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# **INTERNATIONAL LAW AND REVOLUTION**

OWEN TAYLOR

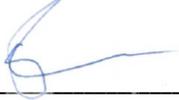
Thesis submitted for the degree of PhD

2014

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## **ABSTRACT:**

This thesis aims to provide an investigation into how revolutionary transformation aimed to affect the international legal order itself, rather than what the international order might have to say about a revolution. This study also hopes to illuminate the potential limits that the legal form offers to revolutionary praxis. Revolutionary praxis is taken to constitute action taken in pursuit of the social aspirations first born in the modern era alongside the expansion of the capitalist mode of production that envisaged a world free of the exploitation of man by man and the relentless pursuit of profit. This thesis takes as a central concern the deep connection between the form of law and capitalism, which implies that law as it is currently recognised would not survive the demise of capitalism, and that therefore revolutionary legal praxis would have as its ultimate aim the overthrowing of the current system of international legal relations. Such practice would simultaneously aim to reveal the law as complicit in and constitutive of capitalist oppression, thereby disenchanting the liberal legalist aspirations of the progressively inclined members of the profession. In order to examine this basic thesis, Soviet and Third World relationships to international law are considered. The Soviet relationship was explicitly couched as revolutionary praxis, although it did not see law as the prime location of such activity. The Third World also aimed at radically overhauling international relations, but did so with a far greater investment in the form of law as a vehicle for this aim. The thesis concludes that although the prime reason for the failure of both Soviet and Third World's international legal engagement could be considered in some sense as 'force of arms', that this was entwined with and supported by the 'force of law'. The law's internal logic proved inimical to revolutionary praxis, which offers a substantial caution to any attempt to 'use' international law to pursue anti-capitalist activity.

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It is with some irony that I come to write the acknowledgements for this thesis, and find it as fraught as the thesis itself. The line between the personal and the professional, the academic and the political should, at least here, be boldly erased and free reign given to self-expression. Yet if these words are to be considered to encapsulate everything that lies within, and the years of life that somehow went into producing it (or at least contemplating its production) then it carries a heavy burden. At the very least it is vital to acknowledge that no labour, least of all the intellectual kind, is conducted in isolation – although the doctoral thesis may well line up alongside those that create the best impression of this for the author. The faults in style and substance within the work that follows are most wholeheartedly my own, but anything of worth contains a debt of gratitude to family, friends and comrades.

First and foremost thanks must go to my supervisor, Matthew Craven, for many years of philosophical debates and discussions, and for ever incisive comments and advice. His support before and throughout the doctoral process was invaluable. Special thanks also go to David Kennedy, for kindly serving as my second advisor in my first year, and providing a uniquely diverse and fascinating intellectual forum at BIARI and then the IGLP in which the early thoughts of this thesis took shape and out of which grew many enduring friendships. Thanks also go to the Arts and Humanities Research Council, whose generous support enabled this project and provided three valuable years in which to focus exclusively on research, writing, and developing as an academic. Their generous funding in collaboration with the British Academy and the Kluge Centre at the Library of Congress supported an illuminating and immensely enjoyable six months in Washington DC.

A project of this length and nature leaves a very particular mark on both the author and the people close to them. Perhaps that is in the design, a rite of passage that must change or break you. But more than anything this has brought home to me the political reality that motivates my study and the inequality we live through. As a materialist it is immediately necessary to acknowledge that none of this would be possible without the generous and unstinting support of my family that provided, in the final years when it was most direly needed, a place to live, write and research. Beyond the material side of things the emotional support you have given me is beyond measure; I have never been more grateful that there are so many of you, and that we are so close.

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## Introduction

It is a strange world that confronts the discipline of international law today. The number of collective international resolutions aspiring to noble activities such as ending world poverty has expanded seemingly exponentially, alongside a plethora of international organisations fighting to implement various human rights norms in various places. The NGO human rights worker has become the star of Hollywood movies, embodied most recently by Brad Pitt in *World War Z*. In both Hollywood and popular academic discourse, international law has become the beleaguered victim of state power in need of saving, or vigilante-style enforcement. It appears that we live in a time in which the best aspirations of humanity are embodied in international law; that the noblest of our species work in NGOs; that their allies are international lawyers, and that the only barrier to realised utopia is someone with the muscle to back it all up. We need these heroes, of course, because there are still bad guys out there who for some reason do not respect the law, do not like human rights, and cannot resist the opportunity to make a profit by nefarious means. These bad guys seem familiar from our historical cautionary tales – they reside East of Greenwich and hold strange religious fundamentalisms or ancient ethnic hatreds and attachments to outdated visions of Empire.

This might sound like a flippant caricature, but this vision has surprising purchase today. An intellectual caution against this legal optimism forms part of the inspiration for this thesis. It is a similar caution that has inspired substantial critical work within international law, and it is to this scholarship that this thesis makes a contribution. The lure of this redemptive image of law remains a powerful one even within this body of work and therefore that progressive potential calls for further investigation. However, there is a second impulse founded in the particularities of contemporary times caricatured above. For the past fifteen or so years, this same valiant legal narrative has incorporated a surprising change. Over most of the past two centuries this white-washed image of international law has been associated with the developed, industrialised ‘West’ (in both cultural and ethnic terms in line with 19<sup>th</sup> and 20<sup>th</sup> Century European attitudes to race), against which was posed the chaos of the law’s opposite – barbarism, unruliness, and revolution. Yet suddenly this same heroic Western position, wielding the scales of international justice like a bludgeon, has appropriated for itself the revolutionary label and thereby formed a fascinating conceptual pairing of international law and revolution. This coupling provides the second basic impulse behind the thesis – what is the relationship between international law and revolution, and what is their respective content? Is there any way in which the content of the two would make such a pairing incompatible?

### *Foreground: Revolutionary Times?*

In popular discourse both the particular content of revolution and of international law serve as placeholders for political change considered favourable to Western interests and the necessary commitment to the legal arguments used to support them. However such shifts in language are important and can be indicative of deeper political change. In this instance the claiming of the language of 'revolution' points to the collapse of the supposed alternative of communism represented by the Soviet Bloc and the concomitant loss of any hope for an emancipated non-capitalist form of social life. The linguistic shift is embodied in the recent example of Ukraine. According to the majority of the Western press, Russia has just recently 'invaded' Crimea, thereby violating Ukrainian Sovereignty. In response, 'Cold War' antagonisms have resurfaced and a collective breath is being held as Western Europe and America ponder the possible collapse of fifteen years of collaborative international social construction.<sup>1</sup> Russia's actions have supposedly been conducted in support of the 'neo-Soviets' in the Ukraine, against the 'pro-revolutionaries' pushing for closer ties with Europe.<sup>2</sup> For the sake of argument, let us put to one side the details of events in Ukraine. The neo-Soviets, supported by Russia, face off against the pro-revolutionaries. This is an interesting reversal. Since the fall of the Berlin Wall and the collapse of the Soviet Union, the 'West', broadly defined as that which opposed the Soviet Bloc, has appropriated the term revolution for itself. However, for the vast majority of the twentieth century this same Western bloc supported counter-revolutionary forces across the globe, brutally repressed revolutionaries at home and abroad, and deposed democratically elected leaders who adopted revolutionary positions.<sup>3</sup>

Ukraine is only the latest example of this rhetorical pose, and of the requisitioning of the term revolution by those same interests that were previously vehemently opposed to the ideals associated with it. Forces allied to Western interests attracted the label of revolutionaries in Syria, Tahrir Square in Egypt, and Libya. The 'colour' and 'velvet' revolutions of post-Soviet Eastern Europe were also conceived in the same vein. Challenging this narrative does not involve adopting a position in which the old Soviet Union, Communist China, North Korea or any other liberal bogey-man is considered to be representative of 'the revolution'. But there was definitely a time, and should still be a sense, in which a revolution meant more than the changing of one set of elites for another; certainly more than opening up a country to neo-liberal economic restructuring in the form of massive public sector sell-offs at deflated prices for vast private and corporate profit, in addition to enabling multinational corporations to move in and exploit low paid wage labourers.<sup>4</sup> Certainly if it had anything at all to do with the

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<sup>1</sup> Henry A. Kissinger, "How the Ukraine Crisis Ends," *The Washington Post*, March 7, 2014, sec. Opinions, [http://www.washingtonpost.com/opinions/henry-kissinger-to-settle-the-ukraine-crisis-start-at-the-end/2014/03/05/46dad868-a496-11e3-8466-d34c451760b9\\_story.html](http://www.washingtonpost.com/opinions/henry-kissinger-to-settle-the-ukraine-crisis-start-at-the-end/2014/03/05/46dad868-a496-11e3-8466-d34c451760b9_story.html).

<sup>2</sup> James Meeks, "Putin's Counter-Revolution," *London Review of Books* 36, no. 6 (March 20, 2014): 3–9.

<sup>3</sup> See the background sections in Chapters 3 and 4.

<sup>4</sup> See discussion, particularly involving the Czech example, in Hilary Wainwright, *Arguments for a New Left: Answering the Free-Market Right* (Wiley, 1994); Bernard Wheaton and Zdenek Kavan, *The Velvet Revolution: Czechoslovakia, 1988-1991* (Boulder: Westview Press, 1992).

latter there would have been no need for a consistent counter-revolutionary policy by advanced industrial states for at least the past century, if not the past two.

The new-found revolutionary fervour of the West has created some interesting myopias toward elements that are supposedly opposed to the liberal dream. In Libya, Egypt, Syria and now Ukraine, blind eyes were turned to the conservative, racist and fascist tendencies within the so-called revolutionary movements. As perceptive commentators have noted specifically in relation to Ukraine, '[t]he inclination to dismiss [this] rising tide of extremism as a natural occurrence in any radical political transformation... is puzzling.'<sup>5</sup> It is less puzzling when considered in a longer historical perspective. Those same Western powers favoured fascist elements against socialist forces in their own countries and abroad in the interwar period and following the Second World War.<sup>6</sup> This doesn't mean that the alternative to Ukrainian nationalism is Russian-socialism. Such binaries are also the territory of this reified and empty discourse. The Ukrainian situation is dire. There are many reasons for those of a socialist mind-set to despair, just as there are many reasons for those in Crimea of a pragmatic or idealistic ilk to favour incorporation into the Russian Federation. The details are sadly beside the point; what is notable is that there is no trace of the old sense of revolution opposed by the West (and incidentally, the later Soviet Union). The content of these Western-backed revolutions that makes them such is entirely obscure; other than the fact that they contain insurrectionary movements supported politically by factions within the European Union or the United States.

Alongside the irrelevance of the content of revolution as long as its politics are pro-Western this newly-incorporated revolutionary fervour comes with a further blind spot. The international legal arguments that oppose the so-called revolution disappear from sight. Ukraine again serves as an illustrative example, although very similar arguments can be posed in relation to Syria and Libya.<sup>7</sup> Russia's legal arguments for intervention in Ukraine are straightforward, focusing on the illegitimacy of power resulting from what they see as an armed coup; the coup's forceful deposition of a democratically elected leader; and the need to protect minorities against the visible escalation of violence.<sup>8</sup> Against this, Western supporters of 'pro-revolution' Ukraine deny the right of either the elected President Yanukovic or the regional government of Crimea to invite Russian aid, as well as claiming Russia to be illegally annexing Crimea, and using force without prior authorization from the Security Council or a plausible claim to self-defence or a pressing need to protect vulnerable minorities. On a basic level, this is a demonstration of the

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<sup>5</sup> Boris N. Mamlyuk, "Ukraine Insta-Symposium: Intervention and Colonialism as Responses to Alleged Fascism," *Opinio Juris*, accessed March 20, 2014, <http://opiniojuris.org/2014/03/17/ukraine-insta-symposium-intervention-colonialism-responses-alleged-fascism/>.

<sup>6</sup> See background in Chapter 3

<sup>7</sup> Of course there was no Syrian 'intervention' – if we ignore the fact that this elides the myriad ways in which 'intervention' was already occurring – but it would be naïve and counter-historical to put this down to the strength of opposing legal arguments.

<sup>8</sup> For an extended list and discussion see Mamlyuk, "Opinio Juris » Blog Archive Ukraine Insta-Symposium." Mamlyuk summarizes Russian Ambassador to the UN Vitaly Churkin's position, see <http://www.rusembassy.ca/node/843>

indeterminate nature of international legal argument. Such arguments are never deployed in isolation from political concerns. Yet what is novel about this conjuncture is the alliance of 'revolutionary' action with international 'legality' in Western argument.

In essence, both the term revolution and the binary of 'legal' and 'illegal' have been deployed here as partisan concepts for a broadly Western neo-liberal agenda (just as Russia's legal arguments serve the same purpose). Their specific content, much like the potential for fascist violence in the Ukraine, seems largely irrelevant so long as there is the possibility that vaguely defined Western interests will be served.<sup>9</sup> It does raise an interesting question though. If the concept of revolution actually had any content, and if that content bore any resemblance to the content it has born historically since the meaningful birth of the concept, would its pairing with international legality be as comfortable? This opens up a further interesting question. What does international legality mean in this context? Despite the desire of European and American politicians to ignore them<sup>10</sup> Russia's legal arguments in relation to Ukraine do not push the bounds of plausibility; neither did those arguments that questioned British recognition of an insurgent government in Libya. In the interests of balance, very high profile legal figures found legal arguments to support the coalition invasion of Iraq. Of course these discussions simply emphasize the indeterminate nature of international legal argument, and its persistent and necessary connection to politics. Yet if international law is as open and malleable as this implies, then there should be no problem for international legal argument to serve multiple contemporary interests, including those of a more meaningful 'revolutionary' nature.

### *Critical Times; Critical Scholarship*

This is the central question of this thesis. With international legal argument understood as basically indeterminate, how compatible would it be to the meaning that was associated with revolution before its contemporary appropriation discussed above. As this thesis will argue, that older meaning referred to deeply emancipatory social changes against production for profit and the commodification of human labour. Does the legal form offer any opposition to this revolutionary goal? This is not merely an academic question. These are not times in which one can be casual or non-partisan about international affairs, if such times ever existed. There are very few commentators today in any discipline that consider contemporary times to be anything other than borderline catastrophic – and this from a relatively comfortable academic position in the (post)industrial heartlands. One may say it is in the nature of every generation to

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<sup>9</sup> Rodric Braithwaite has been highly critical of the haphazard European approach to the Ukraine, Rodric Braithwaite, "Ukraine Crisis: No Wonder Vladimir Putin Says Crimea Is Russian," *The Independent*, March 1, 2014, <http://www.independent.co.uk/voices/comment/ukraine-crisis-no-wonder-vladimir-putin-says-crimea-is-russian-9162734.html>. For a similar line of argument see Chris Floyd, "Oligarchs Triumphant: Ukraine, Omidyar and the Neo-Liberal Agenda," *CounterPunch*, March 4, 2014.

<sup>10</sup> This seems to be a desire shared by various 'critical' international legal academics, arising in personal communications of late.

conceive of itself as the last, but it is not in the nature of every generation to have access to vast amounts of empirical data to support such a thesis.<sup>11</sup>

There have been a wide variety of scholarly projects that note the imbrication of international legal structures with this contemporary malaise. However there are some problems with this work to which this thesis addresses itself. Firstly, and perhaps most importantly, this critical work is often followed up by solutions couched in the language and form of international law. In other words, these critical discourses seek salvation to problems that are created in part by international law in that very same international law.<sup>12</sup> This is not necessarily as immediately laughable as it seems, but it certainly begs a few questions. Specifically, it spurs thought on what those solutions might be, and in the vein of this opening discussion, if they could be considered as revolutionary in any meaningful way. This question is particularly pertinent because this is an area of overlap between some contemporary critical academic discourse on international law and blatantly partisan imperialist rhetoric justifying overt intervention in the politics of foreign states. Both consider international law to be supportive of their idea of revolution. Presumably they do not share the same concept of revolution.

Frustratingly this is not limited to international legal academia. A large proportion of mainstream left political organisations have adopted ‘international legality’ as their standard of acceptability and the horizon of their political imagination. This has been the case, most notably, in the UK since the invasion of Iraq in 2003 by the ‘coalition of the willing’, leading to the long-running Stop the War movement.<sup>13</sup> However this perspective on international law has long been held by groups opposing Israeli settlement of Palestinian land, the exploitation and murder of Palestinian citizens, and the construction of the ‘partition’ wall. The supposedly incontrovertible ‘illegality’ of all of these activities is seen to offer clear indication that if international law were applied uniformly and had unbiased enforcement mechanisms the world would be a better place. The latter may be true – at least in their perception of what the law should do. But this is not what the law *does* in any jurisdiction, domestic or international. The fact that critical voices within the discipline of international law collapse back into this same vision of international law in their work when confronted politically demonstrates that such scholarship cannot even communicate its initial critique to this constituency.<sup>14</sup>

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<sup>11</sup> Even NASA sponsored studies have found computer models to replicate some of the basic insights of 19<sup>th</sup> Century critics of political economy, see Nafeez Ahmed, “Nasa-Funded Study: Industrial Civilisation Headed for ‘Irreversible Collapse’?,” *The Guardian*, March 14, 2014, sec. Environment, <http://www.theguardian.com/environment/earth-insight/2014/mar/14/nasa-civilisation-irreversible-collapse-study-scientists>.

<sup>12</sup> See discussion in Owen Taylor, “Reclaiming Revolution,” *The Finnish Yearbook of International Law* 22, no. 1 (2011): 259–92.

<sup>13</sup> For an excellent critical engagement with this strand, see Akbar Rasulov, “Writing about Empire: Remarks on the Logic of a Discourse,” *Leiden Journal of International Law* 23, no. 2 (June 2010): 449.

<sup>14</sup> See the collaborative letter offering an opinion on the Iraq war published in the Guardian: Various, “War Would Be Illegal,” *The Guardian*, March 7, 2003, sec. Politics, <http://www.theguardian.com/politics/2003/mar/07/highereducation.iraq.>, and Knox’s argument

### *Whither the Critic?*

There is a second problem with this critical scholarship in international law, which relates closely to the above point. It is a problem of purpose. Much of this critical project has taken the form of an essentially ideological struggle, in the sense that international law forms a legitimating discourse that obscures the nature of its origins in political conflict. As Chris Arthur has noted, '[t]he struggle against ideology... helps to deprive it of the capacity to mystify the social relationships out of which it grew, and to make possible a scientific politics'.<sup>15</sup> In many senses this is correct, but there is also the danger here that the process of demystification becomes a goal in its own right. In some senses this can be seen in the critical engagements with international law. Many have aimed to deprive international law of its legitimating ideology, challenging foundational narratives and revealing complicity with oppression, but then have no way of connecting this with a 'scientific politics'. As a result these studies often collapse back into an unqualified assertion of the emancipatory potential of the very object of their critique – the legal form. This is far from a process restricted to the field of international law, but something that pervades a variety of academic studies that shy away from the political implications of their own analyses. In fact, part of the problem lies in scholars' lack of recognition that the empirical work of demystification has been done, and that the subsequent task for progressive scholars lies in a different, and more challenging, direction.

David Harvey encapsulates this brilliantly, describing the necessity of revolutionary theory in geography. Such an approach

does not entail yet another empirical investigation of the social conditions in the ghettos. We have enough information already and it is a waste of energy and resources to spend our time on such work. In fact, mapping even more evidence of man's patent inhumanity to man is counter-revolutionary in the sense that it allows the bleeding-heart liberal to pretend he is contributing to the solution when in fact he is not.<sup>16</sup>

Acknowledging this within the labour of an academic discipline appears to be particularly difficult, yet it need not prove so. In essence, it would require recognition of the essentially politically conservative nature of academic intellectual production. The nature of the academy requires the sequential development of theory within the disciplinary mainstream. It is in the nature of liberal pluralism and intellectual consumerism to value a certain level of diversity, and critical approaches can continue to produce work 'demystifying' the mainstream that fills this niche. In some ways recognising that it is remarkably difficult to do anything more within the disciplined labour of academic production should not shock the politically aware academic. Yet it

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in Robert Knox, "Strategy and Tactics," *The Finnish Yearbook of International Law* 21, no. 1 (2010): 193–229.

<sup>15</sup> Chris Arthur's introduction in Evgeny Pashukanis, *Law and Marxism: a General Theory* (London: Ink Links, 1978), 12.

<sup>16</sup> David Harvey, "Revolutionary and Counter Revolutionary Theory in Geography and the Problem of Ghetto Formation," *Antipode* 4, no. 2 (1972): 10.

would lead toward the somewhat depressing realisation that the majority of ones labour time is devoted towards a wholly non-emancipatory, even potentially counter-revolutionary, activity. However, acknowledging this would foreground the need for political activity, and a scientifically informed one at that, to occur elsewhere.

### *A Note on Methodology*

The aim of this thesis raises a series of methodological points, on sources, subjects and general approach. These can be divided into theoretical influences and chosen source material. The theoretical influences form the basis of Chapters One and Two, and Chapters Three and Four present the bulk of the 'source material' of the thesis. As will be evident in Chapter One, the thesis draws heavily on a Marxian approach, both to history and to the contemporary international political economy. However, this is not a thesis on Marxism, and therefore does not engage directly in an examination of classical Marxist texts. Rather Marxism informs this thesis in three ways. Firstly a Marxian approach draws attention to the interconnections between economics, politics and law in a way that is indispensable to analysing the relationship between the political and economic struggle of revolution and the formation and practice of international law. Secondly, as is argued in Chapter One, the modern concept of revolution is inextricable from Marxist theory. Thirdly, Marxism formed the necessary foundation of the critique of law that this thesis takes forward – the commodity form theory of law discussed in Chapter Two.

The second theoretical frame of the thesis revolves around the idea of revolution, and how to encapsulate this and subsequently understand its effects in the world. There are a variety of ways in which this could be done. For example, one could turn to a series of historical events that have been labelled as 'revolutions' and examine their content. As will be discussed in Chapter One, a variety of engagements have taken this approach. This thesis is more concerned with the concept of revolution – both as a referent for a certain kind of political project and as an animating force in the lives of groups that consider themselves revolutionary. It is for this reason that the methodology of 'conceptual history' is adopted in the first Chapter, in order to explore the historical context of the term revolution and to get a sense of its effect upon collective social consciousness.

Conceptual history is 'a methodology of historical studies that focuses on the invention and development of the fundamental concepts (*Begriffe*) underlying and informing a distinctively historical (*geschichtliche*) manner of being in the world.'<sup>17</sup> It is adopted here as the purpose is to understand how the concept of revolution simultaneously enabled and embodied a particular historical consciousness; a particular 'manner of being in the world'. Conceptual history specifically aims to capture this historical

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<sup>17</sup> Hayden White in Reinhart Koselleck, *The Practice of Conceptual History - Timing History, Spacing Concepts*, trans. Todd Samuel Presner and Others (Stanford: Stanford University Press, 2002), ix.

sensibility, and in this way is differentiated from a more general ‘history of ideas’.<sup>18</sup> In this vein, the concept of revolution is intimately tied to the particular way of understanding history – both of these provide a ‘manner of being in the world’ which Chapter One argues is reasonably distinct to the modern era and of which the concept of revolution is a constituent part. Therefore it is with this manner of being (and approaching the world) that this thesis is concerned, rather than the outcome of particular revolutionaries’ concrete struggles.

However, just as the thesis is not a thesis on Marxism, it is also not predominately a work of conceptual history. That historical perspective is simply necessary in order to understand what kind of ‘revolution’ the thesis is referring to. Chapter One does this through a combination of Marxian intellectual history (in the sense of the developing idea of revolution with Socialist thought), and conceptual history (in the sense of a developing sense of history and collective social endeavour linked to the concept of revolution).

Finally there is the subject of the source material of the thesis, particularly pertaining to international law. There are two areas to clarify here. Firstly the source material is unabashedly more ‘political’ than it is ‘legal’ in nature. However, the argument here depends on this division being resisted. Chapter Two engages indirectly with this division through legal theory, and Chapters Three and Four examine material that is not traditionally focused on in doctrinal studies of international law. However this material is both framed by the institutions and discourses of international law – as well as being formative of that same law. Only by examining the less explicitly ‘legal’ side of these historical moments is it possible to assess the impact of revolutionary movements on international law – rather than simply saying it had no effect on the doctrine.

As will be clear in the discussion in Chapter Three and Four, it is also a function of power and authority as to what can be said to be law, one against which the Soviet Union and the Third World both struggled. The Soviet Union was treated as outside of the law for much of the first decade of its existence, in the face of treaties being signed between it and other member states. The Soviet state was spoken for at conferences, its government not recognised, and its territory invaded. Similarly as newly decolonized states engaged in coordinated action in international fora they found their ability to contribute to the body of international law severely restricted.

With these caveats made, the actual content under examination within this thesis falls within Article 38(1) of the Statute of the ICJ’s standard definition of the sources of international law, namely ‘international conventions’ linked to state recognition, international custom ‘as evidence of general practice accepted as law’, and as subsidiary means, the writings of highly qualified jurists. Yet a basic assumption at work is that the process of agreement behind ‘general practice accepted as law’ is uneven and political. Chapters Three and Four deal with this issue in a tangential manner. The reason that this is not the central concern of this thesis is that it was already a given for

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<sup>18</sup> For a summary of this approach as it was initially articulated, see Arthur O. Lovejoy, *The Great Chain of Being* (Harvard University Press, 1936), Chapter 1.

both the Soviet and the Third World struggles that the definition of international law was dominated by capitalist and colonial powers, in their interests. Therefore it is how those engaged in the struggle – legal theorists and the states themselves – related to the body of international law that becomes the central focus. This has two consequences in terms of material. Firstly that the ‘political’ situation surrounding these moments of international legal contestation take on prime importance, as expressed in the background sections to Chapters Three and Four. Secondly it means that the subject material under consideration – a variety of comments from theorists, politicians, the statements of Third World leaders and the institutions in which they organised – becomes the prime source for understanding how this would relate to legal doctrine.

### *The Structure of the Thesis*

It is with a mind to informing contemporary political struggle that this thesis aims to explore the relationship and compatibility between revolutionary activity and international law. Broadly speaking this means attempting to offer a more ‘scientifically’ informed interpretation of international law for a more radical, emancipatory politics that might lay some meaningful claim to the term revolutionary. It means providing possible answers to whether or not the ‘practice’ of international law might have anything to offer the aspiring revolutionary, and how in any case they should relate to law as an all-encompassing and dominant discourse that structures the oppressive world against which revolutionaries pit themselves. The first two Chapters of this thesis aim to address in detail both the concept of revolution and this body of critical scholarship on international law. They are concerned with giving more concrete content to the concept of revolution. As Chapter One discusses, this is a content that is actually more faithful to the historical development of the concept of revolution itself. This Chapter explores this conceptual development, demonstrating that the concept of revolution was born with the modern era and is essentially tied to the emancipation of all people from oppression and exploitation. At its heart it is an anti-capitalist creed, forged in the early flames of capitalist oppression and tempered over the years of intensified exploitation of humanity and its surrounding environment.

Chapter One will also explore how the concept of revolution is tied to a vision of humanity consciously engaged in the historical process. A process of becoming where women and men move from being William Morris’s ‘ever baffled and ever-resurgent agents of unmastered history’ to the early stages of mastering that process. It is this element of revolution that ties it to the Marxist concept of ‘praxis’. Although the concept of praxis has a complex academic history, in this thesis it simply refers to the conscious connection between theoretical reflection and knowledge, and the practical activity undertaken in light of such contemplation. As Marcuse noted, ‘to engage in praxis is not to tread on alien ground, external to... theory’ - ‘[revolutionary theory] itself is already a practical one; praxis does not only come at the end but is already

present in the beginning'.<sup>19</sup> Praxis also takes place in different areas of social life, and with different aims in mind. It is in this way that the Chapter outlines both the idea of 'revolutionary praxis' and creates the conditions for Chapter Two to elaborate on 'international legal praxis'. Chapter One stresses the intimate connection between the concept of revolution and scientific knowledge of this kind; of theory and practice combined and directed towards a particular goal – the emancipation of all people. The concept of revolution is as simple and complex as this. What this means concretely is that most contemporary invocations and discussions of revolution of the kind mentioned in the opening section of this introduction have absolutely no meaningful connection to the concept of revolution discussed here.<sup>20</sup>

Chapter Two engages closely with critical theory in international law. This is the target audience of this thesis: those same critical international lawyers who hold on to an image of the law as somehow solving the problems in which they find it complicit. This Chapter examines how their own critical roots offer fertile ground for this contradictory position in relation to international law. Mainstream scholarship and practice in international law tends towards a highly positivist and formalist theoretical position, in which the law is seen as exogenously given, objective and determinate, and that the role of the lawyer is to find logical legal arguments, and the role of the international adjudicator to choose the 'correct' interpretation. In international law the *critical* challenge to this position was to expose this as false: there was no ultimately correct interpretation for international law. Every international legal case involved legitimate arguments from either the perspective of the social collective (of states) or the individual legal entity of the state. These arguments were always contradictory and invoking one always led necessarily to the invocation of the other. This was the basis of the indeterminacy thesis that has formed the lynchpin of much critical scholarship in international law, and has also been accepted by the mainstream as an accurate description of international adjudication. It is not actually a position that would surprise any practicing lawyer, but it is an important component of the ideological justification of international law and therefore such critical work made a valuable contribution.

This Chapter also differentiates the concern of this thesis from other excellent critical work that has built on the indeterminacy thesis. Such work has sought the determining influence on international law in other locations such as patriarchal, racist or imperialist forces, and has produced invaluable insights into the function of these elements in both the history and contemporary practice of international law. However, this thesis is aimed at the form of law itself. This other critical scholarship, although admirable, focused its attention elsewhere and in doing so left the form of law open as a point of

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<sup>19</sup> Herbert Marcuse, "The Foundation of Historical Materialism," in *Studies in Critical Philosophy*, trans. Joris de Bres (London: New Left Books, 1932), 5. Also cited in Cutler, *Private Power and Global Authority*, 261.

<sup>20</sup> There are important exceptions to this – even in mainstream media – see for example Volodymyr Ishchenko, "Ukraine Has Not Experienced a Genuine Revolution, Merely a Change of Elites," *The Guardian*, February 28, 2014, sec. Comment is free, <http://www.theguardian.com/world/2014/feb/28/ukraine-genuine-revolution-tackle-corruption>.

return for potential solutions to the problems they traced, in the vein of the foregoing discussion in this introduction. The aim of this thesis is to assess if the form of law itself offers any limitation to revolutionary praxis as discussed in Chapter One. Therefore it poses the question of the compatibility between 'revolutionary' praxis and 'international legal' praxis directly.

Chapters Three and Four offer two historical examples of particular types of revolutionary praxis and international legal praxis in order to provide some basis for assessing the central question of this thesis. These are the only clear examples where the international order as a whole faced a systematic challenge. Chapter Three addresses the Soviet relationship to international law, focusing on the early years of the state in which both theory and practice had an explicit revolutionary content. The Soviet example represents the first serious challenge to the dominance of interpretation held by European states and their successor white colonies once those colonies had finished in the genocidal labour of part-clearing their 'own' lands. The Soviet approach to law was self-consciously 'revolutionary', although there was a variation of degree between legal commentators. The Soviet example holds further value in that the reception of their position abroad stressed the difference of the Soviet 'approach' to law in contrast to 'standard' approaches. This Chapter critically assesses this interpretation and explores potential reasons for that position. However the central focus of this chapter is how this overt perception of difference elided a high level of commonality between the Soviet 'approach' and the standard legal practice to which it was being compared. This common practice conducted by such an overtly revolutionary actor as the early Soviet state hints towards the form of law offering some form of constraint to revolutionary praxis. However the Soviet revolutionaries did not consider the main target of their practice to be the legal arena; it was one location among many in which the struggle must be fought, but for them the revolution would be won elsewhere. Therefore the Soviet example provides a case of overt revolutionary activity coupled with a limited investment of this activity in the form of law.

Chapter Four engages with an example that sought victory and transformative potential more explicitly through the form of international law. It addresses the formation of the Third World and the targeting by this group of international law and international institutions as a key locus of their struggle for emancipation from oppression. This grouping encompasses a wide variety of localised revolutionary movements, but in their collective confrontation of the international order. Although this movement was less uniformly anti-capitalist in its rhetoric, many of the legal principles advanced by the Third World could not be squared with the effective functioning of global capitalism and in this sense offered some further revolutionary potential. The key arguments of this Chapter are that the more radical provisions of the Third World's engagement with international law were vehemently opposed by wealthier countries, and in any case held limited radical potential. Many of the Third World's proposals for a 'New International Economic Order' comprised relatively minor market interventions with the aspired aim of improving the position of developing countries in world trade. Those radical elements that encountered fierce opposition were never articulated with

mechanisms for enacting them, and were never successfully pushed as principles of international law.

Both of these cases present failed attempts to radically transform the international system. In general the prime cause for this remains an evident lack of 'power', however conceived, to implement these revolutionary ideals. But the question of this thesis is the compatibility between revolutionary praxis and legal praxis. In other words, to discover if, in the face of its indeterminate argumentative structure, the form of law offers any limits to revolutionary praxis. The failure of the more radical initiatives of the Soviets and the Third World hints that this may be the case, not simply because they were 'outgunned' but because the law as a locus of argument was in some way inhospitable to revolutionary challenges to its most basic elements.

### *Why Law Anyway?*

In this world of globalized late capitalism, law is all around us. There is no option of whether or not to go by law, but only what to do with it. It is with this in mind that the possibilities of the law's limits are a necessary area of exploration – even more so those of international law, considering the emancipatory potential perceived in it by many. However the nature of such exploration must not involve making a fetish of the law or legal struggle. To do so would be to approach the question with a prior commitment to the legal form. Yet just as Harvey's emotive statement implies, some activity may not be revolutionary, and an investigation into the limits of the legal form has to entertain this possibility. This does not mean that law can be avoided. As the discussion in Chapter Two and Three will make clear, there is no use in avoiding the law out of some kind of revolutionary moralism. But this position raises a necessary caution. Between the path of necessity and idealism lies the vaguely defined 'middle ground' of our times. This platitudinous position haunts the juxtaposition of all such oppositions as revolution and the law. It is here where a deeper consideration of revolutionary praxis offers a possible palliative. Revolutionary praxis is defined by the ultimate goal, and it becomes the task of both theory and practice to map possible routes and to explicate obstacles to achieving this objective. Legal scholars have something to offer here, just as do legal advocates. But it is vital that such a position also remains aware of the limits of law, and can thereby direct revolutionary energy elsewhere when appropriate.

## **Chapter 1: Revolution and Revolutionary Praxis**

*'Men make their own history, but they do not make it as they please; they do not make it under self-selected circumstances, but under circumstances existing already, given and transmitted from the past. The tradition of all dead generations weighs like a nightmare on the brains of the living.'*

*Karl Marx, 'The Eighteenth Brumaire of Louis Bonaparte' 1852*

### **I: Introduction**

Marx wrote the above paragraph as a caution against the aspirations of utopian socialists; those who dreamed of a more cooperative and communally minded way of life, in contrast to growing liberal individualism. They were criticised as utopian because their vision of an alternate way of living was not coupled with a systematic understanding of why things were the way they were, why that liberal philosophy was achieving dominance, or how this meshed with the expanding capitalist mode of production. As a consequence, their analysis failed to offer a convincing method of transition from capitalism to a socialist alternative. Marx's last line offers a poetic, if dark, summary of the dilemma facing all those who dream of a better human society. However much we may envisage a cooperative existence of social well-being, absent the fractious conflicts of the present world, each and every inhabitant of that future vision must be born, cradled and educated in the very mire from which escape is desired. How can such people, scarred by the vicissitudes of scarcity and competitive capitalist production, escape the nightmare of their experience and work to create a different future? Furthermore, if one was a committed materialist, which meant recognising the power of the environment to shape the individual and constrain their actions, how could a political programme of action be drawn up and elucidated that did not contradict the basic tenets of their theory? Finally, if one was opposed politically to the seductions of liberalism, which advocated the free power and action of the individual, where could emancipatory potential be located? How would one speak to the people in a way that empowered them to create change, yet recognised the significant constraints upon their lives, and the fallacy of a doctrine of self-emancipation?

The concept of revolution attempted to provide an answer these problems. The study of revolution and the attempt to enact it provided a theoretical frame in which people socialized by their historical conditions could be understood to actively transform those conditions for future generations. This, it will be argued in this chapter, is the essence of the concept of revolution in its modern form. There are three key components to this interpretation of revolution which will be stressed throughout this Chapter. Firstly, the modern concept of revolution is rooted in a systematic historical and political analysis that recognised human beings as the prime subjects and objects of history. As Marx's quote makes clear, people were both actors in historical processes and yet were also formed by these processes; as such they were both – in dialectical fashion – the subject and object of history.

Secondly, this analysis formed part of the shifting consciousness associated with the birth of modernism. This shift involved a move from understanding history as a cyclical process to one of historical development that included the possibility of meaningful progress. This vision was an integral part of the development of capitalism (and the vision of those who benefitted most), but it was also a component of the immediate corollary of capitalism and its critique, socialism – that true human emancipation and progress would involve the abolition of capitalist exploitation. It is this latter element that this chapter argues is central to the modern concept of revolution.

The third component of this argument is that the modern concept was a politically mobilizing one. It linked theoretical analysis to the direct participation of human agents. In other words, it tied an examination of the structural conditions ‘transmitted’ from the past to the potential agency of groups to transform them in the future.<sup>21</sup> This component is crucially concerned with the participation of people in history, their historical agency, and the structural conditions in which they act. Closely linked to these points, this Chapter argues that it is actually impossible to understand the emergence and consolidation of revolution as a concept without linking it to the historically significant role of the socialist movement and the politics associated with it. For it was in the context of this movement’s theoretical and practical political engagement that the concept and its component elements were developed. Without this context, as shall be argued, revolution loses purchase as an analytical concept and becomes meaningless as a political project.

This Chapter will address these components in the following way. In the first instance, Section II will engage with the place and role of revolution in a broader historical perspective. The historiographical arguments here are not essential to the modern function of revolution as a mobilizing concept discussed above, but they offer insight into the interpretive work that is ever present in conceptual formation. The meanings of concepts are always unstable and open to contestation, and more generally accepted interpretations will change across different points in time. Such contestation does not occur in an apolitical academic sphere – as Robert Cox made explicit, theory always serves a particular purpose and a particular group of people.<sup>22</sup> As such a critical approach to conceptual interpretation must recognise that attaching meaning to a concept is a process that has particular political and social stakes in addition to semantic ones. That is to say that there are direct theoretical and material consequences attached to different interpretations of a concept as particular interpretations of concepts serve different purposes and social alliances. Of course this does not mean that different theories and interpretations cannot be assessed against their own internal coherence and measured against some form of empirical observation. What it means is that this process is never a neutral or objective one, especially in social terms. Part of the purpose of this Chapter then is to stress that the particular meaning

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<sup>21</sup> It is in this sense that it approximates the ‘scientific politics’ of Chris Arthur mentioned in the introduction.

<sup>22</sup> Robert Cox, “Social Forces, States, and World Orders: Beyond International Relations Theory,” in *Approaches to World Order*, by Robert Cox and Timothy J. Sinclair (Cambridge: Cambridge University Press, 1996), 86.

attached to revolution articulated above is not only historically and conceptually sensical, but is politically necessary to progressive academic and popular engagement with international law and global political life more generally.

Closely related to these insights, Section III of this Chapter will present a historical perspective designed to foreground the practice of revolution, rather than the labelling of historical events as revolutions. The central aim here being that in addition to highlighting the political stakes in labelling and interpretation, there also exists a concrete historical record of the development of revolution as a concept. This record serves to emphasize that the early formations of the modern concept of revolution rooted in the critique of capitalism differed from pre-modern ideas of both revolution and historical change, and were deeply embedded in an actual political movement aimed at overthrowing capitalist oppression. Yet, as both Sections II and III will show, there is a contemporary trend that elides elements of this narrative, driven by scepticism towards the possibility of alternative social organisations to capitalism. If this is not considered as a possibility, then the modern concept of revolution can only collapse into an empty and meaningless term.

The following Section IV will introduce the Chapter's third related but distinct historical analysis of the specific elements of the modern concept of revolution, by focusing on the manner in which they were initially formulated by Marx and Engels, alongside the contrast provided by pre-modern concepts of political change and of revolution. This section is designed to offer a historical and historiographical context to the key components of the modern concept of revolution.

The final Section V, building on the insights developed throughout the Chapter focuses on revolutionary agency and praxis; i.e. the politically mobilizing aspects of revolution outlined above. This section stresses the function of revolution as an active process rather than a descriptor, and clarifies the idea of revolutionary praxis against which it would be possible to assess legal praxis. The key components are human agency in the historical process, and the connection of this to scientific knowledge – that is materialist analysis of the structural conditions that influence revolutionary agency. This necessarily involves constant reflection on the simultaneous position of the agents of history as both subjects and objects of history – an ambivalence that is present in the very word 'agent' itself. Perry Anderson's exposition on E. P. Thompson's *The Poverty of Theory* offers a series of productive considerations of historically structured human agency, and this will be addressed in Section V i. The final part of that section, V ii, then unites these components under the concept of praxis, which describes the unity of practical engagement with theoretical reflection. Such activity necessarily occurs in different areas of social life, each with their own particular characteristics yet part of a complex whole. Therefore this approach provides a way of thinking about both revolutionary praxis as argued for within this Chapter, and international legal praxis, as will be discussed in Chapter Two, thus providing the frame for assessing the later examples of the Soviet Union and the Third World.

## II: Revolution: Meaning; Concepts; History

How do we arrive at the interpretation of revolution in its modern form? In much of the existing literature that uses the concept of 'revolution', it is treated as a term with an open meaning – 'one of the looser words'.<sup>23</sup> In a broad sense, it can be used to describe anything from grand historical events like the French Revolution to innovations in industrial or intellectual sectors, such as the Industrial or Digital Revolutions. In common usage it can seem little more than a way of encapsulating change of a certain scale, especially times when such transition is particularly sudden or striking. In some cases revolution may be understood to be restricted in its reference to change of a complete and fundamental nature, in order to add some specificity to the term. But these are clearly inexact terms in themselves, and the attempt to achieve precision therefore merely relocates the indeterminacy. There is no external source of arbitration to determine definitively between the numerous criteria that could define something as fundamental, or complete. The point is simply that any interpretation over revolutionary criteria is personal, subjective, and political as well as empirical. It is possible, for example, to describe the rapid transition of a series of geographical regions from Colonial to Self-rule and recognised internationally in the Colonial Declaration of 1960 as an international revolution of some kind.<sup>24</sup> Conversely, the maintenance of neo-Colonial forms of relationships and a lack of economic autonomy can be considered to render these changes merely those of a surface nature. Similarly, for many scholars, the collapse of the Soviet Union presented a revolutionary transformation in international affairs, as much as did the Bolshevik Revolution that established it. But for others, such a 'change' barely registered on the key dynamics of American imperialism that they understood to dominate global politics.<sup>25</sup> From different perspectives, these kinds of transitions, or lack thereof, will often appear radically different.

The above examples offer a variety of problems beyond that of 'extent'. They also include typologies of change. But in either case, discussion around them does not offer a particularly conclusive way of assessing whether the concept of revolution offers any determinate content. To a large extent this discussion's interminable nature could be dismissed as linguistically determined; it is inherent in the nature of a concept that it maintains a certain ambiguity in its use.<sup>26</sup> As such it is difficult to make an argument

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<sup>23</sup> Crane Brinton, *The Anatomy of Revolution* (Vintage, 1938), 3; Peter Calvert, *Revolution and Counter-Revolution* (Open University Press, 1990); Brian Meeks, *Caribbean Revolutions and Revolutionary Theory: An Assessment of Cuba, Nicaragua and Grenada* (Barbados, Jamaica, Trinidad and Tobago: University of West Indies Press, 1993).

<sup>24</sup> For example, see Bill Bowring, *The Degradation of the International Legal Order?: The Rehabilitation of Law and the Possibility of Politics* (Abingdon, Oxon; New York, NY: Routledge-Cavendish, 2008), 208.

<sup>25</sup> See discussion in Chapter Four, and, for example, see Bruce Cumings, "The Wicked Witch of the West Is Dead. Long Live the Wicked Witch of the East," in *The End of the Cold War: Its Meaning and Implications*, ed. Michael J Hogan (Cambridge, UK; New York: Cambridge University Press, 1992).

<sup>26</sup> 'In use... a word can remain unambiguous. In contrast, a concept must remain ambiguous in order to be a concept. The concept is bound to a word, but is at the same time more than a word: a word becomes a concept when the plenitude of a politicosocial context of meaning and experience in and for which a word is used can be considered into one word.' Reinhart Koselleck,

that one particular interpretation of revolution offers the most faithful reflection of the accepted conceptual definition at this present moment. There will always be competing understandings vying for the popular imagination. Nevertheless the argument put forward here is that the conceptual history of the concept of revolution reveals some basic, but quite specific, characteristics that distinguish its modern characteristics from both earlier usages and certain contemporary (re)interpretations. Indeed, as will be made clear below in Part III, the changing uses over time indicate that, following the industrial revolution in England and the maturation of what we can think of as modernist thought, revolution's meaning solidified around the broadly socialist idea of progressive change towards non- or post-capitalist forms of productive life.

However, before engaging in this analysis of the place and role of revolution in its broader historical context, sections II i and II ii below prefigure this discussion by highlighting how different interpretations of revolution as a concept open us up to different imaginative possibilities, and therefore different orientations for organised political activity. Considering that theory and interpretation always serve a political purpose, explicit or otherwise,<sup>27</sup> it is worth assessing the political stakes involved in differing interpretations of revolution, most especially what they offer by way of opening up collective imaginative horizons. In this sense the concept of revolution offers a uniquely self-reflexive position. It is a concept that focuses on the role of human agency in shaping history, but also one that draws attention to conflict within that historical process – conflict over both material and ideological terrain. Therefore, within its own conceptual makeup, revolution offers a way of understanding its own position as a concept subject to contesting interpretations and invocations that relate directly to differing political stances. This political awareness also offers up an explanation for contemporary conceptions of revolution that ignore the modern specificity of the concept.

i) *Concepts and History:*

There has been no small measure of hostility among historians to efforts to explore revolutions throughout history in the sense outlined at the opening of this chapter. Over the past thirty or so years, revisionist work has attempted to re-examine the most prominent historical examples of 'revolution' and to re-interpret them outside of the framework of the modern concept developed here.<sup>28</sup> These criticisms vary in content.

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*Futures Past - On the Semantics of Historical Time*, trans. Keith Tribe (Cambridge Mass.: MIT Press, 1979), 85.

<sup>27</sup> Cox, "Social Forces, States, and World Orders: Beyond International Relations Theory," 86.

<sup>28</sup> For overviews see Mike Haynes and Jim Wolfreys, eds., *History and Revolution: Refuting Revisionism* (Verso, 2007); Michael Scott Christofferson, *French Intellectuals Against the Left: The Antitotalitarian Moment of the 1970's* (New York, Oxford: Berghahn Books, 2004).; some examples are J. C. D. Clark, *Revolution and Rebellion: State and Society in England in the Seventeenth and Eighteenth Centuries* (Cambridge University Press, 1986); Orlando Figes, *A People's Tragedy: The Russian Revolution, 1891-1924* (London: Pimlico, 1997); François Furet, *Interpreting the French Revolution*, trans. Elborg Foster (Cambridge: Cambridge University Press, 1981); François Furet, *The Passing of an Illusion: The Idea of Communism in the Twentieth Century* (University of Chicago Press, 1999); John Stephen Morrill, *The Nature of the English Revolution: Essays* (Longman, 1993); Conrad Russell, *Parliaments and English Politics, 1621-1629* (Oxford: Clarendon Press, 1979); Conrad Russell, *Unrevolutionary England, 1603-1642* (London:

Some, like Francois Furet's work, aim to reinterpret events like that of the French Revolution, aiming to correct both the historical narrative and the privileged position the event holds in progressive imaginations.<sup>29</sup> It is not the focus of this work to engage with debate on the historical record. However, it is important to recognise that Furet's work can also be read to serve a political function, and forms part of a particular revisionist agenda. The challenge is the asserted demise of an alternative to capitalism, and work like Furet's is intended to reinforce this by reinterpreting the historical record. It is also noteworthy that such challenges tend to specify particular characteristics of a revolution, to which the historical events under their concern then are not considered to approximate. While it will be discussed in more detail in section III part ii, it is immediately clear that such a focus threatens to descend into an interminable debate over the appropriate criteria for a 'revolutionary' event. It also overshadows the animating purpose of those engaged in revolutionary activity, and the necessary political content that was a component part of the concept's modern development.

However, there are certain theoretical positions that accompany these criticisms, and they are worth responding to separately. They represent differing positions on historical interpretation. Firstly there is a resistance to what is claimed to be the retrospective imposition of ideas of revolution onto a historical period. This is a component of the broader demand to treat history according to the criteria of the period, and to avoid where possible the application of contemporary forms of understanding onto the past. Clark, for example, insists that the historian pay 'attention to religion as religion and not as a sublimation of something else.'<sup>30</sup> This charge of prolepsis is then expanded to encompass discussions of revolution.<sup>31</sup>

There is a second theoretical position within revisionist work, closely linked to this point. It is a conceptual point, claiming that revolutionary actions cannot take place without specific reference to revolutionary ideas. This is not a position that cuts cleanly along political lines. For example, the Marxist historian John Pocock noted that '[m]en cannot do what they have no means of saying they have done', 'and what they do must in part be what they can say and conceive that it is'<sup>32</sup>. The discussion in Section V will highlight how such a position might accurately describe the concept of *praxis*, which as the conscious unity of theory and practice could be limited in this way. But for the discussion at hand, Pocock's statement does not serve as an effective description of a general relationship between concepts and the material world. Concepts help people to interpret and assess their actions in the world, and as such also offer a way of understanding past actions, as well as framing future activity around particular

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Bloomsbury, 1990); Simon Schama, *Citizens: A Chronicle of The French Revolution* (London: Penguin Books Limited, 2004).

<sup>29</sup> Jim Wolfreys, "Twilight Revolution: François Furet and the Manufacturing of Consensus," in *History and Revolution* (London; New York: Verso, 2007); Christofferson, *French Intellectuals Against the Left*, Chapter 6: "Antitotalitarianism Against the Revolutionary Tradition – François Furet's Revisionist History of the French Revolution'.

<sup>30</sup> Clark, *Revolution and Rebellion*, 16.

<sup>31</sup> *Ibid.*, 3–4, 101.

<sup>32</sup> J. G. A. Pocock, "Virtue and Commerce in the Eighteenth Century," *Journal of Interdisciplinary History* 1, no. 3 (1972): 119.

imaginative vision. Therefore in any period people may continually reinterpret their own understanding of their activity using different and new concepts. New concepts can serve to provide a window of understanding onto past activity which has already taken place.<sup>33</sup> Such a process certainly doesn't invalidate the original activity in the way Pocock was suggesting.

Such criticisms then merge both a disagreement about the appropriate criteria by which to judge the contemporary relevance of past events, and over how people in general conceptualize their own actions. In regard to the first point, it is clear that what Clark considers to be 'religion as religion' equally represents a form of potential prolepsis. Interpreting the past within expectations of the period presents the same problems as attempting to trace nascent or unarticulated elements of a politically mobilizing concept like that of revolution. What one historian considers to be the standards of the past is also a matter of historical interpretation. Against Clark's criticism cited above, Neil Davidson notes that it would be easy to read events like the Lutheran protests against the Catholic Church as purely 'religious' complaints, and therefore modern readings of this in a political light as prolepsis.<sup>34</sup> However, to do so forces modern conceptual separations between 'religious' and 'political' issues that struggle to be persuasive even today, let alone to offer a persuasive account of a period when organised religion pervaded all aspects of social and political life. As James Holstun writes, 'can one imagine any phrase more alien to William Laud, or William Prynne, or William Walwyn, or any seventeenth-century person, than 'religion as religion'?'<sup>35</sup> To make a powerful intervention in religious terms in such periods was unavoidably political, just as political activity would often be framed religiously.

In regard to the second point, it seems simply a matter of intuition that, contra Pocock, people can experience things prior to (or even without) naming them, in addition to taking existing words and concepts and investing them with new meanings and significance.<sup>36</sup> Concepts can also, and perhaps always do, refer to imaginative possibilities, and in this way create paths for both their own evolution and material social transformation. Often both of these processes will only be understandable retrospectively. Attempting to understand this process is also necessarily an attempt to construct meaning for those past events. When account is given to the fact that contemporary interpretations of concepts are themselves contested, then the argument is no longer about the danger of prolepsis;<sup>37</sup> in other words, it is no longer an

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<sup>33</sup> See, for example, the opening discussion in Neil Davidson, *How Revolutionary Were the Bourgeois Revolutions?* (Chicago, Ill.: Haymarket Books, 2012).

<sup>34</sup> Davidson uses the term 'anachronism', yet the process is better described as prolepsis, see *Ibid.*, 6.

<sup>35</sup> James Holstun, *Ehud's Dagger: Class Struggle in the English Revolution* (London: Verso, 2000), 17; Davidson, *How Revolutionary Were the Bourgeois Revolutions?*, 6.

<sup>36</sup> Christopher Hill, *A Nation of Change and Novelty: Radicals Politics, Religion and Literature in Seventeenth-Century England* (Routledge, 1990), 119, 279; Davidson, *How Revolutionary Were the Bourgeois Revolutions?*, 7.

<sup>37</sup> For general discussion on prolepsis, see Quentin Skinner, *Visions of Politics*, vol. 1 (Cambridge: Cambridge University Press, 2002), 73–6.

attempt to understand the past as it was for those experiencing it, but about where and how the heritage of modern concepts can be located.

There are persuasive arguments that certain modern concepts require certain material preconditions for their development, for example that of the modern State.<sup>38</sup> However, it doesn't follow that it is unproductive to trace the nascent forms of such organisation to the point at which it is considered to meet the historian's criteria. Firstly, because this is a fundamental component of the work required to develop contemporary understanding of different concepts. Thus, despite claims that no concept of revolution was possible before the existence of the modern state,<sup>39</sup> earlier examples and usages of 'revolution' can help to elucidate the layers of meaning present in the modern concept, most particularly via their contrast with pre-modern ideas about political change. Secondly, and perhaps more importantly, this whole process also offers a challenge to the strict lines drawn between historical categories like those of the era of the modern state. Indeed, it pushes towards an acknowledgement that the historical manifestation of particular forms takes place gradually, dialectically formed out of different conceptual frames that are equally in the processes of formation and transformation.

What these observations tell us is that the modern concept of revolution was both enabled by material preconditions, but also developed and grew dialectically out of the myriad meanings embodied by the term historically. The next section will provide a short narrative of the changing usages of the term revolution across time to elucidate this conceptual heritage. Historical work conducted in this vein has been coined 'conceptual history'<sup>40</sup>, although it is important that this isn't read as a departure from a more 'concrete' or 'material' history. Although the work of conceptual history focuses on the concept and its changing meanings, such a process is always situated in the totality of historical relations. As the foregoing discussion in this chapter makes clear, concepts are situated within material history, offering both a window onto concrete relations and onto the collective consciousness of the time. As mentioned above, concepts both open up towards an unknown and imagined future, but are also enabled by the changing material conditions of the people that conceive them.

There is one final point that has to be clarified before outlining the conceptual history of revolution. Part of the concept's contemporary usage is tied to particular adjectives that qualify the 'type' of revolution being referred to. These can range from the more to less specialised. A 'technological' revolution is relatively straightforward (and decidedly modern), whereas a 'bourgeois' revolution both further nuances and straddles the concepts of 'political' and 'social' revolution.<sup>41</sup> The decision to remain with a broader concept of 'revolution' in this thesis is based upon some basic reactions to this. Firstly,

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<sup>38</sup> Quentin Skinner, *The Foundations of Modern Political Thought - Vol. 1, The Renaissance* (Cambridge: Cambridge University Press, 1978).

<sup>39</sup> Fred Halliday, *Revolution and World Politics: The Rise and Fall of the Sixth Great Power* (London: Macmillan, 1999), 130.

<sup>40</sup> Reinhart Koselleck, "Begriffsgeschichte and Social History," in *Futures Past - On the Semantics of Historical Time* (Cambridge Mass.: MIT Press, 1979).

<sup>41</sup> Davidson, *How Revolutionary Were the Bourgeois Revolutions?*, 119.

as will become clear in discussing the conceptual history of revolution, these distinctions are in fact part of the contested terrain of the concept of revolution itself. If attention is to be drawn to these broader struggles and the stakes involved, one cannot specify a particular kind of revolution. Section IV also clarifies not only the reasons for a transition from conceiving of ‘political’ and ‘social’ revolutions separately (alongside the idea of ‘bourgeois’ revolution), to revolution as a single term used to refer to the struggle against the oppressive structures of capitalism – essentially a ‘socialist’ revolution.

However, conceding the addition of the ‘socialist’ adjective has a couple of problematic consequences. Firstly, it allows for a very open conception of revolution in general (as one’s particular stance can always be qualified by the requisite adjective), whereas the argument put forward here is that the conceptual history of revolution points towards one particular persuasive meaning of revolution irrespective of what it is paired with, and that fighting for this has important political ramifications in terms of maintaining an anti-capitalist vision. Secondly, it disables an analysis of revolution from effectively coupling itself with the broad totality of international relations. These relations are at once economic, political, social, and legal. Concepts such as ‘social’ or ‘political’ revolutions already feed into the hermetic perception of these categories and are therefore counterproductive for critical scholarship that foregrounds the interrelationships between them.

### **III: Revolution as Modernity/Progress/History**

Bearing in mind the foregoing discussion on the politics of historical and conceptual interpretation, this Section presents the historical context and the defining features of the modern concept of revolution. As mentioned, these are tied to a general shift in the social conception of history associated with the modern period.<sup>42</sup> These in turn are intimately linked to Enlightenment scientific principles and methods, such that people (with the liberty to do so) began to see in their endeavours the signs of the progressive development of society. Francis Bacon’s reflections provide the perfect example of this turn of thought:

it is reasonable that greater things be expected from our age than from old times (if it only knew its strength and was willing to exert it); seeing that our age is the older age of the world enriched and studded with countless experiences and observations.<sup>43</sup>

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<sup>42</sup> For broader discussion of modernism see Richard Ellmann and Charles Feidelson, eds., *The Modern Tradition* (New York: Oxford University Press, 1965).; on the issues involved in defining modernism see Mary Gluck, “Toward a Historical Definition of Modernism: Georg Lukacs and the Avant-Garde,” *The J* 58 (1986): 845–82.; Nathaniel Berman has done extensive work on modernism and international law, in particular see ‘Modernism, Nationalism, and the Rhetoric of Reconstruction’, 4 *Yale Journal of Law and the Humanities* (1992) 351-380.

<sup>43</sup> Francis Bacon, *The New Organon*, ed. Lisa Jardine and Michael Silverthorne (Cambridge; New York: Cambridge University Press, 2000), 68–69.

There are two aspects of this that are of interest, especially in relation to earlier European conceptions of history and social change. Firstly this new position was a reversal of the dominant prior mode of thinking. In general, educated thought reflected on the great empires and achievements of the past and wondered if contemporary society would ever reach such heights of civilisation. What was old was considered to be imbued with authority and power, and therefore with respect and admiration. It was then an aspiration to emulate past greatness. In this new formulation, it was the new that would exceed the limits of the old. However, the second aspect recognises the dual nature of this reversal – for it was in the passage of time accruing experience that generated both the wisdom of the old, but also, in this new formulation, the superiority of future generations.

This shifting modernist mind-set involved ‘a new way of looking at human history that recognized the existence of secular progress’.<sup>44</sup> The secular nature of this conception is an important aspect of the modernist mind set, and also serves as a link to prior visualisations of the trajectory of human existence. Christian doctrine was generally understood as positing a grim earthly life, in comparison to the eternity of heavenly bliss that awaited those who had lived appropriately pious lives. Although the theocratic debates of the Protestant Reformation challenged traditional conceptions of how the human soul achieved salvation, this did not challenge the basic assumption that an earthly life was miserable and short, to be followed by an eternal and complete happiness. The secularisation of this shifted both the direction of earthly human life, and the purpose of earthly activity – in a sense, it framed the possibility of creating ‘heaven’ on earth. Koselleck has coined this shift the ‘secularization of eschatological expectation’, which forms an important component of the modernist mindset that embraced revolution in the sense we are concerned with.<sup>45</sup>

Eric Hobsbawm offers an excellent summary of the conceptual components of this earthly progress narrative. In the *Age of Revolution*, he lists a series of ‘English words which were invented, or gained their modern meanings, substantially in the period of sixty years [between 1789 and 1848]’.<sup>46</sup> Consider the transformations involved to enable words such as ‘industry’, ‘industrialist’, ‘factory’, ‘middle class’, ‘working class’, ‘capitalism’ and ‘socialism; along with ‘liberal’ and ‘conservative’ as political terms, ‘nationality’, ‘railway’, ‘scientist’, ‘engineer’, ‘utilitarian’, ‘statistics’ and ‘sociology’, alongside ‘ideology’, ‘strike’ and ‘pauperism’.<sup>47</sup> In this period of relatively rapid and radical change, previous conceptions of human history as a cyclical process, or one overshadowed by the great achievements of the past appeared inapt..

It is in this context that the idea of revolution began to animate both this progressive narrative and how it was shaped by human participation. For Koselleck it was during

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<sup>44</sup> Davidson, *How Revolutionary Were the Bourgeois Revolutions?*, 13.

<sup>45</sup> Reinhart Koselleck, “Historical Criteria for the Modern Concept of Revolution,” in *Futures Past - On the Semantics of Historical Time*, by Reinhart Koselleck, trans. Keith Tribe (Cambridge Mass.: MIT Press, 1979), 50.

<sup>46</sup> E. J. Hobsbawm, *The Age of Revolution: Europe, 1789-1848*, New edition (Abacus, 1988), 13.

<sup>47</sup> Ibid.

this period that revolution became a 'metahistorical concept'; encompassing all revolutions and functioning to capture a particular kind of progressive transformation.<sup>48</sup> In the context of the aforementioned historical acceleration and messianism, delinked in some way from prior religious contexts, Koselleck noted the complex coterminality of reform, revolution and evolution.<sup>49</sup> Although a note of caution must be made in taking this point from Koselleck, it is an element that carries a grain of truth. The modern concept of revolution was embedded in the same social transformations that enabled reform to have its particular connotations, as well as influencing the concept of evolution.<sup>50</sup> It was only to be expected that a variety of concepts would attempt to capture the spread of contemporary developments. For Koselleck,

the repeated contamination of revolution and evolution since the nineteenth century does not only indicate linguistic carelessness or political accommodation; the extensive interchangeability of both concepts indicates structural dislocations in the entire social structure which provoke answers differentiated only on a political plane. Evolution and Revolution become, as antithesis, partisan concepts; their similar usage denotes the general expansion of a movement for social emancipation driven by industrialisation.<sup>51</sup>

There are two central components to this point that are worth highlighting. Firstly, as noted above via Davidson's account, the partisan nature of revolution as a concept is only fully enabled within the context of secular social emancipation - and reinforced by the terminological ambiguity that Koselleck noted. But the idea that universal social emancipation was the essence of revolutionary activity cut across this divide. That the ultimate goal of revolution was the emancipation of *all* men meant that the concept took on a 'spatially universal connotation', both as world revolution and as a progressive process that would be permanent.<sup>52</sup> Coupled with the notion that revolution was a man-made event there arose a concurrent duty to activism.

The coterminality that Koselleck noted then takes on a different hue, particularly between reform and revolution. Although in some senses understood as a way of differentiating between the peaceful or bloody nature of progressive transformation, it

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<sup>48</sup> Koselleck, *Futures Past - On the Semantics of Historical Time*, 50.

<sup>49</sup> *Ibid.*, 51.

<sup>50</sup> Arguably, it is no coincidence that evolutionary theories were articulated in the way that they were considering the period in which they were written. Without challenging the basic idea of 'survival of the fittest', we can read the complex interaction between species and environment as demonstrative of something other than the liberal individualist slant often stressed. 'Fittest', in this scenario, can be readily understood to be most cooperative, and harmonious in terms of its feedback into the physical environment, rather than the strongest and most power hungry. Exactly the same logic applies to theories of 'man' in his natural state, rooted in the very same changes in social circumstance; see Thomas Hobbes, *Leviathan* (Oxford: Oxford University Press, 1998).

<sup>51</sup> Koselleck, *Futures Past - On the Semantics of Historical Time*, 51.

<sup>52</sup> *Ibid.*, 52.

would come to encapsulate significantly different theoretical positions.<sup>53</sup> However, at this stage it is important simply to note the array of coordinates within which the concept of revolution acquired meaning alongside the development of modern thought and industrial production. The few examples of previous usages of the term revolution will help to further elucidate this frame.

*i) The Contrast of Pre-Modern Revolution*

Studies of the conceptual history of revolution demonstrate, in the main, the distinction between earlier usage and the modern concept deployed and clarified in this thesis.<sup>54</sup> To reiterate, the modern concept of revolution is considered as a particular historical process, involving in some sense the participation of human beings in moulding a transformation of their society in a way that is fundamentally different in some key aspects to how it was before. We can think of this as a transcendental conception of revolution, in that the conceptual implication is of departure from one position to something new. This does not mean that the process has no element of continuity, or that the historical transformation could not be read 'dialectically'; that is formed from within a complex of different historical factors and comprised of them in the new social formation. But it is a way of capturing both an empirical and a conceptual fact about the collective interpretation of history. The *extent* of the change required is less important than the fact that it is understood to exist, that this is an argument deployed politically and imbued with social meaning, and that it has some basis in empirical transformation.<sup>55</sup> These are the combined elements of revolution in its modern sense.

Prior to the development of this modern concept of revolution, it was deployed to capture cyclical, non-transcendental change. This usage lies much closer to the mechanical motion associated with 'revolution' and the root of revolution in circular motion (from the Late Latin *revolutionem*) which encompassed both the circular revolution of objects, but also the return to prior states of being along such a trajectory. This is the key defining difference between different historical usages of the concept of revolution and it locates itself within differing conceptions of both the process of history itself and the function of humanity within it. The transformation of these perceptions is commonly understood to form a fundamental part of what is conceived of as the modernist mentality. If we dispense with the cognitive associations of primitivism that might accompany the term, the older cyclical and non-transcendental concept can be referred to as the pre-modern concept of revolution.

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<sup>53</sup> For example see Rosa Luxemburg, "Marxism or Leninism," in *Reform or Revolution and Other Writings* (New York: Dover Publications, 2006).; and discussion in Taylor, "Reclaiming Revolution," 287–88.

<sup>54</sup> For example see Raymond Williams, *Keywords – a Vocabulary of Culture and Society* (London: Fontana Press, 1976); Koselleck, "Historical Criteria for the Modern Concept of Revolution."

<sup>55</sup> See for example the discussion in Perry Anderson, *Arguments Within English Marxism* (London: Verso, 1980), Chapter 2., and later in this chapter

The earliest example of this usage is generally traced to Aristotle, along with early treatments of 'politics' in a systematic manner.<sup>56</sup> Despite the popular appeal of this early contact point, there is a cautionary note that must be made. This is a connection made both across languages and across time, and in a sense in which the translation to 'revolution' could equally be 'political change' from the Greek *metabolê*. Although this process helps us to understand the distinctiveness of the modern concept through contrast, it is also partly a problematic exercise as it simultaneously hints at a commonality which may be absent – both in terms of linguistic and historical translation.

Despite this caveat there is a certain utility to contrasting these early engagements with political change to modern concepts. They are useful in charting both the shifting horizons of possible political change, but also the roots of political instability, and in some sense the legitimacy of politically destabilising social dissatisfaction. In Aristotle, we see a description of political transformation, translated as 'revolution' by Jowett, as referring to the transformation of and transition between established configurations of political rule for Greek city-states.<sup>57</sup> Aristotle made a distinction between two types of revolution: the transfer of power within a constitutional frame that remained unchanged, and the 'complete change from one constitution to another.'<sup>58</sup> These would occur between set forms of government, and so describe either the transfer of administrative power from one group to another, or a transformation between an aristocratic or constitutional government, or between democratic or oligarchic political configurations. There is no sense here of the modern concept of revolution, but rather a cyclical change between established coordinates. Discussions of human agency in the process are limited to the possible dissatisfactions of the city-based populations concerned.

This can easily be understood as a product of the social environment in which Aristotle's thought was articulated. The potential horizons of political change were limited in the sense that a radical transformation of productive relations, which would create the conditions for a more fundamental transformation of political life, was wholly absent from his schema. We can read this as Marx did, noting Athenian society's slave-based productive relations and the absence of the transformative powers of the industrial revolution and capitalist growth and accumulation.<sup>59</sup>

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<sup>56</sup> For example, see Meeks, *Caribbean Revolutions and Revolutionary Theory: An Assessment of Cuba, Nicaragua and Grenada*, 7; Peter Calvert, *Revolution* (New York, London: Praeger, 1970), 36.

<sup>57</sup> Aristotle, *The Politics of Aristotle*, trans. B Jowett, vol. One (Oxford: Clarendon Press, 1885), Book V.

<sup>58</sup> *Ibid.*, One:145.

<sup>59</sup> Marx also noted these limitations, stemming from the basis of Athenian society on slave labour, in shaping Aristotle's engagement with the mystery of commensurability of goods through their equation in the form of money. For Marx it is only under the conditions of capitalist development in which he himself writes that the root of the money form in the commensurability of abstract human labour (and socially necessary labour time) becomes possible. See Karl Marx, *Capital, Volume I* (London: Penguin Classics, 1990), 151.

This is supported by the fact that, until the emergence of capitalism as an increasingly dominant mode of production, revolution remains largely absent from Western political thought, which remains within this Aristotelian frame<sup>60</sup> – although political discussion becomes increasingly concerned with the *right* of resistance accrued to those subject to earthly authority, and formulated in reference to divine rule.<sup>61</sup> In this sense early Christian political philosophy posited the likelihood of rebellion if a ruler breached the trust placed in him by his people – although this was formulated in the context of the supreme power of the papacy in reference to Catholic princes.<sup>62</sup> Once again, the kind of political agency envisaged was purely grievance based, for example against tyrannical rule, and the avenue of expression was support for an insurgent challenging the particular tyrant rather than any mass social uprising.<sup>63</sup>

This absence of the concept of revolution persisted through Western political thought at least until the ‘Glorious Revolution’ of 1688. This is generally noted as the first contemporaneous use of the term Revolution, deployed in its pre-modern sense to capture the cyclical return to monarchical order and authority.<sup>64</sup> Raymond Williams has done similar work to that of Koselleck on the historical development of concepts and language, and contextualised the nascent usage of the term in the following way. He noted its initial association with the literal ‘revolution’ of physical bodies, particularly the celestial components of our solar system, in this way serving as a metaphor for the cyclical turn of history and the ‘restoration of lawful authority’.<sup>65</sup> At this time terms such as ‘revolt’ or ‘rebellion’ were more common, and stood for ‘action against an established order’, and served to describe historical events such as the English Civil War.<sup>66</sup> Events in this line would later be considered as certain antecedents to or forms of bourgeois revolutions.<sup>67</sup>

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<sup>60</sup> Davidson frames this as a pre-Renaissance frame of mind, Davidson, *How Revolutionary Were the Bourgeois Revolutions?*, 20.

<sup>61</sup> It is important to note that the idea of legitimate resistance based on a conception of natural or divine order, was also (and thus significantly before its European manifestation) the official state philosophy of the Zhou Dynasty of China (1122-256 BC) encapsulated in the concept of the ‘mandate of heaven’ see for example Elizabeth Perry, *Challenging the Mandate of Heaven: Social Protest and State Power in China* (New York: M.E. Sharpe, 2001).

<sup>62</sup> Sir Earnest Barker, *Social Contract - Essays by Locke, Hume and Rousseau* (Oxford: Oxford University Press, 1947), ix–x.

<sup>63</sup> See Thomas Aquinas, *Political Writings* (Cambridge: Cambridge University Press, 2006), 98; Thomas Aquinas, *De Regno* (Toronto: The Pontifical Institute of Mediaeval Studies, 1949), Chapter 11, <http://dhspriority.org/thomas/DeRegno.htm#7>.

<sup>64</sup> It is worth noting that this period also provides the context for the political thought of both Thomas Hobbes and John Locke, both of whom articulate a more secular version of the kind of theory of resistance discussed above. The secular turn here removes some of the prior certainty of Christian political theorists in the assertion of divine right against tyrannical abuse – both recognising, although this is more explicit in Hobbes, the possibility that strength of arms determines the conditions of legitimacy. See John Locke, *Two Treatises on Government* (London: JM Dent, 1993); Hobbes, *Leviathan*.

<sup>65</sup> Williams, *Keywords – a Vocabulary of Culture and Society*, 273.

<sup>66</sup> *Ibid.*, 270.

<sup>67</sup> See the general framing argument in Davidson, *How Revolutionary Were the Bourgeois Revolutions?*.

It is in this restorative and cyclical manner that the so called ‘Glorious Revolution’ of 1688 could be described at the time as a revolution – considered as the final consolidation of parliamentary supremacy over the crown and the defeat of Catholicism within the British monarchy.<sup>68</sup> In this sense it holds none of the content of the modern concept. Although there are those who contend that the events of 1688 are better understood as an invasion by the Dutch rather than an internal ‘revolution’, this is not a central concern here.<sup>69</sup> This particular event could be read as both the cyclical return of Monarchical power, and as one focal point of many in Britain’s transition to an industrial capitalist power. This latter aspect could fit with the modern concept of revolution as encompassing a transition through capitalist development toward a social system that might enable a more socialist and egalitarian way of life.<sup>70</sup> The latter component of this final point – the necessity of revolution as referring to a transition *from* capitalism – will be discussed further in section IV, as it was central to the development of revolution as a concept through the nineteenth century and the work of scholars and political movements in the socialist tradition.

ii) *The Contemporary Return to Pre-modern Revolution*

Before this, however, it is important to address the ways in which some contemporary engagements with revolution return to the pre-modern concept discussed above, eliding historical agency and the possibility of alternative social formations to capitalism. In order to do so, it is necessary to summarise and reiterate the distinction stressed in this Chapter between pre-modern and modern conceptions of political change and thereby revolution; a distinction heavily emphasised by historians like Koselleck, Williams and Hobsbawm. In many ways, the modern concept of revolution can be understood as a constituent part of the dynamic of modernity, encapsulating the type and pace of change associated with the period. Previous uses serve to demonstrate the absence of such a concept in prior political thought, at least in the secular context we associate with modernism. Talking about revolution in this light draws attention to two different aspects that could be a choice of focus: the ‘fact’ of revolutionary events; and the practice of revolution itself. Of course there is significant space for overlap between these two, and indeed the separation can be argued to be of limited utility. Nevertheless it is important to acknowledge, primarily because the majority of contemporary engagements with the concept of revolution stress the empirical ‘fact’ of its occurrence without foregrounding the ‘practice’ involved – namely the agents of revolution and their own understanding of their activity.<sup>71</sup>

Such scholarship demonstrates that it is still a matter of some debate among scholars of revolution as to whether this conscious aspect is a necessary component of

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<sup>68</sup> Edward Vallance, *The Glorious Revolution: 1688, Britain’s Fight for Liberty* (London: Abacus, 2007).

<sup>69</sup> Lisa Jardine, *Going Dutch: How England Plundered Holland’s Glory* (London: Harper Perennial, 2009).

<sup>70</sup> For example, see E. P. Thompson, *The Making of the English Working Class* (New York: Pantheon Books, 1964).

<sup>71</sup> See discussion in Taylor, “Reclaiming Revolution.”

revolution considered as an empirical fact.<sup>72</sup> However, there are several problems with approaching revolution as fact rather than practice. Firstly it drives debate into an interminable discussion over which events qualify as revolutions, when it is particularly unclear as to what any resolution to such a discussion would actually offer.<sup>73</sup> If one

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<sup>72</sup> Various scholars have broken these divisions down into schools of thought, see John Foran, "Theories of Revolution Revisited: Toward a Fourth Generation?," *Sociological Theory* 11, no. 1 (March 1, 1993): 1–20; Jack A. Goldstone, "Theories of Revolution: The Third Generation," *World Politics* 32, no. 3 (April 1, 1980): 425–53; Jack A. Goldstone, "Toward a Fourth Generation of Revolutionary Theory," *Annual Review of Political Science* 4, no. 1 (June 2001): 139–87. Examples of the 'first generation' are Gustav Lebon, *The Psychology of Revolutions* (New York: Ernest Benn Ltd., 1913); Charles Ellwood, "A Psychological Theory of Revolutions," *American Journal of Sociology* 11 (1905); Pitrim A. Sorokin, *The Sociology of Revolution* (Philadelphia: Lippincott, 1925); Lyford P. Edwards, *The Natural History of Revolution* (Chicago: Chicago University Press, 1927).; Latter developments focused on the 'psychological' causes: Ivo K. Feierabend and Rosalind Feierabend, "Systematic Conditions of Political Aggression: An Application of Frustration-Aggression Theory," in *Anger Violence and Politics - Theories and Research*, ed. Ivo K. Feierabend, Rosalind Feierabend, and Ted Robert Gurr (Englewood Cliffs, N.J.: Prentice Hall, 1972); James Davies, "Toward a Theory of Revolution," *American Sociological Review* 27 (1962); Ted Robert Gurr, *Why Men Rebel* (Princeton: Princeton University Press, 1970).; 'structural and sociological' causes: Chalmers Johnston, *Revolutionary Change* (Boston: Little, Brown, 1966); Niel Smelser, *Theory of Collective Behaviour* (New York: The Free Press, 1963); Bob Jessop, *Social Order, Reform and Revolution* (New York: Macmillan, 1972); Mark Hart, *The Dynamics of Revolution* (Stockholm: Rotobekman, 1971); Edward A. Tiryakian, "A Model of Societal Change and Its Lead Indicators," in *The Study of Total Societies*, ed. Samuel Z. Klausner (New York: Anchor Books, 1967); Mark Hagopian, *The Phenomenon of Revolution* (New York: Dodd, Mead, 1974). Goldstone claimed this early structural/sociological school built upon the sociological approach developed by Talcott Parsons (Goldstone, "Theories of Revolution," 428.), although Parsons resisted the terms 'functional' or 'structural functionalist' as characterising his theory, or as appropriate name for a school – see Kingsley Davis, "The Myth of Functional Analysis as a Special Method in Sociology and Anthropology," *American Sociological Review* 24, no. 6 (1959): 757–72; Talcott Parsons, *Social Systems and The Evolution of Action Theory* (New York: The Free Press, 1975). International Relations scholars have tended to approach revolution through a concept of 'multiple' sovereignty, rather than focusing on the agency involved: see Samuel P. Huntington, *Political Order in Changing Societies* (New Haven: Yale University Press, 1968); Charles Tilly, *From Mobilisation to Revolution* (Reading, Mass.: Addison-Wesley, 1978). The seminal structuralist works on revolution come in Goldstone's 'Third' Generation, namely Theda Skocpol, *States and Social Revolutions: A Comparative Analysis of France, Russia, and China* (Cambridge: Cambridge University Press, 1979); Kay Ellen Trimberger, *Revolution from Above: Military Bureaucrats and Development in Japan, Turkey, Egypt and Peru* (New Brunswick, N.J.: Transaction Books, 1978); S. N. Eisenstadt, *Revolution and the Transformation of Societies: A Comparative Study of Civilisations* (New York: Free Press, 1978); Jeffrey Paige, *Agrarian Revolution: Social Movements and Export Agriculture in the Underdeveloped World* (New York: New York Free Press, 1975).

<sup>73</sup> Goldstone notes that the discipline continually faced destabilisation in the face of new 'revolutions' that forced dominant understandings of revolution to be re-evaluated, and revealed the indeterminate nature of their categorisations, Goldstone, "Toward a Fourth Generation of Revolutionary Theory," 141. The basic theoretical postulates of each 'school' of thought studying revolutions continually re-assessed their definitional categories under pressure from critics, see for example the challenge to Theda Skocpol made by William H. Jr Sewell, "Ideologies and Social Revolutions: Reflections on the French Case," *The Journal of Modern History* 57, no. 1 (1985). Skocpol's response was to both refute the criticism and alter her definition, see Theda Skocpol, "Rentier State and Shi'a Islam in the Iranian Revolution," *Theory and Society* 11, no. 3 (1982): 265; Theda Skocpol, "Cultural Idioms and Political Ideologies in the Revolutionary Reconstruction of State Power: A Rejoinder to Sewell," *The Journal of Modern History* 57, no. 1 (1985). John Walton also classified the Mau Mau Uprising in Kenya and the civil

were able to resolve the debate, for example, over whether or not the Meiji Restoration qualified as a revolution, what light would this shed on the concept or historical interpretation? Those scholars who do argue for such an interpretation are able to posit only qualified 'types' of revolution – in this particular instance the idea of a 'top down' revolution.<sup>74</sup> These debates feed into 'generations' of scholarship on revolutions that supposedly offer incremental advances on the precision of the term,<sup>75</sup>

There are two primary consequences of this work that then characterise the sub-discipline (generally within the discipline of International Relations) of scholarship focused on revolution. The first is an oscillation between under-inclusive and over-inclusive categories.<sup>76</sup> Each temporary settlement over definition will be confronted with either the rise of new social forces articulating their struggle using the language of revolution, or the collapse of previously revolutionary moments into conservative regression - for example what looked like a revolution according to common parlance, becomes instead a *de facto* military coup. Closely related to this point, the actions and articulations of those engaged in revolutionary activity become components of qualifying criteria for the 'fact' of revolution, and are subsequently elided alongside the plurality of other potential factors. The drive, under the auspices of delineating the empirical facts of revolution, to seek quantitative data to support such claims also leads to the exclusion of the conscious, theoretically-driven activities of revolutionary groups, due simply to the fact that these are far less amenable to the quantitative methods of social inquiry.

The second primary consequence of this empiricism relates to what such scholarship then offers politically (or in market terms). Considering that when most broadly framed revolution involves a basic level of social disruption and change, empirical work engaged in that field then offers an analysis of social breakdown, and consequently can make a basic claim towards predicting such events. Policy makers, corporate investors, and banking and insurance companies analysing risk then become significant potential consumers of and contractors for such empirical work.<sup>77</sup> There then evolves a cyclical

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war in Columbia alongside other revolutions, claiming causal similarity and that the great revolutions forming the cannon of the discipline's thought resulted in less transformation than traditionally thought, see John Walton, *Reluctant Rebels: Comparative Studies of Revolution and Underdevelopment* (New York: Columbia University Press, 1984).

<sup>74</sup> Trimberger, *Revolution from Above: Military Bureaucrats and Development in Japan, Turkey, Egypt and Peru*.

<sup>75</sup> Goldstone, "Theories of Revolution"; Goldstone, "Toward a Fourth Generation of Revolutionary Theory"; Foran, "Theories of Revolution Revisited"; Randall Collins, "Maturation of the State-Centered Theory of Revolution and Ideology," *Sociological Theory* 11, no. 1 (March 1, 1993): 117–28.

<sup>76</sup> See discussion in Goldstone, "Theories of Revolution." and the critical observations of Collins, "Maturation of the State-Centered Theory of Revolution and Ideology." And supra note 62.

<sup>77</sup> See, for example, Jack A. Goldstone et al., "A Global Model for Forecasting Political Instability," *American Journal of Political Science* 54, no. 1 (2010): 190–208. This possibility was presaged by the shift to examining the types of states that would be vulnerable to revolutions, see Robert H. Dix, "Why Revolutions Succeed and Fail," *Polity* 16, no. 3 (1984); Jeff Goodwin and Theda Skocpol, "Explaining Revolutions in the Contemporary Third World," *Politics and Society* 17, no. 4 (1989).

market dynamic that further marginalises scholarship concerned with those elements of revolution less amenable to empirical study, and contributes instead to the superficial specificity involved in the contemplation of revolution as a component of broader ‘security studies’. Under such pressures the concept of revolution can swiftly collapse back into the essence of its pre-modern understanding – social and political upheaval of some sufficiently extreme level, with the agency and goal of the participants relatively unimportant.

This thesis does not aim to conduct work of this nature. As previously mentioned, not only is it arguable that revolution can only sensibly be understood in the modernist terms articulated here – under the conditions of which there have been no successful ‘empirical’ examples of revolution, only attempts to pursue it as a goal – but as mentioned this work seems to offer little by way of theoretical depth. Whilst overly concerned with the ‘fact’ of revolution, the mobilization of people under the modern concept’s emancipatory promise is elided – to analytical and political detriment. Rather, the focus of this thesis is on what was distinctive about the modern concept of revolution. That is revolution as goal-orientated historical practice – the mobilization of people under the auspices of revolutionary transformation. This involves both empirical activity that can be near universally recognised as revolution, but crucially it is also comprised of theoretical components deployed on behalf of the agents involved.

#### **IV: Modern Revolution – Political and Social; Bourgeois and Proletarian**

Here we return to the position outlined in the beginning of this chapter, and the concept of revolution serving as a bridge between the historically determined present and the contingent future. As explained above, it is the practice of revolution that is the central concern of this work, rather than finding some criteria by which to label any particular event as a revolution. It is, therefore, of central concern how this practice can be understood. In this sense practice is more or less synonymous with historical agency. However, when we are focused on the intent and the theoretical frame that is defined by revolutionary practice, then it is this animus behind the activity that becomes crucial; the practice is cognisable as revolutionary by the dreams and expectations of those participating.

Therefore, in historical terms, the concept of revolution only really takes shape, in the sense we are concerned with, through the interpretation of the French Revolution, and the attempt to mobilize social forces in Europe under the banner of revolution itself. In some sense, the consolidation of this idea is mirrored by the process in which Marx and Engels articulated their gradual critique of capitalism, and of revolutionary socialism connected to historical materialism.<sup>78</sup> There is no need to repeat the wealth of material on their early thought here, but what is important to note is the way in which the

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<sup>78</sup> Davidson, *How Revolutionary Were the Bourgeois Revolutions?*, 117.; also see Hal Draper, *Karl Marx’s Theory of Revolution. Vol. 1, Parts 1 and 2* (London; New York: Monthly Review Press, 1977), 31–234; Eustache Kouvélakis, *Philosophy and revolution: from Kant to Marx* (London; New York: Verso, 2003), 232–36; Michael Löwy, *The Theory of Revolution in the Young Marx* (Chicago: Haymarket Books, 2005), 23–117.

concept of revolution shifted in their theory to encompass the way in which it is being discussed in this thesis. This offers an elaboration of how and why a general concept of revolution as explained at the beginning of this Chapter is both politically necessary and historically informed, rather than the turn to any qualifying adjectives.

Specifically, their engagement with revolution offers a way of understanding the possible distinctions between 'political' and 'social' revolutions, and their own trajectory towards a general concept of revolution around which the *Communist Manifesto* could be formed. Marx's thinking on the nature of a political revolution is worth noting at length:

What is the basis of a partial and merely political revolution? Its basis is the fact that one *part of civil society* emancipates itself and attains *universal* domination, that one particular class undertakes from its *particular situation* the universal emancipation of society. This class liberates the whole of society, but only on condition that the whole of society finds itself in the same situation as this class, e.g., possesses or can easily acquire money and education. No class of civil society can play this role without awakening a moment of enthusiasm in itself and the masses... If the revolution of a people and the emancipation of a particular class of civil society are to coincide, if one class is to stand for the whole of society, then all the deficiencies of society must be concentrated in another class, one particular class must be the class which gives universal offence, the embodiment of a general limitation; one particular sphere of society must appear as the notorious crime of the whole society, so that the liberation of this sphere appears as universal self-liberation... The negative general significance of the French nobility and the French clergy determined the positive general significance of the class which stood nearest to and opposed to them—the bourgeoisie.<sup>79</sup>

This passage makes explicit the connections between political revolution and bourgeois revolution. Yet Marx also outlines the nascent elements of the universality that the concept of revolution was open to; those highlighted earlier as being central to the modern concept of revolution. For Marx, it was the proletariat that would be able to truly occupy the position hinted at above, in terms of a truly universal revolutionary movement. '[The proletariat] cannot emancipate itself without abolishing the conditions of its own life. It cannot abolish the conditions of its own life without abolishing all the inhuman conditions of society today which are summed up in its own situation.'<sup>80</sup> In the language that opens this chapter, the proletariat can 'only in a

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<sup>79</sup> Karl Marx, "Critique of Hegel's Philosophy of Right - Introduction [1843-4]," in *Early Writings*, by Karl Marx (Harmondsworth: Penguin Books, 1975), 253–4. Emphasis in the original. Also cited in Davidson, *How Revolutionary Were the Bourgeois Revolutions?*, 123.

<sup>80</sup> Karl Marx, "The Holy Family or Critique of Cultural Criticism: Against Bruno Bauer and Company," in *Collected Works*, by Karl Marx and Frederick Engels, vol. 4 (London: Lawrence and Wishart, 1975), 36.

revolution succeed in ridding itself anew of the muck of ages and become fitted to found society anew.<sup>181</sup>

Marx initially worked on distinguishing political revolutions made by the legislature from those by the executive. The former adhered to the constitution as representative of the general will, and instead attacked a particular antiquated version of it; one that is considered to represent particular not general interests. The latter, on the other hand, '[made] all the petty revolutions, the retrograde revolutions, the reactions.'<sup>182</sup> Davidson notes the lack of purchase as a concept that revolution has here, encompassing *coup d'états* or counterrevolutions.<sup>183</sup> However, it was precisely through this process of identifying social revolution with the aims of the proletariat that Marx and Engels extended the concept of revolution backwards and developed an increasingly precise understanding of the general concept of revolution. It was also in this way that social revolution was first distinguished from political or bourgeois revolution. Davidson notes that Engels led Marx in this regard, claiming early on that '[t]he only true revolution [was] a social revolution, to which political and philosophical revolution must lead.'<sup>184</sup>

Through this distinction, socialist contemporaries of Marx such as Bronterre O'Brien read events like the English Civil War, the Dutch Revolt and arguably the French Revolution's Thermidorian Reaction as 'only political revolutions', as they failed to live up to any proletarian potential.<sup>185</sup> Conservative reaction was not blind to this shift, with Lorenz von Stein in essence recognising the 'spectre' Marx described in the *Communist Manifesto*: 'political reform and revolution are at an end; social revolution has taken their place and towers over all movements of the peoples with its terrible power and serious doubts.'<sup>186</sup>

Marx summed up this relationship between political and social revolutions thus:

Every revolution dissolves the old order of society; to that extent it is social. Every revolution brings down the old ruling power; to that extent it is political... All revolution – the overthrow of the existing ruling power and the dissolution of the old order – is a political act. But without revolution, socialism cannot be made possible. It stands in need of this political act just as it stands in need of

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<sup>81</sup> Karl Marx, "The German Ideology: Critique of Modern German Philosophy According to Its Representatives Feuerbach, B. Bauer and Stirner, and of German Socialism According to Its Various Prophets," in *Collected Works*, by Karl Marx and Frederick Engels, vol. 5 (London: Lawrence and Wishart, 1975), 52–3.

<sup>82</sup> Karl Marx, "Critique of Hegel's Doctrine of the State [1843]," in *Early Writings* (Harmondsworth: Penguin Books, 1975), 58–198.

<sup>83</sup> Davidson, *How Revolutionary Were the Bourgeois Revolutions?*, 121.

<sup>84</sup> Frederick Engels, "The Condition of England: The Eighteenth Century [1844]," in *Collected Works*, by Karl Marx and Frederick Engels, vol. 3 (London: Lawrence and Wishart, 1975), 469–88.

<sup>85</sup> Bronterre O'Brien, "A View of Social Development [1837]," in *From Cobbett to the Chartists: Nineteenth Century, Vol 1. 1815-1848*, ed. Max Morris (London: Lawrence and Wishart, 1948), in Davidson, *How Revolutionary Were the Bourgeois Revolutions?*, 118.; also see Giuseppe Mazzini, "Thoughts on the French Revolution of 1789 [1835]," in *The Duty of Man and Other Essays by Joseph Mazzini* (New York: Dutton, 1912), 251–80.

<sup>86</sup> Davidson, *How Revolutionary Were the Bourgeois Revolutions?*, 119.

destruction and dissolution. But as soon as its organizing functions begin and its goal, its soul emerges, socialism throws its political mask aside.<sup>87</sup>

Combined, the above analysis demonstrates a necessary connection between socialism and social revolution - 'the only genuinely social revolution would be socialist.'<sup>88</sup> As the concept of social revolution is consolidated, the concept of political revolution is incorporated as a component. It is for this reason that a singular use of the term revolution to incorporate a broadly socialist and social revolution becomes analytically preferable. Using the term political revolution to describe unfinished or neutered social revolutions in the vein of O'Brien may have helped to stress the particular nature of the proletarian revolution, but in the current world of globalized capitalism the concept of bourgeois revolution holds little analytical purchase.<sup>89</sup> The concept of counter-revolution serves excellently to capture those elements that stymie otherwise revolutionary events.

There are also political problems with such a position. There is little to be gained for the contemporary left in attributing to the bourgeoisie revolutionary agency, and thus a positive image, when their consolidation involved a necessary alliance with landed aristocracy, in the case of the English Civil War, or resulted in the Thermidorean reaction as a way of avoiding the consequences of broader emancipation.<sup>90</sup> Davidson also notes that, despite the opposition that absolutists states presented to the interests of the bourgeoisie, '[the bourgeoisie] were, to varying degrees, unwilling to play a revolutionary role and might even play a counterrevolutionary one out of fear of the working class, meaning that the working class, and the popular masses more generally, constituted the only force that could consistently be relied upon to seek the overthrow of absolutism.'<sup>91</sup>

There is a further caution against taking the line of according social transformations that consolidated the power of the bourgeoisie status as 'revolutionary'. Doing so aligns the progressive nature of revolution, in terms of an aspiration towards universal emancipation, with the development and consolidation of capitalism. This can easily lead to support for the spread of capitalism and bourgeois interests as a path towards socialism. In other words, this position lends itself to a support of imperialism, and aligns with a series of racist attitudes, as well as contradicting the basic tenants of historical materialism. Rosdolsky made this point excellently with regard to Engels' understanding of the reactionary nature of remnant nationalist groups within the European states of his era.<sup>92</sup> These groups were reactionary solely due to the historical

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<sup>87</sup> Karl Marx, "Critical Notes on the 'King of Prussia and Social Reform. By a Prussian' [1844]," in *Early Writings* (Harmondsworth: Penguin, 1975), 419–420; Davidson, *How Revolutionary Were the Bourgeois Revolutions?*, 125.

<sup>88</sup> Davidson, *How Revolutionary Were the Bourgeois Revolutions?*, 119.

<sup>89</sup> Also it was abandoned by Marx, as noted by Davidson. It then makes far more sense to use the general concept of revolution in the sense that this chapter outlines.

<sup>90</sup> Ellen Meiksins Wood, *The Origins of Capitalism: A Longer View* (London: Verso, 2002), 32.

<sup>91</sup> Davidson, *How Revolutionary Were the Bourgeois Revolutions?*, 144.

<sup>92</sup> Roman Rosdolsky, "Engels and the 'Non-Historic Peoples': The National Question in the Revolution of 1848," ed. John-Paul Himka, *Critique* 18, no. 19 (1986): 129.

circumstances of their position, and under different circumstances the exact same position could be progressive (Davidson mentions the Basques as an example, comparing their resistance to Franco to their position in 1848).<sup>93</sup> Internally to Europe this is an important point; externally it is absolutely vital. Understanding the process of revolution as an attempt to engage with oppressive relations broadly, for broader emancipation, rather than as a particular step along a set historical path is an essential part of both a materialist approach to history and a progressive approach to humanity in general; one that refuses to assign agency based on characteristics inherent to any particular group. The 'proletariat' are so only based on their position within the social relations of production - not due to their being French, German or English. Furthermore there is nothing that guarantees their success within the social relations in which they are embedded as against the failure of a group fighting oppression elsewhere.

As a final component of the above point, it must be recognised that theoretical rigour would recall the political point that unearthing the birth of capitalism within its revolutionary crucible was a useful tool in countering conservative assertions that revolutions are doomed to fail. However, this is not incompatible with the position just outlined. In 'bourgeois revolution' the central components are not concrete emancipation for a people - they are the shifting means of exploitation to that of generalized capitalism, involving an alliance between sections of the old ruling class, and the new bourgeoisie. This can be recognised, and stressed, without ignoring the fact that capitalism may contain useful seeds in terms of expanding productive capacity. There is no necessity to slip into either apologetics or utopianism. The latter would be to imagine a socialist revolution without comparable productive capacities to capitalism, and the former to seek capitalism in order to acquire those productive capacities.<sup>94</sup>

## **V: Revolutionary Agency**

Having discussed the theoretical and political stakes involved in historical interpretation, distinguished the modern concept of revolution from its pre-modern counterpart, and questioned the utility and purposes of the return of this pre-modern form, this Section turns to the key aspects of revolution in its modern form: the aimed for supersession of capitalist relations, the agency of humanity in that process, and the necessity of structural analysis in enabling informed revolutionary practice. There are two focal points which will be addressed in turn: agency and praxis. Firstly this section will address historical agency at a more general level. This draws attention to the position of historical agency within the development of modern thought and the reconceptualization of history that accompanied it. This reconceptualization of history involved the perception of historical progress brought about via human activity. This foregrounds such activity taking part in a non-cyclical historical process. These are preconditions for revolutionary agency and praxis, but they are not equivalent to it. Revolutionary praxis, in particular, demands at least some level of revolutionary

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<sup>93</sup> Davidson, *How Revolutionary Were the Bourgeois Revolutions?*, 150.

<sup>94</sup> *Ibid.*, 180.

consciousness – that is, to reiterate, the aimed overthrow of capitalism (because revolutionary consciousness is a product of capitalist relations), and the need to organise and mobilize human agents around that goal in a unity of structural analysis and practical activity. Again, it is important to stress that this does not mean there are clear historical lines that are crossed at which point such agency or praxis becomes clearly visible and possible, but that the components appear unevenly and in nascent forms prior to their more uniform manifestation.

Perry Anderson's thoughts on historical agency provide an excellent summary of the issue at hand. The context for Anderson's exposition is a response to the debate between Luis Althusser and E. P. Thompson.<sup>95</sup> This section will not cover this argument in great detail, but the parameters are important for any discussion of revolution. The debate turned on the agency of the human subject within history – broadly speaking Althusser considered that history was a structurally determined process, and Thompson wished to rescue human agency from the scrapheap to which Althusser was consigning it. These positions are summed up by Althusser's depiction of history as a 'natural-human process without a subject';<sup>96</sup> and Thompson's adoption of William Morris' declaration that Men and women are the 'ever-baffled and ever-resurgent agents of an unmastered history.'<sup>97</sup>

The opposition between Althusser and Thompson throws up a series of ways in which human agency continually appears and disappears in analyses of the historical process, which also relates to the foregoing discussions on the concept of revolution. There are two aspects to consider. Firstly, revolutionary agency as defined by its goal, or the possible outcome. Thompson's agents of 'unmastered' history fit this category, representing a move to foreground the agency of people in the historical process even absent their own fully conscious and willed engagement. It is possible to retrospectively understand this as having revolutionary *content*, not for the participants at the time, but in the (unconscious) construction of structural conditions favourable to the supersession of capitalist relations. As per the foregoing discussion on the concept of 'bourgeois revolution', it is only in this sense in which capitalist development can be considered revolutionary in the modern sense of the concept which referred to universal emancipation.

The second part of this section will address praxis. This foregrounds the conscious element of historical agency. This follows on closely from Anderson's discussion on agency, but the connection between knowledge (theory) and action (practice) are foregrounded to stress praxis as a particular type of historical agency. This is then connected to the idea of revolution as targeted towards universal emancipatory goals,

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<sup>95</sup> Anderson, *Arguments Within English Marxism*, Chapter 2.

<sup>96</sup> Anderson's phrasing, the point is made by Althusser in relation to Capital. "[T]he evaporation of the notions of subject, human essence, and alienation, which disappear, completely atomized, and the liberation of the concept of a process (procès or processus) without a subject... is the basis of all the analyses in Capital." Louis Althusser, *Lenin and Philosophy and Other Essays*, trans. Ben Brewster (New York, London: Monthly Review Press, 1971), 94.

<sup>97</sup> Anderson, *Arguments Within English Marxism*, 21.

which when connected to structural analysis necessarily become anti-capitalist. This is because as capitalism achieves dominance in social relations, capitalist dynamics become the most powerful structural determinants of human life. One does not have to accept this conclusion of the critique of capitalism to recognise that this was a defining condition of modern revolutionary thought. To be a revolutionary meant to have recognised the political consequences of the structural analysis of capitalism. Although other forms of activity could certainly be described as praxis, uniting theory and practice, it would not be meaningfully *revolutionary* praxis without collapsing revolution into an empty category. Similarly, human agency could be directed towards the incidental overthrow of capitalism and thereby have revolutionary content, but this would not meaningfully be revolutionary *praxis*.

*i) Agency and Structure*

Anderson's take on Althusser and Thompson's opposition foregrounds the ambivalence between structurally determined life and the freedom of humanity to shape its own future. This same dichotomy is embedded in Marx's formulation at the beginning of this chapter: humanity makes its own history, but it does so within existing circumstances, 'given and transmitted from the past.' This nightmare that 'weighs on the brains' of the living represents both the material configuration of the world – the fact that some people have vast wealth and others do not – and the ways in which our very capacity to think and imagine alternative ways of life is imbricated in the unequal conditions into which we are born. As stated at the outset of this Chapter, the concept of revolution served to describe the possibility of dreaming of a radically different future and of bringing that about through conscious engaged action in the historical process. In Marx's formulation, a truly universal revolutionary class would arise in the proletariat, through the specific conditions of oppression that applied to them. In order to liberate themselves from wage labour, they would have to abolish those conditions completely. Marx's analysis was, in this sense, simultaneously a structural examination and at the same time a call to political mobilization.

This aside, Anderson's perspective on Thompson's *The Poverty of Theory* provides an appealing formula for understanding the basics of revolutionary agency. Considering the proclivity for contemporary studies of revolution to seek definition based on results, Anderson offers a useful perspective for the practice-orientated approach: '[b]y definition, it is intentional reach rather than involuntary result that distinguishes one form of agency from another.'<sup>98</sup> This then gives Anderson the space to offer up a hypothetical set of typologies for human agency based upon the intentional reach of these social movements. It is his final category that is of interest when it comes to revolution, yet for comparative purposes it is worth recounting the set. This approach also offers an important corrective to the endless cycle of debate insinuated by the opposition between Althusser and Thompson: as Anderson himself notes, 'the two antagonistic formulae of a 'natural-human process without a subject' and 'ever-baffled, ever-resurgent agents of an unmastered practice' are both claims of an essentially apodictic and speculative character – eternal axioms that in no way help us to trace the

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<sup>98</sup> *Ibid.*, 20.

actual, variable roles of different types of deliberate venture, personal or collective, in history.<sup>99</sup>

Against this open debate Anderson breaks the potential goals of human agents down into private goals, personal goals, and collective goals. He makes the claim that for the vast majority of people for the vast majority of the time their goals have been ‘private’ goals. ‘These personal projects are inscribed within existing social relations, and typically reproduce them.’<sup>100</sup> Within a similar vein lie those ‘collective and individual projects whose goals were ‘public’ in character.’<sup>101</sup> There are less of these, although they comprise grander historical projects for the historian than the minutiae of the contrasting private activity. ‘However, these agendas too in their overwhelming majority have not aimed to transform *social relations as such* – to create new societies or master old ones: for the most part they were much more limited in their (voluntary) scope.’<sup>102</sup> Anderson then lists a variety of historical events, noting that ‘most familiar historical events or processes of this kind, whatever their misery or grandeur, have been marked by the pursuit of local objectives within an accepted order over-arching them.’<sup>103</sup>

Finally, [and most importantly for this discussion,] there are those collective projects which have sought to render their initiators authors of their collective mode of existence as a whole, in a conscious programme aimed at creating or remodelling whole social structures. There are isolated premonitions of this phenomenon, in political colonization, religious heterodoxy or literary utopia, in earlier centuries: but essentially this kind of agency is very recent indeed. On a major scale, the very notion of it scarcely predates the Enlightenment.<sup>104</sup>

The last line captures the connection between modernism and the concept of revolution. He cites the French and American Revolutions as ‘the first historical figurations of collective agency in this, decisive sense’, but goes on to clarify that these ‘still remain a great distance from the manifestation of full popular agency desiring and creating new social conditions of life itself.’<sup>105</sup> As an aside, it is also possible to read these as unsuccessful revolutionary struggles and that it was this failure that emphasized their distance from the ‘manifestation of full popular agency’. The American Revolution presents a far less persuasive case, but the French revolution certainly contained strong proletarian aspirations for broader emancipation than a new imperialist state and the subjection to intensified capitalist exploitation. As a result although the revolutionary impulse could be argued to be present the outcome was either conservative reaction, counter-revolution, or a differently orientated process overall. This draws attention to the revolutionary struggle as a process rather than a

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<sup>99</sup> Ibid., 21.

<sup>100</sup> Ibid., 19.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid., 20.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

static event, highlighting the counter-revolution in the Thermidorean reaction and the ways in which the revolutionary struggle continued across Europe until 1848. In any event, Anderson's depiction helps to elucidate the location of the concept of revolution and the historical agency associated with it within the modern period.

This point also highlights the ways in which political defeat, in this example of the *sans-culottes*, can be read as the dominance of 'historical forces'. It is important to recognise that acknowledging the structurally determined nature of any moment is to simultaneously recognise the ambivalence present in any concept of human agency. This ambivalence is evident in the 'nightmare' that Marx noted to weigh on the minds of the living, and in Althusser's absent historical subject. Thompson's concession here is that whatever the nature of historical determinism, it is vital to *think* oneself free.<sup>106</sup> This maps very closely with Freud's conception of 'useful' illusions that one might desire to hold against therapeutic intervention.<sup>107</sup> Although the response of 'dialectics' is often seen as an easy answer to these kind of dilemmas, in this instance it is clear that one need not resolve the debate either way (it seems doubtful that such a resolution is possible with the parameters of social-scientific debate) in order to recognise that without organising to achieve political goals when these goals are opposed by other social groups that *do* organise, the prospects of success seem rather slim.<sup>108</sup>

What counters the potential idealism in this aspiration toward human agency in the face of determining historical structures is the 'scientific' politics mentioned by Arthur in the introduction to this thesis. As has been mentioned, the 'science' of this process is rooted in constant analysis of the structural constraints on political action, with a mind to strategizing effectively. Anderson describes this as the aspiration for deep knowledge and willed engagement (conscious, goal-directed activity) as the root of socialist revolution, embedded in Marx's notion of a transition from the realm of necessity to that of freedom. However, even this focus on knowledge and conscious engagement can run into concerns about the structurally conditioned nature of human activity. These concerns riddled even concerted attempts like Thompson's to counter Althusser's charge of structural determinism.

Expressing one such concern, Thompson speculated that in previous history social being determined social consciousness, and that this might not be the case in a socialist

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<sup>106</sup> E. P. Thompson, *The Poverty of Theory & Other Essays* (New York: Monthly Review Press, 1978), 344.

<sup>107</sup> Sigmund Freud, *On the History of the Psycho-Analytic Movement: Papers on Metapsychology and Other Works; (1913-1914)*, ed. James Strachey, vol. 14, *The Standard Edition of the Complete Psychological Works of Sigmund Freud* (London: Vintage, 2001), 273–301.

<sup>108</sup> Raymond Williams put this most succinctly: the 'transformation of society has an enemy. Not just an electoral enemy or traditional enemy, but a hostile and organised social formation which is actively trying to defeat and destroy you.' See Raymond Williams, *Resources of Hope* (London: Verso, 1989), 71. Also cited in Taylor, "Reclaiming Revolution," 290. There is also a clear link between this point and Cox's description of politically useful theory. Reflecting on this debate as offering a distinction between idealism and materialism, revolution can then be framed as a political project in which one reacts to structural determinants with a mind toward seeking the conditions for universally freer agency; to construct historically determinative conditions more favourable to the enjoyment of free will.

society, where the determining process of social being was broken by the absence of capitalism. For Thompson this opened up the possibility of

a long protraction of tyranny. So long as any ruling group, perhaps fortuitously established in power at the moment of revolution, [could] reproduce itself and control or manufacture social consciousness there [would] be no inherent logic of process within the system which, as social being, [would] work powerfully enough to bring its overthrow.<sup>109</sup>

In part this is revealing as to the ways in which a scholar might attempt to come to terms with and conceptualise the nature of the USSR, and is in that sense insightful. However it also opens up further ambiguities within conceptions of agency.

Here Thompson was perhaps making too much of the 'conscious', 'willed', aspect of socialist revolution. In this frame the ability of a ruling clique to then shape the social conscious would present a problem for agency. However, this mirrors the problematic which underpinned Althusser's structural determinism and the short quote by Marx that opens this chapter. The ruling clique in Thompson's formulation can be read as simply another form of the structural determination of Althusser and the conditions given not made noted by Marx. They do not invalidate historical agency, but they do qualify it. The crucial transformative influence is the knowledge of these historical processes and the structure they represent.

Anderson develops this point noting that the critically constrained historical agency Thompson was describing had no significant differentiation from the agency of any group oppressed by various ruling classes 'since the dawn of the division of labour'.<sup>110</sup> Indeed, Thompson's fear of control by the political elite, rooted in the strained example (because it was in no deep sense socialist) of the Soviet state, actually captures a deep truth about the agency of the ruling classes themselves. It is in *their* historical agency to attempt to control and create social consciousness in this manner, whether or not they are wholly cognisant of this process. The way in which a variety of political texts, from Machiavelli's *Prince* to Locke's *Treatise on Government*, bear such close resemblance to sketchy ruler's instruction manuals in how to pacify the masses bears testament to how theory can serve these objectives.

Indeed, if we return to the latest iterations of scholarship on revolution, we have powerful instances of the same thing: scholarship offering ways of assessing the likelihood of, and thereby methods of forestalling, revolution (understood as political instability and therefore a threat to certain kinds of business activity).<sup>111</sup> The kind of knowledge Anderson is stressing refers to a deeper grasp of the mechanics of historical change, coupled with the kind of agency involved in aiding radical transformation. In many senses this knowledge is maintained as an aspiration, with Anderson claiming that 'it is safe to say that *no* social formation short of full socialist democracy is likely to

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<sup>109</sup> Thompson, *The Poverty of Theory & Other Essays*, 155.

<sup>110</sup> Anderson, *Arguments Within English Marxism*, 24.

<sup>111</sup> Goldstone et al., "A Global Model for Forecasting Political Instability."

generate accurate knowledge of its own deepest laws of motion'.<sup>112</sup> Such a concession threatens to collapse agency back into its structural determinates, but only because it sets the bar on 'accurate knowledge' too high. There is no reason per se that *incomplete* knowledge incapacities historical agency, whilst acknowledging that effective engagement requires the crossing of some threshold on the spectrum of understanding.

In addition to stressing analytical knowledge as offering a break from structural determinism, Anderson recalls Marx's founding of the realm of necessity (and structural determinism) on scarcity. This is a commonly adopted response to anyone positing the Soviet Union as a cautionary example of socialism.<sup>113</sup> Anderson's point is to stress that the Soviet state was still haunted by poverty and shortage, 'in an economy whose productivity of labour remain[ed] half that of West Germany.'<sup>114</sup> As such, even putting to one side the utopian aspect of 'perfect' knowledge linked to action noted above, the material conditions of life are hereby foregrounded as an essential component of a truly liberated social consciousness. As Anderson notes, 'even common aspiration fused with real cognition, in a post-revolutionary worker's democracy, would not suffice to cross the frontiers of necessity.'<sup>115</sup>

This is a valid point, but it doesn't have to be the primary base of response, especially if we accept that scarcity is often constructed through social (and within that market-based) means.<sup>116</sup> This is not to deny the basic premise that production within a social group has to reach a certain level in order to provide for the basic necessities of life, but rather to recognise that assessment on this level is a problematic exercise (who defines necessity, who carries out the analysis and on what basis), and that distribution of goods and access to means of production such as land remain key issues. This connects directly to the need for critical analysis of the structural conditions of possibility when it comes to human agency. Indeed, as mentioned in the introduction, the concept of revolution served precisely to bridge the gap between overt structural determination (in this example rooted in necessity) and the collective agency aimed at dismantling those conditions for future generations.

Such activity would simply be a specifically revolutionary variant of Anderson's earlier formulations of novel collective agency 'aimed at creating or remodelling whole social structures'. The key novel component here is the collective and conscious engagement with this particular goal in mind, not necessarily the effects of full-blown socialism on collective consciousness and social being. If we return to the role of consciousness in Marx's theory we capture the basic function of this kind of knowledge that Anderson discusses, without the need to fall into an overt focus on production, in the vein of the Menshevik/Bolshevik split over the economic backwardness of pre-1917 Russian society. As Overy has argued, Marx operated with a Hegelian conception of

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<sup>112</sup> Anderson, *Arguments Within English Marxism*, 25.

<sup>113</sup> Terry Eagleton, *Why Marx Was Right* (New Haven, CT: Yale University Press, 2011), 9.

<sup>114</sup> Anderson, *Arguments Within English Marxism*, 25.

<sup>115</sup> *Ibid.*

<sup>116</sup> For a haunting example of this fact, see Mike Davis, *Late Victorian Holocausts: El Niño Famines and the Making of the Third World* (London; New York: Verso, 2001).

consciousness – *Vernunft* – which ‘was not mere understanding (*Verstand*), but a deeper appreciation of the existing reality of the material world whose actual conditions would determine the possibility of revolutionary transformation.’<sup>117</sup>

This would coalesce into revolutionary activity ‘aimed at creating or remodelling whole social structures’, but endlessly informed by immanent social analysis. This is where the necessary link between revolutionary agency and the structural conditions in which it operates reasserts itself – without such a link, any number of random activities hold the potential to serve the revolutionary agenda. As a general statement, absent the kind of structural analysis that would offer reasons for *why* any particular activity could serve this aim, this is unpersuasive. Yet we see that this perspective replicates itself within critical scholarship, particularly that of international law.<sup>118</sup>

ii) *Praxis*

The concept of praxis serves to consolidate the idea of revolutionary practice tied to the kind of *vernunft* described above. The legal side of this approach has been tied to Gramsci’s ‘rearticulation of Marxist thought as the *philosophy of praxis*.’<sup>119</sup> Claire Cutler, for example, takes Gramsci’s insights to provide material on the dual nature of law as ‘both the coercive arm of the state and the consensual domain of civil society.’<sup>120</sup> This is partly a materialist rejection of the idealist or formalist conception of law as rooted in ‘transcendent and universal characteristics or principles’, conceived instead in ‘practice and lived experience.’<sup>121</sup> This will be developed further through other Marxist legal theorists, particularly Evgeny Pashukanis, in the next Chapter, but at this stage the concept of praxis serves to tie law to practical experience, or law as an ‘historical force’.<sup>122</sup>

Leaving the legal aspect for later consideration, the essence of this thought aims to capture the possibility for collective and conscious intervention in the historical process. Cutler notes that ‘the philosophy of praxis ‘is realised through the concrete study of

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<sup>117</sup> Richard Overy, “Capital Fellow,” *Literary Review*, no. 409 (May 2013): 7.

<sup>118</sup> See Taylor, “Reclaiming Revolution.”; a consequence of this structural aversion is the conclusion that [t]iny revolutions are everywhere, every day’. Luis Eslava and Sundhya Pahuja, “Beyond the (Post) Colonial: TWAIL and the Everyday Life of International Law,” *Trade, Law and Development* 3, no. 1 (2011): 129.

<sup>119</sup> Wolfgang Fritz Haug, “Rethinking Gramsci’s Philosophy of Praxis from One Century to the Next,” *Boundary 2*, no. 26 (1999): 104. Haug makes a persuasive argument that those interpretations of Gramsci’s ‘philosophy of praxis’ as a ‘cypher’ for Marxism stemmed from the party-political needs of the Partito Comunista Italiano (PCI). Peter Thomas also argues against the ‘philosophy of praxis’ as operating as some kind of ‘codeword’, see Peter Thomas, *The Gramscian Moment: Philosophy, Hegemony and Marxism* (Leiden: Brill, 2009), 105–108. Also see Robert Knox, “What Is to Be Done (with Critical Legal Theory)?,” *The Finnish Yearbook of International Law* 22, no. 1 (2011): 37 and footnote 27.

<sup>120</sup> A. Claire Cutler, “Gramsci, Law, and the Culture of Global Capitalism,” *Critical Review of International Social and Political Philosophy* 8, no. 4 (2005): 529.

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*, 530.

past history and through present activity to construct new history'.<sup>123</sup> Although it is evident that everything is formed in a historical process, the awareness of formation through history combined with conscious activity conceiving of itself as intervening in that process offers a marked difference – praxis is then both a philosophy of examination and a philosophy of practice; observing and changing the world. This is basically a rearticulation of the points addressed through Anderson's exposition above, but this re-emphasising adds an important focus.

Gramsci articulated a transition from the immediate struggle of specific professional groups united by their proximity to one another and the immediacy of their common cause to more expansive collective cause and action.<sup>124</sup> The more immediate forms of struggle are more limited in scope. For example, specific professional groups will find common cause in their proximity to one another and common social experience and subsequently fight for those common interests. But a more expansive struggle, or practice, necessitates an equally broader theoretical understanding of the connections between these more isolated struggles. That theory guiding practice is revolutionary when it recognises the need to transcend capitalist social relations in order to achieve the common interests of subordinated groups. It is this crucial distinction that defines increasingly radical, and then revolutionary practice.<sup>125</sup> Lenin captured this necessary connection between theory and practice most succinctly, noting that revolutionary practice demanded revolutionary theory.<sup>126</sup>

It is sustained theoretical reflection and development that enables the transition from immediate experience of oppression to an understanding of its root causes. Robert Knox captures this well, noting that

[o]ne's immediate experience of oppression or exploitation is powerful, but it is unable to locate that experience within a broader ensemble of social relations. It is only through theoretical reflection that one can understand the ways in which broader logics produce and sustain particular instances of oppression and exploitation. And it is only by understanding these logics that one might formulate practices which could overcome them.<sup>127</sup>

This is a *necessary* connection – and in this sense should be both immanent in the theory and the practice. Marx captured this process in his critique of Feuerbach. Marx stressed the fact that after Feuerbach made his criticism of the duplication of the world into a 'religious, imagined one and a real one' and thereby making the materialist emphasis that the real world was the concrete base there still remained a crucial step.

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<sup>123</sup> Antonio Gramsci, *Selections from the Prison Notebooks of Antonio Gramsci*, trans. Q. Hoare and G. N. Smith (New York: International Publishers, 1971), 427.; quoted in Cutler, "Gramsci, Law, and the Culture of Global Capitalism," 530.

<sup>124</sup> Gramsci, *The Prison Notebooks*, 181.

<sup>125</sup> Robert Knox develops this line of argument in Knox, "What Is to Be Done (with Critical Legal Theory)?"

<sup>126</sup> V. I. Lenin, *What Is to Be Done? Burning Questions of Our Movement* (Peking: Foreign Languages Press, 1973), 28. Cited in Knox, "What Is to Be Done (with Critical Legal Theory)?" 36.

<sup>127</sup> Knox, "What Is to Be Done (with Critical Legal Theory)?" 36–7.

This secular, material social world must then be subjected to critical analysis and transformed through practice. Marx offers the following example: ‘once the earthly family is discovered to be the secret of the holy family, the former must then itself be criticized in theory and revolutionized in practice.’<sup>128</sup> In the context of structure and agency and revolutionary praxis, comprehending the structural determinates of human activity is the first step towards enabling revolutionizing practice – that is practice designed to transform those determining conditions based on a critical understanding of their nature. For the case of the broad concept of revolution discussed in this Chapter, the structurally determining conditions exposed by theoretical analysis were capitalist social relations, which subsequently had to continue to be criticised in theory and revolutionized in practice.

Marx’s *Theses on Feuerbach* offers a companion quote to that which opens this Chapter, against the materialist focus on structurally determining conditions, the ‘nightmare’ that weighs so heavily on human agents.

The materialist doctrine that men are products of circumstances and upbringing, and that, therefore, changed men are products of other circumstances and changed upbringing, forgets that men themselves change circumstances and that the educator himself must be educated... The coincidence of the changing of circumstances and of human activity can be conceived and rationally understood only as *revolutionizing practice*.<sup>129</sup>

This is the early function of the modern concept of revolution – re-engaging human agency in the historical process, and pairing it with the structural analysis of the kind Marx deployed in *Capital*, gives this direction of the kind that emerges in the class struggles referred to by Gramsci above. The unity of these two, and the target for transformation, provides the constituent elements of the modern concept of revolution; a concept rooted in the socialist historical movement, and a political project that endures with capitalist exploitation.

## **VI: Conclusion:**

This chapter has aimed to explain and defend the modern concept of revolution, with a mind to developing the idea of revolutionary praxis and subsequently considering the possible limitations on this praxis that might be posed by the form of law. There are several strands that intersect in the concept of revolution that demonstrate a symbiotic relationship between the concepts of revolution, human agency in history, and the idea of praxis as the unity of historical consciousness and practice. Together these build to form a particular understanding of how revolutionary praxis is defined by the aims involved, and how these are historically formed alongside the development of modernism and the capitalist mode of production.

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<sup>128</sup> Karl Marx, “Theses on Feuerbach [1845],” in *Ludwig Feuerbach and the End of Classical German Philosophy*, by Frederick Engels (Peking: Foreign Languages Press, 1976), 63.

<sup>129</sup> *Ibid.*, 62.

In a sense both the concept of revolution and that of praxis open themselves up to two forms of criticism. That of 'forcing' an interpretation onto history, and that of reading 'consciousness' into human activity that may be extremely difficult to substantiate empirically. There are two simple defences to be made against these charges at this stage. Firstly all 'history' involves a degree of interpretive 'force' between the scholarly 'subject' and the 'object' of their enquiry.<sup>130</sup> What matters more than the fact of this, is how that interpretation can maintain coherence with itself, and how persuasively this relates to whatever empirical material is utilized in the process of argumentative formulation (and, of course, that material which is left out). Secondly, and relatedly, empirical 'proof' maintains its power through its position within an interpretive framework; facts, especially those of the historical kind, do not leap out at observers of their own accord. Added to this, historical actors of the nineteenth and twentieth centuries explicitly wrote about their own actions as 'revolutionary' and considered themselves engaged in a historical process. As has been discussed, when considering revolutionary practice in terms of historical agency, it is this intent which is a vital factor, not the historical outcome. Therefore the concept of revolution demands this particular kind of historical attention. What is noteworthy about the concept of revolution is that, as movements began to conceive of themselves as revolutionary in the modern sense described above, historical figures who considered themselves actively engaged in historical processes became more numerous (or rather became easier to spot because of their self-conception).

The above concept of revolution, including the revolutionaries who gather under its banner, remains inextricable from Marxism. Many of those historical figures who considered themselves explicitly engaged in conscious historical construction also considered themselves Marxists of some description. However, Marxism itself encompasses a wide range of divergent positions, with fractious debates over both theory and practice. Thus despite the temptation to add the caveat that revolution in the sense described here and Marxism's notion of revolution are not precisely coterminous, to do so capitulates to a narrow and essentialising view of Marxism itself. Such capitulation is not without its material cause; as has been extensively noted Marxism has suffered greatly within academic circles along with the demise of active socialist political parties.<sup>131</sup> The result is that concepts seen as explicitly Marxist suffer the possibility of being dismissed on political and ideological grounds before their merit is assessed empirically and theoretically. As should be clear from the foregoing discussion, this has characterised much discussion over the concept of revolution among historians. However, the fact that the concept of revolution raised here aligns

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<sup>130</sup> Koselleck argues that 'the notion of history itself had a long period of historical development, extending from Herodotus to Gibbon, before it achieved conceptualization as a fundamental mode of human existence in the nineteenth century' – Foreward by Hayden White to Koselleck, *The Practice of Conceptual History - Timing History, Spacing Concepts*, ix. In this sense the practice of 'history' itself in its current form is intimately related to both the birth of modernism, and concepts like that of revolution.

<sup>131</sup> Alan Hunt, *Explorations in Law and Society: Toward a Constitutive Theory of Law* (New York, London: Routledge, 1993); Cutler, *Private Power and Global Authority*; Vivek Chibber, *Postcolonial Theory and the Specter of Capital* (London: Verso, 2012).

with Marxist theory is not solely a reflection of a political and ideological affiliation to Marxism. Section IV demonstrates that a clear case can be made that Marxism sprung from the particular coalescence of historical factors that also enabled the concept of revolution to be interpreted in its modern (and Marxist) form.

There are several important elements to re-emphasize at this stage. Firstly the elaboration of the concept of revolution undertaken here has two elements. Most importantly, the concept clearly has historical roots that map closely with the early development of capitalist industry and the humanitarian ideals of the enlightenment. They form a significant part of a secularizing move within the nascent social sciences towards an understanding of human history and agency as a material process within which development of humanity's potential was a worthy social aspiration. This emancipatory mind-set also applied, at least in theory, to all of humanity.

The conceptual history of revolution demonstrates its emergence as a coherent and distinguishable concept in and around the social upheavals in Europe that constituted the French Revolution and the following half-century of political struggle, the subject of Eric Hobsbawm's *The Age of Revolution*. Before this, the concept itself, or translations of it, was closely associated with cyclic change, alongside a general conception of human history as also operating in a circular manner. It is useful to draw attention to this for two reasons. Firstly the concept continues to be deployed today in academic and more mainstream media as referring simply to large scale social upheaval. There are other words that can serve that purpose, and such invocation runs at stark odds to the meaning of revolution for most of the nineteenth and twentieth centuries. Secondly, drawing attention to this heritage foregrounds the relationship between revolution and the exploitation of human labour by those seeking to accumulate profit and privilege. It reiterates the birth of the concept of revolution in the crucible of capitalist oppression and the vision that animated revolutionaries of a society that surpassed the depravities of both capitalism and previous exploitative social systems.

This Chapter also stressed the deep connection between history (or empirical study more broadly), theory, and political activity. Foregrounding the fact that theory always serves a particular political purposes – that it is always for something and for someone – this chapter has aimed to bring to the surface both the political stakes in reclaiming revolution's conceptual history, and the political ends that are served by eliding it. The blurring of the lines around the concept of revolution did not spring simply from the well of academic knowledge; this process was enabled and strengthened by the dismantling of the Soviet Union and the supposed debunking of socialist alternatives to capitalism. It happens to be that such a purpose requires a certain level of 'forgetting' when it comes to historical engagement, but the empirical element to this is not the only feature of the discussion at hand here. The very concept of revolution helps us to understand how the forces of political commitment feed into research and colour the processes at work. This is not only necessary as a general caution to academic ivory-towerism, but it is absolutely essential when it comes to legal theory, which will be the subject of the next chapter.

There is a final element to this chapter, one that is generally more positive. That is to stress the role of human agency in the historical process, which can at times be elided by powerfully materialist accounts of historical change. There are two elements to this. Firstly, following Thompson, it is important to acknowledge that in simple terms, it is vital to 'think' ourselves free; that is to think of ourselves as crucially engaged in a process of historical construction, informed by the sense of history that imbues the present. However, the concept of revolution helps to stress the connection between this agency and the structures which determine our lives; most particularly those structures that prevent the realisation of our deeper visions of emancipated life. This is the counterpoint to revolutionary positivity – the task at hand can seem too extreme, especially in times of counter-revolutionary resurgence like those that characterise the current period. Under a generalized neo-liberal assault and the dearth of transformative political vision in official circles, the concept of revolution cautions us against clutching at straws that may, in the end, form crucial elements of the oppressive apparatus that confronts us.

The concept of praxis unites these elements of conscious historical awareness and human agency. Although there is a long history of debate that surrounds the concept and its place within Marxism more broadly, the concept serves a simple purpose here. It is a way of capturing the unity between theory and practice inherent in the concept of revolution. Understanding revolutionary agency as referring to a particular transformative vision, the combination of revolutionary praxis provides a frame through which progressively inclined action can be approached. We then encounter the basic idea that this kind of praxis can occur in different areas of social life, and that these may be more or less receptive to revolutionary objectives. This will require a different way of engaging, or tactical arrangement, for different areas of life – whilst remaining cognisant, as always, of the interconnected nature of things. Understanding the law as an arena of praxis, which will be elaborated on in the following chapter, we can assess the potential limits that the legal form may place on revolutionary praxis.

There is one final note of caution to be made here, that will become clearer throughout the next Chapter and then the later parts of this thesis. That is not to fetishize the concept of revolution in any way. There are a wide variety of ways in which activity could be considered revolutionary –there is no rigid blueprint of what such activity constitutes. But with the kind of framing developed here, rooted in its conceptual development, there is a sufficiently concrete basis to assert that revolutionary objectives have in mind broad emancipatory projects, encompassing as much of humanity as possible, and have as their target the exploitative global capitalist system. Again, these objectives could have a variety of activities articulated under their rubric, but the objective here is not to provide an exhaustive list of revolutionary activity – rather it is to assess two moments in time when objectives that can be read as revolutionary where channelled into the arena of international law, and to assess the consequences. The next Chapter will clarify the legal theory required to engage in this process, and the subsequent two Chapters will analyse the early Soviet engagement with international law, and that of the Third World movement of the late sixties and early seventies.

## **Chapter 2: International Law and International Legal Praxis**

*'In its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets, and steal loaves of bread.'*

Anatole France, *'The Red Lily'* 1894

### **I: Introduction**

Anatole France's famous literary description of the law, quoted above, evokes the tragedy of the noble aspirations of the French revolutionary. The Poet Choulette laments the Revolution's egalitarian ideals, enacted by 'fools' and 'imbeciles', that enabled only the empire of the wealthy.<sup>132</sup> It was under these continued conditions of inequality that the new legal equality of citizens appeared so discordant. The passage offers a basic caution against seeking formal equality in the face of substantive material inequalities. For the purposes of this thesis, the context of the French Revolution also foregrounds a caution against the merger of revolutionary socialist goals and the form of law rooted in abstract equivalence. But the quote also suggests a level of disconnect between the law's 'majestic equality' and the concrete brutality of day to day life that open up space for the law to escape complicity in cause and to maintain promise as remedy. This Chapter is concerned most directly with this apparent ambiguity in the role of the law, and its question of its consequent capacity to accommodate the revolutionary goals elucidated in Chapter One.

In order to grasp this relationship and the potential limits that the law may offer to such revolutionary praxis, it is necessary to unpack both the function of the legal form, how that form structures legal praxis, and finally how open such praxis would be to forms of revolutionary praxis. From the discussion in Chapter One, it is a simple step to recognise that specific forms of praxis occur in different structurally conditioned areas of social life. These could be the particular political, social and economic conditions pertaining to any one state, or to the particular social arena in which that practice is being articulated – social struggle on the streets; political struggle in Parliament or at the ballot box; or economic struggle through Unions, worker's cooperatives or general strike mobilization represent just a few of the potential options.

Foregrounding the law as praxis draws attention to the fact of its formation within a series of social relations. This foregrounds the function law and the articulation of doctrine as practice, whilst acknowledging the way in which that practice is shaped by doctrinal structures. This is the lived, changing experience of law, as a flexible social tool, responsive to and formative of changing social needs. Taking this approach offers a more direct way of conceiving of the openness of law as practice, yet connected to the possible boundaries exerted by the *form* of law. The form of law represents the basic essence, or logic, that defines and structures law. Without this 'theory of the legal form,

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<sup>132</sup> Anatole France, *Le Lys Rouge*, quatorzième édition (Paris: Calmann-Lévy, 1894), 117.

the specificity of the law is impenetrable.<sup>133</sup> This understanding of the law offers the basic structure to practice conducted within it. Foregrounding this as praxis highlights the ways in which legal scholars and practitioners engage in a process of construction when consciously merging theoretical and practical activity. This is not a case of ‘imagining’ international law as praxis, but rather recognising the interconnections between theory and practice present in the function of law.<sup>134</sup> It is already a body formative of and formed by moments of praxis. Prefacing the pre-existence of the law as praxis thereby cautions against the optimism present in ‘imaging’ international law as praxis and thereby thinking *this move* creates emancipatory possibilities.

In highlighting legal praxis in this manner it is also essential to maintain a background awareness of the connections between distinct ‘fields’ as we consider them for the purposes of analysis; different forms of praxis necessarily blend into one another and are mutually constitutive. It is necessary then, firstly to avoid the reification of any particular field of study and to recognise the ‘totality’ formed by social relations, but more importantly because without this it is possible to overlook activity outside of field of analysis and thereby subconsciously disable radical critiques of activity within the field. Legal struggle is so ubiquitous that it seems naively nihilistic to dismiss its progressive potential. But the point is not to deny the necessity of law, but through rigorous critique to assess its limits. Again, this is not to deny the importance of legal struggle today, but to recognise that there are concrete reasons for the division in the social relations that are formed by and embody the law as a field, and to recognise that this does not result in law being a hermetically sealed category of separate social relations. Rather, the thrust of the thesis is to stress that it is only under certain historical conditions, and under certain types of social relations, that law takes on this significance and apparent separation. The result is that, under those historical conditions, law becomes a significant arena of praxis for precisely the same reasons that it achieves a certain level of reification, and that as a consequence it becomes even more important to understand the limits that law might place upon activity within its purview.

The inevitability of the law just described, coupled with the apparent ambiguity in the law’s relationship to capitalist inequality, exploitation and oppression, constitute the basic frame of this Chapter. It is necessary to interrogate this ambiguity, to acquire a deeper grasp of the form of law, and to see how that form offers potential constraints to law as praxis in the way described above. The bulk of this Chapter is devoted to elucidating the nature of the legal form and its consequent limits, with the last section assessing the possibility of revolutionary legal praxis. Section II will examine the basic positive promise in the law; a hopeful legal vision rooted in the absence of any *necessity* to complicity of law in oppression. As long as there is no reason of legal principle for the law to act in the way of France’s opening quote, then the law may hold emancipatory and possibly even revolutionary potential. The second part of this opening section

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<sup>133</sup> China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (London: Pluto Press, 2005), 2.

<sup>134</sup> Cutler, *Private Power and Global Authority*, 261.

briefly notes some conventional accounts of this legal ambiguity in relation to international law. These have read this ambiguity as product of law in the early stages of its social development, and see it as something that is gradually erased as the international legal system develops in sophistication and becomes ever more objective and predictable.

This vision of law has been subjected to a large amount of critical examination, and Section III addresses this. These critical accounts assert the inevitability of politics in international law, and the basic indeterminacy of international legal argument. However, in stressing the indeterminacy of international legal argument, and the politics within law, these critical challenges did not offer any definitive insight into the nature of the form of law. Legal indeterminacy simply meant analysis shifted elsewhere to find the reasons for the very determined looking structure of international society. Third World and Feminist approaches to international law made essential contributions to this labour, examining the patriarchal, gendered and racist underpinnings of international law, alongside its historical and contemporary complicity with colonialism. However, these approaches have not taken the form of law itself as their main point of critique, and therefore they do not offer sufficient insight to analyse the potential limits of law for revolutionary praxis as discussed in Chapter One.

Section IV turns to the commodity form theory of law as that which has offered the most persuasive critical account of the form of law itself. First espoused by Evgeny Pashukanis, the commodity form theory describes the law as inextricably bound with exchange relations, and therefore legal relations take on a particular significance under capitalism as a system of generalized commodity production. This section will explore this close relationship between capitalism and the law, examining the implications of the commodity form theory and some of the challenges put to the theory that focused on public and administrative law's apparent distance from the legal relations that constitute exchange – property and contract. Proponents of the theory have presented a substantial defence of the commodity form against these criticisms, and reinforced the commodity form theory as a persuasive explanation of both the function of law and the ubiquity of law within capitalist social relations. The commodity form reveals the brutal heart of law in both the dull compulsion of capitalist economic relations and the ultimate coercion that lies behind them. However, reductions of law to coercion elide the ways in which capitalist relations entrench certain exploitative conditions as extra-legal facts. Section V argues that coercion, although central to the legal form, does not capture the entirety of its function due to capitalism's dependence on passive economic coercion in the form of established property relations and the nature of the use value of commodities as sustaining life.

The final Section VI assesses the potential for revolutionary legal praxis, in the light of the form of law exposed by the commodity form theory of law. Considering the nature of revolutionary praxis discussed in Chapter One as orientated towards the overthrowing of capitalist social relations, and the law's inextricable relationship to those relations, it would seem that revolutionary legal praxis would be a contradiction in terms. Yet there are components of critical theory that hint at the semblance of its

possibility. Pashukanis noted that the role of the revolutionary was to ‘struggle to overthrow and unmask the legalistic fetish’ of capitalism. Although a significant amount of critical work has been devoted to the ‘unmasking’ of law, in the vein of that covered in Section III, its overthrow is a different matter. This final section explores the possibility of this in two ways: firstly, the challenging within legal argument of the most essential legal relations. Legal arguments that radically question the basis of property ownership or the validity of contracts offer some potential in this vein. Secondly legal arguments that threaten to promote social relations inimical to capitalism – for example the decommodification of labour power or the invalidity of returns on investment also offer similar potential. Against these, however, there remains a cautionary element in the function of law. Both the law and capitalism are open to exceptional moments that do not advance the interests of capitalists; such is the nature of social and legal struggle. It is only if such occurrences were generalized and became the norm that the broader system could no longer function.

## **II: The Ambiguous Promise of International Law**

The ambiguous promise of law is arguably rooted in the very idea of law itself. All social life has normative behaviour, so jurisprudence is always seeking a definitive element that makes law special. There are two possible ways of doing this which capture the dichotomy of law touched on in the introduction to this chapter. Law can be conceived of as norms that derive from a concept of ‘right’, ‘justice’, or the ‘ought’ of social life. Such conceptions form the basis of divine or natural law. But the need for the ‘earthly’ enforcement and practice of such law leads to the correlative possibility that law has something to do with whoever happens to wield the most social power; in other words that might makes right. This basic opposition between idealism and cynicism leaves the social progressive uncertain about how to relate to law in something of a quandary.

There are two reasons to investigate how this relates to international law. Firstly, as mentioned in the introduction, a variety of left political organisations have adopted international legality as a measure by which they oppose international intervention, or judge the actions of Western leaders.<sup>135</sup> This is problematic if, as this thesis argues, the law does not serve the interests they support. For those concerned with the political project of international revolution, how this kind of activity relates to the forces and doctrines of international law will be of immediate interest in formulating effective strategies and tactics for engaging with that system. As the oft repeated adage goes, if you do not do the law, the law will do you; there is no avoiding it.

But the field of international law is also populated with progressively minded critical scholars who also see in international law the potential for revolutionary upheaval.<sup>136</sup>

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<sup>135</sup> The most high profile case in the UK being the long running ‘indict Blair’ campaign. See Oliver Laughland and Emine Saner, “Tony Blair and the Protesters Who Keep Trying to Arrest Him for War Crimes,” *The Guardian*, November 16, 2012, sec. Politics, <http://www.theguardian.com/politics/2012/nov/16/tony-blair-protesters-citizens-arrest>.

<sup>136</sup> A few explicit examples are Bowring, *The Degradation of the International Legal Order?*; Cutler, *Private Power and Global Authority*; Eslava and Pahuja, “Beyond the (Post) Colonial.” Some scholars are less explicit about the terminology of revolution, yet hold a similar optimism.

There is therefore a second purpose behind the analysis of this thesis. That is to help such scholarship in formulating a more rigorous understanding of the revolutionary potential, or lack thereof, of the legal form, in order to help those with legal training but progressive politics situate themselves in relation to their current profession and their social vision. In theoretical terms, the process of examining the relationship between legal and revolutionary praxis will also help elucidate the content of both forms of praxis.

In this way, although this entire investigation is directed towards an audience on the more critical edge of international legal academia and those most keenly opposed to the current configuration of global power and the operation of late capitalism, it presents a theoretical position that speaks to the broader discipline of international law. The positive hope for law that informs the radical legalism of the political left also supports the basic liberal legalism of more mainstream international lawyers.<sup>137</sup> This is a position that is increasingly dominant in public discourse over Western intervention internationally, from the invasion of Iraq in 2003, to the interventions in Libya in 2011, the debates over Syria of late 2013, and again over the Ukraine in 2014.

These positions oscillate between the vision of law as a restraint upon powerful states, as a protector of vulnerable populations (in need of a defending agent), and as a tool easily manipulated by Machiavellian international actors. The debates over Syria encompassed the full spectrum in this regard: victims of chemical weapons attacks lay in supposed need of avenging (if we ignore for a moment the many tens of thousands killed via more conventional means); international law and the decisions of the UN Security Council offered restraint upon otherwise unchecked responses by the United States and its potential allies; and that same institutional embodiment of law could be read as paralysed by the differing political positions of the US, Western Europe, Russia and China, over which kind of despotic leadership most suited their interests in ruling Syria.<sup>138</sup> For what concerns us here, there remains an overriding ambiguity about whether or not any of this had something to do with law itself, rather than the complex machinations of international politics

As this Chapter addresses the legal form directly, it offers only an indirect reference to the non-legally minded revolutionary – albeit, as pointed out, an important one, considering the ubiquity of law in current times. It is more directly concerned with those legal scholars who see revolutionary potential in the law. This same position translates into a more general position on law and social change, which sees in the former the capacity to bring about emancipatory and socially progressive transformations. Examples abound, but the basic theoretical points are outlined in the following two positions. Claire Cutler, in a generally excellent piece of analysis on

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For example, see Chimni, “International Institutions Today: An Imperial Global State In the Making”; S. Marks, “International Judicial Activism and the Commodity-Form Theory of International Law,” *European Journal of International Law* 18, no. 1 (February 1, 2007): 199–211.

<sup>137</sup> Philippe Sands, *Lawless World: Making and Breaking Global Rules* (London: Penguin, 2012).

<sup>138</sup> It is telling that very little would have to be changed in the foregoing paragraph if Syria were to be replaced with Libya, or the Ukraine.

private power and global authority, notes that new areas of law, especially war crimes and developing human rights doctrines, are ‘potentially disruptive of, if not revolutionary for, statist orthodoxy’.<sup>139</sup> Cutler goes on to note that the ‘revolutionary potential of emerging practice’ is only frustrated due to the conservative nature of other elements of the international legal regime.<sup>140</sup> In these instances Cutler presents a remnant faith in the revolutionary potential of international law (and in essence the law in general) in the face of conservative strands, be they existing legal norms or simply the power of statist orthodoxy.

*i) No Reason of Principle*

Coupled with this vision of subversive potential, comes the basic theoretical assumption that there is no *necessity* in the conservative function of law. The fact that despite some subversive potential law may operate in a manner particularly supportive of the status quo is not seen as a consequence of law, but of something external to it. This position usually emerges when rights discourse is used to support a particular progressive political agenda. For example, principles of ‘social responsibility’, and ‘fair and equitable treatment’, at least doctrinally have the same legal standing as the sanctity of private property or the right of an investor to their guaranteed returns. David Renton deployed this argument in the *Socialist Lawyer*, against the inalienable right of a property owner to do as they wished, postulating that there ‘was no reason of principle why there should not equally be an overriding principle of “social responsibility”’.<sup>141</sup>

Both of these positions represented by Cutler and Renton, interrelated as they are, offer up a series of ways in which they could be challenged within the frame of legal argument. There exist extensive criticisms of a rights based approach in general, which neatly encompass both domestic rights based struggles, and international human rights regimes.<sup>142</sup> These can also be effectively coupled with standard criticisms of international law made by theorists of international relations that see the regime as ultimately dependent on forms of state power.<sup>143</sup> These two criticisms often dovetail, as criticisms of rights-based approaches generally turn on the politics ‘behind’ the law that tips the nominally equal scales in favour of the more politically or materially powerful litigant.

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<sup>139</sup> Cutler, *Private Power and Global Authority*, 253.

<sup>140</sup> *Ibid.*

<sup>141</sup> David Renton, “Do Socialists Have an Alternative Conception of Rights?,” *Socialist Lawyer* 64 (2013): 34.

<sup>142</sup> See the entirety of *Texas Law Review*, Vol 64., Issue 8 (1984), in particular Peter Gabel, “Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves,” *Texas Law Review* 62, no. 8 (1983): 1563; Mark Tushnet, “Essay on Rights,” *Texas Law Review* 62, no. 8 (1983): 1363. Also see David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, N.J.: Princeton University Press, 2004); Duncan Kennedy, “The Critique of Rights in Critical Legal Studies,” in *Left Legalism/Left Critique*, ed. Janet Halley and Wendy Brown (Durham, NC: Duke University Press, 2002); Slavoj Žižek, “Against Human Rights,” *New Left Review*, no. 34 (August 2005): 115–31.

<sup>143</sup> See, for example, John J. Mearsheimer, *The Tragedy of Great Power Politics* (London: W. W. Norton, 2003); Kenneth N. Waltz, *Theory of International Politics* (Long Grove Ill.: Waveland Press, 2010).

However, these criticisms do not quite fully answer the aspiration present in the kinds of positions represented by Cutler and Renton. Renton's claim is that there is no reason 'of principle' (that is internally to legal argument) why social responsibility cannot trump other legal rights. Cutler's claim is that evolving legal norms can hold 'revolutionary potential' irrespective of the fact that this may be outweighed by a presently more powerful counter-force. If we take these claims at face value, then they are entirely compatible with the typical criticisms made above. As statements about the nature of law, they are often repeated and pervade much critical discourse on both domestic and international legal regimes.<sup>144</sup> It is therefore very important to try and assess these on their own terms, which requires an effective theory of law against which we can measure the relationship between revolutionary praxis outlined above, and international law as a field in which such praxis may be conducted.

### *ii) Conventional Accounts of Ambiguity*

Conventional responses to this ambivalence of law have tended to approach international law through a series of common assumptions, all of which serve in some way to reinforce that ambiguity present in law that enables the simultaneous vision of it as both progressive and emancipatory and yet conservative and oppressive. Firstly international law is understood via an analogy with domestic law. In this frame domestic law is considered as a relatively stable, predictable system with certain outcomes and clear formative procedures. The classic formulation of this would be Weber's legal typologies, of which the Western legal system broadly defined serves to provide an example of law in its most mature form.<sup>145</sup> By contrast, international law lacks the overarching authority of domestic law that gives it that certainty. Despite this, international law offers a degree of normative power, increasing over time as these norms are increasingly accepted, yet still lacking the effective enforcement mechanisms of its domestic counterpart. These approaches also tend towards a highly formalist conception of the sources and subjects of law, and couple this with a conception of law as an external, relatively autonomous, neutral and objective order.<sup>146</sup>

The domestic analogy, the formalism over law's construction and subjects, and the vision of law as an external, neutral and objective order, enable the ambiguity present

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<sup>144</sup> Ruth Buchanan, "Writing Resistance Into International Law," *International Community Law Review* 10, no. 4 (December 1, 2008): 445–54; Vasuki Nesiah, "Resistance in the Age of Empire: Occupied Discourse Pending Investigation," *Third World Quarterly* 27, no. 5 (July 2006): 903–22; Chimni, "International Institutions Today: An Imperial Global State In the Making." All positions bar that adopted by China Miéville at Anne Orford et al., "Roundtable - War, Force and Revolution," *Proceedings of the American Society of International Law at Its Annual Meeting* 100 (2006): 261–77. Also see discussion in Taylor, "Reclaiming Revolution."

<sup>145</sup> For a comprehensive summary see David M. Trubek, "Max Weber on Law and the Rise of Capitalism," *Wisconsin Law Review*, no. 3 (1972): 720–53.

<sup>146</sup> Cutler, *Private Power and Global Authority*, 74; Robert J. Beck, Anthony C. Arend, and Robert Vander Lugt, eds., *International Rules: Approaches from International Law and International Relations* (New York: Oxford University Press, 1996), chap. 3; Roberto Ago, "Positive Law and International Law," *American Journal of International Law* 51, no. 4 (1957): 691–733; Peter Malanczuk, ed., *Akehurst's Modern Introduction to International Law*, 7th Edition (London; New York: Routledge, 1997), chap. 1.

in international law to be understood in a particular way. The basic ambiguity of law is constructed as something to be gradually removed during the evolution of the social system that the law regulates. Therefore as long as international law lacks the comparative certainty and enforcement mechanisms of domestic law it can be understood as a more primitive legal system.<sup>147</sup> As institutions proliferate, alongside the pluralisation of the subjects and authors of law via decolonization, the international system evolves into a more complex organism, with a more advanced legal system to reflect this state of affairs. This is coupled with a more nuanced appreciation of international legal obligation arising through social concerns like reputation, reciprocity, perceptions of legitimacy, trust and the like, rather than immediate coercive measures.<sup>148</sup>

### III: The Politics of Law and Fundamental Legal Indeterminacy

Challenges to this vision of law as a neutral, objective and external order have attempted to emphasize the nature of law as socially constructed, subjective, and to note its relative indeterminacy as inherent to law.<sup>149</sup> There is a dual movement here. Firstly the apolitical, neutral, objective and external nature of law is challenged. This aims to dispel the ideological façade of law that serves to present the particular and contingent as universal and necessary. The second movement is to offer explanations for the determinate consequences of law – that is to explain how the law relates to a social environment characterised by inequality, oppression and exploitation. The first move could thus be said to focus on the discursive reality of law, and the second on its concrete material function.

#### *i) Critiques of Legal Discourse*

The first movement noted above was one of the key early components in the ‘New Stream’ of international legal theory.<sup>150</sup> The discursive focus of this critical drive placed

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<sup>147</sup> International law resembles a ‘simple form of social structure’: H. L. A. Hart, *The Concept of Law*, Third Edition (Oxford: Oxford University Press, 2012), 214. Hans Kelsen presents a similar formula with international law based on self-help and reprisals, Hans Kelsen, *Principles of International Law* (New York: Holt, Rhinehart and Winston, 1966).

<sup>148</sup> Abram Chayes and Antonia Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge Mass.: Harvard University Press, 1995); Thomas Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990); A. Claire Cutler, “Private Authority in International Trade Relations: The Case of Maritime Transport,” in *Private Authority in International Affairs*, ed. A. Claire Cutler, Virginia Haufler, and Tony Porter (Albany, NY: SUNY, 1999).

<sup>149</sup> In general see Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge, UK; New York: Cambridge University Press, 2005); David Kennedy, “Theses About International Law Discourse,” *German Yearbook of International Law* 23 (1980): 353–91. Also discussed in Cutler, *Private Power and Global Authority*, 83.

<sup>150</sup> See Nigel Purvis, “Critical Legal Studies in Public International Law,” *Harvard International Law Journal* 32, no. 81 (1991): 81–127; Anthony Carty, “Critical International Law: Recent Trends in the Theory of International Law,” *European Journal of International Law* 2 (1991); Hilary Charlesworth, Christine Chinkin, and Shelley Wright, “Feminist Approaches to International Law,” *American Journal of International Law* 85, no. 4 (1991): 613–45; Deborah Z. Cass, “Navigating the Newstream: Recent Critical Scholarship in International Law,” *Nordic Journal of*

it in close theoretical alignment with 'post-modern' theory in general,<sup>151</sup> although this must be considered alongside the fact that critical work within the legal field has, of necessity, been highly interdisciplinary.<sup>152</sup> Much of this is imbricated with Marxism as a tradition of scholarship that continued to offer one of the most persuasive accounts of capitalist society. Yet its influence within the early critical discourses on international law in the late 1980s was very limited. This can perhaps be understood as a direct consequence of the broader relationship of American Critical Legal Studies (CLS) to Marxism in general. As Alan Hunt has noted it was in some ways a consequence of the particular historical juncture that as critical scholars looked for a way of understanding law outside of its own disciplinary self-identity the Marxist tradition was itself undergoing a period of radical upheaval.<sup>153</sup> As a result '[t]he period in which critical legal studies [came] into existence [was] one in which its radical political perspective encounter[ed] a bewildering variety of internal variation, differentiation and sectarianism within contemporary Marxism.'<sup>154</sup> Hunt went on to note that not only did this make the adoption of a materialist paradigm unlikely, but that the particular strand of Marxism to have the greatest effect focused on the processes of legitimacy and hegemony.

A consequence of this can be seen in the kind of focus adopted compared to the dual possibilities opened up by the thrust of an ideological critique of the function of law. Critical Legal Studies in the United States approached legal discourse from a particular angle:

The peculiarity of legal discourse is that it tends to constrain the political imagination and to induce belief that our evolving social arrangements and institutions are just and rational, or at least inevitable, and therefore legitimate. The modus operandi of law as legitimating ideology is to make the historically contingent appear necessary. The function of legal discourse in our culture is to deny us access to new modes of conceiving of democratic self-governance, of our capacity for and experience of freedom.<sup>155</sup>

This opens up both an awareness of the function of law as a discourse, but also its relation to a set of social and political arrangements that are rendered natural, inevitable, rational, or in some way legitimate. The corollary of this move is, of course, that such arrangements may not be any of those things; that they may in fact reflect particular interests or power structures and that they are, as a consequence, open to challenge and reformulation. Yet early critiques within international legal scholarship

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*International Law* 65 (1996): 341–83; William J. Aceves, "Critical Jurisprudence and International Legal Scholarship: A Study of Equitable Distribution," *Columbia Journal of Transnational Law* 39, no. 2 (2001): 299–393.

<sup>151</sup> Carty, "Critical International Law," 66.

<sup>152</sup> Purvis, "Critical Legal Studies in Public International Law," 88–9.

<sup>153</sup> Hunt, *Explorations in Law and Society: Toward a Constitutive Theory of Law*, 146.

<sup>154</sup> *Ibid.*, 146–7.

<sup>155</sup> Karl Klare, "The Public/Private Distinction in Labor Law," *University of Pennsylvania Law Review* 130, no. 6 (1982): 1358.

foregrounded the rhetorical function of the law, rather than the nature of the social and political milieu that it naturalised.

This involved a significantly progressive step in itself, examining ‘the hidden ideologies, attitudes and structures which lie behind discourse, rather than the subject matter of legal talk’.<sup>156</sup> Yet this position matured into analyses of the legal form itself as being primarily a rhetorical tool – for David Kennedy the law’s role as simultaneously empowering the state and acting as regulator and critic of state action revealed the nature of international legal discourse as a rhetorical move between these points with no certain outcome.<sup>157</sup> This reinserted the earlier ambiguity into law, as opposed to other accounts that attempted to see this as a lack of maturity of a legal system. Yet, in essence, this position embraced the ambiguity of law as an inherently progressive (and liberal) ideal – it enabled law to encompass all positions, and within this flexibility lay both its utility and its beauty.<sup>158</sup> Kennedy demonstrated this in his view of the International Court of Justice’s *Nuclear Tests* case decision, which for him ‘illustrate[d] one way in which the hard and soft strands of sources argumentation [could] be blended and stabilized. The elegance of the Court’s opinion reside[d] in its management of the relationship between the two approaches... which [had] the potential to contradict each other in important ways.’<sup>159</sup> Although there remains an important critical edge in Kennedy’s perspective, it is hard to avoid Anthony Carty’s conclusion that ‘he at least appears to treat international legal discourse as an aesthetic achievement... [whose] very aimlessness is the mark of its perfection: international law for the sake of international law, a beautiful exercise in perpetual and ‘successful’ evasion’.<sup>160</sup>

## ii) *The Indeterminacy of International Legal Argument*

Arguably one of the ‘most complete book-length synthes[es] of CLS and international law’<sup>161</sup> was Martti Koskenniemi’s *From Apology to Utopia*.<sup>162</sup> Here the focus was, once again, upon the oscillation of international law between mutually valid yet opposing argumentative poles. International legal argument was seen to operate within the basic dichotomy of public order and sovereign will. For Koskenniemi, the indeterminacy of international law was ‘ultimately explained by the *contradictory nature of the liberal*

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<sup>156</sup> Kennedy, “Theses About International Law Discourse,” 355.

<sup>157</sup> David Kennedy, “A Newstream of International Law Scholarship,” *Wisconsin International Law Journal* 7, no. 1 (1988): 1–49; A. Claire Cutler, “Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy,” *Review of International Studies* 27, no. 2 (2001): 133–50; Cutler, *Private Power and Global Authority*, 86.

<sup>158</sup> David Kennedy, *International Legal Structures* (Baden-Baden: Nomos Verlag, 1987), 50; Euan MacDonald, *International Law and Ethics After the Critical Challenge: Framing the Legal Within the Post-Foundational* (Leiden: Martinus Nijhoff Publishers, 2011), 33.

<sup>159</sup> Kennedy, *International Legal Structures*, 50.

<sup>160</sup> Carty, “Critical International Law,” 70.

<sup>161</sup> Purvis, “Critical Legal Studies in Public International Law,” 92; Miéville, *Between Equal Rights*, 48.

<sup>162</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Lakimiesliiton Kustannus, 1989). Also see the new edition with an afterward by the author: Koskenniemi, *From Apology to Utopia*, 2005.

*doctrine of politics*.<sup>163</sup> Liberalism posed the fundamental freedom and equality of individuals, yet if this were the only principle upon which to base the political theory, there would be no way of reconciling those moments when ‘individual ends differ, indeed conflict’; ‘[i]n the absence of overriding principles civil war seem[ed] a constant threat’.<sup>164</sup> It was in response to this that liberalism demand[ed] a counterweight to these private rights, such as fundamental rights,<sup>165</sup> a concept of ‘objective interests’,<sup>166</sup> or a conception of the ‘public sphere’.<sup>167</sup>

For Koskenniemi the irreconcilable nature of these opposing positions replicates itself in international legal argument in the form of ‘ascending’ and ‘descending’ arguments. Ascending arguments take as their origin the sovereign interest of the state, whereas descending arguments work down from general principles of international order or collective interest. The most essential point to the indeterminacy thesis is that neither can stand without invoking the other, and that as a consequence any international legal argument is always open to criticism from the obverse position. Purvis notes that the practice of international law then becomes the pursuit of an ‘unachievable resolution of the dichotomy between sovereign will and world order’.<sup>168</sup>

As Koskenniemi reiterates, the basic opposition stemming from the liberal doctrine of politics offers positions that ‘continually threaten each other’.<sup>169</sup>

The ascending strand legitimizes political order by reference to individual ends... Individuals can be constrained only to prevent ‘harm to others’. But any constraint seems a violation of individual freedom as what counts as ‘harm’ can only be subjectively determined. The descending strand fares no better. It assumes that a set of fundamental rights or a natural distinction between private and public spheres exist to guarantee that liberty is not violated. But this blocks any collective action as the content of those freedoms... can be justifiably established only by reference to an individual’s views thereof.<sup>170</sup>

At the international level, these dichotomies play out along familiar doctrinal lines: between positivism and naturalism, normative values and concrete reality, the world order and sovereign will.<sup>171</sup>

Reconciliatory doctrines will reveal themselves as either incoherent or making a silent preference [to one side of the dichotomies.] In both cases they remain vulnerable to criticisms from an alternative perspective. But this perspective, once forced to defend itself, will fare no better. Consequently, doctrine is forced to maintain itself *in constant movement from emphasizing concreteness*

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<sup>163</sup> Koskenniemi, *From Apology to Utopia*, 1989, 47., emphasis in original

<sup>164</sup> *Ibid.*, 60.; also see Miéville, *Between Equal Rights*, 51.

<sup>165</sup> Koskenniemi, *From Apology to Utopia*, 1989, 64.

<sup>166</sup> *Ibid.*, 62.

<sup>167</sup> *Ibid.*, 63.

<sup>168</sup> Purvis, “Critical Legal Studies in Public International Law,” 103.

<sup>169</sup> Koskenniemi, *From Apology to Utopia*, 1989, 66.

<sup>170</sup> *Ibid.*, 66–67.

<sup>171</sup> Purvis, “Critical Legal Studies in Public International Law,” 106.

*to emphasizing normativity* and vice-versa without being able to establish itself permanently in either position.<sup>172</sup>

Thus, for Koskenniemi, 'indeterminacy follows as a structural property of the international legal language itself.'<sup>173</sup> This position is similar to that of Kennedy in that it reinserts ambiguity into legal language as a fundamental characteristic, yet the conclusions Koskenniemi draws from this position are more severe than those of his contemporaries. He notes that

international law is singularly useless as a means for justifying or criticizing international behaviour. Because it is based on contradictory premises it remains both over- and underlegitimizing: it is overlegitimizing as it can be ultimately invoked to justify any behaviour (apologism), it is underlegitimizing because incapable of providing a convincing argument on the legitimacy of any practices (utopianism).<sup>174</sup>

For Koskenniemi, this does not render international law chimerical or a mere façade for power politics. Recognising international law

as an argumentative language in which one could conduct international affairs in a method 'open to professional analysis,' meant that it shifted the locus of power in international relations from one of political strength versus legal restraint, to the importance of institutional bias in relation to legally contested international affairs.<sup>175</sup>

This conclusion constitutes an interesting assertion with regards to the broader indeterminacy thesis. However, it also stresses the fact that legal argument is not inherently contradictory, senseless and to be avoided, but that its strength lies, as for Kennedy, in precisely the capacity to argue both sides of any particular confrontation, from equally valid legal positions. Therefore, although Kennedy and Koskenniemi present slightly different readings of the ambiguity of legal argument, both share the basic assumption that engaging in legal dialogue alters the nature of contest in a way that is essentially positive. For Kennedy, international legal argument is so amenable as to draw all parties into its dialogue, whilst providing elegant methods for mediating disputes. For Koskenniemi, the nature of legal contestation for international affairs presents one open to professional analysis which when coupled with an awareness of institutional bias should provide ways of navigating the legal arena to achieve objectives rather than potential recourse to violence. Both of these positions privilege the figure of the international lawyer as holder of the expertise required to access and successfully

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<sup>172</sup> Koskenniemi, *From Apology to Utopia*, 1989, 46., emphasis in original

<sup>173</sup> *Ibid.*, 44.

<sup>174</sup> *Ibid.*, 48.

<sup>175</sup> Koskenniemi, *From Apology to Utopia*, 2005, 610.

navigate this arena – a position simultaneously exalted by the posited alternative of the raw exercise of power.<sup>176</sup>

In relation to the general discussion of legal indeterminacy, there are two closely connected points to carry forward. Firstly, the possible resolution offered by Koskenniemi in the form of institutional bias, and secondly the nature of whatever social formation we consider to be ‘outside’ of the legal form. In some sense, the institutional bias raised by Koskenniemi offers a point at which one could seek the determinacy of international law. It also offers a potential locus of intervention, or reform, towards which political activity could be directed. However, it is worth coupling this with another observation made by Koskenniemi as to the appeal of international law, particularly regarding those advocating it as indicative of a progressive development of international life. Koskenniemi makes the claim that this project ‘has been a credible one because to strive for it implies no commitment regarding the norms thereby established or the character of the society advanced.’<sup>177</sup>

This results in an interesting duality. Firstly the practice of international law draws one towards institutional bias in order to effect its determination, and secondly that, in general, the advocacy of international law has no concrete content. Together these emphasize the indeterminacy of both the legal form, and the social relations it both expresses and transforms. Yet this should remain an open question, in the following sense. Firstly, it is important to note that accepting the indeterminacy thesis as put forward by Koskenniemi does not take one to the margins of the international legal profession.<sup>178</sup> In general, it provides a deep insight into the structure of international (and general) legal argument. It seems somewhat intuitive that this nature of legal indeterminacy would enable Koskenniemi’s following position that the legal form comes without concrete content. However, a perfunctory analysis of recent history does not create a picture of radical flux and indeterminacy.<sup>179</sup> To take Koskenniemi’s position seriously would be to accept a radical disconnect between the form of law and its social setting and its outcomes, which seems deeply problematic. The basic thrust of this thesis is to push this doubt further – forcing the connections between the function of the legal form and various attempts to radically transform those social relations that it dialectically reflects and effects.

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<sup>176</sup> This point holds even in the face of the repeated connections made between law and power in their work. The background historical narrative is still the basic liberal account of progression from Hobbesian brutality to, admittedly still problematized, modern professional legality.

<sup>177</sup> Martti Koskenniemi, “The Politics of International Law,” *European Journal of International Law* 1, no. 4 (1990): 27.

<sup>178</sup> James Crawford’s note on the reissue of Koskenniemi’s book stresses this fact, noting that the ‘antinomies of ideology and utopia are inescapable and to be lived through – not then a final critique but an analysis of the conditions of the profession’. James Crawford in Koskenniemi, *From Apology to Utopia*, 2005., rear cover

<sup>179</sup> Akbar Rasulov puts this succinctly, noting that like toast that always lands butter-side down, ‘formalism *does*, as a rule, harm the weak more than it does the strong. The doctrine of sovereignty *does*, as a rule, work against the interests of refugees and the downtrodden more than it works for them.’ Akbar Rasulov, “International Law and the Poststructuralist Challenge,” *Leiden Journal of International Law* 19, no. 3 (October 2006): 806.

iii) *Third World and Feminist takes on the Law*

It is in this way that this thesis distinguishes itself from other insightful critiques of international law that operate in a similar vein to Koskenniemi's conclusion – attempting to understand the dark side of international law by reference to the social setting in which it is embedded. Such critiques have aimed to uncover the ways in which 'international law does not operate neutrally, but serves to promote particularistic interests and values'.<sup>180</sup> Two of the most notable strands of this scholarship focus on the relationship between international law and patriarchy, and on the relationship between international law and colonialism. Of course, these two relationships are not exclusive and the two approaches can intersect in highly constructive ways. The former has focused on the ways in which the legal form relies upon gendered concepts that marginalise matters of greater concern to women,<sup>181</sup> and in its practical function creates and relies upon institutions and professional settings that further exclude women. Approaches to law from this feminist perspective are numerous and form a broad church,<sup>182</sup> yet can be seen to share a perspective that focuses on the socially constructed nature of law, and therefore allow for its 'potentially emancipatory nature'.<sup>183</sup> Even without this legal optimism, the location of legal oppression within the realm of patriarchy does not offer a theoretical focus on the legal form itself.

In a similar vein, Third World Approaches to International Law (TWAIL) have done excellent work in seeking to 'disenchant international law by revealing its imperialist, gendered and racist underpinnings'.<sup>184</sup> A similarly broad grouping of scholars,<sup>185</sup> TWAIL has tended to examine the ways in which the 'international law enterprise... becomes a vehicle for Western cultural imperialism'.<sup>186</sup> At its best, scholarship operating from this perspective has offered powerful insights into the relationship between the very origins of international law and the colonial enterprise,<sup>187</sup> yet in a similar vein to the foregoing discussion the logic for the law's problematic operation is consigned to factors external

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<sup>180</sup> Cutler, *Private Power and Global Authority*, 87.

<sup>181</sup> Hilary Charlesworth and Christine Chinkin, "The Gender of Jus Cogens," *Human Rights Quarterly* 15, no. 1 (1993): 63–76; Charlesworth, Chinkin, and Wright, "Feminist Approaches to International Law"; Hilary Charlesworth, "Subversive Trends in the Jurisprudence of International Law," *Proceedings of the Annual Meetings of the American Society of International Law* 86 (1992): 125–30.

<sup>182</sup> See Nancy Kim, "Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism," *Columbia Human Rights Law Review* 25, no. 1 (1993): 49–105; Cutler, *Private Power and Global Authority*.

<sup>183</sup> Cutler, *Private Power and Global Authority*, 88.

<sup>184</sup> Buchanan, "Writing Resistance Into International Law," 446.

<sup>185</sup> For an introduction to TWAIL, see Makau Mutua, "What Is TWAIL?," *Proceedings of the Annual Meetings of the American Society of International Law* 94 (2000): 31–40; B. S. Chimni, "Third World Approaches to International Law: A Manifesto," *International Community Law Review* 8 (2006): 3–27; Obiora Okafor, "Critical Third World Approaches to International Law (TWAIL: Theory, Methodology, or Both?)," *International Community Law Review* 10 (2008): 371–78.

<sup>186</sup> Phillip Trimble, "International Law, World Order and Critical Legal Studies," *Stanford Law Review* 42 (1990): 815.

<sup>187</sup> Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

to the law (for example a racial binary) thereby exonerating legal struggle as a means to transcend the same problems in which it was complicit. In a sense, such approaches have tended to shy away from some of their own critical insights, sharing ‘these very same liberal commitments [that their work noted] also lead international lawyers to adhere to ideas and practices that function[ed] to reproduce the very hierarchies and exclusions that they ostensibly [stood] against.’<sup>188</sup>

These positions share a lot of common ground with more general work on the sociology of law, which may in turn attempt to unveil the gendered, class and racial demarcations that run through the legal profession and in particular the judicial system.<sup>189</sup> Judges may come from a particular social and economic background, and have been predominantly educated in a particular way; when transposed to international law, attention could turn, as with Koskeniemi, to institutional bias. In either case we are not locating the resolution internally to the legal form. What this means is that even as one internalizes politics to law by revealing the law as political, the specificity of law as a terrain of contestation is obscured. If we are considering the implications of international law as a potential location for revolutionary praxis, this is inadequate.

Bob Fine described the same situation eloquently:

[A] sociological approach which looks to the economic and political interests behind specific legal and penal measures appears as a significant advance over... formalism. But here again there is disappointment. For exclusive attention is directed towards the class interests served or the economic functions performed by one or other measure of law or punishment; in other words, exclusive to the question of content. Why these interests or functions should have been served by the *legal* form or regulation, or by *penal* repression remains a question unaddressed... This exclusive focus on the content of law leaves the social and historical character of its form unexamined...<sup>190</sup>

There are important consequences to recognising this fact. The critical project of demystifying law’s obscured political content in the vein of Karl Klare noted above, and the ‘disenchantment’ aimed at by TWAIL, offer a significant critique of formalist perception of law as a neutral and objective arbitrator. Yet this process of demystification runs the risk of becoming the ultimate objective, rather than a component of a broader task. In essence revealing the political content of the law or its iniquitous function due to the social environment in which it is embedded does not address the ideal of the law itself, but rather the function of a particular content. This also tends towards a particular cyclical dynamic in which the law’s failure to live up to

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<sup>188</sup> Buchanan, “Writing Resistance Into International Law,” 446. Also quoted in Taylor, “Reclaiming Revolution,” 277.

<sup>189</sup> See James Boyle, *Critical Legal Studies* (New York: New York University Press, 1992). In particular Duncan Kennedy, “Freedom & Constraint in Adjudication: A Critical Phenomenology,” in *Critical Legal Studies*, ed. James Boyle (New York: New York University Press, 1992); Trubek, “Max Weber on Law and the Rise of Capitalism.”

<sup>190</sup> Bob Fine and et al, eds., *Capitalism and the Rule of Law* (London: Hutchinson, 1979), 34–5.; and in Miéville, *Between Equal Rights*, 83.

its liberal promise spurs reform, and thus a supposed evolution of the law. In other words a process in which the law is brought closer to its ideal image. This then returns to the earlier visions of law discussed in this Chapter, where the ambiguity, which could be read as law's susceptibility to abuse by socially powerful actors, is progressively reduced. This distinction also reinforces the image of international law as either primitive, or non-law, but progressing gradually in the direction of a sophisticated, 'civilised' social system.

It also remains obscure as to *why* law governs these social relations; why the contemporary period seems so saturated by legal relations and what the consequences might be for those with revolutionary praxis in mind. For those inclined to find an answer to such questions, a perspective is required that doesn't operate with a radical distinction between domestic and international law and that is able to offer an analysis of the legal form itself. That is, if we are to assess the law as an arena of revolutionary praxis, as opposed to any other area of social life. This is important as a question of the nature of the legal form, but there is more at stake here than an issue of legal philosophy. By understanding the nature of law, why particular interests and functions are served by *legal* means, we have a better idea of firstly why legal means dominate the imagination when it comes to agency,<sup>191</sup> and secondly what the limits of legal means might be, drawn up by the nature of the legal form. Thus we have grounds to effectively assess the 'revolutionary potential' of the legal form. In the terms of ambiguity in which this chapter approaches legal theory, Fine's question again forces consideration of the possible function of the law itself, and as a result its relationship to capitalist social relations more broadly. In seeking the answer to the potential limits the legal form may place on revolutionary praxis, this question must be addressed.

#### **IV: Pashukanis and the Commodity Form Theory of Law**

One of the most powerful engagements with this precise topic, and one that has recently undergone a revival in international legal theory, was that of Evgeny Pashukanis,<sup>192</sup> who wrote the first comprehensive Marxist theory of Law, commonly described as the Commodity Form Theory of Law.<sup>193</sup> Pashukanis's work has received ample treatment since it was first discovered by Western scholars, such that it already has a significant body of supporters and opponents.<sup>194</sup> The most sustained and effective introduction of this work to international legal theory is that by China Miéville, put most

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<sup>191</sup> For example see 'On the Practical and Ethical Advantages of Legal Tactics of Mobilization' in Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy and Political Change*, Second Edition (Ann Arbor: University of Michigan Press, 2007), 213.

<sup>192</sup> The Russian given name 'Evgeny' is translated into English with a variety of spellings, as will be evident in the references to Pashukanis's work here and in Chapter Three. Throughout this thesis the spelling Evgeny will be adopted.

<sup>193</sup> Pashukanis, *Law and Marxism*. See also Evgeny Pashukanis, *Selected Writings on Marxism and Law*, ed. Piers Beirne and Robert S. Sharlet (London; New York; Toronto; Sydney; San Francisco: Academic Press, 1980).

<sup>194</sup> There are a huge number of these works, beyond those considered in this Thesis. An excellent bibliography, although it ranges beyond Pashukanis, is available in Toby Terrar, "The Soviet Critique of New Left Legal Theory: A Descriptive Bibliography," *Studies in Soviet Thought* 24, no. 3 (1982): 210–26.

comprehensively in *Between Equal Rights*.<sup>195</sup> Miéville's engagement is unparalleled, but for the purposes of exposition it is necessary to reproduce elements here alongside a brief introduction to Pashukanis's work. The following sections will offer a perspective on Pashukanis informed by Miéville's work, discuss some of the problems that other theorists have had with the theory, and explain how despite these Pashukanis presents us with the most comprehensive basic theoretical understanding of law under capitalism, and that as a result this theory is most useful for the purposes at hand.

The commodity form theory of law simultaneously offers some essential insights for the perspective of potential revolutionary legal practice. Most importantly, it offers a theory of the legal form itself – and thereby the possible limits of legal praxis based on the legal form rather than something external to it. It is crucial to note at this early stage that this in itself has to remain a nuanced claim. Pashukanis noted the intimate and in some ways identical relationship between commodity exchange and the legal form. This also meant that these aspects of law – its fundamental nature – were essential to capitalism as a mode of production, understood as being constituted by conditions of generalized commodity production. There is therefore a sense in which this examination of the law appears to turn to something 'outside' of the law (capitalism), in order to understand its form. The discussion that follows will help elaborate on this point, but at this stage it is important to note that this would be a misreading of the commodity form theory. At all stages the relationship is described as one of mutual constitution – in essence two different perspectives on the same set of social relations. That very differentiation between the two perspectives, however, is absolutely essential to the contemporary lure of the legal form for progressively minded scholars.

### *i) Exchange Relations and the Law*

As just stated, the commodity form theory postulates an intimate relationship between law as we currently understand it and capitalism as a system. It notes a close homology, or identity, between the legal form and the process of exchange. The premise is relatively straightforward. Mimicking Marx's approach to his analysis of Capital, Pashukanis opens his analysis with the commodity as a central component of capitalist relations. The concept of the commodity requires a series of specifically legal characteristics – property, legal personality, and contract. Commodities are themselves abstractly equivalent (exchange values are all equivalent, by definition; the concrete form and use value of the commodity is irrelevant – on the surface – to the process of exchange), and commodity owners are equally merely the representative whose will resides in the commodity for the purposes of contractual exchange. Finally behind this process rests the possibility of violence – the enforcement of the contractual agreement of exchange.

The exchange of commodities assumes an atomized economy. A connection is maintained between private and isolated economies from transaction to transaction. The legal relationship between subjects is *only the other side* of the

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<sup>195</sup> Miéville, *Between Equal Rights*.

relation between the products of labour which have become commodities. The legal relationship is the primary cell of the legal tissue through which law accomplishes its only real movement. In contrast, law as a totality of norms is no more than a lifeless abstraction.<sup>196</sup>

The final line is an important corrective against legal formalism. As Miéville states, the legal rule cannot be the basis of the legal form: 'The legal form is a particular kind of relationship. Rules can only be derived from that relationship. They are thus secondary, and in fundamental jurisprudential terms, their specific content is contingent.'<sup>197</sup> This gives rise to an important, and recurring, point, taken up by a variety of legal theorists. The derivation of these rules appears to offer sufficient variability to reject the level of determinism suggested by Pashukanis's theory. That same variability can be considered to reinforce the possibility that law holds revolutionary potential. However, the nature of that determination, which we could rephrase as a deeply rooted tendency, only becomes explicit in a careful consideration of the commodity form. Importantly, this is a relationship best demonstrated by the fact of international law.

This becomes explicit in Pashukanis's own brief comments on international law; considerations that reinforce his position against a formalist understanding of the law. Against the norm-driven argument, Pashukanis notes that an authoritative body may no doubt enforce and protect the legal relationship, but it does not (at least wholly) define it. It is in this way that international law becomes the ideal testing ground for legal theory. '[M]odern international law recognises no coercion organised from without. Such non-guaranteed legal relations are unfortunately not known for their stability, but this is not grounds for denying their existence.'<sup>198</sup> Miéville notes forcefully that '*the very existence of international law as law is evidence that it is in the relationship between legal subjects rather than in any 'posited norm' that the essence of the legal form lies.*'<sup>199</sup>

This basic relationship is one of commodity exchange. However, the precise meaning of this has created numerous problems in the reception of Pashukanis. Alternatively read as a further example of Marxist crude economic determinism,<sup>200</sup> this basic point has often been interpreted as relegating law as contingent upon the economic, or as located within the 'superstructure' thrown up by the basic economic relations of capitalism.<sup>201</sup> However, this fails to appreciate the essence of what Pashukanis is

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<sup>196</sup> Pashukanis, *Selected Writings on Marxism and Law*, 62. Emphasis added.

<sup>197</sup> Miéville, *Between Equal Rights*, 84–85.

<sup>198</sup> Pashukanis, *Law and Marxism*, 89. (fn 9) and cited in Miéville, *Between Equal Rights*, 85.

<sup>199</sup> Miéville, *Between Equal Rights*, 85.

<sup>200</sup> Cutler, *Private Power and Global Authority*, 96–7; Alan Stone, "The Place of Law in the Marxian Structure-Superstructure Archetype," *Law and Society Review* 19 (1985): 45; Hugh Collins, *Marxism and Law* (New York: Oxford University Press, 1982), 109; Alan Hunt, "Dichotomy and Contradiction in the Sociology of Law," *British Journal of Law and Society* 8, no. 1 (1981): 47–77.

<sup>201</sup> The legal aspect of this will be addressed subsequently in the body of the text. For an insightful general discussion see Raymond Williams, "Base and Superstructure in Marxist Cultural Theory," *New Left Review* 82 (1973): 3–17.

arguing. His analysis closely follows Marx, whose following description of exchange is instructive:

Commodities cannot themselves go to market and perform exchanges in their own right. We must, therefore, have recourse to their guardians, who are the possessors of commodities. Commodities are things, and therefore lack the power to resist man... In order that these objects may enter into relation with each other as commodities, their guardians must place themselves in relation to one another as person whose will resides in those objects, and must behave in such a way that each does not appropriate the commodity of the other, and alienate his own, except through an act to which both parties consent. The guardians must therefore recognize each other as owners of private property. This juridical relation, whose form is the contract, whether as part of a developed system or not, is a relation between two wills which mirrors the economic relation.<sup>202</sup>

This passage from Marx can be read in the same light as Miéville, emphasising the economic aspect, which may encourage the kind of economic determinism that so alienated subsequent readings of Marxist theories of law.<sup>203</sup> But this would be a mistake. Marx's point is that commodity exchange is, at one and the same time, a juridical relation. They are inseparable. Miéville is also explicit about this, especially in relation to the base-superstructure analogy that causes so much controversy in the reception of Marxist insights. Miéville notes that '[i]t is clear that, according to Pashukanis, law cannot be relegated to the superstructure. In terms of Marx's base-superstructure analogy, the *legal form* under capitalism is an integral part of the relations that constitute the 'base'.<sup>204</sup>

Mieville makes the claim that having to make this defence rests on a misreading of the purpose of the base-superstructure analogy itself.

The distinction between base and superstructure is not a distinction between one set of institutions and another, with economic institutions on one side and political, judicial, ideological etc institutions on the other. It is a distinction between relations that are directly connected to production and those that are not. Many particular institutions include both.<sup>205</sup>

Keeping this in mind, capitalism itself is not comprehensible except as a system rooted in legal relations. But it is only with the spread and dominance of this system that those relations can evolve into the rich complexity of law that confronts the legal theorist and

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<sup>202</sup> Karl Marx, *Capital, Volume I* (London: Penguin, 1976), 178.; quoted in Miéville, *Between Equal Rights*, 87.

<sup>203</sup> in quoting the above passage, Miéville emphasises the next line by Marx: '[t]he content of this juridical relation... is itself determined by the economic relation', Miéville, *Between Equal Rights*, 87.

<sup>204</sup> *Ibid.*, 88.

<sup>205</sup> Chris Harman, *Marxism and History* (London: Bookmarks, 1998), 28–9.; and quoted in Miéville, *Between Equal Rights*, 89.

leaves them so uncomfortable with the commodity form theory. Of course, this is a process that also interacts with the 'law' of feudal relations, and social norms more generally, such that it may seem further alien to ascribe to this complex whole a basic and fundamental root in the way of Pashukanis. But again, to do so is to overlook the complexity of capitalism as a system in itself, and to elide one of its most basic characteristics – a *generalized* mode of commodity production.

*ii) Capitalism and the Gravity of Law*

Generalized commodity production means that, at a certain point in time, the dominant form of social production becomes the production of commodities. Exchange relations and legal relations, as a consequence of the social relations they enable and represent, then take on a new and unique level of importance. This will become clear throughout the following analysis, but it is important to note at this stage that it is through this process that the legal form interpenetrates social relations to the extent that it does today. Under conditions of capitalism as the dominant mode of production, that is generalized commodity production, the legal relation spreads with the exchange relation – and as Pashukanis notes, '[c]ommodity fetishism is complemented by legal fetishism.'<sup>206</sup>

[B]ourgeois capitalist property ceases to be a weak, unstable and purely factual possession, which at any moment may be disputed and must be defended *vi et armis*. It turns into an absolute, immovable right which follows the object everywhere that chance carried it and which from the time that bourgeois civilization affirmed its authority over the whole globe, is protected in its every corner by laws, police, courts.<sup>207</sup>

For those theorists who focus on the function of public law, these formulations may seem unpersuasive. But this is to focus on the legally concretised results of social struggle, rather than on the essence of the legal relation. Miéville describes this process thusly: 'A complex legal system regulating all levels of social life can be thrown up which appears to differentiate itself from private law, but it ultimately derives from *the clash of private interests*.'<sup>208</sup> Here we have direct echoes of the fundamental contradictions of liberalism that, for Koskenniemi, dominate the legal form and render its basic essence indeterminate.

The frame Pashukanis uses to describe this process is highly apt. He notes that public law 'can only be developed through its workings, in which it is continually repulsed by private law, so much that it attempts to define itself as the antithesis of private law, to which it returns, however, as to its centre of gravity.'<sup>209</sup> The metaphor holds rich potential. It draws attention to the tensions between the broader social function of law and the basic relations of exchange and abstract equivalence that dominate the social

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<sup>206</sup> Pashukanis, *Selected Writings on Marxism and Law*, 79.

<sup>207</sup> *Ibid.*, 78.

<sup>208</sup> Miéville, *Between Equal Rights*, 86.

<sup>209</sup> Pashukanis, *Law and Marxism*, 106.; also in Miéville, *Between Equal Rights*, 86.

system. The result, much like that of a gravitational pull, is a constant, far reaching and very gradual tendency towards a particular centre or outcome. For the purposes at hand, it is this process that is likely to offer the limits to revolutionary legal praxis.

This gravitational pull is rooted in private law and exchange relations. It is therefore crucial to tie the commodity form theory to a broader conception of capitalism as a system because it is this that imbues the private legal relation, or the actual legal form, with its power to generate conformity in other social relations. Miéville notes,

where there are legal relations in a society *not* composed of generalized commodity production, they will be context-specific. But the *generalizing* of the legal form can only occur under conditions of generalized commodity exchange. The final universalisation of a commodity economy is, of course, capitalism. And, crucially and uniquely under capitalism, all social production is production *for exchange*.<sup>210</sup>

It is these conditions that give us the dominance of the legal form, its ubiquity within social relations more broadly, and also the very features that define the legal relation in contrast to other forms of social relation.

Of course, even if one accepts the above formula, one could have an understanding of contemporary capitalism as somehow different, and therefore the commodity form theory as outdated.<sup>211</sup> Here, however, Miéville offers the most sophisticated defence (and development) of Pashukanis's theory. Adopting the reasonable position that Pashukanis's general theory was only the first sketch of a position that would require substantial development, Miéville confronts those criticisms that saw the commodity form theory as inadequate to later forms of capitalism, or otherwise unable to account for various specificities of law. It is undeniable that there are areas in the *General Theory* that lay the foundations for such criticism.<sup>212</sup> But as Miéville does excellent work in demonstrating, these failures are simply failures to fully develop the theory, and do not offer invalidations of it.<sup>213</sup>

### *iii) Capitalism and Public and Administrative Law*

On a basic level, many of these criticisms return to the myriad functions of the law in intervening in social life, which are seen to stretch far beyond the protection of private

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<sup>210</sup> Miéville, *Between Equal Rights*, 93. Emphasis in original

<sup>211</sup> Susan Von Arx, "An Examination of E.B. Pashukanis's 'General Theory of Law and Marxism'" (SUNY, 1997), 8; Stone, "The Place of Law in the Marxian Structure-Superstructure Archetype," 46.

<sup>212</sup> Pashukanis's vision of administrative law subsumes potential problems, and, as Miéville notes through Kay and Mott, his treatment of labour legislation was sketchy at best, to mention just two. See Geoffrey Kay and James Mott, *Political Order and the Law of Labour* (London, Basingstoke: MacMillan, 1982). Stone notes similar concerns, reiterated by Kinsey, see Stone, "The Place of Law in the Marxian Structure-Superstructure Archetype," 45–6; Richard Kinsey, "Marxism and the Law: Preliminary Analysis," *British Journal of Law and Society* 5, no. 2 (1978): 202–27.

<sup>213</sup> Miéville, *Between Equal Rights*, 100–101.

property, free will and the processes of exchange. Miéville notes that such a criticism already misreads the law as protecting exchange rather than being ‘another way of seeing that relation,<sup>214</sup> but is also able to provide a convincing elaboration of how the development of various legal forms, for example the corporation and the trade union, stem from the basic commodity form of law and its very particular relationship to labour power that occurs under capitalism.<sup>215</sup> In general, these focus on elements of administrative (public) law, and the ways in which they continue to represent interests ostensibly outside of the terrain of exchange relations.

Miéville makes use of the nature of labour-power as a commodity under capitalism, taken from Geoffrey Kay and James Mott, to elaborate upon Pashukanis’s work.<sup>216</sup> He acknowledges that the focus on exchange creates space for the criticisms later levelled at Pashukanis, and that even for Pashukanis himself it leads him to a strange formulation of labour regulations as the feudal rule of the individual capitalist.<sup>217</sup> It is not necessary to replicate Miéville’s argument here, but the following point can be made. It is the fundamental position of labour-power as a commodity within capitalism that shifts what would otherwise be more peripheral relations of exchange into the fundamental driving force of social relations more broadly. The consequences of this relationship are a political struggle between the interests of capital and the interests of labour that when consolidated into legal form become forms of public or administrative law. Kay and Mott describe administration as ‘working-class power *post festum*; working class-class political victories captured and formalised in their moment of triumph.’<sup>218</sup> However, Miéville’s point, and the point to stress here, is that the broader nature of law rooted in abstract equivalence (commodity relations) then colours these legal manoeuvres.

Miéville notes that ‘[a]dministration addresses a specific inequality through an attempt to formalise the marginalised group as equal. The attempt is therefore to solve a particular problem through the subsumption of a particular category... into a formal, abstract, juridical one, to *insist upon its abstract equality*.<sup>219</sup> Although these may appear to represent something fundamentally different from the basic commodity form of law that Pashukanis analyses,<sup>220</sup> they are simply the function of the form of law as an

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<sup>214</sup> Ibid., 104 and in footnote 135.

<sup>215</sup> Robert Knox perceptively notes that such victories have later been overturned, but this does not offer an invalidation of Miéville’s position. It simply notes Miéville’s possible failure to foreground the fact that these victories are the product of sustained social struggle highlights the fact that they would be open to revision under renewed assault from those social forces which were previously forced to make concessions. See Robert Knox, “Marxism, International Law, and Political Strategy,” *Leiden Journal of International Law* 22, no. 3 (July 29, 2009): 420.

<sup>216</sup> Miéville, *Between Equal Rights*, 104–9.

<sup>217</sup> Pashukanis, *Law and Marxism*, 141–2; Miéville, *Between Equal Rights*, 106.

<sup>218</sup> Kay and Mott, *Political Order and the Law of Labour*, 96.

<sup>219</sup> Miéville, *Between Equal Rights*, 111.

<sup>220</sup> As they do for Von Arx, “An Examination of E.B. Pashukanis’s ‘General Theory of Law and Marxism’”; Jeanne Gregory, “Sex Discrimination, Work and the Law,” in *Capitalism and the Rule of Law*, ed. Bob Fine and et. al. (London: Hutchinson, 1979), 141; Howard Engelskirchen, “Locating the Analysis of the Legal Form: E.B. Pashukanis,” *Rethinking Marxism* 5, no. 1 (1992): 111.

arena of social struggle, just as exchange relations become an arena of general social struggle once labour-power becomes fully commodified under capitalism – conditions of generalized production for exchange. This is a function of the interaction between the basic logic of capitalism with all its attendant social functions and the historical struggle of individuals within these structuring conditions. Pashukanis’s theory then offers key insights into understanding the dynamics of this process, and the potential limitations of the law as an arena of struggle. As Miéville notes, ‘it is only through the application of the commodity-form theory of law itself to that unique commodity [labour power] that we can see how the form of law itself must develop, *on the basis of its own fundamental form*, as capitalism ages.’<sup>221</sup>

What this further offers is an explanation for the ubiquity of law under capitalism as a system – just as commodity relations expand and become generalized, so to do social relations increasingly take on legal form and expression. Again, Miéville reiterates this same point, claiming that ‘it is only the full application of the commodity-form theory of law in given historical conjunctures that allows us to understand the spread of administration.’<sup>222</sup> In terms of the legal struggle, ‘it is the continuing and inevitable failure of existing laws to patch up all the holes in the social fabric that necessitates the extension of administration. Administration *is law*: it is somewhat removed from private law where the legal form exists in its ‘purest’ form, but administration – public law – is directly derived from that form.’<sup>223</sup>

#### *iv) The Dominance and the Force of Law*

It is under these conditions, as different areas of life take up legal expression, that the legal form itself comes to dominate the social imagination, and to dominate as an arena of social struggle. Yet, as we see above, this is coloured by the ‘gravitational pull’ described by Pashukanis. The basic elements of the legal form still point toward a particular social configuration – one structured by abstract formal equality, an assumption of private property, and the presence of violence to enforce contract. This has a very particular consequence in terms of the relationship between legal relations and concrete facts of the social world. However, this functions in a particular manner that is important to note. Firstly, as Miéville stresses, the exchange relation contains violence immanently. That is to say that there remains the assumption that there exists a force that will ensure contractual obligations are upheld, and that private property is respected (the very notion of private property also implies force and violence). This has a particular relationship to contemporary conceptions of politics, economics and the law, especially the oft insisted upon distinction between them relied upon by formalist accounts. Miéville notes a ‘fascinating circularity’.

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<sup>221</sup> Miéville, *Between Equal Rights*, 109. Emphasis in original.

<sup>222</sup> *Ibid.*, 110.

<sup>223</sup> *Ibid.* Miéville also notes that ‘[w]hat we have here is a theory of the legal recognition of corporations and unions, one the of the fundamental changes in contract sometimes deemed to undermine Pashukanis’s theory, understood as a shift in the atoms of the juridical relationship *on the basis of the commodity relationship under changing conditions of mass industrialisation and the commodification of labour-power itself.*’ *Ibid.*, 109. Emphasis in original.

Capitalism is based on commodity exchange, and... such exchange contains violence immanently. However, the universalisation of such exchange has tended to lead to the abstraction of the state as a 'third force' to stabilise the relations. Thus politics and economics have been separated. *In the same moment*, the flipside of that separation and the creation of a public political body was the investiture of that body – the state – as the *subject* of those legal relations which had long inhered between political entities, and which now became bourgeois international law. But that process itself necessitated the self-regulation of the legal relation internationally by its subjects; this self-help was a simultaneously 'political' and 'economic' function. This is, then, a manifestation of *the collapse of the distinction between politics and economics inherent in the very dynamic which had separated them*.<sup>224</sup>

This highlights the most crucial areas of legal theory for this thesis. That is the relationship between that immanent violence rooted in the economic and the political collapsed into the legal form precisely through the same dynamic that ejects them. However, this is a violence that is at once legal and something else. It is undeniable that exchange relations contain an inherent violence – the violence of 'mine not yours', in addition to the implied enforcement of contractual obligation. However, there are other kinds of violence at work. In some ways this can map onto the 'constituted' and 'constitutive' violence of the legal order.<sup>225</sup> That initial violence in which the legal order is enshrined and hence monopolises and legitimizes constituted violence. However, this is to slip too far into a focus on particular authority, whereas the primary concern here is the legal relation alone. In the interaction between law and the material composition of society, there is an additional ingrained violence that rests outside of the immediacy of the exchange relation, and in a sense outside of the coercive pattern of the law.

It is important to differentiate this from the most immediate and obvious consequential violence of the law – in the form of property. As capitalism has developed as an economic system, it has always been accompanied by legal measures that deprive people of access to the means of reproductive life, thereby forcing them into the selling of wage labour. In its most simple formulation, those without property in an industrial capitalist economy have no means of sustaining life, beyond that secured through political struggle.<sup>226</sup> Once dispossessed of land and the means to produce goods, an

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<sup>224</sup> Miéville, *Between Equal Rights*, 139–40. Emphasis in original

<sup>225</sup> See Walter Benjamin, 'Critique of Violence' in Walter Benjamin, *Selected Writings: 1913-1926* (Cambridge Mass.: Harvard University Press, 1996), 236–252; Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority,'" trans. Mary Quaintance, *Cardozo Law Review* 11 (1990 1989): 920.

<sup>226</sup> Hale offers a lengthy but illustrative description of this condition: 'If the non-owner works for anyone, it is for the purpose of warding off the threat of at least one owner of money to withhold that money from him (with the help of the law). Suppose, now, the worker were to refuse to yield to the coercion of any employer, but were to choose instead to remain under the legal duty to abstain from the use of any of the money which anyone owns. He must eat. While there is no law against eating in the abstract, there is a law which forbids him to eat any of the food which actually exists in the community -- and that law is the law of property. It can be lifted as to any specific food at the discretion of its owner, but if the owners unanimously refuse to lift

individual is then 'free' to take a job or starve, potentially sustained by the welfare provisions both fought for by the working class, and necessary for capital to secure its access to a reserve army of labour. This is violence evident in the moment of dispossession, but obscured in the later consolidation of ownership through legal title.

Chris Arthur describes this very similar process:

[I]t is precisely one of the interesting features of bourgeois exploitation that it inheres in economic relations that *do not* achieve formal legal expression. Formally speaking, Pashukanis is *correct* to refer law only to social relationships based on commodity exchange... The monopolisation of the means of production by the capitalist class is an *extra-legal* fact (quite unlike the political-economic domination of the feudal lord). The bourgeois legal order contents itself with safeguarding the right of a property owner to do as he wishes with his own property – whether it be the right of a worker to sell his labour power because that is all he owns, or that of the capitalist to purchase it and retain the product.<sup>227</sup>

This further reinforces a crucial element of law under the conditions of capitalism. The surplus value extraction (exploitation) occurs 'outside' of the formal legal realm, and remains invisible to it; which in some sense might hint at the fate of those measures which attempt to ameliorate or mitigate this fact through legal intervention. Because the material conditions of exploitation remain external, unless the social upheaval is of sufficient extent, then it remains implied that those seeking profit (surplus value extraction) will be able to adjust the system to extract value elsewhere merely by nature of their superior material position (be it ownership and control of the means of

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the prohibition, the non-owner will starve unless he can himself produce food. And there is every likelihood that the owners will be unanimous in refusing, if he has no money. There is no law to compel them to part with their food for nothing. Unless, then, the non-owner can produce his own food, the law compels him to starve if he has no wages, and compels him to go without wages unless he obeys the behests of some employer. It is the law that coerces him into wage-work under penalty of starvation -- unless he can produce food. Can he? Here again there is no law to prevent the production of food in the abstract; but in every settled country there is a law which forbids him to cultivate any particular piece of ground unless he happens to be an owner. This again is the law of property. And this again will not be likely to be lifted unless he already has money. That way of escape from the law-made dilemma of starvation or obedience is closed to him. It may seem that one way of escape has been overlooked – the acquisition of money in other ways than by wage-work. Can he not "make money" by selling goods? But here again, things cannot be produced in quantities sufficient to keep him alive, except with the use of elaborate mechanical equipment. To use any such equipment is unlawful, except on the owner's terms. These terms usually include an implied abandonment of any claim of title to the products. In short, if he be not a property owner, the law which forbids him to produce with any of the existing equipment, and the law which forbids him to eat any of the existing food, will be lifted only in case he works for an employer. It is the law of property which coerces people into working for factory owners -- though, as we shall see shortly, the workers can as a rule exert sufficient countercoercion to limit materially the governing power of the owners' (Robert Lee Hale, "Coercion and Distribution in a Supposedly Non-Coercive State," *Political Science Quarterly* 38 (1923): 472–73.)

<sup>227</sup> Chris Arthur, introduction in Pashukanis, *Law and Marxism*, 30.; and quoted in Miéville, *Between Equal Rights*, 92.

production, or the production chain, or distribution or consumption controls). The best examples here would be the intended measures of early Third World economic intervention, which will be addressed in Chapter Four.

Many theorists have been tempted to offer ways in which advanced capitalist systems do not offer the same clear cut conditions as in classical Marxist formulations, for example, examining the legally structured 'alternatives' to wage labour such as social security.<sup>228</sup> Again, at this stage it is worth noting two things – firstly that these remain administrative interventions into the social inequities of capitalism, and indeed in a form which is essential for its effective social function. It is, after all, vital to capitalism that a reserve army of unemployed labour be sustained in order to control wage inflation. Secondly, they offer no challenge to the broader systemic function of capitalism or of the legal system. That one may 'choose' the alternative of criminal activity, social security, independent petty commerce or 'consultancy' work<sup>229</sup> does not alter the dominant dynamic of the system, even accepting that these are not forms of 'wage labour', which is itself rather unpersuasive.<sup>230</sup>

## **V: The Brutal Heart of Law**

The recurrence of violence at the heart of the law gives it a brutal image, and feeds into a general tendency, especially in Miéville's work concerning international law, to collapse law into coercion. It is in this vein that international law also offers the exemplar for the legal form more generally, in that it lacks the kind of consolidated organisation of coercive violence that exists to varying degrees within the state and apparently rests on a greater degree of euphemistically deployed 'effectiveness'.<sup>231</sup> For Miéville, the dominance of this fact at the international level leads to his oft-quoted conclusion: '[t]he chaotic and bloody world around us *is the rule of law*.'<sup>232</sup> There is a level of truth to this that is undeniable – something that also applies to the domestic legal sphere. Internationally, although this is a point that also carries domestically, legal struggle entails a clash of forces between which the only determining influence can be force. Between equal rights force decides, and therefore the strongest will out.<sup>233</sup> Crucially this foregrounding of force elides the structural and legal dispossession that prefigures generalized commodity production in line with Arthur's quote above. This is evident in considerations of the state form addressed in the course of Miéville's

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<sup>228</sup> See Duncan Kennedy, "The Stakes of Law, or Hale and Foucault," *Legal Studies Forum* 15, no. 4 (1991): 339.

<sup>229</sup> *Ibid.*

<sup>230</sup> Social security is, in most cases, granted in exchange for some kind of activity, whereas criminal activity and consultancy work can equally be conceived of as other means of exchanging labour for the means of life which are otherwise legally structured as unavailable.

<sup>231</sup> Kelsen, *Principles of International Law*, 422.

<sup>232</sup> Miéville, *Between Equal Rights*, 319. Emphasis in original

<sup>233</sup> 'Intrinsically to the legal form, a contest of coercion occurs, or is implied, to back claim and counterclaim. And in the politically and militarily unequal modern world system, the distribution of power is such that the winner of that coercive contest is generally a foregone conclusion.' *Ibid.*, 292.

argument that depict it as ‘a force to guarantee the law, a force which [was termed] *extra economic (coercive) force*’.<sup>234</sup>

However, there is an important way in which this has to be qualified. Firstly, as constructive criticism of Miéville’s work has shown, Miéville’s conception of ‘force’ must be broadened for his account to remain persuasive. Robert Knox notes, for example, that ‘in emphasizing ‘war’ as the central form of coercion Miéville is elevating the ‘political’ aspects of international society over the economic one, something one would not necessarily associate with a Marxist approach to international relations.’<sup>235</sup> Knox then points out that ‘it is necessary to show that ‘economic coercion’ is also a force on the international stage.’<sup>236</sup> This is very true, but there is a reason that this ‘economic coercion’ draws less attention on the international stage. It is part of the background conditions of exchange, and therefore it is difficult to label it even as ‘coercion’ at all. Although this will be addressed in Chapter Four, it is notable that in response to the Third World’s push to have precisely this recognised as an international delict, legal scholars were forced to consider the following rather obvious fact. ‘Much of State economic activity is harmful to other States for the very obvious reason that State economies are competitive and that promoting one’s own economy may well be injurious to others.’<sup>237</sup> This foregrounds the fact that there is more to this than a broadening of the category of violence, or coercion. Or rather, it is how we conceive of violence and coercion that becomes the problem.

#### *i) The Dull Compulsion of Economic Relations*

Of course coercion is present in the background conditions of exchange, as well as in the enforcement of contract. It is present in the very concept of private property. But it does not suffice to refer to this as force, even in the expanded sense towards which Knox pushes Miéville. There are two reasons for this. Firstly the ‘force’ need never be applied. This is present in both the ideological way in which private property (and law) are naturalised, and in the fact that the basis of the ownership and subsequent exploitation is already an established fact. It is possible to concede that this is still proximate to force, but to conflate the two would miss an important nuance. Secondly, and perhaps more importantly, is the nature of the constellation of private property

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<sup>234</sup> Blenhard Blanke, Ulrich Jürgens, and Hans Kastendeik, “On the Current Marxist Discussion on the Analysis of Form and Function of the Bourgeois State,” in *State and Capital: A Marxist Debate*, ed. John Holloway and Sol Picciotto (London: Edward Arnold, 1978), 121. Emphasis in original

<sup>235</sup> Knox, “Marxism, International Law, and Political Strategy,” 424.

<sup>236</sup> *Ibid.* For Knox this draws attention to the coercive potential of those states not traditionally considered as wielding vast power on the international stage: Economic power being ‘well exemplified by the actions in the 1970s of the Organization of the Petroleum Exporting Countries (OPEC), which refused to sell oil to states that supported Israel following the 1973 Yom Kippur war, triggering a political and economic crisis in the West’ (at 425). OPEC will be discussed later in this thesis in Chapter Three, and its fate is revealing. It is worth noting here that the way in which background economic conditions function provides ample ways for such ‘economic’ coercive potential to be mitigated.

<sup>237</sup> Richard B. Lillich, ed., *Economic Coercion and the New International Economic Order* (Charlottesville: The Michie Company, 1976), 11.

and social relations in which any individual is embedded. This is important in the following ways.

Firstly this expanded conception of coercion is still, in the above sense, rooted in the same structures as the law and commodity exchange. Reified individuals engaged in contractual processes. Now to the extent that we are examining legal relations the fiction that this is the case remains an effective descriptor. Collective bargaining over labour contracts with a corporation need not, for legal purposes, recognise the multitude represented on either side, or their property and resources. However, an individual enters the world as part of a complex net of social relations – even if these are liberal capitalist relations which stress the individual's monad like existence. It is to these relations that we must turn our interest, in examining the role of coercion in the actual moments of contract and existence of property. When an 'individual' moves to enter into a contractual legal relation, they do so from within their position in that web of social relations – and it is within this process that one can understand the 'force' of legislation that separates such an individual from the means of their own survival and forces them into the market to sell their labour.

Now of course, as stated, there is a force that maintains these relations. But when we consider the concrete reality, especially with a mind to transforming it, there is another important element. That position of vulnerability and necessity associated with lacking access to the means to survive has a twofold element. Firstly it is present, initially, outside of the realm of law (although maintained by it). What this means in concrete terms is that the coercive element is passive, in an important way. Secondly, that lack of access is also social – no individual instantly reproduces their own material life. This reproduction occurs on a social basis for the individual while they are incapable (an infant, for example) and as part of a social whole. At some later point they will participate in that process in some way. Even access to land is useless if one has lost the skills, ability, and the requisite suitable ecological environment in which to use this to sustain life. Property is therefore, above all, also a social relation between groups.

These are not novel points, but in relation to international law they serve to capture a particular aspect of the legal relation. The vast inequality in terms of access to technology, finance, and certain types of human and environmental resources is a *background* factor to the immediacy of the law. What this means, in practice, is that the 'force' of this inequality need not be applied. Evidently it *can* be applied, for example through the freedom of any state to alter its trade policies in certain ways.<sup>238</sup> However, such freedom is obviously framed by the background conditions referred to above. Marx describes this not as violence or coercion explicitly, but as the 'dull compulsion of economic relations.'

Direct force, outside economic conditions, is of course still used, but only exceptionally. In the ordinary run of things, the labourer can be left to his

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<sup>238</sup> Of course, following the indeterminacy thesis, we know that this is countered by the common interest – and international trade conventions and organisations – against which such activity would be measured.

dependence on capital, a dependence springing from, and guaranteed in perpetuity by, the conditions of production themselves.<sup>239</sup>

This also takes on an ideological dimension. For Marx, '[t]he advance of capitalist production develops a working class, which by education, tradition, habit, looks upon the conditions of that mode of production as self-evident laws of Nature'.<sup>240</sup> These observations recall some of the earlier insights of CLS, which after all were themselves based on various readings of Marx and interpretations of the relationship between law and capitalism. It is important therefore, to acknowledge the ideological and economic dimensions of law that are imbued with the coercive implications of contract and property embedded in the exchange relation.

However, there is a cyclical element to this process of observation and acknowledgement. Something that mirrors Miéville's own fascinating observation with regards the uniting of politics and economics within the legal form at the international level. There is no need to resolve this process one way or another; to finally determine violence at the heart of law, or something else. Rather, we can note that these observations serve a particular purpose. They can be placed as part of the body of work that 'disenchants' the positive image of international law, or demystifies the relationship between law and oppression. Pashukanis also noted this process, and the danger such work holds for the bourgeoisie within capitalism. Foregrounding the violence in the law both can 'compromise [the] peace and tranquillity needed even by a thief when he has had his fill and is digesting his spoils.'<sup>241</sup>

## *ii) Brutal Law and Legal Nihilism*

The threat lies in revealing the theft subsumed within the law.

If the law is evidently partial and unjust, then it will mask nothing, legitimise nothing, contribute nothing to any class's hegemony. 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.<sup>242</sup>

Yet, the process of unveiling this injustice can also collapse into a nihilist critique of the law – especially common in critiques of international law that collapse it into a simplistic 'might makes right'. At the international level especially, this nihilism is enabled by an idealised vision of the law, generally supposed to exist to a greater extent at the domestic level. Pashukanis offered insightful reflection on this point:

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<sup>239</sup> Karl Marx, *Capital, Volume I*, vol. 1 (Moscow: Progress Publishers, 1999), 372. (This translation is chosen over that of the 1990 Penguin edition for aesthetic reasons)

<sup>240</sup> Ibid. Knox also notes the background ideological function of the law, coupled with the abstract self-interest of economic exchange. In the non-violation of private property, Knox notes possible 'economic reasons (if you steal someone's property they will not trade with you again) or ideological reasons (you genuinely believe that private property is sacrosanct) for abstaining from theft.' Knox, "Marxism, International Law, and Political Strategy," 425.

<sup>241</sup> Pashukanis, *Selected Writings on Marxism and Law*, 180.

<sup>242</sup> E. P Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon Books, 1975), 263.

The nihilist criticism of international law is in error since, while exposing fetishism in one area, it does so at the cost of consolidating it in others. The precarious, unstable and relative nature of international law is illustrated in comparison with the largely firm, steady and absolute nature of other types of law. In fact, we have here a difference in degree. For only in the imagination of jurists are all the legal relationships within a state dominated one hundred per cent by a single state "will". In fact, a major portion of civil law relationships are exercised under influence of pressures limited to the activities of subjects themselves.<sup>243</sup>

Thereby dispensing with the differentiation between international law and domestic law that enables the aforementioned idealism, the nihilistic position threatens *all* law. However, there is still an element to this that is dependent on an idealised equation between law and justice. Without this there would be no reason for surprise at the 'unveiling' of law as partial and unjust. In this vein then, the corollary of such legal nihilism can, with some irony, become the reform and strengthening of law in order to bring it back in line with that ideal of justice. This particular position clearly influenced the Third World engagement with international law addressed in Chapter Four, but for the purposes of this chapter it simply resurrects the indeterminacy of legal argument as open to all kinds of reformist measures. The argument of this thesis is that such a position would, in theory, make revolutionary praxis and legal praxis entirely compatible. Yet the commodity form theory of law implies that the kernel of law in exchange relations points to a 'dull compulsion' within the law that might constitute the limits of the legal form for praxis. The intimate relationship between the legal form, relations of exchange, and the background social conditions necessary for the function of capitalism foreground a direct contradiction between legal praxis and revolutionary praxis as discussed in Chapter One.

This does not mean that revolutionary praxis necessarily collapses into a form of (non-ideal based) legal nihilism. Knox's critique of Mieville offers further constructive material here. Knox adopts Lenin's pragmatic approach to the law, as a 'principled opportunism'.<sup>244</sup> This is also based upon further reading of Pashukanis. It is in part driven by theory, but also by the recognition that

progressive forces often wield a great deal of economic power internal to the bourgeois state (and internationally). It is possible to imagine a situation in which a pattern of economic 'sabotage', strikes, and so on by these actors could force a state to adopt a particular 'interpretation' of the law. [Additionally], there is the argument that a concern with legitimacy and consistency might be manifested on the part of those interpreting the law.<sup>245</sup>

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<sup>243</sup> Pashukanis, *Selected Writings on Marxism and Law*, 180.

<sup>244</sup> Knox, "Marxism, International Law, and Political Strategy," 433. Knox develops this argument more fully in Knox, "Strategy and Tactics."

<sup>245</sup> Knox, "Marxism, International Law, and Political Strategy," 428.

It is worth noting this primarily for the second observation. This stems from Pashukanis's own practical and theoretical engagement with law in the early years of the Soviet experience. More of this will be addressed in Chapter Three of this thesis, but it is also essential to the argument being made here. Pashukanis is generally seen as holding to a position, misinterpreted as a kind of legal nihilism, in which the legal form must wither away with the passing of capitalist relations. Yet for Pashukanis this did not mean that the law was inimical to the revolutionary struggle.

[F]or the petit bourgeois revolutionary the very denial of legality is turned into a kind of fetish, obedience to which supplants both the sober calculation of the forces and conditions of struggle and the ability to use and strengthen even the most inconsequential victories in preparing for the next assault. The revolutionary nature of Leninist tactics never degenerated into the fetishist denial of legality . . . On the contrary . . . he firmly appealed to use those 'legal opportunities' which the enemy . . . was forced to provide.<sup>246</sup>

This frames Knox's principled opportunism. Yet in Pashukanis's work this quote is preceded by the following observation. 'The struggle to overthrow and unmask the legalistic fetish of the system, against which the revolutionary struggle is conducted, is a quality of every revolutionary.'<sup>247</sup> There are two components to this. The second, highlighted by the critical work of CLS and the New Stream in International Legal Theory, is the oft noted process of 'unmasking', 'disenchanted' or 'demystifying'. The former tends to be either not be a shared political project, or is taken to have no direct relationship to the law beyond its pragmatic use at various junctures.

## **VI: Revolutionary Praxis in Law**

However, if we are talking about revolutionary praxis and the law, then both elements of Pashukanis's formulae are essential. This is simply another way of assessing the capability of law, structured by the foregoing discussion, to provide an arena for revolutionary praxis. Miéville's take on Pashukanis does not leave much space for 'progressive' visions of the law. In many cases it seems this has been at the root of critical responses to both Pashukanis's original theory, and Miéville's resurrection of it for modern day international law.<sup>248</sup> The fact seems to remain, for some legal theorists, that the law at some various points either makes a progressive ruling or has a generally positive effect. Simultaneously, it remains open and accommodating to progressive arguments articulated in legal terms. However a deeper appreciation of the early sketches of Pashukanis's theory and Miéville's work gives cause for doubt. Pashukanis notes the 'gravity' within law that draws it back to its root in exchange relations. It is this gravitational pull that colours all public legislation with the hues of capitalist exploitation.

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<sup>246</sup> Pashukanis, *Selected Writings on Marxism and Law*, 138.

<sup>247</sup> Ibid.

<sup>248</sup> For Pashukanis, see Hunt, "Dichotomy and Contradiction"; Stone, "The Place of Law in the Marxian Structure-Superstructure Archetype." For this kind of response to Miéville, see Marks, "International Judicial Activism and the Commodity-Form Theory of International Law."

The specific form that this takes is precisely in the non-coercive coercive relations enabled by and elided by the law. Its abstract neutrality obscures material inequalities of substantive effect. This is far from a novel critique of the law, and it must be acknowledged that development of public law creates all kind of space for extenuating circumstances to alter the basic level playing field of legal reasoning. There is no arguing with the fact, in the vein that Kay and Mott note, that victories of the working class can at times be enshrined in law, and serve to tip the scales somewhat in the favour of labour at various points of negotiation. But what these victories do not radically transform are those areas accepted as immutable, the basic background relations in which some are denied access to the means to reproduce life and have nothing other than their wage labour to sell and, crucially, the veneer of choice that papers over this dispossession. It is in this way that the exploitative relations of capitalism, in their material content, are *extra-legal* facts.

The question remains, then, as to the possibility of legal argument to effect this situation. There are two possible avenues where this could occur, at least in theory. One of which was touched on by Isaac Balbus, and also indirectly by Alan Stone, although both fail to develop an effective idea of revolutionary legal praxis in the sense developed in this thesis. In essence, any revolutionary approach to altering this relationship would involve challenging the background conditions that enable the exploitative relations of capitalism. Other forms of legal struggle could constitute interventions into the conditions under which labour may be sold, for example, which tinker with process of production but do not transform their capitalist nature. The gravity noted by Pashukanis threatens to overbear such interventions as discussed earlier. The most immediate way of challenging these background conditions through the law, and that mentioned by both Balbus and Stone, is through radically questioning the basis of property ownership and the contractual basis of exchange – both, in essence constituting a form of redistribution. Property may be transferred from one to a collective, or abolished in large part altogether; questioning contractual obligations, for example rendering debt obligations void, thereby dispossess the creditor and enacts another form of redistribution.

This raises the most obvious and explicit way in which a progressively minded lawyer could engage in redistributive activities. In a straightforward way, a case could be constructed and put before a court with the aim of securing a ruling in favour of some kind of redistribution. This is something that will be dealt with in greater depth in Chapter Four on the New International Economic Order, which quite explicitly involved attempts to make exactly this kind of legal argument within international law. Suffice to say at this stage that it is an open question about whether this process can ever be enacted in a radical sense. Individual transfers of property or bankruptcy proceedings do not threaten the function of capitalism per se, but temporarily alter the balance of exchange relations in the vein of the administrative interventions discussed above. As to the capacity in law for individual moments of apparently egalitarian rulings that engage in minor victories for oppressed people, the possibility of such cases is not being questioned here.

This discussion highlights a crucial element of revolutionary praxis and the legal form. Revolutionary praxis demands the eventual overthrowing of the systemic oppressive function concerned – in this instance, capitalist relations. This specifically does not constitute an individual, isolated legal victory; in Kay and Mott’s terms: working class power ‘*post festum*’. The reason is simple. Such a legal victory does not challenge the broader relations of exploitative wage labour. It is simple to envisage analogous scenarios in other areas of law. For example, general bankruptcy laws may offer an individual the chance to escape some particularly odious debt. This issue will resurface in both Chapters Three and Four. However, what is essential to reiterate at this stage is the fact that the legal form is not inhospitable to the exceptional victory of a working class principle, say a higher minimum wage, or administrative interventions in the length of the working day; yet what it does appear to be inhospitable to, for example, would be a serious questioning of the validity of human labour power as a commodity and the property constellation that necessitates it.

*i) Beyond Disenchantment*

When it comes to more radically transformative efforts than exceptional interventions, it would appear that there is more at stake. However, much of the legal theory on this front has taken a common line with the previous discussion that aimed to delegitimize elements of the legal order. What pushes this in the direction of revolutionary activity is when that delegitimation is directed towards fundamentally questioning the *system* represented by the law under critique. Without this element, critique in this vein simply collapses into the act of drawing attention to the iniquitous content of the law; thereby suggesting some kind of palliative remedy to its function. As with regard to Pashukanis’s quote above, this is not revolutionary praxis; rather it is reformist. Balbus captured this effectively:

Those who would argue that delegitimation can result from the failure of law to live up to its "promises" (i.e., from the gap between its promises and its performance) fail to understand that the legitimation of the legal order is not primarily a function of its ability to live up to its claims or "redeem its pledges" but rather of the fact that its claims or pledges are valued in the first place. As long as "formality," "generality," and "equality before the law" are seen as genuine human values, even gross and systematic departures from these norms in practice will not serve to delegitimize the legal order as a whole, but will at most tend to delegitimize specific laws and specific incumbents of political office who are responsible for these laws.<sup>249</sup>

This formulation is particularly important, especially when we consider the insight of the commodity form theory of law and the fundamental root of the legal form in formal, abstract relations of equality. For Balbus, contra the legal sociologists of his day, this meant that a "critical analysis of the relationship between claim and reality,"... [was] not, in "itself a source of possible change towards a more humane society," unless

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<sup>249</sup> Isaac D. Balbus, "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of Law," *Law and Society Review* 11 (1977 1976): 581.

and until this "critical analysis" also entail[ed] a critique of the legitimacy of the value underlying the claim itself.<sup>250</sup> Confronting this underlying value system 'thus presupposes a fundamental break with the values and (formal) mode of rationality of the legal form itself, a break which presupposes, in turn, at least an embryonic articulation of a qualitatively different set of values and mode of rationality.'<sup>251</sup>

This is not an easy process. Balbus noted that one of the consequences of legal fetishism, that accompanies commodity fetishism, was that the laws constructed by social groups to govern them became seen as sacrosanct creators of social life. The commodity, although a product of creative human labour designed to fulfil human needs, 'possesses the peculiar capacity of concealing its own essence from the human beings who live with it and by it.'<sup>252</sup> The commodities appear to take on a life and meaning of their own, most especially in the form of their universal equivalent, money. That which is contingent then appears necessary and determinative. For Balbus,

[w]hen Society is held to be a result of the Law, rather than the Law to be a result of one particular kind of society, then the Law by definition is unproblematical. Or, to put it another way, the answer to the legitimation question – why do citizens support the legal order? – is, above all, the fact that the citizens of this order ordinarily do not and cannot ask this question.<sup>253</sup>

It could then be a process of revolutionary legal praxis to work within the law to open up this kind of questioning, to reveal the nature of law (and commodities) as our social products and therefore changeable. Balbus tends towards a semiotic decoding of the legal form as a fillip toward this kind of development.

Insofar as the delegitimation of the legal form and the capitalist mode of production to which it is tied presupposes precisely the capacity of individuals who are dominated by this mode of production to perform such a decoding operation, [their] effort to develop such a decoding purports to contribute to the delegitimation of both the legal form and the capitalist mode of production, a delegitimation which is a necessary condition for the creation of a less abstract, more concrete, i.e., more human, society.<sup>254</sup>

There arises a difficulty, therefore, in this approach. Although Balbus began by seeking a deeper questioning of the legal order, he slipped back into a similar process of delegitimation to that he considered inadequate. There was no real exploration of what a deeper questioning might involve exactly as legal praxis, and thus his contribution does not offer sufficient insight into assessing the arena of law as a location for revolutionary praxis.

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<sup>250</sup> Ibid., 582.

<sup>251</sup> Ibid.

<sup>252</sup> Henri Lefebvre, *The Sociology of Marx* (New York: Vintage Books, 1969), 47.

<sup>253</sup> Balbus, "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of Law," 583.

<sup>254</sup> Ibid., 585.

*ii) Confronting Essential Legal Relations*

Alan Stone offers a further account of the possibility of the deeper destabilization of law that proves useful. Stone's work takes a lot from Pashukanis, although along with various other critics of the commodity form theory he held that the independence of judges and the existence of administrative law posed fundamental problems for the commodity form theory.<sup>255</sup> For Stone,

[t]he great merits of Pashukanis' analysis [were], first, its attempt to draw important connections and parallels between the economic structure and the legal superstructure. One need not accept his commodity theory of law to accept its insights into the legal subject, individual responsibility, and the structure of the legal system generally. Second, the analysis allow[ed] for the domination of the legal system by the dominant classes but avoid[ed] a crude instrumentalism in which members of the dominant classes always prevail[ed]. Third, in drawing the distinction between legal and technical rules, Pashukanis' analysis help[ed] to differentiate in a rudimentary way between the rules that sustain and define social relationships and those that aid a society's functioning. All societies want their trains to run on time.<sup>256</sup>

Without overly rehashing the previous arguments on administration, it is again worth noting that it does not invalidate the commodity form theory to recognise that the law also represents an arena of social struggle in which there exist 'laws that operate to restrain capitalist interests'.<sup>257</sup> At the very least private (and capitalist) rights clash, and it is the clash of these interests (inherent in exchange) that the law structures and mediates.

Nevertheless, Stone's own formulation actually remained remarkably close to that of Pashukanis, and to later developments of this theory in the line of Miéville and Knox mentioned above. He drew a distinction between 'essential legal relations' that were essential to the function of both law and capitalism, and derivative subrelations. For Stone essential legal relations were property and contract. This derivative relationship of all non-essential legal relations mirrors the 'gravity' Pashukanis saw as exerting itself on public law in general. For Stone,

[c]ourts, confronted with particular matters, accept the essential legal relation, consider the functions and purposes of the derivative subrelation, and then seek to render a best decision consistent with the derivative subrelation's principal function.<sup>258</sup> [T]he essential legal relations are at their core respected, and those aspects of the legal superstructure that are isomorphic with elements of the economic base remain to foster the accumulation of wealth under

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<sup>255</sup> Stone, "The Place of Law in the Marxian Structure-Superstructure Archetype," 46.

<sup>256</sup> *Ibid.*, 45.

<sup>257</sup> *Ibid.*

<sup>258</sup> *Ibid.*, 58.

capitalism even if the segment of the capitalist class that controls public utilities cannot take full advantage of the subrelations ordinarily derived from them.<sup>259</sup>

Stone's point was that large differences were possible within the general frame of legal decisions that did not question the underlying essential legal relations – those essential to capitalism and closest to the essence of Pausanias's commodity form. The result was a causal link, from the essential legal relation, that was at once 'complex, flexible and yet constraining'. Thus in Stone's formulation, the legal profession constituted a group of people working within certain structural constraints provided through their social setting, class interests, possibly inertia etc. who thereby develop a jurisprudence that is at once open and yet structurally defined. For Stone this represents no particular conspiratorial mindset or even conscious affiliation with any class or group.<sup>260</sup> What is noteworthy is that the development of said structure, through a 'multitude of variously motivated human agents', occurred for Stone within a broad system open to mistakes, deviances, and subversion.<sup>261</sup> Such subversion was inevitable, especially as this legal system was also reflective of a particular location for the struggle of interest, and thus marginal victories would be possible that had the result of being more or less 'efficient' for capital, but nonetheless entirely compatible with a broadly capitalist society.

For Stone this process was almost always (but not exclusively) descendently hierarchical. Stone's example is negotiable instruments, where each particular decision would not ordinarily challenge the subrelation of negotiability, nor even approach the essential relation of contract. It is in this way that the essential base relations were reinforced. What then emerged, for Stone, was the possibility of those essential legal relations being challenged. This would signal that the broader social system was under threat.<sup>262</sup> Thus the justice (and origin) of private property may be challenged, or the distributive consequences of freely agreed binding contracts. Of course the legal profession would rarely champion the challenge to essential social (legal) relations unless, as unlikely as it may seem, they were engaged in revolutionary praxis.

Such a challenge occurs when the "justice" of the allocative biases inherent in essential legal relations is subject to question. The conception of contract, for example, includes the notions that people are "free" to enter into them and that, with only certain exceptions, the terms arranged by the parties must not be upset by courts. An alternative ethic which is [potentially] inimical to the capitalist system would have the state determine the "correct" terms for every bargain in the context of some theory of distributive justice.<sup>263</sup>

This combines effectively with G. A. Cohen, who noted that the concept of property could equally be open to a far more fundamental challenge:

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<sup>259</sup> Ibid., 64.

<sup>260</sup> Ibid., 59.

<sup>261</sup> Ibid.

<sup>262</sup> Ibid., 60 and 65.

<sup>263</sup> Ibid., 60.

every actual piece of private property . . . either is or is made of something which was once the private property of no one. . . . We must ask, apart from how he in particular got it, how the thing came to be (anyone's) private property in the first place, and examine the justice of that transformation.<sup>264</sup>

This offers a parallel with Balbus' focus on delegitimation, which foregrounds the need for Stone's formula to include further steps in order to carry revolutionary content. It also brings up an interesting parallel with international law discussed by Miéville. Miéville notes that '[d]omestically, lawyers may argue with the state that their client is not guilty of a particular crime, but it is virtually impossible for them to argue that the *category of action itself* is not in fact a crime. This, however, is not so for international law, where there is no monopoly even on that primary level of interpretation.'<sup>265</sup> Miéville goes on to discuss reprisals, but the immediate parallel with discussion here remains on a more abstract level. If, as Stone argued, the rarest and most fundamental, and therefore the most threatening, challenge to a legal system comes from questioning the most essential legal relations, then we are faced with a further situation in which international law may offer an exemplary point for legal theory more generally and a locus strangely more open to revolutionary praxis.

This point of challenge also offers the possibility of encompassing both the 'overthrowing' of the law and simultaneously its 'delegitimation'. This would depend on the line of argument taken, and the more general approach to law. In terms of legal strategies, this also opens up the possibility of a legal praxis aimed at the eventual unravelling of legal argument. What is really at stake is the broader systemic function of the law, and the ability to challenge that in legal terms. Whether or not we really see this at the international level would seem to be a question of extensive historical work, which in part informs the Third and Fourth Chapters that follow. But this would miss the crucial elements of the commodity form theory that inform this thesis as a whole. It would not suffice to find moments in the international legal contestation where an exceptional moment of disruptive legal discourse occurred. This would have to strike deeper to the function of international law more broadly.

Such revolutionary praxis would, in Stone's language, involve overturning those essential legal relations – property and contract. Now it is evident that in setting the criteria thusly, there will be no historical cases that reach the bar. But in assessing the hospitability of the legal form to praxis that points in this direction (revolutionary praxis), it is not necessary to trace a historical example of the abolition of all property rights and contractual obligations – which in that instance would constitute the complete collapse of international law. Rather, it is necessary to see if, in those moments when the contestation of the broader functions of international law was most heated (the two examples in this thesis), the logic behind the legal arguments put forward had in it a tendency towards revolutionary outcomes. That is, would such

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<sup>264</sup> G. A. Cohen, "Freedom, Justice and Capitalism," *New Left Review* 126, no. 3 (1981): 15.

<sup>265</sup> Miéville, *Between Equal Rights*, 143.

arguments serve to have overturned the system, based on their own logic? And crucially, in doing so did they remain comprehensible within the legal form.

## **VII: Conclusion**

This Chapter has opened engagement with international law as a field of praxis, with the aim of understanding the potential limits it might hold for revolutionary praxis discussed in the previous chapter. In order to ask this question the nature of international law, and more broadly law, is of central concern. It is for this reason that this chapter is immediately concerned with legal theory. The central framing thematic is such that progressive lawyers maintain a strong faith in the redemptive, emancipatory or even revolutionary potential of the law. They see no specific reason internal to the legal form to discount its ability to serve these kinds of ends. There is no reason 'of principle', why certain rights cannot trump others, and therefore it is simply a matter of privileging socially progressive rights to unlock the progressive potential of the law.

This Chapter has argued that this has much in common with a view of law as a progressively developed social relation that can be gradually transformed from a legitimization of power to a restraint on the powerful and a shield for the weak. This is a perspective particularly apt to the international sphere, lacking the determining influence of an over-arching authority. This Chapter has presented the argument that this perceived openness of law to progressive lawyering and legislation is a product of legal ambiguity that, in this perspective, is gradually eroded in favour of a developed system of rules as the law evolves. For progressively minded lawyers, the immediate task is then to strengthen international legal rules and institutions. Although it is generally left implicit, this is modelled upon a conception of Western Liberal Democracies as a model of advanced legal systems, towards which international law may progress (and even surpass), given sufficient political will and progressively minded legal activism.

Against this kind of vision, this chapter has summarized various critical strands in both legal and international legal theory. The most powerful of these critiques have tended to stress the inherent indeterminacy of legal discourse, and thereby disenchant the kind of vision of law articulated in the preceding paragraph. There are two kinds of consequences to this critical move. The first is to leave open the question of the law's progressive potential, whilst noting that the indeterminacy of law enables it to serve a variety of ends. The second is to force an explanation for the general tendency of the law to serve more conservative ends than progressive ones. A variety of excellent critical moves have built upon this at the international legal level, aiming to explain international law's complicity with systems of patriarchy, continued colonial exploitation, racism and imperialism. However, these critiques have much in common with legal sociology, in that their explanation for the conservative function of law is located externally to the legal form per se. In this sense, this work does not offer the most effective theoretical frame for assessing the potential limits that law as field of praxis might hold for revolutionary praxis.

In order to achieve this, this chapter has turned to an analysis of law that notes an essential identity between the legal form and the commodity form – that the legal form is simply the other side to the economic frame of the exchange relation. Although this could, in part, be read as a further turn to the ‘outside’ of law, this both misrepresents this theory of law (the economic relation and the legal relation are not separable), but also relies upon an entirely empty conception of law that is to be maintained as separable from all other considerations. As a result this chapter has argued that the commodity form theory of law offers the most effective theory for assessing the potential limits law holds for revolutionary praxis. This Chapter has then presented a summary of the commodity form theory, drawing on the work of scholars such as Miéville who first developed it at a more sophisticated level for international legal theory. However, it has noted that this particular development of the theory has a tendency to foreground force as a determining influence on the law, as especially at the international level the prevalence of a self-help system appears to privilege militarily powerful actors. The centrality of coercion, and its role in law, is undeniable. But the specific way in which this manifests in international law is not wholly served by the theory presented by Miéville – as a reduction to power balances between states.

This chapter has argued that even a broader conception of ‘force’, encompassing economic and ideological elements, fails to entirely account for the specificity of law in these relations, and therefore that for the purposes of this thesis a slightly different angle is necessary. This is because of the unique way in which capitalist exploitation is constructed as an extra-legal fact. This does not mean that the initial conditions for exploitation were not constructed legally, but that once they are in place their acquisition is shifted within legal terms. For example, private property and contractual exchange are predicated on the extra-legal inequalities of bargaining position embodied in the opposition between capital and labour. It thus seems to be a logical implication that legal measures which radically altered that bargaining position such that the opposition between capital and labour could no longer function – entirely decommodified labour, for example – would severely threaten the broader system of legal relations. Stone notes that the more these ‘essential’ legal relations are challenged, the closer we approach a potentially radical upheaval. These debates can surface in the way Cohen notes with a challenge to the ownership of property or land, but also on the international plane with the debate over what constitutes legitimate coercion (reprisals, economic coercion, overt force) and under what conditions contractual obligations can be imposed. It therefore seems that a progressive, and potentially revolutionary legal praxis would aim to target and challenge these underlying structures, to fundamentally strike at the original ownership of property for example, or the very concept itself.

One of the consequences of this would be that the successful legal measures would constantly walk the line between being rendered exceptional, and thus non-revolutionary, and threatening the broader system of legal relations themselves. This particular element will resurface regarding the Soviet legal practice, as shall be clear in the following Chapter. Coupled with this, any ‘gains’ made by such legal measures would also undermine themselves through undermining the very legal structures in

which success has been achieved. Thus revolutionary legal praxis offers a strong countervailing tendency within its very approach. This again offers a further caution as to the depth of law's 'revolutionary potential'.

Furthermore, with revolutionary praxis aimed at transforming capitalist relations and the commodity form theory revealing the inextricable relationship between exchange relations (and thereby capitalism) and legal relations there is an intuitive opposition between revolutionary praxis and legal praxis. It is clear that the huge amount of critical work that has been undertaken aimed at 'disenchanted' the positive liberal image of law has had a role in building some deeper appreciation of exploitation and the role of law in enabling and veiling it. But this is not revolutionary praxis, as Pashukanis made clear. The implications are that revolutionary praxis takes place elsewhere than law, but that simultaneously the necessity of law cannot be avoided. But it is still necessary to understand in what ways the legal form relates to revolutionary praxis, and how, if at all, such praxis might make an imprint on the law. The Soviet example in the Chapter that follows provides a case of explicitly revolutionary activity (at least in the early years) that engaged with international law out of necessity. Chapter Four addresses a moment where the activity was more explicitly directed at the law, yet was also less explicitly revolutionary in its intent. Both contain elements of a potentially revolutionary praxis, and combined offer a picture of the limits of law for those with revolutionary intent.

## **Chapter 3: The Soviet Relationship to International Law**

### **I: Introduction**

This chapter analyses the Soviet<sup>266</sup> relationship to international law, aiming to understand if the legal form offered any limits to potential revolutionary legal praxis. Chapters One and Two inform this discussion in the following way. Primarily, the discussion of revolution and its inherent link to praxis and human agency draws attention specifically to the fact that Soviet actors considered themselves to be revolutionaries. It is indisputable that, rhetorically at the very least, Soviet legal theorists and foreign policy makers were working within a revolutionary praxis. Whether or not this was successful is beside the point. As Anderson's discussion of agency highlights, it is the aims of the praxis at hand that are of importance.

Although the target of this thesis is legal praxis, it is not easy to separate this from other areas of engagement. Particularly in relation to the Soviet Union, legal praxis simply existed on a continuum of revolutionary praxis. As we shall see in the ensuing discussions on Soviet legal theory, and already made clear in the discussion of Pashukanis in Chapter Two, the legal part of this continuum was not considered by Soviet revolutionaries to be the prime location of revolutionary activity. It was nevertheless a necessary one, and to answer the question at hand this Section will turn to the Soviet relationship to international law. This relationship has been characterised, by both early Soviet and Western writers, as the Soviet 'approach' to international law. This very idea of an 'approach' to international law contains a wealth of problematic assumptions, and will be addressed throughout this chapter. Yet the purpose of the following analysis is to assess the impact of legal practice from a period of time and by actors that were, indisputably, framing their engagement as revolutionary praxis. This cannot be done without understanding what is taken to constitute this Soviet approach, and to seek historical and theoretical explanations for this understanding. Therefore a large Section of this chapter will be devoted to this task.

This will also be informed by the preceding discussion of international law as an arena of praxis. This draws attention to specific kinds of legal praxis as potentially indicative of a revolutionary intent: the delegitimation of existing legal norms, likely involving challenging the objectivity of the law; the explicit reference to the law's function as serving capitalist interests; and in some way an ultimate objective of overthrowing the law. We see all these elements in early Soviet references to international law, in calls for world revolution, the rejection of certain existing international norms, and the constant attempt to expose the complicity between the function of international law and the imperialist activities of capitalist states. However, as will be made clear, although this discourse was present, it was also accompanied by both the *use* of

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<sup>266</sup> In general this Chapter will adopt this reference to include both the Russian Soviet Federative Socialist Republic and the Union of Soviet Socialist Republics as the period under consideration covers both.

international law and the articulation of a series of theoretical understandings about both existing international law and its relationship to the new revolutionary body of the Soviet Union.

As we shall see, this particular relationship between revolution and international law – between the revolutionary overthrow of the law and the immediate use of the law – feeds heavily into the construction of a Soviet ‘approach’ to international law that may be differentiated from an implied ‘standard’ approach. Section III addresses this, discussing how the uniqueness of the Soviet approach has been characterised by scholars in three interrelated ways. In the first instance, the Soviet state was understood to have a general disregard for international law. In this view, the Soviet perspective of international law was as law made by capitalist states, to serve the interests of capitalism and imperialism. For analyses of the Soviet approach, an almost inevitable corollary of this disregard was the breach of the international obligations of the Russian state by the Bolshevik government. Secondly the Soviet approach to international law was seen to involve the subordination of law to policy. International law was simply a tool that all states used to pursue their own interests internationally, and as such offered no significant restriction on the actions of the Soviet state. Thirdly the Soviet approach was seen to be highly positivist in theoretical orientation.<sup>267</sup> In this perspective the Soviet government rejected the customary norms of international law, focusing exclusively on those areas of international law that most unequivocally expressed state consent, namely treaties.<sup>268</sup> Finally the three perspectives just outlined are qualified by the recognition of a certain level of later convergence between whatever characterised the initial Soviet approach, and international law more broadly conceived. As the number and nature of states participating in the creation of international law increased and diversified, both ‘general’ international law and the Soviet position are considered to have moderated into closer alignment.

These characteristics of the Soviet approach sit uneasily with the critical perspectives on international law discussed in Chapter Two. The indeterminacy thesis builds upon the idea that for every legal argument, there is a counter argument. As discussed this implies that any outcome for a particular case can be supported by a legal argument. As a theoretical statement about international legal argument in general, the insights of this approach hold valid for the Soviet engagement with international law. The indeterminacy thesis does not state that international law *has become* indeterminate as a result of some contemporary development; say for example the fragmentation of international law. But rather that international legal argument *is fundamentally* indeterminate.<sup>269</sup> If we take this seriously, then the perception that the Soviet approach

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<sup>267</sup> For a critical discussion of this, see Bill Bowring, “Positivism versus Self-Determination: The Contradictions of Soviet International Law,” in *International Law on the Left: Revisiting Marxist Legacies*, ed. Susan Marks (Cambridge University Press, 2008), 133.

<sup>268</sup> See, for example, E. A. Korovin, “Soviet Treaties and International Law,” *American Journal of International Law* 22 (1928): 753–63.

<sup>269</sup> As discussed in Chapter Two, for Koskeniemi this creates the need to examine ‘institutional biases’ in order to understand the concrete nature of international law in practice. For an alternative understanding of indeterminacy as a particular legal argument, rather than a

to international law involved (at least rhetorical) disregard for its strictures, and breach of obligations in the eyes of its opponents, has to be qualified. At the very least we would have to assume that valid legal arguments *were available* to justify the Soviet position. Whether or not they were invoked would be a different matter; one which could then offer support for the rhetorical aspect of this perception of the Soviet approach. As this Chapter will demonstrate, those legal arguments were both available and utilized by the Soviet state.

The second and third perceptions, of a Soviet subordination of law to policy, and a highly positivist Soviet approach, are in some sense direct opposites of one another. This should lead to a level of uneasiness in their being lumped together as effective descriptions of the same object. Legal positivism suspends the necessary conceptual connection between law and morality or ethics, as a more or less direct challenge to the theory of natural law.<sup>270</sup> But positivism nevertheless maintains that law is concretely discernable (and reasonably determinate) through established mechanisms, be that the command of an overall sovereign body backed by force, accordance with a fundamental *grundnorm*, or as rules governing conduct created and altered in accordance with established secondary rules.<sup>271</sup>

This is far from the same thing as seeing law as subordinated to policy; something most clearly expressed in McDougal and Lasswell's New Haven Approach, which finds its intellectual heritage with the American legal realists.<sup>272</sup> In this light it is somewhat problematic to describe the Soviet approach as simultaneously positivist in its focus on treaties, and yet subordinating international law to its policy concerns. This is not to say that such a confluence is impossible; clearly the Soviet state could sign and propose treaties that were somehow subordinate to the needs of its policy objectives, but this is not the same thing as the New Haven Schools' subordination (and alignment) of international law with the social (or moral and ethical) goals of a postulated ideal society. Similarly, neither of these two perspectives sits easily with the Soviet approach being characterised as having a disregard for international law – legal positivism clearly attaches importance to law, and even if law is subordinate to policy aims it nevertheless represents an important vehicle for enacting that policy. In addition, adopting either of these perspectives requires the maintenance of hermetic spheres of policy or law, leaving us with no way to understand the potentially mutually constitutive relationship between them.

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characteristic of the legal form, see Marks, "International Judicial Activism and the Commodity-Form Theory of International Law."

<sup>270</sup> See Anthony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law," *Harvard International Law Journal* 40, no. 1 (1999): 1–80.

<sup>271</sup> See respectively John Austin, *Lectures on Jurisprudence: Or the Philosophy of Positive Law*, 5th ed., vol. 1 (London: Sherratt & Hughes, 1911); Kelsen, *Principles of International Law*; Hart, *The Concept of Law*.

<sup>272</sup> W. Michael Reisman, "The View from the New Haven School of International Law," *American Society of International Law Proceedings* 86 (January 1, 1992): 118. Ian Scobbie directly contrasts the Soviet and the New Haven approaches, see Ian Scobbie, "Wicked Heresies or Legitimate Perspectives? Theory and International Law," in *International Law*, ed. Malcolm Evans (Oxford: Oxford University Press, 2010).

There are a variety of explanatory possibilities for the above characterisations. Firstly that they are all distinct, articulated by different people at different times and that the object of their study – the Soviet ‘approach’ to international law – changed with them. Perhaps in the early years following the revolution the Soviet government disregarded international law; at a later date it was positivist and claimed international law was only what could be found in treaties, and that these bound only those expressly consenting to them; and subsequently, at an even later date, the Soviet Union subordinated all of international law to its policy considerations. One could even map this onto a possible historical narrative of the revolution – from War Communism, to the New Economic Programme, to Stalin’s particular rule. A second possibility is similar to that above, but differs in that one of the perceptions accurately described the Soviet approach to international law, whereas the others were somehow mistaken in their analyses. In this event, perhaps the Soviet approach was to continuously disregard, or espouse a disregard for, international law. As a consequence of its disregard for custom, some observers might then have detected a positivist focus on treaty; as a result of its generic disregard for restrictions posed by international law, perhaps others perceived the subordination of that law to policy.

A third possibility would be that all of the above perceptions were accurate descriptions, to differing degrees at various times. This account creates space for contradictions within the Soviet approach, and within the state itself. It would also allow for variation over time; for each perspective to have a degree of accuracy rather than an absolute purchase. Finally this would draw attention to the concrete circumstances in every instance. In this event, different factions within the Soviet government may have wished to disregard international law, others to restrict obligation to treaties, and some to use international law as a vehicle for state interest. This is a more persuasive account, and as we shall see manages to incorporate some of the ways in which quite incompatible positions were forced together in the early years of the revolution as very divergent needs were catered for. These expressed themselves directly in early Soviet debates over the nature of law, and translated in interesting ways into Soviet international legal arguments and the foreign policy of the Soviet state. Section III of this chapter will be devoted to describing these processes, and how they feed into the characterisations of the Soviet approach described above.

However this explanation is not particularly satisfying in theoretical terms. It incorporates and aligns perspectives that have important differences of inflection, and as a result will overlook the insights that stem from debates between those epistemologies.<sup>273</sup> Furthermore there is no explanatory mechanism involved. Most particularly for the concerns of this thesis, this explanation does not offer any insights into the potential limits of the legal form for revolutionary praxis. In addition it also sidelines the issue of potential convergence. Without any broader frame linking elements of continuity, how are we to assess the claim of convergence, to understand

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<sup>273</sup> See discussion on the Hart-Fuller debate in Kenneth I. Winston, “Is/Ought Redux: The Pragmatist Context of Lon Fuller’s Conception of Law,” *Oxford Journal of Legal Studies* 8, no. 3 (1988): 329–49.

what sort of characteristics such convergence might have, or even to understand what elements have been ‘dropped’ to facilitate such alignment? This is where the methodology of revolutionary legal praxis becomes essential. By identifying a set of practices and theoretical approaches with what was ‘revolutionary’ in the early period we can begin to categorise those conflicting elements involved in the third explanation, along with characteristics of the Soviet approach incorporated therein. In addition we can begin to assess what ‘convergence’ might involve, by tracing continuities between early Soviet practice and the general practice of international law. We would then have a method of assessing how what was ‘revolutionary’ about the early Soviet approach interacted with international law more broadly, and whether or not these elements were included in any potential convergence.<sup>274</sup> This will be the task of the final Section of this chapter.

Before discussing the Soviet approach in detail, it is necessary to provide some of the context for both the concept of revolution in Europe at this time, and the ways in which this fed into the domestic legal debates within the Soviet Union. The international legal praxis of the Soviet Union did not spring from a vacuum, and it is essential to have some grasp of the background conditions in order to understand how something like the Soviet ‘approach’ to international law came into existence. This background will offer an examination of the tumultuous context of revolutionary struggle in Europe at the time, which offers an important context to the legal arguments that form the foundation of the Soviet ‘approach’. The second part of the background narrative will engage with some early domestic debates on law, as these have tended to be lost in translation when it comes to discussion in international legal theory.

## **II: Background – Revolution, Foreign Policy and the Law**

### *i) Revolutionary Reality*

Much of Soviet international legal praxis is only understandable in the context of revolution across Europe itself. This is not to note successful instances of ‘revolution’, but rather the pervasive sense of revolution as discussed in Chapter One, leading to the consistent push for emancipation by the oppressed multitude against the European aristocracy, land-owners and capitalists. Politics became increasingly polarized while haunted by this spectre, and these divisions played a key role in the background of the early Soviet Union.<sup>275</sup> It is not possible to consider the international law of the period as separate from the reality of this particular struggle, which again, in line with the discussion from Chapter One, is framed by the struggles of the nineteenth century.<sup>276</sup>

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<sup>274</sup> We would further have material that would enable critical reflection upon the indeterminacy thesis – to reflect upon how the form of law, and how it is embedded within a mesh of other relations, has a determining influence upon content.

<sup>275</sup> ‘[W]henver politics operates under the influence of the specter (sic) of revolution, societies become much more polarized’, A. J. Mayer, *The Political Origins of the New Diplomacy, 1917–1918* (New York: H. Fertig, 1969), 4.

<sup>276</sup> Sandra Halperin, *War and Social Change in Modern Europe: The Great Transformation Revisited* (Cambridge: Cambridge University Press, 2004); Hobsbawm, *The Age of Revolution*.

There are several key features to draw attention to, as they inform the following discussion on the Soviet relationship to international law. Firstly, the Bolshevik revolution occurred in the context of broader revolutionary struggles across Europe following the First World War. The revolution in Russia represented but one element of the broader European struggle, and served as a fillip to these movements. It was an accepted fact for the revolutionaries in Russia that their revolution was part of a broader movement, and many held doubts as to the likelihood of their survival if successful revolutionary struggles did not spread.<sup>277</sup>

Soviet foreign policy, to which international law would be subordinated in many interpretations of the Soviet 'approach', was shaped around these early realities, and the reception of both the new Soviet state and reactions to these policies were similarly influenced by other European reactions to the possibility of revolutionary contagion. Early Soviet policy was oriented towards immediate survival, tactical manoeuvring within Europe, and the immediate propagation of socialist revolution. The perilous nature of the immediate situation meant that Soviet foreign and domestic policies were seen as part of a necessary whole.<sup>278</sup> In Lenin's view there existed divisions within the 'consortia of capitalist states' that were to be targeted by this Soviet foreign policy.<sup>279</sup> They were to take advantage of the class divisions within capitalist states, the competing economic interests of these states, and more general inter-imperialist rivalry (the only thing in Lenin's view that allowed the Soviet Union to survive the early years),<sup>280</sup> alongside the divisions between the Great Powers and their colonies. His firm belief in the revolutionary capacity of the colonies also provides a background to early Soviet views on self-determination. It is important to note that this was also not simply a pragmatic exercise, but also connected with broader socialist principles of the time.<sup>281</sup>

The context outside of the revolutionary state was also highly combustible. As Sandra Halperin notes,

[f]ollowing World War I, Western states confronted, in addition to a Bolshevik revolution abroad, newly organized and more powerful labor (sic) movements at home. In 1919, a new revolutionary movement – the Third International – was formed under the auspices of Lenin and the Russian Bolsheviks; mass communist parties emerged in France, Germany, and Italy; and Hungary briefly became a communist country. In Britain, the red flag was raised on the town

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<sup>277</sup> See discussions in Richard K. Debo, *Revolution and Survival: The Foreign Policy of Soviet Russia, 1917-18* (Liverpool: Liverpool University Press, 1979); Gabriel Gorodetsky, ed., *Soviet Foreign Policy, 1917-1991 - a Retrospective* (London: Frank Cass, 1994); Erik P. Hoffman, "Soviet Foreign Policy Aims and Accomplishments from Lenin to Brezhnev," in *Soviet Foreign Policy*, ed. Robin Laird (New York: The Academy of Political Science, 1987).

<sup>278</sup> T. A. Taracouzio, *War and Peace in Soviet Diplomacy* (New York: Macmillan, 1940), 135. Also see Zinoviev - Dvenadtsatyi S'ezd Rossiiskoi Kommunisticheskoi, *Aprilia* 1923, p617 (in Taracouzio, *Ibid.*)

<sup>279</sup> *Ibid.*, 136.

<sup>280</sup> V. I. Lenin, *Collected Works*, ed. George Hanna, trans. Yuri Sdobnikov and George Hanna, Third Printing, vol. XXVI (Moscow: Progress Publishers, 1977), 7.

<sup>281</sup> Bowring, *The Degradation of the International Legal Order?*, 13–18.

hall in Glasgow, and the British War Cabinet feared that a Bolshevik revolution was being attempted.<sup>282</sup>

In 1919 the UK Home Office conducted a 'survey of revolutionary feeling',<sup>283</sup> in which the Russian revolution figured among the antagonising causes. Worker's strikes occurred across Europe,<sup>284</sup> taking on a hard political edge against anti-Soviet intervention. Halperin notes that when Poland invaded the Soviet Union in 1920 against the 'menace of Bolshevism', 'the Allied powers supported them by sending shipments of munitions and numerous contingents of military advisers.'<sup>285</sup> She goes on to note that

Strikes in 1920 became decidedly political in nature as workers repeatedly came into conflict with the government over British support for Poland in the Polish-Russian War... On May 10, dockers engaged in loading a freighter with munitions for Poland struck work with the support of their union and the coal-trimmers refused to coal the vessel. A week later the Dockers' Union put a general ban on the loading of munitions for use against Poland. On July 21, British troops broke a strike of dockers at Danzig against the landing of munitions for the Poles. On August 7, Lord Curzon, the Foreign Secretary, sent a note threatening the Soviet government with war if the advance of the Red Army was not halted. The next day Labour Party headquarters telegraphed all local parties and trade union councils urging demonstrations against war with Russia. The result was nation-wide demonstrations.<sup>286</sup>

The repression of the left across Europe in response to these events was extreme. Halperin notes explicitly that '[t]he rise of socialist radicalism, and in particular the Bolshevik Revolution in Russia in 1917, tended to drive all of Europe's relatively privileged or well to-do groups and elements into one antirevolutionary coalition.'<sup>287</sup> Victor Serge also claimed that, during the 'White Terror', as many as a quarter of

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<sup>282</sup> Halperin, *War and Social Change*, 187–8; A. J. Mayer, *Politics and Diplomacy of Peacemaking: Containment and Counterrevolution at Versailles, 1918–1919* (New York: Alfred A. Knopf, 1967), Chap 5.

<sup>283</sup> Basil Thomson, "Survey of Revolutionary Feeling during the Year 1919," pp. 4–5; in J. E. Cronin, "Coping with Labour, 1918–1926," in *Social Conflict and the Political Order in Modern Britain*, ed. J. E. Cronin and J. Schneer (New Brunswick, N.J.: Rutgers University Press, 1982), 120.; also cited in Halperin, *War and Social Change*, 190.

<sup>284</sup> Charles Tilly, "Revolutions and Collective Violence," in *Handbook of Political Science*, ed. F. I. Greenstein and N. W. Polsby, vol. 3 (Reading, Mass.: Addison-Wesley, 1975); F. B. Tipton and R. Aldrich, *An Economic and Social History of Europe, 1890–1939* (Baltimore: Johns Hopkins University Press, 1987).

<sup>285</sup> Halperin also notes that 'after a ceasefire was called, the powers sanctioned a new frontier that gave Poland a considerable amount of additional territory, despite the fact that these areas contained large numbers of minorities and were forcibly annexed.' Halperin, *War and Social Change*, 191, and fn 20.

<sup>286</sup> *Ibid.*, 190–1. Also see E. J. Hobsbawm, "The 'New Unionism' Reconsidered," in *The Development of Trade Unionism in Great Britain and Germany, 1880–1914*, ed. W. J. Mommsen and H. G. Husung (London: George Allen & Unwin, 1985).

<sup>287</sup> Halperin, *War and Social Change*, 192.

Finland's working class may have been massacred or imprisoned.<sup>288</sup> Repression was Europe wide:

In Britain, special laws were passed to repress strikers (1927) [in addition to the considered use of the Royal Air Force in 1920]; troops and police were sent to put down strikers in France (1919, 1920), Yugoslavia (1920), and Switzerland (1932). In Sweden and Norway, troops were used against strikers. In Germany, the government used the remnants of the army and right-wing veterans groups to crush revolutionary activity (1922, 1923, 1929, 1931–1932).<sup>289</sup>

It is also noteworthy that these repressive measures occurred within the Soviet Union itself, thus this was not a picture simply of the repression of revolutionary forces, but of the violent clash of social forces including those of a revolutionary approach struggling to consolidate their position.<sup>290</sup> It is within this context that Soviet foreign policy, and the closely linked Soviet 'approach' to international law, must be placed.

Most accounts of Soviet foreign policy recognise firstly the perceived necessity of the spread of revolution abroad, coupled with immediate survival, which over time shifted as revolution abroad was crushed and the Soviet state withstood counter-revolutionary civil war.<sup>291</sup> In the early years this position was articulated by Chicherin as a complete absence of foreign policy – the task was simply to publish all secret documents, make revolutionary calls abroad, and shut up shop.<sup>292</sup> As such the actual foreign policy of the Soviet state, and its relationship to international law, was seen as inconsistent, comprising a dualism of normal diplomatic relations whilst simultaneously encouraging subversion and revolution whenever the moment seemed propitious.<sup>293</sup> Those more positively inclined saw 'an amalgam of ideology and expediency, utopian expectation and realistic calculation, daring innovation and classical diplomacy.'<sup>294</sup>

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<sup>288</sup> V. Serge, *Year One of the Russian Revolution*, trans. P. Sedgwick (Chicago: Holt, Rhinehart and Winston, 1972), 186–91; Halperin, *War and Social Change*, 194.

<sup>289</sup> Halperin, *War and Social Change*, 193. Also see I. McLean, "Popular Protest and Public Order: Red Clydeside, 1915–1919," in *Popular Protest and Public Order*, ed. R. Quinault and J. Stevenson (London: St. Martin's Press, 1975), 237.

<sup>290</sup> In 1921, there were strikes in the Soviet Union, and a massacre of (anticommunist) strikers in Kronstadt, for which among other things, the strikers called for "Soviets without Communists." See A. Mazour, *Russia: Past and Present* (New York: Van Nostrand, 1951), Chap 6; Halperin, *War and Social Change*, 195. For Stalin's purges see S. Fitzpatrick, *The Russian Revolution, 1917–1937* (New York: Oxford University Press, 1982); and S. Fitzpatrick, "Stalin and the Making of the New Elite, 1928–1939," *Slavic Review* 38, no. 3 (1979): 377–402.

<sup>291</sup> For some examples see Hoffman, "Soviet Foreign Policy Aims and Accomplishments from Lenin to Brezhnev," 12.; Gabriel Gorodetsky, "The Formulation of Soviet Foreign Policy: Ideology and Realpolitik," in *Soviet Foreign Policy* (London: Frank Cass, 1994), 30; Debo, *Revolution and Survival: The Foreign Policy of Soviet Russia, 1917-18*.

<sup>292</sup> Chicherin on Peaceful Coexistence, quoted in Edward Hallett Carr, *A History of Soviet Russia: The Interregnum, 1923-1924* (London: Macmillan, 1951), 202–3. And in Gorodetsky, "The Formulation of Soviet Foreign Policy: Ideology and Realpolitik," 56.

<sup>293</sup> Gorodetsky, "The Formulation of Soviet Foreign Policy: Ideology and Realpolitik," 33.

<sup>294</sup> Debo, *Revolution and Survival: The Foreign Policy of Soviet Russia, 1917-18*, 420.

Many also agreed that, 'in a sense [it was] the Soviet state [that] survived and the revolution [that] perished';<sup>295</sup> that 'the very process of defense (sic) of the revolution, disbursed, disorganized, [and] destroyed much of the social base of the revolution'.<sup>296</sup> This element offers potential insight into the common perception of 'convergence' between the Soviet 'approach' to international law and more general practice – namely that the Soviet approach converged with dominant legal practice alongside the death of revolutionary ideals. More importantly for the discussion at hand it suggests an inability of revolutionary praxis to penetrate the realm of international law.

### *ii) Revolutionary Legality*

This revolutionary context was accompanied by new articulations of legal theory. Soviet legal scholars noted that it was only in the wake of the Soviet revolution that the first Marxist theories of law were articulated.<sup>297</sup> Much of this is covered in the previous Chapter under the discussion of Pashukanis who was a prominent figure in this new movement, but it is important to make some clarifications here. Pashukanis was not the only Soviet legal scholar, although he did rise to such pre-eminence at the Moscow Institute of Soviet Law that one observer noted that his 'textbook was the key to the study of legal philosophy, and his attitude toward law's future shaped the curriculum'.<sup>298</sup> Pashukanis's mentor prior to his rise was Pyotr Ivanovich Stučka, and the nuances between their two approaches are important to note. Primarily this is because it was actually Stučka's take on the law that meshed more closely with what was later to be understood as the Soviet 'approach' to international law. Again, this was an approach which was asserted by some Soviet scholars, but also read into Soviet foreign policy by Western commentators through their expectations and interpretations of what they saw as the Soviet approach.

Although their approaches had a difference in nuance, Stučka was highly supportive of Pashukanis. Pashukanis started out as Stučka's pupil, and Stučka himself was considered part of the commodity exchange form of legal theory. Although as John Hazard noted this school enjoyed pre-eminence in the early years of the Soviet Union, it was an ill-fated body of thought, coming into conflict with Stalin and Andrei Vyshinsky's determination to expand the use of law in the late 1930s. As a result Stučka, after his officially honoured death of natural causes in 1932, was ignored and vilified along with commodity exchange legal theory and theorists.<sup>299</sup> Pashukanis himself disappeared in 1936. Both Stučka and Pashukanis were concerned with the immediate nature of law in

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<sup>295</sup> *Ibid.*, 419. And see Bertram D. Wolfe, *Revolution and Reality - Essays on the Origin and Fate of the Soviet System* (Chapel Hill: University of North Carolina Press, 1981).

<sup>296</sup> Mike Davis, "Isaac Deutscher and the Old Left," in *Capital and Its Discontents*, ed. Sasha Lilley (Oakland: PM Press, 2011), 203.

<sup>297</sup> 'Before December 1919 there was no theoretical work on law from a revolutionary Marxist perspective.' P. I. Stučka, *P. I. Stuchka: Selected Writings on Soviet Law and Marxism*, ed. Piers Beirne, Peter B. Maggs, and Robert S Sharlet (Armonk, N.Y.: M.E. Sharpe, 1988), xiv. Also see Piers Beirne, ed., *Revolution in Law: Contributions to the Development of Soviet Legal Theory, 1917-1938* (Armonk, N.Y.: M.E. Sharpe, 1990).

<sup>298</sup> John Hazard, forward to Pashukanis, *Selected Writings on Marxism and Law*, xi.

<sup>299</sup> See the introduction by the editors to Stučka, *P. I. Stuchka*.

post-revolutionary Russia; with the practical necessities of legal control during the civil war, pitted against the potential anarchism of Decree No. 1 in 1917 that abolished the laws of Tsarist Russia.

Their process of exposing the legal form to the scrutiny of revolutionary Marxism faced opposition from non-lawyers within the party. Such theory was seen to ‘smack of anarchism’, and to be ‘directed against [party] decrees’.<sup>300</sup> In the end it was claimed: ‘[w]hy touch this idyll of law... Who and how does it bother if a small amount of idealism remains...?’<sup>301</sup> For early legal theorists in the Soviet Union like Stučka, it was vital that this idealism be assaulted. For him the law and the form of the state were tools of class oppression and held a deep connection to imperialist rule and capitalist exploitation. For Stučka, law was determined by the ruling class, through the state, and *‘the state [was] a weapon in the hands of the ruling class for holding the suppressed classes in subordination’*.<sup>302</sup> It was here where Pashukanis and Stučka diverged, respectively representing the radical and more moderate wings of the commodity exchange school, although they remained a united front against ‘foreign bourgeois jurists and their domestic allies.’<sup>303</sup> As noted, despite Pashukanis’s pre-eminence at home, it was Stučka’s perspective that saw all law as class law that achieved greater longevity – at least until the later rediscovery of the commodity form of law.<sup>304</sup> This was summed up by Tumanov at the 1930 Georgian Conference on law, arguing that ‘Marxists assert that law is carried out in practice by means of coercion and violence, because all law is class law, and the law of a class without coercion is not a law’. Added to this was the following cautionary note against academicism: ‘understand that in our country of proletarian dictatorship, in the epoch of an intensified class struggle... a calm academic presentation of the view of our enemies is unsuitable’.<sup>305</sup>

Although Pashukanis would have shared elements of this view, it is clear from the earlier discussion in Chapter Two on the commodity form theory that this would only go so far. His theory of law held it to have an intimate relationship to capitalism, and therefore it was not simply a tool that served whichever class happened to be ruling. The legal form came with its own logic that operated independently of the interests of the ‘ruling class’. As has been mentioned repeatedly this has tended to be interpreted as a form of legal nihilism, but for Pashukanis this did not mean that law had to immediately disappear, nor that the legal form could be avoided or ignored. To do so would be another form of legal fetishism. However, for Pashukanis the presence and necessity of the legal form in social relations, especially its dominance of them, remained an indicator of the presence of capitalist relations of exchange and equivalence, and their important connection to the purchase of labour power. It was

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<sup>300</sup> Ibid., 66.

<sup>301</sup> Ibid.

<sup>302</sup> Ibid., 109. Emphasis in original

<sup>303</sup> Ibid., xviii.

<sup>304</sup> For an insightful summary and critique, see Terrar, “The Soviet Critique of New Left Legal Theory.”

<sup>305</sup> Cited in Dennis Lloyd, *Introduction to Jurisprudence*, 1972, 670. Also see Kinsey, “Marxism and the Law,” 206.

this that set him apart from Stučka in the later years of the revolution, and his adherence to this theory that likely aided his untimely end.

For the discussion at hand, what it is important to highlight from Pashukanis is how his basic theory of law sat comfortably alongside the immediate task of defending the revolution and the relationship of this task to the law. Here Pashukanis relied heavily on the pragmatism of Lenin, demanding both the support of the law when it aided the revolutionary cause and the defensive use of the law against counter-revolutionary forces. Pashukanis noted that ‘Lenin brilliantly took into consideration the fact that the legality which our enemy imposes upon us is re-imposed on him by the logic of events.’<sup>306</sup> Legal positions could also merge perfectly with victories forced by political and economic circumstance, as Pashukanis went on to note: ‘the German imperialists, whatever their subjective dislike of the Soviet revolution, were compelled by the force of the general international situation to conclude a treaty with the Soviet government.’<sup>307</sup> The logic of this position stressed that there would be nothing to gain from denying the legal implications of the treaty, or the recognition of the Soviet Union, through some kind of moralistic distaste for law.

Also Pashukanis took the class-rule element of the legal form to imply something particular in terms of legal strategy.

[B]ourgeois legality is the consistent practice of class domination formed over decades and centuries. This standard "legal" form of domination can be destroyed or shaken by extraordinary events, but this still by no means signifies the necessary elimination of the organizational domination of the bourgeoisie itself... And if, as we know, bourgeois legality developed gradually – because of the work of a whole legion of parliamentarians, scholars, jurists, judges and civil servants – then it would be absurd to demand the same legal perfection and legality from proletarian power born yesterday and having to defend its very existence with weapons.<sup>308</sup>

Pashukanis’s caution here was that to see ‘legality’ as simply a tool of class rule one would expect new and recognisably ‘legal’ measures to spring into place in the processes of a revolutionary shift. Against the standard of the previous class-domination through law, proletarian rule would seem arbitrary and unlawful (or unlawful-like). But Pashukanis stressed that the legal form was ‘not an empty sack that [could] be filled with a new class content.’<sup>309</sup> It would take significant time to convert the apparent arbitrary nature of this rule into a recognisable (in the eyes of bourgeois legality) ‘legal’ tradition. Crucially, for Pashukanis, this would be a both counter-revolutionary and pointless exercise – without the social relations of exchange and capitalist production, the legal forms thrown up by these relations would cease to have relevance (and wither away). In this passage, Pashukanis was instead arguing for two moves in relation to the

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<sup>306</sup> Pashukanis, *Selected Writings on Marxism and Law*, 139.

<sup>307</sup> Ibid.

<sup>308</sup> Ibid., 144.

<sup>309</sup> Ibid.

law. Firstly to foreground the fact bourgeois rule remains at heart an arbitrary exercise of power, for all its legal justifications of rule and apparent due process. The second step is a defensive one – to justify the exigencies of the moment against liberal accusations of illegality.<sup>310</sup> Challenging this process and yet also using legal rules where possible to maintain the gains of the revolution was a central process of Pashukanis's approach to law. The defensive move was immediately necessary to defend the revolution, but this did not mean that revolutionary activity would be directed to building up a new legal tradition to match the standards of bourgeois law.

Pashukanis's vision on this front was informed by the following passage from Lenin, which drives home the hypocrisy involved in liberal claims against revolutionary uprisings:

when in the course of centuries or decades all the bourgeois and the majority of the reactionary jurists of the capitalist countries developed detailed rules – wrote dozens and hundreds of volumes of laws and explanations of laws; oppressed the workers; enchained the poor; and placed thousands of cavils and obstructions in the path of any simple worker – then... the bourgeois liberals do not detect "arbitrariness" here! Here, there is "order" and "legality"... but when for the first time in history the working and exploited classes... created their own soviets, called to the task of political construction those classes that the bourgeoisie had subjugated, beaten and deadened; and began themselves to build a new proletarian state, standing amidst the dust of wild battle and in the fire of civil war, to outline the basic principles of a state without exploiters – then all the scoundrels of the bourgeoisie, the whole band of vampires... began to shout about "arbitrariness".<sup>311</sup>

When it comes to revolutionary praxis and the law, the above considerations can serve as a form of blueprint, but only with the following caveat. Taking seriously the insights of the commodity form theory, and if we are talking about revolutionary praxis in the sense described in Chapter One, it is important to stress that, although a necessary tool in combating capitalist exploitation, legal struggle for the sake of law was not compatible with revolutionary aspirations. Therefore, for legal praxis to approximate revolutionary praxis it has to hold no investment in the law as 'law'.

### **III: The Soviet 'Approach' to International Law**

The above background picture is important for two reasons. Firstly it was the foreign policy of the Soviet state that was seen to dominate its international legal practice. Most accounts of the Soviet approach understand the theorizations of Soviet jurists as an attempt at after-the-fact justification of Soviet foreign policy. Therefore the notion that the Soviet state lacked a clear, coherent and 'established' foreign policy, due to its

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<sup>310</sup> There are parallels here with Cohen's discussion of property in law discussed in Chapter Two. All property, at some point and in an arbitrary manner, came to belong to someone, often in the form of violent expropriation or due to the absence of a pre-existing 'legal' claim.

<sup>311</sup> V. I. Lenin, *The Proletarian Revolution and the Renegade Kautsky* (Peking: Foreign Languages Press, 1972), 63–4. Also in Pashukanis, *Selected Writings on Marxism and Law*, 145.

nature as a transformed revolutionary state with different aims to Tsarist Russia feeds into the idea that its international legal practice was even further removed from 'standard' practice of the time. It is important at the outset to challenge this idea that the Soviet state was uniquely incoherent. Although there were serious and changing circumstances that threatened the Soviet state in its early years, which offers some justification for a potentially inconsistent approach to its foreign policy, this remains unpersuasive as a general account. Early Soviet aims were relatively clear, and more or less consonant with general state foreign policy: survival of the state, and the promotion of the interests of the ruling groups abroad.<sup>312</sup>

In this instance the ruling group of the Soviet state, although still struggling to maintain power against foreign invasion and domestic counter-revolution, happened to have an interest that they considered coincided with the working classes, or the oppressed and poorer peoples of the world – something which remains the exception in international politics. There is no real incoherence in this position, just different tactics that one might adopt to pursue these aims. Indeed, Lenin's immediate claim to *realpolitik* for the proletariat made clear two things:<sup>313</sup> firstly that in abstract terms the Soviet state was doing the same as all other states (in the immediately discussed sense); secondly that this was something generally denied to the position of the oppressed. Unquestioned cynical manipulation of others and the avid pursuit of self-interest were the privilege of secure capitalist states under the guise of normalcy – whereas the Soviet state, going about the same business, was read as an inconsistent and unruly international actor.

However, in terms of assessing the Soviet approach and its contribution it is necessary to engage with the basic characterisation of difference, with the caveat that this was unpersuasive in light of the above. As will be made clear in the following discussion, there has been no persuasive attempt to provide a theoretical explanation for this approach of imposed difference in the face of what turns out to be evidence to the contrary. At the outset however, there are two categories that present themselves as possible explanations, although they do not operate with a rigorous theory of law. The first of these fits within a more general historical-cultural perspective, in which a Soviet 'approach' to international law is conceptualised as part of an identifiable Russian tradition. This tradition is then constructed as distinct due to the unique Russian context, but depicted as holistically contributing to the development of a broader 'multicultural' international law, alongside typical progressive narratives of the discipline's flourishing following the Second World War and the later collapse of the Soviet Bloc. The antecedent move is then a simultaneous correction of dominant Euro-centric conceptions of international law, especially in the context of claims that this European narrative dresses up the particular as universal, and a bolstering of that same narrative by re-writing it as one of inclusion and cooperation. Just as there are other

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<sup>312</sup> The point is not to accept this as an eternal descriptor of state action, but to recognise that within the environment in which the new Soviet state was acting, such behaviour was the expected norm.

<sup>313</sup> This claim to the *realpolitik* of the proletariat is emphasised by Miéville in Orford et al., "Roundtable - War, Force and Revolution," 270.

strong regional traditions of international law that have contributed to the formation of international law, so too is there a Russian tradition.<sup>314</sup>

The second of these explanatory categories turns to Soviet practice and theory in international law in order to understand how this may have contributed to or hindered the development of general international law across the period of the Union's existence. In this context the Soviet Union is again perceived as embodying a distinct approach to international law, a perspective from which one might extract progressive development of the law, or perceive intransigent practice that has hindered positive legal development pursued outside of the Soviet Bloc. These two perspectives can be seen manifest in the idea that the Soviet Union pushed for a unique (and progressive) concept of Self-Determination,<sup>315</sup> and alternatively in the Soviet Union's restrictive approach to international law – making too much of state sovereignty and consent within international law and thus hindering the progressive development of multilateral institutions and general customary norms that would be binding upon all states.<sup>316</sup>

Both of these perspectives hold characteristics in common. Firstly, they both suppose a clear divide between norms of 'international law' in a general abstract sense, and the various state practices and perspectives which contribute to the formation of that general body. The second shared characteristic is the subsequent perception of the Soviet Union as embodying a particular form and type of state practice, from which it is possible to extract a culturally and historically specific 'tradition' that has in some way participated in the construction of general international law. For both these positions it is essential that Soviet State practice must be in some way distinct; there has to be something specific to the 'Soviet' approach for there to exist such conceptual 'approaches' in general. In this sense both operate on the dichotomy that 'international law is different in different places' whilst having at the same time a notion that this diversity creates something holistic – a general idea of international law.<sup>317</sup>

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<sup>314</sup> For the Russian tradition see L. Mälksoo, "The History of International Legal Theory in Russia: A Civilizational Dialogue with Europe," *European Journal of International Law* 19, no. 1 (February 1, 2008): 211–32.; for Canadian perspectives in a similar vein (if somewhat internal to the European dynamic) see discussion in Karen Knop and Ronald St. John MacDonald, "Maxwell Cohen at Eighty: International Lawyer, Educator, and Judge," *Canadian Yearbook of International Law* 27 (1989); Ronald St. John MacDonald, "Leadership in Law: John P. Humphrey and the Development of the International Law of Human Rights," *Canadian Yearbook of International Law* 29 (1991); Ivan L. Head and Pierre Elliot Trudeau, *The Canadian Way: Shaping Canada's Foreign Policy 1968-1984* (Toronto: McClelland and Stewart, 1995).; For a contemporary setting of this see Ohuma Yasuaki, "A Transcivilizational Perspective on Global Legal Order in the Twenty-First Century: A Way to Overcome West-Centric and Judiciary-Centric Deficits in International Legal Thoughts," in *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, ed. Ronald St. John MacDonald and Douglas M. Johnston (Martinus Nijhoff, 2005).

<sup>315</sup> For example, see Bowring, *The Degradation of the International Legal Order?*.

<sup>316</sup> For example, see Ronald St. John MacDonald, "Rummaging in the Ruins: Soviet International Law and Policy in the Early Years: Is Anything Left?," in *International Law: Theory and Practice: Essays in Honour of Eric Suy*, ed. Karel Wellens (The Hague: Martinus Nijhoff, 1998).

<sup>317</sup> See David Kennedy, "The Disciplines of International Law and Policy," *Leiden Journal of International Law* 12, no. 9 (1999): 17.

The grounds for this contemporary discussion were laid by earlier discussions of law in the Soviet Union. Scholars both within the Soviet Union and those observing from the outside explored the ways in which Soviet Union represented something unique in its embrace of Marxist-Leninist theory, something which had specific consequences for law, both domestically and internationally.<sup>318</sup> In this vein, scholarship within the Soviet Union, most especially in the decade following the Revolution in 1917, tended to explore the possibility of law's absence, or its uniquely transformed nature in a proletarian state. Externally, commentators could contrast events and perspectives within the Soviet Union with their own, perhaps noting progressive development of areas of law which would be worth incorporating or from which their own jurisdictions might learn, or alternatively discerning a warning of the excesses of socialism.<sup>319</sup>

Although both of these categories therefore collapse into an attempt to understand the formation of international law, neither of them offers a deep theoretical understanding of the form of law. Crucially, neither accounts for the fact that both of these engagements stress difference in the face of evidence to the contrary.<sup>320</sup> As will be discussed when assessing the later interpretations of a 'convergence' between the Soviet approach and general practice, even those accounts that recognise the errors in this earlier scholarship fail to offer theoretical explanations for why this happened, and indeed replicate the same basic theoretical position of the scholarship they are critiquing. The theoretical frame of this thesis offers a different perspective. Firstly it highlights this over-differentiation as a component of the ideological struggle that inevitably surrounds the concept of revolution. Not only might a revolutionary state need to stress difference to demonstrate its pursuit of revolutionary aims (especially if the state is tacking away from such a course and the justification of elite power is rooted in the idea of socialist revolution), but counter-revolutionary forces may find it serves their interests to isolate the revolutionary position as different and threatening.

A more important perspective stems from the consideration of the possibility of revolutionary praxis within international law. Taking international law as an open system of contestation, the expectation of radical difference in the Soviet approach has to be discarded. Instead focus is drawn towards the kind of practice the Soviet state engaged in, and how hospitable the form of law was to their more overtly revolutionary aims. This offers two simultaneous insights – firstly into the capacity of the legal form to serve revolutionary aims, and secondly into the revolutionary content of Soviet legal practice in the light of the considerations of Chapters One and Two. From this perspective the convergence of the Soviet 'approach' and general international practice

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<sup>318</sup> See, for example, George Ginsburgs et al., "The View From Without," *Proceedings of the American Society of International Law at Its Annual Meeting* 62 (1968): 196–214.

<sup>319</sup> For various examples in this vein see Harold J. Berman, *Justice in the U.S.S.R: An Interpretation of the Soviet Law*, Revised (Cambridge Mass.: Harvard University Press, 1974); Harold J. Berman, *Law and Revolution* (Cambridge Mass.: Harvard University Press, 1983).; or alternatively the collection issued in honour of his work: William E. Butler, Peter B. Maggs, and J. B. Quigley, eds., *Law after Revolution* (New York: Oceana, 1988).

<sup>320</sup> See later discussion in this chapter, and the general argument of William E. Butler, "American Research on Soviet Approaches to Public International Law," *Columbia Law Review* 70 (1970): 218–35.

can be read as simultaneously the abandonment of any revolutionary praxis by the Soviet state coupled with the alignment in practice between competing imperialist powers in an international environment made novel by nominally independent ex-colonies.

*i) Early Soviet International Law – Transitional International Law*

With the above in mind, this subsection will examine the basis for the Soviet ‘approach’ to international law through some of the early Soviet legal scholars. These theorists contributed to the Soviet ‘approach’ alongside the general foreign policy of the state and the practice of its diplomats. The earliest systematic statements about international law from within the newly established Soviet state came from Eugene Korovin,<sup>321</sup> alongside selections from Pashukanis in later years, followed by Pashukanis’s rival Andrei Vyshinsky. Vyshinsky’s position, and the actions and legal position of the Soviet state from the Stalinist purges of 1935-6 are of less interest for the purposes of this thesis for reasons that will become obvious. It is the initial legal praxis that bears both the closest resemblance to revolutionary praxis discussed in Chapter One and Two, and its early impact that is most interesting in assessing the relationship between this and the legal form. It is also important to note that various non-Marxist scholars remained within the Soviet Union producing work considering the impact of the revolution on international law.<sup>322</sup> However, their perspectives were not considered externally to provide insight into the new Soviet perspective, remaining closely aligned to European conceptions of international law,<sup>323</sup> and for the purposes of this thesis do not present any differing perspectives on potentially revolutionary legal praxis.

For Korovin, the presence of the Soviet state in international law presented a unique challenge to its traditional formulation, one that impacted upon legal theory more broadly. For Korovin, the previously dominant theoretical frameworks of ‘natural law’ or the ‘idealist school’ were inadequate to the unique post-revolution milieu. The former relied on a unified conception of mankind, which was fundamentally challenged by the rise of a proletarian state which exemplified the class divisions that split any notion of a universal set of ‘naturally’ applicable norms. For Korovin it was ‘inconceivable to speak of the existence of any ideal law common to all mankind which stands above classes.’<sup>324</sup> His analysis found that the latter’s ethical variant, locating law in moral man, and its psychological variant, of man shaped by ‘intuitive legal experience’ were equally upset

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<sup>321</sup> His name is alternately spelled Korovine and Korovin in his publications in English. The English Eugene is adopted in place of Yevgeni in line with those same publications.

<sup>322</sup> N. N. Golubev, “Novye zadachi sovremennoi nauki mezhdunarodnogo prava,” *Pravo i zhizn*, No. 3 (1922); S. A. Kotliarevski, “Krizis mezhdunarodnogo prava” (The Crisis of International Law), *Pravo i zhizn*, No. 1 (1922); translations by Slusser and Triska, see Jan F. Triska and Robert M. Slusser, “Treaties and Other Sources of Order in International Relations: The Soviet View,” *The American Journal of International Law* 52, no. 4 (1958): 700.

<sup>323</sup> And also, with racist undertones, conceived of as derivative of them, see Mälksoo, “The History of International Legal Theory in Russia.”

<sup>324</sup> E. A. Korovin, *Mezhdunarodnoe Pravo Perekhodnogo Vremeni* (Moskva: Gos. izd-vo, 1924), 25–6; Translation by Triska and Slusser. Cited in Triska and Slusser, “Treaties and Other Sources of Order in International Relations,” 703.

by the new realities of socialism made manifest. Irrespective of this, they also failed as sources of international law, which for Korovin was ‘the product of later stages of social development and an expression of a complex historical process in human society, organized on a collective basis.’<sup>325</sup> Thus Korovin presented his third ‘historical’ lens, in which the international law of his time had entered a period of transition.

The transition was characterised by the coexistence of Socialist international law with Capitalist international law, which was a process destined to lead to the victory of socialism and the transformation of international law into inter-socialist federalism. Within this framework Korovin noted that in ‘traditional’ international law, custom was the prime source, with treaties largely considered declaratory of customary practice, whereas in the transition period ‘treaty dominates unchallenged’.<sup>326</sup> It is this aspect that fed into the depictions of the Soviet state as both dismissive of parts of international law – Korovin rejected the idea of a law common to all mankind – and also the positivism of the Soviet state in its exclusive reference to treaties. For Korovin, ‘customary’ relations between capitalist and proletarian states would simply equate to inevitable descent into war. In relation to the domestic legal theory of the Soviet Union, it is important to point out that this places Korovin in much closer alignment with Stučka than Pashukanis.<sup>327</sup>

In contrast to Korovin, Pashukanis’ contribution to international legal theory is slightly more ambiguous. In many ways Pashukanis can be read as more accommodating, and indeed somewhat closer to the realities of early Soviet diplomatic practice. For Pashukanis what Korovin saw as a transition period was rather a point at which international law shifted from being reflective of the struggle of capitalistic states among themselves to that of a temporary compromise between fundamentally antagonistic camps.<sup>328</sup> Although these descriptions are rather similar, Pashukanis noted that attributing to the Soviet Union a rejection of custom was to assign to it a ‘doctrine it has nowhere expressed’, and represented an attempt to deprive it of ‘those rights

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<sup>325</sup> Ibid.

<sup>326</sup> Korovin, *Mezhdunarodnoe Pravo Perekhodnogo Vremeni*, 25–6. See Triska and Slusser, “Treaties and Other Sources of Order in International Relations,” 703. For Korovin this was accompanied by a highly restrictive acknowledgement of *clausula rebus sic stantibus*, limited to cases in which social revolution within a state completely changed the social order. See Korovin, “Soviet Treaties and International Law,” 762; Earl A. Snyder and Hans Werner Bracht, “Coexistence and International Law,” *The International and Comparative Law Quarterly* 7, no. 1 (1958): 58.

<sup>327</sup> Korovin’s more conservative contemporaries, those international lawyers who remained from Tsarist Russia, made qualifications to his work that are worth noting. Andrei Sabanin made the addition that treaties in this instance would only remain definitive in the early stages of transition, as they would subsequently become constitutive of customary elements, and that in this light Korovin’s exclusive focus was excessive. See discussion in Triska and Slusser, “Treaties and Other Sources of Order in International Relations,” 704. Hrabar doubted the extent to which there was sufficient soviet state practice to generate an alternative international legal system, and further doubted any foreseeable exit point from the conceptual ‘transition’ period, and thus the system was better viewed as one of ‘soviet-capitalistic international law.’ See Snyder and Bracht, “Coexistence and International Law,” 60.

<sup>328</sup> Pashukanis, *Selected Writings on Marxism and Law*, 168–83; Snyder and Bracht, “Coexistence and International Law,” 61.

which require no treaty formulation and derive from the fact that normal diplomatic relations exist.<sup>329</sup> Pashukanis also stressed the deeper conflictual nature of international law, noting that '*modern international law is the legal form of the struggle of the capitalist states among themselves for domination over the rest of the world.*'<sup>330</sup> Although Pashukanis foregrounded this struggle, and the force behind it, this was still articulated within the broader sense of his theory discussed in more detail in Chapter Two; force and conflict were always located in relations of exchange. Against those who focused on the 'peaceful functions of international law' Pashukanis stressed those elements that regulate conflict, thus assuming a state of struggle, yet also noted that '[e]very struggle, including the struggle between imperialist states, must include an exchange as one of its components. And if exchanges are concluded then forms must also exist for their conclusion.'<sup>331</sup>

Similarly to Korovin, Pashukanis rejected the idea that international law stemmed from some ideal vision of law relating to the common interests of mankind. In this vein he went some way towards characterising international law as class law, yet he maintained a key focus on the crucial elements of capitalist exchange relations – most importantly the sanctity of private property.<sup>332</sup> However, as Pashukanis's more detailed exposition of the commodity form theory of law was almost uniformly ignored in the context of international legal theory outside of the Soviet Union,<sup>333</sup> his position was seen to align closely with both Korovin's and Vyshinsky's later position, which was the extreme subordination of law to state policy. '[T]he most urgent task of Soviet international law, according to Vyshinky... was to transform itself into a completely pliant and reliable tool of the Soviet Government's foreign policy.'<sup>334</sup> Together these three theorists offer the basic academic material behind the construction of Soviet 'approach' containing elements of a focus on treaties, the subordination of law to the foreign policy requirements of the Soviet state, and the idea that these were reactive theories trailing behind the ad hoc actions of the state itself.

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<sup>329</sup> Triska and Slusser, "Treaties and Other Sources of Order in International Relations," 705. It is worth noting that Korovin's own self-criticism was published in 1935, in which he renounced many of his previous ideas as distorted due to bourgeois influences, see Korovin, *Pisma k Redaktsiyu* (Letter to the Editor) published on the 9<sup>th</sup> of May 9, 1935, in Snyder and Bracht, "Coexistence and International Law," 62.

<sup>330</sup> Pashukanis, *Selected Writings on Marxism and Law*, 169. Emphasis in original

<sup>331</sup> *Ibid.*

<sup>332</sup> Pashukanis made the following note: '[t]he bourgeois jurists are not entirely mistaken... in considering international law as a function of some ideal cultural community which mutually connects individual states. But they do not see, or do not want to see, that this community reflects (conditionally and relatively, of course) the common interests of the commanding and ruling classes of different states which have identical class structures... The victory of the bourgeoisie, in all the European countries, had to lead to the establishment of new rules and new institutions of international law which protected the general and basic interests of the bourgeoisie, i.e. bourgeois property.' Pashukanis, *Selected Writings on Marxism and Law*, 172.

<sup>333</sup> Rudolf Schlesinger is a noteworthy exception, addressed later in this chapter.

<sup>334</sup> Triska and Slusser, "Treaties and Other Sources of Order in International Relations," 707.

#### IV: The View From Without

The first substantial text examining the Soviet position in international law in English was that of T. A. Taracouzio in 1935,<sup>335</sup> a work that Kazimierz Grzybowski lauded as ‘remain[ing] the only comprehensive treatment in this field’ for over three decades.<sup>336</sup> Grzybowski’s update to the work by Taracouzio was specifically situated in the context that some form of foundational change occurred in the intervening years; that ‘[i]n that period the position of the Soviet Union and its participation in the formulation of the principals and rules of the international legal order... changed fundamentally.’<sup>337</sup> His perception in this regard aligns with many interpretations of the Soviet approach to international law, with the factual shifts in Soviet foreign policy understood to be trailed by theoretical development. Earl Snyder and Hans Bracht noted similarly that the ‘Soviet theory of law [underwent] dramatic and far-reaching changes from the inception of the Soviet State’,<sup>338</sup> in a process of ‘after the fact rationalisation of action taken or direction indicated.’<sup>339</sup>

Before addressing this potential shift in direction, Taracouzio’s book offers further interest, due to the thematic tendency that emerges through the volume. It is a perspective that aligns with general descriptions of the Soviet ‘approach’. It also offers a useful summary of Soviet international legal practice. Firstly Soviet theory was uniquely (to the extent that Taracouzio repeatedly pointed it out) subordinate to and derivative of Soviet state practice. Coherent theoretical positions were understood to be late in coming, and when they did they were understood to serve the interests of the Soviet state. This also immediately attaches an elementary historical narrative to his work. As the concrete positions of the Soviet Union change, so too do the theoretical articulations of international law made by Soviet jurists. This lays the foundation for a narrative of convergence, penetrating into international legal discourse only after the Second World War and the move toward the concept of ‘peaceful coexistence’.<sup>340</sup> Both theoretical frame and narrative demand that at the outset the Soviet state expressed a divergent approach to international law, and that over time various processes led to the abandonment of this position and the adoption of some kind of middle ground, crucially

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<sup>335</sup> T. A. Taracouzio, *The Soviet Union and International Law* (New York: Oceana, 1935).

<sup>336</sup> Kazimierz Grzybowski, *Soviet Public International Law Doctrines and Diplomatic Practice* (Leyden, Durham, N.C: A. W. Sijthoff, 1970), xvii. Grzybowski was wrong; for a list of the other comprehensive treatments in the intervening periods see Ivo Lapenna, “Review of Soviet Public International Law, Doctrines and Diplomatic Practice by Kazimierz Grzybowski,” *The American Journal of Comparative Law* 21, no. 3 (1973): 600–604.

<sup>337</sup> Grzybowski, *Soviet Public International Law*, xvii. Grzybowski’s analysis has been heavily criticised, but for the purposes at hand his perspective matches more general accounts. For the critical review of his work, see George Ginsburgs, “Review of Soviet Public International Law, Doctrines and Diplomatic Practice by Kazimierz Grzybowski,” *Soviet Studies* 24, no. 1 (July 1, 1972): 158–61.

<sup>338</sup> Snyder and Bracht, “Coexistence and International Law,” 54.

<sup>339</sup> *Ibid.*

<sup>340</sup> Located in developments within the Krushchev ‘thaw’, see Bernard Ramundo, *Peaceful Coexistence: International Law in the Building of Communism* (Baltimore: Johns Hopkins Press, 1967).; for a more general discussion see Wladyslaw Kulski, *Peaceful Co-Existence; an Analysis of Soviet Foreign Policy* (H. Regnery Co., 1959).

at a period in which ideas about international law within European and American scholarship were shifting in a similar direction.

Taracouzio's perspective is complemented by others to create a picture of the early Soviet divergence as contradictorily both an extreme positivism and the subordination of international law to the policy purposes of the Soviet state.<sup>341</sup> The positivism of the Soviet state is seen as evident in early Soviet focus on treaties, coupled with a rejection of customary international law as applicable to the Soviet state, attributed theoretically to Korovin as discussed in Section III i. The Soviet subordination of law to policy is repeated by a variety of observers. For example, Robert Slusser and Jan Triska, authors of the most comprehensive collection of Soviet Treaty material in the English language in the early 1950s, noted the 'absolute dependence of Soviet theory on the practice of the Soviet state [as] a well-known fact'.<sup>342</sup> Grzybowski summarised his own work as '[examining] the actions of the Soviet Government... in order to give meaning to rules and institutions of international law as they were used to legitimate Soviet conduct in international relations.'<sup>343</sup>

The result of these perspectives was that all Marxist Soviet legal theorists were read in the same light. They were seen to operate primarily pragmatically, inconsistently, and in reaction to state practice. John Hazard detected a 'confusion' because of the 'attitude' among some Soviet legal theorists that law was bourgeois, and therefore had to be rejected, but then these same theorists came up against the crucial difficulty that '[i]t was necessary to live in a world with other states.'<sup>344</sup> Others also noted the supposedly beleaguered position of Soviet legal scholars: '[I]agging behind Soviet practice in time, theorists... had certain governmental practices to follow, to systematize, to analyze in terms of official ideology, and to justify and defend.'<sup>345</sup> Thus it was that Korovin's theory was seen to wrestle with the hostile world in which the neo-natal Soviet state found itself,<sup>346</sup> turning to the idea of transition to bridge the gap between ideology and reality. Pashukanis, in turn, was seen to characterise international law as a 'compromise' between competing world systems, bourgeois and socialist, the former which had lost its exclusive domination, and the latter which had 'not yet won it'.<sup>347</sup> For Korovin, international law changed fundamentally with the appearance of the Soviet state; it was altered based on its usage by the Soviet Union. Pashukanis saw no change in the legal form following the Soviet Revolution, but equally was read by Hazard as articulating the

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<sup>341</sup> A perspective that now informs textbook discussions of international legal theory, see Scobbie, "Wicked Heresies or Legitimate Perspectives? Theory and International Law."

<sup>342</sup> Triska and Slusser, "Treaties and Other Sources of Order in International Relations," 721.

<sup>343</sup> Grzybowski, *Soviet Public International Law*, 507.

<sup>344</sup> John N. Hazard, "The Soviet Union and International Law," *Europe-Asia Studies* 1, no. 3 (1950): 190.

<sup>345</sup> Triska and Slusser, "Treaties and Other Sources of Order in International Relations," 722.

<sup>346</sup> *Ibid.*, 704.

<sup>347</sup> Pashukanis, *Selected Writings on Marxism and Law*, 168–83. On Pashukanis as the originator of the 'compromise' characterisation of international law, see Triska and Slusser, "Treaties and Other Sources of Order in International Relations," 706.

apparently controversial position that the Soviet state could use international law (prior to the withering away of all law) in support of its own goals.<sup>348</sup>

The kinds of opening statements Western scholars felt the need to make when discussing the Soviet Union and international law are highly revealing in this regard. When introducing the Soviet Union, Hazard opened with the observation that

it is clear that the Soviet Government places itself among those who recognize the existence of international law and espouse its principles. At the same time, the literature indicates that the Soviet government considers international law, like all law, to be an instrumentality of the state, to be utilized in pursuit of the politics of the state. It expects other states to call upon international law to further interests which they believe to be their own, and it will do the same.<sup>349</sup>

The need for the opening clarification is an overt indication of the presumption that the Soviet Union could easily not recognize international law – it is very difficult to imagine any scholar opening discussion of American or European Governments by pointing out that they recognize international law and espouse its principles.<sup>350</sup> As will be clear in Section V below, although the Soviet state certainly questioned the neutrality of international law it also deployed legal arguments almost immediately. Furthermore the expectation of the employment of legal argument to serve state interests is attributed by Hazard to the Soviet state as something apparently novel, eliding the uncontroversial possibility that this was standard legal practice for all states when constructing legal arguments. For scholars like Hazard, this position of overt differentiation was justified by the common perception that ‘Soviet leaders [were] not always... interested in international law’.<sup>351</sup> The logic behind this perception was the immediately hostile international environment in which the Soviet state found itself being justified through international legal arguments: international law was the ‘weapon of the enemy’,<sup>352</sup> evinced through the various doctrines of recognition, succession and liability for debts, the expected compensation for expropriated property, and justifications for armed intervention.

Although it would seem one would be very interested in a ‘weapon of the enemy’, and Soviet leaders clearly could not help but be concerned with international law (the Soviet state was embedded in legal relations from its inception) there is a further point against this vision of Soviet practice. Recognising the legal theory of Pashukanis based on his reading of Lenin discussed in the background Section II of this chapter, it is evident that the usage of international law by imperialist states opposing the Soviet Union would not preclude the revolutionary state from taking advantage of every legal argument and opportunity available. Thus although a perspective like Hazard’s was dependent upon a certain divide between the revolutionary state and international law, this did not play

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<sup>348</sup> Hazard, “The Soviet Union and International Law,” 190.

<sup>349</sup> *Ibid.*, 198.

<sup>350</sup> Barring a certain glib anti-legalism articulated in recent times by the US, arguments which sit alongside simultaneous support for a robust international trade regime.

<sup>351</sup> Hazard, “The Soviet Union and International Law,” 189.

<sup>352</sup> *Ibid.*

out in practice nor was it supported by the most sophisticated articulations of that revolutionary theory. As was clear in many actual examinations of Soviet practice, the expected divergence was either absent or justified through legal argument. However, this external perspective could still fall back on describing these realities as the subordination of international law to the foreign policy requirements of the Soviet state. Again, the projection involved allowed this to serve as a descriptor of the Soviet state, not general international legal practice. It was the Soviet state that was seen to 'turn' to 'traditional international law' in instantiating legal relations with those who recognized it.<sup>353</sup>

### **V: Common International Legal Practice?**

The common ground that was present between Soviet practice and 'standard' practice was evident in contemporary accounts, yet due to the theoretical framework being deployed – one that expected to see difference – it seemed to remain impossible to recognise this fact.<sup>354</sup> It is in this context that most common ground was acknowledged with an element of surprise, and explained analytically by a compromise between communist theory and the realities of international life, or the outright dominance of the latter. Taracouzio's work proved exemplary in this regard. In practically every area of international law addressed in his expansive account, the Soviet Union was noted to follow closely traditional practices, to limit innovation, and to operate in a somewhat conservative manner.

Addressing territory, Taracouzio noted that in general the 'international practice of the Soviet Union' shows a very close following of 'generally adopted international practice'<sup>355</sup>. Soviet approaches to diplomacy were summed up as consisting of no real outstanding contribution or change, other than the abolition of ranks (in practice circumvented at a later date) and the special status of trade representatives<sup>356</sup> who blur the traditional boundaries in international law between persons with diplomatic status (and immunity) and those engaged in trade. Interestingly 'in most of these treaties the principle of reciprocity is followed, the same privileges being granted to the foreign trade agencies in the USSR when such agencies are established therein.'<sup>357</sup> In conclusion, 'innovations [in the diplomatic field] are not outstanding.'<sup>358</sup> With regard to nationality and international personality, 'Soviets lay primary emphasis... upon political allegiance'<sup>359</sup> (thus adopting a standard position in relation to nationality) and 'the Soviet law and practice in regard to natural persons in international law are not much

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<sup>353</sup> Snyder and Bracht, "Coexistence and International Law," 55.

<sup>354</sup> Taracouzio's book provides an illustrative example Taracouzio, *The Soviet Union and International Law*. For critical views of his book from both inside and outside the Soviet Union respectively, see E. A. Korovine, "Review," *Harvard Law Review* 49, no. 8 (1936): 1392–95; Philip C. Jessup, "Review," *Pacific Affairs* 9, no. 1 (1936): 127–30.

<sup>355</sup> Taracouzio, *The Soviet Union and International Law*, 56.

<sup>356</sup> *Ibid.*, 194.

<sup>357</sup> *Ibid.*, 195.

<sup>358</sup> *Ibid.*, 206.

<sup>359</sup> *Ibid.*, 122.

different from those of non-communist states<sup>360</sup>. '[T]he Soviet law on diplomatic and consular service may well be called conservative<sup>361</sup> and in treaty making Soviets 'follow in almost every detail general international practice'<sup>362</sup>. Such treaties as were concluded with the 'West' 'do not correctly reflect communist ideas'<sup>363</sup>, whereas those with the Baltic and Eastern states display an element of a distinctive approach, but this occurs within a context where the spread of communist ideas was seen as expedient and therefore fails to represent a particularly divergent practice. In other words it could be read as simply the Soviet state subordinating international law to its needs.

It is remarkable that in the face of this common ground Taracouzio managed to maintain a near devotional adherence to a particular notion of Marxist-Leninist theory manifest in international law from which the Soviet Government was forced to deviate through practical necessity.<sup>364</sup> As was noted at the time, this recurrent, and 'rather obvious' point was interesting not because it revealed some revolutionary 'communist theory', but because it demonstrated the *consistency* evident in Soviet state practice with 'traditional' international law.<sup>365</sup> As has been noted, Taracouzio was far from alone in looking for a unique and different engagement with international law by the revolutionary state, and he was also far from alone in maintaining that difference as extant in the face of a record that blatantly contradicted the proposition.

This point can be made with greater strength by turning to some of the diplomatic records of the Soviet state. At the very least they demonstrate a clear rhetorical adherence to international legal principals, all the more so in the face of what was regarded (in the eyes of the Soviet Government) as action that clearly infringed upon the reciprocal expectations of diplomatic courtesy. Protesting its exclusion from the Washington Conference of Pacific Powers in July 1921 the Soviet Government noted that

the right of Russia to participate in the conference... was fully admitted, but the above-mentioned powers [Great Britain, France, The United States of America, China and Japan] declared that they would themselves undertake to watch out for the interests of Russia without the latter's representation, and that they reserved to themselves the right subsequently to invite a new Russian Government which should replace the present one to submit to the decisions and agreements to be reached by themselves.<sup>366</sup>

Not only did the Soviet Government see this as explicit 'favouring [of a] Russian counter-revolution' but as the further 'demonstration of the system of intervention.'<sup>367</sup> Subsequently any elements of the agreement would be considered, in their opinion, to

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<sup>360</sup> Ibid., 163.

<sup>361</sup> Ibid., 234.

<sup>362</sup> Ibid., 290.

<sup>363</sup> Ibid., 289.

<sup>364</sup> As noted by Philip Jessup, see Jessup, "Review," 128.

<sup>365</sup> Ibid.

<sup>366</sup> Included in Taracouzio, *The Soviet Union and International Law*, 411.

<sup>367</sup> Ibid., 411 and 412.

be 'ineffective and devoid of significance' due to the absence and non-participation of 'one of the principal parties.'<sup>368</sup> They concluded that '[t]he policy [of] tending to leave Russia outside the collective decisions of various powers on questions concerning it, not only cannot assist the settlement of the conflicts at present disturbing the world, but can only render them more acute and more complicated.'<sup>369</sup>

The problems of exclusion were repeated in relation to the Paris Pact of 1928.<sup>370</sup> The Soviet Union was invited to join the pact after the fact of its creation, conducted on a restrictive membership basis in the interests of 'expediency'.<sup>371</sup> The Pact itself famously prohibited war as an 'instrument of national policy', but the Soviet response decrying their continued pariah status also proved sadly prophetic. The Government communiqué pointed out that prior rejections of Soviet drafts on disarmament as an effective means toward peaceful international relations put before the Preparatory Disarmament Commission under the League of Nations were rejected by those same signatories to the Pact. Furthermore the series of potential exceptions to the Pact's functioning were highlighted as problematic, most especially in relation to the mutual defence obligations of the League and their relationship to the Soviet Union at the time, and particularly the reservation of the British government retaining freedom of action in relation to 'any "unfriendly" act or "interference"', both terms that remained open to subsequent British definition.<sup>372</sup> Despite these reservations and their exclusion from the drafting of the Pact, the Soviet government described the result as the imposition of 'some external obligations before public opinion', on which basis the Soviet Government expressed its adherence.<sup>373</sup>

As a final point, the Soviet Government was also keen to stress its adherence to legal obligations more generally, in the face of its above marginalisation. The Soviet memorandum to the Genoa Conference of 1922 noted that the 'Soviet Government... has always fulfilled and intends always to fulfil all obligations undertaken by itself, and that, therefore, all its public and legal guarantees are no less solid than those of any other sovereign power'.<sup>374</sup>

#### *i) The View from Without Redux*

Without taking political rhetoric at face value, on either side of the debate, what we can state is that the Soviet Government consistently argued its position using legal terminology. Although part of the claim made in perceptions of the 'Soviet approach' was that this very process was a subordination of law to policy, the purpose of this Section is to qualify this in two ways. Firstly, that this subordination was not as complete as supposed at various points. Secondly that this 'subordination' was actually

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<sup>368</sup> Ibid., 412.

<sup>369</sup> Ibid., 413.

<sup>370</sup> Alternatively named the Kellogg-Briand Pact; official title the 'General Treaty for the Renunciation of War'

<sup>371</sup> Included in Taracouzio, *The Soviet Union and International Law*, 417.

<sup>372</sup> Ibid., 421.

<sup>373</sup> Ibid., 422.

<sup>374</sup> Ibid., 415.

far more of a recurrent practice than was being presented – not only did the ‘approach’ of the Soviet Union and ‘Western’ Powers converge at a later date in the standard narrative, but the initial divergence was entirely unpersuasive as a descriptor of actual events. What seems a far more persuasive explanation is that the form of law was sufficiently open for the Soviet Union to remain highly consistent with ‘traditional’ practice. Even its more ‘revolutionary’ espousals in regards to expropriation and diplomatic relations were articulated via traditional legal arguments.

Over time these facts did filter through scholarship on Soviet international law. William Butler reflected in his 1970 review on American Research into Soviet Approaches to international law that

in identifying the manipulative, opportunistic side of Soviet international law we tend to overlook larger, more important issues: how, if at all, does the Soviet use of international law differ from that of non-socialist states? Are there certain types of situations where the style of Soviet use of international law varies from ours and certain types where it is basically the same? In what situations does the Soviet use of international law appear to have been effective? Where not? How is effectiveness to be measured? How has Soviet use of international law changed over time, if at all? How does the USSR value and balance the normative, stabilizing aspects of international law with its dynamic policy dimensions?<sup>375</sup>

It would have been admirable and highly useful if such work had been conducted with a mind to informing a theory of law. However, there are two points to make in relation to this shift in scholarly approach. Firstly, the timing of its occurrence is important. As noted the standard narrative includes a convergence in both policy and theoretical position. As Slussa and Triska noted in their own analysis of the Soviet approach, by the mid-twentieth century the previous primacy of custom now played a subordinate role due to the supposed ‘[a]cceleration of history, and above all [the] diminishing homogeneity in the moral and legal ideas that have long governed the formation of [international] law.’<sup>376</sup> Grzybowski also noted a similar shift in Soviet approach to law. The weight of Butler’s account necessarily addresses the boom in Soviet-oriented scholarship in the late 1950s as a result of Cold War tensions and funding opportunities within the US, and therefore fails to attend to the reasons for the articulated divide in the interwar period that is addressed in this thesis.

Secondly, although the problem that Butler rightly noted was that scholarship had been content with describing contemporary trends or controversies in Soviet writing ‘without systematically relating these insights to a larger analytical framework’,<sup>377</sup> what Butler proposed was not a larger *theoretical* analytical framework, but a series of

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<sup>375</sup> Butler, “American Research on Soviet Approaches to Public International Law,” 228.

<sup>376</sup> Charles de Visscher, *Theory and Reality in Public International Law* (Princeton, N.J.: Princeton University Press, 1957), 156. Also see discussion in Triska and Slusser, “Treaties and Other Sources of Order in International Relations,” 725–6.

<sup>377</sup> Butler, “American Research on Soviet Approaches to Public International Law,” 222., 222

methodological recommendations supporting further comparative research. The problem addressed was one of redressing the ‘retardation’ of American scholarship caused by the ‘conviction’ that studying Soviet approaches involved ‘investigating how the Soviets violate[d] international law’,<sup>378</sup> further that ‘[t]here are innumerable other examples as well which suggest[ed] that the relationship between international law and foreign policy in the USSR may be as dynamic and complex as it [was] in the foreign offices of the other large powers.’<sup>379</sup> These are accurate and essential observations, if rather late in coming. But this supposed generosity of perspective was translated into an attempt to (re)discover the ‘Russian Heritage’ and a call to cease ‘ignor[ing] the Russian contribution to international law.’<sup>380</sup> The method suggested was one of comparative research, addressed through the development of regional expertise,<sup>381</sup> as opposed to addressing the theoretical reasons for the original failings and any broader understanding of what common practice might tell us about the nature of law. In essence, this lays the groundwork for later scholarship noted at the opening of this Chapter that works from these assumptions of difference as part of a project of progressively developing a multi-cultural vision of international law, and in the process subsequently reinforces those differences.<sup>382</sup>

To reiterate, then, even that scholarship that noted the problems in the construction of a divergent Soviet ‘approach’ to international law failed to attend to the reasons for this. In addition, it also failed to effectively challenge those assumptions within its recommendations. Furthermore this later scholarship did not adequately address the empirical evidence that weighed against any particularly uniform Soviet practice exhibiting the extreme positions described at the outset of this Section.<sup>383</sup> In this thesis, by focusing on law as praxis, attention is drawn to how international legal doctrine is constituted by the kind of arguments deployed by and against the Soviet Union – they are not external to the law in this instance, but constitutive of it.

For example, the early defensiveness of the Soviet Union could be read as indicative of its vulnerable position in the aftermath of the First World War, whereas its later embrace of broader international legal norms and its conservative posture demonstrates a potential expression of its growing status as a world power – this shift would also accommodate a transition from early revolutionary aspirations, to later more conservative intent. Take Edward McWhinney’s otherwise untheorised observation that ‘Soviet jurists are no longer defensive as to their own capacity

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<sup>378</sup> Ibid., 229.

<sup>379</sup> Ibid., 230.

<sup>380</sup> Ibid., 224.

<sup>381</sup> Ibid., 222, 232, 233.

<sup>382</sup> As examples see Bowring, *The Degradation of the International Legal Order?*; Mälksoo, “The History of International Legal Theory in Russia.” This does not, of course, muddy the admirable intent behind such research of progressively developing international law through attention to particular regional ideas, but the lack of theoretical continuity here can only feed back into the kind of problems addressed in this chapter.

<sup>383</sup> There could be a number of reasons for this, although it does seem that doing so would have stymied the provision of material for comparative studies dependent on distinct cultural ‘contributions’ to international law.

completely to re-write “classical” international law doctrines, if need be, and for that matter fully to make use of the “classical” international law hierarchy of sources, to suit the special needs and advantage of Soviet foreign policy’.<sup>384</sup> This can instead be related to an effective theory of state strategy relating to developing a ‘great power status’ and engagement with legal argument from a position of strength. Importantly, recognising the indeterminacy of legal argument, such recognition would not constitute a simplistic notion that the powerful ignore international law when it operates against their interests, but instead foreground how the use and abuse of law in relation to political status becomes an effective ideological and politico-strategic tool.<sup>385</sup> What remains noteworthy for the question at hand is that this same transition involved a shift away from the more radical assertions of the early Soviet state, as will be addressed in Section VII.

*ii) The absence of Pashukanis’s General Theory*

Even later scholarship in the line of Butler’s continued to be averse to addressing the Soviet example in the light of general legal theory. As mentioned earlier, Pashukanis’s *General Theory* made almost no impact on international legal scholars, perhaps representative of Pashukanis’ primary position as a domestic legal theorist.<sup>386</sup> Irrespective of the reasoning, there was a shared myopia by international legal scholars in their approach to Soviet scholarship. Their focus was on Korovin and selective texts of Pashukanis, supplemented with contributions by Hrabar, Sabanin, and Krylov, through to Kozhevnikov and Tunkin as Cold War representatives.<sup>387</sup> This selection misses the domestic legal debates of the Soviet Union in the early 1920s and the theories of P. I. Stučka and Pashukanis.<sup>388</sup> Importantly, according to Pashukanis, international law differs from law more generally only by degree,<sup>389</sup> a point which tended to be overlooked in discussions examined above. Approaching Soviet legal practice with Pashukanis’s general theory of law not only rehabilitates early Soviet state practice into a holistic view of international law, but it brings that law itself back into focus as an object of analysis, rather than attributing ‘divergent’ practice to the whims of state policy. Furthermore, we end up with a far more convincing account of the consistency and change of state practice in relation to legal argument across different periods of political, economic and military strength, in addition to broader and more nebulous ideological shifts. This will be the subject of Section VI.

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<sup>384</sup> Edward McWhinney, “Review of A Calendar of Soviet Treaties, 1917-1957. By Robert M. Slusser and Jan F. Triska. 1959. and The Theory, Law, and Policy of Soviet Treaties. By Jan F. Triska and Robert M. Slusser. 1962,” *International Journal* 18, no. 2 (1963): 262.

<sup>385</sup> Consider as an interesting example Nathaniel Berman, “Legitimacy Through Defiance: From Goa to Iraq,” *Wisconsin International Law Journal* 23, no. 93 (2005).

<sup>386</sup> This could alternatively be read as part of the discipline’s broader aversion to theory, for this argument see Miéville, *Between Equal Rights*, 9. Bill Bowring presents a notable exception, devoting significant time to engaging with Pashukanis’s theory, see Bowring, *The Degradation of the International Legal Order?*; Bill Bowring, *Law, Rights and Ideology in Russia - Landmarks in the Destiny of a Great Power* (Abingdon, Oxon: Routledge, 2013).

<sup>387</sup> Mälksoo, “The History of International Legal Theory in Russia.”

<sup>388</sup> This divide by no means prevented those in the ‘domestic’ category commenting on international law, or vice versa.

<sup>389</sup> Pashukanis, *Selected Writings on Marxism and Law*, 180.

There is one early counter example to the general oversight of Pashukanis's general theory worth nothing. Rudolf Schlesinger paid some close attention to Pashukanis's work, although as will be clear he shared fundamental ground with the common schematic that describes the Soviet 'approach'. Schlesinger noted that 'the negation of a continuous state personality never corresponded to the political practice of the Soviet.'<sup>390</sup> He also observed that for the Soviet Union, Self Determination 'form[ed] the standard of justice in international law.'<sup>391</sup> This was qualified by the political opposition that characterised the position of the Soviets, such that the latter 'regard[ed] her special influence on the colonial peoples as an important source of genuine political influence.'<sup>392</sup> In general, Schlesinger's work evidenced a greater focus on mutual legal arguments and less overt association of 'illegality' with the Soviet position. However, Schlesinger attributed the theory of international law as a 'compromise' to being first espoused by Korovin, rather than Pashukanis as is the case in mainstream international law literature.<sup>393</sup> He furthermore noted Korovin as the dominant figure from 1925 to 1935, rather than what seems more likely to be the dominance of Pashukanis from the late 1920s until his removal and execution in 1936, and before him Stučka, in domestic academic circles.<sup>394</sup>

However, like much scholarship understanding the Soviet 'approach' to international law, Schlesinger's thematic was heavily influenced by his ideas of what proper Marxist engagement should be. He approached law from a theoretical perspective informed by a rather unrefined Marxism, namely that law in some sense stems from the social substratum, and thus feeds into the notion that the Soviet Government was representative of a fundamental change in that substratum transposed internationally.<sup>395</sup> Schlesinger saw 'Marxism [as] strictly historical, and [that it] rejects any generalisation which erects the categories of a certain historical stage of development onto general characteristics of social agencies working in various stages of that development.'<sup>396</sup> The "real" relationship between people is the 'social division of labour...' and the commodity is therefore a 'mere ideological reflection.'<sup>397</sup> This was a problematic reading of Pashukanis, and further of Marx's analysis of capital. This likely stemmed from Schlesinger's theoretical commitments to law, rather than to a particular idea of what 'Marxism' entailed. Schlesinger's theoretical starting point for legal study was avowedly positivist, and it is here that his problems with the commodity form theory took their most concrete form. His approach was fundamentally inimical to an abstract theoretical treatment of law, and it was this which then translated into what an 'authentic Marxism' targeted at law would constitute. This is unjust both to Marx and

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<sup>390</sup> Rudolf Schlesinger, *Soviet Legal Theory: Its Social Background and Development* (K. Paul, Trench, Trubner, 1945), 277.

<sup>391</sup> *Ibid.*, 288.

<sup>392</sup> *Ibid.*

<sup>393</sup> Rudolf Schlesinger, "Recent Developments in Soviet Legal Theory," *The Modern Law Review* 6, no. 1–2 (1942): 34. See fn 65 for the reference to Pashukanis' espousal of this point.

<sup>394</sup> *Ibid.*, 64.

<sup>395</sup> *Ibid.*, 33.

<sup>396</sup> Schlesinger, *Soviet Legal Theory*, 151.

<sup>397</sup> *Ibid.*, 152.

Pashukanis. Neither would have described the concrete abstractions Schlesinger dismisses as 'mere' ideological reflections. More importantly, neither would have argued that these had no effect upon 'real' social relationships, nor that such areas would constitute an inappropriate subject of critical investigation.

## **VI: Understanding the Soviet 'Approach'**

There are a variety of ways to understand the Soviet 'approach'. This thesis has addressed the very concept of an approach as framed by a particular set of prior conceptions. From both within and outside of the Soviet state, there were assumptions made about what the implications for international law would be of a legal praxis orientated around Marxist principles. In some ways this served to elide the commonalities between the Soviet 'approach' and more general international legal practice. In addition to this assumption about what revolution would entail, the Soviet 'approach' was constructed through an assumption about how international law is formed, through the contribution of various cultural approaches building a broader international legal order. Both of these points deserve further consideration.

Through the theoretical frame of this thesis, the concept of revolution offers insights into the function of this process. As discussed in Chapter One, there are a host of different ways in which the concept of revolution can be deployed that will predetermine all kinds of historical interpretation. Heavily involved in the very concept of the Soviet 'approach' is the idea that a 'revolutionary state' will behave in a certain way, and have certain characteristics that are defined in opposition to the non-revolutionary norm.<sup>398</sup> With this as an interpretive lens, attention is drawn excessively to the differences between the revolutionary and the norm. Those that work against this also buy into the ideological stakes involved in acquiring the label of revolution, with the correlative principle that common ground (shared values, forms, norms) betrays the conservative in the progressive or unveils the revolution as sham. In this sense the claim to revolutionary status also requires the shedding of all common ground in order to remain credible.<sup>399</sup>

Atop this contestation, broader interpretations of revolutions as merely instances of particularly extreme political upheaval also influence the interpretation of Soviet international law. In line with the trend in contemporary discussions of revolution that overlook its conceptual history, these events are seen as temporary ruptures – disruptions of the normal functioning of social order – in the wake of which new ordered social structures will be erected. In this sense one can see the transition within the Soviet Union in this narrative light; from the chaotic early years to the consolidation of state power in opposition to Western capitalism, to the eventual collapse of an

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<sup>398</sup> See, for example, the theoretical lens for James D. Armstrong, *Revolution and World Order: The Revolutionary State in International Society* (Oxford: Oxford University Press, 1993).

<sup>399</sup> This element can be clearly traced in the debates between Korovin and Pashukanis that run through the late 1920s, Korovin convinced that 'socialist content' transforms the form of law, Pashukanis maintaining that a theorist's proximity to Marxism is measured by his stance on the 'withering away of law', see Pashukanis, *Selected Writings on Marxism and Law*, 13.

aberrant economic system and the return to the fold of broader international society (and collaborative law-making).<sup>400</sup>

The second interpretive lens applied to the narrative sketched above finds its roots in what has been termed at various points as the ‘turn to history’ in international legal scholarship.<sup>401</sup> Part of this broader turn has involved a particular project that approaches historical study in order to elaborate a history of international law that is not exclusively European, or overly implicated in explicit colonial and imperial practice. Lauri Mälksoo notes this as forming the ‘emerging understanding that there is no single history of international law’.<sup>402</sup> This scholarship can be seen to form a two pronged approach. The first move involves highlighting the colonial and imperial heritage of international law,<sup>403</sup> thus complicating the equation of international law with neutral objectivity and the image of law as a restraint on power and state interest. The second move is to trace non-European contributions in the development of international law, in order to stress particular aspects of international legal doctrine and to challenge the opposition of ‘Western law’ to ‘Eastern culture’. Both of these approaches run the risk of collapsing into a project aimed at rehabilitating international law as a universal project by purging it of those uncomfortable origins in colonial exploitation.<sup>404</sup>

These two interpretive perspectives blend into one another in the creation of a distinct ‘Soviet’ approach to international law. This is at once both a ‘revolutionary’ approach, thus differentiated from mainstream practice, and a regionally or ‘culturally’ specific approach.<sup>405</sup> Both rest upon their being something specifically different about the relationship between international law and the Soviet Union, either from the perspective of defining a revolutionary break, or that of a distinct, culturally rich contribution to the multicultural vision of intercivilisational international law. At this

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<sup>400</sup> Mälksoo notes: ‘today’s mainstream Russian treatises on international law no longer conceptualize Russia as a special subject of international law. International law is again universal without the Russian or Soviet contributions being over-emphasized in a caricature-like manner’ Mälksoo, “The History of International Legal Theory in Russia.”; or see the aptly titled Lori F Damrosch et al., *Beyond Confrontation: International Law for the Post-Cold War Era* (Boulder: Westview Press, 1995).

<sup>401</sup> For a critical engagement, see Umut Özsu, “Agency, Universality, and the Politics of International Legal History,” *Harvard International Law Journal - Online* 52 (2010): 65, [http://www.harvardilj.org/wp-content/uploads/2010/10/HILJ-Online\\_52\\_Ozsu1.pdf](http://www.harvardilj.org/wp-content/uploads/2010/10/HILJ-Online_52_Ozsu1.pdf). For discussion of the historical turn, see Martti Koskenniemi, “Why History of International Law Today?,” *Rechtsgeschichte* 61, no. 4 (2004); Matthew C. R Craven, “Introduction: International Law and Its Histories,” in *Time History and International Law*, ed. Matthew C. R Craven, M Fitzmaurice, and Maria Vogiatzi (Leiden; Boston: Martinus Nijhoff, 2011).

<sup>402</sup> Mälksoo, “The History of International Legal Theory in Russia,” 213.

<sup>403</sup> Anghie, *Imperialism, Sovereignty and the Making of International Law*.

<sup>404</sup> See the conclusion in Özsu, “Agency, Universality, and the Politics of International Legal History.” On the ‘progress narrative’ in international law see T. Skouteris, “The Vocabulary of Progress in Interwar International Law: An Intellectual Portrait of Stelios Seferiades,” *European Journal of International Law* 16, no. 5 (November 1, 2005): 823–56.

<sup>405</sup> The looming shadow of cultural essentialism that clouds this has its direct heritage in the discourses of civilisation that still permeate international law, and shaped interpretations like those of De Martens that see law as a sign of civilisation against the ‘backward’ nature of non-European peoples – See Mälksoo, “The History of International Legal Theory in Russia.”

stage we can note two somewhat contradictory projects or perspectives that appear in the literature. Firstly this attempt to trace a cultural or historical 'other' into a collaborative historical construction of international law, and secondly an attempt to write this 'other' as a specific challenge or alternative to that mainstream or unified construction. In the first story a variety of projects rear their heads: that of redemption or rescue of the international legal project; or simply a process of setting the record straight – writing a more 'accurate' history of international law that includes diverse contributions. In the second there is located the desire for some alternative – either a 'better' perspective on international law, offering progressive reforms that should be incorporated, such as the Soviet espousal of Self-determination,<sup>406</sup> or a demonstrably cynical appropriation of international law for the interests of the state, not only rejecting the common liberal dream of an international society 'governed by law' but potentially not even coherent or compatible with what this alternative might be 'supposed' to stand for.<sup>407</sup> The Socialist aspirations of the West were just as easily dreamt into the practice of the Soviet state as were expectations of cynicism.

## **VII: Revolutionary Legal Praxis and the Soviet example**

Neither of these interpretations offers much insight into the nature of the legal form itself. Therefore, approaching the Soviet relationship to international law through the lens of potential revolutionary legal praxis provides a supplementary explanation of the Soviet 'approach' to international law. Crucially, it provides a possible way of assessing the potential for the legal form to accommodate revolutionary praxis. It also accommodates the fact that the Soviet Union simultaneously challenged and utilized international law at various points. However, that very utilization clearly contained contradictory elements. Intuitively, it is not a simple task to challenge the legal order and yet stake claims within it. Either position threatens to undermine the other. With the Soviets, their early radicalism was swiftly tempered by both the realities of the environment that confronted them, and also the changing needs of the Soviet state as the new bureaucracy consolidated power and attempted to cement its position on the international stage. In part this leads to the contradictory depictions of the Soviet 'approach' discussed in this chapter, but this also demonstrates a particular logic to legal argument that needs unpacking.

This logic is revealed in those Soviet legal arguments that encountered the most sustained opposition internationally. In this regard, the most interesting challenge posed by the Soviets to the international legal order was their repudiation of debts. The other areas of Soviet legal practice, as will become clear, did not offer anything as close to the kind of revolutionary destabilising of legal argument discussed in Chapter Two as with debt. This struck to the heart of capitalist property and exchange, and therefore posed the greatest potential threat to the legal form as understood in this thesis. In discussing the diplomatic claims against the Soviets, Alexander Sack made the following revealing observation about the nature of international law:

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<sup>406</sup> Bowring, *The Degradation of the International Legal Order?*.

<sup>407</sup> Taracouzio, *The Soviet Union and International Law*.

Modern States are organic parts of the world's social and economic system which is based on the principle of free (even if regulated) and continuous international circulation and interchange of capital and goods, services and men. All states are intercommunicating and interconnected parts of a world-wide economy, and, being interdependent, live together as members of a world polity. Modern States, therefore, necessarily have mutual "obligations of intercourse."<sup>408</sup>

For Sack this had particular consequences for Soviet debt repudiation and refusal to compensate for expropriated property:

if such expropriation would, by International Law, be permissible at the free discretion of the sovereign, the foundation of the modern system of international intercourse, which guarantees to foreigners and their property due process of law on the part of any sovereignty under whose dominion they may be found, would be destroyed.<sup>409</sup>

Allowing for a certain hyperbole, this statement actually contains some interesting grains of truth that will resurface in the following Chapter on the New International Economic Order. At this stage, it is noteworthy how established relations of property preservation and compensation were seen as central to the function of international law. Initial Soviet statements regarding this process were seen as a serious threat to established order – particularly due to the method in which they were invoked. Sack went on to note that

The public debt of Russia was "annulled," not because it was impossible to continue the full and timely payment of current obligations, but in order to deal a "first blow to the international financial capital."<sup>410</sup>

Crucially, in terms of the legal argument Sack was making, the former reasoning behind the non-payment of debts was acceptable; it would constitute a form of default, and could be negotiated accordingly. However it was clearly beyond the legal pale to refuse to make payments specifically as an attack on the international financial system and capitalism as a whole. In this instance, the early position of the Soviets both aimed to delegitimise the international legal system, exposing it as serving the interests of capital, but also incidentally offered a position that if generalised was understood to threaten the function of international legal relations as they were understood at the time.

This does not mean that the legal argument *itself* would undermine the system. But what is interesting in terms of the legal form is that the generalised principle of reneging on debts ran counter to the purposes of the existing international order. There

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<sup>408</sup> Alexander N. Sack, "Diplomatic Claims Against the Soviets (1918-1938) - Part I," *New York University Quarterly Review* 15 (1937): 509.

<sup>409</sup> *Ibid.*, 509–10.

<sup>410</sup> *Ibid.*, 510.

is therefore a mutual coincidence of both powerful opposition to the Soviet arguments, but also opposition within the logic of law. Ginsburgs observed that

the initial period of doctrinal fervor (sic) which spawned most of the radical theorems on the nature of international politics and law coincided with the low point in Russia's exercise of global power and authority, so that the dreams could not be tested for lack of adequate physical strength to sustain them.<sup>411</sup>

Yet it would seem that there is potentially more at work here than simply lack of sufficient power to make a particular position stick. Firstly it is very difficult, if not impossible, to imagine a capitalist system in which investment for profit faced such a generalised likelihood of expropriation. The 'physical strength' needed to assert this position as a general rule within broader capitalist relations would be monstrous. It would necessitate a vastly different social arrangement, one in which such expropriation would no longer make sense, making both the legal 'rule', and most likely the system as a whole, superfluous.

The change in direction of the Soviet position in the following years yields further insights into the tenacity of property claims in international law, and the fate of attempted opposition to this system. The acceptance or otherwise of liability became a bargaining chip in Soviet diplomacy. It is important at the outset not to think of this as a non-legal position, but to recognise that the absolute non-recognition or repudiation was not a useful position in diplomatic terms, which were mutually constitutive of legal argument. There were various treaty arrangements in which Soviet liability was resurrected.<sup>412</sup> For example, at Brest-Litovsk, the Soviets agreed, admittedly under significant duress, to six billion marks of compensation to Germany for the confiscation and nationalisation of the property of German citizens – under which the German state agreed to meet the claims of its nationals. Although this treaty was later annulled by both sides, the substantial initial Soviet payment in gold remained in German hands, and subsequently was taken by the Allies upon the defeat of Germany at the end of the war – justified as being in lieu of part-payment towards Soviet liabilities.<sup>413</sup>

Soviet relations to former parts of Tsarist Russia also involved the recognition of claims, and in this way the Soviet approach to debt came into close alignment with its early approach of generosity to previously occupied territories.<sup>414</sup> When it came to the

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<sup>411</sup> Ginsburgs et al., "The View From Without," 202.

<sup>412</sup> For general discussion see Sack, "Diplomatic Claims Against the Soviets (1918-1938) - Part I"; Alexander N. Sack, "Diplomatic Claims Against the Soviets (1918-1938) - Part II," *New York University Quarterly Review* 16 (1938): 253.

<sup>413</sup> See Sack, "Diplomatic Claims Against the Soviets (1918-1938) - Part II."

<sup>414</sup> Ginsberg summarised this position, noting that the Soviet state 'has rejected all international instruments and institutions related to the system of colonial domination and exploitation, such as the establishment of protectorates, and the mandates under the League of Nations, the regime of capitulations in the Near and Far East, and the right to initial occupation of colonial territory considered as *res nullius*. The Soviet doctrine renounced the doctrine and concept of servitudes in international law established through unequal treaties for colonial domination or the installation of military bases and other advantages to the detriment of weaker states.' Ginsburgs et al., "The View From Without," 204. Sack noted that 'in its treaties with Lithuania,

exploited former colonies of the Tsarist Empire the Soviet state recompensed them where possible for expropriated property, and claimed international responsibility for their foreign debt. Yet this was coupled with a simultaneous refusal to pay that debt to international creditors for the reasons mentioned above. Subsequently, at both Genoa and The Hague in 1921-2, the Soviets made any discussion of liability dependent on formal recognition,<sup>415</sup> and further balanced all claims put to them against a series of counter claims for damages during the war stemming from foreign intervention during the Civil War following the revolution, and for the loss of Soviet assets abroad.<sup>416</sup> Both of these conferences resulted in an impasse, with the Soviet position no longer so weak as to be dictated to as at Brest-Litovsk, with the debts at such a colossal amount that full payment was impossible in any case, and with the debtors split between themselves. Britain, for example, was keen to resume trade, France (by far the holders of the most securities) was set on recompense, while Germany signed a separate agreement at Rapallo in 1922.<sup>417</sup>

Although the details of these claims makes for fascinating reading, not least of which was the final settlement of French claims with the Russian government in 1994, proving the tenacity of French bondholders and in general the claims against expropriation, they are not essential for the theoretical point under consideration here.<sup>418</sup> What is worthy of note is that the revolutionary element of this position was side-lined relatively quickly. Whether or not this was due to the practicalities of the moment or the form of law is an impossible question to answer. This is primarily because to pose this question, a division has to be made between these two positions. This division is essential in much of the reading of the Soviet 'approach' discussed in this chapter, but it fails to reveal much about the form of law in theoretical terms. In addition it tends towards a

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Latvia, and Poland, the Soviet government undertook to return to the other contracting parties the property which had been evacuated during the World War for military reasons from (now) their respective territories into the interior of Russia, and which was owned by persons and companies now belonging to that other party.' Sack, "Diplomatic Claims Against the Soviets (1918-1938) - Part I," 522.

<sup>415</sup> M.' Chicherin to Mr. Lloyd George: "The Russian delegation (to the Genoa Conference) desires to have it clearly understood, though from the legal point of view it is self-evident, that the Russian government would not be able to assume any obligation for the debts of its predecessors in so far as it would not be officially recognized de jure by the interested Powers." See fn 87 in Sack, "Diplomatic Claims Against the Soviets (1918-1938) - Part I," 526.

<sup>416</sup> 'In his letter to the British government of June 29, 1920, written in his capacity of a representative of the Russian co-operatives, AT. Krassin had already declared, in connection with the question of resumption of payments to English creditors of Russia, that "from the point of view of the Soviet government, the priority belongs to the claims against the Entente powers on the part of millions of widows and orphans of the workers and peasants of Soviet Russia killed by shells and bullets of England and France during the so-called intervention.'" See fn 103 in *Ibid.*, 529.

<sup>417</sup> Although the Germans reserved their claims pending the general renunciation of other claimants. For the French: 'Recognition of debts [was] not a concession and cannot be the subject-matter of a bargain... based on the general principle of law, which no government has ever repudiated.' *Ibid.*, 535.

<sup>418</sup> L'Association Francaise des Porteurs d'Emprunts Russes (AFPER), the private body that lobbies for compensation, persists despite the agreement by the French Government, see BBC, "Investors Plan Tsarist Debt 'Stunt,'" BBC, July 10, 2003, sec. Business, <http://news.bbc.co.uk/2/hi/business/3055509.stm>.

problematic assumption that some states 'turn' to international law, presumably for nefarious purposes, whilst others have their policy shaped by it and contribute to it as a natural expression of their identity.

There is one further note on the issue of double standards. In discussion of the Soviet violation of the rights of other states, Sack pointed out that Soviet actions were

doubly violative...[:] first, because they deprived foreign nationals of their property without due process of law; and second, because, taken partly with a view to undermine the foundations of the social and economic regime of foreign countries, they constituted an interference in the domestic affairs of those States.<sup>419</sup>

In this reading, the Soviets violated the principle of non-interference, whereas the preceding invasion of the Soviet state and the aiding and assisting of counter-revolutionary forces within presumably raised no legal questions. Indeed, the fact that the foreign backed White Armies promised to pay the debts the Soviets were repudiating consolidates the notion that the legal arguments themselves turned heavily on how legitimate identities were maintained within the legal frame. In other words, those entities vying for control of state which can make assurances to creditors at risk of losing their investments, find the legality of their claim bolstered by this position.<sup>420</sup>

Whereas other areas of Soviet legal practice, including their position on self-determination, the differential treatment of new states created from the former Russian Empire, particular policies regarding trade representatives, and the abolishing of diplomatic ranks all could be read as holding progressive potential, it is only really this position on debt that, taken to its logical conclusion, could not become generalised without serious systematic change. The other elements do not represent such a potentially fundamental challenge to the function of global capitalist exchange relations, and thereby the legal form as understood by Pashukanis and addressed in Chapter Two. The particularly evocative example of self-determination has, for all intents and purposes, been generalized in a formal sense. That this occurred without systematic change is an indictment. The absence of such systemic change should in part be self-evident, but this will also be the subject of the next Chapter addressing the attempt by those with newly acquired formal independence to alter the unchanged international economic order.

### **VIII: Conclusion**

This chapter has explored the Soviet relationship to international law, in order to assess how explicitly revolutionary praxis translated into the international legal field. In order to do so it has presented a brief background to the early Soviet relationship to international law, highlighting the early Marxist theories of law that offered a potential frame to their legal engagement. It has then engaged with the standard Soviet

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<sup>419</sup> Sack, "Diplomatic Claims Against the Soviets (1918-1938) - Part I," 514.

<sup>420</sup> These kinds of concerns have resurfaced poignantly over Libya, Syria and most recently the Ukraine, as per the discussion in the introduction to this thesis.

'approach' to international law, as a necessary window onto potential Soviet revolutionary legal praxis. It presented a consideration of the interpretation of this approach from outside of the Soviet Union, although necessarily these two perspectives blended into one another. Finally, it turned to some explanations for the nature of this scholarship on the Soviet 'approach', and considered what elements might offer insights for the potential of the legal form to accommodate revolutionary praxis.

Until Butler's summary of Soviet scholarship in American academia, there remained a consistent focus on the radical difference in the approach to international law taken by the Soviets. This chapter emphasized that this radical difference was maintained in the face of direct empirical contradiction. The Soviets continually utilized international legal arguments, even in the early years of the state. They decried their exclusion from international conferences, the lack of respect for their territorial integrity, non-recognition of their government, the fostering of counter-revolutionary forces within, and battled claims for damages and past debt obligations with counter-claims of their own. Legal commentators may have disagreed with the basis of these claims, but these claims were nevertheless articulated within the normative standards of international law. The close factual alignment between Soviet practice and general practice was elided by an exclusive focus on the revolutionary rhetoric of the Soviet state, denouncing international law as capitalist and imperialist.<sup>421</sup> To outside viewers, and some within the Soviet state, it was clearly impossible to both use and discredit international law. However this aligned closely with the pragmatic use of law described by Pashukanis, following the example of Lenin, and would compromise one central component of a potential revolutionary legal praxis – such praxis could not be concerned with consistency within the law, or the preservation of legal forms for their own sake.

However, this brings to the fore the second component of revolutionary legal praxis discussed in Chapter Two. Namely, in addition to the disenchanting of law as serving particular interests, revolutionary praxis also should aim towards the overthrow of capitalist relations and the domination of social life by the market and the processes of exchange. This element was present in the rhetoric of the Soviet state, and in elements of its foreign policy, but in general these positions were not translated into active legal arguments. When shifting into legal contestation, the Soviet position relied on common legal positions, although often articulated in ways that seemed unfounded to conservative scholars of international law. But in these instances Lenin and Pashukanis's insights into the arbitrary nature of bourgeois law are apt. Where they detected arbitrariness, revolutionary legality would stress the novelty of a legal argument taking the side of the oppressed classes. In any event, the presence of coherent legal arguments made by the Soviet Union, coupled with the indeterminacy of the legal form, and juxtaposed against the arbitrary assumptions made about international law that supported the Soviet's opponents, leaves the dismissal of Soviet arguments as non-legal as highly unpersuasive.

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<sup>421</sup> Which, arguably, it was; see Miéville and Anghie respectively. Miéville, *Between Equal Rights*; Anghie, *Imperialism, Sovereignty and the Making of International Law*.

The final Section of this chapter stressed that, when considering revolutionary legal praxis in the light of this thesis, the most destabilizing element of Soviet legal praxis was their position on property, broadly conceived. The Soviets repudiated Tsarist debt, and refused to compensate foreign owners of property expropriated after the revolution. Although these positions swiftly became nuanced in the complexities of European diplomacy, the general position articulated was one that offered both a radical break with traditional articulations in law and one that could not be generalised without radically transforming international capitalist relations. However, it is important to note that this position was also articulated as a balance of interests, or an exchange, in diplomatic practice. At Genoa and The Hague the Soviets posed counter-claims to those held against them, whilst still essentially refusing liability.

Overall the picture presented by the Soviet relationship to international law is not one that, on the surface, appears so radically different to the traditional practice of international law. As a consequence, it does not appear as if Soviet revolutionary ideas translated into international law in the way that the rhetoric and scholarship of the Soviet 'approach' to international law suggests. However, the immediate consequence of this was not that there existed no element of revolutionary legal praxis. Rather that revolutionary legal praxis, by the nature of being legal praxis, could look much like traditional legal praxis – only accompanied by a sustained effort to challenge and collapse the system as a whole. As a consequence of this point, there is much reason to remain sceptical about the potential of 'revolutionary' legal praxis in this example. Especially as the Soviet relationship to international law shifted over time towards a more standard relationship between an aspiring imperialist power contesting space with its international competitors during which those more 'revolutionary' elements faded. In this light, their early radicalism appears less threatening.

However, what does emerge from the consideration of Soviet legal praxis in its most revolutionary light is that certain positions when generalised seem highly incompatible with capitalist social relations. Simultaneously, these also seem unworkable as general legal principles. Of course the Soviet approach to international law was not to try and generalise these principles. At its most revolutionary, the expectation was that different forces, not legal ones, would propagate the collapse of capitalism and instigate an international socialist revolution. In the early years, the law was simply one tool among many to further the purposes of the revolution, and not one that was invested with any special meaning. In the later years, the law became an important part of the future vision of the Soviet state, alongside the (re)construction of an empire and the continuing pressure on labour to produce goods – a position that seemed to differ from its capitalist contemporaries only in kind. The next Chapter on the New International Economic Order offers an example where some similar aims in revolutionary terms were more explicitly directed at the system of international law as a possible means towards realising transformative ends, and therefore offers a complementary perspective on this problematic.

## **Chapter 4: The Third World and the New International Economic Order**

*'Poverty yesterday, famine today, revolution tomorrow'*

*Mohammed Bedjaoui, 'Towards a New International Economic Order' 1979*

### **I: Introduction**

This chapter addresses the relationship of the newly decolonized states to international law, which for the sake of this chapter will be referred to as the Third World engagement or relationship.<sup>422</sup> In contrast to the Soviet example of the previous chapter, this relationship involved a more direct investment of transformative potential into the form of international law. For this reason, the chapter focuses on the idea of the New International Economic Order (NIEO) which embodied the collective vision of these states of a more just and equitable international system. As with the previous chapter on the Soviet relationship to international law, the aim of this chapter is to understand how potentially revolutionary legal praxis fared in relation to general international law. The theoretical frame of the thesis thus structures this engagement in a similar way to the Soviet 'approach' to international law. Once again, the concept of revolution and its inherent link to goal-orientated praxis draws attention to the attempt to transform the international order irrespective of the immediate outcome; although the outcome will have impacts upon the assessment of the possibility of revolutionary legal praxis. Unlike the Soviet example the legal theorists and policy makers involved in the institutions under consideration in this Chapter were not uniformly or explicitly Marxist in orientation and therefore they have a slightly different relationship to the concept of revolution as discussed in Chapter One. As will be made evident in the following analysis the NIEO was not a call for the overthrow of capitalist relations, at least not uniformly. However, there were many aspects both in aspiration and in logical consequence that would have entailed a very radical transformation of capitalist relations such that there was an inevitably revolutionary kernel to this position. It is in this sense that the NIEO and what was eventually considered the 'Third World Approach to International Law' (TWAIL) could be considered to have elements of revolutionary praxis.

Much of the work of the early Third World engagement with international law and later TWAIL scholarship involved an attempt to delegitimize existing legal norms; in particular challenging their supposed objectivity. Central to the project of the Third World and later scholarship writing in its name was the complicity between international law and imperialism, and in particular the mechanisms by which colonialism was justified and maintained. The early Third World engagement also focused on the exploitative nature of the international economic system that was both formative of and enabled by that

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<sup>422</sup> This language is chosen both specifically to avoid conflation with later scholarship grouped under the label 'Third World Approaches to International Law', also discussed in this chapter, and with an awareness that the term 'Third World' had a variety of meanings depending on the perspective of whoever invoked it – see later discussion in this Chapter.

same legal system. What is less clear is whether or not there was any specific intent to 'overthrow' this system. Unlike the Soviet example, the Third World movement did not approach international law or capitalist social relations more generally with the aim of dismantling them. In most instances the claim was made that the system was unjust, and should be rendered fair and equitable through corrective measures, but not that global market relations, and capitalism as a mode of production, should be rejected. It is here that we come to the logical consequences of the various legal measures proposed to correct the inequities of global capitalism, and whether or not they, if pursued to their ultimate conclusions, would enable the broader framework to remain intact.

Although in general the above point holds true, there were times at which the rhetoric surrounding the NIEO took on an explicitly revolutionary character, and even couched itself as part of a broader historical thrust including that of the Soviet Union and thereby embracing the history of revolution. Describing the history of international law, Mohammed Bedjaoui noted that 'after the October Revolution, decolonisation in turn made its contribution to the new look of international law' via economic contestation with richer countries and their law.<sup>423</sup> He further stated that '[decolonisation was] to the international order what the French and Russian revolutions were to the internal orders of France and Russia.'<sup>424</sup> Bedjaoui was not alone in making these parallels, with comparisons made between the global elite's blindness to suffering and the 'complacency of the absolutists on the eve of the great social revolutions of the last two centuries.'<sup>425</sup> Bedjaoui's account is particularly useful because it also demonstrates the presence of law in the Third World account as both part-cause and potential remedy of their exploitation within the global system. There were parallels here with Soviet theories of law, even approaching that of the commodity form, with Bedjaoui describing '[t]raditional international law [as] derived from the laws of the capitalist economy and the liberal political system.'<sup>426</sup>

However, the adjective 'traditional' created space for a different kind of law to be born within the international system and it is here that the greater investment in the legal form than the Soviet case becomes apparent. Bedjaoui's optimistic narrative history of international law described a transition from European, to oligarchic, to plutocratic, to a final stage as democratic and egalitarian. His account was not naïve; he recognised the requisite struggle in bringing about a progressive and fully participatory international system. In his eyes, for all the 'progressive' developments of international law, its 'conservative' function served to preserve privilege, in addition to which transformation would face opposition from 'other extremely influential powers which [would] strive to maintain the order' against the Third World's challenge.<sup>427</sup> This basic ambivalence to the

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<sup>423</sup> Mohammed Bedjaoui, *Towards a New International Economic Order* (Paris: UNESCO, 1979), 59.

<sup>424</sup> *Ibid.*, 88.

<sup>425</sup> Jorge Castaneda, "La Charte Des Droits et Des Devoirs Économiques Des États. Note Sur Son Processus D'élaboration," *Annuaire Français de Droit International* 20, no. 1 (1974): 33, doi:10.3406/afdi.1974.2259.

<sup>426</sup> Bedjaoui, *Towards a New International Economic Order*, 49.

<sup>427</sup> *Ibid.*, 65.

nature of law structured all of the engagements with international law by the Third World in this period, and, as discussed in Chapter Two, underscores much of contemporary progressive visions of law. The Third World's task was couched in legal terms, but the mechanisms were uncertain. Quoting a UNESCO working paper, Bedjaoui boldly stated that their 'aim must be nothing less than to redefine international reality, to set out the law that governs it and to take account of the evolution of all the economic, social, legal and other factors that relate to its principals'; a 'great structural revolution'.<sup>428</sup> Yet hanging over such a project was the awareness that 'the idea of law in the service of development presupposes that economic structures can be determined by legal ones.'<sup>429</sup> The possibility of and mechanisms for this process were far from clear, even for legal progressives like Bedjaoui.

Bearing this in mind, the Third World position still aimed to both disenchant international law and utilize it to achieve their objectives. There was a duality in this unmasking of the law's complicity however. Bedjaoui noted that 'International law... caricatures, or rather magnifies, the defects of the present order, to such an extent as to make it even more unacceptable and precarious.'<sup>430</sup> This could be read in two ways. The law's exacerbation of the world's ills could stem from the idea that the law *should* represent something else. This runs a similar line to the critical work undertaken by Trubek to expose the disparity between claim and reality that Balbus criticised as insufficient for radical practice.<sup>431</sup> Alternatively, the law's exacerbation could simply be the fact that it was an especially overt expression of those relations, and therefore inspired further revolutionary ire. It could easily have meant both things to Bedjaoui, both as the realities of decolonization made nonsense of 'traditional' international law's formal legitimization of domination and as his own visions of justice were conflated with his idea of law. These tensions were never resolved in the work of jurists like Bedjaoui, however there are clear implications for revolutionary legal praxis that flow from these positions. The project to rehabilitate international law, to aid its transition from an exclusive 'plutocratic' law to a 'democratic and egalitarian' law, which was undeniably a part of Bedjaoui's aspiration and representative of the broader demand for the NIEO, might serve to restore law to an ideal image, but without concurrent fundamental transformations in international relations this law would return to masking the defects of the present order. It would then serve the same function that Thompson saw it to require in order to function as an effective legitimating ideology: 'that it [should] display an independence from gross manipulation and [should] seem to be just.'<sup>432</sup>

Atop this uncertainty, the Third World relationship to international law recognised the basic Leninist position discussed in Chapter Two. Although the conservative reality of international law served dominant interests, it could also serve the interests of the new

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<sup>428</sup> Ibid., 75–6.

<sup>429</sup> Ibid., 110.

<sup>430</sup> Ibid., 111.

<sup>431</sup> Balbus, "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of Law," 582. Also see discussion in Chapter Two.

<sup>432</sup> Thompson, *Whigs and Hunters*, 263. And see discussion in Chapter Two

states. Emphasising the basic indeterminacy of international legal argument, old states used the discourse of sovereignty to reject normative resolutions driven by the new states as having customary power, whilst new states could use the same argument to reject long-standing custom.<sup>433</sup> To recall from Chapter Two, this kind of pragmatism was compatible with a revolutionary legal praxis in the sense that the revolutionary struggle should be fought by any means necessary, without investing the struggle in the ideal of law. Pashukanis noted that both idolizing law and demonizing its use as counter-revolutionary were both forms of legal fetishism. What was important was the ultimate aim. To reiterate, despite elements of revolutionary rhetoric, the aim of the NIEO (in Anderson's sense from Chapter One) was not explicitly radical transformation. However, this does not preclude there being revolutionary elements to their legal praxis through the necessary connection between certain kinds of legal argument and the disruption of capitalist exchange relations. Here the contrast with the Soviet example is direct. The NIEO represented the direct attempt to *generalize* norms that held this potentially revolutionary kernel, like the cancellation of debt and the right to nationalise property without compensation. Ironically, by pushing for these changes as principles, it is possible that this represented a more revolutionary legal praxis than the divestment from general principles of law that defined Soviet radicalism.

To assess this possibility, this chapter will examine some of the legal principles of the NIEO, alongside contemporary criticisms. However, as with the Soviet example, it is impossible to consider the 'legal' struggle of this period without placing it in the context of broader confrontation that characterised the period. Section II provides a brief background in order to provide this context, focusing on both the formation of the Third World and the dominance of American Imperialism during this period. Although the Third World was far from a homogeneous bloc, the common experience of imperialist intervention served as a powerful unifier. Part i of this Section will examine this process through the highly representative struggle for Vietnamese independence. Part ii addresses the broad framework of the 'Cold War' that over-determines many accounts of this period. Although it captured the looming threat of nuclear apocalypse and should not be downplayed, the label of the 'Cold War' both elides American dominance and the vital place of the Third World in the struggles of the period. Overall the background emphasises the context for this period as the evident conflict between the first and Third Worlds – between the industrialised West and the undeveloped and underdeveloped rest.

Section III will introduce the Third World relationship to international law, focusing on how the broader project of the NIEO was expected to impact on international law. The Third World's engagement with international law formed two major and interrelated strands, through institutions and through declarations and resolutions. These will be addressed in Sections IV and VI respectively. Section V will deal separately with the Organisation of Petroleum Exporting Countries (OPEC), which although also part of the Third World institutional agenda presented something of a special case. In general the Third World project coincided with the strengthening and growth in numbers of

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<sup>433</sup> See Bedjaoui, *Towards a New International Economic Order*, 133.

international institutions, and this was also a specific target of their transformative agenda. Section IV will examine the growth of Third World institutional bodies, from the prescient conference at Bandung, to the formation of the Non-Aligned Movement, and the United Nations Conference on Trade and Development (UNCTAD). All of these either foreshadowed or embodied elements of the NIEO.

OPEC's special case derives from the particularly acute nature of the conflict between the 'First' and 'Third' Worlds during the oil crisis following the OPEC embargo of 1973, when Western commentators expressed virulent indignation at the audacity of Third World cartelism. OPEC's actions emphasized the strengths and more importantly the weaknesses of the Third World institutional struggle. Section V addresses this directly and places this struggle in the important context of the general commodity boom of 1973-4. Following this discussion of OPEC, Section VI will examine the United Nations General Assembly resolutions advanced and supported by the Third World movement, in addition to the relevant implications of the Lomé conventions and the United Nations Convention on the Law of the Sea (UNCLOS). Section VII will then take into account critical perspectives on the NIEO in general, and reflect upon the ideas present in order to trace the presence of revolutionary legal praxis.

## II: Background

### *i) The Third World*

The divide between the developed and the newly 'developing' nations was a defining aspect of Third World legal struggle, and formed the entire basis for the formulation of the NIEO. However, this should not be seen to imply that either of these opposing 'camps' were homogeneous. Just like in the Soviet example, although to a lesser degree, there were class solidarities across borders. Similarly, the formation of alliances was itself a political project, more than an aspect of geography.<sup>434</sup> The very concept of the 'Third World' itself meant different things from different perspectives. First coined by Alfred Sauvy, it was argued to have direct links to the 'Third Estate' of revolutionary France, capturing both its economically and politically disenfranchised position and its revolutionary potential.<sup>435</sup> Examining the Western perspective, Carl Pletsch argued that the term 'arose from Western anxiety about the emergence of a 'second' world of socialist nations in Eastern Europe. The Soviet Union was a prior concern that governed Western thinking about the underdeveloped world from the start.'<sup>436</sup> For others, the class characteristics of states complicated the issue. V. J. Prashad emphasising that '[t]he class character of Third World leadership constrained its horizon, even as it inflamed the possibilities in its societies. The Third World, then, [was] not just the voice

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<sup>434</sup> 'The Third World was not a place. It was a project.' Vijay Prashad, *The Darker Nations: A People's History of the Third World* (New York: New Press, 2007), xv.

<sup>435</sup> Alfred Sauvy, "Trois Mondes, Une Planète," *L'Observateur*, August 14, 1952. Cited in Bedjaoui, *Towards a New International Economic Order*, 26; Prashad, *The Darker Nations*, 6–7.

<sup>436</sup> Carl E. Pletsch, "The Three Worlds, or the Division of Social Scientific Labor, circa 1950-1975," *Comparative Studies in Society and History* 23, no. 4 (1981): 565–90. Cited in Andrew N. Rubin, "Orwell and Empire: Anti-Communism and the Globalization of Literature," *Journal of Comparative Poetics*, no. 28 (2008): 83.

of the leaders or their political parties but also its opposition.<sup>437</sup> Coupled with this, some of the Western responses to the NIEO were also divided by socialist and trade union activity hoping for a more cooperative international system.<sup>438</sup>

With this in mind, the broader background to the formation of the Third World bears some parallels with that of the Soviet revolution. In a similar way to that of the Soviet revolutionary dream, the failure of the Third World's attempt to re-orchestrate the international order can downplay the scale of disruption and the sense of possibility present at the time of decolonization and the rise of the Third World movement. The revolutionary upheaval across Europe following the First World War required brutal repression from Europe's ruling classes, and the Second World War was followed by similar revolutionary pressures and repressive interventions in the Third World.

These revolutionary pressures took the form of independence struggles against Western colonialism. In 1945 the Arab League formed, specifically with a mind to speeding the processes of decolonization.<sup>439</sup> In that same year, Ho Chi Minh 'proclaimed Vietnam's independence in the words of the American declaration of national sovereignty', convinced that 'the Allied nations which at Tehran and San Francisco [had] acknowledged the principle of self-determination and equality of nations, [would] not refuse to acknowledge the independence of Vietnam.'<sup>440</sup> As Marilyn Young noted acerbically, 'the only people ready to recognize the freedom and independence of Vietnam were the Vietnamese themselves.'<sup>441</sup> The British, then administering the Japanese surrender,

rearmed French prisoners of war and, with a few Indian Gurkha troops of their own, participated in a coup against the Viet Minh Executive Committee that had been administering Saigon in the name of the Democratic Republic of Vietnam. Thus not only did one colonial power come to the aid of another in need, but it drew on the resources of the colonies to do so.<sup>442</sup>

The Vietnamese example is particularly indicative. Following this British-led re-imposition of French rule under the concept of a 'trusteeship', Minh wrote expectantly to US President Truman, reiterating the same claims he made to Woodrow Wilson following the First World War at Versailles for the Americans to fulfil their promise of self-determination for all peoples.<sup>443</sup> His entreaties were met with silence. The callous

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<sup>437</sup> Prashad, *The Darker Nations*, 14.

<sup>438</sup> See for example the Trade Union conference of March, 1976, entitled "Recession or Revival – Co-operation to Restructure the World Economy", in Stan Newens, *Third World: Change or Chaos? Documents from the Conference "Recession or Revival" Called by Liberation and the World Development Movement at TUC Congress House, London, in March, 1976; And, The Speech of President Baumentienne of Algeria on the New International Economic Order at the United Nations in April, 1974* (Nottingham: Spokesman, 1977).

<sup>439</sup> Paul Gordon Lauren, *The End of Empire* (Boulder: Westview Press, 1996), 222.

<sup>440</sup> Minh, quoted in Marilyn Young, *The Vietnam Wars: 1945-1990* (New York: HarperCollins, 1991), 10–11.

<sup>441</sup> *Ibid.*, 11.

<sup>442</sup> *Ibid.*, 11–12.

<sup>443</sup> *Ibid.*, 12.

way in which the fate of what were to become Third World countries continued to be decided amongst Western imperial powers fanned the flames of nationalist revolutionary ire. Young highlighted the grim irony in the British coup when, finding themselves in need of extra military means, they rearmed Japanese troops, threatening to have them tried as war criminals if they refused. When some of the Japanese troops subsequently expressed their sympathy for the Viet Minh, in some cases actively, 'they were condemned by their officers as "traitors to the Emperor", which [Young noted] must have been confusing for everybody involved.'<sup>444</sup>

This half-comical, wholly tragic abuse of a people, the colonial power's own troops, the troops of other colonized peoples, and the troops of a freshly defeated rival empire, captures the essence of this period. In the face of imperial manoeuvring, it is impossible to capture the scale of rage and the sense of injustice that fed into the struggles for national liberation. But it does begin to portray the essence of what it would mean to organise around the concept of the Third World, and the stakes involved for the players. This is also particularly important to highlight, because so much of the later struggle would shift towards compromise and accommodation and the revolutionary fervour become easily overlooked. The long and hard fought struggle in Vietnam remains instructive for the concept of the Third World in a further sense. Pandit Nehru's response to the British use of Gurkha's captures both the rage and sense of solidarity: 'We have watched British intervention [in Indochina] with growing anger, shame and helplessness that Indian troops should be thus used for doing Britain's dirty work against our friends, who are fighting the same fight as we.'<sup>445</sup>

Nehru's quote emphasises the way in which the struggle against imperial oppression in one location spoke deeply to the struggle elsewhere. When the Vietnamese finally dealt a conclusive blow to the re-established French rule at Điện Biên Phủ in 1954, the Vietnamese victory was felt as a victory for people throughout Asia.<sup>446</sup> For military historians, it was 'the first time that a non-European colonial independence movement had evolved through all the stages from guerrilla bands to a conventionally organized and equipped army able to defeat a modern Western occupier in pitched battle.'<sup>447</sup> The very idea of the Third World centred on the common cause of this experience. 'The collapse of empires in Asia demonstrated to those nationalists in Africa that independence could be won, that some Europeans would change their minds

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<sup>444</sup> Ibid.

<sup>445</sup> Quoted in Ibid.

<sup>446</sup> Tariq Ali, noting that for those growing up in India, '1954 was the year of the Battle of Điện Biên Phủ' – 'that was a postcolonial phase when hatred of colonial empires was very strong, and so large numbers of people throughout Asia, especially in countries that had once been colonized, felt that the Vietnamese victory was a victory for all of us.' In Sasha Lilley, ed., *Capital and Its Discontents: Conversations with Radical Thinkers in a Time of Tumult* (Oakland, CA: PM Press, 2010), 210.

<sup>447</sup> Martin Windrow, *The Last Valley: Dien Bien Phu and the French Defeat in Vietnam* (London: Cassell Military, 2005), 42.

voluntarily while others could be defeated in guerrilla warfare if necessary, and that Third World unity against power and prejudice could help them all.<sup>448</sup>

*ii) The not so Cold War – Super Power Imperialism*

In most narratives however, the rise of the Third World is overshadowed by the nuclear stand-off between the United States and the Soviet Union. The context of the so called 'Cold War' provides the other backdrop to the Third World relationship to international law. However, the standard picture of a period dominated by these two competing super-powers vastly overplays the strength of the Soviet Union, and elides American supremacy.<sup>449</sup> The presence of the Soviet Union was evidently important, most especially as a marginally alternative development model,<sup>450</sup> but the traditional focus of the 'Cold War' also marginalises the Third World.<sup>451</sup> Common engagement described US policy as 'continuing arms competition with the Soviet Union and periodic intervention in Third World conflicts.'<sup>452</sup> The Third World thus remained marginal to accounts that focused on the Soviet threat, even in the face of the impact of the 'periodic interventions' in the Third World, both globally and on domestic politics in the US.<sup>453</sup> The focus on the rivalry between the Soviet Union and the United States also draws attention away from the deeper divide that structured the period and would prove central to Third World activism. Ever obliging in their honesty, military minds saw this clearly, stating in the same year as the declaration for the NIEO was made: '[a]s the leading affluent "have" power, [the United States] may expect to have to fight to protect our national valuables against envious "have-nots."<sup>454</sup>

It would be more accurate to understand the framing of the Cold War as a narrative designed to legitimate American intervention in the Third World. Michael Cox compiled a significant amount of data demonstrating that American intelligence itself did not

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<sup>448</sup> Lauren, *The End of Empire*, 228.

<sup>449</sup> Bruce Cumings makes a similar argument, see Cumings, "The Wicked Witch of the West Is Dead. Long Live the Wicked Witch of the East."

<sup>450</sup> Samin Amin noted the three nominally different development models of the period: European Capitalist; the Soviet model, with the idea 'that consumption, technology and labor (sic) organization models [were] "neutral" in relation to the social system', and the Chinese model that 'denie[d] that socialism [could] take over from capitalism its models of consumption and labor (sic) organization.' Samir Amin, *Maldevelopment: Anatomy of a Global Failure* (United Nations University Press, 1990), 90.

<sup>451</sup> This vision of the Cold War is dominated by predominantly American International Relations scholarship, focused on competition between 'great powers', for example see John Lewis Gaddis, "The Long Peace: Elements of Stability in the Postwar International System," *International Security* 10, no. 4 (1986): 99–142. That the Soviet Union attempted to compete with the US on the global stage is undeniable, but the argument here is that characterising the period as a two-horse race is reductionist to the point of irrelevancy.

<sup>452</sup> Michael T. Klare, "East-West versus North-South: Dominant and Subordinate Themes in U.S. Military Strategy since 1945," in *The Militarization of the Western World*, ed. John R Gillis (New Brunswick: Rutgers University Press, 1989), 142.

<sup>453</sup> Klare's account gradually recognises the counter-intuitive (for his theoretical frame) dominance of the Third World on US policy. Klare, "East-West versus North-South."

<sup>454</sup> General Maxwell Taylor, quoted in *Ibid.*, 165.

consider the Soviet Union a threat immediately following the Second World War.<sup>455</sup> Following this line, Bruce Cummings described the faceoff between the United States and the Soviet Union as a 'shadow conflict': '[t]his 'shadow conflict' 'shaded [analytic] vision, obscuring the hegemonic project and highlighting threats that could never stand the glare of realpolitik analysis.'<sup>456</sup> Cummings argued in a similar vein that the US was the sole 'superpower' during this period, long before the traditional 'unipolar' system was seen to arise with the collapse of the Soviet Union.<sup>457</sup> What his analysis highlighted was the American concern with their imperial and industrial rivals, Germany and Japan. For Cummings the Cold War was therefore much more about a containment project for America's new (after their defeat and effective occupation) allies, rather than a life-or-death struggle with the Soviet menace.

This picture matches closely with descriptions of the Marshall Plan as designed 'to correct the massive structural disequilibrium in world trade by rebuilding the "workshop" economies of Europe and Japan and restoring their economic ties with primary producing areas in Asia, Africa, and Latin America,' and thereby to overcome 'the economic crisis which would have faced American officials even in the absence of a Communist threat.'<sup>458</sup> For theorists of imperialism, the US rise to supremacy presented a new phase: 'America's strength lay in mass-production industries organized by bureaucratically managed multi-branch corporations and supplying a continental economy insulated from the other major centres of economic and political power by the Pacific and Atlantic oceans.'<sup>459</sup> This 'global hegemony' without 'formal territorial empire'<sup>460</sup> comprised the new conditions of exploitation that the Third World would confront after securing nominal independence.

This backdrop provides some basic context to the formation of the Third World position. Prashad summarised that formation in the following way: 'The hope of the anticolonial era was translated into an agenda, a project that the new states struggled to enact. It was unique in world history for the majority of the world to agree on the broad outlines of a project for the creation of justice on earth.'<sup>461</sup> Yet despite numerical superiority, the alliance of the Third World was a fragile one. Once formal independence was achieved, hard and often bloodily fought for, the way forward to both redress colonial exploitation and re-orientate a relationship to the international

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<sup>455</sup> In particular see the James Forrestal, *The Forrestal Diaries; The Inner History of the Cold War*, ed. W. Millis (London: Cassell, 1952), 174, 184, 195, 211, 260, 336, 374–5, 387, 434, 440–441, 444, 475, 478, 505.; and Michael Cox, "Western Capitalism and the Cold War System," in *War, State and Society*, ed. Martin Shaw (New York: St. Martin's Press, 1984), 139.

<sup>456</sup> Cummings, "The Wicked Witch of the West Is Dead. Long Live the Wicked Witch of the East," 89.

<sup>457</sup> For the standard narrative of this shift, see Kenneth N. Waltz, "Structural Realism after the Cold War," *International Security* 25, no. 1 (2000): 5–41.

<sup>458</sup> William S Borden, *The Pacific Alliance: United States Foreign Economic Policy and Japanese Trade Recovery, 1947-1955* (Madison, Wis.: University of Wisconsin Press, 1984), 8.; and quoted in Alex Callinicos, *Imperialism and Global Political Economy* (Cambridge, UK; Malden, MA: Polity Press, 2009), 171.

<sup>459</sup> Callinicos, *Imperialism and Global Political Economy*, 166.

<sup>460</sup> *Ibid.*

<sup>461</sup> Prashad, *The Darker Nations*, 276.

environment that was non-subordinate was far from clear.<sup>462</sup> The obstacles to achieving the kind of progressive vision present in the revolutionary rhetoric of the period, and in retrospectives like Prashad's, were innumerable. Furthermore, all such retrospectives have to contend with the fact that not only did these projects mostly fail, but the gap between the richest and poorest nations has continued to widen at an ever increasing pace. Much of the Third World's legal struggle to transform the system that exploited and impoverished them took institutional form, as will be addressed below, and yet these institutions faded into insignificance after the 1970s. The Third World's central concerns of debt relief, compensation for past colonial wrongs, and the international trading system stacked against them were either ignored or intensified. The comments within the South Commission's report of 1990 on debt apply to all areas of Third World struggle: 'the vulnerability of individual developing countries vis-a-vis the North made it impossible for them to make an effective collective stand on the debt issue and to go beyond broad statements of policy.'<sup>463</sup>

### **III: The Third World relationship to International Law**

The background sketched above provides the context of opposition that characterised this period. As with the Soviet example, there is an extent to which the ensuing struggle wasn't primarily seen as a legal one. For most of the Third World's leaders the prime concern was the issue of development, conceived as the transition from a heavily exploited colonial possession towards an independent nation integrated into an international system that aimed to coordinate its activities for the greater good of all peoples. Even jurists like Bedjaoui at times shifted law to the background – noting that the aim of his work was to provide lawyers with a focus for what was primarily an economic event.<sup>464</sup> Bedjaoui's doubt over the law's epiphenomenal or causative role effectively replicated itself throughout the Third World's engagement with international law. However, as with the Soviet case, there was no avoiding the law. Statehood itself was a legal category as well as the fact of formal self-rule, and the 'new' state would be immediately enmeshed in a series of legal relationships. The question for the Third World then became this:

is the new State born into an organised and untouchable legal world and does it respect customary international law, whose historical formation has occurred in a manner totally independent of that State, and for the most part against it? Or does the State emerge into a legal framework in a constant state of flux, to

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<sup>462</sup> Christopher Clapham lists some of these problems – most immediately those of language, and structural economic relationships to the metropole. See Christopher S Clapham, *Africa and the International System: The Politics of State Survival* (Cambridge; New York: Cambridge University Press, 1996).

<sup>463</sup> Prashad, *The Darker Nations*, 277. Quoting the Independent Commission of the South on Development Issues, *The Challenge to the South* (Oxford; New York: Oxford University Press, 1990), 148.

<sup>464</sup> Bedjaoui, *Towards a New International Economic Order*, 243.

whose actions it of course submits, but on which it imprints its own reactions, thereby giving it the opportunity to sift through certain customary rules?<sup>465</sup>

In addition to this, the Third World would then aim to shape that legal system in flux, to enable it to reflect their interests and their vision of a more just international society. Thus the Third World's engagement with international law brought to the fore questions of how it was made, how international legal obligation came about, and crucially how these processes would be enforced.

*i) Legal Means, Revolutionary Ends?*

For some, whether political struggle 'congeals into law or remains a mere statement of fluid politics depends upon several variables' in the end discernable by the 'trained and sensitive eye' of the international lawyer.<sup>466</sup> One such trained and sensitive eye was Thomas Franck, who was astute enough to note the opposition between radical change and legal means. He noted the Third World as seeking revolutionary changes in the world economy, through normative political means, whereas in his opinion 'revolutions [were] highly anti-normative, preferring fluid to congealed politics... Yet, here [was] a revolution that [was] seeking to proceed through the evolution of new sets of norms: a revolution of laws rather than of men.'<sup>467</sup> Reminiscent of the Soviet opposition, the newly independent position of the Third World threatened the traditional (and imaginary) unity of international law, confronting it with apparently new problems of formation such as how to build an acceptable legal order 'in the absence of a true universal community having similar political and social values and interests'.<sup>468</sup>

This thesis has argued that law has to be understood in a different light. In the light of the critical insights discussed in Chapter Two, it is worth recalling that the very essence of law is born in the opposition of interests, not in some imagined community. The intimate relationship between law and exchange explicated by Pashukanis cautions against understanding international law as simply the cultural product of Europe, as was common in early descriptions.<sup>469</sup> Amin again offers a succinct description of the dominating influence for those who might foreground law. 'Capital knows only one "law": the search for a maximum rate of surplus value, disguised by its immediate form – the pursuit of a maximum rate of profit. In this search, it confronts only one obstacle:

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<sup>465</sup> Ibid., 134.; also see discussion in R. P. Anand, "Attitude of the Asian-African States Toward Certain Problems of International Law," *International and Comparative Law Quarterly* 15, no. 01 (1966): 56.

<sup>466</sup> Thomas Franck and Mark M. Munansangu, *The New International Economic Order: International Law in the Making?* (New York: United Nations Institute for Training and Research, 1982), 1.

<sup>467</sup> Ibid., 3.

<sup>468</sup> R. P. Anand, "Role of the 'New' Asian-African Countries in the Present International Legal Order," *American Journal of International Law*, 1962, 383.

<sup>469</sup> C. W. Jenks, *The Common Law of Mankind* (London: Stevens & Sons, 1958); William Edward Hall, *A Treatise on International Law*, 7th ed. (Oxford: Oxford University Press, 1917).

the resistance of the producers of this surplus value – proletarians and immediate producers formally subordinated to the exploitation of capital.<sup>470</sup>

*ii) The One “Law” of Capital*

This offers a basic opposition to the hoped for ‘revolution of laws’. The need of capital to pursue profit, and the need of capitalists to hold on to their wealth, structured the fundamental opposition between the developed and the developing worlds. In desiring to transform this system for the benefit of the poorer and exploited nations, the Third World’s engagement with international law fundamentally called for significant transfers of wealth. In General Maxwell’s insouciant terms, the ‘haves’ faced a called from the ‘have-nots’ for some kind of redistribution. As a logical consequence therefore, the *aims* of the Third World’s struggle called for some form of revolutionary legal praxis as discussed in Chapter Two. Challenging privilege and exploitation on this scale necessarily questioned the basis of property in examining how it came to be owned by one rather than another, and the consequent basis for ‘equal exchange’ between parties. However, as mentioned, the Third World’s engagement with international law was not orientated in an explicitly anti-capitalist vein, but via contestation via establishing international mechanisms.

**IV: Bandung; Non-Aligned Movement and the G77; UNCTAD**

As mentioned the Third World’s engagement involved interaction with existing institutions, in addition to the establishment of new international bodies. This section covers the history of Third World institution building and the consolidation of Third World strength in the United Nations. The institutional precedent to the Third World fora that would later emerge in the Non-Aligned Movement, the G-77, and UNCTAD, was the 1955 Afro-Asian Conference at Bandung. This conference has achieved a somewhat iconic status in retrospectives, some noting that ‘it would be a misreading of history to regard Bandung as though it was an isolated occurrence and not part of a great movement of human history.’<sup>471</sup>

Perhaps these claims are made in part-eulogy for the demise of the Third World movement and the soul-crushing sweep of neo-liberal capitalist reforms across the

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<sup>470</sup> Amin, *Maldevelopment*, 105.

<sup>471</sup> AAPSO, *Bandung, a Clarion Call of Afro-Asian Solidarity*, (18 - 24 April, 1955) Published on the Occasion of the AAPSO International Meeting on the 20th Anniversary of the Historical Bandung Conference (April 13-14, 1975) (Cairo: Permanent Secretariat of the Afro-Asian Peoples’ Solidarity Organisation, 1975), 53. Also the Bandung Spirit Conference Series was initiated in 2005 during the 50th anniversary of Bandung Asian-African Conference organised by civil society organisations, which reconvened for the 55<sup>th</sup> anniversary in 2010, and subsequently met in 2011 and 2013. The most important result of the first conference was a publication of a book related to the theme of the conference: Darwis Khudori, *Rethinking Solidarity in Global Society: The Challenge of Globalisation for Social and Solidarity Movements : 50 Years After Bandung Asian-African Conference 1955* (Strategic Information and Research Development Centre, 2007). Also see [www.bandungspirit.org](http://www.bandungspirit.org), accessed 10 March, 2014; Mark Berger also describes the ‘Bandung era’ as commencing here, Mark Berger, *The Battle for Asia: From Decolonisation to Globalisation* (London: Routledge, 2004), 68.

globe, alongside the rapidly widening gap between richest and poorest both across and within nations, the massive increase in indebtedness for the Third World, and the militaristic and exploitative posture adopted by those developing countries that successfully industrialised and escaped the so-called development trap.<sup>472</sup> Hyperbole aside, the conference undoubtedly represented an important nodal point for the Third World's collective engagement with international law.

*i) Bandung*

The Bandung Conference took place as part of a resurgent anti-colonial movement following independence for a host of territories: India and Pakistan in 1947, Indonesia and Vietnam in 1945 (although as discussed Vietnam's anti-colonial struggle would go on),

the Philippines in 1946, Burma, Ceylon, Korea and Malaysia in 1948, and China in 1949. In 1951, Ghana gained substantial independence (formally declared in 1957), the same year that Libya gained freedom from Italy to join Liberia, Ethiopia, and Egypt as Africa's independent states, while in 1956 the Sudan broke from its Anglo-Egyptian bondage (just as Ethiopia absorbed Eritrea).<sup>473</sup>

In total twenty-nine countries took part, including those just mentioned. Commentators at the time described the conference as a 'unique and significant event'<sup>474</sup>, which indicated 'that the end of five centuries of Western domination [was] rapidly approaching.'<sup>475</sup>

United in political opposition to colonialism and imperialism and joined in 'comparable experiences of Western domination',<sup>476</sup> the conference

made manifest tendencies such as the relatively common social conditions of the colonized states and the nationalist movements that each of these states produced. The Bandung Conference was, for the leaders of these nationalist movements, also the culmination of a process that began at the 1927 Brussels gathering of the League against Imperialism.<sup>477</sup>

However, this common opposition could neither smooth over the divisions within the nascent Third World, nor empower them to confront the West on its own terms. Sukarno's opening speech made these facts clear: with its 'economic strength... dispersed and slight', without advanced Western weaponry and facing the machinations of power politics, the Third World could only offer to 'inject the voice of reason into

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<sup>472</sup> For an emotive example, see Arundhati Roy, *Broken Republic: Three Essays* (London: Hamish Hamilton, 2012).

<sup>473</sup> Prashad, *The Darker Nations*, 33.

<sup>474</sup> George McTurnan Kahin, *The Asian-African Conference* (Port Washington: Kennikat Press, 1955), 1.

<sup>475</sup> Guy J. Pauker, *The Bandung Conference* (Cambridge Mass.: Center for International Studies, MIT, 1955), 2.

<sup>476</sup> *Ibid.*, 4.

<sup>477</sup> Prashad, *The Darker Nations*, 32.

world affairs. [They could] mobilize all the spiritual, all the moral, all the political strength of Asia and Africa on the side of peace.<sup>478</sup>

The newly forming Third World collective also faced internal divisions from those ex-colonies whose newly independent rulers remained in power with Western aid, and whose policy orientation remained close to Western interests. 'Of the twenty-nine states at the Bandung Conference, six important delegates had recently made military-economic arrangements with the United States and Britain.'<sup>479</sup> Pakistan, the Philippines and Thailand had all joined the South East Asian Treaty Organisation (SEATO), and Iran, Iraq, Pakistan and Turkey joined with Britain and the US to create the Central Treaty Organisation. All of these states confronted popular left opposition at home, often crushed with Western support.<sup>480</sup> This contextualised those statements that saw the conference as a vehicle for Nehru's desire to expand the 'neutralist' group (prior to the non-aligned movement), and specifically intended to encourage Cambodia and Laos to 'desist from forging closer links with either the South East Asian Treaty Organisation (SEATO) or the US'.<sup>481</sup> It is less easy to read conferences like Bandung simply as vehicles for the personal projects of national leaders in the light of the Third World's continued experience of intervention. Alongside the Vietnamese example discussed earlier that would drag the US into a protracted and bloody war, Sukarno himself would be deposed in US-backed coup in 1965.

This also provides a certain context to Western reporting on the conference, which gave ample space to the speeches of Mohammed Ali of Pakistan, Carlos Romulo of the Philippines, and John Kotelawala of Ceylon, with the *New York Times* finding it 'gratifying to the West to hear a strong championship of liberty of thought and action,' with the 'right perspective' on colonialism.<sup>482</sup> As Prashad noted, this perspective was one that shifted the blame for colonialism from 'European and US imperialism to communism.'<sup>483</sup> The French press also wrung its hands over the impact of the conference, linking it to Egypt's arms deal with Czechoslovakia, claiming increased tensions in the Middle East as the alliance of communism and Arab nationalism spread from Bandung.<sup>484</sup> Guy Pauker saliently noted that this deal preceded the conference and stemmed from an understandable reluctance to take arms from the West (the US attached particularly onerous conditions to their offer), and in the light of the newly

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<sup>478</sup> Quoted at *Ibid.*, 34. The 'moral' force of the Third World's political voice would soon find its mirror in the 'moral' force attributed to their international resolutions; see the discussion in Section VI.

<sup>479</sup> *Ibid.*, 38.

<sup>480</sup> For example, Truman dispatched arms to aid the Filipino military in dispatching the Huk Rebellion in 1946-54, and the British carpet-bombed the popular Communist insurgency in Malaysia that ran from 1948-1960. See *Ibid.*, 38-9.

<sup>481</sup> Kahin, *The Asian-African Conference*, 5.

<sup>482</sup> NYT, "Appraising Bandung," *The New York Times*, April 24, 1955. Also cited in Prashad, *The Darker Nations*, 38.

<sup>483</sup> Prashad, *The Darker Nations*, 38.

<sup>484</sup> Guy J. Pauker, *Bandung in Perspective* (Cambridge Mass.: Center for International Studies, MIT, 1956), 12.

formed Central Treaty Organisation.<sup>485</sup> Yet the vitriolic claims in Western press emphasise the antagonism surrounding the early construction of the Third World's anti-imperialist solidarity.

It emerged afterwards (although it would not have surprised any of the participants) that the West had heavily prepped its anti-communist axis before the conference,<sup>486</sup> and their political manoeuvrings clearly influenced the proceedings. Mohammed Ali arrived late and forced procedural changes, enabling speeches at the public sessions, seen by observers as an attempt to undermine the 'leadership of Prime Minister Nehru.'<sup>487</sup> The Iraqi delegate Dr. Mohammed Fadhil Jamali opened with a 'vigorous attack on communism',<sup>488</sup> which was telling considering Iraq was then home to the largest Communist Party in Arab lands.<sup>489</sup> Against this the Chinese representative, Zhou En-lai took a consistently conciliatory approach, claiming he had 'come... to seek unity and not to quarrel', not mentioning Taiwan (then Formosa) or revolutionary China's unrecognised seat at the UN.<sup>490</sup> Zhou En-lai's diplomacy went down well even among Western leaning leaders at the conference.<sup>491</sup> That said, in George Kahin's account the conference was centrally concerned with the possible military threat from China and with that of communist forces across Asia.<sup>492</sup> However, allowing that for the Western leaning sponsors of the conference, Ceylon and Pakistan, this might have been the case, this was not a shared perspective among observers or the attendees.<sup>493</sup>

The Conference at Bandung was representative of a period of rapidly increasing Asian and African diplomacy as the decolonization movement built momentum. The Asian Socialist conference of 1953 and the Geneva Conferences of 1954 and 1955 were indicative of this shift, in addition to the Western leaning Manila Conference establishing SEATO. These fed into the variety of objectives present at Bandung: from the diplomatic introduction of revolutionary China to the World,<sup>494</sup> to Nehru's move to consolidate Asian leadership after the earlier Asian Relations Conference in 1947, which

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<sup>485</sup> Ibid.

<sup>486</sup> See Seng Tan and Amitav Acharya, eds., *Bandung Revisited: The Legacy of the 1955 Asian-African Conference for International Order* (Singapore: NUS Press, 2008), 13.

<sup>487</sup> Pauker, *The Bandung Conference*, 6.

<sup>488</sup> Ibid., 7.

<sup>489</sup> Prashad, 39

<sup>490</sup> Pauker, *The Bandung Conference*, 7–8.

<sup>491</sup> Carlos Romulo described Zhou En-lai as 'one who had taken a leaf from Dale Carnegie's tome on *How to Win Friends and Influence People* ... At the Asian-African Conference, he was affable of manner, moderate of speech." Carlos P. Romulo, *The Meaning of Bandung*, The Weil Lectures on American Citizenship edition (University of North Carolina Press, 1956), 11.

<sup>492</sup> Kahin, *The Asian-African Conference*, 36. Kahin based this on the lack of specific aims for the conference and the presence of other forums for general gatherings. Pauker dismissed such a reading, having witnessed no signs of such a project while attending the conference and that such an interpretation would have to be heavily read into the events. Pauker, *Bandung in Perspective*, 5.

<sup>493</sup> Pauker, *Bandung in Perspective*, 5.

<sup>494</sup> Pauker, *The Bandung Conference*, 12.

had failed to lead to the formation of his hoped for Asiatic Relations Organisation.<sup>495</sup> Although follow up conferences were planned for Bandung, they were postponed indefinitely in 1956.<sup>496</sup> Nehru put a positive spin on this in his report to the Indian Parliament in April 30, 1955, stating that the conference had 'wisely avoid[ed] any provision for setting up additional machinery of inter-nation co-operation', seeking 'to rely on existing international machinery in part', and for the rest on individual initiative and bilateral arrangements, thereby respecting 'sovereign governments'.<sup>497</sup>

Retrospectives on the conference vary from claiming it as an achievement just to have met,<sup>498</sup> and a polite and well run affair that settled nothing.<sup>499</sup> Both of these hold true in a way. Although in terms of the declaration there were no concrete commitments, Nehru was probably right in his assessment of the potential cost in financial and diplomatic resources of further institutional establishments – especially considering the longer term effectiveness of those that would follow Bandung. Nehru's own diplomacy at the conference was said to have gone somewhat awry; Romulos described him as 'dogmatic, impatient, irascible, and unyielding', also as polemically anti-American and secretly enamoured of all things British.<sup>500</sup> Anthony Reid claimed 'Nehru came to the Bandung Conference as the leader of Asia, but left it as an outsider'.<sup>501</sup> However, in the face of these differences, and a declaration clearly driven by the principle of the lowest common denominator, Bandung's position as part of a broader narrative of Third World construction was important. It was indicative in terms of the divisions captured within the movement, but also in terms of the hopes for collective action. Importantly for the consideration of the Third World relationship to international law, the conference represented a nodal point within the

Third World movement that sought to translate the de jure political sovereignty and rights previously colonised countries had attained through independence into effective capabilities that would enable them to bring about development and progress to their populations and, through that, to renew the bases of legitimacy for post-colonial governments.<sup>502</sup>

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<sup>495</sup> Anthony Reid, "The Bandung Conference and Southeast Asian Regionalism," in *Bandung Revisited - The Legacy of the 1955 Asian-African Conference for International Order*, ed. See Seng Tan and Amitav Acharya (Singapore: National University of Singapore Press, 2008), 22.

<sup>496</sup> AAPSO, *Bandung, a Clarion Call of Afro-Asian Solidarity*.

<sup>497</sup> Nehru, *Report to the Indian Parliament on the conference: April 30, 1955*, in *Ibid.*, 43.

<sup>498</sup> *Ibid.*, 51.

<sup>499</sup> Pauker, *The Bandung Conference*, 18.

<sup>500</sup> Romulo, *The Meaning of Bandung*, 11–12. Also see Reid, "The Bandung Conference and Southeast Asian Regionalism," 25; Dipesh Chakrabarty, "The Legacies of Bandung," in *Making a World After Empire: The Bandung Moment and Its Political Afterlives* (Athens: Ohio University Press, 2010), 49.

<sup>501</sup> Reid, "The Bandung Conference and Southeast Asian Regionalism," 25.

<sup>502</sup> Helen E. S. Nesadurai, "Bandung and the Political Economy of North-South Relations: Sowing the Seeds for Re-Visioning International Society," in *Bandung Revisited - The Legacy of the 1955 Asian-African Conference for International Order*, ed. See Seng Tan and Amitav Acharya (Singapore: National University of Singapore Press, 2008), 68.

*ii) The Non-Aligned Movement*

In terms of the institutional vehicles of the Third World, the first major non-regional organisation was the Non-Aligned Movement. The movement partly grew out of Bandung and preliminary discussions there between Gamal Abdel Nasser, Nehru and Sukarno. In Brijuni in the summer of 1956, Nasser and Nehru joined Josip Tito to discuss their common interests,<sup>503</sup> leading eventually to the First Conference of the Non-Aligned Heads of State in Belgrade in 1961.<sup>504</sup> The impulse remained the same as Bandung; namely the need for some kind of solidarity outside of the sphere of the competing superpowers.<sup>505</sup> Tito had made support of African and Asian resistance against imperialism a central component of his foreign policy in the decade preceding the Conference, touring India in 1954-5 and Egypt in 1955. 'Yugoslavian arms went to Egypt and Burma, and its UN votes went to the Congo and Angola... In 1953-54, the Yugoslavian government made contact with the FLN in Cairo and began to funnel all kinds of assistance (including cover at the United Nations) from the inception of the FLN uprising in November 1954.'<sup>506</sup> Their binding experience remained imperial oppression. During that first conference Sukarno noted:

There was no prior consultation and agreement between us before we adopted our respective policies of non-alignment. We each arrived at this policy inspired by common ideals, prompted by similar circumstances, spurred on by like experiences.<sup>507</sup>

In this sense the first Non-Aligned conference bore a strong similarity to the conference at Bandung, and shared a similar pattern of avoiding the need for compromise and the construction of a homogeneous position, in part presenting itself as simply an 'inspirational' meeting of minds.<sup>508</sup> However as with Bandung, particularly for the three major figures of the Non-Aligned Movement, there were significant tensions with Western powers that spurred their alliance. American diplomacy had turned away from a belligerent Nehru to Pakistan to achieve its intended encirclement of both the Soviet Union and revolutionary China, and in the Middle East the newly formed Baghdad pact isolated Egypt. The strenuous conditions attached to an American arms deal pushed Nasser to purchase arms from Czechoslovakia, further highlighting his opposition to Western interests.<sup>509</sup> For the American Cold War mentality, non-alignment was the

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<sup>503</sup> Prashad, *The Darker Nations*, 95.

<sup>504</sup> The term 'non-alignment' (in the sense in which the movement would come to embrace it) is said to be coined by the Indian Diplomat V. K. Krishna Menon in the early 1950s. For details see Michael Brecher, *India and World Politics: Krishna Menon's View of the World* (London: Oxford University Press, 1968), 3.

<sup>505</sup> Bearing in mind the qualifications about the implied parity in capability that have been made earlier in this Chapter.

<sup>506</sup> Prashad, *The Darker Nations*, 98.

<sup>507</sup> Conference Proceedings, *The Conference of Heads of State or Government of Non-Aligned Countries; Belgrade, September 1-6, 1961* (Ghana Ministry of Information, 1961), 25-6.

<sup>508</sup> *Ibid.*

<sup>509</sup> Nasser emphasised the reactive nature of his position, under pressure from Israeli attacks in Gaza in 1955. See Raymond A Hinnebusch and Anoushiravan Ehteshami, *The Foreign Policies of Middle East States* (Boulder, Colo.: Lynne Rienner Publishers, 2002), 101. Also see Peter

same as neutralism. Echoing contemporary 'anti-terrorist' diplomacy interpreting non-alignment with the US as equivalent to opposing it, the US cut funding the Aswan Dam project, prompting Nasser's nationalisation of the Suez Canal. 'When the Anglo-French-Israeli force invaded Egypt in retaliation, Tito and Nehru came to Egypt's aid.'<sup>510</sup> This incessant manoeuvring of Third World states against Western powers provides an important context to the otherwise pacific seeming process of international institution building.

The downsides of the Non-Aligned Movement were evident from the outset, essentially mirroring those at Bandung. Unlike Bandung however, the Non-Aligned movement maintained a different kind of momentum beyond the early years in which its figureheads attempted to steer a course of state development between the 'capitalism of the United States' and 'the communism of the Soviet Bloc'.<sup>511</sup> Mark Berger describes this momentum as the 'second generation of Bandung regimes', comprising Chile under Allende (1970-73), Tanzania under Nyerere (1965-85), Jamaica under Michael Manley (1972-80) Libya under Gaddafi after 1969, and Nicaragua under the Sandanistas (1979-90).<sup>512</sup> Berger notes:

In contrast to the first generation, the second generation of Bandung regimes reflected a more radical, explicitly socialist Third Worldist agenda, sometimes known as tricontinentalism, which emerged in the wake of the Tricontinental Conference of Solidarity of the Peoples of Africa, Asia and Latin America, that was held in Havana in January 1966.<sup>513</sup>

The Non-Aligned movement was central to this momentum. The opening Non-Aligned conference 'welcomed the representatives of twenty-two states from Africa, Asia, Latin America, and Europe to Belgrade... [creating] an institution that grew in strength from conference to conference, within and without the United Nations.'<sup>514</sup> At the same time, '[i]ts sheer political diversity made an ideologically coherent and unified stance by [the Non-Aligned Movement] almost impossible.'<sup>515</sup> In the early years it adopted a staunch anti-nuclearism, and pushed for the democratization of the UN, 'do[ing] so in the spirit of justice, not charity.'<sup>516</sup> Once again however, despite these appeals to justice, the Non-Aligned Movement could lay claim to little beyond some 'great moral force'.<sup>517</sup> Prashad noted that both 'Moscow and Washington made empty promises in return [to

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Mansfield and Nicolas Pelham, *A History of the Middle East* (New York: Penguin Books, 2004), Chapter 11.

<sup>510</sup> Prashad, *The Darker Nations*, 100.

<sup>511</sup> Berger, *The Battle for Asia: From Decolonisation to Globalisation*, 51.

<sup>512</sup> *Ibid.*, 53.

<sup>513</sup> *Ibid.*.

<sup>514</sup> Prashad, *The Darker Nations*, 100.

<sup>515</sup> *Ibid.*, 101.

<sup>516</sup> *Ibid.*, 103.

<sup>517</sup> Conference Proceedings, *The Conference of Heads of State or Government of Non-Aligned Countries; Belgrade, September 1-6, 1961*, 87 (Haile Selassie), 99 (Nkrumah), 254-55 (final resolution). Also in Prashad, *The Darker Nations*, 101.

pleas for disarmament] provid[ing] a measure of the limited value of moral pleas in a nuclear age.<sup>518</sup>

=Through this lens the Non-Aligned Movement appears as a somewhat ineffective institution, something that haunts its contemporary existence. However, the early years of anti-imperialist struggle contained elements worthy of note. The Non-Aligned Movement's early supplications to the great powers for peace and disarmament, heavily influenced by the proximity of global nuclear catastrophe,<sup>519</sup> were nevertheless nuanced when it came to anti-imperialist warfare. The Non-Aligned Movement offered 'every type of support [to] the freedom fighters in territories under Portuguese colonialism,' contemporary Angola, Mozambique and Guinea, recognising that freedom struggles still had to be fought whilst calling for the imperialists to cease their wars.<sup>520</sup> This more radical message of the Non-Aligned Movement was encapsulated by Che Guevara's speech at the UN General Assembly – another target institution for Third world activism:

Imperialism wants to convert this meeting into a useless oratorical tournament instead of solving the serious problems of the world. We must prevent them from doing this . . . . As Marxists we maintain that peaceful co-existence does not include co-existence between exploiters and exploited, between oppressors and oppressed.<sup>521</sup>

This captured the dilemma of both the Non-Aligned Movement's institutional face, as well as that of the General Assembly. Namely that these institutions might fail to offer much in the way of concrete moves towards eliminating the exploitation and oppression of the majority of the World's population by a self-enriching minority. In terms of the Third World's relationship to international law the threat of this possibility replicated itself in the marginalisation of the institutions where they held numerical strength, and the translation of their struggle into some kind of global moral conscience – for all intents and purposes, a useless oratorical tournament.

### *iii) The UNCTAD and the G-77*

These same dilemmas would haunt the other major Third World institutional fora – the United Nations Conference on Trade and Development, and the Group of 77 (G-77).

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<sup>518</sup> Prashad, *The Darker Nations*, 102. Once again, this related closely to the Third World relationship to international law. Both institutionally and through international declarations and resolutions, the 'force' of law remained elusive; see discussion in section VI and VII.

<sup>519</sup> This fear of nuclear annihilation was well founded. In his highly revealing study, Scott Sagan noted several moments of near-misses in the handling and transport of nuclear Weapons by the United States. Hugh Gusterson claimed that it was sheer luck that this period was not witness to the accidental detonation of a nuclear warhead, over 'Western' territory. See Scott Sagan, *The Limits of Safety: Organizations, Accidents, and Nuclear Weapons* (Princeton, N.J.: Princeton University Press, 1993); H. Gusterson, "Nuclear Weapons and the Other in the Western Imagination," *Cultural Anthropology* 14, no. 1 (1999): 123.

<sup>520</sup> Prashad, *The Darker Nations*, 103.

<sup>521</sup> Quoted in Maurice Halperin, *The Taming of Fidel Castro* (Berkeley: University of California Press, 1981), 118–9. Also cited in Prashad, *The Darker Nations*, 104.

UNCTAD was first convened in 1964, in the context of the first United Nations Development Decade, and shortly afterwards the G-77 was formed.<sup>522</sup> The G-77 functioned primarily as a major bloc within the United Nations General Assembly, but also aimed to approach other international fora as a collective. Both of these appeared within the context of a sustained struggle by the nascent Third World to have their interests represented on the international stage. This was initially conducted in the preparatory conferences in Geneva and London prior to the UN Conference on Trade and Employment in Havana in 1948.

The delegates from the Third World pointed out that the Geneva draft only represented the opinions of the imperial powers, that it "held out no hope" for the rest of the world. The aggrieved delegates proposed eight hundred amendments, of which two hundred would have entirely sunk the [proposed International Trade Organisation (ITO)]. These nations denounced the 1947 creation of the General Agreement on Trade and Tariffs (GATT) in Geneva because it was restricted to the advanced industrial states. They objected to GATT's oversight of the economic rules, and demanded that they have the right to use preferential systems when it suited them. The chorus fell on deaf ears, as GATT remained and an ITO to work for the benefit of the peasant nations failed to emerge.<sup>523</sup>

The Third World development ethos at this point was firmly rooted in shifting the terms of trade; a position heavily influenced by the vision of Raúl Prebisch, the founding Secretary General of UNCTAD and a significant figure in the G-77.<sup>524</sup> It was for this reason that the demand to use preferential trade systems was pushed, and the failure to achieve recognition for this in previous conferences led to the perceived need for an alternative 'UN institution to implement their agenda.'<sup>525</sup> A short decade after its creation UNCTAD was already interpreted as an attempt to 'create a forum in which the more prosperous member countries [of the UN] would come under pressure to agree to measures benefiting the less-developed countries... [It was] a deliberate effort to use international bureaucracy and conference diplomacy to alter current norms affecting trade and development'.<sup>526</sup>

Yet the early stages of UNCTAD faced a series of frustrations. According to Gamani Corea, Secretary General of UNCTAD from 1973 to 1984, it 'was not seen particularly as a forum in which specific agreements and arrangements were brought about through a

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<sup>522</sup> The first UN development decade was declared in 1961, see A/RES/1710 (XVI)

<sup>523</sup> Prashad, *The Darker Nations*, 69.

<sup>524</sup> David Pollock, Joseph L. Love, and David Kerner, "Prebisch at UNCTAD," in *Raúl Prebisch - Power Principle and the Ethics of Development*, ed. Edgar J. Dosman (Buenos Aires: IDB INTAL, 2006), 38. Prebisch is also credited, along with Wladyslaw Malinowski (head of the UN Economic and Social Council in the early 1960s) with the work of establishing UNCTAD as a permanent organisation, rather than a limited series of conferences.

<sup>525</sup> Prashad, *The Darker Nations*, 70.

<sup>526</sup> Joseph Nye, "UNCTAD: Poor Man's Pressure Group," in *The Anatomy of Influence: Decision-Making in International Organisations*, ed. Robert Cox and Harold Jacobson (New Haven, CT: Yale University Press, 1973), 334. Also cited in Ian Taylor, "The United Nations Convention on Trade and Development," *New Political Economy* 8, no. 3 (November 2003): 409.

negotiating process.<sup>527</sup> Not only did this lead to frustrations for heads of delegations complaining that ‘nothing happen[ed] at UNCTAD’, but it further consolidated UNCTAD’s position as marginal to the location of the ‘concrete’ negotiations that remained situated at the GATT, and later the WTO. That this happened to also be the opinion of the developed countries was no coincidence. UNCTAD was hampered not only by its own conservative tendencies and institutional set up, but by the very act in which it intended to engage. Corea’s recognition of its marginal status for him implied that the immediate task was to render it credible as a negotiating house, but it was difficult to see how this could be achieved without mirroring (and therefore simply replicating) those institutions that already fulfilled that role.

This was a crucial point. Although the Third World decried what they saw as consistent effort by the developed countries to undermine UNCTAD and to ignore their calls for reform, they confronted the fact that the developed countries dominated world trade – their material power outweighed the numerical strength of the developing world.<sup>528</sup> The Third World repeatedly criticised the offerings from the developed countries as being clearly designed to ‘conceal’ their interest,<sup>529</sup> and claimed the limited early successes of UNCTAD (an Integrated Programme on Commodities, and the Generalised System of Preferences) had been ‘sabotaged’ by the North.<sup>530</sup> By the time of Corea’s reflections, the ‘sabotage’ of the industrialised North was being intensified and turned on both itself and the global South in the ‘neo-liberal counter-revolution’ of Thatcher and Reagan.<sup>531</sup>

Some preliminary conclusions can be drawn from this short discussion of the institutional side of the Third World’s relationship to international law. Firstly there is a common theme of divergent interests within the Third World group itself, be it those present at Bandung, the members of the Non-Aligned Movement, the G-77 or those who approached UNCTAD with a hope towards counterbalancing GATT. The common experience of colonial oppression and a disadvantaged position in the world trading system brought diverse interests into some form of alliance, but this could not immediately overcome the differences within the broadly defined ‘developing’ world. It is necessary to stress this primarily because of the rhetoric in the developed world of a Third World offensive launched against them; predominately a product of the combination of Third World anti-imperialist rhetoric (entirely justified considering the historical record) and the pressure felt in the developed world by the commodity boom of 1973-4 coinciding with OPEC’s oil embargo and a global recession. This often

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<sup>527</sup> Gamani Corea, *Need for Change: Towards the New International Economic Order : A Selection from Major Speeches and Reports with an Introduction* (Pergamon Press, 1980), 2.

<sup>528</sup> Taylor, “The United Nations Convention on Trade and Development,” 410.

<sup>529</sup> R. Ramsay, “UNCTAD’s Failure: The Rich Get Richer,” *International Organization* 38, no. 2 (1984): 388–9.

<sup>530</sup> Taylor, “The United Nations Convention on Trade and Development,” 410.

<sup>531</sup> *Ibid.*

overplayed the unity of the Third World against the supposedly beleaguered Western nations.<sup>532</sup>

In the face of this, the second evident conclusion is the nature of the opposition to the Third World's aspirations. Often this took the form of direct and violent intervention, far in excess of the few cases mentioned in this Chapter. But outside of this the developed nations maintained strength in organisations in which the Third World could not develop an equal voice – be it the UN Security Council, GATT and the later World Trade Organisation, the IMF or in other regional organisations and bilateral agreements where dominant capitalist power could be brought to bear. This dominance was in no way immune to the occasional exception, as the following section will make clear. But those exceptions were heavily qualified and short lived. Neither was this a scenario in which the developed 'nations' felt no pain. The neo-liberal counterrevolution hit hard there too. But incorporating such common experiences of oppression brings back the essence of the Third World's struggle as the 'have-nots', or perhaps more accurately the dispossessed (and exploited), seeking some restitution. Broadening that perspective to include the disenfranchised within the developed world does not alter the flow of battle in this period.<sup>533</sup>

In some sense it is telling that all the institutions discussed here, if Bandung can be included in memorialized form,<sup>534</sup> survive to the present day, but transformed in important ways. UNCTAD now resembles a 'non-confrontational' organisation,<sup>535</sup> in which developing countries compete for Western capital and abandon solidarity in a 'malaise of the South',<sup>536</sup> seeking 'acceptance' rather than challenging or providing an alternative.<sup>537</sup> As part of this transformation UNCTAD's weaknesses noted by Corea in 1980 became strengths for the Secretary General two decades later: in his view UNCTAD offered a location in which discussion could be free because 'the organisation

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<sup>532</sup> See, for example Fred Bergsten, "The Response to the Third World," *Foreign Policy* 17 (1974); Stephen Krasner, "Transforming International Relations: What the Third World Wants and Why," *International Studies Quarterly* 25, no. 2 (1981): 119–48., ; and the counter argument by Nesadurai, "Bandung and the Political Economy of North-South Relations," 69.

<sup>533</sup> For examples of Western Trade Union initiatives that drew conscious parallels with the Third World's struggle, see Dave Eliot, "Trade Union Initiatives," in *Third World Change or Chaos?*, ed. Stan Newens (Nottingham: Spokesman, 1977). The international dimension of these initiatives died out swiftly after the supposed high point of the Lucas Aerospace Union mobilization. However, the Lucas Aerospace Combine Shop Stewards' Committee's campaign of the right to work on 'socially useful technologies' remains instructive to contemporary Left politics – but one cannot overlook the fact that this movement was defeated by Lucas Aerospace management and supervened by the ensuing Thatcherite assault. See Hilary Wainwright and David Elliott, *The Lucas Plan: A New Trade Unionism in the Making?* (London: Allison and Busby, 1982); Hilary Wainwright and Andy Bowman, "A Real Green Deal," *Red Pepper*, 2009, <http://www.redpepper.org.uk/A-real-green-deal/>.

<sup>534</sup> Not only does the 'spirit' of Bandung live on, but its conference halls now serve as museum to its own memory.

<sup>535</sup> Taylor, "The United Nations Convention on Trade and Development," 412.

<sup>536</sup> At UNCTAD IX (1996), see *Ibid.*, 414.

<sup>537</sup> Tetteh Hormeku, "NGOs Critical of UNCTAD's Investment and Pro-Business Approach," *Third World Economics*, no. 187/188 (1998): 1.

... does not set rules on trade or investment, has no enforcement authority and does not resolve disputes involving the national interests of its members'.<sup>538</sup>

It is interesting that, even in the eyes of some of its critics, UNCTAD is seen to have a 'legitimacy' that other international trade organisations lack.<sup>539</sup> This redeeming quality combined with the requisite inclusion of 'civil society' apparently offers it as a potential forum for 'counter-hegemonic struggle'.<sup>540</sup> Once again, the absent consideration is 'negotiating authority', with which we return to Corea's concerns of the 1980s. Acquiring this authority meant abandoning the goal of redistribution. This should offer a serious question to the continued investment of hope and transformative potential in these institutions. Corea's own unduly positive reflections on developing country engagement are apposite:

Although it is useful politically and tactically for the developing countries to complain, and to complain loudly, they must not allow themselves to become convinced of the futility of the efforts to reorder international economic relations, *and they must not undermine the efficacy and the credibility of the institutions and the forums in which these efforts are being undertaken.*<sup>541</sup>

The latter point is particularly contentious. It is difficult to imagine the founding members of the Third World movement envisaging their institutional success as limited to creating handmaidens to the efficient function of international capital. Of course, as discussed in Chapter Two this dilemma is at the heart of the attempt to engage in revolutionary legal praxis. Although on some level the diverse aims present within the Third World movement may leave some question as to whether it was engaging in such praxis, an absolutely essential aspect of attempting to advance revolutionary aims through recourse to legal means is precisely not fetishizing the legal form as sufficient in its own right. If a particular legal argument or international institution is manifestly failing to achieve the objectives for which it is being used, then it *has* to be discarded. One apparent pitfall of engaging in the institutional side of international law appears to be the fact that institutions seem to carry significant financial and emotional 'sunk-costs', in addition to developing their own internal logic and bureaucratic will to survive. It then becomes difficult to abandon them as unfit for purpose. Whether or not it is possible to return to them and engage in revolutionary praxis is doubtful considering the historical lessons of the Third World's engagement.

## **V: OPEC: Commodities, commodity booms and Oil – the exception**

UNCTAD's focus on trade foregrounds an issue that has to be addressed prior to the specific elements of the demand for a NIEO. This is the infamous OPEC oil embargo and the subsequent rapid rise in the price of oil. In many ways the OPEC embargo, and the formation of the organisation, are an integral part of the formation of the Third World

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<sup>538</sup> Quoted in Tim Wall, "Trade Climate Warms at UNCTAD X," *Africa Recovery* 14, no. 1 (2000): 4. Also in Taylor, "The United Nations Convention on Trade and Development," 415.

<sup>539</sup> Taylor, "The United Nations Convention on Trade and Development," 417.

<sup>540</sup> *Ibid.*

<sup>541</sup> Corea, *Need for Change*, 17. Emphasis added.

position and its relationship to international law. The apparent success of the organisation not only bolstered the position of the developing nations, but also served as an intended exemplar for the broader demands of the NIEO and those articulated in the trade negotiations preceding and during UNCTAD's early years. It is important to consider here as it was understood to have provided a strengthening of the Third World position and a moment of hope that coincides with the declaration for an NIEO and a series of other agreements that will be addressed in the subsequent Section of this Chapter. Importantly this was a strength that, as discussed above, was seen to be absent in and crucially undermining of other Third World institutional endeavours. In legal terms it is possible to consider this a moment when the Third World's engagement with international law took on something more than 'moral force', and could perhaps begin to approach the force of law.

The formation of OPEC and the role the trade in primary commodities played in the Third World's relationship to international law can only be understood in light of the dependency of most of the Third World on primary commodity exports for their foreign trade. By 1980 at least half of the one-hundred and fifteen developing countries defined as such by UNCTAD were 'dependent on one commodity for over [fifty] percent of their export revenues.'<sup>542</sup> As mentioned, this formed a central platform of the Third World's activism in international fora, particularly at UNCTAD and within the Non-Aligned movement discussed above. According to OPEC's representative to the Non-Aligned Movement, '[b]oth the First Meeting of the OPEC Conference in 1960 and the First Non-Aligned Summit held towards the end of the following year were expressions of the Third World's complete disenchantment with the international economic and political order.'<sup>543</sup> Addressing the International Progress Organisation, a Non-Governmental Organization with consultative status to the Economic and Social Council of the United Nations, OPEC's representative went on to state:

[t]he division of labour, as enshrined by centuries of foreign domination meant that even after full political independence had been achieved, control over the vital economic resources of the developing countries still remained, directly or indirectly, in the hands of the Western multinational companies and their banking and trade institutions.<sup>544</sup>

This remained a central concern of the Third World and figured prominently in all their engagements in the international arena. By the time OPEC was established these issues were already being examined under the principle of self-determination, taking concrete form with the UN Commission on Permanent Sovereignty over Natural Resources which led to the General Assembly Resolution of the same title shortly after the formation of OPEC.<sup>545</sup> The same concerns are reiterated in the Declaration of Friendly Relations, the

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<sup>542</sup> Prashad, *The Darker Nations*, 181.

<sup>543</sup> A. Ferroukhi, "The Role of OPEC in Establishing a NIEO," in *The Principles of Non-Alignment: The Non-Aligned Countries in the Eighties: Results and Perspectives*, ed. Hans Köchler (Vienna: International Progress Organization, 1982), 169.

<sup>544</sup> *Ibid.*, 168.

<sup>545</sup> See UNGA resolutions 1314 (XIII) and 1803 (XVII) respectively.

call for the NIEO, and the Convention on the Economic Rights and Duties of States (CERD) which will be addressed collectively in the section following this. The issues of effective self-determination in economic matters, of the role of private foreign investment, of the detrimental effects of large fluctuations in primary commodity prices and in the exclusion of the Third World from the effective decision making processes were not new. As discussed in the previous sections, they had been central concerns of the anti-imperialist movement for significant time and formed a central part of both imperialist foreign intervention and reactions to it.<sup>546</sup> OPEC was understood to represent a shift in the balance of these relations, precipitating a change from rhetoric to muscle.

Although OPEC was formed in 1961, it was the oil embargo of 1973 that manifested the potential strength of the organisation. The Arab oil boycott was seen to provide 'the developing countries with the leverage to force the developed countries to consider seriously Third World proposals' on the international economic order.<sup>547</sup>

The crisis represented the first effective exercise of market power by a group of developing country exporters of primary products. It had a demonstration (sic) effect on other developing countries, while it produced a fear among industrial countries that such power might be exercised by associations of exporters of other primary products.<sup>548</sup>

In the West, OPEC was seen to be representative of the ability of the Third World to 'harness the "powerful" multinational firms to actively promote their own national interests', threatening both the security and economic prosperity of the developed world.<sup>549</sup>

In some sense the effects of the embargo are undeniable. The price of oil did rise four-hundred percent in the period from October 1973 to January 1974.<sup>550</sup> In financial terms, it was said to represent 'the most colossal commercial redistribution of income in history',<sup>551</sup> with the change in export earnings 'resulting from higher commodity price levels' dwarfing international aid, then running at around eight billion dollars a year.<sup>552</sup> The International Energy Agency (IEA) formed in response to the oil embargo and designed to explore energy alternatives posted dramatic looking statistics to demonstrate the impact on the West. According to their report pre-embargo GNP growth rate was at an average of 5% per year, dropping to 3.4% thereafter. Inflation rose from 4.3% to 8.1%, and unemployment from 3% to 5%. The emotive and rather

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<sup>546</sup> See, for example, Stephen G. Rabe, *The Road to OPEC: United States Relations with Venezuela, 1919-1976* (Austin: University of Texas Press, 2011).

<sup>547</sup> Robert F Meagher, *An International Redistribution of Wealth and Power: A Study of the Charter of Economic Rights and Duties of States* (New York: Pergamon Press, 1979), xii.

<sup>548</sup> *Ibid.*, 2.

<sup>549</sup> Bergsten, "The Response to the Third World," 4.

<sup>550</sup> Dankwart A. Rustow and John Mugno, *OPEC: Success and Prospects* (New York University Press, 1976), 24.

<sup>551</sup> Albert L. Danielson, *The Evolution of OPEC* (New York: Harcourt Brace Jovanovich, 1982), 8.

<sup>552</sup> Angus Hone, "Gainers and Losers in the 1973 Commodity Boom. Developing Countries' Prospects to 1980," *Development Policy Review* 7, no. 1 (1974): 29.

obscure sounding 'misery index' rose from 7.3% to 13% post embargo.<sup>553</sup> The OPEC embargo raised a series of concerns for international lawyers of the day, primarily concerned with the legality of the embargo itself,<sup>554</sup> but also prompted by the growth of a 'sellers' market in the production of raw materials<sup>555</sup> alongside concern with the 'politically motivated exclusion of customers.'<sup>556</sup> These will be addressed in more detail in Sections VI and VII assessing the Third World's international resolutions. OPEC's activity, however, reversed the positions of the developing and developed nations in this regard. It was the developing countries that had previously pushed hard for the recognition of 'economic coercion' in international law. Demonstrating the persistent indeterminacy of legal argument, but potentially also its occasional resistance to an immediate about turn, international legal commentary inclined to consider this example of Third World cartelism illegal remained with its 'inevitable conclusion... that it will require a great deal of practice, of 'case-law', to give the concept of illegal economic coercion substance and definition.'<sup>557</sup>

Alongside this more explicitly 'legal' consideration, ran the more general concern over the cartelism of OPEC's actions, and the fear that this could spread. It is essential, therefore, to iterate the obvious fact that oil production on a global scale has never occurred under 'free market' conditions. Prior to OPEC there had existed two cooperative agreements. Firstly, the 'international corporate cartel', formed by the Red-Line Agreement in 1914 and reinforced by the As-Is Agreement in 1928.<sup>558</sup> Red-Line specified that all Middle Eastern reserves be developed through the Turkish Petroleum Company, formed of BP, Royal Dutch-Shell, and the French *Compagnie Française des Petroles* (CFP). As-Is divided the sale of oil on world markets between BP, Royal Dutch-Shell and Exxon. Other major companies joined during the 1930s, and by the early 1950s the corporate cartel consisted of CFP and the infamous 'Seven Sisters': Exxon, Mobil, Texaco, Socal, Gulf, Shell, and BP.<sup>559</sup> The second cooperative arrangement was formed by a group of US based State Governments, who devised a quota and allocation scheme to affect supply and demand. This was a project sanctioned by the United States Federal Government in 1935, and was considered relatively effective at maintaining prices till 1970.<sup>560</sup> Feeling the need to defend the 'market' in this instance, economists pointed out that

pure competition has never existed in world oil markets and... there has never been a master plan or overall conspiracy... instead, the principal actors have always operated with limited information and in their own self-interest...

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<sup>553</sup> IEA, *Energy Policies and Programmes of IEA Countries, 1979 Review* (Paris, 1980), 20.

<sup>554</sup> Lillich, *Economic Coercion and the New International Economic Order*, Part II.

<sup>555</sup> *Ibid.*, 21.

<sup>556</sup> *Ibid.*, 22.

<sup>557</sup> *Ibid.*, 10.

<sup>558</sup> Danielson, *The Evolution of OPEC*, 6–7.

<sup>559</sup> *Ibid.*

<sup>560</sup> *Ibid.*

integrated companies are simply the survivors in markets which have periodically swung between the extremes of cooperation and competition.<sup>561</sup>

This is a vital consideration, not only in assessing OPEC, but in contextualising the entire Third World approach to international law. These less explicitly 'legal' relations, absent a 'master plan' or 'overall conspiracy' constituted the international economic order that the Third World hoped to transform. Despite the rhetoric in the West, there are many aspects to OPEC that fit within the economic frame above, which reveal its weaknesses as a vehicle for the Third World's transformative aspirations. OPEC consisted of principal actors operating 'in their own self-interest' that would equally threaten to oscillate between cooperation and competition.

Just as divisions lurked within Bandung, so too the 'extreme diversity' that characterized the OPEC membership presented a 'continual impediment to the achievement of cooperation in pricing and production policies.'<sup>562</sup> The alliance was constantly threatened by economic sabotage, as evinced by President Eisenhower's candid statement: '[t]he Middle East countries in the new organization were concerned anyone could break up the organization by offering five cents more per barrel for the oil of one of the countries.'<sup>563</sup> As direct confirmation of this, the Seven Sisters undermined the early activities of OPEC, offering the Iranians and Saudis a price break in 1964. The United States followed suit, reducing its import quota to benefit Venezuela in 1967.<sup>564</sup>

OPEC's potential weaknesses are also evinced by placing the oil embargo of 1973 in the context of the more general boom in commodity prices of 1973-4. This is particularly important against accounts like those of Fred Bergsten and the IEA that attribute elements of the so-called 'stagflation' of the 1970s to Third World activism. As economists noted at the time, '[t]he Reuters Index on 28 December [1973] stood at 1,390 against the 1972 average of approximately 600 and this index has been above 1,100 since June, which should convince even the most sceptical that... price levels [were] not a short-term effect produced by the Arab-Israeli War and the oil cutbacks.'<sup>565</sup> OPEC's embargo lagged the major commodity spikes, which adds further weight to their being alternative explanations for increasing prices.

These explanations range from widespread crop failures in the preceding years, to Peru's catastrophic drop in anchovy catch which had an effect in other food markets and a knock on effect as land use shifted from Cotton and Jute to take advantage of the spike in food prices.<sup>566</sup> Cooper and Lawrence noted that 'Australian sheep were

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<sup>561</sup> Ibid., 19.

<sup>562</sup> Ibid., 8.

<sup>563</sup> Quoted in Nathan J Citino, *From Arab Nationalism to OPEC: Eisenhower, King Sa'ud, and the Making of U.S.-Saudi Relations* (Bloomington: Indiana University Press, 2002), 155. Also quoted in Prashad, *The Darker Nations*, 186.

<sup>564</sup> Rabe, *The Road to OPEC*, 160.

<sup>565</sup> Hone, "Gainers and Losers in the 1973 Commodity Boom," 25.

<sup>566</sup> Marian Radetzki, "The Anatomy of Three Commodity Booms," *Resources Policy* 31, no. 1 (March 2006): 56-64; Richard N. Cooper and Robert Z. Lawrence, "The 1972-75 Commodity Boom," *Brookings Papers on Economic Activity* 3 (1975); Hone, "Gainers and Losers in the 1973 Commodity Boom."

slaughtered in response to the steady rise in demand for meat and wheat (and weak demand for wool), with effects on the subsequent supply of wool. Supplies of metals were affected by the strikes and political unrest in Chile, the major exporter of copper; and Zambia halted its copper shipments through Rhodesia.<sup>567</sup> Importantly the commodity price spikes also followed a particularly 'strong period of macroeconomic performance during 1972 and 1973' in the developed world, where American, European and Japanese industrial cycles peaked.<sup>568</sup> It is also worth considering that the volatility in currency values as the United States devalued the dollar in the early 1970s and precipitated a shift to floating exchange rates also drove investors to shift to commodities as a potentially more stable (or profitable) investment.<sup>569</sup>

The ultimate causes of the 1973-4 commodity boom are of only marginal interest for the discussion at hand. What is notable is that, firstly the context of a broader commodity boom exemplified exactly the broader economic problem that beset the developing countries – primarily the extreme volatility of the primary commodity market. There had been an earlier commodity boom in 1950-1, generally considered to be caused by a massive inventory build-up in response to the Korean War.<sup>570</sup> Following the 1973-4 boom, prices dropped again precipitously; although it is worth noting that here OPEC was able to maintain its higher oil prices. There are two points to take away from this. Firstly the economic system that produced such volatility was the same that enabled OPEC's position of strength. OPEC simply represented a new constellation of economic players in the oil market that could at any point cooperate and compete.

This has a further implication for the later proposals of the Third World articulated in the call for a NIEO. Without addressing the basic background driving motivator of profit – Amin's one 'law' recognised by capital mentioned earlier – control of these markets has proven to be a difficult task even for wealthy countries. For example, 'even sales in 1973 from the U.S. strategic stockpile of lead and zinc of around one-fifth of U.S. consumption, and sales of tin of around one-third of consumption, did not prevent the sharp increase in prices'.<sup>571</sup> Considering responses to the global financial crisis of 2007-8 recommending 'buffers' for international financial institutions, it seems that the lesson of profit seeking investors and 'cushions' is a hard one to learn.<sup>572</sup> The larger the buffer or the stock, the greater the potential opportunity for investors to make large profits, irrespective of the size or nature of the bubble they might generate in the process. Coupled with the financial difficulties of maintaining stockpiles of actual material

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<sup>567</sup> Cooper and Lawrence, "The 1972-75 Commodity Boom," 689.

<sup>568</sup> See discussion in Cooper and Lawrence, "The 1972-75 Commodity Boom"; Radetzki, "The Anatomy of Three Commodity Booms."

<sup>569</sup> Cooper and Lawrence, "The 1972-75 Commodity Boom."

<sup>570</sup> Radetzki, "The Anatomy of Three Commodity Booms," 56.

<sup>571</sup> Cooper and Lawrence, "The 1972-75 Commodity Boom," 712.

<sup>572</sup> See, for example IMF, *European Union: Publication of Financial Sector Assessment Program Documentation—Technical Note on Macroprudential Oversight and the Role of the ESRB*, IMF Country Report No. 13/70 (Washington, DC: IMF, 2013); Michel Barnier, "Summary - The European Union's Comprehensive Response to the Financial Crisis, Five Years On," *European Commission*, 2013, [http://ec.europa.eu/commission\\_2010-2014/barnier/docs/news/2013/130914\\_summary\\_comprehensive\\_response\\_en.pdf](http://ec.europa.eu/commission_2010-2014/barnier/docs/news/2013/130914_summary_comprehensive_response_en.pdf).

commodities in preparation for price fluctuations, not to mention those less-durable commodities, the hopes of some of the measures of the NIEO were clearly overly optimistic.

The second point to bear in mind is the diversity of the Third World, and the differential impact of the OPEC embargo. Commentators at the time noted that although the rise in both oil and other commodity prices 'benefited some developing countries massively', it was likely to cause 'correspondingly severe problems for others, who [were] large net importers of oil and a wide variety of raw materials and metals.'<sup>573</sup> Although India was an exceptional case in terms of its dependence on imports, '[t]he losses to Indian foreign exchange reserves in 1973 [were] estimated at \$400-600m for the purchase of foodgrains and oils alone.'<sup>574</sup> Although OPEC established a development aid programme to counteract this problem, the problem required significant adjustments in terms of aid flows: concerned economists noted that

many developing countries who [were] net oil importers with per caput national incomes of less than \$500 [would] not be able to develop unless they receive[d] significant aid from the oil states, to counteract the effects of the price increases, and additional World Bank and OECD loans or grants, which... [it was suggested could] be diverted from the gainers with per caput incomes in excess of \$800-1000 per annum.<sup>575</sup>

The financial juggling required to maintain the global economic system's "alms for the poor" also highlighted the fact that the developed world controlled these financial processes. As Andre Gunder Frank noted close to the time, 'most of the effective cost of the rise in oil prices... [was] passed on to the non-oil producing countries of the Third World, while the industrial countries increased their exports to the OPEC countries and... recycled the remaining OPEC surplus through their banks.'<sup>576</sup> Other contemporary accounts concurred, noting that the bulk of the resulting current account deficits in the developed world would 'be covered by capital account movements of the oil producers' surpluses into the investment and security markets of the USA, the EEC (led by London and Frankfurt), and Japan.'<sup>577</sup>

## **VI: Resolutions**

The other side of the coin of the Third World's currently rather beleaguered looking engagement with international law took the form of resolutions produced in the General Assembly of the UN, alongside Conventions, certain treaties, and the publications and actions of jurists such as Bedjaoui, particularly through the work of the International Law Commission. Although disparate, there was a common theme to engagement in all of these areas, in line with the foregoing discussions. Nearly all of

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<sup>573</sup> Hone, "Gainers and Losers in the 1973 Commodity Boom," 24.

<sup>574</sup> *Ibid.*, 28.

<sup>575</sup> *Ibid.*, 33.

<sup>576</sup> Andre Gunder Frank, "Rhetoric and Reality of the New International Economic Order," in *Transforming the World-Economy?*, ed. Herb Addo (London: Hodder and Stoughton, 1984), 181.

<sup>577</sup> Hone, "Gainers and Losers in the 1973 Commodity Boom," 30.

these themes are summed up and reiterated in the declaration for the NIEO, which was considered in many cases simply a restatement and call for action on all of these issues.<sup>578</sup> Most particularly there are strong parallels between the declaration for the NIEO and the preceding declarations on Permanent Sovereignty over Natural Resources,<sup>579</sup> and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.<sup>580</sup>

*i) The NIEO – GA Res 3201 and 3202*

The NIEO declaration itself came out of the sixth special session of the UN General Assembly of 1974 and was followed up in the seventh special session in 1975 with a declaration on Development and international economic co-operation.<sup>581</sup> The Sixth Special Session was convened in order to ‘study for the first time the problems of raw materials and development.’<sup>582</sup> It called for

the establishment of a New International Economic Order based on equity, sovereign equality, interdependence, common interest and cooperation among all States, irrespective of their economic and social systems which shall correct inequalities and redress existing injustices, make it possible to eliminate the widening gap between the developed and the developing countries and ensure steadily accelerating economic and social development and peace and justice for present and future generations.<sup>583</sup>

These declarations were based on the awareness that it had ‘proved impossible to achieve an even and balanced development of the international community under the existing international economic order’.<sup>584</sup> Given the foregoing discussions of the frustrated institutional efforts of the Third World this call for a NIEO represented the reassertion of the necessity of change at the highest point of Third World strength. Some Western responses brought into this bombast, claiming ‘the industrial world [to be] still stunned by the effectiveness of the OPEC oil price increases... [and that with the NIEO the] tables in the grand game of power seemed to have shifted irrevocably.’<sup>585</sup>

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<sup>578</sup> Thousands of books were published on the NIEO - including an entire library under the auspices of the United Nations Institute for Training and Research (UNITAR), and the *Centro de Estudios Economicos y Sociales del Tercer Mundo* (CEESTEM) for whom ‘the NIEO constitut[ed] one of the highest priority items on the international agenda.’ Ervin László and Joel Kurtzman, eds., *Western Europe and the New International Economic Order: Representative Samples of European Perspectives* (Published for UNITAR and the Center for Economic and Social Studies of the Third World (CEESTEM) [by] Pergamon Press, 1980), vii. Also see S. K. Saxena, “Select Bibliography on the New International Economic Order, 1960-78,” *Indian Journal of International Law* 20 (1980).

<sup>579</sup> UNGA Res 1803 (XVII), 1962

<sup>580</sup> UNGA Res 2625 (XXV), 1970

<sup>581</sup> UNGA Res 3201 (S-VI) and 3202 (S-VI) 1974; UNGA Res 3362 (S-VII) 1975

<sup>582</sup> UNGA Res 3201 (S-VI), 3

<sup>583</sup> UNGA Res 3201 (S-VI), 3

<sup>584</sup> UNGA Res 3201 (S-VI), 3

<sup>585</sup> David Denoon, ed., *The New International Economic Order: A U.S. Response*, UNA-USA Policy Studies Book Series (New York: New York University Press, 1979), 4.; less strident commentators

This aligned with the rhetoric of the declaration itself, which claimed that '[t]he developing world [had] become a powerful factor that [made] its influence felt in all fields of international activity.'<sup>586</sup>

The declaration contained a host of provisions defining the founding principles of the envisioned NIEO. Repeating the context of equality and cooperation being the founding principles of international relations (in direct contrast to the reality of the current international economic order) the declaration reiterated specific calls for the right to nationalize property according to local legislation; called for just and equitable trade for developing countries; demanded an increase in aid and foreign direct investment; called for reform of the international monetary system; aid for capital light industry, which essentially referred to the need to protect primary commodities against synthetic alternatives (the rise in oil prices temporarily affected this process in favour of the developing world); and positive discrimination for the least developed countries (LDCs), alongside the transfer of finance and technology to those most disadvantaged within the present system. The declaration also called for a coalition of LDC primary producers and their right to form cartels.

It is evident from this brief list that much of the NIEO's basic principles were informed by the potential model offered by OPEC, combined with a hoped for increase in development aid and investment within a system that otherwise wasn't radically different from the old economic order. The key provisions that were to face serious resistance, wherever they appeared, were the possibilities of cartel action by developing countries, their right to nationalize property without adequate compensation, and the meaningful transfer of technology or finance in forms other than tied-aid or loans that contributed to the unsustainable debt burden of most developing countries. In essence, all of these vigorously opposed provisions could effectively be translated as demanding the direct transfer for wealth, or its meaningful redistribution. It is for this reason that the NIEO has been interpreted as a kind of global Keynesianism, in which the welfare-state model of the post-war industrialised countries was transposed to the international plane 'as the world community... accepted increasing responsibility for the welfare of its individual members.'<sup>587</sup> Unfortunately this world community was currently busy bitterly competing as to who could exploit the most human and natural resources the fastest, and that same welfare state was ripe for the neoliberal chop.

The declaration was followed by a programme of action to put this new order into place, which fell under the subheadings of raw materials, money and finance, industrialisation, the transfer of technology, the regulation of Transnational

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noted that 'the climate surrounding the L[east]D[eveloped]C[ountry] demands has taken on a new character' after the actions of OPEC and the commodity boom. 'The result was a more uniform set of demands consisting of measures designed to transfer resources from rich nations to poor, to permit more rapid growth of LDCs, and to bring about a New International Economic Order.' Peggy Weeks, *Commodity Initiatives of Less Developed Countries* (Washington, DC: Congress of the United States Congressional Budget Office, 1977), 1.

<sup>586</sup> Ibid.

<sup>587</sup> Meagher, *An International Redistribution of Wealth and Power*, 8.

Corporations, the finalization of the Charter on the Economic Rights and Duties of States (CERD), the promotion of cooperation among developing countries, mutual assistance in protecting and enabling permanent sovereignty over natural resources, and strengthening the role of the UN's more democratic organs. Much of this section maintained the same programmatic language of the declaration, with only sparse discussion of specific mechanisms. This section was followed by a series of special provisions to address the immediate concerns of the financial crisis of the seventies and its disproportionate impact on the most vulnerable developing countries.

Even this section was striking in its lack of specific mechanisms, but it was the closest the resolution came to laying out a specific and immediate path to achieving some of its espoused aims. Here emphasis was placed on immediate commodity purchases and trade mechanisms – to keep vital goods flowing – and on financial arrangements in the form of aid, loans on concessionary terms, and the renegotiation of debt with a mind to its potential cancellation. Of course, this was a reiteration of the prior programme of action and founding principles, the only difference being its immediacy. This section also provided some potential for immediate action in the form of a 'Special Fund', with a possible link to the UN Capital Development Fund to address financing, coupled with further requests for accelerated action and advisory aid from the IMF and the World Bank Group.

*ii) CERD:*

The Charter on the Economic Rights and Duties of States consolidated many of the provisions of the NIEO, reiterating them in most provisions. The Charter declared its 'fundamental purpose' was to 'promote the establishment of the new international economic order.'<sup>588</sup> Article 2(c) stated the right of each state to 'nationalize, expropriate or transfer ownership of foreign property', for which 'appropriate compensation should be paid by the State adopting such measures, taking into account all its relevant laws and regulations and all circumstances that the State considers pertinent.'<sup>589</sup> More importantly, disputes were to be settled 'under the domestic law of the nationalizing State... unless agreed upon by all States concerned'.<sup>590</sup> Article 5 reiterated the right to form 'organizations of primary commodity producers', and that '[c]orrespondingly, all States have the duty to respect that right by refraining from applying economic and political measures that would limit it.' Other key controversial provisions occur in Article 14: economic measures should be taken 'to achieve a substantial increase' in the foreign exchange earnings and the diversification of exports of developing States; Article 16(1): noting the right and duty to eliminate 'colonialism, *apartheid*, racial discrimination, neo-colonialism and all forms of foreign aggression, occupation and domination, and the economic and social consequences thereof'. Crucially Article 16(1) further stated that 'States which practice such coercive policies are economically responsible to the countries, territories and peoples effected for the restitution and full

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<sup>588</sup> A/RES/29/3281

<sup>589</sup> Ibid.

<sup>590</sup> Ibid. These provisions clearly equate to nationalization without 'adequate' compensation, and were reacted to as such.

compensation for the exploitation and depletion of, and damages to, the natural and all other resources of those countries, territories and peoples.<sup>591</sup>

This Resolution was adopted by a vote of 120 in favour to six against, with ten abstentions. The casters of these sixteen votes were telling, if unsurprising. The abstentions were: Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway and Spain; voting against were: Belgium, Denmark, the Federal Republic of Germany, Luxembourg, the United Kingdom and the United States.<sup>592</sup> France's declared reasons for abstaining were 'primarily in relation to the taking of foreign property,' declaring that 'in view of the wide number of provisions and commitments in this programme, [they did] not consider [themselves] bound'.<sup>593</sup> The Federal Republic of Germany objected to the possible disruption of free trade, noting those provisions as 'liable to suspend the market mechanism which is indispensable for the functioning of the world economy'.<sup>594</sup> The Federal Republic of Germany, Japan and the UK all made reference to the repetition of rights already 'vested in international law', and the need for these rights to be enacted with 'due regard for international law' for the UK, or 'in accordance with international law' for Japan.<sup>595</sup> The US more explicitly stressed the link to existing obligations to compensate for nationalization as a necessary component of any right to do so.<sup>596</sup> The UK also objected to cartels, and the US condemned '[a]rtificial attempts to manage markets which ignore economic realities and the legitimate interests of consumers'.<sup>597</sup>

No investor countries were in favour of the charter. Not only were the aforementioned oppositions made, placing CERD in opposition to existing norms, but the claim was also put forward that CERD would provoke 'insecurity in the minds of investors'; that the 'untraditional' approach to international law could offer no way of maintaining the confidence of financial markets.<sup>598</sup> However, even in the light of these considerations scholars reflecting on the Charter have claimed that '[i]n so far as the Charter of Economic Rights and Duties of States is concerned, certain of its controversial provisions should not belittle its majority of noncontroversial provisions which [were] being followed by a large number of States directly or indirectly'.<sup>599</sup> This is an important note to bear in mind when considering potentially revolutionary legal praxis. Many of the provisions articulated in CERD, which are essential components of the broader NIEO, may be said to contain 'revolutionary' potential in that they threatened property ownership, and prompted severe concerns about the effective functioning of global capitalism were they to be enforced. These provisions were then rejected, whilst maintaining that the more traditional provisions simply restate current practice.

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<sup>591</sup> Ibid.

<sup>592</sup> S. K. Chatterjee, "The Charter of Economic Rights and Duties of States: An Evaluation after 15 Years," *International and Comparative Law Quarterly* 40, no. 03 (1991): 672.

<sup>593</sup> Ibid.

<sup>594</sup> Ibid., 673.

<sup>595</sup> Ibid., 673–4.

<sup>596</sup> Ibid.

<sup>597</sup> Ibid., 674.

<sup>598</sup> Ibid.

<sup>599</sup> Ibid., 683.

Retrospective statements like the one above that certain ‘controversial provisions’ should not reflect badly on the ‘non-controversial’ ones that reflect common practice serve to empty the Charter of radical content. It is also a position highly reminiscent of Corea’s reflection on international organisations like UNCTAD, in which it was claimed that the lack of any progress for radical Third World aims should not disenchant them with either the institution or the process as a whole.

*iii) Lomé I and II, UNCLOS*

These same problems haunted the Third World’s demands in other international conventions and treaties. Their presence and their potential strength had an effect but it was always severely limited by the structural conditions of global capitalism that disadvantaged them. For example the negotiations of seventy one African, Caribbean and Pacific (ACP) countries with the European Union in 1975 that led to the first Lomé Convention represented a ‘successful’ negotiating example at the height of power for the post-formal-colonial states. In the wake of the NIEO, CERD, OPEC’s oil embargo and the commodity boom, the EU was also confronted with the alliance of larger Anglophone countries with greater negotiating power than the expected Francophone group.<sup>600</sup> Christopher Clapham noted the generous terms secured in relation to aid packages, so called ‘Stabex’ funds to cushion falls in primary produce prices, and an ability to impose tariffs without jeopardising their access to EU markets.<sup>601</sup> Unfortunately this ‘success’ resulted in no measurable increase in ACP development, or even in effecting a reverse in their declining living standards across this period. In addition to this, the terms were reversed during the second Lomé negotiations from 1978-9 onwards, with a real terms drop in aid of twenty percent.<sup>602</sup> Compared to a resolution like CERD, in which the more radical provisions were rejected and the rest were considered simply declaratory of current practice, this instance of actually effecting an agreement to secure marginally generous terms demonstrates both the ways in which these efforts failed to significantly advance the position of the Third World in concrete terms, whilst simultaneously securing a merely tenuous legal advantage that was swiftly renegotiated.

The other major Convention negotiated over the course of this same period, the UN Convention on the Law of the Sea (UNCLOS), replicated the same themes. The Third United Nations Conference on the Law of the Sea opened in New York in 1973 and the substantive sessions were held between 1974 and 1982. The Conference adopted the Convention on the Law of the Sea at the 11th session held in New York between 8

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<sup>600</sup> Clapham notes all these factors, although commodity prices dropped sharply in 1974-5. Despite this fact, the other factors Clapham notes remained, and his point stands about the first Lomé Convention, see Clapham, *Africa and the International System*, 99–100.

<sup>601</sup> Ibid.

<sup>602</sup> Clapham notes that despite the nominal total increasing to 5.5 million EUA (European Unit of Account) in Lomé II ‘when account is taken of new states joining the ACP group, increased population, and inflation, it represented a fall of some 20 per cent in real per capita terms. The 8.5m ECU [European Currency Unit] (\$11,220m, at February 1985 exchange rates) allocated for Lomé III in 1985 amounted to roughly the same as the Lomé II real per capita total.’ Ibid., 101.

March and 30 April 1982.<sup>603</sup> OPEC's embargo also impacted on these negotiations,<sup>604</sup> and commentators claimed that 'what [was] happening at sea [was] a continuation of the struggle begun on land between the rich and poor countries.'<sup>605</sup> Although UNCLOS is an extensive declaration, there are two elements of particular significance for the NIEO and the discussion at hand: the expansion of coastal state jurisdiction in the Exclusive Economic Zone (EEZ) and the potential exploitation of the "common heritage of mankind" in the seabed beyond.<sup>606</sup>

The idea of a common heritage from which the profits would be distributed in some way among developing countries fit well within the Third World's aspiration for some kind of redistribution of wealth and a shift in trade terms – although importantly one targeted towards future revenues rather than the rectification of any previous exploitation, or any immediate redistribution. Yet in this particular instance the politics of geography and those of the negating process neutered the Third World position. Despite elaborate arguments by landlocked states about their claim to the oceans,<sup>607</sup> which are revealing of the primacy of property-based arguments within the law if nothing else, the newly negotiated EEZ incorporated over eighty percent of known sea resources, leaving only the hoped for mining of Manganese nodules as a potential contributor to the common heritage funds.<sup>608</sup>

The International Seabed Authority (ISA) established under the 1982 Convention to administer 'the Area' designated as the common heritage of mankind<sup>609</sup> had no independent capacity to explore or exploit these resources, and served essentially as a contractor for private enterprise. Negotiations over this area were heavily structured by the fact that only the advanced industrialised economies had the technology to even

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<sup>603</sup> See ILM, "Third United Nations Conference on the Law of the Sea: Final Act," *International Legal Materials* 21 (1982): 1245; ILM, "Third United Nations Conference on the Law of the Sea," *International Legal Materials* 21 (1982): 1261; Boleslaw Adam Boczek, "Ideology and the Law of the Sea: The Challenge of the New International Economic Order," *Boston College International and Comparative Law Review* 7, no. 1 (1984): 3.

<sup>604</sup> 'The oil shortage of 1973-74 escalated national claims to the oceans' in Richard J. Payne and Jamal R. Nassar, "The New International Economic Order at Sea," *The Journal of Developing Areas* 17, no. 1 (1982): 37.

<sup>605</sup> *Ibid.*, 46.

<sup>606</sup> Boczek, "Ideology and the Law of the Sea," 3.

<sup>607</sup> Bolivia claimed that 'for millions of years the rivers and the winds carried vast quantities of Bolivia's riches to the seas, the seabed and subsoil, thus depriving the land of its resources, including its fertile soil.' [Third UN Conference, Vol. 2, 199], cited in Payne and Nassar, "The New International Economic Order at Sea," 42.

<sup>608</sup> "The exclusive economic zone gives 52% of the economic zones of the world to ten states, six of them developed states. The economic zones contain the overwhelming proportion of exploitable seabed mineral revenue. It is estimated that their oil and gas alone are worth between \$20 and \$30 trillion." Statement of Dr. John Logue, World Order Research Institute, Villanova University, in U.S. Govt. Offices, *Mining of the Deep Seabed: Joint Hearings Before the Subcommittee on Public Lands and Resources of the Committee on Energy and Natural Resources and the Committee on Commerce, Science, and Transportation, United States Senate, Ninety-Fifth Congress, First Session, on S. 2053; September 19, 20, and October 4, 1977* (U.S. Government Printing Office, 1978). Also cited in Payne and Nassar, "The New International Economic Order at Sea," 37.

<sup>609</sup> See ILM, "Third United Nations Conference on the Law of the Sea," 1293.

consider exploiting these resources, and that the corporate bodies with the capability were profit seeking. This particular issue has resurfaced as the price of minerals rises and exploitation becomes potentially profitable, with the ISA experiencing renewed interest in its activities.<sup>610</sup> In this vein UNCLOS simply replicated the dilemma of the Third World position: without the technology to exploit resources for profit and without the consequent negotiating power to stake a realistic claim, they were forced to settle with high-sounding moral claims about the common heritage of mankind with no way of actualizing the idea, in addition to the real terms negotiated leaving almost nothing available for that purpose.

## **VII: Revolutionary Legal Praxis and the Third World – An Assessment**

From the perspective of an advocate for the Third World position the foregoing discussion will appear bleak. It should appear even more so considering that the declaration for a NIEO came at the height of Third World strength. The about turn in this position as the international economy downturned from 1975 to 1977 was evident to the industrial powers, and the drop in developing countries' bargaining power all but brought a halt to initiatives for the NIEO.<sup>611</sup> Assessments of CERD noted that '[i]t [was] obvious that any attempt to invoke its provisions by a developing State against a developed State would not succeed.'<sup>612</sup> Third World debt escalated massively in the 1980s, and negotiations of write-downs continue with no serious debate over challenging the structural conditions for that indebtedness in a way that would prevent its re-emergence. To date no funds have resulted from the common heritage of mankind. OPEC's increased wealth continues to cycle through Western financial institutions, in addition to its American-allied members constructing havens for transnational capitalists using highly exploited migrant labour. No wealth has been effectively redistributed, although the intervening years have seen a rapid growth in the gap between the richest and poorest across the globe. The Third World's project of a more egalitarian society brought about through the intervention of international law has manifestly failed.

On first appraisal this failure does not offer any specific insights into the form of law. This is because of the fact that the failure in this instance seems to stem too clearly from the structurally disadvantaged position of the Third World vis-à-vis the industrialized countries. In Maxwell's stark terms, the 'haves' defended their privilege against the demands of the 'have-nots'. Bearing in mind the problems of national boundaries and the class divisions within them that would nuance such a statement, in the terms in which the Third World conducted the struggle that peaked in the 1970s this statement captures a deep truth. However, it is important to recall that the struggle of the Third World was very explicitly channelled into the international legal form. To

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<sup>610</sup> Suzanne Goldenberg, "Marine Mining: Underwater Gold Rush Sparks Fears of Ocean Catastrophe," *The Guardian*, March 2, 2014, sec. Environment, <http://www.theguardian.com/environment/2014/mar/02/underwater-gold-rush-marine-mining-fears-ocean-threat>.

<sup>611</sup> Meagher, *An International Redistribution of Wealth and Power*, 127.

<sup>612</sup> Chatterjee, "The Charter of Economic Rights and Duties of States," 675.

recall Franck's eloquent phrase, this was in one sense an attempted 'revolution of laws, not of men'. Rephrasing this slightly (and necessarily) as an attempted revolution by men using legal means, the failed international legal advocacy of the Third World should offer something by way of insight into the nature of the legal form and the possible limits it might offer to revolutionary praxis.

The first response to this from the preceding discussion of the Third World's relationship to international law is to deny the legal status of that struggle. After all, the NIEO declarations were only General Assembly Resolutions; UNCTAD simply attempted to serve as an alternative forum in which to discuss trade issues from a perspective favourable to the developing world; CERD was also a General Assembly Resolution, and importantly received no support from any developed nations, a supposedly clear indicator of its non-acceptance as law; none of these declarations expressed concrete measures for enacting them, or demanded specific actions from the states involved, or even provided novel means of resolving disputes. The repeated examinations of the legal status of General Assembly Resolutions demonstrate the intractability of this position; ICJ case law would seem to imply either that they do not have status as law,<sup>613</sup> or that significant evidence of general practice is required, whereas ICJ advisory opinions offer some inclination towards their acceptance.<sup>614</sup> Most commentators accept some form of 'moral force' emanating from them, read as some kind of contrast to more concrete international legal provisions.<sup>615</sup>

This of course overlooks the nature of the formation of international law. From perspectives like Franck's, some politics 'congeals' into law and some fails to do so. It then becomes a matter of time and practice; of contestation and the ability to translate this into law. Bedjaoui noted that the lack of specific mechanisms and provisions in General Assembly resolutions were no reason for dismissing them: despite their formally binding nature (in contrast to General Assembly resolutions) 'treaties do not always contain precise norms, and even when they do, they do not always provide

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<sup>613</sup> Robert B. von Mehren, "International Arbitral Tribunal: Award on the Merits in Dispute Between Texaco Overseas Petroleum Company/California Asiatic Oil Company and the Government of the Libyan Arab Republic (Compensation for Nationalized Property)," *International Legal Materials* 17, no. 1 (1978): 1–37.

<sup>614</sup> D. H. N. Johnson, "Effect of Resolutions of the General Assembly of the United Nations, The," *British Yearbook of International Law* 32 (1955): 97.

<sup>615</sup> Eric Suy, "Innovations in International Law-Making Processes," in *The International Law and Policy of Human Welfare*, ed. Ronald St. J Macdonald, Douglas M Johnston, and Gerald L Morris (Alphen aan den Rijn: Sijthoff & Noordhoff [International Publishers], 1978); F. Blaine Sloan, "Binding Force of a Recommendation of the General Assembly of the United Nations, The," *British Yearbook of International Law* 25 (1948): 1; Johnson, "Effect of Resolutions of the General Assembly of the United Nations, The." Bernard Oxman's considerations on UNCLOS are also particularly apt here. In noting that the ability of one party to unilaterally bring a dispute to arbitration, and the desire by all parties for this to be relatively enforceable, Oxman observed: 'If states had no intention of being bound by the procedures, they might have happily permitted leading scholars to fashion a perfectly logical and elegant dispute settlement regime.... But because almost all states were negotiating with a view to producing a convention they could ratify, they insisted, quite rightly, on accommodation of their important interests.' Bernard H. Oxman, "The Rule of Law and the United Nations Convention on the Law of the Sea," *European Journal of International Law* 7, no. 3 (1996): 367.

reliable machinery for their effective application.<sup>616</sup> In addition, 'some resolutions have normative content which is quite elaborate, and include precise undertakings, even when these are not recognized as having binding value.'<sup>617</sup> The argument of this thesis, however, is that the indeterminacy of the law encapsulates both this understanding of the 'fluid' nature of international law, and the arguments both for and against the 'legal' status of General Assembly resolutions. The theoretical implications are that the Third World's engagement with international law cannot be dismissed as 'non-law'. Rather, these are legal arguments that failed in some way.

What is noteworthy for this investigation is the ways in which much of the Third World's productive work within international law could be accepted as more or less evident of general practice, but that the more radical provisions either prompted serious opposition, denial of legal status, represented temporary victories that were later undone through renegotiation, or were simply ignored. Among those provisions most fiercely opposed were the right to nationalize without compensation (according to domestic law – which meant the same thing), debt forgiveness, and the right to compensation for past colonial exploitation. Now although the case law and the resolutions themselves demonstrate that these legal claims did not achieve much 'force' of law, it is important to consider whether or not this was their only failing, most particularly in order to understand the potential limits of the legal form on revolutionary praxis.

To recall from Chapter Two, there are two important elements to potentially revolutionary legal praxis. The first is the disenchanting of the current legal system, exposing it as serving particular interests and the second is the ultimate aim of overthrowing that legal system – or at least the revolutionary upheaval of the social relations that created and were in turn shaped by it. Like the Soviet Union, the Third World's approach to international law involved an attempt to utilize its provisions, whilst at the same time challenging their broader basis. In this sense, there was clearly a significant and consistent element within the Third World's engagement with international law that decried the law and the broader economic system as unjust and serving the interests of the developed countries. Evidently the Third World did not overthrow international capitalism, and most accounts agree that this was not even part of the agenda.<sup>618</sup> Articulating so much of their cause within international legal argument also implied that the Third World did not have the overthrow of international law in mind either. However, it was evident to some, even jurists like Bedjaoui, that the legal change being demanded amounted to 'saying that we should change the capitalist

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<sup>616</sup> Bedjaoui, *Towards a New International Economic Order*, 255.

<sup>617</sup> *Ibid.*

<sup>618</sup> See the introduction to Herb Addo and Samir Amin, eds., *Transforming the World Economy?: Nine Critical Essays on the New International Economic Order* (London: Hodder and Stoughton in association with the United Nations University, 1984). Also Nesadurai notes that '[w]hile the radical critique [core-periphery/dependency] of the international system helped secure unity within the Third World coalition, radical remedies - de-linking from the capitalist world economy - did not find favour in many developing states.' Nesadurai, "Bandung and the Political Economy of North-South Relations," 81.

nature' of the system under consideration.<sup>619</sup> It was also clear in some of the oppositions to Third World Conventions like CERD that certain provisions threatened the smooth functioning of the global capitalist economy. This was because the redistributions of wealth, sought either through the right to nationalize without compensation or direct transfers, both threatened two vital bases for international capitalism – the safety of investments and the legitimate ownership of property. In essence by asking the questions of how some particular wealth came to be in the hands of one state rather than another, especially when it was previously extracted from another state, the basis of legal ownership was brought into question. And by threatening to enshrine a principle of legitimate expropriation of international capital investments the sanctity of contract was threatened.

In Alan Stone's terms from Chapter Two, these provisions offered a potential threat to 'essential legal relations', and thereby were indicative of a radical challenge to the functioning of the system. However, in this instance the extent of the threat is unclear. It is understandable that developed states would argue against interventions in a "free" market system that was broadly serving the interests of their ruling classes. However, it is far from clear how exactly the NIEO provisions would have played out. The two most prominent cases, nationalization without compensation and debt cancellation provide illustrative examples. Both take the form of a transfer of wealth, in importantly different ways. Both could serve as momentary and unfortunate disruptions of capitalist profit making. Losing the capital invested in a particular plant and the expected future revenue might prove a setback for a particular multinational company. Similarly a loss on government bonds might hurt some investors. However, without changing the background conditions that lead to either large corporate exploitation of natural resources and profit making, or the conditions in which states find it necessary to borrow regularly from financial markets to finance the function of government, there is no reason in particular why instances of nationalisation or debt cancellation would prove unduly onerous. Particularly once account is given to the fact that increasing instances of nationalisation led to higher insurance premiums, and that market structures allow extra costs to be passed on to the consumer. Similarly, defaulting on loans leads to higher premiums on government borrowing. In fact, confidence in this market has proved to be a particularly effective control mechanism of the political process not only within the developing world, but within the margins of Europe with Greece, Italy and Spain being the most prominent examples.

However, if we consider this as a legal 'right', or 'norm' to cancel debt, and similarly to nationalize property, a particular problem arises. That same one "law" of capitalism noted by Amin at the beginning of this chapter dictates that in this environment capital will go elsewhere rather than face the risk of a loss of investment under an international system that normalizes this loss. But if the loss were to be a general principle then there would be nowhere for the capital to go, and no way for the system to function. Capital would have to be distributed on a different basis than the highest rate of profit. In fact, the system as a whole would have to be radically different. Perhaps this kind of

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<sup>619</sup> Bedjaoui, *Towards a New International Economic Order*, 255.

acknowledgement lay behind statements like Bedjaoui's that recognised the ways in which the more radical proposals of the Third World, if pursued as general principles, would be incompatible with the capitalist system. It is important at this point to reiterate that this is not what the NIEO was calling for, at least in explicit terms. However, it is the logical consequence of certain provisions.

In terms of revolutionary Praxis, the Soviet example differs from that of the Third World precisely in this area. Early Soviet practice was orientated towards the overthrow of the global capitalist system. The tactical use of the legal form in pursuit of that aim was entirely compatible with the ultimate objective, as long as the form of law did not become the coordinating principle of the struggle. In Pashukanis's terms this meant as long as the same logic of bourgeois legality was not sought as a justificatory principle for the struggle. Soviet international legal praxis then bore revolutionary elements in that it both attempted to unveil the law as arbitrary and serving the interests of a particular class, but also in that the ultimate aim was to transform the social relations that produced the law. For the Third World's engagement with international law, bourgeois standards of justice were held up (among others) as the motivating principles for the struggle. The aim was to correct an unjust system through the law, although this came with the general caveat that the shift in power relations brought about by independence struggles would also force this change. Both struggles encountered the form of law as hostile to their radical aims, and neither struggle succeeded in transforming the relations of exploitation with which that legal form was entwined.

## **VIII: Conclusion**

This chapter has explored the Third World's engagement with international law, in order to assess how explicitly legal praxis could have had revolutionary content. In order to do so it has presented a brief background to the rise of the Third World, paying particular attention to the hegemonic position of the United States coinciding with the rise in Third World calls for a transformed international system. It then considered the different institutional attempts by the Third World to advance their cause with their consistent focus on the international trading system as the most appropriate locus of intervention. It then examined the declarations and conventions proposed by the Third World, leading up to the declaration for a NIEO in 1974. The final section aimed to assess the potential revolutionary content of these legal measures.

Most of the movements discussed in this chapter are ongoing. There are still calls for a 'new' New International Economic order;<sup>620</sup> the 'spirit of Bandung' still lives in meetings commemorating the original conference; OPEC continues to function and in particular oil producing states in the Gulf with small official populations have accrued vast per-capita GDPs; the Non-Aligned movement still meet regularly, and India recently considered the policy implications of 'non-alignment 2.0';<sup>621</sup> UNCTAD continues to

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<sup>620</sup> Ruth Gordon, "The Dawn of a New, New International Economic Order," *Law and Contemporary Problems* 72 (2009): 131–62.

<sup>621</sup> Sunil Khilnani et al., *Nonalignment 2.0: A Foreign & Strategic Policy for India in the 21st Century* (New Delhi: Centre for Policy Research, 2012).

convene and generally attempt to offer ways in which the Third World could compete more effectively to provide profitable opportunities for international capital; it is possible that under the provisions of UNCLOS, the common heritage of mankind will eventually be exploited by large corporations and that some small sum may thereby drift in the direction of otherwise impoverished states. These facts do not speak well for the 'revolutionary' content of the Third World engagement with international law.

However, it would be unjust to reduce the movement to its surviving international legal elements. It is clear that there were many strands within the Third World movement that recognised that their objectives might not be compatible with international capitalism, and that the system as a whole would have to change. Therefore the idea of revolutionary intent cannot be completely side-lined. Even conservative critics of the NIEO as a kind of capitalism for everybody have to account for the fact that the form of the struggle happened to be the nation state and that within this structure it made sense for the oppressed to align themselves with local nationalist bourgeois elements. In this vein perhaps strengthening nationalist centres offered a potential path to revolutionary transformation. Fortunately, counter-historical speculation is not the aim of this thesis. Socialist leaning states did not fare well under American hegemony and the neo-liberal counter revolution, and those that have 'successfully' navigated their way to some kind of regional prominence, the so-called BRICS, have done so by embracing this counter-revolution.

What remains, however, is the juxtaposition of a rather less coherent revolutionary intent than the early Soviet Union with a more explicitly legal focus. Similarly to the Soviet example, the most radical of these proposals revolved around questioning the basis of wealth (property) and threatening its appropriation and redistribution. Contrary to the Soviet approach, it was the aim of the Third World to generalize these principles – at least by implication if not explicitly. However, as with the Soviet case, over time (in this instance a very short period of time) these radical legal elements were dropped and the 'contribution' of declarations, resolutions and conventions sponsored by the Third World began to look a lot like standard international legal practice, with perhaps a greater rhetorical encomium to principles of justice and equity. Interestingly by painting international law with this veneer, the idea that law and power have somehow been separated on the international stage has acquired some purchase.<sup>622</sup>

In order for this vision to gain traction, both legal indeterminacy and the broader function of what has been termed 'private' international law have to be elided. In fact, the distinction between 'private' and 'public' international law is entirely unproductive in relation to effectively assessing the revolutionary potential of the legal form, and has served, as it has for bourgeois legal theorists since the advent of liberalism, to seduce and confound progressively minded lawyers. The consequence for the Third World's engagement with international law appears to be a paradoxical one: either all revolutionary content was purged in the transition to the legal form as a site of struggle, or the project was serving only to reverse the 'gap' between international law and

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<sup>622</sup> The illustrative example, as ever, is Sands, *Lawless World*.

reality that incensed jurists like Bedjaoui. The latter would suggest that from the most naïve of legal perspectives it appears that the horrendous and exploitative world of late neo-liberal capitalism stands opposed to a weakened and enervated international law that would otherwise regulate the globe into an egalitarian paradise. Perhaps this serves to magnify the defects of the present arrangement, but it would seem that those defects are doing the job rather well on their own. The potentially revolutionary legal praxis of the Third World then fails not only the test of aiming to overthrow the order, but also on the task of disenchanting potential revolutionaries of the legal fetishism that accompanies advanced capitalism.

## Conclusion

### *Counter-revolutionary times*

Phillip Allot has described us as living in ‘revolutionary times’.<sup>623</sup> He is far from alone in using such language. Since he made that statement we have witnessed ‘revolutions’ in Tunisia, Yemen, Egypt, Libya, Syria and most recently the Ukraine. Some scholars have encouraged us to see that ‘[t]iny revolutions are everywhere, every day’.<sup>624</sup> Both Allot and those who line up alongside him to sing encomiums to revolution are not particularly precise about what it is we should be celebrating, beyond some kind of amorphous potentiality somehow present in otherwise abstract academic work, or the existence of pockets of resistance to rampant corporate exploitation. To return to the opening words of this thesis, these are strange times indeed. This idea of revolution that seems so rampant finds among its acolytes critical international lawyers, European and American politicians, and right-wing conservative commentators. It is a revolution that has, in Egypt, culminated in military rule and planned legal massacre,<sup>625</sup> in Libya involved racially motivated killings and the threat of civil war,<sup>626</sup> has left Syria in ruins,<sup>627</sup> and Yemen wracked by violence associated with Al-Qaida.<sup>628</sup> Tunisia offers the Western press a glimmer of hope with a recently written constitution as a bulwark against two years of ‘unemployment, protests, terrorist attacks [and] political assassinations’.<sup>629</sup>

If these are our revolutionary times, then there seems little reason to celebrate their coming, or hope to see tiny versions of them all over the place. This thesis has argued that such a picture rests on a serious misreading of the concept of revolution. However, this misreading does not account for the nature of our current conjecture. Poignantly, Daniel Bensaïd’s published memoirs are titled ‘an impatient life’; described in an insightful review as a ‘sober reflection on the “art of waiting” impatiently in non-

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<sup>623</sup> Philip Allot, “Review Essay Symposium: Philip Allot’s *Eunomia* and The Health of Nations - Thinking Another World: ‘This Cannot Be How the World Was Meant to Be,’” *European Journal of International Law* 16, no. 2 (2005): 257.

<sup>624</sup> Eslava and Pahuja, “Beyond the (Post) Colonial,” 129.

<sup>625</sup> Patrick Kingsley and Manu Abdo, “Anger in Egypt as 529 Morsi Supporters Sentenced to Death,” *The Guardian*, March 24, 2014, sec. World news, <http://www.theguardian.com/world/2014/mar/24/egypt-morsi-supporters-death-sentence>.

<sup>626</sup> Richard Seymour, “Libya’s Spectacular Revolution Has Been Disgraced by Racism,” *The Guardian*, August 30, 2011, sec. Comment is free, <http://www.theguardian.com/commentisfree/2011/aug/30/libya-spectacular-revolution-disgraced-racism>; Owen Jones, “Libya Is a Disaster We Helped Create. The West Must Take Responsibility,” *The Guardian*, March 24, 2014, sec. Comment is free, <http://www.theguardian.com/commentisfree/2014/mar/24/libya-disaster-shames-western-interventionists>.

<sup>627</sup> Martin Chulov, “Syria’s Heritage in Ruins,” *The Guardian*, January 26, 2014, sec. World news, <http://www.theguardian.com/world/2014/jan/26/syria-heritage-in-ruins-before-and-after-pictures>.

<sup>628</sup> Associated Press, “Yemen Bus Bomb Kills Two,” *The Guardian*, February 4, 2014, sec. World news, <http://www.theguardian.com/world/2014/feb/04/yemen-bus-bomb-kills-two>.

<sup>629</sup> Associated Press, “Tunisia Signs New Constitution,” *The Guardian*, January 27, 2014, sec. World news, <http://www.theguardian.com/world/2014/jan/27/tunisia-signs-new-constitution-progressive>.

revolutionary times'.<sup>630</sup> Maybe it is an inability to contain a similar impatience that leads the more progressively inclined to make strange bedfellows with the Angela Merckels of this world. Whatever the reason, the idea that Bensaïd's life spanned non-revolutionary times gives cause for reflection. The concept of revolution argued for in this thesis refers to a political programme aimed at bringing to pass a dream of emancipated human life, free from the particular oppressions and exploitations that are the heart of capitalism. Further it has argued that this was a political programme that tied theoretical reflection to political practice in the unity of praxis. A necessary component of such praxis is the constant critical assessment of the world around us with a mind to finding a way of advancing that revolutionary cause. In this frame, conceiving of a moment or a period as non-revolutionary is less a descriptor of some empty historical pause, but a rather a recognition that revolutionary success is beyond the horizon. A more accurate description of such times that captures the struggle involved would be 'counter-revolutionary times'. In the frame of this thesis these are the times we face.

### *The importance of reclaiming revolution*

It is a sign of the strength of the counter-revolution that the very concept of revolution itself has to be rescued from its grasp. In part, this has been a necessary task of this thesis. Chapter One devoted itself to the 'reclaiming' of revolution for this purpose. It argued that not only was there a greater historical fidelity in this interpretation of revolution, but that it was also politically necessary and enabling to reclaim the concept from its amorphous contemporary role as a catch-all for social upheaval. By reclaiming revolution's socialist heritage the possibility of aspiring to do *more* than resist the oppressive onslaught of social and environmental destruction re-enters the frame. However, it also serves a crucial further purpose for this thesis. It offers a way of assessing the possibility of international law to serve this goal. In this sense this thesis situates itself in dialogue with those critical international legal scholars with left politics who present valuable critical accounts of international law yet tend towards an unqualified assumption in the law's emancipatory potential when it comes to their prognosis. By stressing the concrete nature of revolutionary goals, it is possible to assess with greater depth the compatibility between legal means and revolutionary ends.

Chapter One also described the necessary connections between historical agency, empirical analysis and theoretical work. The concept of revolution deployed in this thesis captures the unity of all of these elements in revolutionary praxis. A significant component of this move is to recognise that historical and conceptual interpretation is not a neutral process. Just as theory is always for something and for someone so too historical interpretation is itself situated within a political struggle and a historical moment. This work can open up political horizons and imaginative possibilities as well as reclaiming concepts from politically disabling trajectories. This process itself is equally a terrain of struggle. In a cautionary note, as far as academic work is concerned

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<sup>630</sup> Jeffrey Weber, "Contra the Blasé Wisdom of Sober Old Men," *Socialist Project*, March 24, 2014, <http://www.socialistproject.ca/bullet/955.php>.

it should never be conflated with more serious challenges to oppressive systems, but in counter-revolutionary times it becomes increasingly necessary. The essential companion to this move is empirical work that attempts to trace historical possibility with a mind to informing the tactics of contemporary political engagement. Chapter One stressed that the birth of capitalism and the modern era were accompanied by both the critical analysis of the capitalist system and the dream of transcending it. The concept and practice of revolution referred precisely to this analytical and practical programme.

*The possibility of revolutionary praxis as legal praxis*

Chapter Two coupled this vision of revolutionary praxis with international legal praxis. This Chapter assessed the lure of legal struggle through the apparent lack of necessity behind law's regressive moments. The ambiguity in the law's function between the ideal of justice and equality and the reality of power and inequity create space for a vision of law's emancipatory and revolutionary potential. International law seems open to the praxis of progressive and critical international legal academics, and thus it appears to be a critical move to imagine international law as praxis. Entertaining the belief that it is an act of imagination that makes international law a form of praxis suggests that without such imaginative intervention the international law had no existing connection to conscious group activity tied to a political vision; in other words, that there is a disconnect between political (ruling) class projects and the law. It also has a further critical consequence. It serves to elide the connection between lawyers and legal academics and their day to day participation in said praxis.

At times 'imagining' the international law is practice serves to render as neutral the majority of the time in which the hypothetical legal academic is participating in the construction and maintenance of this praxis. This does not mean that your average lawyer, or even legal academic, directly theorises their position, but that beginning to do so does not as a consequence open up that terrain to previously incompatible revolutionary praxis. This connects quite directly to the main impulse behind the question this thesis seeks to answer. Progressive international lawyers hold out significant hope for the transformative potential of their legal praxis, once awareness is shifted to accommodate the fact of its existence *as praxis*. Yet as Chapter Two makes clear, there is a relative absence of a critical understanding for why international law in its 'active' moments tends to operate in manner consonant with oppression and exploitation despite their being no apparent 'reason of principle' for this to be so.

Chapter Two also offered a summary of the critical work that has been done in international legal theory that has highlighted the indeterminate nature of international law, and argued that it is this persistent indeterminacy that leaves the legal form apparently open to the emancipatory content progressive legal academics are so keen to pour into it. This chapter offered a brief summary of complementary work that has located the determining influence upon international law in its imperialist, gendered and racist underpinnings. As valuable as this critical work is, it does not provide us with a direct understanding of why the legal form itself functions in this way. The

indeterminacy of the legal form still appears to offer moments when the international law can serve emancipatory or revolutionary purposes. Crucially this thesis is not arguing that this can never be the case, but that such victories are both *exceptional* and *temporary*. In assessing how open the legal form is to revolutionary praxis, this is inadequate. In order to move beyond such an impasse, this Chapter offered a presentation of Pashukanis's commodity form theory, substantially influenced by Miéville's comprehensive application of this theory to international law. The theory notes the heart of the legal form in the 'private' relations of exchange; the law being simply the other side of this 'economic' relation. Crucially Pashukanis notes the 'gravity' of this central nature of law. Although temporary measures that serve emancipatory ends may 'congeal' into law at various points, this runs against the grain of the dull compulsion of the law. This theoretical frame leads to the expectation of law serving revolutionary purposes to be rare and always open to renegotiation and reversal. Such a position gives significant cause to reject legal struggle as a primary location for advancing revolutionary aims.

### *Fundamental legal relations*

Chapter Two concluded that such a position did not mean that there was no space for legal praxis as part of a revolutionary strategy. The pervasive nature of law under capitalism means that it would be yet a further form of fetishism to eschew legal struggle out of some kind of revolutionary moralism. Pashukanis reiterated Lenin's pragmatic approach to legal struggle in this instance, prescribing the revolutionary to take advantage of every legal opportunity yet resist investing the revolutionary struggle in the form of law – a principled but opportunistic approach. This seems relatively straightforward, but it within the actual frame of legal argument there is little to distinguish such practice from standard legal practice that happens to be arguing for a 'revolutionary' position. Such work may prove invaluable at certain points, but it importantly fails to address two aspects of legal struggle: the investment of time, energy and effort in that arena that could be spent more productively elsewhere; and the inevitable consequence of legitimising legal structures via their engagement.

Legal praxis with a revolutionary orientation must then be defined by walking the line between the tactical use of the law to advance immediate causes, the de-legitimation of the law as complicit in oppression, and the aimed overthrow of the system alongside the law that is a constituent part. Chapter Two noted that certain legal theorists have touched on this, particularly in that most critical work has served to de-legitimate or 'disenchant' the law. However, the 'overthrow' of the law continues to appear to have little to do with legal practice itself, which would imply that in its own terms legal praxis could not be revolutionary. However, this Chapter discussed the possibility of a challenge made within legal argument to those relations most central to the law, especially given the insights of the commodity form theory. Those 'essential' legal relations, in both the commodity form theory and other critical engagements, are at heart property and contract. This gives rise to the possibility of advancing as 'norms' principles which are inimical to the operating of capitalism: in essence those that challenge the basis of exchange relations (property and contract) and the availability of

human labour as a commodity. Setting the bar somewhat lower, legal principles that had the logical consequence of tending in this direction might have some potential to serve a similar purpose.

*Soviet legal practice: between pragmatism and revolution*

Chapter Three then aimed to assess the engagement of the early Soviet Union with international law in the light of this consideration. The Soviet example provided some interesting confirmations of the above theoretical frame. Firstly it was undeniable that early Soviet international legal practice and theory had an explicit connection to revolutionary aims as presented in this thesis. One consequence of this has been a persistent interpretation of the Soviet 'approach' to international law as being distinct from 'standard' engagements. This Chapter discussed various reasons for this, highlighting their proximity to attempts to rehabilitate international law as a universal project by constructing it as some kind of multi-cultural enterprise. However, the central point for this thesis is that this scholarly approach elided the persistent invocation of rather traditional legal arguments by the Soviet state. The Soviet state decried its early diplomatic isolation, the violation of its territorial integrity and the fostering of counter-revolution within its borders. Pashukanis noted explicitly that to claim the Soviets disregarded customary international law was to attribute to it a doctrine it had not expressed. The Soviets made counter-claims to those held against them in regard to expropriated property, as well as arguing for particular and unique circumstances behind the appropriation. These claims were also settled in various bilateral treaties over the course of the following years – persisting long after the Soviet state itself, as noted with regard to the claims of French bond-holders.

However, this did not mean that there was no revolutionary content to Soviet legal praxis. Following the discussion above we would expect revolutionary legal praxis to look rather like standard legal practice – it is, after all, legal praxis. The question would remain if there was any truly destabilizing content to the legal positions adopted by the Soviet state, and whether or not this was accompanied by a move to de-legitimize international law. Chapter Three demonstrated that the latter was clearly the case. Common to both the radical and more conservative elements in the commodity form school was the perception that international law was law made by and between capitalist states. Soviet legal practice continually pointed to this fact. However it also relied on legal arguments to defend its position vis-à-vis intervention and political exclusion. The closest Soviet international legal practice came to destabilizing the international legal and capitalist system was in the large scale renunciation of debt and refusal to compensate for expropriated property. Yet the legal arguments made by the Soviet state in this instance were couched in terms of Soviet exceptionalism. This made them more plausible as legal arguments at the time, yet removed their revolutionary potential. As discussed above, exceptions offer no threat to the general rule.

### *Third World legal practice: between idealism and revolution*

The Third World's engagement with international law offered more potential in this regard. Chapter Three stressed that the Third World's call for a New International Economic Order was, in the words of Thomas Franck, an attempted 'revolution of laws rather than of men'. Against this rather anodyne interpretation, this Chapter stressed the bloody and protracted nature of the Third World's struggle against repeated colonial intervention. The Third World's engagement with international law was simultaneously a struggle for independence, formal recognition and recompense for the centuries of exploitation they had endured. The Third World's approach to international law focused on institutional engagement and construction, coupled with a complementary push for international declarations and resolutions that expressed their objectives. Yet this engagement was also an attempt to construct relationships between newly liberated states that would challenge and oppose the dominance of their exploiters. This Chapter stressed that, above everything else, the rise of the Third World and its engagement with international law was dominated by the push for the redistribution of wealth – of the need for the 'haves' to defend their position against the 'have-nots'.

Atop this basic antagonism the Third World's approach involved important differences to the Soviet engagement that foregrounded the legal aspect of the Third World's struggle. They made similar claims to the right to nationalize property and renege on debt, but their struggle attempted to formalize these as principles in international declarations and resolutions. Chapter Three charted the evolution of this approach through the institutional initiatives of the Third World, from Bandung in 1955 to the subsequent foundation of the Non-aligned Movement, the G-77 and UNCTAD, and in particular the formation of OPEC and its (in)famous 1973 oil embargo. The declaration for the NIEO in 1974 came at the apparent highpoint of the Third World's strength on the international stage. The NIEO and the Convention on the Economic Rights and Duties of States contained a series of radical provisions demanding the right to nationalize without compensation, the need to cancel debt, and the liability of imperialist states for their colonial deprivations.

However, none of these declarations were ever paired with concrete mechanisms for implementation; they were resolutely opposed by developed countries, and over time the more radical elements were dropped and the remaining provisions seen accurately as largely declaratory of existing practice. The institutional efforts of the Third World either failed to acquire sufficient weight on the international stage, or shifted focus to accommodate the interests of international financial capital. Although the success of OPEC demonstrated the insatiable international demand for oil, it also demonstrated the structurally disadvantaged position of the Third World as a whole in which temporary trade gains did not fundamentally alter the international economic order. Financial surpluses were recycled through Western financial institutions, rising commodity prices disproportionately affected the Third World, and many members of OPEC had closely aligned interests with the West leaving the cartel vulnerable. The Chapter argued that OPEC is better understood in the general context of the dramatic

rise and fall in commodity prices that continued to plague Third World economies. Overall Chapter Three concluded that the radical provisions of the Third World's international legal engagement failed to have any impact and were later dropped, and that their institutional initiatives suffered a similar fate. In addition to this, the frame through which the Third World viewed the *potential* legal order served to re-enchant the form of law after their initial work of unveiling it as capitalist and imperialist.

*The vulnerable heart of law: property and contract*

Together the two examples of the Soviet and the Third World's engagement with international law imply that the form of law offers limits to revolutionary praxis. Although both engagements contained radical provisions and possibilities these gained no purchase as legal principles. In nearly all other respects the legal practice of both the Soviets and the Third World movement mirrored that of their contemporaries. Soviet international legal practice shed its more radical elements relatively swiftly. In addition to which, the Soviet repudiation of debt and expropriation of property were based on an exceptionalism that neutered the destabilizing potential of these positions. The Third World's approach to international law lost much of the confrontational style of the 1970s in the subsequent decades, and the more radical elements of the NIEO, CERD and their institutional bodies never achieved much force on the international stage. The problematic international economic order identified by the NIEO remains firmly in place. In addition to which the Third World's approach invested significant reformist hope in the form of law, thus failing the first step of revolutionary praxis suggested in Chapter Two.

However, the combination of the two provides a window onto what revolutionary praxis on the international stage might look like, based on the considerations of Chapter Two. Legal initiatives that challenged the essential legal relations of property and contract were those that met the most opposition internationally, but also those that encountered a legal system that seemed to find them inimical to its function. The response from the developed world demonstrated both a reluctance to have positions of power altered within the system as it was, yet also their doubts as to the functioning of capitalism if such redistributive behaviour was normalized. As was recognised at the time, at their heart both of these moves represented a method of redistributing wealth. There are then two ways of approaching this issue. Firstly as an exceptional case. In this instance, there is certainly no problem within international law or in capitalist relations for one person to lose their wealth to another. But as discussed in Chapter Four, it is unclear how this would function as a general legal principle. If debt is risky, the value of the premium goes up, along with the expected returns to the lender. Similarly, capital investment in areas liable to expropriation will face higher risk premiums and investors will expect greater returns to lure them in. These are relatively straightforward market mechanisms for preserving the rate of return on capital, but they also serve to stymie the transfer of wealth.

Like law, the 'market' isn't uniform in this sense (or really separate from law). But it doesn't need to be uniform in order to follow a basic pattern. The logic and function of

capitalism as a system is simply evident in the world around us, and although the process might be uneven it nevertheless combines to present a coherent picture. Somehow, such coherence hasn't prevented the location of hope in the fact that it does not *have* to be this way. Crucially, progressive economists mirror legal progressives in their expectation that there is no 'reason of principle' for the 'market' to operate in such a manner.

One might think the system would shift money from rich countries, where capital is in abundance, to those where it is scarce, whilst transferring risk from poor countries to rich ones, which are most able to bear it... Through an orderly bankruptcy procedure, a well-functioning financial system would grant a fresh start to those who cannot meet their debt obligations, giving creditors an incentive to pursue good lending practices while ensuring that borrowers able to repay loans do so. The current global financial system does none of these things.<sup>631</sup>

One might indeed think that the 'system' might do other than what it does, but this seems an extension of the expectation that the function of law will align with a particular vision of 'justice'. The argument of this thesis is that there is no reason of theory or past experience to continue to entertain such fantasies. Historical studies, like Piketty's extensive and highly popularized study, demonstrate that historically the rate of return on capital has remained relatively steady.<sup>632</sup> In addition to this, Piketty cites several occasions where successful redistributions of wealth within states have been undone at a later date – the most poignant being the émigré's billion in 1825 that compensated returning French aristocracy and landowners for losses during the revolution. Claiming that there is no reason of principle for such a record seems dubious to say the least. When we add to this the Russian payment of Tsarist debt to French debtors in 1994, the persistence and strength of such property claims is startling. All it takes is a shift in political power to make vast payment from the public purse to private hands. For some reason, the revolutionary reversal of such a move remains absent from public debate, despite the prevalence of its occurrence in the interests of private wealth.

It does seem that the legal form's root in exchange relations and the essential nature of property and contract mean that the law structures the same tendencies towards accumulation and dispossession that we see in the history of capitalism. However, there is one possible crack in this edifice that might point towards the possibility of legally structured struggle; the vulnerable heart of law in property and contract. Pashukanis's insightful recognition that law spreads with capitalist relations, and that property 'ceases to be weak, unstable and purely factual' offers a need for the law to develop capitalist relations beyond the incessant necessity for defence *vi et armis*. At the very least, forcing that battle to be fought would present some significant disruptive

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<sup>631</sup> Joseph E. Stiglitz, "Dealing with Debt: How to Reform the Global Financial System," *Harvard International Review*, 2003, 54.

<sup>632</sup> Thomas Piketty and Arthur Goldhammer, *Capital in the Twenty-First Century: The Dynamics of Inequality, Wealth, and Growth* (Cambridge Mass.: Harvard University Press, 2014).

potential. There is still small potential in the law to question how and what came to be owned by who and where.

This doesn't leave much by way of a role for the legal theorist – other than perhaps to drive home the problematic nature of the legal form. But such activity looks very much like an attempt to disenchant, with all its attendant problems of potential re-enchantment. It also comes very close to conscience salving work for Harvey's bleeding heart liberal. If the law's conservative nature is recognised, what then? We face once more the nightmare of the structurally determining conditions that envelop us. It is a difficult task of theory and practice to even begin to conceive of horizons beyond those that loom before us in the shape of continued capitalist exploitation and environmental degradation. In general, the lawyer or the legal academic is already a step removed from the impulse to conceive of such horizons.

Althusser described a similar process for the revolutionary intellectual. Whereas those on the frontline of exploitation encountered conditions that foregrounded their struggle as wage labourers, intellectuals generally existed in conditions that fostered a different kind of consciousness. Their class-instinct would be influenced continually by the apparent gap between intellectual labour and manual labour, and by their comparatively more comfortable social position. As such it would take constant and incessant effort to maintain a consciousness that stayed both critical and committed to acting on that critical insight, against the daily realities of relative social privilege. Althusser noted that in order to serve the working class or the proletariat,

intellectuals have to carry out a radical revolution in their ideas: a long, painful and difficult re-education. An endless external and internal struggle... Intellectuals, [contrary to the proletariat], have a petty-bourgeois class instinct which fiercely resists this transition.<sup>633</sup>

This does not mean that legal scholars and members of the legal profession are necessarily reactionary, especially considering the ways in which neo-liberal restructuring has changed the labour conditions of those more socially minded members of the profession. But revolutionary praxis may well be opposed to the investment in the identity of the lawyer. Although Lenin saw no problem in making use of the law for revolutionary ends, he did so with a very particular image of the legal profession itself – this is something to bear in mind when investing legal struggle with revolutionary potential.

As to lawyers. Lawyers should be kept well in hand and made to toe the line, for there is no telling what dirty tricks this intellectualist scum will be up to.

They should be warned in advance: Look here, you confounded rascal, if you permit yourself the slightest impropriety or political opportunism (if you speak of socialism as something immature or wrong-headed, or as an infatuation, or if

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<sup>633</sup> Althusser, *Lenin and Philosophy and Other Essays*, 13–14.

you say that the Social-Democrats\* reject the use of force, speak of their teachings and their movement as peaceful, etc., or anything of the sort), then I, the defendant, will pull you up publicly, right then and there, call you a scoundrel, declare that I reject such a defence, etc.

The lawyers, as Bebel, I believe, said, are the most reactionary of people.<sup>634</sup>

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\* The Russian Social Democratic Labour Party was the revolutionary socialist party led by Lenin.  
<sup>634</sup> V. I. Lenin, *Collected Works*, ed. V. J. Jerome, trans. Bernard Isaacs and Isidor Lasker, Fourth Printing, vol. VIII (Moscow: Progress Publishers, 1977), 68.

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