

What is radical in “radical international law”?

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1. Introduction

There are radical, or critical, legal scholars, legal theorists whose aim, using a variety of approaches, is to problematise and unsettle the law. There are also radical, or critical, legal practitioners, whose aim is to place their skills at the service of protagonists in the class struggle. But, far from complementing or nurturing each other, the scholars and the practitioners seem to inhabit completely separate worlds.

This article began life as a response to the call for papers for the international Workshop ‘Towards a Radical International Law’, held at the London School of Economics in May 2011. The call for papers¹ started with a bold declaration:

International law is a prominent site for the investiture of hope in the face of global insecurities. Yet, as inequality deepens, violence remains rampant, and the earth’s resources become exhausted, the idioms in which that hope is typically expressed – human rights, development, international crime, and so on – are revealing their complicities and limitations. Some radical rethinking of international law seems urgently needed.

In this article I explore some answers to the question whether there could or ought to be a radical international law, or even, more modestly, a radical approach to international law. Paavo Kotiaho has referred to ‘the left wing international law project’.² Is there such a project?

My own answer to the question is that almost all ‘critical’ or ‘radical’ approaches to international law are firmly located in the academy, or the ‘discipline’, or the ‘field’ as it is often called. These approaches are often marked by the eclecticism and the closely related pragmatism which traditionally emanate from the United States, just as British mainstream thinking is often termed ‘empiricism’.

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1. On file with the author

2. Paavo Kotiaho, ‘A Return to Koskenniemi; or the disconcerting co-optation of rupture’, 2 *Legal Studies Research Paper Series* (2011) <ssrn.com/abstract=1823284>. References to online sources are accurate as of 19 January 2013.

What is going on in each case is an attempt to shake up or to re-frame the theory of international law. However, there is a plain disjuncture between on the one hand those with a professional and career interest in renewing the scholarly community, and on the other those who wish to apply their legal skills to the service of progressive causes.

In this article I first review Critical Legal Studies as they have developed in Britain and the disjuncture - despite efforts at unification - between scholars and practitioners. I focus specifically on Britain, both for the intrinsic interest of the subject matter, but also my own involvement over many years.

There is a striking, for me, absence in almost all of this work. That is, critical legal scholars miss - or even ignore - the 'radical international law' pursued by organised engaged political lawyers. Special attention is therefore given throughout this paper to the International Association of Democratic Lawyers (IADL), the umbrella organisation of activist lawyers in existence since World War II, and from time to time of real importance in the development of international law. The IADL's own membership has comprised since its inception a number of national organisations of politically active lawyers in a large number of states - for example, the National Lawyers Guild in the USA and the Haldane Society of Socialist Lawyers in England.

This leads me to a focus on the American and international dimension of my account, and a special focus, an immanent critique as it were, on one major and highly influential article by David Kennedy, "Thinking Against the Box".³ Kennedy's work, and this article in particular, have been extraordinarily influential for a number of leading critical scholars in Britain. In this respect the work of Akbar Rasulov is discussed in some detail.

From Kennedy and his followers I turn to another scholar (who is also a practitioner) Martti Koskenniemi, and his recent reflections on the politics of international law.

These are two of the most influential scholars in critical or radical international law, but for another - highly persuasive for me - account I draw from Pierre Bourdieu's exceptionally penetrating analysis of the social world in which all lawyers, scholars and practitioners, have their being. This thematic is further developed in relation to the revolutionary content of post World War II international law.

This leads me to my conclusion, a question and a plea to all lawyers.

3. David Kennedy, 'When Renewal Repeats: Thinking Against the Box', 32 *New York University Journal of Law and Politics* (2000) 335-499.

2. Critical scholarship and political lawyering in Britain

2.1 Critical scholars and activist lawyers: a continuing disjuncture

The disjuncture between critical legal scholars and activist lawyers indentified previously is exemplified both in the United States and in Britain. In the United States, critical scholars positioned themselves in Critical Legal Studies (CLS)⁴ during the 1980s, and latterly in New Approaches to International Law (NAIL), and Third World Approaches to International Law (TWAIL), of which more below. Activist practitioners on the other hand have organised and still do in the National Lawyers Guild⁵, founded in 1937 and thus in 2012 is celebrating “75 Years of Law for the People”⁶; and in the closely associated Center for Constitutional Rights.⁷ The CCR litigates in the US courts, and its victories have established major legal precedents, from *Filártiga v. Peña-Irala*⁸ which opened U.S. courts for victims of serious human rights violations from anywhere in the world, to *NOW v. Terry*⁹ which established a buffer zone around abortion clinics.

There has been very little interchange or cross-fertilisation between these two camps in the US.

In Britain, the history of critical legal studies has been distinctively different from the US. While CLS effectively died in the US some years ago, it is still alive in Britain. The journal *Law and Critique*, edited in the Birkbeck Law School, continues to publish a wide range of critically-inclined theoretical scholarship. The annual Critical Legal Conference, the first of which took place at the University of Kent in 1986¹⁰, has long outlasted its US counterpart¹¹ and each year continues to take place at a different campus, including recent conferences in South Africa, India, Finland and Sweden. A small but consistent group of legal scholars identify themselves with the journal and conference.

4. See for example Roberto Mangabeira Unger, ‘The Critical Legal Studies Movement’, 96 (3) *Harvard Law Review* (1983) 561-675; and Mark Tushnet, ‘Critical Legal Studies: A Political History’, 100 *Yale Law Journal* (1990) 1515-1544 ; Nigel Purvis, ‘Critical Legal Studies in Public International Law’, 32 *Harvard International Law Journal* (1991) 81-127.

5. <www.nlg.org/>.

6. <www.nlg.org/about/75years/>.

7. <ccrjustice.org/> “The Center for Constitutional Rights is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, CCR is a non-profit legal and educational organization committed to the creative use of law as a positive force for social change.”

8. 630 F.2d 876 (2d Cir. 1980).

9. 159 F.3d 86 (2d Cir. 1998).

10. See <www.jstor.org/stable/1410297> for the paper given by Nikolas Rose at that conference.

11. See Peter Goodrich, ‘Sleeping with the Enemy: An Essay on the Politics of Critical Legal Studies in America’, 68 *New York University Law Review* (1993) 185-389.

Theoretically, both the journal and the conference are highly eclectic. Marxist or Marxian scholarship is a continuing but relatively very small component, with many more scholars motivated by post-modernism in various forms. A recent manifestation of this school is entitled *New Critical Legal Thinking: Law and the Political*¹². In two of the chapters politics are discussed by reference to Giorgio Agamben's oeuvre. Yet the political does not include legal activism. Similarly a London-based web-site, *Critical Legal Thinking, Law & the Political*¹³, established in 2009, is also a showcase for the flourishing of a hundred schools of thought. It describes its purpose with a grand flourish:

This is our time, the time of protest, of change, the welcoming of the event. Critical (legal) theory must be re-linked with emancipatory and radical politics. We need to imagine or dream a law or society in which people are no longer despised or degraded, oppressed or dominated and from that impossible but necessary standpoint to judge the here and now. (Legal) critique is the companion and guide of radical change.

For sure, the web-site is regularly updated with fascinating material, primarily by young scholars. I am invited to contribute as well.

The Critical Legal Conference for 2012 has just taken place in Stockholm at the time of revising this article (September 2012). Its unifying theme and focus was "Gardens of Justice". According to the call for papers, critical scholars were invited to explore:

a plurality of justice gardens that function together or that are at times at odds with each other. There are for instance well ordered French gardens, with meticulously trimmed plants and straight angles, but that also plays tricks on your perception. There are English gardens that simultaneously look natural – un-written – and well kept, inviting you to take a slow stroll or perhaps sit down and read a book. There are closed gardens, surrounded by fences, and with limited access for ordinary people. There are gardens organized around ruins, let's call them Roman gardens, where you can get a sense of the historical past, but without feeling threatened by its strangeness. There are Japanese stone gardens made for meditation rather than movement. There are zoological gardens, where you can study all those animal species that do not have a proper sense of justice, no social contracts, no inequality and social injustice, and no legal systems. There is, indeed, the Jungle, a real or imaginary place outside the Gardens of Law.¹⁴

In an article placed on the Critical Legal Thinking site¹⁵, Paul O'Connell offered one interpretation of this theme, one which tells us something about the

12. Matthew Stone, Illan rua Wall and Costas Douzinas (eds), *New Critical Legal Thinking: Law and the Political* (Birkbeck Law Press, Routledge: Abingdon, 2012).

13. <criticallegalthinking.com/>.

14. <www.csc.kth.se/clc2012/>.

15. Paul O'Connell, 'Trouble in the Garden: Critical Legal Studies & the Crisis', <criticallegalthinking.com/2012/04/30/trouble-in-the-garden-critical-legal-studies-crisis/>.

current state of critical legal scholarship (and perhaps critical scholarship more generally). In his view, the title and call together are an indictment of the critical legal project

... (movement seems a wholly inappropriate term at present). At a time at which global and national elites are engaged in an unprecedented assault on the living conditions and rights of working people, when democracy, even in its 'low intensity' form, is in retreat, the leading lights in critical legal inquiry are retreating into the gardens of their own imagination, and abandoning the less pristine, less genteel footpaths and public squares of politics.

Such criticisms are not new, of course.

2.2 CLS in Britain and its critics

The history of the CLS movement in Britain may be traced in the books published over the years by the managing editor of *Law and Critique* and leading figure in CLS, Costas Douzinas¹⁶, who has moved intellectually from the French deconstructionist Jacques Derrida in 1991¹⁷, to the ethics of alterity of Emmanuel Levinas in 1996¹⁸, to the Marxist utopianism of Ernst Bloch in 2000¹⁹, to the Slovenian Lacanian Slavoj Žižek, to Jacques Lacan and psychoanalysis, and more recently to the controversial conservative Catholic theorist Carl Schmitt and his disciple Giorgio Agamben in 2007.²⁰ The theoretical outlook of the CLS in Britain, including its take on Marxism, is well summed up in Douzinas and Gearey's *Critical Jurisprudence*.²¹

But it is hard to escape the conclusion that CLS in England has been devoted more to eclecticism and the encouragement of approaches such as law and literature, than to any radical political critique. In 1999, Peter Goodrich, one of the movement's founders, published an acerbic critique.²² His position, as summarised in his abstract, was as follows:

16. For a critique of Douzinas' more recent work see Chapter 8, "Postmodern" reconstructions of human rights' in Bill Bowring, *The Degradation of the International Legal Order? The rehabilitation of law and the possibility of politics* (Routledge: Cavendish, 2008).

17. Costas Douzinas, *Postmodern Jurisprudence: the Law of the Text in the Texts of the Law* (Routledge: Cavendish, 1991).

18. Costas Douzinas, *Justice Miscarried: Ethics, Aesthetics and the Law* (Edinburgh University Press, 1996).

19. Costas Douzinas, *The End of Human Rights* (Oxford: Hart Publishing, 2000).

20. Costas Douzinas, *Human Rights and Empire: The political philosophy of cosmopolitanism* (Routledge Cavendish, 2007).

21. Costas Douzinas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart Publishing: Oxford, 2005).

22. Peter Goodrich, 'The Critic's Love of The Law: Intimate Observations on an Insular Jurisdiction', 10(3) *Law and Critique* (1999) 343-360.

Lacking academic identity, political purpose and ethical conviction, critical legal scholarship in England has been too insecure in its institutional place and too unconscious of its individual and collective desires to resist absorption into the institution. Critical legal studies – as distinct from feminist legal studies, gay and lesbian studies or critical race theory – has tended to teach and so reproduce the core curriculum in a passive and negative mode. Resistant, ostensibly for historical and political reasons, to self-criticism and indeed to self-reflection upon their institutional practices, critical scholars have ended up repeating the law that they came to critique and overcome.

Akbar Rasulov, too, has provided a powerful critique of the influence of post-structuralism in the context of international law which reflects that of Goodrich's.²³ He concludes as follows:

What is going to be the effect of the poststructuralist intervention in international law? Will it be to encourage international lawyers – by reminding them that now, as ever before, everything in the international arena is only a transient product of a contingent combination of traces and hegemonic self-exertions – to experience their everyday work as an ongoing exercise of power? Or will it be to discourage all but the most dedicated of them, with its confusing vocabulary and uncritical interdisciplinarity, from performing any other kind of intellectual operations than a linear explication of the established dogma? Or will it, perhaps, simply tire them with its dogged insistence that the existing tradition is too outdated and a new method has to be created?

Despite Douzinas' recent forays into the critique of human rights, international law, with the exception to which I turn below, was rarely the focus of CLS conferences. Antony Carty was an exception, during the 1990s.

2.3 Critical legal scholars and radical lawyering in Britain

However, a more serious problem, in my view, was the failure of the Critical Legal Conferences to engage with the rather strong tradition of left political lawyering in England. I have in mind political lawyers engaging in radical legal practice. There is also a long tradition of lawyers who have played vitally important roles in other capacities.

The Haldane Society of Socialist Lawyers²⁴ was founded in 1930, as an organisation of lawyers active in the Communist Party and the left of the Labour Party. It is proud to have been 'a legal thorn in the side of every government,

23. Akbar Rasulov, 'International Law and the Poststructuralist Challenge', 19 *Leiden Journal of International Law* (2006) 799–827; this is a review essay on Peter Fitzpatrick and Patricia Tuitt (eds), *Critical Beings: Law, Nation and the Global Subject* (Ashgate: Aldershot, 2004); and Sinkwan Cheng (ed), *Law, Justice, and Power: Between Reason and Will* (Stanford University Press, 2004).

24. See <www.haldane.org> it was named after the first Labour Party Lord Chancellor.

lobbying for law reforms, civil liberties and access to justice for all; supporting national liberation movements against colonialism and campaigning against racism and all forms of discrimination.’ It has always worked closely with the National Council for Civil Liberties (founded in 1936, now named *Liberty*) and with the Trade Union movement. The Society never saw itself as an independent political force, nor did it conceive of law as inherently revolutionary or as capable of being moulded into revolutionary theory; rather, it saw the role of politically active lawyers as serving the interests of the working class and the oppressed.

Haldane lawyers were particularly active in support for the miners in their strike in 1984-1985, and proudly provided services to the National Union of Mineworkers. Members re-located to Yorkshire, Nottinghamshire and elsewhere, providing free representation, and becoming familiar figures in the Magistrates’ Courts (which frequently sat through the day and the evening). They consistently campaigned for human rights in Northern Ireland and against internment without trial. They challenged the miscarriages of justice experienced by the Guildford Four, Birmingham Six, Judith Ward and others. They were also instrumental in calling for a public inquiry into the Bloody Sunday massacre and represented the families and survivors at the Inquiry.

Internationally, members of Haldane provided free legal assistance to the African National Congress (ANC) and South West Africa People’s Organization (SWAPO) members throughout the long years of the struggle against apartheid, and regularly picketed South Africa House. And they were active in the IADL.

Furthermore, the Haldane Society has succeeded in attracting new generations of campaigning lawyers, publishes its journal *Socialist Lawyer* several times a year, and young Haldane lawyers represent defendants accused of public order offences, and provide monitors for anti-fascist and anti-racist demonstrations.

But while some leading left-wing scholars have been active members of Haldane – notably Professors Bill Wedderburn²⁵ and Keith Ewing²⁶ - their participation has been the result of their interest and expertise in labour law – that is Haldane’s key trade union history and connection. Neither has, to my knowledge, every considered themselves to be “critical legal scholars”, or ever participated in critical events.

25. 1927-2012 – known especially for his book: *The Worker and the Law* (Penguin: UK, 1986).

26. Author of *The Bonfire of the Liberties* (Oxford University Press, 2010); with Anthony Bradley, *Constitutional and Administrative Law* (Longman: New York, 2007); with Tom Campbell and Adam Tomkins, *Skeptical Essays on Human Rights* (Oxford University Press, 2002); with Conor Gearty, *The Struggle for Civil Liberties* (Oxford University Press, 2000); with Conor Gearty, *Freedom under Thatcher: Civil Liberties in Modern Britain* (Oxford University Press, 1990).

2.4 A British attempt to link theory and practice

However, there have been serious attempts to bring the two worlds together.

A few years after the founding of the Critical Legal Conference at Kent University in 1986, two leading radical scholars teaching at Kent edited a collection which gave good reason for optimism, that the gap between scholars and practitioners might be bridged.

The *Critical Lawyers Handbook*, published in 1992²⁷, and edited by Ian Grigg-Spall and Paddy Ireland, brought together scholars and practitioners, several active in the Haldane Society, and published my own first short essay, “Socialism, Liberation Struggles and the Law”.²⁸ The themes of my essay were concretised and extended in my own 2008 book²⁹.

A noteworthy feature of the Handbook was its three part structure: Critical Theory; Critical Legal Education; and Critical Legal Practice. Alan Thomson provided a Foreword “Critical approaches to Law. Who needs Legal Theory?”³⁰, introducing the eclecticism which was characteristic of British CLS already. But Robert Fine and Sol Picciotto’s chapter was entitled “On Marxist Critiques of Law”, with an account of Yevgeniy Pashukanis³¹; and Costas Douzinas and the late Ronnie Warrington contributed, in ironic post-modern mode: “The (Im)possible Pedagogical Politics of (the Law of) Postmodernism”. The section also contained Anne Bottomley on Feminism; Sammy Adelman and Ken Foster on “Critical Legal Theory: The Power of Law”; and Peter Fitzpatrick on “Law as Resistance”.

The second section, on Legal Education, started with a senior representative of US Critical Legal Studies, Duncan Kennedy, on “Legal Education as Training for Hierarchy”³²; and continued with Alan Hunt “Critique and Law: Legal Education and Practice”, Alan Thomson on Contract Law, Alan Norrie on Criminal Law, Joanne Conaghan and Wade Mansell on Tort Law, as well as Property Law, Company Law, Labour Law, Constitutional Law and European Law. Indeed, a thorough antidote was provided to the usual black letter, positivist, uncritical textbooks.

My own essay was in the third section on Critical Legal Practice. The outstanding human rights lawyer Michael Mansfield QC, now President of the Haldane Society, contributed “Critical Legal Practice and the Bar”³³; Kate Markus, then at the highly political Brent Law Centre (now a barrister at Doughty Street

27. Ian Grigg-Spall and Paddy Ireland (eds), *The Critical Lawyers Handbook* (Pluto Press: London, 1992).

28. Bill Bowring, ‘Socialism, Liberation Struggles and the Law’, in Ian Grigg-Spall and Paddy Ireland (eds), *The Critical Lawyers Handbook* (Pluto Press: London, 1992) 179-183.

29. Bowring, *Degradation*, *supra* note 16.

30. *Ibid.*, at 2-10.

31. *Ibid.*, at 16-21.

32. *Ibid.*, at 51-61.

33. *Ibid.*, at 157-161.

Chambers) and Chair of Haldane wrote on “The Politics of Legal Aid”³⁴; David Watkinson, the veteran advocate for squatters and travellers, now at Garden Court Chambers but soon to retire, wrote on “Radical Chambers, Wellington Street: A Personal View”³⁵; and John Fitzpatrick, who created and has led for many years the Kent Law Clinic, wrote two chapters, on “Legal Practice and Socialist Practice”³⁶ and “Collective Working at Law Centres”³⁷.

The final section of the Handbook was “An Alternative Guide to Solicitors’ Firms and Bar Chambers”. Most of the scholarly contributors have become prominent in academe and some are at the point of retirement; and the practitioners have taken part in the massive expansion of radical practice, especially at the Bar, with Doughty Street, Garden Court and Took’s Chambers. The Handbook therefore not only brought together the scholarly and practitioner worlds, but was very deliberately aimed at encouraging law students to undertake critical and radical careers. In my view, although I may be accused of nostalgia and of showing my age, it was a highpoint of CLS in Britain.

Following publication of the *Handbook*, there was one attempt only at a joint conference of the CLC and the Haldane Society, at Kent University. This was memorable for a sharp clash between John Fitzpatrick, then a member of the Revolutionary Communist Party, and Stephen Sedley QC, still a member of the Communist Party, before his appointment to the High Court Bench.³⁸ But the critical scholars and the radical lawyers were oil and water, or chalk and cheese: there was no cross-fertilisation or even mixing. I helped to organise the Critical Legal Conferences at University of East London in 1995 and at the University of North London in 2001, both with Marxist streams and a few practitioner-activists; but the predominant tone was eclecticism, despite efforts to counter this tendency.

At the time of revising this article there are renewed attempts by the Haldane Society and the Law School at Birkbeck College to organise joint events, and Haldane members have for three years taken part in thematic evening debates in the School’s successful “Law on Trial” series. But radical legal practitioners have not been seen at the annual CLC for many years.

34. *Ibid.*, at 184-190.

35. *Ibid.*, at 167-172.

36. *Ibid.*, at 149-156.

37. *Ibid.*, at 173-178.

38. John Fitzpatrick was awarded an OBE for his work at the Kent Law Clinic; and Sir Stephen Sedley recently retired as a judge of the Court of Appeal.

3. The International

3.1 The international dimension of political lawyering

If the CLC has taken place in a number of countries, including India, radical practitioners have been organised on a global scale for much longer.

Indeed, here is an example of a radical lawyer with international scope in the 19th century. An example very much to my taste – so please forgive me what may seem to be an extraneous paragraph – is that of the barrister Samuel Moore, who translated into English the *Communist Manifesto* and most of Volume One of *Capital*. He was born in 1838, and having failed as the owner of a cotton mill, became a barrister at the age of 40, practising in Manchester. He was the closest English friend of Friedrich Engels, who was 18 years older than him, born 1820, and who successfully ran the cotton mill belonging to his father's firm until his retirement. Although Moore became a member of the International Working Men's Association in 1866, having been on holiday with Engels the previous year, he was not politically active, save for his monumental work of translation of *Capital*, especially in 1883–4, after Marx' death. He translated the *Communist Manifesto* in 1887. Like Engels, his revolutionary views did not prevent him from accepting very un-revolutionary employment, from 1889 to 1899 as Chief Justice of the territories of the Royal Niger Company (now Nigeria).³⁹ He delivered a tribute at Engels' funeral in 1895, and died in 1911. There was no radical or political lawyers' organisation to which he could belong, but were he to have been born a century, later matters might have been very different.

Both the National Lawyers Guild and the Haldane Society of Socialist Lawyers are member organisations of the International Association of Democratic Lawyers. Yet an awareness of the existence of the IADL and of the tradition of active political engagement of legal practitioners and scholars (more the former than the latter) is almost entirely lacking from the many works of critical scholars.

The IADL was founded on 24 October 1946 in Paris by lawyers from 24 countries.⁴⁰ It remains active, despite the loss since 1991 of the substantial subsidy it received from the USSR and from, for example, the Algerian FLN – which paid for a headquarters building in Brussels, and for staff. Now organised through the internet, its XVI and XVII Congresses took place in Paris and Hanoi respectively in 2005 and 2009. Its website gives details of its many activities and

39. William Otto Henderson, *The Life of Friedrich Engels* (Taylor & Francis: US, 1976) vol.1, at 281.

40. USA., USSR, UK, France, Belgium, Brazil, Bulgaria, Canada, Colombia, Cuba, Ecuador, Spain, Greece, Iran, Luxembourg, Norway, New Zealand, The Netherlands, Poland, Argentina, Sweden, Switzerland, Czechoslovakia, Venezuela, Yugoslavia. See Martin Popper, 'International Association of Democratic Lawyers', 6 *Lawyers Guild Review* (1946) 572-573.

campaigns.⁴¹ The latest Bureau meeting took place in September 2012 in Gaza, hosted by the Palestinian Centre for Human Rights, previously the Gaza centre for Rights and Law, led by Raji Sourani since 1990. The Palestinian lawyers are active members of IADL.

Rene Cassin, a drafter of the Universal Declaration of Human Rights, was named the first IADL President. During the Cold War it was regularly identified and condemned as a Soviet front organisation, which in many ways it was, and its member organisations included the Association of Soviet Lawyers and lawyers' organisation from all the socialist countries, but also strong organisations in the USA (the National Lawyers Guild, still very active), Latin America, Japan, India, many African countries, and Western Europe. It supported and participated in the liberation movements and the struggles of the peoples of South Africa, Angola, Guinea Bissau, Kenya, Mozambique, Namibia, Northern Ireland, Puerto Rico and elsewhere on the globe.

William Twining has noted:

'During the early years of the Cold War the International Commission of Jurists promoted the Rule of Law and civil and political rights... in counterpoint with the International Association of Democratic Lawyers, who supported anti-imperialist movements and social and economic rights.'⁴²

It should be noted that the ICJ was financed initially and until 1967 by the CIA, through the American Fund for Free Jurists, but the CIA's role was not known to most of the ICJ's members.⁴³

Indeed, the IADL played an important role in promoting the right of peoples to self-determination, which I have described as 'the revolutionary kernel of international law'; the enshrining in international law of the principles formulated by Marx and Engels in the second half of the 19th century, and developed by Lenin in the period immediately before the First World War.⁴⁴ Through the bloody struggles for decolonisation which followed World War II and came to a peak in the 1960s, these principles became a legal right as common article 1 to the two International Covenants on human rights of 1966.

The violent hostility from mainstream Western scholars towards the IADL was exemplified in an extraordinary article published in 1960 by Professor El-

41. <www.iadllaw.org>.

42. William Twining, 'Diffusion of Law: A Global Perspective', 49 *Journal of Legal Pluralism and Unofficial Law* (2004) 1-46, at 11, note 18.

43. Richard Claude, 'Review of *The International Commission of Jurists, Global Advocates for Human Rights* by Howard B. Tolley, Jr.', 16 *Human Rights Quarterly* (1994) at 576.

44. See Bill Bowring, 'Self-determination – the revolutionary kernel of international law', in *The Degradation of the International Legal Order? The rehabilitation of law and the possibility of politics* (Routledge: Cavendish, 2008); and Bill Bowring, 'Marx, Lenin and Pashukanis on Self-Determination: Response to Robert Knox', 19(2) *Historical Materialism* (2011) 113-127.

liot Goodman of Brown University and author of *The Soviet Design for a World State*.⁴⁵ Goodman ignored the contributions of Marx, Engels and Lenin, turned history on its head, and declared:

The idea of national self-determination, fathered by political theorists like Mazzini and Wilson, is, of course, Western in origin. But in an age of nation-building in the Afro-Asian world, skillful Soviet use of this concept presents Western diplomacy with a formidable and continuing challenge in the East.⁴⁶

He acknowledged that:

As a result of Soviet initiative, the issue of self-determination for non-self-governing peoples became enmeshed in the numerous deliberations on human rights. Basic to the enjoyment of any human rights, the Soviet delegates insisted, is the right of national self-determination, which must be realized in the colonial and non-self-governing territories of the West.

By 1952, said Goodman, "It was abundantly clear that the venerable complex of ideas associated with national self-determination had been fashioned into a blunt political weapon by a Soviet-Afro-Asian entente."⁴⁷ That is, of course, by an alliance of the USSR with those countries which had already fought their way out of colonial domination.

I repeat that these political struggles, encompassing the planet as a whole, and forever changing the content of public international law, are beyond the horizon of almost all scholars of international law.

3.2 An attempt to bring politics back into CLS: The 2008 Critical Legal Conference

Recently, there was a remarkable, hitherto unique, attempt to extract revolutionary political potential from the CLC. The 2008 conference took place at Glasgow University in September 2008, and was organised by the Marxist international legal scholar Akbar Rasulov, from Uzbekistan, now at Glasgow University⁴⁸. He brought about a visit by the Indian scholar B. S. Chimni, who delivered a provocative keynote speech entitled 'Prolegomena to a Class Approach to International Law'.⁴⁹ Chimni is well known as a leader of Third World Approaches to International Law (TWAAIL) – see below – and the author of the splendid 1993 *International Law and World Order: A Critique of Contemporary Approaches*,

45. Elliot Goodman, 'The Cry of National Liberation: Recent Soviet Attitudes Toward National Self-Determination', 14 (1) *International Organization* (1960) 92-106.

46. *Ibid.*, at 92.

47. *Ibid.*, at 92.

48. Akbar Rasulov was my – brilliant – student on the LLM at Essex University.

49. Bhupinder Chimni, 'Prolegomena to a Class Approach to International Law', 21(1) *European Journal of International Law* (2010) 57-82.

which argued that ‘Marxism still constitutes the most beneficial vehicle for the humanistic grounding of a new jurisprudence’.⁵⁰ I am one of those trying to persuade the publishers to produce a new edition.

In 2007, Chimni published ‘The Past, Present and Future of International Law: A Critical Third World Approach’.⁵¹ He declared that ‘A third world approach to international law, or TWAAIL as it has come to be known, represents in general an attempt to understand the history, structure and process of international law from the perspective of third world states.’ His ambitious project was ‘... that the discipline of international law be transfigured. International lawyers must, going beyond human rights law, consistently engage with the existential world of the global poor and oppressed. Ordinary life must become the focus of the entire discipline of international law.’ It is clear that by ‘discipline’ he meant legal scholars. However, this sophisticated article, although full of references to Douzinas, Agamben, Foucault and others, did not mention self-determination or Lenin, despite the fact that, as Pheng Cheah points out, Lenin’s principled commitment to the “right of nations to self-determination” which he worked out before World War I and put into practice following the Bolshevik revolution, was the inspiration for Fanon and many others.⁵²

Chimni’s 2008 keynote speech, published in 2010 by the *European Journal of International Law*, proposed a ‘class approach to international law’, to get away from the state-centred mainstream, and to focus ‘besides states on social groups and classes which are shaping and have historically shaped international law...’ This will enable “international lawyers to practise the discipline of international law as if people mattered.”⁵³ Thus, he was speaking to scholars of international law.

He introduced a taxonomy of class: he refers to a ‘Transnational Capitalist Class’ (TCC) and a ‘congealing’ ‘Transnational Oppressed Class’ (TOC).

In his view, a class approach would not require adherence to Marxism, but would be perfectly compatible with the views of Weber, Durkheim or Bourdieu. Indeed, class struggle has been endemic in human society ever since the Agricultural Revolution.⁵⁴ Chimni’s proposals were directed entirely to the scholar, allowing greater understanding, new perspectives, and ‘...a class approach allows the rethinking of the liberal conception of international rule of law and its complex and contradictory relationship with the idea of global justice.’ This is, therefore,

50. Bhupinder Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (Sage: New Delhi, 1993).

51. Bhupinder Chimni, ‘The Past, Present and Future of International Law: A Critical Third World Approach’, 8 (2) *Melbourne Journal of International Law* (2007) 499-515.

52. Pheng Cheah, *Spectral Nationality: Passages of Freedom from Kant to Postcolonial Literatures of Liberation* (Columbia University Press, 2004) 210-212.

53. Chimni, ‘Prolegomena’, at 58.

54. See especially a remarkable text: Geoffrey de Ste.Croix, *Class Struggle in the Ancient Greek World: From the Archaic Age to the Arab Conquests* (Gerald Duckworth & Co: London, 1997).

an armchair exercise. Nowhere, unfortunately, do we find the revolutionary content of post WW II international law, transformed by anti-colonial struggle; nor a single word about the role of the politically engaged lawyer.

An extended version of Akbar Rasulov's response to Chimni has been published (2010) in the *Finnish Yearbook of International Law*.⁵⁵ Rasulov neatly sums up his perspective as follows:

Done correctly, a class-analytic re-theorization of international law can supply the international law CLS community not just with a new brilliant theoretical apparatus, but with an apparatus that could give us both a highly effective instrumentarium for debunking any number of rightwing ideological mystifications and a highly reliable analytical platform for constructing practically implementable counter-hegemonic strategies.⁵⁶

That is, he wants to provide scholars with more effective weapons for intellectual critique. He was, of course, addressing a CLS conference audience with a frankness that is typical of Rasulov but highly unusual in the international legal scholarly community:

... where a generation and a half ago, most of the practical momentum in the international law leftwing projects came in the fields of international diplomacy and political activism, a vast majority of all leftwing efforts in international law today are limited to the field of academia... We have lost every connection our predecessors' predecessors had with the world of activist politics and practical diplomacy.⁵⁷

His critique pulled no punches:

The global class structure has long immunized itself against any destabilizing action that could come from the esoteric writings of a marginalized group of Western academics, especially as disorganized as the international law CLS people are.

But he seemed not to be aware of the continuing energy and commitment of political lawyers in many countries of the world, despite being in receipt of copies of *Socialist Lawyer*.

55. Akbar Rasulov, 'Bringing Class Back into International Law – A Response to Professor Chimni', (2008) <ssrn.com/abstract=1675447>, later published as '“The Nameless Rapture of the Struggle”: Towards a Marxist Class-Theoretic Approach to International Law', 19 *Finnish Yearbook of International Law* (2008) 243-294.

56. *Ibid.*, at 3.

57. *Ibid.*, at 6.

3.3 The allure of David Kennedy and Cambridge (Harvard, that is)

In what follows I seek to diagnose the reasons for Rasulov's blindness towards, or unwillingness to recognise, political lawyering. Akbar Rasulov has a special affinity to David Kennedy. David Kennedy's work has been extraordinarily influential in British critical international law. It is a significant point of reference for Susan Marks, who subjected ideology to stern critique in her *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology*⁵⁸, and has been closest to Marxism,⁵⁹ but has turned to Kennedy especially in her recent work⁶⁰. She describes him as '... one of the most influential and inspirational people writing on international law today...'⁶¹

Rasulov, on the contrary, can be highly critical of Kennedy. For example, in his critique of poststructuralism to which I referred above, he stated:

Take, for instance, David Kennedy's *International Legal Structures*.⁶² What is this book about? What does it try to say? That you can think of international law as a canon of rhetorical moves? That the discourse of substance always refers us back to the discourses of process and sources? That legal aporia is ineradicable and that it is precisely because of this that international law has managed to retain its importance in modern politics? Some books are just impossible to sum up.

But he refers approvingly to one of Kennedy's seminal works, 'Thinking Against the Box'⁶³, as well as to Kennedy's wry comments on postmodernism:

I just do not think law is like that. It does not have [any of those] qualities of fixity, order, meaning, or identity [which the cultural critics ascribe to it.] ... Of course we certainly operate with ideas that sometimes seem very crude to a post-modernist [but] if the challenge raised for lawyers . . . is that we should get hip to postmodernism as a compelling description of the contemporary social scene and a cool way to be, I guess my answer would be . . . we lawyers have [already] been postmodern for a while.⁶⁴

58. Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press, 2003).

59. Susan Marks (ed), *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press, 2008).

60. See Susan Marks, 'International Judicial Activism and the Commodity-Form Theory of International Law', 18(1) *European Journal of International Law* (2007)199-211, at 202 (Kennedy's remarkable writings), and at 210 twice ("David Kennedy writes passionately and compellingly of the harms caused by an excessive focus on the legal dimensions of contemporary global problems"); Susan Marks, 'False Contingency', 62(1) *Current Legal Problems* (2009) 1-21; Susan Marks, 'Human Rights and Root Causes', 74(1) *Modern Law Review* (2011) 57-78, at 77.

61. Marks, 'False Contingency', at 13, discussion on the whole of that page; See also *ibid.*, at 18.

62. Rasulov's note is: David Kennedy, *International Legal Structures* (1987) 195-198.

63. David Kennedy, 'When Renewal Repeats: Thinking Against the Box', 32 *New York University Journal of Law and Politics* (2000) 335-499.

64. David Kennedy, 'Some Comments on Law and Postmodernism: A Symposium Response to Professor Jennifer Wicke', 62 *University of Colorado Law Review* (1991) 475-482.

This passage epitomises Kennedy's engagingly discursive and familiar style, his appearance of plain talking and easy sophistication.

However, in 2010 Rasulov provided, for a Glasgow University workshop entitled *The 'New Stream' Twenty Years On: A Critical Genealogy*, a contribution entitled 'Newstream: A Critical Genealogy'. He declared:

In trying to work out the Newstream's basic trajectory, I drew heavily on various conversations with David Kennedy as well as his remarkable (and shockingly underrated) *Thinking against the Box*...in particular section IV(c) thereof.⁶⁵

Nevertheless, in his response to B. S. Chimni, Rasulov proposed an accurate criticism of Kennedy:

To be sure, scholars like David Kennedy have done some very interesting work in this area. *The Dark Sides of Virtue* is probably one of the most important books written on international law in the last twenty years. But as inspiring and thought-provoking as it may be, I don't think it provides anything near what would be a rigorous, comprehensive explanation of this phenomenon – and that, by implication, puts a very considerable limit on its practical convertibility for the purposes of the international law leftwing project.

This is in fact a rather damning critique. Note that Kennedy's work does not even provide 'practical convertibility' for the purely academic project, much less for any political activity outside academe. Highly intelligent and provocative Kennedy's work may be – but inspiring?

3.4 A critique of David Kennedy

So, what is to be found in Kennedy's very substantial article 'Thinking Against the Box'? Here is a crucial element in my diagnosis of Rasulov's ambivalence and indeed the prevailing disjuncture between theory and practice in international law. In this essay, David Kennedy constantly reflects on "the discipline"⁶⁶ and even "disciplinary renewal". These words and phrases have a somewhat monastic flavour, and this is no accident. What Kennedy really has in mind is the order of established professors of international law, especially at Harvard, and also at Yale and Columbia.

Thus he explains that 'Disciplinary renewal – no less than disciplinary stasis – can best be understood as a complex interaction among groups of individuals pursuing intellectual, political, and personal projects.'⁶⁷ To me, this has nothing

65. Akbar Rasulov, 'Newstream: A Critical Genealogy', <ssrn.com/abstract=1675446>.

66. For example, David Kennedy, 'When Renewal Repeats', *supra* note 64, at 335, 336, four times on 337, 338.

67. *Ibid.* at 338.

to do with international lawyers. It is something parasitic. These projects are by necessity tied to individual careers and academic advancement.

My attention was drawn straight away by Kennedy's analysis of the history of the discipline, in the early pages of the article. The period after WW I was presented by Kennedy as entirely a debate within the American academy. There was no mention at all of self-determination, much less Lenin or the Russian Revolution.

Thus, we find the following:

Throughout this period, however, there were also dissident voices urging a less formal, more embedded law as a better expression of political reality and as an expression of a higher, more integrated international community. These voices were strongest in the anxious period just after the First World War, when the discipline was most resolute in rejecting the legacy of the Hague System set in place at the end of the nineteenth century and seen to have failed in 1914. They were often associated in the United States with political science rather than law, with progressive Wilsonianism, with support for the League, and with interest in international organizations more generally.⁶⁸

The Russian Revolution therefore did not take place or at any rate was not worth noticing; there was no rise of Fascism and then Nazism, no Japanese imperialism. Academe in the USA was securely sheltered from the storms affecting the rest of the planet.

When Kennedy turned to the period after the Second World War, there was no mention at all of the Cold War or of anti-colonial struggles. Instead, we learn that by 1960 – a crucial year for the wars of national liberation, but also of the great Resolution 1514(XV), the anti-colonial declaration – the discipline had evolved as follows:

... the post-war generation of international lawyers and academics had established two new schools of thought between which international lawyers in the United States then arranged themselves for a generation. At an intellectual level, this dramatic reorganisation is perhaps the most striking instance of new thinking and disciplinary renewal in the last century.⁶⁹

That is, new thinking and disciplinary renewal had nothing whatsoever to do with what is happening outside the Ivy League. Kennedy explained that the two new schools of thought were the Yale School, the 'policy school' of Harold Lasswell and Myres McDougall, who trained so many leading international lawyers including Rosalyn Higgins and Richard Falk; and in the opposite corner of the ring, the Columbia School led by Louis Henkin and Oscar Schachter. Just as in the pre-war discipline, there was a 'positivist mainstream' and a 'naturalist

68. *Ibid.*, at 378-379.

69. *Ibid.*, at 379-380.

counterpart'.⁷⁰ These Schools had some purchase on the world outside; while Yale 'typically' gave full support to the US fight against the Communist spectre, promoting a 'world order of freedom', Columbia was more interested in cooperation, Peaceful Coexistence, and the formulation of procedural rules binding on both superpowers.

So, for Kennedy, 'people in their forties' began to develop a new mainstream approach to 'the field' (a synonym for the discipline), under the banners of 'transnational law', 'the legal process', or 'liberalism'. Note that these 'people' inhabited a tiny group of elite universities.

Kennedy identified dissident voices – and named Allott, Berman, Carty, Charlesworth, Chimni, Chinkin, Engle, Frankenberg, Hernandez, Koskenniemi, Langville, Mutua, Onuma, Paul, Tarullo and Valdes – great names all, and many of them from outside the USA even, but a highly eclectic list all the same.⁷¹

And in a long footnote⁷² he explained his view of his differences with Martti Koskenniemi as to the 'rhetorical patterns' of 'the field'. He identified a 'central disciplinary problem', how to have law among sovereigns, with his own approach identifying "a deep incoherence" in the discipline, arising from tensions between respecting sovereigns and governing them, between autonomous law and effective law, and 'hard' and 'soft' law. Koskenniemi, for him, was more dynamic, seeing a repeated movement from apology to utopia. In an admission offered on behalf of himself and Koskenniemi (with permission?), he concluded:

The only accounts we offered of the movement forward were vague psychological insinuations that people would keep working to relieve the anxiety of the ambivalence, suggestions that the language of the discipline had an internal formal logic propelling it along, or the assumption that international lawyers had to propose reforms the way that birds have to fly – it is what they do. ...

To which the only conceivable response is – why bother?

However, there is a further point of interest in Kennedy's article. His text was haunted by the figure of the 'practitioner-being' – a very odd title indeed. This figure appeared when Kennedy discussed the way in which most scholarly work in the international law field presented itself, proposing viable improvements.⁷³ Kennedy continued:

The key here is that there is another group of people, called "practitioners", for whom scholars are doing this work and who will judge its persuasiveness and ultimate value. However argumentative and critical this work may be, it will ultimately be judged not by other scholars on the basis of its arguments, but by

70. *Ibid.*, at 380-381.

71. *Ibid.*, at 388-389.

72. *Ibid.*, at 408-409.

73. *Ibid.*, at 399.

practitioners on the basis of its usefulness. When scholars do judge this sort of work, they do so by reference to the often imaginary eye of the practitioner

He conceded that these ‘practitioners’ may very well be the academics themselves. How are these “practitioner beings” seen by those who find in them arbiters? The following passage was perhaps intended to be ironical:

Nevertheless, when practitioner-beings assess things, they do so with their eyes wide open, unaffected by the fashions and egos that can befuddle scholars. Their focus is relentlessly on the real world where the rubber meets the road, and it is their judgment, or predictions about their judgment, that guarantees the pragmatism and political neutrality of the field’s development.⁷⁴

These odd creatures, or rather imaginary beings or even avatars, were as far as they could be from engaged politically-minded international lawyers.

And what of section IV (c), about which Akbar Rasulov enthused?⁷⁵ Section IV is headed ‘Critical Performativity: New Approaches to International Law’, while C, the final part of the article, is entitled ‘The Project: Making New Thinking and Making It Known’. What is this ‘new thinking’?

First, however, Kennedy gave his reader a lengthy autobiography, including how he achieved tenure at Harvard. In particular, when he established NAIL, he wanted to differentiate the new group from ‘critical legal studies’, which seemed to his students ‘at once passé, dangerous, too politicised, too much associated with a “line” of some sort.’⁷⁶ In short, I think, it might have seemed to them to be quite the wrong thing for making a career in international law. And not really the done thing at Harvard. The choice of epithets is rather revealing.

He closed the NAIL project down quite deliberately in 1998. What, writing in 2000, did he have to offer for the future? In his view, a project like NAIL must have ‘... a shared sense that description matters, that things are terribly misrepresented, and that correcting, changing and influencing what is understood, what is seen, what can be asked, can be a matter of passion and politics.’⁷⁷ This sounds to me like a thoroughly idealist way of behaving, and as far from politics as possible.

3.5 The politics of Martti Koskenniemi

In my 2008 book I noted how Susan Marks cited the words of the Finnish scholar (b.1953) Martti Koskenniemi to the effect that international lawyers would be better advised to search for “more concrete forms of political commitment” which might “engage them in actual struggles, both as observers and participants, while

74. *Ibid.*, at 399.

75. *Ibid.*, at 476-500.

76. *Ibid.*, at 489.

77. *Ibid.*, at 498-499.

also taking the participants' self-understanding seriously"⁷⁸. I could see why she empathised. Koskenniemi, more than most international legal scholars combines theory and practice. Furthermore, he occupies a central position for the discipline: for Paavo Kotiaho he is

... an initiator of the discursive practices of the left-wing international legal project, who consequently not only gives rise to the possibility of future projects, but also sets the 'rules of formation of future texts'.⁷⁹

He contributed a chapter, 'What should international lawyers learn from Karl Marx?' to Susan Marks' 2008 collection *International Law on the Left: Re-examining Marxist Legacies*⁸⁰, in which while making it clear that he was not writing as a Marxist⁸¹, he concluded that 'international lawyers, learning from Marx, could see international law's emancipatory promise.'

International law may act precisely as an instrument through which particular grievances may be articulated as universal ones and, in this way, like myth, construct a sense of universal humanity through the act of invoking it.⁸²

So the publication of a collection of his essays under the title *The Politics of International Law* was especially welcome.⁸³

Chapter 11 is a revised version of work cited by Akbar Rasulov, 'Between Commitment and Cynicism: Outline for a Theory of International Law as Practice', first published in 1999.⁸⁴ This article was inspired by Bourdieu's work *The Force of Law*, to which I turn below. It was '... an attempt towards a sociology of international law as a profession.' He had himself found that international lawyers '... almost invariably see themselves as "progressives", whose political objectives... [include] globalisation, interdependence, democracy and the rule of law.'⁸⁵

Having discussed the roles of the international Judge and the government legal Adviser, Koskenniemi turned to the Activist. 'The activist participates in international law in order to further the political objectives that underlie his or her activism. The principal commitment of the serious activist is not to international law but to those objectives.'⁸⁶ In Koskenniemi's view, the lawyer activist who fails

78. Martti Koskenniemi, "'Intolerant Democracies': A Reaction", 37 *Harvard International Law Journal* (1996) 234-235; at Susan Marks, *The Riddle of All Constitutions* (Oxford University Press, 2000) at 141.

79. Kotiaho, 'A Return to Koskenniemi', *supra* note 2, at 3.

80. Susan Marks, *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press, 2008) 30-52.

81. Koskenniemi, 'Intolerant Democracies', *supra* note 78, at 31.

82. *Ibid.*, at 51.

83. Martti Koskenniemi, *The Politics of International Law* (Hart Publishing: Oxford, 2011).

84. *Ibid.*, at 271-293.

85. *Ibid.*, at 271.

86. *Ibid.*, at 289.

to ‘think like a lawyer’ and to ‘internalise the law’s argumentative structures’ will inevitably be marginalised.⁸⁷

Finally, he considered the Academic, ‘whose position is much less stable than that of the activist or the adviser.’⁸⁸ He continued:

Moreover, legal indeterminacy may occasion a doubt about the academic pursuit altogether; is not law precisely about the daily practice of political/government decision-making, weighing pros and cons in a world of limited time and resources, and not about the academic’s abstract norms?⁸⁹

And, in this essay, Koskenniemi was distinctly wary of anything like revolutionary enthusiasm. There will, he thought, be a nasty hangover the following day.

In the final essay of the book, ‘The Fate of Public International Law: Between Technique and Politics’, first published in 2007, Koskenniemi made a declaration of faith – in international law.

I often think of international law as a kind of secular faith. When powerful states engage in imperial wars, globalisation dislocates communities or transnational companies wreak havoc on the environment, and where national governments show themselves corrupt or ineffective, one often hears an appeal to international law. International law appears here less as this rule or that institution than as a place-holder for the vocabularies of justice and goodness, solidarity, responsibility and – faith.⁹⁰

In this, Koskenniemi was remarkably close to David Kennedy, whom he also cited with approval, and for the most part the bloody military reprisals of the colonial powers and the immensely paradoxical diplomatic and financial effort on the part of the USSR which both gave content to the anti-colonial struggle as waged by lawyers were entirely missing from his text.

But there was one passage on self-determination, buried away in a rather abstract discussion of instrumentalism and formalism, which to some extent resonates with my own position - even if Koskenniemi, like so many of his peers, entirely left out the political content, including Lenin’s contribution to the theory and practice of the ‘right of nations to self-determination’:

... ‘self-determination’, typically, may be constructed analytically to mean anything one wants it to mean, and many studies have invoked its extreme flexibility. Examined in the light of history, however, it has given form and strength to claims for national liberation and self-rule from the French Revolution to decolonisation

87. *Ibid.*, at 290-291.

88. *Ibid.*, at 291.

89. *Ibid.*, at 292.

90. *Ibid.*, at 361.

in the 1960s, the fall of the Berlin Wall, and the political transitions that have passed from Latin America through Eastern Europe and South Africa.⁹¹

Koskenniemi is an undoubtedly critical legal scholar of immense sophistication and learning. He is also a distinguished practitioner, serving in the Finnish diplomatic service from 1978 to 1996, finally as director of the Division of International Law. He was Finland's counsel in the International Court of Justice in the *Passage through the Great Belt* case (Finland v. Denmark) (1991-2). In 1997 to 2003 he served as a judge in the administrative tribunal of the Asian Development Bank. He is a member of the *Institut de droit international*. In addition to his classic texts *From Apology to Utopia: The structure of International Legal Argument*⁹² and *The Gentle Civiliser of Nations: the Rise and Fall of International Law 1870 to 1960*⁹³, he has also finalised the Report of the Study Group of the International Law Commission *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*⁹⁴.

It is clear from the quotations set out above that Koskenniemi can see the persuasive force of a call to political commitment, and will even go as far as to say that lawyers can play a role in articulating and constructing a universalist vision. But his career has been one of impeccable distinguished service in the existing state and academic terrain on which he has found himself. He is a critical lawyer, but not in any sense radical or political; and he does not provide the resources with which to bridge the gap which is at the centre of this essay.

4. Bourdieu

4.1 Bourdieu's theory of law and lawyering

From Koskenniemi I turn to a more political figure, the French sociologist Pierre Bourdieu (1930-2002), who while never a Marxist, and a scathing opponent of Sartre, was also a fierce critic of neo-liberalism, most famously in his great *La misère du monde* (1993), oddly translated as *Weight of the World: Social Suffering in Contemporary Society* (Polity, 1999).

91. *Ibid.*, at 261.

92. Martti Koskenniemi, *From Apology to Utopia: The structure of International Legal Argument* (Finnish Lawyers Publishing Company (1989) and Cambridge University Press (2005).

93. Martti Koskenniemi, *The Gentle Civiliser of Nations: the Rise and Fall of International Law 1870 to 1960* (Cambridge University Press, 2002).

94. Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (The Erik Castren Institute Research Reports: Helsinki, 2007).

As I mentioned above, David Kennedy acknowledges Bourdieu's powerful 1987 essay *The Force of Law: Toward a Sociology of the Juridical Field*, but without analysis, and, as it were, placing it oddly together with Foucault's oeuvre.⁹⁵

I start this section with Bourdieu's pithy critique of Marxist engagements with law. Bourdieu focused on E P Thompson, and argued that

The architectural metaphor of base and superstructure usually underlies the notion of relative autonomy. This metaphor continues to guide those who believe they are breaking with economism when, in order to restore to the law its full historical efficacy, they simply content themselves with asserting that it is "deeply imbricated within the very basis of productive relations."⁹⁶ This concern with situating law at a deep level of historical forces once again makes it impossible to conceive concretely the specific social universe in which law is produced and in which it exercises its power.

Bourdieu was, as I have pointed out, no Marxist, but rather a follower of Weber; but there is merit in this criticism. What is the curious intellectual social world in which Kennedy traces the adventures of 'the discipline'? Why is this world so attractive and so tenacious?

For me the most striking contribution of this essay is Bourdieu's characterisation of the legal field, and the inevitable destiny of academic critics. He was much more acute than, for example, Peter Goodrich, whose 20th Anniversary Lecture for the Birkbeck Law School was entitled "An Instance of the Fingerpost: An Excursus on the Legal and the Digital".⁹⁷ Goodrich's powerful attack on British CLS, mentioned above, has not led him to change his theory or his practice.

Bourdieu was interested in the 'social practices of law', which he saw as being the product of the functioning of the 'field', namely the 'area of structured, socially patterned activity or 'practice', in this case disciplinarily and professionally defined.⁹⁸ The 'field' is characterised by a specific logic which is determined by two factors. First, there are the specific power relations of all its participants - judges, practitioners, academics - which give it its structure. Those power relations order the competitive struggles, or conflicts over competence, between its participants. The second factor is the 'internal logic of juridical functioning which constantly

95. Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field', 38 *Hastings Law Journal* (1986-1987) 814-853; and Richard Terdiman, 'Translator's Introduction', 38 *Hastings Law Journal* (1986-1987) 805-813.

96. Edward Thompson, *Whigs and Hunters: The Origin of the Black Act* (Penguin Press: Alan Lane, 1975) at 261.

97. <www.bbk.ac.uk/law/events/annual-lecture-professor-peter-goodrich-friday-18-may-2012>, with a link to the podcast of the lecture, which moved from antiquarian curiosities to acerbic attacks on certain US scholars. There is a further link to the slides which accompanied the lecture.

98. Terdiman, 'Translator's Introduction', at 805.

constrains the range of possible actions' for its participants, and 'limit the range of specifically juridical solutions'.⁹⁹

Bourdieu further specified that this juridical 'field' is indeed the site of 'competition for the right to determine the law'. This competition takes the form of a confrontation between participants 'possessing a technical competence which is inevitably social', and which 'consists essentially in the socially recognised capacity to interpret a corpus of texts sanctifying a correct or legitimised vision of the social world.' Thus, law functions through its ability to provide the 'common sense' of non-legal members of society. Bourdieu put it this way:

It is essential to recognize this in order to take account both of the relative autonomy of the law and of the properly symbolic effect of "miscognition" that results from the illusion of the law's absolute autonomy in relation to external pressures.¹⁰⁰

That is how Bourdieu explained the tension in law between 'formalism' and 'instrumentalism'. In the final analysis, law is to an extent a closed system, developing according to its internal dynamics; and it has the capacity to fool the public into believing that it is really independent from political, economic and social power.

Law also has the capacity to incorporate its lawyer critics, and in a footnote Bourdieu explained that

... even the most heretical of dissident legal scholars in France, those who associate themselves with sociological or Marxist methodologies to advance the rights of specialists working in the most disadvantaged areas of the law (such as social welfare law, *droit social*), nonetheless maintain their commitment to the science of jurisprudence.¹⁰¹

That is precisely what I identified above.

This has the following depressing effect. For Bourdieu, the function of law in maintaining the symbolic order is not the result of an intervention of external power, but on the contrary the result of innumerable actions by the whole range of participants who do not at all intend to implement that function of law, and may very well be entirely subversive in their motivation.

Thus, for example, the subversive efforts of those in the juridical avant garde in the end will contribute to the adaptation of the law and the juridical field to new states of social relations, and thereby insure the legitimation of the established order of such relations.¹⁰²

That is the fate of the lawyer, academic or practitioner.

99. Bourdieu, 'The Force of Law', at 816.

100. *Ibid.*, at 817.

101. *Ibid.*, at 844.

102. *Ibid.*, at 852.

4.2 The revolutionary content of post-WW II international law

My own position¹⁰³ is that international law is indeed a special case, quite different from domestic law. There are serious arguments, drawn from English positivism (Austin) and international relations 'realism', as to whether there is any such thing. It is my contention that the international law to which Martti Koskenniemi referred as the 'gentle civilizer of nations'¹⁰⁴ or for an imagined and reactionary version of which Carl Schmitt had such nostalgia¹⁰⁵, and of which the USSR had throughout its existence such a rigidly positivist account¹⁰⁶, was thoroughly transformed in the post-World-War II period. The creation of the United Nations by the victorious powers – all the permanent members of the Security Council with the exception of China were colonial powers at the time – was almost immediately subverted and transformed by the bloody and tumultuous anticolonial struggles. This, I repeat, is why I describe the right of peoples to self-determination as the revolutionary kernel of international law.

It is my case that the working-out of struggles for this right dominates the international agenda to this day.

The same considerations inspire my materialist account of human rights, which starts with the identification, itself nothing new, of three generations of human rights, each with its inception in the revolutionary events of the 1780s, of the years following 1917 and, especially, of the great anticolonial struggles of the post-World-War II period. Each of these inspiring revolutionary events and the rights associated with them – the civil and political rights of the French Revolution, the social and economic rights of the Russian Revolution, and the third-generation rights, crowned by the right of peoples to self-determination – make available to succeeding generations a 'symbolic capital' upon which each may draw. That is where my account resonates with Koskenniemi's 'form and strength' in the citation above.

In this way, the rights in question, at first glance no more than forms of words, mere rhetoric, acquire material force when mobilised in struggle. This is what I meant by '... their proper status as always scandalous, the product of, and constantly reanimated by, human struggle.'¹⁰⁷

103. Most recently explored in Bill Bowring, 'Marx, Lenin and Pashukanis on Self-Determination: Response to Robert Knox', 19 (2) *Historical Materialism* (2011) 113-127.

104. Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001).

105. Carl Schmitt, *The Nomos of the Earth: In the International Law of the Jus Publicum Europaeum*, translated by Gary Ulmen (Telos Press Publishing: New York, 2003).

106. See Bill Bowring, 'Positivism versus Self-Determination: the Contradictions of Soviet International Law', in Susan Marks (ed), *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press, 2008) 133-168.

107. Bowring, *Degradation*, *supra* note 16, at 112.

5. Conclusion: what are lawyers – academic and activist - to do?

I am with Paavo Kotiaho when, in his powerful critique of Koskenniemi, he cites with approval Robert Knox¹⁰⁸:

.... we ought not to turn to the ethical prescripts advocated by Koskenniemi above, but rather follow the tactical guidance given by Robert Knox, and recognize that

The shape of the legal form means that pursuing a legal strategy can break up collective solidarity, and renders progressive forces unable to address the systemic causes of social problems. Indeed, to mount a legal strategy is to risk legitimating the structures of global capitalism [...] International law, then, must never be pursued because it 'is law', but only insofar as its content can advance the aims of progressive constituencies. What must be pursued is a 'principled opportunism', where – in order to undercut the individualizing, legitimating perspective of law – international law is consciously used as a mere tool, to be discarded when not useful.¹⁰⁹

In his concluding paragraphs, Kotiaho calls for a Marxist analysis of international law, but does not join China Miéville and Robert Knox in following Evgeny Pashukanis' writings of the early 1920s.¹¹⁰ I have engaged critically both with Pashukanis and with Knox's take on him in the three texts cited in this article, and will not repeat my arguments here.

Suffice it to say that I am continuing to research Pashukanis' early work for a forthcoming book *Law, Rights and Ideology in Russia*, and I maintain that Pashukanis, writing in the period of NEP (New Economic Policy) in Soviet Russia with its qualified return to a market economy, foregrounded the persistence of bourgeois law in Russia and thus entirely missed the revolutionary content of the right to self-determination. He became an enthusiastic (uncoerced) supporter both of 'socialism in one country' and of 'peaceful coexistence', eulogising Stalin, only to fall victim to Stalin's purges. He was an academic, not an activist lawyer.

Which is not to say that the radical or left-wing legal scholar has no role to play, far from it. The power of law to perpetuate misrecognition of real power relations and to perform its vital role of legitimation of the symbolic order of capitalism, which is what Susan Marks refers to as 'ideology', must indeed be

108. Kotiaho, 'A Return to Koskenniemi', *supra* note 2, at 11.

109. Robert Knox, 'Marxism, International Law and Political Strategy', 22 *Leiden Journal of International Law* (2009) 413-429.

110. Evgeny Pashukanis, 'International Law', reproduced as an annex to China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill: Leiden, 2005) at 321, 333; and Evgeny Pashukanis, 'Lenin and Problems of Law', in Piers Beirne and Robert Sharlet (eds), *Pashukanis: Selected Writings on Marxism and Law* (Academic Press: New York, 1980).

stripped of its false normativity and subjected to a thorough-going and disillusioned materialist critique. At the same time, an accurate historical account of the development of international law in the 20th century will reveal the actual revolutionary and scandalous content of international law. Which is not to say that law is or can be itself revolutionary.

However, it is to be hoped that the scholar or for that matter practitioner, freed of illusion, eyes wide open, will not simply relapse into the armchair, but will find ways to employ her legal competence and skills modestly in the service of collective resistance and struggle. If not, she will fall into a striking performative contradiction. The political-inspired lawyers will get on with what they are very usefully doing already. The radical legal scholars, on the other hand, have their own important work to do. A good place to start is the immanent critique of some of the illustrious leaders of the debate. In a small way, that is what this essay has attempted to do.