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**TWAIL** *Review*

**03**

Issue 3 / 2022



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(2022) 3 *TWAIL Review* 25–67

## Imperialism, Hypocrisy and the Politics of International Law

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### Abstract

*International lawyers typically dismiss accusations of ‘hypocrisy’ as rhetoric. By contrast, this article argues that such accusations are central to international law. The article begins by examining the centrality of accusations of hypocrisy to the 2014 Crimea crisis, noting the crucial juridical function of accusations of hypocrisy. In order to unpack this, the article turns to political theorists of hypocrisy, who see a structural link between ‘modernity’ and ‘hypocrisy’. Modern societies lack an overarching set of agreed ‘values’, making accusations of hypocrisy a crucial political currency. At the same time, the contradiction between formal legal equality and social and economic inequality in modern society constantly generates hypocritical behaviour. The article demonstrates that we can only fully understand this situation in light of the social relations of capitalism. The article charts historically how the unfolding of capitalist social relations gave rise to different configurations of hypocrisy within international law. Finally, the article asks what potential such accusations might have to help transform and overcome the social relations of capitalism and imperialism.*

### Key words

hypocrisy; imperialism; capitalism; international law; Marxism; Crimea; Ukraine.

## 1 Introduction: Crimea and the Politics of Hypocrisy

The 2014 secession of Crimea received much attention in international law circles. In the midst of a political crisis Crimea voted, in a contested referendum, to become part of the Russian Federation. Following the vote, the Russian Federation recognised Crimea as an independent state. On 18<sup>th</sup> March 2014 the Russian Federation and the

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Republic of Crimea signed a treaty incorporating Crimea. This was met by vociferous criticism, and the General Assembly, in Resolution 28/262, declared that the referendum without international legal validity. Legal analysis of the Crimea situation focused on 'territorial integrity' and the 'right to self-determination'.<sup>1</sup> This was striking given Russia's previous stance that Kosovo's unilateral declaration of independence violated Serbia's territorial integrity.<sup>2</sup> Russia's position in relation to Crimea appeared *hypocritical*.

While it is tempting to dismiss accusations of hypocrisy as political distractions, a brief examination of any number of recent legal disputes reveals the ubiquity of such accusations. Following the election of Donald Trump, the US was faced with accusations of hypocrisy over trade law<sup>3</sup> and human rights law.<sup>4</sup> The Obama administration was dogged by accusations of hypocrisy over the war on terror.<sup>5</sup> Indeed, a glance at almost any recent international legal dispute would reveal the peculiar power that accusations of hypocrisy seem to hold. Observe, for example, the arguments around the appropriate response to the Syrian civil war, where Russia recalled the US' 'colonial hypocrisy'.<sup>6</sup> More importantly, accusations of hypocrisy in international law are a frequent tactic of the Third World, who attempt to marshal them to criticise hegemonic states.

This article argues accusations of hypocrisy in international law are too recurrent and prevalent to write off as merely polemical. Instead, it traces deep *structural* connections between hypocrisy and international law. It begins mapping how accusations of hypocrisy functioned in the Crimea crisis. From here, it unpacks the 'surface level' importance of hypocrisy to international legal discourse, demonstrating how accusations of hypocrisy can have relatively straightforward juridical effects.

<sup>1</sup> Sofia Cavandoli, 'The Unresolved Dilemma of Self-Determination: Crimea, Donetsk and Luhansk' (2016) 20:7 *The International Journal of Human Rights* 875; Simone F van den Driest, 'Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law' (2015) 62:3 *Netherlands International Law Review* 329.

<sup>2</sup> Christopher J Borgen, 'Law, Rhetoric, Strategy: Russia and Self-Determination Before and After Crimea' (2015) 91:1 *International Law Studies* 7.

<sup>3</sup> Jonathan Tasini, 'Trump Trip Shows US Hypocrisy on Human Rights', *CNN* (May 2017) <https://www.cnn.com/2017/05/19/opinions/trump-trip-abroad-human-rights-tasini-opinion/index.html> (accessed 10 September 2022).

<sup>4</sup> Richard L Trumka, 'Donald Trump's Anti-Trade Rhetoric Is Textbook Hypocrisy', *The Guardian* (July 2016) <https://www.theguardian.com/business/2016/jul/04/richard-trumka-donald-trump-anti-trade-hypocrisy> (accessed 10 September 2022).

<sup>5</sup> NPR, 'The Nation, Obama's Hypocritical "War On Terror"' <https://www.npr.org/2011/03/11/134452755/the-nation-obamas-hypocritical-war-on-terror> accessed 10 September 2022).

<sup>6</sup> *The Independent*, 'Russia Accuses UK of "colonial Hypocrisy" over Syria during Heated UN Security Council Meeting' (April 2017) <http://www.independent.co.uk/news/world/politics/russia-accused-uk-colonial-hypocrisy-un-security-council-syria-air-strikes-donald-trump-chemical-a7673506.html> (accessed 10 September 2022).

The article contends that there is a deeper connection. Turning to political theorists it argues that hypocrisy emerges as a 'universal insult' with 'modernity'. Modern societies lack an overarching set of agreed 'values' through which disputes can be mediated, and – more importantly a common institutional framework to enforce such 'values' – this means accusations that one's opponent is not living up to their own values become central. At the same time, the political and economic reality of modern societies contradicts the formal equality on which such societies purport to be founded.

Turning to work in the Marxist tradition, the article contends that we can only fully understand this situation in light of the social relations of capitalism. It is the birth of capitalism which undermines 'common' values and institutions and so enables hypocrisy is able to emerge as a 'universal insult'. Simultaneously, capitalist societies are structured around a formal (legal) equality, whilst simultaneously embedding inequality.

Consequently, there is a structural and material connection between capitalism, hypocrisy and international law. Having established such a framework, the article charts historically how the unfolding of capitalist social relations gave rise to different configurations of hypocrisy within international law, linking these to the subordination of the non-European world, and examining how Third World states came to utilise such arguments. It concludes by unpacking the political (dis)utility of such invocations for social transformation.

## 2 International Law and Hypocrisy

### 2.1. *We are all hypocrites now*

Accusations of hypocrisy abounded during the Crimea crisis. President Vladimir Putin's key argument was that 'the Crimean authorities referred to the well-known Kosovo precedent – a precedent our western colleagues created with their own hands'.<sup>7</sup> The Crimea case, Putin argued, was identical to that of Kosovo, which the international community had refused to condemn. Against those who stated that Kosovo was a special case, Putin argued:

What makes it so special in the eyes of our colleagues? It turns out that it is the fact that the conflict in Kosovo resulted in so many human casualties. Is this a legal argument? ... This is not even double standards; this is amazing, primitive, blunt cynicism.<sup>8</sup>

<sup>7</sup> Vladimir Putin, 'Address by President of the Russian Federation' (18 March 2014) <http://en.kremlin.ru/events/president/news/20603> (accessed 10 September 2022).

<sup>8</sup> Ibid.

Alongside this, Putin detected a further 'double standard', namely that whilst the US and its allies invoked international law to criticise Russia, the US had itself violated international law continuously. Invoking Yugoslavia, Afghanistan, Iraq and Libya, Putin noted that 'it's a good thing that they at least remember that there exists such a thing as international law – better late than never'.<sup>9</sup> In Putin's telling therefore, US condemnations of the situation in Crimea were doubly hypocritical. Firstly, given the US's repeated violations of international law, it was hypocritical to condemn Russia for its alleged violations. Secondly, given that the US supported Kosovo's secession, it would be hypocritical to condemn the virtually identical situation in Crimea. Importantly, the US response was not simply to brush off or deny these claims; instead then-President Obama confronted them head on, noting that:

Russia has pointed to America's decision to go into Iraq as an example of Western hypocrisy. Now, it is true that the Iraq war was a subject of vigorous debate, not just around the world but in the United States, as well ... But even in Iraq, America sought to work within the international system. We did not claim or annex Iraq's territory. We did not grab its resources for our own gain.<sup>10</sup>

Putting aside the veracity of these claims, what is striking is that Obama responded to claims of hypocrisy by asserting *his own claim of hypocrisy*: namely that Russia's invocation of hypocrisy was hypocritical because Russia – unlike the US – had annexed Crimea for 'its own gain'.

In the arguments around Crimea, then, hypocrisy played a significant role. The US challenged the initial international legal arguments of the Russian Federation as a 'trumped up pretext', that is to say, a hypocritical invocation of international law. In response, Russia levelled its *own* claims of hypocrisy and this accusation of hypocrisy was itself met with a further accusation of hypocrisy on behalf of the US. The arguments presented themselves as an endless chain of accusations of hypocrisy.

## 2.2 *Hypocrisy as juridical argument*

International lawyers have not been attentive to the role of accusations of hypocrisy. Accusations of hypocrisy, it is argued, are the equivalent of saying 'look over there', or

<sup>9</sup> Ibid.

<sup>10</sup> Barack Obama, 'Remarks by the President in Address to European Youth' (26 March 2014) <https://obamawhitehouse.archives.gov/the-press-office/2014/03/26/remarks-president-address-european-youth> (accessed 10 September 2022).

an example of the *tu quoque* fallacy.<sup>11</sup> Whilst such accusations might have some *political* value, international lawyers typically argue, they do not have any wider international *legal* significance. Adopting such a position, however, leaves international lawyers unable to explain why accusations of hypocrisy are so frequently levelled in international legal discourse and why they are not simply ignored.

An examination of the dynamics in the Crimea situation further complicates such easy dismissals. Whilst there are clearly elements of 'rhetoric' in Russia's arguments, the discourse of hypocrisy was deployed in a straightforwardly *juridical* way. The references to Kosovo and the International Court of Justice were premised on international law's universality. If Kosovo is a legal precedent, then that argument *must* also be available in respect of Crimea. The accusation of hypocrisy was an assertion that international legal arguments must be available to all, not just hegemonic states.<sup>12</sup>

There was a further juridical function at play. By accusing the other side of hypocrisy, both the US and Russia attempted to prevent the other side from invoking international law. Insofar as hypocrisy was invoked, it was to point out the inconsistency in the interpretation (and application) of international law by one party. Given international law's focus on state practice and *opinio juris*, establishing patterns of contrary conduct to a stated norm will always be an important part of interpretation. An accusation of hypocrisy can work to outright deny the existence of a particular legal norm, or simply to argue a particular attempt to interpret and apply the law cannot stand.

On a surface level, therefore, we can think of four basic reasons that accusations of hypocrisy have power in international law. Firstly, a vital element of international law is the struggle to distinguish it from international politics.<sup>13</sup> Invocations of hypocrisy threaten this division by drawing attention to the 'non-legal' reasons that underlie legal arguments. Secondly, international law remains relatively decentralised and dependent upon the reciprocal recognition and enforcement of its norms by its participants. Accordingly, hypocrisy – which calls into question one party's commitment to those norms – can be a powerful accusation. Thirdly, since international law famously lacks any centralised body for the creation of law, its key norm-generating apparatuses – custom and treaty – rely on those participants. Claims of hypocrisy, by drawing attention to the inconsistency between 'saying' and 'doing' fundamentally implicate state practice, *opinio juris* and treaty interpretation.

<sup>11</sup> Sienho Yee, 'The Tu Quoque Argument as a Defence to International Crimes, Prosecution or Punishment' (2004) 3:1 *Chinese Journal of International Law* 87.

<sup>12</sup> Nico Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16:3 *European Journal of International Law* 369, at 378.

<sup>13</sup> Martti Koskenniemi, 'The Politics of International Law' (1990) 1:1 *European Journal of International Law* 4, at 7.

Finally, international law continues to put store in the 'good faith' of its parties. The Vienna Convention on the Law of Treaties (VCLT) notes that the principle of 'good faith' is universally recognised, and states that treaties must be performed<sup>14</sup> and interpreted,<sup>15</sup> according to said principle. More generally, good faith is seen as one of the 'general principles of law recognized by civilized nations' mentioned in Article 38 of the Statute of the International Court of Justice. Hypocrisy, as an accusation of *bad faith*, represents a legal challenge to state behaviour.

Far from an irrelevant consideration to legal argument proper, accusations of hypocrisy touch upon fundamental issues of international law. An invocation of hypocrisy represents an attempt to cast doubt on the strength of an opponent's legal argument, by referencing their own standards and conduct. As such, an accusation of hypocrisy *demand*s a response, and that response is often a counter-accusation of hypocrisy. This suggests that there might be some deeper connection between 'hypocrisy' and international law. In order to understand this connection it is necessary to think more deeply about the nature of hypocrisy itself.

### 3 The Meaning of Hypocrisy

As is often the case, the word 'hypocrisy' can be traced back to ancient Greece. The term derives from the word '*hypokrisis*' which was closely associated with theatrical performance. The original word meant 'answer', referring to the 'answers' that performers gave to each other as part of their performances.<sup>16</sup> As such, it came to refer to the act of 'playing a part' and was an essentially neutral term.<sup>17</sup> The term 'hypocrite' derived from the Greek word *hypokritēs*. This was a more technical and limited concept, which applied *specifically* to those who were employed as stage actors. The latter term could be deployed in a pejorative way, essentially accusing public figures of 'not being themselves'. These two meanings have shaded together in our more contemporary notion of hypocrisy, which denotes 'the assumption of a false appearance of virtue or goodness'.<sup>18</sup>

This theatrical background is important because – as David Runciman has noted – we understand hypocrisy as linked to the 'construction of a persona ... that generates some kind of false impression'.<sup>19</sup> This is how hypocrisy is different from

<sup>14</sup> Article 26, VCLT.

<sup>15</sup> Article 31, VCLT.

<sup>16</sup> Sissela Bok, *Lying: Moral Choice in Public and Private Life* (Vintage Books, 1999) 89.

<sup>17</sup> David Runciman, *Political Hypocrisy: The Mask of Power, from Hobbes to Orwell and Beyond* (Princeton University Press, 2010) 7.

<sup>18</sup> Bok (1999) 89.

<sup>19</sup> Runciman (2010) 9.

simply *lying*, hypocrisy points out the gap between stated intentions and actions. This gap manifests in three obvious ways: firstly, when one acts inconsistently with one's stated intentions; secondly, when one applies a set of standards to one situation, but refuses to do so to another, identical, situation (or to oneself) and thirdly when one claims to be motivated by a higher goal, but one's actions demonstrate other motives.

Hypocrisy initially moved from the theatrical to the *religious* sphere, with the term specifically associated with excesses of public religious piety in order to cover up sin.<sup>20</sup> However, the term was not a generalised 'insult' since, as Martin Jay notes, in 16<sup>th</sup> century Europe, governed by aristocratic rule, there were 'elaborate rituals and codes of *politesse* and *courtoisie*, in which sincerity was devalued in favour of sensitivity to appearances and sociability'.<sup>21</sup> The rise of 'hypocrisy' as a generalised 'vice' was closely linked to the decline of aristocratic politics and the rise of political liberalism, as well as the growing importance of Puritanism as a religious phenomenon. As such, the cognisance of hypocrisy as a *general* phenomenon outside of a specifically religious context is closely linked to the emergence of 'modernity'.

### 3.1 *The political theory of hypocrisy*

It is this close link between 'modernity' and a generalised concept of hypocrisy that political theorists have sought to explain. Especially influential in this respect has been Judith Shklar's *Ordinary Vices*. For Shklar, the rise of 'hypocrisy' as 'universally available insult' was rooted in the expansion of 'private conscience' as the governing political principle of public life.<sup>22</sup> 'Private conscience' came to prominence with the rise of liberalism and the collapse of previous political orders. In those previous orders there was a common set of public standards, particularly concerning God, the King etc., around which to orient and criticise public behaviour. Here, criticism could proceed on the basis of divergence from mutually agreed and intelligible values.

In the absence of such 'agreement', it was no longer possible to criticise public figures from deviation from a common set of values. Instead the primary way to criticise the behaviour of individuals was through their *own commitment* to their stated values. One could call a figure into question by demonstrating a failure in their 'private conscience'. In this way, the 'charge of hypocrisy is the weapon of choice in a war between those who cannot do without public values which they must distrust'.<sup>23</sup> An accusation of hypocrisy enables the criticism of a political rival without committing to a common set of political values.

<sup>20</sup> Judith N Shklar, *Ordinary Vices* (Belknap Press, 1985) 46–48.

<sup>21</sup> Martin Jay, *The Virtues of Mendacity: On Lying in Politics* (University of Virginia Press, 2012) 48.

<sup>22</sup> Shklar (1985) 63.

<sup>23</sup> *Ibid.*



At the same time as allowing the emergence of a 'universal' category of hypocrisy, liberalism proves fertile ground for generating 'hypocritical' behaviour. Liberal societies, Shklar argued, continually raise the expectations of their participants. When liberal societies inevitably fail to achieve their goals, they will be accused of 'hypocrisy' by their own subjects.<sup>24</sup> This coalesces in the figures of individual politicians, who must both pursue specific policies and edify 'the governed in order to legitimize these plans'.<sup>25</sup> In such a context there is a 'built-in tension; for the disparity between what is said and what is done remains great ... No one lives up to a collective ideal'.<sup>26</sup> In this way, liberalism 'generates disappointment, and a sense of always being deceived ... We cannot let up on hypocrisy'.<sup>27</sup>

This is compounded by liberalism's commitment to 'egalitarianism'.<sup>28</sup> Liberal societies are founded on the idea of 'a politics of abstract equality in which who you are is less important than what you say'.<sup>29</sup> This is true both in terms of the practical-political structures of liberal society – equality before the law and universal rights – and liberal political philosophy. However, this abstract equality is easily counterposed to the real inequalities which exist under liberalism. Liberal societies can be 'accused of tacitly countenancing the very hypocrisy [they aim] ... to overcome'.<sup>30</sup> It is for this reason that much of liberal political thought has involved the construction of metaphorical devices and situations aimed at overcoming this contradiction, think, for example, of Rawls' 'veil of ignorance' and 'original position'<sup>31</sup> or Rousseau's social contract.<sup>32</sup>

Crucially, then, in liberal societies, hypocrisy emerges as *the most* effective political 'insult', since 'contempt for hypocrisy is the only common ground that remains' in a world lacking shared political values.<sup>33</sup> At the same time, the very structure of liberal societies is such that they continually generate a gap between rhetoric and actuality. Accordingly, liberal societies develop a practice of 'mutual unmasking', in which one party is denounced as hypocritical, and then condemns the other side for *their own* hypocrisy:

<sup>24</sup> Ibid, 67.

<sup>25</sup> Ibid, 69.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid, 75.

<sup>28</sup> Ibid, 77.

<sup>29</sup> Jay (2012) 154.

<sup>30</sup> Ibid.

<sup>31</sup> John Rawls, *A Theory of Justice* (Harvard University Press, 1971).

<sup>32</sup> Jean-Jacques Rousseau, *Rousseau: The Social Contract and Other Later Political Writings* (CUP, 2018).

<sup>33</sup> Shklar (1985) 81.

When this cycle becomes an accepted form of politics, the habitual seesaw between competitive unmaskings and remaskings has set in. This is the pattern of ideological politics in which charges of hypocrisy are exchanged with unbroken regularity.<sup>34</sup>

What role for law here? Although Shklar does not directly engage with the law, the close link between liberalism and legalism gives her argument legal implications. A key tenet of liberalism is that in the absence of a set of shared substantive political values the law is able to step in. Liberal societies can be held together by a shared adherence to a set of formal legal processes and commitments – the rule of law – in spite of their substantive differences.<sup>35</sup> But law's attempt to sidestep this is ultimately unsuccessful, as the very abstract equality which provides such fertile grounds for accusations of hypocrisy is maintained by *the law itself*. The contradiction between law's formal equality and neutrality and the reality of political inequality under liberalism always maintains the possibility of accusations of 'hypocrisy'.<sup>36</sup>

### 3.2 *Hypocrisy in international relations*

The structural conditions that Shklar describes as generative of hypocrisy 'domestically' arguably exist in a more intense form on the international plane. Orthodox International Relations scholarship is – to some degree – premised on the idea of an 'anarchy' in international relations.<sup>37</sup> Whilst the existence of such an 'anarchy' can be questioned, it is clear that in a world of plural states there is no single set of *substantive* 'values' to which all states can adhere. This is the foundation of what Gerry Simpson calls the 'Charter liberalism' of international law, which essentially represents 'a classical liberalism transplanted onto the international relations between nation states'.<sup>38</sup>

Charter liberalism eschews overarching substantive values in favour of emphasising equality, the rule of law and voluntary obligations. But such liberalism has to cope with the reality of the many different international actors, each with their own agendas and varying levels of power. All of this means that the conditions for the production of hypocrisy are even stronger in international law. As such, there have been a number of studies of hypocrisy in the field of international relations; many of

<sup>34</sup> Ibid, 63.

<sup>35</sup> Shklar herself recognised this connection in some of her other work on legalism, see Judith N Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard University Press, 1986) 21–23.

<sup>36</sup> Ibid, 105–106.

<sup>37</sup> Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Palgrave Macmillan, 2002).

<sup>38</sup> Gerry Simpson, 'Two Liberalisms' (2001) 12:3 *European Journal of International Law* 537, at 540–541.

these analyses have drawn on Nils Brunsson's work on organised or organisational hypocrisy.

According to Brunsson, 'organisational hypocrisy' exists primarily within political organisations. Political organisations must both efficiently secure their objectives *and* satisfy the demands of the public or external environment.<sup>39</sup> This leads to a split, whereby the 'talk' of a particular political organisation becomes decoupled from its 'action'. Accordingly, 'hypocrisy is a fundamental type of behaviour in the political organization: to talk in a way that satisfies one demand, to decide in a way that satisfies another, and to supply products in a way that satisfies the third'.<sup>40</sup>

Stephen Krasner has taken this argument further, arguing that such hypocrisy structures one of international law's key categories – sovereignty. For Krasner, sovereignty can be divided into four different 'types': international legal sovereignty, which involves formal equality and mutual recognition; Westphalian sovereignty, which involves the political authority to exclude external political subjects; domestic sovereignty, which denotes the power to effectively control one's internal borders, and inter-dependence sovereignty, which orients around the ability to prevent cross border flows.<sup>41</sup> These components of sovereignty play a crucial role in *legitimizing* the international sphere as a whole, and impose a sense of order upon the world.

Focusing specifically on 'international legal sovereignty' and 'Westphalian' sovereignty, Krasner notes out that these two aspects frequently come into conflict with the state behaviour. States are driven by incentives which sometimes coincide with respect for the concept of sovereignty but often do not.<sup>42</sup> Thus, whilst sovereignty is the overarching 'script' which gives legitimacy to international behaviour, states are incentivised on a fairly regular basis to depart from its precepts. This is a form of 'organised hypocrisy' because '[a]ctors violate rules in practise without at the same time challenging their legitimacy'.<sup>43</sup>

Since states draw legitimacy from international legal norms, pointing out such hypocrisy can become a powerful weapon. In this way, the critique of hypocrisy is often connected with the critique of hegemony. As Martha Finnemore has argued, hypocrisy can serve as an important 'weapon of the weak', with less powerful states using accusations of hypocrisy to undermine hegemonic states, whose rule, in part,

<sup>39</sup> Catherine Weaver, *Hypocrisy Trap: The World Bank and the Poverty of Reform* (Princeton University Press, 2016) 5.

<sup>40</sup> Nils Brunsson, *The Organization of Hypocrisy: Talk, Decisions and Actions in Organizations* (Copenhagen Business School Press 2003) 27.

<sup>41</sup> Stephen D Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, 1999) 7.

<sup>42</sup> *Ibid.*, 9.

<sup>43</sup> Stephen D Krasner, 'Organized Hypocrisy in Nineteenth-century East Asia' (2001) 1:2 *International Relations of the Asia-Pacific* 173, at 173.

depends on their legitimacy.<sup>44</sup> As will be demonstrated below, this was to become an important element in the Third World's critique of international law.

### 3.3 *The limits of idealism*

In these accounts, then, we have the elements of an argument for why accusations of 'hypocrisy' has particular importance in international law. 'Hypocrisy' emerges as a general concept with the rise of liberalism. Here, the absence of a common set of substantive values means that 'hypocrisy' is a primary accusation in political contests. This impacts upon law because – in the absence of a set of shared substantive values – law provides a thin set of institutions that can hold social orders together.

The same conditions responsible for the emergence of a generalised concept of hypocrisy are also ripe for the systematic 'practice' of hypocrisy. Political actors in liberal societies must constantly make promises that they cannot keep, and use legitimating language that stands at odds with reality. This is particularly acute in the context of law, since it casts actors in liberal society as formal equals, who pursue their goals through an apolitical (legal) framework. Yet this stands in stark contrast with the actual practice of politics. This is at its starkest in the international context, where states legitimate their behaviour with reference to international legal standards emphasising sovereignty, equality and cooperation, even as they exist in a world of power, domination and inequality.

Ultimately, however, this argument suffers from something of a 'false contingency'.<sup>45</sup> Although we have a sense of the structural connections between liberalism and the emergence of hypocrisy, we have less of an idea as to why liberalism so regularly generates contradictions. For both Shklar and Krasner the 'actions' of liberal actors regularly depart from their 'talk', but there is no real sense as to *why* this happens with such regularity. Could liberal actors not simply live up to their promises? If the 'reality' of political society is so at odds with the formal equality of the law, *why* is this formal equality so strongly upheld?

Similar criticisms apply to Shklar's account of the collapse of common 'values'. It can hardly be said that 'pre-modern' societies had seamless agreement on a common set of values. They themselves were riven with conflicts – religious, political and economic – in which the 'meanings' of common values were constantly renegotiated and, in the case especially of uprisings amongst the peasantry, entirely contested.<sup>46</sup> What did exist in these societies, however, were *institutions* which could authoritatively

<sup>44</sup> Martha Finnemore, 'Legitimacy, Hypocrisy, and the Social Structure of Unipolarity: Why Being a Unipole Isn't All It's Cracked Up to Be' (2009) 61:1 *World Politics* 58, at 66.

<sup>45</sup> Susan Marks, 'False Contingency' (2009) 62:1 *Current Legal Problems* 1.

<sup>46</sup> See e.g. Rodney Hilton, *Class Conflict and the Crisis of Feudalism: Essays in Medieval Social History* (Verso, 1990).

resolve disputes according to status-based concerns. The fate of these institutions, and the political-economic basis on which they rested, is a crucial aspect of the story of the rise of hypocrisy.

In a sense, the issue with the above accounts is their idealism. They root in the conflict between liberal ideas and reality. However, there is little sense of 'where or why these [liberal] ideas are generated'.<sup>47</sup> At the same time, we have almost no account of what drives the 'reality' of liberalism to be so contradictory. This suggests the need for a *materialist* account which can root liberal ideas within a wider socio-economic context.

A materialist account of the relationship between hypocrisy and international law begins with two insights. The first is that the contradiction between 'saying' and 'doing' in liberal societies exists in large part because political actors lack control over the fundamental facts of economic life. In contemporary societies the major economic determinants of social existence are outside of conscious social control. The existence of private property means that major economic 'decisions' are in private hands. These private actors do not act according to their own 'will', but rather to respond to the 'coercive force' of competition.<sup>48</sup>

The second insight concerns the relationship between liberal societies and their 'others'. As Runciman notes, accusations of hypocrisy were not historically limited to disputes *within* liberal societies.<sup>49</sup> 'Liberal' values were first articulated in a context of colonialism, in which the European world extracted resources and wealth from non-European societies.<sup>50</sup> This was accompanied by racialised justifications that cast non-Europeans as outside of the protection of liberal equality. The material foundations of liberal society were premised upon enacting its opposite elsewhere.<sup>51</sup>

That these insights suggest is that rather than focus on simply *modernity* an account on hypocrisy needs to focus specifically on *capitalism*. Such a focus can provide the institutional and socio-economic basis for apprehending how and why the phenomena captured by theorists of hypocrisy appeared when they did. Here, the work of the Marxist tradition is vital.

### 3.4 Capitalism, Imperialism, Hypocrisy

In 'On the Jewish Question' Karl Marx accounted for the way in which the 'absence of shared values' described by Shklar was created by the rise and consolidation of

<sup>47</sup> China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill, 2005) 54.

<sup>48</sup> Karl Marx, *Capital: A Critique of Political Economy* (Penguin, 1990) 381.

<sup>49</sup> Runciman (2010) 168–193.

<sup>50</sup> Domenico Losurdo, *Liberalism: A Counter-History* (Verso, 2011).

<sup>51</sup> Frantz Fanon, *Black Skin, White Masks* (Pluto, 1986) 58–59.



capitalist social relations. For Marx, modern, capitalist societies are marked by a division between 'political community' and 'civil society'. In the former, people act as communal beings and in the latter they act as private individuals. Such a division did not exist in European feudal societies. In these societies 'civil society had a directly political character'<sup>52</sup> and the 'private' sphere was ordered through an overarching set of status-based feudal relationships. These relationships were transnational in nature, with dense webs flowing from the organised Church. In this way, as discussed above, the 'commonality of values' that Shklar describes as preceding the rise of hypocrisy is something of an idealised articulation of the material foundations of European feudalism, which were not simply a set of ideas or values, but rather a set of common, hierarchical *institutions*.

These institutions were anathema to the rising forces that sought to bring capitalist social relations into being. Capitalist social relations require what Ellen Meiksins-Wood calls the 'separation of the political and the economic'.<sup>53</sup> In capitalist societies there cannot be a direct link between status in a hierarchy and questions of production and appropriation. Instead, 'economic' questions are mediated through the pursuit of profit and the concomitant form of private property. Accordingly, the rising bourgeoisie fought against – and overthrew – the overarching feudal structure. Thus, for Marx the '*formation of the political state, and the dissolution of civil society into independent individuals ... are accomplished by one and the same act*'.<sup>54</sup>

In Marx's account, therefore, the material foundation for the collapse of 'common values' identified by Shklar is the rise of capitalist social relations, which undermined the institutional framework of European feudalism. However, Marx goes further than this. In the absence of this common set of institutions, individuals nonetheless need to regulate their mutual relations. This is where law entered the picture, as a form of regulation founded 'upon the separation of man from man', and the 'right of the *circumscribed* individual, withdrawn into himself'.<sup>55</sup>

Thus, alongside an explanation for the demise of the institution framework of 'common values', we find an explanation for the centrality of juridical equality. As Evgeny Pashukanis was to later note, such equality shares a logic with capitalist social relations, which are founded on a mutually recognised capacity to engage in the exchange of commodities.<sup>56</sup> Capitalist social relations present themselves as the legal

<sup>52</sup> Karl Marx, 'On the Jewish Question' in Robert Tucker (ed), *The Marx-Engels Reader* (W.W. Norton & Co., 1978) 44.

<sup>53</sup> Ellen Meiksins Wood, *Empire of Capital* (Verso, 2003) 12–13.

<sup>54</sup> Marx (1978) 46.

<sup>55</sup> *Ibid.*, 42.

<sup>56</sup> Evgeny Bronislavovich Pashukanis, 'The General Theory of Law and Marxism' in Piers Beirne & Robert Sharlet (eds), *Pashukanis, Selected Writings on Marxism and Law* (Academic Press, 1980). For an introduction to this

relations between independent, formally equal subjects engaged in consensual exchange. This is, as Marx put it, 'a very Eden of the innate rights of man', in which individuals – both capitalist and worker – 'contract as free persons, who are equal before the law'.<sup>57</sup>

Yet this 'form of appearance' of capitalism sits in tension with capitalism's class relations. When we leave 'this sphere of simple circulation or the exchange of commodities' we encounter a new set of '*dramatis personae*'.<sup>58</sup> In the place of the formally equal individuals we have members of the capitalist *class* who own the means of production, and members of the working class who own only their labour power. Since the capitalist class controls the only means by which workers can reproduce their existence, they exercise social power far in excess of their supposed 'equality' with workers. As Pashukanis put it: in capitalist democracies 'the "republic of the market" masks the "despotism of the factory"'.<sup>59</sup>

In this way, capitalism systematically generates relations of abstract, formal equality, embodied in the law. At the same time, it is founded on a class division in which social power is concentrated in the hands of one class. These are social processes that go on 'behind the backs' of the participants in capitalist societies and are governed by a logic wider than any conscious or willed action.<sup>60</sup> Here we see the material foundation for the systematic generation of 'hypocritical' behaviour in 'modernity'. The formal equality created by capitalism contradicts its class basis. At the same time, political claims made in capitalist societies come up against the 'separation of the political and economic', whereby the major processes that determine social reproduction cannot be consciously controlled.

The shape of these contradictions has taken different forms in different historical contexts. In particular, during the birth of capitalism 'formal equality' was extended on a limited basis, essentially only including white, property-owning men. Capitalism was thus constituted via a series of formal exclusions – of women, of 'the lesser races', or the propertyless – which contradicted the claims to freedom and

'commodity-form' approach see Robert Knox, 'Marxist Approaches to International Law' in Anne Orford, Florian Hoffmann & Martin Clark (eds), *The Oxford Handbook of the Theory of International Law* (OUP, 2016) 306, at 312–315.

<sup>57</sup> Marx (1990) 280.

<sup>58</sup> Ibid.

<sup>59</sup> Evgeny Bronislavovich Pashukanis, *Law and Marxism: A General Theory* (Ink Links, 1978) 39.

<sup>60</sup> Marx (1990) 135.

equality.<sup>61</sup> Capitalism still reproduces and relies upon these divisions but mediated through formal equality.<sup>62</sup>

These tendencies become clearer when we move to the international stage. The networks composing the European feudal order were supra-national in nature, originating from the power of the Church and extending across the European nobility. The transition from feudalism to capitalism was initially consolidated in the shape of the absolute monarchies and an attendant 'nation-state' form. Such states, organised around a mercantile capitalism, engaged in extensive trade, becoming – in essence – commodity owners. In this way, an international order of sovereign equality emerged to fill the vacuum left by feudal relations. As Pashukanis put it 'sovereign states co-exist and are counterposed to one another in exactly the same way as are individual property owners with equal rights'.<sup>63</sup>

However, this runs up against the reality of global capitalism. Capitalists seek to expand beyond their national borders to invest in less-developed locations, so as to secure greater rates of profit, and stave off crises. Given the close link between these capitalists and their own states, this drives advanced capitalist states to extend their power.<sup>64</sup> At the same time, given the competitive nature of capitalism, capitalist powers seek to exclude and suppress their rivals. Formal sovereign equality and systematic imperialist relations are the simultaneous, contradictory products of capitalism.<sup>65</sup>

### 3.5 *Whose Hypocrisy?*

Taking this all together, we can now put forward the beginnings of an account of the relationship between hypocrisy and international law. Hypocrisy emerges as a 'universal insult' with the collapse of pre-capitalist social relations. These social relations provided a common institutional framework in which to adjudicate disagreement. Absent this framework, the most powerful mode of criticism was to call into question an individual's commitment to their own ideas: hypocrisy.

The collapse of this framework does not simply imply 'anarchy'. Instead, capitalist social relations were accompanied by a set of juridical practices, organised around the formal and abstract equality of their participants. In this way, '[l]aw appears

<sup>61</sup> Brenna Bhandar, 'Property, Law, and Race: Modes of Abstraction' (2014) 4:1 *UC Irvine Law Review* 203, at 212. More generally, see Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Duke University Press, 2018).

<sup>62</sup> Robert Knox, 'Valuing Race? Stretched Marxism and the Logic of Imperialism' (2016) 4 *London Review of International Law* 81.

<sup>63</sup> Evgeny Bronislavovich Pashukanis, 'International Law' in Piers Beirne & Robert Sharlet (eds), *Pashukanis, Selected Writings on Marxism and Law* (Academic Press, 1980a) 176.

<sup>64</sup> Anthony Brewer, *Marxist Theories of Imperialism: A Critical Survey* (Routledge, 1990) gives an overview of the different Marxist accounts of this process.

<sup>65</sup> Miéville (2005) 142.

both as the basis of social organization and as the means for individuals “to be disassociated, yet integrated in society”.<sup>66</sup> In international legal terms, these are best understood as relations of sovereign equality. In this way, the ‘script’ of sovereignty is a *necessary* consequence of capitalist social relations; the ‘most realist, cynical, power-maximising state in the modern world system is a realist, cynical and power maximising juridical form’.<sup>67</sup>

Accordingly, it is capitalist social relations which create the conditions under which ‘hypocrisy’ can emerge as a ‘universal insult’. At the same time, these social relations systematically embed and generate hypocritical behaviour – since the logic of capitalism will constantly come up against its juridical and political forms. International law’s role as an ‘apolitical’ site of formally equal states acting in good faith means that an accusation of hypocrisy will have a powerful juridical impact.

#### 4 Epochs of International Legal Hypocrisy

By linking the emergence of the ‘universal insult’ of hypocrisy to capitalist social relations, a materialist account of hypocrisy enables us to understand that hypocrisy is not a ‘static’ phenomenon. Global capitalism is structured by a division of labour. Actors at different levels of this global division of labour will level accusations of hypocrisy in different ways. Yet the character of this division of labour has changed over history, shifting in response to the spread and intensification of capitalist accumulation and through the resistance to it. Such shifting patterns and regimes of accumulation have given rise to specific articulations of the politics of hypocrisy.

##### 4.1 *Hypocrisy and Christendom*

As previously noted, in the early Middle Ages, the European political order was criss-crossed by a series of feudal obligations. In this sense, ‘[t]he basis of the medieval law of nations was provided by the consciousness of the occidental nations that they belonged together and formed a community’.<sup>68</sup> The institutional basis of this was ‘*unitas ecclesia*, the unity of the Church and Empire’, or the *res publica Christiana*. Both the Church and the Emperor claimed extensive *legislative* power over ‘Christendom’.<sup>69</sup>

This was by no means seamless. There were struggles between the Papacy and Empire for paramountcy, and various powers struggled to rise in the hierarchy. These powers concluded treaties amongst themselves and – to a degree – the ‘Islamic

<sup>66</sup> Pashukanis (1980) 70.

<sup>67</sup> Miéville (2005) 284.

<sup>68</sup> Wilhelm G Grewe & Michael Byers, *The Epochs of International Law* (Walter de Gruyter & Co., 2000) 51.

<sup>69</sup> Ibid 73.

orient'.<sup>70</sup> Legal and political disagreements were resolved through the institutional foundation of the *res publica Christiana*, focusing upon a ruler's personal conduct.

Whilst the power of the *res publica Christiana* was sometimes fraught inside of Christendom, there were no such limitations in non-Christian world. The unity of Christendom was partly 'predicated on hostility to infidels'.<sup>71</sup> Military conflict with the non-Christian world was centralised through the Crusades<sup>72</sup> and through the Donation of Constantine, and other manoeuvres, the Papacy claimed the power to assign 'uninhabited' and 'heathen' land to the polities of Christendom.<sup>73</sup>

#### 4.2 *The Discovery of the 'New World'*

The political-economic structure of the Medieval period was relatively closed. As such, the acquisition of new territory could be regulated through common institutions. However, with the discovery of the 'New World' of the Americas this began to break down.<sup>74</sup> Initially, the Papacy tried to regulate this. In 1493, Pope Alexander VI issued the Bull *Inter caetera*, which granted Queen Isabella and Ferdinand of Spain the title to all 'islands ... 100 miles westwards of the Azores and Cape Verde islands' and obliged the Spanish to convert the natives to Christianity.<sup>75</sup> In 1494, Spain and Portugal separately agreed the Treaty of Tordesillas which changed the demarcation line, with this confirmed by Pope Julius II in the *Ea quae* edict.<sup>76</sup>

However, these agreements were undermined by increased competition between European powers. These powers articulated doctrines in the place of Papal authority, often in an emergent language of hypocrisy. A common accusation of hypocrisy focused on Spanish and Portuguese claims that they were fulfilling their duty of conversion. In his 1552 text *A Short Account of the Destruction of the Indies*, Bartolomé de las Casas argued that such claims were hypocritical. For las Casas 'while the various ordinances ... governing the treatment of the native peoples have continued to maintain that conversion and the saving of souls has first priority, this is belied by what has actually been happening on the ground'.<sup>77</sup> This argument was taken up by rival

<sup>70</sup> Ibid 54.

<sup>71</sup> Jennifer Pitts, 'Empire and Legal Universalisms in the Eighteenth Century' (2012) 117:1 *The American Historical Review* 92, at 96.

<sup>72</sup> John France, *Western Warfare In The Age Of The Crusades, 1000-1300* (Routledge, 1999) 40.

<sup>73</sup> Carl Schmitt, *Nomos of the Earth in the International Law of Jus Publicum Europaeum* (Telos Press, 2003) 54.

<sup>74</sup> Miéville (2005) 171.

<sup>75</sup> Grewe & Byers (2000) 234.

<sup>76</sup> Ibid.

<sup>77</sup> Bartolomé de Las Casas, *A Short Account of the Destruction of the Indies* (Penguin, 2004) 33.



powers.<sup>78</sup> Importantly, the claim of hypocrisy sat alongside denials of the Pope's power, meaning there was no agreement that a 'non-hypocritical' conversion would have granted a legal basis. Thus, the argument represented the beginning of an articulation of hypocrisy designed purely to undermine an opponent's legal argument.

The most developed attempted to craft a legal justification was in the work of Francisco de Vitoria.<sup>79</sup> Reflecting the weakness of feudalism, Vitoria dismissed legal justifications based on the Pope and Emperor's jurisdiction or the duty of conversion, framing these objections to these doctrines in terms of the 'hypocrisy' that forced conversion would generate.<sup>80</sup> In *De Indis* Vitoria insisted that the Indians could not have their property seized simply because they did not accept Christianity. Citing other 'infidels', he noted that '[i]t would be harsh to deny to them ... the rights we concede to Saracens and Jews, who have been continual enemies of the Christian religion'.<sup>81</sup> In this way Vitoria argued that it would be *hypocritical* to treat the Indians differently from Saracens and Jews.

As Antony Anghie notes, what is distinctive about *De Indis* is that Vitoria did not treat the Indians and Spanish as bound 'by a universal, overarching system; instead, they belong to two different orders'.<sup>82</sup> To this we can add another distinction. It was not simply that the Indians and Spanish were two different orders, but the Christian nations themselves confronted one another without the overarching institutional framework of the *res publica Christiana*.

In order to deal with this situation Vitoria articulated a minimum standard of behaviour derived from the law of nature – the *jus gentium*. This *jus gentium* was rooted in the idea that 'it is ... inhuman to treat strangers and travellers badly' unless 'travellers were doing something evil'.<sup>83</sup> This was derived from the fact that 'in the beginning of the world, when all things were held in common' and private property was not intended 'to prevent ... mutual intercourse'.<sup>84</sup> Consequently, the Spanish had the right to sojourn and trade in the Indies – just as the Indians had the right to do so in Spain – and any violation of that could be met with war.<sup>85</sup>

<sup>78</sup> Grewe & Byers (2000) 401.

<sup>79</sup> Antony Anghie, 'Francisco De Vitoria and the Colonial Origins of International Law' (1996) 5:3 *Social & Legal Studies* 321; James Anaya, *Indigenous Peoples in International Law* (OUP, 2004); Martti Koskenniemi, 'Empire and International Law: The Real Spanish Contribution' (2011) 61:1 *University of Toronto Law Journal* 1.

<sup>80</sup> Francisco de Vitoria, *Vitoria: Political Writings* (CUP, 1991) 342.

<sup>81</sup> *Ibid*, 251.

<sup>82</sup> Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (CUP, 2005) 19.

<sup>83</sup> Vitoria (1991) 278.

<sup>84</sup> *Ibid*.

<sup>85</sup> *Ibid*, 283–284.

In the absence of a substantive common framework, Vitoria fell back upon the idea of reciprocity. As Antony Duff notes, hypocrisy and reciprocity are deeply interlinked.<sup>86</sup> Reciprocity involves applying standards to others that one also applies to oneself, the failure to do this is a form of hypocrisy. This formed Vitoria's ultimate justification for the Spanish expansion into the 'new world': insofar as the natives 'took advantage' of the law of nations without also granting the Spanish its benefits they would be hypocrites. By engaging in such hypocrisy the natives forfeited their protection under the law.

Crucially, Vitoria's conception here did not represent a full-blown articulation of a universal concept of hypocrisy. The obligations of the *jus gentium* still relied on a naturalised set of shared Christian-inspired values. In this way, he represented the ambivalent and transitional nature of the period, in which the material institutions of Christendom were *breaking down* but had not yet lost all importance. However, arguments around reciprocity and hypocrisy would, over time become ever more central.

#### 4.3 *The End of Christendom and the Rise of Reciprocity*

In the late-1500s and early-1600s figures like Hugo Grotius, Alberico Gentili and Francisco Suarez began to reconceive an expanded *jus gentium*, in part to account for the attenuation of the common institutions of Christendom. Although these figures differed in significant respects, they shared continuities. Firstly, each rooted the law of nations in the common agreement of nations, either through explicit agreement<sup>87</sup> or custom.<sup>88</sup> Secondly, they argued that whilst the law of nations was distinct from natural law, it nonetheless remained closely tied to it. The logical corollary of this was that the obligation to obey international law was rooted in a natural law precept of keeping one's promises.<sup>89</sup> This was closely linked to (religious-inspired) notions of hypocrisy. The tentative sense of the connection between reciprocity and hypocrisy that Vitoria articulated in relation to the 'new world' began to find expression in those theorising relations within Europe itself.

During the mid to late 1600s these processes began to solidify. Conventionally – although this is disputed<sup>90</sup> – the 1648 Peace of Westphalia and the emergence of the sovereign state is understood as beginning this. It is certainly true that by the late-

<sup>86</sup> RA Duff, 'Blame, Moral Standing and the Legitimacy of the Criminal Trial' (2010) 23:2 *Ratio* 123; Cristina Roadevin, 'Hypocritical Blame, Fairness, and Standing' (2018) 49:1 *Metaphilosophy* 137.

<sup>87</sup> Hugo Grotius, *The Rights of War and Peace: In Three Volumes* (Liberty Fund, 2005) 163.

<sup>88</sup> Francisco Suarez, *Selections from Three Works* (Liberty Fund, 2014) 398–399.

<sup>89</sup> *Ibid.*, 256, 391.

<sup>90</sup> Benno Teschke, *The Myth of 1648: Class, Geopolitics, and the Making of Modern International Relations* (Verso, 2009).

1600s, the sovereign state – as embodied in the ‘absolute monarchies’ – had supplanted the *res publica Christiana*. France, England and the United Provinces of the Netherlands emerged as the most powerful European nations, with extensive colonial interests.<sup>91</sup>

Over the 1700s, colonial powers struggled for pre-eminence, with Britain emerging as paramount at the close of the 1756 Seven Years’ War. The revenue and resources generated by Britain’s position, combined with technological and social transformations, helped to kick-start capitalist industrialisation. This relatively early development of industrial capitalism gave Britain an impetus to view its colonies as sources of raw materials and markets for its emerging industry.<sup>92</sup>

The late 1700s saw a great deal of political turbulence. In 1776, the United States declared its independence from Britain. A decade later, the French revolution erupted. When the more radical wing of the Revolution was crushed, Napoleon embarked on an expansionary policy aimed at fighting France’s rivals, particularly Britain.<sup>93</sup> Following the French revolution a number of anti-colonial struggles began, with the Haitian revolution<sup>94</sup> and the Latin American wars of independence<sup>95</sup> being the most prominent.

Against this background the articulation of ‘hypocrisy’ in international law began to assume a very particular form. International law was conceptualised as concerning ‘sovereign states’ as opposed to any Christian institutional foundation. Here, the work of Emer de Vattel was central. Vattel’s rejected the idea that any body stood above individual states. For him ‘[t]he law between States is analogous to the law between individuals in the natural state’ with nations serving as ‘super-individuals, thrown in the world to seek their self-interest’.<sup>96</sup> These nations are ‘free and independent of each other’ and so ‘should be left in peaceable enjoyment ... of liberty’.<sup>97</sup> These nations ‘are naturally equal, and a perfect equality prevails in their rights and obligations’.<sup>98</sup>

For Vattel, the effect of liberty is that ‘[a] nation then is mistress of her own actions so long as they do not affect the ... rights of any other nation’. As such, ‘each possesses the right of judging ... what conduct she is to pursue in order to fulfil her

<sup>91</sup> Gijs Rommelse, ‘The Role of Mercantilism in Anglo-Dutch Political Relations, 1650-74’ (2010) 63:3 *The Economic History Review* 591.

<sup>92</sup> BS Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (CUP, 2017) 486–487.

<sup>93</sup> Eric Hobsbawm, *The Age of Revolution: Europe 1789-1848* (Abacus, 1988) 101–124.

<sup>94</sup> CLR James, *The Black Jacobins: Toussaint L’Ouverture and the San Domingo Revolution* (Penguin, 2001).

<sup>95</sup> Leslie Bethell, *The Cambridge History of Latin America* (CUP, 1995) 218–246.

<sup>96</sup> Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP, 2005) 113.

<sup>97</sup> Emer de Vattel, *The Law of Nations* (Liberty Fund, 2008) 74.

<sup>98</sup> *Ibid.*, 75.

duties',<sup>99</sup> as such 'whatever is lawful for one nation, is equally lawful for any other'.<sup>100</sup> This meant that, '[o]ne state owes to another state whatever it owes to itself'.<sup>101</sup>

Like Vitoria, therefore, Vattel turned to the idea of reciprocity. This reciprocity meant that 'when any one [state] violates those laws, the others have a right to repress her'.<sup>102</sup> However, Vattel did not even have the minimal framework of the *jus gentium* to fall back on, since his theoretical framework could not countenance a substantive set of legal principles independent of a state's liberty and equality. In this way, of course, he reflected the collapse of the institutional feudal order. In this context the close connection between reciprocity and hypocrisy became crucial. Hypocrisy represented a way of judging the behaviour of other sovereigns *without imposing one's own judgment or appealing to an overarching set of shared values*. Insofar as a state acts inconsistently with the obligations it expects from others, it can be said to have violated the law. Here hypocrisy was operating at its purest level.

Vattel's conception captured, in idealised form, the role that hypocrisy had begun to play in legal argumentation. A good example of such uses of hypocrisy can be found in the controversies surrounding American independence. When the US declared independence in 1776, France had initially been cautious about recognising the US, fearing this independence was not effective.<sup>103</sup> However, there was a 'concern that a belated recognition ... after the potential recognition by Great Britain, would result in the disappearance of commercial preference'.<sup>104</sup> Moreover, France sought to weaken as much as possible the presence of Britain in the Americas. The US victory at the battle of Saratoga in October in 1777,<sup>105</sup> as well as the threat that Britain might recognise the US,<sup>106</sup> led the French government to recognise the US in February 1778.

The British government did not respond by denying the US was effectively independent, instead it alleged hypocrisy arguing that 'had territory been acquired by another, recognised European State conquering British colonies in America, France would surely not have recognised that acquisition'.<sup>107</sup> The French state replied with its own accusation of hypocrisy 'pointing to the example of Queen Elizabeth, who in the

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid, 262.

<sup>102</sup> Ibid, 77.

<sup>103</sup> Mikulas Fabry, *Recognizing States: International Society and the Establishment of New States Since 1776* (OUP, 2010) 28.

<sup>104</sup> Daniel Högger, *The Recognition of States* (LIT Verlag Münster, 2015) 128.

<sup>105</sup> Fabry (2010) 29.

<sup>106</sup> Högger (2015).

<sup>107</sup> Grewe & Byers (2000) 347.

sixteenth century had recognised the independence of the Netherlands in its revolt against Spain'.<sup>108</sup>

The latter argument – that it was hypocritical to condemn an action a state had itself practiced in the past – became increasingly important over the 1800s. A useful example in this respect was the British campaign against the slave trade. The British had been involved in the slave trade but by the end of the 1780s 'the West Indian monopoly ... acted as a brake which had to be removed'.<sup>109</sup> The slave trade was unable to produce sufficient raw materials, and, with the opening up of new markets and territories, the colonial monopoly was increasingly less profitable.<sup>110</sup> All of these factors, combined with slave revolts in and domestic anti-slavery sentiment, led the British government to turn against the slave trade, passing the Slave Trade Act in 1807.<sup>111</sup>

After its failure to secure a multilateral treaty prohibiting the slave trade, Britain concluded a series of treaties throughout the 1810s and 1820s.<sup>112</sup> These treaties included a 'right of visitation' whereby states had a right to 'visit merchant ships suspected of carrying slaves'.<sup>113</sup> However, despite Congress declaring the slave trade piracy, the US refused to sign any treaty.<sup>114</sup> This led to a practice of non-American ships raising the American flag to avoid seizure.

Against this, the British pioneered a policy of checking the papers of ships flying the flag of the US in 'questionable' circumstances.<sup>115</sup> Many of the objections to this policy were couched in the language of hypocrisy. A particularly striking example was Henry Wheaton's 1842 response. Wheaton noted that the existence of slavery in the US was 'originally established among them by the selfish policy of the mother country'.<sup>116</sup> This argument was a direct accusation of hypocrisy: the British were blaming the US for something the British had caused.

According to Wheaton, the US government had attempted to negotiate alternative mechanisms for resolving the issue, all of which had been refused.<sup>117</sup> This

<sup>108</sup> Ibid.

<sup>109</sup> Eric Williams, *Capitalism and Slavery* (UNC Press, 2014) 126.

<sup>110</sup> Robin Blackburn, *The Overthrow of Colonial Slavery, 1776-1848* (Verso, 1988) 138.

<sup>111</sup> Ibid, at 293–330.

<sup>112</sup> Grewe & Byers (2000) 559–561.

<sup>113</sup> Ibid, 560.

<sup>114</sup> Ibid, 563–564.

<sup>115</sup> Ibid, 565.

<sup>116</sup> Henry Wheaton, *Enquiry into the Validity of the British Claim to a Right of Visitation and Search of American Vessels Suspected to Be Engaged in the African Slave-Trade* (Lea & Blanchard, 1842) 12.

<sup>117</sup> Ibid, 85.



refusal was evidence of the fact that the British might have ulterior motives in promoting their right to visitation, since 'if the operation of the right of search were extended to a time of peace as well as war, a new system would be commenced for the dominion of the sea'.<sup>118</sup> Although Wheaton did not outright accuse the British of acting in the name of anti-slavery to increase its own power, he did note that such 'abuses' had been a previous bone of contention. This accusation was reflective of opinion in France and Portugal<sup>119</sup> and broader public opinion,<sup>120</sup> which characterised British anti-slavery policy as a hypocritical cover for the expansion of its own power.

Wheaton also pointed to the hypocritical inconsistency in the British argument, again appealing to reciprocity. He noted that British behaviour was 'directly at war with an official communication made by Lord Palmerston to the government of the Republic of Hayti' condemning Haiti for impounding slave ships following Haiti's anti-slave revolution.<sup>121</sup> He further argued that Britain would itself never consent to such a right of visitation of its own coasts.<sup>122</sup>

The appeal to the connection between reciprocity and hypocrisy also underlay Wheaton's argument as to the *legality* of slavery. Wheaton objected to the idea that slave trafficking was international piracy, because slavery was not illegal under international law.<sup>123</sup> Here, Wheaton drew on Judge Marshall's opinion in *The Antelope* case; Marshall had argued – in a Vattelian vein – that owing to 'the perfect equality of nations ... no one can rightfully impose a rule on another'.<sup>124</sup> Accordingly, a right 'must remain lawful to those who cannot be induced to relinquish it'.<sup>125</sup> The only effective argument would be to demonstrate hypocrisy on the part of slave traffickers: showing that their actions in trafficking were inconsistent with their own stated legal position.

#### 4.4 Colonialism and the Hypocritical Mission

The growing advance of industrial capitalism changed the nature of the relationship between advanced capitalist Europe and non-European, non-capitalist societies. As capitalist social relations established themselves on a firmer basis throughout Europe, capitalists sought higher and higher rates of profit – which the European market was

<sup>118</sup> Ibid, 93.

<sup>119</sup> Jean Allain, 'The Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade' (2008) 78:1 *The British Year Book of International Law* 342, 363.

<sup>120</sup> 'Our Relations with England' (1842) 8:6 *Southern Literary Messenger* 381.

<sup>121</sup> Wheaton (1842) 115–116.

<sup>122</sup> Ibid, 107.

<sup>123</sup> Ibid, 73.

<sup>124</sup> *The Antelope* [1825] 23 U.S. 66, at 122.

<sup>125</sup> Ibid.

failing to provide. In the non-European world, 'capital [was] scarce, the price of land [was] relatively low, wages [were] low ... [and] raw materials [were] cheap',<sup>126</sup> encouraging capitalists to export not just commodities but *capital* to the non-European world.

In order to full take advantage of the non-European world it was necessary to transform it. The protection of capitalist investments, as well as the required forms of social transformation, needed direct state-led intervention and guarantees. Late-19<sup>th</sup> century capitalism was marked by an intensification of direct colonial intervention – particularly in Africa.<sup>127</sup>

In order to obtain land, European states either occupied *terra nullius* land or concluded treaties of cession with indigenous peoples.<sup>128</sup> For societies better able to defend themselves, Protectorates were established.<sup>129</sup> For those more 'advanced' non-European societies, such as the Ottoman Empire, China, Japan and Korea, 'unequal' treaties were concluded, granting European states extraterritorial jurisdiction over their nationals.<sup>130</sup> These specific developments were framed by the 'standard of civilisation' which regulated who had access to legal subjectivity.<sup>131</sup> This was reflected in the writings of international lawyers – including James Lorimer, Henry Wheaton, W.E. Hall and John Westlake in the 19<sup>th</sup> century and Lassa Oppenheim and F. Lindley in the early 20<sup>th</sup> century.<sup>132</sup>

Writing in 1955, George Schwarzenberger characterised a civilised state as one whose 'government was sufficiently stable to undertake binding commitments under international law and ... was able and willing to protect adequately the life, liberty and property of foreigners.'<sup>133</sup> The centrality of economic protection to the standard betrays its close connection to capitalist social relations,<sup>134</sup> yet these social relations

<sup>126</sup> VI Lenin, *Imperialism, the Highest Stage of Capitalism: A Popular Outline* (Foreign Languages Press, 1970) 73.

<sup>127</sup> EJ Hobsbawm, *The Age Of Empire: 1875-1914* (Abacus, 1989).

<sup>128</sup> Anghie (2005) 67–84.

<sup>129</sup> *Ibid.*, 87–90.

<sup>130</sup> Matthew Craven, 'What Happened to Unequal Treaties? The Continuities of Informal Empire' (2005) 74:3 *Nordic Journal of International Law* 335; Ntina Tzouvala, "'And the Laws Are Rude, ... Crude and Uncertain": Extraterritoriality and the Emergence of Territorialised Statehood in Siam' in Daniel S Margolies & others (eds), *The Extraterritoriality of Law: History, Theory, Politics* (Routledge, 2019).

<sup>131</sup> Gerrit W Gong, *The Standard of Civilization in International Society* (OUP, 1984); Grewe & Byers (2000) 445.

<sup>132</sup> See Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40:1 *Harvard International Law Journal* 1 for the most comprehensive account of these figures.

<sup>133</sup> Georg Schwarzenberger, '12:1 The Standard of Civilization in International Law' (1955) 8 *Current Legal Problems* 212, at 220.

<sup>134</sup> Ntina Tzouvala, 'Civilization' in Jean D'Aspremont & Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar, 2019).

were also inextricably tied to a racialised and gendered language of racial 'science', 'civilisation' and 'progress'.<sup>135</sup>

Much of this language was mediated through ideas about hypocrisy. 19<sup>th</sup> century lawyers argued that international law 'cannot be applied to a State which is not able to apply them on its own part to other States'.<sup>136</sup> As such, to include uncivilised societies within the international legal order would be an act of hypocrisy, since it would be 'placing them in a false position ... inducing them to advance claims which they cannot maintain'.<sup>137</sup> In part, then, the concept of civilisation was undergirded by a justification of avoiding hypocrisy on the part of 'civilised states'.

The logic of this argument was also rooted in hypocrisy on the part of the 'natives'. Arguments around the 'uncivilised' nature of natives often had to face the fact that '[m]any of the so-called 'savage' races ... possess[ed] organized institutions of government'.<sup>138</sup> Indeed, these societies had their own systems for governing international relations. The most 'enlightened' of the 19<sup>th</sup> century jurists, such as Hall, acknowledged this. However, they argued that 'international law is a product of the special civilisation of modern Europe'.<sup>139</sup> Even when non-European societies acted as if they understood international law, they were in practice hypocritical, since:

It is not enough consequently that they shall enter into arrangements by treaty identical with arrangements made by law-governed powers, nor that they shall do acts, like sending and receiving permanent embassies, which are compatible with ignorance or rejection of law.<sup>140</sup>

Noting specifically the example of China, Hall argued that such 'semi-civilised states' had 'learned enough' to make demands in international law 'long before a reciprocal obedience to those rules can be reasonably expected'.<sup>141</sup> A more virulent strain of this argument can be found in Lorimer's work. Lorimer, the most openly racist of the 19<sup>th</sup> century jurists,<sup>142</sup> argued that '[t]he Turks, as a race, are probably incapable of the

<sup>135</sup> Ntina Tzouvala, *Capitalism As Civilisation: A History of International Law* (CUP, 2020).

<sup>136</sup> Lassa Oppenheim, *International Law, a Treatise* (Longmans, Green & Co., 1905) 31.

<sup>137</sup> James Lorimer, *The Institutes of the Law of Nations; a Treatise of the Jural Relations of Separate Political Communities* (William Blackwood & Sons, 1883) 170.

<sup>138</sup> MF Lindley, *The Acquisition And Government Backward Territory In International Law* (Longmans, Green & Co., 1926) 20.

<sup>139</sup> William Edward Hall, *A Treatise on International Law* (The Clarendon Press, 1890) 42.

<sup>140</sup> *Ibid*, 43.

<sup>141</sup> *Ibid*, 44.

<sup>142</sup> Martti Koskenniemi, 'Race, Hierarchy and International Law: Lorimer's Legal Science' (2016) 27:2 *European Journal of International Law* 415; Gerry Simpson, 'James Lorimer and the Character of Sovereigns: The Institutes as 21st Century Treatise' (2016) 27:2 *European Journal of International Law* 431, at 440.

political development which would render their adoption of constitutional government possible'.<sup>143</sup> However, even if they could do this, the 'Koran would still have ... contradicted its constitutional professions of reciprocating will'.<sup>144</sup> For Lorimer, since Islam was an exclusive and dominating religion, *any* usage of international law by a Muslim state was – by definition – hypocritical.

A similar argument applied to political radicalism. For Lorimer, 'Nihilism or Fenianism or Communism' were all organised around a policy of 'mere negation', accordingly they could not claim recognition because they are 'a manifestation of that element of jural contradiction which it is the object of jurisprudence to remove'.<sup>145</sup> Any attempt by such forces to invoke international law would be done so with the hypocritical intent to destroy it.

In this way, then, the discourse of avoiding hypocrisy merged with the logic of racialisation and capital accumulation.<sup>146</sup> Racial assumptions about the ability of non-Europeans to fulfil reciprocal obligations meant it would 'be absurd to expect the Sultan of Morocco to establish a Prize Court, or to require the dwarfs of the central African forest to receive a permanent diplomatic mission'.<sup>147</sup> Those same racialised assumptions were used to delegitimise attempts by non-European states to utilise international law as hypocritical. Colonial international law was based upon a systematic 'anti-hypocrisy'.

This explicitly anti-hypocritical position meant that arguments organised around hypocrisy became ever more central. Rival powers accused each other of acting hypocritically in dealing with the 'uncivilised' to advance their interests, or 'prematurely' recognising 'uncivilised states'. This was particularly at issue in the Berlin Conference and its aftermath.<sup>148</sup>

In political terms, some questioned the category of 'civilisation' itself, seeing it as a hypocritical cover for expansion. For example, in his 1850 *Races of Men: A Fragment*, the 'ethnologist' Robert Knox noted that a 'wish to serve Africa forms the excuse for an expedition to the Niger, the real object being the enslaving the unhappy Negro, dispossessing him of his lands and freedom. I prefer the manly robber to this sneaking, canting hypocrisy'.<sup>149</sup>

<sup>143</sup> Lorimer (1883) 124.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid, 99.

<sup>146</sup> See Robert Knox, 'Haiti at the League of Nations: Racialisation, Accumulation and Representation' (2020) 21:2 *Melbourne Journal of International Law* 246, for an account of this connection.

<sup>147</sup> Thomas Joseph Lawrence, *The Principles of International Law* (DC Heath & Co, 1900) 58.

<sup>148</sup> Matthew Craven, 'Between Law and History: The Berlin Conference of 1884-1885 and the Logic of Free Trade' (2015) 3:1 *London Review of International Law* 31, at 42–48.

<sup>149</sup> Robert Knox, *The Races of Men: A Fragment* (Lea & Blanchard, 1850) 76.

More importantly, the systematic anti-hypocrisy of civilisation enabled non-European societies to articulate claims against Europe. Some of the more 'advanced' societies began to transform themselves so as to reach the standard of civilisation.<sup>150</sup> States such as Turkey, Japan and Siam could argue that to fail to recognise their place in the Family of Nations would be hypocritical.<sup>151</sup> Hypocrisy emerged as a 'weapon of the weak'.

#### 4.5 *Civilisation as Hypocrisy*

If the discourse of civilisation allowed hypocrisy to be invoked as a 'weapon of the weak', this was ultimately conservative.<sup>152</sup> Non-European states invoked hypocrisy to argue for their inclusion in a capitalist, racialised order. However, in the first two decades of the 1900s a more systematic challenge emerged in the form of anti-imperialism. Most famously, J.A. Hobson, the English liberal, saw the claims of 'civilising' non-European peoples as a hypocritical cover for the expansion of capitalism.<sup>153</sup>

It was the Russian Revolution and the international Communist movement that systematised this critique. Anti-imperialism was central to the Bolsheviks' political line; they argued that imperialism was key to the continued survival of capitalism and accordingly proposed an alliance between 'national-revolutionary' movements and the revolutionary working class.<sup>154</sup> Key here was the concept of self-determination, under which colonial peoples should be immediately recognised as 'nations'.<sup>155</sup> This political line both systematised the claims of non-European revolutionary nationalists and found resonance with them.<sup>156</sup>

At the close of the war the Bolsheviks took power and repudiated Russia's former unequal treaties, as well as repudiating the doctrine of civilisation and arguing strongly for equality in international affairs.<sup>157</sup> Soviet power posed the threat of an alliance between anti-colonial nationalists and communist revolutionaries. In response,

<sup>150</sup> David P Fidler, 'The Return of the Standard of Civilization' (2001) 2:1 *Chicago Journal of International Law* 137, at 144–145.

<sup>151</sup> RP Anand, *Studies in International Law and History: An Asian Perspective* (Springer, 2013) 57–59.

<sup>152</sup> Tzouvala (2020) 79–86.

<sup>153</sup> John A Hobson, *Imperialism: A Study* (Gordon Press, 1975) 122.

<sup>154</sup> VI Lenin, 'The Socialist Revolution and the Right of Nations to Self-Determination (Theses)' in George Hanna (ed), *V.I. Lenin, Collected Works*, vol 22 (Progress Publishers, 1964) 146.

<sup>155</sup> *Ibid*, 154.

<sup>156</sup> Robert Knox & Ntina Tzouvala, 'Looking Eastwards: The Bolshevik Theory of Imperialism and International Law' in Kathryn Greenman, Anne Orford, Anna Saunders & Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (CUP, 2021).

<sup>157</sup> John B Quigley, *Soviet Legal Innovation and the Law of the Western World* (CUP, 2007) 136.

Woodrow Wilson's concept of 'self-determination' was embodied at an institutional level in the formation of the League of Nations Mandates System, whereby the former colonial territories of the defeated powers were placed under the 'tutelage'. Such 'tutelage' was criticised as a hypocritical cover for the material interests of the European powers.<sup>158</sup>

However, it was the Communist and radical anti-colonial movements who most systematically deployed the concept of hypocrisy in their critique of trusteeship. The Comintern resolved that the main task of the communist movement was the 'fight against bourgeois democracy and the unmasking of its lies and hypocrisy'.<sup>159</sup> In this context, the Comintern refused to 'confine itself to the bare and formal recognition of the equality of nations',<sup>160</sup> which was ultimately 'a reflection of the conditions of commodity production, is turned by the bourgeoisie'.<sup>161</sup> Thus, whilst the Communist movement committed itself to fighting for self-determination it should:

[P]recisely distinguish the oppressed, dependent nations, unequal in rights, from the oppressing, exploiting nations with full rights, to offset the bourgeois-democratic lies which conceal the colonial and financial enslavement of the vast majority of the world's population by a small minority of the wealthiest and most advanced capitalist countries.<sup>162</sup>

As such, for the Bolsheviks, self-determination had to be connected to building a revolutionary alliance to overthrow capitalism. This critique was shared by the national liberation movements, who both drew upon and transformed it.<sup>163</sup>

By the end of the Second World War, the concept of civilisation itself came under attack as intrinsically hypocritical. These political critiques translated directly into an attack on the international legal order, with many Third World nationalists instating that ideas of trusteeship were – in Kwame Nkrumah's words – 'shabby sham gestures of setting up a fake machinery for "gradual evolution towards self-government"' as a 'means to cover the eyes of colonial peoples'.<sup>164</sup>

Throughout the 1940s and 1950s Third World states – backed by the USSR – advanced this critique within the General Assembly. They denounced the 'the

<sup>158</sup> William Bain, *Between Anarchy and Society: Trusteeship and the Obligations of Power* (OUP, 2003) 103–104.

<sup>159</sup> Jane Degras (ed), 'Theses on the National and Colonial Question Adopted by the Second Comintern Congress [28th July 1920]', *The Communist international, 1919-1943: Documents*, vol 1 (Frank Cass, 1956) 139.

<sup>160</sup> *Ibid*, 142.

<sup>161</sup> *Ibid*, 140.

<sup>162</sup> *Ibid*.

<sup>163</sup> Robert JC Young, *Postcolonialism: An Historical Introduction* (Blackwell, 2001) 114–158.

<sup>164</sup> Kwame Nkrumah, *Revolutionary Path* (Panaf, 1973) 19.

hypocrisy which lay behind the so-called sacred mission of civilization'.<sup>165</sup> They refused to accept '[t]he stale argument that the colonial peoples were not ripe for self-determination', since it was 'sheer hypocrisy'.<sup>166</sup> They noted that states professed to dislike 'dictatorship in every form' even whilst supporting colonial dictatorships.<sup>167</sup>

The growing power of the non-European world, the strength of the national liberation movements, and the threat of their alliance with the Soviet Union forced a compromise. In 1960, the General Assembly passed the 'Declaration on the granting of independence to colonial countries and peoples' which contained an explicit critique of the concept of civilisation as hypocritical; noting that '[i]nadequacy of political, economic, social or educational preparedness' could not 'serve as a pretext for delaying independence'.<sup>168</sup>

#### 4.6 *From Decolonisation to Rivalry*

With the continuing victories of the national liberation movements more non-European states entered into the General Assembly. In so doing, they utilised accusations of hypocrisy against advanced capitalist states. Here, the Colonial Declaration was key. By passing such a Resolution, Third World states were able to present decolonisation as the 'will' of states. Accordingly, they were able to criticise states that supported colonialism as hypocrites. As Tanzania's representative put it in 1966 'it was the highest form of hypocrisy for a State to affix its signature to the United Nations Charter, which was based on the dignity and equality of man, and then to perpetuate colonial enslavement'.<sup>169</sup>

This was most straightforwardly the case in respect of Portuguese colonialism. Portugal was repeatedly denounced as hypocritical in appealing to the Charter. In so doing, Portugal was enabled by 'the hypocritical attitude of its military allies which, while professing allegiance to the principles of freedom and peace, supplied Portugal with weapons'.<sup>170</sup> Similar criticisms were levelled at South Africa's apartheid system,<sup>171</sup>

<sup>165</sup> UNGA Summary Record (14 November 1952) UN Doc A/AC.61.SR.16, 82.

<sup>166</sup> UNGA Summary Record (14 November 1952) UN Doc A/C.3/SR.445, 160.

<sup>167</sup> UNGA Summary Record (12 October 1949) UN Doc A/C.3/SR.248, 69.

<sup>168</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 Dec 1960).

<sup>169</sup> UNGA Summary Record (16 November 1967) UN Doc A/C.6/SR.999, 239.

<sup>170</sup> UNGA 'Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples' (5 December 1967) UN Doc A/6700/REV.1, 8.

<sup>171</sup> UNGA Summary Record (16 November 1967) UN Doc A/C.6/SR.999.

and the slowness of the 'international community' of dealing with South Africa's colonialism in 'South West Africa'.<sup>172</sup>

Imperialism also shaped how the US and USSR conducted their rivalry. The USSR, in its role as 'patron' of national liberation, adopted similar arguments to those of the Third World. For example, during a Session of the General Assembly on the 1954 *coup d'état* in Guatemala the USSR's representative noted that the US had 'a material ... interest in ... Guatemala'.<sup>173</sup> Accordingly, any attempt to invoke international law against Guatemala was a hypocritical cover for the US imperialism. The representative of the US responded that it was the Soviet Union which had 'set up a monolithic structure in the free world' and so was in no position to advance accusations of hypocrisy. In the next session the US representative argued – with echoes of Lorimer – that the USSR 'seeks to win ... support by constantly talking about its love of ... international law and order; in fact, it is the promoter of international disorder'.<sup>174</sup>

Such debates were common throughout the Cold War. In the 1956 Soviet intervention in Hungary the USSR's representative argued that US arguments about the illegality of Soviet action were 'not to maintain international peace and security but to foment criminal activities'.<sup>175</sup> The response of Belgium's representative was to point out that the USSR's actions in Hungary were at odds with its professed commitment to self-determination.<sup>176</sup> This was the Cold War pattern. The USSR would criticise a US legal argument as hypocritical, owing to its support for imperialism. The US and its allies would then respond arguing that the USSR's own anti-imperialism was hypocritical given the subjugation of the Soviet bloc. Accusation was met with counter-accusation *ad infinitum*.<sup>177</sup>

These accusations overlapped in important ways. One striking example can be seen in India's invasion of Goa. Goa had been colonised by Portugal in 1510, and remained part of Portugal after Indian independence. This had long been a sticking point and, in 1961, India militarily annexed Goa. Portugal brought the matter before the Security Council, claiming a violation of Article 2(4); Portugal alleged hypocrisy on

<sup>172</sup> UNGA Verbatim Record (27 April 1967) UN Doc A/PV.1507.

<sup>173</sup> UNSC Verbatim Record (20 June 1954) UN Doc S/PV.675, 23.

<sup>174</sup> UNSC Verbatim Record (25 June 1954) UN Doc S/PV.676, 31.

<sup>175</sup> UNSC Verbatim Record (28 October 1956) UN Doc S/PV.746, 5.

<sup>176</sup> *Ibid*, 32.

<sup>177</sup> Other prominent examples include rows over the USSR shooting down spy planes in 1960 (UNSC Verbatim Record (23 May 1960) UN Doc S/PV.857), the Cuban Missile Crisis (UNSC Verbatim Record (23 October 1962) UN Doc S./PV.1022) and the Soviet invasion of Czechoslovakia (UNSC Verbatim Record (21 August 1968) UN Doc S/PV.1441).



the part of India, saying that its anti-colonialism was a 'pretext' for territorial gain.<sup>178</sup> The US representative noted that the invasion 'mocks the good faith of India's frequent declarations of exalted principle [of non-violence]',<sup>179</sup> with France's representative also stating such conduct contradicted India's professions of Gandhian non-violence.<sup>180</sup>

The USSR's representative, supporting India, argued that since Goa had been acquired through colonialism, it was not an integral part of Portugal.<sup>181</sup> He further noted that the UK and US would not condemn Portuguese aggression in Angola, even whilst condemning Indian action, and so were guilty of a hypocritical double standard.<sup>182</sup> In response, the US representative pointed out 'there are a lot of people in the world – in East Germany and all the way from the Baltic to the Black Sea – who want their freedom too' and so the USSR was in no position to lecture about freedom.<sup>183</sup>

It was not simply the USSR that raised the issue of imperialist hypocrisy. India's representative asked 'how dare ... [Portugal] talk of the Charter of the United Nations when, since the very day of their admission, they have done nothing but flout the Charter' in relation to colonialism.<sup>184</sup> Both the Liberian and Ceylonese representatives agreed with these accusations of hypocrisy, with the latter noting of the imperial powers that 'while preaching saintliness to Nehru, reserve the right to worship Machiavelli.'<sup>185</sup>

Goa illustrates the how a quite traditional sense of hypocrisy had 'universalised' during the Cold War. Each side sought to undermine the other's legal argument by identifying hypocrisy. These accusations were essentially conservative, reaffirming the UN system and a minimal Charter liberalism. However, alongside these conservative arguments, we can also detect more radical arguments. Specifically, C.S. Jha – India's ambassador to the UN – argued that Portuguese 'rights' in Goa 'derived from a naked, unabashed application of force'.<sup>186</sup> The maintenance of those rights came 'from international law as written by European law writers'.<sup>187</sup> To characterise India's

<sup>178</sup> UNSC Verbatim Record (18 December 1961) UN Doc S/PV.987, 8.

<sup>179</sup> *Ibid*, 17.

<sup>180</sup> S/PV.988 4.

<sup>181</sup> UNSC Verbatim Record (18 December 1961) UN Doc S/PV.987, 1.

<sup>182</sup> *Ibid*, 24.

<sup>183</sup> UNSC Verbatim Record (18 December 1961) UN Doc S/PV.988, 22.

<sup>184</sup> UNSC Verbatim Record (18 December 1961) UN Doc S/PV.987, 8.

<sup>185</sup> *Ibid*, 31.

<sup>186</sup> *Ibid*, 10.

<sup>187</sup> *Ibid*, 13.

response as 'aggression' was doubly hypocritical, ignoring the *real* aggression of Portuguese colonialism, and applying standards designed to entrench European domination.

Implicitly, then, Jha was accusing the international legal order *itself* of hypocrisy – it purported to be universal and equal, but in fact embedded colonial domination. A truly anti-hypocritical – and so anti-colonial – international law would have to recognise that wars of national liberation were not 'aggression'. The representatives of both France and the United States recognised the threat that such proposals posed. The French representative went so far as to say that such arguments 'would involve a real negation of law'.<sup>188</sup> In this way, he echoed Lorimer's fear that should non-Europeans be given access to international law they would hypocritically use it to destroy the international order. In a sense, radical Third Worldists attempted to use the General Assembly to make this a reality. The culmination of this was the 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations', which sought to enable colonial peoples to 'resist' the suppression of their self-determination.<sup>189</sup>

#### 4.7 *Neo-colonialism as Hypocrisy*

Jha's arguments represented a strain of Third Worldist thinking about the hypocrisy tied it to the structure of international law itself. This structural critique essentially noted that 'even while the West asserted that colonialism was a thing of the past, it ... relied ... on those relationships of power and inequality that had been created by that colonial past'.<sup>190</sup> The radical version of this critique continued that a non-hypocritical version of the law would require complete transformation.<sup>191</sup> This critique was strongest in relation to the concept of 'neo-colonialism'.

Radical thinkers in the Third World argued that when the colonial powers left the non-European world they took with them their economic links and expertise. The colonial territories had entered a global capitalist order that had been developed by and for the advanced capitalist states.<sup>192</sup> The only way to survive was to turn back to

<sup>188</sup> UNSC Verbatim Record (18 December 1961) UN Doc S/PV.988, 4.

<sup>189</sup> In a special committee meeting, the Cameroonian representative argued 'Failure to recognize the right of self-defence against colonial domination ... would constitute an act of hypocrisy by those who proclaimed their allegiance to the Charter', UNGA Summary Record (4 December 1967) UN Doc A/AC.125.SR.70, 14.

<sup>190</sup> Anghie (2005) 215.

<sup>191</sup> Mohammed Bedjaoui, *Towards A New International Economic Order* (UNESCO, 1979). See Luis Eslava & Sundhya Pahuja, 'Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law' (2012) 45:2 *Journal of Law and Politics in Africa, Asia and Latin America - Verfassung und Recht in Übersee* 195 for a typology of how such positions were adopted in the non-European world.

<sup>192</sup> Frantz Fanon, *The Wretched of the Earth* (Grove Press, 1963) 148–178.

the advanced capitalist powers.<sup>193</sup> This situation was dubbed 'neo-colonialism'. The only way to gain full independence would be to nationalise the commanding heights of the economy, and engage in international cooperation. Yet such moves were blocked by an international law which had been formulated for the advantage of Europeans.

The concept of neo-colonialism undergirded a range of Third World General Assembly Resolutions aimed at overturning the hypocrisy of an 'anti-colonial' international law supporting neo-colonialism.<sup>194</sup> The most radical states advanced such a critique with the aim of overturning the international economic order, as embodied in 'the New International Economic Order' (NIEO). Precisely *how* ambitious the NIEO was is highly debated;<sup>195</sup> however, it did represent a clear attempt to go beyond the post-War economic model. It was elaborated in the context of the economic crisis of the 1970s, intimately connected to the US leaving the Gold Standard, and the OPEC oil price rise.<sup>196</sup> The period was also one of *détente*.

In this context, Algeria – one of the most radical Third World actors – called for a Special Session of the General Assembly. In his opening speech Houari Boumediene – Chairman of the Revolutionary Council of Algeria – noted that to speak of peace would be hypocritical since 'the gradual shift out of the cold war context has not been accompanied by a corresponding improvement in the condition of the countries of the third world'.<sup>197</sup> This particular hypocrisy was part of a more general problem in which, despite 'the increase in the number of independent states', there had been 'an ever greater concentration of decision-making power in the hands of a restricted circle of Powers'.<sup>198</sup> Whilst such states claimed to believe in decolonisation, they acted to 'perpetuate the system of pillage established in the colonial era'.<sup>199</sup>

The basic accusation of neo-colonialism undergirded the NIEO. In this story, it was colonialism which had been responsible for the under-development of the non-European world.<sup>200</sup> Accordingly, it was the highest hypocrisy to ask 'the exploited peoples to ... compensate the immense interests that build their wealth and power

<sup>193</sup> Nkrumah (1973) 173.

<sup>194</sup> The most obvious example here was the doctrine of Permanent Sovereignty Over Natural Resources, see General Assembly Resolution 1803 (XVII).

<sup>195</sup> Nils Gilman, 'The New International Economic Order: A Reintroduction' (2015) 6:1 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 1.

<sup>196</sup> Bedjaoui (1979) 103–104.

<sup>197</sup> UNGA Verbatim Record (10 April 1974) UN Doc A/PV.2208, 1.

<sup>198</sup> *Ibid.*, 2.

<sup>199</sup> *Ibid.*, 3.

<sup>200</sup> Walter Rodney, *How Europe Underdeveloped Africa* (Howard University Press, 1982).

specifically by exploiting those peoples'.<sup>201</sup> Moreover, the aid which *was* received by the Third World was given hypocritically, not as an act of charity, but to secure military, political and economic advantage.<sup>202</sup> The argument was clear; a structurally hypocritical international law would have to be radically transformed.

Predictably, the response of the developed countries was to warn about the dangers of hypocrisy. The delegate from the Federal Republic of Germany warned that '[r]eforms should not be a pretext for anyone to dodge the necessary sacrifices'.<sup>203</sup> Echoing Lorimer's fears, the French delegate urged that the NIEO not serve as a pretext for those radical actors who wanted to provoke a 'confrontation'.<sup>204</sup>

Ultimately, the NIEO failed. A key aspect of this failure, discussed further below, was the reliance on the General Assembly. Up until the proposals for the NIEO, Third World states had relied on the power of General Assembly Resolutions to make changes in international law. From the perspective of hypocrisy this was powerful, as such Resolutions could be portrayed as the 'will' of states and hence be used to accuse hypocrisy on the part of those who flouted them. However, the *legal force* of such Resolutions was ambiguous.

Until the NIEO, Resolutions had oriented around 'compromises' to which powerful states acceded (or abstained), meaning the question of 'forcing' Resolutions upon recalcitrant states never had to be tested. Such a situation could not hold with the NIEO, as evidenced by the accusations of hypocrisy levelled at Third World states. In this context the Third World position was dealt a deathblow by a series of arbitrations and cases which argued that General Assembly Resolutions could only be *evidence* of other sources of international law.<sup>205</sup> Accordingly, the critique of structural hypocrisy advanced by radical Third World states could only serve as a *political* statement, and not a plan of legal transformation.

During the Cold War period, accusations of hypocrisy had become universally available. In a world composed of formally equal sovereigns, it was a powerful tool for attempting to delegitimise the arguments of one's opponents. Accordingly, it remained a powerful tool in the struggle between superpowers. However, during this period hypocrisy was able to fully emerge as a 'weapon of the weak'. Drawing on the legacy of those who contested the language of 'civilisation' as hypocritical, Third World states attempted to push through the project of decolonisation, by arguing that the continued existence of colonialism was hypocrisy for those committed to the UN Charter.

<sup>201</sup> UNGA Verbatim Record (2 May 1974) UN Doc A/PV.2231, 6.

<sup>202</sup> UNGA Verbatim Record (10 April 1974) UN Doc A/PV.2208, 9.

<sup>203</sup> UNGA Verbatim Record (10 April 1974) UN Doc A/PV.2209, 11.

<sup>204</sup> *Ibid.*, 7.

<sup>205</sup> Anghie (2005) 221–223.

Alongside this they mounted a more radical critique of international law's structural hypocrisy.

By the 1980s the radical potential of the NIEO had been neutralised, with neoliberal project instead profoundly reconstructing the economic order.<sup>206</sup> The radical critique did, however, leave something of a legacy. The transformations in the law of self-determination and its relationship to the use of force remain, and the concept of 'common but differentiated' responsibilities respond to the idea that developing countries cannot be held to standards to which the advanced capitalist countries were not themselves held.<sup>207</sup>

Invocations of hypocrisy have strongly undergirded the doctrines of humanitarian intervention and responsibility to protect, with powerful states claiming that *inaction* in the face of 'humanitarian crises' would represent a form of hypocrisy.<sup>208</sup> Both of these doctrines have met with scepticism on behalf of less powerful states that they serve as a hypocritical cover for powerful states.<sup>209</sup> Such arguments formed the basic background for the accusations of hypocrisy during Russia's interventions in its 'near abroad'. In both Georgia and Crimea, Russia has – in part – relied upon doctrines developed by the US to avoid the Security Council<sup>210</sup> claiming it would be hypocrisy to deny them the ability to use such arguments.

## 5 The Many Masks of Hypocrisy

### 5.1 *Hypocrisy and Interpretation*

In *From Apology to Utopia* Martti Koskenniemi rooted the politics of international law in international law's indeterminacy.<sup>211</sup> Koskenniemi argued that international law's status as a decentralised legal order means it must fight 'a battle on two fronts' to avoid collapsing into either an irrelevant normative code, or a simple apologia for state behaviour.<sup>212</sup> International law's 'concreteness' must be ensured by 'distancing it from natural morality', whilst its 'normativity' must be ensured 'by creating distance between

<sup>206</sup> David Harvey, *A Brief History of Neoliberalism* (OUP, 2005).

<sup>207</sup> United Nations Framework Convention on Climate Change, Article 3(1).

<sup>208</sup> Robert Knox, 'Civilizing Interventions? Race, War and International Law' (2013) 26:1 *Cambridge Review of International Affairs* 111.

<sup>209</sup> Alex J Bellamy, 'The Responsibility to Protect and the Problem of Military Intervention' (2008) 84:4 *International Affairs* 615, at 615–618.

<sup>210</sup> Knox (2013).

<sup>211</sup> Koskenniemi (2005).

<sup>212</sup> *Ibid*, 17.

it and State behaviour, will and interest'.<sup>213</sup> These contradictory tendencies produce contradictory legal arguments, neither of which can 'trump' the other.

Hypocrisy adds a further dimension to this. To appeal to the hypocrisy of the other side represents a mechanism for casting doubt on their legal arguments, or an attempt to appropriate those legal arguments for one's own ends. As we saw above, the character of such accusations have varied in different historical circumstances. This being said, we can identify certain patterns in how such accusations have been made.

Firstly, we have the accusation of hypocrisy as a mode of *exclusion*. This is designed to exclude an opponent from invoking a particular legal argument, or from the law's protection. These accusations draw on international law's requirements of reciprocity to argue that one cannot claim the benefit of a right if one will not extend that right. Historically, these arguments were connected to European colonialism; whereby non-Europeans were excluded because of their 'inability' to reciprocate. Although such explicitly colonial arguments have fallen by the wayside, hypocrisy as exclusion has survived in the practice of powerful states. This has most evidently been the case in the War on Terror, where, as Anghie<sup>214</sup> and Mégret<sup>215</sup> point out, a number of legal arguments depended on the idea that certain 'rogue' actors (states or 'unlawful combatants') lack legal protections because they do not reciprocate.<sup>216</sup>

Secondly, in an almost perfect inversion, we have the argument from universalism. Here, the accusation is that it is hypocritical to grant some states membership in the legal order, or the ability to use a legal argument, whilst excluding others. The remedy is to extend such benefits universally. These types of accusations were very important for the anticolonial movement. This is the sense in which accusations of hypocrisy can be seen as a 'weapon of the weak'. However, whilst such accusations can serve as 'weapons of the weak', they are also often an ingredient in the struggle *between* powerful states. This is particularly the case where one powerful state attempts to carve out special legal rights for itself.<sup>217</sup>

What both the 'universal' and 'exclusionary' arguments have in common is that their target is not the legality or legitimacy of a norm itself, but rather whether or not the norm is available to a given actor. However, as previously noted, hypocrisy also

<sup>213</sup> Ibid.

<sup>214</sup> Antony Anghie, 'The War on Terror and Iraq in Historical Perspective' (2005) 43:1 *Osgoode Hall Law Journal* 45.

<sup>215</sup> Frédéric Mégret, 'From "Savages" to "Unlawful Combatants": A Postcolonial Look at International Humanitarian Law's "Other"' in Anne Orford (ed), *International Law And Its Others* (CUP, 2006).

<sup>216</sup> Ntina Tzouvala, 'TWAIL and the "Unwilling or Unable" Doctrine: Continuities and Ruptures' (2015) 109 *AJIL Unbound* 266.

<sup>217</sup> Knox, (2013); see also Robert Knox, 'Race, Racialisation and Rivalry in the International Legal Order' in Alexander Anievas, Nivi Manchanda & Robbie Shilliam (eds), *Race and Racism in International Relations: Confronting the Global Colour Line* (Routledge, 2014).

represents an important element in contests over the interpretation and application of norms. Accordingly, a third variant of accusations of hypocrisy involves pointing out the inconsistency between a state's behaviour and their assertion of a particular legal rule.

In the interpretive context, an accusation of hypocrisy represents an attempt to argue that a particular interpretation of a norm cannot be valid, since a state has already demonstrated a different interpretation in other, identical situations. At the extreme end of such a situation, the very existence of a norm might be questioned owing to inconsistent practice. Similar considerations hold for the *application* of law: where an accusation of hypocrisy is designed to argue that if the rule is (or is not) applied in one situation, it must be (or not be) applied in other identical situations. As a more 'defensive' type of accusation, these are perhaps the 'bread and butter' of accusations of hypocrisy.

## 5.2 *Radical Hypocrisy?*

Each of previous accusations of hypocrisy is conservative in nature, insofar as they reaffirm the basic coordinates of the international legal order. This is even true of the 'universalist' variant, which ultimately demanded *inclusion* in said order. However, as we saw from the NIEO and the invasion of Goa, there were also more radical accusations. Such accusations did not simply focus on the hypocrisy of particular states, or on particular norms; rather, they accused the international legal order itself of hypocrisy.

The radicalism of the critique here lay both in its goals and in the understanding of politics that it attempted to mobilise. A core element of Shklar's account of the rise of hypocrisy is that it reflects a world of divergent values. Accusing international law itself of hypocrisy fundamentally broke with such assumptions. The radical Third Worldist critique was an argument for a positive transformation of the international legal order and so could not proceed from the idea that there were *no* common values. Instead, it was only through the assertion of a set of common radical values – those of anti-colonialism – that a non-hypocritical international law could emerge.

It was here that the distinctive brand of Marxism espoused by the radical Third Worldist movement was important. Drawing on Marxist theory, they argued that neo-colonialism could only be understood in the light of global capitalism.<sup>218</sup> This political position provided an alternative account of political subjectivity which could underscore accusations of hypocrisy. Here, the majority of the world had a common

<sup>218</sup> Nkrumah (1971). For a wider account see Knox, (2016); Robert Knox, 'A Critical Examination of the Concept of Imperialism in Marxist and Third World Approaches to International Law' (PhD Thesis, The London School of Economics and Political Science 2014) <http://etheses.lse.ac.uk/1030/> (accessed 10 September 2020).

set of interests which could be asserted against 'the imperialist bourgeoisie and the native ruling class'.<sup>219</sup>

Of course, as previously noted, divergent *values* were not the only, or prime, reason for the rise of hypocrisy, instead it was the lack of common institutions to impose such values in the case of disagreements. It is for this reason that many in the radical Third Worldist tradition turned to the General Assembly. Given its majoritarian nature, the General Assembly appeared to be a forum in which 'common interests' might be *imposed* on a minority. Several books have been written about *why* these manoeuvres were so unsuccessful,<sup>220</sup> but here we can note two important points.

The first is that the General Assembly, even with its 'democratic' credentials, remained premised upon the sovereignty of *states*. The 'common interests' of the oppressed and exploited had to be translated through the 'state', which was frequently controlled by the 'native ruling class'. As Rajagopal notes, this meant that more radical demands were subordinated to the necessity of creating unity between the groups who controlled Third World states.<sup>221</sup>

The second point is that the drive to transform international law was premised upon the idea that General Assembly Resolutions could be a source of international law. This would mean that, irrespective of differences, the majority could *impose* their common interest on the minority.<sup>222</sup> Yet, as noted above, this was not to be.

Crucially, then, the project of radical hypocrisy floundered on the issue of *sovereignty*. Whilst the General Assembly appeared majoritarian in nature, it was ultimately premised on formal equal, sovereign states, upon whom norms could only be imposed by consent. In this way sovereignty operated as a double barrier. On the one hand, state sovereignty was incapable of representing the social forces of the Third World coalition. On the other hand, state sovereignty served to insulate an imperialist minority from any transformative project.

It is here that we come full circle. Capitalist social relations generate both sovereign equality and relationships of inequality and domination, this is precisely why accusations of hypocrisy in international law are so powerful. Any attempt to appeal to 'common values' has to reckon with the structural centrality of this 'sovereignty'.

<sup>219</sup> Amílcar Cabral, 'Presupposition and Objects of National Liberation in Relation to Social Structure', in *Unity and Struggle: Speeches and Writings* (Monthly Review Press, 1979) 133.

<sup>220</sup> See e.g. Anghie (2005); Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP, 2011); Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (CUP, 2003).

<sup>221</sup> Rajagopal (2003) 87.

<sup>222</sup> Richard A Falk, 'On the Quasi-Legislative Competence of the General Assembly' (1966) 60:4 *American Journal of International Law* 782, at 784–785.



As such, the arguments and project of radical hypocrisy came up against the structural limits of international law itself.

## 6 Conclusion: What is to be done with hypocrisy?

On February 24<sup>th</sup> 2022, following its recognition of the breakaway Donetsk and Luhansk regions, the Russian state launched a military invasion of Ukraine. In many senses this was the culmination of the longer process of which the 2014 Crimea crisis was a central part and, as with Crimea, hypocrisy played a key role in the international legal discourse around the invasion.

The Russian state invoked of Article 51 of the UN Charter, claiming to act in defence of the Donetsk and Luhansk governments. This was framed against claims of an ongoing 'genocide' in those regions, and their right to self-determination. Against possible objections, Putin raised the conduct of the US and its allies in the Balkans, Iraq, Libya and Syria. Once again, Putin argued that, faced with such events, the US and its allies 'prefer to point not to the norms of international law, but to the circumstances that they interpret as they see fit'. As such, their condemnation of the invasion of the Ukraine was built on 'lies and hypocrisy'.<sup>223</sup>

Importantly, however, the discourse of hypocrisy was not confined to states with direct interest in the invasion. In particular, states, social movements and political organisations have pointed to the hypocrisy of the US, Western states and the international legal order without necessarily supporting the invasion. This was most obviously reflected in the General Assembly vote on Resolution A/ES-11/L.1. condemning the invasion in which 35 states – primarily from Africa, Asia, Latin America and Eastern Europe – abstained.<sup>224</sup>

The thrust of these criticisms was neatly summed up by Palestinian Foreign Minister Riad Malki who noted: '[w]e have seen every means we were told could not be activated for over 70 years deployed in less than seven days. ... Amazing hypocrisy'.<sup>225</sup> In a whole host of areas – from sanctions, to condemnation, to refugee protection – the Western response – and that of the United Nations – to the Ukraine invasion has been swift and efficient. This stands in contrast to how international legal

<sup>223</sup> Bloomberg, 'Transcript: Vladimir Putin's Televised Address on Ukraine' (24 February 2022) <https://www.bloomberg.com/news/articles/2022-02-24/full-transcript-vladimir-putin-s-televised-address-to-russia-on-ukraine-feb-24> (accessed 10 September 2022).

<sup>224</sup> General Assembly official records, 11th emergency special session : 5th plenary meeting, Wednesday, 2 March 2022, New York, UN Doc A/ES-11/PV.5.

<sup>225</sup> AP News, 'Many in Mideast See Hypocrisy in Western Embrace of Ukraine' (29 March 2022) <https://apnews.com/article/russia-ukraine-islamic-state-group-jerusalem-migration-europe-1ce41cc04aed6afc415e6ed83f83c984> (accessed 10 September 2022).

institutions have treated comparable situations in Afghanistan, Libya, Palestine, Syria, and Yemen, to name but a few.

What appears to motivate such hypocrisy, many have argued, is *racism*.<sup>226</sup> International law's 'selectivity'<sup>227</sup> is rooted in a racialised legal order in which the West, its interests and its allies, will receive more effective protection. In Ukraine, these positions appeared to borne out by a language that has emphasised Ukraine's 'civilisational' and 'racial' place.<sup>228</sup>

There are, of course, objections one might raise here. In particular, whilst an account of international law's racialising character is compelling, many of these accounts operate with an overly binary understanding of processes of racialisation.<sup>229</sup> The status of the Ukrainian populations' 'whiteness' is highly contingent, particularly in the light of the Russian state's attempts at racialisation. In this sense, it is crucial to situate these processes of racialisation within their material context of capitalist social relations.

The central thrust of this article has been that accusations of hypocrisy cannot be simply written off. It has argued that such accusations are embedded in international law, both structurally and historically. In observing the deployment of hypocrisy around the Ukraine invasion, we can clearly see an attempt to utilise it as a 'weapon of the weak'. On the most basic level, we can observe the universalist variant of hypocrisy. Read in its best light, the claim of hypocrisy is designed to argue that all war-mongering states should receive the same condemnation that Russian did for its aggressive invasion, *and* that all peoples should receive the same legal protection as those of Ukraine.

Ultimately, these invocations of hypocrisy are vulnerable from two sides. On the one hand, they are vulnerable to attempts to *differentiate* the case of Ukraine from other situations. On the other hand, counter-accusations of hypocrisy are themselves available. Defenders of the rights of Palestinians, for example, are frequently accused by liberals and conservatives of ignoring other instances of oppression or downplaying the suffering of Israelis.

<sup>226</sup> See e.g. Ralph Wilde, 'Hamster in a Wheel: International Law, Crisis, Exceptionalism, Whataboutery, Speaking Truth to Power, and Sociopathic, Racist Gaslighting', *Opinio Juris* (17 March 2022) <http://opiniojuris.org/2022/03/17/hamster-in-a-wheel-international-law-crisis-exceptionalism-whataboutery-speaking-truth-to-power-and-sociopathic-racist-gaslighting> (accessed 10 September 2022).

<sup>227</sup> Elena Chachko & Katerina Linos, 'International Law After Ukraine: Introduction to the Symposium' (2022) 116 *American Journal of International Law* 124.

<sup>228</sup> Moustafa Bayoumi, 'They Are "Civilised" and "Look like Us": The Racist Coverage of Ukraine', *The Guardian* (2 March 2022) <https://www.theguardian.com/commentisfree/2022/mar/02/civilised-european-look-like-us-racist-coverage-ukraine> (accessed 10 September 2022).

<sup>229</sup> See Knox (2013) for a critique.

This points to the limits of hypocrisy as a 'weapon of the weak'. By its very necessity, this critique cannot be one of substance, it merely attempts to point out inconsistency. As such, it is always vulnerable to counter-accusations, and attempts to carve out the specificity of a particular case. This reflects the ultimately conservative nature of such invocations.

So what is left for the politics of hypocrisy? Does the invasion of Ukraine further illustrate an endless cycle of claim and counter-claim without any moment of transformation? Should we therefore simply abandon such claims? Both Runciman<sup>230</sup> and Shklar<sup>231</sup> ultimately urge us to *reconcile* ourselves to the existence of hypocrisy, given its status as an inevitable feature of liberal democratic societies.

However, such a stance seems untenable. These accounts point to a set of conditions that make accusations of hypocrisy incredibly powerful, yet want to wish that power away. In this respect, it is interesting to note that Shklar acknowledges another type of hypocrisy, namely that which 'laments that the society in which we live does not live up to its declared principles'.<sup>232</sup> Arguably, this was demonstrated by the radical Third Worldist critique of the international legal order. Such criticisms have resurfaced in the context of the Ukraine crisis in those arguments that suggest international law's structural hypocrisy is rooted in its own racism.

Might this provide an alternative framing of hypocrisy? As noted above, the Third Worldist forces which mobilised this language could not ultimately transcend the structural contradictions which systematically produced international law's hypocrisy. The very structures of sovereignty that the Third World coalition sought to leverage were necessarily imbricated in the production of international law's structural hypocrisy. These limits appear even more strongly today, where radical movements challenging the *status quo* are at an impasse. Even the most radical critiques of hypocrisy in relation to Ukraine continue to root their claims in sovereign equality. Yet it is precisely *through* this sovereign equality that the inequality of global capitalism – and its attendant hypocrisy – is reproduced. How could such a non-racist and non-selective international law function in a world of unequal, capitalist states? And how could an argument framed around sovereignty possibly coerce these unequal states into surrendering their position?

Despite this, the persistent recurrence of the radical critique teaches us two lessons. The first is that in the current system accusations and counter-accusations of hypocrisy are an *inevitable* part of international legal argument. This leads on to a second conclusion – that to go beyond accusations of hypocrisy, it will be necessary to move

<sup>230</sup> Runciman (2010) 202.

<sup>231</sup> Shklar (1985) 86.

<sup>232</sup> *Ibid*, 86.

beyond the social relations which generate them. On this basis, the task must be to engage with hypocrisy without undermining the struggle to transcend the social relations that grant it such power.

In this respect, it is helpful to return to the example of the Bolsheviks. Writing in 1919, Nikolai Bukharin argued that capitalism was characterised by 'a hypocritical equality which conceals the actual enslavement of the worker'.<sup>233</sup> He contrasted this with the 'real freedom' of socialism, which 'destroys the formal equality of the *classes*, but by the same token frees the working class from material enslavement'.<sup>234</sup> However, Bukharin recognised that the socialist movement could not simply 'abandon' liberal equality, since this hypocritical equality provided space to construct a socialist movement. The socialist approach to such equality had to be characterised by a certain opportunism.

The clearest example of this opportunism was in the Bolsheviks' approach to imperialism and juridical equality, as discussed above. The Bolsheviks were enthusiastic supporters of equality internationally. They pushed for the inclusion of the non-European world, and made large strides towards abolishing formal colonialism. At the same time, they continually criticised such measures as *hypocritical*, since juridical equality would never be able to abolish imperialism. The Bolsheviks, then, did not pursue juridical equality for its own sake. Instead, it was one element of a broader political project of creating a 'common revolutionary struggle'.<sup>235</sup>

It is here that we find a key to the conundrum. The Bolsheviks argued for the widest possible forms of equality, relying in part on the idea that it would be hypocritical to exclude non-Europeans. At the same time, however, they recognised that hypocrisy was a structural feature of the international order. This recognition meant that their engagement with international law was subordinated to the struggle to undermine the structural conditions that created such hypocrisy. To the international lawyer, this instrumentalisation might itself look hypocritical – the Bolsheviks were pursuing legal arguments for their own ends. Yet by openly proclaiming this instrumentalization, there was no gap between the 'words' and 'deeds' of the Bolsheviks.

The Bolsheviks thus avoided the trap of simply 'abandoning' the discourse of hypocrisy. At the same time, whilst they pointed out the hypocritical nature of the system, they did not seek to transform it to be more 'consistent'. Instead, they located the contradictions of the system within its material coordinates, and organised

<sup>233</sup> Nikolai Ivanovich Bukharin, *The Politics and Economics of the Transition Period* (Routledge, 1979) 45.

<sup>234</sup> *Ibid.*, 46.

<sup>235</sup> VI Lenin, 'A Caricature of Marxism and Imperialist Economism' in MS Levin (ed), *V.I. Lenin, Collected Works*, vol 23 (Progress Publishers, 1964) 33.

politically to *transcend* these coordinates. In this way, of course, they confirmed Lorimer's ultimate fears about radicalism, but they did so *openly*. Such a principled opportunism points to how we might escape from the endless cycle of hypocrisy.

~



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Illustration & engraving: NATHALIE PAZ RANGEL  
*Imprenta Artesanal Escuela Audiovisual Infantil (2021)*  
Belén de los Andaquíes ~ Caquetá, Colombia

*TWAIL Review* Issue 3

Published December 2022

Windsor, Canada ~ Bogotá, Colombia

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