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Contradiction in International Human Rights Law**

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NIHILISTS, PRAGMATISTS AND PEASANTS: A DISPATCH ON CONTRADICTION IN
INTERNATIONAL HUMAN RIGHTS LAW

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Abstract: This essay seeks to help human rights advocates see what they may not have seen before. It focuses on the new UN Declaration on the Rights of Peasants drawing on insights offered by the commodity-form theory of (international) law developed by the Soviet jurist Evgeny Pashukanis. It is through this lens, and the contending views of nihilists and pragmatists, both adherents of Pashukanis, that an analysis of the contradiction inherent in what is at times a radical normative project in developing international human rights law is presented. The debate between nihilists and pragmatists – one that turns on whether to reject or strategically deploy international human rights law given international law’s capitalist background structure – serves to point up the paradox that has ostensible human rights successes perpetuate the suffering they aim to confront. Distinguishing three approaches taken in the elaboration of the Peasants’ Declaration by its economic justice advocates exposes this problem in stark terms. The concluding section offers what appears to be the only solution to the conundrum that shows our most important human rights gains also to be our losses.

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I. International Law and its Connection to Capital

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 a debate between 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 core of the nihilists' thesis, as this paper calls them, was set out a century ago by the radical Soviet jurist Evgeny Pashukanis and adopted recently 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 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.'¹ Here the key insight is that the logic that guides modern inter-state relations is the same logic that regulates individuals in capitalism because 'since its birth, and in the underlying precepts of international law, states, like individuals, interact as property owners'.² The imperial economic power and expansion of European states in the 17th century saw the formation of international law tethered to the spread of capitalism.³ The principles of international law today presuppose the legal concepts of private property and the arrangements necessary to protect and profit from them⁴ – the formal equality of states that cloaks their substantive and material inequality;⁵ sovereignty and territory in international law as functionally analogous to property ownership;⁶

¹ Evgeny B Pashukanis, 'International Law' in P Beirne and R Sharlet (eds) *Pashukanis: Selected Writings on Marxism and Law* (PB Maggs tr, Academic Press 1980) 168, 169.

² China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005) 54.

³ See, Pashukanis, *International Law*, *supra* note 1, 171-172: 'The spread and development of international law occurred on the basis of the spread and development of the capitalist mode of production.' See 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); John Linarelli, Margot E Salomon and M Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (OUP 2018).

⁴ 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.

⁵ Pashukanis captures the point: '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 1, 178.

⁶ '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

and the tenets of private property and thus contract that underpin the rules of international economic law and global finance.⁷ Commodification is woven into the form and fabric of international law with its constant need for new methods of private appropriation and geographic and material opportunities for capital investment.⁸ The logic of capital as it plays out in the *structure* of international law exposes as facetious the conventional presumption that international law is ahistorical, apolitical, and neutral.

The material *content* of international law reflects social relations founded on commodity exchange⁹ and commodity exchange under capitalism is based on, just as it reproduces, exploitative class relations of production.¹⁰ A contemporary take would add also the role of capitalism in sustaining the ‘overlapping subjugations’ of gender, race and nationality including through the exploitation of low pay or no pay labour that grease the wheels of global capitalism.¹¹ This is not to say 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’¹² and as such international law’s presuppositions give legal expression to the rapacious, endlessly expansive, and exploitative features that are capitalism. Grasping the nihilist mantle, Miéville takes the position that no ‘systematic progressive political project or emancipatory dynamic’ can be expected from international law.¹³

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 every ‘tinker’ at the surface level of institutions.¹⁴ The pragmatist, alive to the commodity-form of international law and its hazards, finds value in that ‘tinkering’; tinkering that prevents war, makes people less hungry, recognizes local culture. But the cost

1, 176. The rules addressing the prohibition on the use of force in international law are likewise rooted in the protection of property framed as territory.

⁷ See, Linarelli et al., *The Misery of International Law*, *supra* note 3.

⁸ See, A Claire Cutler, ‘New Constitutionalism and the Commodity Form of Global Capitalism’ in Stephen Gill and A Claire Cutler (eds) *New Constitutionalism and World Order* (CUP 2014) 45, 49. In his writing Miéville argues further that claims, disputation and contestation are a necessary element where the commodity form exists since private ownership implies the exclusion of others and thus coercion (‘violence’) is required to enforce what is mine and not yours. Defence of what is mine is essential lest there be nothing to the stop it becoming yours. Coercion is implicit. 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, 112-113 and ff 115.

⁹ Miéville citing Chris Arthur, *Between Equal Rights*, *supra* note 2, 119.

¹⁰ *Id.*, 92.

¹¹ On feminist materialism in international law see the incisive essays by Miriam Bak McKenna ‘Blood, Breastmilk, and Dirt: Silvia Federici and Feminist Materialism in International Law (Parts One and Two)’ *Legal Form* (2018), in the reference above McKenna draws on Chandra Talpade Mohanty, *Feminism Without Borders: Decolonizing Theory, Practicing Solidarity* (Duke University Press 2003) 28.

¹² China Miéville ‘The Commodity-Form Theory of International Law: An Introduction’ 17 *Leiden Journal of International Law* (2004) 271.

¹³ Miéville, ‘The Commodity-Form Theory of International Law’ *supra* note 8, 130.

¹⁴ *Id.*, 130-131.

of this engagement is to legitimate and help sustain the international legal system that underprops such exploitation and alienation in the first place.¹⁵

If law is part of the problem, pragmatists offer up solutions that would have the conscience of international law – international human rights law – pursued not because it is ‘law’ per se but to advance the aims of progressive constituencies – here, as Robert Knox would have it, international human rights law is a tool of ‘principled opportunism’, nothing more.¹⁶ In his own efforts to reconcile legal activism with the limits of law, Bill Bowring concludes that lawyers should ‘employ legal competence and skills modestly in the service of collective resistance and struggle’.¹⁷ This is to use law not because it is law, but in spite of law:¹⁸ While nihilists and pragmatists agree on capitalism’s deep inscription upon international law, they disagree on whether or not to reject it as a result. The tension between nihilist and pragmatist lawyers is ultimately intractable.

The commodity-form theory that Pashukanis presents posits private law as the ‘fundamental, primary level of law’¹⁹ and applies it to international law. In so far as international legal theorizing in this area remains a work in progress and complexities of international law might expose its limits,²⁰ 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 underpins efforts to elaborate a progressive normative content of international human rights law in the cutting-edge domain of the rights of peasants and indigenous peoples and how access to and control over productive resources are central to the negotiations between states and between states and local communities.

International law is a product of the market just as the invisible hand of the market is made possible by the visible hand of law;²¹ shaping and cohering capitalism in ways that other social institutions could not.²²

¹⁵ Recognition as to 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.

¹⁶ Robert Knox, ‘Marxism, International Law, and Political Strategy’ 22 *Leiden Journal of International Law* (2009) 413, 433.

¹⁷ Bill Bowring, ‘What is Radical in “Radical International Law”?’ 22 *Finnish Yearbook of International Law* (2011) 3, 29.

¹⁸ Grietje Baars, ‘#LesbiansAreHot: On Oil, Imperialism, and What it Means to Queer International Law’ 7 *Feminists@law* (2017). <http://journals.kent.ac.uk/index.php/feministsatlaw/article/view/398/990>

¹⁹ Miéville ‘The Commodity-Form Theory of International Law; An Introduction’ *supra* note 12, 283; Evgeny B Pashukanis, *Law and Marxism: A General Theory* (1929 Ink Links tr 1978).

²⁰ Just as Pashukanis’ legal nihilism – attacking law and the rule of law and advocating for the replacement of the bourgeois state with administrative regulation – paved the way for Stalin’s repression.

²¹ On the latter point, Quinn Slobodian, ‘Ordoliberalism: The Invention of International Economic Law’, Scales of Economy Conference, University of Sydney (2016).

https://www.academia.edu/28283843/Ordoliberalism_The_Invention_of_International_Economic_Law

²² 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.

To an international lawyer, this foregrounds the role of international law in instantiating the relationship between law and money; it invites us to consider how contemporary international law produces and hardens the terms under which the global economy operates; a global economy marked by great poverty, inequality, environmental devastation, and violence. A central function of international law is to secure transnational access to profit and to control over resources, including land. It works through a system of expanding commodification globally as well as 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. Accumulation aimed at higher rates of profit and control over raw materials looks to expand overseas markets for one's own products, and if you have the military clout to deploy it towards a host of aggressively self-interested ambitions. In short, the commodity-form of international law and the corresponding world that international law has helped construct expose the constraints against which international human rights law-making operates, and more specifically for current purposes peasant and indigenous rights.

The concern that nihilists and pragmatists point up serve as an illuminating heuristic device in the study of the rights of peasants and indigenous peoples, the focus of this chapter. To reject human rights for co-conspiring with capitalism's voracious and expansive tendencies would be an elitist project that removes a potentially valuable tool from the toolbox of the oppressed. But in so far as its deployment deepens the hold of capitalism, curtailing the emancipatory potential of human rights law and driving away real alternatives that go beyond contemporary capitalism, using it has a substantial cost.

II. The Commodity-Form through Three Approaches to the Peasants' Declaration

The theory that the form of international law presupposes predatory capitalism suggests that the structural features connecting capitalism to international law delimit options available for juridical reinvention by its victims. Although Pashukanis himself (and the nihilist thesis) opposed the 'pseudo-radicalism' that claimed 'bourgeois law' could be replaced by 'proletarian law',²³ being alerted to the embeddedness of capitalism in the international legal project facilitates an appraisal of the content of bottom up efforts at progressive international human rights law and how far it departs from the features of the legal form to something significantly and lastingly different. A review of the draft UN Declaration on the Rights of Peasants is insightful in this regard.

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 39th session the HRC adopted the Declaration and sent it on to the UN General

²³ Chris Arthur, 'Editor's Introduction' in Pashukanis, *Law and Marxism*, *supra* note 19, 9, 18.

Assembly recommending its parent organ do likewise.²⁴ Civil society, including the representatives of peasant communities, among them the Via Campesina peasant consortium of 167 organizations and 200,000 individual members have contributed forcefully to the Declaration and will seek to defend the instrument during the final negotiations in the General Assembly. The Declaration emerged in response to the impact of globalization on peasants and other people working in rural areas as an attempt to salvage their relationships to land, water, and nature to which they are attached and on which they depend for their livelihood and way of life. As with indigenous peoples, from the traditional role of peasants in conservation and improving biodiversity including for food production, to their over-representation among the poor, this Declaration is to offer a normative articulation of their claims.

The debates during the sessions of the Working Group display many of the usual cleavages as well as the entrenched and familiar positions of various states on particular 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 Kingdom²⁵), and the defence of the right to development by a mix of countries from the Global South (e.g.: Pakistan, China, South Africa). Invariably the content and specifics of the Declaration will reflect compromise given the respective interests of states and between states and the fervent views of civil society. That much is predictable. But one might also anticipate that the Declaration will make some notable normative contribution expounding the rights of peasants.

A review of the advanced draft Declaration exposes at least three approaches to confronting the plight of peasants that are in tension with each other. These tensions offer paradigmatic insights of the legal form at work in a progressive legal project. The first approach, and a revolutionary one, might be framed as the rise of 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’.²⁶ 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

²⁴ UN Doc A/HRC/39/L.16, 26 Sept 2018. For the purposes of the 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 lands.’ United Nations draft Declaration on the Rights of Peasants and Other People Working in Rural Areas. *Id.*, Art 1(1).

²⁵ The UK voted against the Declaration in the HRC as a result. See the UK’s explanation of the vote, UN Media 28 Sept 2018. On the UK’s position generally see Chair-Rapporteur Report of the open-ended intergovernmental working group on a draft United Nations declaration on the rights of peasants and other people working in rural areas, A/HRC/35/59 (3rd session, 20 July 2016) para 74.

²⁶ UN Doc A/HRC/39/L.16, 26 Sept 2018, Art 16(1).

standard of living, to have a place to live in security, peace and dignity and to develop their cultures'.²⁷ State action is required 'to provide legal recognition for land tenure rights, including customary land tenure rights not currently protected by law' and 'to recognize and protect the natural commons and their related systems of collective use and management'.²⁸ 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'.²⁹ Although a 'right to biodiversity' found in the February 2018 version of the draft Declaration didn't 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',³⁰ 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.³¹ These and related articulations are not without their state detractors, of course. Argentina, Colombia and the EU 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 de commodification;³² 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.³³

These rights as advanced by peasants are not casual linguistic preferences; they reflect articulations that contest the logic of (transnational) capitalism, of private property, contract, accumulation, and the exploitation of people and natural resources. They express alternatives to the standard technique of forced displacements, large-scale land and water grabs, and speculative land investments, and impacts that include climate disruptions and environmental devastation, 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.³⁴ The recent history of peasants in India and their struggle over seeds provides a telling example of

²⁷ *Id.*, Art 17(1).

²⁸ *Id.*, Art 17(3).

²⁹ *Id.*, Art 19(1) and 19(1)(d).

³⁰ UN Doc A/HRC/WG.15/5/2, 18 Feb 2018, Art 20(1).

³¹ UN Doc A/HRC/39/L.16, 26 Sept 2018, 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.'

³² For the international food sovereignty movement's six defining principles of food sovereignty:

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

³³ 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 76.

³⁴ Women play a crucial 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

the lived experience that underpins the rise of rights against global capitalism captured in this approach to the Declaration. In 1998 the World Bank Structural Adjustment Programme had India open up 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.³⁵ 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. There are a host of other problems 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 the dramatic fall in agricultural prices due to international trade ‘dumping’. The poverty and sheer desperation led to a spate of suicides: Vandana Shiva’s ‘suicide economy’.³⁶ 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 draft 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. Its contribution is to see dismantled non-market access to food and self-sustenance in the universal establishment of (transnational) market based economies.³⁷ This first approach of the draft Peasants’ Declaration offers normative claims against those dominant values, values that reflect the structural connection between international law and commodification.

The second approach taken in the draft 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: The General Obligations of States require that they ‘elaborate, interpret and apply international agreements and standards, including in the areas of trade, investment, finance, taxation, environmental protection, development cooperation and security, in a manner consistent with their human rights obligations’.³⁸ A paradox presents itself: legal regimes that constitute and sustain global capitalism are retained; indeed they are reinforced in the draft Declaration. International law that has served peasants so poorly is taken as a given and validated. Here,

recognition for their work. Indeed, many are not even paid. Human Rights Council Advisory Committee, UN Doc A/HRC/19/75, 24 Feb 2012, para 22.

³⁵ Monsanto alone controls 90 per cent of the global market in genetically modified seeds. *Id.*, para 36.

³⁶ 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

³⁷ 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).

³⁸ UN Doc A/HRC/WG.15/4/2, 6 March 2017, Art 2(4). Subsequent versions of the draft Declaration reflect some amendments but do not alter the central idea. See UN Doc A/HRC/39/L.16, 26 Sept 2018, Art 2(4).

the Peasants' Declaration anchors its demands to the continued existence of the regimes against which they struggle.

This technique of seeking normative assurances that human rights will be brought to bear on other areas of international law that have a direct and often egregious impact on the exercise of rights 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 2011³⁹ 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.⁴⁰ 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'.⁴¹ 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. The 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, the best one can do is to seek to soften its hazardous features and, as the pragmatists know all too well, the cost is one of legitimating the system one seeks radically to change.⁴² 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'.⁴³ 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

³⁹ Disclosure: The author was a member of the Maastricht Principles Drafting Committee.

⁴⁰ 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.'

⁴¹ *Id.*, Art 29.

⁴² While drawing on substantive dimensions of the Maastricht Principles (and not at all times entirely convincing examples), Ralph Wilde draws interesting conclusions, highlighting comparable concerns to those above. He warns, moreover, that the 'modest nature' of the legal claims in the Maastricht Principles (that graft discrete areas of liability onto the existing structures of global economic relations) not only functions to bolster the status quo but 'which can now be further legitimated by states through claims to being "human rights compliant"'. Ralph Wilde, 'Socioeconomic Rights, Extraterritorially' in E Benvenisti and G Nolte (eds) *Community Interests Across International Law* (OUP 2018) 381, 394.

⁴³ 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.

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.⁴⁴ 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, like the second approach, through the terms of 'benefit-sharing' demonstrates how the draft Declaration suffers from the rootedness of capitalism in international law. 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.'⁴⁵ 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.⁴⁶ Second, challenges to the status quo are permanently deferred through the granting of economic concessions; this is hegemony through the consent of the governed.⁴⁷ 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.'⁴⁸ 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.⁴⁹

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'

⁴⁴ *Id.*

⁴⁵ UN Doc A/HRC/39/L.16, 26 Sept 2018, Art 5(2)(c)

⁴⁶ 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* (Cambridge University Press 2011)125.

⁴⁷ 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.

⁴⁸ 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>

⁴⁹ Antonio Gramsci, *Selections from the Prison Notebooks* (ed and trans Q Hoare and G Nowell Smith), (Lawrence & Wishart 1971) 119-120; 161.

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).⁵⁰ 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 they have lived since time immemorial and 'ensuring that the Ogiek benefit from any employment opportunities within the Mau Forest'.⁵¹

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,⁵² many indigenous communities and organizations have been committed to the project despite its alien, Western legal rationale, assumptions, and concepts.⁵³ 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'⁵⁴ and based on a relationship between 'providers' (indigenous peoples and local communities) and 'users' (unnamed entities providing the R&D)⁵⁵ 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 (e.g.: up front payments, royalties) or non-monetary returns (e.g.: 'contribution to the local economy') derived from its 'utilization' i.e.: financial

⁵⁰ *African Commission on Human and Peoples' Rights v Kenya*, Appl No 006/2012, judgment of 26 May 2017.

⁵¹ The Court's ruling on reparations is awaited.

⁵² Convention on Biological Diversity (1992) entered into force 1993, 196 states parties at September 2018; Nagoya Protocol (2011) entered into force 2014, 111 states parties at September 2018.

⁵³ '... 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.

⁵⁴ Nagoya Protocol, Preamble

⁵⁵ *Id.*

exploitation.⁵⁶ 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’.⁵⁷ In this treaty, the doctrine of prior, informed consent in an uncompromising version becomes applicable to states ‘in the exercise of sovereign rights over natural resources.’⁵⁸ The ability 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.’⁵⁹

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.⁶⁰ But the important Gramscian insight is that the political rights to effective participation in decision-making for the sharing of benefits are both consistent with international human rights law while opening up the distinct possibility of co-opting the right-holders. There is a real risk that political rights to effective participation when part of benefit-sharing are presumed to be consistent with the capitalist logic of natural resource exploitation (in contradiction to indigenous and local culture and way of life).⁶¹ 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.⁶² 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, and, contrary to the philosophy that defines their communal way of life, encourages that those

⁵⁶ *Id.*, Art 2(c): “Utilization of genetic resources” means to conduct research and development on the genetic and/or biochemical composition of genetic resources”

⁵⁷ *Id.*, Art 6(2). See similarly Art. 7 with regards to access to traditional knowledge associated with genetic resources.

⁵⁸ *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 country of origin of such resources or a Party that has acquired the genetic resources in accordance with the Convention,’

⁵⁹ *Id.*, Art 12(4).

⁶⁰ 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 ...’.

⁶¹ Of course, this is not unique to indigenous rights and peasants’ rights. The right of peoples to the exploitation of their natural resources – understood initially as the 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.

⁶² 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.

new found rights are used in their own self-interest and to the exclusion of others.⁶³ As 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.’⁶⁴ 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.⁶⁵ Under the terms of the Convention and Protocol there is scope for *sui generis* protections distinct from dominant intellectual property systems (e.g.: 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.⁶⁶ 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.⁶⁷

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

⁶³ See Ciupa in this case referring to UNDRIP, Kristin Ciupa, ‘The Promise of Rights: International Indigenous Rights in the Neoliberal Era’ in H Brabazon (ed) *Neoliberal Legality*, *supra* note 22, 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.

⁶⁴ Naniki Reyes as cited in Terán, ‘The Nagoya Protocol and Indigenous Peoples’ *supra* note 53, 9.

⁶⁵ 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.

⁶⁶ 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.

⁶⁷ *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>

multi-trillion dollar industry with the commercialization of local plants and knowledge generating enormous 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 draft Peasants' Declaration one can see how the Declaration sustains the very terms against which it also militates, throwing into doubt whether it amounts 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 the commodity form of international economic law is brought to bear on international human rights law. This third approach taken in the Peasants' Declaration exposes a number of fault lines through which 21st 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.⁶⁸ If the first approach taken in the Peasants' Declaration reflects a protest against global capitalism, approaches two and three inadvertently reflect an affirmation of it.⁶⁹

III. Eyes Wide Open

Advances that tame the injurious tendencies of capitalist globalization also normalize the status quo. This takes place through the legitimating function of international human rights law in the area of indigenous and peasants rights including through the pacification of protest that accompanies concessions. 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 shallow ameliorative functions notwithstanding, reflect the strategic logic of the capitalist, imperial state - imperial in its defence of the interests of transnational capital to the ultimate disadvantage of the states and peoples of the Global South.⁷⁰ But 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 rise of rights against global

⁶⁸ See, Pashukanis, 'International Law' *supra* note 1, 172.

⁶⁹ This is Addo's fruitful distinction which he developed in a different context. Herb Addo, 'Approaching the New International Economic Order Dialectically and Transformationally' in H Addo (ed) *Transforming the World Economy: Nine Critical Essays on the New International Economic Order* (United Nations University 1984) 245, 248.

⁷⁰ For apposite reflections on what is meant by 'imperial', BS Chimni, 'International Institutions Today: An Imperial Global State in the Making' 15 *European Journal of International Law* (2004) 1, 1-2.

capitalism – the first approach in the Peasants Declaration – reflects the anti-deterministic reach of the content of human rights law and its normative openness,⁷¹ against the juridical backdrop of global capitalism, the second and third approaches make the existence of that backdrop essential to their claims.

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. Not to engage with international law – as per the nihilist position – is of course tacitly to engage with international law by leaving it as is, absent oppositional, revolutionary voices. As the strategic proposals advanced by pragmatists effectively demonstrate, 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. This has prompted insightful if not open-ended soul searching as to the role of the critical legal enterprise, suggesting its value must lie in alerting people of good heart as to what is at stake.⁷² I alluded to this need for attentiveness when writing in an earlier work about the paradox that comes from having the protection of socio-economic rights and social protection floors rely on capitalist growth with all its attendant harms, as they do without exception. I suggested that to begin the process of overcoming that paradox it needs to be consistently exposed. Thus along with its mandate to protect the most vulnerable the UN Committee on Economic, Social and Cultural Rights could endorse social protection floors but it should also state that in doing so it does not necessarily endorse the means by which the needed redistribution is made possible. The ‘predistributive’ requirements would then be the subject of a separate and related inquiry into compliance with the Covenant.⁷³ In his introductory chapter to this edited volume speaking to what critical legal theory can do, Emiliios Christodoulidis draws the same conclusion, and the only one to adopt in confronting – not the dilemma between nihilists and pragmatists since as this chapter has shown no material impasse between them actually exists – but in confronting the dilemma of international human rights law that the tension between nihilists and pragmatists has exposed. What critical legal theory can do is bring the human rights lawyer to her rendezvous with international human rights law with eyes wide open.

⁷¹ See generally, Emiliios Christodoulidis herein on law and ‘the leverage that critique is afforded under the conditions of normative closure and legal self-reference’. Emiliios Christodoulidis, ‘Critical Theory and the Law: Reflections on Origins, Trajectories and Conjunctures’ in E Christodoulidis, R Dukes and M Goldoni (eds) *Research Handbook on Critical Legal Theory* (forthcoming Edward Elgar 2019).

⁷² Craven et al, ‘We are Teachers of International Law’ *supra* note 15, 374, asking but not answering ‘does the distinctiveness of the critical enterprise lie in the fact that it raises these issues, it prompts these anxieties, but precisely does not resolve them?’.

⁷³ Margot E Salomon, ‘Sustaining Neoliberal Capital through Socio-Economic Rights’ *Critical Legal Thinking* (Oct 2017). <http://criticallegalthinking.com/2017/10/18/sustaining-neoliberal-capital-socio-economic-rights/>; Linarelli et al., *The Misery of International Law*, *supra* note 3, chapter 7.