second aspect of Cabral's analysis also cannot occur. If questions of agency, tactics and change are purely contingent, then a theoretical account is not in a position to specify what types of political action will be more or less effective. This leaves two roads open. The first is that taken by Anghie, which is to leave the possibility as an open question, and hold that it might be 'possible to imagine and argue for very different understandings of the meaning of sovereignty ... and ... of international law'.¹¹⁸⁵

The second option available is that taken by Rajagopal, and captured fully by Eslava and Pahuja above. In this vision, it is the 'resistance' of those who are dominated by international law and attempt to negotiate it that provides the possibility of its subversion. Yet, as noted above, this suffers from the fact that it is unable to say *why* the resistance of a particular group is important and *how* it will be able to transcend wider relations of exploitation and domination. At best, it collapses back into a kind of moralism which celebrates 'resistance' on its own terms, without being able to prioritise different forms of political action.

The question, then, is: can the insights of postcolonial TWAIL scholars as to the persistent and enduring connection between imperialism and international law be articulated in such a way as to avoid these pitfalls? Can we overcome sociological functionalism without falling foul of false necessity and false contingency? As Marks puts it, might there be a way for us to pair their insights with a conception capable of investigating 'what individual and collective action can achieve, what relation is established between structure and agency [and] how the world works as an organic totality'.¹¹⁸⁶

¹¹⁸⁵ Anghie 2005a, 317.

¹¹⁸⁶ Marks 2009a, 10.

3. Imperialism, Materialism and the Dynamic of Difference

As noted in the introduction to this chapter, the previous chapters have been structured by two interconnected themes. The first has been the political, historical and intellectual consequences of adopting a particular ‘theoretical’ concept of imperialism, empire or colonialism. The second has been the complex historical, political and theoretical inter-relationship between the Marxist and Third Worldist traditions and their understandings of imperialism. Thus far, this chapter has primarily examined the first theme, although it has also inescapably touched on the second, by invoking figures such as Cabral and Fanon.

The chapter now turns more fully to this dimension, turning to materialist Third Worldist theorists – particularly Fanon – to understand how it is that one might preserve the insights of TWAIL scholarship whilst avoiding the pitfalls described above.

3.1. *The Political Economy of Identity*

Although *Wretched of the Earth* is probably Fanon’s most famous book, *Black Skin, White Masks* has been in many respects his most influential. The book is well-known for Fanon’s tracking of the cultural and psychic dimensions of colonialism. In this respect, it was hugely influential on postcolonial theory, prefiguring its themes and preoccupations with the colonial, particularly in its psychic, racial and cultural dimensions. Indeed, in his introduction to the book Bhabha eulogised it as setting the scene for postcolonial theory insofar as it ‘challenges ... [the Western] historicist ‘idea’ of time as progressive ordered whole ... alienates ... the Enlightenment idea of ‘Man’ ... [and] challenges the transparency of social reality, as a pre-given image of human knowledge’.¹¹⁸⁷

Fanon’s writings on the psychological dimensions of race are frequently credited with anticipating (and inspiring) the centrality of ‘othering’ in postcolonialism. Fanon argued that the ‘black man’ is not a man but a *black* man. For him, this was ‘the result of a series of aberrations of affect’, rooting the black man ‘at the core of a universe from which he must be extricated’.¹¹⁸⁸ He traced the manner in which colonial relations produced a certain psychic affect within the black race, creating a colonial

¹¹⁸⁷ Fanon 1986, xi.

¹¹⁸⁸ *Ibid.*, 10.

Manicheanism where white is ‘good’ and black is ‘bad’.¹¹⁸⁹ This Manicheanism was not simply felt on the part of the white colonial masters, but was psychologically internalised by black, subject peoples. Consequently, black people aimed to ‘become’ white: by going to the metropolis and learning to be ‘civilised’. In this way they sought to differentiate themselves from other black people. Ultimately, for Fanon, this created a situation in which black individuals became *neurotic*.¹¹⁹⁰

All of these elements seem like a recipe for Fanon to reproduce the pattern described above. We have both the close attention to psychic processes of identity formation and the focus on the specificity of European colonial dominance. In this way, one can see how Fanon’s work might be said to have pre-empted postcolonial theory, and therefore to embody some of its limitations. Yet, as this chapter has indicated, even in *Black Skin, White Masks* – usually considered his most ‘postcolonial’ book – Fanon does quite the contrary, anticipating and disputing such positions. In fact, Fanon went further than this. In one particularly stark – and not often quoted – passage he argued that:

The Negro problem does not resolve itself into the problem of Negroes living among white men but rather of Negroes exploited, enslaved, despised by a colonialist, capitalist society that is only accidentally white.¹¹⁹¹

The significance of this passage cannot be overstated. Although Fanon thought that the psychic, cultural and racialised dimensions of colonialism were of paramount importance, they were not for him the *driving force* behind colonialism. Instead, he rooted colonialism within the material relations of *capitalist imperialism*.

Crucially, for Fanon, the psychic and cultural dimensions of colonialism could only be understood within this wider material context. For him, the ‘juxtaposition of the white and black races has created a massive psychoexistential complex’.¹¹⁹² The dynamics of this psychoexistential process could not be explained from an individual psychological standpoint, since it was incapable of accounting fully for the widespread and systematic nature of this complex.¹¹⁹³ He argued that this complex was the ‘outcome of a double process’. This process was primarily an ‘economic’ one, which was then

¹¹⁸⁹ Ibid., 44–46.

¹¹⁹⁰ Ibid., 79.

¹¹⁹¹ Ibid., 202.

¹¹⁹² Ibid., 14.

¹¹⁹³ Ibid., 16.

psychologically internalised by colonised populations.¹¹⁹⁴ As such, it was necessary to turn to the wider social and economic processes of imperialism to explain how these ‘neuroses’ were produced and sustained.

Fanon outlined a picture of identity formation that departs quite startlingly from that of postcolonial theorists. In his account, the inferiority complex is a *relative* one since as ‘long as the black man is among his own, he will have no occasion, except in minor internal conflicts, to experience his being through others’.¹¹⁹⁵ It is only in relation to the white man that the black man is able to experience his status as an (inferior) black man.¹¹⁹⁶ Crucially, this is not a transhistorical process of identity formation. Fanon explicitly stated that although the black man is only ‘black’ in relation to the white man *the converse is not true*. For Fanon, the white man does *not* only become white through the assertion of his identity against a black man, since ‘[t]he black man has no ontological resistance in the eyes of the white man’.¹¹⁹⁷ This is because in the colonial situation ‘the white man is not only The Other but also the master’.¹¹⁹⁸

What Fanon alluded to here was the fact that the Europeans were not accidentally in the non-European world, but were in fact there for very definite reasons. It was these reasons that fundamentally shaped the dynamic of ‘identity formation’. Thus, it was necessary to inquire into the specific material dynamics which determine *how* and *why* Europeans have come to be in the non-European world. It is here that we return to Fanon’s observation above that the problems of colonialism stem from the slavery and exploitation of a colonial, capitalist society. Fanon held that European expansion took place owing to the imperatives of capitalist expansion, and that ‘othering’ only occurred in this context.

Fanon’s argument was that the Manichean division into black and white was a necessary material product of any system in which a foreign minority were exploiting a native majority.¹¹⁹⁹ This is so for two reasons. Firstly, Fanon argued that a system based on geographically differentiated exploitation necessarily produces great

¹¹⁹⁴ Ibid., 13.

¹¹⁹⁵ Ibid., 109.

¹¹⁹⁶ Ibid., 110.

¹¹⁹⁷ Ibid.

¹¹⁹⁸ Ibid., 138, n25.

¹¹⁹⁹ Ibid., 39.

concentrations of wealth in the hands of a minority. The nature of capitalist imperialism meant that only a small number of the native bourgeoisie would receive a share in this surplus value, with the majority flowing to the ‘mother country’ or to settlers within the colonial territory.¹²⁰⁰ In a very real sense, the Manichean division develops *because* whiteness and wealth are directly and materially associated.

Secondly, the deployment of race is a necessary strategy (and tactic) on the part of the coloniser. Here, the distinct form of capitalist imperialism has very particular consequences. For Fanon, racism is the ‘most visible’ and ‘day-to-day’ element of the ‘systematized hierarchization’ that results from imperialist exploitation.¹²⁰¹ Any system that involved the ‘shameless exploitation of one group of men by another which has reached a higher stage of technical development’¹²⁰² would be racist because any country that ‘lives, draws its substance from the exploitation of other people’ must necessarily make those people inferior.¹²⁰³ Fanon understood racism as a way to *justify* the exploitation of oppressed people and *unify* the populations of metropolitan societies, which were themselves riven with various social and class divisions.¹²⁰⁴ It was in *this* limited sense that a formation of an ‘other’ identity was necessary for the consolidation of a European ‘self’, not as a transhistorical supplement, but rather as a concrete historical and political phenomenon.¹²⁰⁵

Fanon also maintained that race was deployed to manage the antagonisms thrown up by colonialism and imperialism. The racial inferiority complex was used to weaken the resistance of the victims of imperialism; insofar as they internalised its message they began to think that, without European ‘guidance’, they ‘would at once fall back into barbarism, degradation and bestiality’.¹²⁰⁶ In this way, many would be convinced to support the colonial project, or at least not oppose it openly. This also enabled colonial populations to be *stratified* and turned against each other, with a racialised hierarchy

¹²⁰⁰ Ibid., 51.

¹²⁰¹ Fanon 1988, 32.

¹²⁰² Ibid., 38.

¹²⁰³ Ibid., 41.

¹²⁰⁴ One should note here very directly the similarities between Fanon’s argument and that of Bukharin and Lenin’s described in Chapter 3 (Section 2.2.2.) as to the nature of the labour aristocracy. Toscano 2014. describes how a similar position underlay W.E.B. Du Bois’ work on the ‘global color line’.

¹²⁰⁵ Such insights have been advanced by Marxist and Marxist influenced scholars under the rubric of ‘whiteness studies’, see for example Roediger 1999; Ignatiev 1995.

¹²⁰⁶ Fanon 1963, 211.

formed which would allow some natives to share in the benefits of imperialist exploitation:

The Frenchman does not like the Jew, who does not like the Arab, who does not like the Negro ... the Arab is told: "If you are poor, it is because the Jew has bled you and taken everything from you." The Jew is told: "You are not of the same class as the Arab because you are really white and because you have Einstein and Bergson." The Negro is told: "You are the best soldiers in the French Empire; the Arabs think they are better than you, but they are wrong." ... Unable to stand up to all the demands, the white man sloughs off his responsibilities. I have a name for this procedure: the racial distribution of guilt.¹²⁰⁷

Equally, in order to properly enslave and transform the 'natives', it was necessary to totally destroy their (pre-capitalist) cultures. This was both to allow for the implantation of capitalist social relations *and* to reduce the natives to passive actors who could be put to work.¹²⁰⁸ Again, this too served to pacify their resistance, as historical and cultural bonds of kinship could also aid in political organisation.

It has been necessary to recount Fanon's position at some length because he serves a vital role in understanding how one might articulate a materialist theory of imperialism that is able to take what is best from postcolonial theory. Whilst Fanon thought that questions of culture and identity were important, he did *not* think that these relations are the primary drivers of imperialism. Instead, through his materialist analysis, he traced the way in which they are the necessary accompaniment to the expansive characteristics of capitalist imperialism.

Crucially, this means that he is able to escape the problems of false necessity and false contingency outlined above. 'Othering' is no longer an untranscendable horizon, but rather one linked to a specific set of imperialist social relations, which could be overcome through concerted action. At the same time – as evidenced in his discussions of neo-colonialism – he understood the colonial situation as rooted in a broader logic of capitalist accumulation, meaning that simply overturning the European system would not be enough to guarantee liberation.

¹²⁰⁷ Fanon 1986, 103. Importantly, Fanon again prefigures the way in which certain Marxist scholars of race have understood the function of racialisation in stratifying labour, see Roediger and Esch 2012.

¹²⁰⁸ Fanon 1988, 33.

Accordingly, then, we might say that Fanon is a prime example of *materialist postcolonial theory*.¹²⁰⁹ His work adopts the Marxist-derived materialist theory of imperialism, but also is concerned with the distinctive elements of imperialism that characterise postcolonialism: namely a focus on identity, culture and ‘othering’. What this means is that the type of negotiation between ‘structure and agency’ and ‘strategy and tactics’ epitomised by Cabral can be undertaken, *even whilst preserving the insights* of postcolonial theory.¹²¹⁰

In keeping with the thrust of the previous chapters – namely that one’s understanding of imperialism will *always* have consequences for one’s understanding of international law – one ought to ask how this Fanonian manoeuvre might be carried out in international legal terms.

3.2. A Materialist Dynamic of Difference

In order to contemplate this, it is worth returning to Anghie’s outline of the ‘dynamic of difference’. Anghie writes that he:

[U]se[s] the term ‘dynamic of difference’ to denote, broadly, the endless process of creating a gap between two cultures, demarcating one as ‘universal’ and civilized and the other as ‘particular’ and uncivilized, and seeking to bridge the gap by developing techniques to normalize the aberrant society ... The dynamic is self-sustaining and indeed, as I shall argue, endless; each act of arrival reveals further horizons, each act of bridging further differences that international law must seek to overcome.¹²¹¹

¹²⁰⁹ As noted in Chapter 2, Section 3.3., Rajagopal does situate himself in relation to Fanon’s work. However, Fanon’s analysis ultimately does not figure very prominently in Rajagopal’s account. Rajagopal largely focuses on the *political* aspects of Fanon’s attack on narrow nationalist conceptions of liberation, without emphasising the theoretical scaffolding behind that account (Rajagopal 2003, 15–17). Inasmuch as Rajagopal *does* deal with this theoretical apparatus he tends to reproduce an account forwarded by postcolonialism, in which Fanon is simply seen as promoting the ‘cultural-psychological aspect of social struggles’ (Ibid., 250).

¹²¹⁰ Although Fanon is the foremost representative of such thinking, he is hardly unique. In the first wave of radical Third Worldism, there were *many* who made similar arguments, see in particular Césaire 2000; Cabral 1979b. Young (2001) does an admirable job of tracing how Third Worldism produced a distinctively syncretic Marxism which put questions of subjectivity, identity, culture, race and imperialism at its heart. However, Young ultimately draws too straight a line between these articulations and contemporary postcolonialism. As has been argued here, there is a key difference, owing to the *materialist* concept of imperialism underlying their work. There are a number of contemporary scholars who operate within the postcolonial *problématique* but use Marxist materialism to deal with the issues it raises. Amin roots the problem of Eurocentrism in the expansion of European capitalism, showing that it was Europe’s initial backwardness that enabled it to rapidly develop, see Amin 2009. Finally, a number of Marxists have attempted to intervene within the field of postcolonialism, attempting to reclaim the figures of Third Worldist Marxism, and arguing that the hybrid character flagged up by postcolonial scholars is an effect of the uneven and combined expansion of capitalism. See Bartolovich and Lazarus 2002; Lazarus and Varma 2008; Larsen 2001; Parry 2004; San Juan Jr. 2002.

¹²¹¹ Anghie 2005a, 4.

There are several salient features of this description. First and foremost, Anghie is describing a ‘universalising’ process, whereby a certain ‘particular’ identity expands to encompass the whole globe. Secondly, the process is endless, because the expansion has no internal limits. Thirdly, the process is not *even*, the reason for the endless expansion is that ‘aberrant societies’ are never fully normalised.¹²¹²

As previously noted, in arguing for an essentially transhistorical concept of imperialism, Anghie’s account resembles those of Morgenthau or Cohen. However, when we examine the *specific characteristics* that Anghie has ascribed to the dynamic of difference, they seem to bear a much closer resemblance to *another* account of imperialism described in Chapter 1 (Section 4.2.), that of A.P. Thornton. As may be recalled, Thornton described imperialism as ‘energy’, ‘dynamic’, a ‘happening’.¹²¹³ He emphasised that what distinguished imperialism (from ‘Empire’) was the fact that it denoted motion and transformation. Interestingly, then, the very characteristics that Anghie describes as part of a transhistorical dynamic are precisely the characteristics that Thornton uses to denote the *historical specificity* of imperialism.

Of course, we have come across the ascription of transhistorical characteristics to historical phenomena before. In Chapter 3 (Section 1.2.1.), it was noted that there was a more than superficial similarity between realist and Marxist theories of imperialism, both essentially held that what characterised the world order was an endless conflict between advanced powers. However, the Marxist position, as a critique rather than a mere criticism, was that such phenomena had to be historicised and located within a set of specific social relations. As previously mentioned, the task is to move beyond ‘fixed, immutable, eternal categories’ and instead ask ‘how these relations are produced’, locating them within ‘the historical moment which gave them birth’.¹²¹⁴

¹²¹² Here, Anghie’s ‘dynamic of difference’ is being used in an exemplary sense. This is firstly because of Anghie’s direct influence and secondly because the features picked out here are representative of the broader thrust of TWAIL theorising. Pahuja for instance, argues that international law was a way through which the ‘self-constitution of the West’ was posited through defining some as ‘outside’ (Pahuja 2011, 29). She holds that in the present day this is mediated through the discourse of ‘economic growth’ and ‘development’. These are framed as involving ‘catching up’ with the West, but ultimately are both ‘endless’ because ‘growth’ and ‘development’ are infinite (Ibid., 38, 77). As noted in Chapter 2 (Section 3.3.) Rajagopal operates with a similar notion of resistance. The point simply, then, is that the fundamental characteristics identified here a part of the ‘dynamic of difference’ are common amongst the TWAIL scholars working under the influence of postcolonial theory.

¹²¹³ Thornton 1977, 49.

¹²¹⁴ Marx 1977, 97–98.

In this respect, one cannot help but note a similarity between the process Anghie describes and Marx and Engels' famous remarks as to the nature of the bourgeoisie in the *Communist Manifesto*. There, Marx and Engels wrote that the 'need for a constantly expanding market for its products chases the bourgeoisie over the whole surface of the globe' and that it must 'nestle everywhere, settle everywhere, establish connexions everywhere'.¹²¹⁵ This class, they continued, was forced to constantly revolutionise production, leading to 'uninterrupted disturbance of all social conditions, everlasting uncertainty and agitation'.¹²¹⁶

What this signals is that the 'dynamic of difference' that Anghie describes bears a close resemblance to those processes of imperialist capitalist accumulation described in Chapter 3 (Section 1.2.), which go beyond Marx in several important ways. In these accounts, imperialism was understood to be rooted in the endless capitalist imperative to accumulate and realise surplus value. Bukharin, Lenin and Luxemburg all insisted that capitalism is structured by a drive whereby it must constantly expand beyond national borders. It is only in so doing that the greater profits needed by the bourgeoisie are able to be secured and realised. At the same time, in order to realise these profits it is necessary to systematically *transform* peripheral societies: both to secure better conditions for capital accumulation and because these acts of transformation are profitable on their own terms.

Thus, immediately, we can see that the drive to expand and *universalise* a certain form of social life is embedded deeply within the logic of the capitalist mode of production. Of course, these transformations cannot simply be 'economic'. Capitalist processes necessarily carry with them a series of cultural, social and political mores. As Luxemburg emphasised, the universalisation of capitalism necessarily implies the *total destruction or reconfiguration* of pre-capitalist social and cultural forms. Moreover, this is not simply a transformative process, because – as emphasised by Bukharin and Lenin – we are not dealing with the simple 'universalisation' of capitalism, but the continued export of capital, that the conditions for *favourable* capital accumulation must be constantly enforced. The net result of this, is that one can link the 'process of creating a gap between two cultures, demarcating one as "universal" and civilized and the other as

¹²¹⁵ Marx and Engels 1978a, 476.

¹²¹⁶ Ibid.

“particular” and uncivilized, and seeking to bridge the gap by developing techniques to normalize the aberrant society’¹²¹⁷ very concretely with the process of capitalist accumulation.

At the same time, a key insight of the Marxist theorists surveyed above is that the need for capitalist accumulation is *unceasing*. As Luxemburg observed, it is the nature of capitalism to constantly engage in expanded reproduction on a greater and greater scale, always increasing profits and continually accumulating capital. This, of course, can help explain the *endless* nature of the dynamic described by Anghie. This endlessness owes less to the transhistorical nature of ‘othering’, and more to do with the fact that *within the determinate coordinates of capitalist imperialism* there are no *internal* limits to capital accumulation.¹²¹⁸

The necessity of endless accumulation also goes some way towards explaining why ‘each act of bridging [reveals] further horizons’. However, the issue is deeper than this. As noted in Chapter 3 (Section 1.1.), Marx and Engels’ own theories as to the international expansion of capitalism sometimes suffered from a kind of diffusionism, in which they thought capitalism would smoothly universalise through economic means. By contrast, Marxist theorists of *imperialism* thought that things were less straightforward. They argued that the particular connections between national states and capital and the uneven development of capitalism gave rise to a *system* in which there was an international division of labour, between an advanced core and a more ‘backward’ periphery.

Since the aim of capitalists is *not* ‘development’, but rather securing increased profit, the effects of capitalism upon the peripheral countries are uneven. As Luxemburg and Bukharin pointed out, capitalists frequently made use of pre-capitalist and ‘non-capitalist’ forms of organisation and exploitation (such as slavery) in order to coerce the working class in the peripheral countries into working. Moreover, as the theorists of neo-colonialism observed, the particular structure of colonial and neo-colonial expansion produces extremely uneven development in a few sectors and the high

¹²¹⁷ Anghie 2005a, 4.

¹²¹⁸ Harvey 2011, 47.

concentrations of wealth amongst a very narrow group of people (Chapter 1, Section 5.4.).¹²¹⁹

The point of this is that the ‘normal’ pattern of development in imperialist capitalism means that peripheral formations are *always* incomplete, hybrid forms characterised by extremely uneven development. Indeed, as Bukharin noted,¹²²⁰ given the division of labour between agrarian and industrial regions, this is often *desired* by those in advanced capitalist formations. But it is precisely because of these low levels of ‘development’ – occasioned by capitalism itself – that more intervention by ‘the international community’ and capitalists is legitimated. Here, we have the final aspect of the dynamic, whereby the ‘transformation’ is always ‘incomplete’ and therefore justifies further rounds of intervention and transformation.¹²²¹

On a very basic level, then, the transhistorical characteristics ascribed by Anghie to the dynamic of difference are in fact the *historical* characteristics of (imperialist) capital accumulation. Just as Chapter 3 (Section 1.2.3.) sought to reconstruct how the classical Marxist theorists of imperialism articulated a materialist theory of Eurocentrism, we can here see the beginnings of a materialist theory of the ‘dynamic of difference’.

3.3. *Fanonian International Legal Theory?*

Having suggested that – at the very least – we can see a homology between the dynamic of difference and the process of capital accumulation, the issue becomes how this is related to *international law*. In other words, by what material process does international law come to express this logic. Here, it is useful to return to Lazarus and Varma’s account of Eurocentrism. They argue that when examining Eurocentrism it could either be examined as an ‘episteme’ or an ‘ideology’. In the former case, Eurocentrism was to be understood as ‘a trans-ideologically dispersed field of vision, or conceptual “atmosphere”’ which could not be subject to critique.¹²²² By contrast, ‘ideology’ is ‘selective, partial, and partisan’.¹²²³ On this basis, we might understand the above as an

¹²¹⁹ Cabral 1979b, 127–128.

¹²²⁰ See Chapter 2, Section 1.2.1.

¹²²¹ As noted in Chapter 2, Section 4.2. Anghie does acknowledge this to some degree, with respect to the economic programmes of the IFIs, but in his account this economic dimension is subordinate to the broader ‘dynamic of difference’, rather than been a driving force behind it. See Anghie 2005a, 268.

¹²²² Lazarus and Varma 2008, 315.

¹²²³ Ibid.

attempt to translate a reading of the dynamic of difference as an episteme, into one in which it serves an ideology.

This immediately brings to mind Marks' account of international law's role as ideology. Straightforwardly, we can see that what Anghie has pinpointed is the way in which international law serves to establish and sustain the very particular conditions necessary for the accumulation of capital. On this basis, the social relations of imperialism are translated *very directly* into legal ideology. At this point, it is useful to return to the Marxist theories of 'civilisation' described in Chapter 3 (Section 3.1.), which described the ways in which the language of civilisation was in fact reflective of the needs for European expansion. As Baars notes, on this basis we ought to speak less of the 'civilising mission' and more of the 'capitalising mission'.

Importantly, the resources to mount such a position are also to be found *within* Third Worldist theories of international law. One could, for instance, point to the accounts of Bedjaoui and Umozurike and their attendant focus on the relationship between international law and the *material practices* of imperialism. Perhaps more importantly, Chimni's account has stressed the role of international law and institutions in the accumulation of capital.

However, the mention of these authors flags up a very important point. As repeatedly noted, one of the problems with the first wave of Third Worldist jurists was that all of their plans *failed*, and failed quite spectacularly. Although they managed to articulate a coherent set of strategic perspectives for international legal reform, they ultimately depended on a kind of sociological functionalism as regards international law. Postcolonial TWAIL scholarship has attempted to go beyond this, and to locate the connection between international law and imperialism at a foundational level. Thus, in any serious attempt to elaborate a materialist – or Fanonian – dynamic of difference, it is not enough to say that the dynamic of difference is a reproduction of (imperialist) capitalist accumulation. It is also necessary to show *how and why* this dynamic *constantly recurs* in *international law*. What is needed, in other words, is a materialist account which goes beyond sociological functionalism.

Here it is useful to turn to Miéville's appropriation of Pashukanis' commodity-form theory. As previously noted, in Miéville's account we can find two distinct but inter-related reasons for the 'bias' of international law towards imperialism. The first is that because international law is indeterminate, interpretation will generally be resolved in favour of the stronger parties, which internationally will be imperialists and their allies. Whilst this may well be accurate – although it suffers from a number of problems¹²²⁴ – it ultimately rests on a similar argument to the first wave of Third Worldists. Taken to its extreme it also becomes self-contradictory. Given that Miéville does believe it is ultimately possible to overthrow imperialism, he presumably believes that there are forces *strong* enough to do this. A logical consequence of this is that these forces could leverage that strength into international legal argument. This was precisely the wager of the Third Worldist jurists.

It is therefore Miéville's second, structural, argument which is the more compelling. Miéville, following Pashukanis, argues that on the level of *form* there is a direct connection between law and capitalism and that, consequently, there is a *structural* connection between international law and imperialism. One can see very directly how this would be of relevance to the above. When historicised, what Anghie identifies as the dynamic of difference embodies and is structured by the logic of capitalist expansion and accumulation. Insofar as the legal form is a 'mystified expression' of the logic of the commodity form, it makes perfect sense that these dynamics would *also* play out within the law itself.

As has been argued repeatedly throughout this thesis, one of the main aims of TWAIL scholarship has been to go beyond the sociological functionalism that characterised the original Third World jurists. This functionalism suggested that international law is an essentially neutral vessel that 'reflects' and 'expresses' the global balance of forces, and so might be turned against imperialism. TWAIL scholars have sought to argue that there was something *specific* about international law which predisposed it towards reproducing imperialism. Theories of civilisation, development and the dynamic of difference all attempted to do this, however in so doing they reproduced the limitations outlined in this chapter. As suggested in Chapter 2 (Section 2.5) and developed in Chapter 3 (Section 2.2.1), Pashukanis' theory was itself an attempt to grapple with

¹²²⁴ Knox 2009.

something very similar to sociological functionalism. Contesting those who thought that law was simply instrumentalised by the ruling class, he established a *structural* link between law and capitalism. By extension, and as developed by Miéville, this entailed a structural connection between imperialism and international law.¹²²⁵ In this way, then, Pashukanis' work was a materialist response to the limitations of a kind of sociological functionalism. As such, it is logical that it could inform a materialist theory of the 'dynamic of difference'.

Once we examine this at the level of the *form* of law it is also possible to explain how this dynamic also structures various progressive attempts to invoke international law. The analysis of the commodity-form theory demonstrates that law cannot – on its own terms – actually go beyond imperialism. This is because the existence of (international) law presupposes the existence of (imperialist) capitalism. The primary conclusion one can draw from this is that, even if law might be effective at fighting some of the effects of imperialism, it can only ever do so *within its material coordinates*. At best it can only stop some of its excesses, but ultimately will remain wedded to the fundamentals of imperialist social relations and their necessary effects.

Immediately, we can see how it is that the dynamic of difference plays out: attempts to fight imperialism within international law can only go so far, and so – in the long run – will be self-undermining. This is not least because, since the fundamental logics of capitalist accumulation are kept in place, new tactics and forms of accumulation can be articulated in order deal with even wide-reaching transformation. The classic example would be decolonisation. This also flags up an important point, one of the roles that international law plays is to capture mass resistance to imperialism (as in the case of decolonisation) and channel it through a form which ultimately remains wedded to it.

The issue is not simply that international law is ultimately 'compatible' with imperialism. Because the legal form shares a logic with the commodity form, its categories and forms of argument mirror this logic. This means that any legal assertion will have to be framed in such a way as to mirror the categories of capitalism. In particular, commodity-form theorists argue that the law has an abstracting,

¹²²⁵ Chapter 3, Section 2.2.2. Miéville very explicitly situates Chimni's approach in such a trajectory, arguing that his account essentially located the imperial character of law in a theory of 'iniquitous content'. Miéville 2005, 82–84.

individualising tendency, whereby events are removed from their overall systemic context and instead presented in an individual right. In this way – as noted by Marks and Krever (Chapter 3, Section 2.3.) – international legal argument is structured in such a way as to be unable to address structural and systemic issues.

On this reading, international law channels resistance through abstracted categories which reflect (imperialist) capitalism's logic. This is the material foundation of the 'resistance-renewal' dynamic described by Rajagopal: by acting through international institutions, resistance is always channelled into forms that mirror imperialism's logic. As such, even at its most progressive, international law reproduces the logic of imperialism in what one can accurately characterise as a 'dynamic of difference'. This is a dynamic of difference not rooted in a transhistorical account of 'othering', but rather in the determinate, material characteristics of capitalist imperialism.

In this way, the best insights of the older radical traditions of Third Worldism – their focus on the material dimensions of imperialism and its interpenetration with international law – can be married with the crucial observations of TWAIL scholars as to the *enduring* connection between law and imperialism. Interestingly, there has perhaps been one figure in the radical Third Worldist movement who has attempted to mount such an analysis of international law: the previously mentioned Jacques Vergès.¹²²⁶

Vergès held that any breach of a social norm could, in theory, call into question the existing order. An act of theft, for example, could call into question the system of private property.¹²²⁷ For him, the role of the trial was to deal with such offences in such a way as not prevent them from problematising the existing order.¹²²⁸ As with some of the Marxist theories described above, Vergès drew attention to the abstracting character of the law and – without explicitly invoking this – the way in which it mirrored the logic of capitalism. Thus, for example, he argued that Eichmann's trial in Jerusalem ultimately failed to understand the way in which the Nazi regime and its atrocities were rooted in the character of German imperialism. In this way, he argued, 'the horrors of

¹²²⁶ See Chapter 2, Section 2.5.

¹²²⁷ Vergès 1968, 15.

¹²²⁸ Ibid., 18.

Nazism became the monstrous nightmare of a kind of Germanic Marquis de Sade, a disease of the soul, of which Eichmann ... could claim to be a victim'.¹²²⁹

It is fitting that Vergès came closest to articulating this Fanonian point. Like Fanon, Vergès was an active supporter of and militant for Algerian liberation. Also like Fanon he was not himself an Algerian. The two were both born outside of France, raised in French colonies (now *départements*) and received professional educations in France. Both also were active in the Communist movement: Vergès a long time militant; Fanon working on Aimé Césaire's Communist-backed campaign in Martinique. In their own ways, both exemplify the complex intertwining of Marxism and Third Worldism that occurred throughout the twentieth century.

4. Stretch-Marx

4.1. Subject Positions

It is vital to note that the above approach does not simply mean 'subsuming' the insights of postcolonial TWAIL scholarship into a pre-existing Marxist framework. Instead, by putting the insights of postcolonial TWAIL scholarship on a materialist basis, much of the work described in Chapter 3 will have to be put on a different footing. In order to understand this, it is necessary to return to some of the insights outlined in Chapter 1. As may be recalled, Robert Young argues that the reason that the term 'colonialism', as opposed to imperialism, was deployed by the anti-colonial movement was because of the subject-position that this movement occupied.¹²³⁰ Essentially, they accepted the Marxist critique of imperialism, but highlighted those aspects of it with which they were most confronted. Initially, of course, this was formal colonialism. Yet after formal colonialism ended, they continued to represent this distinctive subject-position through speaking of neo-colonialism.

A materialist account of the dynamic of difference represents a similar manoeuvre. It takes seriously the Marxist critique of imperialism. It further extends this critique so as to understand the structural connection between international law and imperialism. However, it does so from the perspective of the Third World. Some crucial points follow from this. The first is that in this way it is possible to return to the complex

¹²²⁹ Ibid., 23–24.

¹²³⁰ Young 2001, 19. See Chapter 1, Section 5.3.

intertwining of Marxism and Third Worldism. Rather than reading a materialist dynamic of difference as confronting TWAIL with Marxism, we can understand it as the recovery of TWAIL's own historical legacy. As noted in the previous section, the radical Third World jurists all operated with a materialist concept of imperialism. This was true of the movement more broadly, with figures such as Fanon who – as described above – sought to give materialist accounts of the production of identity and 'civilisation'.

This leads on to a second, vital, point. Insofar as adopting this understanding involves viewing the imperialist system from a distinct 'subject-position', it illuminates specific aspects of imperialism that more 'metropolitan-based' accounts of imperialism have missed. It is for this reason that the specific mechanics of colonialism – in particular the forms of racialisation that it generates – were catalogued by the anti-colonial Marxists. In this respect, it is quite telling that the Marxist accounts of international law described in Chapter 3 pay very little attention to the specific effects of colonialism on the colonies themselves. Of course, they necessarily recognise the massive social transformations occasioned by European colonialism to some degree. But even here, the focus is primarily on the European states as the prime actors, and the way in which the particular legal characterisations of the colonies played out *internationally* and among European states. There is little focus on what these characterisations meant 'on the ground' for the colonies, and how this shaped their ability to act within the international order.

Perhaps the strongest evidence of this is the fact that, despite the centrality of the concept of 'neo-colonialism' to the Third Worldist Marxist understanding of imperialism, this term is almost nowhere to be found in contemporary Marxist international legal theory.¹²³¹ What this signals is an inattentiveness to the specific way in which imperialist capitalism plays out within its peripheries. Consequently, the 'subject-position' that Young describes is not simply an arbitrary starting point. To return to the anti-colonial Marxists, whilst their accounts may have downplayed some aspects of imperialism,¹²³² their perspective *did* enable them to shed light on a number

¹²³¹ The term is not mentioned at all by Bowring, and only once in Miéville, quoting Umozurike (Miéville 2005, 268–269).

¹²³² In particular, they paid very little attention to the issue of *rivalry* between imperial powers. This is made more complicated by the fact that when the major Third Worldists were writing, the Soviet bloc existed, and the rest of the imperialist camp *was* largely united against them. See Chapter 1, Section 4.4.

of important but neglected elements of imperialist social relations. In particular they drew close attention to the way in which colonialism (and neo-colonialism) were intimately bound up with processes of racialisation.

The relevance of this can best be captured through a reading of Miéville's (aforementioned) 'Multilateralism as Terror'. As previously noted (Chapter 3, Section 3.3), in this article Miéville seeks to trace the role that international law has played in enabling and justifying imperialist intervention within Haiti. Ultimately, Miéville maintains that the dynamic at play in the intervention was that of 'capital accumulation'. International legal argument was deployed to undermine the modest reforms of Aristide's government, which had threatened several of the international capitalist firms operating within Haiti. Whilst this is a point well made, there is a strange absence from Miéville's account. Haiti's population is, of course, almost entirely black. Those agents that Miéville most condemns in the piece, namely the US, and the American international legal community, largely are not. One does not need to dramatise the facts so vulgarly to understand that it might be wise to consider what role 'race' and racialisation played in this intervention.

Despite this, within Miéville's account there are only two references to racism.¹²³³ In both of these instances he makes notes that the 'media' had (mis)represented Haiti by mediating its reporting through racist stereotypes. Yet why just confine this to the 'media'? Surely a crucial part of Miéville's insistence on the constitutive nature of international law is that it plays a vital role in constructing, mediating and structuring the way that facts play out 'on the ground'. Insofar as there was 'racist reporting', it was reporting a situation that had been racialised (at least in part) *through* the international legal order. The contrast between this account and those of Anghie and Mutua regarding the law on the use of force is telling. Both argue that a crucial role played by international law lies in constituting peripheral territories as legitimate sites for intervention. This is in part achieved through casting them in particular 'racialised' roles – the 'savage' or the 'uncivilised' – which both draw upon and reinforce established, racialised tropes about non-Europeans.¹²³⁴

¹²³³ Miéville 2008, 76, 79.

¹²³⁴ Mutua 2001; Anghie 2005b.

An examination of Miéville's own account of the Haitian situation seems to demand a similar form of analysis. One of the manoeuvres of MINUSTAH was to cast political activists of Aristides' Fanmi Lavalas Party as 'gang members' and 'armed bandits' and its community leaders as 'gang leaders'. On this basis, UN attacks on these activists could be justified in the name of repressing criminal activity.¹²³⁵ The familiarity of this move should be obvious: casting political activity as mindless 'gang activity' or criminality is a classic racialising trope, and here it was a trope that was directly embedded in and legitimised by international law.¹²³⁶ Yet, in Miéville's account, this is all overshadowed by capital accumulation.

Thus, whilst a non-materialist 'dynamic of difference' treats racialisation as a driving force in and of itself, the traditional Marxist account *counterposes* this dynamic to capital accumulation. This perhaps emerges most clearly in the Marxist discussion of the colonial period and the international legal construction of 'civilisation' (as discussed in Chapter 3, Section 3.1.). Both Neocleous and Miéville explicitly state that it was the material processes of capital accumulation *as opposed to* a form of racial 'othering' which drove international legal doctrine. There is both an implicit and explicit opposition between either capital accumulation *or* racialisation as structuring international law, each to the exclusion of the other. This is perhaps best captured in Baars' re-casting of the 'civilising mission' as the 'capitalising mission'.¹²³⁷

If Haiti's present predicament might make us doubt such a hard and fast opposition, Haiti's past completely obliterates it. Haiti – or rather the island of which Haiti is now a part – was first settled in the 1490s by the Spanish (as Hispaniola), who annihilated the indigenous population. It was later colonised by the French as Saint-Domingue, in time becoming one of France's most important and productive colonies: exporting sugar and coffee and earning huge revenues. The labour that produced these goods for export was primarily composed of African slaves, with Haiti accounting for a huge percentage of the transatlantic slave trade. These slaves were later – in the shadow of the French Revolution – to rise up, and, eventually, declare the first black republic. Throughout

¹²³⁵ Miéville 2008, 81.

¹²³⁶ Miéville 2008, 90.

¹²³⁷ Baars 2012, 99.

their struggle they would be caught up in the manoeuvrings of the European and American powers.¹²³⁸

This rather cursory gloss of Haitian history illustrates a very simple point. It is simply *impossible* to abstractly separate out the processes of the international expansion and accumulation of capital and forms of racialisation. Haiti's very integration into the world market was dependent upon the most direct and overt form of racialisation – chattel slavery – and these racialised forms continued to play a vital role in structuring Haiti's place in the global economy even after it had attained independence and abolished slavery.¹²³⁹

What this suggests is that rather than counterpose capital accumulation to racialisation, it is necessary to understand them as two aspects of the same process. As Brenna Bhandar notes, as a matter of historical fact, private property was 'was constituted along *with* properties (whiteness, for instance) that circulated globally and were attached to particular bodies'. Because of this, she continues, 'private property (to take one pillar of capitalist relations) and raciality (another pillar) are co-constitutive'. One can see how these processes necessarily also play out in (international) legal terms, with Bhandar insisting that, through the doctrine of recognition, 'the legal form itself, with its attendant notion of the civilised subject, was constituted through the violence inflicted on colonised subjects'.¹²⁴⁰ In a materialist account of the dynamic of difference, therefore, racialisation cannot simply be seen as an optional extra which gives way to the 'real' processes of capital accumulation. Rather, the very process of capital accumulation is at the same time one of racialisation.

This is not an insight without precedent within the Marxist tradition. Although not explicitly conceptualised in these terms, the Marxist attempts to elaborate a theory of Eurocentrism described in Chapter 3 (Section 1.2.3) described the way in which imperialism led to an stratification of the international working class. In these accounts, the metropolitan working class was able to accrue a series of *privileges* by virtue of its position. This can be understood as a theory of racialisation and was – at times –

¹²³⁸ This particular history was the subject of C.L.R. James' magisterial study *The Black Jacobins*, a book concerned with mapping the connections between race, class and imperialism (reflecting James' position as Marxist influenced by radical Third Worldism), see James 2001.

¹²³⁹ Hallward 2010.

¹²⁴⁰ Bhandar 2010.

explicitly understood in those terms.¹²⁴¹ It is telling that this aspect of the classical Marxist theory is not present in Miéville's own account of imperialism. Instead, he takes from Bukharin purely the idea of militarised competition.

However, in keeping with the insights about the 'subject-position' of the Third World, these positions did not go far enough, since it observed only how racialisation operated to privilege metropolitan labour, and not how it structured capital accumulation in its peripheries. As Fanon demonstrated, the forms of exploitation that are an integral part of capitalism on the world stage give rise to racialised categories, which then become the necessary accompaniment for the continued existence of accumulation. Insofar as international law is necessarily part of the process of capitalist accumulation, it too enacts and internalises these racialised forms.

4.2. *Racial Capitalisms*

4.2.1. Stretched Marxism

The theoretical implications of this position are best illustrated in Fanon's *The Wretched of the Earth*. In one of that book's more famous passages, Fanon argued that 'traditional' Marxist categories of capitalism and class could not adequately make sense of the reality of life in the colonies. This was because:

The originality of the colonial context is that economic reality, inequality, and the immense difference of ways of life never come to mask the human realities. When you examine at close quarters the colonial context, it is evident that what parcels out the world is to begin with the fact of belonging to or not belonging to a given race, a given species. In the colonies the economic substructure is also a superstructure. The cause is the consequence, you are rich because you are white, you are white because you are rich. *This is why Marxist analysis should always be slightly stretched every time we have to do with the colonial problem.*¹²⁴²

Following Fanon, we can say that the flipside to any materialist theory of the dynamic of difference is a 'stretched Marxism'. The question, of course, is what precisely such a stretched Marxism would look like.

¹²⁴¹ In his notebooks on Hobson's *Imperialism*, Lenin – developing his theory of the labour aristocracy – highlighted the following passage: 'the white *races*, discarding labour in its more arduous forms, LIVE AS A SORT OF WORLD ARISTOCRACY BY THE EXPLOITATION OF 'LOWER RACES', while they hand over the policing of the world more and more to members of these same races'. Lenin 1968, 420 cited in Toscano 2014.

¹²⁴² Fanon 1963, 40 (emphasis added).

Although Fanon's own argument is distinct, he reflects more broadly the position outlined by many in the anti-colonial and Third Worldist movements. These theorists were convinced – in the words of Aimé Césaire's resignation letter to the French Communist Party – that 'the struggle of colonial peoples against colonialism, the struggle of peoples of color against racism ... is more complex, or ... of a completely different nature to the fight of the French worker against French capitalism, and cannot ... be considered a part, a fragment of that struggle'.¹²⁴³ Crucially, this did not mean *abandoning* Marxism, or the commitment to overthrowing capitalism, but rather insisting that 'Marxism and communism be placed in the service of black peoples, and not black peoples in the service of Marxism and communism'.¹²⁴⁴ This is the rational result of adopting the 'subject-position' of the colonised when examining imperialism.¹²⁴⁵

In many accounts, these anti-colonial figures are dismissed or celebrated for not being Marxists.¹²⁴⁶ Yet if – as Lenin declared – 'a concrete analysis of a concrete situation' is 'that which constitutes the very gist, the living soul of Marxism',¹²⁴⁷ then the attempt to read Marxism *through* one's own conditions appears to be one of the most important tasks of Marxism.¹²⁴⁸ It is for this reason that Fanon's language of 'stretching' is appropriate. It captures the fact that this is neither an attempt to apply pre-existing Marxist categories to the Third World, nor an abandonment of Marxism, but rather – in a materialist manner – an attempt to *read the categories of Marxism through the experience of the Third World*.

Essentially, Fanon's argument boils down to the fact that 'in the colonial context', race served a role in structuring the distribution of the political and economic benefits of

¹²⁴³ Césaire 2010, 147.

¹²⁴⁴ Ibid., 150.

¹²⁴⁵ Cabral mounted a similar argument in respect of the 'teleology' of development. He argued that the 'normal' stages of development had been disrupted in the colonies by the *specific intervention* of imperialism, and so the 'normal' procedures of Marxist analysis could not apply. See Cabral 1979b, 126–133.

¹²⁴⁶ Bhabha 2004, 113; Gleijeses 1997, 46; Larsen 2001, 17.

¹²⁴⁷ Lenin 1966b, 166.

¹²⁴⁸ Neil Larsen puts it very well (in relation to Roberto Schwarz) writing that 'one must think critically by means of the already developed Marxian categories, but at the same time think *against* their own tendency to "catachresis" or "misplaced-ness" by working a social and economic reality never systematically addressed by Marx *back* into the categories themselves', Larsen 2001, 80. Such a position was similarly important to Mao, who argued that 'If a Chinese Communist, who is a part of the great Chinese people, bound to his people by his very flesh and blood, talks of Marxism apart from Chinese peculiarities, this Marxism is merely an empty abstraction' (Mao 2004, 539).

imperialist exploitation.¹²⁴⁹ By virtue of their race, white settlers were placed in an advantageous material position and accrued a series of political and ideological benefits. For Fanon, this meant that traditional Marxist understandings of the role of class could not be mechanically applied to the colonial situation. Instead, what was required was a *materialist analysis* of race as a social form. This analysis must first outline how race – as a social relation – is produced and then unpack the material conditions that enabled it to serve a central role in structuring a given social formation.

As noted earlier, for Fanon race is not a free-standing relationship; it is instead *generated* through the systematic economic logic of capitalist exploitation.. Because imperialist capital accumulation involves a geographically differentiated flow of surplus value away from peripheral (non-European) societies, it generates racial difference: since whiteness and wealth become directly associated, in order to justify, create the conditions for and manage the antagonisms of this exploitation. It is because these forms are so closely linked to the processes of capital accumulation – and so important to the latter's continued existence – that they serve a dominant role in ordering imperialist social relations. Whereas some have read Fanon as simply saying that race 'trumps' economics, or is more important than class,¹²⁵⁰ we can also read him as making a more subtle point. Fanon's analysis suggests that under *the material conditions of imperialism*, race will play a crucial role in organising and structuring social existence.¹²⁵¹ In this way, continuing with the idea of colonialism as viewing imperialism from a particular subject-position, we can see Fanon's position as a flipside of the material account of Eurocentrism outlined in Chapter 3 (Section 1.2.3.).¹²⁵²

Because Fanon's account traced the connection between capital accumulation and racialisation, he also paid close attention to the way in which specific racialised forms were thrown up by different regimes of capital accumulation. Since he saw race as a

¹²⁴⁹ Fanon 1988, 36.

¹²⁵⁰ Larsen 2001, 17.

¹²⁵¹ There is a resonance with Marx's observation that a materialist account did not deny the dominance of Catholicism in the Middle Ages or politics in Ancient Rome, but rather sought to explain *why* this was so on the basis of how they 'gained their livelihood' (Marx 1990, 90). One can view Fanon as doing the same but for 'race'.

¹²⁵² In this respect, it is interesting to note that Fanon articulates very explicitly the idea that his role is to work from the basis of 'European' theory and carry it into a critique of colonialism. He argued that: 'All the elements of a solution to the great problems of humanity have, at different times, existed in European thought. But the action of European men has not carried out the mission which fell to them, and which consisted of bringing their whole weight violently to bear upon these elements, of modifying their arrangement and their nature, of changing them and finally of bringing the problem of mankind to an infinitely higher plane' (Fanon 1963, 314).

social relation, Fanon understood that its targets were by no means fixed, but varied according to which particular population was subject to exploitation. Thus, as previously noted, Fanon argued that the ‘Negro problem’ was one of a ‘capitalist society that is only *accidentally* white’.¹²⁵³ On this very basic level, patterns of racialisation would change depending on which particular territories or populations were at issue. Immediately for Fanon, then, there was a fundamental racialised division thrown up by imperialist exploitation, which would be subject to variation in terms of its targets.

However, it was not simply that the subjects of racialisation that changed. Fanon also insisted that, owing to the close connection between capital accumulation and racialisation, changes in regimes of accumulation and techniques of production would also give rise to different *forms* of racialisation. He explained that in the initial period of capitalist expansion, involving ‘crude exploitation of man’s arms and legs’ and the mere plunder of resources, without implanting capitalist social relations, imperialism gave rise to ‘[v]ulgar racism in its biological form’.¹²⁵⁴ However, with the ‘evolution of techniques of production’ and the limited industrialisation that came with colonial capitalism, racism evolved into ‘more subtle forms’.¹²⁵⁵ Since capitalist social relations could not simply exterminate native populations but needed ‘various degrees of approval and support’ and the ‘cooperation’ of the exploited, racism assumed a ‘more “cultivated” direction’.¹²⁵⁶

Finally, aside from these more deep-rooted changes, Fanon also understood that these racialised forms would change in line with a series of conjunctural imperatives. Thus, as previously noted, Fanon described the process of the ‘racial distribution of guilt’, whereby racial categories would be used to stratify and manage exploited populations.¹²⁵⁷ In this way, different racialised forms would be simultaneously deployed against different populations, in line with the changing need to protect capital accumulation. Similarly, Fanon understood that racialised social forms would change

¹²⁵³ Fanon 1986, 202.

¹²⁵⁴ Fanon 1988, 35.

¹²⁵⁵ *Ibid.*

¹²⁵⁶ *Ibid.*, 37.

¹²⁵⁷ Fanon 1986, 103.

insofar as they were challenged by anti-imperialist resistance, which again forced them to become less direct.¹²⁵⁸

4.2.2. A New Canon?

It is through examining the work of TWAIL scholars that we see how this process has interacted with international law. International law has played a vital role in racialising the peripheries of capitalism, opening them up for the penetration of European capital, structuring their relationship to imperialism and providing rationales for military interventions in order to secure this. A ‘stretched Marxist’ account of international law is one which traces the way in which these racialised forms are generated by and structure the processes of capital accumulation. Given the role that stretched Marxism played in the thinking of the radical anti-colonial movement, one might expect that similar resources could be available for a theory of international law. Certainly there have been Third Worldist jurists and scholars who have also identified with the Marxist tradition. These figures – examined in Chapter 2 – include Bedjaoui, Umozurike, Chimni and Gathii. All of these figures understand imperialism as being driven by the process of capitalist expansion and accumulation, and further understand international law as mediating and articulating this process.

However, none of these scholars quite captures the dynamics of stretched Marxism. Bedjaoui, in his concern to address the economic problems of neo-colonialism through his new international economic order, is not attentive to the racialised form that this economic order assumed. Umozurike was more forthright, claiming that ‘white racism’ remained a ‘fundamental element’ in the international legal order. However, he remained unable to specify the precise structural connection between racism, capitalism and imperialism, and consequently was unable to provide a materialist analysis of the recurrence of this phenomenon. Ultimately, the sociological functionalism to which these two scholars held meant they were unable to see how and why these racialised processes *are reproduced within international law*.

Although Chimni is perhaps the author who best exemplifies the contemporary connection between Marxist and Third Worldist approaches international law, he ultimately falls prey to similar problems. Chimni’s attentiveness to the problems of

¹²⁵⁸ Fanon 1988, 44.

colonialism and neo-colonialism is second to none in the Marxist canon, and in this way he exemplifies the ‘subject-position’ of the colonised. However, his Marxism is not ‘stretched’ enough, insofar as, for him, these relations are primarily economic. There is little expansion on its racial and cultural dimensions. Perhaps the closest author closest to the tradition of stretched Marxism is Gathii, who – as previously noted – urges that we hold to ‘both’ the Marxist critique and that of postcolonialism. Yet, in his account, these appear as two different traditions that operate at different registers. Therefore, there is no ‘stretched Marxism’ here; rather, there is ‘stretch’ on the one hand, and ‘Marxism’ on the other.

Thus, there are no easy examples that can be picked up here. However, retrieving a lost legacy is not as simple as locating a ‘canon’. If the preceding three chapters have argued anything, it is that there is a very complicated relationship between the Marxist and Third Worldist traditions. In particular, we can draw a line from the ‘stretched Marxism’ described in this section, to the early postcolonialism described in Chapter 1 (Section 5.5.2.). Postcolonial theorists took seriously the idea that (as *per* Fanon and Césaire) the colonial was a distinct *problématique* which required a rethinking of categories. As a result, they foregrounded the role of race, culture and identity in the construction and maintenance of imperialism. However, rather than attempt a materialist explanation of these phenomena, they interpreted them as ‘displacing’ the logic of capitalism. Consequently, they mounted a theory of imperialism in which issues of identity *drove* it, and which required a supplemental understanding of imperialism by way of historical *fiat*. In this respect, one might say they were ‘all stretch and no Marxism’.

It is this intellectual legacy that TWAIL scholarship has inherited. The task seems clear. Postcolonialism responds to a real historical, political and theoretical urge to understand imperialism, yet it does so by discarding the materialist method that had animated earlier accounts of imperialism. One can reclaim the insights of postcolonial theory by setting it *within* a material context which does not reduce ‘race’ or ‘culture’ to epiphenomena of capitalism, but understands them as social forms coextensive with and necessary to the accumulation of capital, which therefore come to assume a vital and structuring role within the imperialist system.

Fanon's emphasis on the changing forms of racialisation provides a bridge in this respect. The relationship he describes between transformations in the process of capital accumulation and transformations in forms of racialisation would also – on the reading outlined above – be reflected in international law. As will be recalled, an analysis similar to this was one of the pivots around which Marxist-influenced Third Worldist legal scholarship has turned.

As was argued in Chapter 2, Bedjaoui, Umozurike and Chimni all sought to trace the way in which transformations in the nature of imperialism were reflected in different international legal regimes. They understood the initial 'encounter' between Europe and the 'new world' to be one rooted in early capitalist expansion. This was an unsystematic process of primitive accumulation, which was achieved through trade and 'looting'. Consequently, it did not require wholesale transformations of the internal life of peripheral territories. International law, therefore, was unsystematic and characterised largely by a *silence* about colonies. Often non-European sovereigns were recognised so as to facilitate trade and others such as the 'Indians' were compelled to engage in trade, or their resources were subject to European appropriation.

As capitalism stabilised and grew within Europe, there was a stronger imperative to expand outwards. This expansion could no longer be simply concerned with the extraction of wealth; now societies would have to be transformed wholesale. This was because they were to be the *markets* for European goods and the direct sites for the export and accumulation of capital. European states would therefore often require a greater deal of control in order to carry out these transformations. For this reason, direct political control in the form of colonisation became more and more necessary. This was buttressed by the competition *between* European powers, which could better secure profits through the creation of tariff territory. International law mediated this through the standard of civilisation, which justified colonisation, mediated other European dealings with the non-European world *and* provided an external compulsion for non- or pre- capitalist states and empires to open themselves up to the logics of capital accumulation.

Such a situation was unstable, however, both because of the resistance of colonised peoples to colonialism *and* because of the costs associated with direct colonial control.

International law served the role of channelling anti-colonial struggles within the colonies in such a way as to remain compatible with imperialism: both in terms of maintaining these struggles within the nation-state, and also by neutering the Third World's demands for nationalisation. What this meant was that – given the continued existence of imperialism – international law mediated *neo-colonial* relations.

With the collapse of even those marginal oppositional movements and the slow implosion of the USSR, there was even less restraint upon the capitalists in the advanced capitalist core. This, combined with stagnating conditions at home, led to a renewed round of capital accumulation under the auspices of neoliberalism and globalisation, which was facilitated by international institutions such as the World Bank and IMF. As a part and parcel of this process there has been a wave of military interventions, which were legitimised through an international law which both posited peripheral territories as open for military violence.

It is *this* account which must be 'reclaimed' and built within Marxist and TWAIL scholarship. Following Fanon, we can see that these changing forms of capital accumulation are also changing forms of racialisation. The above story can be seen of international law casting the peripheries in different racialised roles in order to facilitate the continued process of capital accumulation. Over time this has shifted from a language based directly on 'civilisation', to one which draws on subtler tropes of 'chaos', 'disorder' and rogue states. It has also (as outlined in Chapter 3, Section 3.3.) been shaped by the resurgence of inter-imperialist rivalries.

Thus, this racialisation plays out in different forms in different periods, but nonetheless forms the real 'dynamic of difference' which fundamentally structures international law. Crucially, therefore, we are able to combine the insights of the Marxist and postcolonial wings of TWAIL scholarship. This is not achieved by throwing them arbitrarily tying them together, but rather by understanding their common 'ancestry' in the stretched Marxist tradition of the radical anti-colonial and Third Worldist movements.

4.3. *Principled Opportunism?*

Armed with such an understanding, it is also possible to tackle the political challenge of an anti-imperialist international law. A stretched Marxism is able to take seriously the racial and cultural dimensions of imperialism, and account for how these are persistently produced in international law. However, it does so in such a way that allows us to negotiate the relationship between structure and agency and between strategy and tactics described in Section 2.4.2. of this chapter. This approach roots the dynamic of difference – and its attendant racialised forms – within the Marxist tradition of thinking about imperialism. It argues that there is a *structural* connection between international law and imperialism, with a dynamic of difference occurring at the level of the *form* of international law.

Since this position understands imperialism as a *specific historical social relation*, it is able to negotiate the problems thrown up by postcolonial theory. Imperialism has a beginning, and so can have an end. Yet at the same time, it is not just the historically contingent phenomenon of European colonialism; it is driven by a deeper logic of capitalist accumulation. Such an account is thus able to avoid both false necessity and false contingency. In specifically legal terms, the structural relationship between imperialism and international law means that any project that seeks to go beyond imperialism will ultimately also have to go beyond international law.¹²⁵⁹

It here that one runs up against the problem first discussed in Chapter 2 (Section 5). Is such a position not a *nihilist* one, which deprives the Third World of a shield (even if this shield is made of paper)? The answer to this question is *no*. Such a position only holds insofar as one is unable to differentiate between strategy and tactics. In understanding imperialism as a specific social form with a complex logic, it can be argued that its transcendence is a strategic goal, that is to say one which is both long-term and structural. A corollary of this is that transcending international law is *also* a long-term structural goal. However, because strategy and tactics are not identical, this does not commit one to the idea of never using international law. Instead, the question is: given the strategic objective of transcending imperialism, *how* can international law be deployed (tactically) in aid of this? This leads to a second, related question, since

¹²⁵⁹ Miéville 2005, 318.

international law embeds a ‘dynamic of difference’, how can one navigate this form without fatally reproducing its logic?

Vergès’ position (outlined in Chapter 2, Section 2.4.) proves useful in answering this question. Although his account might have suggested a ‘nihilism’ towards law, Vergès instead maintained that anti-imperialists could and should use law, provided they did so *on their own terms*. This meant using law as a platform to launch direct attacks on the existing order, and as a propaganda platform for mobilising ‘extra-legal’ forces to fight against imperialism. In this way, the strategic goal was directly manifested through tactical actions.

One need not follow Vergès exactly to see the possibilities that such an approach suggests. Once one has an overall strategy, it is possible to frame tactical actions with reference to this goal. Two points flow immediately from this. Firstly, tactical actions should not be pursued in such a way as to directly undermine the strategic goal. If it is necessary to transcend international law, then, when engaging in international legal action, one must take pains not to valorise international law. Secondly, and crucially, international law should not be pursued on its own terms. Rather, legal action should be pursued in such a way as to buttress those forces best able to transcend imperialism.

One might dub such a position ‘principled opportunism’. It is opportunistic because it seeks to instrumentalise legal argument, but principled because it understands the structural connection between law and imperialism, and the consequent limitations that this places on any opportunistic intervention. The substance of this position requires:

[T]hat the deployment of legal argument be *openly* subjected to political exigencies, with different arguments being deployed whenever necessary. As such, legal argument is being geared towards the strategic aim of building a movement to overthrow capitalism, rather than on its own terms. On the one hand, this will involve defensive struggles, where legal argument is deployed in order to defend political activists when the state seeks to attack them. ... Equally – provided rhetorically this is characterised as being for instrumental reasons – one might pursue a legal claim in order to attempt to prevent an action, or ‘punish’ those involved with it, this could involve contesting the legality of certain state practices ... in order to publicly reveal these practices, and perhaps to constrain their future use (thus giving the movement a greater ability to organise).¹²⁶⁰

¹²⁶⁰ Knox 2010b, 224–225.

A materialist conception of the dynamic of difference – in suggesting both the possibility of the transcendence of imperialism but also its structural interconnection with international law – is able to transcend the opposition between simple ‘legalism’ and ‘nihilism’ and so provide an international legal complement to the anti-imperialism of the radical Third Worldists.

CONCLUSION

1. The Politics of Periodisation (and the Periodisation of Politics)

The aim of this thesis has been to map the way in which a key concept in the social sciences – ‘imperialism’ – has been received within the international legal discipline. In order to do this, it focused on two schools: Marxist and Third Worldist approaches to international law. The thesis began by charting the debates about the causes, nature and driving forces of ‘colonialism’, ‘empire’ and ‘imperialism’. It demonstrated that the particular ways in which these concepts have been understood reflected the political concerns of the movements that took them up, as well as the particular political conjunctures in which they found themselves. One of the most important points that the first chapter attempted to make was that particular concepts of imperialism were particular ways of understanding *its place in history*.

The term ‘empire’ is one that has remained relatively stable, with a usage that can be traced back as far as the Roman era. At the same time, it acquired a very specific meaning in the context of the expansion of European empires, referring to the territorial control which characterised them. Typically, this territorial control was matched by an assertion of formal legal jurisdiction. In invoking ‘empire’ therefore, one invokes something both historically general and historically specific. As this thesis has contended, these types of understanding have distinct political consequences. Insofar as empire is a perennial feature of the human experience, it is arguably an *unavoidable* one. What this suggests is that the best we can do is try and mitigate the bad consequences of empire. By contrast, insofar as empire is identified with the European experience – whether specifically or through an emphasis on formal control – we have already *overcome it*.

The terms ‘imperialism’ and ‘colonialism’ were articulated in very different circumstances, and reflect different politics. Although ‘imperialism’ came from the same Latin root as ‘empire’ (*imperium*), its usage appeared much later, in relation to Louis Napoleon’s ‘Second French Empire’. Quickly it came to refer to an expansive or aggressive foreign policy. The term came to its own with the *radical* criticism of European expansion around the time of the ‘Scramble for Africa’. Initially, it was the term used by Hobson to describe the rapid international expansion of European capital

into underdeveloped areas. This was marked by a particularly vicious level of competition between these European powers.

It was this sense of the term imperialism which was eventually taken up and popularised by the Marxist tradition. Imperialism was understood as specific *stage* of capitalism and, as such, a system driven by an economic logic. In terms of imperialism's 'place in history', therefore, it was neither timeless feature of human existence, nor specifically tied to the European experience. At the same time, there were those who insisted that imperialism was not a distinct historical phenomenon but was rather a species of 'empire-ism'. For them, 'imperialism' was simply the 'active' part of empire, and so took on whatever characteristics were ascribed to empire.

Colonialism too suffered from this tension. Like 'empire', the term had its roots in the Roman experience, describing the practice of granting citizens settlement rights over territory. This was the main sense in which it was understood until the period when 'imperialism' was coined, after which colonies tended to be understood as the 'possessions' of a dominating metropole. However, the term *colonialism* emerged later, with the anti-colonial movement. Here the 'ism' denoted that the colonialism was a *system* governed by a particular logic. In this way, colonialism was seen as the flipside to the Marxist concept of imperialism. It was not abstractly counterposed to the Marxist understanding, but rather was the view of that same system 'from below'. Hence, colonialism too was *not* an inevitable feature of human society, and so could be transcended, but was governed by a logic that was wider than political and legal domination.

As with the imperialism, this was contested. A more moderate group identified colonialism with the specific political domination of Europe. For them, once independence had been achieved, colonialism would be at end. Whereas those who understood imperialism as 'empire-ism' were *not* generally part of the anti-imperialist movement, this conservative concept of colonialism was embraced by elements of the *anti-colonial movement itself*. This, combined with the failure of independence to secure many expected gains, led the radical elements of the Third Worldist movement to articulate the concept of 'neo-colonialism'. This was the logical extension of their idea

of colonialism as a system; if colonialism was driven by a logic beyond formal political domination, then it was feasible it could continue *without* formal political domination.

However the political movements that deployed the concept of neo-colonialism ultimately failed in their attempts to use international institutions. It was in the shadow of this failure that postcolonial theory solidified as an intellectual current. Postcolonial theorists attempted to show the tenacious grip that Eurocentrism had on the former colonies and the social arrangements associated with ‘modernity’.

Ultimately, what emerged was clear. The concept of ‘empire’ has always contained a tension between an account that foregrounded its existence since the beginning of time, and one that linked it to a very particular historical experience. In both such instances, the political impulse that derives from this historical situating is a passive one: either empire will always be with us, or it will end with the dismantling of Europe’s formal control. By contrast, the radical position saw things differently: imperialism could be transcended, but it also had a tenacious logic, and its abolition would require fundamental changes in the world order. Yet even there were constant pressures and attempts to re-impose the schema of empire and its attendant political conclusions.

One of the insights that this thesis has sought to advance is that the historical and political understandings of colonialism, empire and imperialism are also carried over into the way they are related to international law. Hence, insofar these phenomena are purely identified with the formal domination of the European experience, international law *ended* imperialism, and so is anti-imperialist. By contrast, insofar as imperialism is a systemic phenomenon then international law did not end imperialism, but is actually entangled within its processes.

This dynamic played out most clearly in the context of the original Third Worldist jurists. Those who adopted the radical, Marxist-inflected account of colonialism held that international law was intertwined with colonialism and imperialism. As a result, they insisted that the dismantling of the European colonial system had not meant an end to colonialism but had rather given rise to neo-colonialism. On this reading, international law was not ‘automatically’ anti-imperialist. Only a thoroughgoing shakeup of international law would be able to combat imperialism.

Those who adopted a more conservative concept of colonialism identified it almost wholly formal European domination. Since this colonialism lacked an underlying logic, the issue was not so much international law's imbrication with colonial practices, as the fact that non-Europeans had been excluded from 'making' international law. On this reading, decolonisation and the universalisation of international law marked it out as anti-imperialist. However, what *both* of these positions had in common was a belief that international law was a neutral vessel that simply reflected the changing balance of forces. Even the radical wing ultimately thought that international law would reflect the rising tide of anti-colonialism.

It was the systematic and repeated failure of this project that gave rise to TWAIL. Whilst a broad church, TWAIL scholarship has comprised a group of scholars more influenced by Marxist theory, and a group influenced by postcolonial theory. For the former, the connection between international law and imperialism was a material one, with international law being shaped by changing regimes of capital accumulation, and ruling classes pursuing their interests through the international law. The latter, attempting to respond to the sociological functionalism of the original Third World jurists, argue that international law is not neutral space, but part of a wider process of 'civilising'.

Despite these differences, like the original Third Worldist jurists TWAIL scholars ended up in a similar *political* place, asserting that to abandon international law is to lose a vital 'shield' against imperialism. This similarity seemed to contradict the importance of their holding different concepts of imperialism. On further inspection this was not the case. Chimni, the outstanding Marxist TWAIL scholar, has a politics which flows from his analysis. He sees international law as potentially progressive because it expresses the contradictions of imperialism. By contrast, in the case of the postcolonialism-influenced scholars there is a radical break between theory and politics. The pessimistic account of international law constantly reproducing the civilising mission seems to leave no room for its progressive usage.

However, Chimni's account ultimately relies on a sociological functionalism similar to that of the early Third Worldist jurists. Like those accounts, it seems unable to explain

why the Third Worldist law reform projects failed so badly, except as a kind of accidental and contingent defeat. Accounts rooted in the ‘civilising’ character of the law represent an attempt to grapple with this false contingency, and point out the necessary and *enduring* character of the connection between law and imperialism. It is precisely for this reason that they turn to postcolonial scholarship.

At this point, the interplay of different concepts returns with a vengeance. In order to emphasise the enduring character of imperialism, postcolonial scholars essentially reproduced the understanding of *empire* above. For them, it was a transhistorical feature of human life, rooted in certain psychic structures. Yet this account on its own terms was *also* inadequate, it could not explain how imperial forms change, or might be overcome. This meant it was also accompanied by a contingent account of imperialism, whereby its specificity was located in the distinctively European experience.

This legacy has been reproduced by those TWAIL scholars who sought to go beyond sociological functionalism. Consequently, their account of the relationship between imperialism and international law seems to run in two opposed directions. In one account, imperialism is the untranscendable horizon that international law embeds and reproduces; in the other, international law embeds imperialism because of a specific historical encounter. In the former case, international law is inextricably linked with an untranscendable imperialism; this leads to an utterly pessimistic account in which international law constantly reproduces imperialism. In the latter case, the connection is a contingent one, with international law embedding a colonial *legacy*, which might be overcome. Given the necessity of both of these concepts of imperialism, neither account can be preferred.

The question, then, is whether it is possible to make use of the radical periodisation of imperialism, whilst avoiding sociological functionalism, and highlight the cultural and psychic dimensions of imperialism? In this respect, it is startling that *all* of the accounts of the ‘civilising mission’ ultimately describe a process whose logic greatly resembles that of capital accumulation. Turning to the Marxist tradition’s attempt to theorise both Eurocentrism and its relationship to international law, it is possible to articulate a *materialist* account of the dynamic of difference, which roots it in capital accumulation.

However, in order to go beyond sociological functionalism, it is necessary to show why law specifically reproduces these dynamics. The commodity-form theory of international law proves invaluable to resolve this issue. In this account, law stems from and shares the same logic as capital accumulation. Since the ‘dynamic of difference’ is also part of this logic of capital accumulation, it will necessarily be reflected in international legal terms.

Importantly, this is not just an attempt to read TWAIL insights ‘through’ the Marxist tradition, but rather to return to the ways in the two have always been closely bound together. Third Worldist Marxists emphasised that processes of racialisation were not ‘optional extras’ added onto economic processes. Rather, capital accumulation is a process that *necessarily* produces racialised categories, and these racialised categories structure the distribution of imperialism’s material benefits. In articulating a materialist theory of the dynamic of difference, therefore, it is necessary to ‘stretch’ Marxism, and account for the way in which international law plays a role in producing racialised social forms which are redeployed within the process of capital accumulation.

Such a ‘stretched Marxism’ is able to illuminate the enduring connection between imperialism and international law, and to signal the importance of race and culture, without falling foul of false necessity or false contingency.

2. Why Imperialism? Why Now?

As noted in the Introduction, there are several ways in which this work is important. Evidently, given the above, the *most* important contribution of this work is the attempt to sketch the outline of a ‘stretched Marxist’ position. This position, which attempts to draw together the historical and theoretical commonalities between Marxist and Third Worldist accounts of imperialism, does seem to embody the strengths of both, without falling foul of their weaknesses. More importantly, it is not simply an arbitrary cobbling together of different theoretical traditions, but rather represents an attempt to recover and re-articulate a historical legacy. Such an approach could form the basis for further work.

Even if one is not convinced by this particular argument, this thesis has attempted a number of other tasks. Firstly, it has presented a systematic survey and analysis of the way in which historians, theorists and social scientists have understood the concepts of ‘colonialism’, ‘empire’ and ‘imperialism’. This is an issue to which international lawyers have not paid a great deal of attention, despite frequently invoking those terms. In setting out these debates, and the political consequences that flow from them, this thesis can hopefully contribute to a more rigorous understanding of these concepts.

Secondly, advancing the first point somewhat, this piece has attempted to build on Marks’ claim that particular concepts of ‘empire’ also bring with them particular understandings of international law. The chapters on TWAIL and Marxism attempt to flesh out this insight. Even if one disagrees with the more ‘critical’ aspects of this argument, examining *how* different concepts of imperialism play out in international legal argument serves a useful role.

These two points are particularly important given the *historical* nature of much international legal theorising about imperialism. In drawing out these debates, this thesis represents an attempt to move beyond the casual empiricism which marks many of these histories. Whilst such accounts do perform a vital function, by not explicitly reflecting on their use of categories and concepts they often end up subsuming distinct periods into a single narrative, or missing the commonalities between particular historical moments.

The third task that this has achieved is rather straightforward. Although both TWAIL and Marxism have become prominent in recent years, there have been few attempts to systematically reconstruct them, or describe how they relate to each other. This thesis has attempted to do that, but also go further, situating both within a wider historical and theoretical trajectories. In so doing, it has been possible to emphasise their theoretical and historical continuities.

3. Possible Futures

The above considerations point towards further research projects. First and foremost, the conception of ‘stretched Marxism’ could be deployed directly, to examine both

historical and contemporary moments. It provides a specific set of analytical tools for doing this. Of these, perhaps the most significant concerns the structural interconnection between imperialism and international law, with imperialism being understood as a system driven by the logic of capital accumulation which systematically gives rise to changing forms of racialisation.

Particularly important in this respect is to chart the way in which the *changing* patterns of capital accumulation have given rise to new configurations of imperial power, which manifest themselves in different forms of racialisation, achieved through international law. A very obvious place to start, and one area where this has already borne some fruit, is in the changing justifications for the use of force. Understanding the ways in which crises have made it necessary for major imperialist centres to *intensify* processes of capital accumulation, yet at the same time limited their ability to do so, is key in explaining the shift to a 'lower intensity' but constant deployment of violence under the war on terror and its drone programme. This, of course, is exacerbated by the possible rise of other powerful centres of capital accumulation. Accordingly, whilst the war on terror continues to deploy racialised tropes, it does so in very specific ways.¹²⁶¹

Similarly, one might extend this backwards. A vital task would be to examine whether or not a 'stretched Marxist' conception of imperialism found its way into any of the Third Worldist accounts of international law. As has been illustrated, certainly there was a *radical* idea of imperialism underlying the early Third Worldism, but this was not a 'perfect' reflection of the kind of work attempted by Fanon and Cabral. It would be interesting to inquire whether there were any jurists – apart from possibly Vergès – who shared such a conception. What seems more likely though, is that in the accounts of radical Third World activists or movements, it is possible to find some reflection upon international legal questions. More generally, this thesis has pointed to the need to understand Third Worldism not as a monolithic bloc but as a movement with various political wings. It has also insisted that these political differences were reflected in wider theoretical disagreements that have consequences for international law. In this respect, it is interesting to note that at the first Tricontinental Conference (described in Chapter 4, Section 1) rather than the usual paeans to the UN, it was vociferously

¹²⁶¹ For attempts to develop this position see Knox 2013 and Knox 2014.

denounced as an instrument of imperialism by many of the participants.¹²⁶² An exploration of how these radical movements engaged with international law could be very productive.

This also points to another possible project. One of the aims of the thesis was to illuminate how distinct understandings of imperialism bring with them distinct accounts of its relationship to international law. This is in contradistinction to the majority of international legal scholarship, which treats imperialism and its associated terms as black boxes, whose meanings are transparent. However, because the focus of this thesis has been primarily on Marxist and Third Worldist accounts of imperialism, questions of the wider theoretical trajectory of the international legal discipline have only been addressed tangentially. Consequently, it would be valuable to examine how the debates outlined in Chapter 1 were received by international lawyers. Inasmuch as they were *not* explicitly received, it would be fruitful to show how international lawyers nonetheless reproduced these arguments, and to trace how the political consequences play out within the international legal discipline.

4. Conclusion

What, then, is the ultimate conclusion? Perhaps the guiding intuition of this thesis has been Lenin's observation that 'without revolutionary theory there can be no revolutionary movement'.¹²⁶³ Whilst one can clearly go too far in such a sentiment, it does flag up an important issue: the necessity of 'knowing your enemy'. It is only in understanding *how* a system works that one is able to contest and possibly transcend it. Whilst one would hardly be so immodest, or rather delusional, as to think that a PhD thesis would be able to achieve the overthrow of imperialism, clarifying one's concept of imperialism *is* an important step towards understanding how to overcome it.

The elaboration of 'stretched Marxism' is a modest attempt to do this. It draws attention to the role that international law plays in solidifying and reproducing imperialist social relations, and the centrality of racialised forms to these relations. In pinpointing the logic of this system, and pointing out its structural interconnection with international law, stretched Marxism argues that although we *can* go beyond imperialism (and

¹²⁶² Hsinhua Correspondent 1966, 22–23.

¹²⁶³ Lenin 1973, 28.

consequently international law), this will not be a simple matter. One cannot simply denounce imperialism as being 'against' international law, and it is impossible to 'ignore' international law. Rather, one must understand how to negotiate the international legal order in a tactical manner, whilst being aware of the strategic necessity of its overthrow.

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