

## **The Radical Ideation of Peasants, the “Pseudo-Radicalism” of International Human Rights Law, and the Revolutionary Lawyer**

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This article studies the new United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas<sup>1</sup> drawing on the commodity-form theory of law developed by the Soviet jurist Evgeny Pashukanis. It is through this lens, that foregrounds the relationship between capitalism and law and their shared constituent form, that an analysis of the contradiction inherent in what is at times a radical normative project in international human rights law is presented. In recognizing the existence of a commodity and money economy as the basic precondition of international law, paradoxes that have ostensible human rights successes perpetuate the suffering they seek to confront are revealed. That dilemma shows our most important human rights gains – as captured in the Peasants’ Declaration – also to be our losses. Yet, with unintended consequences of human rights lawyering made visible, the advocate can launch a potentially transformative ‘legal’ strategy – a strategy with law but not wholly of law; a strategy that engages law and its institutions while it unbinds the users from law’s hegemony, past and future; and, crucially, as Marx imparted, through the changing of circumstances along with ‘self-changing’ legal practice can be rendered revolutionary. From there two seminal modes of reconciliation are initiated: reconciling the use of international human rights law with a commitment to social transformation and reconciling the post-capitalist politics of progressive lawyers with their use of the law.

The advocates of the Declaration on the Rights of Peasants have been among the most ardent critics of capitalism and capitalist globalization. They seek to advance, not only through word but action, forceful alternatives to the subjugation by the interests of capital of the countryside and its people – peasants, indigenous peoples, small scale farmers and fishers, agricultural workers, landless people. The Declaration is necessarily the product of negotiated settlement with states yet widely celebrated as an achievement in reflecting the demands of peasants globally. But what if the logic of the legal form, the ‘essential identity’ of law – as much international law – shares the core logic of capitalist society, that of the commodity-

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<sup>1</sup> UN Doc A/RES/73/165, 17 December 2018.

form? <sup>2</sup> Put differently, what are the implications for social transformation if law is not autonomous from the capitalist system?

This work is situated within Marxist debates about the relationship between law and capitalism and the political consequences that flow from that relationship. Through a Marxist reconstruction of what is referred to herein as the ‘nihilist’ position, read through the UN Declaration on the Rights of Peasants, new ways of seeing the Declaration and the ideals of its promoters are opened up. This study examines a particular legal moment; however, its insights can be applied more broadly wherever international human rights law is deployed with the ambition of upending capitalism. In particular, this formative case helps to flesh out the intricacies of how we might evaluate the progressiveness or not of a particular set of legal measures, and, moreover, the very use of international human rights law for social transformation.

## **I International Law and its Connection to Capitalism**

There is a fundamental tension at the heart of modern international law; it questions the foundational limits of international law as an enfranchising venture and, as such, the costs that come from deploying it. The tension can be expressed through the positions of nihilists who reject international law for its capitalist, structural bias and pragmatists who are nonetheless willing to utilize it for its gains to the disenfranchised, pyrrhic as they may be. The pragmatist also holds out hope for social revolution, for transformation, through a strategic use of law. The core of the nihilist thesis, as this paper calls it, was set out a century ago by the radical Soviet jurist Evgeny Pashukanis and adopted in current times most notably by the international law and relations scholar China Miéville. A number of international legal scholars take inspiration from its central claim as to the ‘commodity-form theory’ of international law, including both nihilists and pragmatists. This is where our dilemma begins.

The thrust of the dilemma comes from the premise that there exists a structural connection between capitalism and law, including international law. As per Pashukanis, ‘the existence of a commodity and money economy is the basic precondition without which all these concrete [legal] norms would have no meaning’;<sup>3</sup> Miéville offers an elaboration: ‘[t]he legal form is a particular kind of relationship. Rules [i.e.: content] can only be derived from

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<sup>2</sup> See generally, Isaac D Balbus, ‘Commodity Form and Legal Form: An Essay on the “Relative Autonomy” of the Law’ 11 *Law and Society Review* (1977) 571, 573.

<sup>3</sup> Evgeny B Pashukanis, *Law and Marxism: A General Theory* (Ink Links 1929, B Einhorn tr 1978) 93.

that relationship. They are thus secondary, and in fundamental jurisprudential terms, their specific content is contingent'.<sup>4</sup> A key insight is that the premise guiding modern inter-state relations is the same as that which regulates individuals in capitalism because 'since its birth, and in the underlying precepts of international law, states, like individuals, interact as property owners'.<sup>5</sup> As Pashukanis frames it: '[m]odern international law is the legal form of the struggle of the capitalist states among themselves for domination over the rest of the world.'<sup>6</sup> The imperial economic power and expansion of European states in the 17<sup>th</sup> century saw the formation of international law tethered to the spread of capitalism.<sup>7</sup> International law today presupposes private property and the arrangements necessary to protect and profit from them,<sup>8</sup> with sovereignty and territory in international law as functionally analogous to property ownership.<sup>9</sup> The formal 'equality' of states cloaks their substantive and material inequality,<sup>10</sup> while a specious public-private divide shapes the rule of law writ large,<sup>11</sup> even

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<sup>4</sup> China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005) 84-85.

<sup>5</sup> *Id.*, 54. Following Marx, Pashukanis argues that a distinctly legal relationship first arises in the context of commodity exchange. In Pashukanis' commodity-form theory of law, dispute, the conflict of interests, is key in that without dispute there would be no need for regulation. Contract is central to Pashukanis' theory of law because formal equality is established between commodity owners and people relate to each other by means of contract. The relationship is 'predicated on private property [and] dependent on coercion'; (that something is 'mine-not- yours' and I can assert my claim) (*Id.*, 318; 95 fn 99). On this account, as capitalist social relations supersede older forms, law comes to dominate: a legal form inseparable from capitalism. On the materialist critique of the 'ideology of equality': 'The idea of equality itself, *being a reflection of the relationships of commodity production*', Evgeny B Pashukanis, 'Lenin and the Problems of Law' (1925) in P Beirne and R Sharlet (eds) *Pashukanis: Selected Writings on Marxism and Law* (PB Maggs tr, Academic Press 1980) Section III, 146 (Italics by Pashukanis quoting Lenin). See, seminally, Karl Marx, 'Critique of the Gotha Programme' (written 1875, first published 1891) in *Marx-Engels Collected Works*, Vol 24 (Lawrence & Wishart 2010) 75.

<sup>6</sup> Evgeny B Pashukanis, 'International Law' (1925-1926) in P Beirne and R Sharlet (eds) *Pashukanis: Selected Writings on Marxism and Law* (PB Maggs tr, Academic Press 1980) 168, 169.

<sup>7</sup> See, *Id.*, 171-172: 'The spread and development of international law occurred on the basis of the spread and development of the capitalist mode of production.' Further, James Anaya, *Indigenous Peoples in International Law* (OUP 2000); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004); Michael Fakhri, *Sugar and the Making of International Law* (CUP 2014).

<sup>8</sup> International law, like liberal law more generally, presuppose the legal concepts of private property and thus contract. See, Duncan Kennedy, 'The Role of Law in Economic Thought: Essays on the Fetishism of Commodities' 34 *American University Law Review* (1984-1985) 939, 978.

<sup>9</sup> 'Sovereign states co-exist and are counterposed to one another in exactly the same way as are individual property owners with equal rights. Each state may "freely" dispose of its own property, but it can gain access to another state's property only by means of a contract on the basis of compensation: do ut des.' Pashukanis, *International Law*, *supra* note 6, 176.

<sup>10</sup> A familiar refrain today but Pashukanis captured the point thus: 'Bourgeois private law assumes that subjects are formally equal yet simultaneously permits real inequality in property, while bourgeois international law in principle recognizes that states have equal rights but in reality they are unequal in their significance and power. ... These dubious benefits of formal equality are not enjoyed at all by those nations which have not developed capitalist civilization and which engage in international intercourse not as subjects, but as objects of imperialist state's colonial policy.' Pashukanis, *International Law*, *supra* note 6, 178. Miéville, *Between Equal Rights*, *supra* note 4, 292: 'The international legal form assumes juridical equality and unequal violence'.

<sup>11</sup> On the rule of law as a 'predatory device to privatize the public domain', alternative dispute resolution as a private alternative to 'delivering ordinary public access to justice' and 'the ideology of development' backed by law which functions as a vehicle for private plunder, see, Ugo Mattei, 'Emergency-based Predatory Capitalism: The Rule of Law, Alternative Dispute Resolution, and Development' in D Fassin and M Pandolfi (eds)

as the divide collapses in terms of the private law base of all law that the commodity-form theory presents. Capitalism as it plays out in the structure of international law exposes as facetious the conventional presumption that international law is ahistorical, apolitical, and, in any authentic sense, neutral; indeed, '[i]n its very neutrality, law maintains capitalist relations'.<sup>12</sup> Commodification as woven into the form but also the fabric of international law has its content (norms) either facilitating or seeking to offset the constant need for new methods of private appropriation and geographic and material opportunities for capital investment, depending on the legal regime.

The form of (international) law is related to its material content – social relations founded on commodity exchange<sup>13</sup> – with Pashukanis indicating, vitally, that to grasp the (politics of) law that unfold within the content of law, the place to begin is with a correct understanding of the legal form: Miéville notes that 'Pashukanis considered his work a corrective to the tendency to analyse legal content in isolation'.<sup>14</sup> To focus on content 'is legitimate up to a point' Pashukanis remarked, however, if 'we forgo an analysis of the fundamental juridical concepts [legal form], all we get is a theory which explains the emergence of legal regulation from the material needs of society, and thus provides an explanation of the fact that legal norms conform to the material interests of particular social classes'.<sup>15</sup> Pashukanis effectively prompts us to read international human rights law, perhaps especially its most progressive or seemingly radical norms, not merely as legal content but as the content of law in the context of a particular form of law.<sup>16</sup>

Harnessing the commodity-form theory of law in this way is not to suggest that economic interests are all that matter in international legal relations or that the content of international law cannot reflect public interests, or that the judicial interpretation of rules cannot favour the disenfranchised. But it is to highlight how 'international law's constituent forms are constituent forms of global capitalism ...'.<sup>17</sup> and, as such, international law's presuppositions give legal expression to the rapacious, endlessly expansive, and exploitative features that make up capitalism. Grasping the nihilist mantle, Miéville takes the position that

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*Contemporary States of Emergency: The Politics of Military and Humanitarian Interventions* (Zone Books 2019) 89.

<sup>12</sup> Miéville, *Between Equal Rights*, *supra* note 4, 101.

<sup>13</sup> Chris Arthur, 'Editor's Introduction' in Pashukanis, *Law and Marxism*, *supra* note 3, 9, 29.

<sup>14</sup> Miéville, *Between Equal Rights*, *supra* note 4, 118.

<sup>15</sup> Pashukanis, *Law and Marxism*, *supra* note 3, 55.

<sup>16</sup> See generally, Miéville, *Between Equal Rights*, *supra* note 4, 118.

<sup>17</sup> Miéville, *Between Equal Rights*, *supra* note 4, 290; China Miéville 'The Commodity-Form Theory of International Law: An Introduction' 17 *Leiden Journal of International Law* (2004) 271.

no ‘systematic progressive political project or emancipatory dynamic’ can be expected from international law.<sup>18</sup>

While the nihilist doesn’t necessarily deny that international law can be put to reformist use, it can only ever be of limited emancipatory value; given its legal form it can only ever ‘tinker’ at the surface level of institutions.<sup>19</sup> The pragmatist, alive to the commodity-form of international law and its hazards, finds value in ‘tinkering’; tinkering (the ‘expedient’ use of law) that prevents war, makes people less hungry, recognizes local culture and, crucially, both builds up the revolutionary capacity of the movement and is ‘strategic’ in its ‘ultimate objective’ of transcending the existing order.<sup>20</sup> Pragmatists offer up solutions that would have international human rights law pursued despite the legal form: as a tool of ‘principled opportunism’.<sup>21</sup> The risk of this engagement (nihilists would say ‘cost’) is to legitimate and help sustain the international legal system that underprops such exploitation and alienation in the first place.<sup>22</sup> Law *is* capitalist law, as Pashukanis has helped to illustrate, the limits to what can be achieved through law are structural.<sup>23</sup> This is the dilemma the peasants were up against in vying for their Declaration on the Rights of Peasants and other People Working in Rural Areas. Nihilists and pragmatists agree on capitalism’s deep inscription upon international law but disagree on whether to reject the law as a result. The

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<sup>18</sup> China Miéville, ‘The Commodity-Form Theory of International Law’ in S Marks (ed) *International Law on the Left: Re-examining Marxist Legacies* (CUP 2008) 92, 130.

<sup>19</sup> *Id.*, 130-131.

<sup>20</sup> Robert Knox, ‘Strategy and Tactics’ 21 *Finnish Yearbook of International Law* (2010) 193.

<sup>21</sup> Robert Knox, ‘Marxism, International Law, and Political Strategy’ 22 *Leiden Journal of International Law* (2009) 413, 433, and 435.

<sup>22</sup> Knox is of course alive to this cost: ‘Whilst the ultimate aim may be to transcend law, and the particular practice geared towards it, in an immediate sense it remains within the logic of the law’ and so he elaborates strategies that draw on the use, not merely of legal institutions and legal arguments, but the legal *situation* in order to promote political goals. Inspired by the ‘strategies of rupture’ advocated by Jacques Vergès in *De La Stratégie Judiciaire* (1968): ‘the trial is used “less to acquit the accused than to illuminate his ideas”, the ruptural strategy *uses* the spectacle and publicity of law, to directly undermine the law by launching a political attack on the existing order’. Knox, ‘Strategy and Tactics’, *supra* note 20, 225. We turn to strategies with law but not wholly of law in Parts III and IV below.

The danger of ‘valorizing the currency’ of international law through its deployment is not new and need not draw exclusively on its ties to capitalism (although even if not explicit capitalism is often just below the surface of critique): ‘Why were we encouraging faith in international law as an agent of justice and peace when we know that it helps to legitimate oppression and justify violence, and we devote a considerable portion of our energies to showing how? One response to this might be that there is surely not a coherent, unified currency here. International law also has the potential to help those trying to resist oppression and curb violence. In other words, it works in more than one dimension, and so therefore must we. Or is this just rationalization?’ Matthew Craven, Susan Marks, Gerry Simpson and Ralph Wilde, ‘We are Teachers of International Law’ 17 *Leiden Journal of International Law* (2004) 363.

<sup>23</sup> See the pointed article by Grietje Baars, “‘Reform or Revolution?’ Polanyian versus Marxian Perspectives on the Regulation of the Economic’ 62 *Northern Ireland Legal Quarterly* 4 (2011) 415 in which she concludes that attempts to reform the market along the lines of the ‘embedded liberalism’ of corporate social responsibility schemes, rather than taming the markets, will see this ‘corporate-led global governance hasten the collapse of capitalism and confirm the inevitability of revolution and the subsequent creation of a law-free society’.

pragmatist proposes that in these circumstances what matters is how law is used to avoid ‘fatally undermining longer term, structural considerations’<sup>24</sup> so that social revolution, and not merely reform, is possible.

The commodity-form theory that Pashukanis presents posits private law as the ‘fundamental, primary level of law’, as much for international law.<sup>25</sup> While there are legal relationships regulating all areas of social life, and ‘state authority introduces clarity and stability into the structure of law, [it] does not create the premises for it, which are rooted in the material relations of production’.<sup>26</sup> In so far as international legal theorizing in this area remains a work in progress,<sup>27</sup> the commodity-form theory of international law functions as a potent heuristic device. For current purposes, it helps us to appreciate how international law viewed as the clash and claims of states defending ‘private’ interests – ‘social interests founded on commodity exchange’<sup>28</sup> – undercuts efforts at elaborating a progressive normative content of international human rights law in the seemingly cutting-edge domain of the rights of peasants and indigenous peoples for access to and control over productive resources. It helps us to understand the demands of peasants not merely as the emergence of legal regulation derived from their material needs (the *content* of international human rights norms),<sup>29</sup> but fully to appreciate the immutable legal *form* – the form which regulates the legal relationship – within which their struggles for both social transformation and social reform are conducted. The content of peasant law is thus analysed not in isolation but as ‘a content of a particular form’,<sup>30</sup> an insight which is indispensable to any strategy that seeks, contra the nihilist, to deploy (capitalist) law to (post-capitalist) transformative ends.

International law is a product of capitalism just as the invisible hand of the market is made possible by the visible hand of law,<sup>31</sup> shaping, cohering and legitimizing capitalism in ways that other social institutions could not.<sup>32</sup> Contemporary international law produces and hardens the terms under which the (global) economy operates; an economy marked by great poverty, inequality, environmental devastation, and violence. A central function of

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<sup>24</sup> Knox, ‘Strategy and Tactics’, *supra* note 20, 215 .

<sup>25</sup> Pashukanis, *Law and Marxism*, *supra* note 3, 93.

<sup>26</sup> *Id.*, 94; and see, Miéville, *Between Equal Rights*, *supra* note 4, 86.

<sup>27</sup> Just as Pashukanis’ legal nihilism paved the way for Stalin’s repression, critiquing law and the rule of law and advocating for the replacement of the bourgeois state with administrative regulation.

<sup>28</sup> Arthur, ‘Editor’s Introduction’, *supra* note 3, 29.

<sup>29</sup> See, Pashukanis, *Law and Marxism*, *supra* note 3, 55.

<sup>30</sup> Miéville, *Between Equal Rights*, *supra* note 4, 118.

<sup>31</sup> On the latter point, Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press 2018) 7 drawing on E-U Petersmann.

<sup>32</sup> Honor Brabazon, ‘Introduction: Understanding Neoliberal Legality’ in H Brabazon (ed) *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (Routledge 2017) 1, 2.

international law is to secure transnational private control over resources and access to profit. It works through a system of exploiting labour and expanding commodification globally and into new areas of activity. Competition, comparative advantage and the international division of labour, and deep economic integration are among its techniques; exploitation, alienation, and dispossession are among its costs. Securing ever-higher rates of profit relies on overseas markets for one's own products, while a state's military clout is deployed towards a host of aggressively self-interested economic ambitions. No area is off limits to accumulation.<sup>33</sup> It is against international law's structural feature as 'a creation, and sine qua non of capitalism,'<sup>34</sup> as well as its contingent rules, that international human rights law-making – and, more specifically for current purposes, peasant and indigenous rights law-making – operates.

The study of the *content* of the Peasants' Declaration in this context leads us to the concern that the nihilist and pragmatist positions point up. Their opposing views on whether to reject the use of law offer an illuminating analytical lens through which to contemplate the dilemma faced by peasants and indigenous peoples and those advocating alongside them. To reject the international law of human rights for co-conspiring with capitalism's voracious and expansive tendencies would seem itself an elitist project that removes a potentially valuable tool from the toolbox of the oppressed, when the time is right.<sup>35</sup> The use of legality was frequently characterized as 'dirty, thankless work' wrote Pashukanis of Lenin, 'but it was necessary to know how to do this work in a certain type of situation, and to put aside the kind of revolutionary fastidiousness which acknowledged only the "dramatic" methods of struggle'.<sup>36</sup> Yet what we come to realize through the alarm bells set off by the commodity-form theory of law, is how deploying law deepens the hold of capitalism and tends to reinforce the structural and systemic conditions upon which harms to peasants occur (upon which human rights violations are based). How law as a capitalist and hegemonic enterprise

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<sup>33</sup> On amassing freely our private experiences to commercial ends, see, Shoshana Zuboff, *The Age of Surveillance Capitalism* (Profile Books 2019). On extending industrialization to all our reproductive activities, see, Silvia Federici, 'Marxism and Feminism' in C Fuchs and L Monticelli (eds) *Marx@200: Debating Capitalism, & Perspectives on for the Future of Radical Theory*, TripleC: Communication, Capitalism and Critique (5 May 2018; <http://www.triple-c.at>) 469, 474. On the insidious spread of commodification to the 'death futures business', see, Michael J Sandel, *What Money Can't Buy: The Moral Limits of the Market* (Penguin 2012) 138.

<sup>34</sup> Baars, "Reform or Revolution?", *supra* note 23, 423.

<sup>35</sup> Pashukanis, 'Lenin and the Problems of Law', *supra* note 5, Section V, 132, 159, on Lenin making the case for the circumstances in which prior to the Russian Revolution, as opposed to after it, a right to self-determination was a revolutionary demand: 'Lenin understood what his opponents failed to understand: that the "abstract", "negative" demand of formal equal rights was, in a given historical conjuncture, simultaneously a revolutionary and revolutionizing slogan.'

<sup>36</sup> *Id.*, section II, 139. 'Always remaining deeply committed to principle, Lenin nevertheless did not refuse to apply those concrete methods of struggle which at a given point happened to be the only possible way to achieve a desired result – even though the method was, for example, an appeal to a tsarist court.' *Id.*

is strengthened through use, its authority to legitimate the existing political-economic order buttressed, while real alternatives that go beyond contemporary capitalism are stalled, perhaps infinitely. What we come to realize from the commodity-form theory, first and foremost, is the problem that articulating demands in the *form* of legal rights poses to efforts at transforming society.

The body of rules that makes up international law is not an ‘autonomous thing’ dissociated from its grounding in material reality,<sup>37</sup> even if its origins, drawn of one particular kind of society, are obfuscated.<sup>38</sup> The ties between capitalism and international law at the level of form is something no one more than the communities advocating for the Declaration are aware, but the full extent of these implications are yet to be grasped. Part II of this paper turns to consider the content of the Peasants’ Declaration in the context of the commodity-form insights that all law is materially capitalist law: law that presupposes private property and contractual exchange, law of a commodity-money economy, with each owner seeing the other as an abstract and formal equal pursuing autonomous interests,<sup>39</sup> with fairness always determined on the basis of the present-day mode of social production.<sup>40</sup> In untangling the ‘reform or revolution’ dilemma that the nihilist and pragmatist positions characterize, Part III reveals the Declaration’s subversive features. Part IV confronts the fractured relationship of (revolutionary) lawyers on the left to the law and its usage. In drawing together ways in which we might get beyond the here and now by bringing theory to bear on practice, comes the possibility of utilizing international human rights law that ‘registers without being co-opted or domesticated by the discourses and the system it resists’.<sup>41</sup> This article closes with the definitive method of engagement for any revolutionary human rights lawyer: in order to change the world start with yourself by being conscious of a legal form premised not on social existence, but, necessarily given its homology with the commodity-form, in contradistinction to it.

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<sup>37</sup> See, Susan Marks, ‘International Judicial Activism and the Commodity-Form Theory of International Law’ Book Review, Miéville, *Between Equal Rights*, 18 *European Journal of International Law* 1 (2007) 199, 203.

<sup>38</sup> Addressing the ‘fetishism of the Law’ that mistakenly sees it as an independent and autonomous reality to be explained according to its own internal dynamics, whereby individuals conceive themselves as law’s creation thus inverting the causal relationship, that is: ‘[w]hen Society is held to be the result of the Law, rather than the Law to be the result of one particular kind of Society’ see, Balbus, ‘Commodity Form and Legal Form’, *supra* n 2, 582-584.

<sup>39</sup> Balbus provides a seminal elucidation of the homology between the commodity-form and the legal form and just how ‘[T]he subject of “equal rights” substitutes for the concrete subject of needs, and the abstract legal person substitutes for the real, flesh-and-blood, socially differentiated individual’. *Id.*, 577.

<sup>40</sup> Marx, ‘Critique of the Gotha Programme’, *supra* n 5, 75, 84.

<sup>41</sup> Awol Allo, ‘The Courtroom as a Site of Epistemic Resistance: Mandela at Rivonia’ 12 *Law, Culture and the Humanities* 1 (2016) 1, 1.



## II The Commodity-Form of Law through Three Approaches to the Peasants' Declaration

In presupposing relations of commodity exchange under capitalism, the commodity-form theory of international law signals that the structural features connecting capitalism to international law effectively foreclose the use of juridical options by capitalism's victims. Pashukanis himself (and the nihilist thesis) opposed the 'pseudo-radicalism' that claimed 'bourgeois law' could be replaced by 'proletarian law'.<sup>42</sup> With capitalism forming the basic logic of any contemporary juridical engagement, 'anti-regime' interventions (for example in the form of peasant rights) should not be understood as 'anti-systemic'.<sup>43</sup> It is against this fixed order that peasants (and indigenous peoples) sought to see developed international norms that would protect their community interests and way of life against capitalist globalization.

In 2012 the UN Human Rights Council (HRC) established an intergovernmental Working Group to negotiate a Declaration on the Rights of Peasants and other People Working in Rural Areas. On 26 September 2018 at its 39<sup>th</sup> session the HRC adopted the Declaration and sent it on to the UN General Assembly. The General Assembly adopted the Declaration on 17 December 2018 at its 73<sup>rd</sup> session.<sup>44</sup> Civil society, including the representatives of peasant communities, among them the Via Campesina peasant consortium of 167 organizations and 200,000 individual members, contributed forcefully to the Declaration. The Declaration emerged in response to the impact of globalization on peasants and other people working in rural areas. It is an attempt to salvage their relationships to the land, water, and nature to which they are attached and on which they depend for their

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<sup>42</sup> See, Arthur, 'Editor's Introduction', *supra* note 13, 18. Pashukanis defended the withering away of (bourgeois) law in the higher stages of socialist development. Likewise, Miéville's unapologetic position is that: 'The attempt to replace war and inequality with law is not merely utopian – it is precisely self-defeating. A world structured around international law cannot but be one of imperialist violence. The chaotic and bloody world around us *is the rule of law*'. (Emphasis in the original). Miéville, *Between Equal Rights*, *supra* note 4, 319.

<sup>43</sup> This is adapted from Addo's critique of the New International Economic Order and his distinction between 'anti-regime' forces that may contribute to the reforming the system but are not 'anti-systemic' forces. Herb Addo, 'Introduction: Pertinent Questions about the NIEO' in H Addo (ed) *Transforming the World Economy: Nine Critical Essays on the New International Economic Order* (United Nations University 1984) 1, 15.

<sup>44</sup> Hereinafter Peasant Declaration, Art 1(1): 'For the purposes of the present Declaration, a peasant is any person who engages or who seeks to engage, alone, or in association with others or as a community, in small-scale agricultural production for subsistence and/or for the market, and who relies significantly, though not necessarily exclusively, on family or household labour and other non-monetized ways of organizing labour, and who has a special dependency on and attachment to the land.'

livelihood and way of life. As with indigenous peoples, this Declaration is to offer a normative articulation of the claims of peasants given their commitment to small-scale and sustainable production, including agricultural production for subsistence, to food sovereignty and agroecology. From their traditional role in conservation and improving biodiversity, including for food production, to their over-representation among globalization's poor, nearly two decades of effort culminated in their hard-fought for rights.

The debates during the sessions of the Working Group display many of the usual cleavages as well as the entrenched and familiar positions of states on various issues. These include concern over the language of 'free, prior and informed consent' (Russian Federation) given the fear of devolving real influence or even a veto to communities; the rejection of collective rights in international human rights law (United Kingdom); and the defence of the right to development by a mix of countries from the Global South (including Pakistan, China, and South Africa). Invariably, the Declaration was going to reflect compromise given the respective interests of states and those of states and the fervent views of civil society. That much was predictable. It was appropriate also to anticipate that the final Declaration would make some notable normative contribution expounding the rights of peasants and other people working in rural areas.

A careful review of the Declaration exposes three approaches to confronting the plight of peasants. The approaches reflect tensions with each other, as well as paradigmatic insights of the commodity-form at work in a (seemingly) progressive legal project. The first approach might be tagged as rights against global capitalism. Here we see included in the right to an adequate standard of living 'facilitated access to the means of production' as well as 'a right to engage freely ... in traditional ways of farming, fishing, livestock rearing and forestry and to develop community-based commercialization systems'.<sup>45</sup> There are rights of peasants to land, including 'the right to have access to, sustainably use and manage land and the water bodies, coastal seas, fisheries, pastures and forests therein, to achieve an adequate standard of living, to have a place to live in security, peace and dignity and to develop their cultures.'<sup>46</sup> States are required 'to recognize and protect the natural commons and their related systems of collective use and management.'<sup>47</sup> There is a 'right to seeds' which includes '[t]he right [of peasants] to save, use, exchange and sell their farm-saved seed or propagating material'.<sup>48</sup> Although a 'right to biodiversity' in the February 2018 version of the draft Declaration didn't

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<sup>45</sup> *Id.*, Art 16(1).

<sup>46</sup> *Id.*, Art 17(1).

<sup>47</sup> *Id.*, Art 17(3).

<sup>48</sup> *Id.*, Art 19(1) and 19(1)(d).

survive, in which peasants ‘have *the right* to maintain their traditional agrarian, pastoral and agroecological systems upon which their subsistence and the renewal of biodiversity depend, and the right to the conservation of the ecosystems, in which those processes take place’,<sup>49</sup> a requirement that states ‘take appropriate measures to protect and promote’ those and other systems ‘relevant to the conservation and sustainable use of biological diversity’ was retained.<sup>50</sup> These and related articulations will have their state detractors, of course. Argentina, Colombia and the European Union fought (not entirely successfully) to have references to the right to food sovereignty replaced by the term food security that lacks the elements of local control and decommodification;<sup>51</sup> and, the stronger participation standard of ‘free, prior and informed consent’ found in the Declaration on the Rights of Indigenous Peoples, and widely supported by judicial and quasi-judicial human rights bodies, had already been contested and dropped from the draft Declaration well before it reached the HRC. Japan proposed the weaker language of ‘access’ to seeds over a ‘right’ to seeds in order to avoid any interpretation that would undermine international agreements on intellectual property.<sup>52</sup>

These rights as advanced by peasants do not reflect casual linguistic preferences; they are pointed articulations that contest the logic of global capitalism, of private property, contract, accumulation, and the exploitation of people and natural resources. They express alternatives to the standard techniques of forced displacements, large-scale land and water grabs, and speculative land investments, and impacts that include environmental devastation and climate disruptions, rapid urbanization, the obliteration of culture, the creation of food insecurity in rural communities as well as widespread hunger, with women its greatest victims globally:<sup>53</sup> standard techniques underwritten by international law. The recent history of peasants in India and their struggle over seeds provides a telling example of the lived experience that underpins the rise of rights against global capitalism captured in this approach to the Declaration.

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<sup>49</sup> UN Doc A/HRC/WG.15/5/2, 18 Feb 2018, Art 20(1).

<sup>50</sup> Peasant Declaration, Art (20)(2): ‘States shall take appropriate measures to promote and protect the traditional knowledge, innovation and practices of peasants and other people working in rural areas, including traditional agrarian, pastoral, forestry, fisheries, livestock and agroecological systems relevant to the conservation and sustainable use of biological diversity.’

<sup>51</sup> For the international food sovereignty movement’s six defining principles of food sovereignty:

<https://www.globaljustice.org.uk/six-pillars-food-sovereignty>

<sup>52</sup> Report of the open-ended intergovernmental working group on a United Nations declaration on the rights of peasants and other people working in rural areas UN Doc A/HRC/39/67 13 July 2018, 44 and para 76.

<sup>53</sup> Women play an essential role in the food security of households, producing between 60 and 80 per cent of food crops in developing countries and cultivating more than 50 per cent of food grown globally. While the great majority of women work in agriculture, as much as 70 per cent of the world’s hungry are women. Moreover, they rarely receive any recognition for their work. Indeed, many are not even paid. Human Rights Council Advisory Committee, UN Doc A/HRC/19/75, 24 February 2012, para 22.

In 1998 the World Bank Structural Adjustment Programme had India open its seed sector to multinational corporations. Farm saved seeds were replaced by seeds from Monsanto and other multinational corporations, including genetically modified organisms, which need fertilizers and pesticides and cannot be saved.<sup>54</sup> Corporations prevent seed savings through patents and by engineering seeds with non-renewable traits that cause them to die. As a result, poor peasants have had to buy new seeds for every planting season, driving up their costs. What was traditionally a free resource available by putting aside a small portion of the crop, allowing also for biodiversity instead of monoculture, became a commodity. A host of other problems accompanied the change, including poor yields; the shift from indigenous varieties, for example of cotton, that are rain fed and pest resistant to corporate crops that require irrigation and pesticides; and a dramatic fall in agricultural prices due to international trade ‘dumping’. Poverty and sheer desperation led to a spate of suicides: this is Vandana Shiva’s ‘suicide economy’.<sup>55</sup> It is against multiple registers of capitalist dispossession – material, spiritual, as well as the dispossession of hope – that we can locate the rise of rights against global capitalism in the Peasants’ Declaration. These rights against global capitalism reflect an effort to challenge the forced shift from non-market to global market economies and values. The dominant understanding of ‘development’ and ‘progress’ is still coterminous with the idea of industrialized, western, and modern development. The aim is to see dismantled non-market access to food and self-sustenance in the universal establishment of transnational, market-based economies.<sup>56</sup> This first approach of the Peasants’ Declaration offers normative claims against those dominant, legally sanctioned, values.

The second approach taken in the Peasants’ Declaration, in contrast to the first, is one that can be said to legitimate and sustain the terms of globalization against which the peasants strive. It also reflects how the capitalist content of international economic law does much of the work otherwise provided by the legal form. The General Obligations of States in the Declaration require that they ‘elaborate, interpret and apply relevant international agreements and standards to which they are a party in a manner consistent with their human rights

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<sup>54</sup> Monsanto alone controls 90 per cent of the global market in genetically modified seeds. *Id.*, para 36.

<sup>55</sup> Vandana Shiva, ‘From Seeds of Suicide to Seeds of Hope: Why Are Indian Farmers Committing Suicide and How Can We Stop This Tragedy?’ *Huffpost Blog*, 25 May 2011:

[http://www.huffingtonpost.com/vandana-shiva/from-seeds-of-suicide-to\\_b\\_192419.html](http://www.huffingtonpost.com/vandana-shiva/from-seeds-of-suicide-to_b_192419.html)

<sup>56</sup> See, Farshad Araghi and Marina Karides, ‘Land Dispossession and Global Crisis: Introduction to the Special Section on Land Rights in the World-System’ 18 *Journal of World-Systems Research* 1 (2012) 1; Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Harvard University Press 2011).

obligations ... .<sup>57</sup> Earlier versions of the draft Declaration indicate that the ‘international agreements’ pertain to ‘the areas of trade, investment, finance, taxation, environmental protection, development cooperation and security.’<sup>58</sup> A paradox presents itself: legal regimes that constitute and sustain global capitalism are retained; indeed they are reinforced in the Declaration. International law that has served peasants so poorly is taken as a given and validated. Here, the Peasants’ Declaration anchors its demands to the continued existence of the regimes against which they struggle.

This technique of seeking assurances that human rights will be brought to bear on regimes of international law that have egregious impacts on human well-being is commonplace among (academic) activists and UN human rights bodies, an approach that is not limited to the outcomes of intergovernmental negotiations. The celebrated Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, adopted by 40 human rights legal experts in 2011<sup>59</sup> reflects the same approach, one that validates international economic law and other agreements in the first instance, agreements against which human rights compliance must be sought.<sup>60</sup> Even in the most progressive area of the Principles, the obligations of international cooperation to fulfil socio-economic rights globally, compliance with the obligation to create an internationally enabling environment is to be achieved through ‘the elaboration, interpretation, application and regular review of multilateral and bilateral agreements as well as international standards’.<sup>61</sup> That the endorsers of the Maastricht Principles were circumscribed in the nature and extent of their pronouncements by having agreed to reflect the state of the juridical art, rather than go beyond it with proposals to restructure radically the global economy, highlights another layer in the paradox at the centre of this essay. Not only do the Maastricht Principles at times unwittingly accept the economic status quo and the inevitability of economic globalization, but if the Maastricht endorsers were ever going to offer a progressive account of extraterritorial obligations that is consistent with the current state of international human rights law, they could do nothing else. Moreover, even a radically progressive reading of the law in this area would still be operating at the level of content, ever constrained, the thesis

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<sup>57</sup> Peasant Declaration, Art 2(4).

<sup>58</sup> UN Doc A/HRC/WG.15/4/2, 6 March 2017, Art 2(4). See also the Peasant Declaration Art 16(4).

<sup>59</sup> Disclosure: The author was a member of the Maastricht Principles Drafting Committee.

<sup>60</sup> Maastricht Principles, Art 17: ‘States must elaborate, interpret and apply relevant international agreements and standards in a manner consistent with their human rights obligations. Such obligations include those pertaining to international trade, investment, finance, taxation, environmental protection, development cooperation, and security.’

<sup>61</sup> *Id.*, Art 29.

goes, by law at the level of (commodity) form. A problem identified here is, quite simply, that if one is to rely on the law *as it is* then one is bound by its terms. As such, it may seem that the best one can do is to seek to soften its hazardous features and, as a pragmatist account highlights, the cost is one of legitimating the system one seeks to change. In light of the pragmatist's dilemma, James Harrison can be seen to have presented a profound proposal when he suggested, in his consideration of the fragmentation problem, replacing the 'coherence mindset' for one of 'investigative legal pluralism'.<sup>62</sup> He advises that before any attempt at reconciliation is even proffered, the place to begin (including among judicial bodies) is with an honest exploration of frictions between the values and priorities of the different regimes. Only then should any further legal inquiry proceed to the second stage as to whether the diverse analytical lenses allow for an accommodation of normative visions and practices. This, Harrison indicates, is both to open up the possibility of real reconciliation as much as to avoid an artificial attempt at coherence where reconciliation is impossible.<sup>63</sup> From this vantage point comes at least the possibility of moving beyond alleged fixes to globalization to offering up alternative imaginaries altogether. To sum up so far: the first approach identified in the Peasants' Declaration embraces new imaginaries; the second makes them impossible.

The third approach in the Peasants' Declaration, like the second, through the terms of 'benefit-sharing' demonstrates how the Declaration, relies on capitalism. In realizing rights of peasants to natural resources present in their communities, the Declaration provides 'Modalities for the fair and equitable sharing of the benefits of such exploitation that have been established on mutually agreed terms between those exploiting the natural resources and the peasants and other people working in rural areas.'<sup>64</sup> But contrary to the first approach that seeks to define rights against the logic of global capitalism, here 'benefit-sharing' requires a continuation of, rather than a break with, the logic of commodification underpinned by exclusive property rights.<sup>65</sup> Further, challenges to the status quo are permanently deferred through the granting of economic concessions; this is hegemony through the consent of the

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<sup>62</sup> James Harrison, 'The Case for Investigative Legal Pluralism in the International Economic Law Linkages Debate: A Strategy for Enhancing International Legal Discourse' 2 *London Review of International Law* (2014) 115.

<sup>63</sup> *Id.*

<sup>64</sup> Peasant Declaration, Art 5(2)(c).

<sup>65</sup> See generally, Georges Abi-Saab, 'Permanent Sovereignty over Natural Resources' in M Bedjaoui (ed) *International Law: Achievements and Prospects* (UNESCO/Martinus Nijhoff 1991) 600, 601; Sundhya Pahuja *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP 2011) 125.

governed.<sup>66</sup> It is not for outsiders to stand in judgement as to what concessions are necessary or preferred and indigenous peoples have elsewhere made the case that engagement allows ‘demonstrating how to do this right’, how indigenous people can ‘pave a middle way for developing resources responsibly.’<sup>67</sup> Yet through the technique of ‘benefit-sharing’ the alienations and antagonisms produced by capital accumulation can merely be managed and the ‘solution’ invariably becomes an indispensable aspect of sustaining the processes of capitalist exploitation and accumulation. The turn to benefit-sharing in this way represents an instantiation of Gramsci’s passive revolution— socialization and cooperation by the ruling class in the sphere of production that nonetheless does not touch upon their appropriation of profit nor their control over the ‘decisive nucleus of economic activity’, thereby ensuring that the elite interests prevail.<sup>68</sup>

This embrace of benefit-sharing found in the Peasants’ Declaration is not unusual. Reading the 2007 UN Declaration on the Rights of Indigenous Peoples into the African Charter on Human and Peoples’ Rights, in what is widely considered a landmark case, the African Court on Human and Peoples’ Rights found a violation by Kenya of the right of the indigenous Ogiek community to ‘occupy, use, and enjoy their ancestral lands’ under Article 14 of the African Charter on the right to property (the creative interpretation of the right to property to protect collective rights of indigenous peoples having been spearheaded by the Inter-American Court of Human Rights).<sup>69</sup> The African Court also found a violation of the right of indigenous peoples ‘to freely dispose of their wealth and resources’ given that the community was deprived by the state, through the pursuit of economic exploitation and displacement, of the right to enjoy and dispose of the ‘abundance of food produced on their ancestral lands’. This was the first time that the African Court found a violation of the right of peoples to natural resources. This first indigenous rights case before the African Court reflects a number of novel elements, perhaps most notably an interpretation of the right of indigenous peoples to natural resources to include the right to their traditional food sources. Yet alongside its innovative normative dimensions sits the compensation request by the Ogiek applicants for royalties from existing economic activities in the Mau Forest, where

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<sup>66</sup> See, Joe Wills, *Contesting World Order: Socioeconomic Rights and Global Justice Movements* (CUP 2017) 11, and for a valuable exploration that brings ‘neo-Gramscian’ insights to bear on socio-economic rights.

<sup>67</sup> Ashifa Kassam, ‘First Nations Group Proposes Oil Pipeline that Protects Indigenous Rights’ *The Guardian* (18 Sept 2018): <https://www.theguardian.com/world/2018/sep/08/canada-oil-pipeline-first-nations-proposal-indigenous-rights>

<sup>68</sup> Antonio Gramsci, *Selections from the Prison Notebooks* (ed and tr Q Hoare and G Nowell Smith), (Lawrence & Wishart 1971) 119-120, 161.

<sup>69</sup> *African Commission on Human and Peoples’ Rights v Kenya*, Appl No 006/2012, judgment of 26 May 2017.

they have lived since time immemorial, and ‘ensuring that the Ogiek benefit from any employment opportunities within the Mau Forest’.<sup>70</sup>

Benefit-sharing is developed in other international instruments and in the case of the Convention on Biological Diversity and its Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization,<sup>71</sup> many indigenous communities and organizations have been committed to the project despite its alien, Western legal rationale, assumptions, and concepts.<sup>72</sup> Any arrangements less disturbing of indigenous and local communities’ land, way of life, and traditional knowledge, and promises of conservation, sustainability and poverty reduction notwithstanding, the Nagoya Protocol is in many ways a status quo masterwork: ‘fair and equitable sharing of benefits’ is premised on the ‘economic value of the ecosystem and biodiversity’<sup>73</sup> and based on a relationship between ‘providers’ (indigenous peoples and local communities) and ‘users’ (unnamed entities providing the R&D)<sup>74</sup> to whom the indigenous peoples and local communities cede traditional knowledge, innovations, and practices that are associated with genetic resources for receipt of monetary returns (for example, upfront payments and royalties) or non-monetary returns (for example, ‘contribution to the local economy’) derived from its ‘utilization’, that is, their financial exploitation.<sup>75</sup> The hard won indigenous rights standard of ‘free, prior and informed consent’ in decisions that affect them and their lands and territories is thinned out in the Protocol – rendered subject to ‘domestic law’ – with the state required merely ‘to take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval is obtained for access to genetic resources where [indigenous peoples and local communities] have the established rights to grant such resources’.<sup>76</sup> In this treaty, the doctrine of prior, informed consent in an uncompromised version becomes applicable to states ‘in the exercise of sovereign rights over natural resources.’<sup>77</sup> The ability

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<sup>70</sup> The Court’s ruling on reparations was still being awaited at January 2020.

<sup>71</sup> Convention on Biological Diversity (1992) entered into force 1993, 196 states parties at January 2020; Nagoya Protocol (2011) entered into force 2014, 122 states parties at January 2020.

<sup>72</sup> ‘... Our ceremonies, offerings, prayers, chants, reciprocal support, and tears helped us, the Indigenous women from Latin America and the Caribbean, to continue calmly in these tiring, technical, and difficult dialogues under an umbrella of Western paradigms.’ (F López, personal communication to Terán, 12 April 2010). Maria Yolanda Terán, ‘The Nagoya Protocol and Indigenous Peoples’ 7 *The International Indigenous Policy Journal* (2016) 1, 12.

<sup>73</sup> Nagoya Protocol, Preamble.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*, Art 2(c): “‘Utilization of genetic resources’ means to conduct research and development on the genetic and/or biochemical composition of genetic resources ... .”

<sup>76</sup> *Id.*, Art 6(2). See similarly, Art 7 with regards to access to traditional knowledge associated with genetic resources.

<sup>77</sup> *Id.*, Art 6(1): ‘In the exercise of sovereign rights over natural resources, ... access to genetic resources for their utilization shall be subject to the prior informed consent of the Party providing such resources that is the



of indigenous peoples and local communities to rely then on their customary use and exchange of genetic resources and associated traditional knowledge within and among their communities is exercisable only ‘in so far as possible.’<sup>78</sup>

In its best light, the indigenous standard of participation gives disenfranchised local communities greater say in decisions that affect their rights and their way of life, at times to the point of a veto.<sup>79</sup> But the important Gramscian insight is that the political rights to effective participation in decision-making for the sharing of benefits are consistent with international human rights law while opening up the distinct possibility of co-opting the dissenters. There is a real risk that arrangements to come from participation in the design of a benefit-sharing scheme requires acceptance of the capitalist logic of natural resource exploitation (in contradiction to indigenous and local culture and way of life).<sup>80</sup> As such, it is through the very exercise of those rights that indigenous peoples and local communities serve to validate and entrench the rationalities and mechanics of global capitalism while deferring wholesale challenges to them.<sup>81</sup> The Nagoya Protocol sees traditional knowledge commodified and intellectual property rights granted to indigenous peoples and local communities, drawing them into the global market with rights to profit financially from their culture; contrary to the philosophy that defines their communal way of life, it encourages that those new found rights are used in their own self-interest and to the exclusion of others.<sup>82</sup> As

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country of origin of such resources or a Party that has acquired the genetic resources in accordance with the Convention, ... .’

<sup>78</sup> *Id.*, Art 12(4).

<sup>79</sup> See the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007) Arts 10 and 29(2) and *Poma Poma v Peru*, Comm 1457/2006, UN Doc CCPR/C/95/D/1457/2006 (HRC 2009) para 7.6: ‘... The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community.’ But cf Arts 19 and 32(2) of UNDRIP, the latter providing merely that: ‘States shall consult and cooperate in good faith with indigenous peoples ... in order to obtain their free and informed consent prior to approval of any project affecting their lands or territories and other resources ... .’

<sup>80</sup> Of course, this is not unique to the rights of indigenous peoples and peasants’ rights. The right of peoples to the exploitation of their natural resources – understood initially as a right of states – can be found in the 1950s norm of permanent sovereignty over natural resources and in common article 1 of the two human rights covenants.

<sup>81</sup> Comparable scenarios play out in other areas. The controversial response of the World Bank to concerns over the impact of (foreign) land acquisition on local populations, small scale farmers and fisher people is largely how to manage it: to facilitate the consultation of those affected, avoid increasing their vulnerability, and sharing the value of responsible agro-investment.

<sup>82</sup> See Ciupa in this case referring to UNDRIP, Kristin Ciupa, ‘The Promise of Rights: International Indigenous Rights in the Neoliberal Era’ in Brabazon (ed) *Neoliberal Legality*, *supra* note 32, 140, 157; Tobias Stoll, ‘Article 31: Intellectual Property and Technology’ in M Weller and J Holman (eds) *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018): ‘Indigenous peoples might consider to seek intellectual property protection for their traditional knowledge themselves’ (precisely the concern implied in Ciupa) 299, 314-315. Yet, ‘a rule might emerge ... that third parties are barred from applying for, obtaining, and exercising intellectual property rights which are based on traditional knowledge or traditional cultural expressions of Indigenous Peoples and obtained or used without their prior and informed consent.’ *Id.*, 327.

one indigenous participant in the Nagoya negotiations put it: ‘In our vision the plants, animals, rivers, everything is related and interconnected. We believe that the resources from Mother Earth are for the well-being of humanity. Consequently, it was very painful for us to understand these initial discussions on the commercialization of our resources and to put a price on genetic resources and traditional knowledge.’<sup>83</sup> Rights against global capitalism may yet emerge from standards on biological diversity and benefit-sharing but it is an uphill battle to have intellectual property reimagined internationally.<sup>84</sup> Under the terms of the Convention and Protocol there is scope for sui generis protections distinct from dominant intellectual property systems (for example patents) that are responsive to the needs and worldviews of indigenous and local communities and protect local communities against misappropriation by third parties while making the knowledge available for wider benefit.<sup>85</sup> And indigenous and local communities are providing clear guidelines on the content of a suitable sui generis system, including by safeguarding the free exchange of resources, recognizing collective custodianship, ensuring systems that primarily seek to address the subsistence and cultural needs of communities rather than commercial objectives, and respecting customary laws for benefit-sharing that emphasize equity, fairness, helping those in need and conservation values.<sup>86</sup>

The Secretariat of the Convention on Biological Diversity and The Nagoya Protocol explains that the treaties sought to regulate internationally bioprospecting activities undertaken for commercial and non-commercial purposes, as well as to regulate the privatization and marketization of new medicines that are based on discoveries from natural products and traditional knowledge. Herbal products for example are a multi-trillion dollar industry with the commercialization of local plants and knowledge generating enormous

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<sup>83</sup> Naniki Reyes as cited in Terán, ‘The Nagoya Protocol and Indigenous Peoples’, *supra* note 72, 9.

<sup>84</sup> Notably the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore has been discussing the possibility of a sui generis system internationally to protect traditional knowledge since 2001.

<sup>85</sup> Convention on Biological Diversity, Art 8(j): ‘Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;’ The preamble to the Nagoya Protocol recalls the relevance of Article 8(j) of the Convention on Biological Diversity.

<sup>86</sup> *Sui Generis Systems for the Protection of Traditional Knowledge*, Information for the Secretariat of the Convention on Biological Diversity Submitted by: IIED, Kechua-Aymara Association for Nature and Sustainable Development (ANDES, Peru), Fundacion Dobbo Yala (Panama), University of Panama, Ecoserve (India), Centre for Indigenous Farming Systems (India), Herbal and Folklore Research Centre (India), Centre for Chinese Agricultural Policy (CCAP, China), Southern Environmental and Agricultural Policy Research Institute (ICIPE, Kenya), Kenya Forestry Research Institute (31 October 2005). <http://pubs.iied.org/pdfs/G02378.pdf>

profits for transnational drug companies with no returns to locals. Lack of implementation of the Nagoya Protocol is a live concern; on the account described, implementation is the other.

What the indigenous examples above demonstrate, as for the Peasants' Declaration, is that benefit-sharing on dominant terms comes at a cost: it masks the structural subordination at the heart of contemporary capitalism just as it contributes to its continuation. It draws into global capitalism its most passionate opponents and those with the greatest experience to spearhead alternatives. With this third dimension of the Peasants' Declaration one can see how the Declaration sustains the very terms against which it militates, throwing into doubt whether it can ever amount to a meaningful departure from global capitalism and the deeper problems they engender nationally and internationally.

The second approach taken in the Peasants' Declaration demonstrates how international economic law is brought to bear on international human rights law. This third approach taken in the Peasants' Declaration exposes fault lines through which 21<sup>st</sup> century capitalism is taken as a permanent, unspoken feature of international human rights law. These two approaches beg the question as to whether the status of the disenfranchised is merely and always an object of the 'completed transaction' that is capitalist globalization, a central claim of nihilists.<sup>87</sup> If the first approach taken in the Peasants' Declaration reflects a radical, normative challenge to global capitalism, approaches two and three inadvertently reflect an affirmation of it. Yet, if the first approach points to the possibility of pragmatism – overturning capitalist law through the use of law – Pashukanis and the nihilist thesis would hold that even if the Declaration solely espoused peasant rights against global capitalism, the articulation of those demands in the *form* of legal rights is itself an impediment to an emancipatory society.

### **III Radical Ideation versus 'Pseudo-Radicalism' or Can Capitalist International Law be Undone?**

On the face of it, the dilemma faced by international human rights lawyers in search of a transformed world cannot be resolved. To engage with international (human rights) law is to engage with international (human rights) law capitalist warts and all. Sacrifices made for this exercise in 'law reform' include: endorsing (capitalist) law, sustaining the commodity and

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<sup>87</sup> See Pashukanis, 'International Law', *supra* note 6, 172.

money economy, directing energy towards the illusive promise of taming capitalism,<sup>88</sup> reinforcing the power of the state ('duty-bearer'), and pacifying social revolutionaries with fractional gains while leaving the structural source of their disaffection intact. Not to engage with international law – as per the nihilist position – is tacitly to engage with international law by leaving it as is, absent oppositional voices. In truth, there is no real pragmatic compromise to be had at all; one is either in or out and to do nothing is also to take a position. Marx's seminal observation that the only "fair" distribution is on the basis of the present-day mode of production<sup>89</sup> that is, any gains will *always be on the basis* of capitalism, is an illustration of the 'inner-connection between the form of law and the commodity form'.<sup>90</sup> Yet Marx rejected denunciations of 'reformist illusions', defending instead legal demands that were achievable under capitalism. He accused his counterparts (here the Marxist wing of the French labour movement) of "revolutionary phrase-mongering" and of denying the value of reformist struggles.' That was the context in which Marx famously remarked that 'if their politics represented Marxism, "*ce qu'il y a de certain c'est que moi, je ne suis pas Marxiste*" ("what is certain is that I myself am not a Marxist")'.<sup>91</sup> So, where does this leave lawyers in search of post-capitalist transformation?

One pragmatic Marxism of note envisions a middle way for the critical international lawyer, one marked out by using the law strategically while retaining the 'ultimate objective of transcending the existing order' (i.e.: the struggle is framed and directed by 'the strategic goal of overthrowing capitalism').<sup>92</sup> In order to avoid this critical (pragmatic) position collapsing into the liberal (pragmatic) position, the case has been made that the 'ultimate objective' has to be present in everyday acts.<sup>93</sup> On this productive account, law as a creation of capitalism and law as a tool for anti-capitalist agitation are incongruous but not

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<sup>88</sup> Whatever socially sensitive schemes or corporate social responsibility standards are developed: 'a system based on market principles will inevitably place a premium on wealth and encourage a culture of greed.' Ellen Meiksins Wood, 'Capitalism and Social Rights' 140 *Against the Current* (2009): <https://solidarity-us.org/atc/140/p2150/>

<sup>89</sup> Marx, 'Critique of the Gotha Programme', *supra* note 5, 84; and Rosa Luxemburg, *Reform or Revolution* (1908) in Helen Scott (ed) *The Essential Rosa Luxemburg* (Integer tr 1937, Haymarket Books 2008) 41, 84.

<sup>90</sup> Chris J Arthur, 'Towards a Materialist Theory of Law' 7 *Critique* 1 (1977) 31, 38.

<sup>91</sup> On Karl Marx and Jules Guesde, *The Programme of the Parti Ouvrier*, 1880: <https://www.marxists.org/archive/marx/works/1880/05/parti-ouvrier.htm#n5> In contributing to what are today considered labour rights (length of the working day, labour rights for women, age limit for the prohibition of child labour), see, Marx, 'Critique of the Gotha Programme', *supra* note 5, 98.

<sup>92</sup> Knox, 'Strategy and Tactics', *supra* note 20, 218. See notably Rosa Luxemburg in *Reform or Revolution* where she provides a strident critique of the reformist writings by her contemporary Eduard Bernstein in which the socialist way forward is reform *and* revolution '[I]f this effort is separated from the movement itself and social reforms are made an end in themselves, then such activity not only does not lead to the final goal of socialism but moves in a precisely opposite direction.' Luxemburg, *Reform or Revolution*, *supra* note 89, 67.

<sup>93</sup> Knox, drawing on Lukács, 'Strategy and Tactics', *supra* note 20, 219.

irreconcilable if the common ('class') struggle has as its ultimate goal a long term-transition out of capitalism. The struggle for reforms as means and the social revolution as aim<sup>94</sup> is a fruitful provocation to progressive lawyers.<sup>95</sup>

Applying the law developed by capitalist relations to the unforgiving task of realizing socially transformative ends invites galvanizing a critique of law that works to undo its hierarchies,<sup>96</sup> and to mobilize instead what might come from law when it is decoded, exposed, and dethroned. In the schematics provided below, social transformation takes shape through a variety of counter-hegemonic entry points from the influence of normative subversion to new forms of legal practice attuned to the domination, subjugation and oppression that come from the congenital connection between law and capitalism. The question becomes thus: If law is not going to be abandoned altogether,<sup>97</sup> how do advocates go about dismantling the master's house with the master's tools? Can we direct the power and authority of law to fashion new tools? Might it be that with those tools the process of transformation begins, a process with the potential to overcome the attributes, imperatives,

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<sup>94</sup> From Rosa Luxemburg: 'Between social reforms and revolution there exists for social democracy an indissoluble tie. The struggle for reforms is its means; the social revolution, its aim'. Luxemburg, *Reform or Revolution*, *supra* note 89, 41.

<sup>95</sup> For example, Bill Bowring and Paul O'Connell respectively see social struggle as key to the legitimacy of human rights: In getting from immanent critique to reasons for engagement, Bowring's anti-liberal 'revolutionary conservatism' offers that 'human rights are real, and provide a ground for judgement, to the extent that they are understood in their historical context, and as, and to the extent to which, they embody and define the content of real human struggles'. Bill Bowring, *The Degradation of the International Legal Order: The Rehabilitation of Law and the Possibility of Politics* (Routledge-Cavendish 2008) 108 and 129. Paul O'Connell defends human rights from within the Marxist tradition 'that emphasizes contradiction, social struggle, and the need to transcend the system which structurally undermines human flourishing'. O'Connell foregrounds the centrality of social struggle in shaping the concrete meaning of rights in specific contexts and in resisting the logic of the market. Paul O'Connell, 'On the Human Rights Question' 40 *Human Rights Quarterly* (2018) 962.

<sup>96</sup> Hierarchy comes in a variety of guises: Hierarchy as the dominant form of social organization in capitalist societies (and thus the forfeiture of 'genuine power and freedom that can only come from the sustained experience of authentic and egalitarian social connection') along with a legal system that 'persuades people to accept both the legitimacy and the apparent inevitability of the existing hierarchical arrangement'. The legal system accomplishes this legitimation through its public settings 'laden with ritual and authoritarian symbolism' and through 'legal reasoning, an ideological form of thought whose distinctive legitimizing characteristic is that it presupposes both the existence of and the legitimacy of existing hierarchical institutions'. Peter Gabel and Paul Harris, 'Building Power and Breaking Images: Critical Legal Theory and the Practice of Law' 11 *NYU Review of Law and Social Change* (1982-83) 369, 371-372. And community-lawyering, that also inspires some of the ideas below, aims at a 'a client-centered, non-hierarchical approach in their work in order to accomplish a "redistribution of power" within their own relationships as they simultaneously seek such a goal for their clients.' Caroline Bettinger-Lopez, Davida Finger, Meetal Jain, JoNel Newman, Sarah Paoletti and Deborah M Weissman, 'Redefining Human Rights Lawyering Through the Lens of Critical Theory: Lessons for Pedagogy and Practice' XVIII *Georgetown Journal on Poverty Law and Policy* 3 (2011) 337, 356.

<sup>97</sup> Abandoning law is to leave it unopposed. Replacing law with a form of administration regulation offers its own hazards to an emancipated society. Anarchism, and here I have in mind a non-violent, organized left anarchism, with its rejection of the state and law and its anti-authoritarian, anti-hierarchical and mutualist philosophy, is a convincing alternative to working within, and exploring how (and whether) it is possible to overcome capitalist law. I leave that inquiry for another day.

and institutions of capitalism: law as it might have been; law as if solidarity, community, and communality matter. Let us return to the Peasants' Declaration.

The Peasants' Declaration offers an inadvertent defence of juridical capitalism but that does not exhaust its representations. To start, contrary to the capitalist ethic and its neoliberal variant, the Declaration is uncompromisingly inclusive. The Declaration applies to any person who engages or seeks to engage alone, or in association with others or as a community, in small-scale agricultural production for subsistence and/or for the market; any person engaged in artisanal or small-scale agriculture, crop planting, livestock raising, pastoralism, fishing, forestry, hunting or gathering, and handicrafts related to agriculture or a related occupation in a rural area, their dependents and family members; indigenous peoples and local communities working on the land, transhumant, nomadic and semi-nomadic communities, and the landless, engaged in the above-mentioned activities; as well as, hired workers, including all migrant workers regardless of their migration status, and seasonal workers, on plantations, agricultural farms, forests and farms in aquaculture and in agro-industrial enterprises.<sup>98</sup> Here, the people, groups, and communities on whose alienations 'global' wealth has been built challenge the tenets of self-interest and competition that underprop capitalism. Unlike in capitalism where the more well-off is favoured, and in neoliberal capitalism where the most well-off is favoured, in this Declaration of solidarity, priority is given to the least well off among the least well off: 'Landless peasants, young people, small-scale fishers and other rural workers should be given priority in the allocation of public lands, fisheries and forests.'<sup>99</sup> Unlike (neoliberal) capitalism that concentrates control in the hands of the few, the Declaration advocates for limiting 'the excessive concentration and control of land and taking into account its social function' as part of agrarian reforms in order to facilitate broad and equitable access to land and other natural resources.<sup>100</sup> Moreover, peasants extend their hard won rights to include 'the right to the conservation and protection of the environment and the productive capacity of their lands'.<sup>101</sup> While the Declaration can be criticized for taking an approach that embraces the prospect of sharing in the wealth of society (i.e.: the capitalist society against which the peasants advocate), the subjects of this Declaration, who are among the very poorest people in the

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<sup>98</sup> Peasant Declaration, Art 1.

<sup>99</sup> *Id.*, Art 17(6).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*, Art 18(1).

world, do not have the realization of their aims rooted in an effort at making poor peasants rich.<sup>102</sup>

Relying on the capitalist, ‘authoritarian’ state, as human rights necessarily do, should not blind us to the slow revolution that can come from what is referred to here as the auto-marshalling of dissidence, expressed in the Declaration through the radical instrument of communality. This reflects another subversive feature of the Declaration. Key to the rise of capitalism was to attack communal ways of life; when life cultivated the collective, ties to each other were strong, providing for great force, with the development of each (social) individual inseparable from that of every other individual. For capitalism to prevail it had to individualize; communal life had to be extinguished.<sup>103</sup> In capitalism, private property, individual gain and a competitive ethic is paramount (even if the owners of capital do their best to avoid competition through monopolies); it is an economic model and philosophy ‘striving to deprive each other’, as Einstein put it.<sup>104</sup> Under capitalism, no one does anything for anyone without getting something in return; any cooperation is because one seeks to gain.<sup>105</sup> It works against solidarity, collective organization, actual mutual interest, and the social institutions that make them possible.<sup>106</sup> To codify rights that are premised on lives lived in community is to use international human rights law to disrupt the individuation necessary for capitalism to thrive.<sup>107</sup> It is to have radical ideation challenge the limits of ‘proletariat law’ condemned as only ever ‘pseudo-radical’, incapable of overthrowing ‘bourgeois law’. It is to signal the possibility of renewal *through* law despite its commodity-form; despite its connection to capitalism; despite its hegemony.

If the rise of capitalism requires the dismantling of communality, the reinstatement of collective life as a matter of international human rights law is a subversive act. Through the defence of communal and collective life international human rights law challenges the individual ethic that is vital to capitalism. The reinstatement of collective life through the

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<sup>102</sup> Note Rosa Luxemburg’s critique of Eduard Bernstein’s ‘socialism’ in *Reform or Revolution*, *supra* note 89, 75.

<sup>103</sup> Silvia Federici on Women and Capitalism, Interview, Dig Radio, 13 Sept 2019: <https://www.thedigradio.com/podcast/silvia-federici-on-women-and-capitalism/>

<sup>104</sup> Albert Einstein, ‘Why Socialism?’ *Monthly Review* (May 1949).

<sup>105</sup> GA Cohen, *Why Not Socialism?* (2009 Princeton University Press) 44-45.

<sup>106</sup> See, Margot E Salomon and Bruno de Witte, ‘Legal Trajectories of Neoliberalism: Introductory Remarks’ in ME Salomon and B de Witte (eds) *Legal Trajectories of Neoliberalism: Critical Inquiries on Law in Europe*, Robert Schuman Centre for Advanced Studies, European University Institute, Working Paper 2019/43: [https://cadmus.eui.eu/bitstream/handle/1814/63447/RSCAS\\_2019\\_43.pdf?sequence=8&isAllowed=y](https://cadmus.eui.eu/bitstream/handle/1814/63447/RSCAS_2019_43.pdf?sequence=8&isAllowed=y)

<sup>107</sup> In mind here is not an ‘illusory community’ produced by the legal form where ‘citizens define their communality through an abstraction from the real social differences and interests that separate the members of capitalist society and set them against one another’. It can better be understood as reflective of the ‘concrete social existence’ of the individuals that constitute it. See, Balbus, ‘Commodity Form and Legal Form’, *supra* note 2, 577-581.

rights of peasants and indigenous peoples sets down inhospitable conditions for the flourishing of capitalism. The point is this: the *content* of the law of peasants and indigenous peoples through the legal ‘pseudo-recognition’<sup>108</sup> of their communality begins chipping away at the very political-economic system that underpins the legal form and is reinforced by it.

The focus herein on the rights of peasants and indigenous peoples invites foregrounding the slow subversion by communality, but it is not the only legal tool that can erode capitalism in this way. The power of capital is threatened in so far as policies decommodify the ways in which people live. Since capitalism requires commodification as an essential condition of its very existence,<sup>109</sup> where the Peasants’ Declaration moves beyond commodification – see for example demands for community-based commercialization and water management systems<sup>110</sup> – a function of its dissidence is automatically marshalled. From there emerges a process of eroding the extant political-economic system and thus the handmaiden it finds in the legal form premised on capitalism, on commodity-exchange.<sup>111</sup>

Harnessing rights as means – not least where the aim is social transformation – need come with a warning. The refusal by states to recognize a movement’s demands might strengthen its resolve, but it invites the possibility that the energies of social advocates will be directed at getting their demands *recognized* as rights; recognition becomes the movement’s core objective.<sup>112</sup> The Via Campesina estimates that peasants and peasant advocacy groups spent 17 years in getting the UN human rights machinery to take seriously – not their claims to land and to their own food and agricultural systems – but their demands to have their claims articulated through official, law-making channels. The rights-victory that the *establishment* of the Intergovernmental Working Group on the Declaration represented and the eventual *adoption* by the General Assembly of the Peasants’ Declaration, as much as anything else, invites the risk that peasant advocates will equate these victories with their own ‘internal ends’ and situate their own capacity for transformation outside of the

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<sup>108</sup> ‘Rights-victories can facilitate a movement’s cooptation by tempting the movement to “return” its power to the State in exchange for what I will call a pseudo-recognition of the movement’s particular demands. ...’ Peter Gabel, ‘Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves’ 62 *Texas Law Review* (1984) 1563, 1591.

<sup>109</sup> Meiksins Wood, ‘Capitalism and Social Rights’, *supra* note 88.

<sup>110</sup> Peasant Declaration, Arts 16(1) and 21(3).

<sup>111</sup> On this line of argument I draw inspiration from Ellen Meiksins Wood, ‘Capitalism and Social Rights’, *supra* note 88 and then Paul O’Connell who makes the case that the assertion of socio-economic rights in the context of the logic of commodification is necessarily a rejection of the ‘the basic impulses of the capitalist system’ see, O’Connell, ‘On the Human Rights Question’, *supra* n 95, 986-988.

<sup>112</sup> Gabel, ‘Phenomenology of Rights-Consciousness’, *supra* note 108, 1593. And as Gabel would frame it: where “getting our rights” is the movement’s ultimate objective rather than being but a moment of its own internal development. To that extent the movement’s anger at the State may reveal a tendency toward compliance rather than transformation’.



movement and in the apparatus of the state.<sup>113</sup> Put differently, before they had rights, that is, when they were refused rights-recognition, peasants could not make their claims in terms of legal rights in so far as that brings certain benefits, however, their power was external to the state. As Peter Gabel's work points up: 'Rights-victories can facilitate a movement's cooptation by tempting the movement to "return" its power to the State in exchange for a pseudo-recognition of the movement's particular demands'.<sup>114</sup> As the Via Campesina invariably makes clear: 'now that the Declaration is an international legal instrument, La Via Campesina and its allies will mobilise to support regional and national implementation processes',<sup>115</sup> yet a lesson of note is precisely how an excessive preoccupation with "rights-consciousness" tends overtime to reinforce alienation and powerlessness, because with rights necessarily comes the affirmation that the source of power resides in the state rather than in the people themselves.<sup>116</sup>

Empowering the state is an aspect of any engagement with the international law of human rights, and this fact was not lost on the Declaration's civil society representatives: having to fit the indigenous world view into the technical, Western model that the negotiations on the Declaration required was a strategy suffused with sorrow.<sup>117</sup> The dilemma with which this article opens is mirrored by the delight of its advocates with the adoption by the UN General Assembly of the Declaration on the Rights of Peasants and other People Working in Rural Areas and the compromised soul of the peasant or indigenous person that accompanies it. As always with (capitalist) law, there is never any absolute loss or gain<sup>118</sup> only strategic calculation under conditions of contradiction - contradiction that lays bare a consequence of the "pseudo-radicalism" denounced by Pashukanis.

#### **IV Capitalist Law and the Work of the Revolutionary Lawyer**

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<sup>113</sup> See, *id.*

<sup>114</sup> *Id.*, 1591.

<sup>115</sup> 'Finally, UN General Assembly adopts Peasant Rights Declaration! Now Focus is on its Implementation' 18 December 2018:

<https://viacampesina.org/en/finally-un-general-assembly-adopts-peasant-rights-declaration-now-focus-is-on-its-implementation/>.

<sup>116</sup> Gabel and Harris, 'Building Power and Breaking Images', *supra* note 96, 375.

<sup>117</sup> Terán, 'The Nagoya Protocol and Indigenous Peoples', *supra* note 72.

<sup>118</sup> See also the work reconciling the 'dual potential' of engaging rights and law in Gabel, 'Phenomenology of Rights-Consciousness', *supra* note 108, 1594, as well as Marius Pieterse, 'Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited' 29 *Human Rights Quarterly* (2007) 796, 822.

The general theory provided by Pashukanis and the nihilist thesis forces a consideration as to how advances that seek to tame the injurious tendencies of capitalism and capitalist globalization through the content of law are delimited by the legal form within which they necessarily operate; a form defined by legal relations between commodity owners and reflecting capitalist property relations, a legal form that equally undergirds international law. ‘Law reform’ projects of all kinds have come up against a comparable dilemma: working towards improvement would seem to require licensing a given legal project instead of challenging the modern international legal enterprise,<sup>119</sup> and international law’s historical and structural complicity with alienation and violence.

In this work, international human rights law in the area of peasant rights can be seen to function so as to reinforce and legitimate law’s relationship with capitalism, including through the appropriation that comes from the movement ceding much of its power to the state. The pacification of protest that tends to accompany concessions is a further means through which the possibility of mobilizing for transformative change is thwarted. As we’ve seen, the approaches that seek to bring human rights to bear on globalization’s juridico-institutions of trade and investment and the increasingly popular model of benefit-sharing, any ameliorative functions notwithstanding, ensconce capitalism; the programme becomes one dedicated to ‘the suppression of the abuses of capitalism instead of the suppression of capitalism itself’.<sup>120</sup> Yet, perhaps the greatest loss reflected in the latter two approaches of the Peasants’ Declaration is how they might serve the ancillary function of narrowing the possibility even to imagine alternative forms of social organization and alternative arrangements to global capitalism. Where the rights against global capitalism – the first approach in the Peasants’ Declaration – reflect reach in the content of human rights law and its normative openness, against the juridical backdrop of global capitalism, the second and third approaches make the existence of that backdrop essential to their claims. What all three

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<sup>119</sup> Mégret captures the dilemma well. On the feminist project of humanizing war, he writes: ‘[T]he concern should be whether war reform is not constantly at risk of further reifying war, of whether every counter-hegemonic move does not contain the seeds of its own undermining. ... One troubling suspicion ... is that the attempt to reform the laws of war along more gender-sensitive lines may challenge masculine “excesses” but only at the cost of stopping short of challenging war altogether as the ultimate manifestation of such excesses.’ Frédéric Mégret, ‘The Laws of War and the Structure of Masculine Power’ 19 *Melbourne Journal of International Law* 1(2018) 200, 223. Likewise, ‘Gender-based Security Council resolutions ... are a double-edged sword: they provide “footholds” for feminist activism on the one hand, and a means for the Security Council to enhance its legitimacy and power on the other. The resolutions divert attention away from the underlying structural causes of armed conflict (in particular, the inequitable distribution of global power and wealth) while, at the same time, providing a powerful organising tool for local, national, regional and international feminists networks and movements.’ Aeyal Gross, ‘Dianne Otto’s Feminism as Critique of International Law’ 18 *Melbourne Journal of International Law* (2017) 123, 123.

<sup>120</sup> Luxemburg, *Reform or Revolution*, *supra* note 89, 90.

approaches invariably share is reliance on the state, and the state ‘cannot be understood as autonomous to capital’ in that it has been penetrated by capitalist concerns and is bound under international law to advance capitalism.<sup>121</sup>

While Pashukanis left the relation between form and content underexamined, paradoxically, the work of the nihilists opens up ways of engaging with international human rights law, of bridging the domains between what is and what might yet be.<sup>122</sup> The contribution of critical theorists would come to naught were they not taken up as tools to change the world. To apply law designed by capitalist relations to the task of realizing socially transformative ends is not self-defeating but nor is it purely an exercise in pragmatism; it is precisely what one should do with the interpretations of the world that the best philosophers have offered.<sup>123</sup> Whatever great truth might lie in the philosopher’s wisdom, ‘man must prove the truth’.<sup>124</sup> And, ‘The coincidence of the changing of circumstances and of ... self-changing can be conceived and rationally understood only as revolutionary practice’.<sup>125</sup>

The issue for the revolutionary lawyer today becomes whether the international law of human rights can drive radical transformations of law and society. Or, less ambitiously but no less significantly, whether important gains can be won in the legal arena without them being at once important losses. In that ‘there is never a moment when all conditions for making revolution exist’,<sup>126</sup> there is a salient case for working within the international legal arena while persistently challenging how international law expresses and co-constitutes elite capitalist interests, the law’s function in legitimizing existing social relations and reproducing advantage, as well as its reliance on constitutional fictions, centrally that of an international legal order based on (state) consent and reflective of the democratic will of people. While relying on the law’s appearance of authority, the revolutionary lawyer must actively challenge the ways in which international law, as much as international human rights law, take capitalist conditions for granted, as if they were the inevitable, natural and only

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<sup>121</sup> On the former points: Miéville, *Between Equal Rights* drawing on Lenin and Bukharin, *supra* note 4, 292. For a concise and potent set of reflections on the European Union in this regard, see Alexander Somek, *European Constitutionalism: The Neoliberalism Drift, Law and Political Economy* (11 April 2019) <https://lpeblog.org/2019/04/11/european-constitutionalism-the-neoliberal-drift/>.

<sup>122</sup> See generally, Emiliios Christodoulidis, ‘Critical Theory and the Law: Reflections on Origins, Trajectories and Conjunctions’ in E Christodoulidis, R Dukes and M Goldoni (eds) *Research Handbook on Critical Legal Theory* (Edward Elgar 2019) 2, 3.

<sup>123</sup> ‘The philosophers have only interpreted the world, in various ways; the point is to change it.’ Karl Marx, *Theses on Feuerbach, Eleventh Thesis* (1845).

<sup>124</sup> *Id.*, *Second Thesis*.

<sup>125</sup> *Id.*, *Third Thesis*.

<sup>126</sup> Srečko Horvat, *Poetry from the Future* (Allen Lane 2019) 108.

conceivable order of things. Engaging with a legal system is not at once a defence of it; law is always but an instrument. As addressed above, the right rights-strategy can serve diverse counter-hegemonic functions while generating ‘the knowledge of how to conduct a struggle on legal ground’<sup>127</sup> and creating an experience of public community that could dissolve people’s belief in and obedience to the institutions of capitalism itself.<sup>128</sup>

The revolutionary lawyer, as an overt part of her legal strategy, must question the very logic of the capitalist legal order and not merely particular laws.<sup>129</sup> The rights-strategy also requires that lawyering success is measured by such factors as whether the legal intervention widens the public imagination about alternatives and fosters confidence in the possibility of transcending the economic dependence and political subjugation that define world order under law.<sup>130</sup> The strategy should also see exposed the true socio-economic and political foundations underpinning international legal negotiations and disputes and the structural source of human rights violations. An approach to legal strategy that is explicit about the structural causes of human rights violations, and not limited to ‘microworlds’ that ask us to understand individual harms as random and dislocated from each other, from root causes, and from the logic of law itself is essential if change is to be made or sustained.<sup>131</sup>

Situating rights claims in their structural context is something the Peasants’ Declaration does extremely well. It reduces the risk that a legal ‘victory’ will at the same time serve to foreclose consideration of the structural and systemic causes of human rights violations.<sup>132</sup> With a rights-strategy that uses the law just as it is explicit about the political-

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<sup>127</sup> Pashukanis, ‘Lenin and the Problems of Law’, *supra* note 5, 142: ‘Lenin’s works from the Soviet period are simultaneously “anti-legal propaganda”, i.e. a campaign against bourgeois legal ideology, and an appeal to struggle and to eliminate legal illiteracy and impotence ... .’

<sup>128</sup> ‘... it is only then that the judge can appear as a man in a tunic and “the law” can appear as something like his speech-impediment.’ Gabel, ‘Phenomenology of Rights-Consciousness’, *supra* note 108, 1596.

<sup>129</sup> In his Marxist critique of law Balbus makes a compelling case on the far-reaching implications of taking principled positions on laws so as to delegitimize the legal order as a whole, and thus the capitalist mode of production on which it rests and which it helps sustain: ‘An adequate theory of legitimation and/or delegitimation would [therefore] have to explain why the *logic* of the legal order as such, in contrast to particular laws or legal practices, is ordinarily accepted as unproblematical, and is not called into question in the name of a radically different logic’. Balbus, ‘Commodity Form and Legal Form’, (emphasis in the original), *supra* n 2, 582.

<sup>130</sup> Generally, on reevaluating ‘lawyering success’, see Lucie White, ‘To Learn and Teach: Lessons from Driefontein on Lawyering and Power’ *Wisconsin Law Review* (1988) 691.

<sup>131</sup> On the former points, Gary L Blasi, ‘What’s a Theory For: Notes on Reconstructing Poverty Law Scholarship’ 48 *University of Miami Law Review* (1994) 1063, 1090-1091. See also the critique of ‘methodological individualism’ that warns against targeting the needy individual while disregarding the more complex explanations of root causes, of how poverty is produced and reproduced, and the significance of power to the equation, including inadvertently by the UN Committee on Economic, Social and Cultural Rights in John Linarelli, Margot E Salomon and Muthucumaraswamy Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (OUP 2018) 251-259.

<sup>132</sup> See, for example, Gabel and Harris drawing on the work of critical legal studies lawyers: ‘It is likely that neither Klare nor Freeman would assert that legal victories won on behalf of workers and minorities have been

economic and juridical sources of human rights crises, a space is opened within which to reconfigure the relationship between law and rights and between the commodity-form of law and its controversial use for social transformation.

Lastly, the progressive lawyer must never forget – and must never be seen to forget – that the real power necessary to catalyse transformative change is external to the state and its institutions. The place to begin these acts of sedition is with the consequential move of changing oneself. In confronting the contradiction in international human rights law that the tension between nihilists and pragmatists has exposed, what will be decisive is whether the ‘revolutionary’ advocate comes to her rendez-vous with international human rights law with eyes wide open.

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of no value to the people affected by them. But the deeper point they make is that whatever economic and social gains were achieved through these victories they were accompanied by the gradual dissipation of the claim for fundamental alterations in the nature of social relations. This is precisely the bargain that the State hopes to strike when confronted with direct political action: more rights in exchange for a return to passivity.’ Gabel and Harris, ‘Building Power and Breaking Images’, *supra* note 96, 375, n 12.