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# *Prolegomena to a Class Approach to International Law*

B. S. Chimni\*

## **Abstract**

*This article offers an introduction to a class approach to international law. It challenges the 'death of class' thesis and argues for the continued relevance of the category of 'class'. Among other things, the contention is that the category of 'class' subsumes without erasing the gender and race divides. 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.*

## **1 Introduction**

This article offers an introduction to a class approach to international law. While mainstream international law scholarship (MILS) has much to contribute to the understanding of contemporary international law (CIL), its near exclusive focus on states occludes a serious examination of social groups and classes which influence state policies and are often principal movers and beneficiaries of international law regimes.<sup>1</sup>

\* Centre for International Legal Studies, School of International Studies, Jawaharlal Nehru University, New Delhi, India. The article is a revised version of a keynote address delivered at the British Critical Legal Studies Conference held in Glasgow, UK, in September 2008. I would like to thank the participants at the Conference, in particular Akbar Rasulov, for their comments.

<sup>1</sup> I have defined MILS 'as an ensemble of methods, practices, and understandings in relation to the identification, interpretation, and enforcement of international law'. A key feature is 'an epistemology of law that dictates the fragmentation of social sciences in relation to the creation, interpretation, and implementation of international law'. One consequence is that MILS does not recognize 'that there are structural constraints in the international system that greatly limit the pursuit of common good through international law'. That is to say, it neglects the fact 'that there are deep structures that entrench rules

In contrast, a class approach to international law focuses besides states on social groups and classes which are shaping and have historically shaped international law, enabling us to fill crucial gaps in the understanding of the international law making and implementation process, including the location of international lawyers in the international system. A class focus, to put it differently, enables international lawyers to practise the discipline of international law as if people mattered.<sup>2</sup>

A class approach to international law does not necessarily mean, it is also worth stressing at the outset, a Marxist approach to international law. Weber, Durkheim, and Bourdieu, among others, also deployed the social category class to understand modern society.<sup>3</sup> Their understanding of ‘class’ can therefore equally be used to sketch a class approach to international law. While this article relies on Marx and his interpreters (including Bourdieu), the underlying assumption is that *any* class approach has, albeit in different ways, much to contribute to an understanding of CIL. A class approach also does not mean the rejection of non-class approaches (conservative, liberal, feminist, or post-modern) to CIL. These can *complement* each other better to understand the structure and process of international law. But a class approach certainly rejects the view that universal human values are a more suitable basis for understanding and evaluating the functioning of international law.<sup>4</sup> For such an approach neglects established fractures in society, both national and global. While universal human values certainly have a place in international law discourse, they are, like human rights discourse, subject to selective appropriation, parochial interpretations, and manipulation by dominant groups, classes, and states.

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and systems of belief which sustain the domination of subaltern states and peoples’: Chimni, ‘An Outline of a Marxist Course on Public International Law’, 17 *Leiden J Int’l L* (2004) 1, at 1–2.

<sup>2</sup> Thus, for instance, in looking at the impact of the global financial crisis, and in framing multilateral legal rules to deal with such crisis, a class approach will look not only at its implications for states but equally at the impact on the lives of ordinary people. In the past ‘the costs of financial crises have been borne to a large degree by citizens of the affected countries and only minimally by financial market actors, even though these actors’ search for high returns was a major factor in bringing the crisis about’. Yet international law continued to focus on the mandate and response of international monetary and financial institutions to these crises: T. Porter, *Globalisation and Finance* (2005), at 187.

<sup>3</sup> For different approaches to class analysis see E. O. Wright (ed.), *Approaches to Class Analysis* (2005). To take an example Weber defined ‘class’ in the following manner:

We may speak of a ‘class’ when (1) a number of people have in common a specific causal component of their life chances, in so far as (2) this component is represented exclusively by economic interests in the possession of goods and opportunities for income, and (3) is represented under the conditions of the commodity or labour markets. [These points refer to ‘class situation’, which we may express more briefly as the typical chance for a supply of goods, external living conditions, and personal life experiences, in so far as this chance is determined by the amount and kind of power, or lack of such, to dispose of goods or skills for the sake of income in a given economic order. The term ‘class’ refers to any group of people that is found in the same class situation].

H. H. Gerth and C. Wright Mills (eds), *From Max Weber: Essays in Sociology* (1948), at 181. For a detailed analysis see Breen, ‘Foundations of a neo-Weberian Class Analysis’, in Wright, *supra* note 3, at 31.

<sup>4</sup> Fisler, Damrosch and Mullerson, ‘The Role of International Law in the Contemporary World’, in L. Fisler et al. (eds), *Beyond Confrontation: International Law in the Post-Cold War Era* (1995), at 1, 4.

In articulating a class approach to international law the article proceeds as follows. Section 2 dilates on the category of 'class' through challenging the 'death of class thesis'. In the process of critiquing the 'end of class' thesis, it refers to the views of key writers such as Bourdieu, Poulantzas, Resnick and Wolf, and Wright. It *inter alia* suggests that the category of 'class' has continued relevance even in advanced capitalist societies and is not to be viewed in opposition to the categories of gender and race, pointing to the complementarities between them. Section 3 considers whether it is appropriate to speak of a *global* social formation and *global* classes. In this regard it clarifies the meaning of a 'social formation' and refers to the global character of capitalism and the emergence of a transnational public sphere to evidence the existence of a global social formation. The section then goes on to look at the emergence of a transnational capitalist class (TCC) which drives globalization in both the developed and third world countries and examines the impact of TCC on CIL. Section 4 considers, against the backdrop of a congealing Transnational Oppressed Class (TOC), the meaning of 'internationalism' and 'class struggle' today and its relationship to CIL. Section 5 schematically lists the advantages of adopting a class approach to international law.

## 2 On Class

In order to advance a class approach to international law it is necessary at first to clarify the concept of 'class'. Social classes have been defined in classical Marxist literature as follows:

Classes are large groups of people differing from each other by the place they occupy in a historically determined system of social production, by their relation (in most cases fixed and formulated in law) to the means of production, by their role in the social organisation of labour, and, consequently, by the dimensions of the share of social wealth of which they dispose and the mode of acquiring it. Classes are groups of people one of which can appropriate the labour of another owing to the different places they occupy in a definite system of social economy.<sup>5</sup>

The task of clarifying the concept of 'class' may be accomplished through a critical review of the principal arguments advanced to support the 'death of class' thesis. It is today contended that the category of 'class' is no longer useful for at least five reasons:

First, despite its centrality to Marxist sociology, the category of 'class' has not been adequately developed. Marxist scholars themselves admit that the 'traditional Marxist notions of class are generally vague and inadequate'.<sup>6</sup> The general tendency is to work with a two-class model of capitalist societies: the capitalist and the working class, offering an impoverished view of complex multi-class social structures.

Secondly, the determination of classes is based on economic relations occluding the identification of classes in the ideological and political spheres. Conversely, the ideological and political role of classes is simply derived from their economic locations without taking into account the multifaceted mediations and interactions which determine these roles.

<sup>5</sup> V.I. Lenin, *Selected Works* (1975), iii, at 172.

<sup>6</sup> S.A. Resnick and R.D. Wolff, *New Departures in Marxian Theory* (2006), at 91; D. L. Johnson (ed.), *Class and Social Development: A New Theory of the Middle Class* (1982), at 21.

Thirdly, it is increasingly recognized that the gender and race divides in society are as salient as the ‘class’ divide. The non-recognition of these other social divides renders the category of ‘class’ less than useful. On the other hand, attempting to accommodate and incorporate these other categories dilutes the category of ‘class’ to a point where it loses its distinctiveness and analytical usefulness.

Fourthly, the fact of diffusion of capital through the dispersion of stock ownership and the accompanying separation between formal legal ownership and real economic ownership renders the category of class an anachronism.

Fifthly, there is neglect of the fact that in the second stage of modernity the advanced capitalist world manifests what Beck terms as ‘capitalism without classes’.<sup>7</sup> While it is perhaps true that ‘the collective success with class struggle’ is responsible for the irrelevance of the idea and reality of social classes, the fact remains that ‘class’ is replaced by the category of ‘individualization’, albeit accompanied by post-class and post-national forms of radical inequality.<sup>8</sup> In sum, as Beck puts it, ‘for the first time in history, the individual rather than the class is becoming the basic unit of social reproduction’.<sup>9</sup>

These criticisms of the use of the category of ‘class’ have a degree of validity but, as is argued below, not debilitating, as these can be adequately addressed from within a Marxist approach. Each contention is treated in turn.

First, while it is true that Marxist scholars often tend to use a two-class model in their analysis, it is mostly as a convenient shorthand for class analysis. Most Marxist writers go further and address other classes (peasants, landlords, etc.), in particular the middle or intermediate classes.<sup>10</sup> The determination of the middle or intermediate classes is a complex process. For, if the Marx distinction between productive and unproductive labour were used for the purpose, many in the middle class would be included in the definition of the working class. Marx had noted that ‘from the standpoint of capitalist production’, ‘labour is productive if it directly valorises capital, or creates surplus values’.<sup>11</sup> But the distinction between productive and unproductive labour, as Marx clarified, was not related to its ‘determinate content’ or use value. In fact, as Marx noted, ‘the same kind of labour may be *productive or unproductive* . . . . A singer who sells her song for her own account is an *unproductive labourer*. But the same singer commissioned by an entrepreneur to sing in order to make money for him is a productive worker; for she produces capital’.<sup>12</sup> Therefore, the distinction between productive and unproductive labour would have to be combined with other criteria such as the distinction between intellectual and manual labour to categorize individuals/professions into middle or intermediate class.<sup>13</sup> Resnick and Wolff propose a detailed

<sup>7</sup> Cited by Atkinson, ‘Beck, Individualization and the Death of Class: A Critique’, 58 *British J Sociology* (2007) 349, at 354.

<sup>8</sup> Beck, ‘Beyond Class and Nation: Reframing Social Inequalities in a Globalising World’, 58 *British J Sociology* (2007) 679, at 682.

<sup>9</sup> U. Beck and J. Willms, *Conversations with Ulrich Beck* (2004), at 101.

<sup>10</sup> Resnick and Wolf, *supra* note 6, 92; Johnson, *supra* note 6, at 87–109.

<sup>11</sup> A. Cottrel, *Social Classes in Marxist Theory* (1984), at 60ff.

<sup>12</sup> Cited in *ibid.*, at 62.

<sup>13</sup> Lenin talked of socialism as a state in which, among other things, the ‘distinction between manual workers and brain workers was abolished’: Lenin, *supra* note 5, at 172.

map of classes using a different criterion. Starting from the Marx proposition that the class process is that 'in which unpaid surplus labour is pumped out of direct producers', they go on to distinguish between 'fundamental classes' and 'subsumed classes'.<sup>14</sup> The latter 'refers to persons who neither perform nor extract surplus labour. Rather, they carry out certain specific social functions and sustain themselves by means of shares of extracted surplus labour distributed to them by one or another fundamental extracting class'.<sup>15</sup> The subsumed classes provide 'certain of the conditions of existence – non-economic as well as economic – of the fundamental class process'.<sup>16</sup>

Resnick and Wolff go on to distinguish between two types of subsumed classes: 'Type 1 comprises the directors of social processes which are conditions of existence for the capitalist fundamental class process; and Type 2 the directed performers of such processes (the latter may be employed by Type 1 subsumed classes or by capitalists)'.<sup>17</sup> Type 1 will include merchants, moneylenders, and landlords. In a corporation milieu Type I individuals would include shareholders and the directors of merchanting, personnel, supervision, advertising, bookkeeping, legal services, etc. Type 2 will include individuals like public, primary, or secondary school teachers, salespersons employed by capitalists, or rent collectors employed by the landowner. However, individuals can occupy different class positions in different activities or situations. Resnick and Wolff conclude that 'society, for Marxian theory, is always a complex formation of interacting fundamental and subsumed classes; it is a social formation'.<sup>18</sup> One does not necessarily have to agree with their classification of fundamental and subsumed classes. But what they adequately demonstrate is that the mapping of classes beyond the two-model classification is possible in order to capture complex social realities. Such a map in turn can be used to understand the response of diverse social classes to different international legal regimes.

Secondly, the criticism that the category of 'class' is limited to, or that classes are determined in, the economic sphere alone is not entirely correct. Poulantzas, for instance, rejects the purely economic determination of classes.<sup>19</sup> In his words, 'a social class can be identified either at the economic level, at the political level, or at the ideological level, and can thus be located with regard to a particular instance'.<sup>20</sup> In order

<sup>14</sup> Resnick and Wolff, *supra* note 6, at 93.

<sup>15</sup> *Ibid.*, at 94.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, at 96.

<sup>18</sup> *Ibid.*, at 95.

<sup>19</sup> N. Poulantzas, *Political Power and Social Classes* (1978), at 62ff.

<sup>20</sup> *Ibid.*, at 63–64 (emphasis in original). As Poulantzas explains:

Marx's analyses of social classes never refer simply to the economic structure (relations of production) but always to *the ensemble of the structures* of a mode of production and social formation, *and to the relations which are maintained there* by the different levels . . . everything happens as if social classes were the *result of an ensemble of structures and of their relations*, firstly at the economic level, secondly at the political level and thirdly at the ideological level.

Wright concurs, noting that 'classes are structurally determined not only at the economic level, but at the political and ideological levels as well': *ibid.*

to go beyond the idea of economic classes Poulantzas adds to the distinction of productive and unproductive labour that of manual and mental labour, and it is in the intersection of the two that he locates classes at the political and ideological levels. In his view, ‘only productive manual workers should be considered part of proletariat’.<sup>21</sup> For, despite being salaried workers, the political and ideological position of the middle class, especially those who are part of the growing world of (what Negri terms) ‘immaterial production’ and the service sector, is different from that of the working class.<sup>22</sup> Cottrell sums up the Poulantzas position thus:

The working class is defined by the intersection of productive labour (economic determination) and manual labour (political and ideological determination), and the non-proletarian wage workers are to be grasped as a ‘new petty bourgeoisie’ by virtue of the effects of their intermediate position with respect to the antagonism of bourgeoisie and proletariat.<sup>23</sup>

Thus Poulantzas, like Resnick and Wolff, goes beyond the test of productive and unproductive labour which Marx proposed for determining the identity of the proletariat. More to the point is the fact that there is no necessary relationship between location in the class structure and class position; the ideological and political positions of an individual or a group can diverge from their class location.<sup>24</sup>

The work of Bourdieu also facilitates an understanding of ‘class’ which is not limited by its location in economic structures to meet the criticism that classes are not determined at the ideological and political levels. According to Bourdieu, class location of an individual or a group within a social formation is determined by three factors: by the total volume of economic and cultural capital; the composition of economic and cultural capital; and the change and stability in the composition of economic and cultural capital over a period of time.<sup>25</sup> The notion of cultural capital, as Weininger explains, ‘refers to a culturally specific “competence”, albeit one which is unequally distributed and which is efficacious – as a “resource” or a “power” – in a particular

<sup>21</sup> *Ibid.*, at 31. As Poulantzas puts it, ‘although every worker is a wage-earner, every wage-earner is certainly not a worker, for not every wage-earner is engaged in productive (i.e., manual) labour’: N. Poulantzas, *Classes in Contemporary Capitalism* (1975), at 20.

<sup>22</sup> On the dominance of immaterial production over industrial production see A. Negri, *Empire and Beyond* (2006). Negri contends that ‘there is an emergent hegemony of immaterial production compared with other forms of production. This fact replaces the previous hegemony of industrial production . . . In the last decade of the twentieth century, industrial labour has lost its hegemony and in its place “immaterial labour” has emerged, in other words labour that creates immaterial products: knowledge, information, communications, linguistic and emotional relations’: *ibid.*, at 127 and 128. The hegemony is *not quantitative* but qualitative, that is, ‘in the extent to which it has the power to transform the others’: *ibid.*, at 127, 129. While Negri is perhaps hasty in inaugurating a new global mode of production the point is not without merit in as much as it captures the changing nature of global capitalism: the incessant and instant mobility of knowledge and capital and knowledge as capital. This new mode of production is dominated by an emerging TCC. It encompasses phenomena ranging from communications imperialism to bio-imperialism all of which are increasingly central to the operation of transnational capital.

<sup>23</sup> Cottrell, *supra* note 11, at 69.

<sup>24</sup> For a critique of the Poulantzas position see E.O. Wright, *Class, Crisis and the State* (1979), at 43ff.

<sup>25</sup> Weininger, ‘Foundations of Pierre Bourdieu’s Class Analysis’, in E.O. Wright (ed.), *Approaches to Class Analysis* (2005), at 82, 88–89.

social setting'.<sup>26</sup> The cultural capital is inculcated in individuals and groups by social institutions like the family and the school. The existence of classes is thus mediated by what Bourdieu terms 'class habitus'. This conceptual matrix allows class analysis to escape 'both the objectivism of action understood as a mechanical reaction "without an agent" and the subjectivism which portrays action as the deliberate pursuit of a conscious intention'.<sup>27</sup> The notions of 'cultural capital' and 'class habitus', among other things, help situate the 'invisible college' of international lawyers within national and global social formations.<sup>28</sup> Since the role of the 'invisible college' is crucial in the making and interpretation of international law the class approach offers a powerful insight into the process and structure of international law.

Thirdly, the view that the Marxist understanding of 'class' is no longer valid as it does not take into account gender and race divides is not entirely persuasive. The category of 'class' is not to be viewed in opposition to that of gender and race. A social class may be understood as a *complex unity* which encompasses the gender and race divides.<sup>29</sup> The latter categories are thus neither simply subsumed under the category of class nor are mere additions to it. These are interpenetrating and overlapping categories which intersect in multiple ways. But, as Sen insightfully notes, 'no other source of inequality is fully independent of class', and therefore 'the basic issue is complementarity and interrelation rather than the independent functioning of different disparities that work in seclusion (like ships passing at night)'.<sup>30</sup> From this perspective Wright points for example to five possible forms of class/gender interface:

gender as a *form* of class relations; gender relations and class relations as *reciprocally affecting* each other; gender as a *sorting mechanism* into class locations; gender as a *mediated linkage* to class locations; and gender as a *causal interaction* with class in determining various outcomes.<sup>31</sup>

Bourdieu went further and placed class and gender on an equal footing.<sup>32</sup> These moves are not empty gestures, but assume that the category of 'gender' possesses a separate essence from class relations. At least one consequence is that 'the struggles over gender inequality may have more scope for success inside of capitalism than Marxists

<sup>26</sup> *Ibid.*, at 87.

<sup>27</sup> Cited by Weininger, *supra* note 25, at 90.

<sup>28</sup> The phrase 'invisible college' was used by Schachter to speak of the 'professional community of international lawyers' forming an 'invisible college dedicated to a common intellectual enterprise': Schachter, 'The Invisible College of International Lawyers', 77 *Northwestern University L Rev* (1977) 217.

<sup>29</sup> See generally L.S. Chancer and B.X. Watkins, *Gender, Race and Class: An Overview* (2006).

<sup>30</sup> A. Sen, *The Argumentative Indian* (2005), at 207, 208. In a recent essay Fraser notes that the 'intersectionist' alternative is 'widely accepted today' and attempts 'to integrate the best of recent feminist theorizing with the best of recent critical theorizing about capitalism': Fraser, 'Feminism, Capitalism and the Cunning of History', 56 *New Left Rev* (2009) 97, at 103, 98.

<sup>31</sup> E.O. Wright, *Class Counts* (2000), at 119.

<sup>32</sup> Weininger, *supra* note 25, at 112–113. It may be noted that Bourdieu addressed the interconnections between class and gender differently at different points of time. In the beginning he talked of 'networks of intertwined relationships' between class and other social divisions such as gender and race: *ibid.*, at 108. He noted that 'groups mobilised on the basis of a secondary criterion (such as sex or age) are likely to be bound together less permanently and less deeply than those mobilised on the basis of fundamental

have usually been willing to acknowledge'.<sup>33</sup> From the standpoint of characterizing CIL the significant point is the need to take into account its impact on the fate of all three social categories viz., class, gender, and race.

The fourth critique of the category of 'class' is that the democratization of ownership through spreading stock ownership and the rise of the managerial class call for rethinking the relevance of the category. But, as has been noted in response, the diffusion of stock ownership only leads to 'reinforcing the actual control of big stockholders, who thus succeed in commanding an amount of funds out of proportion to their actual ownership. Paradoxically, dispersion of stock thus favours the centralization of capital.'<sup>34</sup> Furthermore, as Cottrell explains, despite the democratization of ownership:

The means of production remain the object of an exclusive possession, by the capitalist enterprise (stock company) itself. Capitalist enterprises remain separate legal subjects and separate units of possession, producing commodities for the market and bound by the requirements of profitability, and the 'producers', whether manual workers or managers, can gain access to the means of production only if they are able to conclude a wage contract with a capitalist enterprise. In this light the joint stock company may be seen as a *form* of capitalist property, a form distinct from personal ownership, but in no way representing the 'abolition of the capitalist mode of production'.<sup>35</sup>

At the political and ideological levels the dispersion of stock ownership is the material basis on which the middle classes are won over to the side of the capitalist mode of production (CMP). The dividends received secure their vote for capitalism.<sup>36</sup>

The fifth criticism of the category of 'class' is that, at least in the case of advanced capitalist societies, the creation of the welfare state has led to the dissolution of 'the

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determinants of their condition': *ibid.*, at 110. But later he departed from this understanding. Speaking of social divisions based on gender Bourdieu noted that:

whatever their position in social space, women have in common the fact that they are *separated from men by a negative symbolic coefficient* which, like skin colour for blacks, or any other sign of membership in a stigmatised group, negatively affect everything that they are and do, and which is the source of a systematic set of homologous differences; despite the vast distance between them, there is something in common between a woman managing director . . . and the woman production line worker.

*Ibid.*, at 112. But this need not necessarily be the only possible manner in which the relationship between class and gender is conceptualized. There is a complexity here that cannot be captured by a simple conferring of equality on both the categories.

<sup>33</sup> *Ibid.*, at 274.

<sup>34</sup> DeVroey, 'The Separation of Ownership and Control in Large Corporations', 7(2) *The Review of Radical Political Economics* (1975) 1, cited in Wright, *supra* note 31, at 69. See also Cottrell, *supra* note 23, at 110.

<sup>35</sup> Cottrell, *supra* note 23, at 80.

<sup>36</sup> This insight helps to explore the limits of ideas such as corporate led development. To the extent that it is the middle classes that support such an understanding the enthusiasm for it should be discounted, as the intermediate classes have a stake in the profits of global corporations, whether national or global. In the context of India see generally Fernandez and Heller, 'Hegemonic Aspirations: New Middle Class Politics and India's Democracy in Comparative Perspective', 38 *Critical Asian Studies* (2007) 495.



culture of classes'.<sup>37</sup> It has, as Beck argues, led to the 'demise of collective identities' and the emergence of individualization. This is, as Atkinson explains, 'a dual process whereby, under conditions of reflexive modernity, individuals are *disembedded* from "historically prescribed social forms and commitments" including those related to class, and subsequently, re-embedded in new ways of life in which they "must produce, stage, and cobble together their biographies themselves"'.<sup>38</sup> It is however projected not merely as a subjective but a structural phenomenon.<sup>39</sup> Critics point out that Beck's theory and observations are not empirically grounded, i.e., they are 'data free'.<sup>40</sup> Further, he does not appreciate the distinction between situations of individual discrimination and class subordination; thus individual discrimination acquires a different edge depending on its class location. The discourse on international human rights law incorporates this insight by *inter alia* distinguishing between individual and collective rights. Beck's failure to make the distinction between individual discrimination and class subordination and their dialectic explains why there is 'ambivalence and contradiction' in his conceptualization of 'individualization', for at times he does not think that class is being entirely effaced.<sup>41</sup> The Beck formulation suffers from Eurocentrism as well, in as much as it does not consider the fate of 'class' in the third world or in transitional economies and its implications for the culture of classes in the western world; the benefits which accrue to the working classes in the first world and the consequent redefinition of their interests are ignored. The underlying assumption that class can only be located in the national frame is also problematic, for there is no reason why classes cannot be constituted at the global level, and (as we shall see) indeed they have been. For someone who lays stress on post-national forms of inegalitarianism this omission is difficult to comprehend.

### 3 From National to Global Classes: On Global Social Formation

The debate on the concept of 'class' reveals the complex nature of the exercise of identifying classes in national social formations, their interweaving with the categories of gender and race, and the understanding of their role in the reproduction of society. This problem is rendered even more intricate when one speaks of classes at the global level. Can we speak of a global society? Are there global classes? Can we do a multiple class analysis at the global level? How are class interests expressed in an inter-state system? To what extent does the existence of sovereign states mean that class interests are manifested in a greatly mediated and indirect manner at the global level?

<sup>37</sup> Beck, *supra* note 8, at 682.

<sup>38</sup> Atkinson, *supra* note 7, at 352.

<sup>39</sup> *Ibid.*, at 353.

<sup>40</sup> *Ibid.*, at 355.

<sup>41</sup> *Ibid.*, at 356–357.

### A *Distinction Between Mode of Production and Social Formation*

In order to respond to these questions it is useful to make explicit at first the distinction between a mode of production and a social formation. A mode of production is ‘an abstract-formal object which does not exist in the strong sense in reality’.<sup>42</sup> The only things that ‘really exists is a historically determined social formation, i.e., a social whole, in the widest sense, at a given moment in its historical existence: e.g. France under Louis Bonaparte, England during the Industrial revolution’.<sup>43</sup> A social formation is usually characterized ‘by a specific combination of capitalist, feudal and patriarchal modes of production whose combination alone exists in the strong sense of the term’.<sup>44</sup> The social formation thus ‘constitutes a complex unity in which a certain mode of production dominates the others which compose it’.<sup>45</sup>

It can be argued in the same vein that accelerated globalization has led to the emergence of a *global social formation* in which different modes of production (*in a double sense* as they exist both inside nation states as well as in the international system) co-exist but which is dominated by the Capitalist Mode of Production (CMP). To borrow the words of Mandel, ‘world-wide capitalist relations of exchange [and production] bind together capitalist, semi-capitalist and pro-capitalist relations of production in *an organic unity*’.<sup>46</sup> This assertion may have lacked conviction earlier because the global integration of national societies had not reached the qualitative stage of today in the absence of the information and communication revolution.<sup>47</sup> The present situation is very different. The rapidity with which the ongoing financial crises engulfed the world goes a long way to confirm the emergence of a global social formation. Of course the place of different national social formations in the global social formation, including the level of integration, engenders a complex web of relationships which calls for further conceptual and empirical mapping. But an embryonic global social formation can be confidently affirmed.

### B *The Global Character of Capitalism*

A central feature of capitalism is, it deserves emphasis, its inherent tendency to spatial expansion. It also explains why capitalism has always been imperialist; the expansion of capitalism is characterized by combined and uneven development; it simultaneously spawns development and underdevelopment. But this fact was not integrally factored into Marx’s understanding of capitalism. Marx’s analysis, as the Indian Marxist economist Patnaik notes, ‘is concerned essentially with a “closed”

<sup>42</sup> Poulantzas, *supra* note 19, at 15. A mode of production is a combination of forces of production and relations of production.

<sup>43</sup> *Ibid.*

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

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

<sup>46</sup> Mandel, ‘The Nation-State and Imperialism’, in D. Held *et al.* (eds), *States and Societies* (1983), at 526, 527 (emphasis added).

<sup>47</sup> But see Bergesen, ‘The Class Structure of the World-System’, in W. R. Thompson (ed.), *Contending Approaches to World System Analysis* (1983), at 43–54.

capitalist economy'. Therefore, among other things, 'the interaction between capitalism and the colonies remains an area of silence for Marxist theory (apart from Luxembourgeois's solitary and incomplete effort)'.<sup>48</sup> What is in issue here, as he goes on to note, is not the story of colonialism but of how 'to incorporate it into the core of Marxist *theory*' so as to be able to appreciate contemporary forms of imperialism better.<sup>49</sup>

While in the years after 1853 Marx and Engels, having studied Ireland, condemned the destructive nature of colonialism in no uncertain terms (especially in their writings on India) this did not impact on their analysis of the CMP as a closed system. Even Lenin did not seriously examine the role that colonialism played in the process of reproduction of capital.<sup>50</sup> It led to the neglect of the fact that capitalism and imperialism have an internal and not a conjunctural relationship, and therefore capitalism has been from the very beginning imperialist.<sup>51</sup> Or, to put it differently, the historic role of capitalism has always been the creation of a global social formation, albeit a formation which does not yield a just world order.

It, however, needs to be clarified that, while the relationship between CMP and imperialism is *internal*, its content and form undergo change in different periods of history; the ensemble of economic, social, and political practices which constitutes imperialism experiences transformation in time. What we are seeing today is the emergence of what may be termed *global imperialism*. Its distinct characteristic is that the class which benefits from it is the transnational fraction of the national capitalist classes with *international finance capital as the central driving force* (as against a combination of industrial and finance capital in the period of high colonialism). The benefits which accrue to TCC are partially shared with the subsumed and middle classes in the first and the third worlds; the ideologues of the global financial oligarchy often come from this section. But, as the recent global financial crisis has shown, finance-driven imperialist globalization cannot be sustained. Be that as it may, the crisis does testify to the evolution of a global social formation.

### C *Emergence of a Transnational Public Sphere*

The emergence of a global social formation today is also evidenced by the rise of a transnational public sphere. Traditionally, thinking about the public sphere has been

<sup>48</sup> Patnaik, 'The Communist Manifesto after 150 Years', in P. Karat (ed.), *A World to Win: Essays on The Communist Manifesto* (1999), at 7 (emphasis in the original).

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

<sup>50</sup> *Ibid.*

<sup>51</sup> This is a truth neglected even by eminent Marxist and critical writers with grave theoretical and political consequences. Petras, for instance, notes that 'reading the Miliband–Poulantzas debates [in the 1970s] on the capitalist state, one would never know that the major ideological/economic resources and institutions of the US "capitalist state" were engaged in a major imperialist war': J. Petras, *The New Development Politics: The Age of Empire Building and New Social Movements* (2003), at 154.

‘informed by a Westphalian political imaginary’.<sup>52</sup> This is changing in the era of accelerated globalization because, as Fraser explains:

the all-affected principle holds that . . . the relevant public should match the reach of those life-conditioning structures whose effects are at issue. Where such structures transgress the borders of states, the correspondent public spheres must be transnational. Failing that, the opinion that they generate cannot be considered legitimate.<sup>53</sup>

While the emerging transnational public sphere remains as yet a bourgeois sphere which is not easily accessed by large segments of TOC, it is increasingly extending its impact through reporting and expressing solidarity with the social and political struggles of TOC. In other words, life-conditioning social structures are today shaped by global capitalism amidst an accelerated globalization process, and the relevant public is accordingly constituted of different transnational groups and classes, including the TCC, TOC, and the transnational middle classes (TMC).

Of course the emerging global social formation, and the transnational public sphere, still has at its base an inter-state system the logic and dynamics of which cannot be set aside. The external policy of a state is a compound expression of several factors: dominant class interests, the compromise with other social classes, national security concerns, cultural anxieties, resistance movements, and the distinctiveness of the international law-making process. This means that the effects of the dominant global mode of production or the interests of the hegemonic transnational classes are not directly translated into rules of international law. There are a number of other variables and mediating processes which come into play. At the same time, however, to the extent that international law is an instrument which not merely reflects but also constitutes and influences the nature of its subjects, it has in recent times played a crucial role in the construction of a global social formation facilitating the realization of TCC interests. The prescription of *uniform global standards* or the creation of *global property rights* through international law is significant in this regard. These developments can in turn be traced to the fact that the transnational fraction of the capitalist class (the TCC) has come to dominate state structures and influence policies in key developed and developing countries. The TCC has (at the economic, ideological, and political levels) encouraged global integration and has sought the adoption of corresponding principles and norms in international law. The invisible college of international lawyers has made its own contribution to the process; academics, diplomats, bureaucrats, judges, arbitrators have had a critical role in advancing the vision of TCC in the world of international law.

#### D *The TCC: the Case of Europe*

The TCC has been defined in different ways. According to Sklair, ‘the transnational capitalist class is not made up of capitalists in the traditional Marxist sense. Direct ownership or control of the means of production is no longer the exclusive criterion for

<sup>52</sup> Fraser, ‘Transnationalizing the Public Sphere: On the Legitimacy and Efficacy of Public Opinion in a Post-Westphalian World’, 24 *Theory, Culture & Society* (2007) 7, at 8.

<sup>53</sup> *Ibid.*, at 22.

-serving the interests of capital, particularly not the global interests of capital'.<sup>54</sup> In his view the TCC consists of the following four fractions: TNC executives and their local affiliates (corporate fraction); globalizing state and inter-state bureaucrats and politicians (state fraction); globalizing professionals (technical fraction); and merchants and media (consumerist fraction).<sup>55</sup> Others like Robinson and Harris suggest that the TCC 'is comprised of the owners of transnational capital, that is, the group that owns the leading worldwide means of production as embodied principally in the transnational corporations and private financial institutions'.<sup>56</sup> Bourdieu provides us with the theoretical means to deal with the two differing definitions which can be said to stress structure (Robinson and Harris) and agency (Sklair) respectively. Bourdieu seeks to 'dissolve the very distinction between those two seemingly antinomic viewpoints of social analysis by providing an empirical-cum-theoretical demonstration of the simultaneous necessity and inseparability of the "structuralist" and "constructivist" approaches'.<sup>57</sup> The true principle of action resides, Bourdieu suggests, in neither of these two 'states of the social' which are structures, institutions, and agents, but in their relation. It is out of the perpetual and multiple 'dialectic of field and habitus, position and disposition, social structures and mental structures, that practices emerge and (re)make the world that makes them'.<sup>58</sup> In this case of course the world in issue is the world of international law.

The global integration process under the leadership of TCC is also a multi-level process. It is taking place at several planes: international, regional, and national (especially in cities). Since a crucial element in the global integration process today is the regional process, it is useful briefly to examine the most significant of them, that is, the European integration process. Apeldoorn suggests that an emergent TCC has played a critical role in it.<sup>59</sup> Noting that 'classes are not unified actors', Apeldoorn conceptualizes 'the process of capitalist class formation as one in which the different groups within the capitalist class crystallise into rival class *fractions*'.<sup>60</sup> The two primary structural axes along which class fractions are concretely formed are identified as,

first, that of industrial (productive) versus financial (money) capital and, second, that of domestic (or national) versus transnational capital, which became particularly relevant for analysing divisions within industrial capital. Within the latter a further differentiation can be made with respect to the degree of globalisation: that is, whether the transnational activities of an enterprise take place on a truly global scale or are rather more confined to a particular macro-region (e.g., Western Europe).<sup>61</sup>

<sup>54</sup> L. Sklair, *Globalization: Capitalism and its Alternatives* (2002), at 98.

<sup>55</sup> *Ibid.*, at 99.

<sup>56</sup> Robinson and Harris, 'Towards a Global Ruling Class? Globalization and the Transnational Capitalist Class', 64 *Science and Society* (2000) 11, at 22. A 'fraction denotes segments within classes determined by their relation to social production and the class as a whole'; *ibid.*, at 22.

<sup>57</sup> Wacquant, 'Symbolic Power in the Rule of "State Nobility"', in L. Wacquant (ed.), *Pierre Bourdieu and Democratic Politics* (2005), at 133, 136.

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

<sup>59</sup> Van Apeldoorn, 'The Struggle over European Order: Transnational Class Agency in the Making of "Embedded Neo-Liberalism"', in N. Brenner *et al.* (eds), *State/Space: A Reader* (2003), at 147, 147. He affirms the centrality of class in the study of political economy: *ibid.*, at 148.

<sup>60</sup> *Ibid.*, at 149.

<sup>61</sup> *Ibid.*

The actual process of class formation is to be located in concrete historical and institutional contexts.<sup>62</sup> The TCC in Europe is, according to Apeldoorn, embodied in the European Round Table of Industrialists (ERT): ‘a prime organisation through which the transnational capitalist class has formed’.<sup>63</sup> In ERT ‘the interests of that class (fraction) are organised, shaped and synthesised into a comprehensive strategy’.<sup>64</sup> The ERT operates ‘primarily at the level of ideas and ideology formation’<sup>65</sup> and has changed over time:

From 1988 onwards, one can witness a change in the composition of ERT’s membership that made the globalists the dominant group within the ERT. Not only did many globalist companies, such as Shell, Unilever, ICI, BP, La Roche, BT and Bayer, (re-)join the ERT, but older ERT companies, formerly producing primarily for the European market and competing against non-European imports, became more global themselves. This globalisation of European industry took place within the context of intensifying global competition, as well as the political failure of the neo-mercantilist project, in the light of which neo-liberalism gained appeal as an alternative strategy.<sup>66</sup>

But the European TCC had to accommodate the concerns of ‘the former neo-mercantilist and of the social democrats that promoted a social dimension of the new European market’, even if subordinated to its own interests.<sup>67</sup> In this way it has been able to unite the interests of the capitalist class as a whole, ‘expressing its collective interests, while at the same time appealing to a wider set of interests and identities’.<sup>68</sup>

### ***E The TCC: the Case of the Developing World***

The transnational fraction of the capitalist class has also gained ground in the third world in the last two to three decades. There are both material and ideological reasons that account for its growing influence. At the material level the pursuit of neo-liberal policies in major third world countries has given the TCC fraction an edge. The opening of major third world markets and liberal investment regimes has increased the presence of TNCs in the third world and allowed the third world TCC to play the role of junior partners (e.g., through entering into joint ventures) of developed country counterparts. The push for capital account convertibility by both local and global interests (including pressure from the international financial institutions) has increased the presence of Foreign Institutional Investors (FIIs) in emerging economies like India. Secondly, the pursuit of neo-liberal policies has created the space (through altering monetary and financial regulations) for the emergence of third world multinationals from major developing countries like Brazil, China, India, and South Africa. The value of outward FDI stock

<sup>62</sup> *Ibid.*, at 152.

<sup>63</sup> *Ibid.*, at 153.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*, at 154. See also Sklair, *supra* note 54, at 73.

<sup>67</sup> Brenner, *supra* note 59, at 157.

<sup>68</sup> *Ibid.*

from developing countries 'reached US \$859 billion in 2003, up from US \$ 129 billion in 1990, and has increased 11 times since 1985'.<sup>69</sup> Thirdly, neo-liberal policies have through transforming labour policies and laws caused a setback to the trade union and peasant movement in developing countries, lowering resistance to TCC interests.

The significance of ideological factors cannot be underestimated. The rhetoric of neo-liberal globalization has, in the absence of clearly articulated alternatives, caught the imagination of the political leadership in third world countries, influencing policy-making. Secondly, the TCC worldview has been effectively disseminated among the middle classes through the culture and media industries (with substantial doses of FDI in them), creating a strong support base for the TCC. Finally, an increasingly influential diaspora has in key countries like India and China bought into TCC ideology and used its growing status at home to validate it.<sup>70</sup> But, as in the case of TCC in Europe, the TCC in developing countries have also had to enter into alliance with other fractions of the capitalist class in order to sustain its influence.

## F *The TCC and International Law*

The emergence of the TCC as the dominant class at the global level has naturally had an impact on CIL. The TCC has attempted to bring about changes which legitimize its world-view and assist in the realization of its interests. The TCC seeks the adoption of international economic laws which facilitate the *globalization of production and finance* through creating and protecting global property rights, codifying the rights of transnational corporations, and limiting the economic autonomy of sovereign states.<sup>71</sup> The eventual aim is to create a *global economic space* in which *uniform global standards* and norms are to be implemented by all states, irrespective of the stage of development. Marx and Engels wrote in *The Communist Manifesto* that the rise of the bourgeois class to political ascendancy 'lumped together' independent or 'loosely connected provinces with separate interests, laws, governments and systems of taxation' into 'one nation, with one government, one code of laws, one national class-interest, one frontier and one customs tariff'.<sup>72</sup> Today an emerging TCC is seeking to 'lump together' sovereign states to overcome the hurdles to capital created by the existence of separate governments, laws, and systems of taxation. Since finance capital is the most influential component of TCC it

<sup>69</sup> Gammeltoft, 'Emerging Multinationals: Outward FDI from the BRICS Countries', 4 *Int'l J Technology and Globalisation* (2008) 5, at 6; UNCTAD, *World Investment Report 2006*, available at: [www.unctad.org/Templates/webflyer.asp?docid=7431&intItemID=3968&lang=1&mode=downloads](http://www.unctad.org/Templates/webflyer.asp?docid=7431&intItemID=3968&lang=1&mode=downloads); Pedersen, 'The Second Wave of Indian Investments Abroad', 38 *J Contemporary Asia* (2008) 613.

<sup>70</sup> On the possible emergence of TCC in China see Sklair, *supra* note 54, ch. 9 on 'Capitalist Globalisation in China', at 244.

<sup>71</sup> The globalization of property rights is *inter alia* manifested in the creation of globally enforceable intellectual property rights, the privatization of public undertakings, greater security for foreign capital (e.g., MIGA), and the return to the Hull formula to deal with the expropriation of alien property. On the constraints on the economic independence of third world states and growing rights of transnational corporations see Chimni, 'International Institutions Today: An Imperial State in the Making', 15 *EJIL* (2004) 1; Chimni, 'The World Trade Organization, Democracy and Development: A View from the South', 40 *J World Trade* (2006) 1, at 9.

<sup>72</sup> Karat, *supra* note 48, at 93.

has in recent years played a crucial role in the creation of global economic space. Global financial firms, as key agencies of accelerated globalization, have closely worked with governments in the developed world to frame ‘international rules and ideas that help these firms profitably expand their activities around the world, such as rules and ideas supporting unrestrained cross border mobility and requiring debtor countries to adjust to the demands of global financial markets’.<sup>73</sup> The result of the globalization of financial transactions is of course ‘enormous wealth for some and terrible hardship for others’.<sup>74</sup>

The contemporary attempt to transcend and harmonize national laws is being made through the medium of proliferating international institutions which together constitute an emerging global state.<sup>75</sup> It has meant the growing *loss of policy space* for developing countries in social, economic, and environment fields.<sup>76</sup> The policy space is lost in particular to key international economic institutions like the WTO, IMF, and World Bank and forums such as the Basel Committee which have today sufficient power or/and authority to enforce rules.

A consequence of the rising influence of TCC in the framing of international laws has been a growing north–south divide coupled with divides within the north and the south; the distributional outcomes have been far from desirable. The growing divides account in an important way for the rapid growth in international human rights law in recent decades. International human rights law is often driven by an oppositional ideology articulated by global social movements which contest the unjust globalization process. The language of human rights is thus increasingly being used to actualize

<sup>73</sup> Porter, *supra* note 2, at 22. A suitable international law is being shaped through the growing role of the private actor in international law making (e.g., banking and securities law and *Lex Mercatoria*): Underhill and Zhang, ‘Setting the Rules: Private Power, Political Underpinnings, and Legitimacy in Global Monetary and Financial Governance’, 84 *Int’l Aff* (2008) 535, at 535–554. The World Economic Forum (WEF) plays a crucial role in the promotion of the interests of the TCC:

The forum is an organization in which the various segments of the global power bloc can come together under the leadership of transnational capital to construct a unifying political vision, and present to the rest of the world the interests of global capital in the guise of a universal vision—‘entrepreneurship in the public interest’.

Rupert, ‘Class Powers and the Politics of Global Governance’, in M. Barnett and R. Duvall (eds), *Power in Global Governance* (2005), at 205, 224.

<sup>74</sup> Porter, *supra* note 2, at 21.

<sup>75</sup> Chimni, ‘International Institutions’, *supra* note 71.

<sup>76</sup> However, this is not meant entirely to deny that ‘however much globalisation throws real constraints in the way of state activity, most notably in the macroeconomic arena, it also allows states sufficient room to move, and thus to act consonant with their social policy and economic upgrading objectives’. It may also be acknowledged that ‘both the normative and organizational configuration of institutions play a key role on conditioning the way states respond to globalisation pressures, enlarging and reducing their room to move as the case may be’: Weiss, ‘Is the State Being “Transformed” by Globalisation?’, in L. Weiss (ed.), *States in the Global Economy: Bringing Domestic Institutions Back In* (2003), at 293, 298, 302. But it does not mean that the loss of sovereignty thesis is misplaced. A distinction has to be made between the loss of policy space and the modes through which states are coping with that loss: *ibid.*, at 308ff. The coping process may create alternative governance patterns with some positives, but these are inadequate compensation for the serious loss of policy space which inhibits states from adopting policy measures that best suit their stage of development and the interests of their people.



the demands of oppressed and marginal groups (including women, children, disabled persons, minorities, migrants, displaced persons, refugees, indigenous peoples). But the TCC has been quick to claim credit for the exponential expansion of international human rights law and the use of it to legitimize its vision of CIL. The growth of international human rights law is offered as evidence that the global capitalist class is concerned with the welfare of the subaltern groups and classes; it partly explains why the growth of international human rights law has not been seriously opposed by TCC.

Indeed, the TCC has made effective use of expanding human rights law. Thus, for instance, the discourse on human rights is used to entrench the global property rights regime, as in the instance of intellectual property rights (IPRs). The TCC has also used human rights discourse to advance and embed the idea of corporate led development through invoking the notion of corporate social responsibility (CSR) which links corporate activity to human rights.<sup>77</sup> Further, the ideologues of TCC have deployed human rights discourse to destabilize the foundational principles of international law, viz., the principles of non-use of force, sovereignty, and non-intervention which offer protection to subaltern states and peoples. The idea of ‘armed humanitarian intervention’ or, more recently, ‘responsibility to protect’ incorporates an understanding which allows dominant states to justify the use of force against states which do not fall in line with TCC interests. Finally, the international human rights regime is being reconfigured at its core to meet the interest of global capital accumulation.

The primary example of such reconfiguration of human rights is the manner in which the enforcement of human rights in the crucial area of labour rights is moved from states and international organizations to market actors via the idea of CSR. ‘Over the last 20 years’, as Hassel has recently noted with respect to international labour standards, ‘the debate of labour standards [has] moved from regulation by ILO convention to codes of conducts, from governments to multinational firms, and from centralized approaches to decentralised settings’.<sup>78</sup> While some see this as making headway with the implementation of labour rights, others see it as diluting the standards and enforcement mechanisms and threatening to undermine the work of the ILO over the decades.<sup>79</sup> Alston sums up the principal concerns in the context of the ILO Declaration on Core Labour Standards (1998) thus:

an excessive reliance on principles rather than rights, a system which invokes principles that are effectively undefined and have been deliberately cut free from their moorings in international law which in turn were based on many years of jurisprudential evolution, an ethos of voluntarism in relation to implementation and enforcement, combined with an unstructured and unaccountable decentralization of responsibility, and a willingness to accept soft ‘promotionalism’ as the bottom line.<sup>80</sup>

<sup>77</sup> See generally Blowfield, ‘Corporate Social Responsibility: Reinventing the Meaning of Development?’, 81 *Int’l Aff* (2005) 515.

<sup>78</sup> Hassel, ‘The Evolution of a Global Labour Governance Regime’, 21 *Governance: An Int’l J Policy, Administration, and Institutions* (2008) 231, at 244.

<sup>79</sup> Alston, ‘“Core Labour Standards” and the Transformation of the International Labour Regime’, 15 *EJIL* (2004) 457.

<sup>80</sup> *Ibid.*, at 518.

Alston aptly concludes that ‘a façade of labour rights protections is being painstakingly constructed in order to defuse the pressure from those concerned about the erosion of workers’ rights as a result of some aspects of globalisation’.<sup>81</sup>

Given these developments CIL may be viewed as a system of principles and norms arrived at primarily between states, and secondarily through a network of non-state entities, embodying particular class interests which are enforced by a range of means, including increasingly international institutions, which are the building blocks of a nascent global state. More specifically, CIL may be characterized as *bourgeois imperialist international law* which codifies the interests of an emerging TCC at the expense of interests of TOC and substantive global democracy.<sup>82</sup> To be sure, the different branches of CIL, even as they reflect the overall character of CIL, respond to dominant class interests differently. International economic law, for instance, codifies the interests of TCC more directly than other branches of international law. On the other hand, international environmental law, even as it accommodates the interests of TCC, seeks to come to terms with the reality of global ecological crisis. Thus while the TCC can dither on undertaking serious binding commitments to deal with the problem of climate change, it cannot entirely neglect the consensus within the scientific community on the meaning and implications of climate change for the future of global capitalism and planet Earth.

It is time to consider, drawing from the earlier discussion of ‘class’, how the above characterization of CIL can accommodate other social fractures leading to a characterization of CIL not merely on class terms but also, for instance, on the basis of gender. Thus would not a characterization of international law as *bourgeois imperialist patriarchal* (despite its inelegance) better capture the essence of CIL? In their path-breaking book, *The Boundaries of International Law*, Charlesworth and Chinkin note that ‘the international legal system fails all groups of women whatever categorization is used’.<sup>83</sup> The situation of women is in that regard no different from that of other subaltern peoples. This is *inter alia* testified to by the historical fact that in many respects colonialism and patriarchy represented two sides of the same coin.<sup>84</sup> It is unsurprising therefore that in the era of global imperialism also the situation is not radically different; it is its historical accompaniment. In the words of Charlesworth and Chinkin, ‘the very nature of international law has made dealing with the structural disadvantages of sex and gender difficult. The reality of women’s lives do not fit easily into the concepts

<sup>81</sup> *Ibid.*, at 521.

<sup>82</sup> This definition was first advanced in Chimni, *supra* note. 1, at 9–10.

<sup>83</sup> H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000), at 2.

<sup>84</sup> Johanna de Groot has demonstrated how ‘nineteenth century representations and discourses of sexual identity and difference drew upon and contributed to comparable discourses and representations of ethnic, ‘racial’, and cultural identity and difference’. Both women and natives were, and I quote Johanna de Groot,

portrayed and treated as children in need of the protection and care of male/imperial authority by virtue of their weaknesses, innocence and inadequacy. The use of a parental concept of authority combined a sense of care and involvement with the subordinate sex or race as well as power and control over them, and as such is equally appropriate for the definition of the power of men over women or of domination over subordinate races.

and categories of international law’;<sup>85</sup> ‘the accepted sources of international law sustain a gendered regime’.<sup>86</sup> This understanding clearly points to a gender characterization of CIL. But at the same time Charlesworth and Chinkin also recognize that the use of an undifferentiated classification of ‘women’ is problematic because ‘it imposes the appearance of homogeneity that conceals real differences in the lives of women. These include race, ethnicity, indigeneity, religion, class or caste, wealth, familial status, geographic location, education, sexuality and age’.<sup>87</sup> In other words, while Charlesworth and Chinkin confine themselves to a feminist critique, they are sensitive to other social fractures in society, pointing to the validity of multiple characterizations of CIL. If the Sen thesis on the centrality of class is accepted the *bourgeois imperialist patriarchal* characterization would appear to be in order. The characterization of CIL as imperialist also points towards the fact that its racial past continues to haunt its present; the civilized/uncivilized divide now assumes newer forms.<sup>88</sup>

However, it deserves emphasis that a class approach to international law is not determinist in its orientation. It recognizes that CIL has both a constitutive function and a degree of independence from dominant class interests.<sup>89</sup> It means that the idea of ‘international rule of law’ is not simply a façade for the realization of class and gender interests. Despite the characterization of international law as imperialist, the idea

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This mode of representation should not however be assigned a mere functional significance. It is to be viewed ‘as a process of defining the “self end others”’. To urge to reform and to care and protect went beyond finding an instrumental justification for colonialism. It was constitutive of the self-image of the colonizers: de Groot, “‘Sex” and “Race”: the Construction of Language and Image in the Nineteenth Century’, in C. Hall (ed.), *Cultures of Empire: A Reader* (2000), at 37, 43–44.

<sup>85</sup> Charlesworth and Chinkin, *supra* note 83, at 17.

<sup>86</sup> *Ibid.*, at 62. Charlesworth and Chinkin note:

although an enormous amount of energy and commitment was required for women to bring ‘soft law’ instruments requiring the elimination of violence against women into the international arena, under traditional sources of international law their non-binding form reduces their normative effect. It is difficult to assert the existence of custom in the face of consistent opposition from powerful and influential states. Even if an international prohibition of violence against women became widely accepted, it is possible that opposing states could claim to be ‘persistent objectors’ to the norm. It may be argued that, if customary international law is diffuse, ambiguous and subject to rejection by ‘persistent objectors’ to the norm. It may be argued that, if customary international law is diffuse, ambiguous and subject to rejection by persistent objectors, it is not a worthwhile status to seek for an issue such as the prohibition of violence against women. An alternative strategy might be to argue for the normative effect of General Assembly resolutions, acknowledging the change in the sources of law that this entails.

*Ibid.*, at 77.

<sup>87</sup> *Ibid.*, at 2.

<sup>88</sup> A. Anghie, *Imperialism, Sovereignty and International Law* (2004).

<sup>89</sup> See generally Klare, ‘Law-Making as Praxis’, 40 *Telos* (1979) 123.

of international rule of law continues to make sense for the TOC. While it may be tempting to embrace a form of international legal nihilism, such a move does not serve the interests of the subaltern groups and classes. There are foundational principles of international law (e.g., the principle of non-use of force) which are, even as these are sought to be undermined by the TCC, of crucial significance from the standpoint of TOC and weak states.<sup>90</sup> The quest for legitimacy compels the TCC not always to neglect the interests of TOC, especially in the face of opposition and struggles of TOC.

#### 4 International Law from Below: Global Struggles of TOC

In a class approach to international law the theoretical critique of CIL is therefore internally linked to a theory of resistance which records, evaluates, and brings to bear on the international legal process the struggles of TOC against unjust laws. In this regard a class theory of resistance seeks to avoid the trap of both liberal optimism and left-wing pessimism.<sup>91</sup> In its view neither the narrative of progress nor the imagery of endless dominations captures the complex dialectic of social change. The contradictions which mark national and global social processes create space for counter-hegemonic discourse and the politics of emancipation, without promising a utopia. The class approach however valorizes concrete struggles for global democracy and justice.

The linking of theory and practice within a class approach contrasts with critical theories in general, which tend to be ‘better on emancipation *from* than emancipation *to*, and still weaker on how to get from here to there’.<sup>92</sup> The result often is scepticism about the idea of ‘radicalism with rules’.<sup>93</sup> There is a tendency, especially within strands of post-modern critical theory, not to link ‘ends to means’ or ponder over ‘how the world community can act today to realize its interests over the long term’.<sup>94</sup> But, as Wendt, arguing the case for reconstructionists, points out, despite the uncertainty

<sup>90</sup> It may be appropriate in this context to recall that Rosa Luxemburg had noted in the context of the socialist revolution that the absence of democracy and rights would lead to ‘the atrophy of all political institutions, the growth of corruption and the degeneration of the revolution’: Thatcher, ‘Left-communism: Rosa Luxemburg and Leon Trotsky Compared’, in D. Glaser and D.M. Walker (eds), *Twentieth-Century Marxism: A Global Introduction* (2007), at 40.

<sup>91</sup> Chimni, ‘Third World Approaches to International Law: A Manifesto’, in A. Anghie *et al.* (eds), *The Third World and International Order: Law, Politics and Globalization* (2003), at 47.

<sup>92</sup> Wendt, ‘What is International Relations For? Notes Toward a Postcritical View’, in R. Wyn Jones (ed.), *Critical Theory & World Politics* (2001), at 205, 212 (emphasis in the original).

<sup>93</sup> C. Mievile, *Between Equal Rights: A Marxist Theory of International Law* (2004).

<sup>94</sup> Wendt, *supra* note 92, at 212. Wendt advances a conception of ‘post’ critical theory of international relations which ‘combines emancipation, which can occur only by deep transformation of the existing order over the long run, with the positivist willingness to think scientifically about the task’: *ibid.*, 208. He rejects the ‘antipositivist, antiscience connotations of contemporary critical theory’ and notes that, despite the uncertainty and complexity of the social world, ‘it would be a mistake to reject altogether the attempt to shape social evolution’: *ibid.*, at 208, 210.

and complexity of the social world you can ‘nudge, or guide evolution . . . influence broad, developmental *tendencies*’.<sup>95</sup> Incremental transformations of the law are not to be scoffed at.<sup>96</sup> A class approach to international law instead underlines the importance of such transformations as these become part of the social and legal dialectic which reproduces the global social formation bringing relief to TOC. While the importance of incremental changes in begetting welfare to TOC should not be overestimated, it is left-wing infantilism to fall prey to the argument that ‘reforms’ legitimize domination. The transformations in CIL are, it should not be forgotten, brought about through the global struggles of TOC.

### A *Internationalism Today*

The idea of internationalism was always an integral part of Marxist formulations to bring about social change.<sup>97</sup> But, as Halliday has aptly observed, the reference to the internationalism of the past has to be ‘based on a critical, informed, reading of that past record’, in particular the fact that it became ‘an instrument of states’.<sup>98</sup> Old internationalism has to be (in alignment with the category of TOC) replaced with the idea of a *new and complex internationalism* which is more inclusive, constituted of both old and new social movements, of state and non-state actors, and is consequently not amenable to be embodied in singular organizational structures which can be captured by states. Complex internationalism, to borrow the words of Santos, ‘aims at uniting social groups on both a class and non-class basis, the victims of exploitation as well as the victims of social exclusion, of sexual, ethnic, racist and religious discrimination’.<sup>99</sup> There is consequently no single party or segment of TOC which is solely burdened

<sup>95</sup> *Ibid.*, at 211 (emphasis in the original).

<sup>96</sup> The word ‘reform’ would have been apt but for the fact that its meaning has been co-opted and deployed by the TCC and has now come to mean the implementation of market reforms.

<sup>97</sup> Internationalism, according to Halliday,

is a theory with at least four modular components: first, a conception of an international system that imposes a common structure of oppression on different peoples and nations; second, a conception of how, within that global structure, a revolutionary agent, at once national *and* global, is created, and charged with the responsibility of lending challenge to that structure; third, that the growth through this process of increased internationalist consciousness is matched by the spread of objective processes, e.g., of communications, railways, planes, trade, and investment, that reinforce the international rise in consciousness; and fourth, that all of this, far from being lamented as the destruction of the specific, be it nation, tradition, or identity, is to be welcomed, and is indeed part of the broader emancipatory advance of humanity.

Halliday, ‘Revolutionary Internationalism and its Perils’, in J. Foran *et al.* (eds), *Revolution in the Making of the Modern World* (2008), at 65, 67.

<sup>98</sup> *Ibid.*, at 66 and 68.

<sup>99</sup> Santos and Boaventura de Sousa, ‘Human Rights as an Emancipatory Script? Cultural and Political Conditions’, in B. Santos (ed.), *Another Knowledge is Possible: Beyond Northern Epistemologies* (2007), at 3, 10.

with leading the resistance.<sup>100</sup> The presence of a fragmented organizational structure does not, however, rule out the possibility of class struggle. ‘Class struggle exists’, as Poulantzas pointed out, ‘even when classes are disorganized’.<sup>101</sup> The plurality of organizations is an advantage as these are less likely to be co-opted by states. Even those who explicitly speak of realizing socialist aspirations clarify that ‘this does not mean an old-style avant-garde party that imposes a singular goal and arrogates to itself such clarity of vision as to exclude all other voices’.<sup>102</sup> However the idea of complex internationalism celebrates the absence of a singular structure of resistance without neglecting the need for some coordination between TOC at the global level. Such synchronization is already beginning to take place. Today there is increasing coordination between social and protest movements of TOC (often using the Internet) at the global level, with platforms like the World Social Forum (WSF) providing some form of organizational cohesion. Multiple actors and social movements combine in diverse ways, using a range of tactics and strategies, depending on issues and contexts, to struggle for change in the international legal system and to work for global justice.<sup>103</sup>

## B Violence Today

An important question which arises in the context of the tactics and strategies of diverse actors and social movements is whether violence can be used to bring about change. Equally should a government which comes to power with the support of oppressed classes use violence to bring about internal social transformation or lend support to global social movements which use violence? Nearly four decades ago, reflecting on ‘The Death of Salvador Allende’, the celebrated author Marquez wrote that ‘the most dramatic contradiction of his [i.e. Allende’s] life was being at the same time the congenital foe of violence and a passionate revolutionary. He believed that he had resolved the contradiction with the hypothesis that conditions in Chile would permit a peaceful evolution toward socialism with bourgeois legality. Experience taught

<sup>100</sup> Further, as Harvey has noted, ‘it is misplaced to require at the global level’ ‘an old-style avant-garde party that imposes a singular goal and arrogates to itself such clarity of vision as to exclude all other voices’: D. Harvey, *Spaces of Hope* (2000), at 49. Likewise Zizek writes that ‘the new emancipatory politics will no longer be the act of a particular social agent, but an explosive combination of different agents’: Zizek, ‘How to Begin from the Beginning’, 57 *New Left Review* (2009), at 43, 55.

<sup>101</sup> Wright, *supra* note 3, at 32.

<sup>102</sup> Harvey, *supra* note 100, at 49.

<sup>103</sup> See generally Baer, ‘The Global Water Crisis, Privatization, and the Bolivian Water War’, in J.M. Whiteley *et al.* (eds), *Water, Place and Equity* (2008), at 6 195. In describing the Bolivian water war Baer talks of ‘a new form of social movement . . . that was based on territorial concerns and resources rather than union affiliation’: at 219. There was ‘a coalition of neighborhood associations, labor unions, workers, farmers, and other sectors of society’ which formed the Coalition of for the Defense of Water and Life, or ‘La Coordinadora’: at 202. It ‘included organized citizens with normative claims about the exclusionary and undemocratic nature of the implementation process’: at 210. The struggle for access to water, among other things, saw a general strike and intellectual initiatives: at 203. The struggle was eventually successful in having a contract of the Bolivian state for the supply of water services with Aguas del Tunari, a subsidiary of the US corporation Bechtel, cancelled.

him too late that a system cannot be changed by a government without power'.<sup>104</sup> But, from a long-term perspective, Allende was right (although he paid with his life for his commitment to democratic means) and his critics wrong. The future of sustainable social transformation lies, at both the internal and international levels, with democratic means and non-violent action. In seeking change today the destructive experience of societies which attempted self-emancipation through violence cannot be wished away. Violence can only lead, to borrow a phrase from Foucault, to 'repeated play of dominations' fulfilling the prediction of left-wing pessimists.<sup>105</sup> It must therefore be eschewed by social movements, states, and non-state actors which act on behalf of TOC.

### C *Class Struggle Today*

A possible objection to the talk of global TOC struggles in a framework of complex internationalism can be that it is erroneous to speak of class struggles when contemporary TOC struggles are dominated by non-class resistance. For instance, new social movements (NSMs) are said to be more concerned with the corrosive commodification process, and therefore the sphere of circulation of capital rather than the sphere of production and the traditional struggles of labour.<sup>106</sup> If, however, the overlapping, interpenetrating and complementary nature of the relationship between class and non-class social divides is borne in mind, as for instance in the case of struggle for the rights of women, NSMs may be seen as *multi-class movements* with class struggle at their core. Many of the issues which NSMs take up, particularly in the third world, are basically class issues. Thus, for instance, the struggles against development-induced displacement or struggles for environment protection often concern the poorest of the poor in the third world, viz., the indigenous or tribal peoples and poor peasants.<sup>107</sup> To put it differently, the nature of global capitalism is changing today. The extending circuit of capital in the era of globalization certainly generates surplus value from those who are inside its productive frame, but also produces 'accumulation by dispossession' without proletarianization. The expanding accumulation process today encompasses the privatization of natural resources or the global commons. You therefore see struggles in the entire third world over water, forest produce, bio-diversity, and

<sup>104</sup> Garcia Marquez, 'The Death of Salvador Allende', in H. Alavi and T. Shanin (eds), *Introduction to the Sociology of 'Developing Societies'* (1982), at 350, 359.

<sup>105</sup> Foucault, 'Nietzsche, Genealogy, History', in P. Rabinow (ed.), *The Foucault Reader* (1986), at 76, 85. Luxemburg had therefore attempted to minimize the role of violence: 'ruthless revolutionary energy and tender humanity – this alone is the true essence of socialism . . . a man who hurrying on to important deeds inadvertently tramples underfoot even a poor worm, is guilty of a crime': *supra* note 89, at 40.

<sup>106</sup> Madra and Adaman, 'Marxisms and Capitalisms: From Logic of Accumulation to Articulation of Class Structures', in D. Glaser and D.M. Walker (eds), *Twentieth Century Marxism: A Global Introduction* (2008), at 212, 222.

<sup>107</sup> See generally Gordon and Webber, 'Imperialism and Resistance: Canadian Mining Companies in Latin America', 29 *Third World Q* (2008) 63.

the like.<sup>108</sup> There are other manifestations of *new forms* of ‘class struggle’ as well. The growing informalization of labour in the third world, coupled with the phenomena of sub-contracting and outsourcing of work by the transnational corporate sector, has meant the reconfiguration of the global map of capital–labour relations. The increasing role of immigrant workers in the world economy adds another dimension to it. There are thus diverse and increasing locations of labour generating multiple contradictions leading to expanding sites of class struggles. It is useful to recall in these contexts E.P. Thompson’s salutary reminder that ‘class struggle is the prior, as well as the more universal, concept’ than that of class. For:

classes do not exist as separate entities, look around, find an enemy class, and then start to struggle. On the contrary, people find themselves in a society structured in determined ways (crucially, *but not exclusively*, in production relations), they experience exploitation (or the need to maintain power over those whom they exploit), they identify points of antagonistic interest, they commence to struggle around these issues and in the process of struggling they discover themselves as classes, they come to know this discovery as class-consciousness.<sup>109</sup>

Thus the growing struggle against ‘accumulation by dispossession’ is ‘class struggle’, even when it is not always rooted in production relations. In other words, the changing structure of global relations of exploitation necessitates an enlarged and more inclusive conception of capital–labour relations.

Of course it is important in the process not to neglect traditional class-based struggles. It is unfortunate in this respect that the pronouncement of ‘farewell to the working class’ or ‘the death of the peasantry’ has found resonance among many left writers.<sup>110</sup> A farewell to the working class has been bid at a time when the global work force is said to have ‘doubled in numbers between 1975 and 1995 to reach 2.5 billion workers’.<sup>111</sup> It has been further augmented since. Ahmed is therefore right to point out that it is ironic that there is talk of ‘post-work’ in social and political theory just when the working class is becoming a universal class.<sup>112</sup> Likewise the pronouncement of the death of the peasantry overlooks the fact that ‘in the two most populous countries in the world, China and India, half or more of the working population is still in agriculture’, partly explaining the rising land disputes in countries like India and China.<sup>113</sup>

<sup>108</sup> See for instance Escobar and Pardo, ‘Social Movements and Biodiversity on the Pacific Coast of Colombia’, in B. Santos (ed.), *Another Knowledge is Possible: Beyond Northern Epistemologies* (2007), at 288. See also Baer, *supra* note 102.

<sup>109</sup> Thompson, ‘Class and Class Struggles’, in P. Joyce (ed.), *Class* (2005), at 133, 136 (emphasis added). Despite the structuralist approach of Poulantzas he similarly writes:

classes involve in one and the same process both class contradictions and class struggle; social classes do not firstly exist as such and only then enter into class struggle. Social classes coincide with class practices, i.e. the class struggle, and are only defined in their mutual opposition’.

Poulantzas, *supra* note 21, at 14.

<sup>110</sup> E. Hobsbawm, *Age of Extremes: the Short Twentieth Century 1914–1991* (1994), at 289.

<sup>111</sup> R. Munk, *Globalisation and Labour: The New ‘Great Transformation’* (2002), at 8.

<sup>112</sup> Ahmed, ‘The Communist Manifesto: In Its Own Time, and in Ours’, in Karat, *supra* note 48, at 35, 43ff.

<sup>113</sup> Byres, ‘Structural Changes, the Agrarian Question, and the Possible Impact of Globalization’, in J. Ghosh and C.P. Chandrasekhar (eds), *Work and Well-being in the Age of Finance* (2003), at 171, 202.



Lastly, mention may also be made of the disregard of the anti-imperialist struggles in the third world reflecting once again, even among Marxists, a Western bias.<sup>114</sup>

In concluding this section it may be observed that it is no accident that many global struggles of recent times have been round international legal regimes in the area of environment, finance, and trade, as these negatively impact on the indigenous or tribal peoples, peasantry, working classes, and the TOC in general. The struggles may not have succeeded in seriously denting the edifice of a TCC-shaped CIL at present, but have initiated a process of rethinking which can contribute to the realization of the goals of global justice.

## 5 Conclusion: The Significance of Class Approach

This article is written on the premise that a class approach to international law offers critical insights into the structure and process of international law whatever the theoretical frame used: be it that of Marx, Weber, or Bourdieu. While the class approach has to take cognizance of the complex intra- and inter-class relationships, as also their interface with gender and race, and further their complex constitution at the global level, the exercise is likely to yield a richer understanding of international law and institutions. Since even a rudimentary class approach to international law and institutions has yet to be fully articulated, one does not even have to reach closure (if that is desirable at all) on complicated debates on the category of 'class' or 'TCC' to produce fresh insights. A class approach to international law rooted in materialist epistemology and sociology is most helpful once the need to enrich it through borrowing from other intellectual traditions, in particular feminism and critical race theorists, is recognized. But there is no denying the need for *rigorous empirical work* which would delineate the global class map and back the classification with substantial evidence, including that of lopsided distributional outcomes resulting from extant international legal regimes. Meanwhile, schematically speaking, the following are the overlapping advantages that a class approach to international law yields.

<sup>114</sup> Writing of the 1960s and 1970s Petras observes:

Deep divisions appeared between Western Marxists and anti-imperialist writers. The former denied the significance of the massive revolutionary struggles in Indo-China, Latin America and Southern Africa. 'Third Worldism' became a common deprecatory label among the Western Marxists who focused exclusively on developments in the 'advanced capitalist countries' and, more particularly, on their own nuclear campaigns, library research and potential tiffs in their literary-political journals.

Petras, *supra* note 51, at 157. More recently, criticizing new left scholars like Perry Anderson, Petras underlines the neglect of struggles in the third world in the nineties as well:

It is the height of willful myopia to ignore the imperial defeats and the emergence of significant anti-imperialist movements in the Third World and the mass struggles that call into question the whole repertoire of imperial 'neo-liberal' policies, their international financial sponsors and their domestic political underpinnings

*Ibid.*, at 159.

First, it enables the writing of a history of international laws and institutions which examines the role of social forces, groups, and classes which influenced their evolution and development in different periods of history.

Secondly, a class approach helps to identify the dominant social groups and class fractions which are the principal beneficiaries of individual international legal regimes.

Thirdly, a class approach helps one focus sharply on the existential condition and concerns of the TOC in a way which clarifies the limits of international human rights law;<sup>115</sup> it thereby helps to etch and draw attention to the alienation of international law from the fate of the TOC.<sup>116</sup>

Fourthly, a class approach links theory with practice, paying due attention to the resistance of TOC to different international legal regimes. The narratives of resistance thus become an integral part of the story of international law.

Fifthly, a class approach assists in a nuanced understanding of the world of civil society organizations and social movements and their approach to different international legal regimes. It helps to distinguish organizations and movements which espouse the causes of TOC from those which express solidarity with the interests of TCC.

Sixthly, a class approach allows the rethinking of the liberal conception of international rule of law and its complex and contradictory relationship with the idea of global justice.

Seventhly, a class approach helps to locate the community of international lawyers within the global class structure. The location is multiple and complex, given the north–south and gender divides. But the notion of ‘cultural capital’ helps to explain the general ideological and interest complex which determines the thinking and role of the invisible college of international lawyers. Inasmuch as the process and content of international law, in contrast to domestic law, is much influenced by international lawyers, the class location of the invisible college has significant implications for realizing a peaceful and just world order.

<sup>115</sup> See Marks, ‘Exploitation as an International Legal Concept’, in S. Marks (ed.), *International Law on the Left* (2008), at 281.

<sup>116</sup> See Chimni, ‘The Past, Present and Future of International Law: A Critical Third World Approach’, 8 *Melbourne J Int’l L* (2007) 499.