

B.S. CHIMNI*

Capitalism, Imperialism, and International Law in the Twenty-First Century

Introduction	17
I. On Capitalism.....	20
II. The New Imperial Economic, Legal and Political Formation	27
A. Neocolonialism	27
B. Global Imperialism.....	28
III. The New Imperial Social Formation	32
IV. The New Imperial Formation and Spirit of International Law.....	36
V. Futures: Towards Global Common Good	39
Conclusion.....	44

INTRODUCTION

This paper addresses the conference theme of “Capitalism and the Common Good” from a Third World Approaches to International Law (TWAIL) perspective.¹ The principal contention of TWAIL is that there is an intimate relationship between capitalism, imperialism, and international law, which accounts for the fact that it has always disadvantaged Third World peoples, especially its subaltern groups. In the TWAIL view, the idea that capitalism promotes the “global

* Professor of International Law, Jawaharlal Nehru University, New Delhi, India. The present paper is a revised version of the keynote address delivered at the Conference on “Third World Approaches to International Law (TWAIL): Capitalism and the Common Good” organized by the University of Oregon School of Law from October 20–22, 2011, at Eugene, Oregon. I would like to thank the organizers of the conference, especially Michael Fakhri, for inviting me to participate.

¹ For an introduction to TWAIL, see B.S. Chimni, *Towards a Radical Third World Approach to Contemporary International Law*, 5 ICCLP REV. 14, 16–30 (2002); Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT’L L. 77 (2003); James Thuo Gathii, *International Law and Eurocentricity*, 9 EUR. J. INT’L L. 184 (1998).

common good” can be sustained only if we neglect the structural critique of capitalism and also embrace what the German sociologist Ulrich Beck has termed “methodological nationalism,” excluding from consideration the relationship between “capitalism” and “imperialism.”²

However, the underlying assumption that advanced industrialized countries have sustained some form of welfare capitalism at home through exploiting Third World countries is today coming to be challenged by pointing to the emergence of economic powerhouses such as China and India and other BRICS (Brazil, Russia, India, China, and South Africa) nations that include Brazil and South Africa. The questioning assumes an edge at a time when the advanced capitalist world is faced with a serious economic crisis while countries such as China and India are witnessing decent growth rates. To put it starkly, the issue is whether imperialism is still a reality today and will shape the nature and character of international law and institutions in the twenty-first century.

It will be argued that the asymmetrical relation between the advanced capitalist and Third World countries, including the BRICS economies, is a continuing reality. In the past, imperialism coexisted with periods of deep economic crisis such as the Great Depression. Indeed, the economic crisis in the advanced capitalist world would be heightened in the absence of gains from economic imperialism. But perhaps what we are seeing today is the emergence of a *new imperial formation*. To appreciate the emergence of a new imperial formation it is necessary to acknowledge the anthropologist Ann Laura Stoler’s observation that “imperial formations have never been ‘steady states,’ they have been states of becoming rather than being.”³ The nature of an imperial formation corresponds to the stage and character of global capitalism. In the era of globalization, imperialism is assuming a new form, a feature of which is that a global class divide is coming to be

² According to Beck the “key assumption” of “methodological nationalism,” is that humankind is split up into a large but finite number of nations, each of which supposedly develops its own unified culture, secure behind the dike of its state-container The social space that is bordered and administered by the nation-state is assumed to contain all the essential elements and dynamics necessary for a characterization of society And when the sociological gaze is attuned like this, it has enormous difficulty in perceiving society when it appears outside this framework. The result is that non-nation-state forms of society are overlooked, minimized, or distorted.

ULRICH BECK & JOHANNES WILLMS, CONVERSATIONS WITH ULRICH BECK 13 (2004).

³ Ann Laura Stoler, *On Degrees of Imperial Sovereignty*, 18 PUB. CULTURE 125, 139 (2006).

superimposed on the North-South divide, signifying the emergence of a new imperial *social* formation. In that very limited sense, Michael Hardt and Antonio Negri are correct when they point out that “it is no longer possible to demarcate large geographical zones as center and periphery, North and South.”⁴

The *new imperial social formation* is being shaped by an emerging transnational capitalist class (TCC) that is constituted by those segments of the capitalist class in the advanced capitalist countries and emerging economies that gain from the globalization process at the expense of the subaltern classes in both the First and the Third Worlds, or what may be termed the transnational oppressed classes (TOC).⁵ According to Leslie Sklair, the TCC consists of the following four fractions: Transnational Corporation (TNC) executives and their local affiliates (corporate fraction); globalizing state and inter-state bureaucrats and politicians (state fraction); globalizing professionals (technical fraction); and merchants and media (consumerist fraction).⁶ It is these fractions that primarily shape the current pattern of economic and legal globalization, be it the deregulation of international finance capital, or the internationalization and protection of intellectual property rights, or the undermining of international labor law. The vision of TCC is backed by sections of the transnational middle class that also stand to gain from imperial globalization producing a global class divide.

4 MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* 335 (2000).

5 William I. Robinson & Jerry Harris, *Towards a Global Ruling Class? Globalization and the Transnational Capitalist Class*, 64 *SCI. & SOC'Y* 11 (2000). It may be pointed out that classes are not unified actors. Bastiaan van Apeldoorn conceptualizes the process of capitalist class formation as one in which the different groups within the capitalist class crystallize into rival class fractions:

[The] [t]wo primary structural axes along which class fractions are concretely formed may be identified: first, that of industrial (productive) versus financial (money) capital, and, second, that of domestic (or national) versus transnational capital, which becomes particularly relevant for analysing [sic] divisions within industrial capital Within the latter, one can further differentiate *can be made* with respect to the degree of globalisation [sic]: that is, whether the transnational activities of an enterprise take place on a truly global scale or are rather more confined to a particular macro-region (e.g., Western Europe).

Bastiaan van Apeldoorn, *The Struggle over European Order: Transnational Class Agency in the Making of “Embedded Neo-Liberalism,”* in *STATE/SPACE: A READER* 149 (Neil Brenner et al. eds., 2003).

6 Leslie Sklair, *GLOBALIZATION: CAPITALISM AND ITS ALTERNATIVES* 99 (2002); Robinson & Harris, *supra* note 5.

The new imperial social formation is accompanied by a *new imperial political formation* that is seeing the emergence of international institutions as key actors in international relations mediating between advanced capitalist states and the Third World, including the emerging economies. In different degrees, the economic sovereignty of Third World states is being relocated through international laws in international institutions that arguably constitute an emerging global state backed by the armed might of the advanced capitalist states, in particular the unrivalled military power of the United States.⁷ Together the new imperial social, legal, and political formations constitute the distinctive character of imperialism in the era of globalization, or what may be called global imperialism.

The challenge before TWAIL is two-fold. The first task is to explore in detail the meaning and features of the new imperial social and political formation and the ways in which it is shaping international laws and institutions. A second challenge is to spell out preferred normative futures and indicate the manner in which global capitalism and international laws and institutions have to be reconstituted for realizing global common good in the twenty-first century. The plea advanced in this paper is for serious reform in the structure and workings of global capitalism and accompanying international law and institutions if it is to promote the global common good.

I ON CAPITALISM

Before turning to these tasks it is essential to rehearse the *general* critique of capitalism, as its soundness determines the validity of the idea and any proposals for restructuring global capitalism in the twenty-first century both in nations and the world in order to, among other things, rupture the relationship between capitalism and imperialism.

The critics of capitalism contend that it is unable to promote the common good for at least six reasons. First, stated succinctly, capitalism primarily benefits the propertied classes to the disadvantage of the working classes and other marginalized groups in society. Of course there are alternative conceptions of capitalism with different implications for the pursuit of the “common good.” In his

⁷ See B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1 (2004).

well-known book, *Capitalism and Freedom*, Milton Friedman defines capitalism as the “organization of the bulk of economic activity through private enterprise operating in a free market.”⁸ In this view capitalism promotes the liberty and welfare of the people through the working of the free market. On the other hand, critics argue that capitalism is marked by a concentration of wealth in the hands of a class that either buys labor power or invests in financial products in order to enhance their wealth. A capitalist society is therefore distinguished by class fractures. For example, in the United States, the ratio of the average income of the top twenty percent of the population to the average income of the bottom twenty percent is 8 to 1.⁹ A comparison of the earnings of top one percent of the population with the bottom twenty percent yield more startling results. In one estimate, while top U.S. executives received on an average earned forty-two times the income of the average worker in 1980, by 2005 the average CEO made at least 262 times as much.¹⁰ In times of economic crisis the class fractures are accentuated since any form of welfare capitalism is difficult to sustain without taxing the rich who have the political power to resist any such attempt.

Second, capitalism promotes irrational and short-term solutions to problems, especially if it rewards the rich. Thus, for instance, contrary to the popular belief that the global financial crisis in the United States was the outcome of liberalized and unregulated markets, the truth is that the market was left unregulated to help postpone a crisis caused by insufficient aggregate demand, albeit market ideology also played a role in the global financial crisis.¹¹ The lack of aggregate demand was, as Joseph Stiglitz has explained, a result of the “increase

⁸ MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 4 (1962).

⁹ Michael Spence, *The Impact of Globalization on Income and Employment: the Downside of Integrating Markets*, FOREIGN AFF., July-Aug. 2011, at 28, 40 (2011).

¹⁰ Horst Brand, *U.S. Workers Confront Growing Insecurity*, DISSENT, Fall 2009, at 48, 49.

¹¹ Financial liberalization and deregulation was based on a widespread belief in the greater efficiency of market forces, and it led to the creation of increasingly sophisticated financial instruments. Deregulation was in part a response to pressure from competitive forces in the financial sector, but it was also part of a generalized trend towards less government intervention in the economy. New financial instruments and continued liberalization in the financial system allowed speculative activities to expand significantly, so that gambling became an important and, at times dominant, feature of financial activities. This became a source of instability in many economies, and indeed, in the entire international economic system.

United Nations Conference on Trade and Development, *Trade and Development Report*, VIII (Sept. 6, 2011).

in inequality” in the United States and the world.¹² As another researcher, Photis Lysandrou, has pointed out, “the enormous concentration of wealth ownership” and the absence of investment opportunities generated enormous pressure on Wall Street to create profitable financial products (bonds, stocks, futures, and other derivatives) even at the cost of undervaluing the risks involved.¹³ The problem was, therefore, not with the structure of finance but with the structure of inequality.¹⁴ However, it has to be conceded that the turn to novel and innovative financial products is also a function of the magical quality of finance capital. It sells what are pieces of paper to make money generating bubbles of growth “out of nothing,” even if only to burst. When the bubble did burst in the United States, the price was not paid by the banks and financial institutions, but by ordinary people, increasing the inequalities, which were the original cause of the crisis.¹⁵ Since there is unlikely to be the redistribution of wealth to reduce inequalities both in the United States and in the world, the next bubble of growth can only come through the doings of finance capital explaining the resistance to the serious regulation of financial markets.

Third, the irrational working of capitalism extends to its transactions with nature. The sacred unity between man and nature is subjected to the logic of market, leading to its dysfunctional commodification. Increasingly, nature has come to be subordinated to the needs of industrial capital. Today there is no area of environmental regulation that is not subject to troubling corporate influence. The geographical spread of capitalism over the last few centuries has thus engendered a global ecological crisis, symbolized by the phenomenon of global warming. But the relationship between the expansion and accumulation of capital and environmental degradation is most often erased. It is therefore not surprising that international environmental law is unable to effectively respond to the ongoing global ecological crisis. The empty concept of sustainable development is coming to be filled with the greed of global capital. In short, capitalism has come to endanger life on planet earth. The contention that capitalism generates the necessary resources and

¹² Joseph Stiglitz, *The Global Crisis, Social Protection and Jobs*, 148 INT’L LAB. REV. 1, 1–10 (2009).

¹³ Photis Lysandrou, *Global Inequality as One of the Root Causes of the Financial Crisis: A Suggested Explanation*, 40 ECON. & SOC’Y, 324, 325–26 (2011).

¹⁴ *Id.* at 327.

¹⁵ *Id.* at 323.

technological innovation to address the travails of nature is disproved by its inability to check the global ecological crises.

Fourth, the capitalist system is a source of disenchantment and loss of meaning. The disillusionment is more so at times of acute economic crisis when growing unemployment and the absence of adequate social welfare measures causes great distress to the poor and marginalized groups. But even in good times, capitalism spawns alienation as virtuous life comes to be associated with the idea of “possessive individualism.” Furthermore, as in present day capitalism, or the era of liquid modernity, as the sociologist Zygmunt Bauman characterizes it, your life is “measured, evaluated, praised or denigrated by the standards appropriate to consumer life.”¹⁶ In such a world, human potential is expressed through what a person possesses. Such a view causes the alienation of humans from fellow humans and nature and is coming to be universalized through the diffusion of capitalism.

Fifth, the association between capitalism and democracy is tenuous and therefore its defense cannot rest on the fact that it promotes liberty. As Milton Friedman concedes, you can “have economic arrangements that are fundamentally capitalist and political arrangements that are not free.”¹⁷ After all, as he notes, “Fascist Italy and Fascist Spain, Germany at various times . . . Japan before World Wars I and II, tsarist Russia in the decades before World War I—are all societies that cannot conceivably be described as politically free. Yet, in each, private enterprise was the dominant form of economic organization.”¹⁸ In the same vein capitalism can coexist with global political arrangements that are nondemocratic. Thus, today’s critics point to the absence of a truly democratic global body that manifests the aspirations of an emerging global society.¹⁹ It explains, among other things, the debates today over the “democratic deficit” that characterizes international institutions.²⁰ Be it the international

¹⁶ ZYGMUNT BAUMAN, *LIQUID LIFE* 9 (2005); ZYGMUNT BAUMAN & KEITH TESTER, *CONVERSATIONS WITH ZYGMUNT BAUMAN* 115–16 (2001). *See also* Karl Marx, *Economic and Philosophic Manuscripts of 1844* (Dirk J. Struik ed., Martin Milligan trans., 1977).

¹⁷ FRIEDMAN, *supra* note 8, at 10.

¹⁸ *Id.*

¹⁹ RICHARD FALK & ANDREW STRAUSS, *A GLOBAL PARLIAMENT: ESSAYS AND ARTICLES* (2011).

²⁰ Robert A. Dahl, *Can International Organizations be Democratic? A Sceptic’s View*, in *DEMOCRACY’S EDGES* 19–36 (Ian Shapiro & Casiano Hacker-Cordon eds., 1999); Joseph S. Nye, Jr., *Globalization’s Democracy Deficit: How to Make International*

financial institutions or the U.N. Security Council, there is long standing demand of the Third World countries that these be democratized.

Finally, and most crucially, there is the internal relationship between capitalism and imperialism. The German thinker Rosa Luxemburg (1871–1919) was among the first to argue in her book *The Accumulation of Capital* (published in 1913) that imperialism is linked to the very survival of capitalism. She recognized the historical fact that “the extension of capitalism into new territories was the mainspring of . . . the ‘vast secular boom’ between the seventeenth and the nineteenth centuries.”²¹ Luxemburg thus grasped the essence of imperialism in stating that “[i]mperialism is the political expression of the accumulation of capital in its competitive struggle for what remains still open of the non-capitalist environment.”²² In her lifetime, competitive colonialism was the outcome. Colonialism was followed by neocolonialism and is today succeeded by global imperialism. To put it differently, the need for capital to expand to non-capitalist spaces remains a reality in the twenty-first century. The attempt to occupy all noncapitalist space manifests itself today in what David Harvey calls “accumulation by dispossession.” It involves, among other things, the privatization of the public sector and essential services such as water, education, and health and the exploitation of land and natural resources of the poor world.²³ The Luxemburg thesis that “imperialism belonged inseparably to capitalism” has thus stood the test of time.²⁴ Luxemburg was also among the first to link the growth of the armaments industry (in modern parlance the military-industrial complex) to the problem of accumulation of capital, eventually leading to “lawlessness and violence” in international relations.²⁵ The two world wars followed the publication of her book. In the contemporary world the “lawlessness and violence” of global capitalism is manifesting itself

Institutions More Accountable, FOREIGN AFF., July-Aug. 2001, at 2; Andrew Moravcsik, *Is there a ‘Democratic Deficit’ in World Politics?: A Framework for Analysis*, 39 GOV'T & OPPOSITION 336 (2004); DANIELE ARCHIBUGI ET AL., GLOBAL DEMOCRACY: NORMATIVE AND EMPIRICAL PERSPECTIVES (2012).

²¹ Joan Robinson, *Introduction* to ROSA LUXEMBURG, *THE ACCUMULATION OF CAPITAL* 28 (1951).

²² ROSA LUXEMBURG, *THE ACCUMULATION OF CAPITAL* 446 (Agnes Swarzschild trans., 1951).

²³ DAVID HARVEY, *THE NEW IMPERIALISM* (2003); DAVID HARVEY, *A BRIEF HISTORY OF NEO LIBERALISM* (2005).

²⁴ V.G. KIERNAN, *MARXISM AND IMPERIALISM* 22 (1974).

²⁵ LUXEMBURG, *supra* note 22, at 446.

in armed interventions and wars against a number of countries that include Afghanistan, Iraq, and Libya.

In view of the fact that the relationship between capitalism and imperialism is critical to an objective assessment of the virtues of capitalism it is unsurprising that it is most often neglected by leading theorists of capitalism. For instance, in his well-known work, *Capitalism and Freedom*, Milton Friedman does not mention imperialism at all.²⁶ The eminent American sociologist Peter Berger in his book, *The Capitalist Revolution* (1991), instead goes on to explore the reasons why imperialism in the form of colonialism was not as terrible as it is made out to be.²⁷ In his seminal works, *A Theory of Justice* (1971) and *The Law of Peoples* (1999), John Rawls traced a nation's wealth to "its political culture [and to the] moral qualities of its people" entirely ignoring the role of imperialism.²⁸ But, as Seyla Benhabib, Professor of Political Science and Philosophy at Yale University observes in response:

These claims rest less on empirical evidence and more on Rawls's methodological takeoff point that considers liberal peoples as living in well-ordered societies, whose good fortune is a consequence of their own institutions and moral nature. In this remarkably Victorian account of the wealth of nations, the plunder of Africa by all western societies is not mentioned even once; the global character of the African slave trade and its contribution to the accumulation of capitalist wealth in the United States and the Caribbean basin are barely recalled; the colonization of the Americas disappears from view; and it is as if the British never dominated India and exploited its riches. These historical omissions are of such magnitude in a work on the Law of Peoples that we have to ask why Rawls has imposed blinders which [sic] affect his sight of international justice so drastically.²⁹

Implicit in the Benhabib response is the understanding that imperialism is a reality even today. Therefore, before the virtues of the capitalist system are celebrated there needs to be deep reflection on its relationship with imperialism.

It is the absence of such introspection that explains why despite the criticisms directed against capitalism it is still seen "as an acceptable and even desirable order of things: the only possible order, or the best of

²⁶ FRIEDMAN, *supra* note 8.

²⁷ PETER BERGER, *THE CAPITALIST REVOLUTION* 121 (1991).

²⁸ SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS* 99 (2004).

²⁹ *Id.* at 99–100.

all possible orders.”³⁰ The French sociologists Luc Boltanski and Eve Chiapello call the ideology that justifies continued engagement with capitalism as “the spirit of capitalism.”³¹ They define it as “the set of beliefs associated with the capitalist order that helps to justify this order and, by legitimating them, to sustain the forms of action and predispositions compatible with it.”³² A crucial dimension of the “spirit of capitalism” is said to be the fact that it provides the standards that make it possible to condemn the discrepancy between the workings of capitalism and “normative conceptions of the social order.”³³ The critique of capitalism is in this sense viewed as an integral part of the capitalist order as it “compels its spokesmen to justify that process in terms of the common good.”³⁴ The spirit of capitalism is renewed in each era.

The acceptance of this critique is not simple deception or illusory. It is for real. There is equally a “spirit of international law,” a theme that is addressed later, which sees mainstream international law scholars (MILS) co-opting the critique of international law and institutions to make it respond to the global common good. But in the TWAIL view, the response of liberal critics of both capitalism and modern international law is always partial and incomplete for it does not account for the phenomenon of imperialism. It is therefore not surprising that a Friedman, or a Berger, or a Rawls neglect to speak of imperialism or find ways of legitimizing it. But even critics of capitalism like Boltanski and Chiapello fail to explore the relationship between capitalism and imperialism. The term “imperialism” also does not appear in the index of most textbooks on international law. The short point is that capitalism can be critiqued at two fundamental levels. These may be termed the domestic and international critiques. The *domestic critique* does not tell us the full story of the troubling impact of capitalism and is in the final analysis more easily disposed of than the external critique. The *international critique* refers to the integral relationship of capitalism and imperialism. In short, TWAIL contends that unless capitalism is restructured in ways that snap the relationship between capitalism and imperialism it cannot promote the global common good.

³⁰ LUC BOLTANSKI & EVE CHIAPPELLO, *THE NEW SPIRIT OF CAPITALISM* 10 (2005).

³¹ *Id.* at 8.

³² *Id.* at 10.

³³ *Id.* at 25.

³⁴ *Id.* at 28.

II THE NEW IMPERIAL ECONOMIC, LEGAL AND POLITICAL FORMATION

From a TWAIL perspective the essential relationship between capitalism and imperialism, and its different phases, is the key to understanding the evolution of international law. Old imperialism or colonialism influenced the development of international law in a fundamental way. TWAIL scholars situate the colonial project at the very heart of international law.³⁵ Anghie has demonstrated how international law developed in reference to and continues to reproduce a “dynamic of difference” that characterized the civilized/barbarian distinction used to justify the colonial project. More specifically, colonialism shaped international law doctrines relating to occupation declaring among other things certain inhabited lands *terra nullius*; affirmed the validity of unequal treaties; established the doctrine of recognition that allowed some states to define the conditions under which entry could be sought to the club of civilized nations; fashioned expedient rules dealing with alien rights; and later invented the mandate and the trusteeship systems; to justify a range of colonial practices. Colonialism was followed by neo-colonialism.

A. Neocolonialism

The second phase of imperialism was termed “neo-colonialism” by Kwame Nkrumah, the leader of independent Ghana, who was among the first to use the phrase in his well-known work, *Neo-Colonialism, the Last Stage of Imperialism* (1965). He noted that there was continuing exploitation of newly independent countries by foreign capital in the postcolonial period. For their part, Third World countries attempted to transform the body of international law rules through using the forum of the U.N. General Assembly where they possessed a majority. It led to the adoption of important resolutions in the 1960s and 1970s, culminating in 1974 with the Program and Declaration of Action on a New International Economic Order and the Charter of Economic Rights and Duties of States.³⁶ In this period the advanced industrialized world did make some conciliatory

³⁵ ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 4 (2005).

³⁶ MOHAMMED BEDJAOU, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* (1979).

gestures. For example, the General Agreement on Tariffs and Trade (GATT) was amended in 1966 to include provisions that promised special and differential treatment for Third World countries, albeit in soft law language. But, by and large, all attempts to translate the program for a new international economic order into international agreements were unsuccessful. The developing world even failed to adopt soft law codes of conduct on transnational corporations and transfers of technology. The negotiations to revise the Paris Convention on Industrial Property Rights also collapsed. Meanwhile, the primary commodity and debt crises in the 1980s compelled developing countries to accept structural adjustment programs imposed by the international financial institutions and give up the demand of change in the workings of the world economy.³⁷ The neocolonial exploitation of the Third World countries thus came to be institutionalized.

B. Global Imperialism

Neocolonialism has today been replaced by global imperialism, or imperialism in the era of globalization. It is constituted by *a new imperial economic, legal, and political formation* characterized by at least eight features representing both the sharpening of neocolonial facets and the introduction of new elements.

First, global imperialism is marked by the dominance of international finance capital, a hyper mobile capital constituted substantially of speculative capital de-linked from production, which can move millions of dollars from one territory to another at the press of a button. Its ascendancy is, as noted earlier, the function of growing inequalities in the world coupled with deregulation of financial markets. Global imperialism's immense clout explains the fact that despite causing the global financial crisis, including the Euro Zone crisis, and the trillion dollar bailouts, the policies in the financial sector are still shaped at its behest. As an UNCTAD report observes "[i]t is . . . somewhat ironic that the financial agents that caused the crisis should have become the judges of the suitability of public policies adopted to contain its damage."³⁸ To put it differently, even the advanced capitalist states find it difficult to regulate finance capital.

³⁷ B.S. Chimni, *International Financial Institutions and International Law: A Third World Perspective*, in *INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW* 31, 36 (Daniel D. Bradlow & David B. Hunter eds., 2010).

³⁸ UNCTAD, *supra* note 11, at VIII.

Second, global imperialism is characterized by the adoption of laws for the creation and protection of *international* property rights. In a very essential sense capitalism is a legal institution and fundamental to the workings of capitalism is the legal protection of property rights. Jeremy Bentham famously stated that “[p]roperty and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.”³⁹ Property rights in the era of globalization are not merely protected by national laws and institutions but increasingly by international laws and institutions. It is leading to the “internationalization of property rights,” by which is meant their specification, articulation and enforcement through international laws and institutions. A good example is intellectual property rights protected by the Agreement on Trade Related Intellectual Property Rights (TRIPS) and the enforcement powers of the WTO. It needs to be said that international property rights per se are not a problem. It is more the fact that international property rights are instituted in ways that benefit the TCC as against the interests of the TOC. The undermining of the right to health by a strong patent regime adopted to benefit giant multinational pharmaceutical corporations is a case in point.⁴⁰

Third, the era of global imperialism is marked by the growing preeminence of the doctrine of free trade as reflected, among other things, in the importance of WTO as an institution. However, the counsel to developing countries to rapidly liberalize international trade overlooks the history of free trade which shows that developed countries industrialized behind high tariff walls and also the range of protectionist measures in place even today (e.g., in agricultural commodities).⁴¹ The ideology of free trade also ignores the troubling consequences of trade liberalization on the industry and workers in the developing world in the absence of adjustment measures. The WTO regime, which institutionalizes the principle of free trade, has not proved beneficial for Third World countries. Yet in the ongoing Doha round of trade negotiations, dubbed the “development round,”

³⁹ David Kennedy, *Some Caution About Property Rights as a Recipe for Economic Development*, 1 ACCT. ECON. & LAW 7 (2011) (quoting JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 69 (Oceana Publications 1975)).

⁴⁰ MICHELE BOLDRIN & DAVID K. LEVINE, *AGAINST INTELLECTUAL MONOPOLY* (2008).

⁴¹ HA-JOON CHANG, *KICKING AWAY THE LADDER* (2002); B.S. Chimni, *Developing Countries and the GATT/WTO System*, in *DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM* (Joel Trachtman & Chantal Thomas eds., 2009).

the industrialized world is insisting on further tariff concessions from the Third World countries.

Fourth, the era of global imperialism is marked by new modes of primitive accumulation aptly termed “accumulation by dispossession” as it takes place at the expense of core rights of peoples.⁴² In a bid to overcome the loss of dynamism global capitalism is encroaching on all available non-capitalist spaces in the Third World. Thus, for instance, witness the privatization and commodification of basic public services like the provision of water, education and health in Third World countries under the influence of TCC. A further example of “accumulation by dispossession” is bio-imperialism, which involves the exploitation of the biodiversity of the global south by biotechnology multinationals.⁴³ There is also the acquisition of land at cheap prices by TNCs, often through state intervention. In such cases there is little effort to take care of the rights of the displaced communities. Indeed, the age of global imperialism is seeing a return to the colonial vision of development for the global south that is all about “development of resources not of people.”⁴⁴ The process of “accumulation by dispossession” is helped by inequitable international investment laws, especially Bilateral Investment Protection Treaties (BITS), as these ignore societal and environmental concerns.

Fifth, global imperialism has meant the weakening of labor rights through, among other things, the erosion of international labor law. Hard law conventions adopted by the International Labor Organization (ILO) over decades are being neglected in favor of soft law texts such as the 1998 ILO Declaration on Fundamental Principles and Rights at Work that incorporate a minimalist position.⁴⁵ Indeed, labor flexibility has today become the mantra for global capital allowing it to use a global reserve army of labor to enhance its profits. It has had a devastating effect on millions of workers and their families, especially in times of economic crisis. This is especially true in Third World countries with no form of social security in place.

⁴² HARVEY, *supra* note 23.

⁴³ Arturo Escobar & Mauricio Pardo, *Social Movements and Biodiversity on the Pacific Coast of Colombia*, in ANOTHER KNOWLEDGE IS POSSIBLE: BEYOND NORTHERN EPISTEMOLOGIES 288 (Boaventura de Sousa Santos ed., 2007).

⁴⁴ H.W. Arndt, *Economic Development: A Semantic History*, 29 ECON. DEV. & CULTURAL CHANGE 457, 463 (1981).

⁴⁵ Philip Alston, ‘Core Labor Standards’ and the Transformation of the International Labour Rights Regime, 15 EUR. J. INT’L L. 457 (2004).

Sixth, in the age of global imperialism there are innumerable hurdles to both voluntary and forced migration. While goods, capital and services are mobile, human bodies are constrained by borders. In the process of construction are fortress North America and fortress Europe. The general tightening of policies against economic migrants, other than for highly skilled workers, is well known. What is not so widely known is the restrictive regime established to prevent the entry of asylum-seekers. These measures include the establishment of a non-entrée regime enforced through interdiction, visas, carrier sanctions, and the idea of a safe country of origin; and deterrence measures including detention and dispersion of asylum seekers, as well as withdrawal of welfare measures and the right to seek employment.

Seventh, global imperialism is characterized by the relocation of crucial aspects of the economic sovereignty of states to a network of international institutions that are coming to constitute an emerging global state.⁴⁶ Stoler has noted that even in the colonial era there were “gradated variations and degrees of sovereignty and disenfranchisement.”⁴⁷ The loss of economic sovereignty to international institutions is a contemporary variant. For Third World countries, including emerging economies, it means the loss of crucial policy space in the realm of monetary, industrial, technology, trade, and environmental policies. The result of these developments is that Third World countries cannot adopt suitable policies for the advancement of the welfare of its people. What the industrialized world could do yesterday, Third World countries cannot do today.

Finally, a key feature of global imperialism is that the international law relating to the use of force is aligned to global values to advance an imperial agenda. Take for instance the recent doctrine of responsibility to protect (R2P). The conceptual shift it represents over the earlier doctrine of humanitarian intervention exemplifies the emerging relationship between the use of force and global values. As Anne Orford explains: “With the emergence of the responsibility to protect concept, we see a movement away from that representation of intervention as an exceptional interference in the domestic affairs of States, and towards the representation of international presence as authorized, and indeed mandated, by international legal

⁴⁶ Chimni, *supra* note 7.

⁴⁷ Stoler, *supra* note 3, at 139.

obligations.”⁴⁸ Sovereign political spaces are thus replaced by a global human rights space in which force can legitimately be used. Libya can be said to be the first formal victim of the R2P doctrine. It is explicitly mentioned in United Nations Security Council (UNSC) Resolution 1973 of March 2011, used to justify NATO intervention in Libya.⁴⁹ Another example of the alignment of the law relating to the use of force to global values is the idea of “war on terror.” It facilitates the assumption that any use of force to deal with terrorism cannot involve the violation of sovereign space.⁵⁰ This understanding has served to legitimize the use of force against Afghanistan and Iraq.⁵¹

In sum, a new imperial economic and legal formation has come into existence that is backed by a political formation constituted of the advanced capitalist states and a complex network of international institutions having the capability of using unrivalled force to realize the interests of global imperialism.

III

THE NEW IMPERIAL SOCIAL FORMATION

But the claim that global imperialism characterizes the extant global order seems in apparent contradiction with the reality of the rise of emerging economies such as Brazil, China, and India. It raises questions about the continuing usefulness of the category “imperialism” in characterizing the extant international economic order. After all, China and India are large and populous states that have, through sustained high growth rates, succeeded in reducing poverty within the frame of a liberal international economic order that is being labeled global imperialism. The success of emerging economies would seem to necessitate a change in the TWAIL view

⁴⁸ Anne Orford, *Jurisdiction without Territory: From the Holy Roman Empire to the Responsibility to Protect*, 30 MICH. J. INT’L L. 981, 999 n.87 (2009).

⁴⁹ The preambular paragraphs of the resolution inter alia speak of “the responsibility of the Libyan authorities to protect the Libyan population.” S.C. Res. 1973, U.N. Doc. S/Res/1973 (Mar. 17, 2011).

⁵⁰ As Costas Douzinas points out:

Because terror is not a nation, the war on terror appears as police action, as the war of law. It makes us imagine the world as one, through normative, legal and moral regulation, and the enemies as outlaws. The terrorist as criminal shares the one legal order and as evil-doer repudiates our common ethics.

Costas Douzinas, *Postmodern Just Wars and the New World Order*, 5 J. HUM. RTS. 355, 368 (2006).

⁵¹ Antony Anghie, *The War on Terror and Iraq in Historical Perspective*, 43 OSGOODE HALL L.J. 45.

that imperialism shapes international law and institutions even today, especially at a time when the centers of capitalism are faced with serious economic crises.

TWAIL, however, contends that *a new imperial social formation* is in the process of emerging in which, among other things, a global class divide is overlaying the North-South divide. It is particular classes in the emerging economies, to be precise the transnational fractions of the capitalist class, and a certain section of the middle class, that are gaining from the growth in the era of accelerated globalization. The poor still constitute large numbers of the population. For example, persons below the poverty line alone constitute at least 400 million people in India. But the loss of policy space to international economic institutions does not allow their concerns to be addressed. Thus a new imperial social formation has come into being.

Two questions arise here: First, is there sufficient evidence for the growth of transnational capital in the emerging powers? Second, in what ways has the growing influence of TCC in the emerging economies shaped their response to the structures, laws and institutions of global imperialism? In sum, can the claim of a new imperial social formation in which the TCC from the Third World is playing an important role be sustained?

Addressing the first question, Jerry Harris, an important contributor to the debate on the emergence of a TCC, observes that the TCC of the developing countries “are not the obedient junior partners of the previous imperialist era; rather they are emerging as independent players and rebalancing global power.”⁵² He points out that the “cross-border mergers and acquisitions from Brazil, Russia, India and China climbed to over \$70bn, with 70% directed to the Americas and Western Europe.”⁵³ Speaking of China, Harris notes that in terms of its outward expansion “of the top 100 non-financial corporations in the developing world, China and Hong Kong account for 34, with 600 owned foreign affiliates. These 34 corporations had foreign assets of \$161bn, foreign sales of \$83bn and employed 848,672 foreign workers as of 2004.”⁵⁴ In the last decade or so “Indian companies

⁵² Jerry Harris, *Statist Globalization in China, Russia and the Gulf States*, 73 SCI. & SOC'Y 6, 7 (2009); Peter Gammeltoft, *Emerging Multinationals: Outward FDI from the BRICS Countries*, 4 INT'L J. TECH & GLOBALIZATION 1, 5–22 (2007).

⁵³ Harris, *supra* note 52, at 7.

⁵⁴ *Id.* at 20.

have received government approvals to invest in 100 different countries . . . and, as of 2004, Indian companies were running businesses in 90 different countries all over the world.”⁵⁵ In 2006, Brazil exported capital worth \$18 billion.⁵⁶ In the case of China and to an extent India (and also Russia and the Gulf States), transnational capital is expanding through statist globalization; meaning, globalization led by state corporations leading to “transnational accumulation through state corporate ownership.”⁵⁷ For instance, “State-owned Chinese transnationals already control 60% of the country’s cross-border investments, with similar numbers for India, Thailand, Indonesia, South Korea, and Malaysia.”⁵⁸ It also needs to be noted at this point that the emerging economies also hold “substantial amount of US treasuries as currency reserves” and are “increasingly investing in the securities markets through recently established Sovereign Wealth Funds.”⁵⁹ Business houses from the emerging economies are also participating in the recent global phenomenon of leasing out large tracts of farmland, especially in Sub-Saharan Africa, albeit this phenomenon is not confined to investors from emerging economies.⁶⁰ Finally, it is important to stress that the TCC, along with influential segments of the middle class, have come to occupy the ideological heights in the emerging economies. Therefore, the policy influence that the TCC exercises goes beyond what is indicated by sheer numbers.

What then does the increasing export of capital from traditional capital importing countries and the growing influence of TCC ideology mean? While the Harris conclusion that TCC from emerging powers are no longer junior partners is somewhat exaggerated, it may be said that the interest of transnational capital in the emerging powers broadly coincides with that of its counterparts in the advanced capitalist world. In the area of finance, trade and investment, the TCC has used its economic clout and ideological primacy to shape the foreign *economic* policy of emerging powers. This understanding

⁵⁵ Jørgen Pederson, *The Second Wave of Indian Investments Abroad*, 38 J. CONTEMP. ASIA 613, 625 (2008).

⁵⁶ Leany Lemos & Danielo Campello, *The Non-Ratification of Bilateral Investment Treaties: A Story of Conflict in a Land of Cooperation* (2011), available at http://www.uc.cl/icp/webcp/img/pdf/LEMOS_CAMPELLO_FINAL.pdf.

⁵⁷ Harris, *supra* note 52, at 29.

⁵⁸ *Id.* at 9.

⁵⁹ Lysandrou, *supra* note 13, at 329.

⁶⁰ Olivier De Schutter, *The Green Rush: The Global Race for Farmland and the Rights of Land Users*, 52 HARV. INT’L L.J. 503, 504 (2011).

explains why there is less and less opposition of these powers to structures of global capitalism and international laws and institutions that support it despite *continuing to be subjected to imperialist exploitation*. The emerging economies no longer pursue their traditional anti-imperialist policies. There are only halfhearted attempts to resist the loss of, or to retrieve critical policy space from, international economic institutions. Instead, emerging economies are carrying out neoliberal reforms to facilitate the entry of capital, goods and services from the industrialized world. John Ikenberry, Professor of Politics and International Affairs at Princeton University, is therefore correct in his observation that “China and other emerging great powers do not want to contest the basic rules and principles of the liberal international order; they wish to gain more authority and leadership within it.”⁶¹ While emerging economies may not have the same approach to all elements of the liberal international order, they do, as Ikenberry observes, “have deep interests in preserving that system.”⁶² This became abundantly clear in the aftermath of the global economic crisis. Instead of articulating an alternative vision, key powers like Brazil, China, and India, on whose economic success rested hopes of riding the crisis, simply sought more influence in the liberal international order. They only wanted a greater voice in global economic governance. To put it differently, under the influence of the TCC the emerging powers do not see the existing international economic order as an imperial system. It is believed that the liberal international system can be incrementally reformed and made representative, effective, and just. In these circumstances, “an especially perverse outcome of the global economic crisis might . . . be the consolidation of a more broadly embedded, multipolar neoliberal order.”⁶³ The support for a liberal international economic order signals the absence of strong opposition to an imperialist global order, a state of affairs that is crucial to its continuance and legitimacy.

But while the multipolar neoliberal economic orders may be good for some classes, the vast majority of the people in the emerging powers are negatively impacted. In other words, contrary to what Hardt and Negri suggest, the emerging powers remain the subject of

⁶¹ John Ikenberry, *The Future of the Liberal World Order: Internationalism After America*, FOREIGN AFF., May-June 2011, at 56–57 (2011).

⁶² *Id.* at 58.

⁶³ JAMIE PECK, CONSTRUCTIONS OF NEOLIBERAL REASON 276 (2010).

imperialist exploitation. Therefore, in democratic emerging powers an anti-imperialist sentiment continues to have a strong presence among ordinary citizens, which compels governments at times to oppose particular international economic policies and laws. The opposition acquires an edge when it comes to the politics of imperialism. The foreign policy of a state is a function of a combination of cultural, historical, and geo-political factors.⁶⁴ In the case of countries that were colonized, or subjected to colonial practices, there is strong attachment to the principle of sovereign equality of states. It is the reason why the foreign policy of emerging economies like China and India often departs from its foreign economic policy, as in the instance of opposition to the idea of unilateral armed humanitarian intervention or the R2P doctrine (although the two did not oppose the intervention in Libya they have expressed concern as to the regime change form it eventually assumed and hinted that they would oppose such NATO interventions in the future).

Among the emerging powers, China alone has the development trajectory, material wherewithal, and the inclination to be an active part of the imperial order in the twenty-first century. In this context, it is worth touching on the debate on the increasing trade and investment relation between China and Africa. It is the subject of much analysis and contrasting conclusions. While some see the relation as being mutually beneficial, a number of scholars argue that it has a neocolonial character.⁶⁵ There is concern about the “poor labor and environmental practices” of Chinese companies, but more significantly Chinese “support for illiberal regimes and the increasing securitization of Africa’s oil sector.”⁶⁶ The world has to wait and watch how matters evolve.

IV THE NEW IMPERIAL FORMATION AND SPIRIT OF INTERNATIONAL LAW

The new imperial formation is generating a “new spirit of international law” that justifies engagement with it. A few words therefore need to be said on the subject. The success of capitalism has

⁶⁴ Henry A. Kissinger, *Domestic Structure and Foreign Policy*, in *INTERNATIONAL RELATIONS AND FOREIGN POLICY: A READER IN RESEARCH AND THEORY* 261–76 (James N. Rosenau ed., 1969).

⁶⁵ Fantu Cheru & Cyril Obi, *Chinese and Indian Engagement in Africa: Competitive or Mutually Reinforcing Strategies?*, 64 *J. INT’L AFF.* 91, 106–07 (2011).

⁶⁶ *Id.* at 105.

been its ability to regenerate and reinvent itself to represent different phases of capitalism as promoting the common good, what Boltanski and Chiappello called the “spirit of capitalism.”⁶⁷ There is a parallel story of international law; that is of the endless renewal of “the spirit of international law.” Each era has seen the production of new laws and institutions that promise liberation and emancipation from the ills that characterize the world order of the day. For instance, colonial international law was able to reinvent itself as a democratic and universal international law through various initiatives that supported decolonization. It then met the charge of being a neo-colonial international law by evolving, among other things, an international development law. In the era of global imperialism entirely new branches of international law have emerged that promise to address the urgent problems of the day and promote the welfare of global peoples renewing the spirit of international law. The rapid development of international human rights law in particular lends credence to international law’s pursuit of the global common good. Indeed, international human rights law has arguably become “the only global vision of social justice currently available.”⁶⁸ It has replaced all other “isms” and promises a just world order.

Mention may also be made of a rapidly evolving international criminal law with the International Criminal Court (ICC) at its heart. There are conventions that seek to address the problems of organized crimes, including the trafficking and smuggling of people, as also combating corruption.⁶⁹ The rapid development of international laws to combat international terrorism has further renewed faith in international law. A dozen international treaties and a Counter Terrorism Committee (CTC) established by the U.N. Security Council hold out the promise of effectively fighting international terrorism through international cooperation.⁷⁰ The need to develop an

⁶⁷ BOLTANSKI & CHIAPPELLO, *supra* note 30.

⁶⁸ SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE 231 (2006); *see also* SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010).

⁶⁹ *See* United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, Nov. 15, 2000, 2225 U.N.T.S. 209; United Nations Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41.

⁷⁰ Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 704 U.N.T.S. 220; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 1778; Convention on the Physical Protection of Nuclear Material, Mar. 03, 1980, 1456 U.N.T.S. 124;

appropriate response to the current problem of piracy further fortifies the spirit of international law.

The work of bodies like the International Law Commission (ILC), United Nations Conference on International Trade Law (UNCITRAL), and the Human Rights Council (HRC) also give the impression of a constantly developing international law that plug gaps in global law and facilitate international cooperation to address pressing problems.

International institutions also help renew faith in international law by co-opting critique in the same way as capitalism does. The ability of international institutions to take critique and turn it into an instrument of its own legitimacy and advancement is a remarkable story. The World Bank is a good example of how critique is co-opted to strengthen the institution. In order to deflect the censure it has faced over the years the Bank has adopted cosmetic policy changes to represent itself today as being gender sensitive, green, and a friend of the poor.⁷¹

The role of the community of international lawyers is also crucial in renewing the spirit of international law. A narrative of progress informs much mainstream international law scholarship helping reaffirm faith in international law. The fact that international law has come to be addressed by key thinkers of our times, be it a John Rawls or a Jürgen Habermas, gives the language of international law further salience.⁷²

Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Feb. 24, 1988, 1589 U.N.T.S. 474; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 201; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 201; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 2122 U.N.T.S. 359; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Dec. 14, 1973, 1035 U.N.T.S. 167; International Convention against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 256; International Convention for the Suppression of the Financing of Terrorism, Dec. 09, 1999, 2178 U.N.T.S. 197; International Convention for the Suppression of Acts of Nuclear Terrorism, Apr. 13, 2005, 2445 U.N.T.S. 89.

⁷¹ MICHAEL GOLDMAN, *IMPERIAL NATURE: THE WORLD BANK AND STRUGGLES FOR SOCIAL JUSTICE IN THE AGE OF GLOBALIZATION* (2006).

⁷² See, e.g., JOHN RAWLS, *LAW OF PEOPLES* (1999); Jürgen Habermas, *The Constitutionalization of International Law and the Legitimation Problems of a Constitution of World Society*, 15 *CONSTELLATIONS* 444 (2008).

In sum, the language of international law constantly offers hope by giving the impression that it is addressing lags and filling gaps. In that way the “new spirit of international law” legitimizes the new imperial social, economic and political formation. It is not as if the renewal of the spirit of international law in the era of accelerated globalization is altogether without substance. The world cannot do without international law in dealing with global problems that confront humanity in the twenty-first century. It is only through the international legal process that problems such as the global ecological crises can be addressed. Yet international law also facilitates the imperial project. The double life of international law thus parallels the double life of capitalism; the latter is also not altogether without achievement. It accounts for why TWAIL advocates engagement with it. It stays away from forms of critique that invite the charge of legal nihilism. But TWAIL needs to articulate and clarify the goals and values to which it is committed and ways in which these can be embodied in contemporary international law.

V

FUTURES: TOWARDS GLOBAL COMMON GOOD

It is important in other words for TWAIL to disclose its normative preferences so that its critique is not seen as the carping of those without the responsibility of articulating alternative economic and political arrangements for promoting the global common good. Since the lesson of history is that there are too many contingencies and uncertainties for blueprints to work, TWAIL only needs to offer hazy maps of normative futures in order to meet the charge of nihilism. In this all too brief section some tentative steps are taken in that direction. Even the hesitant steps are taken with the ready recognition that, as the Canadian political philosopher James Tully points out, the meaning of “global common good” is not “universal and transcendental, but what comes to be seen as agreeable in the course of transformative negotiations, fitting relative to circumstances, and open to review and renegotiation by future generations.”⁷³

In their book, *Commonwealth*, Michael Hardt and Antonio Negri define “the common” to mean first, “the common wealth of the material world—the air, the water, the fruits of the soil, and all nature’s bounty . . . the inheritance of humanity as a whole, to be

⁷³ James Tully, *Dialogue*, 39 POL. THEORY 145, 150 (2011).

shared together.”⁷⁴ Second, they indicate it to mean “those results of social production that are necessary for social interaction and further production, such as knowledges, languages, codes, information, affects, and so forth.”⁷⁵ The latter are important elements of the “common” because as Negri notes “there is an emergent hegemony of immaterial production compared with other forms of production,” replacing “the previous hegemony of industrial production.”⁷⁶ It involves the creation of “immaterial products: knowledge, information, communications, linguistic and emotional relations.”⁷⁷ To these meanings may be added a third which is implicit in the Hardt-Negri understanding of the “common”: the term “common” may be used to denote the production of goods and services that are necessary to sustain a life of dignity for all peoples of the world.

In working towards the “the political project of instituting the common” Hardt and Negri proceed by rejecting false alternatives: it is to be “neither private nor public, neither capitalist nor socialist” opening “a new space for politics.”⁷⁸ They are not alone in seeking to transcend the binary of capitalism-socialism to realize common good. Dos Santos argues that “[b]eyond the state and the market, a third social domain must be reinvented: a collective, but not state-centered, private but not profit-oriented, a social domain in which the right to a solidarity-oriented transformation of property rights will be socially and politically anchored.”⁷⁹ Both the visions anticipate a substantial role for the state in transmuting property rights and regulating the market in ways that reduce class divides in society. The state will be expected to establish regulatory and redistributive policies that do not permit a sharp concentration in ownership of wealth and promises all citizens work and a life of dignity.⁸⁰ A solidarity-oriented transformation of property rights in the advanced capitalist world will also help take an important step towards delinking the relationship between capitalism and economic imperialism as global accumulation of capital receives less priority. The Third World state will have to, at its end, oppose policies that facilitate “accumulation by

⁷⁴ Michael Hardt & Antonio Negri, *COMMONWEALTH* viii (2009).

⁷⁵ *Id.*

⁷⁶ Antonio Negri, *EMPIRE AND BEYOND* 127 (2006).

⁷⁷ *Id.* at 128.

⁷⁸ Hardt & Negri, *supra* note 74, at ix.

⁷⁹ Boaventura de Sousa Santos, *Human rights as an Emancipatory Script? Cultural and Political Conditions*, in *ANOTHER KNOWLEDGE IS POSSIBLE: BEYOND NORTHERN EPISTEMOLOGIES* 31 (Boaventura de Sousa Santos ed., 2007).

⁸⁰ Lysandrou, *supra* note 13, at 328.

dispossession.” It will have to ensure that the public sector and services, natural resources (including bio-resources) and land are not made the object of primitive accumulation. On the other hand, the mix of private and public is important for a system founded on socialist property alone produces its own forms of inequalities and modes of domination.⁸¹ The “commons” can be made accessible to all as long as they are not made the subject of exclusionary property rights. Arriving at an appropriate combination of private and public instrumentalities is not an impossible task. Take for example, the case of intellectual property rights (IPRs). Are strong patent rights the only way to encourage invention and innovation? Can we not find ways of rewarding scientists and technologists and addressing the concerns of private actors in ways that do not inhibit the realization of public interests? Can we not for instance have a global patent system that allows pharmaceutical firms to make reasonable profits without negatively impacting the right to health of TOC?

For being able to achieve an appropriate system of global property rights, as also leave States sufficient policy space to advance the welfare of TOC, legal regulation must above all, to use the words of Hardt and Negri again, give up any “vain attempt to bring unity to global legal systems (based on international law or consensus among nation-states).”⁸² The absence of uniform global standards will allow Third World states to adopt laws that suit their genius and stage of development. The retrieved policy space can be significant in promoting the welfare of its peoples. The necessity of the act of retrieval is coming to be accepted even in international official circles and texts. For instance, the 2011 U.N. Guiding Principles on Business and Human Rights to implement a “Protect, Respect Remedy” framework observes that “States [should maintain] adequate domestic policy *space* to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.”⁸³ A European Parliament (EP) resolution on international investment policy, adopted on April 6, 2011, likewise calls on the European Commission “to include in all future agreements specific clauses

⁸¹ Boris Kagarlitsky, *THE TWILIGHT OF GLOBALIZATION: PROPERTY, STATE AND CAPITALISM* 55 (Renfrey Clark trans., 2000).

⁸² Hardt & Negri, *supra* note 74, at 373.

⁸³ Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

laying down the right of parties to the agreement to regulate, inter alia, in the areas of protection of national security, the environment, public health, workers' and consumers' rights, industrial policy and cultural diversity."⁸⁴ The new thinking is beginning to have an impact as a "new generation" of international investment agreements are coming to be adopted that explicitly recognize competing policy objectives such as the protection of society and the environment.⁸⁵

Given the growing significance of international finance capital in the global economy there is also an urgent need to safeguard policy space to permit its re-regulation. The European Parliament resolution, for instance, states that "speculative forms of investment" should not be protected in international investment agreements.⁸⁶ But that is not enough. There is the need to adopt hard laws that allow states to constrain the mobility of hyper-mobile speculative capital. In the least, there should be no insistence by international financial institutions on capital account convertibility. A financial transaction tax (FTT) would further help to discourage speculative capital and garner resources to finance development projects in the Third World.

There also need to be other strategies put in place to defend or retrieve existing policy space. Two initiatives of Brazil illustrate what these can be, even if they represent half-hearted attempts in that direction. First, even as it welcomes foreign investment, Brazil has stopped signing instruments like bilateral investment protection treaties (BITS) as these do not balance the rights of foreign investors with the rights of host peoples.⁸⁷ Second, Brazil has formulated an effective and aggressive dispute settlement strategy in the WTO to both defend and retrieve policy space (e.g., as it did in the cotton subsidy and the airline subsidies cases).⁸⁸

But it may be contended that in the face of global problems some loss of policy space or erosion of sovereignty is unavoidable if an effective response to them has to be shaped. The difficulties in defining optimal policy space may be briefly explored by referring to

⁸⁴ European Parliament Resolution on the Future of International Investment Policy, EUR. PARL. DOC. P7_TA(2011)0141 ¶ 25 (2011).

⁸⁵ Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT'L ECON. L. 1037 (2010).

⁸⁶ Resolution, *supra* note 84, ¶ 11.

⁸⁷ Lemos & Campello, *supra* note 56. Brazil concluded fourteen BITS between 1994 and 1999 with European States, but it failed to enact them and withdrew these treaties from Brazilian Congress in 2002.

⁸⁸ Gregory Shaffer et al., *The Trials of Winning at the WTO: What Lies Behind Brazil's Success*, 41 CORNELL INT'L L.J. 383 (2008).

a widely cited article written by Nobel Laureate Elinor Ostrom and others looking at the challenges of managing the global commons. To begin with, the authors also conclude that there is “no single type of property regime” that “works efficiently, fairly, and sustainably in relation to all [common property resources].”⁸⁹ The different types of property regimes that could come into play include open access, group property, individual property and government property.⁹⁰ In other words, the recommendation is that an appropriate combination of public and private measures with respect to individual areas of global commons should be worked out.

But Ostrom et al. note that any such effort has to face at least four challenges at the global level. First, there is the “scaling-up problem,” which means that “having larger number of participants . . . increases the difficulty of organizing, agreeing on rules, and enforcing rules.”⁹¹ Second, there is the “cultural diversity challenge” which further “decrease[s] the likelihood of finding shared interests and understandings.”⁹² Third, this diversity is “exacerbated by ‘north-south’ conflicts stemming from economic differences between industrialized and less-industrialized countries.”⁹³ Fourth, there is the challenge arising from the “[r]equirement of unanimous agreement as a collective-choice rule,” that is, the principle of “voluntary assent to negotiated treaties.”⁹⁴ But rather than see these challenges as offering good reasons for being flexible and giving policy space to the Global South, as, for instance, in the climate change regime, Ostrom et al. feel that these factors inhibit an optimal global response as “this allows some national governments to hold out for special privileges before they join others in order to achieve regulation, thus strongly affecting the kinds of resource management policies that can be adopted at this level.”⁹⁵ There is, of course, no denying the need for global cooperation to respond to CPR problems. Neither is there a ready formula to determine the sufficiency of policy space for countries of the Global South. But singular responses that ignore the history of imperialism are not necessarily optimal. On the other hand,

⁸⁹ Elinor Ostrom et al., *Revisiting the Commons: Local Lessons, Global Challenges*, SCIENCE, Apr. 9, 1999, at 279.

⁹⁰ *Id.*

⁹¹ *Id.* at 281.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 282.

⁹⁵ *Id.*

TWAIL has to systematically explore the question of optimal policy space in particular contexts, including CPR, to articulate balanced and imaginative solutions. Attention needs also to be paid to institutionalizing some form of global democracy, that is over and beyond democratizing the working of individual international institutions, so that people can have a direct say in shaping responses to global problems.⁹⁶ Of course, at the foundation must be participatory democratic institutions within nation-states that allow citizens an active voice in the allocation and distribution of economic resources to promote “development as freedom.”⁹⁷ The overall idea is a sustainable economy that is “subordinated to social power.”⁹⁸

Even this sketchy discussion on normative futures cannot be concluded without mentioning that any vision of global futures must find an ontological ground that gives the universe and life meaning beyond notions of “good life” that are grounded in material realities. A happy commonwealth will inevitably involve a spiritual (as opposed to religious) understanding of human flourishing. From Marx to Foucault—icons of critical thinking—the eventual driving force of both their life and work was the spiritual flourishing of humankind.⁹⁹ A spiritual vision is also critical to dealing with the human condition in times of “liquid modernity.”

CONCLUSION

But whether these imaginations of global futures will bear fruit in the twenty-first century will depend on the struggles of the TOC against the new imperial formation and the support it receives from sections of the transnational middle class and a coalition of willing Third World states. Under the influence of the TCC, global capitalism is uniting the world as never before. The TCC is truly cosmopolitan in its outlook. It does not have a home. By drawing together the world it is also enabling the unity of TOC to struggle against global imperialism to realize the global common good. But the unity of TOC has to be constructed on the basis of sustained struggles at the national level to retrieve policy space for subaltern states to regulate industrial and finance capital, decide when to liberalize trade and how

⁹⁶ Falk & Strauss, *supra* note 19.

⁹⁷ See AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).

⁹⁸ Erik Olin Wright, *Compass Points: Towards a Socialist Alternative*, 41 NEW LEFT REV. 107 (2006).

⁹⁹ See, e.g., Marx, *supra* note 16.

much, prevent “accumulation by dispossession” and promote “development as freedom.”

The road ahead is long and tortuous. But as the Arab Spring has shown a combination of mass movements, including what Asef Bayat terms “non-movements,” and nonviolent methods along with modern means of communication, precisely the kind finance capital uses, can be extremely effective in achieving set objectives. By “non-movement,” Bayat means “collective actions of non-collective actors” that is without “recognizable leadership and organization.”¹⁰⁰ Given the advances in communications technology this form of social action may assume as much importance in the future as organized social movements. At the global level what social movements will also require is the support of those Third World states that are willing to challenge the policies of imperialism. In other words, there have to be multiple strategies and sites of struggle against imperialism.¹⁰¹ Meanwhile, learning from the history of capitalism and imperialism, as also “actually existing socialism,” a tentative vision for the future needs to be articulated occupying the middle ground between an unacceptable status quo and a socialist utopia.

¹⁰⁰ ASEF BAYAT, *LIFE AS POLITICS: HOW ORDINARY PEOPLE CHANGED THE MIDDLE EAST* 14 (2009).

¹⁰¹ As Tully notes, “there is no privileged site or form of struggle against which all others can be ranked as less important or as mere reforms.” Tully, *supra* note 73, at 155.

