

THE ASCENDANCY OF CAPITAL OVER NATION-STATES IN THE INTERNATIONAL LEGAL ARENA: A HISTORICAL-MATERIALIST PERSPECTIVE ON REDEFINING HORIZONTALITY IN INTERNATIONAL LAW

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Abstract: Orthodox international law (IL)—primarily legal positivism, assumes a horizontal legal order. In adopting a Hobbesian understanding of the international arena, legal positivists assert that no sovereign supersedes that of any individual nation state; therefore, states hold each other legally culpable in a horizontal manner¹ and international legal institutions derive authority from state-consent. However, this document aims to challenge the adherence of orthodox IL to a horizontal legal order by demonstrating how capital effectively acts as a *de-facto* sovereign in the international arena, imposing IL top-down onto states as subordinate legal actors. This claim is corroborated by Antony Anghie’s postcolonial legal assertion that IL has historically served as a Trojan horse for furthering colonial ambitions.² Additionally, the Marxian concept of primitive accumulation, which situates colonialism within a larger project of capital accumulation, provides further theoretical backing for this perspective. Thus, this paper posits that the orthodox conception of IL as a horizontal system of equal sovereign states is inadequate, and instead proposes a paradigm in which capital acts as a *de-facto* sovereign, enforcing a vertical hierarchy undergirding international legal relations. This scholarly analysis will blend Marxian analysis with the empirical historical examples posited by Anghie, offering an in-depth examination of the manner in which colonialism dynamically influences and continually restructures the very fabric of IL.³ Ultimately, considering the implications of nation-states being subservient to the normative prescriptions of IL, coupled with the understanding that these laws are fundamentally influenced by a larger colonial project, and acknowledging that this colonial project is inherently embedded within a broader structure of capital acquisition as per the theory of primitive accumulation; it can be posited that nation-states, through their subservience to IL, are ultimately guided by capital, thus, do not operate in a horizontal, International arena.

Keywords: International Law; Legal Positivism; International Relations; Nation-State Consent; Postcolonial Legal Theory; Primitive Accumulation; Historical Materialism; International Jurisprudence

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¹ William C Starr, *Law and Morality in H.L.A. Hart’s Legal Philosophy*, 16 MARQUETTE LAW REVIEW 673–689 (1984).

² Antony Anghie, *The evolution of international law: Colonial and postcolonial realities*, 27 THIRD WORLD QUARTERLY 739–753 (2006).

³ Antony Anghie, *The evolution of international law: Colonial and postcolonial realities*, 27 THIRD WORLD QUARTERLY 739 (2006).

Table of Contents

Introduction		30
I.	Theoretical Context	31
A.	International Law as A Series of Normative Prescriptions	31
B.	International Law Situated Within a Larger Colonial Project	32
C.	The Colonial Project as A Structure of Capital Accumulation	33
II.	Positing A Theoretical Framework	35
III.	Historical-Materialist Legal Analysis	37
A.	Natural and Theologian International Jurisprudence	37
B.	Incipient International Legal Positivism	38
C.	The Post-Colonial Era’s International Jurisprudence	39
D.	Post 9/11 Era International Jurisprudence	41
Conclusion		44

INTRODUCTION

This document, as outlined below, is partitioned into three primary segments. Segment I: *Theoretical Context*, initially seeks to contextualise the concept of critical international legal jurisprudence. This includes Rosalind Higgins' New Haven approach, Anghie's postcolonial legal perspective and a Marxist historical-materialist international legal approach. Subsequently, this segment presents an argument that Anghie's approach, which extends Higgins' stance by suggesting that conventional IL is not merely normatively constructed but is tailored to suit the interests of colonialism, is advanced even further by Historical-Materialist analysis. This approach proposes that colonialism itself functions as an instrument for capital accumulation.

In section II, *Positing a Theoretical Framework*, this paper advances a theoretical construct arguing that nation-states, as legal subjects, are subordinate to the normative dictates of IL. This is in accordance with Higgins' conclusion. It further posits that IL's normative prescriptions are nested within a larger colonial project, as per Anghie's conclusion. Lastly, this document identifies that the colonial project is located within an overarching structure of capital acquisition, as per the position of primitive accumulation theorists. Consequently, nation-states emerge as legal entities subordinate to the interests of capital accumulation. Thus, it can be concluded that IL functions through a hierarchical, top-down legal order.

Finally, section III: *Historical-Materialist Legal Analysis*, will follow Antony Anghie's original chronological categorizations of IL, which span from natural law, early positivist law, the post-colonial period, to the contemporary era post-9/11 with necessary historical-materialist amendments demonstrating the ways in which colonialism is intimately tied to capital acquisition made throughout the progression. The overarching aim of this work is to enhance and build upon Anghie's perspectives, by supplementing their arguments with those of historical-materialist legal scholars to demonstrate the ways in which capital, functioning from above, enforces IL onto states, categorising them as subordinate legal entities.

Chronologically, pertaining to natural legal jurisprudence and positivist jurisprudence, this section will firstly critically examine the historical development of IL, particularly its role in legitimising the acquisition of capital and the control exerted by core states over peripheral states. Drawing on Anghie's and Marx's concepts of natural law and primitive accumulation, it interrogates the colonial period, identifying the subordination of Indigenous peoples and the theft of their land and labour as integral to the establishment of early capitalist structures. Continuing, the transition towards Legal Positivism, while purportedly grounded in empiricism and objectivity, effectively sustained the colonial project by perpetuating the dominance of European hegemonies. The paper further argues that the emergence of the Westphalian state-centric model and the legal invisibility of capital perpetuated this vertical hierarchy.

Further, in this section, interrogating the post-colonial era, despite ostensible decolonization efforts by International Organizations (IOs), continued the exploitative patterns of the past. Mechanisms like the mandate system and investor-state dispute settlements (ISDS) disproportionately advantaged Transnational Corporations (TNCs) and contributed to the systemic extraction of resources from peripheral states. Moreover, initiatives such as the Bretton Woods Institutions (BWIs) and the mandate system of the League of Nations (LON) often masked capitalist expansion under the guise of promoting good governance.

Lastly, this section examines how the war on terror in the post 9/11 era proved to be a significant challenge for traditional realist IR and positivist IL due to their shared foundational

assumptions. The emergence of non-rational, non-nation-state centred threats such as terrorism, climate change, and the Covid-19 pandemic posed issues for those frameworks that primarily focus on states as the primary and rational actors within the international arena and as such, capital was able to capitalise on these existing theoretical blindspots within orthodox IR and IL to shape the international arena evident in the ways in which the post-9/11 era saw the creation of new mechanisms for capital accumulation, prioritising the interests of capital and further marginalising peripheral states at the behest of capital.

Consistently, throughout all these periods, IL consistently endorsed a process of commodification and privatisation of peripheral resources, contributing to the global capital accumulation system. This paper thus concludes by challenging the orthodox international legal conceptualising of the international arena as horizontal and anarchic, arguing instead for its recognition as a vertical order dominated by the interests of capital.

I. THEORETICAL CONTEXT

A. International Law as A Series of Normative Prescriptions

According to jurist Rosalyn Higgins, who aligns herself within New Haven jurisprudence, the concept of international legal subjecthood lacks objective credibility.¹ Indeed, Higgins argues that the inclusion or exclusion of certain actors as legal subjects is determined by normative doctrine rather than objective criteria.² By accepting Higgins' argument that political structures construct international legal ontologies, including the determination of who qualifies as a legal subject, a new question arises: what purpose do these structures serve? Higgins' position challenges the orthodoxy of IL, which is primarily rooted in legal positivism, by revealing that such orthodoxy relies on a set of normative ontologies that are structurally constructed rather than objective and apolitical.³ In this sense, she— as a critical legal theorist, argues that IL is itself politically-latent and a means to serve political interest.

Combining this premise with that of international relations (IR) poststructuralist, critical scholar Robert Cox's position that "theory exists for someone, and for some purpose",⁴ it can be inferred that the orthodoxy of IR, functioning as a normative theory, similarly exists "for someone, and for some purpose".⁵

Reiterating the acknowledgment of theory's normative ontological and epistemological assumptions, it becomes evident that theory exists with a specific purpose in mind. In light of Higgins' assertion that international legal orthodoxy adheres to normative theoretical prescriptions, it logically follows that the purpose of international legal orthodoxy as a theory is to fulfil a particular objective or serve a specific function.

¹ Rosalyn Higgins, *Conceptual thinking about the individual in international law*, 4 BRITISH JOURNAL OF INTERNATIONAL STUDIES 1–19 (1978).

² CLAPHAM, A. RETHINKING THE ROLE OF NON-STATE ACTORS UNDER INTERNATIONAL LAW, UNITED NATIONS - LECTURE SERIES, https://legal.un.org/avl/lis/Clapham_IL.html.

³ Rosalyn Higgins, *Conceptual thinking about the individual in international law*, 4 BRITISH JOURNAL OF INTERNATIONAL STUDIES 1–19 (1978).

⁴ Robert W. Cox, *Social Forces, states and world orders: Beyond international relations theory*, 10 MILLENNIUM: JOURNAL OF INTERNATIONAL STUDIES, (1981), at 126.

⁵ Robert W. Cox, *Social Forces, states and world orders: Beyond international relations theory*, 10 MILLENNIUM: JOURNAL OF INTERNATIONAL STUDIES, (1981), at 126.

This understanding emphasises that international legal orthodoxy is not a value-neutral or objective framework but is driven by specific purposes and objectives. By examining the normative foundations and underlying motivations of international legal orthodoxy, we can gain insights into the intended aims and interests it serves.

B. International Law Situated Within a Larger Colonial Project

If IL is designed to advance someone's interests, the identity of this someone may not necessarily be a clearly identifiable or rational actor actively driving the agenda. Instead, this someone can represent a broader tendency or inclination that surpasses the sovereignty of individual nation-states in shaping IL.⁶ Under this perspective, the interests and motivations shaping IL may extend beyond the actions and intentions of specific actors or states. It suggests the existence of underlying forces or dynamics that influence and guide IL in a manner that transcends individual nation-states' autonomy.

Indeed, Antony Anghie supports this notion by arguing that colonialism, as a phenomenon, not only shapes IL but also overrides the sovereignty of individual nation-states. According to Anghie, colonialism has played a pivotal role in constructing the framework of IL, exerting influence that extends beyond the boundaries of sovereign states. This perspective highlights the ways in which colonialism has impacted the formation and operation of international legal norms and structures.

Notably, within this perspective, the phenomenon of colonialism is not a single political actor or an identifiable “someone”,⁷ as per Cox’s quote. Rather the colonial phenomena represents a broad set of proclivities noted to further the political advancements of an international colonising class despite not being guided by a definitive rational actor. Indeed, colonialism exhibits irrationality and is fraught with multiple self-undermining internal contradictions, rather than demonstrating rationality.⁸

Both Marxian and Gramscian renditions of historical-materialism corroborate this analysis by acknowledging the significance of class tensions in shaping the capitalist mode of production. It recognizes that within capitalist societies, different social classes, such as the bourgeoisie and the proletariat, play crucial roles and have conflicting interests. However, historical-materialism also emphasises that these classes are not necessarily guided by rational decision-making processes just as Anghie emphasises that the colonising class present in their analysis should not be understood as a rational, unitary political actor.

Considering the ability of the historical-materialist approach to provide a historical context and analyse the power dynamics underlying IL, it is indeed appropriate to subject IL to a historical-materialist interrogation. Such an interrogation can help illuminate dominant political structures and their respective interests.⁹ While Antony Anghie's account of IL does employ elements of historical-materialist analysis, particularly in his exploration of colonialism's central role in shaping IL, he falls short in fully centering colonialism within the

⁶ Colin Murray & James Ferguson, *The anti-politics machine: “development”, depoliticization and bureaucratic power in Lesotho.*, 29 MAN 199 (1994).

⁷ Robert W. Cox, *Social Forces, states and world orders: Beyond international relations theory*, 10 MILLENNIUM: JOURNAL OF INTERNATIONAL STUDIES, 1981), at 126.

⁸ David Harvey, *The spatial fix - hegel, von Thunen, and Marx*, 13 ANTIPODE 1–12 (1981).

⁹ Elliot Goodell Ugalde, *Developing A Critical Approach Towards Contrasting Protectionist and Free-Trade Paradigms*, 16 ON POLITICS 87–100 (2023).

broader structure of capital accumulation.¹⁰ While he emphasises the significance of colonialism in determining the normative ontological prescriptions of IL, he does not extensively explore the intersectionality between colonialism and the larger project of capital accumulation.

Indeed, Anghie's inquiry establishes that the colonial endeavour serves as a pivotal influence in shaping international legal orthodoxy. Moreover, the deliberate assimilation of international legal orthodoxy by legal positivists signifies a purposeful endeavour to conceal the impact of colonialism in its formation.¹¹ Anghie further proposes that colonial ambitions provide legitimacy to the enforceability of IL by resolving John Austin's positivist contradiction. Austin's contradiction suggests that the equality of nation-state sovereignty and anarchic nature of the international arena makes IL vertically unenforceable.¹²

Anghie puts forward the proposition that colonial ambitions played a significant role in legitimising IL by establishing legal subordination of peripheral states to hegemonic states. Consequently, this suggests that IL could indeed be enforced within a hierarchical and vertical framework, where states operate through inter-state subordination, rather than in a horizontal and anarchic state of nature thereby circumventing Austin's paradox concerning the legitimacy of IL.¹³ Fundamentally, Anghie posits that the historical influence of colonialism on IL clearly illustrates the inherent inequality among nation-states in the international sphere, given that core states tend to wield significantly more political influence than their peripheral counterparts.

To reiterate, as per Anghie's assertion, if the colonial project's influence over the international arena is greater than the dominance of individual nation-states, IL operates through a vertical legal order where the colonial project's inclinations effectively function as a de-facto sovereign over nation-states in the international arena. Yet, despite this assertion, Anghie fails to identify the ways in which the colonial project is itself intimately tied to the acquisition of capital by-way-of primitive accumulation.

C. The Colonial Project as A Structure of Capital Accumulation

While Anghie acknowledges colonialism as a guiding meta-narrative in the historical development of IL and its influence on the underlying normative principles, he falls short of sufficiently situating the colonial project within the broader framework of capital accumulation. A phenomenon which is often referred to by historical-materialists as primitive accumulation.¹⁴ By not adequately centering the colonial project within the larger structure of capital accumulation, Anghie's analysis may overlook important dynamics and power relations at play.

Instead of engaging in a holistic, capital-centric analysis to explain IR's historical colonial proclivities, Anghie concurs with the positions of positivist jurists, including E.H. Carr, suggesting that IL's colonial ambitions are unitarily a result of nation-states being unable to

¹⁰ Antony Anghie, *The evolution of international law: Colonial and postcolonial realities*, 27 THIRD WORLD QUARTERLY 739–753 (2006).

¹¹ Antony Anghie, *The evolution of international law: Colonial and postcolonial realities*, 27 THIRD WORLD QUARTERLY 743–744 (2006).

¹² James Brown Scott, *The legal nature of international law*, 1 AMERICAN JOURNAL OF INTERNATIONAL LAW 831–866 (1907).

¹³ Beate Neuss, *Kenneth N. Waltz, theory of international politics, New York 1979*, SCHLÜSSELWERKE DER POLITIKWISSENSCHAFT 481–485.

¹⁴ Siddhant Issar, *Theorising 'racial/colonial primitive accumulation': Settler colonialism, slavery and racial capitalism*, RACE & CLASS (2021).

establish universal legal principles.¹⁵ Restated, Anghie suggests that colonialism guides IL as a consequence of “a dynamic of difference”¹⁶ between European and peripheral states’ cultures. Combining Anghie’s work with the theories of primitive accumulation suggests that Anghie’s analysis, which attributes colonial underpinnings to cultural difference, may be culturally deterministic. Contrastingly, the insights provided by primitive accumulation theorists indicate that the colonial aspects of IL are not simply arbitrary outcomes of cultural disparities. Rather, they are deeply rooted in the historical dynamics of capital accumulation and power relations. Therefore, a comprehensive understanding of IL’s colonial dimensions should consider both cultural factors and the broader structural and material forces of capital accumulation.¹⁷

Primitive accumulation as an analytical tool posits that colonial structures exist as a means of divorcing producers from their means of subsistence.¹⁸ Restated, it suggests that colonial structures primarily exist to further the interests of capital. Marx’s original account of the phenomena suggests that the transition between feudal and capitalist modes of production required vast amounts of original capital, particularly land and labour.¹⁹ The acquisition of this original capital was achieved via colonial expansion with Marx specifically citing the discovery of gold in the Americas and the enslavement of Indigenous peoples in haciendas thereafter as a prerequisite to the capitalist mode of production.²⁰

“The colonial system ripened, like a hot-house, trade and navigation. The *societies Monopolia* of Luther were powerful levers for concentration of capital. The colonies secured a market for the budding manufactures, and, through the monopoly of the market, an increased accumulation. The treasures captured outside Europe by undisguised looting, enslavement, and murder, floated back to the mother-country and were there turned into capital” (Marx, *Das Kapital*, at 351).²¹

Indeed, the imposition of colonial laws, particularly those related to the commodification of land and labour, played a crucial role in furthering the colonial project’s pursuit of capital accumulation. These laws often undermined Indigenous land tenure, facilitating the advancement of private capital acquisition by colonial powers. By disregarding and undermining the existing rights and relationships of Indigenous peoples to their lands, colonial authorities sought to exploit and extract resources for the benefit of private capital interests.²²

Indeed, contemporary historical-materialists posit that structures of neo-colonialism continue to advance primitive accumulation via a process of accumulation by dispossession. For one, David Harvey highlights the ongoing capitalist crisis of overaccumulation, which he argues requires the continuation of accumulation by dispossession. According to Harvey, accumulation by dispossession is more efficient in accumulating capital than the traditional exploitation of labour power. This is because, in the context of over-accumulation, surplus

¹⁵ Jack Goldsmith & Stephen D. Krasner, *The limits of idealism*, THE GLOBALIZATION OF INTERNATIONAL LAW 265–282 (2017).

¹⁶ Antony Anghie, *The evolution of international law: Colonial and postcolonial realities*, 27 THIRD WORLD QUARTERLY 2006 at 743.

¹⁷ NOEL CASTREE & DEREK GREGORY, DAVID HARVEY, A CRITICAL READER (2006).

¹⁸ KARL MARX, GABRIEL PIERRE DEVILLE & LA MONTE ROBERT RIVES, THE PEOPLE’S MARX; A POPULAR EPITOME OF KARL MARX’S CAPITAL (1900).

¹⁹ MAXIMILIEN RUBEL & MARGARET MANALE, MARX WITHOUT MYTH: A CHRONOLOGICAL STUDY OF HIS LIFE AND WORK (1976).

²⁰ Karl Marx, *The Genesis of Industrial Capital*, in CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 2019 at 35.

²¹ Karl Marx, *Part 8: So-Called Primitive Accumulation*, in CAPITAL: A CRITIQUE OF POLITICAL ECONOMY (2019).

²² KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (1968).

capital cannot be reinvested into the cycle of accumulation at the same rate at which it is being produced. As a result, surpluses of capital remain idle, creating a condition of stagnation. Harvey's analysis underscores the significance of accumulation by dispossession as a means to address the crisis of overaccumulation and maintain the accumulation of capital within the capitalist mode of production.²³

Harvey notes, following the transition from feudal-slave labour to capitalist-waged labour, capital developed a tendency to forcefully expand in order to address its crises of overaccumulation. This drive for expansion is driven by the need to find new sources of labour, markets, and assets. Capitalism's inherent need for constant growth and accumulation pushes it to seek out new territories, resources, and labour in order to sustain its expansionary trajectory. This expansionary drive is often accompanied by processes of colonialism, imperialism, and accumulation by dispossession, as capital seeks to overcome the limitations posed by overaccumulated capital and ensure its continued accumulation and profitability.²⁴

Reiterated, accumulation by dispossession provides overaccumulated capital with an influx of new assets to utilise and thereby no longer lie idle thereby synthesising capital's crisis of overaccumulation. Hence, capital naturally inclines towards participating in colonialism, and Anghie's emphasis on IL's role in facilitating such colonialism signifies the result of this inclination. Instances like international land grabs and agrarian land reforms,²⁵ which are facilitated through IL, serve as clear and contemporary illustrations of the ongoing process of colonial dispossession within an international legal framework.

II. POSITING A THEORETICAL FRAMEWORK

Ultimately, to refute legal positivists' belief in a horizontal IL order requires demonstrating that nation-states are not politically-equal and dominant actors in the international arena. Anghie, corroborates this refutation by suggesting that the role of colonialism in guiding IL policy supersedes that of any individual nation-state. In his account, the colonial project exists as a de-facto sovereign in the international arena. Yet, primitive-accumulation posits that colonialism is itself guided by mechanisms of capital accumulation. By combining these premises, the logical conclusion—and the argument presented in this paper—is that IL operates within a vertical legal order, wherein capital imposes IL from the top down onto states as subordinate legal actors, aligning with its own interests.

²³ DAVID HARVEY, *THE NEW IMPERIALISM* (2013).

²⁴ DAVID HARVEY, *THE NEW IMPERIALISM* (2013).

²⁵ A. Claire Cutler, *Critical reflections on the Westphalian assumptions of International Law and Organization: A crisis of legitimacy*, 27 *REVIEW OF INTERNATIONAL STUDIES* 133–150 (2001).

Reiterated, in the forthcoming section III, this paper's theoretical argument rests on the following provable premises:

1. Nation-states are legal subjects subservient to the normative prescriptions of International Law
2. International Law's normative prescriptions are situated within a larger colonial project.
3. As per primitive accumulation, the colonial project is situated within a larger structure of capital acquisition.

Ergo, nation-states exist as legal actors subordinate to the interests of capital accumulation. Thus, IL operates via a top-down, vertical legal order.

The document: *The Evolution of International Law: Colonial and Postcolonial Realities* by Antony Anghie has already provided empirical evidence to support the first two premises by demonstrating the subordinate status of peripheral states to colonial international legal prescriptions.²⁶ Additionally, Marxian scholars studying primitive accumulation have already proven the validity of the final premise. As such, this document seeks only to expand on Anghie's empirical examples of IL's— and nation-states' by extension, subordination to colonialism and tie them to primitive accumulation to elucidate a more holistic, historical-materialist understanding of IL as a structure of capital acquisition, not just as a “dynamic of [cultural] difference”.²⁷ In demonstrating that colonialism— as a mechanism of capital acquisition, supersedes the dominance of individual nation-states on the international arena, a vertical legal order exposes itself and the positivist assumption of an internationally anarchic, horizontal international arena is negated.

Thus, section II will analyse Anghie's historical empirical examples that demonstrate how colonialism shapes and redefines the "actual body of international law"²⁸ by systematically contextualising each of Anghie's examples, which span from natural law, early positivist law, the post-colonial period, to the contemporary era post-9/11, within a broader framework of primitive accumulation. Additionally, this document will provide supplementary examples of capital's influence on IL by referencing the investor-state dispute regime and the concept of the "legal invisibility of capital".²⁹ The ultimate goal of this document is to complement and supplement Anghie's positions rather than discredit them. Furthermore, this paper supports Anghie's premise that IL serves to advance colonial interests. Simultaneously,

²⁶ Antony Anghie, *The evolution of international law: Colonial and postcolonial realities*, 27 THIRD WORLD QUARTERLY 739–753 (2006).

²⁷ Antony Anghie, *The evolution of international law: Colonial and postcolonial realities*, 27 THIRD WORLD QUARTERLY 2006 at 742.

²⁸ Antony Anghie, *The evolution of international law: Colonial and postcolonial realities*, 27 THIRD WORLD QUARTERLY 2006 at 739.

²⁹ A. Claire Cutler, *Critical reflections on the Westphalian assumptions of International Law and Organization: A crisis of legitimacy*, 27 REVIEW OF INTERNATIONAL STUDIES 2001 at 133.

the argument presented challenges Antony Anghie's assertion that colonialism is primarily an end in itself, or at least an unintended consequence of international-cultural difference. Instead arguing that colonialism is a means employed to advance the interests of capital.

III. HISTORICAL-MATERIALIST LEGAL ANALYSIS

A. Natural and Theologian International Jurisprudence

IL's historical inception, rooted in natural jurisprudence,³⁰ established IL's preliminarily subordination to capital acquisition. Anghie describes how natural law legitimised 16th century colonialism in the Americas citing Francisco de Vitoria's legal prescriptions of supposedly naturalised Indigenous subordination. Additionally, the concept of *Terra Nullius*, originating from natural law, served to legitimise the initial colonial project.³¹ By supplementing Anghie's position with the theoretical concept of primitive accumulation, it is suggested that Vitoria's theologian jurisprudence not only served to legitimise colonialism as a means of advancing Euro-exceptionalism via a fallacious appeal to nature, as Anghie suggests, but also primarily aimed at separating Indigenous peoples from their means of subsistence in order to facilitate the acquisition of capital. This perspective highlights the underlying motive of capital acquisition as a driving force behind pre-capitalist colonialism.

In *Das Kapital*, Marx parallels Anghie's assertion that the theologian, natural law sought to rationalise and legitimise the colonial project. Specifically, Marx likens primitive accumulation's origins to the "original sin in theology".³² However, unlike Anghie, Marx argues that the legitimization of colonialism through the application of theological and legal frameworks primarily served as a project to accumulate capital, rather than being solely a consequence of conflicting cultural beliefs upon contact. Effectively, Marx suggests that colonialism is not an end in itself, rather a means of engaging in the theft of Indigenous land and labour.³³ Rearticulated, Whereas Anghie suggests that Vitoria's legal prescriptions sought only to subordinate Indigenous peoples due to a perceived cultural inferiority masquerading as natural jurisprudence, Marx highlights the ways in which the subordination of Indigenous peoples was itself rooted in a project of appropriating Indigenous lands and labour for the purposes of capital procurement.

Therefore, if we consider that natural law's theologian legal prescriptions aimed to legitimise the colonial project, as empirically demonstrated by Anghie, and that the colonial project itself aimed to justify the appropriation of Indigenous resources for capital acquisition, as demonstrated by Marx, it logically follows that natural law also served to legitimise the appropriation of Indigenous resources as a means of acquiring capital. As such, amalgamating Marx' and Anghie's positions suggests that natural international legal jurisprudence operated vertically insofar as its legal prescriptions ultimately existed as colonial structures of capitalist expansion.

³⁰ Stephen C Neff, *A short history of international law*, INTERNATIONAL LAW (2018).

³¹ Chelsea Vowel, in *INDIGENOUS WRITES: A GUIDE TO FIRST NATIONS, MÉTIS & INUIT ISSUES IN CANADA* 236–237 (2017).

³² Karl Marx, *The Secret of Primitive Accumulation*, in *DAS KAPITAL: A CRITIQUE OF POLITICAL ECONOMY* 2010 at 507.

³³ KARL MARX & DAVID C. MACLELLAN, *GRUNDRISSE* (1972).

B. Incipient International Legal Positivism

In the 18th century, the infantile capitalist project had acquired sufficient original capital through primitive accumulation to realise itself.³⁴ As such, the feudal mode of production was replaced with the capitalist mode of production.³⁵ Furthermore, the system of feudal enslavement of Indigenous peoples was replaced by the imposition of waged labour, which, despite changes in form, still upheld class continuity.³⁶

Corresponding, legal positivist jurisprudence overshadowed natural international legal jurisprudence claiming to have replaced natural law's theological, normative prescriptions with a legal grounding within empiricism and objectivity.³⁷ Still, post-positivist jurists like Rosalind Higgins argue that labelling legal positivism as empirical is a misnomer, as legal positivism's jurisprudence often imitates the inclination of natural law to put forward its own set of normative legal assumptions.³⁸ Additionally, Anghie suggests that these legal positivist assumptions continued to exist as a means of naturalising the colonial project. He argues that legal positivism's reliance on Westphalian-derived assumptions about sovereignty were deliberately constructed to obscure the significant influence of colonialism in shaping IL.³⁹

In essence, he contends that the sovereignty doctrine perpetuated the subordination of peripheral states by European states even after the decline of natural law's influence. However, he mistakenly concludes that this doctrine existed solely as a teleological result of European political supremacy during the emergence of legal positivism,⁴⁰ failing to recognize its underlying purpose of safeguarding the interests of capital as exposed by historical-materialist analysis.

In truth, Westphalian state-centric assumptions about the international arena not only obfuscate the role of colonialism in constructing IL, but also the role of capital in constructing IL.⁴¹ Further, Claire Cutler posits that because orthodox IL assumes nation-states to be the most dominant actors in the international arena, private activity is insulated from legal accountability. Cutler refers to this as “the legal invisibility”⁴² of capital under IL whereby under legal positivism's jurisprudence, capital's role in shaping IL is obfuscated and IL's ability to restrict that role is non-existent. This reveals an asymmetric relationship between capital and IL, where capital influences and regulates IL to enable the accumulation of resources through dispossession, serving as a way to address crisis of overaccumulation. Meanwhile, transnational corporations (TNCs) benefit from a legal invisibility that prevents IL from effectively regulating or disciplining capital in response. This mono-directional legal

³⁴ Andre Gunder Frank, *On so-called primitive accumulation*, 2 *DIALECTICAL ANTHROPOLOGY* (1977).

³⁵ KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (1968).

³⁶ MICHAEL PERELMAN, *THE INVENTION OF CAPITALISM: CLASSICAL POLITICAL ECONOMY AND THE SECRET HISTORY OF PRIMITIVE ACCUMULATION* (2004).

³⁷ Stephen C Neff, *A short history of international law*, *INTERNATIONAL LAW* (2018).

³⁸ Rosalyn Higgins, *Conceptual thinking about the individual in international law*, 4 *BRITISH JOURNAL OF INTERNATIONAL STUDIES* 1–19 (1978).

³⁹ Antony Anghie, *The evolution of international law: Colonial and postcolonial realities*, 27 *THIRD WORLD QUARTERLY* 739–753 (2006).

⁴⁰ Antony Anghie, *The evolution of international law: Colonial and postcolonial realities*, 27 *THIRD WORLD QUARTERLY* 739–743 (2006).

⁴¹ Mohsen al Attar & Claire Smith, *Racial capitalism and the dialectics of development: Exposing the limits and lies of International Economic Law*, *LAW AND CRITIQUE* (2022).

⁴² A. Claire Cutler, *Critical reflections on the Westphalian assumptions of International Law and Organization: A crisis of legitimacy*, 27 *REVIEW OF INTERNATIONAL STUDIES* 2001 at 133.

disciplining further corroborates a wholly top-down, vertical application of IL derived from legal-positivism's adherence to the state-centric, Westphalian paradigm.

C. The Post-Colonial Era's International Jurisprudence

The post-colonial era implies a temporal distancing from the colonial project. Yet, as Anghie and other scholars note, various international organisations (IOs) involved in administering IL for the purposes of decolonization such as the League of Nations (LON) paradoxically served to maintain the subordinate class continuity of peripheral nation-states⁴³ and thereby maintain the exploitation of these peripheral states' capital.⁴⁴ Anghie suggests that the LON's mandate system served as a dialectical synthesis aimed at resolving the contradiction between the conflicting interests of colonised and coloniser states. This system provided a legal framework wherein colonial powers could retain political control over newly independent states while creating an illusion of legitimate emancipation.⁴⁵

To maintain dominance over peripheral states, the mandate system established several committees like the Permanent Mandates Commission (PMC) and the International Labour Organization (ILO).⁴⁶ These committees played a crucial role in monitoring and guiding the conduct of peripheral states under the mandate system's governance structure. While supporting Anghie's perspective through a historical-materialist lens that prioritises the role of capital, Susan Stokes argues, as per the logics of accumulation by dispossession, that this discretion ultimately served to incentivize privatisation for the purposes of foreign acquisition.⁴⁷ Thus, the mandate system too existed as means of furthering capitalistic expansion insofar as it encouraged peripheral states to privatise and commodify their assets for the purposes of foreign procurement.⁴⁸

At the same time, despite the post-colonial era's exponential growth of TNCs, both in number and relative political influence,⁴⁹ the legal invisibility of capital and TNCs as legal actors remained an inalienable feature of IL.⁵⁰ In truth, the post-colonial era saw individual nation-states grow increasingly subservient to the interests of capital as IOs prescribed IL inline with an international political ethos of neoliberal austerity.⁵¹ Additionally, economic globalisation intensified the financial interdependence between core and peripheral states, leading to a greater dependence of peripheral states on core ones. This situation enabled TNCs to obtain capital from peripheral states by compelling them towards privatisation.⁵²

⁴³ in THE LIFEWORK OF A LABOR HISTORIAN: ESSAYS IN HONOR OF MARCEL VAN DER LINDEN 47–70 (2018).

⁴⁴ Prebisch, Raúl: The Economic Development of Latin America and its principal problems, DIE 100 WICHTIGSTEN WERKE DER ÖKONOMIE 194–195 (2019).

⁴⁵ Antony Anghie, *The evolution of international law: Colonial and postcolonial realities*, 27 THIRD WORLD QUARTERLY 739–753 (2006).

⁴⁶ B. Rajagopal, in INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE 50–53 (2007).

⁴⁷ SUSAN CAROL STOKES, MANDATES AND DEMOCRACY: NEOLIBERALISM BY SURPRISE IN LATIN AMERICA (2001).

⁴⁸ NITA RUDRA, GLOBALIZATION AND THE RACE TO THE BOTTOM IN DEVELOPING COUNTRIES: WHO REALLY GETS HURT? (2008).

⁴⁹ GWYNNE SKINNER, RACHEL E. CHAMBERS & SARAH MCGRATH, TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS: OVERCOMING BARRIERS TO JUDICIAL REMEDY (2020).

⁵⁰ A. Claire Cutler, *Critical reflections on the Westphalian assumptions of International Law and Organization: A crisis of legitimacy*, 27 REVIEW OF INTERNATIONAL STUDIES 2001 at 133.

⁵¹ Anna Chadwick, *Neoliberal legality: Understanding the role of Law in the neoliberal project*, 30 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1071–1076 (2019).

⁵² N. Ram & Andre Gunder Frank, *Capitalism and underdevelopment in Latin America*, 1 SOCIAL SCIENTIST 73 (1973).

However, the most significant mechanism reinforcing state subservience to capital in the post-colonial era was the implementation of the investor-trade regime, which enabled TNCs to employ IL as a tool for legally disciplining states.⁵³ This regime functions through the introduction of investor-state dispute settlements (ISDS) during the post-colonial era. Many of these settlements include asymmetrical provisions that empower TNCs to use IL to litigate against states, without providing states with equivalent means to litigate against TNCs.⁵⁴ Coupling ISDS treaties' transfer of rights without adequate responsibilities onto TNCs⁵⁵ Cutler's assertion of a legal invisibility protecting TNCs from IL further exposes a wholly vertical legal order whereby capital's influence over states via IL is entirely mono-directional. To reiterate, when we combine a critical analysis of ISDS with Cutler's examination of the legal invisibility of TNCs, it becomes evident that TNCs utilise IL as a tool to discipline states through ISDS mechanisms. However, states are unable to employ IL to discipline TNCs in return since TNCs are not recognized as legal entities themselves. This coupling of perspectives illustrates an extension of the vertical international legal order in the post-colonial era, wherein IL's prescriptions perpetuate the subordination of states to the interests of capital.

David Harvey further elucidates the impact of capital on IL during the post-colonial era. He posits that the liberation of colonies was deliberately executed under the assumption that these newly freed colonies would lack the required infrastructure to economically compete with dominant or hegemonic states. This pre-established assumption was in service to the interests of capital, thereby guaranteeing the persistent economic superiority of the colonial forces even in the post-colonial period.⁵⁶ Therefore, the LON' mandate system, followed by the role of the Bretton Woods Institutions, notably the International Monetary Fund (IMF), and the International Bank Of Reconstruction and Development (IBRD) in privatising industries in peripheral states, can be understood as mechanisms designed to attract foreign capital under the guise of promoting good governance and purportedly alleviating the predicted economic challenges faced by newly emancipated, peripheral states. This approach masked the underlying objective of accumulating foreign capital through these initiatives.⁵⁷

To illustrate this point, one can examine one of the LONs' covenant, which explicitly justifies its authority to guide the economic policies of newly independent states as a means of assisting them in adapting to the "strenuous conditions of the modern world".⁵⁸ This justification served as a pretext for exerting control over the economic decisions of peripheral states and ensuring their alignment with the interests of capital. In reality, the notion of good governance as exemplified by the LONs' mandate system or the Washington Consensus as represented by the later Bretton Woods Institutions and their structural adjustment programs, actively promoted accumulation by dispossession. These initiatives aggressively and actively encouraged peripheral nations' governments to create favourable investment climates for

⁵³ B. Rajagopal, *in* INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE 50–53 (2007).

⁵⁴ Michelle Chan et al., *Impacts of the international investment regime on Access To Justice*, SSRN ELECTRONIC JOURNAL (2018).

⁵⁵ Gus Van Harten, *Private Authority and transnational governance: The contours of the international system of investor protection*, SSRN ELECTRONIC JOURNAL (2004).

⁵⁶ DAVID HARVEY, *THE NEW IMPERIALISM* (2013).

⁵⁷ DAVID HARVEY, *THE NEW IMPERIALISM* 2013 at 57.

⁵⁸ B. Rajagopal, *in* INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE 2007 at 57.

foreign capitalists, ultimately leading to the dispossession of local resources and the further concentration of capital at the behest of hegemonic states.⁵⁹

Rearticulated, Harvey concedes that various postcolonial, western-imposed economic programs were imposed in peripheral states under the pretext that they would stimulate economic growth. However, he contends that these programs, which were backed by IL and ranged from the mandate system to later structural adjustment policies, mainly aimed to stimulate the privatisation of goods in peripheral regions. This, in turn, facilitated their acquisition by Western entities as a method of accumulation through dispossession.⁶⁰

In addition to legitimising the role of the Bretton Woods Institutions as "gatekeepers to western capital"⁶¹ and promoting the privatisation of peripheral resources, throughout the post-colonial era, IL also legitimised the commodification of these resources. This process of commodification assumed that peripheral goods could be treated as commodities, a notion that aligns with Karl Polanyi's original depiction of the commodification of land and labour.⁶² IL played a crucial role in endorsing and facilitating this commodification process, reinforcing the capitalist framework of resource exploitation. An illustrative example of this is seen in the postcolonial era, where IL facilitated agrarian land reforms aimed at transforming Indigenous land tenure in peripheral states, which often existed as *res extra commercium*, into commodities that could be internationally privatised. This process aligned with capital's inclination to devise and legitimise new forms of private appropriation, thereby furthering the accumulation of capital through the commodification of land.⁶³

Ultimately, in the post-colonial era, IL replaced the overt bondage of formal colonisation as a means of capital acquisition with a system of international economic dependence, as highlighted by dependency and world-systems economists. This system continued to serve as a mechanism for capital accumulation, while simultaneously solidifying capital's formal and legal dominance over states through the introduction of ISDS mechanisms. Still, in both pre-colonial and postcolonial international legal frameworks, there exists a vertical legal order whereby core states' dominion over peripheral states operates in the interests of capital and legal positivism's adherence to a horizontal and anarchic international arena is proven axiomatically false.

D. Post 9/11 Era International Jurisprudence

Anghie's original document identifies 9/11 as the temporal focal point which differentiates the era of contemporary IL with post-colonial era IL (Anghie, 2006). Cynthia Enloe concurs with this temporal delineation, describing it as a consequence of orthodox IR, particularly the state-centric perspective of realist internationalism failing to address contemporary geopolitical grievances. According to Enloe, realist internationalism's state-centric approach fails to adequately account for the challenges posed by non-state actors that are prevalent in the current era. These non-state actors have emerged as significant threats and

⁵⁹ Susanne Soederberg, *Taming corporations or buttressing market-led development? A critical assessment of the global compact*, RECOGNITION AND REDISTRIBUTION 73–85 (2019).

⁶⁰ Giovanni Arrighi, Nicole Aschoff & Ben Scully, *Accumulation by dispossession and its limits: The Southern Africa Paradigm Revisited*, 45 STUDIES IN COMPARATIVE INTERNATIONAL DEVELOPMENT 410–438 (2010).

⁶¹ B. Rajagopal, in INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE 2007 at 95.

⁶² KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (1968).

⁶³ STEPHEN GILL & A. CLAIRE CUTLER, NEW CONSTITUTIONALISM AND WORLD ORDER (2015).

power brokers, highlighting the limitations of traditional state-centric perspectives in understanding and addressing contemporary global issues.⁶⁴

Indeed, the onset of the war on terror presented substantial challenges for the conventions of IR realism and positivist IL, largely due to their shared ontological postulates. These conventional methodologies predominantly perceive nation-states as principal entities within the international stage, assuming them to exhibit rational behaviour. However, the unconventional character of terrorism, which encompasses non-state and non-rational actors, has complicated the traditional paradigms of IR realism and positivist IL.⁶⁵ Simultaneously, IL jurists, who endeavoured to uphold the Westphalian paradigm by presuming that terrorists were indeed rational actors, found themselves grappling with the emergence of other non-rational, existential security threats such as climate change and more recently, the Covid-19 pandemic.

Although these security threats exposed a glaring blindspot within orthodox IR and IL demonstrating a need to abandon state-centric international ontologies and subsequently dismantle the Westphalian paradigm,⁶⁶ IL continued to maintain TNCs' legal invisibility. In line with capital's inclination to find profitable solutions to emerging crises, the post-9/11 era witnessed the establishment of a series of new mechanisms for accumulation by dispossession. Rather than addressing the inherent flaws within state-centric international frameworks, these mechanisms prioritised the interests of capital. This highlights how the dominant economic forces shape and exploit global crises to further their own accumulation strategies, often at the expense of marginalised communities and peripheral states⁶⁷

For instance, Antony Anghie points out the United States' lack of legal accountability for the 2003 invasion of Iraq as evidence of a revival of a colonial meta-narrative rooted in a notion of civilising subordinate states.⁶⁸ In a complementary manner, David Harvey demonstrates how this resurgence of the meta-narrative aligns with the interests of capital. By placing Anghie's analysis within a broader historical-materialist framework, Harvey illustrates how capital has effectively utilised this meta-narrative to advance processes of dispossession. This highlights the interconnectedness between the colonial meta-narrative, the interests of capital, and the perpetuation of dispossession.

Primarily, Harvey emphasises the ways in which a contemporary, post-9/11 era meta-narrative of civilising peripheral states allows for the destruction and devaluation of peripheral states' assets for the purposes of private, foreign acquisition.⁶⁹ International sanctions, facilitated by IL as a means of economically disciplining supposedly uncivilised states, pressure such states to privatise and sell their assets at which point TNCs can acquire these assets and use them to recycle their overaccumulated capital. Indeed, military occupation, such as the previously mentioned invasion of Iraq, can devalue foreign assets and resources, which in turn serves the interests of TNCs seeking to acquire and exploit those resources. The justification for such military interventions, often framed within a neocolonial civilising meta-narrative, further facilitates the devaluation and subsequent procurement of foreign assets by TNCs. This highlights how the narrative of civilising in order to bring stability can be used to

⁶⁴ Kathryn Ward & Cynthia Enloe, *Bananas, beaches, and bases: Making feminist sense of international politics*, 22 CONTEMPORARY SOCIOLOGY 80 1993 at 46.

⁶⁵ PETER HOUGH ET AL., INTERNATIONAL SECURITY STUDIES: THEORY AND PRACTICE (2015).

⁶⁶ Nargis Zahra, *Realism and the State*, 64 PAKISTAN HORIZON 61–74.

⁶⁷ NOEL CASTREE, DAVID HARVEY: A CRITICAL READER (2009).

⁶⁸ Antony Anghie, *The evolution of international law: Colonial and postcolonial realities*, 27 THIRD WORLD QUARTERLY 739–753 (2006).

⁶⁹ NOEL CASTREE, DAVID HARVEY: A CRITICAL READER (2009).

legitimise actions that ultimately benefit the interests of capital and TNCs in their pursuit of resource acquisition.

In this sense, the events of 9/11, which exposed the limitations of orthodox IL in accounting for non-state actors, were not utilised as an opportunity to revise and move away from orthodox IL's state-centric Westphalian assumptions. Instead of critically reassessing the framework. "In line with capital's tendency to never solves its crisis—opting instead to move them around spatiotemporally",⁷⁰ the war on terror as a crisis, was commandeered by capital as a means of establishing a neo-colonial meta-narrative of civilising peripheral states which in turn, justifies contemporary capital dispossession through IL facilitated sanctions and military occupations.

Indeed, even when the fundamental ontologies of state-centrism within IL are critically challenged, capital maintains its influence in shaping IL to further its own interests. This suggests that IL operates in a vertical manner, guided by the interests of capital. Despite potential challenges and critiques to the state-centric paradigm, capital continues to exert its influence over IL, perpetuating a system whereby the interests of capital are prioritised and upheld.

Simultaneously, the utilisation of ISDS treaties by TNCs to counter state-imposed damages when dealing with modern non-state facilitated, collective-action crises⁷¹ has weakened the capacity of states to effectively tackle these crises. For example, state employed climate change measures and measures meant to address Covid 19 both continue to be stunted by TNC evocation of ISDS treaties.⁷² Furthermore, the emergence of these crises, which highlights the shortcomings of the traditional state-centric approach to IL, has not led to the abandonment of the Westphalian paradigm.⁷³ Instead, it has provided transnational corporations with an opportunity to exploit the ISDS regime as a means of disciplining states that attempt to address such crises evident in the surge of TNCs' litigation grievances against nation-states for trying to restrict corporate emissions.⁷⁴

Contrary to the viewpoint of legal positivists, who argue that IL's failure to effectively tackle collective-action problems facilitated by non-state actors, such as Covid-19 and climate change, highlights the ineffectiveness and illegitimacy of IL,⁷⁵ as per Austin's paradox,⁷⁶ the reality is that IL is not incapable but rather unwilling to address these crises. This reluctance stems from IL's tendency to align itself with capital's exploitation of these crises for its own benefit.⁷⁷ Restated, IL fails to address contemporary collective-action crises' not as a result of its legal illegitimacy, rather as a result of its legitimising of TNCs' ability to employ the ISDS regime to discipline states who attempt to address these crises.

⁷⁰ NOEL CASTREE, DAVID HARVEY: A CRITICAL READER 2009 at 236.

⁷¹ Todd Sandler, *Collective action and Transnational Terrorism*, 26 THE WORLD ECONOMY 779–802 (2003).

⁷² Kyla Tienhaara, *Investor–state dispute settlement*, REGULATORY THEORY 475–691 (2017).

⁷³ Joseph Tuman, COMMUNICATING TERROR: THE RHETORICAL DIMENSIONS OF TERRORISM (2010).

⁷⁴ NOEL CASTREE, DAVID HARVEY: A CRITICAL READER (2009).

⁷⁵ Khaled Al-Kassimi, *A “New Middle East” following 9/11 and the “arab spring” of 2011?—(NEO)-Orientalist imaginaries rejuvenate the (temporal) inclusive exclusion character of Jus Gentium*, 10 LAWS 29 (2021).

⁷⁶ Beate Neuss, *Kenneth N. Waltz, theory of international politics, New York 1979*, SCHLÜSSELWERKE DER POLITIKWISSENSCHAFT 481–485.

⁷⁷ MAXIMILIEN RUBEL & MARGARET MANALE, MARX WITHOUT MYTH: A CHRONOLOGICAL STUDY OF HIS LIFE AND WORK (1976).

CONCLUSION

The assumption of a horizontal legal order by Orthodox IL, particularly legal positivism, is ultimately flawed. However, Anghie's argument regarding a vertical legal order, whereby the colonial project functions as a de-facto sovereign over individual nation-states, only provides a partial understanding of the situation. In centring Anghie's position within a framework of primitive accumulation, it becomes evident that although colonialism and neo-colonialism shape IL, neither are ends in themselves. Indeed, colonialism, in its various forms, is part of a broader project of capital accumulation. In this context, as per Anghie's assertion, IL does adhere to a vertical legal order. However, within this vertical legal order, capital itself assumes the role of the de-facto sovereign in determining the prescriptions of IL. Historical legal prescriptions cited as evidence in this document include the legal invisibility of TNC's, the ISDS regime, the mandate system's ability to maintain an economic periphery, the Bretton Woods Institutions' role in the privatisation of foreign capital, and the contemporary application of sanctions and military occupations as a means of capital acquisition justified through a contemporary meta-narrative of civilising peripheral states.

ACKNOWLEDGEMENTS

I wish to convey my sincere appreciation to Dr. Claire Cutler and Dr. Simon Glezos for their indispensable guidance and enduring support during my academic endeavours at the University of Victoria leading up to this publication. Their profound expertise in international jurisprudence and international political theory has been instrumental in refining and augmenting the quality of my scholarly work.