

# African Liberation and the Mythical Separation of the Political and the Economic in International Law

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## Abstract

The putative division of public international law and international economic law, as one of the fundamental causes of the unjust international legal order, has received lesser attention, while even the most devastating African-centred critiques of injustices have taken this division for granted. It is in this sense, that I would suggest that an extensive critique of the current international legal order must not skirt around the fundamental critique of the division of public international law and international economic law. However, the precondition for this line of analysis requires a prior analysis of how capitalism instantiates this division.

**Keywords:** Capitalism; International Law; Marxism; Historical Materialism; Postcolonial.

## Introduction

Nkwame Nkrumah's famous dictum, 'Seek ye first the political kingdom and all else shall be added to you'<sup>1</sup> captures the hitherto attitude of anti-colonial struggles, independence and decolonisation in Africa. Nkrumah's dictum is, however, also suggestive of a teleological conception of historical movement as a series of stages wherein the attainment of political power becomes a necessary condition before the stage of attaining economic power. However, if it is analysed through a spatio-temporal prism, the dictum would have been revolutionary for its time, despite the possibility that it may have had the effect of inadvertently perpetuating the artificially constructed divide between the political and the economic. I suggest that part of the reason for post-colonial Africa's constant paralysis is its embeddedness in historicist and linear conceptions of time, which in turn have largely informed the project of decolonisation. The idea that political power is a precondition for economic emancipation relies on two fundamental errors. The first is that political power necessarily leads to or results in economic emancipation. This view has, within the context of Africa, proven to be specious. The second is that there exists a sphere of the political that is conceptually and practically separated from the economic. This is an ideological view which is traceable to a specific historical period and has no natural or inherent basis.

I suggest that the periodisation, compartmentalisation, enclosures and spherical approaches in relation to the political and the economic rest on historicist and teleological assumptions regarding the movement of history. Kathleen Davis suggests that some of these assumptions derive their explanatory power from economic models of periodisation which tend to align transitions 'from ecclesiastical to secular society with a transition from a medieval, rural, agrarian economy to a modern, urban, commercial economy, most typically expressed as a transition from feudalism to capitalism.'<sup>2</sup>

Furthermore, these views are attributable to 'Hegelian theodicy' which assumes a view of history where freedom is progressively achieved and all that is evil gradually fades away.<sup>3</sup> Various developmental approaches in and about Africa are largely informed by this common sensical course of history. Most importantly, it is this historicist view that appears to have and continue to inform the liberation project in Africa.

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1 Nkwame Nkrumah, 'Tenth anniversary of the C.P.P' in S Obeng (ed) *Selected speeches of Dr. Kwame Nkrumah* (Advance Press 1979) 3-15.

2 Kathleen Davis, *Periodization & Sovereignty: How Ideas of Feudalism & Secularism Govern the Politics of Time* (University of Pennsylvania Press 2008) 1-2.

3 According to Luciano Pellicani, Karl Marx's notion of 'the dialectic' remains intrinsic to 'Hegelian theodicy' in that thinking dialectically for Marx means 'to see reality as a fragmented totality longing to regain its original unity.' Luciano Pellicani, *The Genesis of Capitalism and the Origins of Modernity* (Telos Press 1994) 13.

The bifurcation of the political and the economic is also found within some strands of Marxism. Ellen Meiksins Wood observes the tendency within some Marxist strands

to forget the critique of political economy and everything it entails in favour of technological determinism and a mechanical, unilinear succession of modes of production, in which less productive modes are inexorably followed by more productive ones according to some universal law of nature. This version of Marxism has little to distinguish it from conventional theories of social evolution and progress, or the 'stagist' view of history as a succession of modes of subsistence associated with classical political economy.<sup>4</sup>

The separation of the political and the economic is not only conceptual but also a practical matter. The idea that political freedom necessarily creates space for the attainment of 'economic freedom' remains suspect. This is more so because anything organised along capitalist social forms is an exercise in political power. For instance, it is the case that in a capitalist society, direct control of production is an exercise of political power. If capitalism is a social form and if production and reproduction of social form is organised along capitalist forms, then it should follow that in the final analysis the owner of the means of production also exercises political power, albeit not in the same coercive form as the impersonal state does.

It is in this sense that the paralysis of the project of African decolonisation can also be ascribed to the teleological understanding of the unfolding of historical time which inheres in the attainment of the 'political kingdom' first. The dominant view seems to suggest that the urgent task for Africa, having attained political freedom, is to focus on 'the economic' and in so doing come up with viable economic policies that will benefit the people of the continent. In so doing, even potentially devastating critiques of capitalism have assumed 'the political' as unproblematic by foregrounding their critiques of capitalism in the economic. This has unfortunately had the effect of evacuating capitalism of its social content by not seeing capitalism as essentially political.<sup>5</sup> Drawing largely from Vivek Chibber,<sup>6</sup> I contend that the separation of the political from the economic in the context of Africa is largely a practical problem instantiated by the pressures of having to navigate the vagaries of a capitalist world economy that confronted post-colonial leaders.

The overarching suggestion I make is that international law has so far been the medium through which global capitalism was able to achieve the separation of the economic and the political. This has particularly been more acute in the post-World War II era. However, I substantiate this claim with a broad analysis of the post-colonial African

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4 Ellen Meiksins Wood, *Democracy against Capitalism: Renewing Historical Materialism* (Cambridge University Press 1995) 4.

5 *ibid* 21.

6 Vivek Chibber, *Postcolonial Theory and the Specter of Capital* (Verso 2013).

condition. This is followed by a historical materialist analysis of capitalism and its inauguration of the structural separation of the political from the economic. Because of the claim that this separation finds concrete expression in international law, the next section proceeds to deal with how international law expresses and executes this structural separation.

The final section deals with the implication of this separation for African liberation. In the final analysis, the purpose of focusing on the separation of the economic and political that is instantiated by the capitalist system, is to suggest that a different world and a different way of being is possible. A radical political agenda informed by a re-reading of the historical materialist approach should eschew economic reductionism and historicism so as to observe capitalism as a fundamentally political system. I would suggest that the possibility of African liberation resides in this approach.

### African Liberation, ‘African Modes of Self-writing’ and ‘the Spectre of Capital’

Africa is a vast continent, not only in terms of its cartographical breadth but also in relation to its sprawling history and multiple realities. To talk about Africa is to at once traverse its complex pre-colonial identity on the one hand and the complexity of the colonisation project and its varied impact on an equally complex people on the other. What, therefore, does it mean to talk about Africa? What does it mean to talk about a continent of which its people do not possess a single identity, a people whose reasons for calling for decolonisation were (and are) as diverse as their understanding of the very notion of liberation itself? For instance, Richard Dowden states that in the early years of decolonisation in Africa, a ‘group of French territories including Côte d’Ivoire and Senegal wanted to remain part of the French empire.’<sup>7</sup> The Euro-American depiction of Africa as the land occupied by a people whom history has damned to dystopia, remains largely intact.<sup>8</sup> However, the terrifying aspect is that Africans themselves continue to squabble, both at a theoretical and practical level, on what this liberation should, at a very fundamental level, entail.

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7 Richard Dowden, *Africa: Altered States, Ordinary Miracles* (Granta 2019) 63. Dowden further states that ‘the first President of the Seychelles, James Mancham, fought hard to keep the Islands British.’ *ibid* 63.

8 Achille Mbembe captures this view succinctly when he states that the dominant thinking is still that ‘only the White race possessed a will and a capacity to construct life within history. The Black race in particular had neither life, nor will, nor energy of its own. Consumed by ancient ancestral hatreds and unending internal struggles, it turned endlessly in circles. It was nothing but inert matter, waiting to be molded in the hands of the superior race.’ Achille Mbembe, *Critique of Black Reason* (Wits University Press 2017) 42.

These diverse understandings of liberation have yielded what Slavoj Žižek calls the problem of ‘*diagnosis*’, ‘*cardiognosis*’, ‘*prognosis*’ and ‘*epignosis*’.<sup>9</sup> Although Žižek uses these four-stage approach in relation to the impasse of today’s global emancipatory struggles, the same approach is productive as an analysis of the African liberation impasse. For Žižek, ‘*diagnosis*’ relates ‘to the basic coordinates of our global capitalist system’, ‘*cardiognosis*’ relates to the ‘knowledge of the heart’ of this system, ie to the ideology that makes us accept it; ‘*prognosis*’ relates to

the view of the future that awaits us if things continue as they are; and *epignosis* (a theological term that designates knowledge which is believed, engaging us in our acts, subjectively assumed) relates to the subjective and organisational forms appropriate for the new phase of our emancipatory struggle.<sup>10</sup>

Žižek’s schema suggests that if the *diagnosis* is incorrect, so would our *cardiognosis*, *prognosis* and *epignosis*.<sup>11</sup> Perhaps the trouble and impasse in Africa is that, more often than not, there is a problem of vacillation in that some solutions, having properly diagnosed the problem, give inordinate attention to *epignosis* whilst perfunctorily attending to *cardiognosis*. In other words, whilst the problem is properly diagnosed, less time is spent on understanding the system, its dynamics, and its structures and strictures.

In doing so, the proper diagnosis that would have been made is rendered useless by an inappropriate *epignosis* that results from perfunctory understanding of the *cardiognosis*. In certain instances, prognosis is confused with diagnosis thereby resulting in wrong *epignosis* and in certain instances *epignosis* is conflated with prognosis. Žižek’s schema is an example of the confusion that attends the African post-colonial condition and this, in turn, has led to the liberation impasse in Africa. The debate between post-colonial approaches and Marxist-inspired approaches is a lucid example of the debilitating impasse that can attain lack of attention to this productive schema. In particular, I suggest that post-colonial theoretical approaches in and towards Africa may have slightly misdiagnosed both the pre-colonial and post-colonial African condition, with the resultant vacillation between Žižek’s schema. Furthermore, post-colonial theoretical approaches and their largely perfunctory treatment of Marxist approaches have not helped to enrich the analysis of the African continent.

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9 Slovaj Žižek, *Trouble in Paradise: From the End of History to the End of Capitalism* (Penguin 2015) 4.

10 *ibid* 4–5.

11 *ibid* 4. Žižek states: ‘We will begin with the *diagnosis* of the basic coordinates of our global capitalist system; then we will move on to the *cardiognosis*, “knowledge of the heart”, of this system i.e., to the ideology that makes us accept it. What will then follow is prognosis, the view of the future that awaits us if thing continue as they are, as well as putative openings, or ways out. We shall conclude with *epignosis* (a theological term that designates knowledge which is believed ...’ Žižek *ibid* 4.

Edward Said, broadly accepted as the progenitor of post-colonial theory, states in *Culture and Imperialism* that

neither imperialism nor colonialism is a simple act of accumulation and acquisition. Both are supported and perhaps even impelled by impressive ideological formations which include notions that certain territories and people *require* and beseech domination, as well as forms of knowledge affiliated with that domination.<sup>12</sup>

Therefore, according to Said, the main problem with Marxism is its inability ‘to accommodate the specific political needs and experiences of the colonised.’<sup>13</sup> This is because Marx was blind to the world outside Europe.<sup>14</sup> The incredulity towards totalising grand narratives is what characterises post-colonial theory’s critique of Marxism.

However, it could be argued that post-colonialism’s critique of Marxist historicism is contingent on a particular interpretation of a particular strand of Marxism. Besides post-colonial critique of Marxism there has, over time, been a general despair on the capacity of Marxist inspired approaches to correctly diagnose Third World problems. This has led Drucilla Cornell and Steven Seely to suggest that

a general air of pessimism that has swept through critical theory in the face of the failures of the so-called Communist states to actualise the great socialist aspirations and the ruthlessness of advanced capitalism that has created inequalities of world historical proportions, let alone the never-ending war, horrific structural violence, and brutal suppression of revolutionary movements that plague our world today. The Marxist dream of a revolution toward an emancipated humanity and classless planetary society is, we are told by even supposedly leftist thinkers, a hopelessly romantic and impossible metanarrative that relies on bad pretensions to scientific truth and problematic assumption of originary “human nature”.<sup>15</sup>

The pessimism that Cornell and Seely refers to has, in certain instances, manifested itself in the tendency to lend privilege to race in such a way that capitalism as an exploitative system and as constitutive of racism ceases to be a fundamental problem. In this sense, the historical resolution of Africa’s problems simply becomes the resolution of the race question. This is largely because capitalism gets to be viewed as an economic problem that requires economic solutions. This is attributable to the historicist conception of capitalism. Unfortunately, there has been a tendency to place inordinate emphasis on Blackness, to the complete exclusion of an analysis of capitalism. The other main contributing factors for the perfunctory and sometimes

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12 Edward Said, *Culture and Imperialism* (Vintage 1993) 8–9.

13 Leela Ghandi, *Postcolonial Theory* (Edinburgh University Press 1998) 71.

14 Said (n 10) cited in Ghandi *ibid*.

15 Drucilla Cornell and Stephen Seely, *The Spirit of Revolution: Beyond the Dead Ends of Man* (Polity Press 2016) 1.

incorrect treatment of a Marxist historical materialist approach are largely attributable to particular strands of Marxism that have diminished the critical edge of historical materialism to a barren dose of economism. The portrayal of Marxism as Eurocentric has played no small measure in its dismissal.

Within the context of Africa, post-colonialism's critique of Marxist historicism is taken up by, amongst others, Achille Mbembe, who is currently regarded as one of the foremost theorists of African history and politics. He has been consistent in his critique of Marxism as constituting a 'dead end' in terms of the African reflection of the self and the world.<sup>16</sup> In 'African Modes of Self Writing', Mbembe excoriates the Marxist-nationalist school<sup>17</sup> for its reliance on 'victimhood' and that it uses 'Western discourse to account for universal history'<sup>18</sup> through its teleological approach to historical time. As Mbembe puts it, 'In Marx's narrative, both the subject and the telos of history are known. In this tradition, the ultimate frontier of history is a commodity free society.'<sup>19</sup>

In 'Modes of Self Writing', Mbembe goes further to suggest that whilst the 'the rapacity of global capitalism may be at the origin of the tragedy, Africans' failure to control their own predatory greed and their own cruelty also led to slavery and subjugation.'<sup>20</sup> Like most post-colonial theorists, Mbembe's fundamental problem is Marxist alleged historicism which, within the context of Africa, has instantiated ways of looking at a perpetual site of conspiracy against Africa, absence of African agency and the fact that 'in African history ... there is neither irony nor accident. We are told that African history is essentially governed by forces beyond African control.'<sup>21</sup> It is this attribution of historicism that forms the fundamental pillar of post-colonial critique of Marxism. Mbembe's conclusion on his critique of Marxist historicism is that in the context of Africa, historicism, like witchcraft, leads to the cult of victimhood and loss of agency. Mbembe seems to suggest that Marxism's inordinate focus on the structure results in less attention on agency. In this sense, the agent is always a helpless victim of the omnipotent structure.

The post-colonial critique of Marxism, à la Mbembe, has however been visited with devastating critiques. The most recent and compelling critique against post-colonial theory is offered by Vivek Chibber.<sup>22</sup> What comes out most pungently from Chibber is that post-colonial theory cannot avoid 'the spectre of capital.' This goes against the dominant view that the analysis of African problems cannot rely on the critique of capitalism because of the claim that capitalism in Africa manifested itself differently as

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16 Achille Mbembe, 'African Modes of Self-Writing' (2002) 14(1) Public Culture 2002 242.

17 *ibid* 244.

18 *ibid* 249.

19 *ibid* 250.

20 *ibid* 257.

21 *ibid* 251.

22 Chibber (n 6).

compared to European capitalism. It is often suggested that Eurocentric approaches, in particular Marxism's historical materialist approach, are inadequate to explain capitalism's *sui generis* path in Africa. This line of argument further suggests that Marxism's under-privileging of the race problem is proof enough of its inadequacy.

Chibber's novelty lies in how he comes to the post-colonial theory conclusion that Marxism is Eurocentric and therefore inadequate. He achieves this by questioning post-colonial theory's understanding of history, in particular whether the universalising urge of capitalism achieves its objective in Third World countries in the same way as it did in Europe. Chibber's objective is to expose the fact that post-colonial theory's conclusion of the inadequacy of historical materialism as an analytic of colonial modernity is based on its flawed analysis of both the English and French Revolutions. Post-colonialism uses the specificity of European capitalism to suggest its difference from the specificity of African capitalism in order to justify why Third World countries require *sui generis* theories suitable for the resolution of Third World problems. In other words, for post-colonial theorists, 'capital not only failed to subsume the colonial world under its logic, but that it has no internal motor to universalise.'<sup>23</sup>

The essence of post-colonial theory is that we must reject grand narratives because what happens in Africa is qualitatively different from what happened in Europe. For post-colonial theory, the mere existence of certain peculiar results of capitalism in the Third World suggests that we cannot use enlightenment meta-theories. In other words, the logic of capitalism becomes different in Africa precisely because in Africa capitalism, instead of homogenisation, relies on racial differentiation and racial oppression. In this sense, it is claimed, capitalism is not 'robust'<sup>24</sup> in Africa. As a result of this qualitative difference, post-colonial theory suggests that we need to develop *sui generis* theories such as post-colonial and decolonial theories to analyse the African conditions.

However, if what is happening in Africa mirrors what happened in Europe, should we continue to reject the meta-narratives of Marxism? As Chibber asks,

What if it turned out that European history and structures are in fact much like those of the East? On what basis should we then reject grand narratives? Is it not the case that a rejectionist grand narrative is being used to frame other approaches as grand narratives with the sole purpose of rejecting them as grand narratives? To the contrary, we would now have good reason to *embrace* theories that viewed West and East as part of the same story, that construed them as variants of the same universal history.<sup>25</sup>

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23 *ibid* 100.

24 *ibid* 145

25 *ibid* 128.



In fact, it may just be that what is regarded as the failure of capitalism is actually its results.<sup>26</sup> There is certainly a difference in the manifestations of capitalism in Africa, however, the cause is the same.

At the heart of post-colonial theory is the view that Western capitalism is different from colonial capitalism.<sup>27</sup> This is different from saying that the implementation of capitalism in colonial countries had different consequences. This is not the base argument by post-colonial theorists. Their central argument is the difference between the two colonialisms. In other words, as opposed to its impact in the West, capital did not have a universalising effect in the colonies.<sup>28</sup> As a result, Eurocentric theories are inadequate for analysing the colonial and post-colonial Third World condition. The inverse would be that if indeed capital had the same universalising effect on the Third World, then it follows that what is referred to as Eurocentric is appropriate and equally up to the task of analysing the colonial and post-colonial African condition.

If the base argument of post-colonial theories is the failure of universalisation, then the question is what is the meaning of universalisation? For post-colonial theorists, universalisation, or the proper establishment of capital in a region, refers to total social transformation of the receiving nation.<sup>29</sup> In other words, ‘in so far as capital fails to promote a liberal polity, it fails in its universalizing mission.’<sup>30</sup> Take away this fundamental social transformation by capital, and according to post-colonial theory, universalisation would have failed, as it did in Third World countries. Hence ‘the fault lines’ between capitalism in Europe and in the Third World countries. In other words, if capital establishment does not result in concomitant transformation of cultural and political forms, it is considered to have failed in its universalising mission.<sup>31</sup>

The problem with this assertion, as Chibber argues, is that it does not take into consideration the fact that there are instances where capital is able and willing to co-exist with ‘illiberal’ societies. Meiksins Wood, for instance, cites Iranian theocracy as an example of the possibility of a capitalism that is illiberal.<sup>32</sup> The success of capital in this sense lies in the establishment of liberal institutional forms such as the rule of law, formal equality and so on. This unfortunately becomes the Achilles of a post-colonial analysis of capitalism: its analysis of historicism which results in its re-inscription of the object of its critique. This is the result of the conflation between liberalism and

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26 *ibid* 145.

27 *ibid* 50.

28 *ibid* 51.

29 *ibid*.

30 *ibid*.

31 *ibid* 52.

32 *ibid* 153.

capitalism in such a way that capitalism becomes synonymous with liberalism and the converse.

This approach also fails to appreciate the fact that the emergence of and the success of capitalism relies on the conceptual and practical separation of the economic and the political. To be sure, the specificity of colonial experience should not be denied. However, it should be mentioned that post-colonial analysis of the post-colonial condition is possibly informed by liberal historical inaccuracies. In other words, it relies, according to Chibber, on incorrect liberal historiography to critique liberalism and Marxism.<sup>33</sup> In this sense, Chibber argues against the specificity of colonial modernity.

According to Chibber, post-colonial theory takes a historically incorrect version of European history and based on that, concludes that colonial modernity is different in that it lacks ‘recognizably capitalist cultural and political forms’ and therefore requires *sui generis* theoretical approaches.<sup>34</sup> Despite what is arguably different colonialisms, what Chibber and Meiksins Wood show is that the fundamental and common feature of colonialism was the universalising character of capitalism. In this sense, when we refer to ‘African modes of self-writing’, we have to make reference to the capitalist character of colonialism. Modern capitalism produces distinct cultural forms in the West and in Africa.<sup>35</sup> Because of the universalising nature, and not homogenising impact of capitalism, this in itself suggests that the interests of the marginalised people in both the Third World and the North are, in the final analysis, similar. Capitalist modernity universalises without homogenising.

Chibber’s argument about the universalising nature of capitalism in the Third world, and Africa in our instance, compellingly suggests the incompleteness of any talk about African liberation that eschews a head-on critique of capitalism. This is despite the fact that it is currently *en vogue* to embrace, with alacrity, a revulsion towards historical materialism and Marxist categories in general because, as Chibber says, the view is that ‘the world has moved on’ and that the dilemmas of late capitalism cannot be adequately comprehended by historical materialism and that the failure of African liberation movements is precisely due to ‘Marxism’s theoretical inadequacies.’<sup>36</sup>

However, if, to borrow from Fanon, ‘total liberation is that which concerns all sectors of the personality’<sup>37</sup> and if it is impossible to ‘imagine class differences without exploitation and domination’,<sup>38</sup> it should perhaps be inadequate to talk about liberation without a critique of the exploitative character of capitalism. The question, I suggest,

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33 *ibid* 93 and 95.

34 *ibid* 31.

35 *ibid* 153.

36 *ibid* 2.

37 Frantz Fanon, *The Wretched of the Earth* (Penguin 1963) 250.

38 Meiksins Wood (n 4) 258.

should be why and what enables post-colonial theory, including other approaches on the progressive left, to eschew a critique of capitalism and the vitality of Marxist historical materialist critique as fundamental to liberation of the African continent? What makes culture and ideology replace class and capitalism as not only objects of study but also as explanatories.<sup>39</sup>

I suggest that part of the problem is attributable to the ‘naturalisation’ of the political and the economic as two distinct spheres. In other words, post-colonial theory tends to fall into the very trap of separating the political from the economic, that which is set up by capitalism itself. In what follows, I draw from Meiksins Wood to demonstrate how the separation of the political from the economic is achieved.

### Genealogy of the Separation of the Political from the Economic

In *Nietzsche, Genealogy and History*, Michel Foucault describes the genealogical methodology in the following manner:

[Genealogy] is not the erecting of foundations: on the contrary, it disturbs what was previously considered immobile; it fragments what was thought unified; it shows the heterogeneity of what was imagined consistent with itself.<sup>40</sup>

For Daniel Williams, ‘genealogy is an analytical approach which preconceives social progress not as the tail end to a string of events, or as the end of a process of development, but a particular momentary manifestation of the ‘hazardous play of domination.’<sup>41</sup> A genealogical approach in this instance is productive in deconstructing the discursive stability, including hidden ideological machinations that result in the current common-sensical acceptance of the separation of the economic from the political.

It is in this sense that I suggest that perhaps the greatest obstacle to African liberation lies concealed in capitalist modernity’s separation of the political and the economic.

In this section I suggest that foremost to capitalism’s sustainability and sustenance hitherto has been its ability to separate the economic from the political. As Meiksins Wood observes, ‘in capitalism, there is complete separation of private appropriation from public duties; and this means the development of a new sphere of power devoted

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39 Chibber (n 6) 1.

40 Michel Foucault, ‘Nietzsche, Genealogy, History’ in Donald F Bouchard (ed), *Language, Counter-Memory, Practice: Selected Essays and Interviews* (Cornell University Press 1977) 147. Also see Daniel Williams, ‘Law, Deconstruction and Resistance: The Critical Stances of Derrida and Foucault’ (1988) 6 *Cardozo Arts & Entertainment* 386.

41 Williams (n 40).

completely to private rather than social purposes.’<sup>42</sup> It is in this spirit that Meiksins Wood asks the following questions:

what is it in the historical nature of capitalism that appears as a differentiation of ‘spheres’ especially the ‘economic’ and the ‘political’; how has capitalism ‘driven the wedge between the economic and the political – how and in what sense essentially political issues like the disposition of power to control production and appropriating or the allocation of social labour and resources, have been cut off from the political arena and displaced to a separate sphere?’<sup>43</sup>

These questions highlight an equally critical question, which is central to this piece: what does capitalism’s separation of the political and the economic achieve and perpetuate? I suggest that this separation is specific and indispensable to the functioning and perpetuation of capitalism. It is, as Meiksins Wood, says, ‘the most effective defence mechanism available to capitalism.’<sup>44</sup> In fact, without this separation, capitalism loses its status as a specific historic social form that differentiates itself from previous pre-capitalist social forms. Capitalism therefore sustains itself through this separation.

The separation of the political and the economic arises from two ostensibly antithetical approaches: Bourgeoisie economists and certain strands of Marxism, in particular, what I call crude Marxism. However, what joins these two seemingly antithetical approaches is the comprehension of the political and economic as distinct spheres. Bourgeoisie economists see legal and political forms as central to the facilitation of the capitalism while crude Marxism sees legal and political forms as reflective of the capitalist system. In so doing, these approaches treat the legal and political forms as fundamentally epiphenomenal. However, Meiksins Wood correctly critiques these two approaches by stating that

any application of the base/superstructure metaphor that stresses the separation and enclosure of spheres – however much it may insist on the connection of one to the other, even the reflection of one by the other – reproduces the mystifications of bourgeoisie ideology because it fails to treat the productive sphere itself as defined by its social determinations and in effect deals with society in the abstract. The basic principle about the primacy of production, the very foundation of historical materialism, loses its critical edge and is assimilated to bourgeoisie ideology.<sup>45</sup>

Meiksins Wood suggests that for historical materialism to recover its critical urge it needs to be set free from its historicist integument. This requires that we ‘reconsider’

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42 Meiksins Wood (n 4) 31.

43 *ibid* 20.

44 *ibid*.

45 *ibid* 22.

the base/superstructure metaphor from notions of ‘reflection’ and ‘in the last instance.’<sup>46</sup> The reconsideration of the basis/superstructure metaphor allows us to evacuate the historicist dimension of historical materialism and expose the capitalist sleight of hand used to separate the political and economic in a capitalist society. In short, in order to sustain the political and revolutionary urge contained in the notion of historical materialism, we have to flatten the metaphor.

There has been a dearth of critical analysis and responses by African scholars on the deleterious impact that the separation of the political and the economic by capitalism has had on the continent. Moreover, there has been and continues to be, insufficient analysis of how this separation finds concrete expression in international law and in turn how the configuration of current international law is constituted by and further constitutes capitalism’s separation of the political and the economic. The next section deals with international law and the separation of the political and the economic.

### International Law as the Medium and Expression of the Political and the Economic

I have suggested in the previous sections that the dawn of capitalism instantiates the separation of the political and the economic. From its inception, international law not only bears the hallmarks of this separation but has become the expression and medium of the separation between the economic and the political. In this section I take this view further by suggesting that the system of international law conjured up after World War II ‘reflects the systemic division between the political and the economic’.<sup>47</sup> The consequence of the split between the political and the economic in the international legal system has been the depoliticisation of international economic law.<sup>48</sup>

#### According to Macmillan

This fragmentation and depoliticization has enabled the imposition of conditions attached to the lending by the World Bank and the IMF (the Bretton Woods institutions) in their role as lenders (often of the last resort) to states. Structural adjustment using loan conditionality has become one of the famous ways in which these institutions put pressure on developing countries (and other countries in need of emergency finance) to change their laws and institutions.<sup>49</sup>

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46 *ibid* 21.

47 Fiona Macmillan, ‘Critical Law and Development’ in Emilio Christodoulidis, Ruth Dukes and Marco Goldoni (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar 2019) 4 <<https://eprints.bbk.ac.uk/id/eprint/25134/1/macmillan.Development>> accessed 22 July 2021.

48 *ibid* 5.

49 *ibid* 6.

The Bretton Woods institutions use, according to Macmillan, their ‘depoliticised’<sup>50</sup> economic muscles to inordinately influence internal policies of the ‘developing’ world in the form of, amongst others, ensuring the ‘imposition’ of particular versions of the rule of the law.<sup>51</sup> Furthermore, the usurpation of the notion of the rule of law to ‘facilitate capital accumulation and drive inter-state competition has also been achieved through the World Trade Organisation obligations, which require national laws to be brought in uniformity with the World Trade Organisation rules.’<sup>52</sup>

Using the space provided by the putative non-political role that it ostensibly plays, the World Trade Organisation (WTO) has, for instance, through the use of the principle of the most favoured nation treatment, functioned to ensure the continued protection of the ‘extraction of primary resources by countries lacking them on favorable terms.’<sup>53</sup> The Bretton Woods institutions and the WTO concretise international law’s separation of the economic and the political by ensuring that ‘the social functions of production and distribution, surplus extraction and appropriation, and the allocation of social labour are ... privatized and they are achieved by non-authoritative, non-political means’<sup>54</sup> in the form of and under the rubric of international economic law.<sup>55</sup> In the final analysis, the separation of the political from the economic is achieved by and through international law by ensuring the sustenance of the fragmentation of public international law and international economic law and ensuring that the real theatre of action is in the international economic legal system.<sup>56</sup>

If it is the case that international law is the medium and expression through which the separation of the economic from political is achieved, and if this separation has been used to ensure that the economic side of this divide has been ‘productively’ used to ensure that it becomes less accountable, we then need to ask how has Africa responded to international law and whether its past and present response to international law has assisted in the course of African liberation.

## African Responses to International Law

Bhupinder Chimni observes that despite challenges mounted by Third World international lawyers on the history and content of international law and the inequitable nature of its rules, ‘they have failed to propose and articulate an alternative approach

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50 *ibid* 4.

51 *ibid* 7.

52 *ibid*.

53 Macmillan (n 47) 10.

54 Meiksins Wood (n 4) 29.

55 Macmillan (n 47) 10.

56 *ibid* 17.

which is inclusive and internally consistent.<sup>57</sup> This critique is equally applicable to Africa and how the Continent has largely responded and interacted with international law. I suggest that Africa and its international law scholars have been reticent, if not languid, in identifying and treating the separation of the economic from the political as an analytical prism from which to challenge the disproportionate unfairness of international law.

Historically, the audibility of African countries desirous of independence was contingent on these calls being made through the vehicle of the nation-state.<sup>58</sup> In other words, calls for decolonisation were forced to be made within the context of international law, an international law which already recognised and contained certain principles such as *uti possidetis* and the rules of recognition. This is because international law only recognised nation-states as actors in international law. However, as Sundhya Pahuja argues, the fundamental price to pay for the use of international law was the negation of self-definition.<sup>59</sup>

African nations had to renounce self-definition in order to be recognised by international law, a recognition which would allow them to be audible as international actors under international law calling for independence. However, recognising the invidious position that African countries found themselves during decolonisation, and further recognising where Africa is today, and the role so far that international law has played in ensuring the present state of the continent, the following question can be posed: whether international law was and can still be used a vehicle for the total liberation of Africa. Specifically, the question is whether international law contains within itself a counter-imperial dimension that can be used for emancipatory purposes. The answer to this question depends on where one is located within a raft of theoretical approaches.

James Thuo Gathii,<sup>60</sup> identifies two major trends in how Africa has historically engaged with international law. It is instructive to note in Gathii's two major trends are the absence of the artificially constructed divide of the political and the economic and any engagement with the fact that the current international law is both the expression and medium through which this divide is wrought.

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57 Bupninder S Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (Sage 1993) 19.

58 For a general discussion and analysis on the approach taken in the early days of decolonisation, see Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011).

59 *ibid* 31.

60 James Thuo Gathii, 'Africa and the History of International law' <<https://ssrn.com/abstract=2029019>> accessed 20 November 2020.

Gathii categorises these two major trends as constituted by the ‘contributionists’ on the one hand and ‘critical theorists’ on the other.<sup>61</sup> Gathii identifies Taslim Elias Olawale (Elias) as the leading figure in the ‘contributionist project’ who essentially views ‘decolonisation as representing the emancipation of international law, as much as he celebrated it for emancipating Africa from colonial rule’.<sup>62</sup> Gathii observes that for Olawale, Africans have contributed to the creation and shaping of international law.<sup>63</sup> In this sense he aligns himself with post-independence African scholars who, far from rejecting the Christian and Western origins of international law, believed that Africans actually participated in the making of international law.<sup>64</sup> According to Gathii, the ‘contributionist’ approach of Elias is different from that of critical theorists in that it did not explore how international law and the notion of sovereign equality of states could contribute in concealing the unequal North-South relationships.<sup>65</sup>

Unlike the ‘contributionists’, African critical international law scholars of the immediate post independent Africa have focused the critique of international law on structural and economic inequalities engendered and perpetuated under the rubric of international law.<sup>66</sup> These scholars have, according to Gathii, been ‘sceptical of the possibilities for reform within or through the use of international law by amongst others, their critique of the imperialist character of international law.’<sup>67</sup> As Gathii puts it, ‘for the critical tradition, international law was a handmaiden of the expansion of the economic interests of colonizing countries.’<sup>68</sup>

On the other hand, Luis Eslava and Sundhya Pahuja<sup>69</sup> suggest that Third World Approaches to international law (TWAIL) are characterised by a ‘surprisingly reformist agenda’.<sup>70</sup> Eslava and Pahuja state as follows in relation to TWAIL:

however, if concerns about justice have united the movement and given TWAIL an axis around which both resistance and reform can turn, basic questions about the nature of international law sometimes seem an absent subject of analysis within the smorgasbord of TWAIL and TWAIL friendly approaches.<sup>71</sup>

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61 *ibid* 1.

62 *ibid* 9.

63 *ibid* 1.

64 *ibid* 6.

65 *ibid* 9.

66 *ibid* 14.

67 *ibid*.

68 *ibid* 15.

69 Luis Eslava and Sundhya Pahuja, ‘Between Resistance and Reform: TWAIL and the Universality of International law’ (2011) 3(1) *Trade, Law and Development* 103.

70 *ibid* 105.

71 Eslava and Pahuja (n 67) 105.



For Eslava and Pahuja, in the final analysis, critical TWAIL scholars such as Antony Anghie ‘still hold out that international law can offer a space in which claims of justice can effectively be expressed’.<sup>72</sup> In this sense, TWAIL’s critical edge is dulled by its insistence in overcoming international law’s limits within the structures and strictures of pre-existing ‘International law’s normative regime’.<sup>73</sup> However what complicates TWAIL in its ‘resistance and reform dynamic’ is, according to Eslava and Pahuja, its constant vacillation between the conservative strand, the reformist strand and the revolutionary strand within international law.<sup>74</sup>

TWAIL approaches, and by extension predominantly African approaches to international law, have also been critiqued from a Marxist angle by China Miéville.<sup>75</sup> For Miéville, international law can neither be counterposed with colonialism, neo-colonialism and imperialism because international law is immanently imperialist.<sup>76</sup> Whilst some critical scholars have made prescient observations about the colonial origins of international law and its imperialist character, their focus on the content of the rules of international law to the exclusion of an analysis of ‘the legal form’ leads them to the conclusion that international law can resolve its imperial designs. Miéville cites the example of Umozurike’s views in his seminal work<sup>77</sup> that international law should be able to ‘provide the legal framework within which the New International Economic Order can be achieved. Though the main actions to redress neo-colonialism must be internal, international law is an additional medium.’<sup>78</sup> For Miéville, Umozurike’s approach sees neo-colonialism, which is the continued existence of imperialism, ‘to be a political phenomenon which can be remedied, in part, by recourse to international law, which by its nature is held to oppose imperialism.’<sup>79</sup> The possibility of international law being an antidote to imperialism is for Miéville belied by the history of international law thus far.<sup>80</sup> This according to Miéville is because

imperialism outlasts the transition to universalised juridical sovereignty, and not because postcolonial sovereignty is incomplete. Such imperialism is not something international law can successfully oppose – it is embedded in the very structures of which international law is an expression and a moment. The imperialism of international law, then, means more than just the global spread of an International legal order with

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72 *ibid* 110.

73 *ibid*.

74 *ibid* 112–113.

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

76 *ibid* 296.

77 UO Umozuriki, *International Law and Colonialism in Africa* (Nwamife Publishers 1979).

78 Miéville (n 75) citing Umozurike *ibid* 138.

79 Miéville (n 75) 296.

80 *ibid*.

capitalism – it means that the power dynamics of political imperialism are embedded within the very juridical equality of sovereignty.<sup>81</sup>

It is suggested that African responses to international law, which are largely located within TWAIL, have, despite their critique of international law, not provided sufficient attention to the imbrication of international law within the structures of capitalism and the fact that international law today constitutes the dominant agency and vector of global capitalism. In instances where aspects of international economic law are critiqued, such critique tends to negate the fact that perhaps the problem with the current international legal order is the putative bifurcation of international law into public international law and international economic law, that is constitutive of and constitutes global capitalism.

## Conclusion

In this article, I have put forth that international law today gives expression to the capitalist system's separation of the economic and the political. In this sense, the separation of the political and the economic in international law ensures that 'the social functions of production and distribution, surplus extraction and appropriation, and the allocation of social labour are ... privatized and they are achieved by non-authoritative, non-political means.'<sup>82</sup> I have also tentatively suggested that this separation is, in part, the cause of the continuation of the current unjust global order. Furthermore, the separation of the economic and the political, which emerges at a historically specific moment, continues to generate adverse consequences for the African continent. It would seem that the time may have arrived to treat this separation as an analytic and proceed to problematise it. However, the condition for analysing and problematising this separation would amount to a full-on critique of the capitalist system.

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81 *ibid* 297.

82 Meiksin Wood (n 4) 29.

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