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# *A Marxism for International Law: A New Agenda*

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B.S. Chimni. ***International Law and World Order: A Critique of Contemporary Approaches***, 2nd edn. Cambridge: Cambridge University Press, 2017. Pp. 649. £120. ISBN: 9781107065260

## **Abstract**

*What can Marxist theory contribute to the discipline of international legal studies? Can one be a Marxist and an international lawyer at the same time? What place is there for international legal scholarship in Marxist politics? How can Marxist international law theory position itself vis-à-vis other critical legal traditions? Does Marxism have any theoretical gaps that it needs to fill? How does a Marxist approach to international law differ from a New Left one? In this review essay, I propose to explore these and other related questions by examining one of the most important recent contributions to the Marxist debate about international law, the new edition of B.S. Chimni's *International Law and World Order*. My aim in these pages is to reveal and bring to the surface its general critical method, some of the less obvious aspects of its underlying theoretical project, its disciplinary ambition as well as its overall place in the broader landscape of contemporary international law thought, including its relationship with other works of Marxist international law theory.*

## **1 Introduction**

There are some books on my shelves that I can remember a lot of small, largely useless facts about: what colour their dust jacket is, how light or heavy they feel when you hold them in your hands, how long the acknowledgement section runs. I can

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remember where I first came across them, who recommended them to me, what notes I may have scribbled on their inside cover or if I ever lent them to a colleague or a student. I can remember in what year they were published and which publishing house brought them out. I can remember a lot of things about these books. But I cannot remember much about their content. Not all books are created equal. Some you only put on your bookshelves but never, to use Arthur Conan Doyle's famous metaphor, in your 'brain's attic'. You open them, you read them, and, then, like the latest Nicolas Cage film, you essentially forget all about them. A month or two later, beyond some vague notion of what general subject they are meant to cover, you can scarcely recall anything specific about them: the actual structure of their argument, the concrete points they were trying to make, the particular examples they used, the case studies they discussed and so on.

Of course, this is not in any way the fault of the author. No one ever sets out deliberately to write a forgettable book. Nor is it, however, the fault of the reader. Can one really blame anybody for trying to keep their 'brain attic' tidy? Managing your memory archives, after all, is one of the most important components of good academic practice. Besides, let us face it, it is simply not possible to remember everything that you read. Sooner or later, you reach that tipping point after which every text you see begins to look suspiciously familiar. That book or article you are now struggling to recall anything about may well be the crowning glory of somebody's entire career. But is it really your fault now that what it has to say seems so unoriginal that you are struggling to find any place for it in your memory? We have all been there before. Everyone knows how this happens: you pick up a book, flip through the first few pages, scan the introduction and the conclusion and a quiet sense of *déjà vu* gradually sets in: 'Hasn't all this been done already; didn't somebody else argue the same point before but much more cogently; who was it?' Sooner or later, it all just turns into a blur.

Not all books are created equal, however. There are some that you come to experience in an entirely different manner – not as just another collection of tools or a neat-looking placeholder but as a *distinct intellectual event*, a penny-dropping, eye-opening, aha moment, the kind of stuff you usually think of when asked to name the defining points in your journey of intellectual self-discovery. There may be only one such book in your library or more than a dozen; it does not matter. You always know what these books are. You remember a lot more about these books than any others because, in a certain intangible way, they are always 'there' with you. Wherever your thought goes, whatever you read, write or argue about, they are always there with you, like a shadow presence. They have taken the pride of place in your brain attic, becoming the anchoring points of your intellectual persona, the centrepiece of your 'archive of lived actualities'<sup>1</sup> – it does not matter which metaphor you choose, in the end. What matters is how you treat them: they are your personal perennially active points of reference; your never-ending lessons that you can return to again and again across the years. The content of the lesson may change – its wisdom may become deeper or shallower – but your ability to learn from it never does.

<sup>1</sup> A. Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (1996), at 11.

Over the last 14 years, B.S. Chimni's *International Law and World Order (ILWO)* has become one of such 'lesson' books for me both as an international law academic and as a student of Marxist legal thought. It brings me a great satisfaction to see it come out in a new edition and to know that once again it will be available to a wide circle of readership for years to come.

## 2 Marxism and International Law: Where to Start?

Any international lawyer who comes to the subject of Marxist theory for the first time is likely to experience a certain sense of disorientation. Karl Marx, Vladimir Lenin, Leon Trotsky, Rosa Luxemburg, Ellen Meiksins Wood – there is just so much there to read. Where should one even start?<sup>2</sup> Like every tradition, Marxism comes in many different shapes and colours. Wherever one looks across the field of Marxist debates, one is likely to find countless rifts, splits and schisms. The admirers of 'young Marx' bitterly oppose the followers of 'Leninist' Marxism. The exponents of 'orthodox' Marxism quarrel with 'post-modern' Marxism. The Trotskyites denounce the Stalinists. The Maoists face off with the Eurocommunists. The 'New Left' Marxists dismiss the 'structuralist' Marxists; the Robert Brenner school attacks the 'neo-Smithian' camp; the champions of Nicos Poulantzas bicker with the followers of Ralph Miliband; the 'analytical'

<sup>2</sup> The most obvious answer, of course, would be that one should start with Marx himself. The problem with this solution is that, first, many of Marx's most widely acclaimed writings were, in fact, never published during his lifetime, either because they were just some early notes he wrote for himself 'for purposes of self-clarification' (*The Grundrisse*) or because the broader theoretical project of which they were part had been ultimately abandoned (*The German Ideology*). To turn to these texts in the hope of figuring out 'what Marx really meant' would, thus, be essentially like studying an unsubmitted draft essay someone wrote during their master's in the hope of establishing on that basis what views they came to hold a decade after they finished their doctorate degree. Even in the best-case scenario, there is going to be an awful lot of speculation and empty guesswork involved. Things seem hardly any more encouraging when one looks also at what Marx had actually published. The writings from the *Franco-German Yearbook/Vorwärts!* period (*On the Jewish Question* (1844), *The Holy Family* (1845) and so on) are basically the functional equivalent of a raw debut album – what *Kill 'em All* is to *Metallica* or *Please Please Me* is to the *Beatles* – they are interesting and full of promise, to be sure, but one can hardly consider them an accurate reflection of the rest of Marx's oeuvre. *The Poverty of Philosophy* (1847), *The Communist Manifesto* (1848), *The Eighteenth Brumaire of Louis Bonaparte* (1852), *The Civil War in France* (1871) and so on are all essentially conjunctural texts. That is to say, they are basically 'reaction pieces' produced in response to very specific historical events, debates, and figures. While full of important insights into Marx's intellectual career, none of them really offers a systematic exposition of Marx's broader theoretical creed as such. *The Capital* (1867) – the one book that everyone usually agrees is supposed to represent the pinnacle of Marx's thought – is not only a notoriously forbidding text that any unprepared reader is likely to find frustrating and inaccessible. It is also fundamentally incomplete: of the six volumes he originally intended to write, Marx himself only finished the first one. Engels subsequently cobbled together volumes 2 and 3 from various scattered notes left after Marx's death. The rest never saw the light of day.

If all of this were not enough to make the idea of 'going to the original source' look problematic, one should also add here the possibility that, as many Marxologists have argued, over the course of his career, Marx's general worldview underwent several 'epistemological ruptures' – that is, abrupt paradigm shifts. Depending on which version of his biography one takes, there may, in fact, have been anywhere up to three such abrupt shifts or ruptures: the first taking place around 1845, the second just after 1848, the

Marxists slam the Hegelo-Marxian tradition – and so on and so forth.<sup>3</sup> Forget trying to figure out whose version of Marxism is ‘correct’ and who is more faithful to Marx’s original message. Simply deciding which of these debates one should bother paying attention to can seem like a whole research project in itself.

Luckily, Marxism is not only a very rich and diverse tradition, but it is also a tradition whose theoretical interests over the years have come to cover many different disciplines and subject areas, with the inevitable result that to be able to familiarize oneself with the current state of Marxist debates in any given field, one does not need to go back to any ‘common tradition’ or original ‘core’ writings anymore. The basic theoretical questions that shape the Marxist research agenda in fields such as development economics today have almost nothing in common with the research questions that drive the course of Marxist debates in fields like comparative literature or the history of performing arts. Needless to say, this trend towards increasing intellectual fragmentation comes at a significant political cost. As each new subject area develops its own, field-specific version of the Marxist tradition, the respective community of scholars inevitably begin to accumulate an ever-greater degree of expertise in the narrowly ‘local’ body of Marxist scholarship, to the detriment of being able to follow or influence the course of Marxist debates occurring elsewhere. Typically, the result is an increasing pattern of disengagement not only from other ‘local’ Marxist traditions developing in the neighbouring fields but also from the broader legacy of ‘Marxist theory in general’.

Every cloud, however, has its silver lining. For all of its downsides, the rise of field-specific Marxisms does have one undeniable advantage: it makes the process of getting up to speed with the relevant body of writings a lot less difficult and demanding. Mastering the entirety of modern Marxist literature may be a truly gargantuan task. But if it is the Marxist theory of international law specifically that you want to become proficient at, your starting mission is going to be a lot more manageable and attainable. There exist, in fact, only three book-length texts today that can be legitimately described as foundational or indispensable reading when it comes to understanding the state of the contemporary Marxist scholarship in international law.<sup>4</sup> The first is

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third at some point after 1871. To try to reverse engineer a single system of thought from such a rich and contradictory legacy, by any standard of appreciation, would have to be considered an exercise in theoretical forgery. On the various epistemological ruptures in Marx’s thought and their implications for Marxology, see further L. Althusser, *For Marx* (1969), at 31–39; E. Balibar, *The Philosophy of Marx* (rev. edn, 2014), at 6–10.

<sup>3</sup> For a general introduction to some of these debates, see D. Glaser and D. Walker (eds), *Twentieth-Century Marxism* (2007); G. Therborn, *From Marxism to Post-Marxism?* (2008).

<sup>4</sup> This is not to say, of course, that there are not any other interesting or noteworthy Marxist writings about international law. There are. None of these texts, however, is as *culturally important* in the context of the contemporary Marxist international law debate as the three books I mentioned above. But see further Neocleous, ‘International Law as Primitive Accumulation’, 23 *European Journal of International Law (EJIL)* (2012) 941; Knox, ‘Marxism, International Law, and Political Strategy’, 22 *Leiden Journal of International Law (LJIL)* (2009) 413; S. Marks (ed.), *International Law on the Left* (2008); B. Bowring, *The Degradation of the International Legal Order?* (2008); A. Claire Cutler, *Private Power and Global Authority* (2003). See also, more generally, R. Knox, ‘Marxist Approaches to International Law’, *Oxford Bibliographies Online*, 28 March 2018, available at [www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0163.xml](http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0163.xml).

Susan Marks' *The Riddle of All Constitutions*;<sup>5</sup> the second is China Mieville's *Between Equal Rights*<sup>6</sup> and the third is *ILWO*.

Each of these books, inevitably, has its own strengths and weaknesses. *The Riddle of All Constitutions* offers a remarkably effective illustration of the classical Marxist project of ideology critique as applied in a traditional international law context.<sup>7</sup> But Marxism, as Marks herself is the first to admit, is not 'just' a theory of ideology; there are many more sides and dimensions to the Marxist 'legacy' than the concept of ideology critique can cover.<sup>8</sup> *Between Equal Rights* is a beautifully written text; lucid, polemical and uncompromising in its commitment to rehabilitate the thought of an early Soviet jurist Evgeny Pashukanis, the author of the so-called commodity-form theory (CFT). But Mieville's argument, typically, works best if you only want to make sense of international law quickly and without ever studying it, and the portrait it paints of the contemporary international legal system is incomplete and oversimplified. *ILWO*'s greatest weakness to date has been the fact that for the better part of the last two decades it has been out of print.

### 3 *ILWO* and the 'Green Critique': Should a Marxist Write Academic Texts?

I first came across *ILWO* in the summer of 2004. A medium-sized, hardbound volume published in New Delhi in 1993, it was not an easy book to get a hold of; but I was determined.<sup>9</sup> Earlier that year, the *European Journal of International Law (EJIL)* published B.S. Chimni's article on the imperial global state in the making.<sup>10</sup> To say that I found its argument inspiring would be an understatement; to this day, it remains one of my all-time favourite illustrations of critical international law scholarship.<sup>11</sup> As soon as I discovered that the same author had also written a book about a broadly similar topic, I knew immediately that I had to find it.

My quest came to fruition several months later. The first impression I had of *ILWO*, however, was anything but positive. It was not at all the book I thought it would be. After reading the *EJIL* article, I somehow came to assume *ILWO* would be basically a case of 'more of the same, but longer'. I could not have been more wrong. Instead of a classical Marxist analysis of the complex role played by international law in the contemporary world historic conjuncture, *ILWO* turned out to be an exercise in traditional

<sup>5</sup> S. Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (2000).

<sup>6</sup> C. Mieville, *Between Equal Rights: A Marxist Theory of International Law* (2005).

<sup>7</sup> See especially Marks, *supra* note 5, at 8–29, 139–151.

<sup>8</sup> See Marks, 'Introduction', in Marks, *supra* note 4, 1, 2–16.

<sup>9</sup> B.S. Chimni, *International Law and World Order* (1993).

<sup>10</sup> Chimni, 'International Institutions Today: An Imperial Global State in the Making', 15 *EJIL* (2004) 1.

<sup>11</sup> For my thoughts about Chimni's theoretical insights and breakthroughs achieved in that article, see Rasulov, 'Marxism and the State: Three Background Notes (Part Three)', in *Legal Form: A Forum for Marxist Analysis of Law*, 20 October 2017, available at <https://legalform.blog/2017/10/20/marxism-and-the-state-three-background-notes-part-three-akbar-rasulov/>.

legal-theoretic commentary – something of the kind one would usually associate with the writings of Oxford and Cambridge jurists.

As I leafed through *ILWO*'s pages that sunny July afternoon, my sense of surprise quickly gave way to disappointment: 'Why would a Marxist write something like this?' Where the *EJIL* article offered its readers a rich panoply of complex interdisciplinary arguments, *ILWO* went no further than narrow textual criticism. Instead of talking about 'actually existing international law', it talked about various abstract theories put forward by a group of eminent academics, one of whom came from international relations (Hans Morgenthau), the other three from international law (Myres McDougal, Richard Falk and Grigory Tunkin).

The contradiction, in a sense, seemed deeply ironic. Ideationally, when it came to the intellectual content of its argument, there was no doubt *ILWO* was the product of a Marxist scholar. References to Perry Anderson, Eric Hobsbawm and 'the goal of socialism' began already on page 3 of the introductory chapter.<sup>12</sup>

On the other hand, the actual genre of the inquiry itself – a scholarly examination of a series of academic arguments – seemed undeniably conservative. To write about abstract theoretical debates rather than the distribution of power; to study the thought of celebrated academic figures rather than the actual contradictions of global capitalism; to detail the contents of theoretical arguments rather than the operative conditions of neo-colonial exploitation – since when was this what Marxists were supposed to be doing? What is the point, ultimately, of proving that Tunkin did not have a very convincing account of the general relationship between 'the economic structure of a particular nation-state' and 'international economic relations'<sup>13</sup> or that the 'science of language and communication' put paid to the ordinary-meaning-of-words approach to treaty interpretation?<sup>14</sup> One might be interested in these insights if one were writing Tunkin's biography, but from the point of view of helping inform the course of revolutionary struggle, neither of them seems remotely useful.

Of course, it always seems possible to object; the whole concept of writing a scholarly monograph is, at its root, a fundamentally conservative idea, so why get so frustrated on account of this particular book? If one takes seriously Marx's 11th thesis on Ludwig Feuerbach – 'the philosophers have only interpreted the world in various ways; the point is to change it'<sup>15</sup> – then the only *truly* Marxist thing an international lawyer can do is work towards changing the 'actually existing international law', and writing a scholarly monograph hardly seems the most self-evident way to do that. So why get so worked up about *ILWO*? If its author took a wrong turn anywhere, surely it was when he decided to write an academic monograph in the first place, not when he actually wrote a monograph about Morgenthau, Tunkin and others.

<sup>12</sup> Chimni, *supra* note 9, at 17–18.

<sup>13</sup> *Ibid.*, at 243.

<sup>14</sup> *Ibid.*, at 271–278.

<sup>15</sup> See Marx, 'Theses on Feuerbach', in K. Marx and F. Engels, *The German Ideology: Part One*, edited by C.J. Arthur (2nd edn, 1999) 121, available at [www.marxists.org/archive/marx/works/1845/theses/theses.htm](http://www.marxists.org/archive/marx/works/1845/theses/theses.htm).



As a reader of *German Ideology*, I find this argument very powerful and more than a little unsettling. Like the 'Green Critique' in Duncan Kennedy's article about activist teaching,<sup>16</sup> it essentially suggests that my sense of disappointment in *ILWO* is deeply hypocritical. To claim that my problem with a Marxist academic text was that it did not go after 'targets' that were important enough is essentially to imply that taking part in the process of academic text production is somehow not in itself incompatible with 'genuine Marxist politics'. Given that I am a professional academic, this suggestion at the very least seems rather self-serving. The fact that I have made it so readily that I did not even bother to articulate it in full makes it look even more suspect. It is a common truism among Marxists that 'activism implies an engagement with mass strata of the population capable of action that would transform the system'.<sup>17</sup> How deeply in self-denial must one be as a Marxist to assume that it is actually the place of a Marxist activist to spend any time on writing legal academic texts?

Taken to its logical conclusion, the argument seems irrefutable. Like Kennedy, I feel caught on the back foot:

I find this indictment overwhelming. When it is delivered in deadly earnest by a person who is working full time organizing poor tenants or farm workers, or by a person who has raised thousands of dollars for a far left electoral candidate, I have no answer at all. I can only hang my head and put on a sheepish grin.<sup>18</sup>

And yet, of course, that is not at all who this type of argument usually comes from in practice. As Kennedy would say, my typical interlocutor here is not a Milovan Djilas, a Fidel Castro, or a John Maclean but, rather, some bitter, middle-aged colleague, full of self-paralysing doubts and Nietzschean *ressentiment*, livid at the idea that at least some of us still dare to demand something more from our careers than just being allowed to advocate prudence, pragmatism and an international rule of law.<sup>19</sup>

Besides, I immediately note to myself, however valid it may be, none of this Green Critique stuff actually means that it is still a good idea for a Marxist to waste so much effort on such abstract academic debates. Who cares if a group of law professors in Moscow and New Haven did or did not fully appreciate the practical implications of Ludwig Wittgenstein's argument or if the 'ordinary language' theory leaves enough room for acknowledging the power of ideology?<sup>20</sup> Those skills and energies that the author of *ILWO* devotes to fighting these points would almost certainly have been better directed elsewhere.

Or, at least, that is how I remember today the first thoughts that raced through my mind that sunny July afternoon when I first began reading *ILWO*. Our sense of the practical tends to change as we grow older. When the initial reaction wears off, we usually get to see the broader context – and its horizon of limitations – a lot more

<sup>16</sup> Kennedy, 'First-Year Law Teaching as Political Action', 1 *Law and Social Problems* (1980) 47, at 48.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*, at 49.

<sup>19</sup> *Ibid.*, at 50–51.

<sup>20</sup> Chimni, *supra* note 9, at 278, 296.

clearly. What role should the Marxist theoretical project play in contemporary international law? What kind of disciplinary ambition should it develop? What ideological function should Marxist scholarship pursue in the international legal domain? None of these questions admits of easy, self-evident answers.

#### 4 Marxism and Legal Academia: Rejection or Acceptance?

Being determines consciousness. Routines determine politics. Legal academia – teaching, research, university administration – is a fundamentally bourgeois field of practice. No proletarian revolution has ever been triggered or inspired by an act of legal academic writing. But, to paraphrase Roscoe Pound, in the house of Marxist politics, there are many mansions – not everyone who lives in it has to live by the ethics of the 11th thesis. Marx himself certainly took a much more nuanced position on the matter in his later years: Was the act of writing *The Capital* not, essentially, an attempt to interpret the world?<sup>21</sup> And, yet, can anyone today really argue that the theories he articulated in that book did not, in the end, also change it?

Triggering and inspiring revolutions are a laudable objective for a Marxist activist. But these are not the only kinds of activities that belong under the rubric of progressive politics. It may be exciting to find oneself thrust in the middle of some grand ‘transcendent revolutionary activity’,<sup>22</sup> but the struggles we may pursue can also be a lot more modest in terms of their scale and ambition – to transform our immediate workplace, for example – without losing their emancipatory character or practical importance. Critiquing the world – ‘bringing to light the hidden forms of domination and exploitation which shape it’<sup>23</sup> – is an important task. But the process of critique can take many forms and target many different objects. To expose the emergence of a global imperial state and to detail the role of international law and institutions in enabling and facilitating its development, no doubt, is an important feat for the Marxist project of international legal critique. But to show that the Marxist tradition has something of relevance to contribute to other regions of the international legal debate – as Marks, for instance, does in *The Riddle of All Constitutions* and in her work on exploitation<sup>24</sup> – is certainly no mean achievement either. What is more, in a world where the global proletarian revolution no longer seems a fixed historical inevitability – as it probably did to Evgeny Pashukanis and Evgeny Korovin<sup>25</sup> – and the life

<sup>21</sup> Marx, *The Capital*, *supra* note 2.

<sup>22</sup> Kennedy, *supra* note 16, at 50.

<sup>23</sup> Wacquant, ‘Critical Thought as Solvent of Doxa’, 11 *Constellations* (2004) 97, at 97.

<sup>24</sup> Marks, ‘Exploitation as an International Legal Concept’, in Marks, *supra* note 4, 281.

<sup>25</sup> Korovin’s name may not be as familiar to international lawyers today as it may have been once. Widely considered the ‘founding father’ of Soviet international law, Korovin was one of the most influential and original Marxist legal thinkers of the last century. For background on Korovin and his theoretical legacy, see Mamlyuk and Mattei, ‘Comparative International Law’, 36 *Brooklyn Journal of International Law* (2011) 385, at 394–406; Mamlyuk, ‘Russia and Legal Harmonization: An Historical Inquiry into Intellectual Property Reform as Global Convergence and Resistance’, 10 *Washington University of Global Studies Law Review* (2011) 535. For a somewhat different take, see Malksoo, ‘The History of International Legal Theory in Russia: A Civilizational Dialogue with Europe’, 19 *EJIL* (2008) 211, at 226.



of international law, ever more decentred and rhizomatic in its institutional forms, spreads more and more aggressively all over the Coverian 'field of pain and death',<sup>26</sup> it may very well be the case that for someone trained in the legal discipline taking part in those grand theoretical debates that *ILWO* made its target of critique is precisely the place where their talents and energies as a Marxist activist can be best put to use in the cause of global emancipatory struggle.

It is all good and well to assert, as Grietje Baars does, for instance, that to resist the destructive march of global capitalism 'through legal regulation is a structural impossibility'<sup>27</sup> or to proclaim, as Mieville does, that 'international law's constituent forms are [the] constituent forms of global capitalism, and therefore of imperialism',<sup>28</sup> that 'a world structured around international law [thus] cannot but be one of imperialist violence'<sup>29</sup> and that 'to change the dynamics of the system' one should, therefore, aspire not 'to reform the institutions but to eradicate [all] forms of law.'<sup>30</sup> It is all good and well to declare that 'the best hope for global emancipation [is] the end of [international] law'.<sup>31</sup> But what are we going to do *after* we do that? Unless we follow all these proclamations with some form of highly effective direct political action, writing and publishing them is not going to get us very far. It is certainly not going to put an end to international law's complicity in 'imperialist violence', 'global capitalism' and its 'constituent forms'. It will, however, almost immediately lose us the ear of the vast majority of people in the international law community and end the possibility of any further meaningful dialogue with them. For, indeed, what can one tell international lawyers that would be of interest to them after one tells them that their entire life project is essentially a species of moral abomination and that it is so deeply irredeemable and corrupt that any engagement with it that is not an act of outright repudiation will immediately turn one into an imperialist stooge?

It is not for nothing, after all, that after publishing *Between Equal Rights* Mieville has more or less stopped writing about international law.<sup>32</sup> His argument strategy simply left him no room for any further engagement with the field, and his continuous presence within it, to the extent it goes anywhere beyond symbolical, is essentially premised on the fact that the general ignorance of the international law profession about Marxism has allowed *Between Equal Rights* to monopolize the label of 'the Marxist

<sup>26</sup> Cover, 'Violence and the Word', 95 *Yale Law Journal* (YLJ) (1986) 1601.

<sup>27</sup> Baars, "'Reform or Revolution'?: Polanyian versus Marxian Perspectives on the Regulation of the Economic', 62 *Northern Ireland Legal Quarterly* (2011) 415.

<sup>28</sup> Mieville, *supra* note 6, at 290.

<sup>29</sup> *Ibid.*, at 319.

<sup>30</sup> *Ibid.*, at 318.

<sup>31</sup> *Ibid.*

<sup>32</sup> He did publish two more articles on international law-related topics. Neither of them, however, has sought to revisit the thesis that international law as a social form was best being 'eradicated'. On both occasions, the point rather was taken for granted. See Mieville, 'Anxiety and the Sidekick State: British International Law after Iraq', 46 *Harvard International Law Journal* (HILJ) (2005) 441; Mieville, 'Multilateralism as Terror: International Law, Haiti, and Imperialism', 19 *Finnish Yearbook of International Law* (FYIL) (2008) 63.

theory of international law'. But there has been no dialogue of any kind taking place between them – Mieville's function in the broader international legal discourse today is essentially to serve as a token footnote<sup>33</sup> – and the lack of any interest in resuming it obviously comes from both sides. And who can blame the international law profession: would you want to keep talking to somebody who has accused you of being nothing but a sophisticated apologist for imperialism?<sup>34</sup>

And, in the end, that is what it is all about. The ultimate dilemma that confronts Marxist international law theory is whether Marxist legal scholars should denounce international law's established disciplinary culture and its framework of ideals – and, thus, exile themselves *à la* Mieville from whatever conversations take place among international law scholars henceforth – or whether they should instead try to work within it in the hope of winning over the hearts and minds of those lawyers and legal scholars who may be sympathetic to their message? What is the best way forward for the Marxist tradition? Should it reject 'the coordinates of the existing order'<sup>35</sup> or seek to renegotiate them; should it leave or should it stay; repudiate or rescue?

The workings of disciplinary politics are full of uncertainties and wild leaps of faith. Choosing our strategic goals narrows our range of available argument options, and yet each such choice, in the end, is nothing but a wager. 'What is to be done' is never a foregone conclusion. The antinomian bind is real,<sup>36</sup> and no amount of careful analysis can free us from its consequences. The choices Chimni makes in *ILWO* are decidedly different from Mieville's. The reasons for this are not difficult to work out or at least to rationalize. Unlike Mieville, Chimni is a scholar who writes primarily with an international law audience in mind and who aspires, for the most part, to remain in a state of dialogue with it. He is a Marxist, no doubt, but he is also a legal academic. And the battle he chooses to fight is one for the future of the Marxist theoretical project in international law, not for the eradication of either.

## 5 Marxism versus the New Left

As Maurice Isserman and Michael Kazin remind us, one of the main defining traits of the New Left movement historically was its active preoccupation with radicalism as a fundamentally aesthetic experience.<sup>37</sup> The reasons for that, partly, were generational. For large segments of the post-beatnik generation, the old vocabularies of class struggle and civil rights no longer seemed capable of capturing the spirit of the new political experience they sought and desired. Stripped of all mystifying jargon, what

<sup>33</sup> On the phenomenon of token footnotes and its role in legal scholarship, see Schlag, 'My Dinner at Langdell's', 52 *Buffalo Law Review* (2004) 851.

<sup>34</sup> Mieville, *supra* note 6, at 293.

<sup>35</sup> Knox, 'Strategy and Tactics', 21 *FYIL* (2010) 193, at 216.

<sup>36</sup> See Kennedy, 'A Semiotics of Critique', 22 *Cardozo Law Review* (2001) 1147, at 1158–1161.

<sup>37</sup> See M. Isserman and M. Kazin, *America Divided* (2nd edn, 2004), at 190–191.

this experience essentially boiled down to in most cases consisted simply of enacting a certain kind of social posture – commonly theorized under the rubric of ‘militancy’ – whose defining traits included an ‘emphasis on total commitment’ and a keen ‘taste for the dramatic’. The age-old topics of class struggle, economic domination and the ‘profound modification of property relations’<sup>38</sup> no longer seemed worthy of the same kind of attention given to them previously. In the new political age, struggle and domination were everywhere – the political was the personal, the universal, the quotidian – and it was the job of the left activists to shine the light on this fact in the most striking manner possible. Dramatism and the flair for symbolic gestures were not seen as merely fashionable. They were simply indispensable; a certain measure of theatricality could go a long way towards turning an individual event or statement into the historical representation of freedom itself.

Ideologically, one of the main ways in which this new sensibility played itself out in practice was the sudden revival of the age-old debate about the essential differences between reform and revolution, the two umbrella categories of left-wing politics. What distinguished this particular wave of discourse from the previous generations’ forays into the subject<sup>39</sup> was the fact that its implied premise sprang from the assumption that only a total, root-and-branch renunciation of every pillar of the traditional bourgeois culture – individualism, accumulationism, liberal agnosticism, the reification of the public–private divide, political conformism and so on – could save modern society from the nearly certain disaster to which it was condemned by predatory capitalism. Anything less than that was a symptom of surrenderism and political cowardice.

The era of New Left politics did not last very long. For all of its lasting and profound influence on the subsequent countercultural movements,<sup>40</sup> its demise as a meaningful political force was as swift as it was ‘pitiful’.<sup>41</sup> The only legacy that still remains of it today is an incoherent, fragmented memory. The hold that this memory exerts over the present-day liberal imagination, however, is nothing short of remarkable. Partly for reasons of sanctioned ignorance, partly because of ideological convenience, over the last 40 years, in various segments of the Western public discourse, the New Leftist programme of dramatized radicalism has come to be conflated with the broader idea of Marxist politics. Asked ‘What do Marxists believe and want?’, a typical inheritor of this strand of conventional wisdom will not usually hesitate to point in the direction

<sup>38</sup> Sartre, ‘Materialism and Revolution’, 4 *Politics* (1947) 161, at 167.

<sup>39</sup> See, e.g., R. Luxemburg, *Reform or Revolution* (1973 [1900]); D. Kellner (ed.), *Karl Korsch: Revolutionary Theory* (1977); Gorz, ‘Reform and Revolution’, 5 *Socialist Register* (1968) 111; Sartre, *supra* note 38.

<sup>40</sup> J. Heath and A. Potter, *The Rebel Sell: How the Counterculture Became Consumer Culture* (2006), at 52–65.

<sup>41</sup> D. Howard, *The Marxian Legacy* (1977), at 20. Compare Heath and Potter, *supra* note 40, at 160–161: ‘It’s not that the system “co-opted” their dissent; they were never really dissenting. ... If you really want to opt out of the system, you need to ... go off and live in the woods somewhere (and not commute back and forth in a Range Rover). [A]nyone who follows the logic of countercultural thinking through to its natural conclusion will find herself drawn into increasingly extreme forms of rebellion. The point at which this rebellion becomes disruptive generally coincides with the point at which it becomes genuinely anti-social. And then you’re not so much being a rebel as you are simply being a nuisance.’

of those classical New Leftist slogans: ‘absolute refusal’,<sup>42</sup> ‘total criticism’,<sup>43</sup> ‘creative social dislocation’<sup>44</sup> and the ‘transgressive artefact’.<sup>45</sup>

The irony of this turn of events can hardly be lost on an informed observer. The gulf between the New Left and traditional Marxism could not be greater or more profound.<sup>46</sup> One scarcely needs to look further than Lenin’s classic essay on left-wing communism or Georg Lukacs’s magisterial *History and Class Consciousness* to see just how alien the New Leftist culture of dramatized radicalism is to the traditional Marxist worldview. Every action of a Marxist activist, notes Lenin, has to be grounded in considerations of practical efficiency. Where the immediate context of one’s activity is dominated by a regressive ideological regime, one’s work must begin by attempting ‘to convince the [respective] backward elements, to work among them’, taking cognizance of their internal beliefs and prejudices, ‘not fenc[ing oneself] off from them’.<sup>47</sup> To be able to change the politics of a given community, a Marxist first has to learn to speak that community’s language of hopes and ideals, to get inside its logic and to understand its laws of reasoning so as to be able better to exploit its dogmas and contradictions.

In an age when the global proletarian revolution can no longer be counted on to occur of its own accord, the first task of socialist strategy has to be the ‘creat[ion] of the objective and subjective conditions which will make mass revolutionary action ... possible’.<sup>48</sup> Given the structural importance of international law in the contemporary global social formation, these ‘objective and subjective conditions’ will also have to be created, *inter alia*, among the respective communities of international law-related agents. Whether one likes it or not, however, the dominant ideological framework of the international law profession today is still structured around the belief that international law, historically, by and large is a force for good, that international legal rules matter, that the proliferation of international legal institutions has an immanent progressive value and that it ‘signifies a desirable move towards a superior state of social development’.<sup>49</sup> To make any headway in changing the ideological landscape of this community, Marxists have to learn to speak to and around these ideas, engaging their power, exploring their ambivalence and appealing to their emotive potential.

No doubt, at the end of the day, legalism and the rule of law do seem like an inherently conservative ideology.<sup>50</sup> This does not mean, however, that the project of

<sup>42</sup> H. Marcuse, *One-Dimensional Man* (2002), at 257.

<sup>43</sup> R. Unger, *Knowledge and Politics* (1975), at 4.

<sup>44</sup> Isserman and Kazin, *supra* note 37, at 190 (quoting Steve Weissman).

<sup>45</sup> D. Kennedy, *A Critique of Adjudication* (1997), at 342–344.

<sup>46</sup> For a broader comparison of the two, see Howard, *supra* note 41, at 20–38; Heath and Potter, *supra* note 40, at 58–62.

<sup>47</sup> Lenin, ‘“Left-Wing” Communism: An Infantile Disorder’, in V.I. Lenin, *Collected Works*, vol. 31 (1966), 17, at 54.

<sup>48</sup> Gorz, *supra* note 39, at 111.

<sup>49</sup> See T. Skouteris, *The Notion of Progress in International Law Discourse* (2010), at 6–7.

<sup>50</sup> For one of the more balanced discussions of this claim, see Horwitz, ‘The Rule of Law: An Unqualified Human Good?’, 86 *YlJ* (1977) 561; M. Horwitz, *The Transformation of American Law 1780–1860* (1977), at 253–266.

Marxist politics must therefore proceed from a complete repudiation of every element of the rule-of-law narrative.<sup>51</sup> For to take that view – to conclude that only a radical eradication of every form of law is a programme deserving of Marxism – would in fact be tantamount to acknowledging that, however indirectly, legalism as a reified idea still retains its authority and validity in a Marxist universe, and this is essentially equivalent to saying that Marxists should believe in transcendental realities and the determination of history by ideas.<sup>52</sup> In the end, the question ‘What should Marxists do about international lawyers’ fondness for legalism?’, as Lukacs reminds us, is really only a question of strategy, nothing more.<sup>53</sup> Call it ‘principled opportunism’<sup>54</sup> or call it the ‘pragmatism of intentions and consequences’,<sup>55</sup> but just as there is nothing cowardly or surrenderist in deciding to work within a given disciplinary community’s cultural framework rather than denouncing it, so too there is nothing reactionary or unseemly in recognizing the possibilities offered by that community’s ideological resources. After all, ‘revolutionaries who are incapable of combining illegal forms of struggle with *every form of legal struggle* are poor revolutionaries indeed’.<sup>56</sup>

There is nothing more naive for a Marxist international lawyer than to assume that the only choice that confronts us today is one between ‘reform and revolution’<sup>57</sup> or that the only way forward for the Marxist project in international law begins with the outright rejection of any form of ‘radicalism with rules’.<sup>58</sup> And whatever other reservations one may have about Chimni’s broader theoretical project in the new edition of *ILWO*,<sup>59</sup> it is certainly not the product of a naive, New Left-leaning intellectual militant.

In the end, the most valuable lesson I have learned from *ILWO* over the last 14 years has been the same lesson every great act of critical legal scholarship teaches us. It is the lesson about theoretical strategy and the necessity of continuing the struggle for a better international law. If Marxism is to establish itself as a serious enough presence

<sup>51</sup> Lukacs, ‘Legality and Illegality’, in G. Lukacs, *History and Class Consciousness* (1971) 256, at 256.

<sup>52</sup> *Ibid.*, at 263.

<sup>53</sup> *Ibid.*, at 270.

<sup>54</sup> Knox, *supra* note 35, at 222–226.

<sup>55</sup> D. Kennedy, *The Dark Sides of Virtue* (2004), at xx–xxiv.

<sup>56</sup> Lenin, “‘Left-Wing’ Communism”, *supra* note 47, at 96–97 (emphasis added).

<sup>57</sup> Recent scholarship has moved away from such absolutist framings. For more nuanced discussions of the concept of revolution in the context of Marxist international law theory, see Taylor, ‘Reclaiming Revolution’, 22 *FYIL* (2011) 259; Bowring, ‘What Is Radical in “Radical International Law”?’, 22 *FYIL* (2011) 1; Knox, *supra* note 35. But see also Baars, *supra* note 27.

<sup>58</sup> Mievile, *supra* note 6, at 73–74.

<sup>59</sup> See U. Ozsu, ‘B.S. Chimni’s “Relatively Autonomous” International Law’, *EJIL: Talk!*, 27 December 2017, available at [www.ejiltalk.org/b-s-chimnis-relatively-autonomous-international-law/](http://www.ejiltalk.org/b-s-chimnis-relatively-autonomous-international-law/); K. Tzouvala, ‘Reading Chimni’s *International Law and World Order*: The Question of Feminism’, *EJIL: Talk!*, 28 December 2017, available at [www.ejiltalk.org/reading-chimnis-international-law-and-world-order-the-question-of-feminism/](http://www.ejiltalk.org/reading-chimnis-international-law-and-world-order-the-question-of-feminism/); R. Knox, ‘Imperialism, Commodification and Emancipation in *International Law and World Order*’, *EJIL: Talk!*, 29 December 2017, available at [www.ejiltalk.org/imperialism-commodification-and-emancipation-in-international-law-and-world-order/](http://www.ejiltalk.org/imperialism-commodification-and-emancipation-in-international-law-and-world-order/). For Chimni’s response, see ‘Concluding Response from Professor Chimni: International Law and World Order’, *EJIL: Talk!*, 29 December 2017, available at [www.ejiltalk.org/concluding-response-from-professor-chimni-international-law-and-world-order/](http://www.ejiltalk.org/concluding-response-from-professor-chimni-international-law-and-world-order/).

in the international legal landscape, it has to prove that it can hold its own not only as a theory *about* international law (a theory ‘from the outside’) but also as a theory *of* international law (a theory ‘from the inside’). It has to show that it can speak to all of those questions that trouble international lawyers as lawyers, not just those that traditionally interest Marxist scholars working outside the international legal field. Seen in this context, Chimni’s and Marks’s decision to press on for a ‘radicalism with rules’ certainly makes a lot more sense than Mieville’s across-the-board condemnation of international law as a form of social life *tout court*.

Martti Koskenniemi called this the tragedy of legal realism: realism had been very successful when it came to undermining the established dogmas of formalist positivism; where it failed, however, was in not realizing that such a displacement could not in itself lead to any changes in the broader disciplinary fabric unless realism could simultaneously provide answers to those questions that define the jobs that international lawyers perform as lawyers.<sup>60</sup> Like realism, Marxism in international law today faces the same challenge. To succeed in its mission, it needs to show to the international law profession that it can meaningfully speak to questions and concepts that structure the practical landscape of the international legal process; that it can put forward, say, a theory not only of human rights and neo-colonialism but also of custom and international arbitration; that it can explain what is wrong (and right) about the national treatment principle in the General Agreement of Tariffs and Trade and the deep seabed regime in the law of the sea, not only the American and British wars in the Balkans and the Middle East, and that it can address the hopes, concerns and anxieties not only of Marxists who are interested in international law but also of international lawyers who are interested in Marxism.<sup>61</sup>

## 6 *ILWO*’s Disciplinary Agenda: Temptations, Omissions and Some Unanswered Questions

Much water has flowed under the bridge in the world of international legal theory since 1993. Now that the new edition of *ILWO* is here, the question that immediately arises is just how much and what exactly has changed about it. At its root, *ILWO* still remains an exercise in traditional legal-theoretic commentary. The entire first chapter of the book (at 1–37) is taken up by conspicuously theoreticist discussions; why expressly theoretical studies are important (at 1); how exactly the particular theoretical project *ILWO* puts forward relates to mainstream international law scholarship,

<sup>60</sup> Koskenniemi, ‘Introduction: Alf Ross and Life beyond Realism’, 14 *EJIL* (2003) 653, at 655–658. For further discussion of this idea, see also Rasulov, ‘From Apology to Utopia and the Inner Life of International Law’, 29 *LJIL* (2016) 641, at 644–648.

<sup>61</sup> To achieve this objective, the best place to start, of course, would be by reading and taking seriously – rather than ridiculing or dismissing – the arguments, questions and concerns raised by non-Marxist international lawyers seeking to engage with the topic of Marxist international law theory. In this vein, see, e.g., Koskenniemi, ‘What Should International Lawyers Learn from Karl Marx?’, in Marks, *supra* note 4, 30; Roth, ‘Marxian Insights for the Human Rights Project’, in Marks, *supra* note 4, 220.



post-colonial theory, socialist feminism and the 'liberal international relations-international law approach' (at 10–37); how the two modalities of critique – empathetic (internal) and oppositional (external) – can be best combined to yield the most useful and powerful insights (at 3); why it makes sense to omit from *ILWO*'s ambit the positivist theory of international law, even though it still remains the 'dominant approach' (at 12) and so on.

And, yet, it would certainly be incorrect to say that *ILWO* is still the same book it was in 1993 or that it even pursues the same basic intellectual agenda. For starters, the shape of the critical landscape the new edition aims to cover has greatly expanded. The list of academic eminences it has chosen to 'target' has grown from four to eight. Three of the original four – Morgenthau ('classical realism': chapter 2, at 38–103), McDougal (policy-oriented jurisprudence: chapter 3, at 104–178) and Falk (the 'Grotian' or 'the world order model' approach: chapter 4, at 179–245) – make a successful comeback. David Kennedy and Martti Koskenniemi ('new approaches to international law' [NAIL]: chapter 5, at 246–357) and Hilary Charlesworth, Christine Chinkin and Catharine MacKinnon (feminist approaches to international law: chapter 6, at 358–439) round out the list of the typical representatives of the five 'most insightful and influential contemporary approaches to international law' (at 3).

The chapter about the Soviet theory of international law (Tunkin), like the original concluding section, has been dropped. Given that the latter had opened with the acknowledgement that '[t]here is no grand conclusion to this volume',<sup>62</sup> the decision not to reproduce it probably makes sense editorially if not from the reader's experience point of view. Whether one can say the same about the Tunkin chapter, however, is not so clear. Some of the most interesting insights developed in the first edition of *ILWO* were presented in the context of its extensive critical engagement with the official Soviet theory of international law, of which the Moscow State University professor had been by far the most visible and lucid spokesperson. Although some of those arguments have been recycled and reinserted in other sections of the new edition, the loss of such a powerful catalyst has certainly taken the edge off *ILWO*'s broader critical project.

Naturally, one could argue that since both the Soviet Union and its tradition of dividing the global legal space into Schmittian-style 'socialist' and 'bourgeois' segments have been relegated into the dustbin of history, there hardly now seems to be any reason to keep the Tunkin chapter. Who in international law reads Tunkin these days anyway? However relevant his arguments may have been once, nobody puts him on reading lists anymore. Whatever interesting and noteworthy ideas he may have had, surely one can find all of them recycled in other scholars' work now. Far more likely than not, they will also probably have done a much better job articulating them too: like most Soviet lawyers, Tunkin was not an exciting writer.

All of these points, no doubt, seem good and valid. But something does not quite add up. If there did not seem to be any use in bringing back the Tunkin chapter, what

<sup>62</sup> Chimni, *supra* note 9, at 297.

exactly was the use, one might ask, in bringing back the other three original chapters? Can the New Haven school really be considered one of the most ‘influential contemporary approaches to international law’? If it seems so certain that international lawyers do not really read Tunkin anymore, can one be assured they still read McDougal and Morgenthau? How often are Falk’s writings found on standard international law reading lists? If Tunkin’s style was so boring and uninspiring and his arguments have long since lost their sense of novelty, can any one of the other three be said to be different? None of these questions lends itself to an easy answer. And, yet, all of that is ultimately beside the point. Because the real purpose of *ILWO*’s excursions into policy-oriented jurisprudence, classical realism and so on was never just to familiarize its readers with the ‘most insightful and influential contemporary approaches to international law’. It was to warn them against the false critical alternatives that will await them the moment they step outside the box of positivist orthodoxy.

All of us have been there. Every international lawyer sooner or later finds themselves starting to doubt the intelligibility of the traditional positivist paradigm. The closer one looks at it, the more self-evident it seems that even in its most ‘enlightened’ formulation<sup>63</sup> the standard positivist account of international law ‘neither accurately depicts the structure and process of international law nor possesses the [necessary] conceptual and theoretical resources to contribute to the realization of a peaceful and just world order’ (at 14). Most of us react to this realization with a sense of anxiety. It threatens the integrity of our relationship to our chosen disciplinary affiliation and our professional self-image. Discomforted by the various political and ethical implications this can raise, many of us proceed to repress this knowledge. Others find ways to ‘move on’; Peter Sloterdijk calls this the logic of cynical reason.<sup>64</sup> Those who do not succumb to either of these tendencies, it seems, are those for whom *ILWO* was primarily written. They are its principal target audience; their hearts and minds are its chosen battleground.

If I am right in this reading, however – if that is indeed where the new *ILWO*’s disciplinary ambition lies – then the decision to omit the Tunkin chapter starts to look even more questionable. Why does a reader who comes to *ILWO* today need to be warned about all of the flaws and shortcomings of Falk’s Grotian eclecticism but not the flaws and shortcomings of Tunkin’s quasi-Schmittian project of socialist international law as the great civilizational other of the bourgeois international legal system? How can we be so concerned about the potential seductiveness of McDougal’s technocratism and yet ignore the obvious appeal of Tunkin’s Marxist positivism? If one is indeed so interested in supplying a critically minded student with all of the intellectual tools needed to help her see through the false hopes and intellectual dead ends, surely the Tunkinian deviation – the idea that one can combine a strong commitment to statocentricity and voluntarism, on the one hand, and communist internationalism, on the other – deserves no less critical attention than anything produced by Morgenthau.

<sup>63</sup> Simma and Paulus, ‘The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View’, 93 *American Journal of International Law* (1999) 302, at 306–307.

<sup>64</sup> See P. Sloterdijk, *Critique of Cynical Reason* (1988).

## 7 *ILWO's* Version of Marxist International Law Theory

With Tunkin out, the argument in the Marxist chapter of the new *ILWO* (chapter 7, at 440–550) now revolves mostly around the idea of the so-called ‘integrated Marxist approach to international law’ (IMAIL) and its applications to areas such as international legal history (at 477–498), the contemporary ‘era of global imperialism’ (at 499–524), legal interpretation (at 524–534) and international human rights (at 534–543). In terms of the main *dramatis personae*, the pride of place here unquestionably belongs to Mieville – and, through him, Pashukanis (at 462–477) – and his New Leftist-style approach to the ‘reform or revolution’ debate (at 458–462, 516–524).

The critical deconstruction of Mieville’s argument seems predictable and for the most part justified. Many points in Mieville’s argument, Chimni notes, are ‘not new’ and fairly unoriginal (at 476); his history of international law ‘appears [to be] more realist than Marxist’ (at 522); his adaptation of CFT to international law completely overlooks the non-identity of ‘wage labour-capital relations with [those occurring] between sovereign states’ (at 475); his failure to distinguish between colonial international law and the international law of the neo-colonial period casts serious doubts on the diagnostic accuracy of his proposed analytic (at 476); his account of the present-day international legal order consistently disregards the crucial role of the Bretton Woods institutions (at 520), which inevitably leads him to ignore the ‘intricate and multidimensional nature’ of the contemporary international legal system and ‘mischaracterize ... the possibilities of reform in it’ (at 462). One could continue the list of charges – Bill Bowring and Marks each outline a few further possible additions<sup>65</sup> or take an even harsher line. The fact that Chimni has not suggests a certain measure of punch pulling and an intention, perhaps, not to turn *ILWO* into a point-scoring reply-all letter.

In any event, it is his idea of IMAIL that represents the most theoretically interesting – and ideologically controversial – part of Chimni’s argument in the new ‘Marxist chapter’. All of its digressions into Wittgensteinian philosophy aside, the general theoretical project behind *ILWO's* first edition at its root was still very much the product of the classical Marxist tradition. Even though it did acknowledge right from the outset the need for Marxist theory to evolve and to correct itself,<sup>66</sup> the general analytical apparatus it brought into play at all times remained deeply orthodox. The main focus of attention theoretically fell invariably on questions of political economy and the international economic system, and the overarching theoretical ambition proposed and pursued was consistently articulated in narrowly critical terms: ‘[I]t is not the systematic account of the Marxist approach to international law and world order which is the primary objective of the present work [but] the critique of certain approaches from the Marxist perspective.’<sup>67</sup>

<sup>65</sup> See Bowring, *supra* note 4, at 21–30; Marks, ‘International Judicial Activism and the Commodity-Form Theory of International Law’, 18 *EJIL* (2007) 199.

<sup>66</sup> Chimni, *supra* note 9, at 17–20.

<sup>67</sup> *Ibid.*, at 20.

The new *ILWO* radically departs from both of these positions, and the key turning point here is the idea of IMAIL. Not that one can immediately work what exactly it stands for. At one point, IMAIL is said to be virtually synonymous with TMAIL (at 15); at another, a direct outgrowth of socialist feminism (at 20). A few paragraphs before that it is identified as the logical continuation of Gandhi's teachings and aspirations (at 19). The emerging narrative leaves an impression of apparent inconsistency, but the basic idea behind it is, in fact, rather simple. Although Chimni himself never puts it in so many words, IMAIL for him is, essentially, the concept of intersectionality writ large.

At the heart of IMAIL, lie two closely interrelated ideas: the theory of the so-called five determinative logics of international law (at 31) and the principle of conscious analytical eclecticism (at 444). The first of these is defined and elaborated as follows:

These logics are the 'logic of capital', the 'logic of territory', the 'logic of nature', the 'logic of culture' and the 'logic of law'. The relationship of the different logics is dynamic and complex and evolves over time. While the five 'logics' together co-constitute 'world order', each of the logics has its own inner structure, dynamics and rituals. In other words, while each of the logics represents 'a rich totality of many determinations and relations' no logic is reducible to other logics. However, in this composite framework of intersecting logics, IMAIL assigns relative priority to the 'logic of capital' as the other four logics operate within the boundaries drawn by it in different phases of history (at 31).

Note the two central claims around which Chimni builds his argument: that none of the five proposed logics is reducible to any other – each of them, in other words, is structurally autonomous – but that, in the final analysis, the logic of capital still reigns supreme over all of the rest. The language and the rhetorical style may have changed, but the basic argument Chimni is revisiting here is essentially a combination of Louis Althusser's theory of overdetermination and its logical centrepiece the concept of the 'determination in the last instance'.<sup>68</sup>

Contrary to what one might call the vulgar version of Marxist theory, the movement of history, argued Althusser, could never be understood as an effect of any one single process or cause but, rather, of a whole series of formally separate, but practically overlapping, causes and processes. This inevitably involved the creation of numerous 'feedback' loops and the emergence of relative hierarchies of importance:

[T]he elements are asymmetrically related but autonomous [from one another, but] one of them is [always] dominant. The economic base determines in the last instance which element [will] be dominant in a [given] social formation. ... But the dominant element is not fixed for all time, it varies according to the overdetermination of the [respective] contradictions and their uneven development.<sup>69</sup>

Seen from this angle, the main problem with the five critical traditions the new *ILWO* formally identifies as its targets of critical intervention lies in their collective failure to recognize the full extent of this pattern of overdetermination and the relative dominance within it of the logic of capital.

<sup>68</sup> Althusser, *supra* note 2, at 112–113.

<sup>69</sup> *Ibid.*, at 255.

Morgenthau's classical realism, notes Chimni, 'only takes into account the logic of territory' but hardly ever the logic of law or the logic of capital (at 45). This inevitably leaves it 'advanc[ing] an impoverished understanding of the history and dynamics of international law', not least when it comes to explaining 'the relationship between capitalism, imperialism, and the evolution' of the contemporary international legal order (at 102). By contrast, both McDougal and Falk tend to offer much more nuanced analytical frameworks, 'tak[ing] cognizance of all five logics'. Both of their theories, however, are critically 'unsatisfactory' (at 109, 111, 181). McDougal's approach openly 'refuse[s] to accept the relative primacy of the logic of capital' (at 111). Falk's theory, in contrast, while it does 'certainly devote greater attention' to the subject of capitalism, fails to assign the logic of capital its proper role (at 181). What is more, due to his failure to attend to the question of legal interpretation with the same degree of rigour as McDougal, Falk's approach also tends to overlook 'the relative autonomy of international law' as an independent variable (at 181).

Similarly, the main problem with the so-called 'autonomous' feminist theories of international law lies in the fact that, while trying to elucidate the important constitutive function of gender, they consistently downplay the significance of the logic of capital. Predictably this leads to a consistent mischaracterization of the general dynamics of domination and exclusion in the global arena and international law's role in it (at 360). By contrast, the 'integrative' feminist theories, which unlike the 'autonomous' theories do not propose to read every political question through the lens of gender, carry the potential of developing a much more nuanced and sophisticated perspective by opening themselves up to intersectional thinking (at 371). Nevertheless, Chimni argues, most practitioners of the integrative approach – as exemplified, among others, by Charlesworth and Chinkin – usually opt for a critically regressive methodological solution that inserts the insights of radical feminism into a pre-existing analytical structure lifted from liberal political theory. The result is a consistent ignorance of the truly 'deep structures [and] internal contradictions that mark the international legal system' (at 371), an oddly naive quest for 'feminist internationalism' (at 388) and a nearly complete discounting of the subject of 'international political economy' (at 437). By contrast, Chimni notes, the radical feminist scholars – as exemplified in this case by MacKinnon – even though some of their actual writings on international law may be plagued by an unjustifiable degree of optimism (at 378), raise the promise of a much more fruitful use of the idea of intersectionality, precisely because of their openness to Marxist theories of capitalism (at 372–376, 439).

Compared to the other four chapters, *ILWO*'s depiction of the NAIL project does not generally share the same degree of clarity. In large part, this probably comes down to Chimni's general sense of scholarly integrity. Despite the fact that the underlying logic of his broader narrative requires him to portray NAIL as a purely discourse-focused tradition,<sup>70</sup> his truthfulness to the studied material seems to preclude him from carrying

<sup>70</sup> The catalogue of NAIL's faults listed at the end of the respective chapter is quite telling. The NAIL project is blind to 'local and global structures of oppression'; does not engage with class-, race-, and gender-based 'fractures in society'; does not 'believe in [the] cognitive reciprocity' between 'Western and non-Western knowledge frameworks'; does not 'take resistance movements seriously'; does not 'see the grounds of its own genesis and the historical limits of its relevance'; and does not 'state its normative preferences about alternative futures' (at 357).

out this kind of interpretative operation. Unsurprisingly, then, the discussion of the two scholars Chimni chooses to identify as NAIL's standard bearers turns out to be both more granular and rather unfocused.<sup>71</sup> Although he suggests at the start of the chapter that the principal thrust of the NAIL project essentially comes from the idea of a Nietzschean-style universal scepticism – Kennedy's declaration that 'the most well-intentioned efforts to strengthen global governance and reinforce international law may, in fact, be as much a part of the problem as of the solution' is assigned a particularly high probative value (at 250) – Chimni fails to develop the argument implied by this premise and to work out its implications. What he offers instead is a series of loosely inter-connected vignettes, each of which proposes a slightly different concept of what NAIL ultimately 'stands for': a Lyotardian-style anti-leftist post-modernism (at 255, 306–309); a Derridean-style ahistorical and apolitical deconstructionism (at 260–264); an enthusiastic turn to history (at 320) and to political economy (at 256, 283); an anti-universalist comparativism (at 330–333); a Kantian neo-formalism (at 333–355); a Bourdieusian-style sociology of expertise (at 279–281, 289–292); an anti-materialist theory of imperialism (at 285–288, 323–326); one long meditation on the idea of Saussurean structural indeterminacy (at 315–318) and so on and so forth.

Still, Chimni's final verdict on NAIL is not too difficult to work out. For all of its dazzling critical achievements, NAIL's main shortcomings ultimately are not that dissimilar to Falk's. On the one hand, in 'delink[ing] the story of international law from the story of universalizing capitalism', NAIL fails to give sufficiently 'serious consideration to the role of colonialism and imperialism in the evolution and development of international law' (at 306, 323, 355–356). On the other hand, despite pioneering the use of all kinds of 'diverse philosophical, linguistic, and legal materials to make imaginative interventions' across different areas of international legal study, NAIL 'lacks an integrated view of international law that [can] explain the form and content of international law as two aspects of the same phenomenon' (at 294, 356).

So far, nothing unpredictable: a Marxist scholar trying to explain why other scholars are wrong ends up concluding that each of them in their own way failed to pay enough attention to the logic of capital (at 447–449) – how clichéd and how unsurprising! But, wait, just when you might think you have cracked *ILWO's* essential message, there suddenly comes a new twist. There are not, in fact, only five 'false' critical alternatives one needs to learn about as a student of international law. Though he does not say this in so many words, from the tone of Chimni's remarks at the start of the *IMAIL* chapter, it seems abundantly clear that side by side with classical realism and 'autonomous' feminist theories, there also exists another seductively reductionist *false tradition*: the orthodox Marxist theory.

<sup>71</sup> The reduction of the NAIL tradition to the writings of only two scholars, of course, can be considered a fairly controversial choice. For a more balanced and nuanced presentation of the NAIL, see, e.g., J.-M. Beneyto and D. Kennedy (eds), *New Approaches to International Law* (2012).



The whole concept of the integrated Marxist approach, as Chimni explains, is premised on the assumption that Marxism ‘tend[s] to assign too much explanatory power to ... the “logic of capital” and the accompanying category of “class”’ (at 444). While sometimes this can be ‘traced to the misinterpretation and misapplication of Marxis[t]’ ideas (at 444), ‘Marxists *are* prone to treat the category “class” as a catch-all category’ (at 447). Even within the most sophisticated versions of the traditional Marxist discourse there exist ‘certain conceptual and theoretical gaps that can be filled *only* by turning to other theoretical traditions’ (at 444), not least importantly feminism and post-colonial critical race theory.

There is much here, of course, that intuitively makes sense. Taken in its standard configuration, the mainstream Marxist tradition does, unquestionably, suffer from a certain pattern of gender and race-blindness.<sup>72</sup> Its concept of emancipation, geared as it is towards the ‘revolutionary transformation of the conditions of exploitation of labour’, tends to suppress its proponents’ awareness of most ‘other forms of domination’, from sexism and patriarchy to racism and Eurocentrism.<sup>73</sup> To say that the Marxist theoretical apparatus has gaps that need to be filled, in a sense, is to state the obvious.

The problem with this statement, however, as Chimni himself immediately recognizes, is that it does not really tell us how exactly this ‘gap-filling exercise’ is meant to be carried out in practice. It seems clear that ‘for such an eclectic enterprise to be sound, there must be a degree of compatibility between the different strands of theory brought together’ (at 444). But how is one actually meant to measure this ‘degree of [inter-theoretical] compatibility’? If there is one thing Marxist philosophy has taught us about the dynamics of theoretical cross-pollination, it is that it is not, in fact, nearly as simple or as innocuous as the traditional discourse about interdisciplinarity tends to suggest it is. Indeed, as Althusser notes, for example, it is not at all certain that the Marxist theoretical framework can actually incorporate that many ‘foreign’ theoretical elements. Whenever it opens itself up to that kind of influence, it risks getting ‘contaminated’ by their underlying philosophy, an event that can lead not only to a significant loss of analytical rigour and critical power but also an immediate collapse into the worst form of liberal eclecticism.<sup>74</sup> Or, as Roberto Unger puts it, each time Marxism loosens its standard model of the ‘deep structure’, it takes another step towards theoretical nihilism and political defeatism.<sup>75</sup>

What are the risks the Marxist theory of international law runs when it sets out to incorporate within its theoretical framework, alongside the logic of capital, not only the logic of territory but also the logic of culture and the logic of nature? What exactly

<sup>72</sup> See D. Roediger, *Class, Race and Marxism* (2017); C. MacKinnon, *Towards a Feminist Theory of the State* (1989); Gilroy, ‘You Can’t Fool the Youths ... Race and Class Formation in the 1980s’, 23 *Race and Class* (1981) 207. See also Tzouvala, *supra* note 59; Knox, ‘Valuing Race? Stretches Marxism and the Logic of Imperialism’, 4 *London Review of International Law* (2016) 81.

<sup>73</sup> Balibar, *supra* note 2, at xv.

<sup>74</sup> Althusser, ‘Letter to the Central Committee of the PCF’, 15 *Historical Materialism* (2007) 153, at 158.

<sup>75</sup> R. Unger, *Social Theory: Its Situation and Its Task* (1987), at 98.

is the ‘logic of culture’? What does it cover and what sort of phenomena and processes is it supposed to represent? Chimni’s short elaboration of this concept indicates that this rubric is meant to ‘encompass the world of ideas and ideology’ and that it ‘shapes among other things the meaning and role of such key ideas as nationalism, development and security’ (at 35). If that is the case, however, why not simply call the spade a spade and rename this logic the ‘logic of ideology’? Similarly, what exactly should one understand by the ‘logic of nature’? Chimni’s brief explanation provided at the start of the book suggests that all that this concept really stands for is a general sense of apprehension that ‘the ecological crisis [is] deepen[ing]’ and that ‘nature [should not be] treated as the Other of humankind’ (at 34). If that is the case, however, then laudable as this concern may be, it hardly deserves to be described as a ‘logic’, given that the latter concept in Chimni’s presentation essentially represents what in the old Marxist vocabulary used to be called the ‘motor of history’<sup>76</sup> – that is, the fundamental history-formative processes ‘that co-constitute the world order’ (at 111). While it certainly makes sense, *prima facie*, to include among such processes the processes of territorial conquest, capitalist economic expansion and the progressive juridification of international relations, the idea that the ‘humankind should treat nature better’ obviously belongs in an entirely different ontological register. Elevating it to the level of a separate ‘logic’ can bring nothing but confusion, not to mention introducing some rather unwelcome overtones of biological and environmental determinism.<sup>77</sup>

Even leaving aside these ambiguities, however, the central question remains: how exactly are we supposed to fill those ‘gaps’ in the Marxist theoretical apparatus that the idea of IMAIL suggests require filling? Following what protocol? At various points, Chimni makes references to ‘the adoption of a contextual method’ (at 446), the refusal to impose a one-size-fits-all approach (at 547) and ‘focus[ing] on both the particular and the universal and the interrelationship between the two’ (at 447). None of these concepts, however, indicates an actual methodology. And what does each of these propositions really mean? How is the idea that we should not impose a one-size-fits-all approach not just another way of saying ‘contextualism’? How is ‘contextualism’ not just another word for ‘there must be a certain degree of inter-theoretical compatibility’?

One will not find any answers to these questions in *ILWO*, and this, in the end, is probably its single greatest weakness and flaw as an act of legal-theoretical intervention. But it is a flaw borne out of a highly original ambition and the decision to venture into a field that no one had previously explored. In seeking to convert the theory of overdetermination into a workable method and in the process to reconnect Marxism with the broader landscape of international legal theory, *ILWO*, no doubt, achieves a rather mixed bag of results. But let this fact not obscure from us the broader context amidst which its theoretical project takes place. Let us not lose sight of what it aspires

<sup>76</sup> See L. Althusser, *Politics and History* (1972), at 50–51; N. Poulantzas, *Classes in Contemporary Capitalism* (1975), at 23.

<sup>77</sup> For a typical example of such determinism, see, e.g., J. Diamond, *Guns, Germs, and Steel* (1997).

for and tries to push us towards otherwise – a fundamental, root-and-branch re-imagination of Marxism's general theoretical agenda in contemporary international law. The first sketch was always going to have some blots and inaccuracies. Let us celebrate the fact that its author dared to attempt it and not lament the fact that it did not turn out to be perfect.

## 8 Conclusion

For the greater part of the last one-and-a-half decades, the dominant point of reference for the concept of 'the Marxist theory of international law' among the non-Marxist international law contingent has been Mieville's brilliant, but in very many ways limited, excursus into New Leftist radicalism. In showing us the possibility of bringing the Marxist tradition and international legal theory together in a fundamentally different fashion, the new *ILWO* will hopefully offer a much-needed correction to this trend. And the significance of this promise cannot be underestimated.

Aesthetically and politically, all Marxist debates in contemporary international law unfold along the same basic continuum of arguments. At one end of it lies *The Riddle of All Constitutions*; at the other *Between Equal Rights*. *ILWO*, in its new configuration, seeks to install itself at the proverbial centre. Unlike *The Riddle of All Constitutions*, it aims to introduce its readers to as many Marxist topics and themes as possible – not only the theory of ideology but also imperialism, class struggle and the neocolonial dynamics of the North–South divide. Unlike *Between Equal Rights*, it does not aim to do this by adopting a denunciatory tone. Its project is far trickier – its goal is to introduce an international law audience to a ruthlessly critical vision of their discipline without at the same time condemning their dreams, values and hopes, however naive or suspect they may seem otherwise.

The business of Marxist theory for Chimni does not end with the act of critique. It is not enough from his perspective merely to question the established status quo or to wash its received wisdoms with cynical acid. Marx's ultimate aim, he writes, has always been to create a world 'in which man is no longer a stranger among strangers, but ... where he is at home' (at 550). It is the job of Marxist theorists to complete this task, to chart the path forward, to rescue the idea of human progress from the cynical defeatism of the late capitalist culture and to save our faith in a better tomorrow. Nowhere is this last point made more visible than in the very last segment of the new edition: the section entitled 'Alternative Futures' (at 543–550).

What sort of utopia should international lawyers today work towards? The labels we choose, Chimni seems to suggest, do not ultimately matter. His own preferred term, generally, is 'socialism', but, in the contemporary historical conjuncture, the language of socialism, he notes, still seems to be far too often associated with the idea of totalitarianism. From the purely pragmatic point of view, therefore, he concludes that it would probably be better now to push for the 'temporary suspension' of the language of socialism in favour of some other, less toxic, vocabulary – something that would be able to convey the general notion of a utopian alternative that exists as a 'third

possibility' between the historical horrors of the actually existing capitalism and the actually existing socialism (at 545–546).

Having explored a similar subject on previous occasions,<sup>78</sup> Chimni finds no space in the new *ILWO* to provide a detailed exposition of what exactly he has in mind by this idea. Nor does he explain why the new vocabulary he proposes – ‘third possibility’ – seems to be so similar to Anthony Giddens’ notorious ‘third way’ theory. What he does do instead is outline a series of general observations (at 546–549), which it would be instructive to list here, even if only so as to remind ourselves how differently the second edition of *ILWO* has turned out from the first one:

- ‘the idea of a “third possibility” should not be thought of as a ... projection of a [single] fixed and frozen ... blueprint’;
- ‘in imagining and mapping a “third possibility” the accumulated knowledge and experiences of the non-Western world must be borne in mind’;
- ‘there can be no unique or singular version of “third possibility” that each society must follow’;
- the principle of electoral democracy should be recognized as a non-negotiable value, but the logic of democratic decision-making should also be extended to ‘decisions relating to production, consumption, and distribution of goods and services’, including at the level of the ‘global administrative process’;
- the ‘third possibility’ should not insist on the immediate and complete termination of ‘actually existing capitalism’ and the different market institutions and property regimes developed under it, but it should insist on putting an end to all forms of imperialism and ‘the idea of subjugation of Nature’;
- all forms of class, race and gender-based oppression and inequality have to be eliminated;
- ‘a future world state must ... be ... a confederation or a commonwealth of free peoples’, and each society must be able to determine for itself ‘the balance it values between the State and the market’ and
- ‘the struggle for realizing a “third possibility” must be based on the principle of non-violence’.

There is a certain sense of irony in seeing *ILWO* end on this note, though, of course, it is nothing surprising. Speculative thought does not come easily to critically inclined minds. Many a legal scholar when switching from the deconstructive mode of argument to programmatic prescription has fallen prey to the same problem. Indeed, looking back at the history of modern legal thought, Duncan Kennedy once identified this as one of the most distinctive patterns of all critical legal writing, going back to Oliver Wendell Holmes and Wesley Hohfeld:

To this day their posterity includes the scholar who develops [the most] elaborate critique of [everyone who came before], and then [feels compelled to] offer[] his or her own alternative. The alternative sinks like a stone, but the critique not only effectively does in its object but survives as a model for [the] future.<sup>79</sup>

<sup>78</sup> Chimni, ‘Alternative Visions of Just World Order: Six Tales from India’, 46 *HILJ* (2005) 389.

<sup>79</sup> Kennedy, *supra* note 45, at 82.

One can find the same pattern in much of contemporary international law scholarship. *From Apology to Utopia* is one typical illustration that readily comes to mind.<sup>80</sup> *The Dark Sides of Virtue*, with its paean to decisionism ‘at once responsible and uncertain’, is another.<sup>81</sup> *In the Wake of Empire* is a third.<sup>82</sup> It seems safe to say that we can also add *ILWO* to this list now – the ‘alternative futures’ segment is simply impossible to read without a certain measure of exasperation and scepticism. A Marxist account of international law that ends in the declaration that the global socialist utopia will be compatible with the continued existence of numerous capitalist states and the various forms of market institutions and property regimes they rely on and uphold? How can any of this actually be considered Marxist? For all of their limitations, Tunkin and Korovin at least never agreed to let capitalism off the hook.

And, yet, in closing, it is the last part of the Kennedy quote that I would like to focus on more here – the value of the proffered critique, in the final analysis, does not depend on the plausibility of the proposed ‘alternative’. The new *ILWO* may not have been very successful in outlining the path to the global socialist utopia. But to fault it for that, I think, ultimately, would be rather unfair – no single book can be asked to do all that it does in the preceding 550 pages and on top of that also detail a fully workable protocol of universal salvation. There will be other Marxist books, no doubt about that, and other Marxist scholars in years to come who could take on this challenge – and by all means let them find success and inspiration where *ILWO* did not. But let us not forget also that the reason they will not need to begin their proverbial journey from square one is because books like *ILWO* will have cleared the most difficult part of the trail for them. And that sort of debt can never be repaid, only acknowledged. The alternative may sink like a stone – yes – but the critique soars on, and its legacy, in the end, has a liberating effect on everyone.<sup>83</sup>

<sup>80</sup> M. Koskenniemi, *From Apology to Utopia* (rev. edn, 2006), at 513–561.

<sup>81</sup> Kennedy, *supra* note 55, at 348–357.

<sup>82</sup> Berman, ‘In the Wake of Empire’, 14 *American University International Law Review* (1999) 1521, at 1552–1554.

<sup>83</sup> ‘But above all, knowledge by itself exercises an effect – one which appears to me to be liberating – every time the mechanisms whose laws of operation it establishes owe part of their effectiveness to miscognition.’ Bourdieu, ‘A Lecture on the Lecture’, in P. Bourdieu, *In Other Words: Essays towards a Reflexive Sociology* (1990) 177, at 183.