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Macbeth’s Three Witches: Capitalism, Common Good, and International Law

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I

STARTING FROM THE START

The classical liberal theories of the long nineteenth century created the mythic economic individualist only by fencing off the economy from the rest of human life and pressing into the service of industry concerns that. . . . “had nothing to do with the logic of the free market.”¹ *Why would neoliberalism alone have no soul?*²

My Article’s aim is quite modest. It begins with the normative politics of human versus citizen in the age of globalization and the proliferation of technology. Today there are varied accounts of common good that render the international political community open to the accounts of international law. Ideally speaking, laws are made with an aim to protect and promote common good. However, this is not to say that international law promotes global common good automatically. Unfortunately, the very idea of a common good is fettered to a sovereign and so long as a sovereign works to promote its own citizens’ common good, it does not have to worry about the common good of the humans beyond its boundaries. This is the essence of sovereignty within international law.

However, Chimni’s class approach, one of his many contributions to the critique of international law, identifies Western countries’ hold over the means of international law’s production. He usefully deconstructs international law to see it as a product of Marxian class struggle.³ It is only apt then to recall Pashukanis who said “[t]he historical examples adduced in any textbook of international law loudly proclaim that modern international law is the legal form of the struggle of the capitalist states among themselves for domination over the rest of the world.”⁴

¹ Bethany E. Moreton, *The Soul of Neoliberalism*, SOCIAL TEXT, Fall 2007 at 103, 117.

² *Id.*

³ See generally B.S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES (1993).

⁴ See, e.g., Evgeny Pashukanis, *International Law* (1925), in SELECTED WRITINGS ON MARXISM AND LAW 168, 168 (Piers Beirne & Robert Sharlet eds., Peter B. Maggs trans., 1980), available at <http://www.marxists.org/archive/pashukanis/1925/xx/intlaw.htm>. For the Marxist perspective on international law, see W.W. Kulski, *Soviet Comments on International Law*, 46 AM. J. INT’L L. 131 (1952); John Quigley, *Perestroika and International Law*, 82 AM. J. INT’L L. 788 (1988). Cutler argues that the private/public distinction in international law is artificial and it has been maintained to ensure the exercise of public authority by private actors. See A. Claire Cutler, *Artifice, Ideology and Paradox: The Public/Private Distinction in International Law*, 4 REV. INT’L POL. ECON. 261 (1997).

Today, B.S. Chimni, one of the voices of the Delhi School of International Law, is India's leading scholar to have applied a class approach to international law within the Marxist tradition.⁵ Among other things, this Article is an invitation to see the Chimni-led Delhi School as an unmistakable host for a critical tradition informed by the works of R.P. Anand and C.F. Alexandrowicz.⁶ Chimni has consistently argued that "a growing network of international institutions—economic, social, and political—constitute a nascent global state, whose current task is to realize the interests of an emerging transnational capitalist class in the international system to the disadvantage of subaltern classes in the third and first worlds."⁷

Also, courts, and thus the interpretation of law, within developed capitalist economies with liberal democracies have mostly sided with the capitalist class. No wonder, in comparative legal literature it is already well recognized that "American courts, far from being neutral, have been on the side of the rising [capitalist] class" and yet "no persuasive evidence has been offered to show a pattern of political alliance between judges and the political power . . . [that works] to quash the rights of the poor in favour of the rich."⁸ Little surprise then, that today's capital accumulation is marked by the birth and proliferation of a Third World in the capitalist countries and capitalists in the Third World.

⁵ After Professor R.P. Anand, B.S. Chimni, whose works were celebrated at the University of Oregon School of Law TWAIL conference, has been the leading critical voice from the Delhi School of International Law. For the ten books that influenced Chimni, see B.S. Chimni, *10 x 10*, 8 INT'L J. CONST. L. 437–44 (2010).

⁶ While Professor Ram Prakash Anand was based in Delhi, Charles Henry Alexandrowicz was a professor in Madras managing the Indian Study Group of International Affairs at the University of Madras, Tamilnadu, India. Chimni notes "Western textbooks on international law tend to entirely ignore the contribution of the non-West to the evolution and development of international law. This is where the Alexandrowicz book [*An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries)*] assumed immense importance for me." *Id.* at 441.

⁷ B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EURO J. INT'L L. 1, 1 (2004). See also B.S. Chimni, *The Past, Present and Future of International Law: A Critical Third World Approach*, 8 MELB. J. INT'L L. 499 (2007); B.S. Chimni, *A Just World Under Law: A View From the South*, 22 AM. UNIV. INT'L L. REV. 199–220 (2007).

⁸ Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5, 22 (1997).

Through capitalism's biopolitics,⁹ the bourgeois-controlled global legal order presents investment as an opportunity to prosper.¹⁰ However, international laws that were promoted by the capital-exporting nations are waning since the West became an importer of capital, especially from China and Arab countries. While there is a rise of nationalism and protectionism in Western countries against non-Western capital, new investors from the non-West seek a robust protection of their investment through old international law. What is the role of capitalism in this new global legal-social reversal? Clearly, the 1997 and 2008–2009 financial crises provide antitheses to capitalism's unqualified lyricism. At a time when globalization is promoting a seamless flow of capital, my Article questions the relationship between international law, capitalism, and the common good.

Shakespeare's *Macbeth* talks about three witches. They appear in four scenes in the play to foretell and direct the fate of the drama, and the character Macbeth's fascination with them underlines much of the play's action.¹¹ But the witches of *Macbeth*, Albright observes, "nowhere gnash their teeth or rage at the triumph of justice; in fact their plan succeeds in every last detail."¹² He thinks this can be explained "in the orthodox Christian fashion, as the subsumption of partial evils into the universal good."¹³ If *Macbeth's* three witches are replaced by capitalism, the common good, and international law, capitalism can be understood as the necessary evil for the larger common good that international law purportedly promotes. Just as the three witches of *Macbeth*, capitalism, common good and international law are capable of foretelling and controlling the narrative of human lives. One of such narratives comes out as what Žižek identifies as the only true question:

⁹ First used by Lynton Caldwell, "biopolitics" refers to the application of theories and methods from the life sciences toward the scientific understanding of political behavior. See Caldwell, *Biopolitics*, 56 *YALE REV.* 1 (1964).

¹⁰ According to Chimni, contemporary international law may be characterized as bourgeois imperialist international law which codifies the interests of an emerging transnational capitalist class at the expense of interests of TOC and substantive global democracy. See B.S. Chimni, *Prolegomena to a Class Approach to International Law*, 21 *EUR. J. INT'L L.* 57, 74 (2010) [hereinafter *Prolegomena to a Class Approach*].

¹¹ See WILLIAM SHAKESPEARE, *THE TRAGEDIE OF MACBETH* (first folio publication 1623) (2001).

¹² Daniel Albright, *The Witches and the Witch: Verdi's Macbeth*, 17 *CAMBRIDGE OPERA J.* 225, 252 (2005).

¹³ *Id.*

The only *true* question today is: does global capitalism contain antagonisms strong enough to prevent its indefinite reproduction? Four possible antagonisms present themselves: the looming threat of ecological catastrophe; the inappropriateness of private property for so-called intellectual property; the socio-ethical implications of new techno-scientific developments, especially in biogenetics; and last, but not least, new forms of social apartheid—new walls and slums.¹⁴

As another crisis looms over the international financial horizon, richer countries have begun financial introspection. In the wake of “long-run budget deficit,” in September 2011 U.S. President Barack Obama announced larger tax hikes for wealthier Americans. Reportedly, the Republicans, Krugman observed, responded with shrieks of “class warfare.”¹⁵

The world now looks to China, the biggest reservoir of American currency, for rescue.¹⁶ After all, an economic performance this fine by China can paper over any number of communist sins of the past.¹⁷ “*Enter Macbeth With Hammer and Sickle*” is what a *Wall Street Journal* column read on the seventh anniversary of the September 11th attack.¹⁸ Surely, our Macbeth is the tale of betrayal: albeit who among international law, capitalism, and the common good is eventually betrayed is slightly easier to figure out.

Financial services industries after Bretton Woods “sought to make a virtue of disequilibrium, treating volatility and risk as productive forces in their own right for a globally circulating economy of credit and debt.”¹⁹ Since then, two economic crises in little more than a decade have exposed Western and non-Western states’ relationship with capitalism. Just before the 2007 financial crisis, Weber and

¹⁴ Slavoj Žižek, *How To Begin From The Beginning*, NEW LEFT REV., May–June 2009, at 43, 53.

¹⁵ See Paul Krugman, *The Social Contract*, N.Y. TIMES, Sept. 22, 2011, at A35 (“So do the wealthy look to you like the victims of class warfare?”).

¹⁶ See, e.g., Randall Peerenboom, *China Stands Up: 100 Years of Humiliation, Sovereignty Concerns, and Resistance to Foreign Pressure on PRC Courts*, 24 EMORY INT’L L. REV. 653 (2010).

¹⁷ The rise of China is the most important international relations story of the twenty-first century, but according to Charles Glaser “it remains unclear whether that story will have a happy ending.” Charles Glaser, *Will China’s Rise Lead to War? Why Realism Does Not Mean Pessimism*, 90 FOREIGN AFF. 80 (2011). The question for many in the United States is whether China, unlike the Soviet Union, will prove a serious economic competitor as well as a geopolitical one. *Id.*

¹⁸ See Terry Teachout, *Enter Macbeth With Hammer and Sickle*, WALL ST. J., Sept. 11, 2008, at W7.

¹⁹ Randy Martin, *War, by All Means*, SOCIAL TEXT, Summer 2007, at 13, 15.

Arner discussed a possible new design of international financial regulation with bold conclusions.²⁰ But capitalism has become a story of broken promises. The insistence that the “future be lived out in the present constitutes an abandonment of capital’s own utopian promise of progress for all through a dream machinery that would yield secure deferral of something better to come.”²¹

However, international economic lawyers will certainly contest this position; they would point to the success of postwar Bretton Woods institutions, the triumph of the World Trade Organization (WTO), and other liberalizing institutions that seek to mobilize capital around the world by opening up markets. Weber and Arner’s work is an example of such a premise. They drew three conclusions:

First, . . . that the international standards framework should be expanded and modified to explicitly incorporate development goals in addition to stability. While financial stability is a central goal, financial development should merit the same attention . . . Second, in looking at the international standards framework, issues of competition and financial liberalization and their role in both financial stability and development should also be covered. Third, beyond the standards initiative, the international financial architecture deserves further attention—if not a full Bretton Woods-style review, then at least to take into account the WTO and related financial services frameworks and to address financial crisis resolution in a more coherent manner, and address interactions with global climate change mechanisms.²²

However, most aspects of the so-called “new design” seem to have fallen on their face as the world enters into a new phase of financial insecurity.²³ Whether their conclusions hold water any longer is an open question as, on September 17, 2011, *The New York Times* reported the “debt crisis in Europe has finally, and officially washed

²⁰ Rolf H. Weber & Douglas W. Arner, *Toward a New Design for International Financial Regulation*, 29 U. PA. J. INT’L L. 391 (2007).

²¹ Martin, *supra* note 19, at 20.

²² Weber & Arner, *supra* note 20, at 453.

²³ One after another the ideas of free market are tumbling like a pack of cards. In September 2011 Obama urged “France and Germany to move quickly to find a solution to the eurozone crisis, while UK chancellor George Osborne claim[ed] Britain is ‘ahead of the curve.’” Phillip Inman & Larry Elliott, *Warning of a Stock Market Rout Unless a Eurozone Rescue Package is Found*, GUARDIAN (London), Sept. 23, 2011, at 31; *see also*, Heather Stewart et al., *IMF Chief Tells Europe: You Must Bail Out the Banks Again*, GUARDIAN (London), Sept. 22, 2011, at 6 (“[d]espite the recent stress tests carried out by the European Banking Authority, which suggested that most of the banks were well-placed to cope with the sovereign debt crisis, the IMF estimates that banks have taken a €300bn (£260bn) hit in the past year as a result of the growing risk of default by Greece and other vulnerable eurozone countries”).

up on American shores.”²⁴ There is also a consensus that the 9/11 events have once again positioned states as the sole guarantor of national and international security.²⁵ Consequently, today, international capital suffers an unprecedented paradox: Western states that promote neoliberalism through the WTO, the World Bank, and the IMF, among other such platforms simultaneously exhibit protectionism toward Sovereign Wealth Funds (SWFs) coming from non-Western states like Singapore and Saudi Arabia.²⁶

Thus, we live in a world that discriminates capital depending upon its origin. Neoliberalism that advocated free flow of capital and the market as an instrument of the common good is on a retreat as, we are told, non-Western capital is not as safe, secure, and secular as Western capital. Yvonne Lee argues that the reversal of capital flow from non-Western countries like “China, Russia, Singapore, and United Arab Emirates” to Western economies such as the United States and France “have raised the spectre of SWFs as smoking guns.”²⁷

²⁴ Gretchen Morgenson, *Suddenly, Over There Is Over Here*, N.Y. TIMES, Sept. 17, 2011, at BU1. Some, from the Strategy, Policy, and Review Department of the IMF, even talk about starting a World Financial Organization (WFO) “with the power to sanction members whose national regulatory policies are not up to international standards.” See Barry Eichengreen, *Out of the Box Thoughts About the International Financial Architecture* (IMF, Working Paper WP/09/116, 2009).

²⁵ Richard Falk, *The Abandonment of International Law After 9/11*, Address before the Congressional Black Caucus Annual Legislative Conference (Sept. 21–24, 2005), available at http://www.wagingpeace.org/articles/2005/09/21_falk_abandonment-international-law.htm (“The U.S. Government has long adopted double standards when it comes to respecting international law, especially in the setting of national security issues. It promotes a generalized respect for the Rule of Law in world politics, is outraged by violations of international law by its enemies, and chooses selectively when to comply and when to violate.”).

²⁶ For a wholesale discussion on the topic, see Luca Schicho, *Pride and Prejudice: How the Financial Crisis Made Us Reconsider SWFs*, 2 GOETTINGEN J. INT’L L. 63 (2010). The Sovereign Wealth Funds Institute says, “[a] Sovereign Wealth Fund (SWF) is a state-owned investment fund or entity that is commonly established from balance of payments surpluses, official foreign currency operations, the proceeds of privatizations, governmental transfer payments, fiscal surpluses, and/or receipts resulting from resource exports.” *What is a SWF? About Sovereign Wealth Funds*, SWF INSTITUTE, <http://www.swfinstitute.org/what-is-a-swfi/>; see, e.g., Richard N. Cooper, *Recent Books on International Relations: Economic, Social, and Environmental*, 90 FOREIGN AFF. 169, 172 (2011) (reviewing EDWIN M. TRUMAN, *SOVEREIGN WEALTH FUNDS: THREAT OR SALVATION?* (2010)).

²⁷ Yvonne C.L. Lee, *The Governance of Contemporary Sovereign Wealth Funds*, 6 HASTINGS BUS. L.J. 197, 197 (2010).

In light of the new fortunes of the old developing countries due to “escalated oil prices and the exponential growth of emerging markets,”²⁸ Sornarajah thinks that developed states might “dismantle to a significant extent the international law they had created to protect foreign investment and retreat into principles of sovereignty earlier advocated by the developing states.”²⁹ Perhaps other areas of international law might undergo similar self-reflections.³⁰

A. *Is There a Universal Common Good?*

Historically, universalism, as the West’s international law project, did not see common good as its end, much like the Enlightenment thinkers who did not assign much value to global diversity.³¹ Only after the two world wars did the West begin to project international law as a universal agent or agent of the common good.³² The thinkers

²⁸ *Id.* at 200.

²⁹ M. Sornarajah, *Sovereign Wealth Funds and the Existing Structure of the Regulation of Investments*, 1 *ASIAN J. INT’L L.* 267, 267 (2011). Chimni points out: “radical concepts such as ‘common heritage of mankind’ were advanced in the process of arriving at rules to govern the use of the oceans.” B.S. Chimni, *Marxism and International Law: A Contemporary Analysis*, 34 *ECON. & POL. WKLY.* 337, 346 (1999). But these initiatives, he remarks, “floundered on the rock of neo-colonialism.” *Id.* The question is: is this position set to change?

³⁰ Reflection on international law in the Third World is a new indulgence. Thus there are obvious reasons behind a rather nondescript response to Žižek’s questions in the Third World’s legal scholarship. The idea of legal scholarship in India, for example, is as recent as the 1950-60s when Professor Anand authored some foundational papers on the Third World’s concerns in international law. See R.P. Anand, *Attitude of the Asian-African States Toward Certain Problems of International Law*, 15 *INT’L & COMP. L.Q.* 55 (1966); R.P. Anand, *Role of the ‘New’ Asian-African Countries in the Present International Legal Order*, 56 *AM. J. INT’L L.* 383 (1962). Since the “United Kingdom is a very special case owing to its relatively late arrival to the world of academic legal scholarship[.]” one need not stress how new academic legal scholarship in the Third World is colonized in the past largely by Britain. See Alexander Somek, *The Spirit of Legal Positivism* 10–12, 1, 3 n.4 (June, 2010) (unpublished manuscript) (on file with the Social Science Research Network). He notes that in the United States the academic realm is largely based on the understanding that “the production of law review articles is in some manner, however causally obscure, a way of improving the world.” *Id.* at 2.

³¹ See generally Prabhakar Singh, *The Scandal of Enlightenment and the Birth of Disciplines: Is International Law a Science?*, 12 *INT’L CMTY. L. REV.* 5 (2010).

³² After the Nürnberg and Tokyo trials, numerous international treaties and conventions attempted to devise a comprehensive and enforceable definition of war crimes. The four separate Geneva conventions, adopted in 1949, in theory made prosecutable certain acts committed in violation of the laws of war. The conventions provided for the protection of wounded, sick, and shipwrecked military personnel, prisoners of war, and civilians. Like the convention on genocide, however, the Geneva conventions specified that trials were to be arranged by individual governments. In 1977 two protocols were adopted to clarify and supplement the Geneva conventions. Recognizing that many conflicts were internal

of the Enlightenment, such as Thomas Jefferson, Tom Paine, John Stuart Mill, and Karl Marx, never doubted that the future for every nation in the world was to accept some version of Western institutions and values.³³ A great transformation was supposed to lead to a universal civilization. Colonization was seen as part of that great transformation.

Strong sovereignty has always been an anathema for the very idea of a global common good; pitched at a high level of abstraction, common good has never been the goal of those who fashioned modern sovereignty. Modern sovereignty is a clever mix of the insulation from Others' emotions and the projection of domestic needs as the need of everyone. Having understood the concept of sovereignty from their masters, post decolonization, however, new independent people of the Third World distinguished the West's common good from that of the non-West's peoples on account of their lived experiences.³⁴ Capital, mostly in the form of natural resources and raw materials, stood right at the center of how the former colonizers and Third World people saw their economic growth and development.³⁵ Consequently, state responsibility due to financial, physical, and economic injuries by aliens became a lively subject of cross-examination between Western and non-Western scholars.³⁶ Indian judge Guha Roy, for example, generated quite an

rather than international in scope, the second protocol afforded greater protection to guerilla combatants in civil wars or wars of "self-determination."

See Encyclopædia Britannica Online, *Post-World War II Developments*, <http://www.britannica.com/EBchecked/topic/635621/war-crime/224687/The-Nurnberg-and-Tokyo-trials> (last visited Aug. 18, 2012).

³³ "The achievement of a similar transformation is the overriding objective today of transnational organizations such as the" WTO, the IMF, and the OECD. JOHN GRAY, *FALSE DAWN: THE DELUSIONS OF GLOBAL CAPITALISM 2* (1998). "In advancing this revolutionary project they are following the lead of the world's last great Enlightenment regime, the United States. . . . All such thinkers advocated the creation of a single worldwide civilization, in which the varied traditions and cultures of the past were superseded by a new, universal community founded on reason." *Id.*

³⁴ See B.S. Chimni, *Globalization, Humanitarianism and the Erosion of Refugee Protection*, 13 J. REFUGEE STUD. 243 (2000). "The contribution of transnational capitalism, and the agencies which promote its interests, in undermining Third World economies and politics is largely ignored." *Id.* at 258.

³⁵ M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* (3d ed., 2010).

³⁶ It is noteworthy that the U.N. since its inception had tried to draft articles on "State Responsibility." See *State Responsibility*, INTERNATIONAL LAW COMMISSION, (July 13, 2006), http://untreaty.un.org/ilc/summaries/9_6.htm. The General Assembly in resolution 59/35 of Dec. 2, 2004, commented the "articles on responsibility of States for

interesting conversation with the American professor, R.B. Lillich.³⁷ While the Western capital-exporting countries wanted more than national protection for their investment in the newly independent countries, the new sovereigns would not afford more than what they gave to their nationals. These were early post-war signs of unease between international law, capitalism, and the common good.

Clearly, decolonization had bred new issues of sovereignty and of citizenship versus human rights. In 1843, while replying to Bauer on the “Jewish Question,” Marx expressed his skepticism about automatic human emancipation guaranteed allegedly by political emancipation through citizenship within a state.³⁸ Under the forces of globalization, when the traditional states today have been unbundled creating a so-called global state through the force of technology, capitalism has clearly redrawn the boundary between a developed country’s citizen and a poor country’s human.

Examples abound: for instance, Paulsen has argued for the United States Constitution’s complete powers in trumping international law, which also includes human rights.³⁹ For him, under the United States Constitution, the U.S. state can’t be held accountable for waging wars or other international sins. His theory of constitutional supremacy

internationally wrongful acts,” and requested the Secretary-General to invite governments to submit their written comments on any future action regarding the articles. *Id.* Compilation of decisions of international courts, tribunals, and other bodies referring to the articles was another task that the General Assembly commended. *Id.* It sought to invite Governments to submit information on their practice in this regard. The Secretary-General is also supposed to submit this material well in advance of the 62nd session along with the decision to include the compilation in the provisional agenda of its 62nd session an item entitled “Responsibility of States for Internationally Wrongful Acts.” *Id.*

³⁷ R.B. Lillich, *The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law Under Attack*, 69 AM. J. INT’L L. 359 (1975). In this seven-page article, Lillich garners the support of Phillip Jessup, who wrote *Non-Universal International Law*, 12 COLUM. J. TRANSNAT’L L. 415 (1973), contesting R.P. Anand. Lillich was replying to Guha Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 AM. J. INT’L L. 863 (1961).

³⁸ See LUTHER BINKLEY, *CONFLICT OF IDEALS: CHANGING VALUES IN WESTERN SOCIETY* 49 (1969).

³⁹ Michael Stokes Paulsen, *The Constitutional Power To Interpret International Law*, 118 YALE L.J. 1762 (2009). There are others who have argued that in the U.S.:

International law is often considered somewhat of a mystery by those in the legal world who are not accustomed to its substantive rules and practices. A possible reason for this is that its systems of promulgation, recognition, and execution do not closely resemble their equivalent counterparts in domestic law and appear unfamiliar to the outside observer.

Rex D. Glensy, *The Use of International Law in U.S. Constitutional Adjudication*, 25 EMORY INT’L L. REV. 197, 202 (2011). However this is true for all the countries. *Id.*

must succeed at the cost of human lives in invaded countries. His “gleeful dismissal of international law”⁴⁰ empowers the U.S., simultaneously dismantling the rights of poor humans around the world who may be attacked by U.S.-led forces (and drones) to have their rights and lives jeopardized.

Indeed, as Tomuschat asserts, “it is a matter of public knowledge that the invasion by the coalition forces on 20 March 2003 had no support from the Security Council.”⁴¹ The invasion amounted to a violation of article 2(4) of the United Nation’s (U.N.) Charter. “The U.N. only recognized the occupation once the coalition forces decided that it would be politically useful to obtain legal backing, or at least international legitimacy, for their occupation of Iraq.”⁴² Yet, in the *Al-Jedda* case,⁴³ the United Kingdom (U.K.) argued that it was the U.N. that had the effective control of the operations and the U.K. was thus not responsible.

A certain Jewish Question thus converts into a global South’s human question. The war on terror is its most apt example. The conflict is between American citizens’ security and Afghani or Iraqi citizens’ elimination till the latter begins to conform to the former’s demands. This situation calls for explanations and there can be many.

B. The Nature of Humans

One can start from the nature of man and end with the details on the destructive power of the capital. In other words, one can start with Freud’s “psychoanalytic humanism” where, like Hobbes, we assume a man to be a bundle of suppressed evil desires seeking manifestation in tendencies of war, bloodshed, and other psychic pleasures.⁴⁴ Or, we

⁴⁰ Julian Ku, *The Prospects for the Peaceful Co-Existence of Constitutional and International Law*, 119 YALE L.J. ONLINE 15, 15 (2009), available at <http://yalelawjournal.org/2009/09/29/ku.html>.

⁴¹ Christian Tomuschat, *R (on the Application of Al-Jedda) v. Secretary of State for Defence: Human Rights in a Multi-Level System of Governance and the Internment of Suspected Terrorists*, 9 MELB. J. INT’L L. 391, 397 (2008).

⁴² *Id.*

⁴³ *R v. Secretary of State for Defence*, [2007] UKHL 58, [2008] 1 A.C. 332 (appeal taken from Eng.).

⁴⁴ See generally SIGMUND FREUD, *THE INTERPRETATION OF DREAMS* (James Strachey trans., J. Wiley & Sons 1961) (1899). However, Freud made a fortune of detractors. Brooks argues:

We had a financial regime based on the notion that bankers are rational creatures who wouldn’t do anything stupid en masse . . . these failures spring from a single failure: reliance on an overly simplistic view of human nature. We have a prevailing view in our society—not only in the policy world, but in many spheres—

can side with Adler in refuting Freud's belief in biological perversity for an explanation based on people's "drive for power."⁴⁵

The common good as the end of the global deliberative process owes a lot to twentieth century theorizations about the nature of a man, as for Nietzsche all moralities are based on prevailing customs of a group of people and the philosophical beliefs which have come up to justify them.⁴⁶ Allegedly Western philosophy has still not emerged from the "Nietzschean dead end" of the death of God and all kinds of moralism.⁴⁷ For Nietzsche, God died in a very particular sense; "[h]e no longer plays his traditional social role of organizing us around a commitment to a single right way to live."⁴⁸

Who in this globalized world are the prevailing group of people? With the alarming rate in which the injustices in the world are increasing, we can safely put blame on a phenomenon rather than a person. What will that phenomenon be? Capitalism might be the most obvious answer, but also the toughest to prove. With capital's omnipresence and its acquired omnipotence, it is surely difficult to put it in the witness box straight away. Therefore, it is perhaps apt to study a human as, to borrow Spirkin's formulation, "biosocial," one that produces the society and is in turn produced by it.⁴⁹

The common good, such as the welfare of men, women, and children, protection of human rights, access to good environment, and

that we are divided creatures. Reason, which is trustworthy, is separate from the emotions, which are suspect. Society progresses to the extent that reason can suppress the passions. This has created a distortion in our culture Who knows, [the new humanism] may even someday transform the way our policy makers see the world.

David Brooks, *The New Humanism*, N.Y. TIMES, Mar. 8, 2011, at A27.

⁴⁵ Discussed in BINKLEY, *supra* note 38, at 105, ¶ 2. See also *Medicine: The Old Wise Man*, TIME, June 16, 1961.

⁴⁶ See FRIEDRICH NIETZSCHE, *THE GAY SCIENCE* (W. Kaufmann, trans., 1974). See also William T. Vollmann, *Friedrich Nietzsche: The Constructive Nihilist*, N.Y. TIMES, Aug. 14, 2005 (reviewing CURTIS CATE, *FRIEDRICH NIETZSCHE* (2002)).

⁴⁷ In reference to Nietzsche, Francis Fukuyama says, "[a]cknowledgment of the death of God is a bomb that blows up many things, not just oppressive traditionalism, but also values like compassion and the equality of human dignity on which support for a tolerant liberal political order is based." Francis Fukuyama, *Nietzsche: A Philosophy in Context*, N.Y. TIMES, May 9, 2010, at BR12 (reviewing JULIAN YOUNG, *FRIEDRICH NIETZSCHE: A PHILOSOPHICAL BIOGRAPHY* (2010)).

⁴⁸ Sean Kelly, *Navigating Past Nihilism*, N.Y. TIMES, Dec. 5, 2010, <http://opinionator.blogs.nytimes.com/2010/12/05/navigating-past-nihilism/?ref=friedrichnietzsche>.

⁴⁹ ALEXANDER SPIRKIN, *DIALECTICAL MATERIALISM* 250 (R. Daglish trans., Progress Publishers 1983).

international security against terrorism, etc., is the end that must guide our international political deliberations.

Unfortunately today the concept of a “risk society” governs our major deliberations. The capitalist ideology, through a variety of investment instruments, first uses the free market to generate risks—social, cultural, political, medical, and environmental—and then sells this paranoia as insurance coverage, sometimes with the capitalist state’s guarantee. In a new Hegelian reflexive, a welfare state is first dismantled and then presented as “the opportunity for new freedoms” under the aegis of volatile and vulture capitalism.⁵⁰

C. *Human Rights as Malleable Rights?*

The truth, however, is different within international law. While there are stronger rights for developed countries’ citizens, backed by U.N. resolutions, NATO’s might, and unparalleled capital support, the rights of poor countries’ humans remain malleable rights often flattened by citizens’ rights as seen in the war on terror.⁵¹ For some time the notion of a “Divided West” worked to assuage those who felt the heat of capitalism in the war on terror, but that myth stands busted, to the disappointment of those who believed in human rights.⁵² No wonder, as Zook points out, that “human rights has always been one of the most problematic elements of the U.N. system in terms of the discrepancies between rhetoric and practice; compliance remains incomplete and enforcement remains inconsistent at best.”⁵³

Surely, it is human versus citizen today. Bill Richardson, ex-governor of New Mexico, once wrote that America “should lead the world toward a global norm of respect for basic human rights—and toward enforcing that norm through international institutions and

⁵⁰ See generally Slavoj Žižek, *Against Human Rights*, NEW LEFT REV., July-Aug. 2005, at 115, 118 [hereinafter Žižek, *AHR*].

⁵¹ See Richard Falk, *Comparative Protection of Human Rights in Capitalist and Socialist Third World Countries*, 1 UNIVERSAL HUM. RTS. 3 (1979) (arguing that the Third World is diverse and human rights compliance is a difficult question); William W. Burke-White, *Human Rights and National Security: The Strategic Correlation*, 17 HARV. HUM. RTS. J. 249 (2004).

⁵² See Volker Heins, Aditya Badami & Andrei S. Markovits, *The West Divided? A Snapshot of Human Rights and Transatlantic Relations at the United Nations*, 11 HUM. RTS. REV. 1 (2010).

⁵³ Darren C. Zook, *Decolonizing Law: Identity Politics, Human Rights, and the United Nations*, 19 HARV. HUM. RTS. J. 95, 97 (2006).

multilateral measures.”⁵⁴ Such idealism coming from an American politician is heartening to see, even though it is imbued with political naiveté. No wonder then, Allott has identified a typical American Kantian view as a consoling myth—that the flow of capitalism and promotion of democracy in other parts of the world would somehow induce a global order automatically and, perhaps, effectuate perpetual peace among nations.⁵⁵

Thus in the case of citizen versus human, while the alleged freedom of the free markets mostly offers multiple freedoms to certain political citizens, it works to render pre-political humans fundamentally unfree. Better still, we should problematize the opposition between every human’s general universal rights and a citizen’s specific political rights.⁵⁶ In the ongoing war on terror, this problematization is illuminating: how the political rights of an American citizen subvert an Iraqi, Afghani, or Pakistani human, i.e., the right to live in a war-free world.⁵⁷

While humans find no sponsors to defend their human rights, the citizens, depending upon the relative strength of their country’s economy and political muscle, find their rights guaranteed.⁵⁸ As the human versus citizen debate entails, there is no universal common good in a global market’s life-world. One may also note Upendra Baxi’s remarks that today’s market economy has “human rights investors, producers and consumers” as players.⁵⁹ There are ample examples. In January 2011 the Indian Ministry for Environment “gave the state permission to divert 3,100 acres of forest to the [\$12 billion] plant” of POSCO, a multinational steel company after “[a] government panel had earlier said the plant’s environmental clearances should be scrapped.”⁶⁰ The plant has faced stiff opposition from the local people, campaigning to save farmland and forests.⁶¹

⁵⁴ Bill Richardson, *A New Human Rights Agenda for the United States: New Realism, Human Rights, and the Rule of Law*, 21 HARV. HUM. RTS. J. 1, 3 (2008).

⁵⁵ See Philip Allott, *The True Function of Law in the International Community*, 5 IND. J. GLOBAL LEGAL STUD. 391 (1998).

⁵⁶ Žižek, *AHR*, *supra* note 50, at 126.

⁵⁷ Declan Walsh, *Pakistani Parliament Demands End to U.S. Drone Strikes*, N.Y. TIMES, Mar. 20, 2012, at A8.

⁵⁸ See, e.g., Miodrag A. Jovanović, *Are There Universal Collective Rights?*, 11 HUM. RTS. REV. 17 (2008).

⁵⁹ UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* ch. VIII (3d ed. 2010).

⁶⁰ *India Gives Final Okay to \$12bn Posco Steel Plant*, BBC NEWS, May 3, 2011, <http://www.bbc.co.uk/news/world-south-asia-13263586>.

⁶¹ *Id.*

We can thus see that capital spells out the conditions of its own applications. It co-opts its critique with time.

The huge coffers of corporate social responsibility that multinational companies have been forced to develop by various jurisdictions like India⁶² make Baxi's prophecies inevitable. Thus at a time the liberal citizens produce human rights for periodic consumption by un-free humans in poorer parts of the world, capital ensures that there is enough liquidity of human rights to help investors and consumers of human rights stay in business.

II

THE COMMON GOOD'S THEORIES AND CAPITALISM'S ROLE

In natural law's metaphysical world, there is no unanimity on the nature of the common good. Though these differences are not trivial, I will straightaway borrow Mark Murphy's conclusion that aggregate common good is better than instrumental or distinctive common good.⁶³ Murphy thus contradicts Finnis's love for instrumental common good.⁶⁴ The common good is often argued as having "Aristotelian roots," while Marx-Engels drew capitalism to the center of political theory.⁶⁵ However, without a doubt Aristotle is not the sole theorist of the common good; Thomas Aquinas, the tenth century paradigmatic natural law theorist, wrote about the common good within the vocabulary of justice and peace.⁶⁶

The U.N. Charter of 1945 perhaps borrows Aquinas in its preamble: "establish conditions under which justice . . ." and "live together in peace."⁶⁷ In its preamble, the U.N. also recalls Hobbes in the process assuming the "natural condition of mankind" as terrible and short. Mankind thus must come to an agreement to govern its life by an absolute political sovereign. How are we to plant capital within the function of the state and the law? Arguably, Aristotle's idea of the "common good speaks to both liberals and communitarians."⁶⁸

⁶² See *Posco-India Commits Part of Its Earning for CSR*, OUTLOOK INDIA, Jan. 31, 2011, <http://news.outlookindia.com/item.aspx?710428>.

⁶³ Mark C. Murphy, *The Common Good*, 59 REV. METAPHYSICS 133, 136 (2005).

⁶⁴ *Id.* at 143.

⁶⁵ See Thomas W. Smith, *Aristotle on the Conditions for and Limits of the Common Good*, 93 AM. POL. SCI. REV. 625 (1999).

⁶⁶ ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE* (Fathers of the English Dominican Province trans., Benziger Bros. ed., 1947) (c. 1265–1274).

⁶⁷ U.N. Charter pmbl.

⁶⁸ Smith, *supra* note 65, at 634.

In the postcolonial world, an Aristotelian realist must ask: whose “common good”? What makes an international community? Aquinas, according to Murphy, “appeals to the common good in his accounts of the definition of law” and “the dictates issued by political authority.”⁶⁹ About Aristotle, Thomas Smith says, “[t]he common good was once a central problem in political theory because it provided a framework for thinking about the relationship between individual interests and the interests of the community.”⁷⁰ Furthermore “[s]uch concepts as political neutrality, social contracts, and natural rights have come under sustained attack in debates over liberal theory. Not surprisingly, these debates have led to a renewed interest in the common good.”⁷¹

Today, “capitalism” and the “common good” are both terms of multiple definitions.⁷² Time and space only multiplies their complications. The number of scholars theorising capitalism has remarkably shot up. While today’s liberalism seemingly sways away from the common good as seen in the war against terror, allegedly “the motive for injustice is a lack of sensitivity to other people’s notions of the good.”⁷³ After the protracted phase of social Darwinism, scholars began to see capital’s virtue in liberating humankind.⁷⁴

A. *Capitalist Darwinism*

“Capitalist Darwinism” means a dominant worldview that assigns capital evolutionary potential by borrowing Darwinian theory of evolution and the survival of the fittest. Capitalist Darwinism’s idea of the survival of the fittest is remarkably close to the neo-classical conception of death through competition, a market condition where

⁶⁹ Murphy, *supra* note 63, at 133.

⁷⁰ Smith, *supra* note 65, at 625.

⁷¹ *Id.* (citing Alasdair MacIntyre, *The Privatization of the Good*, 52 REV. POL. 344 (1990)).

⁷² For an American and European perspective on capitalism, state, and the common good, see James Chace, *The Common Good*, 12 WORLD POL’Y J. 129, 129 (1995). See also Thomas R. Rourke, *Michael Novak and Yves R. Simon on the Common Good and Capitalism*, 58 REV. POL. 229, 229 (1996). (Rourke talks about the “contradiction between the Catholic and liberal approaches to the organization of society.” Liberals reject the “Catholic concept of the common good in favour of a relatively unrestricted pursuit of individual goods.”).

⁷³ Smith, *supra* note 65, at 626.

⁷⁴ See Sherwin Klein, *The Natural Roots of Capitalism and Its Virtues and Values*, 45 J. BUS. ETHICS 387 (2003).

non-competitive players die their own death. Perry Anderson lucidly connects Darwinism and neoliberalism:

Capitalism as an abstract economic order requires certain universal conditions for its operation: stable rights of private property, predictable legal rules, some procedures of arbitration, and (crucially) mechanisms to ensure the subordination of labour. But this is a competitive system, whose motor is rivalry between economic agents. Such competition has no 'natural' ceiling: once it becomes international, the Darwinian struggle between firms has an inherent tendency to escalate to the level of states. There, however, as the history of the first half of the twentieth century repeatedly showed, it can have disastrous consequences for the system itself.⁷⁵

However, Capitalist Darwinism's hollowness becomes⁷⁶ rather obvious when, among other examples, scholars establish that "war and profit have always gone hand in hand"⁷⁷ and that some countries will remain poor because they possess oil.⁷⁸

Small surprise, then, that the humanitarian laws or laws of war are not about stopping wars; they tell us how to conduct a good war and how to justify it! William Connolly aptly calls this the specters of "cowboy capitalism."⁷⁹ Quite expectedly Žižek harbors a rather radical view on capitalism: "the history of capitalism is a long history of how the predominant ideological political framework was able to

⁷⁵ Perry Anderson, *Editorial: Force and Consent*, NEW LEFT REV., Sept.-Oct. 2002, at 5, 20 [hereinafter *Force & Consent*].

⁷⁶ CHARLES DARWIN, *THE ORIGIN OF SPECIES* (Bantam Books 1999) (1859).

⁷⁷ Christopher Parker & Pete W. Moore, *The War Economy of Iraq*, 243 MIDDLE EAST REP. 6, 6 (2007). See Ity Abraham, *US Imperialism and the Iraq War*, 40 ECON. & POL. WKLY. 5446 (2005) (Abraham presents a novel political geographical view of the Iraq war.).

⁷⁸ Nancy Birdsall & Arvind Subramanian, *Saving Iraq from Its Oil*, 83 FOREIGN AFF. 77 (2004).

⁷⁹ William E. Connolly, *The Evangelical-Capitalist Resonance Machine*, 33 POL. THEORY 869, 883 (2005) (pointing out that "they drive a wedge into that ungodly alliance between cowboy capitalism and extremist Christianity that smothers the prospects for egalitarianism and pluralist democracy."). On June 24, 2010, Simmons & Simmons, a law firm, together with The Council of Christians and Jews (CCJ), hosted a seminar entitled *Faith in Capitalism: How Can We Make the Global Economy More Ethical?* The CCJ was established in 1942 and is Britain's oldest interfaith organization. The seminar brought together bankers, investment fund managers, and lawyers to discuss challenges and questions about ethics and trading in global markets. Discussions focused on how to make global capitalism more ethical in today's market and whether faith plays a part. David Gifford, CEO of the CCJ, said, "[t]he role of Christian Judeo values in the ethics of business is being both questioned and challenged." *Faith in Capitalism*, SIMMONS & SIMMONS (June 24, 2010), http://www.simmons-simmons.com/index.cfm?fuseaction=news_room.release_item&page=4292.

accommodate (and to soften the subversive edge of) the movements and demands that seemed to threaten its very survival.”⁸⁰

Does it come as a surprise, then, that the last century was the only century to have witnessed two World Wars? It also explains the twenty-first century’s continued war-fetish; so much for the Hobbesian contract for establishing the conditions of peace.⁸¹

How easily do we put the common good aside when one state wants to control the resources, like oil, of another, breaching the social contract? War is an example of the breach of a social contract by the state. Žižek quips: “[w]ar is acceptable insofar as it seeks to bring about peace, or democracy, or the conditions for distributing humanitarian aid.”⁸² War furthers capitalism, and thus war today is the biggest harbinger of capitalist growth; in fact who can deny that America became what it is today due primarily to Europe’s destruction in World War II? Accordingly, as Anderson notes “the wartime boom of American capitalism was successfully extended to allied and defeated powers alike, to the common benefit of all OECD states.”⁸³ Wolfgang Streeck formulates the post-World War II marriage of capitalism and democracy as “democratic capitalism.”⁸⁴

B. Efficient Breach of International Law

What will Hobbes say when, high on cultural relativism, America, a sovereign, does a regular but, to borrow Posner and Sykes’s formulation, an “efficient breach of international law”?⁸⁵ The number

⁸⁰ Slavoj Žižek, *From History and Class Consciousness to the Dialectic of Enlightenment . . . and Back*, 81 NEW GERMAN CRITIQUE 107, 119 (2000).

⁸¹ See generally Prabhakar Singh, ‘Austin’s Positivism’: Is it a Retrospective Investigation of Contractualist’s Sovereign? Locating Hobbes’ Theory in the History of ‘Sovereign’s Debate,’ 6 GLOBAL JURIST TOPICS 1 (2006).

⁸² Žižek, *AHR*, *supra* note 50, at 120. As Kaczorowska reminds, breaches of humanitarian law constitute international tort and there is a duty of reparation on the tortfeasor. See ALINA KACZOROWSKA, PUBLIC INTERNATIONAL LAW 471 (2002).

⁸³ *Force & Consent*, *supra* note 75, at 6.

⁸⁴ Wolfgang Streeck, *The Crises Of Democratic Capitalism*, NEW LEFT REV., Sept.-Oct. 2011, at 5, 5 (“[C]onsider the ‘Great Recession’ and the subsequent near-collapse of public finances as a manifestation of a basic underlying tension in the political-economic configuration of advanced-capitalist societies; a tension which makes disequilibrium and instability the rule rather than the exception, and which has found expression in a historical succession of disturbances within the socio-economic order. More specifically, I will argue that the present crisis can only be fully understood in terms of the ongoing, inherently conflictual transformation of the social formation we call ‘democratic capitalism’”) (footnote omitted).

⁸⁵ Eric A. Posner & Alan O. Sykes, *Efficient Breach of International Law: Optimal Remedies, “Legalized Noncompliance,” and Related Issues*, 110 MICH. L. REV. 243 (2011).

of breaches seems to grow with international capital's growth. Historically wars have rendered states a clean slate for economic policy prescriptions with an open invitation for capitalism.⁸⁶ What is problematic here is that a law that is public is gradually replaced by a private concept; breach of contract is a private law concept.

International investment law has seen some of the most anti-international or anti-public and pro-private justifications. As Sornarajah insightfully points out, multinational companies wielded unfair powers over host countries by manipulating "lower order sources of international law, such as judicial decision, [and] the writings of highly qualified publicists."⁸⁷ Indeed "[i]t subjects many respected academics to a charge of an absence of neutrality in the pursuit of their disciplines."⁸⁸

Posner and Sykes seem to forget that regulating public international law by private law concepts may be efficient for capitalists but not for the universal good. In other words, what is efficient for the citizens of the developed countries is not so efficient for poor countries' humans. As such, to the detriment of the developing countries, "many of the legal techniques, particularly in the field of foreign investment, were created through the exercise of private power."⁸⁹ It is an example of the "private power being used to create public international law."⁹⁰ And yet Bogdandy and Venzke argue that the "effect of judicial precedents is concealed by the doctrinal ordering of things in light of Article 38(1)(d) of the ICJ Statute which classifies international judicial decisions as 'subsidiary means for the determination of rules of law.'"⁹¹ They lament that the decisions of the international courts are "pictured as a source for recognizing the law but not a source of law."⁹²

One is tempted to ask whether there is a direct relationship between war, peace, and capital. Gartzke, divorced from other theorists, answers in the affirmative. He believes in the idea of a "capitalist

⁸⁶ See Birdsall & Subramanian, *supra* note 78, at 87.

⁸⁷ SORNARAJAH, *supra* note 35, at 277.

⁸⁸ *Id.* at 279 n.8.

⁸⁹ *Id.* at 278.

⁹⁰ *Id.* at 279.

⁹¹ Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification*, 23 EUR. J. INT'L L. 7, 9 (2012).

⁹² *Id.*

peace.”⁹³ More than democracies, it is the free flow of capital that would bring peace to the world, he wishfully thinks.⁹⁴ McMillan’s view on capital is worth noting:

As an illustration, against the rhetoric of ‘Weapons of Mass Destruction’ and the spread of democracy, critics of the US invasion of Iraq have suggested that the attack was motivated by Iraq’s vast Oil resources. Conversely, others have suggested that the Bush administration had no issue with Iraq’s use of their Oil resources, until they switched from trading their Oil in US Dollars to Euros, threatening the hegemony of the (petro)Dollar as the universal currency of the Oil market.⁹⁵

Human freedom today, as an aspect of human rights, does need some attention from naïve formulators of capital’s benevolence. In Kantian terms, global capital induces “our acting as ‘immature’ individuals, not as free human beings who dwell in the dimension of the universality of reason.”⁹⁶ Just as drowning in water does not mean drinking it, a mere presence of water can create conditions for both consumption and death.

The presence of massive capital similarly can drown an importing community and yet not quench its needs. What will ensure quenching with an insurance against drowning is the freedom of the needy. Wars do not give this; rather, during the times of peace unregulated capital can create war-like battlefields. Capital arrives with its own conditions. A Leninist, Žižek says that “[f]ormal freedom is the freedom of choice *within* the coordinates of the existing power relations, while actual freedom designates the site of an intervention that undermines these very coordinates.”⁹⁷ Nevertheless, NATO, the United States and the rest of the capitalist world continue to present war on terror “as a facilitator of historically inevitable transformations.”⁹⁸ By contrast, the local violence “is presented as emanating from the recesses of a pre-market culture.”⁹⁹ This is understandable, as capital’s prime agenda is to turn every human into

⁹³ See Doug Bandow, *Spreading Capitalism Is Good for Peace*, KOREA HERALD, Nov. 10, 2005.

⁹⁴ *Id.*

⁹⁵ Chris McMillan, *Žižek on Economy*, DISAVOWED FOUNDATIONS (May 28, 2010), <http://chrismcmillan.org/2010/05/28/zizek-on-the-economy/>.

⁹⁶ Slavoj Žižek, *A Permanent Economic Emergency*, NEW LEFT REV., July-Aug. 2010, at 85, 90.

⁹⁷ Slavoj Žižek, *A Plea for Leninist Intolerance*, 28 CRITICAL INQUIRY 542, 544 (2002).

⁹⁸ Parker & Moore, *supra* note 77, at 15.

⁹⁹ *Id.*

a citizen and yet speak in the vocabulary of human and labor rights often heralding as corporate social responsibility.

Given the obvious gifts of capitalism, one wonders whether calling capitalism's effects on the common good in question is a cliché. But capitalism has a high co-optive potential, making its clients feel paranormal in wake of its manifestations. It exists as a suspect meta-real engulfing all and the sundry in its discursive expanses. It is often prescribed as a bitter pill, a necessary evil at best. Thus, "[m]an', the bearer of human rights, is generated by a set of political practices that materialize citizenship; 'human rights' are, as such, a false ideological universality, which masks and legitimizes a concrete politics of Western imperialism, military interventions and neo-colonialism. Is this, however, enough?"¹⁰⁰

Conclusive evidence of capital's villainy is tough to find, but when capital meets the tribal life-style we may perhaps see some ethical evidence against it.¹⁰¹ In a neat instance of Hegel's "reflexive determination," as Žižek would say, "[a]ll big 'public issues' are now translated into attitudes towards the regulation of 'natural' or 'personal' idiosyncrasies."¹⁰² Therefore "pseudo-naturalized ethno-religious conflicts are the form of struggle which best suits global capitalism."¹⁰³

Should, for example, the predicaments of displacement due to mining projects engender nostalgia about their land, trees, gods, and culture, pro-capital ideologies will brand the tribal people as avatars of jungle lowlife unnecessarily clinging to an archaic lifestyle?¹⁰⁴ Even better, when this view is purposefully reinstated into the ideology of the subject while seeing tribal life-world instrumentally—endowed with Hobbes's "natural" physical attributes of an animal—

¹⁰⁰ Žižek, *AHR*, *supra* note 50, at 128–29.

¹⁰¹ After having exploited the natural resources so much, India is set to pass a robust new law to regulate mining in India. The proposed Mines and Minerals (Development and Regulation) Bill (2011) is the central government's response to a full-blown crisis in the sector. See Editorial, *Stopping the Loot*, THE HINDU, Oct. 4, 2011, <http://www.thehindu.com/opinion/editorial/article2509680.ece>.

¹⁰² Žižek, *AHR*, *supra* note 50, at 117.

¹⁰³ *Id.*

¹⁰⁴ See Prabhakar Singh, *Indian International Law: From a Colonized Apologist to a Subaltern Protagonist*, 23 LEIDEN J. INT'L L. 79, 95 (2010) ("The tribal exclusion . . . obviates the pain of tribal marginality of Indian aboriginals, despite the fact that the tribal leader Birsa Munda of Jharkhand was instrumental in the struggle against British rule. In regional literatures Munda has been elevated to the status of deity as the strong tribal voice of resistance from the jungle against the alien British rule.").

market forces will automatically tend to interpret such resistances as the most natural outcome of a tribal personality, “not as the result of being thrown around by market forces.”¹⁰⁵ This creates a situation of fundamental un-freedom, akin to slave trade; trade that makes humans slaves yet enriches citizens. It still is human versus citizen.

C. *Capitalism and Its Critique*

We are witnessing à la Žižek an overload of critiques of capitalism’s horrors. Is it an academic re-invention of the wheel? Have not Marx and the Marxists said enough about it? Perhaps not enough. As early as 1896, Irving Fisher wrote, “[o]f economic conceptions few are more fundamental and none more obscure than capital.”¹⁰⁶ Whether this obscurity has vanished in 2012 is an open question. Of free market, the chief vehicle through which capitalism is promoted, Ogletree wrote:

They stimulate productive efficiency and material abundance, and they foster conditions that reinforce basic human liberties. Yet they produce harm as well, in particular, the exploitation of low-skilled workers, and environmental damage. They also give rise to vast inequalities of income and wealth that marginalize disadvantaged members of society. These harmful tendencies are difficult to contain, however, because they are directly linked to factors that render free-market economies effective in the first place.¹⁰⁷

The global financial meltdown of 2008-2009 further exposes transnational capital’s ambivalence for the global common good.¹⁰⁸ Therefore, the international financial system must in some fashion oversee and regulate market processes for the sake of a broader public

¹⁰⁵ *Id.*

¹⁰⁶ Irving Fisher, *What is Capital?*, 6 *ECON. J.* 509, 509 (1896).

¹⁰⁷ Thomas W. Ogletree, *Corporate Capitalism and the Common Good: A Framework for Addressing the Challenges of a Global Economy*, 30 *J. RELIGIOUS ETHICS* 79, 80 (2002).

¹⁰⁸ See Enrique Carrasco, *An Opening for Voice in the Global Economic Order: The Global Financial Crisis and Emerging Economies*, 12 *OR. REV. INT’L L.* 179, 179 (2010). He argues that: “[t]he global financial crisis of 2008 has had a profound impact on the conceptions that have informed economic and financial frameworks on the national and global level. Policymakers now believe that unregulated financial innovation is highly suspect. Economic and financial deregulation no longer enjoys an exalted status. The efficient market hypothesis has come under fire. The flaws of global standard setting, such as the capital adequacy standards promulgated by the Basel Committee on Banking Supervision, have been exposed.” *Id.* at 179–80 (footnotes omitted).

good. But this, as Chimni explores, is a cry in the wilderness.¹⁰⁹ There are proofs of lawyers spending ample time wondering whether capital is a legal concept. Cooke's 1937 paper observes a definite "function of money" in the works of jurists like "Pufendorf, Grotius and Montesquieu, a compound theory of political economy and jurisprudence in Adam Smith, and a derivation of justice in Hume's philosophy from the same scarcity of means and ends which is the fundamental postulate of modern economics."¹¹⁰

The intellectual property regime is one such example. No doubt, only through funded research have scientists developed life-saving drugs. But rent-seeking behaviour goes to the extent of stopping medicine from reaching the needy in poorer parts of the world. The problem is not in the law, law enforcers, or other agents alone. As "public privilege recedes and rights expand," a capital oriented regime further moves intellectual property into grayer areas.¹¹¹ A capital-infested ideology will, without a hiccup, declare the subversion of the human rights to life-saving drugs by the intellectual property rights of political citizens.

In the field of international investment law, as Sornarajah notes, citing *Benvenuti et Bonfant v. Congo*,¹¹² purely private interests are shaping public international law despite slim legal foundations; in this case support for internationalization of contracts was made at the cost of the sovereign powers of Congo, an African nation.¹¹³ This has been done to tie and curtail the sovereign powers of some states against foreign investors. Using lowly sources of international law like arbitral awards and writings of qualified publicists of international law, Third World states in the 1960s were tied down to private contracts in stark opposition to the principles of state sovereignty.¹¹⁴

¹⁰⁹ B.S. Chimni, *International Financial Institutions and International Law: A Third World Perspective*, in INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW 30 (Daniel Bradlow & David Hunter eds., 2011) [hereinafter Chimni, *IFIs*].

¹¹⁰ Colin A. Cooke, *The Legal Content of the Profit Concept*, 46 YALE L.J. 436, 436 (1937).

¹¹¹ James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 882 (2007).

¹¹² *Benvenuti & Bonfant v. Congo*, ICSID Case No. ARB/77/2, Award of 8 August 1980, 21 I.L.M. 740 (1982).

¹¹³ SORNARAJAH, *supra* note 35, at 305.

¹¹⁴ *Id.* at 392–97.

D. Capitalism's Bio-Politics

The current bio-politics of the global order delivers humanity to a Žižekian moment of profound revelations, a moment of a capitalist socio-economic reality. As discussed above, a vast world of Marxist literature has dealt with capitalism's question. These authors often argue that "socialist control of economic life requires decentralized decisionmaking to avoid substituting the power of a centralized status hierarchy for the power of those who control the means of production."¹¹⁵

Psychoanalysis takes the investigations even further today. Vividly epitomized in Ogden Nash's poetry, the very nature of capital spawns a "vicious circle."¹¹⁶ I take the liberty of replacing the dentist with the capitalist and teeth with life in Nash's poem. If I may say so, capital *ipsa loquitur*:

And this, O Fate, is I think the most
vicious circle that thou ever sentest,

That Man has to go continually to the [capitalist] to keep his [life]
in good condition;

When the chief reason he wants his [life] in good condition,

[I]s so that he won't have to go to the [capitalist].¹¹⁷

This is the long and short of capitalism's fictional function. Žižek finds the origin of "public use of reason" in Kant's essay, *What Is Enlightenment?*¹¹⁸ Today, unfortunately, expert-driven capital inverts Kant. With the paradigmatic use of "private use of reason," European higher education, for instance, seeks to alter the way they problematize social problems.¹¹⁹ The true task of thinking simply disappears here, not only to offer solutions to problems posed by the violent state and volatile capital, "but to reflect on the very form of these problems; to discern a problem in the very way we perceive a problem."¹²⁰

The WTO represents the supreme importance of capital in our contemporary lives. Andrew Guzman goes a step further to announce global governance through the WTO: a world where every aspect of

¹¹⁵ Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1069 (1980).

¹¹⁶ See Ogden Nash, *This is Going to Hurt Just a Little Bit*, in THE BEST OF DENTAL HUMOR 63, 63 (Stephen T. Sonis ed., 1997).

¹¹⁷ *Id.*

¹¹⁸ Žižek, *supra* note 96, at 90.

¹¹⁹ *Id.*

¹²⁰ *Id.*

humanity is governed through trade and capital even though the text of the WTO agreements are less ambitious about their goals.¹²¹ Now, both Marxists in general and Guzman stand at two extremes of a spectrum that sees capital interacting with the idea of the common good in starkly opposite fashion. As Žižek points out:

For example, it is clear that the US-led overthrow of Saddam Hussein, legitimized in terms of ending the suffering of the Iraqi people, was not only motivated by hard-headed politico-economic interests but also relied on a determinate idea of the political and economic conditions under which 'freedom' was to be delivered to the Iraqi people: liberal-democratic capitalism, insertion into the global market economy, etc.¹²²

Capital is indeed important and its mobility improves living standards, offers options in a market economy, and increases overall prosperity. But this does not spread welfare automatically. Capital flow needs to be trafficked in such a way that benefits reach proportionately to all its actors, participants, and agents. After the fall of the Soviet Union and American capitalism in the 2008–09 crisis, the unregulated market economy has “demonstrated the inherent flaws of that approach by falling into a credit crisis and a consequent major recession.”¹²³ International law becomes important here. To rein in capital, international law must be adequately armed.

III

INTERNATIONAL LAW VERSUS THE COMMON GOOD

International financial institutions (IFIs) “derive their mandate and authority from international law, but are averse to observing the international rule of law,” Chimni recently wrote.¹²⁴ What does this say about the nature of international capital? Our lives today are regulated by a set of treaties, regulations, and guidelines from international organizations such as the U.N., the World Bank, and the IMF that bind states into soft obligations as well as those obligations expressed in the Latin maxim *pacta sunt servanda*.¹²⁵

¹²¹ See Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. 303 *passim* (2004).

¹²² Žižek, *AHR*, *supra* note 50, at 126.

¹²³ Richard D. Cudahy, *From Socialism to Capitalism: A Winding Road*, 11 CHI. J. INT'L L. 39, 65 (2010).

¹²⁴ Chimni, *IFIs*, *supra* note 109, at 31.

¹²⁵ See Hans Wehberg, *Pacta Sunt Servanda*, 53 AM. J. INT'L L. 775, 781–86 (1959).

A. *The Commandment YOU CANNOT*

Looking at the structure of management and decision-making in the IFIs, Chimni argues, “that their unique features reinforce the tendency to neglect subaltern states and groups.”¹²⁶ And there is a set of people that the World Bank often recognizes as living below the poverty line. This ensemble of capitalism, international law, and the Third World lends itself to see international law as, to borrow Nandy’s apt formulation, an “Intimate Enemy.”¹²⁷ Combine this with what Žižek recently said:

The commandment YOU CANNOT is its *mot d’ordre*: you cannot engage in large collective acts, which necessarily end in totalitarian terror; you cannot cling to the old welfare state, it makes you non-competitive and leads to economic crisis; you cannot isolate yourself from the global market, without falling prey to the spectre of North Korean *juche*. In its ideological version, ecology also adds its own list of impossibilities, so-called threshold values—no more than two degrees of global warming—based on ‘expert opinions’.¹²⁸

After the Eurozone’s austerity measures—probably twice in Greece and, on a smaller scale, Ireland, Italy, and Spain—as Žižek puts it, “protesting workers, students and pensioners,” would see such steps as “yet another attempt by international financial capital to dismantle the last remainders of the welfare state.”¹²⁹ The idea of “a human” in the human rights discourse is thus more rhetorical than ever in the history of mankind.¹³⁰

B. *Withering Capitalism?*

While the capitalist and powerful Western states are struggling to keep their economies in order after the 2008–09 financial crisis, unrest in the Arab world has helped the governments of such states to steer their citizenry towards larger issues of protecting human

¹²⁶ Chimni, *IFIs*, *supra* note 109, at 32.

¹²⁷ ASHIS NANDY, *THE INTIMATE ENEMY* (1983), *reprinted in* EXILED AT HOME (A. Nandy ed., 2002). I have borrowed Nandy’s phrase to use “intimate enemy” as a lens to read the relationship of international law and the developing world in Prabhakar Singh, *International Law as Intimate Enemy*, (on file with the author).

¹²⁸ Žižek, *supra* note 96, at 93.

¹²⁹ *Id.* at 85.

¹³⁰ See the now classic article on the subject of international law and colonialism. Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L.J. 1 (1999). Also see for a historical account, David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 17 QUINNIAC L. REV. 99 (1997). “International Law has taken us, or followed us, from co-existence to cooperation, from autonomy to community.” *Id.* at 101.

rights.¹³¹ The benefits of mass psychology are perhaps best milked at these hours; the bigger sorrow of the Others helps one forget one's smaller grief. Could it be that the capitalist states are investing to sustain the Other world's larger sorrow?

One can't answer such queries with any certainty. After all, conspiracy theories such as this do more harm than good. They push us towards legal, functional, and social nihilism. Today there already exists a Third World Approach to International Law (TWAAIL) that began with Harvard Law School's 1997 conference on the subject.¹³² The current idea of a Third World betrays any geographical essentializations. "[Today] [a]ny difference grows faint between democracy and totalitarianism and any political practice proves to be already ensnared in the biopolitical trap."¹³³ And "the relative autonomy of contemporary international organizations is a function of the fact that they do not seek to advance the interests of one or another advanced capitalist state, but that of the global capitalist system in its different phases."¹³⁴

Balakrishnan Rajagopal thinks that the meaning of a Third World remains disarticulated.¹³⁵ Žižek's opposition to the politics of human right alludes to Rajagopal's understanding of a hegemonic international law.¹³⁶ Žižek asks whether the symbolic fiction "of universal rights be recuperated for the progressive politicization of actual socio-economic relations?"¹³⁷ Perhaps humanitarian law's new avatar, the *Responsibility to Protect* (R2P) answers this.¹³⁸

¹³¹ Perry Anderson, *On The Concatenation In The Arab World*, NEW LEFT REV., Mar.-Apr. 2011, at 5.

¹³² See generally James Thuo Gathii, *TWAAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L. & DEV. 26 (2011).

¹³³ Jacques Rancière, *Who is the Subject of the Rights of Man?* 103 S. ATLANTIC Q. 297, 301 (2004).

¹³⁴ Chimni, *IFIs*, *supra* note 109, at 34.

¹³⁵ Balakrishnan Rajagopal, *Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy*, 27 THIRD WORLD Q. 767, 767 (2006).

¹³⁶ Žižek, *AHR*, *supra* note 50, *passim*.

¹³⁷ *Id.* at 115 (from article abstract).

¹³⁸ See Vasuki Nesiah, *From Berlin to Bonn to Baghdad: A Space for Infinite Justice*, 17 HARV. HUM. RTS. J. 75, 97 (2004).

Table 1. Disciplinary Typology of the Three Words

	Traditional Imperialist (Europe)	Late Capitalism (United States)	Third World
History	Retreat into Sovereignty (Sornarajah)	Retreat into Sovereignty (Sornarajah)	Class Approach (Chimni)
Legal Anthropology	Cultural Imperialism	Multiculturalism/Pluralism (Žižek/Somek)	Disputing the Sources of International Law (Sornarajah)
Constitutionalism	International subordinated by EU's constitutional principles	U.S. Constitution trumps international law	Unhealthy Constitutionalism
Political Science	Two World Wars	War on terror	Terror of wars
International Relations	International Law's future Domestic (Slaughter and Burke-White)	International law's interpretation possessed and exercised by all three branches of the U.S. government.	Third World's subalterns are civilisations' junk/ copy the First World
Precedents	"Muted Dialogues" among various EU courts and international law (Bronckers)	Paquete Habana and Charming Betsy misleading and unsound.	Growing religious/social Constitutionalism (Hirschl)
Mass Psychoanalysis	Defensive Pluralism	Aggressive Multiculturalism (Žižek)	Identification with the West (Nandy)/Embracing International law (Sornarajah)
Law	EU member States v. international Law	United States Constitution v. International Relations/law	TWAIL
Legal Studies	(Koskenniemi)	(Paulsen)	(Baxi)
Sociology	Dualism	Parochial	(Nandy)

One after another, non-Western states are becoming the Western world's testing grounds: in the last century it was Vietnam, and now Iraq, Afghanistan, Libya, and parts of Pakistan have led the West to assume the responsibility of protecting Third World humans through rocket launchers, carpet bombs, and the display of ugly military might. Clearly, through R2P, the norms of international law wrestle with anthropology's subjects as international (humanitarian) law lends itself to a new age of the white man's burden. Laden with the assumed responsibility to protect, the Security Council exudes pride in its resolutions. Recently the U.N. website read: "[a]dopting resolution 1973(2011) by a vote of 10 in favour to none against, with 5 abstentions (Brazil, China, Germany, India, Russian Federation), the Council authorized Member States, acting nationally or through

regional organizations or arrangements, to take all necessary measures to protect civilians under threat of attack in the country”¹³⁹

Suddenly the role of the League of Arab States in the maintenance of international peace and security in the region came to be recalled. However, as many of us know, no one would follow international law if it did not serve as the vehicle of their interests. Posner and Goldsmith aptly point this out.¹⁴⁰ They conclude, “[b]ased on the record, [Europe] has no grounds to criticize the U.S.”¹⁴¹ All in all, both the United States and Europe, and thus the entire developed world of which the latter is the father or mother, in order to assuage feminist concerns about international law, have shown less than a robust affection for international law. These are multiple moments of truth. The history of “human” rights needs to be recalled at this stage.

C. Žižek, *Third World and Human Rights*

So, to put it in the Leninist way: what ‘human rights of Third World suffering victims’ effectively means today, in the predominant discourse, is the right of Western powers themselves to intervene politically, economically, culturally and militarily in the Third World countries of their choice, in the name of defending human rights.¹⁴²

In *Against Human Rights*, Žižek subjects his readers to a set of counterintuitive *déjà-vu*-s. He recalls the Balkans of the 1990s, the site of widespread human rights violations. His accusations on the capitalist West are telling. Žižek recounts Bisani, an Italian visiting Istanbul in 1788. In his accounts, the Italian dismissed the very feature that the West celebrates today as the sign of its cultural superiority—the spirit and practice of multicultural tolerance as an effect of Islamic “degeneracy.”¹⁴³

We therefore must, at this point, go back to eighteenth-century Europe. “[I]n a supreme twist of irony,” Žižek pens, “Western

¹³⁹ Press Release, Security Council, U.N. Department of Public Information, Security Council Approves ‘No-Fly Zone’ Over Libya, Authorizing ‘All Necessary Measures’ to Protect Civilians, By Vote of 10 in Favour with 5 Abstentions, U.N. Press Release SC/10200 (Mar. 17, 2011).

¹⁴⁰ Jack Goldsmith & Eric Posner, *Does Europe Believe in International Law?* WALL ST. J., Nov. 25, 2008, at A15.

¹⁴¹ *Id.*

¹⁴² Žižek, *AHR*, *supra* note 50, at 128.

¹⁴³ *Id.* at 115–16.

travellers [sic] were disturbed by the public presence of Jews in big Turkish cities.”¹⁴⁴ There are other equally telling stories:

Expelled from France by the Napoleonic regime, [the Trappist monks of Etoile Marie] settled in Germany, but were driven out in 1868. Since no other Christian state would take them, they asked the Sultan’s permission to buy land near Banja Luka, in the Serb part of today’s Bosnia, where they lived happily ever after—until they got caught in the Balkan conflicts between Christians.¹⁴⁵

Interestingly enough, as Chimni points out, the same set of Western European states adopted “Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union.”¹⁴⁶ Respect for human rights features prominently in it. However, this is happening at a time when multiculturalism has officially failed in Europe. Thus in the formulation of R2P, the West confronts its “own historical legacy run amok.”¹⁴⁷ The constant manipulation of the structures of international law exudes similar frustrations of its makers, Europe and the new master, America. Thus the fundamentalist essentialization of the Third World’s ways of life “is itself a feature of liberal-capitalist democracy.”¹⁴⁸

D. Power, Capital, and the Common Good

The truth of capitalism tumbles out of the closet: “pseudo-naturalized ethno-religious conflicts are the form of struggle which best suits global capitalism.”¹⁴⁹ And then we have so-called critical approaches, such as Yale scholars’ New Haven school, that instead of exposing the role of power in the functioning of international law are “less willing to speak truth to power.”¹⁵⁰ No wonder, then, that Chimni proposes an alternative Marxist course on international law.¹⁵¹

¹⁴⁴ *Id.* at 115.

¹⁴⁵ *Id.* at 116.

¹⁴⁶ B.S. Chimni, *An Outline of a Marxist Course on Public International Law*, 17 LEIDEN J. INT’L L. 1, 6 (2004) [hereinafter *A Marxist Course*].

¹⁴⁷ Žižek, *AHR*, *supra* note 50, at 116.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 117.

¹⁵⁰ Chimni, *IFIs*, *supra* note 109, at 3.

¹⁵¹ See *A Marxist Course*, *supra* note 146, at 1 (“There is today an urgent need to offer to students of international law critical alternative texts exploring the nature, character, and subject matter of international law. Alternative stories have to be told, for growing international legal regulation is translating into injustice for the subaltern classes in both the third and first worlds. But introducing critical alternative texts is not an easy task, given the dominance of mainstream international law scholarship in the world of international law.”).

The sins of international law, he maintains, are often forgotten as an “instrument of common good.”¹⁵² And the contemporary structural constraints in the international system greatly limit the pursuit of the common good.¹⁵³

Capital grows with investments. Every kind of destruction, of infrastructure, culture, religion, ethnicity, or states, calls for investment for reconstruction. Capitalism clearly feeds on war while humanitarian laws tell us how to conduct a proper, fair, and legal war. International laws, like the human rights à la Žižek, are bourgeois rights. “[U]niversal human rights are effectively the right of white, male property-owners to exchange freely on the market, exploit workers and women, and exert political domination.”¹⁵⁴ And:

The paradox is therefore a very precise one, and symmetrical to the paradox of universal human rights as the rights of those reduced to inhumanity. At the very moment when we try to conceive the political rights of citizens without reference to a universal ‘meta-political’ human rights, we lose politics itself; that is to say, we reduce politics to a ‘post-political’ play of negotiation of particular interests.¹⁵⁵

How are we to translate Žižek’s disturbing findings into a legal language for lawyerly consumption? The lawyers and jurists would otherwise just turn a blind eye to such findings. Methodologies, vocabularies, ideologies, and professionalism, they would argue, demand the separation of one discipline from another in an expert’s call for strict disciplinary purity.

This also exhibits capital’s sublime omnipresence and omnipotence. This omnipresence ensures the formation of experts in all kinds of public spaces: school, industry, international organizations, and public opinion. Žižek provides apt insights into this process, stating that: “the dawn of capitalist modernity imposed the twin hegemony of the school system and legal ideology.”¹⁵⁶

Individuals were formed into legal subjects through compulsory universal education, while subjects were interpellated [sic] as patriotic free citizens under the legal order. The gap was thus maintained between bourgeois and citizen, between the egotist-

¹⁵² Žižek, *AHR*, *supra* note 50, at 116.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 129.

¹⁵⁵ *Id.* at 131.

¹⁵⁶ Žižek, *supra* note 96, at 91.

utilitarian individual concerned with his private interests and the citizen dedicated to the universal domain of the state.¹⁵⁷

Chimni's insights into the functioning of capitalism are supremely important here; he brings in Marx at the thick of international law's understanding.¹⁵⁸ We then begin to understand why the makers and suppliers of international law fear Marxist views on its reevaluation. Similar concerns lead Žižek to expose capitalism's permanent state of emergency that spawns the privatization of general intellect, for example, in Europe's Bologna process, "orienting education towards the production of expert knowledge."¹⁵⁹

Its effects on international law are telling. Apropos to Chimni, global capitalism is changing bourgeois democratic international law to a bourgeois imperial international law.¹⁶⁰

¹⁵⁷ *Id.*

¹⁵⁸ *A Marxist Course*, *supra* note 146, at 3. He talks about a critical Marxist international law scholarship (CMILS):

First, in contrast to the formal definitions of international law and its doctrines offered by [mainstream international law scholarship (MILS)], CMILS advances more meaningful definitions that distinguish the character of international law and its doctrines in different historical phases and identifies the groups/classes/states that are the principal movers and beneficiaries. CMILS contends that while MILS does use the categories of interest and power in analyzing [customary international law (CIL)], the manner in which these categories are deployed deprives them of critical edge. Thus MILS works with the empty concept of national interest, excluding the possibility of discovering particular group or class interests that determine its content. Likewise, the concept of power is mostly identified with its more overt and discrete manifestations rather than being understood as a force that continuously informs the creation, interpretation, and enforcement of international law.

Id. at 3–4.

¹⁵⁹ Žižek, *supra* note 96, at 90. David Brooks might agree with Žižek while talking about the United States. He says, "[f]or the past 30 years we've tried many different ways to restructure our educational system—trying big schools and little schools, charters and vouchers—that, for years, skirted the core issue: the relationship between a teacher and a student." Brooks, *supra* note 44, at A8.

¹⁶⁰ See, for a very detailed discussion, Chimni, *Prolegomena to a Class Approach*, *supra* note 10, at 57 ("Noting the emergence of a global social formation the article claims that a transnational capitalist class is shaping international laws and institutions in the era of globalization. It calls for the linking of the class critique of contemporary laws and institutions with the idea and practices of resistance, and considers in this setting the meaning of internationalism and class struggle today for an emerging transnational oppressed class. The article concludes by schematically outlining the advantages of a class approach to international law.").

IV

ON INTERNATIONAL LAW

A. *International Law as an Intimate Enemy*

International law is a large body of malleable laws spawning even larger ambitions. But national constitutions try to curtail this for the love of sovereignty as a legal concept while the same political state breaches the sovereignty of the weaker states. One does not have to go further than Paulsen's version of the death of international law at the hands of the U.S. Constitution, which is akin to Nietzsche's death of God.¹⁶¹ The understanding of international law should therefore be much more nuanced.¹⁶² Trade and investment laws, human rights law, humanitarian laws, law of the seas, and law of the nations, among other international laws, do not point to a clear direction in which it is moving. The centuries-long cultural, political and civilizational domination of the non-West has today led to the development of critical perspectives on international law.

Taking an "objective" view on colonialism, in "*Colonialisme et Neo-Colonialisme*"¹⁶³ Sartre thinks the "colonial system is led by its own internal necessity to corrupt and demoralize the colonized, to impoverish them, to destroy their social structures and disrupt their

¹⁶¹ See Paulsen, *supra* note 39, at 1762.

¹⁶² See *id.* at 1771 ("[I]t follows that, to the extent international law is thought to yield determinate commands or obligations in conflict with the U.S. Constitution's assignments of powers and rights, international law is, precisely to that extent, *unconstitutional—practically* by definition. In such cases, U.S. government actors must not—constitutionally speaking, may not—follow international law." (emphasis added)). Fortunately Paulsen has attracted comments from people who do not see international law in such a poor light. Spiro writes:

But for its contemporary particularities, Michael Stokes Paulsen's essay *The Constitutional Power To Interpret International Law* would work comfortably as an excellent example of late-nineteenth-century legal scholarship, with all of its best and worst qualities. The piece makes for good reading; it is sweeping in scope, confident in tone, and certain of result. It is tightly argued in a self-contained order of doctrinal logics. Paulsen wears his ideology on his sleeve, not a bad thing. He is comfortable in the power of America's constitutional faith, assuming that the United States can and should go it alone except to the extent that it serves the national interest. International law is never more than an option, he argues, and not a very appealing one at that. Paulsen believes that the Constitution should and will keep international law at bay.

Peter J. Spiro, *Wishing International Law Away*, 119 YALE L.J. ONLINE 23, 23 (2009), available at <http://yalelawjournal.org/2009/09/29/spiro.html>.

¹⁶³ JEAN-PAUL SARTRE, *SITUATIONS, V: COLONIALISME ET NÉO-COLONIALISME*, (Gallimard ed., 1964).

social relationships.”¹⁶⁴ However, Sartre’s parsimonious objectivity exhibits an occasional lapse into subjectivity as he finds an objective explanation of colonialism incomplete.¹⁶⁵ And then, as is very apparent in his *critique de la raison dialectique*, he eventually attempts “to transcend the objective-subjective dichotomy and to perceive the actions of human beings, members of particular classes or groups, as products both of objective material forces and of more or less freely chosen intentions, transcending material condition.”¹⁶⁶ Thus international law for the Third World transforms into an intimate enemy. We have to learn to live with it; after all, not all of it is bad, goes the argument. Thus TWAIL, as Third World scholars’ approach to studying international law’s existing administrative and capital promoting structure, is a project to explore that “human will.”¹⁶⁷

B. Economic Approach to International Law

The logic of economics, now very commonplace among American lawyers and certain American schools has blossomed, ignoring Adorno’s insight about societies where domination always outlasts economic planning.¹⁶⁸

Economics’ instrumental reason objectifies nature as matter, men as producers (and consumers), and nature-man’s interaction as a product.¹⁶⁹ This recipe turns market freedom into an administrative plan. One would then expect a bit of a loss of repression with every step of planning completed. More and more repression is the result instead. Sartre, it is argued, “exposes unmercifully” how the Western conception of “the picturesque and exotic serves to justify” the Western “treatment of the natives as objects, rather than as human beings.”¹⁷⁰

A pro-capital technological society demands individuals’ compliance and adjustment at the cost of freedom. Quite naturally the demanding capitalists and the “demandee” Third World stand in opposition. After international law’s proven colonial birth, its psychological evaluation as an intimate enemy brings Nietzsche’s

164 A.A. Fatouros, *Sartre on Colonialism*, 17 WORLD POLITICS 703, 704 (1965).

165 *Id.* at 704.

166 *Id.* at 706.

167 Friedrich Nietzsche, *The Genealogy of Morals*, in THE BIRTH OF TRAGEDY AND THE GENEALOGY OF MORALS 149 (Francis Golffing trans., 1956).

168 THEODOR ADORNO, NEGATIVE DIALECTICS 321 (E.B. Ashton trans., 1973).

169 Nancy S. Love, *Epistemology and Exchange: Marx, Nietzsche, and Critical Theory*, 41 NEW GERMAN CRITIQUE 71, 73 (1987).

170 Fatouros, *supra* note 164, at 709.

psychological exchange to bear on Marx's dialectic of production. Inaccurate alone, together Marx and Nietzsche stand to expose, so to speak, international law's counterintuitive structural-functionality.¹⁷¹ Unfortunately the capitalist mode of integrating the surplus into the functioning of the international system remains international law's fundamental fact.

C. *International Law and Technology*

A center-periphery discourse today animates international law's critical approaches. Given that technology is melting boundaries, during the "war on terror" technology has become a potent tool to interfere with the sovereignty of weaker states. Thanks to technology, we are witness to the largest periphery formation in the history of mankind. Unfortunately, the larger this periphery, the bigger the peripheral population. And through drone attacks in the "war on terror," it is this periphery, in places like Afghan-Pakistan tribal areas, that has become the biggest victim.¹⁷² Kanwar identifies three key issues concerning the deployment of unmanned systems such as drones:

1. distinction (between combatants and non-combatants and between military objectives and civilian objects);
2. the prohibition on causing unnecessary suffering to combatants;
3. proportionality¹⁷³

However, when and where "the United States, for example, has ever analyzed whether its drone program is International Humanitarian Law-compliant before putting these weapons into the field" is not known.¹⁷⁴ During the "war on terror," globalization's tribal by-product at such peripheries are examples of the Third World being created and targeted by the use of technology. Devoid of

¹⁷¹ I owe my understanding of "structural functionality" of international law to Moshe Hirsch. See Moshe Hirsch, *The Sociology of International Law*, 55 U. TORONTO L.J. 891, 904 (2005).

¹⁷² See Vik Kanwar, *Post-Human Humanitarian Law: The Law of War in the Age of Robotic Weapons*, 2 HARV. NAT'L SECURITY J. 577, 581 (2011) ("From the point of view of the international lawyer, the concern is not asymmetry of protection, but rather that one side might be shielded from legal consequences . . . reality of Predator drones makes headlines daily. The question of precision—targeting the right kill and avoiding the wrong kill—is at the center of the controversy over these weapons.").

¹⁷³ *Id.* at 584.

¹⁷⁴ *Id.* at 585.

emotions, technology kills the enemy and the civilians without a distinction.

In globalization's wake, the Third World has to pay a cultural tax for a gradual, but stubborn, belief in the idea of the Western nature of international law. Plainly put, the Third World's nirvana suggestively lies in its anthropo-sociological extinction from international scholars' vocabulary leaving the great platter of international law's world uniform and universal.

This, in my view, constitutes international law's original sin. The half-life, as it were, of international law today is about to complete, and the First World sees the Third World's effective use of international law for a legal retaliation as the cancerous after-effects of its radiation. Take, for example, any branch of international law: in trade laws, terrorism, human rights, or global security, the trend is to advocate parochial constitutional superiority over international law by developed states like the United States and their scholars.¹⁷⁵

In trumping international law through their war on terror (or the terror of wars), after parochial constitutional assertions of the United States and the European Union, Western states today combat "their own historical legacy run amok."¹⁷⁶

So, we are told, the war on terror (or a rephrased terror of wars as mostly the non-Westerners think) is a capitalist gift to humanity of a safer place rather than a politico-cultural tax for sticking to non-Western beliefs. Vik Kanwar identifies three key issues in the use of robotic technology during wars: distinction, prohibition of unnecessary suffering, and proportionality. However, the lack of any impartial agency to evaluate whether these three principles have been followed during the drone attacks during the "war on terror" leaves the task upon conscientious scholars to debate whether the attack (of self-defence) is proportional or not. The experts are of little help

¹⁷⁵ The most ghastly of all attacks on international law in recent times is one by Paulsen. However, he has more detractors than admirers in all parts of the world. The view that Paulsen advances is extreme. Ahdieh confronts him:

International law does not mean *less* than domestic law; at least as law, it means *nothing*. No authority beyond his own certainty in this proposition, however—be it the Constitution, Supreme Court precedent, congressional legislation, or executive decree—can get him there. As Professor Paulsen points out, there is a fog—but it is not in international law.

Robert B. Ahdieh, *The Fog of Certainty*, 119 YALE L.J. ONLINE 41, 51 (2009), <http://www.yalelawjournal.org/2009/09/29/ahdieh.html>.

¹⁷⁶ Žižek, *AHR*, *supra* note 50, at 116.

here.¹⁷⁷ Although we live in a world of expert opinions and advices, often experts do not speak on their own. They are either funded or hired by organizations for expert opinions. No wonder a particular organization's opinion comes through their hired experts. International law in the age of technology is such an expert's production. The experts have divided international law further into smaller branches for higher focus—constitutional, economic, environmental, space, and humanitarian. Yet the process through which one becomes an expert has another political agenda behind it.

V

END OF THE START

In the Oscar-winning *The Ghost and the Darkness*,¹⁷⁸ the local African narrator speaks to the audience about two man-eating lions who the people of Tsavo, a place in Uganda, thought were evil incarnate. This is based on a true story: John Beaumont, the owner of a British railroad firm, is building a rail line connecting Tsavo to the British colonial project. Engineer-turned-hunter John Patterson is summoned to the African nation to supervise the construction. After an incident, workers flee away, fearing their lives.

The hero, deployed after his famed Indian experience, appeals to the leader of the fleeing workers who belong to the Indian subcontinent. After his initial tricks to woo back the fearful workers fail, the engineer asks the worker-leader to overcome his fear for the honor of the dead Indian-African workers. In a way, the engineer invokes the rhetoric of human rights for those already killed by the lions to keep the colonial project alive.

What deception? The real motivation of the engineer's sermon on mastering fears to the proletariat workers stood exposed by the arrival of Beaumont. It was the fear of the senator's reputation that drove the engineer. The workers only formed a cog in the colonial development project with the engineer manifesting a "Weberian nightmare" of a bureaucratic genre.

¹⁷⁷ See David Kennedy, *Challenging Expert Rule: The Politics of Global Governance*, 27 SYDNEY L. REV. 5 (2005). "I offer this broad research agenda in the spirit of Julius Stone's own sociological admonition that we strengthen our understanding of how our world is actually governed. We focus too much on the foreground. We overlook the work of experts, and understand only dimly the workings of expertise itself". *Id.* at 24.

¹⁷⁸ THE GHOST AND THE DARKNESS (Constellation Entertainment 1996).

The senator informs the engineer about the competing French and German companies. Apparently, the senator's knighthood was also at stake. Gauged from the narration of the characters, the workers stood between the Scylla and Charybdis of death and the fear of death. Those workers in this narration stand for the nuanced Third World.

Aristotle wonders "whether political life in particular times and places can be invigorated by thoughtful deliberation on the conditions for and limits of the common good."¹⁷⁹ Capitalism's unfreeing abilities call for certain attention to this Aristotelian question. Whether capitalism is alleviating or vitiating poverty remains an open question. Unfortunately, we have not been able to find whether, with the aid of capitalism, international law is indeed striving for the common good.

¹⁷⁹ Smith, *supra* note 65, at 635.