

Writing about Empire: Remarks on the Logic of a Discourse

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Amy Bartholomew (ed.), *Empire's Law: The American Imperial Project and the 'War to Remake the World'*, Toronto: Pluto Press, 2006, ISBN-13 9780745323695, 381 pp., \$100.00 (hb), \$36.00 (pb).

A new genre of scholarly writing has emerged in recent years in the field of what one can broadly call critical international theory. Its principal defining feature is an intense preoccupation with the phenomenon of the so-called 'new world order', which it tries to explain and describe through an analytical lens constructed primarily around two ideas: the idea of 'empire' and the idea of 'imperial law'. In this article I attempt to provide a brief overview of this genre, which for the sake of simplicity I shall call henceforth the 'new imperial law' or NIL genre, and to reflect critically on its underlying ideological dynamics.¹

The basic way in which I propose to go about this task is by taking up a series of essays collected in a recently published volume, *Empire's Law: The American Imperial Project and the 'War to Remake the World'*, and treating them, so to say, as a window into the rest of the genre. Needless to mention, this is not the only possible way in which one can conduct this sort of study. The reason I have chosen it over other alternatives is essentially threefold: first, the volume in question brings together several names who seem to command quite a considerable amount of attention in critical international theory circles; second, the arguments rehearsed across the various essays seem to me to be highly representative of all the major NIL themes; third, setting up the enquiry this way, I believe, makes it easier to achieve that ever-elusive balance between abstract theorizing and concrete practical illustrations that the kind of enterprise I want to pursue here traditionally requires.

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1 Although it has a number of notable parallels in more traditional varieties of liberal international law scholarship, the NIL genre, quite certainly, constitutes a new departure in the field of international theory. As I shall show in the pages ahead, the way it frames the general problematic of the contemporary world order – 'empire' vs. 'law', 'United States' vs. 'Europe', 'Hobbes' vs. 'Rousseau' – and the implicit ideological vision it imparts with that are highly original. For the most representative examples of the NIL genre, other than the volume under review see also M. La Torre, 'Global Citizenship? Political Rights under Imperial Conditions', (2005) 18 *Ratio Juris* 236; J. Cohen, 'Whose Sovereignty? Empire versus International Law', (2004) 18 (3) *Ethics & International Affairs* 1; N. Bhuta, 'A Global State of Exception? The United States and World Order', (2003) 10 *Constellations* 371; 'America and the World', *infra* note 25.

In the end, it is only the broader generic patterns that I aim to investigate in these pages, not the immediate substance of any particular piece of writing. What follows below, in other words, should not be seen simply as a review essay or critique of any one particular author's work, but more as an attempt to investigate a certain way of thinking about the 'new imperial order' – its substantive features, its narrative tropology, and, ultimately, its ideological meaning in the contemporary critical-theoretical conjuncture.

I. NIL: THE FIRST IMPRESSION

In terms of their general positioning, all NIL writings are commonly characterized by two principal features. In the first place, they are all invariably presented as *works of critical social theory*, that is to say, as works that are designed to demystify, elucidate, and expose some previously obfuscated aspect of socio-historical reality so as to reveal the 'hidden forms of domination and exploitation that shape it'.² In the second place, they are simultaneously held out also as profoundly *political acts* with an explicitly left-wing counter-hegemonic bias.

Take the aforementioned collection, *Empire's Law*. Between the editorial introduction and the glowing endorsements on its back cover, the volume is proclaimed not simply 'a "must read" for students of international law, politics and ethics' but also 'required reading [for] citizens the world over'. As its editorial team understands it, its primary aspiration is to bring together 'some of the world's most outstanding theorists' so as 'to provide a uniquely lucid account' – not just of how the 'new imperial order' has come about, but also of what sort of power dynamics feed it and what kinds of implications this has for freedom, democracy, and the rule of law around the world. The underlying objective behind all this is to 'recover and repossess our democratic discourse and politics' on behalf of 'international law', 'legality and human rights' and against the 'new imperial hegemony' (p. 217).

Now, whatever one may feel about the general merits of such an enterprise, the one practical problem with it in the present case is that, quite simply, it just does not work. The more closely one inspects the immediate contents of what actually tends to get said in the general NIL discourse, the more obvious it becomes that most NIL writings tend to demonstrate a systematic tendency to pass over not only some of the most basic elements of the international legal doctrine – in one of his more notable essays, 'Interpreting the Fall of a Monument' (pp. 44–51), Jürgen Habermas, for example, declares that 'the core mission of the UN [is to] eliminate the *jus ad bellum*' (p. 44)³ – but also the numerous background practices and sensibilities that make up the nuts and bolts of the corresponding disciplinary projects and discourses of international law and international relations. What is more, in many cases these intellectual slippages are further compounded by such a heavy dose of what could only be described as crude, undisguised Eurosupremacism that even the otherwise

2 L. Wacquant, 'Critical Thought as Solvent of *Doxa*', (2004) 11 *Constellations* 97, at 97.

3 The same line is repeated also in Cohen, *supra* note 1, at 12. Leaving aside the bizarrely reificationist vision of *jus* this view implies, if the law on the use of force was indeed supposed to have been 'eliminated' with the creation of the United Nations, how would one then understand Articles 2(4), 42, or 51 of the UN Charter?

most reserved outside observers tend to find it difficult at times to refrain from expressing disquiet.⁴

Consider as a first illustration Samir Amin's essay, 'Whither the United Nations?' (pp. 340–66). The history of modern international law, as Amin presents it, begins, just as the received wisdom would have it, in 1648, with the infamous Peace of Westphalia, a system of interrelated treaties concluded between the Holy Roman Empire, Sweden, France, and their various confederates at the end of the Thirty Years War that set out a series of organizational principles for the conduct of international relations and resolution of international disputes. By the middle of the nineteenth century, following the Congress of Vienna, the Concert of Europe gradually extended the Westphalian model across the rest of the European continent. Another century later the League of Nations started making it 'quasi-universal' – 'quasi' because, as Amin notes, the League 'did not challenge the colonial status of Asia and Africa' – until, finally, with the emergence of the United Nations in 1945, an organization 'founded on genuinely universalistic principles', it became projected over the whole globe (p. 341).

So far, so clear, so linear, and so surprisingly reactionary. An account of international legal history that is so unreservedly apologetic and Eurocentric as this would certainly not have looked out of place in some 1950s-style Cold Warrior's dogma,⁵ and yet Amin's contribution to the NIL debate, as his fellow NILers explain, is supposed to represent an intervention from the 'Marxist Left' (p. 13)! Just how exactly a discourse that so enthusiastically ontologizes the nation-state form and so relentlessly avoids deploying any of the classical Marxist analytical instruments – there is not a single paragraph anywhere in Amin's essay that offers any sort of analysis aiming to penetrate the reified imagery of the Westphalian system, let alone explain its historical logic in terms of the corresponding systems of social relations, class contradictions, or even modes of production – can be considered a typical example of a Marxist analysis is anyone's guess. But the idea that it is exactly that, and should be openly recognized as such, seems to be nonetheless consistently recognized and promoted.⁶

As his account moves closer to the present day and the era of the neo-imperial global order, Amin's story gradually takes another curious turn. Emerging in the aftermath of a devastating international conflict, the UN system, he explains, was

4 See, e.g., B. Fassbender, 'The Better Peoples of the United Nations? Europe's Practice and the United Nations', (2004) 15 EJIL 857.

5 The idea that the 'Westphalian model' had originated with the Peace of Westphalia is, of course, in reality nothing but a twentieth-century myth. See A. Carty, *The Decay of International Law* (1986); D. Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', (1997) 17 *Quinnipiac Law Review* 99; B. Teschke, *The Myth of 1648* (2003). In a similar vein, the League of Nations did not just fail to 'challenge the colonial status of Asia and Africa'. It actively entrenched it. See A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), 115–95. Finally, it is simply downright inaccurate to suggest that the UN system was 'founded on genuinely universalistic principles'. If ever there was a treaty that explicitly legalized a global system of colonialism, the UN Charter is definitely it. Whoever doubts this should read its Article 73.

6 Amin's essay is not the only example that illustrates this pattern. The same presentational move can be observed also in the case of Leo Panitch and Theo Gindin's 'Theorizing American Empire' (pp. 21–43) and a number of other similarly 'Marxist' texts.

'entrusted ... with an historically unique and supremely important mission' of securing global peace and international stability and was correspondingly constructed by its founders in such a way that 'only [those] military interventions that it has ordered itself and that [are] carried out under its own operational and political command' would be considered admissible and legitimate under existing international law. Sixty years after this momentous act of global constitutionalism, the rise of US foreign-policy unilateralism, which peaked with the 2003 invasion of Iraq, has 'threatened to ruin' this arrangement, the only logical consequence of which, observes Amin, will be a comprehensive destabilization of the very foundations of international peace, security, and the rule of law (pp. 345–6).

To counteract this development, Amin concludes, all the progressive forces in the world must now unite behind a common programme of action which should include 'condemn[ing] the US, NATO and G7' for 'appropriat[ing] responsibilities that are not rightfully theirs'; replacing the old absolutist concept of state sovereignty with the new concept of the 'sovereignty of the peoples'; rapidly expanding the system of the international judiciary; giving more active support to the 'courts of global public opinion' (such as, for example, the so-called 'Russell Tribunal' which exposed war crimes during the Vietnam War); alleviating Third World debt; and, along the way, also doing something about the looming oil and water crises, the global monetary system, and the ILO (pp. 353–64).⁷

Given his established leftist credentials, it would be quite difficult under any circumstances to suspect Amin of knowingly promoting any kind of hidden right-wing agenda. And yet, however appealing his utopian vision might seem to one's liberal humanitarian sentiments, the truth about it is that virtually all the underlying claims and background assumptions on which it rests are either completely false or irrevocably reactionary.

Take, for example, the idea that the UN system was designed in such a way that it only approves those military actions that are carried out under its 'own operational and political command'. It 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 realized 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.

Similarly, the idea that the concept of sovereignty has ever been understood in international law in absolutist terms is simply groundless. As numerous historical studies have shown, the whole history of the international legal system since at least the middle of the nineteenth century has been one of an ever-progressing 'restriction' and 'reduction' of state sovereignty.⁸ The idea that there ever had been such a period when the doctrine of state sovereignty in international law was 'unfettered' represents, against such a background, at best, an 'invented tradition' – a false memory of a past that never was – at worst, a pernicious fallacy. Either

7 The same vision is also advanced in Cohen, *supra* note 1, at 19 ff., and La Torre, *supra* note 1, at 240 ff.

8 See M. Koskenniemi, *The Gentle Civilizer of Nations* (2002), 4–5; Kennedy, *supra* note 5.

way, its ideological function in the dramatization of international law's history, and, in particular, the history of the UN Charter's regime, remains quite obvious. It promotes an essentially unwarranted lionization of the UN project and – because projects of such scale never occur spontaneously – infuses the image of the various professional and bureaucratic elites associated with it with a completely fabricated sense of historical redemptiveness.

Moving to a different level, if we take, for example, the suggestion that it should be part of the progressive global agenda today to push for the strengthening of the international judicial architecture and various 'courts of global public opinion' – both of these sets of institutions, as every attentive student of the subject would immediately recognize, belong precisely among those basic strategies with the help of which the neo-imperial global order is created, entrenched, and reinforced.⁹ If there is anything, indeed, that one ought to be doing about the international judicial architecture as a progressively inclined political agent under such conditions, it must, it follows, be vigorously opposing its unchecked expansion, not supporting it.¹⁰

One could go on and list a number of other similar points, but the bottom line should be clear by now. Whatever Samir Amin's personal scholarly credentials may be otherwise, in its immediate substantive context his analysis of the 'new imperial order' promotes an essentially reactionary ideological agenda. Between its uncritical acceptance of the old-line Westphalian mythology and its unreflective support for supranational juridification as the most effective weapon against neo-imperialism, not only does it manage to propagate a completely fabricated narrative of historical progress – the very stuff of conservative utopia – but it also distracts and redirects its audience's political attention towards causes and projects whose pursuit, in the final analysis, is at best completely pointless, at worst, downright counterproductive.

Characteristically, though, this strange collection of fictions and misdirections is not in any sense unique or unprecedented. What one sees emerging in Amin's essay, rather, is a set of themes which repeat across the whole of the contemporary NIL genre. Where exactly does this common *doxa* come from and what is its basic meaning? Amin's curious list of programmatic suggestions provides some very interesting pointers. But in its entirety the answer to these questions, I think, can be best developed by examining two other very representative NIL texts, written by Amy Bartholomew (pp. 1–17) and Peter Swan (pp. 137–160) respectively.

The principal historical event around which Bartholomew's thesis unfolds is the emergence in the aftermath of 9/11 of the so-called 'Bush doctrine', the central pillar

9 See B. S. Chimni, 'International Institutions Today: An Imperial Global State in the Making', (2004) 15 EJIL 1.

10 As China Miéville puts it, '[i]t would obviously be fatuous to deny that law could ever be put to [ideologically progressive] reformist use. . . . But the recourse to law can only ever be of limited progressive value.' 'At best, it seems, in the ideological struggle for international law one can hope for occasional victories in a constant struggle over categories. These victories, however, will be predicated on legal forms that not only make the categories ripe for counter-appropriation, but that can only be actualized in the coercive interpretations of the very state and other bodies whose interpretations and actions the radical lawyer is critiquing. However persuasive the subversive interpretation, in other words, it will be the interpretation of those with power that will inhere in the world.' 'The forms and relations of international law are the forms and relations of imperialism. Attempts to reform through law can only ever tinker with the surface level of institutions.' C. Miéville, *Between Equal Rights* (2005), 304–17.

of George W. Bush's 'New Security Strategy' (NSS), which asserted the unilateral right of the US government to carry out pro-democratic interventions abroad and to engage in various pre-emptive self-defence practices. As Bartholomew sees it, it was not so much that the rise of the Bush doctrine had 'put at egregious risk' the 'values' of 'freedom and democracy' as that it had severely undermined 'the limited but principled commitment of international legality to equal sovereignty, a commitment that', as she remarks, 'reigned' in international law throughout the whole of the post-Second World War era (p. 3). The upshot of this development was a replacement of what Bartholomew calls 'the global expansion of "law's empire"', to adopt Ronald Dworkin's felicitous phrase – a phenomenon whose origins she traces to the Martens clause¹¹ – with 'another kind of project – one that is far more menacing: the project of "empire's law"' (p. 2).

Now, presuming that one really intended (as those glowing endorsements on *Empire's Law's* back cover suggest) that one's audience should include 'students of international law and politics', one probably ought to have been somewhat more cautious in making such remarks. Neither among practising international lawyers nor among academics writing on international law has there ever been a tradition of linking the idea of the international rule of law to the Martens clause. No judge, diplomat, or scholarly commentator of any stature has lent their authority to such a view. Not even the most heterodox Kelsenians have ever chosen the Martens clause as their prime candidate for the *grundnorm*.

Moreover, one of the most widely recognized legal facts about the post-1945 world public order is that neither the UN system itself nor the formal doctrine of sources that came to complement it in the last sixty years has actually been built around the principle of 'equal sovereignty'.

Indeed, one need look no further than the UN Charter itself. The combined effect of its various provisions, from Article 39 to Article 103, from its very inception, has been to create a fifteen-member body that, so long as it decided that what it was doing qualified as 'upholding international peace and security', could effectively command the whole of the international society of states to comply with all and any of its demands, the only thing preventing it from formally becoming a global Leviathan being the negative veto powers held by each of its five permanent members, that is to say, another type of Leviathanian structure. In a similar vein, as the landmark *North Sea Continental Shelf* judgment vividly demonstrates, the basic system of law-making procedures that emerged in the post-1945 international arena openly allowed 'specially affected states' in each area of international law-making to have a far greater say in determining the substantive contents of general

11 Arguably the most fundamental provision in contemporary international humanitarian law (IHL), the Martens clause was first inserted into the 1899 Hague Convention on the Laws and Customs of War on Land and has since been replicated in many other IHL treaties. In its most recent formulation (Additional Protocol I to the Geneva Conventions of 12 August 1949, Art. 1.2) it reads as follows: 'In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.'

international law than all the rest of the international community of states put together.¹²

Still, the idea that the 2003 Iraq invasion had somehow marked a genuinely radical break from the general logic of the post-Second World War international legal order and that the essential nature of that break was a rapid movement away from the idea of sovereign equality is repeated tirelessly from one NIL text to another.

For Jean Cohen, for example, the Iraq invasion embodied the epochal decision by a global superpower ‘confront[ed with] one of the most multipolar moments in history’ to enter the ‘path . . . to the political instrumentalization of “law” and put to rest the existing system of international order.’¹³

For Andrew Arato, it ‘indicate[d] that we have entered a new period where international law is no longer the primary framework or reference point for democratization projects [since] the war occurred in clearest possible violation of the UN Charter [and was] opposed by the immense majority of citizens and governments the world over’ (p. 218).

For Massimo La Torre, it spoke of an ‘explicit reject[ion]’ of the traditional ‘idea of a general permanent organization of States associated on a footing of equality’.¹⁴ Never mind how defensible this interpretation of events might have seemed in March 2003 – the utopian scheme whose abrupt passing La Torre laments so passionately had *never* been part of the actually existing international legal order, not in 2003, not in 1989, not even in 1945 or 1648 – either in terms of its ‘living practices’ or in terms of its fundamental structural design.¹⁵ To allege the contrary would be to perpetuate the very same web of hypocritical misrepresentations which the NIL scholarship originally set out to dispel and against which it positioned itself.

Given, however, that this is precisely what seems to be happening across the board from one major NIL text to another, the question that inevitably arises at this point is: why? Or, rather – because the ‘why’ in such circumstances can only be inferred from the ‘how’ – how exactly have these misrepresentations been actualized in the NIL practice and what can this actualization tell us about the hidden ideological charge of the NIL discourse with its such prominent attempts to mythologize not only the UN Charter and the ‘UN era’ but also the very ontological foundations of international law?¹⁶

The answer to this question, I believe, comes out most obviously in Peter Swan’s essay ‘American Empire or Empires? Alternative Juridifications of the New World Order’ (pp. 137–60).

According to Swan, the radical structural break which heralded the beginning of the new imperial age consisted, essentially, of three main stages or components.

12 *North Sea Continental Shelf Cases*, [1969] ICJ Rep. 4, paras. 73–74.

13 Cohen, *supra* note 1, at 3, 21.

14 La Torre, *supra* note 1, at 239.

15 See G. Simpson, *Great Powers and Outlaw States* (2004); Anghie, *supra* note 5.

16 See Cohen, *supra* note 1, at 13: ‘The global political system is dualistic, composed of sovereign states and international law.’ This pattern of ontologically equating international law with states and thus hypostatizing it as if it were a political subject is quite typical not only of Cohen’s argument but of the NIL discourse as a whole. Cf. Bartholomew’s misappropriation of Dworkin’s ‘law’s empire’ (p. 2).

The first was the issuance of the NSS. As Swan sees it, the proclamation of the Bush doctrine ‘pushed [the US] challenge to traditional international legal limitations on the use of force’ to completely unprecedented heights (p. 141). Given that these limitations, he continues, had previously managed to secure some ‘60 years of relative peace’ in the international arena (p. 137), even a lesser challenge to them could not but have the most dangerous and far-reaching ramifications. In the event, however, the NSS not only topped everything that had come before it, it also came accompanied by a pair of further developments.

The second component of the radical break, remarks Swan, became most prominent when just after the statute of the newly established International Criminal Court (ICC) entered into force, the United States refused to allow any of its troops to be brought within its jurisdiction. As Swan explains, what this refusal had essentially signified was the rapid crystallization in the contemporary international affairs of a veritable regime of US ‘legal exceptionalism’ (p. 143).

Together with the Bush administration’s actions in Guantánamo, this then quickly precipitated the third structural stage – what, after Giorgio Agamben, Swan calls the rise of the ‘permanent state of exception’ – a state of affairs in international politics in which ‘not only decisions about war and peace but also decisions affecting the constitutional rights of individuals’ ‘are made not in accordance with the law, but “outside the law” as an extension of emergency powers’ (pp. 138, 144).¹⁷

Attractive as Swan’s argument may seem at first sight, one does not need much critical acumen to see why it should be approached with considerable suspicion.

In the first place, the ‘60 years of relative peace’ that preceded the arrival of the NSS is, in fact, a period that includes not only Korea, Suez, Vietnam, the Bay of Pigs, Bangladesh, and Nicaragua, but also Algeria, Angola, the Iran–Iraq war, the Soviet ‘incursions’ into Hungary, Czechoslovakia, and Afghanistan, Vietnam’s own invasion of Cambodia, Kuwait, Grenada, and Eritrea. And all this before one even gets to Kashmir, Palestine, the wars between Israel and its Arab neighbours, and all those countless international conflicts that have not been commonly recognized as such, from the ‘revolt’ against Mossadeq in 1953 to the Congo ‘mission’ in 1964.

Furthermore, however villainous the ideologues of the Bush administration may have appeared – and they certainly are not a very endearing group of individuals – they were nowhere near as visionary or inventive as to have been able to produce a piece of policy so fundamentally novel that it could ‘push the traditional international legal limitations on the use of force’ to places where they had not been pushed before. The pre-1989 international legal order may have looked very different from what had come to replace it by the mid-2000s, but the idea that a

¹⁷ See also, more generally, G. Agamben, *State of Exception* (2005).

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 it.

At least since the mid-1950s, on both sides of the Cold War divide, the hegemonic privilege of a global superpower to intervene at will to promote its preferred ideological vision abroad was commonly treated as an integral, if not exactly regularly advertised, part of the objective reality of the existing international order. In US practice, this idea was articulated in the language of ‘pro-democratic invasions’. On the Soviet side, the preferred nomenclature was that of ‘international socialist duty’. The former was known in international law as the Reagan (and before that the Truman) doctrine, and the latter, appropriately enough, as the Brezhnev doctrine. However one feels about this, there was nothing unprecedented or historically unique in the juridical logic of the NSS. It certainly did not ‘mark something new in the annals of American Empire’ (p. 4).

The same holds true for the ICC example. What Swan identifies as the archetypal case of ‘American exceptionalism’ turns out, on closer scrutiny, to be a policy adopted also by a number of other states. Does their continuing refusal to ratify the Rome Statute indicate that China and Russia are also trying to create ‘islands’ of Chinese and Russian exceptionalism in the sea of international law? What about Israel? Or Iran? How many exceptionalisms can one afford to admit before the implied imagery of a malicious global bully ‘explicitly affirm[ing] its ‘contempt for international law’ (p. 143) disintegrates under the weight of its own conceptual pretensions?

Last but not least, however charitably one reads it, the whole Agambenian argument – the thesis that between the NSS and Guantánamo the Bush administration somehow managed to create for itself a realm ‘outside the law’ – seems at best a proposition of a rather ‘disputable philosophy’.¹⁸ To be sure, the underlying rhetorical trope does create a pretty striking metaphoric imagery. But the juristic concept which it conveys and by which it is ‘inspired’ is essentially meaningless. It has no critical value as a theoretical category. The only ideational effect which it can generate is a self-perpetuating natural-legalist mystification. And it certainly serves no practical legal-analytical purpose of any kind.

Indeed, if we look at it closely, it seems to derive from a completely dubious juristic vision that rests on a profound misunderstanding of the basic organizational logic of international law-making as well as a deliberate inattention to what one might call the ‘inner life of the law’ more generally. That is to say, the indispensable analytical conditions of its theoretical sustainability – that murky set of logical corollaries which, in the words of Fredric Jameson, allow ‘what can be thought to seem internally coherent in its own terms, while repressing the unthinkable . . . which lies beyond its boundaries’¹⁹ – include a complete disregard not just of the

18 H. L. A. Hart, ‘Positivism and the Separation of Law and Morals’, (1958) 71 *Harvard Law Review* 593, at 621 (‘we must not present the moral criticism of institutions as propositions of a disputable philosophy’).

19 F. Jameson, *The Political Unconscious* (2002), 38.

way in which the rules of general international law are actually made and amended. What is required for the Agambenian juristic theory to hold together is also a systematic disregard of the basic structural relationships linking background and foreground legal norms, jural correlatives and jural opposites, rules of prohibition and rules of permission, 'law on the books' and 'law in action', the 'living law'²⁰ and the positive legal order.

Put differently, one would have to strike out the whole of the great modernist tradition in contemporary legal theory – from Wesley Hohfeld and Eugen Ehrlich to Hans Kelsen, Herbert Hart, and Roberto Unger – before one even gets to that theoretical level at which the Agambenian argument starts making any perceptible sense.²¹

For, indeed, unless one adopts a grotesquely natural-legalist conception of international law – so that any state of affairs which diverges from this aprioristic code of substantively determined rights and wrongs would have to be automatically discounted as 'non-law' – none of the policies pursued by the Bush administration in the post-9/11 era can, by any rational measure, be described as an attempt to move 'outside international law'. Whether one talks about Guantánamo or the doctrine of pre-emptive self-defence, what the Bush administration had consistently tried to achieve throughout its two terms in office was a change in the substantive contents of the respective international legal regimes, not a suspension of the international legal order altogether. (It was, in fact, quite enthusiastic about every aspect of the WTO law.) One may not like the substance of the various new rules that it tried to postulate and push through, but none of this can detract from the fact that these postulations were designed as *legal rules* and that the regimes created on their back were all intended as *legal regimes* (and, crucially, operated that way too).²² Indeed, to insist otherwise would in itself be a deeply suspect act. The only objective purpose it would serve would be to instil an unwarranted sense of 'romantic optimism' (Hart)²³ and to cover up the fact that, far from being a regrettable aberration, the world of Guantánamo, the Bush doctrine, and 'torture memos' was, in fact, a world created in accordance with law (Miéville²⁴).

NIL's failure to produce accurate descriptions and to assign coherent theoretical categories to some of the most elementary facts of international legal practice, in

20 E. Ehrlich, *Fundamental Principles of the Sociology of Law* (1936), 493–506.

21 This is not, admittedly, the most charitable reading of Agamben's legal-theoretical argument. For other, more generous takes, see, e.g., D. McLoughlin, 'In Force without Significance: Kantian Nihilism and Agamben's Critique of Law', (2009) 20 *Law and Critique* 245; J. Whyte, "'I Would Prefer Not To': Giorgio Agamben, Bartleby, and the Potentiality of Law', (2009) 20 *Law and Critique* 309; T. Zartaloudis, *Giorgio Agamben, Power, Law and the Uses of Criticism* (2010). See also, more generally, P. Fitzpatrick and P. Tuitt (eds.), *Critical Beings: Law, Nation and the Global Subject* (2004).

22 See, e.g., F. Jones, 'Guantánamo Bay and the Annihilation of the Exception', (2005) 16 *EJIL* 613.

23 Hart, *supra* note 18, at 620: 'The vice of this use of the principle that, at certain limiting points, what is utterly immoral cannot be law or lawful is that it will serve to cloak the true nature of the problems with which we are faced and will encourage the romantic optimism that all the values we cherish ultimately will fit into a single system, that no one of them has to be sacrificed or compromised to accommodate another.'

24 Miéville, *supra* note 10, at 319: 'A world structured around international law cannot but be one of imperialist violence. The chaotic and bloody world around us is *the rule of law*' (emphasis in original).

the end, though, is neither peripheral nor accidental. On the contrary, it constitutes an integral component of the whole structure of the NIL discourse.

Consider once more Habermas's essay in *Empire's Law*. About one-third into his argument, he comes to comparing the 2003 Iraq invasion with the 1999 NATO campaign in Kosovo. While the 2003 intervention was clearly both illegal and illegitimate under modern international law, the 1999 intervention, for Habermas, was different, in that the 'undisputed democratic and rule-of-law character of all the members of the acting military coalition' that led the Kosovo campaign had subsequently overturned that intervention's fundamental illegality, or at least 'offered [it a] legitimation after the fact' (p. 46).²⁵ The notion that the Kosovo campaign was somehow fundamentally distinct from the Iraq invasion in terms of its international legitimacy seems to represent a common theme across many NIL writings.²⁶ Curiously enough, however, the actual reasoning behind this argument is virtually never articulated with any precision. The only relevant distinction Habermas finds it possible to make between the two cases is the differing compositions of the respective intervening coalitions. Kosovo, though illegal, in the bigger scheme of things was still somehow okay in a way in which Iraq was not, because 'all the members of the acting military coalition' in that case had an 'undisputed democratic and rule-of-law character'.

Now, try to imagine what this line of reasoning looks like to a typical 'student of international law and politics', the alleged core of *Empire's Law's* target audience. Think about what sort of historical references it is most likely going to evoke: when 'old Europe' comes on board, interventions are legitimate; when it refuses, they are not; meanwhile, the identity of the intervening coalition can by itself legitimize otherwise patently illegal invasions.²⁷ A little more than a hundred years ago, the two principal ideas in conjunction with which this kind of rhetoric was normally used were commonly known under the headings of the 'standard of civilization' and the 'white man's burden'. European states were 'civilized' because they had liberal governance structures and a rule-of-law culture. Non-European states were 'uncivilized' because they had neither. The latter, consequently, could never be equal to the former, which meant that they could not be regarded as fully sovereign. And, of course, only a fully sovereign state can have any real say over its formal status under international law. Enter the doctrine of the 'civilizing mission' and the concomitant right of colonial conquest – by Europe, of everyone else.²⁸

25 The same point is made even more forcefully in 'America and the World: A Conversation with Jürgen Habermas', available at <http://evans-experientialism.freewebspace.com/mendieta.htm>.

26 See, e.g., I. Johnstone, 'US–UN Relations after Iraq: The End of the World (Order) as We Know It?', (2004) 15 *EJIL* 813; La Torre, *supra* note 1, at 251 ('the Iraq war is a turning point in the building of [the new imperial order]').

27 Or, as Habermas puts it on a different occasion, it is all about being a liberal state 'whose organizing principles comport with the principles of the UN's Declaration of Human Rights' (*supra* note 25).

28 On the 'standard of civilization' see further Anghie, *supra* note 5, at 84–6; Koskenniemi, *supra* note 8, at 127–36; G. Gong, *The Standard of 'Civilization' in International Society* (1984).

2. THE INTERTEXTUALITY OF NIL

How did a scholar with such a long-standing left-wing reputation as Jürgen Habermas come to advocate the resumption of such a reactionary political concept as the standard of civilization? How did legal theorists as otherwise sophisticated in their thinking as Massimo La Torre end up propagating such a primitive conception of international law? As self-evident as questions like these may seem to be, they are not, I believe, what we should turn our attention to now. In part this is so because chasing them will not lead us anywhere other than to empty speculations. But in part it is so also because, on the most basic level, the really important insight lies in a completely different dimension – however much we may focus on the immediate surface of NIL narratives, in the end what makes that surface cohere, what silently towers in the background over the whole totality of the various meanings that are carried within it, is a series of patterns and devices that belong to a completely different semiotic register.

Perhaps the best place to start explaining this would be with the general concept of intertextuality. Here, for instance, is how Michel Foucault tried to define it: ‘The frontiers of a book’, he wrote, can never be found within the book itself: ‘beyond the title, the first lines, and the last full stop, beyond its internal configuration and its autonomous form’, every book is ‘caught up in a system of references to other books, other texts, other sentences: it is a node within a network’.²⁹ One can find many alternative definitions of intertextuality,³⁰ but this one will certainly do for the purposes of the argument I want to make here.

What is the basic idea behind the concept of intertextuality? Texts do not exist in isolation, they always come as already integrated parts of some greater whole, some broader discursive formation, which, by and large, operates as a gravitational field. Each text that is released into an open discursive circulation acquires its meaning through its relational positioning vis-à-vis all the other texts that circulate in the same discursive field. Where exactly within that field it gets ‘caught up’ – and how exactly its meaning will be fixed – is not thus something that is decided by the wishes of its author, but by the general structure of that field’s currently active system of references, that is to say, the second-order semiotic conventions that develop within it.

What kind of conventions are these? To put it in a somewhat schematic way, every discursive field operates on the basis of a certain repertoire of common tropes – argument patterns and templates that are used more regularly than others by its participants. Over time, in response to the internal politics of the field, some of these tropes become associated with particular intellectual and ideological positions, and certain topics and debates constructed that way come then to be seen as metonymic stand-ins or proxies for other, much broader questions and themes. Depending on how exactly each given text’s principal narrative hinge-points align with the broader pattern of such metonymic associations, the text in question comes to

29 M. Foucault, *The Archaeology of Knowledge* (1972), 23.

30 See G. Allen, *Intertextuality* (2000).

acquire both its current location within the surrounding web of references and its practical meaning in the eyes of that field's participants, the combination of the two becoming the foundation for its external ideological functionality, that is to say, the general range of political projects and roles to the pursuit of which it comes to lend itself most readily.

Whatever preferences one may have as an author concerning how one's writings ought to be understood by their readers, in the larger scheme of things, thus remains fundamentally irrelevant. The only meaningful goal one can try to pursue in such circumstances would be to 'pre-fit' one's text to the field around it by hazarding a more or less informed guess about the current patterns of metonymic associations adopted within it and pitching the tone of one's writing accordingly. For something like that to become possible, however, it would be necessary not only to map out the respective field in terms of its component networks of intertextual references but also to grasp the immanent logic of its currently active pattern of associations.

Put differently, the basic analytical insight that the concept of intertextuality supplies, and in which, to my mind, is carried the ultimate answer to the whole phenomenon of NIL scholarship is that each text, in the end, is nothing more than an *object-effect* of its current intertextual location, a product of the conceptual and rhetorical projections that enter its semiotic space from all the various nodal points that surround it and constitute its background system of references.

What are the main intertextual nodes that structure the broader discursive field in which NIL writings take place?

To my mind, the best place from which to start thinking about this question is a short (and undeservedly underappreciated) article published by Susan Marks in this journal seven years ago.³¹ Marks's central thesis was surprisingly simple but also incredibly lucid. All 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, each of which is built around its own distinct concept of 'empire' and a corresponding theory of 'law'. Although each of these three visions of 'empire' depicts the basic referent behind that term in profoundly negative terms, what makes it possible to speak here not simply about three different aspects of the same idea but about three different concepts is that each of these referents comes 'pre-fitted' into a distinct plot formula constructed to create a very specific distribution of meanings and, by implication, theoretical impulses. Since each of these plot formulae ultimately culminates in a very particular bottom-line message that legitimates a very particular vision of history, what all of this means in practice, concludes Marks, is that choosing between the three concepts of 'empire' entails choosing not only between three completely different *employment logics* (in Hayden White's terms) but also between three completely different ranges of ideological functionality.

31 S. Marks, 'Three Concepts of Empire', (2003) 16 LJIL 901.

The oldest – and for most international lawyers probably the most familiar – way to emplot the story of law's relationship with 'empire' is by equating the latter with the nineteenth-century system of European colonialism and the former with the liberal-internationalist theory of self-determination.³² Seen from this perspective, the basic relationship between 'law' and 'empire' comes across essentially as a relationship of fundamental conflict and opposition. The 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.

In terms of its ideological effect, this empire-as-European-colonialism formula quite obviously has a very strong predisposition towards reinforcing the general progress narrative adopted by the transnational liberal elites. In addition to that, however, it also implicitly entrenches a highly mystified vision of international law and the international legal order. To put it in a rather schematic fashion, the conception of the law promoted by this formula portrays international law not just as a particular form of social control or a modality for practising global politics, but as some sort of an *animated entity* that has both an independent will of its own and a distinct political agenda.

One does not need to be specially schooled in ideologematic analysis to guess what sort of general political effects such a mystificationism tends to produce. In the first place, it tends to encourage an excessively cheerful view of both the historically achieved anti-colonial developments and international law's general capacity as an instrument of emancipation in this process. In the second place, it unabashedly sanctifies the whole past record of the liberal-internationalist project, conveniently covering up along the way the fact of its historical centrality to the actual advancement of that very system of European colonialism that it now denounces. In the third place, and far more importantly, it tends also to spread a profoundly false sense of security – and thus helps strengthen the culture of quietism – in the anti-imperialist camp. It does that not simply inasmuch as it suggests that the 'fight' against global imperialism has already been won, or inasmuch as it misrepresents the historical reality of imperialism by portraying it in such narrow terms, but because it promises that international law itself somehow 'stands against' global imperialism, as if there were something inherent in the very character of the 'legal form' that made legalism inimical to imperialism.

On the most immediate level, of course, such a promise is simply unrealizable. Whatever one understands international law to mean, it means, *inter alia*, a certain body of legal rules. Rules, as every practising lawyer knows all too well, are deeply imperfect tools. They are porous and often conflict with one another. Many of them are vague. Many more are saddled with ill-defined exceptions. Both of these conditions create a strong systemic predisposition towards self-serving interpretations.

32 For a summary, see A. Cassese, *Self-Determination of Peoples* (1995).

Those rules that do not suffer from excessive vagueness are almost always either too over- or under-inclusive in terms of their jurisdictional reach or are, alternatively, so rigid and inflexible in terms of their prescriptive content as to make the achievement of any real-life compromises and peaceful adjustment of outcomes among the participating players virtually impossible.

Much more importantly, however, the whole vision behind this promise is also deeply reactionary. As David Kennedy observes in a similar context, the idea that the anti-imperialist cause can be won by ‘international law’ ‘rather than people making political decisions [not only] encourages [us to seek] emancipation through reliance on enlightened, professional elites with “knowledge” of rights and wrongs’ – in the same way in which medieval Christians sought redemption through reliance on the infallible Church – it also alienates us from ourselves and from the realities of our own political actions, roles, histories, and capacities.³³

The second most common tradition of representing the relationship between ‘law’ and ‘empire’, observes Marks, proceeds from the assumption that the latter should be generally understood in terms of the current geopolitical status occupied by the United States as ‘the world’s only superpower’. The basic narrative formula that emerges on the basis of this assumption shares with its predecessor the aspiration to portray the history of law’s relationship with empire in terms of a grand metaphysical conflict. This time, however, it is the ‘empire’ which is understood to have harvested the fruits of victory, 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’.

Needless to say, the basic ideological functionality of this emplotment strategy radically differs from that of its rival. To be sure, on the one hand, international law is once again presented as a deeply mystified transcendental entity that has a certain ahistorical substance as well as a stable sense of identity. On the other hand, this time it is seen to be both a *subject* (the opponent of ‘empire’) and an *object* (that which ‘empire’ has trampled). Given the basic plot formula – ‘empire’ ran into ‘law’, smashed it, and then bludgeoned it into submission – this representational duality becomes increasingly crucial insofar as its effect is basically to suggest that whatever the ontological status of ‘law’ may be, it cannot, under any circumstances, be counted on to repeat the same remarkable feat which its namesake achieved in the first master-narrative. That is to say, if ‘empire’ is to be thwarted, ‘law’ somehow needs to be *helped* in its noble fight.

The principal question that arises at this point, then, is: who exactly is supposed to be this ‘helper’? Which actor or group of actors is supposed to attend to the task of liberating ‘law’ from its oppression by ‘empire’? To see how the second tradition tends to address this question, let us turn to a brief illustration.

33 David Kennedy, ‘The International Human Rights Movement: Part of the Problem?’, (2002) 15 *Harvard Human Rights Journal* 101, at 116–17.

3. NIL AS FEUDAL SOCIALISM

None of the NIL writings illustrates the internal logic of the second tradition's geopolitical assumptions more revealingly than the evocatively titled essay in *Empire's Law* by the German professor and judge, Ulrich Preuss, "The Iraq War: Critical Reflections from "Old Europe"" (pp. 52–67).

The principal question to which Preuss seeks an explanation is: why exactly do 'Americans' always end up going to war whenever they feel their security is fundamentally threatened while 'Europeans' do not? The answer, he decides, must be sought in the cultural origins of the American psyche. From James Madison onwards, writes Preuss, 'Americans' have been obsessed with the idea of 'absolute security'. What this translated to in terms of policy preferences, inevitably, was a preoccupation with pursuing complete 'independence from any power or alliance, friendly or not', and a keenness for 'military responses to [all] perceived threats'. Add to this the fact that 'Americans' have never managed to grow out of their infantile 'sense of superiority' derived from the 'deep religious conviction of being a chosen people' – a character trait they inherited from the Pilgrim Fathers – and what you get in practice, concludes Preuss, is several generations of political elites who are not only incredibly difficult to reason with but are also essentially incapable of resisting the temptations of aggressive unilateralism on a virtually subconscious level (pp. 53, 65).

'Europeans', on the other hand, he observes, have historically inclined in the direction of a much more pragmatic approach to foreign policy. Measured and balanced, the 'European' way, has remained immune to absolutist logics. The reason for this is that, unlike the 'Americans', 'Europeans' eventually woke up to the idea that 'Rousseau will [always] prevail against Hobbes', that is to say, that 'soft power' will always be more effective than 'hard power' (p. 67).

It is the failure of the 'Americans' to learn this lesson, concludes Preuss, that ultimately explains their aggressive imperialist tendencies in the post-Cold War era. This being the problem, the solution then seems rather self-evident: 'The "old" Europe that has become wise should not become tired of showing [Rousseau's] insight to its American friends' (p. 67).

Leave aside for the moment the curiously patronizing tone of this last remark and focus instead on the *actual logic* behind Preuss's argument. The American state acts in the mode of aggressive unilateralism because that is, essentially, what the 'American people' always do. They just cannot help it; it comes with their Pilgrim-Father gene. The best way to tame this trend (and to save the multilateralist cause), however, is not to resist it, but to charge the wise 'old Europe' to teach its American counterparts the value of the European pragmatic approach.

Pause for a second now and retrace these steps. At the dawn of the twenty-first century, the United States turned into a global bully not because George W. Bush's first administration included too many hawks, nor because such a foreign policy benefited the immediate interests of a certain sector of the Usonian ruling classes, nor even because imperial wars have always been a great source of opportunity for various segments of the global industrial capital – but because that is what the

American *Volkgeist* made it do. There exists, in other words, some kind of a nefarious national-cultural DNA shared by all Americans (including second-generation immigrants such as Colin Powell) that over the course of the last four hundred years has determined the basic logic of *all* US foreign-policy actions, overriding every other history-formative factor, be it the falling rate of profit or the individual idiosyncrasies of various commanders-in-chief.

Tempting as it may feel at this point simply to dismiss this whole argument *tout court*, doing so, I believe, would be quite mistaken. First, despite its obvious absurdity, Preuss's account of the essential nature and logic of 'US imperialism' is not, in fact, nearly as unrepresentative of the general consensus in certain circles in the 'old Europe' as many on the European secular left normally like to think. In the second place, the general model of history on which Preuss's account is based is not actually a product of mild delirium, but rather the offspring of a very distinguished philosophical tradition. In basic structural terms, it has the same intellectual roots as Samuel Huntington's *The Clash of Civilizations* and the whole of the post-9/11 official discourse of the 'war on terror', which is to say, essentially, that genealogically it can be traced all the way back to Hegel, Herder, and Savigny.

Politicians, lawyers, and community leaders make whatever decisions they do not because they respond to external pressures, but because it is their national cultural identity which, like some kind of a demoniac entity that has taken over their possessed bodies, makes them act that way – how often has this kind of mystificatory gibberish been presented in recent years in various parts of the European public discourse as the *de facto* most effective explanation not only of US foreign policy, but also of the whole of the global political arena and modern history? Just think of the general drift one gets in the mainstream European media these days whenever it turns its attention to Russia's gas rows with Ukraine or its 'invasion' of Georgia. Or of China's relationship with Tibet. Or, for that matter, any aspect of the 'Islamic question in Europe'.

Just as in the legal-theoretical discourse, as Diego Lopez Medina correctly points out, one has to draw a consistent categorical distinction between 'high legal theory' and 'pop jurisprudence',³⁴ so, too, in the politico-theoretical discourse one must constantly distinguish between 'high political theory' and 'pop political paradigms'. Prussian neo-Herderianism will never find any solid ground under the former heading. But in the case of 'pop political paradigms' the situation is completely different, and in the end it is always the latter that supply the ideational material for the production of mass ideologies.

To be sure, the 'old Europeans' are not the only significant fan base behind this neo-Herderian revival. But the fact that the neo-Herderian masterplots typically tend to identify 'old Europe' as the ultimate vanguard of the global historical progress is certainly not inconsequential.

34 D. Lopez-Medina, *Teoria Impura de Derecho* (2004).

At the start of the third chapter of *The Communist Manifesto*, Karl Marx and Friedrich Engels observe that among the several existing strands of socialism one of the most notable ones is ‘feudal socialism’. Compared with other types of socialism, it is characterized chiefly by the fact that it represents a profoundly hypocritical movement. As the defeated feudal class tries to find a new way of attacking the bourgeoisie, unable to rely on its ‘organic themes’ it comes to produce a discourse of fake indignation on behalf of the proletarian masses. Seen in this context, one could say that feudal socialism represents what in Nietzschean terms can be called a product of the collective *ressentiment*: the reaction of the old aristocracy which despises the new bourgeois upstarts and is deeply envious of their flourishing, but which also knows that it stands no real chance of defeating them in an open inter-hegemonic contest and so resorts instead to the cunning ways of two-faced sabotage. The real logic which animates the feudal socialist reasoning, as Marx and Engels note, is not so much that the capitalist oppression of the proletariat is inherently bad in itself, but that it is bad because it is not the feudal class but the bourgeoisie that benefits the most from this oppression:

What they upbraid the bourgeoisie with is not so much that it creates a proletariat as that it creates a revolutionary proletariat. In political practice, therefore, they join in all coercive measures against the working class; and in ordinary life, despite their highfalutin phrases, they stoop to pick up the golden apples dropped from the tree of industry, and to barter truth, love, and honour, for traffic in wool, beetroot-sugar, and potato spirits.³⁵

The parallels with the NIL case are obvious and hardly require much elaboration. Substitute ‘United States’ for the bourgeoisie, ‘old Europe’ for the aristocracy, and ‘Third World’ for the proletariat and you get the general picture. The aristocracy rebukes the bourgeoisie for mistreating the proletariat, aiming to position itself as the morally superior enlightener against the former’s unscrupulous profit-chasers. ‘Old Europe’ rebukes the ‘American empire’ for lawlessly invading and exploiting Third World countries, aiming to position itself as the morally superior enlightener – all the while happily continuing to benefit from whatever unequal terms of trade the ‘American empire’ secures for the West in its dealings with the Third World.

The central question at the heart of the second tradition of writing about ‘law’ and ‘empire’, as I noted above, was: who is going to be the law’s helper? Notice how NIL authors have tended to frame the answer to this question. When the United States ‘went it alone’ in Iraq in 2003, the invasion was unquestionably illegal. When the intervention was approved of by ‘Europe’ (as was the case in Kosovo in 1999), it was at the very least ‘legitimizable after the fact’.

Notice also what tends to be implicitly identified here as ‘Europe’ – or rather which particular historical and ideological legacies of the peoples of the European continent tend to be included into the imagery behind that wise ‘old Europe’ that Prussia has in mind and how much room there is left in this vision of ‘Europeanness’ for the historical legacy of, say, the Polish Jews, the Hungarian Roma, the Turkish

35 *The Communist Manifesto: A Modern Edition* (1998), 64.

diaspora in post-1989 Germany, or the Irish dockers in 1920s London – indeed, *any* segment of the working class.

Whatever one might feel about its ideological pedigree, the NIL vision of Europe is a social model extrapolated from a society that appears to have no religious or ethnic minorities, no undernourished and no unemployed, no radicals and no communists, no fascists and no anarchists. Or, rather, a society that, even where it does include any of these groups, ultimately, allows none of them to be remembered, to have their visions added to the constitution of that society's common self-image. For how else can one explain that between Hobbes and Rousseau one seems to have lost not only Marx and Sartre, but also Kropotkin and Freud, St Paul and Muhammad, Leon Trotsky and Israel ben Eliezer, Jules Harmand and Jörg Haider?

4. EMPIRE-AS-GLOBALIZATION

The starting point of the third master-narrative about 'law' and 'empire', as Marks observes, is a post-structuralist reappropriation of the classical Leninist concept of imperialism. A typical example of what such an approach entails can be found in Michael Hardt and Antonio Negri's *Empire* (2000): 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 which does not lend itself to easy summary, especially through the traditional vocabularies of 'statehood' and 'territory'. The political horizon of this new system has neither an identifiable centre nor an identifiable limit. It is not dominated by any particular state, class, or nation. It has no 'outside', which means it leaves no space, social or geographical, to which one can withdraw or retreat. It is, at root, a rhizomatic network, and its apparatus of rule is decentred, kaleidoscopic, heterogeneous, and irreducible to any single master-plan. Everyone and everything is always/already captured inside it, including, crucially, law and legal institutions.

Needless to say, one can find quite a few problems with this sort of approach. This is not the place to detail them.³⁶ What matters more for our purposes is that this way of thinking about 'empire', as Marks observes, tends to train its users to view legal phenomena in much less mystified terms than the two rival traditions. A large part of this comes from the fact that it does not project the relationship between 'law' and 'empire' in terms of a metaphysical conflict. The third concept of 'empire' is essentially synonymous with the idea of 'globalization' and 'as soon as [the idea of empire] is used to refer to the political order associated with contemporary globalization', observes Marks, 'it becomes clear that, far from international law and institutions being against empire, or empire being against them, *empire and international law and institutions are for one another*'.³⁷ Like two limbs of the same body, they are locked in a profoundly symbiotic relationship, sometimes helping and enabling one another, sometimes constraining and hampering each other's development.

³⁶ See G. Balakrishnan, *Debating 'Empire'* (2004).

³⁷ Marks, *supra* note 31, at 903 (emphasis in original).

The basic plot formula which the third concept of 'empire' invites its users to construct is, as one would expect, deeply de-romanticized. One will find here no heroes and no villains, no victims and no promises of an easy redemption. What is slowly uncovered instead is a sharply sobering realization that not only has international law always had a deeply ambivalent relationship to imperial power, but that it is also neither a subject nor an object, but only a specifically organized form of global collective life, a form through which one can pursue an unabashedly hegemonic project as well as a trenchantly counter-hegemonic resistance – a quasi-linguistic system which 'enables the taking of any conceivable position in regard to a dispute or a problem' but which does not itself prescribe any.³⁸

To be sure, each 'form' comes with its own residual 'content'. The use of law as a political medium does not work as easily on the counter-hegemonic side as it does on the side of the 'imperial power'. Both as a language and as a system of rules and institutions, international law as we know it today seems to have a strong intrinsic 'tilt'³⁹ that favours the interests of the global capitalist historic bloc.⁴⁰ But that does not in itself undo the fact that it is still 'only' an inanimate form. Inanimate forms never 'do' anything on their own. One always needs to enlist a speaking subject before the language can be used to articulate anything.

All of this points, in the end, to the general ideological functionality of the third tradition. Provided some of its more outlandish tendencies are duly bracketed out,⁴¹ the post-structuralist reconceptualization of 'law' and 'empire' by and large tends to produce a considerably more progressive range of ideological functionality than either of its two main rivals. By highlighting the essentially symbiotic relationship between international law and imperialism and the concomitant indispensability of constantly stressing the all-important role of the subjective element (the speaker of the language), the third tradition has the potential of enabling its audiences not only to preserve a considerable amount of intellectual and rhetorical energy that otherwise gets routinely wasted in the two other traditions, but also to proceed much more self-consciously towards the actual pragmatic challenge of identifying what exactly can and needs to be done to advance the counter-hegemonic anti-imperialist project through the instrumentality of the international legal form.

None of the NIL writings takes up the third concept of 'empire'. The dominant preference rather lies with the formula of empire-as-US-hegemony and the basic model of the feudal-socialist reasoning it induces. (And even on those occasions when the latter's influence is somehow resisted, the ideological effect of reducing the historical reality of the new imperial order to a crude outline of the Usonian inter-statal dominance still remains quite devastating. Not only does it obscure the fact that the stability of the United States' hegemonic position is, in fact, directly

38 M. Koskenniemi, *From Apology to Utopia* (2005), 564.

39 W. Holt, 'Tilt', (1984) 52 *George Washington Law Review* 280; E. Pashukanis, *Selected Writings on Marxism and Law* (1980).

40 Although, of course, we can argue about the actual limits of this tilt at rather considerable length. Compare Miéville's argument with Koskenniemi's. See Miéville, *supra* note 10, at 48–60.

41 A. Rasulov, 'International Law and the Poststructuralist Challenge', (2006) 19 *LJIL* 799, at 806–8, 815–16.

predicated on its continuous support by a number of other First World powers; it also severely misrepresents the general condition of the global political arena by suggesting, in effect, that the sole line of division that splits it is that between the United States and the rest of the world. One only needs to pay close attention to the scale and intensity of the various ‘trade wars’ – bananas, steel, biotech products – between the United States and the European Union throughout the last decade and a half to see just how inaccurate that picture is already at the First World end of the spectrum.)

Even in those NIL texts which are supposed to have been written in the voice of the ‘Marxist Left’, there is not a page to be found anywhere of a serious critical analysis attempting to penetrate the fetishistic rigidity of the second tradition, let alone to question the ideological attractiveness of that tradition to the hegemonic requirements of global capitalism.⁴²

For, indeed, from the Marxist point of view, every global imperial structure is supposed to be understood, first and foremost, as a historical solution worked out at the ‘political’ level in response to the fundamental contradictions of the corresponding globally dominant mode of production occurring at the ‘economic’ level.⁴³ In the present context, this would mean at the very least an attempt to address and connect between themselves such trends and events as, for instance, the continuous rise of new finance monopolies since the end of the 1980s; the deregulation of the global commodity and labour markets; the privatization of public services and the roll-back of the welfare state in the North Atlantic region; the de-industrialization of the advanced capitalist economies and the increasing marginalization of the global industrial capital within the dominant historical bloc; the rise of the floating rate of exchange model in global currency markets and the polarization of income in both the developed and the developing world; the onset of the ‘credit crunch’; the credit crunch-inspired retreat from the neoliberal vision of economic development back in the direction of the Keynesian-style modest interventionist tradition, and so on and so forth.⁴⁴

None of the apparently ‘Marxist’ explanations offered by NIL authors, however, even begin to point in that direction. Instead, what the readers are treated to, under the banner of the most ‘piercing’ ‘Marxist’ analysis of the new imperial legal order, is, at worst, the same brand of neo-Herderianism that made Huntington’s name in the 1990s, at best, a half-hearted spin-off of Hans Morgenthau’s political realism theory, complete with its quasi-theological animization of the ‘state’ and the concomitant fetishization of inter-statal relations.⁴⁵

42 One cannot rule out, of course, the possibility that, ultimately, this is just a result of some strategic choice. In an intellectual environment traditionally dominated by the Westphalian statocentric paradigm, deploying the Marxist analytic in earnest is not, after all, the most effective way to make one’s name.

43 Cf. H. Ticktin, ‘Political Economy and the End of Capitalism’, (2007) 35 (1) *Critique* 67.

44 For an excellent attempt to explore this problematic in a decidedly systematic fashion, albeit mainly from an international relations perspective, see G. Arrighi, *Adam Smith in Beijing: Lineages of the Twenty-First Century* (2007). See also P. Anderson, ‘Jottings on the Conjunction’, (2007) 48 *New Left Review* 5; S. Watkins, ‘Continental Tremors’, (2005) 33 *New Left Review* 5.

45 See the essay by Panitch and Grindin (pp. 21–43).

Arnold Wolfers, himself a prominent figure in the political-realist movement, once remarked disparagingly that the idea of global politics adopted by the realist tradition was essentially based on the imagery of a billiard ball:⁴⁶ ‘opaque, hard, clearly defined spheres’ interacting with one another only ‘through collision’.⁴⁷ That the best alternative the NIL ‘Marxists’ have found to the Herderian *Volkgeist* tradition was precisely the same vision which the US ideologues of the Cold War era used to justify their neocolonial aspirations should at the very least give one considerable food for thought.

5. CONCLUSION

In one of his recent pieces Loïc Wacquant described the phenomenon of what he called ‘false critical thought’ – a particular kind of socio-theoretical discourse which, ‘under the cover of apparently progressive tropes’, serves deeply reactionary political purposes by offering as its guiding theoretical frame a kind of spurious ‘soft culturalism wholly absorbed by the narcissistic preoccupations of the moment’ and thus, in effect, ‘invit[ing its audience] to submit to the prevailing forces of the world, and in particular to market forces’.⁴⁸

At its worst, NIL scholarship represents a classic example of exactly this sort of phenomenon. Denouncing the chilling advances of the new imperial order, it mobilizes an ostensibly progressive topology of ‘anti-hegemonism’ and the ‘rule of law’, all the while projecting an understanding of neo-imperialism conceived in essentially mystificatory terms and a vision of law reified and fetishized beyond any critical use. Attempting to throw light on the various historical events surrounding the rise of the new imperial legal order, it chooses the 2003 invasion of Iraq as its main focal point, conveniently pushing aside a whole host of other far more fundamental developments, be it the breathtakingly fast juridification of the WTO system or the progressive evolution of the ‘augmented’ Washington Consensus. Pretending to equip its readers with a new intellectual toolkit, it offers instead a guiding theoretical frame constructed from some of the most reactionary examples of culturalist essentialism and ahistorical fetishism. Pretending to explain the squabble born out of the inter-imperial resentment between the United States and ‘old Europe’, it dresses it up as if it were the only meaningful form which the politics of anti-imperialist resistance could take in the modern world.

Quite unsurprisingly, every bottom-line conclusion it ends up producing pushes as its central message the idea of the historical inevitability of the need to acquiesce: in the essential logic of the existing global capitalist system, in the general domination by the advanced economies of the North Atlantic region, in the corresponding system of global political configurations *grosso modo*, and even, ultimately, perhaps, in the new global imperial order itself.

46 A. Wolfers, *Discord and Collaboration* (1962), 82.

47 A.-M. Slaughter, ‘International Law and International Relations’, (2000) 285 RCADI 9, 34.

48 Wacquant, *supra* note 2, at 99.

'When evaluating theoretical debates', writes John Hutnyk, 'it is good to remember how the displacement of concepts is another, sometimes overlooked, mode in the general disorientation of our times that sells us rightwards drift in the guise of a committed politics.'⁴⁹ In the end, one could not have put it better about NIL.

Still, if, as Jameson suggests, we always require a stronger interpretation to overthrow and refute the one that is already in place,⁵⁰ it seems it will not be enough to simply lay the NIL scholarship bare for what it is – we also need to produce some sort of an alternative to it. How that can best be done, however, is a story that is best left for another occasion.

49 J. Hutnyk, *Bad Marxism* (2004), 139.

50 Jameson, *supra* note 19, at xiii.