

ARTICLES

An Outline of a Marxist Course on Public International Law

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Abstract

This paper draws on the insights of Marxism to outline a critical alternative course on public international law. It explains *inter alia* the changes in the doctrines and rules of international law by linking them to extra-textual realities. It contends that the character of contemporary international law is being transformed from bourgeois democratic international law to a bourgeois imperial international law. It sustains this conclusion by looking at certain developments in the world of international law in recent years. However, the outline offered is not exhaustive in terms of either the subjects considered or their analysis.

Key words

character of contemporary international law; course on public international law; critical alternatives; mainstream scholarship; Marxism

I. INTRODUCTION

I.1. The difficulties in telling an alternative story

There is today an urgent need to offer to students of international law critical alternative texts exploring the nature, character, and subject matter of international law. Alternative stories have to be told, for growing international legal regulation is translating into injustice for the subaltern classes in both the third and first worlds.¹ But introducing critical alternative texts is not an easy task, given the dominance of mainstream international law scholarship (MILS) in the world of international law. MILS may be defined as an ensemble of methods, practices, and understandings in relation to the identification, interpretation, and enforcement of

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1. The term 'subaltern class' is being used in this paper to include all oppressed and marginal groups in society. It therefore includes exploitation and oppression based on class, gender, race, and caste. But since 'subaltern class' is not simply a cultural formation, but a historical category, this exploitation and oppression is to be located in the matrix of both property relations and lived histories.

international law.² This ensemble of methods, practices, and understandings comprises a number of features. Four may be mentioned in order to bring out its distinctive nature. First, broadly speaking, MILS is parasitic on an epistemology of law that dictates the fragmentation of social sciences in relation to the creation, interpretation, and implementation of international law. It advances a distinctive international law methodology which tells us which practices count in the world of international law and which do not. Such a methodology, going by the name of positivism, excludes a range of social and political practices as falling outside the domain of international law. MILS therefore ends up offering formal/abstract definitions of international law and its doctrines. Second, MILS writes the history of international law as a narrative of progress.³ In this view, whatever may have been the sins of international law in the past it is an instrument of common good today. There is also the embedded belief that every increase in international legal regulation is necessarily a step towards establishing a just world order. Therefore, more international law is always better, since it is a move towards establishing the rule of law in international relations. Third, there is the understanding that international law is a system of rules that can be objectively known, interpreted, and applied. Interpretative disputes and their outcome are never seen as a function of power but simply a result of unclear texts that are a product of compromises arrived at during the course of international negotiations. Fourth, the practitioners of MILS do not recognize that there are structural constraints in the international system that greatly limit the pursuit of common good through international law. It is not as if MILS is naive. It often takes the factors of power and interest into account in explaining the international legal process and its outcomes.⁴ However, what MILS does not recognize is that there are deep structures that entrench rules and systems of belief which sustain the domination of subaltern states and peoples. These features lead MILS to the sanguine conclusion that ‘today, principled criticisms of international law as such, of its contents and general orientation, can be heard only rarely’.⁵ To put it differently, the strategy adopted by MILS to exclude critical alternative narratives is either to deny their existence through subsuming them under its own banner or to represent them as deviant scholarship unworthy of engagement. Thereafter, the space of critical dissent is occupied by mild reformists pretending to be radical oppositionists.⁶ What is worse, some alternative narratives that position themselves as critical alternatives can be even more accommodating of power than MILS. The New Haven School is a good example of an interdisciplinary approach that presents itself as sharply critical of MILS (and is in many respects) but is even less willing to speak

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2. On the difficulties of making the characterizations of ‘mainstream’ and ‘marginal’ approaches in international law see R. Mullerson, *Ordering Anarchy: International Law in International Society* (2000), 49.
 3. A. Orford, ‘Embodying Internationalism: The Making of International Lawyers’, (1998) 19 *Australian Yearbook of International Law* 1, at 16.
 4. But see M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (2000), 214.
 5. C. Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of the New Century’, (1999) 281 *Recueil des Cours* 9 at 39.
 6. D. Kennedy, ‘When Renewal Repeats: Thinking Against the Box’, (2000) 32 *New York University of International Law and Politics* 335, at 372.

truth to power.⁷ It is, in other words, not enough to offer critical or interdisciplinary alternative texts. Such texts can be complicit with power in a different way. What is necessary is an ensemble of methods, practices, and understandings that go to empower the subaltern classes.

The present paper uses the insights of Marxism to outline such a critical alternative text in the form of a general course on contemporary international law (CIL). This story has been told before, but, as we all know, in the service of ‘actually existing socialism’. Its demise has opened up the possibility of a critical retelling, a retelling which is not dogmatic in any way and is fully conscious of the enormous human costs of ‘actually existing socialism’. The story is retold in the belief that Marxism as critique has not exhausted itself (albeit without attributing any foundational role for Marxist critical reflection), despite its failure to articulate the normative basis for creating a just society. The reason for choosing the genre of ‘a course on public international law’ is that it is not enough to critique CIL at a structural level *inter alia* through linking its evolution to developments in the capitalist world economy. It must be followed up by a more detailed and integral exposition of the doctrines and rules of CIL as carriers of dominant interests and discourse. For we believe that it is the textbook on CIL that is the most influential vehicle in disseminating the MILS worldview, especially in the third world. Textbooks condense and assemble a mass of materials on different topics/areas of international law in a systematic and coherent manner to impart knowledge to students of international law. Unless alternative textbooks do the same in a more persuasive and illuminating way, deploying a different ensemble of methods, practices, and understandings, the MILS textbooks will retain their influence despite the most acute critiques of aspects of CIL and MILS.⁸ The word ‘outline’ in the title indicates the extremely modest aim of the present essay. It does no more than offer some glimpses into what is possible. It is not exhaustive either in terms of the subjects considered or in the analysis of those that are included.

1.2. What is distinctive about our text

It will perhaps be helpful, to begin with, to state in a schematic fashion some of the distinctive features of critical Marxist international law scholarship (CMILS).

First, in contrast to the formal definitions of international law and its doctrines offered by MILS, CMILS advances more meaningful definitions that distinguish the character of international law and its doctrines in different historical phases and identifies the groups/classes/states that are the principal movers and beneficiaries. CMILS contends that while MILS does use the categories of interest and power in analyzing CIL, the manner in which these categories are deployed deprives them of critical edge. Thus MILS works with the empty concept of ‘national interest’, excluding the possibility of discovering particular group or class interests that

7. For a detailed critique of the New Haven approach see B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (1993), ch. 3.

8. From a feminist standpoint an attempt has been made in H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000).

determine its content. Likewise, the concept of power is mostly identified with its more overt and discrete manifestations rather than being understood as a force that continuously informs the creation, interpretation, and enforcement of international law.

Second, CMILS, in contrast to MILS, identifies the structural constraints on the democratic transformation of CIL. It posits both external and internal constraints (and their linkages) that stop CIL from becoming an instrument of social transformation. At the external level, CMILS recognizes *inter alia* that at least since the sixteenth century, when an incipient capitalist world economy began to take shape, its structure has constrained the democratization of international law. Internally, the problem principally lies with the frozen and power-driven doctrine of sources of international law. CMILS instead seeks to embed deliberative democracy in the lawmaking process, for it allows the notion of ethical compromise to come into play in the creation of international law. Ethical compromise (i.e., compromise that leads to the realization of generalizable interests), in contrast to a compromise informed by power (i.e., compromise that actualizes particular interests), helps to promote the interests of the subaltern classes.⁹ From this perspective CMILS seeks *inter alia* changes in the law of treaties and celebrates 'soft law' texts that represent the outcome of communicative action.

Third, CMILS underlines the element of indeterminacy which characterizes all international law interpretation of texts and facts. While it eschews the radical indeterminacy of the New Haven School (which uses this understanding to justify its subjective perceptions of particular texts and events), it reveals the problems with the mainstream transparency/objectivity thesis. In other words, CMILS aspires to occupy the middle ground between complete objectivity and radical indeterminacy to create space for interpretative rules and strategies that contribute to the welfare of the subaltern classes.

Fourth, in contrast to MILS, CMILS takes cognizance of dissenting voices, in particular critical third world approaches to international law (TWAİL). It is disturbed by the incestuous debate carried out between American and European mainstream scholars and the tendency to universalize it as *the* discourse of international law. CMILS refuses to believe that the only way to bring about the democratization of CIL is by embracing the 'tools' of MILS.¹⁰ Instead, it supports protocols of scholarship which engender inclusion of international law outsiders, whether in the first or third worlds. This is a matter of importance, for in many ways international law is what international lawyers say it is.

In sum, CMILS provides a more coherent and meaningful story of international law than does MILS. It uses the insights of historical materialism to explain better the changes visiting the doctrines and rules of international law, by linking them to extra-textual realities. It eschews, however, determinism of any kind, albeit without embracing the opposite trap of enumerating endless variables that shape

9. B. S. Chimni, 'Discourse Ethics and International Negotiations' (mimeo). See generally J. Habermas, *Moral Consciousness and Communicative Action* (1990); J. Habermas, *Theory of Communicative Action* (1987), I.

10. Feminist international lawyers had to confront this critique from MILS. See Orford, *supra* note 3, at 25–6.

society (whether domestic or international) so that CIL appears a product of sheer chance. CMILS is, in other words, interdisciplinary in a different way. CMILS, by avoiding the trap of legal nihilism, also hopes to suggest ways of dealing with unjust laws.

2. THE STATE, THE CAPITALIST WORLD ECONOMY, AND INTERNATIONAL LAW

The state is at the centre of the universe of international law. It is, even today, the principal 'subject' of international law. The definition that international law offers of its central actor is, however, a formal one. It is confined to indicating the criteria of statehood. There is the inevitable reference in MILS to the 'best known formulation of the basic criteria of statehood' laid down in Article 1 of the 1933 Montevideo Convention on Rights and Duties of States.¹¹ It states: 'The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.'

The formal definition excludes from view the fact that the state is a function and form of social relations.¹² It therefore fails to record that the modern state emerged in response to certain fundamental social transformations (representing the transition from feudalism to capitalism) that visited sixteenth- and seventeenth-century Europe. 'The state only *fully* becomes', as Pashukanis noted, 'the subject of international law *as the bourgeois state*.'¹³ More significantly, this bourgeois state, from the very beginning, coexisted with the colonial state in an evolving capitalist world economy, indelibly marking the body of international law.¹⁴ Since MILS does not perceive the state as an integral part of the capitalist world economy, it fails to appreciate that its structure does not allow all states to develop simultaneously but instead spawns uneven development between states. There is, in other words, no recognition that this 'uneven development is not a residue or an impurity . . . *it is the constitutive form of the reproduction of the CMP [capitalist mode of production]*'.¹⁵ To put it differently, MILS rejects the understanding that capitalism can only be imperialist.

The colonial state remained an object of international law till it recovered its independence in the middle of the twentieth century. The arrival of 'newly independent states' meant that the bourgeois states now coexisted not only with 'socialist' states (in the post-October Revolution phase) but also with non-capitalist states in much of the decolonized world. On the other hand, the survival, expansion, and development of the capitalist world economy demanded that the bourgeois democratic state (the

11. J. Crawford, *The Creation of Statehood in International Law* (1979), 36.

12. For a very basic introduction to relevant Marxist sociology see Chimni, *supra* note 7, at 213–20.

13. E. Pashukanis, *Pashukanis: Selected Writings on Marxism and Law*, ed. P. Bierne and R. Sharlet (1980), 174 (emphasis added).

14. A. Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law', (1996) 5 *Social and Legal Studies* 321.

15. N. Poulantzas, *Classes in Contemporary Capitalism* (1978), 49 (emphasis added).

best shell for capitalism) be established as the universal form of state. The collapse of 'actually existing socialism' facilitated this. A range of laws and practices have been deployed by advanced capitalist states to universalize the bourgeois state. To take just one example, on 16 December 1991 the European Community adopted 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union'.¹⁶ The guidelines laid down the criteria that must be satisfied before recognition could be granted to a new state. These included *inter alia* commitment 'to the rule of law, democracy and human rights', key words for describing a bourgeois democratic state. This attempt to ensure that the bourgeois state form be embraced by all newcomers has been reinforced by the emerging norm of a 'right to democratic governance'.¹⁷ Thus not merely the recognition of new states but also the recognition of governments has become the concern of international law in a bid to make the bourgeois state the universal form of state.¹⁸ What MILS does not appreciate is that the norm of democratic governance can subsume a wide spectrum of social formations, leading to 'a flattening out of the variegated global conditions within which democratizing projects are embedded'.¹⁹ There is therefore little understanding of the fact that the creation of a bourgeois democratic state under mismatched social conditions transforms the concerned society into a dependent and dominated social formation with the principal function of facilitating the presence and operation of transnational capital.²⁰

A dependent and dominated social formation and state is one whose specific economic, political and ideological structure is constituted by asymmetrical relationships with the dominant social formations and states which enjoy a position of power over it.²¹

The form and content of dependence and dominance change according to the different phases of the evolution of the capitalist world economy. The last two decades (the era of accelerated globalization) have seen a substantial redefinition of the relationship of dependent and dominated states with dominant social formations and states. It has witnessed the direct inscribing of international laws in dependent and dominated states, facilitating greater imperialist domination. A network of international laws that extend and deepen the reign of global capitalism by further limiting the autonomy of the dependent and dominant state has been adopted.²² In key areas of sovereign economic, social, and political life the dependent and dominated state cannot take independent decisions, since it has ceded its powers to international

16. UNSC Doc.S/23293 of 17 Dec. 1991, Annex II. The text of the Guidelines has been reprinted in (1992) 31 ILM, 1486–7.

17. T. M. Franck, 'The Emerging Right to Democratic Governance', (1992) 86 AJIL 46.

18. For the distinction between recognition of states and recognition of governments see Crawford, *supra* note 11, at 27–9.

19. H. Smith, 'Why Is There No International Democratic Theory?', in H. Smith (ed.), *Democracy and International Relations: Critical Theories/Problematic Practices* (2000), 1, at 4.

20. J. Grugel, 'State and Business in Neo-liberal Democracies in Latin America', in Smith, *supra* note 19, at 125; S. Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (2000).

21. Poulantzas, *supra* note 15, at 43–4.

22. B. S. Chimni, 'Third World Approaches to International Law: A Manifesto', in A. Anghie *et al.* (eds.), *The Third World and International Order: Law, Politics and Globalization* (2003), 51ff.; B. S. Chimni, 'Marxism and International Law: A Contemporary Analysis', (1999) *Economic and Political Weekly*, 6 Feb., 337.

law and institutions. On the other hand, the prescription of ‘democratic governance’ offers advanced capitalist states a pretext for intervening against forces that do not further their economic and geostrategic interests, as long as it can be established that those forces are in violation of liberal–democratic norms.²³ Among other things it is my contention below that in view of these developments, spelled out in greater detail later, the character of CIL is in the era of globalization metamorphosing from a bourgeois democratic international law to a bourgeois imperial international law.²⁴

3. THE CHARACTER OF CONTEMPORARY INTERNATIONAL LAW

The character of CIL is not, it is important to clarify, shaped merely by the developments in the capitalist world economy. That assertion would represent crude economic determinism. It is shaped by a range of factors including: (i) the dominant understanding of the history of international law; (ii) the cohesiveness and strength of the class that occupies centre stage at the global level at a particular historical conjuncture; (iii) the nature and logic of the states system; (iv) the role of non-state actors, including international institutions and civil society organizations; (v) the strength of domestic and international resistance movements; and (vi) the internal dialectic of international law. Each of these factors may play a decisive role, depending on the subject, arena, and political conjuncture of lawmaking.

The origin of CIL, as already noted, is inextricably bound up with colonialism. Colonization meant the erasure of the personality of the colonized state. It was in this period that the doctrines and rules of CIL were shaped, as a way of responding to and justifying colonialism. Be it the law relating to acquisition of territory, the rules of recognition, or the law of state responsibility, it was dictated by the necessity of consolidating and sustaining colonial rule. The decolonization process saw the arrival of ‘newly independent states’ and the relative democratization of international law through the universalization of the principle of sovereign equality of states. Attempts at a more substantive democratization of international relations were resisted by the former colonial masters. MILS followed suit in the literature of international law. The colonial foundations of international law were easily acknowledged in a world that was officially decolonized. However, the continuing critique of CIL was seen as illegitimate. MILS refused to accept the argument that the more substantive democratic transformation of world economic and political laws and institutions is controlled by certain global social forces through, *inter alia*, a network of laws, doctrines, and interpretative devices. Thus the moment of confession of the relationship between colonialism and international law was deployed by MILS to legitimize CIL by distancing it from its origins. The subjects of oppression

23. B. R. Roth, *Government Illegitimacy in International Law* (1999), 426.

24. The different historical phases of modern international law may be classified as follows: 1600–1760: old colonialism; 1760–1875: new colonialism; 1875–1945: imperialism; 1945–1980 imperialism (neo-colonialism); and 1980–: imperialism (globalization). For a brief analysis of the first four phases see Chimni, *supra* note 7, at 223–36. For a review of developments in the current phase of globalization see Chimni, *supra* note 22. Bourgeois *imperial* international law is to be distinguished from bourgeois *imperialist* international law of the period 1875–1945. The former characterization seeks to capture the essence of international law in the current period of accelerated globalization dating from the early 1980s.

were now seen as occupying the same place as the perpetrators. The uncomfortable fact that formal equality in law translated into dependence and domination in the real world was quickly passed over; as Marx pithily observed: 'Between equal rights force decides.'²⁵ What emerged by the 1970s may, however, be characterized as bourgeois democratic international law, since structural dependence in this period permitted post-colonial states considerable autonomy in the formulation and implementation of internal social and economic policies.

From the last two decades on, the character of CIL has been in the course of being transformed from bourgeois democratic to bourgeois imperial international law by changes in the world economic and political situation which have led to the ascendance of the transnational fractions of the capitalist class in advanced capitalist countries. This class acts in collaboration with the now ascendant transnational fractions in the third world.²⁶ The emerging transnational capitalist class (TCC) 'is comprised of the owners of transnational capital, that is, the group that owns the leading worldwide means of production as embodied principally in the transnational corporations and private financial institutions.'²⁷ The TCC seeks to establish international laws and institutions that facilitate the globalization of production and finance through the internationalization of property rights and limiting the autonomy of the dependent and dominated states. This objective is being achieved, as noted earlier, through adopting relevant international laws (in areas of foreign investment, trade, and finance) and transferring sovereign powers from states to international institutions. The World Trade Organization (WTO) and the international financial institutions are the key players here, albeit accompanied by a range of other social and environmental institutions. The international institutions, it is perhaps important to stress, do not possess their own power but '*express and crystallize class powers*'.²⁸ The class powers that are being crystallized and expressed today are those of an emerging TCC that exercises the most influence in the global arena.

We must, however, hasten to add that the existence of a sovereign state system ensures that CIL does not represent a direct translation of the interests of the TCC. The fragmentation of states at the international level ensures this. While a dominant class (the TCC) has emerged at the global level (through a complex coalescing process), and a global state is in the process of being created, the TCC has today still to contend with the demands of the logic of the states system.²⁹ There is therefore a need to factor in the autonomy of the state (however constrained) when it enters the domain of international relations.³⁰ State autonomy is a function of a range

25. K. Marx, *Capital* (1977), I, 225.

26. On the emergence of a transnational capitalist class see W. I. Robinson and J. Harris, 'Towards a Global Ruling Class? Globalization and the Transnational Capitalist Class', (2000) 64 *Science and Society* 11–54. A 'fraction' denotes segments within classes determined by their relation to social production and the class as a whole', at 23.

27. *Ibid.*, at 22.

28. Poulantzas, *supra* note 15, at 70 (emphasis added).

29. On the emergence of the global state see B. S. Chimni, 'International Institutions Today: An Imperial Global State in the Making', (2004) 15 *EJIL* 1–37 (forthcoming).

30. See generally A. Linklater, *Beyond Realism and Marxism: Critical Theory and International Relations* (1999).

of social and cultural factors, including perceptions of national security and the imperative of 'free and fair elections'. It is the factor of state autonomy which *inter alia* explains the differences between the United States and EU states in various international fora. It also explains why there has to be a degree of responsiveness by even dependent and dominated states to the concerns and aspirations of its peoples. Therefore all negotiations leading to the adoption of international law texts are not, despite the collaboration of the TCC across global space, sham negotiations. There is a complex process (among other things regulated by international law) through which dominant interests are mediated to yield solutions that have legitimacy in the eyes of the population over which each government presides. Therefore compromises have to be reached, especially when there is organized resistance by the subaltern classes to certain policy outcomes. But the emergent compromises do not necessarily represent ethical compromises and thereby a setback to the dominant classes. In any case, the role of the advanced capitalist states in the international system is not only to defend the narrow corporate interests of the TCC but to create and sustain a normative system that facilitates and legitimizes the functioning of the world capitalist system.³¹ This requires holding out the illusion that the success of capitalism means the welfare of the subaltern classes and concessions have to be made to support it.

Powerful states have also to get to grips today with non-state entities that are coming to play an important role in the lawmaking process. These non-state entities range from sub-national authorities to international institutions to non-governmental organizations (NGOs). Of course the significance of the role of non-state entities varies with the subject matter and the extent of organization in the field, so that there are, for instance, NGOs and NGOs. They are, like states, also informed by the north-south divide. This allows northern NGOs, in particular business NGOs (for example, the International Chamber of Commerce), to play a critical role in the international lawmaking process. Likewise, the networking of sub-national authorities allows them to shape the law literally outside the democratic process. It has meant that the dependent and dominated state is being hollowed not only through measures from above but also through networking from below. There are also, of course, dissenting civil society organizations (leading and combining old and new social movements) which provide some kind of, even if ineffective, counterweight. Their resistance has in recent years drawn increasing attention to the inequities that inform contemporary international law and institutions and have often to be taken into account.

But despite the constraints of the states system, the need to ensure the survival of formal democracies and the presence of dissenting social movements and so on, the extant nature of the capitalist world economy ensures that overall (as opposed to under particular rules and regimes) the interests of the TCC and powerful states prevail and are codified. CIL may therefore, in general terms, be defined as a system of principles and norms arrived at primarily between states, and secondarily

31. A. Gramsci, *Selections from the Prison Notebooks* (1971), 181–2; Marx, *supra* note 25, chs. XXVI–XXXIII. The fact also explains the recent differences between the United States and some key EU states; it *inter alia* reflects different strategies of exploitation and dominance.

through a network of non-state and sub-national entities, embodying particular international class interests, that are enforced by a range of means, increasingly international institutions. More specifically, CIL is today in transition from being bourgeois democratic in character to a bourgeois imperialist international law that increasingly codifies the interests of an emerging TCC at the expense of interests of the subaltern classes and substantive global democracy. The principal features of bourgeois imperialist international law are that it greatly limits the autonomy of the dependent and dominated state through, *inter alia*, relocating sovereign powers from states to international institutions, it facilitates and safeguards the free mobility of capital, in particular international finance capital, it creates and protects international property rights without imposing corresponding duties on the right-holders, and it legitimizes greater use of force through introducing new doctrines to protect the emerging globalized system of production and finance and the accompanying geo-politics.³² These features, among other things, reflect a process of international law that severely constrains the ability of dependent and dominated states and subaltern classes to have their aspirations codified in international law. The characterization of CIL as bourgeois imperialist does not, however, mean that it therefore offers no advantage to the dependent and dominated states and the subaltern classes in the international system.

CIL is not simply a mask for class rule. While we would not go so far as Thompson as to contend that the institution of law is an 'unqualified human good', he is right in noting that the view of 'structural reductionism' 'overlooks . . . the immense capital of human struggle . . . inherited in the forms and traditions of the law'.³³ In the context of CIL mention need only be made of the struggle of colonized peoples, in particular the sacrifices of the subaltern classes, to overthrow colonial rule and thereby democratize international law. Their continuing struggle since has also shaped the content of international law in many ways. Furthermore, as Thompson stresses,

the essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot be seen to be so without upholding its own logic and criteria of equity; indeed, on occasion by actually *being* just.³⁴

Even powerful states therefore often have to be respectful of the rule of law in the international system. The need to sustain the integrity of the system in turn opens up spaces that can be used to advance the cause of the subaltern classes. But the relative independence of international law does not mean that it does not incorporate and codify class interests, as Thompson concedes.³⁵ Thus, it is only at the point that Thompson calls law 'an unqualified human good' that it becomes problematic.³⁶

32. In these regards see the discussion *infra*.

33. E. P. Thompson, 'Whigs and Hunters', in *Lloyd's Introduction to Jurisprudence* (1985), 1057.

34. *Ibid.*, at 1056. (emphasis in original).

35. *Ibid.*

36. H. Collins, *Marxism and Law* (1982), 144.

Certainly the *idea* of the rule of law is not an empty one, and it possesses substantive independence from class interests. But equally the idea of the rule of law lends itself to manipulation and control by class interests. The limits of the rule of law in international relations are today defined by the extent to which it safeguards the interests of the TCC and the powerful states that articulate it. Since a complete mismatch between the rules of international law and the interests and practices of powerful states is rare, violation is not a frequent event. However, when there is a mismatch in periods of rapid development (as in the past two decades), either the rules themselves are transformed (e.g., the WTO rules) or these are violated (e.g., the rules relating to the use of force). International law, to reiterate, does possess relative independence but is constrained by the interests of the dominant actors and classes.

The implications of these developments and reflections on different aspects of international law form the subject of the rest of the article. The idea will not be to deal in detail with the various topics of international law; the aim of the article is to show, in contrast to MILS, the relationship between concepts, texts, and extra-textual developments.

4. SOURCES OF INTERNATIONAL LAW

Most textbooks begin their exposition of CIL with a discussion of ‘sources of international law’. MILS distinguishes between ‘sources’ and ‘ultimate sources’ of international law, and excludes the latter from consideration.³⁷ This refusal to engage with extra-textual reality means, *inter alia*, that MILS does not have a serious theory of social change to explain its formal definition of international law. CMILS, on the other hand, marries international political economy to a historical sociology to explain systematically the basis of transformation of international law norms by reference to evolving social structures, forces, and classes that constitute the world economy and the states system, even as it does not deny that international legal rules are also constitutive of social practices. To put it differently, CMILS is better positioned to clarify the meaning and implications of the formal sources of international law. These are most authoritatively stated in Article 38(1) of the Statute of the International Court of Justice (ICJ). We, however, merely look at the two principal sources of international law identified there, namely treaties and customary international law, and also touch on the phenomenon of ‘soft law’.

4.1. Treaties

MILS, as is its wont, offers a formal definition of treaties. It usually refers the reader to Article 2(1)(a) of the Vienna Convention on the Law of Treaties 1969, which defines a treaty as ‘an international agreement concluded between States in written form and governed by international law, whether embodied in a single legal instrument or in two or more related instruments, and whatever its particular designation’.³⁸ There is little indication in this abstract definition of the social relationships encapsulated in

37. M. Shaw, *International Law* (1997), 55; Akehurst's *Modern Introduction to International Law* (1997), 35.

38. The treaty entered into force on 27 Jan. 1980. For the text of the Convention see (1969) 8 ILM 679.

a treaty. Contrast this with the definitions offered by the Soviet scholars Korovin and Pashukanis: ‘Every international agreement is the *expression of an established social order, with a certain balance of collective interests*’;³⁹ ‘A treaty obligation is nothing other than *a special form of the concretization of economic and political relationships*’.⁴⁰ These definitions, through drawing in extra-textual reality, offer greater insight into the meaning of a treaty than the formal definition offered by MILS. They refer us to both the fact of an established (capitalist) social order and to its concretization as economic and political rules embodying a certain balance of collective (class) interests.

A treaty is arrived at in the matrix of the already existing rules of the ‘treaty game’ that clarify what is permissible and what is objectionable in the course of negotiating and adopting international agreements. These rules, codified in the ‘treaty of treaties’, namely the Vienna Convention on the Law of Treaties 1969, favour powerful participants in the treaty-making process. First, the Vienna Convention does not require anything more than formal adherence to the rules of deliberative democracy. Thus it does not prevent the quiet coercion of states – a fact that tends to be overlooked by MILS.⁴¹ In other words, as Brilmayer points out, ‘arguments based on consent are deceptively simple’ as explanation for the binding nature of agreements.⁴² Their ‘theoretical power lies in the suggestion that perhaps nothing really needs to be justified’.⁴³ But, as is evident to any observer of international negotiations, ‘bargaining frequently takes place in a world of uneven resources and opportunity costs’.⁴⁴ It provides the soil in which quiet coercion flourishes. Second, there is the question of who is consenting: the state or the people who constitute it? MILS does not address this issue, for the norm of the ‘right to democratic governance’ does not require participatory democracy to be institutionalized. In the circumstances, the treaty often conceals the interests of certain social classes even as MILS pretends that it embodies agreed compromises of different ‘national interests’. While it is admittedly difficult to capture the class dimension of treaties in the language of international law when it comes to the lawmaking process,⁴⁵ there is no reason why MILS cannot concern itself with the exclusion of some subjects of interest to subaltern classes from the treaty-making process,⁴⁶ address the issue of the absence of substantive democracy in consenting states, and endorse the idea of

39. E. A. Korovin, ‘Soviet Treaties and International Law’, (1928) 22 AJIL 753, at 763 (emphasis added).

40. Pashukanis, *supra* note 13, at 181 (emphasis added).

41. In the words of Klein, ‘in view of the rather restrictive definition of “coercion” in the classical law of treaties (as embodied in Art. 52 of the 1969 Vienna Convention), powerful States would still seem to enjoy a reasonably large freedom to press their claims’. P. Klein, ‘The Effects of US Predominance on the Elaboration of Treaty Regimes and on the Evolution of the Law of Treaties’, in M. Byers and G. Nolte (eds.), *United States Hegemony and the Foundations of International Law* (2003), 363, at 368.

42. L. Brilmayer, *American Hegemony: Political Morality in a One-Superpower World* (1997), 75.

43. *Ibid.*

44. *Ibid.*, at 72.

45. On the other hand, however, as Benvenisti emphasizes, ‘international law must recognize that governments are agents of only a part of the communities they purport to represent at the international negotiating table’. E. Benvenisti, ‘Domestic Politics and International Resources: What Role for International Law?’, in M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (2000), 114. For a critique of the state as a unitary actor from a legal–constitutional perspective see U. Kischel, ‘The State as a Non-unitary Actor: The Role of the Judicial Branch in International Negotiations’, (2001) 39 *Archiv des Völkerrechts* 268, at 268.

46. Charlesworth and Chinkin, *supra* note 8, at 123.

transnational state responsibility (a matter to which we return later), in order to advance the cause of marginal and oppressed groups.⁴⁷

It has been aptly observed that ‘treaties and treaty-like instruments at the close of the twentieth century have become much too important to the functioning of international society to remain or to become the property of any one discipline or sub-discipline’.⁴⁸ For there is in the era of globalization no aspect of international relations which is not regulated by international treaty law. It therefore calls for more sophisticated approaches to treaties than is being offered by MILS. According to Johnston, a ‘substantial change in the treatment of treaties on the part of legal discipline must be premised . . . *on the basis of functional – not formal – logic . . .*’.⁴⁹ The functionalist view he proposes ‘stresses the relevance of considerations inherent in the context within which the issue or problem occurs, so that legal norms are kept in balance with institutional and political realities’.⁵⁰ We also share the understanding that it is

useful to *distinguish three kinds of consent*, varying with the instrument and the circumstances of its negotiation: consent to be juridically accountable in a court of law, consent to be held operationally answerable in the diplomatic arena, and *consent to be morally bound in the eyes of progressive public opinion*.⁵¹

CMILS understands the last as a call for the evaluation and recasting of a treaty in the light of its impact on certain groups in social life, namely the working class, women, peasants and the landless, children, indigenous peoples, and so on. CMILS, however, goes beyond the functionalist approach to advance a comprehensive strategy that furthers the interests of the subaltern classes, without entirely undermining a rule-oriented approach. The following elements, among others, constitute such a strategy.

First, CMILS calls for the further codification of the rules of deliberative democracy. The Vienna Convention on the Law of Treaties needs to be amended to include provisions that proscribe the use of all forms of coercion (for example, economic and diplomatic coercion) in international negotiations.⁵² CMILS would also, to further deliberative democracy, call for the greater representation of subaltern classes in the negotiation teams sent by states.

Second, CMILS would like to introduce a form of peoples-based social impact assessment system. In support of such a process CMILS would require *inter alia* that treaties be negotiated and ratified with the consultation and consent of the elected representatives of the people. While this move may still not prevent

47. See section 10, *infra*.

48. D. M. Johnston, *Consent and Commitment in the World Community: The Classification and Analysis of International Instruments* (1997), 57.

49. *Ibid.*, at 49 (emphasis added).

50. *Ibid.*, at 58.

51. *Ibid.*, at 276 (emphasis added).

52. See Chimni, *supra* note 9. The grounds for the invalidity of a treaty listed in Part V of the Vienna Convention presently include error, fraud, corruption or coercion of a representative of a state and coercion of a state by the threat or use of force.

consent to treaties that are not in the interests of subaltern classes, it would help render the process more transparent and amenable to dissent and political mobilization.

Third, when it comes to treaty implementation CMILS would prescribe a set of legal tools that would offer dependent and dominated states flexibility to implement its obligations in a manner that safeguards the interests of the subaltern classes. Thus, for example, in the context of the WTO, CMILS would argue for a greater deference to national interpretations and implementation of rules rather than a uniform mode insisted on by the WTO Dispute Settlement Body (DSB). For the national deference principle translates into greater autonomy to states at a time when it is being subverted through a network of international agreements.⁵³ It would allow the subaltern classes to put pressure on the state to adopt interpretations that safeguard their interests.

Fourth, CMILS would call for the clarification and development of customary international law rules of interpretation in order to reveal, and thereafter limit, the influence of power in the interpretative exercise. Following Wittgenstein, CMILS believes that since the meaning of a word lies in its *use* in the language, there is no such thing as determinacy/indeterminacy outside the world of social practices.⁵⁴ Consequently, what should be problematized are social (class) practices and not the abstract concept of meaning. Such problematization would help focus on the social (class) roots of interpretation. Thereafter there is a need to develop and use 'interstitial norms' that recognize the social (class) roots of conflicting interpretations (as manifested *inter alia* in resistance to particular interpretations) and reach closure after taking cognizance of the social consequences of both.⁵⁵ The interstitial norms could be legal (principle of good faith) or moral (equity in settling conflicting claims).⁵⁶

Fifth, CMILS would re-examine and highlight the *rebus sic stantibus* or material change in circumstances doctrine and make it integral to the concept of a balanced and just treaty, albeit in its consensual form.⁵⁷ This is in contrast to MILS, which contends that 'in modern times it is agreed that the rule applies *only in the most exceptional circumstances* otherwise *it could be used as an excuse to evade all sorts of inconvenient obligations*'.⁵⁸ This view overlooks the fact that dependent and dominated states can only turn to the *rebus sic stantibus* doctrine for addressing the problem of unjust treaties. Of course, in the final analysis, the invocation of the clause would hinge both on the social consequences of obeying a rule and on the collective resistance to it by affected peoples. In this context, international human rights law

53. B. S. Chimni, 'India and the Ongoing Review of the WTO Dispute Settlement System: A Perspective', (1999) *Economic and Political Weekly*, 30 Jan., 264–7.

54. For details see Chimni, *supra* note 7, ch. 3.

55. According to Lowe, 'interstitial norms' 'have no independent normative charge of their own. They do not instruct persons subject to the legal system to do or abstain from doing anything, or confer powers, in the way primary norms do. They direct the manner in which competing or conflicting norms that do have their own normativity should interact in practice.' V. Lowe, 'The Politics of Law-making: Are the Method and Character of Norm Creation Changing?', in Byers, *supra* note 45, 207, at 216.

56. A. Bagchi, 'Compulsory Licensing and the Duty of Good Faith in TRIPS', (2003) 55 *Stanford Law Review* 1529.

57. See Art. 62 of the Vienna Convention on the Law of Treaties.

58. *Akehurst*, *supra* note 37, at 144 (emphasis added).

is of obvious relevance, and CMILS suggests that it should be increasingly drawn on to support the invocation of the *rebus sic stantibus* doctrine.

4.2. Customary international law

For a practice to be designated a custom it must constitute 'evidence of a general practice accepted as law'. From a CMILS standpoint the significant question is why certain norms are designated or evolve as norms of customary international law and others do not. It is not very different from the question as to what the process is which gives rise to a rule of customary international law.⁵⁹ But the response to the question cannot simply be to uncover the class interests involved, for this would be to ignore the whole realm of international relations in which the state acts as an actor with a certain independent set of interests, as well as to fail to take into account the role of specific historical conjunctures (the Second World War, the Cold War, and so on). In other words, each norm of customary international law would have to be analyzed separately to determine the range of factors that go to constitute it.

However, while the formation of a customary international law norm is a complex process, it is a 'source' which closely manifests the will of powerful states. Indeed, it is accepted wisdom that the weight of some actors will matter more in the formation of customary international law. As Shaw puts it, the process 'is democratic in that all states may share in the formulation of new rules, though the precept that some are more equal than others in this process is not without a grain of truth'.⁶⁰ This inequality also assumes another form: 'for a custom to be accepted and recognized it must have the concurrence of the major powers in that particular field', generally the usual suspects, namely powerful states.⁶¹ This weighing of the practices and interpretations of the advanced capitalist states reveals the bourgeois character of international law. In the colonial era the entire law of state responsibility with respect to the rights of aliens was developed through customary international law to justify imperialist practices. Thus it does not require much imagination to argue that the principle of prompt, adequate, and effective compensation was designated as a principle of customary international law to protect the property rights of foreign capital as against the rights of subaltern peoples. The postcolonial era has been no different. Norms of customary international law have been engendered that are against the interests of dependent and dominated states, for example the norm of humanitarian intervention.

However, not all norms of customary international law are necessarily against the interests of subaltern states. For 'the influence of powerful States on customary law-making is not always decisive, because the "power of rules" [or what we call the "relative independence" of rules] sometimes affects what they are able to accomplish, when they seek to develop, maintain or change rules of customary international law'.⁶² For if it were to be always decisive it would both destabilize

59. Byers, *supra* note 4, at 205.

60. Shaw, *supra* note 37, at 58; Byers, *supra* note 4, at 205.

61. Shaw, *supra* note 37, at 63 (emphasis added).

62. Byers, *supra* note 4, at 206. See also S. Toope, 'Powerful but Unpersuasive? The Role of the United States in the Evolution of Customary International Law', in Byers and Nolte, *supra* note 41, at 287.

and delegitimize the international legal system.⁶³ But what is equally true is that states and classes without power cannot even collectively utter the magic words ‘customary international law’. Thus the dependent and dominated states failed to have any norm of the new international economic order (NIEO) designated as a norm of customary international law or, to take a different example, the principle of burden-sharing as a part of customary international refugee law.⁶⁴ For the acceptance of such norms calls forth an interpretative exercise that vests power in those very states (and MILS ideologues) on which obligations are to be imposed through the norm of customary international law. The satisfaction of the element of *opinio juris* depends to a great extent on their pronouncements. Furthermore, there is the persistent objector exit clause which powerful states can use to prevent the application of a customary norm inimical to their interests.⁶⁵ To put it differently, the content of customary international law, in contrast to treaty law, offers a more flexible mode of lawmaking and is therefore more easily attuned to class interests.

4.3. Soft law

While treaties and customary international law can never become instruments of change for subaltern states and classes, new sources (resolutions of international organizations or texts adopted in the non-governmental world) are banished to the realm of ‘soft law’. For, according to MILS, “soft law” is not law.⁶⁶ This result is achieved by embracing a positivist conception of law that is on the one hand de-linked from underlying social relations and, on the other hand, obsessed with (pseudo-) clarity of obligations and the availability of (unreflective) sanctions. The real anxiety is that to accept new democratic sources would mean the radical restructuring of the international system to the disadvantage of the international capitalist class. To put it differently, while ‘soft law’ reflects generalizable interests, hard law in a bourgeois world order embodies particular interests.

Unsurprisingly, the ideals of deliberative democracy and distributive justice that inform much ‘soft law’ are confined to political processes within nation-states, allowing imperialism to escape transnational state responsibility. These ideals, despite growing global integration, have even less relevance in the emerging bourgeois imperial international law. In brief, notwithstanding the fact that ‘soft law’ is most often the product of communicative action and power (and not as suggested by MILS the ‘tyranny of the majority’), it remains marginal to the operation of the international legal system. Not merely class issues meet this fate. Gender concerns are treated in the same way. As Charlesworth and Chinkin point out, gender issues ‘suffer a double marginalization in terms of traditional international law-making: they are

63. Toope, *supra* note 62.

64. See B. S. Chimni, *International Refugee Law: A Reader* (2000), 146–52.

65. One state alone, even if it is as powerful as the United States today, may not be able to influence the process of the formation of customary international law. In the present-day world a single state cannot redefine the rules of the game without undermining the legitimacy of the international (capitalist) system. That is why even the United States is compelled to heed the views and concerns of other advanced capitalist countries. See Toope, *supra* note 62, at 308–13.

66. Shaw, *supra* note 37, at 92.

seen as “soft” issues of human rights and are developed through “soft” modalities of law-making that allow states to appear to accept such principles while minimizing their legal commitments’.⁶⁷

5. THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW: GROWING INTEGRATION

Two standard theories are used to explore the nature of the international legal system through determining the relationship between municipal law and international law, namely the monist and dualist theories. The dualist view ‘assumes that international law and municipal law are two separate legal systems which exist independently of each other. The central question then is whether one system is superior to the other.’⁶⁸ The monist doctrine, on the other hand, ‘has a unitary conception of the “law” and understands both international law and municipal law as forming part of one and the same legal order’.⁶⁹ The conceptual debate between the two schools has yielded few significant insights.⁷⁰ For the relationship between municipal law and international law is validated or transformed not at the level of theoretical construct but in the realm of life, be it internal or international life. In a significant way ‘the dualism–monism distinction reflects the degree of openness of a domestic society as a whole and particularly its constitutional (legal) subsystem to the outside world’.⁷¹ The distinction, in other words, depends on the intensity and depth of inter-state relations or – which is the same thing – the development of the capitalist world economy. Its deepening integration in the era of accelerated globalization compels advanced capitalist states increasingly to impose its will on dependent and dominated states. Therefore in many areas of international life the monist theory is coming to prevail. As Mullerson notes, ‘in some areas the distinction between international and domestic [law] is *completely disappearing*’.⁷²

Of course, the openness of domestic society is not necessarily a choice exercised by subaltern states, but is in many cases a product of quiet coercion by dominant states and international institutions that they control. In the face of an expropriating monism that does not translate into justice, adhering to a dualist approach may serve a progressive purpose. It could help retain maximum autonomy for the dependent and dominated state in the interpretation and implementation of uniform global standards. Since in states adhering to the dualist approach international obligations have to be incorporated into municipal law, it would give greater flexibility in the implementation of international obligations. Thus, as argued above, the application of a national deference principle in implementing WTO obligations would create space for implementing legislation which safeguards, albeit within defined limits, the interests of subaltern classes without the state being seen to

67. Charlesworth and Chinkin, *supra* note 8, at 66.

68. Akehurst, *supra* note 37, at 63.

69. *Ibid.*

70. I. Brownlie, *Principles of Public International Law* (1998), 55.

71. Mullerson, *supra* note 2, at 172.

72. *Ibid.*, at 17, 178 (emphasis added).

be in violation of its international obligations. The autonomy that the national deference principle provides is the reason why the United States incorporated it (*vide* Art. 17.6) into the WTO Anti-Dumping Agreement. Of course, it is the class character of the state following the dualist approach, and the strength of resistance movements, which would determine the extent to which and the context in which subordination to international law will be spurned and a national deference approach adopted, where it does not bring commensurate benefits to subaltern classes.⁷³

6. THE JURISDICTION OF STATES

If the relationship of municipal law to international law is determined on the stage of global capitalism, so is the nature and extent of jurisdiction exercised by states. Historically, the jurisdiction exercised by a state under international law has been primarily related to its territory. It is the area for which laws can be prescribed and in which they can be enforced. However, the territorial principle was never absolute, as testified to by the nationality and protective principles of jurisdiction. But what MILS is silent about is the fact that in the colonial era the metropolitan powers went far beyond the nationality or protective principles to exercise near-complete extraterritorial jurisdiction in colonized territories, either through capitulation treaties or territorial control. Then came the decolonization process. The story of international law since then has been the effort by imperial powers to recover the loss of jurisdiction through legitimizing postcolonial forms of extraterritorial jurisdiction. This trend has been accentuated by growing global integration. The essence of contemporary developments, then, is the creation of a jurisdictional field that (i) seeks to limit the jurisdictional competence of the postcolonial state by constituting the bourgeois state as the normal state, to the advantage of the TCC; (ii) attempts to turn all geographical spaces into productive spaces through appropriate jurisdictional mechanisms; (iii) embeds a set of jurisdictional competences that simultaneously allows the advanced capitalist states to exercise extraterritorial jurisdiction *and* to use the territorial foundations of the law to shield the TCC and imperial state functionaries from advocates of transnational justice; and (iv) facilitates a dispute settlement regime that meets the needs of the transnational corporate world to establish a private justice system. The developments that support the first three elements of this thesis are touched on below. The aspect related to the privatization of jurisdiction is briefly noted in the next section.

First, a distinction between acts *jure imperii* and *jure gestionis* has been adopted by advanced capitalist states in order to extend jurisdiction over the commercial acts of third states. This separation of sovereign from commercial functions allows the consolidation of the power of the capitalist class in the sphere of production and the

73. Thus, while on the whole the dependence of third world states today translates into unequal integration into the international system, it is important to recognize that it is not integration per se but its character that is problematic.

constituting of the bourgeois state as the universal state. The separation is today an integral part of the law of state immunity.⁷⁴

Second, there is the expansion of jurisdiction of states over new geographical spaces. This development reflects the capitalist drive to subjugate and transform all space into productive space. It led, for instance, the 1982 Law of the Sea Convention to extend the jurisdiction of states (12-mile territorial waters, a 24-mile contiguous zone, a 200-mile exclusive economic zone) as well as establish rules relating to the exploration and exploitation of seabed beyond national jurisdiction. In the latter context the idea of a common heritage of mankind was advanced to create what can be called planetary jurisdiction. But the concept was stood on its head and the private exploitation of the seabed minerals through large consortiums was permitted by establishing a parallel system of exploration and exploitation. This led to the legitimization of international property rights as against common property rights as the matrix for the exercise of jurisdictional rights in new geographical spaces.

Third, there is the increasing incidence of the exercise of unilateral extraterritorial jurisdiction by advanced capitalist countries, in particular the United States.⁷⁵ It is justified *inter alia* by reference to the protective and effects doctrines. This expansion in extraterritorial jurisdiction is a function of both market and power.⁷⁶ The greater integration of the world market compels imperial states to attempt to control external situations and events that have consequences for domestic corporations and citizens.⁷⁷ To this end power is used, among other things, to universalize the national laws of imperial states. Several ways have been used, by the United States for example, to achieve this objective. Two may be mentioned to illustrate the point. The use of the certification mechanism is one. As Krisch notes, 'the extensive use of the certification mechanism provides a tool for the United States to create law for other States and to monitor its observance, while the United States itself remains unbound and unmonitored'.⁷⁸ Second, there is a move to 'substantivism' in the US courts, a term used to describe 'a choice-of-law methodology whose goal is to select the better law in any given case'.⁷⁹ While democratic on the face of it, 'substantivism' means 'the potential over-application of US law, and the potential for process-related

74. The fact that today even China, despite protestations, more or less accepts the principle of restrictive immunity reveals the extent to which the bourgeois state has become the normal sovereign state. G. Wang, 'Sovereignty in Global Economic Integration: A Chinese Perspective', in S. Yee and W. Tieya (eds.), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (2001), 357.

75. A good example of it is the Helms-Burton Act, 1996. For the text see (1996) 35 ILM 357. The impression that European states do not exercise extraterritorial jurisdiction is erroneous. See Brownlie, *supra* note 70, at 311–12.

76. It is perhaps true that 'the adoption of an extraterritorial rule or decision is not always contrary to international law, it is only contrary to international law when it does not have a reasonable link with the State enacting such a rule or making such a decision.' B. Stern, 'How to Regulate Globalization?', in Byers, *supra* note 45, 247, at 257 (emphasis in original). But in the era of globalization a 'reasonable link' is not always difficult to establish for imperial states, especially when it is backed by power. H. L. Buxbaum, 'Conflict of Economic Laws: From Sovereignty to Substance', (2002) 42 *Virginia Journal of International Law* 932.

77. As Krisch puts it in the context of the Internet: 'Through dominance of the markets, US law is spread globally'. N. Krisch, 'More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law', in Byers and Nolte, *supra* note 41, 135, at 164.

78. *Ibid.*, at 161.

79. Buxbaum, *supra* note 76, at 957.

unfairness in the resolution of economic conflicts'.⁸⁰ It also acts 'as a lever of forcing convergence . . . outside the political process that generally structures the harmonization movement'.⁸¹ This is already happening in the field of banking, securities regulation, civil aviation, cyber law, and other fields.⁸² In other words, a bourgeois imperial international law is being entrenched in several spheres of international law through the unilateral move to harmonize.

Fourth, extraterritorial jurisdiction has assumed a multilateral form. Thus, for example, the WTO, besides exercising compulsory jurisdiction over disputes arising from texts that constitute the WTO regime, also permits a member state, in certain circumstances, to make extraterritorial prescriptions. Such is, for instance, the case with national laws dealing with the relationship of trade and environment. Subject to the precondition of carrying out good faith dialogue with the other state(s) to arrive at a bilateral or multilateral solution to the environmental 'problem' in question, unilateral measures are deemed legitimate.⁸³ This is the substance of the decision of the WTO Appellate body in the *United States – Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia* case.⁸⁴

Fifth, there is the denial of what may be termed 'justice jurisdiction' by the courts of advanced capitalist states when confronted with the phenomena of 'mass torts' committed by transnational capital in the poor world. At the very moment that globalization unites the world, and extraterritorial jurisdiction is exercised by advanced capitalist states, its courts have sought to create 'new national frontiers of responsibility for the conduct of global capital'.⁸⁵ As Baxi notes, 'the jurisprudence of jurisdiction is also the history of construction and creation and annihilation of spaces of justice'.⁸⁶ Doctrines such as *forum non conveniens* have been used 'maximally [to] deny foreign mass disaster plaintiffs their day in their chosen forum'.⁸⁷ The Bhopal case, in which a US court applied this doctrine, is just one instance of this jurisprudence of injustice.

Sixth, there is the evolving realm of universal jurisdiction in the domain of international crimes.⁸⁸ It extends the jurisdictional autonomy of all states, albeit in directions that may promote justice in the world, with the state acting as a surrogate for the international community.⁸⁹ But there is a troubling downside in an

80. *Ibid.*, at 966.

81. *Ibid.*, at 972.

82. J. Braithwaite and P. Drahos, *Global Business Regulation* (2000), 475–7.

83. But, as Stern notes, 'the fact that the enforcement is territorial does not conceal or erase the fact that the prescription is extraterritorial, and thus the entire law remains illegal'. Stern, *supra* note 76, at 258.

84. For the text of the decision see WT/DS58/AB/RW, 22 Oct. 2001: Report of the Appellate Body. For a comment see B. S. Chimni, 'WTO and Environment: The Legitimization of Unilateral Trade Sanctions', (2002) *Economic and Political Weekly*, 12–18 Jan., at 133.

85. U. Baxi, 'Mass Torts, Multinational Enterprise Liability and Private International Law', (1999) 276 *Recueil des Cours* 297, at 312.

86. *Ibid.*, at 343; Hu Zhenjie, 'Forum Non Conveniens: An Unjustified Doctrine', (2001) 48 *Netherlands International Law Review* 143, at 159–62.

87. Baxi, *supra* note 85, at 352; Zhenjie, *supra* note 86.

88. C. M. Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', (2001) 42 *Virginia Journal of International Law* 82.

89. *Ibid.*, at 96.

imperial world. The exercise of universal jurisdiction can, even its advocates admit,

produce conflicts of jurisdiction between states that have the potential to threaten world order, subject individuals to abuses of judicial processes, human rights violations, politically motivated harassment, and denial of justice. In addition, *there is the danger that universal jurisdiction may be perceived as hegemonistic jurisdiction exercised mainly by some Western powers against persons from developing nations.*⁹⁰

7. INTERNATIONAL ECONOMIC LAW

The growing integration of the capitalist world economy in the era of globalization has meant rapid developments in international investment and trade laws entrenching international property rights, ensuring the mobility of industrial, service and finance capital, and undermining the autonomy of the dependent and dominated states, with grave consequences for the social and economic rights of subaltern classes. Reference may be made to certain key developments that inform the emergence of bourgeois imperial international law.

First, at the initiative of the imperial states, several international treaties have been adopted on the subject of foreign investment. These include bilateral investment protection treaties (BITs), the Agreement establishing the Multilateral Investment Guarantee Agency (MIGA), the Agreement on Trade Related Intellectual Property Rights (TRIPS), the Agreement on Trade Related Investment Measures (TRIMS), and the General Agreement on Trade in Services (GATS). The essence of these international legal developments is to confer on TNCs a bundle of rights that range from ease of entry and establishment, the proscription of performance requirements, the strong protection of intellectual property rights, generous rules of compensation in the event of nationalization or expropriation and insurance against non-economic risks to the free choice of settlement of disputes in order to avoid problematic national laws and fora. The subject of trade and investment is also included in the WTO Doha Round of trade negotiations. It may add to this bundle of rights. On the other hand, few duties are imposed on the TNCs vis-à-vis host states and peoples.

Second, international trade law has expanded greatly through the adoption of the General Agreement on Tariffs and Trade (GATT) Final Act of the Uruguay Round of Trade Negotiations ('Final Act') which *inter alia* established the WTO. GATT incorporates the basic principles of 'free trade'. These include the most-favoured-nation and national treatment principles. There are also rules that govern the use of quantitative restrictions, subsidies, anti-dumping duties, customs unions, and emergency measures. The essence of the principles of free trade that have been elaborated in the GATT/WTO regimes is to pry open the markets of the dependent and dominated economies without giving sufficient access to competitive products from these countries to the markets of advanced capitalist states. The agreements that constitute the Final Act go beyond the statement of basic principles to regulate a

90. *Ibid.*, at 154–5 (emphasis added).

whole range of non-trade areas such as intellectual property rights (IPRs), investment measures, and services. More areas are the subject of the Doha Round of trade negotiations, namely trade and the environment, competition policy, and so on. Implied in the regulation of non-trade areas is the transfer of sovereign power to the WTO. While through this process the GATT/WTO regimes encourage the free mobility of goods, capital, and services, little has been done to increase the mobility of labour, revealing the bias of CIL vis-à-vis the subaltern classes. Indeed, during the very period in which barriers to the movement of goods, capital, and services are being brought down, the advanced capitalist states are raising the barriers to the movement of labour. While the multilateral spirit of the GATT/WTO regime is not to be scoffed at, any overall assessment of the operations of GATT/WTO regimes can only conclude that they are not to the advantage of the subaltern classes in the third world. It may also be noted in this context that the principle of special and differential treatment has been considerably watered down.

Third, an international monetary law has evolved to constrain the dependent and dominated economies from breaking free and implementing autonomous economic and financial policies. This international monetary law is essentially the creation of the international financial institutions. The essence of international monetary law is the imposition of conditionalities which ensure that a neo-liberal agenda suited to the interests of TCC is implemented.⁹¹ One result has been the privatization of public assets and, perhaps even more significantly, a capital-account liberalization culture that has allowed hyper-mobile finance to run roughshod over subaltern states to the benefit of TCC. The 1997 east Asian crisis was a manifestation of this loss of monetary sovereignty and control that severely affected the living standards of the subaltern classes.

Fourth, there has evolved over the last few decades 'the notion of *lex mercatoria*', which 'enables private power to be exercised in the making of international commercial law'.⁹² First, of course, private entities are playing, through various organizational fronts (for example, the International Chamber of Commerce), a role both in adopting international law standards and in influencing inter-state negotiations to enhance the interests of the TCC. The state is no longer the only participant in the international lawmaking process, albeit it remains the principal actor. The globalization process is breaking the historical unity of law and state and creating 'a multitude of decentered law-making processes in various sectors of civil society, independently of nation-states'.⁹³ Second, a separate world of international commercial arbitration has been created to resolve business disputes. Earlier, 'forum-selection clauses were deemed invalid as attempts to oust the forum court of its jurisdiction, and choice-of-law clauses were deemed invalid as inconsistent with the absolute right of a sovereign to apply its law to persons and conduct

91. 'The extension of the normative force of international standards by the device of conditionality is an important characteristic of contemporary international law.' Lowe, *supra* note 55, at 212.

92. M. Sornarajah, 'Globalization and International Law: The Law as an Instrument of Hegemonic Power', 76 (on file with the author).

93. G. Teubner, 'Foreword: Legal Regimes of Global Non-state Actors', in G. Teubner (ed.), *Global Law Without a State* (1997), xiii.

within its territory'.⁹⁴ In contrast, at present party autonomy 'has been interpreted expansively'.⁹⁵ Party autonomy allows a private entity to choose the jurisdiction and law it likes. Thus what is essentially a system of private justice has been established through the international commercial arbitration movement in the name of facilitating international trade and business. What is more, this world of international commercial arbitration is controlled by a club of arbitrators 'who make law that is favorable to the large commercial conglomerates that straddle the world'.⁹⁶

8. INTERNATIONAL ENVIRONMENTAL LAW

International environmental law is another area in which the interests of imperialism are coming to prevail. CIL and MILS have in this case too failed to confront the differing perspectives of the first and third worlds, or the global ruling and subaltern classes, as the central debate regarding the conceptual foundation of international environmental law.⁹⁷ First, according to Mickelson, while advanced capitalist states and MILS do present 'an historical context for international environmental law' it is a truncated historical context that does not include the ravages of colonialism.⁹⁸ A full historical account would take cognizance of the manner in which nature was appropriated by the colonial powers to stabilize and expand capitalism within the world economy. In the colonial period third world spaces were treated as *terra nullius* for the exploitation of natural resources unconstrained by any international law of sustainable development. But this historical relationship between the expansion and accumulation of capital and environmental degradation is left unconsidered, conveniently erasing third world histories.

Second, advanced capitalist states and MILS gloss over the possibility that the world has already been transformed into a zero-sum game for development. Yet no distinction is made between the basic human needs of the subaltern classes and consumerism. The focus on the idea of intergenerational equity subtly de-emphasises the fact, even as it does not deny it, that without intragenerational equity we will not be able to achieve equity among generations. It means that the principle of common but differentiated responsibility, the central principle of international environmental law from the perspective of subaltern states and classes, does not receive the content it would have done had historical responsibility been taken seriously. There is thus the unfulfilled potential of legal instruments, be this the bio-diversity convention or the climate change convention.

Third, contradictory legal principles have been adopted in different international agreements to the detriment of the overall goal of environmental protection and to the benefit of TCC. Thus, for example, while several environmental law agreements talk of the need to transfer environment-friendly technology to the third world,

94. Buxbaum, *supra* note 76, at 938.

95. *Ibid.*, at 939.

96. Sornarajah, *supra* note 92.

97. K. Mickelson, 'South-North, International Law, and International Lawyers', (2000) 11 *Yearbook of International Environmental Law* 52, at 53.

98. *Ibid.*, at 56.

the WTO Agreement on TRIPS establishes a hard patent regime that limits such a possibility by making this technology more expensive. In other words, the goal of sustainable development is subject to the protection of international property rights. The reason is that the TCC has come to exercise great influence on international environmental negotiations. As one acute observer of these negotiations has noted, 'corporations influence almost every negotiation on the environment that has taken place under the auspices of the UN'.⁹⁹

Fourth, as has already been alluded to, courts of advanced capitalist states and MILS do not take seriously the violation of environmental standards in subaltern states by transnational capital, even when it involves the gross violation of the human rights of the subaltern classes.¹⁰⁰ The *locus classicus* here is the Bhopal disaster case. In 1984 a leak of methyl isocyanate gas from a pesticide plant in Bhopal, India, owned by the US corporation Union Carbide, resulted in thousands of deaths and the exposure of an estimated 500,000 individuals to the gas, resulting in chronic illnesses, including depression of the immune response. The Indian government, representing the plaintiffs, failed in its attempt to sue in the United States thanks to the *forum non conveniens* doctrine, and following much-delayed litigation the case was settled in India for a paltry \$470 million.¹⁰¹

9. INTERNATIONAL HUMAN RIGHTS LAW

The discourse of human rights is today omnipresent. States, irrespective of the class(es) in power, seek to present themselves as the embodiment of international human rights. The reasons are that the universalization of the bourgeois state necessitates that the free and equal individual be placed at the centre of that universe; that it is the necessary condition for the creation of global markets and a global system of production; and that the language of human rights helps entrench the private rights of individuals and corporations. As Evans puts it, 'in the current period, legitimate human rights can be defined only as that set of rights that require government abstention from acts that violate the individual's freedom to innovate and to invest time, capital, and resources in processes of production and exchange'.¹⁰² But, to be sure, it is not my argument that the language of rights is not empowering for subaltern classes. The language of rights can shield against arbitrary state action, a matter of supreme importance to resistance movements. However, it is equally the case that despite the enormous expansion in human rights law and institutions in the past few decades, both the international (north–south) and internal divides have increased and the welfare state is on the retreat.

Right, as Marx observed, 'can never be higher than the economic structure of society and its cultural development conditioned thereby'.¹⁰³ Since the bourgeois

99. A. Aggarwal *et al.* (eds.), *Poles Apart* (2001), 382.

100. For some of the cases that have captured public attention in recent years see M. Anderson, 'Transnational Corporations and Environmental Damage: Is Tort Law the Answer?', (2002) 41 *Washburn Law Journal* 399, at 405–6.

101. See generally Baxi, *supra* note 85.

102. T. Evans, 'Citizenship and Human Rights in the Age of Globalization', (2000) 25 *Alternatives* 415, at 416.

103. K. Marx and F. Engels, *Selected Works* (1970), III, 19.

state with the free and equal individual at its centre is superimposed on dependent and dominated societies, it is difficult to deliver on the promise of the realization of social and economic rights. It explains the continuing reluctance of the United States to ratify, and thereby give greater legitimacy to, the International Covenant on Economic, Social and Cultural Rights (ICESCR). What the imperial world fears is the universalization of alienation to which ICESCR draws attention, namely the absence of control over conditions of work and its product. It dreads the implications of the insurrectionary fact that for the subaltern classes 'life itself appears only as a *means to life*' with the accompanying 'loss of . . . self'.¹⁰⁴ It is conscious of the fact that the universalization of alienation is, among other things, a function of neocolonial policies and laws which violate the economic, social, and cultural rights (ESCR) of the nationals of dependent and dominated states. Thus, for example, the WTO, the International Monetary Fund (IMF) and the World Bank are promoting a neo-liberal agenda at the initiative or behest of the advanced capitalist states on the ground that it would promote human welfare. However, despite growing evidence that the structural adjustment programmes of the IMF–World Bank combine and the rules of the WTO have a negative impact on the rights of subaltern classes, there has been no attempt to rethink these policies. The UN Human Rights Commission (UNHRC) has even passed a resolution that calls for ensuring that international economic agreements help actualize human rights.¹⁰⁵ But notwithstanding this resolution the United Nations itself is busy placing its faith in the neo-liberal agenda. This becomes clear from, among other things, its global compact initiative and the bid to create neo-liberal post-conflict states through relying on the IMF–World Bank combine.¹⁰⁶

In brief, developments in international human rights law need to be given meaning today in the matrix of an imperial global dispensation. This places limits on the realization of human rights, that is, without substantial transformation of the societies that are its subjects. It also explains why, for example, victims of human rights violations 'have to clear more hurdles and accept more limited access to remedies than the owners of intellectual property'.¹⁰⁷ In the circumstances, framing all issues and strategies in the language of rights distracts from their realization.¹⁰⁸

10. THE INTERNATIONAL LAW OF STATE RESPONSIBILITY

On the other hand, however, the international law of state responsibility excludes answerability for the policies of imperialism. The law of state responsibility was historically designed to protect the rights of aliens in the era of colonialism, in particular property rights. It is no accident that it evolved inextricably linked with the law relating to the nationalization and expropriation of alien property. While

104. K. Marx, *Economic and Philosophic Manuscripts of 1844* (1959), 73 (emphasis added).

105. UN Doc. E/CN.4/Sub.2/2000/7, 17 Aug. 2000 – Commission on Human Rights: Sub-commission on the Promotion and Protection of Human Rights, Fifty-second Session: Intellectual Property Rights and Human Rights.

106. B. S. Chimni, 'Refugees and Post-Conflict Reconstruction: A Critical Perspective', in E. Newman and A. Schnabel (eds.), *Recovering from Civil Conflict: Reconciliation, Peace and Development* (2002), 163, at 166–7.

107. T. Collingsworth, 'The Key Human Rights Challenge: Developing Enforcement Mechanisms', (2002) 15 *Harvard Human Rights Journal* 183, at 203.

108. D. Kennedy, 'The International Human Rights Movement: Part of the Problem?', (2002) 15 *Harvard Human Rights Journal* 101, at 108.

today the law of state responsibility 'is in the main dealing with a set of principles concerned with second-order issues, in other words the procedural', a number of textbooks still deal with the law along with the rights of aliens.¹⁰⁹ The first Special Rapporteur of the International Law Commission (ILC), F. V. Garcia Amador, who submitted six reports on the subject between 1956 and 1966, did the same.¹¹⁰ It was only later that the focus shifted to 'the framework or matrix of rules of responsibility, identifying whether there has been a breach by a State and what were its consequences'.¹¹¹ The Commentary on the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts states: 'The articles do not attempt to define the content of the international obligations breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would involve restating most of substantive international law, customary or conventional'.¹¹² This de-coupling of the procedural from substantive rules is a significant step towards erasing the historical link between the protection of alien property rights and the law of state responsibility, thereby allowing it to occupy an apparently neutral field, with the result that the injustice of an obligation (as manifested in resistance of subaltern classes and the violation of their human rights) is not a defence against its violation.¹¹³ Thus the formalism of the principle of sovereign equality that informs the law of treaties is matched by the formalism of the law of state responsibility. Each returns to the other to legitimate itself; the law of state responsibility returns all questions relating to the negotiations, interpretation, and content of the treaty back to the law of treaties:

It is a matter of the law of treaties to determine whether a State is a party to a valid treaty, whether the treaty is in force for that State and with respect to which provisions, and how the treaty is to be interpreted.¹¹⁴

The double manoeuvre renders victims of international law invisible and without remedy.¹¹⁵ This has not of course prevented MILS from including rules relating to countermeasures in the ILC's Draft Articles on State Responsibility which favours, as has been pointed out by Nepal, Switzerland, and Greece in the Sixth Committee, powerful states (and classes) and undermines the prestige of the international legal order.¹¹⁶

On the other hand, the 'solidarity measures' included (termed by Art. 48 of the ILC Draft as 'invocation of responsibility by a State other than an injured State') exclude

109. Shaw, *supra* note 37, at 541.

110. J. Crawford, *The International Law Commission's Arts. on State Responsibility* (2002), 1.

111. *Ibid.*, at 2.

112. *Ibid.*, at 74.

113. None of the recognized 'circumstances precluding wrongfulness', including the defence of 'necessity', cover the case.

114. *Ibid.*, at 75.

115. To put it differently, positivism 'allow[s] international lawyers to avoid recourse to controversial moral judgements'. Brilmayer, *supra* note 42, at 98.

116. W. Czaplinski, 'UN Codification of Law of State Responsibility', (2003) 41 *Archiv des Völkerrechts* 76. Earlier, too, some governments such as those of Cuba, India, and Mexico had suggested the 'deletion of the Chapter on countermeasures altogether'. Crawford, *supra* note 110, at 48. 'On the other hand, USA declared that the regulation proposed is too restrictive and in fact constituted an important limitation upon the right to apply countermeasures, the Draft should be re-thought and better elaborated in this respect', Czaplinski, at 76.

from scope state responsibility for transnational harm. It conceives some situations (best termed ‘international harm’) as calling for solidarity measures, thereby normalizing and legitimizing transnational harm. In contrast, what CMILS proposes is, first, opposition to the idea of countermeasures in the absence of fair institutional procedures. Second, it would argue the case for a regime of transnational responsibility of states for transnational harm.¹¹⁷ CIL should make each state responsible not only to its own citizens but also to the citizens of other states, that is when its acts result in the human rights violations of citizens of other states. Unless some form of transnational state responsibility is institutionalized it is difficult to see how subaltern classes can access justice. CIL, as Gibney points out,

has already codified certain kinds of transnational duties, but this codification has occurred in the context of the enforcement of human rights violations committed in or by ‘other’ countries. What is missing is an interpretation of the duties states take on when they assist and allow offending governments to operate – and in doing so become offending states themselves.¹¹⁸

Or for that matter prescribe policies (either themselves or through international institutions) that result in human rights violations in other states but are generally attributed (*vide* the principle of state consent) to the state of which the persons are nationals whose rights have been violated. Transnational state responsibility has of course to go hand in hand with transnational corporate responsibility and transnational institutional responsibility (left out of the ILC’s Draft Articles). This three-pronged approach is necessary to democratize the emerging bourgeois imperial international law.

I I. INTERNATIONAL LAW AND THE USE OF FORCE

Laski wrote that

as long as the effective purpose of the state, internally regarded, is to protect the principles of capitalism, so long, in its external aspect, will it require to retain the use of war as an instrument of national policy . . . capitalism and a world-order are incompatible; war is rooted in the capitalist system in our experience of its necessary functioning.¹¹⁹

To put it differently, ‘imperialism is, in general, a striving towards violence and reaction’.¹²⁰ Force thus has a class content and is used to further the interests of the international capitalist class. The subaltern classes are its victims in a triple sense.

117. ‘Transnational harm refers to injury which the state, or non-state actors, or forms of social organization do to the members of other societies. The revolution in transnational harm is . . . the result of the globalization of capitalist relations of production and exchange.’ A. Linklater, ‘Towards a Critical Historical Sociology of Transnational Harm’, in S. Hobden and J. M. Hobson (eds.), *Historical Sociology of International Relations* (2002), 162, at 170.

118. M. Gibney, ‘Transnational State Responsibility for Violations of Human Rights’, (1999) 12 *Harvard Human Rights Journal* 267, at 295.

119. H. J. Laski, *The State in Theory and Practice* (1935), 229.

120. V. I. Lenin, *Selected Works* (1975), I, 702.

First, the decision to go to war is taken without consultation with them. Second, it is from these classes that combatants are largely recruited and sacrificed. Third, they inhabit an unprotected and immobile universe where related non-combatants (women and children) invariably become victims of conflict.

Force assumes different forms in different eras. In the colonial phase of imperialism the unapologetic and open use of coercion was deemed legitimate. The post-colonial phase itself can be divided into two phases: the Cold War and globalization phases. During the Cold War there was a broad consensus over the UN Charter obligation not to resort to the threat or use of force against the political independence and territorial integrity of states (Art. 2(4)) unless it was in self-defence (Art. 51) or authorized by the UN Security Council (under Chapter VII). The Charter framework has now slowly begun to unravel. The era of accelerated globalization has seen attempts to redefine the norms relating to the use of force in order to realize the current interests of imperialism: the doctrine of pre-emptive attack is one outcome. To be sure, it is not 'the dogmatism of international law' that accounts for the new thinking on the question of use of force;¹²¹ sufficient interpretative flexibility was always available to justify the threat or use of force by powerful states as long as some procedural constraints were respected. Today, however, the foremost imperial state, the United States, in the absence of a global countervailing power, seeks to change the rules of the game in a bid to legitimize total global domination. The military role of the imperial state is, among other things, crucial to the overseas expansion of transnational capital. Towards this end the United States has established over one hundred military bases in the world and has repositioned NATO. On the other hand, it is not willing to pay heed to global protests (as in the war on Iraq) or to international humanitarian law (IHL) (e.g., the Gulf War, Kosovo, and Iraq). However, given the fact that the Charter law is a 'powerful constituent element of peace',¹²² and the consensus that was in place for decades, and also the fear of the consequences of unravelling the Charter framework and undermining IHL, differences are likely to arise (as they have) among imperial states from time to time on the need to reject it.

There is much greater unity among these states when it comes to the doctrine of humanitarian intervention, the understanding of course being that it will be selectively enforced. It reflects the successful ideological deployment of the contemporary discourse of human rights opportunistically to present the global capitalist crisis as a local crisis and to legitimize killing with kindness. The doctrine of humanitarian intervention therefore has the support of MILS and also of much of public opinion in the imperialist world. It will now combine with the ongoing 'war against terror' to produce a lethal legitimacy for violence against subaltern states and peoples.¹²³ In terms of international law, humanitarian intervention outside the UN Charter

121. J. Habermas, 'The Fall of the Monument-I', *The Hindu*, 5 June 2003.

122. H. Lauterpacht, *The Function of Law in the International Community* (1933), 437. According to Lauterpacht, 'peace is pre-eminently a legal postulate', at 438.

123. Note in this respect the shift from 'weapons of mass destruction' to 'regime change' as justification for the war against Iraq. See generally T. J. Farer, 'Humanitarian Intervention before and after 9/11: Legality and Legitimacy', in J. L. Holzgrefe and R. O. Keohane (eds.), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (2003), 53, at 80–9.

framework is clearly unlawful. In the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* the ICJ had directly considered the relationship between human rights and the violation of the principle of the use of force by the United States and concluded that 'while the United States might form its own appraisal of the situation as to the respect of human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect'.¹²⁴ It may also be recalled that the authoritative 1970 Friendly Relations Declaration does not make an exception in favour of humanitarian intervention.

It is often argued that there has evolved a customary international law norm that permits armed unilateral humanitarian intervention. But this view has been persuasively contested by others. After a review of the principal authorities and state practice on the subject, Brownlie has concluded: 'Whilst in theory customary law could develop in such a way as to legitimize action by way of humanitarian intervention, the proponents of a change in the customary law have a burden of proof of a new consensus among States which could not be discharged on the evidence available'.¹²⁵ Thus there is no rule of international law that permits unilateral armed humanitarian intervention. But such a contention is met with the slogan that humanitarian intervention may be illegal but moral. In short, the doctrine of humanitarian intervention, along with the doctrine of pre-emptive attack, has been *invented* as an integral part of an emerging bourgeois imperial international law in a bid to establish global political domination.

12. LOOKING AHEAD

In 1935 Laski wrote that 'the high road to an effective international order lies through the reconstruction of the class-relations of modern society'.¹²⁶ A year later Dutt observed that 'conflict between enlarged world productive forces against the existing social and political forms is the crux of world politics'.¹²⁷ Both these observations retain their validity even today, albeit the vision of what has to replace the existing world order has undergone transformation. The old socialist model has lost much of its attraction after the collapse of 'actually existing socialism' and growing evidence of the violation of the civil and political rights of socialist citizens. On the other hand, the global capitalist system continues to reproduce development and underdevelopment in a single movement in the international system. It is the cause of the massive violation of the rights of peoples the world over. Yet there is no third model that has caught the imagination of the subaltern classes. But those who are the subjects of oppression are not waiting for an alternative to be fully articulated. They are willing to muddle through history, for it is a struggle for survival with dignity. There is thus the hope that the growing protests in the north and the south

124. [1986] ICJ Rep., at para. 268.

125. I. Brownlie, 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects', (2000) 49 ICLQ 878, at 904.

126. Laski, *supra* note 119, at 254.

127. R. P. Dutt, *World Politics 1918–1936* (1936), 23.

against an unequal globalization process will invent the new model as it brings about changes in the existing global capitalist dispensation. At the very least these resistance movements, if they gather strength and unity, can reform several key sites of the system and make the world a better place to live in.

What role should international lawyers play in this struggle? Given the crucial role that MILS has played in codifying and legitimizing dominance it would be naive to expect its proponents to suddenly appreciate the protests of the old and new social movements and join them as organic intellectuals in an attempt to reform the existing rules of the game. It underlines the significance of critical scholarship. But critical scholarship, unfortunately, is a divided house. The third-worlders, the Marxists, the feminists, the new approaches are unable to come together to contest MILS. The reasons are more fundamental than the simple lack of co-ordination. There are profound differences in their vision of the future and about what can be done to get from here to there. But this should not preclude collective critical reflection and thinking on MILS. Fragmented efforts at critiquing MILS are unlikely to dent it seriously. The results of the efforts of New Approaches to International Law (NAIL), third world approaches to international law (TWAIL) and feminist approaches to international law (FtAIL) have already made a difference. It would make a bigger difference if they were to come together without in any way merging their identities to produce *inter alia* alternative critical texts.

For those who believe that critique must be followed by reconstruction, the challenge is to use CIL and institutions to the advantage of the subaltern classes. The Austro-Marxist Karl Renner believed that legal institutions of capitalist society could play an effective role in its transformation to a socialist society. As Bottomore has pointed out, Renner was 'occupying a place precisely between Bolshevism and reformism'.¹²⁸ While Renner perhaps went too far in his belief that 'capital as the object of property, though *de jure* private, has in fact ceased altogether to be private' or that law is an 'empty frame' or that 'the development of law works out what is reasonable', there is no gainsaying that legal nihilism is not the appropriate counter.¹²⁹ What is called for is a creative and imaginative use of existing international laws and institutions to further the interests of the 'wretched of the earth' even as we underline its class character. International lawyers cannot pretend to do more.

128. T. Bottomore and P. Goode (eds.), *Austro-Marxism* (1978), 44.

129. K. Renner, 'The Institutions of Private Law and Its Social Functions', in *Lloyd's*, *supra* note 33, at 1071.