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Empire's Law (The Earl A. Snyder Lecture in International Law)

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Empire's Law

SUSAN MARKS*

On March 7, 2002, Professor Marks delivered the sixth annual Snyder Lecture at the Indiana University School of Law—Bloomington.

In their recent book *Empire* Michael Hardt and Antonio Negri make the claim that

Empire is materializing before our very eyes. Over the past several decades, as colonial regimes were overthrown and then precipitously after the Soviet barriers to the capitalist world market finally collapsed, we have witnessed an irresistible and irreversible globalization of economic and cultural exchanges. Along with the global market and global circuits of production has emerged a global order, a new logic and structure of rule—in short, a new form of sovereignty. Empire is the political subject that effectively regulates these global exchanges, the sovereign power that governs the world.¹

In this lecture I want to consider what Hardt and Negri mean by this claim, what they have in mind when they assert the emergence of a new, global order with a “new logic and structure of rule,” and what implications their analysis might have for students of international law. To bring these issues into focus, I propose to set them against the background of earlier meditations on the relationship between imperialism and international law and on the significance of the colonial encounter in the construction of international legal ideas, concepts and categories.

But first I think it might be helpful to dwell a little on Hardt's and Negri's central concept, announced already in the fashionably monoverbal title of their book. For empire is, of course, a term that has many different referents and many different inflections, and if we are to grasp the analysis put forward by Hardt and Negri, we need to be in a position to see how their conception of

* Fellow, Emmanuel College, Cambridge. I am grateful to Scott Newton for helpful comments in the preparation of this lecture.

1. MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE*, at xi (2000).

empire carries forward or departs from other ways of understanding the term. Indeed, we need to be ready not only for comparisons with other ways of understanding empire, but also for comparisons with its similarly polyvalent cognates and affiliates: imperialism, colonialism, and their respective variants.

I. EMPIRE BEFORE “EMPIRE”

The word empire derives, of course, from the Latin *imperium*, where it denoted the sovereignty exercised from Rome over much of the Mediterranean world. It continues to be used in this way to refer to the phenomenon by which, in all periods of history, nations have subjugated their neighbors and brought expanding areas under the control of a single supreme authority. Thus, alongside the Roman Empire, we speak of the Aztec Empire, the Chinese Empire, the Ottoman Empire, and so on.

But then, it is not usually these cases that come to mind first when we hear the term empire. More commonly, we have in mind European domination of the non-European world, beginning with the adventures of the early modern period and eventually culminating in the fateful scrambles and elaborate, if widely diverse, colonial structures of the late nineteenth and early twentieth centuries. One of the most obvious respects in which the European empires differed from the other empires I have just mentioned is that those subjugated were not from neighboring lands, but from distant places. They were inhabitants of the Americas, Asia, Oceania, and Africa. But, of course, this is just the surface-level manifestation of a far deeper difference: the European empires were associated with the phenomena of imperialism and colonialism.

In scholarly usage, a distinction is sometimes drawn between these two terms, such that imperialism refers to the practice of ruling colonies from a metropolitan center, while colonialism refers to the practice of founding colonial settlements. Colonialism has its etymological roots in the Latin *colonia*, meaning a farm or settlement established in foreign territory by Roman citizens, on the basis that Roman citizenship would be retained. By the late Nineteenth Century, however, these practices had become linked as a result of active policies and organized processes of territorial expansion, and this perhaps explains why in everyday usage we tend to use the terms imperialism and colonialism with relative interchangeability. Earlier forms of colonization had often been small-scale, unofficial, and non-systematic initiatives, but by the late Nineteenth Century, European states were aggressively competing to acquire colonies. The idea that this was a “civilizing mission” pursued to

improve the conditions of the colonized, while by no means a product of this period, also gained ground at this time.

In the early Twentieth Century, the term imperialism took on a further connotation, as Marxists, along with some liberals, began to concentrate on the relationship between European imperial policy and capitalism. In perhaps the best known work on this theme, Lenin argued that European expansion corresponded to a particular stage in the development of capitalism. With the growth of monopoly capitalism, capitalism had become, as he put it, "over-ripe."² More money had been generated than could profitably be invested at home, and financiers, manufacturers, and traders thus needed to persuade their governments to expand the terrain of investment by acquiring colonies in which capital was lacking but labor and raw materials were abundant. Other writers on this theme, such as Kautsky, focused less on the historical processes that led to imperial rivalries, and more on the structure of the economic relations involved. Either way, what is significant for our purpose is that, in these arguments, imperialism does not refer primarily to a political system of colonial government. Rather, it refers to a distinctive economic system, a key facet of which is the penetration and control of markets abroad.

This had important implications in the second half of the Twentieth Century. For if modern imperialism was simply a political system of colonial government, then the eventual independence of the vast majority of those colonies presumably signaled the end of imperialism. But if it was above all an economic system, then decolonization could not be assumed to have that result. The transformation of colonies in Africa, Asia, and the Pacific into independent states might affect their political relations, but it could not be assumed to put an end to their material subordination. Thus, Kwame Nkrumah coined the term neo-colonialism to refer to the forms of control which continued to be exercised by metropolitan powers and other powerful nations (some of them, of course, themselves post-colonial states) over erstwhile colonies.³ Studies of neo-colonialism, or neo-imperialism as it is sometimes also called, have described and explained this control in a wide variety of ways and frequently on the basis of processes which implicate all societies, including ones that never actually were or had colonies. According to one influential theory, capitalism has developed as an autopoietic system—in Immanuel Wallerstein's terminology, a

2. V.I. LENIN, *Imperialism: The Highest Stage of Capitalism*, in 1 COLLECTED WORKS OF V.I. LENIN 495 (1917), quoted in ANTHONY BREWER, *Marxist Theories of Imperialism* 109, 111 (2d ed., 1990).

3. KWAME NKUMAH, *NEO-COLONIALISM: THE LAST STAGE OF IMPERIALISM* (1965).

“world-system”—in which the globe is divided into core, semi-peripheral, and peripheral regions, linked in interlocking relations of exploitation and dependency.⁴

In the Twentieth Century’s closing decades, these analyses came to be challenged on the basis of yet another account of imperialism. In this account, whatever the cogency of the analyses as studies of the political economy of imperialism and neo-imperialism, they are flawed by a failure to attach sufficient importance to ideas, images, and symbols as producers of colonial subjectivities and reproducers of colonial relations. Like more narrowly drawn analyses, they neglect to consider the extent to which, and the ways in which, European imperialism was inseparable from ideas about race, sex, hygiene, civilization, identity, property, European superiority and non-European inferiority, not to mention (as I shall shortly discuss) sovereignty, political community, and law. These ideas, and the diverse representational practices through which they were articulated, helped to rationalize and legitimate colonial rule. At the same time, however, they also created openings for anti-colonial struggle, providing concepts and logics which could be turned around against those invoking them. In path-breaking work, Edward Said showed how, in this sense, imperialism must be grasped not merely as a political or economic system, but as a cultural system as well.⁵

Taking our cue from Said and other post-colonial theorists, we now speak quite routinely of forms of cultural imperialism, a practice understood as current both among societies and also within them. This brings me to one final (though by no means the only other) way in which a variant of the term empire has been used in recent years. In conjunction with calls for a “politics of cultural recognition,” the need has been emphasized to cultivate a post-imperial perspective.⁶ By “perspective” is meant here the attitude we adopt when interacting with other people, nature, and the world in general, and, informing that, the standpoint from which we contemplate how things are, how we should live, and so on. A post-imperial perspective, as most clearly elaborated in the work of political theorist James Tully, is a standpoint that recognizes other standpoints.⁷ That is to say, it rejects as unjust the idea that issues affecting collective life can be addressed from a fixed, unitary “Archimedean” point.

4. *See generally* IMMANUEL WALLERSTEIN, *THE CAPITALIST WORLD-ECONOMY* (1980).

5. *See generally* EDWARD W. SAID, *CULTURE AND IMPERIALISM* (1993); EDWARD W. SAID, *ORIENTALISM* (1978).

6. JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY I* (1995).

7. *See generally id.*

Thus, a post-imperial perspective eschews paternalism, embraces difference, and seeks to devise forms of community accordingly. For Tully, a post-imperial perspective is a necessary corrective to the notion (which he associates with an imperial perspective) that belonging is to be elided with assimilation, and association with uniformity.⁸ This notion has helped to obstruct the demands of indigenous peoples, women, linguistic and religious minorities, and others who remain marginalized or excluded despite the earlier waves of anti-imperialist transformation. If their demands are to be met, our ethical, political, ontological, epistemological, and even ecological deliberations must be pursued on a more humble, less defended, and in this sense post-imperial basis.⁹

I think I have now said enough to recall that empire and related words are used in a plurality of senses, in connection with a plurality of ideas and arguments. What sense, then, do Hardt and Negri intend when they write, not of imperialism or neo-imperialism, and not of an empire (belonging to a particular period) or the empire (belonging to a particular nation), but of "Empire," marked as a proper name by an upper-case E, yet so strangely generalized and delocalized? For the moment, I would like us to rest content with the answer that they do not intend any of the specific usages I have just mentioned. Their conception draws on a number of the ideas I have touched upon, but it also criticizes those ideas, or at any rate challenges their adequacy, and certainly does not map squarely onto any of them. I will discuss what is involved a little later. At this point, however, I want to stay with the more familiar notions of empire, and introduce the question of how modern imperialism has been understood as relating to international law. As I indicated at the beginning, this will provide an instructive background against which to appreciate the scope and significance of Hardt's and Negri's claims.

II. IMPERIALISM'S LAW

In addressing the question of how imperialism has been understood as relating to international law, I will focus on two accounts, oriented to different conceptions of imperialism. One, written in the mid-1920s by the Russian jurist E.B. Pashukanis, quotes Lenin, and takes as its point of departure a conception in which imperialism is above all an economic system, and

8. *Id.* at 7-17.

9. *Id.*

specifically an articulation of capitalist patterns and logics.¹⁰ The other, written in recent years by Antony Anghie, quotes Said, and takes as its point of departure a conception in which imperialism is also a cultural system, constituting the subjectivities and sustaining the relationships that underpin Western domination of the Third World.¹¹ I am not sure whether it is quite fair to juxtapose the work of these two scholars in this way. Pashukanis certainly cannot compete, for whatever his insight, he speaks in an idiom that now seems dated and, indeed, discredited. And Anghie for his part may not be happy to find himself in the company of the famously authoritarian figure who ruled the Moscow Institute of Soviet Law with an iron fist (and I mean, of course, that he ruled what it taught) until he was purged by Stalin in 1937. But, to anticipate my eventual argument, I believe that the two forms of critique exemplified in the writings of these scholars are valuably brought together, especially today, even if the Marxist critique of imperialism remains in important respects deficient. At any rate, the two analyses will, as I said, be helpful in considering the claims of Hardt and Negri.

A. Imperialism and International Law in Marxist Perspective

Let me begin then with Pashukanis. I draw on a text written as an entry on international law for an *Encyclopaedia of State and Law*, in which Pashukanis develops four principal themes. In the first place, he observes that the received definition of international law masks the specific context of rivalry among capitalist states to which its norms are addressed.¹² According to that definition, international law is a system of law defining the rights and duties of states in their mutual relations for the sake of coordinating their interests, enabling their cooperation, and hence promoting peace.¹³ Yet, as Pashukanis sees it (writing, as I indicated, less than a decade after World War I), the basic factor defining international law and emergent international organizations is

10. See *International Law*, in PASHUKANIS: SELECTED WRITINGS ON MARXISM AND LAW 168, 169-70 (Piers Beirne & Robert Sharlet eds., 1980) [hereinafter PASHUKANIS].

11. See Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 N.Y.U. J. INT'L L. & POL. 243, 284 (2000); see also Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1 (1999) [hereinafter, Anghie, *Finding the Peripheries*]; Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOC. AND LEGAL STUD. 321 (1996) [hereinafter, Anghie, *Francisco de Vitoria*].

12. PASHUKANIS, *supra* note 10, at 169.

13. *Id.* at 168.

competitive struggle among capitalist states.¹⁴ Thus, the rhetoric of peace conceals the essentially violent character of international relations. At the same time, the generalized language conceals the specifically capitalist character of the relations with which international law is concerned.

Despite this conflictual reality, Pashukanis's second major theme is that, in his words, the "bourgeois jurists are not entirely mistaken, however, in considering international law as a function of some ideal cultural community which mutually connects individual states."¹⁵ This community indeed exists, at least as an ideal, but the point is that it is based on common interests among powerful forces within capitalist states. Societies that have not established a capitalist mode of production are excluded from the international community, and hence from the protection of international law. In this regard, Pashukanis notes that whereas feudal Europe was united under a "religious notion of the community of all Christians," the capitalist world invented the concept of civilization "for the same purposes."¹⁶ The division of states into those which are civilized and those which are not means that capitalist states can apply international law in their relations with one another, "while the remainder of the world is considered as a simple object of their completed transactions."¹⁷ In this way, just as the bourgeoisie dominates the proletariat at home, so too is it able to dominate colonial countries abroad. Citing a German jurist who affirms that relations with peoples outside the international community are not to be judged by reference to international law, but rather "according to the bases of the love for mankind and Christianity," Pashukanis dryly suggests that "[t]o assess the piquancy of this assertion [one must] recall that, at the time of the colonial wars, the representatives of these lofty principles, e.g. the French in Madagascar and the Germans in Southwest Africa, liquidated the local population without regard for age and sex."¹⁸

Pashukanis's third theme concerns the manner in which modern international law was shaped by the development and spread of capitalism, and especially by the need to protect property.¹⁹ Thus, the concept of sovereignty and the principle that only states are fully subjects of international law responds to the situation of strong, centralized states, in which capital requires (and

14. *Id.* at 169-71.

15. *Id.* at 171.

16. *Id.* at 172.

17. *Id.*

18. *Id.*

19. *Id.* at 173-78.

finances) the prohibition of private wars, the establishment of standing armies, the efficient administration of customs arrangements, and the energetic conduct of colonial policy. More generally, international law structures relations between states on the model of relations between owners of private property. As he writes:

Sovereign states co-exist and are counterposed to one another in exactly the same way as are individual property owners with equal rights. Each state may “freely” dispose of its own property, but it can gain access to another state’s property only by means of a contract on the basis of compensation.²⁰

This is especially evident in the concepts and norms of international law regarding territorial title, whereby state territory is figured as property, to be bought, sold, and generally disposed of as if it were a commodity—although the analogy is also evident, of course, in the law and practice of treaty-making. In the passage just quoted, Pashukanis puts the word “freely” in quotation marks when he refers to the right of states freely to dispose of their property. His irony derives, of course, from the recognition that some states are freer to dispose of their property in the way they wish than others. Just as the formal equality of the parties in the sphere of private law often hides their real inequality, so too “bourgeois international law in principle recognizes that states have equal rights yet in reality they are unequal in their significance and their power.”²¹

In a final theme, Pashukanis turns to the character of international law as law. He observes that in national societies, private-law relations arose in conjunction with, and continue to depend upon, a public-law order.²² In international law, however, the kind of institutional framework needed for such a public-law order is largely lacking. There is no international police force capable of enforcing international law. Does this mean, as some have argued (and he mentions in particular Austin and a number of German jurists), that international law is not really law?²³ For Pashukanis, this question is badly posed, inasmuch as it treats law as a free-standing thing. It “fetishizes” law as an objective form that magically detaches from the social relations which it

20. *Id.* at 176.

21. *Id.* at 178.

22. *Id.*

23. *Id.* at 178-80.

expresses and assumes an independent existence, in the same way as, according to Marx, commodities get fetishized.²⁴ From this perspective, those who assert that international law is not really law simply displace the fetishism of international law to the fetishism of law in general. As Pashukanis puts it, they expose “fetishism in one area” but do so “at the cost of consolidating it in others.”²⁵ Better, as he sees it, to acknowledge that all law is precarious and unstable than to idealize national law. Better, in other words, not to exaggerate the autonomy and independent force of law, but to recognize instead that, by changing the legal form of a relationship, you do not automatically change that relationship’s substantive reality. Thus, neither law in capitalist societies nor international law must be allowed to obscure the fact that what is involved are relations between classes, which must be confronted and transformed as such.

In this text, then, Pashukanis develops an account of the relationship between imperialism and international law which foregrounds the extent to which international law has been shaped by capitalism. In doing so, he highlights issues of violence, community, property, and law that he finds unaddressed in, and indeed mystified by, the canonical works of international legal scholarship.

B. Imperialism and International Law in Post-Colonial Perspective

I pass now to our post-colonial theorist, Antony Anghie, who in recent years has published a series of articles on the colonial origins of modern international law.²⁶ In traditional accounts, international law is presented as having had to confront the phenomenon of colonialism, but the possibility is not considered that colonialism might itself have had constitutive significance for international law. Anghie’s central thesis, however, is that the colonial encounter in fact played a crucial role in the formation of core international legal concepts, categories and doctrines, and especially sovereignty.²⁷ I draw here on two articles: one in which Anghie elaborates this thesis in relation to very early international legal jurisprudence,²⁸ and another in which he elaborates it in relation to Nineteenth-Century international legal

24. *Id.* at 180.

25. *Id.*

26. *See supra* note 11.

27. *See Anghie, Francisco de Vitoria, supra* note 11, at 321.

28. *Id.*

jurisprudence.²⁹ In the first of these articles, Anghie shows how in the Sixteenth Century Francisco de Vitoria framed a conception of sovereignty that helped to legitimate Spanish conquest and dispossession in the Americas by defining the peoples of the region as non-sovereign. In this regard, Anghie emphasizes that Vitoria was not simply applying a pre-existing conception of sovereignty to this novel situation; he was creating a new conception in response to the demands of colonial interaction.³⁰ Anghie describes this process as involving the following moves.

First, Vitoria sought to demonstrate the existence of a universal system of law that could encompass relations between the Indians and Spaniards, despite the important differences between their respective societies.³¹ This could not be, as some of his contemporaries supposed, divine law, as in his view that law could not legitimately be applied to non-Christians.³² It could, however, be a secular system of natural law (*jus gentium*), accessible to all human beings through the application of reason. Vitoria then proceeded to specify this *jus gentium* in a way that reflected Spanish customs and interests. In particular, he excluded the Indians from the sphere of sovereignty, upon which key rights and privileges depended, on the basis that their forms of political community were inherently non-sovereign.³³ This had important effects, since one of the rights and privileges that depended upon sovereign status was the right to wage war. In denying the Indians sovereign status, Vitoria thus denied their right legitimately to resist incursions by the Spaniards, and conversely affirmed the right of the Spaniards to use violence against them. In Vitoria's scheme, then, the colonized peoples of the Americas were subject to the *jus gentium* only as objects against whom the privileges of European sovereignty could be asserted and consolidated. As Anghie puts it, the Indians were "included within the system only to be disciplined."³⁴

In the second article, Anghie concentrates on Nineteenth-Century international legal jurisprudence, and shows how Vitoria's ideas about sovereignty were carried forward and rearticulated in new circumstances. One aspect of these new circumstances was, of course, intensified colonial interaction. Another aspect, however, was a shift at the level of theory. Most

29. Anghie, *Finding the Peripheries*, *supra* note 11.

30. See Anghie, *Francisco de Vitoria*, *supra* note 11, at 322.

31. *Id.* at 324-25.

32. *Id.* at 324.

33. *Id.* at 330.

34. *Id.* at 331.

European and American jurists no longer believed in the *jus gentium* as a system of natural law discoverable by the application of reason. Rather, they held to the positivist notion that international law is a system of rules created by agreement among sovereign states.³⁵ According to this notion, consent, not nature or reason, is the basis of international law, and sovereign status is in turn the touchstone of capacity to give consent.³⁶ Insofar as positivism was embraced as the dominant theoretical framework, and in the light of the intensification of colonial interaction, it thus became more important than ever to determine which entities had sovereign status. Anghie shows how a wide variety of concepts, categories, and doctrines were marshalled to the task first of establishing the Western powers' right to decide on the scope of sovereign status, and then of determining that scope in a way which excluded the peoples of Asia, Africa, and the Pacific.³⁷

One such concept was that of legal "personality."³⁸ The question of sovereign status was addressed in terms of the ascription of legal personality to a would-be sovereign state. In turn, this was addressed in terms of the further concept of the "family of nations."³⁹ Non-European peoples would have legal personality, and hence sovereign rights, if they could be seen as belonging to the family of nations. Membership in that family, however, was indexed to a distinction between civilized and uncivilized, according to which civilization was identified not just with distinctively European forms of political community, but with European social institutions and practices as well. Thus, the family of nations functioned to enshrine a cultural criterion of participation in the making, interpretation, and enforcement of international law. In Anghie's account, doctrines concerned with the recognition of states were another important element in this process of translating cultural differences into legal ones.⁴⁰ Whereas recognition presents itself as a straightforward matter of clarifying the status of new or unknown entities, Anghie argues that it was primarily about affirming the right of European states to allocate sovereignty, and to do so on a racialized basis. Hence, with recognition doctrines, sovereignty became a commodity to be granted, denied, promised, deferred, or repackaged with strings attached. Doctrines concerning territorial title can be

35. Anghie, *Finding the Peripheries*, *supra* note 11, at 2-3.

36. *Id.*

37. *Id.* at 6.

38. *Id.* at 26.

39. *Id.* at 28.

40. *Id.* at 29, 34.

analyzed in a similar way. Territory, too, was a commodity, the modes of acquiring and disposing of which colonial powers claimed the right to control.⁴¹ Anghie also discusses the ways in which principles concerning the law of treaties were refashioned so as to assert the validity of coerced treaties.⁴² At the same time, canons of interpretation were developed that worked to deny non-European peoples the benefits, however dubious, of the treaties they had concluded. Reinforcing this was a reconceptualization of these treaties as belonging to a distinct category of treaty-making that was not dependent upon, and thus carried no implication of, the sovereign status of the parties.⁴³

Anghie also examines from this perspective a range of other concepts and doctrines, but I think I have said enough to indicate the general lines of his argument. Just as Pashukanis develops an account of the relationship between imperialism and international law which foregrounds the extent to which international law has been shaped by capitalism, so Anghie develops an account of that relationship which foregrounds the extent to which international law has been shaped by colonialism. In particular, Anghie shows how the concept of sovereignty cannot properly be understood outside the context of its denial in the non-European world. In this sense, as post-colonial theorists have demonstrated in innumerable other ways as well, the non-European world operated as the proving ground for European subjectivity—the “other” by reference to which European identities and projects (and among the latter, international law) were defined and realized. Like Pashukanis too, Anghie observes that received definitions of international law, and received ways of studying it, cannot account for these processes, and indeed only serve to obscure them.⁴⁴

III. FROM IMPERIALISM TO “EMPIRE”

In the preceding sections, I have recalled some of the different ways in which the term empire and its variants are used. I have also discussed arguments about the bearing for international law of two of those usages, one—elaborated within the framework of Marxist thought—taking imperialism to be above all about capitalist exploitation, the other—elaborated within the

41. *Id.* at 36-38.

42. *Id.* at 43-49.

43. *Id.* at 45, 47.

44. *Id.* at 78-80.

framework of post-colonial thought—holding it to be above all about European subjectivity and non-European exclusion. It remains now to take up Hardt's and Negri's usage of this term. What do they mean by the claim, which appears in the passage I quoted at the beginning of this lecture, that Empire is materializing before our eyes? What do they mean by the claim that Empire is the sovereign power that governs the world? What is it that is materializing and governing?

That national governments, even the most powerful among them, face growing difficulty in controlling the activities of business, and especially finance, is today very widely acknowledged. The question of the significance of this development for nation-state-based systems of power is considered by many to be one of the most important political questions of our age. For Hardt and Negri, however, the issue is not so much what significance the globalization of markets has for nationstate-based systems of power. The issue, rather, is what significance it has for the emergence of a global system of power. Their argument is that, in circumstances of intensifying globalization, political authority has been reconfigured to create a new, global form of sovereignty composed of agencies which operate in diverse arenas (national, regional, and global), yet interlock to form a single framework of governance for the entire world.⁴⁵ That framework, and the form of sovereignty that comes with it, is what Hardt and Negri call Empire.

In choosing this term, they explain that they seek to signal a number of features, informed by imperial history and tradition, but reinscribed now in a context that extends beyond any previous instantiation of empire or imperialism. In the first place, Empire is a regime that, in their words, "encompasses the spatial totality;"⁴⁶ that is to say, it knows no territorial boundaries. Secondly, it also knows no "temporal boundaries," offering a vantage point from which the past appears to have been overcome, while the future seems to promise an everlasting present.⁴⁷ At the same time, thirdly, it appears to lead in a direction that joins societies across political boundaries, inasmuch as, like previous imperial formations, it is dedicated to the inauguration of perpetual peace (even if, like those previous formations, it remains enmeshed with the deployment and rationalization of violence).⁴⁸

45. HARDT AND NEGRI, *supra* note 1, at xii.

46. *Id.* at xiv.

47. *Id.* at xv.

48. *Id.*

Finally, Empire knows no subject-matter boundaries. It operates on all registers of social life: not just at the level of public regulation, but also at every other level, right down to the “internalised” level of self-regulation by individuals in everyday life.⁴⁹ In all these senses Hardt and Negri propose that what makes Empire distinctive is its character as unbounded, and hence, in their phrase, lacking any “outside.”⁵⁰

Discussions of globalization commonly portray the intensification of globalizing processes as inevitable and inexorable, and invite us to celebrate or resign ourselves to that fact, depending on our point of view. On the other hand, many scholars and activists have criticized that perspective and exposed it as ideological (in its effect, if not in its intention). Hardt and Negri endorse that critique, and insist that those not content with the effects of globalization must approach it without fatalism. Thus, in characterizing Empire as lacking an outside, these scholars do not seek to imply that there is no escape, in the sense that there is no scope for resistance, no possibility of transforming current arrangements. On the contrary, they propose that there are in fact enhanced opportunities for resistance in current conditions.⁵¹ For the same changes that open the way for Empire—most obviously, the revolution in communications and information technology, but also other developments such as the rising importance of what Hardt and Negri call “immaterial labour”⁵² (the provision of services, intellectual work)—also open the way for “counter-imperial” networking and action.⁵³ The point is simply that nostalgia for more limited horizons and more self-sufficient times is misplaced, as too, in Hardt and Negri’s assessment, are calls for societies at the world-systemic periphery to “delink” from the global economy.⁵⁴ Thus, the claim that Empire has no outside is (among other things) a claim that the best resources for acting against Empire may be to be found within it.

In developing these themes, Hardt and Negri discuss a wide range of further concepts, ideas and proposals. Many of the arguments that emerge are highly compelling. Others are perhaps less so, and it must be said that there is at times disconcertingly little indication that the book’s authors have been chastened, as surely we must be, by the events of Twentieth-Century history.

49. *Id.*

50. *Id.* at 222.

51. *Id.* at 391.

52. *Id.* at 290-94.

53. *Id.* at xv.

54. *Id.*

This is especially the case in their discussions of the need for overthrow of the current order by popular forces.⁵⁵ Though the popular forces in their vision are no longer the proletariat, but a more diverse and less unified collective subject (which they term the “multitude”⁵⁶), it remains less than wholly clear on what basis we can assume that overthrow in its name will be any less disastrous than in other notable cases. For our purposes, however (and, I think, more generally as well), these issues are not the main point. Rather, the significance of Hardt’s and Negri’s account lies in the fact that they cast the processes they describe—the dispersion of power, the breaking down of boundaries, and so on—in terms of a conception of Empire. By doing this, they establish a link between discussions of globalization on the one hand and previous and ongoing discussions of imperialism on the other. At least three points are suggested, with important implications for international legal writing concerning imperialism of the kind I illustrated in earlier sections of this lecture.

First, it is a major concern of Hardt and Negri to show that globalization cannot adequately be understood as imperialism in new form. To many analysts, globalizing processes are primarily about the pre-eminent position of the United States in global affairs, its ascendancy to the role once filled by Great Britain, among other powers. For Hardt and Negri, however, this is too simplistic. Of course, the United States does occupy a pre-eminent position in global affairs, but to characterize that position as neo-imperialist is to disregard the fact that the structures of domination in today’s world have changed.⁵⁷ In the terminology used by Hardt and Negri, a process of deterritorialization has occurred with respect to earlier systems of exploitation and exclusion.⁵⁸ Those systems worked through a series of dichotomies—between ruling class and proletariat, colonizer and colonized, core and periphery, First World and Third World, and so on—which have more recently become fractured and blurred.⁵⁹ The Third World is now also inside the First World, and the First World inside the Third, and this may be another sense in which there is now no “outside.” At any rate, the point is that today hierarchies are constituted and sustained by more complex patterns and logics, which are obscured, and hence reinforced, where globalization is elided with neo-imperialism.

55. *Id.* at 393-413.

56. *Id.*

57. *Id.* at xiv.

58. *Id.* at xii.

59. *Id.* at xiii.

Secondly, however, it does not follow from this that attention to imperialism and neo-imperialism is no longer necessary. With deterritorialization comes reterritorialization, in the sense that old dichotomies shape the operations of the new more complex systems of domination. That is to say, they mediate those systems, reflecting the uneven geography that is one of globalization's most widely remarked features. Indeed, Hardt and Negri observe that "the geographical and racial lines of oppression and exploitation that were established during the era of colonialism and imperialism have in many respects not declined but instead increased exponentially."⁶⁰ This suggests that analyses such as those I described earlier are more important than ever, even if the first point I just highlighted makes clear that the context for those analyses must be understood as having changed.

At the same time, thirdly, those analyses need to be treated as connected. Addressing globalization in terms of Empire brings into focus the extent to which globalizing processes affect and engage all domains of life, of which the domains of "official" economic and political life may well be the least significant. While, as I just recalled, the effects of globalization are by no means even or uniform (and rather the reverse), Hardt and Negri show that globalizing processes are best studied in relation to one another, as part of a larger phenomenon, rather than in isolation or only in relation to some other set of processes, such as those associated with imperialism.

In introducing these three points, I suggested that they had important implications for international legal writing on imperialism. But, of course, these same points also have important implications for international legal writing on globalization, a topic with which a rather greater number of international legal scholars are currently engaged. If the considerations I have just highlighted are persuasive, then those studying globalization must begin to consider the ways in which globalizing processes intersect with and reproduce pre-existing forms of exploitation and exclusion. To fail to do that is to carry forward the long and inglorious tradition in international legal scholarship, noted by both Pashukanis and Anghie, of covering up for international law (whether intentionally or not).

60. *Id.* at 43.

IV. CONCLUDING REFLECTIONS

Let me now try to draw the threads of this discussion together, and touch upon one further concept before closing. The main story of this lecture is the one I have tried to trace through the work of Pashukanis, Anghie, and finally Hardt and Negri. First, Pashukanis showed how international law has been shaped by imperialism, understood primarily as an expression of capitalist economic relations. Then Anghie showed how international law, and in particular sovereignty doctrines, have been shaped by the colonial encounter, viewed principally as a site for the production of identity and difference. Now Hardt and Negri are showing how sovereignty is being reshaped through the emergence of Empire. At the center of this story is a concept I have not explicitly discussed so far, but do so very briefly now by way of conclusion. This is the concept of sovereignty.

To international lawyers, sovereignty generally refers to the right of a state to exist as an independent political community. Doctrines associated with sovereignty include the principle that all sovereign states are equal, and the principle that there may be no interference in the affairs of a sovereign state, except within the established framework of international law. If Hardt and Negri are using the term sovereignty to refer to Empire, they patently do not have this definition and these doctrines in mind. Their point is precisely that sovereignty has ceased to be an attribute purely of nationstate-based polities, and has become also an attribute of the global order. Anghie characterizes sovereignty in a broader sense as the right to exercise authority, that is to say, the assertion of legitimate power. This seems to be what Hardt and Negri have in mind. At the same time as he characterizes sovereignty in this way, however, Anghie notes that for colonial peoples sovereignty operated precisely so as to negate their right to exercise authority and assert power. It operated precisely so as to justify injustice and violence in relations between the European and non-European world.

Anghie's argument points to another way of thinking about the meaning of sovereignty, which coexists in Hardt's and Negri's book with the broad definition just mentioned. This is a conception that revolves around the following two questions identified quite early in the book as key elements in the "problematic of Empire": "Who will decide on the definitions of justice and order across the expanse of this totality in the course of its process of

constitution? Who will be able to define the concept of peace?"⁶¹ Sovereignty, then, appears here as the right to decide what counts as justice, the right to define what counts as peace.⁶² And if that is what sovereignty is, then it begins to seem to all the more important to sort the imperialist legacies from the anti-imperialist potentials, and the imperial tendencies from the post-imperial pressures, within international law. Indeed, whatever our fields of legal study, we may find it hard to escape getting drawn into struggles, not just over law's empire, but over Empire's law.

61. *Id.* at 19.

62. This conception of sovereignty has close affinities with that elaborated by Carl Schmitt, though Schmitt gave a very different account of the implications that follow. See CARL SCHMITT, *POSITIONEN UND BEGRIFFE IM KAMPF MIT WEIMAR-GENÈVE-VERSAILLES 1923-1939* (1940), quoted in MARTII KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS* 429 (2001).