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# *International Judicial Activism and the Commodity- Form Theory of International Law*

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China Miéville. ***Between Equal Rights: A Marxist Theory of International Law***.  
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## **Abstract**

*In his book Between Equal Rights: A Marxist Theory of International Law, China Miéville revisits the work of 1920s Russian jurist E. B. Pashukanis to develop a 'commodity-form' theory of international law. The theory serves as a valuable and instructive counterpoint to influential currents in international legal scholarship. However, this essay argues that Miéville is unnecessarily negative about the prospects for international law to contribute to progressive change. Central to his thesis is the critical insight that international law is indeterminate. He maintains that 'for every claim there is a counter-claim and "legalistic" [anti-imperialism] is therefore ultimately toothless'. By contrast, this essay contends that indeterminacy and its antipode, determinacy, are not properties of international law. Rather, they are arguments, the emancipatory force of which is not fixed, but context-dependent.*

On 17 November 2006 the United States Secretary of Homeland Security, Michael Chertoff, made a speech at the Annual Lawyers Convention of the Washington DC-based Federalist Society, in which he addressed the subject of international law.<sup>1</sup>

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<sup>1</sup> See [http://www.dhs.gov/xnews/speeches/sp\\_1163798467437.shtm](http://www.dhs.gov/xnews/speeches/sp_1163798467437.shtm). I am grateful to Mark Pallis for drawing my attention to this speech.

Chertoff began on terrain that would have been more familiar to his audience. Himself a lawyer, he recalled the shift that had occurred in United States judicial policy since he first began his career in the 1970s. A backlash had occurred against the ‘judicial activism’ of the 1960s and 1970s, and an ethos of ‘judicial restraint’ – a greater sensitivity to the limits of the judicial function, a more modest approach with respect to the decisions of democratically elected legislators – had come to prevail in the Supreme Court. Chertoff noted that this was in no small measure due to the efforts of people like the members of the Federalist Society, but he said there was no room for complacency, for now a new challenge had arisen which he invited his audience to confront. This was ‘the rise of an increasingly activist, left-wing and even elitist philosophy of law that is flourishing not in the United States but in foreign courts and in various international courts and bodies’.

Chertoff gave the example of ‘passenger name record data’. In order to enhance its capacity to identify people entering the United States who have connections with terrorists, the Administration sought access to information provided to airline companies and travel agencies by passengers when they purchase air tickets (address, telephone number, credit card details, etc). Insofar as the information would come from Europe, this had led to difficulties because certain members of the European Parliament had objected on privacy grounds. Chertoff reported that in fact these difficulties had been resolved satisfactorily. But he explained that the incident focused his attention on the extent to which ‘what happens in the world of international law and transnational law increasingly has an impact on my ability to do my job and the ability of the people who work in my department to do their jobs’. Chertoff noted that this is not a new phenomenon. In 1986 the International Court of Justice had ruled against the United States in a case brought by Nicaragua, brushing aside the fact that, as he put it, the Court ‘didn’t really have jurisdiction’ to deal with the complaint. Equally, he recalled that this is not a phenomenon that only affects the United States: Israel too has felt the vigour of international judicial activism. In a recent Advisory Opinion, the same court used what he characterized as a ‘hyper-technical reading’ of the UN Charter to deny Israel’s right to protect itself from the threat of terrorist attacks from Palestinian territories.

Chertoff’s point was not that nothing good can ever come out of international law. He cited aviation and maritime security as among the areas where international law can be very beneficial. Rather, his aim was to highlight the emergence of a ‘very activist, extremist legal philosophy’, on the basis of which vague and ambiguous norms of supposedly universal application were being used to trump domestic prerogatives. He observed that this was all the more troubling when you consider who interprets international law: in his words, judges of international courts who have not been ‘appointed or ratified by our legal or political process’, committees like the Human Rights Committee and other UN organs that ‘take some of the impetus for their view of international law from countries like Cuba and Zimbabwe’, and ‘international law experts or self-styled experts, [which] basically means law professors’. Warning that ‘international law is being used as a rhetorical weapon against us’, and that ‘we are constantly portrayed as being on the losing end, and the negative end of international

law developments', Chertoff concluded with an appeal to his audience to recapture the initiative.

## 1 Four Visions

I am going to leave this speech there and return to it later. All I want to say for the moment is that, although the Secretary of Homeland Security spoke harshly of law professors, it seems safe to assume that he has more time for some of us than others. For his remarks resonate strongly with arguments that have been advanced by a number of professors at highly rated US law schools, among them Jack Goldsmith of Harvard and Eric Posner of Chicago. In a recent book, Goldsmith and Posner argue that, while international law 'is a real phenomenon', and can contribute to world order, its power and significance have been exaggerated by international legal scholars.<sup>2</sup> In their assessment, 'international law emerges from states acting rationally to maximise their interests', and the best understanding of it is one that takes into account the limits of what law can achieve against this background of state self-interest and rational choice. Goldsmith and Posner associate themselves here with a longstanding current in thinking about international law, especially (though not exclusively) in the United States, updated to incorporate the rational choice perspective that is today so prominent in US policy circles. At the same time, these two authors set themselves apart from what they are probably right to suggest is (or at any rate has been) the 'mainstream' in contemporary approaches to international law.

In their book Goldsmith and Posner mostly identify that mainstream with other American scholars, such as Thomas Franck, Harold Koh, and Abram and Antonia Chayes. On this side of the Atlantic, however, mainstream scholarship recently received a very lucid and high-profile exposition in the work of Philippe Sands. As will be well known to many readers of this journal, Sands's contention is that we live today in a 'lawless world', in which power-politics, or more specifically the politics of one uniquely powerful state, has eclipsed respect for international law.<sup>3</sup> Whether one focuses on the Iraq War, Guantánamo Bay, Abu Ghraib, the International Criminal Court, the Kyoto Protocol, or the torture memos, for Sands the general trend is clear: the United States, with the collaboration of the United Kingdom, has launched an assault on international law – in his ringing phrase, a 'war on law'.<sup>4</sup> Sands insists that it was not always so. In the 1940s, the Atlantic Charter reflected the commitment of the United States and its allies to 'replace a world of chaos and conflict with a new, rules-based system'.<sup>5</sup> He seeks to promote a renewal of that commitment. While he is 'not starry-eyed about international law' and recognizes that 'on occasion it has failed millions around the world and will continue to do so',<sup>6</sup> he wants us to see

<sup>2</sup> J. L. Goldsmith and E. A. Posner, *The Limits of International Law* (2005), at 225.

<sup>3</sup> P. Sands, *Lawless World: America and the Making and Breaking of International Rules* (2005).

<sup>4</sup> *Ibid.*, at xii.

<sup>5</sup> *Ibid.*, xi.

<sup>6</sup> *Ibid.*, 21.

that '[i]mperfect as some of the international rules may be, they reflect minimum standards of acceptable behaviour and . . . provide an independent standard for judging the legitimacy of international actions'.<sup>7</sup>

In what I have said so far, I have evoked two very influential visions of international law: one a neo-conservative (realist) vision in which international law has some value but is not ultimately a determining force in global affairs; the other a progressive (liberal) vision according to which international law could replace chaos and conflict if only powerful states would become more committed to respecting and enforcing it. Marxist theorist China Miéville repudiates both those visions of international law. In his important book *Between Equal Rights* he lays out a radical, third vision, according to which international law is a determining force in global affairs but it lacks the capacity to further a just international order. For Miéville, emancipatory change cannot be secured through law: what is needed is the '[eradication] of the forms of law', and all efforts to use international law to promote justice and curb violence are misdirected and 'self-defeating' (at 318–319). The book takes its title from a line in Marx's *Capital*, where Marx observes that capitalism is structured around 'an antinomy of right against right' (the capitalist's right as purchaser of labour and the worker's right as seller of it), on the basis that 'between equal rights, force decides'.<sup>8</sup> Miéville's argument centres on the point that this same combination of equal rights and coercive decision likewise defines international law. In developing his claim, he proposes a theory of international law that draws on, and reformulates, the 'commodity-form' theory of law elaborated in the 1920s by Russian jurist E. B. Pashukanis.

I share Miéville's sense of the inadequacy of the neo-conservative and progressive visions of international law. To my mind, he is certainly right to maintain that international law is not simply a sideline or footnote to power-politics, but nor is it the key to global justice and social harmony. Rather, as I learned to recognize above all from the remarkable writings of David Kennedy and Martti Koskenniemi, international law is a constituent of politics, and (*pace* Sands) if it has failed and goes on failing millions, this is not 'on occasion', but overwhelmingly and systematically. Put differently, if we live in a world of chaos and conflict, that is not in spite of international law, it is in part because of it. Miéville develops this point with great force, and contributes very significantly to our understanding of what lies behind it and how it can be explained. But while I find his account immensely illuminating and in important respects persuasive, I cannot accept his contention that international law has no emancipatory potential. Miéville is very aware of the position I take up here. Reflected in it is yet another – a fourth, we might call it 'critical' – vision of international law, which draws inspiration from a range of analytical traditions that include deconstruction, ideology critique, and feminist theory. And, in contrast to neo-conservative and progressive scholars who are only or largely in conversation with one another, he takes critical writing seriously. In what follows I will try to articulate some of the doubts which leave me less than fully convinced by his defence.

<sup>7</sup> *Ibid.*, 238.

<sup>8</sup> *Capital*, Vol. 1 (1973), at 344.

## 2 Force Decides

Let me first outline Miéville's argument in a bit more detail. I begin with some theoretical premises. One key starting-point for his analysis is the observation that approaches to international law are very frequently characterised by idealism. Miéville employs the term 'idealism' here in the special sense inaugurated by Karl Marx, when he criticized as idealists those who contemplate the world in a manner that implicitly overstates the autonomous power of ideas. As is well known, Marx insisted instead on the need for a 'materialist' form of inquiry – one that investigates the social conditions in which ideas develop and become useful. When Miéville highlights the idealism of approaches to international law, what he thus has in mind is their tendency to take ideas and interpretations at face value, their failure to delve deeper and ask 'why those ideas at that time' (at 4).<sup>9</sup> Linked to this, Miéville also signals the importance for the study of international law of the Marxist concept of 'totality'. This refers to the expansive, integrative nature of capitalism and to its globalizing tendencies, which compel us to consider the entire world as a dynamic whole. More generally, it refers to the notion that a social phenomenon cannot be properly understood unless it is viewed within the context of the larger social forces that create the conditions for its emergence and development. In deploying the concept of totality, Miéville calls attention, then, to the need for a complex kind of analysis that relates international legal rules to the wider processes through which their interpretation is shaped and enabled.

This leads to a further important point. As was already evident in my earlier discussion, both mainstream international legal scholars and their neo-conservative critics view international law as a body of rules. While progressive scholars lament non-compliance with those rules (imperfect though they are acknowledged to be), neo-conservative scholars maintain that compliance is a function of rational choice, and that international law can never override national self-interest. Either way, the issue is rules and the extent of, and basis for, compliance with them. From what I just said, however, it is apparent that this can be criticized as idealist. To treat international law as a body of rules is to treat it as an autonomous thing, and to set aside the larger questions associated with its grounding in material reality, including ultimately its grounding in the complex material reality of the world as a whole. For Miéville, a more adequate approach is one that considers international law as a process. In this alternative conception, law is seen as 'inextricably part of politics' (at 38).<sup>10</sup> Rather than being a static benchmark against which to judge politics (as legal or illegal, compliant or non-compliant), it becomes a dynamic element within political life. Thus, the accent falls not on compliance, but on interpretative practice. Miéville associates this perspective with Myres McDougal and the New Haven 'policy science school'. But he observes that McDougal remained an idealist inasmuch as he failed to investigate the specificity of the legal form; he failed to account for international law as a distinct element within political processes (why these ideas at this time?). This is the task that Miéville sets for himself.

<sup>9</sup> Emphasis omitted.

<sup>10</sup> Emphasis omitted.

What, then, is Miéville's theory? Taking his cue from Pashukanis, he proposes that, as a general matter, the legal form presupposes and tracks the commodity form. Legal relations are relations between people as owners and exchangers of commodities (labour, money, goods, etc.), and law as a regulatory system became generalized under capitalist conditions of generalized commodity exchange. This applies equally to international law. As Pashukanis explains, '[s]overeign states co-exist and are counterposed to one another in exactly the same way as are individual property owners with equal rights'. In the international legal system 'the necessary conditions for the execution of exchange, i.e. equivalent exchange between private owners, are the conditions for legal interaction between states'.<sup>11</sup> And presupposed in those conditions is the possibility of asserting one's rights, and, if necessary, enforcing them, that is to say, backing them up with force. In Miéville's words, '[a]t the very moment of legal action, a subject implies "political" action in the form of direct coercive violence' (at 150). Examining the history of international law, he describes at some length the changing (but also in key respects constant) relationship between international law and coercive violence in the shape of imperialist adventure and colonial rule. In his assessment, moreover, this is an ongoing history, which by no means ended with the retreat of formal empire. If the rule of law is supposed to replace the terror of the jungle, he wants us to recognize instead the inseparability of imperialist domination and international law – and to recognize this not just as an historical contingency, but as a structural, systemic feature: '[t]he chaotic and bloody world around us is *the rule of law*' (at 319).<sup>12</sup>

Miéville's conclusion is that the 'systematic amelioration of social and international problems cannot come through law' (at 318). If people writing about international law have generally failed to acknowledge this, he observes that the vast majority of them are lawyers or jurists, and 'it would be biting the hand that feeds them for international lawyers to say that international law is . . . fundamentally unreformable' (at 3). Miéville makes very clear that there is a spectrum of views. Some scholars – and he focuses in particular on the work of Martti Koskenniemi – are keenly aware of the indeterminacy of international law and its capacity to legitimate projects of questionable social utility. But he considers that the distinctive eclecticism of Koskenniemi's and other critical scholarship – its multiplicity of influences and reference-points – 'stands in the way of [these writers] developing rigorous, systematic analyses of international legal indeterminacy'. There are 'powerful critical tools, but a poverty of systematic *theory*' (at 56).<sup>13</sup> This leaves critical scholars without any way of understanding the structural constraints that condition international law's transformative potential. Instead, their hopes are allowed to depend on the idea that a 'moment of imperialism can be abstracted away from the whole structure and process'. However, for Miéville, this is a delusion: '[t]o try to pick pieces of imperialism to support and others to condemn is to fail to deal with it as a totality' (at 275).

<sup>11</sup> Pashukanis's text is reprinted in the Appendix to Miéville's book, at 329.

<sup>12</sup> Emphasis in original.

<sup>13</sup> Emphasis in original.

To illustrate his claim, Miéville examines the role of law in the first Gulf War of 1990–1991. As he recalls, both sides in the conflict justified their action with reference to international law. While Kuwait and its allies relied on the right of self-defence and on UN Security Council authorization, Iraq appealed to norms concerning territorial title and intervention by invitation (among other legal grounds). Whatever the factual validity of Iraq's assertions at that time, both sets of arguments were formally correct to the extent that they deployed established categories and were professionally intelligible. Miéville then writes: 'For every claim there is a counter-claim, and 'legalist' opposition to the war is therefore ultimately toothless' (at 281). He continues: 'The dynamic of [legal] argument resolves nothing . . . [R]esolution is not the result of the internal logic of the concepts, but represents interpretation backed by force' (at 282, 284).<sup>14</sup> Miéville certainly acknowledges that local successes are possible, and have occurred. For example, developments in international criminal law mean that Henry Kissinger must be careful where he travels. But Miéville emphasizes that there is no expectation that Kissinger could actually be successfully prosecuted. With this in mind, Miéville comments that the apparent triumph of international law in cases such as this is in fact a triumph in the 'court of public opinion'. It occurs 'outside the arena of international law'; it is a 'Pyrrhic, extra-legal victory', which only serves to underscore the inefficacy of international law as a strategy of counter-hegemonic action (at 297). Likewise in the context of the second Gulf War. Those who argued that the war was illegal could not 'back up their interpretations with force. The . . . War went ahead, with the British and American Governments insisting it was legal: this was actualised international law' (at 296).

### 3 Some Doubts

What I wonder about in all of this is the conclusion which Miéville draws from his analysis – his bottom line, to use a popular (if, when applied to Marxist theorizing, slightly jarring) phrase. I accept his theoretical premises unreservedly. To me they indeed illustrate the very real and ongoing pertinence of Marxist concepts and categories for the study of international law. He is surely right that approaches to international law are shot through with idealism. One could multiply the examples, but to give just one from a field of international law with which I am familiar: it is a common feature of discussions of human rights that we speak of the need for governments to respect, protect and fulfil human rights in a manner which makes the failure to do so seem like a mere matter of inadvertence or misapprehension. The talk is of getting governments to understand their obligations better and become more attentive to them, and only rarely do we consider the reasons why those governments are interpreting their obligations as they are. Only rarely do we communicate and investigate the reality that human rights must be fought for and won. We need to become better at looking behind interpretations and examining the conflictual social conditions in which they emerge and are sustained. In this regard, it is worth noting that

<sup>14</sup> Emphasis omitted.

materialism is an analytical orientation, rather than an achievable state of affairs. No analysis can claim to be fully materialist, and the critique of idealism is, accordingly, ongoing and pervasive.

I also have little difficulty in accepting Miéville's explanatory account. Again, I find in it indeed a reminder that those who seek emancipatory change ignore the possibilities of Marxist analysis to their cost. His account revolves, as indicated, around the idea that international law presupposes conditions of equivalent exchange that include both sovereign equality and decisive force. Certainly, he is by no means alone in calling attention to the enmeshment of law with violence (one may think of the influential writings on this theme by Walter Benjamin and more recently Jacques Derrida),<sup>15</sup> and of international law with imperialism, including imperialism after the demise of formal empire (the pathbreaking work of Antony Anghie comes most immediately to mind).<sup>16</sup> But he takes the analysis in new directions, and makes connections that expand understanding very considerably. Perhaps my only hesitations have to do with his particular notion of imperialism, or more specifically his notion of what imperialism means in today's world. He frequently refers to 'the US and other imperialist powers' (e.g., at 290), and explains that he uses the term imperialism to mean 'the political-military rivalry between capitalist states that manifests the changing integration of capital and monopoly capital with those states' (at 229–230). At another point, he writes that '[d]efinitionally, the international order of imperialism is one of inter-imperialist rivalry, of bitter squabbling and disagreement' (at 239). I am not sure to what extent this quite captures the reality of imperialism in late capitalism. The language of rivalry and squabbling seems more redolent of 19th and 20th century imperialisms than 21st, and I wonder about the concept of 'imperialist powers'. Whatever view one takes of globalization theories, Michael Hardt and Antonio Negri seem to me persuasive when they make their well-known claim that contemporary empire is not simply an affair of states, still less of certain states, but an all-encompassing, heterogeneous, and partly deterritorialized order.<sup>17</sup> At the least, I would question whether Miéville's definition exhausts the meaning of imperialism today.

My principal doubts, however, relate to the last part of Miéville's argument described above. One of the great contributions of his book is its sustained and highly suggestive engagement with the work of E. B. Pashukanis. But, if I am not mistaken, he does not mention one of the passages in Pashukanis's essay on international law that has always resonated with me most, and as a way into the next section of my discussion, I want to highlight this now. It appears in the context of Pashukanis's discussion of the argument that international law is not really law – an argument he finds exemplified in John Austin's famous claim that it is instead 'positive morality'. Pashukanis writes:

Another group of jurists simply deny the very existence of international law. Among them is the founder of the English school of positivist jurisprudence, Austin . . . From the Marxist

<sup>15</sup> See esp. 'Critique of Violence' in W. Benjamin (P. Demetz, ed.), *Reflections* (1978) 277, and Derrida, 'Force of Law: The "Mystical Foundation of Authority"', in D. Cornell, M. Rosenfeld and D. G. Carlson (eds), *Deconstruction and the Possibility of Justice* (1992) 3.

<sup>16</sup> See esp. A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005).

<sup>17</sup> M. Hardt and A. Negri, *Empire* (2000).



perspective this 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 of degree . . .<sup>18</sup>

His point is presumably that to deny the existence of international law as law is to presuppose that there is something firm, steady and absolute called law against which international law can be measured and found wanting. In fact, however, all law is precarious, unstable and relative. Denying that international law is law obscures this, and supports the fetishism of law as some kind of magical power that transforms social inequalities by refashioning them as equal legal relations. Yet the social inequalities remain. In Pashukanis's words, 'only by taking the viewpoint of legal fetishism is it possible to think that the legal form of a relationship changes or destroys its real and material essence'.<sup>19</sup> The importance of this insight – not only for Miéville's arguments, but also for the entire tradition of critical and radical legal thought – can scarcely be overstated. But if the legal form of a relationship does not automatically or of itself change that relationship's real and material essence, and if international legal forms thus do not automatically and of themselves change actual political relations, does it follow that international law can never productively be mobilized as part of an effort to bring about such change?

Let me start with Miéville's contention that, since there is a counter-claim for every claim, international law resolves nothing. Force decides, and the fact that the 2003 Iraq War happened means that arguments supporting its legality, as distinct from arguments denying that legality, were actualized international law. I wonder about this word 'actualized'. What exactly does it signify? Miéville writes of the possibility for making interpretations 'stick' (at 285). Again, however, what is it to make an interpretation stick, and whose opinion on this counts? At what point in time, moreover, do we assess this? Is sticking a matter of justifying events that have already occurred or been decided upon, or should it also include action which shapes the way decisions are made and carried out, now and in the future? Miéville contends that international law's anti-imperialist successes are only ever in the court of public opinion, and that that involves a step outside the arena of international law. But if, as I believe he is right to maintain, international law is not simply a body of rules, then surely nor is it simply a collection of formal legal procedures and institutions. I am not so clear that international law's anti-imperialist successes are only ever in the court of public opinion, but even if they were, public opinion is not simply a response to or judge of international legal developments; it partly constitutes those developments. Miéville's account gives very little sense of what might be called the public-cultural dimensions of international law, its mutually determining relationship with the media, and so on. The sharp line he draws between international law's inside and its outside does not seem to do justice to his own characterization of international law as a part of political processes.

<sup>18</sup> Reprinted in Appendix to Miéville's book, at 333.

<sup>19</sup> *Ibid.*

There is another aspect to this. If force decides, it does not do so always and ever in the same way. By that I mean that not all outcomes are assimilable to a single logic. I mentioned earlier Miéville's insistence on the concept of totality. Through this, he delivers the important message that we cannot hope to understand particular social phenomena unless we consider them as elements within larger social systems. The concept of totality is extremely valuable, not least for its reminder of the need to approach things relationally rather than in isolation. But a totality is not a monolith. This point is registered in a manner which I have found particularly instructive for my own work in writings associated with the tradition of 'ideology critique'. The critique of ideology encourages us to view the forces structuring our world as contradictory in the specific sense that they comprise, as Terry Eagleton puts it, 'at once beliefs and interests wholly "internal" to [them], and other forms of discourse and practice which run counter to [their] ruling logic'.<sup>20</sup> In criticizing ideology, we show how counter-logics get obscured – but also how they may be revealed and further activated as instruments for emancipatory change. Miéville proposes that people writing about international law have generally been attached to the idea that it retains emancipatory potential because many of them are also lawyers or jurists, and it would be biting the hand that feeds them to acknowledge international law's unreformability. Perhaps there is some truth to that, though it seems a little simplistic. More importantly, he assumes here that the issue is whether international law can be reformed. He assumes that someone who believes that international law can contribute to the creation of a more just world order must consider international law reformable. From the perspective of ideology critique, however, the point is not reformability, but non-identity. International law is not reformable; there can be no expectation that it will one day be placed beyond ideology or made ideology-proof. Miéville writes that '[i]f a space for using international law [to further systematic social change] is opened up, it is at the same time always already closing' (at 301), and he is absolutely right. The work of critique is never done.

Miéville well recognizes the appeal of ideology critique as a basis for the study of international law, and he touches on it at several points in the book. In doing so, he makes another assumption on which I would like to comment. This is the assumption that ideology inheres in particular ideas. In the conception of ideology critique to which I have referred, however, ideology is not a matter of particular ideas, but of signifying processes that have particular effects. The focus is on how in specific contexts rhetorical and other symbolic practices are deployed to sustain prevailing constellations of power. Typically these practices work by masking alternative approaches or by making them seem impossible, unnatural, unreasonable, or for some other reason inappropriate and unworthy of consideration. Thus, for instance, the idea that international law is indeterminate may sometimes serve as a critique of ideology, sometimes as ideology itself. At one point Miéville refers to the experience of those, like myself, who in early 2003 argued that it would be illegal to wage war on Iraq, and then later on sought to call attention to the ways in which international law could

<sup>20</sup> T. Eagleton, *Ideology* (1991), at 171.

provide support not only for opposition to the war and subsequent occupation, but also for defence of the coalition's actions. Having made arguments premised on the determinacy of international law, we found it difficult to shift gear and engage our allies in the anti-war movement on the subject of international law's indeterminacy. To Miéville this shows that formal legal argument is 'self-defeating' (at 300). For myself, however, I prefer to think of this experience as bringing into relief a communicative challenge. How can we find a language that can hold together both formal legal arguments and arguments that criticize legal formalism? How can we express things in a way that makes it clear that determinacy and indeterminacy are not properties of international law, but are themselves *arguments* which we use in different contexts for different ends? To me ideology critique suggests a way forward, though I fully admit that I have not yet succeeded in making that language very audible or attractive to others, especially others outside the specialist world of academic international law.

Let me add one final thought on this theme. Miéville is critical of those who overstate the significance of ideology, and he seems to me right to insist that the rhetorical and other symbolic practices to which I have referred are not all there is. At least as I use the term, however, ideology critique does not purport to encompass all there is. It is not a theory of the world, but an analytical tool. That said, if I am to respond adequately on this aspect, I cannot stop there, for Miéville contends that what is needed is precisely 'systematic theory', which situates international law in relation to the material forces that shape and enable it. In his assessment, analytical or critical tools (however powerful) are not enough; without systematic theory we are left with no way of understanding the constraints that condition international law's transformative potential. I find it difficult to dissent from that. I would simply strike a note of caution, which has to do with the concept of totality underpinning the drive towards systematic theory. It is one of the more intriguing features of this concept that it confronts us with a paradox: we are enjoined to represent the totality, yet, as Fredric Jameson observes, the 'totality is not available for representation'.<sup>21</sup> No account can ever sufficiently specify the social and historical forces that make things what they are. Like the cognate concept of materialism, totality must be understood as an analytical orientation, rather than an achievable goal. This calls, I think, for a certain reserve, not always reflected in Miéville's text and not perhaps helped by his very frequent and at times slightly shouty use of italics. But the key point here is the need for systematic theory in the study of international law. As Miéville vividly shows, the 'how' questions that have mostly preoccupied critical international legal scholars can only take us so far. A whole host of 'why' questions must also be asked.

#### 4 Conclusion: 'International Judicial Activism'

I have suggested some elements of a response to China Miéville's claims, but I have not so far said anything about Michael Chertoff. What then of his speech to the Federalist

<sup>21</sup> F. Jameson, *The Political Unconscious* (1981), at 55. See further M. Hardt and K. Weeks (eds), *The Jameson Reader* (2000), Introduction, 22 (quoting this passage and highlighting and explicating the paradoxical character of totality).

Society, which I outlined at the beginning? How does it fit into my story? Let me end now with a few remarks about that. I leave aside his recycling of standard US bugbears, his populist anti-intellectualism, and his heady mix of libertarian and authoritarian impulses. That's American politics (though, of course, increasingly European politics as well). More interesting, I think, is Chertoff's declaration that what happens in the world of international law has an impact on his ability to do his job and on the ability of the people who work in his department to do their jobs. As he puts it elsewhere in the speech, he constantly faces 'constraints that others want to put upon us based on their conception of . . . international law'. Miéville's analysis might lead us to believe that Chertoff could rest secure in the knowledge that these constraints will never stick (to use Miéville's word). Since force decides, his conception – the US conception – will always prevail. But Chertoff does not reassure his audience. Instead he warns them that international law is being used as a rhetorical weapon against the US Administration, and urges them to move onto the offensive. Also interesting is the fact that Chertoff illustrates the trend towards what he considers international judicial activism with reference to the same two International Court of Justice cases which for Miéville illustrate the incapacity of international law to promote emancipatory change. To Miéville's mind, the Court's 1986 judgment in favour of Nicaragua is an example of a 'progressive moment' in international law (at 317), but one stalled inasmuch as the United States could 'flout [the decision] with impunity' (at 298). Similarly, the Court's 2004 Advisory Opinion ruling illegal the wall constructed by Israel in Palestinian territory is 'nothing more than ink on paper' (at 297, quoting a Saudi newspaper). Perhaps so, but if Chertoff is worried enough to sound the alarm, can we really say with Miéville that the apparent victory of progressive international law is its '[undermining] as a site for activism'? (at 298)

To be sure, Chertoff's expressions of concern serve at one level simply as a smoke-screen for the US Administration's intense engagement with international law. Far from living in a lawless world, we live, as David Kennedy has argued in a recent book, in a world saturated by international law, and this is nowhere more apparent than in United States foreign relations.<sup>22</sup> While Chertoff complains of the hyper-technical approach followed by the International Court of Justice in its Advisory Opinion on Israel's wall, United States officials are busily engaged in their own hyper-technical interpretations, of which the Justice Department's torture memos are perhaps the most notorious example of recent years. Sometimes indeterminacy is their line; sometimes determinacy. Either way, international law is part of the strategic plan. At another level, however, Chertoff is right about being constrained. That was, in part, my drift when I maintained that contemporary empire is not just an affair of (certain) states, and that, in any event, force does not decide always and ever in the same way. What are we to take from this with regard to the possibilities of international law? In the book just mentioned, David Kennedy writes passionately and compellingly of the harms caused by an excessive focus on the legal dimensions of contemporary global problems. It blunts ethical judgement and promotes self-righteous denunciation.

<sup>22</sup> D. Kennedy, *Of War and Law* (2006).

It masks complicity in a culture of violence and displaces responsibility for injustice onto others. Finally, it crowds out politics and weakens responsible governance. All of that is surely true and hugely important, and it only serves to reinforce Miéville's warning of the 'danger of basing progressive critique *on* international law' (at 298).<sup>23</sup> But to point to the danger of basing progressive critique on international law is not, of course, to provide reasons for eschewing legal argumentation altogether. We may caution against over-investment in international law while still retaining a sense of its value in critique. For some analysts, this will be the principal (if unintended) message of Michael Chertoff's speech, with its suggestion – fearful to him but immensely encouraging to others – that international law is, or could become, engaged in an 'activist' project of the kind once pursued by the United States Supreme Court.

<sup>23</sup> Emphasis in original.