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# **Examining (International) Law:**

## **Towards a Systematic, Coherent and Radical Theory**

*“To be radical is to go to the root of the matter.*

*For man, however, the root is man himself”*

– Karl Marx

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## Abstract

This thesis examines accounts of law – and more particularly public international law – provided by Marxian scholarship. It does so with the aim of revealing and analysing those aspects which can help build the conceptual framework necessary for the creation of a *systematic, coherent* and *radical* theory of the contemporary world order. In order to be intellectually satisfying and practically useful, such a theory must be capable of addressing the relationships amongst law, state and economy at the global level, and accounting for the *form, content, function* and *structure* of the global legal order.

Throughout, this thesis draws on a number of different traditions of legal, political and economic thought from American Legal Realism and French Structuralism to World Polity Theory and Pashukanite and Gramscian Marxism. However, it seeks to highlight, in particular, those insights available from theorists whose works have hitherto failed to receive the attention they deserve within critical international legal scholarship because of their primary association with *domestic* legal or political criticism.

The intention in doing so is to demonstrate the benefits of rejecting the *a priori* distinction between the domestic and international legal fields so common within orthodox legal scholarship on both sides of the divide. What is hoped will be provided by such a rejection is the conceptual space for generating a theory relevant not simply to public international law but to every legal field and, thus, ‘the Law’ as a whole.

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Finally, I want to acknowledge all the support (both emotional and editorial) I have received from my parents, Brian and Margo Boyd, and my partner, Jordanna Blockley. Without their help, and their willingness to put up with me during the times when undertaking this degree alongside a traineeship felt like it was becoming overwhelming, this would have been a far less enjoyable and rewarding experience.

Responsibility for all arguments and errors remains, of course, mine.

I declare that, except where explicit reference is made to the contribution of others, that this thesis is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

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Signature

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Name



## List of Abbreviations

AJIL .....	American Journal of International Law
CEDAW .....	Convention on the Elimination of all forms of Discrimination against Women
EJIL .....	European Journal of International Law
EPZ .....	Export Production Zone
GATS .....	General Agreement on Trade in Services
GATT .....	General Agreement on Tariffs and Trade
ICC .....	International Criminal Court
ICJ .....	International Court of Justice
IGOs .....	Inter-governmental Organisations
IHL .....	International Humanitarian Law
ILO .....	International Labour Organisation
IMF .....	International Monetary Fund
LJIL .....	Leiden Journal of International Law
NAIL .....	New Approaches to International Law
NCCs .....	National Capitalist Classes
NGOs .....	Non-governmental Organisations
NLR .....	New Left Review
NMCs .....	National Middle Classes
NWCs .....	National Working Classes
SSRN .....	Social Science Research Network
TCC .....	Transnational Capitalist Class
TMC .....	Transnational Middle Class
TNCs .....	Transnational Corporations
TWAIL .....	Third World Approaches to International Law
TWC .....	Transnational Working Class
UN .....	United Nations
WHO .....	World Health Organisation
WTO .....	World Trade Organisation

## Chapter 1 – Introduction

### Defining the project

#### Analytical scope: ‘roads not taken’

A thesis of this length could not hope to be comprehensive while maintaining the necessary robustness of analysis. It is necessary, therefore, to clarify what this thesis does *not* examine.

It does not examine particular fields within international law (international criminal law, international humanitarian law, etc.), except by way of example, and avoids entanglement with purely doctrinal debates. There is already an abundance of literature analysing ‘black-letter’ international law and so, instead, it focuses on “the ‘deep grammar’ of international law”:<sup>1</sup> the background theories, practices and structures common to all its fields of which individual cases, treaties and customary rules are merely the material condensations.<sup>2</sup> While seeking to avoid a-historicism, this thesis examines only *contemporary* international law, for although critical histories of international law are valuable, it is not necessary for the purposes of this thesis to have more than a rough sketch of what such a history might look like.<sup>3</sup> Although this thesis examines critical left scholarship and incorporates Marxian analyses, it does not engage in the various debates currently running *within* Marxism (whether over the existence of and reasons for global crises or stagnation, the relative importance of the ‘internal logic of capital’ and ‘class struggle’ in economic movement, the significance of distinct forms of capital – ‘competitive’, ‘monopoly’, ‘industrial’, ‘finance’, etc. – or the role of the military-

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<sup>1</sup> Miéville, C. *Between Equal Rights: a Marxist Theory of International Law* (Pluto Press, London, 2006), p3

<sup>2</sup> This focus, though it may put off some practitioners, is important. As Alan Hunt argues, “[t]here is no escape from theory; no conversations can be free of it. The best that we can do is to be as self-conscious as possible about the assumptions and connection which we bring into our conversations”. (Hunt, A. “The Critique of Law: What is ‘Critical’ about Critical Legal Theory?” *Journal of Law and Society* Vol. 14, No. 1 (Spring, 1987), p9)

<sup>3</sup> Although there are few systematic histories of international law from either orthodox or critical perspectives, many orthodox textbooks begin with brief histories, such as Stephen Neff’s “A Short History of International Law” in Evans, M. (ed.) *International Law* (2<sup>nd</sup> edn.) (Oxford University Press, Oxford (2006), pp29-55. This is especially true of textbooks of *particular fields* of international law, in which this device is used to separate their subject matter from international law in general. For a particularly interesting example of this in relation to (transnational) commercial law, see Goode, R., Kronke, H. And McKendrick, E. *Transnational Commercial Law: Texts, Cases and Materials* (Oxford University Press, Oxford, 2007).

industrial complex in accumulation), unless unavoidable. Finally, this thesis is located within international *legal* scholarship and so will touch upon the fields of International (political) Relations and (global) Macro-economics only insofar as they are relevant to legal analyses.

### Conceptual perspective

This thesis examines ‘critical’ accounts but seeks to build a ‘radical’ theory: the value of critical legal theory, as Alan Hunt explains, is its “deep sense of dissatisfaction with the existing state of legal scholarship... the prevailing orthodoxies in legal scholarship... the conservatism of the law schools and... the role played by law and legal institutions in modern society”.<sup>4</sup> However, writing in 1987, Hunt acknowledged that critical legal theory “has now been around sufficiently long that it must soon pass beyond the stage of debunking and trashing orthodoxy... [and] grapple with the problems of advancing a distinguishable and working alternative”.<sup>5</sup> This project of moving *beyond critique*, which necessitates a *radical* approach, is not yet completed, and is thus what concerns this thesis.

Radical, however, does not *necessarily* mean Marxist. Theorists working from other conceptual frameworks often share Marxists’ “determination to uncover the social relations expressed, mediated and obscured in legal categories”.<sup>6</sup> Marxism has itself been subject to a number of prominent and powerful (largely poststructuralist) critiques. Structural Marxism (about which this thesis will engage in detail) in particular, as Alasdair Stewart explains, being “[s]ituated in the strange position of being unappealing to Marxists for [a perceived deficiency in its theory of class] and to non-Marxists for being Marxist... has suffered from a lack of interest in recent years”,<sup>7</sup> and has never gained a significant

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<sup>4</sup> Hunt (1987), p5. For a particularly good and far more detailed account – which weaves together the work of Max Horkheimer, Jürgen Habermas, Robert Cox and Michel Foucault – of the benefits of critical theory (‘[which looks] at the world from the perspective of those who cannot be content with things as they are’) over ‘traditional’ or orthodox theory (‘which takes the world as it finds it’), see Susan Marks’s book *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press, Oxford, 2000), pp125-146.

<sup>5</sup> Hunt (1987), p7. Marks describes theory which *simply* debunks and trashes orthodoxy as ‘sceptical’ rather than ‘critical’ theory on the basis that the former, like ‘traditional’ theory, still “present[s] its analyses as ‘news from nowhere’”, whereas the latter “takes up enquiry with a view to engaging social actors in a process of reflection on their circumstances” and how these affect their perspectives. However, Hunt’s point remains valid insofar as Marks acknowledges that ‘critical’ theory does not itself “propos[e] blueprints or advanc[e] formulae of its own” for an alternative to the contemporary global order. (See Marks (2000), pp144 and 137)

<sup>6</sup> Fine, R. “Marxism and the Social Theory of Law” in Banakar, R. and Travers, M. (eds) *An Introduction of Law and Social Theory* (Hart Publishing, Oxford, 2002), p102

<sup>7</sup> Stewart, A. “Althusser’s Structuralism and a Theory of Class” *Critique* Vol. 36, No. 3 (Dec 2008), p421

foothold in international legal scholarship. However, although it is outwith the scope of this thesis to give a detailed ‘defence of (Structural) Marxism’ as a theoretical tradition, it is important to clarify that the choice of perspective is far from arbitrary.

The strength of Marxism is that its *conceptual repertoire* is both robust and flexible enough for analysing social relationships at multiple levels and it also offers a complementary *political strategy* for implementing its insights to achieve practical change. By comparison, the poststructuralist focus on individuality and difference – evidenced by an engagement with language theory, micro-histories, psychology etc. – is not easily imported into international legal scholarship which, at least formally, ignores individuals and treats only nation-states and international institutions as legal actors.<sup>8</sup> Furthermore, the rejection of Marxism’s conceptual project – driven by what François Lyotard famously called ‘incredulity towards metanarratives’ – leaves its practical emancipatory potential compromised:

“[T]he very ingenuousness of [poststructuralism’s] promise to respect everyone’s individuality, offers a meagre threat to existing power hierarchies... Revolt and revolution fade into formalistically defined gestures of ‘opposition,’ directed not against capitalism but against a ‘power’ that is at once omnipresent and evanescent – impossible ever to overcome”.<sup>9</sup>

As Michael Hardt and Antonio Negri argue, this is not only *ineffective*, but “can even coincide with and support the functions and practices of imperial rule”<sup>10</sup> by misdirecting progressive projects and legitimising, by leaving unquestioned, important aspects of how that rule operates. The counterpoint which Marxism offers to this is the insight that:

“No matter how fluid, spontaneous, and revolutionary a society is, it must create institutions that at some point guide and define the limits of social practice. As a series of crystallised social practices within history, law becomes a condition as well as a form of social practice, a framework within which law-making itself takes place. Law is thus always *structure* as well as practice”.<sup>11</sup>

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<sup>8</sup> This formal statocentrism is, of course, not without its exceptions and contestations. International Humanitarian Law, for example, can be said to ascribe rights to individuals, while International Criminal Law attributes responsibility to them. However, according to orthodox accounts, the state is still the key actor in the field, either because instances of individual rights and responsibilities are highly specific to a particular issue or situation, or because the treaties and rules of customary law which confer individual rights/responsibilities (and upon which such rights/responsibilities are dependent) are made by, and bind, only nation-states. For a more detailed discussion of this particular issue, see McCorquodale, R. “The Individual and the International Legal System” in Evans (2006), pp307-332

<sup>9</sup> Foley, B. “Marxism in the Poststructuralist Moment” *Cultural Critique*, No. 15 (Spring, 1990), p16

<sup>10</sup> Hardt, M. and Negri, A. *Empire* (Harvard University Press, Massachusetts, 2000), p142

<sup>11</sup> Spitzer, S. “Marxist Perspectives in the Sociology of Law” *Annual Review of Sociology*, Vol. 9 (1983), p109 (emphasis added)

## Locating the project

The radical law project has not always been one to attract support within Marxist scholarship. This is because many Marxists believe, to use Fidel Castro's words, that "the people have a deep sense of justice, above and beyond the hairsplitting of jurisprudence"<sup>12</sup> which becomes at best a distraction, and at worst collaboration in a bourgeois ideological sham. China Miéville goes even further to argue, uncompromisingly, that "[t]he chaotic and bloody world around us *is the rule of law*",<sup>13</sup> that law is incompatible with "any systematic progressive political project"<sup>14</sup> and that "[i]n order fundamentally to change the dynamics of the [global capitalist] system it [is] necessary... to *eradicate the forms of law*"<sup>15</sup> altogether. Yet Marx himself was concerned enough about the legal order to engage in its critique, even if by the time of his death his account remained incomplete and, in parts, unclear.

Such critique remains important for three reasons. Firstly, as was remarked recently at a radical law conference, 'you can ignore the law, but the law won't ignore you'. This, of course, echoes the famous warning (attributed to Pericles)<sup>16</sup> that 'just because you do not take an interest in politics doesn't mean politics won't take an interest in you'. This is not simply an argument against apathy, however, but rather a reminder that, to the extent that power is exerted through international law, arguing that it is 'not really' international law which affects the outcome of power-relations does nothing to lessen its effect. Secondly, there has been a visible spread of legal regulation into every aspect of social and political life in contemporary capitalism,<sup>17</sup> which means that there are few, if any, areas in which

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<sup>12</sup> Hsiao, A, and Lim, A, (eds) *The Verso Book of Dissent: From Spartacus to the Shoe-Thrower of Baghdad* (Verso, London, 2010) p205, quoting Fidel Castro

<sup>13</sup> Miéville, C. "The Commodity-Form Theory of International Law: an Introduction", *Leiden Journal of International Law* Vol. 17 (2004), p302 (emphasis in original) As Susan Marks argues, though she does not share Miéville's pessimism about the emancipatory potential of engaging with law, "[i]f [(international) law] has failed and goes on failing millions, this is not 'on occasion,' but overwhelmingly and systematically. Put differently, if we live in a world of chaos and conflict, that is not in spite of international law, it is in part because of it." (Marks, S. "International Judicial Activism and the Commodity-Form Theory of International Law", *E.J.I.L* Vol.18, no.1 (2007), p202)

<sup>14</sup> Miéville (2004), p301

<sup>15</sup> Miéville (2004), p301 (emphasis added)

<sup>16</sup> c. 495-429 BC

<sup>17</sup> This is clear from even a brief scan of the United Nations Treaty Series Cumulative Index No. 44 (<http://treaties.un.org/pages/CumulativeIndexes.aspx>, accessed 24 June 2011) where a simple *list* of treaties since 1875 runs to over three hundred pages. The chronological trajectory of increasing codification visible in the list must, however, be viewed in light of David Kennedy's argument that "[i]t is a long running cliché that statutes have 'proliferated'... [however], these developments do not increase the distributive importance

law can be dismissed as irrelevant. Finally, as Richard Kinsey argues, “[i]t is not possible to conceive of the complex division of labour of a capitalist order and the totality of its social relations *without* law. Law is embedded, inextricably, in the organisation and culture of our social existence”.<sup>18</sup> It defines “what shall be property and what shall be a crime”,<sup>19</sup> and legal ideology plays an important part in normalising and legitimising capitalist relations, not least through the artificial elision of ‘justice’ and ‘legality’ and separation of law and politics, which together obscure the fact that “speaking law to politics is not the same thing as speaking truth to power”.<sup>20</sup> Whether or not (international) law contains emancipatory potential, what is important, and what justifies its critique, is its structural centrality in the global capitalist order.

### Marxian analysis in international law<sup>21</sup>

Beyond the ‘official’ Marxist line on international law promulgated from within the Soviet Bloc – which despite its radical shell was little more than “a tool for the exigencies of official policy”<sup>22</sup> exhibiting the same formalism Marx originally critiqued in bourgeois legal scholarship – the vast majority of Marxist legal theory has been explicitly *domestic* in focus. Within the last 20 years, however, there has been a resurgence of explicitly theoretical work focused on developing a Marxian critique of *international* law. Some of the key figures during this period include Susan Marks, B.S. Chimni (who, although often writing from an explicitly Marxist perspective, is typically considered instead as being part of the TWAIL movement which can be critical of Marxism’s Eurocentric aspects), China Miéville, A. Claire Cutler and Bill Bowring (who was also involved in legal practice). This development is being continued and strengthened by a number of theorists including Rob Knox, Reccia Orzek, Umut Özsu, Paavo Kotiaho, Irina Cerić and Akbar Rasulov.

The paucity of Marxist international legal scholarship is evident not only in the small number of theorists writing on the subject, but also in the restricted range of Marxist

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of law, but only bring to visibility what was there all along”. (See Kennedy, D. “The Stakes of Law, or Hale and Foucault!” *15 Legal Stud. F.* 1991, p334)

<sup>18</sup> Kinsey, R. “Marxism and the Law: Preliminary Analyses” *British Journal of Law and Society* Vol. 5. No. 2 (Winter, 1978), p202 (emphasis added)

<sup>19</sup> Thompson, E.P. *Whigs and Hunters: the Origins of the Black Act* (Allen Lane, London, 1975) p259

<sup>20</sup> Kennedy, D., *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, Princeton, 2004), p28

<sup>21</sup> This section builds on a line of discussion which emerged during the *Glasgow Conversations in International Law* symposium on 19 February 2010 at Glasgow University School of Law, and on Rob Knox’s contribution on the ‘long rambling history’ of Marxist international legal scholarship.

<sup>22</sup> Miéville (2006), p60

theoretical traditions from which these theorists draw their inspiration, compared to the breadth of the Marxist conceptual landscape utilised by critical domestic legal theorists. Much of the recent Marxist international legal scholarship has been centred on the important work of Evgeny Pashukanis (who explicitly deals with international law even if it is not his main concern). In contrast, little mention has been made of the legal critiques which are present in the works of Alan Stone, Isaac Balbus, Göran Therborn, Antonio Gramsci, Georg Lukács, Louis Althusser or Nicos Poulantzas, for example, despite the important place these have within domestic Marxist legal theory.

## Structuring the project

The second chapter of this thesis will seek to investigate the *form* of law and show how the accounts of legal *relationships* and the legal *order* provided by theorists of the contemporary left contribute to this element of the radical international law project in ways which the orthodox alternatives cannot. It will engage with Miéville's 'commodity-form theory of international law' which, drawing on amongst other things Pashukanite Marxism and Newstream analyses of indeterminacy, has become a valuable focal point for contemporary critical investigations into the legal form and its immanent connection to the systematic violence of imperialism. However, it will argue that Miéville's theory is neither nuanced nor comprehensive enough to stand alone, and must be augmented by analysis from other Marxist traditions, such as those centred on the works of Gramsci, Lukács and Althusser.

The third chapter will seek to examine the *structure* of the global legal order and show how B.S. Chimni's proposition that we conceptualise that order as a 'nascent (imperial) global state' allows for the strategic integration of insights from domestic legal scholarship which alternative accounts do not, or cannot, incorporate. It will argue that, in order to understand how this global state *functions*, it is vital to transcend not only orthodox conceptions of the state, but also classical and Pashukanite Marxist conceptions. Instead, the global state must be viewed as a *class state* of the sort analysed by Poulantzas, shaped by the interactions of *transnational* classes within a complex and multi-level institutional structure.

The fourth chapter will seek to analyse how the legal form is imbued with *content* and show how the capitalist (class) relations which constitute the global *economy* become inscribed in the international *legal* order in ways mediated by that order's internal *structure*. It will argue for the rejection of instrumentalism as an explanatory framework in favour of an account which incorporates the concept, and is thus able to recognise the phenomenon, of 'relative autonomy' and will engage in particular with the works of Stone, Hillel Ticktin and David Kennedy in its exploration of how the essential relations of the contemporary global-capitalist order are expressed in concrete norms and legal practices.

The final and concluding chapter will seek to tie together the analytical strands above into one coherent, if necessarily prolegomenal, whole.



## Chapter 2 – ‘Law’ unpacked

In order to examine the accounts of International Law provided by theorists of the critical left it is necessary to begin by asking “what *is* ‘International Law’?” and – what appears to be simply a reformulation but is a subtly, and crucially, different question – “what is it they *speak of* when they speak of ‘International Law’?” Both questions fit within the more general field of enquiry into the *nature* of ‘Law’: to be able to see the difference between them it is necessary to distinguish International Law *as the objective social phenomenon* (denoted here by ‘international law’, all in lowercase) and *as the conceptual artefact that purports to designate it* (denoted here by ‘International Law’, capitalised). It is the elision of these two meanings which explains why, as H.L.A. Hart observes, “most speculation about the ‘nature’ of law... has usually been conceived as a search for the definition of law [even though] nothing concise enough to be recognised as a definition could provide a satisfactory answer”.<sup>23</sup>

This distinction requires to be drawn not only for the sake of discursive clarity, but also because the problem with the existing orthodox accounts of international law lie in the distance which may be found within them between their concepts and the underlying objective phenomenon. There will always be *some* distance of course because, like the *physical* phenomenon of gravity described in Pierre Macherey’s literary analogy,<sup>24</sup> the *social* phenomenon of international law functions without ‘announcing the logic of its functioning’, meaning that International Law is not *in* international law but elsewhere, in the domain of legal scholarship. The difference between Marxian and orthodox international legal scholarship (given that they necessarily share the same object) therefore exists in the former’s potential for *reducing* the critical distance between concept and phenomenon. This potential lies in the fact that those Marxists who take (international) law seriously, when they speak of (International) Law, speak of, and thus explain, what other theorists intentionally do not or cannot, because of the limitations of their conceptual frameworks. As Macherey advocates, we should question orthodox scholarship “as to

<sup>23</sup> Hart, H.L.A., *The Concept of Law* 2<sup>nd</sup> edn. (Oxford University Press, Oxford, 1997), pp13-16

<sup>24</sup> “[B]odies fell and will always fall without announcing the law of their falling... the law [of gravity] is not *in* the falling bodies, it is elsewhere, by their side, on a different level which is the domain of scientific knowledge”. Macherey, P. *A Theory of Literary Production* (Wall, trans) (Routledge & Kegan Paul, London, 1978), p150 (emphasis in original)

what it does not and cannot say, in those silences for which it has been made... [and] in the very letter of the text where incoherence and incompleteness burst forth”.<sup>25</sup>

### **Orthodox scholarship’s search for the legal form**

In its search for the legal *form*, orthodox legal scholarship has produced a number of often quite different accounts of the nature of law. While analysing each of these individually is of course beyond the scope of this thesis, it is useful, in questioning the ‘incoherence and incompleteness’ of orthodox scholarship as a whole, to consider a few examples. These may, of course, be categorised in a variety of ways, with the most common approach within orthodox scholarship being to group accounts according to the ‘tradition’ to which they belong. This approach is, however, conventional rather than necessary and, although it does not map neatly onto the orthodox taxonomy, a useful way in which to group these examples for the present purposes is provided by Roscoe Pound, who divides them into three categories: *law as rules*, *law as a regime of social control* and *law as a process*.

According to Pound, “the oldest and longest continued use of the term ‘law’ in juristic writing is to mean the aggregate of laws, the whole body of the legal precepts which obtain in a given politically organised society... Law was an aggregate of laws and a law was an authoritative rule of conduct”.<sup>26</sup> This view is echoed in Hans Kelsen’s ‘Pure Theory’ of law, which argues that “[i]nternational law consists of norms that were created to regulate interstate relations... they impose obligations on, and grant rights to, all states”.<sup>27</sup> The next development, Pound claims, emerged when “Kant at the end of the eighteenth century applied the term to the condition which the body of precepts brings about or seeks to bring about and so came near to the idea of the legal order”.<sup>28</sup> Although neither are part of the Kantian tradition, the work of the American Legal Realists (in particular Robert Hale and Oliver Wendell Holmes)<sup>29</sup> and the international law scholarship which grew out of the Institutionalist school of International Relations (which includes the work of Anne-Marie

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<sup>25</sup> Macherey (1978), p155

<sup>26</sup> Pound, R., *The Ideal Element in Law*, (University of Calcutta, Calcutta, 1958), p1

<sup>27</sup> Kelsen, H. *Introduction to the Problems of Legal Theory* (Paulson, trans) (Clarendon Press, Oxford, 1992), p107

<sup>28</sup> Pound (1958), pp1-2

<sup>29</sup> See (i) Hale, R.L. “Coercion and Distribution in a Supposedly Non-Coercive State” *Political Science Quarterly* Vol.38, No.3 (Sept. 1923), pp470-494, (ii) Holmes, O.W. “The Path of Law” *Harvard Law Review* Vol. 110, No. 5 (Mar., 1997), pp 991-1009 and, for a secondary account, (iii) Kennedy (1991), pp327-365

Slaughter and Harold Hongju Koh)<sup>30</sup> both look beyond rules to consider the legal order. The former (which though not internalised by international law scholarship, is easily adapted from its domestic roots) focuses on law's role in the provision of the background 'rules of the game' for social interaction, which it has "not because it orders in the sense of telling [states] what to do and what not to do, but because [it] is an aspect of [states'] calculation of what they can get and get away with *in their* relationships with other [states]".<sup>31</sup> The latter, focuses on the more direct role of law in fostering international cooperation. Finally, Pound describes what he sees as a consequence of the development of functional analyses, the "increased attention to the phenomena of the actual administration of justice... what Mr. Justice Cardozo has taught us to call the 'judicial process'... As Llewellyn has put it, '[w]hat officials do about disputes is... the law itself'".<sup>32</sup> Elements of this approach can be found in the work of Myres McDougal, who argues that international law "is not a mere static body of rules but is rather a whole decision-making process... of continuous interaction... in which the decision-makers of particular nation states unilaterally put forward claims... and in which other decision-makers, external to the demanding state... weigh and appraise these competing claims... and ultimately accept or reject them".<sup>33</sup>

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<sup>30</sup> See (i) Koh, H.H. "The 1998 Frankel Lecture : Bringing International Law Home" *Houston Law Review* Issue 35 (1998-1999) pp623-681, (ii) Slaughter, A-M. "The Real New World Order" *Foreign Affairs* Issue 76 (Sept/Oct 1997) pp183-197 and, for secondary accounts, (iii) Steinberg, R. and Zasloff, J. "Power and International Law" *A.J.I.L.* Vol.100, No.1 (Jan., 2006), pp. 64-87 and (iv) Snidal, D. "International Political Economy Approaches to International Institutions" in Bhandari, J.S. and Sykes, A.O. (eds.) *Economic Dimensions in International Law: Comparative and Empirical Perspectives* (Cambridge University Press, Cambridge, 1997), pp477-512

<sup>31</sup> Kennedy (1991), p357 (emphasis in original) An example is provided by Warren Schwartz and Alan Sykes in their analysis of the 'most favoured nation' (MFN) rule (originally part of the General Agreement on Tariffs and Trade (GATT), now part of the World Trade Organisation (WTO) system) which requires that "any concession negotiated with a single trading partner or group of trading partners must be extended without condition to all other trading nations". As Schwartz and Sykes explain, "the MFN obligation serves as an important part of the rules governing the conduct of multilateral trade negotiations. Ex ante, the participants in the negotiations know that all concessions they give under MFN will extend to every other signatory government regardless of their ability to exact a quid pro quo. They further realise that they may benefit from concessions extended by others without having to give a quid pro quo. Ex post, the participants know that the value of any concession they obtain under MFN will not be impaired by subsequent and more generous concessions to other countries. Hence, the MFN requirement is not simply a rule that constrains trade discrimination, *but also a rule that shapes the bargaining game in the WTO/GATT system.*" (Schwartz, W.F. and Sykes, A.O. "The Economics of the Most Favoured Nation Clause" in Bhandari, J.S. and Sykes, A.O. (eds.) *Economic Dimensions in International Law: Comparative and Empirical Perspectives* (Cambridge University Press, Cambridge, 1997), p59 and 46 (emphasis in original), respectively.)

<sup>32</sup> Pound (1958), pp2-3

<sup>33</sup> McDougal, M. "The Hydrogen Bomb Tests and the International Law of the Sea" *A.J.I.L.* Vol. 49, No. 3 (Jul 1955), pp356-357

### Viewing law as rules

Although international law is a normative system to the extent that individual laws can be expressed as rules, to generalise from this and treat international law simply as “the sum total of a number of individual laws taken together”,<sup>34</sup> raises far more questions than it answers. For example, orthodox normative accounts may be able to explain *whether* a particular set of practices amongst states in a region has become a rule of regional, or even general, custom (and thus international law formally so-called). However, they cannot explain *why* some practices exist and others do not. For those that do exist, they cannot explain why some are formalised as (legal) rules and others not – remaining (political) ‘rules of international comity’<sup>35</sup> – without resorting to the nebulous, circular and contradictory principle of *opinio iuris sive necessitatis*, that “mysterious phenomenon of customary international law which is deemed to be a source of law only on condition that it is accordance with law”.<sup>36</sup>

Similarly, there is nothing inherent in the concept of *pacta sunt servanda*<sup>37</sup> which indicates that it ought to be regarded as a *legal* rule, and yet, as McDougal argues, it “is not a matter purely of verbal æsthetics what variables in [the] world power process are described as ‘law’”<sup>38</sup> and what variables are described as ‘politics’ or ‘economics’. The nominalist alternative, according to which the rules of international behaviour are “only law because we say they are law, rather than because of their form or essence”,<sup>39</sup> lacks any explanatory force. It offers no answer to the question of *why* we call some rules law, and others not. The critical distance between international law and International Law is erased (as both are assumed to exist at the conceptual level) not by conforming International Law to international law, but by collapsing the latter altogether, making the former into an empty signifier. Nominalism also precludes any investigation into *why*, if international law does not exist *as such* (because of the “radical contingency in the legal nature of international law”),<sup>40</sup> International Law has come to exist.

<sup>34</sup> Bentham, *Principles of Morals and Legislation* (1879) quoted in Pound (1958), p6

<sup>35</sup> Harris, D.J. *Cases and Materials on International Law* (6<sup>th</sup> edn) (Sweet & Maxwell, London, 2004), pp38-39. See also the North Sea Continental Shelf Cases (*Federal Republic of Germany v Denmark and The Netherlands* I.C.J. Reports 1969, p3) and the Asylum Case (*Columbia v Peru* I.C.J. Reports 1950, p266)

<sup>36</sup> Harris (2004), p38

<sup>37</sup> This international legal principle (that ‘every treaty in force is binding upon the parties to it and must be performed by them in good faith’) is repeated in Article 26 of the Vienna Convention of the Law of Treaties 1969 (1980) U.K.T.S. 58 Cmdn. 7964. See also Harris (2004), p828

<sup>38</sup> McDougal, M. “Law and Power” *A.J.I.L* Vol. 46, No. 1 (Jul 1952), pp109

<sup>39</sup> Miéville (2006), p14

<sup>40</sup> *Ibid*, p13

### Viewing law as *process*

McDougal proposes his ‘law as process’ alternative to what he sees as the focus of the normative conception of law “upon doctrine to the exclusion of the pattern of practices by which it is given meaning and made effective”.<sup>41</sup> In essence, McDougal argues for an account of law which takes into account not simply the *formal* authority to make decisions laid down by the rules of international law, but the *actual* procedures and policies followed and implemented in *effective* decision-making.<sup>42</sup> This provides the additional conceptual space necessary for the consideration of how individual international laws are made, interpreted and applied in customary practice, treaty-negotiation or judicial/arbitral decision-making, as well as an account of what happens when, as in the *Anglo-Norwegian Fisheries Case*,<sup>43</sup> international laws appear either to be in conflict or to ‘run out’. Here, Norway made claims that certain areas of sea fell within its territorial waters, claims which “could not be justified by reference either to explicit agreement or widely accepted custom, and which has been protested by other nation states, but by drawing upon all relevant sources of policy and a great variety of considerations in the context, the [International Court of Justice] concluded that Norway’s claims were lawful”.<sup>44</sup>

McDougal’s alternative, however, is also problematic: by viewing international law as a process only action is rendered, or recognised as, constitutive. The failure or refusal to participate (by not becoming a party to a treaty, tendering an appearance in an arbitral or judicial forum, populating yearbooks with legal opinions or enforcing a decision), is not captured by this *concept* of Law and thus the resultant effect of *inaction* on the *practice* of law remains untheorised.<sup>45</sup> As Michael Byres argues, “[t]he ability of powerful States to participate more effectively in the customary process [through having larger diplomatic corps able to follow international developments and promptly object to those contrary to

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<sup>41</sup> McDougal (1952), p110

<sup>42</sup> As McDougal argues, any “[m]eaningful exposition... must, therefore, make reference at least to the *participants* and their perspectives, including the demands they make on each other, the *interactions* in which they influence each other, the bases of their power, the *practices* they engage in, and the effects that they get.” Law, in this account, “when understood with all its commitments and procedures... offers... a continuous formulation and reformulation of policies”. (Ibid, pp107 and 111 (emphasis added))

<sup>43</sup> *U.K. v Norway* I.C.J. Reports 1951, p116

<sup>44</sup> McDougal (1955), p359 footnote 10

<sup>45</sup> Indeed, the blindness of process-driven definitions of law to moments of *inaction* is not entirely surprising given that a certain continuity of *action* is central to the very *definition* of the word ‘process’: “**process** (‘prəʊses) *n* 1 a *series of actions* that produce a change or development...” (Collins English Dictionary: Millennium Edition (HarperCollins, Glasgow, 1999), p1232 (emphasis added))

their interests as well as greater military, economic and political strength to enforce jurisdictional claims, impose trade sanctions and divert international criticism] may be partly concealed by the fact that States sometimes choose not to participate in that process in respect of particular rules... [furthermore], a powerful State's decision *not to participate* actively in respect of a particular rule may in some situations *also constitute an application of power* having effects of its own"<sup>46</sup> insofar as it *could* have participated and changed the outcome.

### Viewing law as social control

The final orthodox view is that which views international law as a regime of social control. Many accounts which use this conception view it as a regime of cooperation influencing individual and communal decision-making,<sup>47</sup> and even those, such as the Realists, who view the (international) legal order as essentially *coercive*, do not base their arguments (as rule-theories might) on the actuality and ever-present threat sanctions. Indeed, it is often pointed out by those Miéville calls 'international law deniers' (both those who deny that international law is *law* and those who 'just' deny that it is a *determining force* in international relations)<sup>48</sup> that the lack of a formal, supra-national and centralised sovereign entity, a Hobbesian Leviathan capable of unilaterally enforcing international law, means that international legal sanctions are often uncertain and visibly determined by political and economic concerns, even to orthodox textbook authors:

“The USSR and the US were not arraigned for intervening unlawfully in Afghanistan in 1979 and Grenada in 1983 respectively and Israel, though condemned by the UN, has never been brought to book for its annexation of Middle East territory... Iraq's invasion of Kuwait, which affected Western oil interests, was rapidly dealt with, but there was no such physical retaliation against Indonesia's invasion of East Timor”.<sup>49</sup>

Discussing law in terms of the *legal order* does not restrict inquiry to formal legal rules but instead recognises that international law is a total system which exists and affects social

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<sup>46</sup> Byers, M. *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press, Cambridge, 1999), p38 (emphasis added). The anthropomorphism inherent within the claim that a state can 'decide' is of course problematic, but it does not invalidate the underlying argument that a decision *not* to act can have as great, or even greater, effect than a decision to act.

<sup>47</sup> For example, Slaughter focuses on how “[n]ational regulators track their quarry through cooperation” and argues that, “[w]hile frequently ad hoc, such cooperation is increasingly cemented by bilateral and multilateral agreements”. (Slaughter (1997), p190)

<sup>48</sup> See Miéville (2006) pp16-32

<sup>49</sup> Harris (2004), p7

interaction even where particular rules are silent. In other words, it recognises that “[l]iving outside the law is an impossibility”.<sup>50</sup> This may be obvious with regard to *domestic* law but it applies equally to *international* law even if, in the daily lives of most people, its existence and effects appear both latent and distant in comparison. Secondly, this view allows the concept of International Law to capture, and thus explain, the situations of *apparent inaction* on the part of legal actors: it recognises that “the legal order permits as well as prohibits, in the simple-minded sense that it *could* prohibit, but [international judges and treaty-negotiators] reject demands from those injured that the injurers be restrained”.<sup>51</sup> Indeed, the permission of the international legal order may even be hidden within formal but unenforced prohibition: “a covert legal permission, which would often be highly controversial if formalised”.<sup>52</sup>

As Wesley Hohfeld argues, even in interactions where international law is silent, it is still responsible for the outcome insofar as it ‘could have made it otherwise’, and it is only because “we don’t think of ground rules of permission as ground rules at all, by contrast with ground rules of prohibition”<sup>53</sup> that the full ‘distributional consequences’ of law for social interaction largely remain unrecognised. This conception has much to offer the radical international law project in its displacement of the more simplistic alternatives but, however insightful, its usefulness *in the current context* is limited by the fact that what it

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<sup>50</sup> Kinsey (1978), p204

<sup>51</sup> Kennedy (1991), p333 (emphasis in original). By definition, this is an aspect of the international legal order which does not easily lend itself to illustration by particular example though it may be witnessed each time an international conference on environmental or humanitarian issues fails to reach and produce an agreement.

<sup>52</sup> Ibid, p346. *The Nicaragua (Merits) Case* (Nicaragua v United States of America, I.C.J. Rep 1986, p14) is a paradigmatic example of this. The ICJ found the United States to be in breach of international legal prohibitions on *intervention* in the affairs of another nation-state, *use of force* against another nation-state and *violating the sovereignty* of another nation-state when it aided Nicaragua’s domestic anti-government *Contras* and engaged in direct attacks in Nicaraguan waters. This *formal* maintenance of international law’s prohibition on such action, however, must be viewed in light of the *actual* fact (recognised by the court at one point in its judgement, but only in order to attempt to explain it away by reference to the unique process of decolonisation) that “there [had] been in recent years a number of instances of foreign intervention for the benefit of forces opposed to the government of another State” (paragraph 206). Indeed, as Rasulov points out, “the idea that a superpower could regularly engage in a certain amount of unilateral interventionism as well as deliver a pre-emptive strike against its arch-enemies was certainly not alien to [the international legal order]. At least since the mid-1950s... this idea was articulated [by the U.S.] in the language of ‘pro-democratic invasions’. On the Soviet side, the preferred nomenclature was that of ‘international socialist duty’.” (Rasulov, A., “Writing About Empire: Remarks on the Logic of a Discourse” *L.J.I.L.* 23(2) 2010 pp456-457) A further (economic, rather than military) example, is given by Sally Engle Merry: “CEDAW is law without sanctions”. Although there is a monitoring process (to demonstrate the commitment of those governments who ratified the convention to eliminate gender discrimination), it is not incidental that its impact is at best “indirect, filtered through pre-existing global inequalities” (of both gender and class) which are an *integral part of transnational relations of production* in contemporary capitalism. (Merry, S. “Human Rights Law as a Path to International Justice: The Case of the Woman’s Convention” in Dembour, M-B. and Kelly, T. *Paths to International Justice: Social and Legal Perspectives* (Cambridge University Press, Cambridge, 2007) pp163, 174)

<sup>53</sup> Kennedy (1991), p333

illuminates is international law's *function*, rather than its *nature*: it is in essence a group of claims about what law *does* (regulates social interaction), not what it *is*.

### Viewing law as 'all things to all men'

While orthodox scholars "inquire, often in a sustained, sophisticated, and quite critical manner, into the consequences, meanings, value, and formal definitions of artefacts like 'rights,' 'principles,' or 'rules,' they virtually never question the *ontological identity or status* of such legal artefacts".<sup>54</sup> This is why orthodox accounts, even where they provide nuanced *descriptions* of international law, are unable to provide a convincing *explanation* of it; we have an account of the *how* without the *what*. To move beyond description, a theory of international law needs not only to provide conceptual space for its distinct existence within the wider structure of modern social relations, but must also account for this existence, for what is specific about it. For if there is no significant difference then it makes little sense to talk of and analyse international law as a distinct phenomenon at all; if there is, then identifying and analysing this difference will help provide a useful and coherent account of what international law is, even if the distinctiveness that will be thus reached at the level of concepts would not easily translate into a clear empirical separation of international law from the other major parts of that structure.

The definitions analysed above have all adhered in orthodox scholarship because, despite their problems, they each capture *an aspect* of how international law operates and what it appears to be. One of the core problems with the orthodox approach, however, lies in its attempted solution to the individual issues with these definitions: "taking all three of these meanings as included in the one term [International Law] ...and then assuming that the whole may be defined"<sup>55</sup> results in no factor being ultimately determinative and distinguishing, and thus any account produced being either vague and shapeless or self-contradictory. International law becomes at once an activity (or activities) in which legal professionals and legal subjects engage, a subject which exercises control by forbidding or permitting actions, and as an object (or a collection of them) which may be made, enforced or violated. Pierre Schlag offers a cutting critique of this in his analysis of what he calls the 'objectivist' and 'subjectivist' aesthetics.

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<sup>54</sup> Schlag, P. *The Enchantment of Reason* (Duke University Press, Durham, 1998), p97 (emphasis in original)

<sup>55</sup> Pound (1958), p3



In the former, law and “legal entities (principles, policies, rules, and so on) are perceived, apprehended, and expressed in the same manner as aspects of *physical* reality”.<sup>56</sup> This is so common, indeed, that the underlying assumptions go largely unremarked despite being ‘downright bizarre’:

“[I]t is one thing to affirm that rocks, hammers or car engines partake in the object-form – that they are substantial, bounded, divisible (and so on). It seems to be quite another to affirm the same thing about race discrimination law, personal jurisdiction, or involuntary manslaughter.”<sup>57</sup>

In the latter, “Law ‘requires’, it ‘demands’, it ‘obligates’, it ‘compels’. Law and the legal entities are cast as the effective source of legal action. And they become personified – endowed with the characteristics reserved for subjects: will, intention, purpose, and even personality.”<sup>58</sup> This anthropomorphisation, or even deification, of the law (‘magical thinking’ as Schlag calls it) is, of course, equally bizarre. Although it may be possible to argue that such oddities, ambiguities and contradictions are not errors of analysis but a feature of the presence-action of international law in the multitude complexities and contradictions of global society, this elides methodological eclecticism and empirical complexity, resulting in an unintentional quasi-Hegelian International Law as the ‘sewer into which all contradictions flow’.

## **Finding *form* through Marxian scholarship**

What Marxian scholarship offers by way of improvement upon the problems with orthodox scholarship analysed above, given that both are orientated towards the same phenomenon, international law, is a qualitatively different concept of International Law derived from the fact that Marxists approach things differently: they ask a different kind of question and focus on a different set of problems.

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<sup>56</sup> Schlag (1998), p102 (emphasis added)

<sup>57</sup> Ibid, p103

<sup>58</sup> Ibid, p104

Reprieve and crossover: viewing law as (*hegemonic*) social control

Because of the insights it provides, the orthodox view of *law as a regime of social control* is one which has found traction also within Marxian legal scholarship. Unfortunately, this has also sometimes meant the importation of its problematic tendencies, with some Marxist accounts resorting to a crude reductionism wherein the legal order is treated as a simple and conscious system of brute repression by capitalists, exercised primarily through nation-state institutions.<sup>59</sup> This clearly offers no meaningful contribution to an analysis of the *international* legal order: it relies on the exercise of police power which has no direct analogy in international relations, it provides no reason why repression occurs *through law*, rather than remaining openly political or economic in nature, and it ignores the fact that international law does not *typically* operate through the kind of direct oppression which such an account would suggest. As Knox argues, “those whose needs go unfulfilled are much greater in number and, by consequence, possess a much greater potential capacity for violence than those who ‘own’. If violence were the only, or primary, guarantee of commodity exchange [and the legal order built upon it], then it would have been overthrown long ago”.<sup>60</sup>

To understand the other, crucial, ‘guarantee’ it is necessary to turn to the explanatory force of the concept of Ideology. However, in order to do so effectively, it is necessary first to clarify what phenomenon is being designated by it. Marks, in her book *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology*,<sup>61</sup> outlines a number of different ideas of what Ideology is meant to describe, most of which would not positively contribute to the radical international law project. Where, for example, ideology is seen as existing simply in (mistaken) ideas it makes sense to argue, as Miéville does, that the ideological function of international law is not “*all*, or even primarily or most interestingly what there is to it [because] actually-existing law is manifestly *not* ‘merely’ ideological [in this sense], but impinges on and regulates everyday life at all levels”.<sup>62</sup> Indeed, as Marks herself argues, “the problem with ideology is not that it involves error,

<sup>59</sup> Notably, as Piotr Ivanovich Stučka highlights, “[t]he first official Soviet definition of the concept of law was provided by the People’s Commissariat of Justice of the RSFSR in 1919... in the guiding principles for *criminal law*: ‘law is a system (or order) of social relations corresponding to the interests of the ruling class and *protected by its organised force* (i.e., by the class state).’ See *Sobranie Uzakonenii* No.66, Item 490 quoted in Stučka, P.I. *Selected Writings on Soviet Law and Marxism* (Sharlet, Maggs and Beirne eds) (M. E. Sharpe, London, 1988) pp143-144 (emphasis added)

<sup>60</sup> Knox, R. “Marxism, International Law, and Political Strategy” *L.J.I.L* 2009, 22(3), p426

<sup>61</sup> (Oxford University Press, Oxford, 2000)

<sup>62</sup> Miéville (2006), p82 (emphasis in original)

but that it sustains privilege. To be sure, mystification is in play, but the ideas nurtured are not simple mistakes or inaccuracies; they are *as much a part of the prevailing reality* as is the privilege they serve to sustain.”<sup>63</sup> This dual insight, that ideology is more than the ‘velvet glove’ of lies and propaganda hiding the ‘iron fist’ of capitalist repression, finds its most radical formulation in the work of Althusser, who also provides the explanation for the (re)production of ideology:

“[A]n ideology always exists in... its practice. This existence is material. Of course, the material existence of the ideology... does not have the same modality as the material existence of a paving-stone or a rifle. But... we are indebted to Pascal’s defensive ‘dialectic’ for the wonderful formula which will enable us to invert the order to the notional schema of ideology [that ‘men tend to do what they think they are doing’]. Pascal says more or less: ‘Kneel down, move your lips in prayer, and you will believe.’ ...Ideas have disappeared as such (insofar as they are endowed with an ideal or spiritual existence), to the precise extent that it has emerged that their existence is inscribed in the actions of practices governed by rituals defined in the last instance by an ideological apparatus.”<sup>64</sup>

The ideology of international law is the result of totality of the material practices of international legal actors and international legal professionals of all types, and any critique must take these material practices, and not simply the ideas secreted by them, seriously.

It is possible to construct a more nuanced version of the Marxian account of international law as a *regime of social control*, which does exactly this, using the insights provided by Gramsci’s concept of *Hegemony*, which “makes it possible to grasp the connection between the ways in which social consciousnesses are formed and the exercise of political (or class) rule under conditions of high levels of popular consent”<sup>65</sup> and in the absence of generalized repression. Hegemony, for Gramsci, designates the ‘ideological subordination’ of the working class through processes in which “[t]he world view of the ruling class... [is] so thoroughly diffused... as to become the common sense of the whole of society”,<sup>66</sup> at least in part by incorporating “*some* aspects of the aspirations, interests, and ideology of subordinate groups”.<sup>67</sup> This incorporation is not only the result of

<sup>63</sup> Marks, S., “Introduction” in Marks, S. (ed), *International Law on the Left* (Cambridge University Press, Cambridge, 2008a), p.8 (emphasis added)

<sup>64</sup> Althusser, L. *On Ideology* (Verso, London, 2008), pp40-44 with quoted phrase in square-bracketed insert from Pound (1958), p6

<sup>65</sup> Hunt, A. “Rights and Social Movements: Counter-Hegemonic Strategies” *Journal of Law and Society* Vol. 17, No. 3 (Autumn, 1990), pp310-311

<sup>66</sup> McLellan, D. *Marxism After Marx* 4th edn. (Palgrave Macmillan, Hampshire, 2007) , pp200-201

<sup>67</sup> Hunt (1990), p311 (emphasis added). As Hunt explains, “[t]he work which Gramsci does on Marx’s concept of ideology is fivefold. Focus is shifted from the intellectual plane of philosophical systems to the formation of popular consciousness or common sense. Second, there is less emphasis on ideology as

conscious concession but also the result of class struggles: as Macherey argues, “a historical period does not spontaneously produce a single, monolithic ideology but a series of ideologies determined by the total relation of forces; each ideology is shaped by the pressures upon the class which generates it”.<sup>68</sup>

The introduction of the concept of ‘consent’ into an account of law as coercion is, however, not without its problems: as Hunt argues, “[t]he more Marxism has succeeded in overcoming... its tendency towards an instrumental reduction of law to the state and the state in its turn to organised violence, the more it has, paradoxically, manifested the dualism coercion/consent which characterises ‘bourgeois’ legal thought”.<sup>69</sup> This can be seen in the ‘rupture’ between Marxian approaches to domestic law that focus on “the regulation of the social relations of production”<sup>70</sup> through property and contract law, and on “the role of law in the preservation of class domination”<sup>71</sup> through criminal and constitutional law, which, if unsophisticatedly reintegrated, can lead to “an unstable analysis which lurches between the polarities set up... [while] the elements themselves remain discrete and... are not seen in the combinatory effect”.<sup>72</sup> Hunt’s argument that the consent-coercion (or, in Marxist terms, ideology-repression) binary does not exhaust what may usefully be said about (international) law finds support in the writings of Poulantzas

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‘system’, as integrated or coherent. Third, ideological struggle is viewed, not as titanic struggles between rival *Weltanschauungen*, but as practical engagements about shifts and modifications in ‘common sense’, or popular consciousness. Fourth, is the emphasis on ideologies as active processes which “‘organise’ human masses and create the terrain on which men [*sic*] move, acquire consciousness of their position, struggle, etc.’ Fifth, his conception of ideology is positive whilst Marx’s was negative. For Marx ideology blocked and distorted, whilst for Gramsci it provided the very mechanisms through which participation in social life was possible.” (Hunt (1990), p310) Marks’ work on the critique of ideology also provides a number of important insights into the ‘modes, strategies and manoeuvres’ through which ideology can operate. (See Marks (2000), pp18-25). Furthermore, Marks argues, pithily, “a totality is not a monolith”, and works to reveal “how counter-logics get obscured – but also how they may be revealed and further activated as instruments for emancipatory change” in an *active* process of struggle over meaning and practices (rather than simply a process of *passive* reception by subordinate groups of a singular dominant ideology). (Marks (2007), p208)

<sup>68</sup> Macherey (1978), p115

<sup>69</sup> Hunt, A. “Dichotomy and Contradiction in the Sociology of Law” *British Journal of Law and Society* Vol. 8 No. 1 (Summer 1981), p62

<sup>70</sup> Ibid, p63

<sup>71</sup> Ibid, p63

<sup>72</sup> Ibid, p52 Though written in the context of sociological investigation centred upon domestic law, this is a criticism which dovetails with Martti Koskenniemi’s theory in *From Apology to Utopia: the Structure of International Legal Argument* (Lakimiesliiton Kustannus, Helsinki, 1989) where he accepts the concept of indeterminacy and applies it not only at the linguistic-theoretical level, but the concrete instance of legal argument. Koskenniemi argues that the tendency for law to ‘oscillate like a pendulum’ between opposing poles is not simply a function of the structure of legal analysis, but the structure of the law itself. See in particular pp503-512 and 590-596. Interestingly, Marks argues (*contra* Koskenniemi) that “determinacy and indeterminacy are not properties of international law, but [instead] *arguments* which we use in different contexts for different ends”. Whichever position is accepted, what Marks’ analysis provides is a valuable reminder that recognising (international) law as indeterminate is not *in itself* radical: “the idea that international law is indeterminate may sometimes serve as a critique of ideology, sometimes as ideology itself”, such as when it dissuades the working class from arguing in favour of determinacy in a situation where it might be to their benefit. (See Marks (2007), pp208-209 (emphasis in original))

who criticises the idea that law “functions through repression and ideological inculcation, and *nothing else*... [and that its power lies] in what it forbids, rules out, and prevents; or in its capacity to deceive, lie, obscure, hide and lead people to believe what is false.”<sup>73</sup>

Hunt outlines the danger in this dichotomous theorising that the problematic nature of consent becomes obscured through being contrasted with the obvious evil of coercion, while Poulantzas adds that it also leads to a conception of the state which acts only through ‘terror or trickery’, thus ignoring the relation of the masses to power which forces the state to act “within an unstable equilibrium of compromises between the dominant classes and the dominated”.<sup>74</sup> For Hunt dichotomy finds its ‘most general expression’ in the work of Gramsci but this is based on a simplistic reading of the Gramscian account. Gramsci, far from not recognising consent as problematic, built a theory which is a *critique* of the ‘consent’ produced by the bourgeoisie and internalised and thus *reproduced* by the proletariat. As such, it provides a *solution* to Hunt’s problematic. Importantly, “Gramsci’s focus is upon the securing of ‘leadership’ and ‘direction’ by the dominant bloc rather than upon the more passive idea of consent itself”.<sup>75</sup>

### Viewing law as *relationship*

However insightful, Gramsci’s account of Hegemony, like its orthodox equivalents, is more useful for explaining what international law *does*, not what it *is*. For an understanding of the legal *form* necessary for a radical International Law, we must turn to the work of Pashukanis. As summarised neatly by Miéville:

“Pashukanis argues that *the logic of the commodity form is the logic of the legal form*... in commodity exchange, each commodity must be the private property of its owner, freely given in return for the other. In their fundamental form commodities exchange at a rate determined by their exchange value, not because of some external reason or because one party to the exchange demands it. Therefore, each agent in the exchange must be i) an owner of private property, and ii) formally equal to the other agent(s)... The legal form is the *necessary form* taken by the relation between these formally equal owners of exchange values.”<sup>76</sup>

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<sup>73</sup> Poulantzas, N. *State, Power, Socialism* (NLB, London, 1978), p30 (emphasis in original)

<sup>74</sup> Ibid, p31

<sup>75</sup> Hunt (1990), p311

<sup>76</sup> Miéville (2006), p78 (emphasis in original)

The key elements of Pashukanis' contribution will be dealt with below: the identification of international law as a *relationship*, the question raised of the *homology* of the legal form and the commodity form and the provision of a possible solution to the apparent *contingency* of law's 'law-ness' in the alternative accounts discussed above.

## Relations of exchange and production

Viewing law as a relationship turns the most pervasive orthodox account on its head: focusing on rules "posits an international law that is outside [social] relationship[s] and *applies* to [them]. For Pashukanis on the other hand, *out of the relationship comes the law*".<sup>77</sup> Of course, in itself, this is not particularly radical: even the orthodox *law as regime* theorists recognised that "the law of possession could not possibly have been evolved before a system of possession was in existence [and p]rovisions of law with reference to contract could not possibly have come before the corresponding agreements had been made".<sup>78</sup> The orthodox accounts, however, simply posit what are in essence distinct, proto-legal, precursors of the contemporary legal regimes and relations they analyse, rather than making the *radical* analytical move of linking the relationships underlying legal norms to the totality of capitalist social (*class*) relations. Furthermore, too great a focus on a *social order* risks uncritically privileging structures over agency and thus limiting the scope of investigation into the individuals and classes whose interactions are being *ordered*.

Pashukanis, focusing on the commodity-form, finds the explanation of international law's form in the *capitalist exchange relation* and Miéville builds on this an account of the international legal order which locates the violence of international imperialism in that same relation. However, such 'violence' (here referring more to capitalist relations of domination than mere physical force, though the former of course involves the latter) "is the violence of the market, of the commodity, and of the legal form, but it is not class violence. The necessity of coercion inheres in the exchange of commodities, not on a particular mode of production and exploitation".<sup>79</sup> Yet class is at the heart of the Marxist theory, not least because, as Chris Arthur argues, "it is precisely one of the interesting features of bourgeois exploitation that it inheres in economic relations that *do not* achieve

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<sup>77</sup> Miéville (2006), p74

<sup>78</sup> Ehrlich, E. And Isaacs, N. "The Sociology of Law" *Harvard Law Review* Vol. 36, No.2 (Dec., 1922), p139

<sup>79</sup> Miéville (2004), pp297-298

formal legal expression... The monopolisation of the means of production by the capitalist class is an *extra*-legal fact (quite unlike the political-economic domination of the feudal lord)".<sup>80</sup> Indeed, Marx himself argued that "[t]he way in which men produce their means of subsistence... must not be considered simply as being the production of the physical existence of the individuals. Rather it is... a definite *mode of life* on their part... What they are, therefore, coincides with their production, both with *what* they produce and with *how* they produce"<sup>81</sup> rather than *how* they exchange the products of that production.

There is clearly tension here insofar as "Marx derived law from relations of commodity production, [whereas] Pashukanis derived it from commodity exchange",<sup>82</sup> and some theorists, including Robert Fine and more recently Bill Bowring, argue that the commodity-form theory is therefore 'plainly wrong', at least by Marxian standards. Miéville's counterargument – that under capitalism, "[n]ot only is all production *for* exchange, but the producers only avail themselves of production *by* exchange: that is the nature of wage-labour... the wage-labourer sells her labour-power to the capitalist for its value, in an act of exchange without which capital would be paralysed"<sup>83</sup> – is interesting but insufficient. Although capitalist production cannot take place without the exchange inherent in the employment contract, it is *production* which has ontological (and should have epistemological) primacy. As Macherey explains:

"[T]he [commodity] does not produce its [consumers] by some mysterious power; the conditions that determine the production of the [commodity] also determine the forms of its [consumption]. These two modifications are simultaneous and reciprocal... the guiding principle for which is to be found in Marx's statement 'Not only the object of consumption but also the mode of consumption is produced, not only in an objective way but also subjectively'."<sup>84</sup>

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<sup>80</sup> Arthur, C. "Introduction" in Pashukanis, E. *Law and Marxism: a General Theory* (InkLinks, London, 1978) p30 (emphasis in original) Indeed, as Marks argues "[e]xploitative relations are disavowed by law, and masked by an ideology that represents participants in the labour market as free and equal". (Marks, S. "Exploitation as an International Legal Concept" in Marks, S., (ed) *International Law on the Left* (Cambridge University Press, Cambridge, 2008b), p292

<sup>81</sup> Marx, K. and Engels, F. *The German Ideology* (Arthur, C.J. ed) (Lawrence & Wishart, London, 1974), p42 (emphasis in original)

<sup>82</sup> Fine (2002), p150

<sup>83</sup> Miéville (2006), p94

<sup>84</sup> Macherey (1978), p70 In its original, literary, terms, a "book does not produce its readers by some mysterious power; the conditions that determine the production of the book also determine the forms of its communication".

This, of course, complements Richard Kinsey's argument:

“Precisely because the relations between private labours becomes in practice the abstraction ‘abstract labour’ it can be posed theoretically as such. Nonetheless it is a lived relation. Equally, the juridical relation between men in alienation as abstract wills can be posed theoretically as such, precisely because it is a determinate relation of commodity exchange... As such, for Marx... *such an abstraction can never be treated as an abstract universal separable from the production process, that is, its history*”.<sup>85</sup>

The logic of commodity exchange Miéville outlines is *necessary but not sufficient* to explain (international) law: the legal *form* may be related directly to the movement of the (global) economy in general precisely because it is abstract and general, but legal *content* cannot share that relation because, like a given social formation (be it national, regional or global), it is instead concrete and particular. The imperialist nature of international law is thus not simply in the immanent but abstract conflict of the legal form, but also the imported, concrete, repression of economic exploitation inherent in transnational productive relations at a particular point in the historical development of global capitalism.<sup>86</sup>

### Relating base and superstructure

Discussion of the relative importance of relations of production and exchange brings us to the famous Marxian ‘base-superstructure metaphor’ – that spatial representation of the economy as the ‘base’ of capitalist society and law as part of the ‘superstructure’ which rests upon it. Some, including Poulantzas, argue that the metaphor is misleading because it suggests “the possibility and legitimacy of *a general theory of the economy* taken as an epistemologically distinct object”,<sup>87</sup> and thus leads to two opposite, but linked, misconceptions. The first, vulgar economism, holds that “any specific examination of the superstructural fields as objects in their own right is quite simply inadmissible, since the general theory of the economy provides the keys to explaining the superstructures as

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<sup>85</sup> Kinsey (1978), p215 (emphasis added).

<sup>86</sup> Perhaps the most well-known account of actually-existing exploitation in global productive processes is provided by Naomi Klein in her book *No Logo* (Harper Perennial, London, 2005). For an insightful account of the use of the concept in international legal scholarship, as well as a concise historical account of the orthodox and Marxist uses of the term, see Marks (2008b), pp 281-307.

<sup>87</sup> Poulantzas (1978), p16 (emphasis in original)



mechanical reflections of the economic base”.<sup>88</sup> The second, associated with politicism, holds that “this general theory [of the economy] has to be duplicated by analogy in a *general theory* of every superstructural field”,<sup>89</sup> such as the international law. Both are, of course, reductionist and, to the extent that the metaphor does imply such, Poulantzas is right to reject it – particularly because, as Piers Beirne reminds us, “Marx's own work never posited an *a priori* causal structure... [but rather] a relational form of analysis whereby particular social relationships between classes are to be understood within the contexts of empirical and historical exigencies”.<sup>90</sup> A far more useful reading of the metaphor is the, perhaps somewhat unorthodox, one provided by Raymond Williams in his *New Left Review* article from 1973:

“We have to revalue ‘superstructure’ towards a related range of cultural practices, and away from a reflected, reproduced or specifically dependent content. And, crucially, we have to revalue ‘the base’ away from the notion of a fixed economic or technological abstraction, and towards the specific activities of men in real social and economic relationships, containing fundamental contradictions and variations and therefore always in a state of dynamic process.”<sup>91</sup>

This not only complements Anthony Chase’s argument, accepted by Miéville, that “[i]t is the economy as a source of change... rather than as an unmediated cause... that should draw our attention”,<sup>92</sup> but also accords the robust materialism of Holloway and Picciotto’s argument that:

“...the economic and the political are both forms of social relations, forms assumed by the basic relation of class conflict in capitalist society, the capital relation; forms whose separate existence springs, both logically and historically, from the nature of that relation. The development of the political sphere is not to be seen as a reflection of the economic, but is to be understood in terms of the development of the capital relation, i.e. of class exploitation in capitalist production.”<sup>93</sup>

It is a failure to recognise this nuance which has meant that so “many writers within the Marxian tradition have sought to construct a coherent theory of law’s place within the

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<sup>88</sup> Ibid, p16

<sup>89</sup> Poulantzas (1978), p16 (emphasis in original)

<sup>90</sup> Beirne, P. “Empiricism and the Critique of Marxism on Law and Crime” *Social Problems* Vol. 26, No. 4, April (1979), p380

<sup>91</sup> Williams, R. “Base and Superstructure in Marxist Cultural Theory” (1973) 82 *N.L.R.* p6 quoted in Kinsey (1978), p210

<sup>92</sup> Chase, A. *Law and History. The Evolution of the American Legal System* (The New Press, New York, 1997), p 45 quoted in Miéville (2006), p89

<sup>93</sup> Holloway, J. and Picciotto, S. “Introduction: Towards a Materialist Theory of the State” in Holloway, J. and Picciotto, S. (eds) *State and Capital: a Marxist Debate* (Edward Arnold, London, 1978), p14

capitalist system”<sup>94</sup> without success, because the alternative to seeing legal and economic analyses as two “ways of approaching a larger whole rather than disciplines focusing on natural divisions in social life that are capable of being understood as self-contained systems”<sup>95</sup> is to internalise the orthodox disciplinarity which overdetermines any conclusion by presuming the separation it purports to analyse. Indeed, as Poulantzas highlights, whatever the causal relationship:

“[The capitalist social totality] does not arise out of the combination of various instances, all of which possess an inalterable structure before they come into relation with one another. It is rather the mode of production itself – that totality of economic, political and ideological determinations – which fixes the boundaries of these spaces, sketching out their fields and defining their respective elements. They are *from the very beginning* constituted by their mutual relation and articulation”.<sup>96</sup>

If the spatial metaphor is to be kept, therefore, it needs to reflect the fluid and sometimes messy actually-existing interpenetration of the levels rather than the neat and static idealised relation. Stone argues, that “[t]he legal system is... another arena for pursuing economic conflict, but it is not the same as the economic system. Its central actor is not the economic man/woman of the marketplace, but the judicial one”.<sup>97</sup> Although to an extent this is true, the mutuality of the legal and economic spheres lies in the fact that both of the abstract ‘personalities’ Stone identifies inhere immediately in the *same* concrete individuals: *homo juridicus* and *homo economicus* are epistemologically *but not ontologically* distinct. This is an important point, for however nuanced the analysis, and however ‘dynamic’ and ‘mutually interrelated’ the base and superstructure are taken to be, the spatial metaphor still has at its core an assumption that the levels *are* ontologically distinguishable, an assumption which is called into question by Rasulov:

“What exists in empirical reality, from the Marxist point of view, is only one single undifferentiated totality of the social intercourse... Unlike liberal-bourgeois thought, the Marxist tradition does not, thus, treat the ideas of ‘economy’, ‘politics’, ‘law’, ‘art’, etc., as though they were somehow reflective of some objectively verifiable essences. The only objectively verifiable essences that can be said to exist from the Marxist-theoretical point of view are... ‘total social facts,’... ‘Economy’, ‘politics’, ‘law’ – all these terms, from the classical Marxist point of view, ultimately represent nothing more than just so many *historically convenient labels of description*, symbols that in the end say far less about the inherent objective characteristics of those phenomena which they purport to describe than

<sup>94</sup> Stone, A., “The Place of Law in the Marxian Structure-Superstructure Archetype” *Law & Society Review* Vol. 19, No. 1 (1985) p39

<sup>95</sup> Stone (1985), p41

<sup>96</sup> Poulantzas (1978), p17 (emphasis in original)

<sup>97</sup> Stone (1985), p45

about the various historically determined analytical focuses which the describers in question have brought to their studies of those phenomena.”<sup>98</sup>

At this point it is useful to deal with the natural question which arises; why, if law is a *relationship*, an aspect of the ‘undifferentiated totality of the social intercourse’, does it appear as a distinct *thing*, whether that thing is a system of rules, a social order or something else? Although Pashukanis’ theory solves a number of problems, he leaves this aspect undertheorised and for an answer we must turn to Lukács and his account of the process of reification.<sup>99</sup>

## Reification

Lukács talks of reification primarily in the context in which Marx first describes the process – the *economic* relations in capitalism between buyer and seller of commodities in the marketplace. However, “the problem of commodities must not be considered in isolation or even regarded as the central problem in economics, but as the central, structural problem of capitalist society in all its aspects”,<sup>100</sup> including its *legal* aspect, because in law, as in economics, “a relation between people takes on the character of a thing and thus acquires a ‘phantom-objectivity’, an autonomy that seems so strictly rational and all-embracing as to conceal every trace of its fundamental nature: the relation between people”.<sup>101</sup>

Both production and exchange are relations between people: in the case of production it is a relationship between the ‘owners’ of the elements of the means of production (raw materials, machinery/technology and, importantly, human skill/strength) and in the case of exchange it is a relationship between the ‘owners’ of the products of productive processes (physical products themselves, or the exchange-value in money of products previously produced and exchanged). The products of productive processes “assume the form of commodities inasmuch as they are exchangeables, i.e. expressions of one and the same [measure of value]”.<sup>102</sup> At the same time:

<sup>98</sup> Rasulov, A., “The Nameless Rapture of the Struggle” *Finnish Yearbook of International Law* Vol. 19 (2008a) p275. See also Mauss, M. *The Gift* (Trans. Halls, W.D.) (Routledge: London, 2002)

<sup>99</sup> See Lukács, G. *History and Class Consciousness* (Merlin Press, London, 1971) pp83-110

<sup>100</sup> *Ibid*, p83

<sup>101</sup> *Ibid*, p83

<sup>102</sup> *Ibid*, p85

“Through the subordination of man to the machine the situation arises in which men are effaced by their labour in which the pendulum of the clock has become as accurate a measure of the relative activity of two workers as it is of the speed of two locomotives. Therefore, we should not say that one man’s hour is worth another man’s hour, but rather than one man during an hour is worth just as much as another man during an hour. Time is everything, man is nothing; he is at most the incarnation of time.”<sup>103</sup>

However, this “formal equality of human labour in the abstract is not only the common factor to which the various commodities are reduced; it also becomes the real principle governing the actual production of commodities”<sup>104</sup> insofar as the worker’s “own labour becomes something objective and independent of him, something that *controls* him by virtue of an autonomy alien to man”<sup>105</sup> while at the same time being a commodity *belonging to* him. Reification makes these social interactions of production and exchange appear as objective features (inhering in exchange-value) of the commodities, and so makes their exchange appear as a relation between the commodities themselves, rather than their owners: the interactions of relationships become the relations between things. This is an ideological process in both senses described above. Although it has been said that “all reification is a forgetting”,<sup>106</sup> not only does the social relation of production *appear* as a relation between things, but “[o]bjectively a world of objects and relations between things springs into being... [and t]he laws governing these objects... confront [us] as invisible forces that generate their own power”.<sup>107</sup>

For legal relations, reification makes the social interactions of legal subjects (inhering in negotiation of contract/treaties, legislation, adjudication, enforcement etc.) appear as objective features of the concrete outcomes of these relations, and so makes the legal system appear as a relation between the laws themselves, rather than the legal subjects. Legal rules are simply reified legal relationships, frozen in time,<sup>108</sup> which take on the form of *things* capable of affecting other relationships from a position of externality rather than, as they are, constituent parts of those relations.<sup>109</sup> Even more fundamentally, legal

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<sup>103</sup> Lukács (1971), p89

<sup>104</sup> Ibid, p87

<sup>105</sup> Ibid, pp86-87 (emphasis added)

<sup>106</sup> Adorno, T. And Benjamin, W. *The Complete Correspondence 1928-1940* (Trans. Walker, N.) (Polity Press, Cambridge, 1999), p321

<sup>107</sup> Lukács (1971), p87. Reification, to use Duncan Kennedy’s words, is not merely “one of the mind-fucks of capitalism”. (Kennedy, D. “The Role of Law in Economic Thought: Essays on the Fetishism of Commodities” *The American University Law Review* Vol.34 (1985), p969)

<sup>108</sup> McDougal stumbles upon this insight without fully understanding its implications when he describes international legal rules as a ‘frozen cake of doctrine’. (McDougal (1952), p111)

<sup>109</sup> This sub-chapter has focused only on the de-reification of legal *rules* because of the constraints of space in a thesis of this length and because the conception of law *as rules* is the most common in orthodox legal

relations between abstract legal subjects, such as states, are *themselves* the products of the reification of the social relations surrounding the production and exchange of concrete objects by concrete individuals.

This is why the accounts of Marxist international law scholars who have not broken free of the orthodox conceptualisation of law as rules, are still valuable. They give an account of the reified objectivity that is the *content* of law (though they mistake this for its *nature*) while Pashukanis pierces the reification to give an account of its *form*. Although focusing on content “provides an explanation of the fact that legal norms conform to the material needs of particular social classes”,<sup>110</sup> “to proceed beyond a nebulous left functionalism, the content of law must be considered the content of a particular form”.<sup>111</sup> Pashukanis, however, does not provide us with a theory of how form and content are related, and this is a point to which it will be important to return, for this is what is needed to formulate a systematic, coherent and radical analysis of the international legal order.

Keeping with the issue of reification, although Pashukanis does not call it such, he recognises a second and even more fundamental reification than the one outlined above. This double reification goes to the heart of why law is not contingent, and takes place in that same moment of exchange in which the commodity form and the legal form are born, together:

“[A]t a particular stage of development, the social relations of production assume a mysterious form. On the one hand they appear as relations between things (commodities), and on the other, as relations between the wills of autonomous entities equal to each other – of legal subjects. In addition to the mystical quality of value, there appears a no less enigmatic phenomenon: law.”<sup>112</sup>

Law is thus not something external, accidental and contingent, but an integral and *necessary* part of the relationship of commodity exchange. It is the lack of a theorisation of the *necessity* of international law for global capitalism – or rather the necessity that a certain relationship arises and has the features which we describe as legal (formal equality, objectivity, etc.) – which is the recurring weakness of the other conceptions of law, and

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scholarship. However, in order to continue the process of the de-reification of (international) law, this must be augmented by attempts to de-reify legal *processes* which, like rules, do not exist in the abstract as autonomous *things*, but instead continuously (re)produced by relationships between individuals and classes.

<sup>110</sup> Pashukanis, E. *Law and Marxism: A General Theory* (InkLinks, London, 1978), p55 quoted in Miéville, (2006), p118

<sup>111</sup> Miéville, (2006), p118

<sup>112</sup> Pashukanis (1978), p117 quoted in Miéville, (2006), p90

which Pashukanis manages to avoid. At the heart of his account of the necessity of law is the realisation that the legal relationship is always a relationship of conflict, whether or not it is manifested in coercion or consent, whether explicit or implied as a background condition:

“Where there is even the potentiality of disputation between the *sovereign, formally equal individuals* implied by commodity exchange... a specific form of social regulation is necessary. It must formalise the method of settlement of any such dispute without diminishing either party’s sovereignty or equality. *That form is law*, which is characterised by its abstract quality, its being based on the equality of its subjects and its pervasive character in capitalism”.<sup>113</sup>

For Miéville, this element of Pashukanis’ work – the focus on dispute between legal subjects – is vital for understanding the legal form because “without dispute there would be no need of [legal] regulation”.<sup>114</sup> As Chris Arthur argues:

“In technical regulation unity of purpose can be assumed, but a *controversy* is a basic element in everything juridic... law arises in order to cope with competing interests... the cell-form of law is the legal person asserting a claim”.<sup>115</sup>

### Relational multiplicity: unpacking ‘Legality’

Looking, as Pashukanis does, at the legal relations *behind* rules, processes, etc. not only avoids reification, but it also negates the orthodox fetish for enforcing a rigid theoretical distinction between legality and illegality: a rule may be followed or broken and a relationship may change, but with relationships this change is an analogue fluctuation rather than a digital rupture. This is not restricted to rule theories for whether international law is viewed as rules, processes or regime, violations of those rules, subversions of those processes and exceptions to that regime tend to be viewed as situations or moments to be

<sup>113</sup> Miéville (2006), pp78-79 (emphasis in original)

<sup>114</sup> Ibid, pp86-87

<sup>115</sup> Arthur, C.J. "Towards a Materialist Theory of Law", *Critique* Vol. 7, No. 1 (1977), p35 (emphasis in original). This distinction between legal and technical regulation, drawn from Pashukanis’ own work, is useful in the present context because it highlights the intimate relationship between law and the moment of dispute. However, it is far from unproblematic. Not only is the use to which Pashukanis puts it – framing the limits of the (dis)continuities of regulation in capitalism and socialism – utopian and uncritical, but also what is described as purely technical regulation may in fact be highly controversial. For example the laying down of an international regulation specifying the gauge of railway tracks on cross-border routes may appear to be the result of a ‘unity of purpose’ in the harmonisation of standards to reduce barriers to the free movement of goods and passengers. However, this ‘harmonisation’ may in fact be the codification in law of a victory for one party in a clash between two rival standards, or more accurately, between two factions of the industrial capitalist class each seeking to universalise the standard it employs in the production of railway cars.

explained away rather than integral parts of the legal system which involves, and is constituted by, “disputes moderated by coercion”.<sup>116</sup>

For example, some claim “that ‘[i]t is unsound to study any legal system in terms of sanctions. It is better to study law as a body of rules which are usually obeyed, not to concentrate exclusively on what happens when the rules are broken. *We must not confuse the pathology of law with law itself.*’”<sup>117</sup> This is a common refrain, and even Lukács, though he argues for Marxists to treat the (il)legality of a proposed action as a minor point amongst other considerations, still tacitly accepts that law consists of norms which permit or prohibit and which may thus be broken or abided by.<sup>118</sup> The negation of this fetish is, however, vital. As in the coercion-consent dichotomy discussed above, treating illegality as pathological, as the *illegitimate* exercise of power (by the state, between classes or amongst individuals) ‘outside’ the law, emphasising its ‘otherness’, obscures *and in doing so legitimises* the fact that (class) power is exercised in multifarious ways ‘inside’ the normal functioning of international law. Power “remains operative even in the most routine of legal acts”<sup>119</sup> and law’s normal functioning *includes* rather than *is disturbed by* formally *illegal* acts.

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<sup>116</sup> Miéville (2006), p135. Perhaps the clearest example of this is provided by Miéville a few pages later at pp147-148: “[W]hile a war represents a situation of widespread law-breaking... it is also one of law-assertion. The spirals of reprisal and counter reprisal which tend to characterise law are very often described and justified precisely in legalistic, ‘self-help’ terms. In other words, in response to a perceived infringement of sovereignty... a state will exercise its coercive interpretation, waging war as a way of establishing its legalistic claim to have had its abstract rights violated. This sets in motion counter-claims, also regulated by force. In that sense, then, almost definitionally a modern war is simultaneously a fundamental violation of international law by each side in the perception of the other, *and* is the regulatory mechanism by which the content of that legal relationship is fleshed out: a clash of coercion, by which the *effective interpretation* of the disputed law is decided... War is simultaneously a violation of international law *and international law in action.*” (emphasis in original) As Miéville argues, the law-breaking aspect of war (and indeed war itself, despite its omnipresence in capitalist modernity) is generally described by the participants as either aberrant/pathological and/or instances of ‘pure politics’ in order to attempt to alleviate the cognitive dissonance inherent in the fact that “[d]uring war, large numbers of violators loudly proclaim the very law they violate”.

<sup>117</sup> Ibid, p135, quoting Akehurst, M. *A Modern Introduction to International Law* (6 edn.) (Allen & Unwin, London, 1987), p7 (emphasis added by Miéville). Harris echoes this view, saying that “[n]o writer would seem to dissent from the view expressed by Brierly that, in terms of the number, as opposed to the political importance, of the occasions on which international law is complied with, it is more honoured in the observance than in the breach”. (Harris, (2004), pp6-7) Jessup, similarly, argues that “[w]ars, breaches of treaties, oppression of the weak by the strong, are the headlines of the daily press and of the history textbooks. The superficial observer has not noted the steady observance of such treaties as that under which letters are carried all over the world at rates fixed by the Universal Postal Union. He ignores the fact that there is scarcely an instance in two hundred years in which an ambassador has been subjected to suit in courts of the country where he is stationed... the instances in which judgements of international tribunals have been flouted are so rare that the headline-reader may well place them in the man-bites-dog category”. (Jessup, *A Modern Law of Nations* (The Macmillan Company, 1948), pp6-8)

<sup>118</sup> Lukács (1971) pp256-272

<sup>119</sup> Cover, R. “Violence and the Word” *Yale Law Journal* 95 (1986) p1607

If we accept Pashukanis' contention that law is best described as a *relationship*, however, it comes as no surprise that most rules "relate to violations of criminal or civil law... determine a sanction, or else contain the procedural rules applicable when a rule has been violated [and thus] *deviation from a norm always constitutes their premise*".<sup>120</sup> We can see that while the violation of a norm is an action distinguishable from obedience to it, the logic involved in, and the relationship underlying, violation is no more opposed to, or exclusive of, obedience than that of making, side-stepping or changing that norm – all are 'legal' in nature insofar as they are *orientated around legal norms, the reified products of interactions between legal subjects*.<sup>121</sup> The choice of how to engage with legal norms is to a large extent a matter of tactics (whether between individuals, factions within a class *inter se* or between classes),<sup>122</sup> although this 'choice' is subject to structural constraints including ideological (pre)determination.

Both domestically and internationally, capitalists are more readily able to use relations other than norm-affirmation to their advantage, as when they tend to reject legal norms they do so from positions of power in areas of law that are more uncertain than those which have the most repressive effects on the proletariat and weak states.<sup>123</sup> (Though there is much of value in the 'indeterminacy thesis' expounded by some working within the 'Newstream'/NAIL tradition, it would be obtuse to deny that some disputes are more easily and predictably determinable in concrete situations than others.) Domestically this is evidenced by comparing constitutional and criminal law; internationally the comparison may be made between the vague and often contradictory law on the use of force under the UN Charter and the detailed transnational economic regime of the General Agreement on

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<sup>120</sup> Pashukanis, E. "The General Theory of Law and Marxism" in Beirne, Piers Sharlet (eds.) *Pashukanis: Selected Writings on Marxism and Law* (Academic Press, London, 1980a), p110 quoted in Miéville (2006), p135 (emphasis added by Miéville)

<sup>121</sup> It is a feature of the English language that the word 'legal' elides two importantly different meanings, as can be seen from, for example, the *Collins English Dictionary: Millennium Edition*, p884: "**legal** ('li:gəl) *adj* **1** established by or founded upon law; lawful. **2** of or relating to law..." In describing norm-following and norm-violation as both 'legal', the second definition (which overlaps with the term 'juridical') is engaged: in setting up the (il)legality binary, the first is engaged.

<sup>122</sup> See Knox (2009), pp433-435, Chimni, B.S. "International Institutions Today: an Imperial Global State in the Making" *E.J.I.L* Vol.15 No.1 (2004), p3 and Lukács (1971) pp256-272

<sup>123</sup> In fact, the proletariat is *doubly* constrained for, as Rasulov argues, not only is law-violation easier for capitalists, but also "[t]he use of law[-affirmation] as a political medium does not work as easily on the counter-hegemonic side as it does on the side of the 'imperial power'." (Rasulov (2010), p468) This is, of course, far from accidental: given the greater influence on the creation of law which the capitalist class is able to have, it is in its interests to (re)produce vagueness in areas in which it may have to resort to tactics other than simple law-affirmation, and to foster clarity in areas in which the proletariat may seek to do so.



Trade in Services (GATS) produced by the World Trade Organisation (WTO) Uruguay Round of multilateral trade negotiations.<sup>124</sup>

If we take Pashukanis' initial insight<sup>125</sup> of seeing law as a type of relationship, add Miéville's focus on the moment of dispute, integrate Lukács' theory of reification to account for the existence of legal norms, and follow the resulting analysis, we go from having one type of relationship to at *least* three types of legal relationship, each of which has the capacity to affect the others in complex and subtle ways. Too narrow a focus on the relationship of the dispute therefore runs the risk of obscuring that international law is *not* in fact, as a simplistic reading of Pashukanis might suggest, a singular relationship.<sup>126</sup> It is instead a network of them, and just as international law is more than the sum of the laws which make up its content, so too is international law more than the sum of the relationships which make up its form.

Speaking of relationships gives us the *form* of international law, and introducing the concept of reification begins to explain *how* it is possible for these relationships to affect one another, but what is still missing is an account of the *structure* of the totality of legal relationships and how this structure is enmeshed with the wider social structures of international politics and the global economy.<sup>127</sup> Additionally, this view of international law risks producing an analysis which, in focusing directly on relationships between legal subjects and not on the ways in which these are mediated (through institutions, professionals, ideologies, etc.), cannot account for important ways in which international law is experienced by those legal subjects. For this, we must turn to Althusser and the concept of the *Apparatus*.

### From *form* to *structure*: viewing law as *apparatus*

Although Althusser never explicitly defines the term 'apparatus', apparently thinking it self-evident, and despite the fact that he treats the legal apparatus in a somewhat

<sup>124</sup> For a good critique of the GATS regime, see Cutler, A. "Toward a Radical Political Economy Critique of Transnational Economic Law" in Marks (2008), pp 199-219

<sup>125</sup> For the source of this insight, see the work of Pashukanis' teacher, Stučka. (Stučka (1988), p27)

<sup>126</sup> It also, as argued above, obscures the fact that in "[b]oth international and nation-state law... law operates more in the routines of everyday life than in moments of trouble". (Merry (2007), p183)

<sup>127</sup> Pashukanis and Miéville in this regard provide little more than examinations of the similarities between the legal form and the commodity form, and analysis of whether or not the legal form should be considered as part of the base or superstructure (which is of course based on the assumption that the much-contested base-superstructure metaphor is still, or was ever, as theoretically useful as it seems to have been popular).

theoretically confused manner,<sup>128</sup> combining the core element of his theory with insights taken from theorists who have further developed it allows us to understand the nature of the ‘legal apparatus’ or, more precisely, the nature of those aspects of the broader network of (state) apparatuses which form an integral part of the legal order.

Apparatuses, for Althusser, are “realities which present themselves to the immediate observer in the form of distinct and specialised institutions”<sup>129</sup> or rather *networks* of such institutions (as each apparatus is not simply formed from one single institution). This can be seen in Althusser’s argument that “*the State apparatus...* means: not only the specialised apparatus (in the narrow sense) whose existence and necessity I have recognised in relation to the requirements of legal practice, i.e. the police, the courts, the prisons; but also the army... and above this ensemble, the head of State, the government and the administration”.<sup>130</sup> This, though an important point, still requires the unpacking of what is meant by an *Institution*. As Göran Therborn explains, we should view an institution “not as a goal-oriented subject in an environment but as a formally bounded system of structured processes within a global system of society processes”.<sup>131</sup> Interactions amongst institutions do not therefore replace interactions amongst individuals, either ontologically or epistemologically. Instead, institutions exist as structured fields through which individual (and, according to the Marxian account, *class*) relations take shape. Institutions are not only *fields* for class struggle, however, “but also the *outcome* of class relations. They are ways of sedimenting and storing social advantages in the form of established processes, routines, procedures and technologies”<sup>132</sup> which are specific to those institutions and concretised in the actions of those who (inter)act through them.

The Pashukanite conceptual framework, unless augmented by these insights, does not provide space for the recognition that law is not only made up of relationships (which can

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<sup>128</sup> After stating that the Repressive State Apparatus contains “the Government, the Administration, the Army, the Police, the Courts, the Prisons, etc.” (Althusser (2008), pp16-17), and listing as an Ideological State Apparatus (ISA) the ‘legal ISA’, Althusser throws into a footnote the theoretically important claim that “[t]he ‘Law’ belongs both to the (Repressive) State Apparatus and to the system of the ISAs” (Althusser (2008), p17 footnote 9), without providing any explanation. Since Althusser argues that *no* apparatus is solely Repressive or Ideological, but acts through both repression and ideology, it cannot be said that this element of Althusser’s theory provides the missing explanation.

<sup>129</sup> Ibid, p17

<sup>130</sup> Ibid, p11 (emphasis in original)

<sup>131</sup> Therborn, G. *What Does the Ruling Class do when it Rules?* (NLB, London, 1978), p37. For an interesting discussion of the organisational structuring of social relations from both Weberian and Marxian perspectives, see Beetham, D. *Bureaucracy* (Open University Press, Milton Keynes, 1987)

<sup>132</sup> Savage, M. *Class Analysis and Social Transformation* (Open University Press, Buckingham, 2000), p124 (emphasis added). The Westphalian nation-state, often considered to consist of a collection or system of the traditional institutions of government, can *itself* be conceptualised, in light of this definition, as an institution.

be mapped onto Althusser's discussion of state *power*), but also the institutions which mediate those relationships and which cannot simply be reduced to them (though it is true that the internal procedural rules of these institutions are as much reifications of relationships as the substantive legal rules analysed above).<sup>133</sup> This dual nature is evidenced by the fact that, although they are linked, state *power*, the expression of the asymmetry of class relations of domination, and the state *apparatus*, those institutions through which that power is exercised, are distinguishable in both theory and practice:

“We know that the State apparatus may survive... political events which affect the possession of State power. Even after a social revolution like that of 1917, a large part of the State apparatus survived after the seizure of State power by the alliance of the proletariat and the small peasantry”.<sup>134</sup>

Speaking only of legal relationships, whether in dynamic/immediate or reified/frozen forms, cannot provide a theory which accounts for this ‘stickiness’ of institutions and the reasons why certain relationships are mediated in certain ways in certain historical epochs. Recognising that international law gains its materiality and structure through apparatuses, however, and locating legal relationships within these, allows the conceptual space necessary for such an explanation.

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<sup>133</sup> Such relationships include, but are not restricted to, the relationships between those who set up the institutions and instituted the processes, and the relationships between those who do, and who ever have, acted within, upon and between them.

<sup>134</sup> Althusser (2008), pp14-15

## Chapter 3 – The state of ‘the State’

The Althusserian conceptual schema of multiple state apparatuses is clearly relevant to *domestic* Marxian legal scholarship in which the legislative, judicial and policing institutions are seen as natural objects of study *on both sides* of Hunt’s divide between analyses of the legal “regulation of the social relations of production (in particular property and contract relations) and... the role of law in the preservation of class domination (in particular embodied in criminal and constitutional law)”.<sup>135</sup> Indeed, the latter two fields are traditionally viewed as *inseparable* from the nature and function of the (nation-)state *as an overarching authority* in the domestic legal order.

However, an attempt to introduce the same schema into *international* Marxian legal scholarship appears counterintuitive: not only are criminal and constitutional law discourses almost entirely absent (and, at least according to orthodox accounts, there appear to be no phenomena analogous enough to domestic criminal and constitutional law even to give rise to such discourses)<sup>136</sup> but also the lack of a centralised, supranational, political apparatus is so apparently obvious that it is a tacit feature of the very *definition* of international law used by many orthodox scholars<sup>137</sup> (and even some Marxist ones).

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<sup>135</sup> Hunt (1981), p63

<sup>136</sup> Two phenomena appear to present themselves as exceptions: firstly, the adoption of a formal Constitution by the (supranational) European Union and, secondly, the establishment of the ICC and various ad-hoc international criminal tribunals. However, both of these phenomena are somewhat anomalous. The former is highly specific to a *particular region and historical conjuncture*, and as such has had little impact on the wider field of international law practice or scholarship. The latter, with its explicit recognition of *individuals* as actors with legal rights and responsibilities, and a focus largely on actions carried out by governments against their own citizens *within* particular states, has never sat particularly comfortably within the traditional, statocentric, discourse.

<sup>137</sup> For example, the *Restatement (Third) of Foreign Relations Law of the United States* (American Law Institute, 1987), states that “[t]he international political system is loose and decentralized... There is no ‘world government’ as the term ‘government’ is commonly understood. There is no central legislature with general law-making authority; the General Assembly and other organs of the United Nations influence the development of international law but only when their product is accepted by states... There is no executive institution to enforce law; the United Nations Security Council has limited executive power to enforce the provisions of the Charter and to maintain international peace and security, but it has no authority to enforce international law generally... There is no international judiciary with general, comprehensive and compulsory jurisdiction; the International Court of Justice decides cases submitted to it and renders advisory opinions but has only limited compulsory jurisdiction.” Furthermore, John Austin famously claimed that international law is not ‘properly so-called’ because law is ‘the command of the sovereign’ and there is no supranational sovereign entity. (See Austin, J. *The Province of Jurisprudence Determined* (Prometheus Books, Amherst, 2000) For more examples see Miéville (2006), pp18-19 and Brierly, J. *The Law of Nations* (1963) pp68-76 quoted in Harris (2004), p 4

## International law scholarship, the (nation-)state and the problem of *structure*

### Orthodox scholarship on state and structure

As Ulrich Beck argues, orthodox international law scholarship largely fails to distinguish “between statehood – as a basic *principle* of modernity – and forms of concepts of the state – in the sense of different basic *institutions* of modernity that lend concrete shape to the principle of statehood”.<sup>138</sup> In doing so, it treats the former, the *State*, as reducible to the particular form of the state apparatus in capitalist modernity, the *nation-state*, as exemplified by the system of rules centred around the Montevideo Convention on Rights and Duties of States, “commonly accepted as reflecting... the requirements of statehood at customary international law”.<sup>139</sup> The convention declares that “[t]he State as a person of international law should possess... (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States”.<sup>140</sup> Although there are debates within mainstream scholarship over whether the Montevideo requirements are exhaustive, and over the significance for the status of a polity of the recognition of it as a state,<sup>141</sup> the one thing which all the participants of these debates seem to share is the view that the State is the “sovereign [nation-]state... internally supreme over the territory it controls”<sup>142</sup> and the sole, unified representative of that territory on the world stage. This is a view of the State “essentially based on the imagery of a billiard ball: ‘opaque, hard, clearly defined spheres’ interacting with one another only ‘through collision’”<sup>143</sup> (or in other words, a bounded and non-porous entity, interacting internationally as a monolithic subject-object), embodied in the traditional governmental institutions and aiming to secure the performance of very particular (and from the Marxian perspective, essentially inconsequential) rituals of sovereignty such as concluding treaties and engaging in diplomatic relations. This simplistic and superficial account of the State, naturally, leads to

<sup>138</sup> Beck, U. *Power in the Global Age* (Polity, Cambridge, 2005), p257 (emphasis in original)

<sup>139</sup> Harris (2004), p99

<sup>140</sup> Article I, Montevideo Convention on Rights and Duties of States (1933), reproduced in Harris (2004), p99

<sup>141</sup> Some scholars argue that recognition is merely indicative of whether a particular polity is a state, while others argue that recognition is actually partly constitutive so that a polity is only a state when generally recognised as one. This debate is, naturally, at its most heated in relation to controversial geopolitical situations (e.g. the dissolution of the U.S.S.R. and S.F.R.Y, the ‘Palestinian question’ and the ‘Homelands’ such as the Transkei set up by the government of Apartheid South Africa) See Harris (2004), pp99, 144-145 and 147-148

<sup>142</sup> Beeson, M., “Sovereignty under Siege: Globalisation and the State in Southeast Asia”, *Third World Quarterly*, Vol. 24, No.2 (2003) p359

<sup>143</sup> Rasulov (2010), p470

a view of the international legal order as one constituted primarily (if not entirely) by easily cognisable horizontal inter-state interactions.<sup>144</sup>

### Marxian scholarship on state and structure

#### The 'commodity-form theory' of international law

This simplistic view of the State, leading to the assumption that international law is 'law *without* a State' and law *without need* for a State, is also a defining feature of Miéville's 'commodity-form theory of international law'. Rather than being a direct importation of the orthodox conception, however, it is derived from Pashukanis' argument that "[n]o matter how eloquently the existence of international law is proved, the fact of the absence of an organisational force, which could coerce a state with the same ease as a state coerces an individual person, remains a fact. The only real guarantee that the relationships between bourgeois states... will remain on the basis of equivalent exchange... is the real balance of forces."<sup>145</sup> Miéville accepts that "Pashukanis's essay on the subject was written before the era of the UN and the chaotic multilateral developments of decolonisation",<sup>146</sup> but argues it remains relevant because the international institutions which *have* appeared since have neither developed the requisite degree of centralisation, nor acquired the capacity for effective enforcement of their policies and decisions independent of nation-states.<sup>147</sup> Therefore, his examination of actually-existing international legal relationships, in light of his conclusion that international law is law properly so-called, suggests to Miéville that the state as "abstract arbiter, a public authority, is in fact *contingent to the legal form*",<sup>148</sup> however important in functional terms it may be vis-à-vis the domestic legal order. He even argues:

<sup>144</sup> See, for example Akehurst (1987), p1, Shearer, I.A. *Starke's International Law* (11<sup>th</sup> edn.) ( Butterworths, London, 1994), p3 and Schwarzenberger, G. *A Manual of International Law* (Stevens and Sons, London, 1967), p3

<sup>145</sup> Pashukanis, E. "International Law" in Beirne, P. and Sharlet, R. (eds.) *Pashukanis: Selected Writings on Marxism and Law* (Academic Press, London, 1980b), p179 as quoted in Miéville (2006), p129

<sup>146</sup> Miéville, (2006), p114

<sup>147</sup> For example, as Rasulov argues, "[i]t is a well-known fact that the UN has never exercised any form of operational oversight over military actions carried out under its mandate. The plans to set up a military staff committee, envisaged under Articles 46 and 47 of the UN Charter, have never been realised in practice. All UN-approved operations since 1945 have instead proceeded by way of 'outsourcing' to various 'coalitions of the willing' and individual volunteering members." (Rasulov (2010), p452) Nevertheless, the existence of the UN (and other international institutions) is not insignificant, and Miéville's conceptual framework leaves him unable, and unwilling, to explain this existence and any mediatory effects which may/do result.

<sup>148</sup> Miéville (2006), p128

“[L]aw itself – in its earliest, embryonic form – is a product precisely of the *lack* of such authority... (proto-)international law historically predates domestic law... because law is thrown up by and necessary to a systematic commodity-exchange relationship, and it was between organised but disparate groups without super-ordinate authorities rather than between individuals that such relationships sprang up.”<sup>149</sup>

The veracity of this as a historical claim is dealt with, below. At this point what is important is Miéville’s contention that the international legal order is a *purer* example of the legal form *because* of its lack of an overarching State. Leaving aside the rather unhelpful reintroduction of metaphysical distinctions, this appears to contradict Pashukanis’ own position on the matter insofar as he argues that “[c]oercion... as the imperative addressed by one person to another, and backed up by force, contradicts the fundamental precondition for dealings between the owners of commodities”.<sup>150</sup> This suggests the State – understood in the classical Engelsian sense as an abstract ‘third force’ – is a necessary guarantor of the commodity relation because it purportedly ‘steps in’ to *replace* direct coercion by legal subjects and, as argued by the ‘state derivation’ theorists, it could be said that State mediation is logically *necessary* for the development of any society that has a class structure.<sup>151</sup>

## Classical Marxism

Pashukanis and the ‘state derivationists’ both employ, explicitly or implicitly, the classical Marxist definition of the State expounded most clearly in Engels’ *The Origin of the Family, Private Property and the State* and Lenin’s *State and Revolution* (which itself draws heavily on Engels’ work). For Engels:

“The state is... by no means a power forced on society from without... Rather, it is a *product of society at a certain stage of development*; ...in order that... classes with conflicting economic interests, might not consume themselves and society in sterile struggle, a *power apparently standing above society* became necessary that for the purpose of moderating the conflict and keeping it within the bounds of ‘order’; and

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<sup>149</sup> Miéville (2006), pp130-131

<sup>150</sup> Pashukanis, E. *Law and Marxism: a General Theory* (Inklings, London, 1978), p143 quoted in Miéville (2006), p126

<sup>151</sup> For a good account of debates surrounding the ‘state derivation’ argument, see the discussion in Holloway and Picciotto (1978), pp1-31

this power, arising out of society, but placing itself above it, and increasingly alienating itself from it, is the state.”<sup>152</sup>

Public power, according to Engels, expresses itself in the ‘self-acting armed organisation of the population’ in ancient polities. However, this becomes impossible with the class stratification of society and so this power takes on a particular form: “it consists *not merely of armed men but of material appendages, prisons and institutions of coercion of all kinds*”.<sup>153</sup> As Lenin explains:

“The state is the product and the manifestation of the irreconcilability of class antagonisms. The state arises when, where and to the extent that class antagonism objectively cannot be objectively reconciled... [and exists as] an organ of class rule, an organ for the oppression of one class by another; it creates ‘order’, which legalises and perpetuates this oppression by moderating the collisions between the classes.”<sup>154</sup>

This moderation, however, does not alter the fact that society is split into antagonistic classes whose ‘self-acting arming’ would end in armed struggles between them and this is why, according to Lenin, every revolution, by destroying the state apparatus, shows us the naked class struggle which was previously hidden. David McLellan puts all this particularly concisely in his statement that “Lenin’s direct and simple definition of the state is that ‘the State is a special organisation of force: it is an organisation of violence for the suppression of some class’”.<sup>155</sup>

### The contingency of the state

In contrast, Miéville claims the State is *not necessary* for the functioning of domestic capitalism – and thus the facsimile of it at the global level suggested by an application of the Althusserian schema is not necessary for the functioning of global capitalism – because, *contra* Pashukanis, “violence and coercion *are* immanent in the commodity relationship itself... [and so] in legal systems without superordinate authorities self-help –

<sup>152</sup> Engels, F. *The Origin of the Family, Private Property and the State* (6<sup>th</sup> edn.) (Stuttgart, 1894), pp177-178, quoted in Lenin, V.I. *The State and Revolution* (Lawrence & Wishart, London, 1974) (emphasis added) pp12-13

<sup>153</sup> Engels (1894), quoted in Lenin (1974), p15

<sup>154</sup> Lenin (1974), p13. A more modern translation can be found in Lenin, V.I. *The State and Revolution* (Service, R. trans.) (Penguin, London, 1992), pp8-9 which, replaces ‘creates’ with ‘is the creation of’. This more clearly renders Lenin’s view of the state (as *a product* as well as *producer* of the capitalist order).

<sup>155</sup> McLellan (2007) quoting Lenin, V.I. *Selected Works* Vol.2 (Moscow, 1960), p320



the coercive violence of the legal subjects themselves – regulates the legal relation”.<sup>156</sup> At first glance this appears convincing, particularly in the *domestic* legal order where, as Pashukanis’ observes, in times “of intensified revolutionary struggle... the official apparatus of the bourgeois state recedes into the background in comparison with the ‘voluntary guards’ of the fascists... [and] ‘seeks salvation’, not by creation of ‘an authority standing above classes’, but by the maximum pressure of the forces of the struggling classes”.<sup>157</sup> However, this leaves unanswered the crucial question of whom or what determines the conditions for the resort to self-help and sets the limits of its use.

The resort to self-help is an integral part of Kelsen’s claim that international law is analogous to ‘primitive’ or tribal law:

“The dynamics of the primitive legal order has only two stages: the development of the general norm through custom, and its application by the subject whose interests, protected by this norm, have been violated. This subject is authorised by *the legal order* to react against the violator of the law with the sanction provided by the law. Primitive law is characterised by the technique of self-help... The subject himself must fulfil the sanction without its being decreed by an individual norm, which *an organ different from the injured subject* must enact and execute.”<sup>158</sup>

At first glance, such an argument appears to support Miéville’s assumptions. However, on closer inspection, it can be seen that Kelsen draws an important distinction between ‘the legal order’, which for Kelsen is interchangeable with the State ‘in a broader sense’, and an ‘organ different from the injured subject’, which is part of the (nation-)state ‘in a narrower sense’ as simply the aggregate of such organs. Even in the absence of *state* organs, it remains the *State* which determines the conditions for the resort to self-help and sets the limits of its use (and, in the language of the Hale and the Realists, shapes “two particularly important general categories of rules... the rules governing the conduct of the parties [in a particular situation]... [and the] rules that *structure the alternatives*”<sup>159</sup> through its strategic (in)action).<sup>160</sup>

<sup>156</sup> Miéville, (2006), p133 (emphasis in original)

<sup>157</sup> Pashukanis (1980a), p130 footnote 47 quoted in Miéville (2006), pp125-126

<sup>158</sup> Kelsen, H. “The Law as a Specific Social Technique” *The University of Chicago Law Review* Vol. 9, No. 1 (December 1941), p88 (emphasis added)

<sup>159</sup> Kennedy (1991), p330 (emphasis added).

<sup>160</sup> Despite the value present in Kelsen’s recognition of the distinction between *State* and (nation-)state, the passage above is a typical example of the problematic reification and ‘subjectivist aesthetic’ identified in Chapter 2, above. The ‘legal order’, of course, lacks the *will* to ‘authorise’ a subject to enforce a sanction, just as a norm lacks the *will* to ‘decree’ it. Furthermore, the idea that the ‘legal order’ and state ‘organs’ (institutions) are separate from the individual subjects who exist and work within them, and whose relations constitute and (re)produce them, is a product of reification of both ‘law’ and ‘the state’.

### Unpacking 'the state'

Even disregarding the realist and Kelsonian counterarguments, the core problem with Miéville's argument is that it does not actually prove that the State is contingent to the international legal apparatus, as he claims. What it proves – and this is, of course, a far less radical conclusion – is that the *institutions* of the bourgeois nation-state are contingent to legal *relationships*. Put simply, Miéville's analysis overreaches itself because it lacks Althusser's distinction between *state power* and *state apparatus*<sup>161</sup> which is the prerequisite for a nuanced account which does not limit itself to what Poulantzas calls a "narrow, juridical definition of the State... always limited to the public kernel of army, police, prison, courts, and so on"<sup>162</sup> (which Althusser calls the 'repressive state apparatus' or RSA). Indeed, Althusser's discussion of apparatuses is centred around his theory that the state is *not* only the traditional institutions (of repression, viewed from a Marxist standpoint), but that also "included in the strategic field of the State"<sup>163</sup> are a network of institutions (which mainstream legal theory would consider 'private', and thus fundamentally different in character to 'public' state institutions) which Althusser characterises as 'ideological *state apparatuses*' or ISAs.

It is useful here to note briefly that this argument lets us side-step the risk, avoided only narrowly by Gramsci, of being caught in a dichotomy 'between consent and coercion'. As recognised by Althusser, "[a]ll the State Apparatuses function both by repression and by ideology, with the difference [being] that the (Repressive) State Apparatus functions massively and predominantly by repression, whereas the Ideological State Apparatuses function massively and predominantly by ideology".<sup>164</sup> These two poles are at once avoided and reconciled in the realisation that "[t]here is no such thing as a purely repressive apparatus... There is no such thing as a purely ideological apparatus... this double 'functioning'... make[s] it clear that very subtle explicit or tacit combinations may

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<sup>161</sup> Although at one point Miéville appears to recognise that "in particular historical conjunctures... it is the 'official apparatus' that recedes, not the state itself" (Miéville (2006), p126), this potential acknowledgement that the *State* extends beyond the official *state apparatus* does not prevent him from adopting a theory of the State which elides the official *institutional* power which recedes in comparison to more direct, but still importantly *State*, power which remains.

<sup>162</sup> Poulantzas (1978), p36. Kelsen, in separating the 'narrower' and 'broader' concepts of the State, touches upon this crucial distinction, but does not appear to realise the implications and does not develop it significantly.

<sup>163</sup> Ibid, p37.

<sup>164</sup> Althusser (2008), p23

be woven from the interplay”<sup>165</sup> between them when a strict methodological separation is rejected.

In the context of the nation-state Althusser provides a non-exhaustive list of these apparatuses: the RSA, consisting of “the Government, the Administration, the Army, the Police, the Courts, the Prisons, etc.”<sup>166</sup> and the ISAs, consisting of religion, the education system, the family, the political system, workplace organisations, telecommunication networks and the cultural arena of literature, sport, the Arts, etc. In orthodox accounts, of course, the former category is assigned the label of *public*, and the latter, *private*. In answer to the question of how social structures in the *private* domain may be regarded as *state* apparatuses, Althusser explains that “Gramsci already forestalled this objection... The distinction between the public and the private is a distinction internal to bourgeois law... [The State] is neither public nor private; on the contrary, it is the precondition for any distinction between public and private”.<sup>167</sup> It is thus unimportant whether apparatuses are ‘public’ or ‘private’; what matters is how they *function*. In analysing this function, it is necessary to take into account the fact that the boundaries between the apparatus categories are also permeable: depending on the underlying dynamics of the relations of production expressed within them, “apparatuses can slide from one sphere to the other and assume new functions either as additions to, or in exchange for, old ones”.<sup>168</sup>

The complexity of a State constituted not simply by the governmental apparatus, but instead by a diverse and fluid set of heterogeneous state apparatuses, means that it is not, as most orthodox (and some Marxian) accounts may suggest, cognisable as a simple and unified pyramid whose summit, in the form of a centralised administration, need only be occupied to gain State power. Neither, as a more nuanced theory might posit, is it simply a multi-level network where State power is distributed across stable and predetermined ‘key’ institutional structures. Instead, what is required is a *nodal* model in which State power is recognised as a much more complex phenomenon in terms of both where and how it is exercised. Just such a model is offered by Poulantzas, as can be seen in the warning he offers to activists within the socialist movement:

“(a) ...the formation of a Left government does not necessarily... entail that the Left exercises real control over all, or even certain state apparatuses. This is all the

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<sup>165</sup> Althusser (2008), p19

<sup>166</sup> Ibid, pp16-17

<sup>167</sup> Ibid, p18

<sup>168</sup> Poulantzas (1978), p33

more so in that the state institutional structure allows the bourgeoisie to meet a popular accession to power by permutating the sites of real and formal power.

(b) Even when a Left government really controls state... apparatuses, it does not necessarily control the one or ones which play the dominant role in the State and which therefore constitute the central pivot of real power... the organisation of the bourgeois State allows it to function by successive dislocation and displacement through which the bourgeoisie's power may be removed from one apparatus to another: the State is not a monolithic bloc, but a strategic field...

(c) ...each apparatus... is organised around a centre whose effective power is not located at the summit of the hierarchy as it appears... Even if the Left in power manages to control, in their formal hierarchy, the heights of the dominant state apparatus or apparatuses, it remains to be seen whether it will really control the core of their effective power.<sup>169</sup>

What this shows is that to be able to map where power lies in any particular state, it is necessary to investigate not just the form of its government, or even the relative positions of the individual apparatuses within that State, but – since that those apparatuses are “not only the *stake*, but also the *site[s]*”<sup>170</sup> of struggles over State power – the logical and historical conditions which have shaped those relations of struggle and the (corresponding) intricate and overlapping institutional structures through which those relations are materialised. Put differently, in a Marxian analysis of the legal order it is important to investigate both the *current condition* and the *logical and historical development* of three of its key features – the methods and techniques of its administration, the web of institutions through which this administration is materially effected, and the class struggle which both determines the conditions of this administration and is that which is being administered.

### The (re)turn to historic analysis

Although both logical and historical analyses are important, it is not enough to ‘add in’ historical analyses once logical analysis has been carried out; the theoretical account must *from the start* be sensitive to the actual-existing historical trajectory and processes through which the nation-state – whose rise coincides with the rise of the capitalist mode of production – developed and spread on a global scale. As John Holloway and Sol Picciotto argue:

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<sup>169</sup> Poulantzas (1978), pp138-139

<sup>170</sup> Althusser (2008), p21 (emphasis in original)

“It makes little sense to talk of the capitalist ‘forms’ of social relations at all unless one has other forms in mind, unless one regards these forms as transitory... Form analysis is analysis of an historically determined and historically developing form of social relations, and it is hard to see how an adequate form analysis can be anything other than historical.”<sup>171</sup>

Miéville’s chronology of the progression from pre-national polities with proto-international law to *international* law proper, for example, is an attempt at this but is too reductionist to be persuasive (it posits as smooth, universal and simple a process which more historically robust accounts have shown to be uneven, temporally and territorially dependent and complex) and it is tellingly devoid of historical references despite its abundance of theoretical ones.<sup>172</sup>

This can be contrasted with Benno Teschke’s account in his book *The Myth of 1648: Class, Geopolitics, and the Making of Modern International Relations*<sup>173</sup> which not only discusses the debates in international relations scholarship over the origins and evolution of the modern states-system and the rival paradigms which attempt to explain the ‘transition to modernity’, but also investigates in significant detail a range of historical events and epochs including Medieval feudalism, the Carolingian empire, the *Reconquista*, the German *Osteiedlung*, the Crusades, the Norman Conquest, French Absolutism, Mercantilism and maritime empire-building, and The Glorious Revolution. Teschke argues that “the nature and dynamics of international systems are governed by the character of their constitutive units, which, in turn, rests on the specific property relations prevailing within them”,<sup>174</sup> so that “variations in international patterns of conflict and co-operation are bound up with changing *modes of production*”.<sup>175</sup> This not only recognises the importance of relations (of circulation) *amongst* polities, which Miéville focuses on, but also “that essential indicator of bourgeois [economic] relations – the extraction of surplus value by the class owning the means of production”<sup>176</sup> *within* polities – about which he says very little. While Miéville argues that class relations of production are expressed in legal *content*, in specific international norms, Teschke’s analysis shows that

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<sup>171</sup> Holloway and Picciotto (1978), p27

<sup>172</sup> A similar criticism is made of Pashukanis by Kinsey, who argues that “the major weakness in [Pashukanis’] work is a tendency to display a rather pedantic formalist and historical insensitivity... the general and abstract normative structure of the historically particular 19<sup>th</sup> century civilian codes is treated implicitly as the form of bourgeois law in general. There is little concerted attempt to address the problem of the historical development and mediation of the law.” (Kinsey (1978), pp203-204)

<sup>173</sup> (Verso, London, 2003)

<sup>174</sup> Teschke (2003), p46

<sup>175</sup> Ibid, p39 (emphasis added)

<sup>176</sup> Arthur (1978), p.195, quoted in Miéville (2006), p91

class relations of production determine not only this, but also the structure and functioning of the global political order through the determination of the institutional form taken by polities (whether the modern nation-state or otherwise).

## **International law scholarship and the contemporary conjuncture**

As argued at the beginning of this chapter, both orthodox and Miéville's international law scholarship share an outmoded view of global society and a simplistic view of the State. The foregoing analysis has sought to correct the latter but, while it has important implications for the former, it does not address it directly: even with a more nuanced understanding of the State, the assumption that the global social formation is constituted by inter-state relations, though rendered more precarious, still stands. It is therefore necessary to turn to a thorough investigation into the structure of the international legal order.

### Defining the contemporary conjuncture

The structure of the global order had never been static. An interesting empirical study of its basic structural dynamics (though only insofar as they involve (nation-)states and Inter-governmental Organisations (IGOs)) is provided by Jason Beckfield.<sup>177</sup> He begins with two basic historical facts. Firstly, the number of states grew steadily in the 1800s, increased more rapidly after the establishment of the League of Nations in 1919 and then, "[a]fter 1940, the number of states in the international system grew from 65 to 190 by 2000".<sup>178</sup> Secondly, during the same period, the number of IGOs "grew slowly from one (the Central Commission for the Navigation of the Rhine, whose members were Baden, Bavaria, France, Germany, Hesse and the Netherlands)... to a total of 330 IGOs by 2000".<sup>179</sup> These 330 include, of course, organisations like the UN, IMF, World Bank, ILO and WHO which "influence policy, distribute resources, and include nearly every state in

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<sup>177</sup> Beckfield, J. "The Social Structure of the World Polity" *The American Journal of Sociology* Vol. 115, No. 4 (Jan 2010), pp1018-1068 In defining what he means by 'an IGO', Beckfield follows Peevehouse, Nordstrom and Warnke who state that "the broadest understanding of what constitutes an IGO is that the organisation (1) is a formal entity, (2) has states as members, and (3) possesses a permanent secretariat or other indication of institutionalisation such as headquarters and/or permanent staff... IGOs are differentiated from nongovernmental organisations (NGOs) based on the act that the latter organisations' memberships are composed of individual persons, interest groups, or businesses". (pp1029-1030 footnote 12)

<sup>178</sup> Ibid, p1037

<sup>179</sup> Ibid, p1036

the international system as members”.<sup>180</sup> However, the ‘world polity’, as Beckfield describes it, also includes and is shaped by “organisations that restrict membership by level of economic development (e.g., the Organisation of Economic Cooperation and Development), geographic region (e.g., the Association of Southeast Asian Nations), economic sector (e.g., the Organisation of Petroleum Exporting Countries), linguistic heritage (e.g., Francophonie Institutionnelle), religion (e.g., Organisation of the Islamic Conference), or geopolitical alignment (e.g., the North American Treaty Organisation).”<sup>181</sup>

Beckfield’s analysis leads to a model of the global order which “includes two types of nodes, states and IGOs, making it a two-mode network... a network of states that are interlinked through memberships in organisation... [and] a network of organisations that are interlinked through their member states”.<sup>182</sup> Although his model has important limitations because of its highly restricted focus on two types of *formal* global social actor, it does lead Beckfield to an important conclusion:

“[N]early all states have at least one tie to nearly all other states... although they may have a greater number of ties to certain states than to others. And nearly every IGO is likely to be connected to nearly every other IGO by at least one common member state... but some IGOs may share more member states than others. This suggests that in static terms, the world polity blends structural density with disintegration, decentralisation with centralisation, homogeneity with heterogeneity, and cohesion with fragmentation. Given their theoretical relevance, it is essential to estimate these static properties. But the dynamics matter more.”<sup>183</sup>

What must be uncovered, therefore, is the most useful way in which to conceptualise these dynamics.

## Globalisation

Globalisation is perhaps the most common conceptual framework employed in orthodox and critical accounts of the dynamics of the contemporary global order. Nevertheless, it is a complex concept designating a complex phenomenon and to analyse either fully requires the incorporation of insights from the works of Joseph Stiglitz, Stanley Hoffmann,

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<sup>180</sup> Beckfield (2010), p1022

<sup>181</sup> Ibid, p1022

<sup>182</sup> Ibid, p1022. Beckfield does acknowledge the existence of other social actors/institutions such as “international non-governmental organisations (INGOs), transnational corporations (TNCs), and other civil-society organisations” (p1019) but unfortunately does not incorporate these into his analysis.

<sup>183</sup> Ibid, p1029

Boaventura de Sousa Santos, David Held, Manuel Castells and Ulrich Beck. Santos recognises that “[t]here is strictly no single entity called globalisation”.<sup>184</sup> To this, Hoffmann adds an outline of the three forms contemporary globalisation takes. In *cultural globalisation* “the key choice is between uniformisation (often termed ‘Americanisation’) and diversity”<sup>185</sup> in Art, language, fashion, media, etc. *Political globalisation* is characterised by the establishment and spread of “international and regional organizations and transgovernmental networks (specializing in areas such as policing or migration or justice)... [and] private institutions that are neither governmental nor purely national – say, Doctors Without Borders or Amnesty International”<sup>186</sup> – which relegate the (nation-)state to “a reduced role that is mainly limited to social protection, physical protection against aggression or civil war, and maintaining national identity”.<sup>187</sup> Finally, and most importantly for the current project, there is *economic globalisation*.

The concept of economic globalisation can be further unpacked according to the Marxian distinction between relations of production and exchange/circulation. It designates, as Stiglitz argues, “the closer integration of the countries and peoples of the world... brought about by the enormous reduction of costs of transportation and communication, and the breaking down of artificial barriers to the flows of goods, services, capital, knowledge, and (to a lesser extent) people across borders”.<sup>188</sup> However, what is also present, but missing from Stiglitz’ definition, is the “new international division of labour based on the globalisation of *production* carried out by the transnational corporations (TNCs), which are, more prominently than ever, the key agents of the new world economy. The main features of the new world economy are: worldwide sourcing; flexible systems of production and low transportation costs allowing for the production of industrial components in the periphery and export to the core”.<sup>189</sup>

The main problem with the globalisation discourse is the tendency of its account to elide all three of the aspects above and reduce them to a simplistic account of the erosion and

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<sup>184</sup> Santos, B. de Sousa. *Toward a New Legal Common Sense* (Butterworths Lexisnexis, London, 2002), p178

<sup>185</sup> Hoffmann, S. “Clash of Globalisations” *Foreign Affairs* Vol. 81 Issue 14 (July-August 2002), p105

<sup>186</sup> *Ibid*, p105

<sup>187</sup> *Ibid*, p104

<sup>188</sup> Stiglitz, J. *Globalisation and its Discontents* (Penguin, London, 2002), p9

<sup>189</sup> Santos (2002), p167 (emphasis added). The scope of this ‘new international division of labour’ is difficult to calculate with precision, but one recent estimate put the number of TNCs in 2008 at around 80,000. (See Alvarez, J. *The Public International Law Regime Governing International Investment* (Hague Academy of International Law, The Hague, 2011), p17



(eventual) disintegration of the nation-state as a distinct and effective level of social cohesion and regulation. Yet, as Hardt and Negri argue:

“We must avoid defining [the contemporary conjuncture] in purely negative terms, in terms of what it is not, as for example is done when one says: the new paradigm is defined by the definitive decline of the sovereign nation-states, by the deregulation of international markets... and so forth. If the new paradigm were to consist simply in this, then its consequences would be truly anarchic.”<sup>190</sup>

Indeed, as Beck recognises, “[w]hat is new in this is not the fact that the strategies of capital are putting pressure on states or making them follow their lead – this is exactly what political economy has been about from the very beginning – but rather *how* this is being done”.<sup>191</sup> The contemporary conjuncture must be understood to involve not the *death* of the traditional nation-state, but its empirical and conceptual *displacement* from the centre of the global order to a position “in a network of interaction with supranational macro-forces and subnational micro-processes”<sup>192</sup> as well as altogether *anational* processes which generate “transcontinental or interregional flows and networks of activity, interaction, and the exercise of power”.<sup>193</sup> For a substantial and nuanced account of this, it is necessary to turn to the concept of *Empire*.

## Empire-building

The concept of Empire, in the context of the international legal order, requires elucidation before the phenomenon it purports to designate can be properly analysed. As Marks<sup>194</sup> and, later, Rasulov<sup>195</sup> argue, “[a]ll modern writings that aim to explore the logic of the structural relationship between ‘law’ and ‘empire’ in the end invariably come down to three principal master-narratives”,<sup>196</sup> each with their own distinct concept of Empire.

<sup>190</sup> Hardt and Negri (2000), p13

<sup>191</sup> Beck (2005), p249 (emphasis in original)

<sup>192</sup> Castells, M., *The Information Age: Economy, Society and Culture – Vol. II: The Power of Identity* 2<sup>nd</sup> ed. (Blackwell, Oxford, 2004), p365 See also Boyd, C. “The Demise of State Legitimacy: is Globalisation the Villain of the Piece?” *Groundings* Vol.2 (Sept 2008), p40

<sup>193</sup> Held, D., et al. *Global Transformations: Politics, Economics and Culture* (Stanford University Press, Stanford, 1999), p16

<sup>194</sup> Marks, S. “Three Concepts of Empire” *L.J.I.L* 16 (2003a) p901 See also Marks, S. “Empire’s Law” 10 *Ind. J. Of Glob. Leg. Stud.* 449 (2003b)

<sup>195</sup> Rasulov (2010), p461

<sup>196</sup> *Ibid*, p461

The first view, which equates empire with nineteenth-century European colonialism, invests the concept with only historical significance because it accepts the orthodox account that “[t]he more ‘law’ had found its voice, the more it rose in opposition to ‘empire’, challenging it and steadily encroaching on its domain, until eventually, with the adoption of the epochal UN General Assembly Resolution 1514(XV) in 1961, it *delivered the final victorious blow, bringing the whole colonial system to its rightful end*”.<sup>197</sup> The second recognises the continuation of imperialist power, but reduces empire to U.S. hegemony, with “the boycott of the Kyoto protocol, the ‘un-signing’ of the ICC Statute, and the establishment of the Guantánamo prison being the regular ‘proofs’ of its unimpeded march over the vanquished body of ‘law’”.<sup>198</sup> Both of these, however, are problematic: not only does each present a simplistic account of law and power as locked in metaphysical opposition (differing only in their assessment of which ‘wins’),<sup>199</sup> but also neither captures the complexity of the contemporary structure of the global order.

The third narrative, most famously proposed by Hardt and Negri in their book *Empire*, is by far the most nuanced and theoretically useful in terms of analysing both empire, and its relationship to law. According to this ‘post-structuralist reappropriation of the classical Leninist concept of imperialism’, as Rasulov describes it, “at some point following the end of the Cold War, the development of global capitalism entered a qualitatively new stage, bringing to life an entirely novel system of global governance”<sup>200</sup> which, rather than being *opposed to* law, is *bound up with* it. The first two views to a large extent ignore the insights gained from the globalisation discourse, remaining within a strictly *international* framework, whereas the third recognises that “*no nation-state can today, form the centre of an imperialist project*”<sup>201</sup> because *even for the most powerful capitalist states*, their “functions and constitutional elements [are being] displaced to other levels and domains”<sup>202</sup> of sub- supra- and/or a-national natures. Concomitant to this, pre-existing boundaries and divisions between states are dissolving. (For example the ‘Third World’, rather than disappearing, “enters into the First, establishes itself at the heart as ghetto, shantytown, favela, always again produced and reproduced. In turn, the First World is

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<sup>197</sup> Rasulov (2010), p462 (emphasis added)

<sup>198</sup> Ibid, p463

<sup>199</sup> This dichotomy is also evident in Philip Alston’s discussion of the differences between Serge Sur and Anne-Marie Slaughter’s conceptualisation of globalisation processes in Alston, P. “The Myopia of the Handmaidens: International Lawyers and Globalisation” 8 *E.J.I.L.* (1997), pp435-448

<sup>200</sup> Rasulov (2010), p467

<sup>201</sup> Hardt and Negri (2000), xiv (emphasis in original)

<sup>202</sup> Ibid, p307

transferred to the Third in the form of stock exchanges and banks, transnational corporations and icy skyscrapers of money and command”.<sup>203</sup>

The resultant blurring of the traditional national/international dualism is captured by Beck’s characterisation of the emerging order as a ‘glocal’ arena (a term made from the neologistic combination of ‘global’ and ‘local’) in which “[g]lobal politics has turned into global domestic politics”<sup>204</sup> and international law has turned into (or, rather, has been revealed as) *global domestic law*. This Beckian ‘glocality’ is ripe for a rigorous Marxian analysis yet, although they draw heavily on Marx in other respects, Hardt and Negri instead choose to formulate an account based on Foucauldian biopolitics, positing a global order that “encompasses the spatial totality... suspends history and thereby fixes the existing state of affairs for eternity... operates on all registers of the social order extending down to the depths of the social world.... [and is] the paradigmatic form of biopower”.<sup>205</sup> This, with its conspicuous absence of class (replaced by the impossibly vague ‘Multitude’) and the rejection of structure in favour of an order which is “decentred, kaleidoscopic, heterogeneous, and irreducible to any single master-plan”<sup>206</sup> is a retrograde step, particularly in light of the valuable insights provided by Marxian scholarship highlighted above.

### Constitutionalisation and the formation of a ‘nascent (imperial) global state’

Describing the contemporary conjuncture using concepts taken from the analytical framework used by constitutional law scholarship appears at first glance to be a far *inferior* option to those provided by Globalisation and Empire, not least because it risks introducing into international legal scholarship the simplistic, uncritical and clichéd debates over the nature and existence of ‘the social contract’ which first arose within domestic jurisprudence. However, it has two major advantages. Firstly, the advantage it has over much of the scholarship which has contributed to the *globalisation* debate is that it aims at an account not only of the *processes* involved in the contemporary dynamic, but also the emergent *structure*; the newly *constituted* global legal order. Secondly, the advantage it has over the model provided by Hardt and Negri is that it allows one to take seriously Teschke’s conclusion that *class* relations of production ultimately determine the structure

<sup>203</sup> Ibid, pp253-254

<sup>204</sup> Beck (2005), p249 (emphasis in original)

<sup>205</sup> Hardt and Negri (2000), xiv-xv

<sup>206</sup> Rasulov (2010), p467 See also Alston (1997), pp435-448

and functioning of the global order. It is capable of doing so because, from the perspective of Marxian scholarship, an order capable of being discussed using constitutional-law concepts looks very much like a State: a collection of apparatuses (whether public or private, repressive or ideological) which, while not necessarily being materialised in traditional nation-state institutions, functions to preserve the stability of the social formation and maintain its ideological cohesiveness. Furthermore, and perhaps most importantly, to speak of a State within Marxian scholarship is to speak of a *class* State. Hardt and Negri rightly criticise conceptualisations of the emergent global order which simply draw a domestic analogy with the (Westphalian) nation-state, and thus conclude that:

“If we were to remain within the conceptual framework of classic domestic and international law, we might be tempted to say that a supranational quasi-state is being formed. That does not seem to us, however, an accurate characterisation of the situation.”<sup>207</sup>

However, as argued above, this is *not* the only available concept of the State. To speak of a global State is not necessarily to speak of a supra-national facsimile of the *nation*-state, and in making the assumption that it *is*, Hardt and Negri simply reproduce, uncharacteristically, the errors and limitations of orthodox scholarship. As Chimni explains, “[t]he thesis that a nascent global state has emerged assumes a particular [unorthodox] understanding of ‘state’... it does not imply... the replacement at a *structural* level of the sovereign state system, but rather its transformation in a manner that facilitates the construction of a global state... constituted at the *functional* level”<sup>208</sup> by a network of public and private international institutions.

### **International law scholarship and the nascent global state**

Of course even if this is an interesting *definition* of the contemporary conjuncture, the question Pashukanis originally raised still stands, together with those arising from our broader, Althusserian concept of the State. Can we *actually* see a ‘global state’ which maintains a recognisable relationship to law and the economy? If so, what does it look

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<sup>207</sup> Hardt and Negri (2000), pp38-39

<sup>208</sup> Chimni (2004), p5 (emphasis in original)

like? What are its apparatuses? How have they arisen? How does the global RSA relate to global ISAs and what role does each of them play?

### The global state *apparatus*

Chimni, in his article *International Institutions Today: an Imperial Global State in the Making*,<sup>209</sup> argues that international institutions have spread throughout all aspects of international relations (which is supported by Beckfield's analysis above) and that this limits state autonomy, particularly in relation to economic policy-making, which he claims has been relocated to international economic institutions (particularly the WTO, IMF and World Bank) *with effective enforcement powers*. Furthermore, according to Chimni, the UN has "embraced the neo-liberal agenda"<sup>210</sup> of promoting transnational capital (in part through increased private-sector involvement) and is involved in the erosion of the traditional prohibition of the use of force in favour of armed humanitarian intervention. In addition, he claims that several international institutions that had "adopted a critical discourse in the past have been repositioned and normalized"<sup>211</sup> in response to pressure exerted by powerful states, while the increase in NGO participation in, and influence over, international institutions extends the reach not only of *critical* groups but also of *pro-capital* corporate associations. These developments, in Althusserian terms, constitute the growth of the global ISA(s). Finally, Chimni argues that a network of sub-national and non-governmental organisations and authorities act as "the decentralized instruments of global governance"<sup>212</sup> to erode state autonomy from *within* while international institutions do it from *without*.

### The global RSA

As argued above, the 'role of law in the preservation of class domination', particularly embodied in criminal and constitutional law (as part of the wider RSA), has appeared to be missing from international law, and thus its study is often missing from (even Marxian)

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<sup>209</sup> *E.J.I.L.* Vol.15 No.1 (2004), pp1-37

<sup>210</sup> *Ibid*, p1

<sup>211</sup> *Ibid*, p2

<sup>212</sup> *Ibid*, p3

international legal scholarship. This is true even of Chimni's scholarship despite the fact that it is viewing the global order as a nascent global state with its Beckian 'global domestic politics' which provides the bridge for the (re)discovery of this role. Unlike in orthodox scholarship, which restricts its studies of international criminal law to the work of the ICC and attendant tribunals, radical international law scholarship must take seriously Hardy and Negri's argument that "the era of major conflicts has come to an end... we have entered the era of minor and internal conflicts. Every imperial war is a *civil war*"<sup>213</sup> in which "military deployment is presented as an internationally sanctioned *police action*".<sup>214</sup> Those class factions in governmental control of powerful states and international institutions are able to mobilise this force in their own interests almost as easily as it can mobilise domestic police forces, and this is particularly evident in relation to the Haitian coup of February 2004. As Miéville explains:

"The February 2004 Haitian coup that saw the overthrow of President Jean-Bertrand Aristide, the subsequent occupation of Haiti by US, Canadian and French troops, and their rapid replacement with troops of the UN MINUSTAH mission, has been exhaustively and desperately documented by activists and the alternative media... UN troops have justified Haitian police death-squad attacks... MINUSTAH troops have repeatedly besieged, occupied and attacked pro-Lavalas slums... in the name of 'anti-gang' activity... [and] MINUSTAH has fired on mass demonstrations demanding a return to democracy".<sup>215</sup>

Although Miéville dramatically describes the situation as a "rainbow nation of imperial proxy invaders"<sup>216</sup> engaged in "multilateralism as terror",<sup>217</sup> a more accurate description would be 'multilateralism as a *technique* of the repressive global state apparatus'. Indeed, this is not brutality for brutality's sake: specific and identifiable capitalist class factions have benefited from this 'global police action' in the same way that specific factions of the capitalist class benefit when domestic police are used to break strikes and prevent protests. Miéville recognises this, and notes that:

"The [post-coup Interim] Latortue government turned its back on the [previous] Lavalas administration's efforts to crack down on tax evasion by the rich... [f]ertiliser subsidies for poor farmers were cut... the minimum wage... was cut[.] The opening up of [a] Haitian zone of brutalised and super-cheap labour just before [the lifting of the textile quotas in place since 1961 with the end of the 10-year

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<sup>213</sup> Hardt and Negri (2000), p189 (emphasis added)

<sup>214</sup> Ibid, p37 (emphasis added)

<sup>215</sup> Miéville, C. "Multilateralism as Terror: International Law, Haiti and Imperialism" *Finnish Yearbook of International Law* Vol.19 (2008), p73, 80

<sup>216</sup> Ibid, p79

<sup>217</sup> Ibid, p81

WTO Agreement on Textiles and Clothing]... was of great help to ‘big textile’[.] The brutalities of the sweatshop labour and their cost-reducing effects are of course not a side-effect but the specific desiderata of capital”<sup>218</sup>

### The global ISA(s)

Of course, just as at the domestic level there is more to the State than its repressive apparatus, so too is this the case at the global level. As Knox argues:

“[I]n emphasising ‘war’ as the central form of coercion Miéville is elevating the ‘political’ aspects of international society over the economic one, something one would not necessarily associate with a Marxist approach to international relations... throughout Miéville’s book there is no mention of the World Bank or the international Monetary Fund, despite their increasing importance and... the prominent usage of economic sanctions in international law and their role in the enforcement of Security Council resolutions and foreign policy more generally.”<sup>219</sup>

This omission of war from Chimni’s account, therefore, is far from fatal. Looking at the rest of his conceptualisation of the global state, the features he outlines do in fact reflect the ontological state of the State. The network of global state institutions, and the legal relations which constitute them and are mediated by them cross all territorial/geopolitical boundaries and all distinctions between levels of the global social formation. What Chimni describes as the growth of ‘decentralised instruments of global governance’ eroding ‘state autonomy’ from *below*, Ann-Marie Slaughter, perhaps more accurately, describes as the (nation-)state ‘disaggregating into its separate, functionally distinct parts’:

“These parts – courts, regulatory agencies, executives, and even legislatures – are networking with the counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order... Government institutions have formed networks of their own [in addition to inter-*national* institutions], ranging from the Basle Committee of Central Bankers to informal ties between law enforcement agencies to legal networks that make foreign judicial decisions more and more familiar.”<sup>220</sup>

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<sup>218</sup> Ibid, pp86-87

<sup>219</sup> Knox (2009), pp424-425 For a discussion of this sort of use of economic measures, such as import restrictions, as foreign policy tools (in this case to influence environmental or labour standards/practices) in relation to the rules of the WTO, see Howse, R. and Trebilcock, M.J. “The Free Trade-Fair Trade Debate: Trade, Labour and the Environment” in “The Free Trade-Fair Trade Debate: Trade, Labour, and the Environment” in Bhandari, J.S. and Sykes, A.O. (eds.) *Economic Dimensions in International Law: Comparative and Empirical Perspectives* (Cambridge University Press, Cambridge, 1997), pp186-234

<sup>220</sup> Slaughter, A-M. “The Real New World Order” *Foreign Affairs* Issue 76 (Sept/Oct 1997) p184 Furthermore, as Slaughter argues, “[t]he judges of the supreme courts of Western Europe began meeting every three years in 1978... Meetings between U.S. Supreme Court justices and their counterparts of the European Court have been sponsored by private groups, as have meetings of U.S. judges with judges from

What is important in this is that, although functioning in a global rather than merely national way, the institutions of the global state include (but are not limited to) the *same institutions* that Althusser identified for the nation-state, with the same staff, the same processes and the same relationship to law.<sup>221</sup> Slaughter even goes so far as to argue that, “[h]uman rights lawyers are *more* likely to develop transnational litigation strategies for domestic courts than to petition the U.N. Committee on Human Rights”,<sup>222</sup> though this is a step further than her argument actually requires.<sup>223</sup>

What Chimni describes as the growth of restrictions on ‘state autonomy’ from *above* can also be viewed as the increasing importance of what Stiglitz calls those “international institutions that have written the rules, which mandate or push things like liberalisation of capital markets (the elimination of the rules and regulations in many developing countries that are designed to stabilise the flows of volatile money into and out of the country)”,<sup>224</sup> privatisation and so on. To understand the place of such international economic institutions in the apparatus-structure of the global state, it is necessary to look at three main institutions: the IMF, the World Bank, and the GATT/WTO.<sup>225</sup> These have both

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the supreme courts of Central and Eastern Europe and Russia. The most formal initiative aimed at bringing judges together is the recently inaugurated Organisation of the Supreme Courts of the Americas”. (p189)

<sup>221</sup> Although an investigation into the *full* implications of this deceptively simple point is beyond the scope of this thesis, it is clear that this fragmentation of the nation-state and blurring of the distinctions between national and international is highly relevant to the analysis of the existence, nature and value of the ‘norm of democratic governance’, the alleged emergence of which is investigated by Marks in *Riddle of all Constitutions*. (See, in particular, pp88-92.)

<sup>222</sup> Slaughter (1997) p185 (emphasis added) Harold Hongju Koh, in “Transnational Public Law Litigation” *Yale Law Review* Issue 100 (1990-1991), p2371, describes what such transnational litigation strategies entail: “(1) a *transnational party structure*, in which states and nonstate entities equally participate; (2) a *transnational claim structure*, in which violations of domestic and international, private and public law are all alleged in a single action; (3) a *prospective focus*, fixed as much upon obtaining judicial declaration of transnational norms as upon resolving past disputes; (4) the litigants’ strategic awareness of the *transportability of those norms* to other domestic and international fora for use in judicial interpretation or political bargaining; and (5) a subsequent process of *institutional dialogue* among various domestic and international, judicial and political fora to achieve ultimate settlement.”

<sup>223</sup> Indeed, Ronald A. Cass argues that this dynamic does not necessarily hold for *private* international law, which is often “implemented through arbitration rather than through established judicial mechanisms... [because] parties can more readily satisfy themselves that an arbitrator without ties to either party will be impartial than that any national governmental body that might have jurisdiction over their dispute (which quite often limits the choice to *your judge or mine*) will be neutral.” (Cass, R.A. “Introduction: Economics and International Law” in Bhandari, J.S. and Sykes, A.O. (eds.) *Economic Dimensions in International Law: Comparative and Empirical Perspectives* (Cambridge University Press, Cambridge, 1997), p13 (emphasis in original) and Park, W.W. *International Forum Selection* (Kluwer, The Hague, 1995))

<sup>224</sup> Stiglitz (2002), p10 (emphasis in original)

<sup>225</sup> For an useful, if very brief, account of these three ‘Bretton Woods institutions’ from an orthodox perspective, see Loibl, G. “International Economic Law” in Evans (2006), pp689-717. Although Loibl’s chapter touches upon International Investment Law (IIL) as a part of the wider International Economic Law (IEL) regime, a far more comprehensive account of this field, which sits uncomfortably between *public* and *private* international law, is provided by Alvarez (2011). Alvarez, *contra* Evans, focuses on the differences between IIL and IEL, most notably the lack of any overarching investment institution comparable to the



repressive and ideological functions. On the one hand, as Stiglitz (former chief economist at the World Bank) explains, “[in the 1980s t]he IMF and the World Bank became the new missionary institutions, through which [free-market] ideas were pushed on the reluctant poor countries that often badly need their loans and grants”.<sup>226</sup> On the other hand, these institutions were able to effect concrete changes in economic policy through *economic coercion* – the strategic granting or withholding of financial support:

“In the 1980s, the Bank went beyond just lending for projects... to providing broad-based support, in the form of *structural adjustment loans*; but it did this only when the IMF gave its approval – and with that approval came IMF-imposed conditions on the country. The IMF was supposed to focus on crises; but developing countries were always in need of help, so the IMF became a permanent part of life in most of the developing world.”<sup>227</sup>

Although the references to ‘developed’ and ‘developing’ *countries* suggests a purely *international* analytical framework, Stiglitz does recognise that these institutions are not purely, or even primarily organised along national lines. Although he does not use the Marxian vocabulary of class, his analysis points to a system controlled by and primarily favouring not different nations (as unified entities) but different factions of the international capitalist class (industrial, financial, etc.):

“The institutions are dominated not just by the wealthiest industrial countries but by commercial and financial interests in those countries... The choice [of] heads for these institutions symbolises [this]... [as does] who *speaks* for the country. At the IMF, it is the finance ministers and the central bank governors. At the WTO, it is the trade ministers. Each of these ministers is closely aligned with particular constituencies *within* their countries. The trade ministries reflect the concerns of the business community... The finance ministers and central bank governors typically are closely tied to the financial community; they come from financial firms, and after their period of government service, that is where they return.”<sup>228</sup>

These institutions have important, concrete, effects amenable to empirical analysis, as Judith Goldstein, Douglas Rivers and Michael Tomz’s analysis of the GATT/WTO regime demonstrates.<sup>229</sup> Although their analysis is engaged in from an orthodox, statocentric,

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GATT/WTO, IMF and World Bank regimes regulating finance and trade (though a *de facto* link exists in the tradition that the President of the World Bank is also the Chairman of the International Centre for the Settlement of Investment Disputes (See Alvarez (2011), p44).

<sup>226</sup> Stiglitz (2002), p13

<sup>227</sup> Ibid, p14

<sup>228</sup> Ibid, pp18-19 (emphasis in original)

<sup>229</sup> Goldstein, J., Rivers, D. and Tomz, M. “Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade” *International Organisation* Vol. 61, No. 1 (Winter 2007), pp37-67

perspective what is valuable is the attempt to “*quantify* the GATT/WTO’s effect on the level and direction of trade”.<sup>230</sup> They reach two important conclusions. Firstly, “[t]rade among those with standing in the GATT/WTO was considerably higher than what one would predict, based purely on proximity, national income, and other non-political variables”.<sup>231</sup> Secondly, each of the eight round of trade talks facilitated by the GATT/WTO, generating a set of agreements shared by all their members, “apparently contributed to trade, [though t]he impact of the participation diminished gradually and become negligible with the establishment of the WTO after the Uruguay Round. By that time, only a handful of countries remained outside the regime: a few Middle Eastern nations, formerly Communist Countries, and microstates.”<sup>232</sup> This then, provides a measurable indicator of the globalisation – not only of commodity *circulation* but also commodity *production* (insofar as production has *itself* become globalised, as argued below). While, because of their theoretical assumptions, Goldstein *et al.* attribute a *positive* effect to the transnational trade law which is centred on this regime, Stiglitz provides a rather different account:

“[A]fter the last trade agreement in 1995... the *net* effect was to lower the prices some of the poorest countries in the world received relative to what they paid for their imports. The result was that some of the poorest countries in the world were actually made worse off. Western banks benefited from the loosening of capital market controls in Latin America and Asia, but those regions suffered when inflows of speculative hot money (money that comes into and out of a country, often overnight, often little more than betting on whether a currency is going to appreciate or depreciate) that had poured into countries suddenly reversed.”<sup>233</sup>

This is a more concrete expression of Marks’ more general argument:

“[T]he production of ‘under-development’ is not simply spontaneous. As [Rosa] Luxemburg explains, it entails the use of coercive force... just as the production of ‘under-development’ is not a spontaneous phenomenon, it is not an anonymous phenomenon. Bertolt Brecht once famously quipped that ‘famines do not simply occur; they are organised by the grain trade’. Brecht reminds us here that hunger is not simply an objective fact of the world, but a policy option and an outcome of decisions taken by particular people in particular contexts.”<sup>234</sup>

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<sup>230</sup> Ibid, p38 (emphasis added)

<sup>231</sup> Goldstein *et al.* (2007), p63

<sup>232</sup> Ibid, p56

<sup>233</sup> Stiglitz (2002), p7 (emphasis in original). In relation to the Argentine Crisis of the late 1990s/early 2000s, even the IMF’s own report concluded that “[t]he IMF on its part... erred in failing to call an earlier halt to support for a strategy that... was not sustainable”. (IMF Independent Evaluation Office *Report on the Evaluation of the Role of the IMF in Argentina: 1991-2001* (2004) quoted in Alvarez (2011), p255 footnote 506.

<sup>234</sup> Marks (2008a), pp12-13

### The global *class* state

As will be recalled, the classical Marxist definition of State explicitly grounds the concept in the idea of class struggle. To understand the phenomenon of the global state, requires, therefore answering Chimni's important questions: "[a]re there global classes? ...How are class interests expressed in an inter-state system? To what extent does the existence of sovereign states mean that class interests are manifested in a greatly mediated and indirect manner at the global level?"<sup>235</sup>

As Rasulov notes, discussing class in the context of international law scholarship appears at first somewhat jarring:

"A common assumption... has come quietly to shape the common theoretical horizon of modern international studies. Constructed around a fetishistic hypostasis of the statal form, it suggests that the analytical apparatus of the Marxian class theory has nothing of value to contribute to modern international law... on the murky parched planes of the international arena, there are no signs of any class struggles to be seen. The jukebox of global politics plays only the tunes written by *one* set of composers, the national governments of sovereign states and their ever more glamorous proxies, the international civil service."<sup>236</sup>

Nevertheless, even though classes are not formally recognised in international law and possess no immediate international legal agency, Rasulov rightly argues that "the international legal domain still represents one of the common areas... for the conduct of the global class struggle – and *thus*, by implication, for the constitution of the global class structure"<sup>237</sup> or, to put it another way, for the structure of the global class state.

### The problem of nation-states as *class proxies*

Although necessary (and greatly facilitated by the insights from Chimni and others, above) the introduction of a Marxian class analytic into international legal scholarship is not unproblematic, largely because of the long and sustained use by the latter of 'the domestic

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<sup>235</sup> Chimni, B.S. "Prolegomena to a Class Approach to International Law" *E.J.I.L* Vol. 21, No. 1 (2010), p65

<sup>236</sup> Rasulov, A. "Bringing Class Back into International Law: a Response to Professor Chimni" *Critical Legal Conference International Law plenary 'Critical Legal Strategies'* (September 2008b), p1 Available at SSRN: <http://ssrn.com/abstract=1675447>

<sup>237</sup> *Ibid*, p5

analogy': a conceptual tool in which (*public*) *international law* is described as equivalent to the (*domestic*) *law of contract*.<sup>238</sup> The problem is not the drawing of analogies between domestic and international law *as such* (it can, as argued in this thesis, in fact be valuable if done correctly), but the often attendant (yet unnecessary) anthropomorphisation of the state.<sup>239</sup> There are two problems with this – one practical and one theoretical.

Firstly, there is no evidence that anyone in the international law profession actually formulates their practice of international law based on this. For example, the legal representative of France, M. A. De La Pradelle, discussing the meaning of territorial sovereignty before the ICJ in the *Nationality Decrees in Tunis and Morocco* case,<sup>240</sup> openly contradicted it, stating that:

“[T]erritory is neither an object nor a substance; it is a framework. What sort of framework? The framework within which the public power is exercised... territory as such must not be considered, it must be regarded as the external, ostensible sign of the sphere within which the public power of the state is exercised.”<sup>241</sup>

When viewed in this way, the supposed equivalence between state territories and private estates disappears. National territory is *not something* separate from the nation-state, but a function of the limits of the exercise of State power on society. The estate of the individual, however (whether comprising land, property or possessions) *is*, essentially, a collection of *things*, as there is no internal society, no internal class divisions and struggle, from which the individual arises as an abstract ‘third force’.

Secondly it results in a temptation for Marxian international law scholarship to posit a simplistic and fetishism-driven equation of the bourgeoisie with ‘first world’ states and the proletariat with ‘third world’ states which obscures the *actual and much more complex*

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<sup>238</sup> Indeed, as Hardt and Negri, talking of the development of the globalisation discourse, argue that “[t]o a large extent...the models that had presided over the birth of the nation-state were simply dusted off and reposed as interpretive schema for reading the construction of a supranational power. The ‘domestic analogy’ thus became the fundamental methodological tool in the analysis of international and supranational forms of order”. (Hardt & Negri (2000), p7)

<sup>239</sup> This takes the form of *nation-states* and *national territories* being treated as equivalent to *individuals* and *private estates* and, although less common, states being described as the ‘producers’ of the goods and services that are the result of national industries, and ‘purchasers’ of commodities imported into them. Miéville traces this tendency as far back as the writings of Hugo Grotius (1583-1645): “Grotius makes this clear. ‘[T]he jurist [Ulpian] is speaking of private estates and of public law, but in speaking here of the territory of peoples and of private law the same reasoning applies, because from the point of view of the whole human race peoples are treated as individuals.’ This is insofar, evidently, as those individuals are owners of estates.” (Miéville (2006), p54, quoting Grotius, H. *The Freedom of the Seas* (Batoche Books, Kitchener, 2000), p29)

<sup>240</sup> P.C.I.J. Rep., Series B, No.4 (1923)

<sup>241</sup> Ibid, pp106-108, as quoted in Harris (2004), p195

character of the underlying economic (and legal-dispute) process. Miéville does exactly this when he argues that “the logic of modern inter-state relations is defined by the same logic that regulates individuals in capitalism... since the system’s birth – and in the underlying precepts of international law – states, like individuals, interact as property owners”.<sup>242</sup>

Miéville’s analysis is not always this simplistic and he remains sceptical of *international law*’s emancipatory potential, but it is exactly the kind of reasoning he engages in, above, which can lead to the overestimation of that potential in light of the fact that the working class have historically been able to gain important concessions from the bourgeoisie/bourgeois state in *domestic law*. The most common examples of such concessions are in relation to ‘the length of the working day’, as discussed by Marx in *Capital*,<sup>243</sup> and ‘the Black Act’, as discussed by Thompson in *Whigs and Hunters*.<sup>244</sup> The difference lies in the fact that:

“[In the case of the Black Act] the contending classes fought quite directly to fill the legal form with specific content, and at particular points the working class triumphed... However... [s]tates, not classes... are the fundamental contending agents of international law [which clash in international courts and tribunals]... and while their claims and counterclaims are certainly informed by their own domestic class struggles, they do not ‘represent’ classes in any direct way – it is generally the opposing ruling classes of the different states which are clashing with the legal form”.<sup>245</sup>

From this Miéville concludes that, “[w]hen it comes to international law... the more powerful state, with the coercive strength to enforce its own interpretation of the legal rules, is a more powerful *capitalist* state. Its interpretations and its coercive efforts are deployed for capital, which is predicated on class exploitation”,<sup>246</sup> but *this is also true of the less powerful state* and so, “exceptional circumstances aside, every international legal decision represents the triumph of (at least) one *national* ruling class – it is they after all who have had recourse to the legal form”.<sup>247</sup> Although this is an important step in overcoming the problems of anthropomorphisation it, again, does not go far enough. In

<sup>242</sup> Miéville (2004), p274 This is yet another example of the ‘subjectivist aesthetic’ identified by Schlag except that, rather than *the law* (inter)acting with will, purpose and personality, Miéville’s analysis imposes this aesthetic on *the (nation-)state*.

<sup>243</sup> See Marx, K. *Capital* (Vol. 1) (Penguin, London, 1976), especially pp604-607 These concessions, of course, are largely restricted to proletariat of the ‘first world’ economies and are consistently and forcefully denied those working in the ‘third world’ – see Klein (2005), p204.

<sup>244</sup> Thompson (1975)

<sup>245</sup> Miéville (2004), p301

<sup>246</sup> *Ibid*, pp297-298 (emphasis in original)

<sup>247</sup> *Ibid*, p301 (emphasis added)

light of Stiglitz's insight about the different (transnational) class factions represented by the World Bank/IMF and WTO respectively – and Poulantzas' insight that “[r]ather than facing a corps of state functionaries and personnel united and cemented around a univocal political will, we are dealing with fiefs, clans and factions: a multiplicity of diversified micro-politics”<sup>248</sup> *within* each state – it can be seen that ‘every international legal decision represents the triumph of *one faction* of the *global* ruling class’.

Indeed, to understand the disconnect which Rasulov highlights – the existence of global class relations and the blindness of orthodox international law scholarship to them – it is necessary again to turn to Lukács. What his insight reveals *here* is that the traditional idea of the global economy being constituted by *domestic* economies (inter)acting internationally is a product of reification *par excellence*; a double-reification of the underlying class relations whereby nation-states not only appear as things able to act on their own national class relations from a position of externality (when they are in fact the reified products of those relations), but also able to act on/influence other nation-states.<sup>249</sup> However, a nation-state interacting with another nation-state is, at its heart, one set of class relations concentrated within a particular geographical area becoming enmeshed with and co-constitutive of, another. In other words, Lukács' insights allow us to understand the *international* relations amongst states as, ultimately, the *transnational* relations of individuals and classes. This, of course, is missed by Miéville because his treatment of states as individuals not only fails to challenge, but actually perpetuates, the reification which obscures national and *transnational* class relations for international legal scholarship.

### Class beyond nation-states

Lukács provides a reason for introducing analysis of the *transnational* interaction of national classes into international legal scholarship, but further analysis is required before accepting Chimni's claim that the global order should be viewed as a global state with its own immanent class relations involving distinct transnational classes: the Transnational

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<sup>248</sup> Poulantzas (1978), p135

<sup>249</sup> This particular example of reification also has important parallels with the orthodox assumption, critiqued by Marks, that “global democracy requires to be built through the accumulation of national democracies” rather than, primarily, “bringing democratic principles to bear in international and ‘transnational’ settings”. (Marks (2000), p3)

Capitalist Class (TCC), Transnational Middle Class (TMC) and Transnational Working Class (TWC).

Since it is productive relations which both define and produce classes,<sup>250</sup> it is through looking at the changing face of contemporary production that the complexity of contemporary class relations should become apparent. An important aspect of this change – the development of truly *global*, rather than merely *international* productive processes – is described by Klein:

“For some companies a plant closure is still a straightforward decision to move the same facility to a cheaper locale. But for others... layoffs are only the most visible manifestation of a much more fundamental shift: one that is less about where to produce than how. Unlike factories that hop from one place to another, these factories will never rematerialise. Mid-flight, they morph into something else entirely: ‘orders’ to be placed with a contractor, who may well turn over those orders to as many as ten subcontractors, who – particularly in the garment sector – may in turn pass a portion of the subcontracts on to a network of home workers who will complete the jobs in basements and living rooms.”<sup>251</sup>

As Santos argues, although “the modern world system has always been structured by a world class system, a transnational capitalist class is emerging today whose arena of social reproduction is the globe *as such*”.<sup>252</sup> It is therefore necessary, as Leslie Sklair attempts, to “establish the TCC empirically by identifying its members and the institutions through which they exercise their powers”.<sup>253</sup> The most concise and valuable conceptualisation of the TCC is that provided by William Robinson and Jerry Harris, who argue that it comprises the owners of ‘transnational capital’, or in other words, “the leading worldwide means of production as embodied principally in the transnational corporations and private financial institutions”.<sup>254</sup> Sklair develops this conceptualisation further by breaking the

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<sup>250</sup> Not only are classes defined by their relationship to the productive process but also, as Thomson explains, classes are *produced* by productive relations (or more accurately, relations of struggle over the mode and means of production): “[C]lasses do not exist as separate entities, look around, find an enemy class, and then start to struggle. On the contrary, people find themselves in a society structured in determined ways... experience exploitation (or the need to maintain power over those whom they exploit)... identify points of antagonistic interest... struggle around these issues and in the process of struggling they discover themselves as classes, they come to know this discovery as class-consciousness.” (Thompson, E.P., “Class and Class Struggles” in Joyce, P., (ed.) *Class* (2005), pp133-136 quoted in Chimni (2010), p80.) This complements Poulantzas’ argument that “social classes do not firstly exist as such and only then enter into class struggle. Social classes coincide with class practices, i.e. the class struggle, and are only defined in their mutual opposition”. (Poulantzas, N. *Classes in Contemporary Capitalism* (Verso, London, 1975), p14. See also Rasulov (2008a), p263 and Marx and Engels (1974), p42

<sup>251</sup> Klein (2005), p201

<sup>252</sup> Santos (2002), p168 (emphasis added)

<sup>253</sup> Sklair, L. *The Transnational Capitalist Class* (Blackwell, Oxford, 2001), p1

<sup>254</sup> Robinson, W. and Harris, J., “Towards a Global Ruling Class? Globalisation and the Transnational Capitalist Class” *Science and Society* 64 (2000), p22

TCC down into “four main, interlocking groups”<sup>255</sup> or *class fractions*: “those who own and control the TNCs (the corporate fraction), globalising bureaucrats and politicians (the state fraction), globalising professionals (the technical fraction), and merchants and media (the consumerist fraction)”.<sup>256</sup> Although this precise division is problematic (ignoring as it does the traditional Marxian analytical distinctions between industrial and finance capital and including those, such as bureaucrats and professionals, more properly included with the TMC),<sup>257</sup> Sklair’s underlying point remains valid:

“While each of these groups performs distinct functions, personnel are often interchangeable between them. Key individuals can belong to more than one fraction at the same time, and the transition from membership of one to another group is more or less routinised in many societies.”<sup>258</sup>

To accept Santos’ argument, it is not necessary to assume that class relations have become *purely* transnational, that the TCC and TMC have “replaced the historically much more familiar phenomena of national bourgeoisie and national middle class”<sup>259</sup> or that “the emergence of the TWC suggest[s] that the workers of all countries have at long last united and now rattle their chains in unison”.<sup>260</sup> As Rasulov reminds us, since “the transnational productive process... does not in itself automatically supplant all other types of productive processes occurring on a smaller scale”<sup>261</sup> and there remains a significant volume of capital *not* directly produced by transnational industry or finance, then the class in control of the transnational *means* of production cannot be said to “automatically replace national or regional-based capitalist class formations”<sup>262</sup> either. Neither has the TWC replaced National Working Classes (NWCs), and in fact, as Santos argues, “capital has been far more successful than wage labour in uniting its forces on a global scale”.<sup>263</sup> not only do

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<sup>255</sup> Sklair, L. “Democracy and the Transnational Capitalist Class” *The Annals of the American Academy* 581 (2002), p145

<sup>256</sup> Sklair (2002), p145

<sup>257</sup> As Rasulov explains, the transnational class system can be divided into three basic parts: “[t]he first[, the TWC,] includes all those... who through their direct labour *actually produce* the basic material foundations required to ensure the physical survival and reproduction of [global capitalism]. The second[, the TCC,] in contrast, includes all those who, while existing side by side with the labouring producers, contrive to live off the latter’s productive activities by systematically *expropriating* some part of the total material output they produce... the third[, the TMC,] includes all those remaining members... who without engaging in any immediately *productive labour* do not at the same time appropriate any part of the total material output for themselves but only help the second group to organise and continually reproduce the established state of affairs between it and the first group in return for a certain payout”. (Rasulov (2008a), p265 (emphasis in original))

<sup>258</sup> Sklair (2002), p145

<sup>259</sup> Rasulov (2008a), p269

<sup>260</sup> Ibid, p269

<sup>261</sup> Ibid, p296

<sup>262</sup> Ibid, p296

<sup>263</sup> Santos (2002), p183



NWCs have to deal with exploitation from a TCC that “easily out-manoeuvres... workers’ organisations that are still nationally based”,<sup>264</sup> but also still from their own NCCs and NMCs who share the imperative of “making sure the maximum amount of work is extracted from each worker, the maximum number of working hours extracted from each day”<sup>265</sup>. Just as the birth of the nation-state was an uneven, temporally and territorially dependent process, part of the “complex historical co-development (but not co-genesis) of capitalism, state and state-system”,<sup>266</sup> the birth of the global state is marked by having to “contend with the demands of the logic of the states system”<sup>267</sup> and national class relations, even once transnational class relations have taken hold. The material existence of nation-states remains, “and no amount of conceptual restructuring can dissolve it”.<sup>268</sup> What such restructuring *can* do, however, is explain and demystify that existence and reveal that, when studying either the nation-state or the global state, transnational classes are always present.

#### (Trans)national class consciousness

The references to ‘workers’ organisations’ and ‘political will’ raise the familiar question of class consciousness, so it is important to emphasise that “classes exist as a feature of *objective* reality... The *subjective* experiences of the participating actors constitute related but nevertheless quite different issues for enquiry”.<sup>269</sup> Although a concrete instance of *purely* national labour organisation is a factor indicative of a national rather than transnational productive relationship – since it is people’s “social existence that determines their consciousness”<sup>270</sup> – it is not conclusive: a worker’s organisation may be nationally based and its members may self-identify as members of a NWC, yet those members may actually be part of the TWC because they are engaged in a particularly transnational productive process (e.g. they work in an EPZ,<sup>271</sup> or in a call-centre engaged in outsourced

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<sup>264</sup> Santos (2002), p168

<sup>265</sup> Klein (2005), p204

<sup>266</sup> Teschke (2003), p40

<sup>267</sup> Chimni, B.S., “An Outline of a Marxist Course on Public International Law” in Marks, S., (ed) *International Law on the Left* (Cambridge University Press, Cambridge, 2008), p62

<sup>268</sup> Nettl, J.P., “The State as a Conceptual Variable”, *World Politics*, Vol 20, No. 4 (1968), p559.

<sup>269</sup> Scase, R. *Class* (Open University Press, Buckingham, 1992), p7

<sup>270</sup> Marx, K. *A Contribution to the Critique of Political Economy* (Progress Publishers, Moscow, 1977) p21

<sup>271</sup> As Klein explains, an EPZ (Export Processing Zone) is “a tax-free economy, sealed off from the local government... a miniature military state inside a [‘third world’] democracy... an area where goods don’t just pass through but are actually manufactured... where there are no import and export duties, and often no income or property taxes either... [t]he management is military-style, the supervisors often abusive, [the workforce un-unionised,] the wages below subsistence and the work low-skill and tedious.” (Klein (2005), pp204-205. See also pp210-216 Also speaking of EPZs, Marks makes the important point that, formally (in

work for foreign businesses). This is true also for the TCC/NCCs even though “[w]ithin certain parts of Marxism there is a tendency to assume that the bourgeoisie always has class-consciousness”.<sup>272</sup> Alasdair Stewart, following Sartre, rightly argues that “it is just as probable for the bourgeoisie to remain unconscious as the proletariat. Sartre meant that the bourgeoisie itself may believe the ideology that capitalism benefits everyone in society and not be deliberately trying to undermine all efforts by the proletariat”<sup>273</sup> but it can also, in this context, mean that members of the TCC may self-identify with a particular NCC despite being mainly involved in a transnational mode of production with transnational class relations, or vice-versa.

Rasulov argues that “[i]nsofar as one’s contribution to the historically existing processes of socio-economic production in which one currently participates creates *effects*, however miniscule, beyond one’s immediate geo-economic vicinity, one ineluctably becomes part of one or the other of the three transnational classes”.<sup>274</sup> Tension between objective transnational class membership and national class consciousness would thus not display false-consciousness but instead an individual holding multiple or contradictory class positions. Although this is a much better explanation, it risks a conceptual elision of *transnational* and *international* class relations, which can be avoided if individuals’ contributions are assessed *as a whole* rather than against a threshold. This is important because, as Rasulov recognises, the global state is not (or, perhaps not yet) a *post-national* one.

### **International law scholarship, class analysis and the global state’s function**

Even more important than an investigation into the structure and constitution of transnational *classes*, however, is an investigation into transnational *class struggle*, as it is this which is vital to a Marxian account of the global class state. The TWC are not a passive object existing only to be exploited, to be *acted upon*: only through class struggle

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the Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights and numerous ILO conventions) “international law insists that workers have rights to fair pay and decent conditions. In doing so... its implicit message is that exploitation is work gone wrong. Exploitative employment appears as a kind of pathology of the labour contract. What the Marxian analysis brings out is that, on the contrary, exploitation belongs with the normal functioning of a system in which capital accumulation depends on labour exploitation.” (Marks (2008b), p300)

<sup>272</sup> Stewart (2008), p438

<sup>273</sup> Ibid, p438

<sup>274</sup> Rasulov (2008a), p270

does the concept of class become imbued with content, and only “from the point of view of the class struggle, as an apparatus of class struggle ensuring class oppression and guaranteeing the conditions of exploitation and its reproduction”<sup>275</sup> does the global State (apparatus) have a material function and existence.

### Locating class struggle in the global state, and the State in global class struggles

#### Class struggle in the global state: beyond classical Marxism

Although the classical Marxist definition of the State is far more useful than the orthodox alternative, to understand fully how class struggles become inscribed in the global state it is necessary to move beyond it to the more nuanced conceptualisation which can be constructed using the works of Poulantzas and Therborn.<sup>276</sup> This view is one of the State as “a relationship of forces, or more precisely *the material condensation of such a relationship* among classes and class fractions”,<sup>277</sup> into a network of state apparatuses (each forming the “*site* and a *centre* of the exercise of [class] power”)<sup>278</sup> which function together as a ‘machine’ for the mediation of class antagonisms.

Although starting from an Althusserian conceptualisation of the State, both Poulantzas and Therborn have more nuanced views of what is meant by *state power* and *state apparatus(es)*. In their accounts “power itself is not a quantity or object of possession, nor a quality linked to a class essence or a class subject (the dominant class)”<sup>279</sup> but rather “a concept designating the field of their struggle...[that] designates the horizon of action occupied by a given class in relation to others”.<sup>280</sup> Similarly, a particularly nuanced

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<sup>275</sup> Althusser (2008), p58

<sup>276</sup> Therborn’s account is in places imprinted with the lingering after-images of a narrower, more simplistic view of the State. For example, at one point he argues, *contra* Althusser, that “[t]he family, for example, evidently cannot be considered as part of the state, whereas an ideological apparatus like the school system is organisationally patterned by the *administrative* apparatus of the state”, despite the fact that the wider Poulantzasian view of the State, which he accepts, can easily accommodate the family within its structure and functioning. See Therborn (1978), p41 footnote 31 (emphasis in original)

<sup>277</sup> Poulantzas (1978), pp128-129 (emphasis added)

<sup>278</sup> Ibid, p148 (emphasis in original)

<sup>279</sup> Ibid, pp146-147. This is particularly important given the overlapping of levels of classes and multiple class identities/positions which exist in the global State, as discussed in the quotations from Rasulov, above. If power were any of these things, the complexity of the global class structure would render any account attempting to locate it either vague or inconsistent.

<sup>280</sup> Ibid, p147

concept of the Apparatus is visible in Therborn's description of the social-revolutionary 'smashing' of the State:

"Marx and Lenin asserted that the existing state apparatus must be 'smashed' in any socialist transformation of society. What are to be smashed are neither the various agencies of the state (though some will no doubt be abolished) nor the personnel who work in them (though some will have to be removed). *To smash the state apparatus means to smash the class character of its technology or organisation*, as well as the manifestations of the latter in the mode of regulating tasks, personnel and material resources."<sup>281</sup>

The State is thus not a 'thing' external to class relations and "endowed with an intrinsic instrumental essence and a measurable power-quantum".<sup>282</sup> It is neither "created *ex nihilo* by the ruling classes, nor is it simply taken over by them"<sup>283</sup> but is instead "*part of [the] specific division of labour within [global] society... [and] reflects in a particular way the social division of labour and the prevailing social class relations, contributing to their reproduction in the ever-ongoing social process*".<sup>284</sup> Indeed, as Pashukanis argues, "[w]herever there is class division and thus class struggle and power, the State *already* exists as institutionalised political Power. Thus, [in a class-divided society] there is no 'state of nature' or 'state of society' prior to the State".<sup>285</sup> Similarly, and by no means coincidentally, "[l]aw is always present from the beginning in the social order: it does not arrive *post festum* to put order into a pre-existing state of nature".<sup>286</sup>

As it is an extension and refinement of Althusser's conceptualisation of the State, this account involves the recognition of his distinction between state power and the state apparatus and does not provide a concept of the State which is reducible to class power *to the exclusion of its existence as a material apparatus*. This is important because class power "can exist only insofar as it is materialised in certain apparatuses... [which] are no mere appendages of power, but play a role in its constitution".<sup>287</sup> This means that the 'material condensation' of class relations is a more complex phenomenon than the direct

<sup>281</sup> Therborn (1978), p123 (emphasis in original)

<sup>282</sup> Poulantzas (1978), p147

<sup>283</sup> Ibid, p14

<sup>284</sup> Therborn (1978), p35 (emphasis added)

<sup>285</sup> Poulantzas (1978), p39 (emphasis added). Similarly, Therborn argues that the State is a "nodal point of the relations of power within society. The state as such has no power; it is an institution where social power is concentrated and exercised... where there are no classes, there is no state... Thus, by definition, every state has a class character". Therborn (1978), p132

<sup>286</sup> Poulantzas (1978), p83

<sup>287</sup> Ibid, p45. For the state then, we see the same structure as earlier argued exists for law: just as relationships are at the core of the legal apparatus but do not exhaust it, so too are relationships at the core of the state apparatus, but do not exhaust it.

transcription of the power of the TCC equally into each state apparatus. Instead, (class) power relations become “crystallised in the State in a refracted form that varies according to the apparatus”<sup>288</sup> in question.

While the autonomy of these global apparatuses from the TCC and each other is “limited by the fact that they express the class relations of the same [global capitalist] society... [it can also be seen that] at any given moment significant disjunctures appear between [state power and the state apparatus]... substantially increased by the coexistence within a particular state system of several apparatuses, in which different sets of class relations may have crystallised”.<sup>289</sup> At the global level, these disjunctures appear because, although the global State is a capitalist State organised along the lines of the capitalist mode of production, within any society several “different modes of production (*in a double sense* as they exist both inside nation states as well as in the international system) co-exist”<sup>290</sup> within it, “as well as three or more classes each capable of different forms of alignment [and] often divided into fractions”.<sup>291</sup>

This analysis, then, provides the fuel for Poulantzas’ rejection of two (apparently opposite, though crucially linked) conceptions of the State: the ‘State as Thing’ and ‘State as Subject’. According to the former, the dominant class fraction “is supposed to deploy a political unity that is somehow prior to state action; the State plays no role in organising the bourgeois power bloc”<sup>292</sup> while, according to the latter, State, endowed with reason and a unitary will, imposes that will “on the divergent and rival interests of civil society”<sup>293</sup>. As the analysis above shows, both these conceptions fail to account for the complexities of the apparatus-structure of the global state, and present an incomplete and misleading account of the existence of internal contradictions *within the State*: “[i]n the first case, class contradictions are external to the State; [in the second,] the contradictions of the State are external to social classes”<sup>294</sup> yet both sets of contradictions are *the same* contradictions.

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<sup>288</sup> Poulantzas (1978), p131

<sup>289</sup> Therborn (1978), p35 As Therborn goes on to argue, “[a]lthough the state is, in a fundamental sense, always one, the level of integration of its apparatuses varies considerably, and it should not be taken for granted that they share a common class character... Within limits imposed by the general nature of the state, it is especially probable that the class character of its diverse apparatuses will vary with the link between the tasks of the apparatus and the concerns of classes rooted in the mode of production. It may thus be expected that, allowing for a possible period of revolutionary ‘smashing’, the army of capitalist states would retain feudal traits longer than, say, the fiscal apparatus”. (Therborn (1978), p41)

<sup>290</sup> Chimni (2010), p66

<sup>291</sup> Therborn (1978), p148

<sup>292</sup> Poulantzas (1978), p131

<sup>293</sup> Ibid, p131

<sup>294</sup> Ibid, pp131-132 (emphasis in original)

Being a *condensation* of class relations, the network of state apparatuses, and the global State as a whole, cannot help but *reproduce* the multi-factional and contradictory dynamics of the productive relations which result from the (often uneasy) co-existence of diverse classes and modes of production. This consequence is “concretely manifested in the diverse, contradictory measures that each of these classes and fractions, through its specific presence in the State and the resulting play of contradictions, manages to have integrated into state policy”.<sup>295</sup> The “internal cracks, divisions and contradictions of the State cannot represent mere dysfunctional accidents, since they are organically linked to the establishment of state policy favouring the bloc in power... *The establishment of the State’s policy must be seen [instead] as the result of the class contradictions inscribed in the very structure of the State*”.<sup>296</sup>

### The State in global class struggles: function

Although touched upon earlier during the discussion of the legal *form*, it is only in light of the Poulantzasian concept of the State that the *function* of the international legal order can be fully understood because the function of international law and the global state are interdependent and inseparable. This interdependence is not, however, simply mutual involvement in “organised class terror”<sup>297</sup> (exercised by an authoritarian administration through the *patently* repressive use of public/criminal law).<sup>298</sup> As Hale argues, in every state there exists also *latent* coercion, exercised on and through property and contract law:

“In protecting property [a state] is doing something quite apart from merely keeping the peace. It is exerting coercion wherever that is necessary to protect each owner, not merely from violence, but also from peaceful infringement of his sole right to enjoy the thing owned.”<sup>299</sup>

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<sup>295</sup> Poulantzas (1978), p135

<sup>296</sup> Ibid, p132 (emphasis in original)

<sup>297</sup> Beirne and Sharlet (1980), p115

<sup>298</sup> The situation in Haiti discussed above is a *global* example of this, while a *domestic* equivalent is the situation in France in 1968 as described in detail by the Cohn-Bendit brothers in *Obsolete Communism: the Left-wing Alternative* (Penguin, London, 1969)).

<sup>299</sup> Hale (1923), p472 This, as Kennedy explains, provides a valuable counterargument to “rhetoric [which] justifie[s] the existing capitalist system on the ground that it [is] based on freedom (the free market, free labour, freedom of contract, consumer sovereignty) by contrast to socialism, which supposedly replace[s] all these freedoms with their opposite, namely state coercion”: coercion need not take the form of patent repression, need not be exercised through criminal law, and is present within the most fundamental rules and relationships of the capitalist legal order. (Kennedy (1991), p328)

Indeed, Knox's critique of Miéville's reduction of coercion to violence and Gramsci's discussion of the phenomenon of hegemony serve as reminders that the global state does not *typically* operate through direct oppression (which we would expect to find in a theory of the global state as the will of the TCC) or even (as, at first glance, the above passage appears to suggest) merely exist as the ever-present *threat* of violence, ready to flex its muscles on their behalf.<sup>300</sup>

Instead, its function in the transnational mode of production is more subtle, pervasive and contested: it "marks out the field of struggles, including that of the relations of production: it organises the market and property relations; it institutes political domination and establishes the politically dominant class; and it stamps and codifies all forms of the social division of labour – all social reality – within the framework of a class-divided society".<sup>301</sup> Rather than simply *dominating*, it "*shapes the materiality of the social body upon which domination is brought to bear*"<sup>302</sup> in two important ways.

Firstly, as Kennedy (drawing upon the insights of Hale and the Realists) explains:

"[The state is] responsible for the whole network of ground rules within which labour conflict is conducted, including such basic rules as that corporations can 'own' factories, that no one 'owns' the ocean, that you have no legal obligation to help a starving stranger, that workers can sell their labour and must refrain from taking its product home with them... Most of the time, these ground rules of the

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<sup>300</sup> This is, of course, not to say that international law and the global state *never* act in directly oppressive ways (and any complete critical international legal theory must take account of those situations in which it does) but they are neither the *main* nor the *most interesting* ways in which they function. As Therborn argues, "the state is more than a centralised external power confronting the ruled classes. In another sense it also comprises them... members of all classes are citizens of the state in a capitalist... society". Therborn (1978), p219

<sup>301</sup> Poulantzas (1978), p39. For example, "[w]hat is the [global state] doing when it 'protects [intellectual] property right[s]' [through the World Intellectual Property Organisation]? Passively, it is abstaining from interference with the owner when he deals with the thing owned; actively, it is forcing the non-owner to desist from [dealing with] it, unless the owner consents". (Hale (1923), p471) Furthermore, it is (re)producing the commodification of basic social needs/goods. This can be seen in the patenting of vital AIDS drugs by multinational pharmaceutical companies and through the relatively recent developments that have rendered genetic modifications (which could improve food yields in areas with poor soil/weather) amenable to protection by international patent law.

<sup>302</sup> Poulantzas (1978), p81 (emphasis in original). For example, rather than forcing people into exploitative wage labour which benefits the TCC, the global State produces a legal order in which this state of affairs becomes a natural outcome. As Hale explained, "[u]nless... the non-owner can produce his own food, the law compels him to starve if he has no wages, and compels him to go without wages unless he obeys the behests of some employer. It is the law that coerces him into wage-work under penalty of starvation – unless he can produce food... but in every settled country there is a law which forbids him to cultivate any particular piece of ground unless he happens to be an owner... Not only does the law of property secure for the owners of factories their labour; it also secures for them the revenue derived from the customers. The law compels people to desist from consuming the products of the owner's plant, except with his consent; and he will not consent unless they pay him money". (Hale (1923), p473)

system are just assumed, as are the hundreds and hundreds of other articulated rules that it takes to decide what we *mean* by ‘owning a factory’.”<sup>303</sup>

To the extent that the state *uses* (patent or latent) force to ‘ensure obedience to the rules of the game’ (or *refrains* from doing so) and these rules affect the outcome when such conflict is played out, “the state is implicated in [that] outcome. It is an author of the distribution [of goods and power] even through that distribution appears to be determined solely by the ‘voluntary’ agreement of the parties”.<sup>304</sup>

Secondly, the state mediates<sup>305</sup> conflicts *within and amongst* classes and class factions by “represent[ing] and organis[ing] the long-term interests of a *power bloc*, which is composed of [TCC] class fractions... [and organising] the conflictual unity of the alliance in power and the unstable equilibrium of compromise among its components... under the bloc hegemony and leadership of one class or fraction”.<sup>306</sup> As Stewart explains:

“Poulantzas... stress[es] that a member of the [TCC]’s short-term interest in increasing its own capital puts it at odds with the rest of the [TCC]... In order that the accumulation of capital can continue, the role of the capitalist state is to organise the [TCC] in a power bloc, creating a long-term interest that they lack, and to disorganise the [TWC]... [T]he state [can] make some concessions towards the [TWC] against the wishes of certain parts of the [TCC] in order to secure the long-term existence of capitalism. Essentially, it acts as a valve to release any build-up of pressure.”<sup>307</sup>

<sup>303</sup> Kenedy (1991), p329 (emphasis in original)

<sup>304</sup> Kenedy (1991), p329

<sup>305</sup> As Therborn importantly highlights, “[m]ediation here signifies not arbitration, but exercise of class power through the state. The class state does not go between the classes to separate fighters, but to connect them, in an asymmetric relationship of domination and exploitation”. (Therborn (1978), pp219-220) The State creates, to quote Horace, *concordia discors* (harmony in discord). (Horace *Epistles*, I xii.19 as quoted in *The Oxford Dictionary of Quotations* (3<sup>rd</sup> edn.) (Book Club Associates, London, 1979), p258)

<sup>306</sup> Poulantzas (1978), p127 (emphasis in original). Stiglitz provides examples of such discord and harmony between the World Bank and IMF. On the one hand, Stiglitz claims that during his time at the World Bank, “the IMF kept much of the negotiations and some of the agreements secret from World Bank members even in joint missions” and his “colleagues at the Bank frequently complained that even those participating in a mission had to go to the government of the country [involved,] who ‘leaked’ what was going on”. On the other hand, the World Bank cooperated with the IMF in the 1980s by providing its ‘structural adjustment loans’ only when the IMF gave its approval. (See Stiglitz (2002), pp51 and 14)

<sup>307</sup> Stewart (2008), p438. This is a subtly, but importantly, different argument from that proposed by those ‘state derivationists’ who “derive the necessity of the form of the state as a separate institution from the nature of the relations between capitals. Starting from the fact that capital can exist only in the form of individual capitals, these authors... conclude that it is only due to the existence of an autonomised state standing above the fray that the social relations of an otherwise anarchic society are reproduced and the general interest of total social capital thus established”. (Holloway and Picciotto (1978), p19) The problem with the ‘state derivationist’ position is that, “[i]n so far as the state is derived from the need to fulfil a function which cannot be fulfilled by private capital, the state’s ability to perform this function is already presupposed” (Holloway and Picciotto (1978), p21). However, as Holloway and Picciotto rightly argue, “the contradictions of capitalist society [are] reproduced within the state apparatus, thus making it questionable whether the state can ever act adequately in the interests of capital in general [and] if state actions are not to be identified with the interests of capital in general, this breaks the logical link between the laws of motion of



International law is an integral part of this state-function because it “*damps down* and *channels* [intra- and inter-class] political crises, in such a way that they do not lead to crises of the [global] State itself”.<sup>308</sup> It does this not only through *developing, applying* and *enforcing* international law, however. Through applying the insights gained from the earlier ‘unpacking of legality’ in the analysis of the legal *form*, it can be understood that:

“[T]here is always a set of state practices and techniques that escape juridical systematization... This is not to say that they are ‘anomic’ or arbitrary... But the logic they obey... is somewhat distinct from the logic of the juridical order... each juridical system allows the Power-State to disregard its own laws and even enters an appropriate variable in the rules of the game that it organises... which... entails both that legality is always compensated by illegalities ‘on the side’, and that state illegality is always inscribed in the legality which it institutes... Lastly, of course, there are cases where the State engages in straightforward violations of its own law – violations which, while appearing as crude transgressions not covered by the law, are no less part of the structural functioning of the State.”<sup>309</sup>

However, although the global State is able to absorb and manage the resistance of popular masses through the tactical use of international law, the equilibrium reached is permanently dynamic and unstable because “the resistance of the exploited classes is able to find means and occasions to express itself”.<sup>310</sup> It does so in the gaps and contradictions of the State which inevitably result from the fact that the State is the material condensation of complex and contradictory class relations. This contradictory relationship between the global State the TCC is what Steven Spitzer’s ‘notion’ of *State against Capital* is intended to capture. On the one hand, “[t]he ‘capitalist state’ may use law as a means of ‘disciplining’ *specific capitals* in the interest of capitalism as a whole, and [on the other,] power groups in capitalist societies may use the state and its laws against the interests of both specific capitals and *capitalism in general*”<sup>311</sup> while, unintentionally, strengthening and legitimating the legal order by articulating their demands through laws and legal institutions.

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capital and the content of state activity”. (Holloway and Picciotto (1978), p25) Poulantzas’ account does not encounter this problem for two reasons. Firstly, it *from the start* incorporates an understanding of the contradictory nature of capitalist relations (and thus the capitalist state). Secondly, it is not based on the impersonal and abstract ‘logic of capital’ (though it does not ignore it) but instead on the class struggle.

<sup>308</sup> Poulantzas (1978), p91 (emphasis in original)

<sup>309</sup> Ibid, pp84-85 (emphasis in original) See also Miéville (2006), pp147-148

<sup>310</sup> Althusser (2008), p21

<sup>311</sup> Spitzer (1983), pp112-113 (emphasis added) See also Knox’s discussion of the possibility of domestic political pressure from subordinated groups and classes affecting intergovernmental relations. (Knox (2009), pp427-428)

## Chapter 4 – ‘Filling the bottle’

So far this thesis has found the *form* of international law in international legal *relationships*, introduced the concept of reification to account for how it is possible for these relationships to affect one another, turned to the concept of the *apparatus* for an explanation of the *structure* of the totality of legal relationships, and touched upon the *function* of the international legal order in the context of the global State. Form/relationship and structure/apparatus are not, however, the only aspects of the phenomenon of international law described by the concept of International Law. Any serious theoretical investigation must also account for its *content*.

Although Pashukanis’ critical account of the legal form is useful because it is “corrective to the tendency to analyse legal content *in isolation*”,<sup>312</sup> if it is simplistically applied it risks producing a theory disinterested in, or even “inimical to, examinations of particular legal contents”.<sup>313</sup> To avoid this, it is vital not to treat the legal form as “an empty bottle into which any content can be poured”<sup>314</sup> as to do so “would be to conceptualise content and form as separate, isolated qualities of a social formation, and to fail to understand the dialectical interrelation between the two”.<sup>315</sup> While a focus on form can shed some light on this interrelation (insofar as that form is not infinitely plastic and cannot contain some particular contents),<sup>316</sup> it is not sufficient. For this reason, this chapter seeks to analyse how the legal form is imbued with content: how *economic* relations of production and exchange become inscribed in international *legal* rules, processes and decisions. It will build upon the earlier discussions on the ‘base-superstructure metaphor’ in its analysis of the structural linkages *between* the networks of global economic and legal relations and, more importantly, will investigate the ways in which economic relationships gain material existence *within* the international law, mediated by its internal structure.

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<sup>312</sup> Miéville (2006), p118 (emphasis in original)

<sup>313</sup> Ibid, p285

<sup>314</sup> Ibid, p119

<sup>315</sup> Ibid, p119

<sup>316</sup> As Scott Veitch argues, “[b]reaching the law for principled political reasons has been, and will no doubt continue to be, an important engine for social change; and one through which a large number will often stand to gain” (Veitch, S. “Judgement and Calling to Account: Truths, Trials and Reconciliation” in Duff et al (eds) *The Trial on Trial 2* (Oxford: Hart, 2004), p. 157) and yet, although legality and illegality are interrelated aspects of the functioning of international law, the legal *form*, by its very nature, cannot contain such ‘principled opportunism’ in its *content*. At a formal level, therefore, the law-breaker and the law-affirmer (judicial decision-maker, treaty-party, etc.) are always forced into a problematic “reciprocal and simultaneous denunciation by both sides of the politics of the other as violence *simpliciter*”. (Christodoulidis, E. “The Objection that Cannot be Heard: Communications and Legitimacy in the Courtroom” in Duff et al (eds) *The Trial on Trial 1* (Oxford: Hart, 2004), p. 181)

## Economics *and* the legal order

### Recognising 'tilt'

That economic relations of production and exchange *do* become inscribed in the content of the international legal order is clear, and may usefully be looked at through the lens of Wythe Holt's concept of *Tilt*:

"Tilt is a fancy and somewhat sanitized word for oppression, signifying that the bias and prejudice which everyone experiences every day is neither random nor fortuitous. Few effects of tilt are clear and unambiguous; although some people derive a net benefit from tilt, most are burdened by it... While usual, tilt is neither natural nor inevitable. It is a human artefact that, like all human artefacts, is malleable and transformable... While legal tilt is often obscure and, depending upon the purpose and perspective of one's inquiry, difficult to delineate, one can discover instances when tilt is apparent."<sup>317</sup>

The example Holt chooses is one from the field of *domestic* law, the 'labour conspiracy cases' of the early to mid-nineteenth century.<sup>318</sup> In these, the judiciary consistently handed down decisions, the content of which was 'transparently biased in favour of employers', that 'concerted economic activity by labour unions was *per se* a violation of the common law crime of conspiracy' even though the 'workers argued that it would be fundamentally unfair to deny them the power of acting jointly, as employers might freely combine against them and as the strength of capital lay in its cumulative, collective nature'. Despite its age and domestic focus, this is still an important example: in an age of globalised productive processes with global classes, this same pattern is repeated across the globe. For example, in the EPZs Klein describes, but also more generally, union activity and even unions themselves are still often illegal:

"In some Central American and Asian EPZs, strikes are officially illegal; in Sri Lanka, it is illegal to do anything at all that might jeopardise the country's export earnings, including publishing and distributing critical material."<sup>319</sup>

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<sup>317</sup> Holt, W. "Tilt" *George Washington Law Review* Issue 52 (Jan 1984) pp280-281

<sup>318</sup> *Ibid*, p281

<sup>319</sup> Klein (2005), p214

The same story is repeated in the historical development and present functioning of anti-terror or ‘security’ legislation and adjudication, as investigated by Mark Neocleous in his book *Critique of Security*.<sup>320</sup> Neocleous’ analysis reveals a shift in the phenomenon and concept of ‘martial law’ – “from regulation of the military within the state to regulation by the military of the whole social order on behalf of the state”<sup>321</sup> – followed by a reconceptualisation of martial law in terms of ‘emergency powers’ in order to both soften and entrench (through *legislative* rather than simply *executive* action) the exercise of martial law powers to ‘police’ ‘disorder’ in times of relative peace. Although ostensibly framed as being necessary to deal with (para)military violence, “it was war of a rather different kind – the class war – within the more general regulation of capitalist modernity for which the emergency powers were exercised”.<sup>322</sup> As part of the same movement, the ‘stick’ of (*national*) *security* was complemented by the ‘carrot’ of *social security* (developed to dampen class conflict through the alleviation of the extremes of economic inequality and taking the form of international aid, development grants and loans, etc. at the *international* level) under the broader concept of *Economic Security* and, as Neocleous points out, “both domestically and internationally, ‘economic security’ is coda for capitalist order”.<sup>323</sup> The clearest articulation of this can be seen in the policies of the TCC (through the states and international institutions controlled by its various factions) when faced with actually-existing communism:

“The key institutions of ‘international order’ in this period [(the IMF and GATT of 1947, the Brussels Pact of 1948, etc.)] invoked a particular vision of order with a view to reshaping global capital as a means of bringing ‘security’ – political, social and economic – from the communist threat... The issue was communism as a threat to private property and thus to the vision of an ‘economic order’ of the ‘civilised West’; that is, communism as an alternative socio-economic order, not the Soviet Union as a military threat.”<sup>324</sup>

Whether dealing with public or private law, domestic or international law, Neocleous’ argument supports Holt’s claims that:

<sup>320</sup> (Edinburgh University Press, Edinburgh, 2008) See, in particular, pp47-98.

<sup>321</sup> Neocleous (2008), p47 (emphasis in original)

<sup>322</sup> Ibid, p53 As Neocleous notes, “the extensive powers granted by the [Emergency Powers Act 1920 in the UK] were immediately exercised during a miners’ strike of 1921, and then again in 1924 during a London Transport strike, for eight months during 1926 to manage the General Strike (even though the strike lasted only a few days), 1948 and 1949 during dock workers’ strikes, 1955 during a railway strike, 1966 during a seamen’s strike, 1970 during strikes by refuse collectors, dock workers and electricity workers, 1972 during the miners’ strike and a dock worker’s strike, 1973 during the strike by miners and Glasgow fireworkers, 1975 during a refuse collectors’ strike in Glasgow, and 1977-8 during a fireworkers’ strike. Parallel to this use, the first prosecutions to follow on from a perceived ‘emergency’ in 1921 were of Communists.” (p53)

<sup>323</sup> Neocleous (2008), pp94-95

<sup>324</sup> Ibid, pp97-98

“[T]he types of decisions in which we easily find tilt are not randomly spread across the spectrum, but are concentrated in areas in which working people directly confront bosses and the propertied. The effect of tilt in these decisions is to discipline the work force, to emphasize and reinforce the power of owners and managers over workers. Tilt therefore has a coherence that demands investigation.”<sup>325</sup>

### Explaining ‘tilt’: beyond instrumentalism

The intrinsic connection, briefly sketched out above, which exists between economic conflict and the content and functioning of the legal order risks leading the theorist towards ‘instrumentalist Marxism’ in which the “legal system [is] seen as [an instrument] which can be manipulated, almost at will, by the capitalist class as a whole or, in certain moments, by particular fractions of capital”.<sup>326</sup> Although it cannot be denied that instrumentalism “has occupied a significant status in the intellectual history of Marxism... to portray it as representative of even a majority of Marxist theorists today is, however, a flagrant *reductio ad absurdum* of Marxist theory”.<sup>327</sup> Firstly, as Macherey argues:

“The [capitalist class] certainly makes decisions, but, as we know, [their] decisions are determined... the story follows a necessary path – not, as Poe would say, because everything derives from a final intention, but because it is the reading of a previously established model.”<sup>328</sup>

Secondly, as many Marxists have recognised, at both national and international levels, the economic power of the capitalist class does not, *and cannot*, always be directly translated into favourable legislative, contractual or judicial/arbitral decisions. As Mark Tushnet argues, “we all know that judges are formally independent of class pressures, that they only occasionally say that they are acting to promote class interests, and that their social ties to the ruling class are loose enough to make it implausible that the judges are instruments of the ruling class”.<sup>329</sup> Furthermore, as E.P. Thompson argues in discussing the Whigs of the 18<sup>th</sup> Century, *even where* the capitalist/ruling class *is able* to make, interpret or violate laws to their advantage, this does not mean that the legal apparatus is “a pliant medium to be

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<sup>325</sup> Holt (1984), p284

<sup>326</sup> Beirne (1979), p379. This is sometimes called ‘voluntarism’ instead because it attempts to explain the effects of the legal order through looking to the will and actions of the capitalist class.

<sup>327</sup> Beirne (1979), p378

<sup>328</sup> Macherey (1978), p48

<sup>329</sup> Tushnet, M. “Marxism as Metaphor” *Cornell L. Rev.* Vol 68, (1982), p281

twisted this way and that”.<sup>330</sup> This is because “if the law is evidently partial and unjust then it will mask nothing, legitimise nothing, contribute nothing to any class’s hegemony”.<sup>331</sup> In an effort to appear just, the capitalist class are thus, at least sometimes, rendered “prisoners of their own rhetoric”<sup>332</sup> and forced into “actually *being* just”.<sup>333</sup> Indeed, individual capitalists may believe their own rhetoric and yet act, unknowingly, in such a way as to reproduce their own class hegemony:

“Law is the opium of both the masses and the ruling class. The fact that the ruling class has a more strategic position and a greater interest in the manufacture of this opium in no way exempts them from all its addictive effects.”<sup>334</sup>

This is a particular problem for instrumentalist accounts, which rely upon the capitalist class and legal professionals having a *conscious awareness* of class interests to be able to have these enacted into law: although this may sometimes be what happens, as both Hugh Collins and Mark Tushnet argue, “lawmakers may not always, perhaps never, know what constitutes the long-term interests of the ruling class”.<sup>335</sup> Indeed, instrumentalist accounts are faced with the problem of explaining either “how motivations *inevitably* coincide with a person’s objective class position, or... how [a] social class... comes to share a common perception of interests”<sup>336</sup> if it is *not* inevitable. Whichever explanation is favoured, the problem remains that “the whole enterprise of ensuring coherence and consistency in legal reasoning has to be dismissed as false consciousness, perpetuated by lawyers who are concerned to mystify their desire to support the interests of the ruling class”.<sup>337</sup>

### Explaining ‘tilt’: towards ‘relative autonomy’

An important insight into the difficulties faced by the instrumentalist approach is offered by Isaac Balbus, who argues that it provides not only the wrong *solution* but addresses the wrong *question*: the ‘autonomy’ of the international legal order from the global economy which would be claimed by many orthodox theorists and denied by instrumentalist Marxists is a feature of the extent to which that order “functions and develops

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<sup>330</sup> Thompson (1975), p. 262.

<sup>331</sup> Ibid, p263.

<sup>332</sup> Ibid, p263

<sup>333</sup> Ibid, p263 (emphasis in original)

<sup>334</sup> Spitzer (1983), p115

<sup>335</sup> Tushnet (1982), p283

<sup>336</sup> Ibid, p283 (emphasis added)

<sup>337</sup> Ibid, pp284-285

independently of the *will* of extralegal social actors”<sup>338</sup> such as transnational corporations or financial institutions like the IMF, World Bank and WTO. This, however, leaves entirely unquestioned the extent to which that order is or is not autonomous of the global capitalist economic *system* of which those corporations and institutions are part.

Although the questions are distinct, the answer to each, to an extent, is dependent on the answer to the other. If the instrumentalist claim was an accurate reflection of observed reality, and international law has *no* autonomy from the capitalist *class*, then this would necessarily entail the conclusion that it has no autonomy from the capitalist *system* either. However, as argued above, instrumentalism is highly problematic because international law is not only, or even typically, used instrumentally. Similarly, if the orthodox claim was an accurate reflection of observed reality, and international law is *wholly* autonomous from the capitalist *class*, then this would necessarily entail the conclusion that it is *wholly* autonomous from the capitalist *system* insofar as that system is, essentially, a system of classes and class relations. However, as also argued above, international law *is sometimes* used instrumentally and does operate to benefit a particular class, which means that it cannot be wholly autonomous in either sense. The inevitable conclusion, therefore, is that international law is *relatively* autonomous in both senses. As Alistair Stewart argues:

“There are... *two kinds* of relative autonomy; autonomy from the structures and autonomy from classes. However, these do not come into contradiction... the first explains the relative autonomy that exists [in general] whereas the second in combination with the first gives the relative autonomy within a concrete social formation.”<sup>339</sup>

As Beirne explains, this entails that:

“...in its basic struggle with the working class, the capitalist class cannot manipulate [international law] at will... [it is] subject to the functional constraints of the structural ensemble of social relationships under capitalism... [which] may, simultaneously, be internal to [its institutions] – in the force of its belief systems, recruitment patterns and organisational stability confronted by the fluid contours of the class struggle(s) – and external.”<sup>340</sup>

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<sup>338</sup> Balbus, I., “Commodity Form and Legal Form: an Essay on the ‘Relative Autonomy’ of the Law” *Law & Society Review* Vol. 11, No. 3 (Winter 1977), p572 (emphasis in original)

<sup>339</sup> Stewart (2008), p441 (emphasis added)

<sup>340</sup> Beirne (1979), p379

## Economics *in* the legal order

### Breaking up the 'law block'

Balbus' reproblematisation of the autonomy question is insightful, but his solution is a return to a Pashukanite argument of an essential homology of the commodity and legal forms which, although "valuable in demystifying the law as an ideological form in capitalist societies... has also created a cul-de-sac for Marxist attempts to come to grips with law".<sup>341</sup> Alan Stone makes the important critical point that, because of the generalities of its underlying propositions, it cannot be expected to "yield specific predictions about such mundane things as the content of specific legal rules or whether, where, or when specific laws will be enacted".<sup>342</sup> Indeed, as Tushnet argues, it faces two problems in any attempt to account for the content of international law. In it, "[b]ourgeois legal systems are described as sets of general, abstract rules of universal application... [yet, in] contemporary capitalism, 'the overwhelming characteristic of the regulations seems to be [an] attention to minute detail rather than abstract principle'".<sup>343</sup> Furthermore, it cannot account for what is demonstrated by legal realist analyses:

"[There are always] rules and counterrules, rules with exceptions of such scope as to threaten the rule itself... it is 'often... impossible' to link a legal rule [directly] to 'any aspect of the relations of production' [and] some laws are 'deliberate attempt[s] to change... minor aspect[s] of the relations of production' and therefore cannot reflect them".<sup>344</sup>

Understanding legal content-production, therefore, "requires us not only to grasp the historical meaning of international law as a semantic order of reification (in the Lukácsian sense of the word), but also to identify the exact internal structure by which the constituent reificatory acts behind it operate".<sup>345</sup>

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<sup>341</sup> Spitzer (1983), p105

<sup>342</sup> Stone (1985), p40. As Rasulov argues, "[t]he global class struggle... certainly remains the prime engine of history, but it is an engine that can never do the whole work by itself, let alone determine every single detail of historical evolution". (Rasulov (2008b), p4)

<sup>343</sup> Tushnet (1982), p289 Examples of such a focus on detail include the 1921 multilateral Convention (No.15) Fixing the Minimum Age for the Admission of Young Persons to Employment as Trimmers or Stokers (as modified by the Final Articles Revision Convention, 1946), the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the 2005 multilateral Convention on Feed Micro-algae, University Research and Emergency Prevention. (See UNTS No.44, pp5, 206 and 265 respectively)

<sup>344</sup> Tushnet (1982), p282

<sup>345</sup> Rasulov (2008a), pp284-285



## Essential legal relations, derivative subrelations and particular legal rules

Stone offers a solution through what he calls “the distinction between law in general and the fundamentals of the legal order”,<sup>346</sup> of which the latter are to be found particularly in the *private* law areas of property and contract. He refers us to two apparently contradictory arguments made by Marx in the 1859 preface to *A Contribution to the Critique of Political Economy*: firstly that the relations of production are the economic structure on which the legal and political superstructures rest, and secondly, that speaking of ‘property relations’, in place of ‘relations of production’, “merely expresses the same thing in legal terms”<sup>347</sup> (about which Richard Kinsey rightly recognises that “[t]he implication is clear: any separation of the legal expression and the social-economic relation is wholly artificial”).<sup>348</sup> What Stone adds to the analysis above, is a reconciliation of this separation and synonymy – by utilising the distinction Engels makes between ‘essential legal relations’ and particular laws/judicial practice<sup>349</sup> and introducing a third category of ‘derivative subrelations’ – which allows us to “distinguish laws that are central to a legal system from laws that could be changed tomorrow without affecting the character of the legal system (or economic system, one may add)”<sup>350</sup>.

The essential legal relations which can be derived directly from the economy (that property shall be private property, that parties to treaties shall be formally equal, etc.) do not touch upon concrete and specific legal rules (such as the different limits there have been at different times to the ‘territorial sea’) except through hierarchies of legal concepts<sup>351</sup> which, the further they get from the economy, are governed more and more by the internal structuring logic of the legal apparatus.

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<sup>346</sup> Stone (1985), p42

<sup>347</sup> Marx, K. *A Contribution to the Critique of Political Economy* (1971) p21 quoted in Kinsey (1978), p206

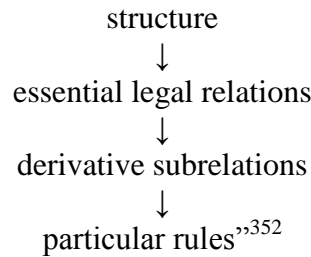
<sup>348</sup> Kinsey (1978), p206

<sup>349</sup> See Engels, F. “Ludwig Feuerbach and the End of Classical German Philosophy” in Feuer, L.S., (ed) *Marx and Engels: Basic Writings on Politics and Philosophy* (Anchor Books, New York, 1959)

<sup>350</sup> Stone (1985), p50 quoting Kamenka, E. “Demythologising the Law” *Times Literary Supplement* May 1 (1981) p476

<sup>351</sup> In this context, such concepts include the principles governing the interpretation of treaties contained within the Vienna Convention of the Law of Treaties 1969 (1155 UNTS 331), the principle that states ‘shall settle their international disputes by peaceful means’ codified by Article 33 of the UN Charter (892 UNTS 119) and the principle that ‘specially affected states’ have, and ought to have, a greater impact on the formation of customary international law, as articulated by Hersch Lauterpacht (see (1950) 27 B.Y.I.L 376, 394, quoted in Harris (2004), p37)

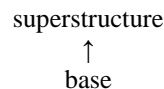
According to Stone the hierarchic relations amongst these categories “move along the following path:



This allows for an account which does not reduce individual legal decision-makers to capitalist conspirators or automatons because, “[s]o long as the essential legal relations are taken as the starting point, those actors who create the derivative subrelations and the particular legal rules under them will develop a jurisprudence compatible with the structurally defined system”<sup>353</sup> even when individual laws or legal decisions do not develop in the way an instrumental Marxist might expect. This is a particularly important insight because while the international political order “has in practice meant domination by an elite, the ideology it produced has taken on the appearance of neutrality... [and international] decision making that is dispassionate, impersonal, disinterested, and precedential, is [widely] considered desirable *and descriptive*”.<sup>354</sup>

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<sup>352</sup> Stone (1985), p59 The ‘vertical’ topological arrangement of this pyramid or column does not appear to be intended by Stone to convey any particular message and the fact that it is *suggestive* of that other famous topology of



is not significant in this context. Indeed, as the directions of the arrows indicate, if any comparison is to be drawn, Stone’s topology would first have to be *inverted*. However insightful Stone’s explanation of the linkage between rules and relations may be, it is still, necessarily, theoretical. Although this does not *in itself* render it problematic, it must be recognised that “although the relation entailed in the act of alienation is theoretically expressed in the abstract as the juridical relation, the concreteness of this abstract relation must not be in doubt... the equalisation/abstraction of human labour actually occurs in the determinate act of exchange, not merely in the mind of the theoretician”. Therefore, how Stone’s ‘essential legal relations’ “are articulated or expressed [as particular rules] in a particular social formation is largely a problem of *historical analysis*”. Unlike the legal form, which may be understood in the abstract, understanding legal content requires detailed investigation into “the particular constellation of the institutions and ideas and their so-called ‘uneven development’ which constitute the particular social formation in question” and which may constitute a fruitful area for future study. (Kinsey (1978), pp214, 210 (emphasis added) and 219 (footnote 51))

<sup>353</sup> Stone (1985), pp58-59

<sup>354</sup> Holt (1984), pp284-285 (emphasis added). That Stone’s account is able to integrate this apparent (and sometimes actual) separation of legal actors from immediate economic concerns is an improvement on the Pashukanite alternative. For example, as Stone argues, “[d]espite an extended discussion of the *forms* of capitalist legality, Pashukanis does not show how judges, formally independent of class pressures, act to promote capitalist interests”. (Stone (1985), p46)

The primary and foundational relationship for the legal order is the formal equality of legal subjects, which is (as Pashukanis explains and as is discussed, above) derived directly from the same feature of economic subjects in the commodity-exchange relation, and which has its existence in international law in the formal juridical equality of sovereign states. As the legal order does more than merely reflect the form and functioning of the economy but is implicated in its (re)production, this legal equivalency could not be otherwise without affecting the character of the legal system or indeed the economic system. This formal equivalency inherent within the capitalist legal form serves as a condition for the more particular legal rules and institutions which are based on it. From states' formal equality flows their purported equal ability to create law through custom and treaty, and thus to contribute to the setting up of international institutions such as the IMF, WTO and World Bank, and imbue these with arbitral and enforcement functions. From this spring the particular, actually-existing institutions, their procedures for creating legal rules and decisions binding on their members, and those rules and decisions themselves (such as the rule that the WTO dispute settlement system "cannot add to or diminish the rights and obligations" set out in the WTO Agreement<sup>355</sup> or the decision that the OECD countries "ha[ve] the legal right to modify not only their *inter se* legal relations, but the rights and obligations of the totality of the WTO membership").<sup>356</sup>

Even the most detailed and nuanced analysis of the global economy cannot explain the particular rules governing a particular international tribunal, and it is not necessary for the functioning of the global capitalist economy that each individual rule of international institutions bolster this functioning so long as essential legal relations are taken as the starting point, which holds true without the need to theorise a coherent capitalist *agenda* on the part of the institutions and the states which act in and through them.

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<sup>355</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation (the 'WTO Agreement'), Annex 2, World Trade Organisation, the Results of the Uruguay Round of Multilateral Trade Negotiations: the Legal Texts 1869 UNTS 401, quoted in Mavroidis, P.C. "No Outsourcing of Law? WTO Law as Practiced by WTO Courts" *A.J.I.L.* Vol.102, No.3 (Jul 2008), p422, footnote 5.

<sup>356</sup> Decision in *Brazil – Aircraft (Article 21.5 – Second Recourse)* Panel Report, Brazil – Export Financing Programme for Aircraft (Second Recourse by Canada to Article 21.5 of the DSU) paras.5.80-5.91 WT/DS46/RW/2 (adopted 23 Aug. 2001). See also Mavroidis (2008), p429, footnote 35

## Mapping the (essential legal structure of the) global legal order

Now that we have Stone's topography, the next task is to attempt to map the global legal order onto it and ask 'what, then, is the *essential legal structure* of international law?' As discussed above (following the analysis of both the 'state derivationists' and Poulantzian structuralism) it can be said that structure is intimately tied to function: just as the apparatus-structure of the global state is tied to its functioning, the internal structure of the legal order is tied to its functioning (and both these functions are interdependent and inseparable). Together, they organise, by creating an 'unstable equilibrium of compromise', disparate and often conflicting TCC fractions into a 'power bloc' while strategically disorganising the TWC through the tactical use of both concessions and open struggle.

The key thing here is that this mediatory (dis)organisation dampens and channels the *crises of capitalism*. This is important because, as Hillel Ticktin argues, "the concepts of decline and crisis are integral to a Marxist conception of capitalism"<sup>357</sup> and, thus, the global capitalist legal order: the (class) contradictions described above are inevitably inscribed in the global State and thus the global capitalist order is necessarily *unstable, contradictory* and *prone to crises*. Each crisis is not the same, however, and engenders a different solution with a different set of essential legal relations and particular rules. Ticktin provides an account of the changing (global state-)political structure to which the changing legal relations correspond:

"[W]hen the contradictions could no longer be contained in the spontaneous movement of capital accumulation, alternatives were needed to stabilise the system... Historically, capital has employed five solutions. The first was the turn to finance capital, so absorbing the surplus capital. This was combined with the second and third solutions: imperialism and war, with World War One being the ultimate result. In the post-World War Two period, war became permanent through the Cold War and the many smaller hot wars that took place. This was linked to concessions to the working class in the form of the welfare state, which was the fourth mediation, which prevented the poles of the contradictions from pulling apart."<sup>358</sup>

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<sup>357</sup> Ticktin, H. "A Marxist Political Economy of Capitalist Instability and the Current Crisis" *Critique* Vol. 37, No. 1, (Feb 2009), p15

<sup>358</sup> Ibid, pp23-24. See also Neocleous (2008) on the merger of *national security* and *social security* into 'economic security'.

Although “[this] series of mediating forms have stabilised capitalism in the period up to the present day... those forms have now been so weakened that the present crisis has broken out”,<sup>359</sup> bringing with it a *fifth* mediation – an unstable combination of New Finance Capital and the War on Terror.

As Ticktin explains in more detail, it was Lenin who “provided a mechanism of understanding the need for imperialism, arguing that monopoly led to finance capital and so the export of capital and hence imperialism”.<sup>360</sup> However, imperialism’s role in stabilising capital was itself unstable, and “led to a world war and revolutions, followed by a world depression”.<sup>361</sup> Stalinism and the Cold War followed and provided a dual-stabilisation. On the one hand, Stalinism “attracted the cream of the would be revolutionaries and neutralised them... by directing them into futile or meaningless ventures... by so debasing Marxism that it ceased to be a revolutionary doctrine”<sup>362</sup> and by turning radical movements into bureaucratic entities. On the other, “the horrific example of the Soviet Union itself, [with its] show trials and millions purged in the name of Marxism [meant that]... the ruling class in the West could mount a Cold War with apparent justification, even though there was never any real [military] threat”.<sup>363</sup>

This (imagined) “threat of total global war, spiced up with real wars, allowed the massive diversion of resources into the military sector, which, in principle, could never be satisfied”<sup>364</sup> as it is governed not by value but by necessity. Together with war the capitalist classes, “accepted the need to introduce a welfare state in order to avoid more radical demands.... [and] married the warfare state with the welfare state... The economy was controlled or organised so that it avoided both underconsumption and disproportionality between economic sectors. With the working-class controlled, the rate of profit could be maintained. As a form of capitalist stabilisation it was and remains

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<sup>359</sup> Ticktin (2009), p15

<sup>360</sup> Ticktin, H. “Political Economy and the End of Capitalism” *Critique* Vol. 35, No. 1, (Apr 2007), p70

<sup>361</sup> *Ibid*, p70

<sup>362</sup> *Ibid*, p70

<sup>363</sup> *Ibid*, p70

<sup>364</sup> *Ibid*, p70. As a result, “[a] glance at the history of the world over the last century shows that it has been in virtually continuous war for the whole period but most particularly since 1939... [which] implies that capitalism in decline has to find an external means of survival... The end of the Cold War and Stalinism has meant that the March 2000 downturn was the first overinvestment crisis since 1940. The Iraq and Afghan Wars have taken up the slack, with expenditure on the military and those wars doubling US expenditure on military causes”. (Ticktin (2007), pp77)

unsurpassable.”<sup>365</sup> And yet, as the Cold War came to an end as Stalinism waned, the TCC (re)turned to (New) Finance Capital as a mode of control. Ticktin’s conclusion is clear:

“Looked at from the perspective of a declining capitalism we are looking at an attempt by the capitalist class to maintain its dominance in the face of serious challenges. First it goes for ‘planning’ the economy, which is seen as conflicting with private enterprise, and then it returns to the parasitic form of finance capital, leading to de-industrialisation, polarisation of incomes, downturns and the threat of serious depressions. Both solutions constitute direct threats to capital itself. The first was always seen as squeezing out capital from the economy but accepted as the least worst alternative in the circumstances. The second, that of finance capital, was embraced by the capitalist class knowing all the risks.”<sup>366</sup>

In light of Ticktin’s account it can be understood why, for example, the property-law doctrine of *terra nullius* and the distinction between the rights and duties of ‘civilised’ and ‘uncivilised’ peoples in the making and application of treaties which were so important for the colonialist-imperialist solution have no place in the contemporary solution of New Finance Capital even though, both as concepts and phenomena, *Property* and *Contract* are fundamental to both. Similarly, the harmonisation of standards, symmetrical elimination of barriers to trade and coercion towards privatisation which characterise the contemporary order as created/promoted by the WTO, IMF and World Bank would have hindered rather than helped the earlier forms of warfare state solution with its reliance on protectionism, hierarchical trade flows and nationalised industry.

### Dividing up the legal field

The analysis of the legal order in chapter two, above, led to a rejection of the term ‘Law’ in favour of a more nuanced separation of its constitutive elements, and an acceptance that, as Duncan Kennedy argues, a certain “set of legal conceptions, though no particular set of legal institutions, is part of the *definition* of the commodity mode of production”.<sup>367</sup> Those legal conceptions, as Richard Kinsey recognised, “circumscribe and define the available means and forces of production so that, although at one level ‘ideal’, laws must be counted

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<sup>365</sup> Ibid, p70

<sup>366</sup> Ticktin (2007), p71. The main risks are that, as Ticktin argues, “[f]inance capital is necessarily short-termist, [and] contemporary finance capital has shortened its time horizons compared with the earlier period of finance capital down to the Second World War. It is also... unproductive, in Marxist terms, and as it extracts its money from the productive sector, it is parasitic on the economy as a whole... [yet i]ts dominance forces industry to follow its lead and adopt its practices” despite the problems it creates. (See Ticktin (2007), p72)

<sup>367</sup> Kennedy (1985) p992 (emphasis added).

amongst the concrete conditions of social existence.”<sup>368</sup> On the other hand, Kennedy makes the legitimate point that there is an apparent tension between this argument and the Marxist commitment to materialism because “legal concepts are anything but material. Indeed, the belief in the formative power of legal concepts is often ridiculed as an archetypical form of idealism”.<sup>369</sup> Kennedy is correct in rejecting a view of Marx as a simplistic *economic determinist*, but this does not, as Kennedy appears to believe, mean that the view of Marxism as *materialist* must also be rejected.

Rasulov offers a solution to (or, rather, elimination of) ‘that infamous problem of law as a constitutive factor’<sup>370</sup> which Kennedy raises in his ‘critique’ of Marxian materialism, above. For Rasulov, the ‘sense of circularity’ at the heart of the problem ultimately derives from a ‘lack of conceptual precision’ which leads to the inability to distinguish between two radically different phenomena:

“It is only if we understand ‘law’ in its Ehrlichian sense [the ‘*living law*’, the actually-observed ‘customary’ law-in-action] that it will have to be recognized, as Tushnet insists, as ontologically constitutive vis-à-vis the economic base. Taken in the more traditional formalist-positivist sense [as the formally posited system of legislative ordinances], ‘law’ remains, just as the classical Marxist tradition has always insisted, a completely superstructural phenomenon.”<sup>371</sup>

To avoid Kennedy’s conclusion, therefore, it is necessary to make explicit the argument that from a rigorous Marxist point of view not all ‘law’ exists on the same ontological plane. However, this is not only true in the sense captured by Stone’s distinction amongst ‘essential relations’, ‘derivative subrelations’ and ‘particular rules’ *within* a particular field of law such as contract, but also more fundamentally than that, in the sense of distinctions amongst whole fields of ‘law’. When the accounts being analysed talk of ‘Law’ being an integral part of the economic base (as it is), they are almost all (correctly) only talking about the ‘law of property’ and ‘law of contract’, and not other fields such as ‘(international) criminal law’, ‘(international) humanitarian law’, or ‘the law on diplomatic relations’.

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<sup>368</sup> Kinsey (1978), p210

<sup>369</sup> Kennedy (1985), p993

<sup>370</sup> Rasulov provides a valuable and concise formulation of this problem: “[a]ccording to the classical Marxist tradition, law constitutes an integral element of the social superstructure. Its internal structure and content are, therefore, determined by the corresponding structure and content of the economic base, i.e. by the systemic logic of productive relations. The systemic logic of productive relations, in its turn, however, is determined ultimately by who owns the primary means of production. Ownership is a legal category. If a legal regime is thus ultimately determinative of the fundamental structure of productive relations, how can one say then that the economic logic determines the legal order?” (Rasulov (2008a), p264 footnote 89)

<sup>371</sup> Ibid, p265 footnote 89

Indeed, in addition to his vertical-hierarchic typology of legal concepts and norms, Stone recognises just this sort of horizontal-spread typology. Imported from the writings of Jürgen Habermas, it divides laws into “(1) those that constitute the mode of production (e.g., property, contract) and promote the economy; (2) those that complement the market by adapting the legal system to new business arrangements (e.g., much commercial law); (3) those that replace market activities (e.g., public utility law and occupational licensure); and (4) those that respond to politically effective reactions to economic dysfunction (e.g., minimum wage or environmental laws)”.<sup>372</sup> This sort of division is both more accurate and more useful than treating ‘the Law’ as a unified and unitary whole, and complements his own earlier distinction. For Stone, “the idea of essential legal relations... refers to the legal expressions or images of the *central components* of the capitalist economic structure”,<sup>373</sup> which are *contract* and (*private*) *property* (described by Stone as the “distinguishing feature[s] of capitalism that cannot thrive without law”).<sup>374</sup>

### (Re)introducing realism

In addition to his critique of Marxist materialism, Kennedy argues that “Marx conceived of the legal structure of the commodity mode of production as a coherent whole, with detailed subrules flowing rationally from the first principles (the whole modified in an episodic and superficial way by specific legislative interventions)”<sup>375</sup> and thus believed that the legal structure could just be taken ‘as a given’ in analysing economic change. As a result, Kennedy argues, “Marx missed the crucial realist/institutionalist insight: there are many different regimes of specific legal subrules that are consistent with the indeterminate general notions of property and free contract. The law of value, the pricing of commodities according to labour inputs, will work differently according to which one of the alternatives the lawmakers select”.<sup>376</sup> For this reason, as Spitzer highlights, “it has become obvious that legal change does not correspond neatly to the life course of any

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<sup>372</sup> Stone (1985), p46

<sup>373</sup> Ibid, p54 (emphasis added))

<sup>374</sup> Ibid, p51 (emphasis added))

<sup>375</sup> Kennedy (1985), p995

<sup>376</sup> Kennedy (1985), p995. For Kennedy in this, at least, Marx’s account shared the failings of the ‘classical legal thinkers’ who attempted to show that “the idea of respect for the labour of others could, all by itself, generate through the process of legal reasoning a vast, detailed code of particular rules about what could be property and about what constituted an actionable injury to property... [and] that the abstract notion of freedom could generate, also by the strictly rational processes of the law, an equally complex code of rules of contract, agency, corporations, and so forth.” (Kennedy (1985), p955)



given mode of production; nor do specific legal arrangements necessarily stay within the boundaries of the mode of production in which they are expected to appear”.<sup>377</sup>

Nevertheless, the core realist insight is capable of being incorporated within the Marxian analytic: what is implicit in Stone’s model – that rules and subrelations may differ between different (domestic) legal apparatuses, or evolve within a particular apparatus, so long as they do not contradict the essential legal relations of private property and ‘free’ contract – is explicitly recognised by Kinsey:

“The specific content of laws will vary as Engels correctly realised... What however is invariable and necessary to the capitalist mode of production is that the juridical relation is expressed through abstract and general norms – such as those of the laws of contract and private property – which in turn are premised upon the juridical relation being established as a concrete practice.”<sup>378</sup>

For an explanation for the continuity of the essential relations we may turn to the relationship between the legal and commodity forms: for an explanation for the discontinuity of the particular rules, we must turn to the concrete specificity (in time and place) of particular social formations. Although some of Kennedy’s critique of Marx(ism) is misplaced, he is correct to claim that “[b]reaking up the ‘law block’, by recognising the internal incoherence of legal doctrine, and the contingent constitutive role of law makers at all levels, eliminates an obstacle to understanding what happens when oppressed groups gain concessions through the legal system”<sup>379</sup> because it reproblematises the idea that there is a monolithic ‘inner logic of capitalist law’ to which concessions must be somehow opposed (which mirrors Miéville’s reproblematisation of the legal-illegal distinction).

Kennedy follows on from his criticism of Marx for ignoring the field of potential for particular rules to change, and change their effect, within the framework of the general principles of capitalist law by arguing that “[t]he legal component of the mode of production is, in so much as it actually functions in the world, the collection of particular

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<sup>377</sup> Spitzer (1983), p118

<sup>378</sup> Kinsey (1978), p210

<sup>379</sup> Kennedy (1985), p996. As Tushnet argues, “[r]eforms are extracted from unwilling segments of the ruling class by pressure from the working class, enhanced by those leading segments of the bourgeoisie that understand how reform may preserve capitalism. Conversely, repressive laws are imposed by the ruling class on a working class too weak to resist.” (Tushnet (1982), p287) What Kennedy’s analysis adds to this is the conceptual space for the realisation that the relative strengths of each class, and the extent to which reforms can be integrated without destabilising the underlying economic relations, will vary amongst the elements of the ‘law block’ and thus lead to varying equilibria.

rules, not the general principles”.<sup>380</sup> As Kennedy realises, this would be neither interesting nor important “if we could say that the principles, while not coming directly to bear on the cases, come to bear indirectly... [Instead,] the whole point of recognising the element of subjectivity, of nonclosure in the legal system according to its own criteria, is that we sometimes can’t identify, in the new cases, which decision actually enforces the norms of property and contract”.<sup>381</sup> This argument can be condensed to the maxim: “general propositions don’t decide concrete cases”.<sup>382</sup> The alternative, as argued by Tushnet, is that:

“There are results in particular cases, which the judges rationalize by invoking or creating a rule. But there are always alternative rules that could have been invoked to yield a different result, and alternative rationalizations of the same result that invoke still other rules... indeterminacy of any significant degree will doom the comprehensive project. Not only will it be clear that the result could have been different, so that the link between the rule invoked and the material base will be entirely adventitious, but the rule itself could have been different, so that the link that is supposed to explain things would have to be reconstructed entirely ad hoc.”<sup>383</sup>

This is correct, but not quite in the way Kennedy or Tushnet suppose.

### Structuring the fractured ontology of ‘the law (block)’

#### Structures within structures

There are gaps, contradictions and other instances of ‘nonclosure’ in the structures outlined above.<sup>384</sup> However, this does not mean that, in these various open spaces and moments, an account of the global legal order must revert either to subjectivist voluntarism and

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<sup>380</sup> Kennedy (1985), p998

<sup>381</sup> Kennedy (1985), pp998-999. This lack of clarity is at least in part caused by the fact that “[t]he legal realists have taught us that ‘property’ is an extraordinarily vague term. The concept itself gives no clues as to what kinds of things can be ‘objects’ of ownership, nor as to the particular rights, powers, privileges, and immunities that go along with ownership. ‘Property’ is a catch all for an infinitely varied set of ‘bundles of rights’... ‘Contract’ is no more clear cut. The enforcement of a contract against the will of one of the parties is, like any other lawsuit, an instance of unfreedom or coercion. The exact kind and extent of state coercion that should occur in connection with private agreements cannot be deducted from the idea of contract itself”. (Kennedy (1985), p951)

<sup>382</sup> Holmes, J. (dissenting) in *Lochner v New York* 198 U.S. 45 (1905), p76

<sup>383</sup> Tushnet (1982), pp288-289

<sup>384</sup> It must be remembered of course that “[w]hen new cases arise, legal practitioners deal with them through the techniques of interpreting precedent and interpreting first principles [and s]ometimes *everyone agrees* that a particular outcome is ‘legally correct’. The system [in such cases] has enough closure so that it is proper to speak of a different outcome, under the circumstances, as a ‘legal mistake’, or as evidence of bad faith in the law maker”. (Kennedy (1985), p996 (emphasis added))

individualistic theories of ‘rational choice’ or to Miéville’s claim that ‘between equal rights, force decides’ (such force being the extra-legal force recognised by Arthur, above) in order to explain the actions of decision-makers: there is *always another structure* behind the one initially being analysed which either fills in the gaps in the dominant structure or becomes dominant during the moment of ‘nonclosure’.

Primarily, the underlying structure is the ideological structure discussed in chapter two, above. Indeed, the ideological structure to an extent functions best *in and because of* the gaps in the formal structure of the international legal order which hide the intimate connection between international law and global capitalism. As Macherey argues:

“It must always seem that a new story with a different ending is possible. The narrative gives the impression of novelty in so far as it is a new story at every moment: other words might have been spoken, things might have happened differently... Constraint simultaneously implies a certain transparency: the narrative compels precisely because it *seems* that it might have been different. But this transparency owes its existence and its power to the fact that it is combined with a certain opacity: one is not reading all possible narratives, but this particular materialisation, this specific writing. There is only one narrative: each of its moments is ‘surprising’, ‘free’, but also definitive.”<sup>385</sup>

What Macherey shows as true of the novel is also true of the treaty text, tribunal decision, doctrinal statement or textbook chapter. While the sense of indeterminacy Kennedy inherits from the realists is a useful counterpoint to some of the mechanistic tendencies within Marxian scholarship, he overstates his case. Even in the most open moment of international legal decision-making the outcome is more predictable than it may appear. However, in order to predict the moments of (re)closure it must be remembered that neither the legal nor the ideological structures are in any sense *automatic* structures. Just like the institutions through which they gain their material shape, they are embodied, primarily, in individuals, in their personnel. To speak of international legal decision-making is to speak of international legal decision-makers as part of the international legal *profession*.

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<sup>385</sup> Macherey (1978), p47 (emphasis in original)

## The (international) legal *profession*

Kennedy argues, ostensibly *contra* Marx, that:

“Over and over again, historical actors, particular men and women, decide the content of the background regime of legal rules without determining guidance from the internal criteria of the legal system. They act with a measure of existential freedom [and]... [i]n this specific sense, law reduces to the subjectivity of the law makers.”<sup>386</sup>

However, as Kennedy himself recognises, “[t]here is nothing abstract about this subjectivity, *nor is it in any sense unconditioned. It is always in relation to a situation that is experienced as given. It does not transcend history*”.<sup>387</sup> This is why (even though “[w]hat makes the state in capitalist society a capitalist state is not the class composition of the personnel of the state apparatus but the position occupied by the state in the capitalist mode of production”)<sup>388</sup> it is both possible and vital for Marxian international law scholarship to develop “a general class-theoretic account of the international law profession”<sup>389</sup> and its place in the (re)production of the existing global capitalist social formulation which incorporates both ‘closure’ and ‘nonclosure’. Marxian analysis can weather Kennedy’s critique, but only by taking it seriously and analysing *why* decision-makers decide as they do.

Although *Marx’s own* analysis predated the growth of the professions, so “he could not fully have foreseen the critical role that professional training and skill acquisition would play in modern capitalist development”,<sup>390</sup> *domestic Marxian legal scholarship* has not been slow to develop this critique (with perhaps one of the most cited examples being Ralph Miliband’s account).<sup>391</sup> Unfortunately, many accounts (including Miliband’s own) treat legislators and judges as either active conspirators with capitalists or passive automatons unconsciously carrying out the will of capital. This is problematic – not because the class location of individuals in key nodal positions in institutions is irrelevant

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<sup>386</sup> Kennedy (1985), pp996-997

<sup>387</sup> Ibid, p997 (emphasis added)

<sup>388</sup> Holloway and Picciotto (1978), p5

<sup>389</sup> Rasulov (2008a), p279

<sup>390</sup> Hagan, J. *et al* “Class Structure and Legal Practice: Inequality and Mobility among Toronto Lawyers” *Law & Society Review* Vol.22, No.1 (1988), pp9-10. The importance is summed up by Schlag in his argument that “[a] law student must learn to ‘think like a lawyer.’ In learning this, he or she will also learn that ‘all lawyers think alike.’ But, how does it come to be that all lawyers think alike? The answer is training.” (Schlag (1998), p126)

<sup>391</sup> See Miliband, R. *The State in Capitalist Society* (Quartet, London, 1973)

or exaggerated, but because it is simply the surface expression of a deeper and more persistent structure which would continue to overdetermine legal outcomes even if the membership of the international legal profession were to change drastically. Even *more problematic*, however, is that international legal scholarship has traditionally lacked even attempts to analyse the profession in terms of class, a blindness which “serves to occlude our sight of the long-term historical processes that structure the field of global economic production and determine the general range of the corresponding juridical forms in terms of which this field is organized and the system of institutional regimes and processes by which its exploitative dynamics is maintained”.<sup>392</sup>

This is particularly apposite in the field of international humanitarian law (IHL), critiqued by David Kennedy in his book *The Dark Sides of Virtue: Reassessing International Humanitarianism*.<sup>393</sup> As Kennedy argues, IHL promises “a legal vocabulary for achieving justice outside the clash of [global] politics”<sup>394</sup> and as such, even though human rights (violations) have often been as much a focal point, rallying cry and *cause* of class antagonism between the TWC and TCC, it also demobilises and alienates the TWC by offering “the confidence that these matters are being professionally dealt with”<sup>395</sup> by others. To the extent that the professional and political elites involved in determinations of right can claim to be disconnected from economic *actors*, they can, despite their own class backgrounds, present themselves as ‘independent’ and ‘benevolent’. However, against the background of the role of the international legal order in the (re)production global capitalist economic *relations*, it becomes necessary to consider Schlag’s claim that if we reject the legal profession’s presentation of itself, “what remains is an assortment of legal actors, judges, and lawyers who practice ritualised forms of violence on each other and on other people... killing, plunder, extortion, and so on. As for legal academics, they are demoted to the status of thug-trainers”<sup>396</sup> in their role as teachers of international law(yers).

The value of introducing class analysis is that it allows us “to uncover the ideological biases of what Myres McDougal called the community of authoritative decision-makers... [and] the various mechanisms of political co-optation of international civil servants, foreign office diplomats, international law publishing houses, and even international law

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<sup>392</sup> Rasulov (2008a), p283

<sup>393</sup> (Princeton University Press, Princeton, 2004)

<sup>394</sup> Kennedy (2004), pp21-22

<sup>395</sup> Ibid, pp26

<sup>396</sup> Schlag (1998), p21

textbook-writers”.<sup>397</sup> Although this aspect of the radical international law project requires empirical and conceptual investigation beyond the scope of this thesis, Rasulov’s argument in particular contains an important insight for the current analysis which it is worthwhile to highlight. Legal professionals and orthodox scholars and professionals appear to share the view that “[a] man merely learned in the law is not a lawyer, and reading will hardly make him one”,<sup>398</sup> a “conception of the legal world, in which [for example] academics are not a *part* of the legal order, but are merely commentators on the work of those who are part of it”.<sup>399</sup>

However, the group of people whose daily practices have an impact on the functioning of international law is far wider than this: simply to accept that the profession is limited to those who self-identify as members of it is inherently idealist and subjective. Instead, the ‘international legal profession’ should be understood to include all those who have a functional affect on the legal apparatus and, as a corollary, it should be recognised that any particular individual may (according to this functional analysis) simultaneously be a member of a different profession in another apparatus. On this wider reading, its members – rather than being simply situated within the TMC – “occupy a variety of class positions... [and] the legal profession is in this sense integrated into the surrounding community and society”<sup>400</sup> rather than having a distinct class position *as a profession*. The ‘existential freedom’ Kennedy attributes to legal decision-makers, therefore, is in reality no less determined than the ‘freedom’ of the economic actor acting within the framework of the logic of capital and the class struggle.

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<sup>397</sup> Rasulov (2008a), pp289-290. This list could be expanded yet further to include international litigators and advisory lawyers working for multinational private firms, those who formulate and implement policies within international NGOs, the ‘invisible college’ of international law academics, funders of international legal research and conferences, members of admission committees for international law faculties and institutions, and many more.

<sup>398</sup> Sunderland, E. “The Art of Legal Practice” *Michigan Law Review* Vol.7, No.5 (March 1909), p399

<sup>399</sup> Partington, M. “Academic Lawyers and ‘Legal Practice’ in Britain: a Preliminary Reappraisal” *Journal of Law and Society*, Vol.15, No.4 (Winter 1988), p375

<sup>400</sup> Hagan *et al.* (1988), p11

## Chapter 5 – Conclusion

### Towards a systematic, coherent and radical theory

#### The project

This thesis has examined a number of accounts of law – national, *international* and *transnational* – provided by orthodox theorists as well as theorists working within the tradition of the critical left. The aim has been to ‘separate the wheat from the chaff’ – to reveal and analyse the aspects of these accounts which can be used to construct a *systematic, coherent* and *radical* theory of the contemporary world order, and to discard those aspects which (through being vague, contradictory, simplistic or misleading) cannot or should not be incorporated within the theoretical framework of the ‘radical law project’.

The requirement that the resulting theory be *systematic* has meant that all aspects of the global legal order have had to be investigated: its *form, content, function* and *structure*, as well as its relationship to politics (in the form of the state) and the economy. The requirement that the resulting theory be *coherent* has necessitated a clear and consistent narrative structure able to tie together the particular arguments in each section as well as a conceptual perspective broad enough to tackle the disparate aspects of the total global social formation without reducing one to another, and has meant that each account used has had to be analysed carefully in order to ensure the compatibility of its insights with the conceptual framework as a whole. The requirement that the resulting theory be *radical* has meant that, rather than accepting the common understandings, formal doctrines and surface manifestations which form the basis of much orthodox international law scholarship, this thesis has had to delve right to the very root of the matter and uncover the hidden assumptions, informal networks and underlying logics of the global legal order.

Insights have been drawn from a number of different theorists working within a wide variety of different traditions (including American Legal Realism, French Structuralism, World Polity Theory and Pashukanite and Gramscian Marxism) spread across orthodox and Marxian, domestic and international, legal, political and economic scholarship. The consequent combinations have at times been intuitive and at times counterintuitive and have required varying degrees of analysis to clarify their (in)consistencies. While each

insight has been of value in constructing the conceptual framework outlined above, some insights are ‘more equal than others’: especially valuable to this study of *international law* have been those provided by Marxists (in particular Gramsci, Althusser, Lukács and Poulantzas) better known for their contributions to *domestic* legal and political criticism.

To be able to appreciate what these theorists are able to contribute to the ‘radical international law project’ it has been necessary not simply to employ the ‘domestic analogy’ characteristic of so much international law scholarship, but to reject completely the *a priori* distinction between the domestic and international legal fields so common within orthodox legal scholarship on both sides of the divide. This has been facilitated, primarily, by the introduction of the concept of *transnationality* and an analysis of the phenomenon of *reification*, and that it has been possible has lent support to the idea that the resulting theory can have a wider application than those it seeks to supersede.

### The product

What, then, have these investigations, analyses and examinations revealed? What does this radical conceptual framework which is under construction look like, and what benefit does it have over the orthodox alternatives?

The first thing discovered was that orthodox scholarship has three main explanations of the legal *form* (rules, process or regime), all of which have serious empirical and theoretical problems (which are only amplified when attempts are made to synthesise them) and lack the necessary explanatory power to capture the nature of what international law *is*. Marxian scholarship, on the other hand, is able to provide an account which avoids these problems. In order to formulate this account it was necessary to begin with Pashukanis’ insight that the legal *relationship* that sits behind the legal rule is the key element of Law, recognise the implications of Miéville’s reproblematisation of the notion of ‘legality’ and his focus on disputation between legal actors for the different types of relationships which require investigation, incorporate Lukács account of reification to understand how formal laws appear to affect one another, and apply Althusser’s distinction between power and apparatus to provide the conceptual space for the existence and role of legal (and other) institutions in the global legal order. It is the resulting account of international law – a complex network of relationships, reified as rules, between legal subjects, mediated



through institutions, interwoven with the logic of commodity production and exchange – which provides the core of this thesis.

Building upon this analysis, this thesis then attempted to construct an account of the *structure* of the global legal order. During this process, it became clear that orthodox and even some Marxian scholarship (notably the Pashukanite tradition so central to the earlier analysis) proceeds from an impoverished understanding of the nature of ‘the State’. In order to transcend this, it was necessary to examine in detail Althusser’s theory of apparatuses, turn (temporarily) to the classical Marxist definition of the state and the historical analysis of Teschke before dealing explicitly with the contemporary dynamics of the global legal order as described, primarily, by Hardt and Negri. What a study of these dynamics revealed was that Chimni’s proposition that we conceptualise that order as a ‘nascent (imperial) global state’ not only provides the basis on which to apply an Althusserian analytical schema to international law (and thus link this part of the theory to the earlier enquiry into the legal *form*) and corresponds to the more concrete analyses offered by Stiglitz, Beckfield and others, but also allows for the strategic integration of *class analysis*. The importance of the *transnationality* of the class structure of the global state was highlighted in particular by Klein, Rasulov and, again, Lukács. When the global state was viewed as a *class state* of the sort analysed by Poulantzas (even more radically than the classical Marxist account, as the material condensation of the interactions of *transnational* classes within a complex and multi-level institutional structure) the three-way link amongst the *functioning* of the global legal, political and economic orders became clear.

Thereafter, the focus moved to analysing how the legal form is imbued with *content* and showing how the capitalist (class) relations which constitute the global *economy* become inscribed in the international *legal* order in ways mediated by that order’s *internal* structure. It became clear that this analysis required a rejection of instrumentalism as an explanatory framework in favour of an account which incorporates the concept, and is thus able to recognise the phenomenon, of the ‘relative autonomy’ of the legal and economic spheres. The importance of the epistemological (and ontological) separation of ‘Law/law’ into its component parts which began in the earlier analysis of the legal form was highlighted by the inclusion of insights gained from an engagement with the works of Stone, Kennedy and Ticktin aimed at exploring how the *essential relations* of the contemporary global capitalist order are expressed in concrete norms and legal decision-

making practices. This not only contributed to a greater understanding of how *content* and *structure* are related, but also how international law can be both determined by, and constitutive of, the global economy.

### **Next steps for analysis**

As indicated in the introduction, this chapter has so far sought to tie together the analytical strands in those that preceded it into one cohesive whole. However, given the scale of the ‘radical international law project’, to offer more than a prolegomenal sketch of the resulting theory would be a major undertaking in which a thesis of this length could not hope to be comprehensive while maintaining the necessary robustness of analysis. This is the reason why the title – Examining (International Law): Towards a Systematic, Coherent and Radical Theory – contains that crucial word ‘towards’. This thesis is intended to ‘point the way’. In order to progress further, however, it will be necessary to ‘flesh out’ the above analysis in a number of ways.

Firstly, more detailed studies of *particular fields* within both domestic and international law – incorporating not only theory but also doctrine, empirical social research and the ‘black-letter’ law of cases and contracts, treaties and textbooks – are needed to show how transnational class relations are differently materialised in each and how each contributes to the overall functioning of the global capitalist order. Secondly, more thorough critical accounts of the *historical development* of these fields – rather than broad histories ‘of Scots Law’ or ‘of international law’ – are needed to show how both national and international law have developed in tandem with global capitalism and in each stage of its evolution has performed varying, but always crucial, functions. Thirdly, more self-conscious consideration of the multiform *debates, traditions and rifts within Marxian scholarship* and the effects of the resultant tensions on the generation of a coherent theory is needed to understand how the ‘radical international law project’ might avoid becoming mired in the minutiae of these while still doing justice to the complexity of the conceptual landscape in which it is situated. Fourthly, more in-depth analysis of all branches and levels of the *legal profession* (in the wider sense argued for above) is needed to show how, despite the legal realist critique of determinate legal decision-making, Marxian analyses (more often associated with abstract concepts and general social forces) can still yield useful insights

into concrete and particular situations. Finally, a greater volume of work addressing (*within the bounds of both domestic and international legal scholarship*, rather than as a separate concern/field) the issues of transnationality and the place of individuals and other non-state actors in the legal order is needed to show how rejecting the assumptions of orthodox theory can shine new light on existing problems and provide more theoretically satisfying and practically useful solutions.

## Final remarks

At the core of this thesis, and the ‘radical international law project’ as a whole is an exceedingly uncomplicated but (or, perhaps, therefore) vital impulse which, for a number of reasons, orthodox scholars either lack or edit out of their work. That impulse is the one which drives one to go beyond mere description, to do more than simply highlight and document the various injustices wrought by the contemporary global capitalist system (both *in contravention of* and *through* law) and, instead, to seek to change the system.<sup>401</sup> In order to be able to do so, it is necessary to ask, continually and tirelessly:

“*Why is this thus? What is the reason of this thusness?*”<sup>402</sup>

It is, therefore, the answering of these questions to which preceding analysis was directed.

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<sup>401</sup> As Marx famously said, “[t]he philosophers have only *interpreted* the world, in various ways; the point is to *change* it.” (See *Theses on Feuerbach* as reproduced in Marx and Engels (1974), p123 (emphasis in original) and, for a more detailed discussion on this point, Marks (2000), pp121-125)

<sup>402</sup> Artemus Ward (Charles Farrar Browne) as quoted in *The Oxford Dictionary of Quotations* (3<sup>rd</sup> edn.) (Book Club Associates, London, 1979), p564 (emphasis added)

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