

# Marxism and International Law: Perspectives for the American (Twenty-First) Century?

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## Abstract

The watershed of the US-led invasion of Iraq in 2003 calls for new approaches to the theory of international law. Hardt and Negri's *Empire* is a focal point for the broadly postmodernist New Approaches to International Law, which celebrates an infinite variety of *resistances* to oppressive structures. This book is itself in need of deconstruction. Post-structuralism must give way to a framework of analysis that accepts a place for agency, and with it, responsibility, alongside social structures. Contemporary Marxist critique of international relations, coming mainly from the field of geopolitical international history, can combine with social democratic critique of the international economic system to attach firm responsibility for the material economic woes of international society to the United States. The militarism of US foreign policy is, in a Marxist critique, primarily a function of US economic contradictions. Law plays a role here as a coercive instrument of the state. This state is capitalist in operating globally a system of accumulation by dispossession. Where necessary it reinforces its operations with violence. However, international law, as an expression of the equality of nations, especially in their social needs, is honoured in the breach by such dispossession and violence.

## Key words

imperialism and colonialism in international law; Marxism; postmodernist approaches to international law scholarship

## I. INTRODUCTION

Rumours of the death of socialism have been accompanied, oddly enough, by rumours of the disappearance of the United States. Post-structuralists tell us that we are all victims now but that, somehow, the multitude will arise against 'the powers'. Power enslaves us all in its impersonality, but resistance is everywhere. A primary focus of this study is Michael Hardt and Antonio Negri's *Empire*, a post-structuralist and, at the same time, post-Marxist critique of globalization.<sup>1</sup> This paper will argue against the book that an updated theory of capitalist imperialism convincingly captures the contemporary international scene. The brutal power of the United States is everywhere. It is infinitely destructive of international law. Postmodernism is the exhausted moral spirit of the old Europeans, and the ghosts of Marxist interpretations

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1. M. Hardt and A. Negri, *Empire* (2000).

of imperialism offer us the most convincing explanations as to why the violence of the United States increases by the year.

In this view Marxism does not offer a theory of international law as such, but merely a contemporary, up-to-date explanation as to why it is being systematically, or structurally, violated. Marxism is presented as a vision, an analysis of a condition, essentially pessimistic in its tracing of an increasing intensification of exploitation on a global scale, violently promoted and protected by the United States and its allies, the so-called 'coalition'. So the contradictions of capitalism are reflected in the contradictions of international law.

However, *law as such* is not merely an ideological legitimization of capitalism. It is also a positivist identification or equation of the idea of law with that of the state, in particular the United States. Law, as an instrument of coercion by the state, as a concentration of capitalist power, facilitates the fragmentation and oppression of the world community. However, *international law as such*, in the Western tradition going back at least to Westphalia, is definitely not an ideological instrument in this programme. Its flagrant violation points the way back to an ordered humanity based on principles of the equality of states, and economic and social justice, reached through negotiation and dialogue, but having to rest on an equilibrium of force.

## 2. POST-STRUCTURALISM AND THE END OF MARXISM

The greatest strength of post-structuralism is essentially emotional, atmospheric. It reflects the collapse of the revolutionary spirit of May 1968 in France, and the decay of Keynesian social democracy and of 'real existing socialism' in the former Soviet bloc. The onward march of monetarism and neoliberal economics makes it appear that every micro-decision is a profit-and-loss accounting exercise, whether in the running of a hospital, a university, a company, or a nation-state. The latter is supposedly powerless to regulate a molecular capital monetary flow that appears to permeate every nook and cranny of social being.<sup>2</sup> Economic nationalism and social democracy all have to give way to the inexorable drive of market opportunity. The rhetoric is that the market-state provides the open forum for opportunity, in contrast to the nation-state that attempted to impose legal regulations on behalf of particular moral commitments.<sup>3</sup> The reality appears to be that the relentless drive of the all-consuming market sweeps away all social democratic attempts to direct investment or stem speculative currency transactions that play havoc with democratic controls of the economy. These arguments have to maintain that capital has no significant territorial location and no particular social concentration. Yet in *Empire* they become an irrational cult of pessimism and even nihilism in the face of the impossibility of social change for which the *call of the multitude to arise* is a hopeless remedy.

From within the international law confraternity perhaps the strongest and most authoritative recent espousal of these views comes from Martti Koskenniemi.<sup>4</sup> In

2. The expression *molecular* is taken from D. Harvey's *The New Imperialism* (2003), 29–32.

3. P. Bobbitt, *The Shield of Achilles. War and Peace and the Course of History* (2002), xxxii.

4. In his contribution to M. Byers and G. Nolte (eds.), *United States Hegemony and the Foundations of International Law* (2003), 98.

rather a forceful tone Koskeniemi announces:

The time of conspiracy theories is over. There is neither an overall 'plan' nor overarching wisdom located in the United States, or elsewhere . . . But instead of making room for only a few non-governmental decision-makers I am tempted by the larger vision of Hardt and Negri that the world is in transit towards what they, borrowing from Michel Foucault, call a biopolitical Empire, an Empire that has no capital, that is ruled from no one spot but that is equally binding on Washington and Karachi, and all of us. In this image there are no interests that arise from states – only interest positions that are dictated by an impersonal, globally effective economic and cultural logic. This is a structural Empire which is no less powerful as a result of not being ruled by formal decision-making from anywhere.

It is quite possible that international lawyers should simply absorb what I have already called the atmosphere of post-structuralist gloom. In *Cultural Pessimism, Narratives of Decline in the Post-modern World*, Oliver Bennett places economic developments since the early 1970s in a wider context of Western cultural decay. He traces the immediate cause of contemporary economic anomie to the break from fixed to floating currency exchanges in 1973. This marked the end of the balance between organized labour, large corporate capital, and the nation-state.<sup>5</sup> The post-1973 shift to speculative financial markets (\$1.5 trillion in 1997) means that these speculative markets amount to more than 50 times the level of daily world trade. The role of futures and derivatives – a global bond market of \$200 billion a day compared with a \$25 billion trade in equities – marks the independent force of global finance with its own laws. The same measureless expansion in the role of the trade of multinational enterprises (MNEs) comes to \$16.3 trillion a year by 1998, growing at 8 per cent, with intra-MNE trade at about 50 per cent of all international trade. Transport costs are negligible in comparison to savings in raw materials and labour costs, brought about by mobility.<sup>6</sup>

What is crucial is the sociopolitical impact of these developments. The commitments of shareholders to companies can be cut by a telephone call, leading to slash-and-burn restructuring strategies. Factor-price equalization means that workers' salaries can be kept at a lowest global common denominator, and for 70 per cent of US employees salaries are stagnant or declining. It is impossible to tax corporate profits that can so easily move to cheaper locations. As a percentage of US revenue they are down from 39 per cent in 1939 to 12 per cent in the 1990s, meaning huge public borrowing commitments and budget deficits. The greater inequality of the new capitalism means a propensity to uncontrollable structural change, merging, downsizing, with a consequent breakdown of all connective ties of family, friendships, and communities. This is the economic background to crime, divorce, and other social breakdown – an untrammelled individualism in transactional societies – where long-term co-operative relationships are replaced by short-term market transactions governed by expediency and self-interest. These market values spread into medicine, education, and so on, and signify the end of common interest.<sup>7</sup> Some

5. O. Bennett, *Cultural Pessimism, Narratives of Decline in the Post-Modern World* (2001), 146.

6. *Ibid.*, at 153–4.

7. *Ibid.*, at 160–1.

predict an imminent disintegration of the global capitalist system, with a new capitalism locked into a negative dialectic with tribalist identity politics, where a mounting scarcity of resources and conflicts of interests are matched by a decreasing capability for co-operation.<sup>8</sup>

Bennett places these economic developments alongside developments in politics, sciences, and the arts, pointing to a general culture indicating marks of clinical depression. Global capitalism leads individuals into feeling trapped, with no control over their lives. Rampant individualism is accentuated by maladaptive social comparisons, pressurizing with overwhelming idealized standards, in an environment of unprecedented levels of competitive assessment in education and employment – a modern plague of the law of self-esteem. This is all within a framework of consumerism focused on increased personal insufficiency – which operates with an increased differentiation of products whose built-in deterioration engenders perpetual dissatisfaction in the consumer.<sup>9</sup>

A political development to parallel the economic ones described above has been the nuclear stand-off of the Cold War. The threat of nuclear extinction has caused a moral sickness or nausea, necessitating a dissociation from feeling in order to be able to live in a society threatened by annihilation. The widespread numbing of a moral sense encourages a Dionysian immersion in sensation, leading to ever increasing levels of schizophrenia and anomie. Chaos paradigms of world society multiply, as there is breakdown of the governing authority of states, and a transfer of power to sectarian groupings, criminal organizations, and private security agencies. The most obvious source of immediate political danger comes from the growing sectors of third-world societies dropping out of the world economy, providing a source of increasing resentment which leads easily to terrorism, given the access to arms, explosives, and other means of aggression.<sup>10</sup>

The prevalence of terrorism, for Bennett, is best understood in the wider climate of total political disintegration, marked by epidemics of torture, genocide, and politicide (government-sponsored murder), which McBride, speaking for Amnesty International in the 1960s, described as marking a massive breakdown of public morality and of civilization itself. By the 1980s over a third of the world's governments used torture, and Amnesty was able to note that public campaigning made no difference. There was no public outrage. The figures for genocides and politicides range to nine and twenty million respectively. The crucial dimension is comparison-fatigue and the failure of any 'political' process of response.<sup>11</sup>

The criticism that Marxists make of post-structuralist elaborations of this picture is the depoliticizing impact they provide. They offer an alternative ideology that does lead to the multiple resistances of which Koskenniemi speaks, but they add significantly to the realistic, empirical picture that Bennett has presented. Foucault's anti-Marxist decentralized contestation of power resists what it sees as any attempt to replace one set of social relations with another – which would only be a new

8. *Ibid.*, at 170–2.

9. *Ibid.*, at 162, 190.

10. *Ibid.*, at 61–5.

11. *Ibid.*, at 65–75.

apparatus of power-knowledge. Rather than being unitary, power is a multiplicity of relations infiltrating the whole of the social body, with no causal priority to the economic. This process does not simply repress and circumscribe people, but constitutes them. Power evokes resistance, albeit as fragmentary and decentralized as the power relations it contests.<sup>12</sup>

The constitutive character of knowledge has been identified as a key epistemological foundation of cultural pessimism. Bennett points to the argument that knowledge as a way of life is impossible – either we are on the outside – in which case its essence eludes us – or we are on the inside and too close.<sup>13</sup> For Foucault also, power is always already there – one is never outside or on the margins. Resistance is possible, but it is nothing more than the oppositional other of the prevailing apparatus of power – knowledge, minor, local knowledges in opposition to the scientific hierarchization of knowledges. This can appear as a theoretical foundation for pluralism – opposition to a so-called will to totalize that is a refusal to accept the possibility of difference and discontinuity. Instead, it should be recognized that there are irreducibly different perspectives, each in its way critical of existing social reality. This approach reflects the rise of a medley of social movements – feminists, ecologists, black nationalists, and so on. They all insist on change without a totality, piecemeal. Yet the Foucault perspective, in a Marxist view, is itself a total vision that evacuates any political content from the concept of resistance, objecting to any political action except waging war on the totality.<sup>14</sup>

These ideas are reproduced in *Empire*, and the argument here will be that the ideas do not, in spite of the metaphysical halo of postmodernism, become good political-economic theory or empirical analysis. The rhetorical, virtually magical style of this work makes it difficult to engage with its arguments. Its mystical adulation of speculative currency flows and MNEs is irrepressible. For instance, the following is typical of the authors' style: 'The huge transnational corporations construct the fundamental connective fabric of the biopolitical world in certain important respects', and so on. Now they (the MNEs, not the authors!) 'directly structure and articulate territories and populations', and so on.<sup>15</sup> In the same nonsensical style they pronounce that the supposedly complex apparatus that selects investments and directs financial and monetary manoeuvres determines 'the new biopolitical structuring of the world'. They tell us that 'There is nothing, no "naked life", no external standpoint, that can be posed outside this field permeated by money; nothing escapes money'. The authors stand in hopeless awe of what they call the great industrial and financial powers which produce not just commodities, but subjectivities, that is – wait for it – 'agentic subjectivities within the biopolitical context: they produce needs, social relations, bodies, and minds – which is to say, they produce producers'.<sup>16</sup> In metaphysical terms what Hardt and Negri are doing is simply to deny any dialectic between structure and agency. Structure is everything. This makes it metaphysically impossible for them to conceive of anyone or any particular grouping having actions

12. A. Callinicos, *Against Postmodernism* (1989), 82.

13. Bennett, *supra* note 5, at 16.

14. Callinicos, *supra* note 12, at 84–6.

15. Hardt and Negri, *supra* note 1, at 31.

16. *Ibid.*, at 32.

ascribed to them. So they tell us that ‘The machine is self-validating, autopoietic – that is systemic. It constructs social fabrics that evacuate or render ineffective any contradiction; it creates situations which, before coercively neutralizing difference, seem to absorb it in an insignificant play of self-generating and self-regulating equilibria’,<sup>17</sup> and so on.

There are four hundred pages of this convoluted rhetoric. In the space of an article it is proposed to highlight the flourishes with which the authors dispose of the nation-state as a possible form of political defence of social democracy, and then consider the economic power of the United States, the crisis of 1973, financial deregulation, and the relation of the United States to the MNEs.

Hardt and Negri object that the concepts of nation and national state faithfully reproduce the patrimonial state’s totalizing identity of both the territory and the population. Relying on sovereignty in the most rigid way, nation and national state make the relation of sovereignty into a thing, often by naturalizing it, ‘and thus weed out every residue of social antagonism. The nation is a kind of ideological shortcut that attempts to free the concepts of sovereignty and modernity from the antagonism and crisis which define them’,<sup>18</sup> and so on. Apparently Hardt and Negri know that Luxemburg’s most powerful argument was ‘that nation means dictatorship and is thus profoundly incompatible with any attempt at democratic organization’.<sup>19</sup>

The nation or the people it produces is contrasted with the multitude. The former is something that is one, having a will, and to whom one action may be attributed; it commands. While the multitude is ‘a multiplicity, a plane of singularities, an open set of relations, which is not homogeneous or identical with itself and bears an indistinct, inclusive relation to those outside of it . . . The construction of an absolute racial difference is the essential ground for the conception of a homogeneous national identity’.<sup>20</sup> Even the nation as the dominated power will, in turn, play an inverse role in relation to the interior they protect and suppress internal differences and so on.<sup>21</sup>

In contrast the United States has a constitution that favours the productive synergies of the multitude rather than trying to regulate them from above. This encourages the expansiveness of capitalism, which, supposedly, does not know an outside and an inside (i.e. it is all-absorbing). The US Constitution provides the opportunity for the decentred expansion of capital.<sup>22</sup> This apparently makes the United States especially suited as an instrument of the global events since the early 1970s. Hardt and Negri’s account is rather neutral. ‘Little by little, after the Vietnam War the new world market was organized: a world market that destroyed the fixed boundaries and hierarchical procedures of European imperialisms’. After American power had destroyed European colonialisms, ‘the army of command wielded its power less through military hardware and more through the dollar . . . an enormous step forward towards the construction of Empire’.<sup>23</sup>

17. *Ibid.*, at 34.

18. *Ibid.*, at 95.

19. *Ibid.*, at 97.

20. *Ibid.*, at 103.

21. *Ibid.*, at 106.

22. *Ibid.*, at 161–7.

23. *Ibid.*, at 246.

The second mechanism for its construction was a process of decentring the sites and the flows of production. The transnationals transferred the technology necessary for constructing the new productive axis of the subordinate countries and mobilized the labour force and local productive capacities in these countries. Rather strangely, the authors conclude this part of their argument as follows: 'These multiple flows began to converge essentially towards the United States, which guaranteed and co-ordinated, when it did not directly command, the movement and operations of the transnationals. This was a decisive phase of Empire. Through the activities of the transnational corporations, the mediation and equalization of the rates of profit were unhinged from the power of the dominant nation-states'.<sup>24</sup>

So one might ask why Nixon had the wit to decouple the dollar from the gold standard and put a surcharge of 10 per cent on all imports from Europe to the United States, a transfer of the entire American debt to Europe? It 'thus reminded the Europeans of the initial terms of the agreement, of its [US] hegemony as the highest point of exploitation and capitalist command'.<sup>25</sup>

Yet nation-state resistance must always be rejected as an option, being a metaphysical impossibility. If it is argued that through the imposition of imperialist domination the underdevelopment of subordinated economies was created and then sustained by their continued integration into dominant capitalist economies, it is still an invalid conclusion that disarticulated developing economies should aim for relative isolation in order to achieve their own full articulation. Instead the tendential realization of the world market should destroy any notion that today a country or region could isolate itself or delink itself from the global networks of power. The interactions of the world market have resulted in a generalized disarticulation of all economies.<sup>26</sup>

The fetishization of the US economic policy decisions of the 1970s follows. In italics the authors announce that the state has been defeated and the corporations rule the earth. Politics have disappeared and consensus is determined by economic factors such as the equilibria of trade balances and speculation on the value of currencies. The mechanisms of political mediation function through the categories of bureaucratic mediation and managerial sociology. This means that single government has been disarticulated and invested in a series of separate bodies, banks, international organisms of planning, and so on.<sup>27</sup> Notwithstanding these categorical statements, the authors still insist that at the top of the pyramid of world power are the United States and a group of nation-states which 'control the primary global monetary instruments and thus have the ability to regulate international exchanges. Only the United States itself has the global use of force. On a second tier, under this umbrella come the transnationals that organize what the authors call the networks, already many times described'.<sup>28</sup> Never tired of contradicting themselves the authors go on to tell us once again that it is foolish to harbour nostalgia for the nation-state,

24. *Ibid.*, at 247.

25. *Ibid.*, at 266.

26. *Ibid.*, at 283–4.

27. *Ibid.*, at 308.

28. *Ibid.*, at 309–10.



as either a cultural or an economic–juridical structure. Its decline can be traced through the evolution of a whole series of bodies such as the General Agreement on Tariffs and Trade (GATT), its successor the World Trade Organization (WTO), the World Bank, and the International Monetary Fund (IMF). Even if the nation were to try to resist, it could only make things worse, since ‘the nation carries with it a whole series of repressive structures and ideologies’.<sup>29</sup>

The resistance to a dichotomized focus on third-world nation-state and US imperialism is in favour of the postcolonial hero ‘who continually transgresses territorial and racial boundaries, who destroys particularisms . . . liberation means the destruction of boundaries and patterns of forced migrations’. For the most wretched of the earth, ‘its new nomad singularity is the most creative force . . . The power to circulate is a primary determination of the virtuality of the multitude, and circulating is the first ethical act of a counterimperial ontology’.<sup>30</sup> So the authors are not denying the focused power of the United States and its imperial allies. Rather they claim that this power is irrelevant to the future liberation of their postmodern hero. The means to get beyond the crisis of empire ‘is the ontological displacement of the subject’.<sup>31</sup> They offer a kind of millennial spirituality. Calling on Saint Francis of Assisi, they say that once again we find ourselves in Francis’s situation, ‘posing against the misery of power the joy of being . . . biopower, communism, co-operation and revolution remain together, in love, simplicity and also innocence . . . This is the irrepressible lightness and joy of being communist’.<sup>32</sup>

### 3. NATIONAL SOVEREIGNTY AND ECONOMIC REFORM

Poststructuralist pessimism poses the danger of political resignation and passivity, or simply total moral and intellectual confusion. What if it were the case that responses to imperialism, or what might condescendingly be described as the conspiracy of imperialism, were possible? Maybe there are perfectly obvious and feasible responses to the ills of the global economy that states cannot implement because these responses are resisted by other, more powerful states whose own interests argue against them. First one needs simply to set out what reforms are required and then explain how they are being blocked. Then, hopefully, the mist of *Empire* will pass away.

Joseph Stiglitz, a former chief economist to the World Bank, and a chief economic adviser to US President Bill Clinton, considers that it is possible to adopt a non-mystical approach to international monetary problems, particularly as they affect developing countries. He sets out two starting principles for his argument in favour of government intervention in the market. It should happen where there is imperfect information and where social cohesion is threatened. In this event an economy will

29. *Ibid.*, at 336.

30. *Ibid.*, at 363.

31. *Ibid.*, at 384.

32. *Ibid.*, at 413.



not function rationally. Starting from these principles Stiglitz argues quite simply that no case has been made for capital market liberalization.<sup>33</sup>

In summary, for Stiglitz monopoly concentration of capital in the interests of a small number of creditor states, particularly the United States, operating through a secretive, undemocratic IMF, serves acutely dysfunctionally the interests of most developing, that is, poor, countries. The creditor states resist change simply because it is in their financial interest to do so. Immediate prospects for the necessary political reform at the global level are not good.<sup>34</sup> The IMF rhetoric that liberalization would enhance world economic stability by diversifying sources of funding is nonsense. Banks prefer to lend to those who do not need money. The limited competition in financial markets means that lower interest rates do not follow. The so-called freedom of capital flow is very bad for developing countries, because there is no control of the flow of hot money in and out of countries – short-term loans and contracts that are usually only bets on exchange rate movements. It consists of money that cannot be used to build factories, for example, because companies do not make long-term investments with it. Such a financial climate can only destabilize long-term investments. There are bound to be adverse effects on growth in this environment, because countries have to set aside in their reserves amounts equal to their short-term foreign-denominated loans. Thus if country A borrows \$100 million at 18 per cent it should deposit the same in US Treasury bills at 4 per cent – losing 14 per cent.<sup>35</sup>

Where benefits are not paid for, or compensated, global collective action is necessary – that is, externalities to achieve global economic stability. The mindset of the IMF is that it will vote to suit creditors, and weighted voting cannot be changed with the United States using its effective veto. Yet contributions are actually coming from the developing countries, since the IMF is always repaid. Stiglitz is not sanguine that the necessary reforms to this institution will come. If there were to be open debate in the IMF, perhaps the interests of workers and small businesses would fare better against those of creditors. As things are, secrecy always allows special interests full sway and engenders suspicion.<sup>36</sup>

The institutional solutions are clear. Banking and tax restrictions must be imposed to ensure effective restrictions on short-term capital flows. There is needed a bankruptcy provision that expedites restructuring and gives greater presumption in favour of a continuation of existing management – thereby inducing more diligence in creditors. The IMF role in debt restructuring is fundamentally wrong. The IMF is a major creditor, representing major creditors, and a bankruptcy system can never allow creditors to make bankruptcy judgements.<sup>37</sup>

The rest of the institutional changes necessary are perfectly clear. They have nothing to do with bureaucracy and efficiency and everything to do with the equity which political choice must realize. The risk-based capital adequacy standards

33. J. Stiglitz, *Globalization and Its Discontents* (2002).

34. *Ibid.*, at 223–8.

35. *Ibid.*, at 65–7.

36. *Ibid.*, again at 223–8.

37. *Ibid.*, at 237.

imposed on developing-country banks are inappropriate. The IMF must be required to expand substantially its Special Drawing Rights to finance global public goods to sustain the world economy. The risks of currency fluctuation must be absorbed by the creditors, and the concerns of workers and small businesses have to be balanced against those of creditors. There must be global taxation to finance development. It is quite simply because alternative policies affect different groups differently that it is the role of the political process – not international bureaucrats – to sort out the choices.<sup>38</sup>

So why has Stiglitz cause not to be sanguine about these obvious reforms to the world financial system?

#### 4. CHARACTERISTICS OF LATE CAPITALISM AND THE STRUCTURE OF INTERNATIONAL RELATIONS

There are several apparent contradictions in capitalism. Industrial or productive capitalism tends to become, gradually, financial capitalism. That is, such productive capitalism accumulates greater and greater profit, which it then has increasing difficulty in placing, since it is not necessary, or perhaps even possible, to reinvest the capital in productive processes to serve an ever shrinking market. This is because of the exploitative conditions inherent in the ownership of the means of production under capitalism. Profit comes from the transfer of the surplus value of labour, necessitating a reduction in the scope and extent of consumer demand.<sup>39</sup> It then drifts into increasingly scarce – because demanded – assets, such as derivatives and property, which acquire speculative values.

The surplus capital is exported into production abroad that then becomes significantly competitive with the home producers, while still competing for the same limited consumer markets. In their classical study *Chaos and Governance in the Modern World System*, Arrighi and Silver set out the historical framework of modern capitalism in its development from industrial to finance capitalism. Just as the hegemony of the Dutch Republic, and after it, the British Empire, exported capital to finance their eventual rivals, so also did the United States from 1945 until the 1970s. The crisis of US hegemony was marked with the abandonment of the dollar–gold standard and the floating of currencies in the early 1970s. Just as with the former hegemonies, the United States had built effective rivals out of western Europe, Japan, and, increasingly, the Pacific Rim.<sup>40</sup> Because of the capitalism-induced concentration of markets, almost the only effective outlet for the increased productive capacity of these rivals is the United States itself. Equally the consumer boom in the West, and

38. *Ibid.*, at 238–48.

39. E. Todd, *Weltmacht USA. Ein Nachruf* (2003), 95, referring to the taboo nature of discussion of shrinking demand among economists considering globalization. The only exception he can find is Chalmers Johnson, *Ein Imperium verfällt Wann endet das Amerikanische Jahrhundert?* (2000), at 252.

40. G. Arrighi and B. J. Silver (eds.), *Chaos and Governance in the Modern World System* (1999), generally, and esp. ch. 1, 'Geopolitics and High Finance', 37–96.

particularly the United States, is credit-led, marked by the capacity of oligarchies of the United States and its 'coalition' to corner surplus liquidity.<sup>41</sup>

So international economic relations are increasingly marked by a dependency of the greatest consumer of world manufactures and natural resources, the United States, on the producers, western Europe, Japan, and the Pacific Rim, through the medium of increasing United States debt. An advantage that the United States has had from the period following 1945, when it dominated world production and trade, is the dollar. By fixing the value of its own currency as the world currency, it can pay its debts by printing money.<sup>42</sup> This is where the Stiglitz critique can become focused. The absence of world monetary reform has nothing to do with the 'money, money everywhere' rhetoric of Hardt and Negri. It has everything to do with the usefulness of the fiscal and monetary control of one world currency by a single power.

However, the full context of the usefulness of this power can only be understood if another aspect of the concentration of wealth and avoidance of income redistribution is stressed. The way out of surplus production for the United States, since the 1930s, has been the war economy, military production financed by the state, first through domestic income but eventually through the control of world liquidity.<sup>43</sup> That is, the United States found its way out of the Great Depression by adopting the 'warfare-welfare' economy of armaments, which, after the defeat of Germany and Japan, retained its impetus through the Czech crisis (the Prague communist coup of February–March 1948) and the Korean War.

Since then the United States has remained primarily a war economy driven by the need to confront external danger at a global level. This feeds effectively on the paranoid style that is fundamental to US foreign policy. David Harvey explains that the internal configurations of power that were able to resist Roosevelt's modest attempts through the New Deal to rescue the economy from its contradictions through redistribution of wealth, meant instead the paranoid style of politics. The difficulty of achieving internal cohesion in an ethnically mixed society characterized by intense individualism and class division made for the construction of American politics around the fear of some 'other' (such as bolshevism, socialism, anarchism).<sup>44</sup> This aggressive policy extends to an unequal military alliance system which ensures transfers of profit back to the United States through compulsory purchases of US armaments, an effective export of the 'warfare-welfare' economy.<sup>45</sup>

It is widely recognized that these economic contradictions accentuate further political contradictions. First, there is the changing character of US military dominance at the global level. This dates from 1945 and the US reconstruction of Germany and Japan as semi-sovereign states, as protectorates. Under a US military umbrella they were free to redevelop their own industrial potential. By the time of the Korean

41. Todd, *supra* note 39, 32–6, identifies this feature of advanced capitalism as affecting equally all the so-called Western democracies, and France and Britain, in particular, are governed by remote oligarchies that preside over increasingly polarized societies.

42. The least disputable aspect of this argument: see Arrighi and Silver, *supra* note 40, at 284; Harvey, *supra* note 2, at 128–9; Todd, *supra* note 39, at 117–19.

43. Arrighi and Silver, *supra* note 40, at 137, 147.

44. Harvey, *supra* note 2, at 48–9.

45. Todd, *supra* note 39, at 115–16.

War the United States had ringed the Soviets and Chinese with an unprecedented number of military bases, which meant that not merely were there only two superpowers, there were, in fact, in the classical (Westphalia) international law sense of the term only two (maybe three) sovereign states in the world, states with the power to declare and wage war. Turkey, Israel, Japan, Germany, the United Kingdom, Italy, and many other states were no longer autonomous, even legally.

The major distinction of the argument of Arrighi and Silver is to place in historical context the limitations of the Westphalia system of international law, based on the sovereign equality of states. This was reflected in the original Dutch system of hegemony which prevailed from 1648 until the Napoleonic Wars. When British hegemony replaced the Dutch in the nineteenth century, other states enjoyed only a nominal independence at a time when British industrial and naval supremacy guaranteed a global Pax Britannica. Britain called into independence the Latin American states, but they remained under British economic tutelage until 1914. With the coming of US hegemony after 1945, even the semblance or fiction of the Westphalia system disappeared. However, since the 1970s there has been a radical bifurcation of military and financial global power. This was most remarkable in the 1980s, when the Reagan military build-up was financed through manipulation of interest rates for the dollar to suck world liquidity into the United States.<sup>46</sup>

The difficulty with overwhelming US global military dominance at present rests in the transformation of its capital base. As long as military production was financed from within the United States the latter saw no security threat to itself. Now that the finance to support these military structures has started to come from outside, the picture becomes more uncertain. US military power is accompanied by increased indebtedness of the American state to foreign capital seeking profit within the United States, either on the stock exchange or in government securities. This began in the 1970s, but it has become acute in the course of the 1990s. These concrete developments are central to the whole 'global financial expansion that in the 1980s and 1990s reflat[ed] the power of the US state and capital and correspondingly deflated the power of the movements that had precipitated the crisis of US hegemony'.<sup>47</sup>

The United States has become financially dependent on its industrial protectorates, Germany and Japan, as well as on Arab oil states and Chinese diaspora interests (Singapore, Hong Kong, and Taiwan). These entities may not be hostile to the United States, but they are not necessarily committed to US political–military policies. At the same time they do have the economic power to limit US action, even if self-destructively. Besides, even now, the United States does not have the military and political resources to constrain positively the direction of these states and city-states. This creates uncertainty in the United States about how to behave towards its erstwhile protectorate-allies.<sup>48</sup> Todd sees here a fundamental weakness in the global order. The United States lays sole claim to military dominance at a global level, but

46. Arrighi and Silver, *supra* note 40, at 88–96, 284.

47. *Ibid.*, at 284.

48. An identical argument by Todd, *supra* note 39, at 110–11, who points to the particular role of Germany and Japan as subordinate powers, suffering huge military bases which they finance indirectly.

it is, in fact, neither financially nor militarily capable of ensuring the monopoly of the use of force which has to be, since Max Weber, the characteristic of legality in modernity.<sup>49</sup>

Another political contradiction of late capitalism concerns the relations between the United States, its 'coalition' and the so-called developing world. Again Arrighi and Silver have challenging insights into a true history of international law. These are completed by Harvey with his theory of accumulation through dispossession. Capitalism has always been global, and has always involved a huge transfer of value from the developing to the developed world. Dutch wealth was based on the plunder of Spanish Indies' gold and silver bullion. The exploitation from the eighteenth century of the Empire in India was utterly crucial to Britain's world hegemony. British power was further enhanced through the humiliation of China in the nineteenth-century Opium Wars that allowed the full realization of India's potential.<sup>50</sup>

The central thesis has to be that the so-called global order has always been and never ceased to be based on plunder. As Harvey puts it, the market-state will never produce a harmonious state in which everyone is better off. It will produce ever greater levels of social inequality. He argues that Marxism must not 'regulate accumulation based upon predation, fraud and violence to an "original stage" that is no longer considered relevant... A general re-evaluation of the continuous role and persistence of the predatory practices of "primitive" or "original" accumulation within the long historical geography of capital accumulation is, therefore, very much in order'.<sup>51</sup>

There is no longer even the pretence of a global project to integrate the formerly colonial world into a common world order. In the 1950s–1970s there had been a project of development, Truman's 'Fair Deal', although there was no real transfer of resources to the so-called developing countries. It appeared as if there were a US and even a European post-colonial alternative to the subordinated and openly exploitative treatment of the non-Western world during the previous four centuries. Agriculture should have been the basis of the transfer of resources to a growing industrial base within developing countries, encouraging the strengthening of nation-state-based economies. This process was to be supported by foreign investment and soft development finance, through the World Bank and the IMF, which allowed a place for monetary policy to reduce unemployment and inflationary pressure. Nonetheless there was no Western acceptance of cross-society political alliances within developing countries. These were seen as 'extremist' and destabilizing in the context of the Cold War. They could only survive with Soviet support. They were caught up in the ideological conflict of the Cold War and subjected to periodic Western military interventions, such as in Guatemala, the Dominican Republic, Chile, Vietnam, Angola, and many other instances. Consequently there were the severest

49. *Ibid.*, at 119.

50. Arrighi and Silver, *supra* note 40, at 219–46.

51. Harvey, *supra* note 2, at 144.

international political constraints standing in the way of assuring the widening of the purchasing power and consumer demand of non-Western societies.<sup>52</sup>

Even the neo-Keynesian development project was abandoned in the 1980s and replaced by a once again openly predatory transfer of capital resources from the developing countries to the West. This has covered suppression of natural resource prices, protection and subsidization of the exports of Western agriculture, and simply the buying up and destruction of local industrial capacity, in the context of devaluation of assets and debt rescheduling. Market and opportunity mean simply removing any redistributive element from politics. Such redistributive politics are branded as 'extremist' or 'illusory'.

The crucial weapon or instrument in the implementation of these policies has been the United States' control of the world currency, the dollar. Once again it is a direct link between the political impossibility of monetary reform and the continued pillage of the third world – vindicating Stiglitz's sceptical prognosis. As Will Hutton graphically explains, it was raw power that enabled the United States to insist on the dollar as the international unit of account in 1944. However, at the time government policy was still Keynesian, with the aim of achieving income equality, employment, and economic stability. There was to be no devaluation of the dollar against gold, with full convertibility. Yet in the early 1970s the United States imposed a world financial system in which the dollar would be the number one currency against which the others would float, but it accepted no obligations in managing its own currency. While the dollar fell, it had no rival currency and so the United States was able to appropriate 80 per cent of the industrialized West's current surplus for its own strategic and military purposes. Without interest rate ceilings or reserve requirements, US banks lending out of London could come to dominate global banking.<sup>53</sup>

The creation of a new world currency, managed by a world central bank – a currency that Stiglitz suggested might be made out of expanded Special Drawing Rights managed by an IMF whose voting system was reformed – was out of the question for simple reasons of national interest. US President Reagan abandoned tax on dividends paid to foreign holders of US financial assets. By the end of the 1980s virtually every country had been forced to remove outward capital controls, and by 1999 virtually 80 per cent of the world's current-account surplus had been won for the United States. The structures for US deficit financing of its consumer boom and armaments programme were in place. These developments 'have been the results of a series of consistent policy choices over thirty years reflecting essential US reflex dispositions towards unilateralism'.<sup>54</sup>

Such a stranglehold on credit has offered huge possibilities of enrichment. The increase in interest rates for the dollar in the 1980s not only ensured the inflow of capital to finance the arms race, it forced most Latin American economies, with huge dollar debts, into recession, into devaluation of their currencies and into

52. Arrighi and Silver, *supra* note 40, at 205–11.

53. W. Hutton, *The World We Are In* (2001), 234–9.

54. *Ibid.*, at 240–2, esp. 242. Also Harvey, *supra* note 2, at 127–32, 'The Powers of Mediating Institutions'.

debt–equity swaps that facilitated a general US buy-up of productive assets.<sup>55</sup> The same pattern was repeated with the Asian financial crisis of 1997, when the United States picked up large sectors of South Korean industry at knock-down prices, so that US dollar loans could be repaid. The dollar is used for 77 per cent of international loans and 83 per cent of foreign exchange transactions – as much as in 1945. Hutton warns that this has not been irrational economic dogma: ‘It was the dogma of the expanding superstate. The international financial system has been shaped to extend US financial and political power, not to promote the world public good’.<sup>56</sup> Hutton succinctly describes the global political deficit of the international financial system in social democratic terms. There is no equality of opportunity, nor an equitable sharing of risk. Nor is there a social contract for the redistribution of income, the investment in social, physical, and human capital.<sup>57</sup>

Harvey resorts to more familiar Marxist language. He insists that the fundamental drive to accumulation by dispossession is as old as capitalist imperialism itself. The crisis could not be happening ‘if there had not emerged chronic problems of over-accumulation of capital through expanded reproduction coupled with a political refusal to attempt any solution to these problems by internal reform’.<sup>58</sup> He describes the opportunities open to those who can manipulate a monopoly of credit mechanisms in traditional Marxist terms. Monopoly control of credit systems allows unlimited possibilities for operating a credit squeeze, forcing a drying-up of liquidity and forcing enterprises into bankruptcy.<sup>59</sup> Accumulation by dispossession allows the release of a set of assets (including labour power) at very low (and in some instances zero) cost. Over-accumulated capital can seize hold of such assets and immediately turn them to profitable use.<sup>60</sup> These ‘money, money, everywhere’ activities are as old as the hills.

Some of the mechanisms of primitive accumulation that Marx emphasized have been fine-tuned to play an even stronger role now than in the past. The credit system and finance capital became, as Lenin, Hilferding, and Luxemburg all remarked at the beginning of the twentieth century, major levers of predation, fraud, and thievery. The strong wave of financialization that set in after 1973 has been every bit as spectacular for its speculative and predatory style. Stock promotions, ponzi schemes, structured asset destruction through inflation, asset-stripping, through mergers and acquisitions, and the promotion of levels of debt incumbency that reduce whole populations, even in the advanced capitalist countries, to debt peonage, to say nothing of corporate fraud and dispossession of assets (the raiding of pension funds and their decimation by stock and corporate collapses) by credit and stock manipulations – all of these are central features of what contemporary capitalism is about. The collapse of Enron dispossessed many of their livelihoods and their pension rights. But above all we have to look at the speculative raiding carried out by hedge funds and other major institutions of finance capital as the cutting edge of accumulation by dispossession in recent times.<sup>61</sup>

55. Hutton, *supra* note 53, at 243–5.

56. *Ibid.*, at 247–51, esp. 251. Also Harvey, *supra* note 2, at 137–82, ‘Accumulation by Dispossession’.

57. Hutton, *supra* note 53, at 247.

58. Harvey, *supra* note 2, 181.

59. *Ibid.*, at 155.

60. *Ibid.*, at 149.

61. *Ibid.*, at 147.



## 5. THE SHAPING OF INTERNATIONAL LAW AGENDAS

Law may refer to the command enforced by a sovereign state, the positivist's equation of law with the state. The word 'law' in 'international law' may refer more generally to the legal relations among equal and independent states according to the Westphalia system, in existence since 1648. Marxism can easily identify the first sense of 'law' as an instrument of 'the capitalists' who control the state. This is a very useful shorthand for the assumption of a rule of thumb political sociology that a state bureaucratic apparatus is effectively controlled by a clique or oligarchy in its own interests. The difficulty is how to understand the relations between a dominant capitalist state and a whole range of other states in the international system. Concretely, this means asking how the United States relates to the other major Western powers, including Japan, and, then, to what are loosely called the developing, or simply significantly poorer countries, including China, India, Brazil, and innumerable other smaller countries. This article has relied on an updated classical Marxist analysis of contemporary capitalist imperialism, that insists there is nothing new in the name of the so-called 'new imperialism'. Now it will be asked whether international law can offer any autonomous prescriptions in response by delving also among the first Marxist theories of imperialism and the nation,<sup>62</sup> while considering specifically the quality and possibilities of US relations with other powers.

Arrighi and Silver consider most exhaustively the historical dimension of a series of capitalist hegemonies and identify the original structure of international law as attributable to the character of Dutch hegemony.

When it was first established under Dutch hegemony, national sovereignty rested on a mutual recognition by European states of each other's juridical autonomy and territorial integrity (*legal* sovereignty), and on a balance of power among states that guaranteed their *factual* sovereignty against the attempts of any state to become so powerful as to dominate all the others.<sup>63</sup>

After 1945, the British fiction of a balance of power that could still assure a *factual* sovereign equality of states was discarded even as a fiction. 'As Anthony Giddens has pointed out, US influence on shaping the new global order both under Wilson and under Roosevelt "represented an attempted incorporation of US constitutional prescriptions globally rather than a continuation of the balance of power doctrine".<sup>64</sup> In other words, while the symptoms of the present crisis in international law are clear to all, the nature of recent developments in US international law policy is seriously misunderstood. It is not now that the Westphalia model of international law is being challenged. This was buried, at the latest, with the onset of the Second World War, perhaps even with the Treaty of Versailles. The United States has never

62. V. Kubalkova and A. Cruickshank, *Marxism and International Relations* (1989). One could give weight to Soviet or Chinese doctrines of international law, or also the whole range of other post-1945 Marxist theories of international relations, but the turn of the millennium, remarkably, allows focus on issues in a manner similar to the immediate pre-1914 period, that is, when there is a crisis of hegemony, this time of the United States, while earlier of Britain.

63. Arrighi and Silver, *supra* note 40, at 92 (emphasis in original).

64. *Ibid.*, at 93. See again, most extensively, Bobbitt, *supra* note 3.

in the twentieth century accepted that the constitution of a state was an internal matter. The export of its own constitutional model was the object of two world wars. The semi-sovereign German and Japanese protectorates were its models for the organization of world society. There was no dissent about this from the West.

It is a mistake to claim that it is now, for instance, that the UN Charter is being ignored or the equality of states is being denied. There is not a present and unprecedented US overthrow of international norms. The US project of international society, at least since 1945 (and in terms of its war aims), was always quite different from classical international law. It was the export of its constitutional model of market democracy against the totalitarian socialism of the Soviet Union and China. By the early 1950s it had locked the whole planet into a coalition to this end. The difference now is that the changing underlying economic structures of international society mean that the United States does not have the material resources to be assured of its ability to enforce its project against possible new foes, nor can it any longer rely on its economically resurgent erstwhile allies. This leads it to change from acting as a hegemonic power which continues to enjoy international legitimacy, to becoming a power which, clearly since its invasion of Iraq in spring 2003, tries to rely exclusively on its own political and military strength to force through its will.

The main preoccupation of the international law agenda of the United States, here acting alone except for UK support, has been to develop doctrines of pre-emptive attack, armed intervention, and the spreading of military bases, through agreement with host states and the global strengthening of military policing against terrorism. This agenda now dominates the international scene. There are US military protectorates in Afghanistan and Iraq. Others may be in the offing for North Korea, Iran, and Syria. While there is less enthusiasm for intervention in Africa and Latin America, further protectorates, or very large measures of military assistance and co-operation are in place, or are likely at least, in Sierra Leone, Colombia, the Democratic Republic of the Congo, and Liberia. The underlying principle of both US and UK policy is that such states are not sovereign and equal members of international society. Hence the United States undertakes international military actions, first, without troubling to find the consent of the UN and, second, without even looking to have the support of NATO. In the Federal Republic of Yugoslavia, Afghanistan, and Iraq the United States has waged wars which are all in contravention of the basic international law norms of the sovereign equality of states and of the elementary need for community authority to legitimate the exercise of force against individual members of the society of states.

The question is how this can be explained, and also whether any constructive response is possible. Writing in 1999 Arrighi and Silver do not consider that serious conflict between the United States, its erstwhile Western allies and the significant Pacific Rim states is inevitable, despite the bifurcation of military and financial global power, provided that there is not 'US resistance to the loss of power, and prestige (though not necessarily of wealth and welfare) that the recentering of the global economy on East Asia entails'.<sup>65</sup> Capitalism is a global phenomenon. Even

65. Arrighi and Silver, *supra* note 40, at 270. They see a balance of power in east Asia as possible.

China has long embarked on a process of primitive accumulation, which Harvey characterizes as an internally imposed accumulation by dispossession, comparable to the Tudor enclosures.<sup>66</sup> Todd also acknowledges that advanced capitalism affects social structures, democracy, and the rule of law in all major Western societies, including France.<sup>67</sup> Probably, in so far as Hardt and Negri's work draws, eclectically of course, on Marxism, it also clearly fits into this picture.

An early Marxist theory of 'ultra-imperialism' at the beginning of the twentieth century proposed that a peaceful adjustment of the relations of production (including international relations) to the worldwide forces of production was possible. Karl Kautsky thought that this adjustment could be brought about by capitalism itself. Capitalism would go through an additional state, which would see an aggrandizement of the policy of cartels into a foreign policy:

this phase of ultra- or super-imperialism involving the union of imperialists across the globe would bring to an end their struggles with one another. The notion, in other words, of a co-operative effort in the Grotian tradition enabling a joint exploitation of the world by internationally merged finance capital...<sup>68</sup>

However, writing at the end of 2002 and in late spring 2003 respectively, Todd and Harvey consider that present US foreign and, consequently, international law policy do indicate a very firm intention to resist any loss of power and prestige. The United States is evidently fully willing to accept open conflict with other powers. For both authors, the US actions are necessitated by the internal contradictions of its political–military and economic–social relations, above all, with its allies. Political relations with its allies have broken down because this is the wish of the United States. Political and military will have to be asserted to compensate for economic and social weakness within the United States. Economic structures shape the agenda of contemporary international law in the following respects. Most importantly, the United States realizes that its economic pre-eminence in the global system is very seriously threatened in the medium term. Its economic dependence on its Western allies, particularly Japan and the European Union, means that it feels compelled to choose issues on which to exercise its political power in a primarily coercive military dimension, in order to force an acknowledgement of its supremacy.<sup>69</sup>

This is where the exact nature of the evidence Todd and Harvey adduce to arraign the United States is interesting. Presumably the post-structuralist view of the global penetration of 'capital discourse' means that it is impossible to speak of independent agency in international relations. In this sense the United States does not exist as an entity, and, *ipso facto*, it can hardly have a plan of world domination. The United States is deconstructed as having no essence prior to international society. Intentionality is a mere effect of discourse and not a cause in its own right. Following Saussure's linguistic structuralism meaning stems from relations of difference between words

66. Harvey, *supra* note 2, at 153–4.

67. Todd, *supra* note 39, at 32–6.

68. Kubalkova and Cruickshank, *supra* note 62, at 52. This assumption underlies my own contribution to A. Qureshi (ed.), *Perspectives in International Economic Law* (2002), 'The National as a Meta-Concept of International Economic Law', 65–79.

69. This is the clear overall argument of both their books.

rather than reference to the world, in this case the consciousness of individuals.<sup>70</sup> Todd's French discourse of critique of the United States is, perhaps, embedded in the French hostility to the United States which may be traceable back to Roosevelt's treatment of de Gaulle in North Africa in winter 1942–3. That opposition itself may be followed back into the mists of time. Wittgenstein has called 'mentalism' the belief that subjective mental states cause actions. Instead we merely ascribe motives in terms of public criteria which make behaviour intelligible. Therefore it is better for social scientists to eschew intentions as causes of actions and focus on the structures of shared knowledge which give them content.<sup>71</sup> This would place Todd firmly within a huge literary industry of French anti-Americanism.

Capitalism is a discourse that produces resistances, because it has to strive to both absorb and exclude its 'other', whatever is not capitalist. Harvey has no difficulty with using postmodern political theory to describe the workings of capitalism.<sup>72</sup> Capitalism can be said necessarily to create its own 'other'. It can make use of some non-capitalist formation or it can actively manufacture its 'other'. There is an organic relation between expanded reproduction and the often violent processes of dispossession that have shaped the historical geography of capitalism. This forms the heart of his central argument about accumulation by dispossession.<sup>73</sup> However, Harvey objects to placing all struggles against dispossession 'under some homogenising banner like that of Hardt and Negri's "multitude" that will magically rise up to inherit the earth'.<sup>74</sup> Wendt makes a similar objection to post-structuralism or what he calls 'wholism' in social theory. He argues that no matter how much the meaning of an individual's thought is socially constituted, all that matters for explaining his behaviour is how matters seem *to him*. In any case, what is the mechanism by which culture moves a person's body, if not through the mind or the Self: 'A purely constitutive analysis of intentionality is inherently static, giving us no sense of how agents and structures interact through time'.<sup>75</sup> Individuals have minds by virtue of independent brains and exist partially by virtue of their own thoughts. These give the Self an 'auto-genetic' quality, and are the basis for what Mead calls the 'I', an agent's sense of itself as a distinct locus of thought, choice, and activity: 'Without this self-constituting substrate, culture would have no raw material to exert its constitutive effects upon, nor could agents resist those effects'.<sup>76</sup>

So the vital distinction that the historian has to struggle to make is between the following two styles of argument. Wittgensteinians say that, in the proverbial hypothetical court case, the jury can only judge the guilt of the defendant – having no direct access to his mind – by means of social rules of thumb to infer his motives

70. A Wendt, *Social Theory of International Politics* (1999), 178.

71. *Ibid.*, at 179.

72. See, for instance, D. Harvey, *The Condition of Postmodernity* (1989), which explains the break from fixed to floating currencies as marking the end of the balance between organized labour, large corporate capital, and the nation-state, and which Bennett highlights as a watershed in the spread of modern cultural pessimism, *supra* note 5, at 146.

73. Harvey, *supra* note 2, at 141–2.

74. *Ibid.*, at 169.

75. Wendt, *supra* note 70, at 180–1.

76. *Ibid.*, at 181–2.

from the situation (a history of conflict with the victim, something linking him to the crime scene, etc.). They go further and argue that the defendant's motives cannot be known apart from these rules of thumb and so there is no reason to treat the former as springs of action in the first place.<sup>77</sup> At the same time many now distinguish between two kinds of mental content. 'Narrow' content refers to the meanings of actions in a person's head which motivate his actions, while 'broad' content refers to the shared meanings which make the actions intelligible to others.<sup>78</sup> While Wendt draws these distinctions from the philosophy of agency and structure, they are always perfectly familiar to historians. The difficulties of contemporary history are what face the polemics of Todd and Harvey. They have relatively little access to the primary archives, whether official or private, that would satisfy the most rigorous historian, but the value of knowledge is also relative to the circumstances in which it is constructed, whether individually or socially.

Todd's argument is, very much like Wittgensteinian public criteria, based on an analysis of the material situation of the United States and the material consequences of its actions. The United States is no longer necessary for the maintenance of 'freedom', democracy, and the rule of law in the world, given the disappearance of the 'socialist world'. The country has, since the 1970s and especially since 1995–2000, seen its economic situation radically altered to its disadvantage – the world's largest debtor, and significantly less productive than its main trade rivals. The same United States embarks upon apparently ludicrous military adventures against extremely weak third-world countries and penetrates into the Central Asian landmass, under the pretext of pursuing a terrorism that it equates with the Arab–Muslim region, despite the limited pull of militant Islam outside Pakistan and Saudi Arabia. It acquires bases in several former Soviet Central Asian republics, Afghanistan, and, eventually, Iraq (Todd is writing in December 2002), all through unilateral action, without consulting either NATO or the United Nations. A centrepiece of this policy is to block any settlement of the Palestinian–Israeli conflict and to keep the European Union marginal to a mediation of the conflict.

Europe, Japan, China, and Russia have no immediate interest in quarrelling with one another and especially no economic interest in confronting the Arab and Muslim world. They have every assurance that energy will be supplied because the Arabs and Iran need to do so for their own development. At the same time Israel's quarrel with the Palestinians is a serious source of conflict of interest for all of the United States' traditional allies. It could weaken or complicate their relations with the source of an essential energy supply. So the assertion of unqualified US solidarity with Israel fits together with a plan to maintain literally physical control of the oil resources of the Middle East. It enables the United States to view with equanimity the possible destabilization of the source of its allies' oil supplies through a generalized Arab–Muslim hostility towards 'the West'.<sup>79</sup>

77. *Ibid.*, at 179.

78. *Ibid.*, at 181.

79. Todd, *supra* note 39, at 36–8, 56–8, 146–54, 164–82.

The kernel of Todd's structural argument is that the United States is behaving irrationally because both its internal and international situation have become unstable. It is fixated on the unilateral use of force to ensure control of territory and oil in the Middle East and Central Asia as a way of maintaining dominance over its erstwhile Allies. In this context the Westphalian and UN Charter rules of international law do not apply to the United States' relations with the Middle East and Central Asia. Doctrines of pre-emptive strike against terrorist states, or humanitarian intervention against brutal dictatorships can be variously used, and are being used, to underpin a volatile Western–Middle East relationship. The balancing of Israeli and Palestinian rights to self-determination is not important compared to keeping the European Union marginal to the political relations of the Middle East.

Writing in spring 2003, Harvey is in possession of the fact that the war with Iraq is in full swing. He agrees with Todd that the starting point of US action is its increasingly serious economic weakness. His argument has a classical Marxist framework, considering the options between a Kautsky-style 'ultra-imperialism' of the Western powers and Lenin's scenario of a violent competition among the imperialist powers – meaning, effectively, all powers, including China.<sup>80</sup> He is also influenced by the tradition of geopolitics of the 1900s of Halford Mackinder that treats control of the Eurasian landmass as central to world domination. However, beyond that Harvey relies primarily on an 'intentionalist' explanation of US policy. He refers to planning documents of US leaders, which are openly available, and also to the writings of influential opinion leaders within the United States. These are not the equivalent of open access to the minutes of meetings of key decision-makers, but they suppose that access to US elite intentions is possible. At the same time, these elites are, for the moment, able to direct the course of US power.<sup>81</sup>

Harvey considers that both intentions and actions, for example the defence strategy documents of 1991–2 and the language justifying the invasion of Iraq, show a clear opinion in favour of a military solution to the weakness of the United States. Alliances and traditional international law are to be discarded in favour of unilateral, also military, action in US interests. These actions are to demonstrate its absolute military and political global supremacy. Territorial and physical control of Middle East oil is sufficient for the United States to maintain its dominance for the near future.<sup>82</sup> As Harvey puts it, 'if it [the United States] can move on (as seems possible) from Iraq to Iran and consolidate its position in Turkey and Uzbekistan as a strategic presence in relation to Caspian basin oil reserves (which the Chinese are desperately trying to butt into), then the US, through firm control of the global oil spigot, might hope to keep effective control over the global economy and secure its own dominance for the next fifty years'.<sup>83</sup>

All this dramatic confrontational strategy is understandable, given the immense danger that the present international economic situation poses for the United States.

80. Harvey, *supra* note 2, at 75, 209, and see also, more generally, Kubalkova and Cruickshank, *supra* note 62, at 52–3, that the development of capitalism is so uneven that conflict is inevitable.

81. Harvey, *supra* note 2, at 18–25, 74–86, 183–212.

82. *Ibid.*, at 19.

83. *Ibid.*, at 78.

The constructive alternative would be for the United States to turn away from imperialism and engage in both a massive redistribution of wealth within its borders and a redistribution of capital flows into the production and renewal of physical and social infrastructures. This would mean an internal reorganization of class power relations and transformation of social relations that the United States has refused to consider since the Civil War. More deficit financing, much higher taxation, and strong state direction are what dominant class forces within the United States will not even consider.<sup>84</sup> At the same time the economic, particularly financial, threat from east Asia is huge. Arrighi and Silver think that the immediate major task for the United States is to accommodate itself to this constructively. Harvey thinks, that, on balance, the United States is unlikely to take this course. The ferocity of the primitive capital accumulation that is taking place in China may well spark in China a rate of economic growth capable of absorbing much of the world's capital surplus. There may be revolution and political breakdown in China caused by the stress of present social change. However, if there is not, 'the drawing off of surplus capital into China will be calamitous for the US economy, which feeds off capital inflows to support its own unproductive consumption, both in the military and in the private sector . . . In such a situation, the US would be sorely tempted to use its power over oil to hold back China, sparking a geopolitical conflict at the very minimum in central Asia and perhaps spreading into a more global conflict'.<sup>85</sup>

The Leninist scenario of violent competition among capitalist blocs is most likely. The more explicit the United States project becomes the more it will almost certainly force an alliance between France, Germany, Russia, and China, which more reflective US figures, such as Henry Kissinger, believe will not necessarily lose in a struggle with the United States.<sup>86</sup> Arguing from within social democratic parameters, Hutton and Todd hope that the European Union can balance the economic power of the United States more peacefully. The key instrument is the aggressive use of the euro as a political weapon, to enforce European social policies both within the European economic area and in international development aid policy.<sup>87</sup> However, Harvey insists that such a project cannot hope to be realistic unless it involves an explicit rejection of neo-liberal economic policy – which indeed both Todd and Hutton would also advocate. There must be a strong revival of sustained accumulation through expanded reproduction (read: curbing the speculative powers of finance capital, decentralizing and controlling monopolies, and significantly redistributing wealth). Otherwise this Kautsky-style benevolent 'New Deal' imperialism can only move deeper into the quagmire of a politics of accumulation by dispossession throughout the world in order to keep the motor of accumulation from stalling.<sup>88</sup>

Contemporary US policy, that for the moment enjoys UK support, appears nihilistic in relation to the existing Westphalian international legal order, making it a pure fiction. It appears at the same time, consciously but completely unrealistically,

84. *Ibid.*, at 75–6.

85. *Ibid.*, at 208–9.

86. *Ibid.*, at 200.

87. Todd, *supra* note 39, at 211–38; Hutton, *supra* note 53, esp. at 400–11.

88. Harvey, *supra* note 2, at 211–12.



to be a project to restore the political control of large parts of the non-Western world that was temporarily relinquished in the 1950s and the 1960s. There is much argument that the granting of independence was premature and that it has to be undone because there are simply not adequate political institutions, namely state structures, in large parts of the globe.<sup>89</sup> Again, as with the present US treatment of its erstwhile allies, this apparently radical suspension of traditional Westphalian and UN Charter law in relation to large parts of the South has to be seen in its longer historical context. It is, in terms of timescale, merely a phase in the development of international law since the sixteenth century. Arrighi and Silver have most brilliantly captured this phase as one of a crisis of United States capitalist hegemony. They give full place to changing developments in the history of international law since Dutch hegemony ushered in the Westphalia system. The League of Nations and the United Nations mark the transition from British to US hegemony. The latter's hegemony is now fundamentally in question. The US attempt to reverse the course of history, to reintroduce colonial-type international protectorates, is another aspect of the nihilism that will simply not face the responsibilities of global management in terms of necessary economic and social change.

Optimistic European voices argue that a reassertion of an economic balance of power between Europe, Russia, Japan, China, and others (possibly eventually India and Brazil) and the United States make inevitable a return to the dialectics of dialogue in the resolution of international conflict. This supposes that the Americans adjust to a reduced but still significant role in the international economy. In relation to the South this optimistic Europeanism argues that European, Japanese, and Chinese capitalism are more socially oriented than the predatory Anglo-American neo-liberal market economy states. Unlike the United States and the United Kingdom they can negotiate compromise relations with different cultures, premised on a slow process of gradualist reform and on integration. Concretely this means Europe absorbing Russia and the Middle East into its economic–social zone, in which a postmodern, agnostic absence of the military dimension to politics will prevail. Arguably Japan and China can take the same lead in east Asia. In this picture the United States goes off altogether into the wilderness from which it emerged at the beginning of the twentieth century. It is left with the North American Free Trade Agreement (NAFTA). Todd and Hutton, from England and France, place plenty of hope in developments in such directions. They can point to the failure of neo-liberalism to make a decisive breakthrough in France and Germany, not to mention reversals of economic strategy in Putin's Russia and, finally, the great enigma of China.

None of this optimism can be grounded in the rather more Leninist imperialist scenario outlined by Harvey. The concrete flaw in European optimism is that the United States is aware of its strategic precariousness and has already moved to anticipate it. It enjoys a political military precedence if not dominance, which can impede any alternative global project. Japanese, other east Asian, and European

89. This is argued most forcefully by such British figures as R. Cooper ('The New Imperialism', *Observer*, 7 April 2002), an adviser to Tony Blair, and Niall Ferguson, a historian of the British empire and international economic and financial history.

capital are locked into the radically skewed US capital market as part of capital's natural search for maximum profit. European and east Asian industrial production is equally locked in the embrace of this US market. The latter is not only skewed but also twisted, since an integral part of the consuming power of this market is the surplus capital of the exporters to the United States.

On the outside stands the economically marginal, disenfranchised world proletariat, threatening, or being seen to threaten, illegal immigration, international crime (especially people- and drug-trafficking), and, of course, terrorism. Marxism would surely require that this proletariat must become more radical as it becomes more economically marginal. The latter must happen because of the continuing transfer of capital resources from the South to the North, an uninterrupted process since the sixteenth century. The will and the means do not really exist in the West (Europe and Japan will not go along with the United States) to restore political control over the South. So the disorder it represents will gradually engulf the West. That is, unless a social democratic alternative – whether or not dubbed Kautsky-style 'ultra-imperialism' – can support a true development of the same social democratic model, a substantive economic self-determination of peoples in the developing world.<sup>90</sup> However, Marxist analyses of the impact of the international political economy on the general structure of international law remain the most convincing for the present.

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90. As the author has already suggested, particularly *supra* note 68, and also in A. Carty, 'Liberal Rhetoric and the Democratization of the World Economy', in (1988) 98 *Ethics* 742–56.