
The commodity-form theory of international law

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1. The necessity of (Marxist) theory

1.1. *The blight of managerialism*

International law has notoriously and accurately been described as a ‘wasteland’ for theory.¹ Of course, the tsunami of managerialist writing² is informed by theories of law, international law and the world, but mostly unexamined and the more ideological for that. In this context the rise of what has been called the ‘New Stream’ of radical international law scholarship has been of immeasurable importance, with its project to ‘dislodge the discipline . . . from its stagnation . . . and rejuvenate the field as an arena of meaningful intellectual inquiry’.³

‘The New Stream . . . stands as part of a broader movement in contemporary legal theory commonly known as Critical Legal Studies (CLS) or critical jurisprudence.’⁴ The CLS movement is united in its critical

¹ B. S. Chimni, *International Law and World Order* (New Delhi: Sage, 1993), p. 15.

² It is estimated that 80,000 books on international law had been published by 1967, and that currently 700 books and 3,000 articles on international law are published annually (P. Malanczuk, *Akehurst’s Modern Introduction to International Law*, 7th revd edn (Oxford: Routledge, 1997), p. 8).

³ D. Kennedy, ‘A New Stream of International Legal Scholarship’ (1988) 7 *Wisconsin International Law Journal* 1 at 6. Useful introductions to and overviews of the New Stream include N. Purvis, ‘Critical Legal Studies in Public International Law’ (1991) 32 *Harvard International Law Journal* 81; A. Carty, ‘Critical International Law: Recent Trends in the Theory of International Law’ (1991) 2 *European Journal of International Law* 66; H. Charlesworth, ‘Subversive Trends in the Jurisprudence of International Law’ (1992) 86 *American Society for International Law Proceedings* 125; D. Cass, ‘Navigating the Newstream: Recent Critical Scholarship in International Law’ (1996) 65 *Nordic Journal of International Law* 341; W. Aceves, ‘Critical Jurisprudence and International Legal Scholarship: A Study of Equitable Distribution’ (2001) 39 *Columbia Journal of Transnational Law* 299 at 309–24. D. Kennedy and C. Tennant, ‘New Approaches to International Law: A Bibliography’ (1994) 35 *Harvard International Law Journal* 417 contains a comprehensive list of critical international legal sources up to 1994.

⁴ Purvis, ‘Critical Legal Studies’, 89.

attitude to mainstream legal theory and has drawn on eclectic bodies of thought to pursue this. This has led to a problem: despite its powerful critical tools, the New Stream has sometimes been left with a poverty of systematic theory. '[I]t is a movement in search of a theory, but at the same time it is a movement which has not agreed that such a theory is either possible or desirable.'⁵

The New Stream and CLS's influences include:

normative philosophy, critical theory, structuralism, anthropology, prepositional logic, literature, sociology, politics and psychiatry . . . Legal Realism, New Left anarchism, Sartrean existentialism, neo-progressive historiography, liberal sociology, radical social theory and empirical social science⁶

along with the now ubiquitous postmodern social and linguistic theory, in both Foucauldian and Derridean variants. The coagulation of these into an often rather nebulous 'critical theory' can obscure the real philosophical differences between various of these strands,⁷ and lead to a sometimes internally contradictory body of thought.⁸

The desire to systematise radical theory, and to do so from a Marxist perspective, does not imply a theoretical closed-mindedness or intellectual sectarianism. My own Marxist studies in international law, for example, have been fundamentally informed by certain postmodern approaches, in particular, that of Martti Koskenniemi.

⁵ A. Hunt, 'The Critique of Law: What is Legal About Critical Legal Theory?', in P. Fitzpatrick and A. Hunt (eds.), *Critical Legal Studies* (Oxford: Blackwell, 1987), p. 5.

⁶ Purvis, 'Critical Legal Studies', 88–9.

⁷ Many authors point out the instability of the movement, given these contradictory influences. See P. Fitzpatrick and A. Hunt, 'Critical Legal Studies: Introduction' in Fitzpatrick and Hunt, *Critical Legal Studies*, p. 2; Purvis, 'Critical Legal Studies', 124.

⁸ For example, M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Finnish Lawyers Publishing Company, 1989), p. 475, cites Derrida to the effect that interpretation will only ever offer up more words, each of which are as unstable as their fellows, ultimately maintaining a situation of radical indeterminacy in legal discourse (and discourse in general). However, this 'Derridean' sense of indeterminacy is not the same indeterminacy that Koskenniemi has outlined elsewhere in his book. That was a product of the peculiar nature of the modern international system, the unstable, contradictory vacillation between sovereignty and world order. Koskenniemi mis-sells his own analysis when he equates it with Derrida's linguistic essentialism. As Alcantara puts it, '[e]ven in *disregard* of verbal indeterminacies, Koskenniemi explains, law as a system would still be indeterminate'. This is '[m]ore significant' than the 'indeterminacy of legal texts': O. Alcantara, 'Ideology, Historiography and International Legal Theory' (1996) IX(25) *International Journal for the Semiotics of Law* 39 at 67, 66) (emphasis in original).

1.2. *The insights of indeterminacy*

Koskenniemi systematises the observation that the fundamental categories of international law move in contradictory directions: as Myres McDougal puts it, they are ‘pair[s] of opposing concepts’.⁹ Koskenniemi famously shows how the fundamental categories of international law can be used to argue absolutely contradictory positions, with ‘descending’ arguments by reference to international law’s ‘Utopian’ pole of concern for ‘world society’, or ‘ascending’ ones derived from its ‘Apologist’ pole, for which individual state rights are fundamental:

The two patterns – or sets of arguments – are both exhaustive and mutually exclusive . . . The result . . . is an incoherent argument which constantly shifts between the opposing positions while remaining open to challenge from the opposite argument.¹⁰

The conclusion is that, as Purvis puts it, international legal doctrines are ‘entirely reversible’.¹¹ Take, say, the controversial question of reprisals activity in international law. The mainstream opinion is that reprisals are illegal.¹² The 1964 UN Security Council resolution condemning a British reprisal against Harib Fortress in Yemen, stated that the council ‘[c]ondemns reprisals as incompatible with the purposes and principles of the United Nations’.¹³ This recourse to the ‘purposes and principles’ of the UN represents a ‘descending’ normative argument against unfettered state retaliation. In response to this, proponents of the legality of reprisals point to Article 51 of the UN Charter, allowing the use of force in self-defence. Some reprisals, they say, are the ‘functional equivalents’ of self-defence, and should be legal as such.¹⁴ This is to counter the descending argument with an ascending one, based on the central importance of state sovereignty.

⁹ M. McDougal, (1954) *American Society of International Law, Proceedings* 120.

¹⁰ Koskenniemi, *From Apology to Utopia*, pp. 41–2.

¹¹ Purvis, ‘Critical Legal Studies’, 113.

¹² See, for example, I. Brownlie, *International Law and the Use of Force by States* (Oxford: Oxford University Press, 1963), p. 281; G. Schwarzenberger, *Manual of International Law*, 3rd edn (London: Stevens, 1952), p. 82; D. Bowett, *Self-Defence in International Law* (Manchester: Manchester University Press, 1958), pp. 13–14. (Bowett here states the majority view. His own position is ambivalent.)

¹³ Cited in R. Falk, ‘The Beirut Raid and the International Law of Retaliation’ (1969) 63 *American Journal of International Law* 415 at 429 (emphasis in original).

¹⁴ Y. Dinstein, *War, Aggression and Self-Defence*, 2nd edn (Cambridge: Cambridge University Press, 1994), p. 216; R. Tucker, ‘Reprisals and Self-Defense: The Customary Law’ (1972) 66 *American Journal of International Law* 586, *passim*.

However, any such ascending argument contains its own counter-position. By definition, reprisals are illegal incursions against another state's sovereignty, and, if sovereignty is the basis of obligation and authority, it is hard to see how that sovereignty can legally be disrupted. This is the ascending version of the argument that reprisals are illegal. The counter to this is to be found in the descending justifications for reprisals activity, according to which reprisals can 'advance the purposes of the United Nations'.¹⁵

There is something in the structure of the argument that allows both sides to make plausible, logical claims based on fundamental legitimating concepts of international law. It is this indeterminate process of legal argument that Koskenniemi outlines. For Koskenniemi, and the CLS perspective, these contradictions are reflections of contradictions in liberalism itself – 'a system of thought . . . beset by internal *contradiction* . . . and by systematic *repression* of the presence of those contradictions'.¹⁶

1.3. *The limits of idealism*

One of the limitations of the New Stream approach is in its implicit theory of the social world, an idealist constructivism. Alcantara makes this clear when he talks about 'how the inherited myths, concepts and models of human thought shape the manner in which we view external phenomena'.¹⁷ This is to depict international law as a kind of constraining myth inherited from the past: in Purvis's construction, '[i]nternational law's weaknesses are in some sense irrelevant; self-validation sanctions the international-law myth'.¹⁸

The structures of everyday life that surround us – such as international law – are deemed the accretions of ideas. Ideas progress here by autopoeisis. This is a radically idealist philosophy, privileging abstract concepts over the specific historical context in which certain ideas take hold, and how. There is no theory in Koskenniemi, for example, of precisely *why* the edifice of international law should be thrown up as part of liberalism.

¹⁵ E. Colbert, *Retaliation in International Law* (New York: King's Crown Press, 1948), pp. 203–4. The same argument is advanced in B. Levenfeld, 'Israel's Counter-Fedayeen Tactics in Lebanon' (1982) 21 *Columbia Journal of Transnational Law* 1 at 35.

¹⁶ M. Kelman, *A Guide to Critical Legal Studies* (Cambridge, MA: Harvard University Press, 1987), p. 3 (emphasis in original). See Koskenniemi, *From Apology to Utopia*, p. 52.

¹⁷ Alcantara, 'Ideology, Historiography', 72. ¹⁸ Purvis, 'Critical Legal Studies', 112–13.

1.4. *The Marxist response*

For the underlying political-economic dynamics that the contradictory edifice of liberalism might be expressing we can turn to Marx. In *Capital*, he briefly shows how the social relations of general commodity production are the foundation for liberalism and its contradictions.

It is . . . the direct relationship of the owners of the conditions of production to the immediate producers . . . in which we find the innermost secret, the hidden basis of the entire social edifice, and hence also the political form of the relationship of *sovereignty and dependence*, in short, the specific form of the state in each case.¹⁹

At the level of individuals, as Marx suggests, the ascending and descending arguments are mediated by the state. However, this is not the case internationally, when the units are states themselves: in this instance, the relationship is still one of sovereignty and dependence, but it is no longer contained by an overarching power.

For Koskenniemi, liberalism underpins international law because of the constant application of the ‘domestic analogy’ by liberal writers, because without an overarching power ‘the structuring power of liberal ideas in international law’ was so strong – and again, there is no real historical context underpinning the claim.²⁰ Building on Marx’s suggestive comments, however, we can get beyond idealism and see that the logic of modern inter-state relations is defined by the same logic that regulates individuals in capitalism, because since the system’s birth – and in the underlying precepts of international law – states, like individuals, interact as property owners. This can be seen in early modern writings. ‘Grotius . . . transferred the notion of liberty-as-property to the state in international affairs, viewing the character of state boundaries as that of a private estate.’²¹

This kind of historical-materialist analysis – an attempt to explain why certain ideas and structures come to the fore in certain political-economic contexts – is often misunderstood and denounced by CLS scholars as a

¹⁹ K. Marx, *Capital*, Vol. 3 (New York: Vintage, 1981), p. 927 (emphasis added).

²⁰ Koskenniemi, *From Apology to Utopia*, p. 72, and more generally at pp. 68–73.

²¹ P. Gowan, *The Global Gamble: Washington’s Faustian Bid for Global Dominance* (London: Verso, 1999), p. 145. See H. Grotius, *The Freedom of the Seas* (Union, NJ: Lawbook Exchange, 2001), at p. 29: ‘the jurist [Ulpian] is speaking of private estates and of public law, but in speaking here of the territory of peoples and of private law the same reasoning applies, because from the point of view of the whole human race peoples are treated as individuals’ – insofar, evidently, as those individuals are owners of estates.

bogeyman of crudity. Thus Purvis, in passing, dismisses the ‘deterministic Marxist dialectic between an economic base and its ideological superstructure’.²² Alcantara excoriates how ‘[t]he realm of pure human thought and idea is relegated by the Marxist to a state of jejune non-effectuality’.²³

Among the many responses to this trite canard, Engels himself makes it quite clear that ‘if somebody twists this [materialist conception of history] into saying that the economic factor is the *only* determining one, he transforms that proposition into a meaningless, abstract, absurd phrase’, and that ideas and ‘systems of dogma also exercise their influence upon the course of historical struggles and in many cases determine their form in particular’. Materialism inheres in the fact that ‘the *ultimately* determining factor in history is the production and reproduction in real life’.²⁴

The CLS alternative – some un- or under-theorised constructivism – leaves us no way of understanding the systematic structural constraints and dynamics operating on actually existing international law, and why it should take the form it does. For all their devastating and persuasive analysis of the failures and contradictions of liberalism and international law, they offer no theory of the specificity of the legal form itself.

1.5. *The black box of the legal form*

This is not, of course, unique to CLS theorists: a failure to conceptualise the legal form underpins the traditional definition of international law. The notion that it is a ‘body of rules’ implies a contingency to the specific ‘law-ness’ of those rules, as Hedley Bull perspicaciously points out.²⁵ HLA Hart crystallises the lacuna over the legal form in his claim that the analogy between international and municipal law ‘is one of content not of form’²⁶ – the content here being the shared normative obligation contained in both sets of ‘social rules’. If the legal form is not shared between international

²² Purvis, ‘Critical Legal Studies’, 99. ²³ Alcantara, ‘Ideology, Historiography’, 42.

²⁴ K. Marx and F. Engels *Selected Works* (Oxford: Blackwell, 1970), vol. III, p. 487 (emphasis in original).

²⁵ H. Bull, *The Anarchical Society* (London: Macmillan, 1977), p. 122. See also his restatement of the argument in pragmatic terms, which nonetheless leaves the essential ‘law-ness’ untheorised – a lacuna dismissed as ‘theoretical difficulties’. ‘If the rights and duties asserted under these rules [of international law] were believed to have the status merely of morality or of etiquette, this whole corpus of activity [of statesmen, legal advisors, international assemblies] could not exist. The fact that these rules are believed to have the status of law, whatever theoretical difficulties it might involve, makes possible a corpus of international activity that plays an important part in the working of international society.’ (p. 130).

²⁶ H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), p. 231.

and municipal law, then there is nothing *legal* inhering in both beyond the fact that they are called law.

This implicit theory of law's contingency is quite unsatisfactory. There is surely something specifically 'legal' about international law, and its historical emergence is part of a process of historical transformation. The universalisation of international law is predicated on the legal form. An international legal theory must open up the black box at the centre of international law. The fundamental unit of analysis must be that legal form itself.

2. Marxism(s)

2.1. *The specificity of Marxism*

Classical Marxism is, above all, a rigorously materialist theory, according to which ideas, concepts and bodies of theory must be made sense of within a particular material context. Concomitant with that:

1. it is a total theory, in which social reality is not a discombobulated morass of ontologically distinct phenomena, but an interrelated, conflictual, complex totality;
2. it is a dynamic theory, for which a dialectical understanding of the contradictory dynamics within social totality is necessary to understand changes in that totality;
3. it is a theory in which modes of production and productive relations, the specific and conflictual contexts of political economy in history, are key to the understanding of social reality (including international law); and
4. it is a theory for which class as a category, and the conflict between classes – between those with differential access to and control over the productive resources – are key.

What follows is an attempt to outline a Marxist theory of international law, which is able to supersede the limitations of earlier Marxist and 'mainstream' theories. At the same time, I will attempt to show how this theory might build on the indispensable insights of some of the New Stream writers, while constructing materialist foundations to put these insights on a firmer base. To do this, I build on the astonishing work of the Bolshevik legal theorist Yevgeny Pashukanis, and attempt to apply and extrapolate his groundbreaking methodology and insights to the field of international law.

2.2. 'Official' Marxism

One group of theories which can quickly be dispensed with are the 'official' theories of international law of the erstwhile Soviet Bloc. After 1928–30, when the era of more open theoretical debate was suppressed and theory became nothing but a tool for the exigencies of official policy,²⁷ the 'debates' in the USSR tended to revolve around the extent to which a new and separate sphere of 'socialist international law' existed.²⁸

Tunkin and other Soviet writers offered slightly modified variants of mainstream international legal theory,²⁹ with the addition of this peculiar and untheorised addendum. This was devoid of theoretical rigour, and was asserted less because it explained anything than because 'it was unacceptable to Soviet scholars to even contemplate for a moment that the relationship between socialist countries and the outside world was regulated by bourgeois international law'.³⁰ Official Soviet 'Marxism' added nothing new or helpful to international legal theory.

²⁷ A second and even more crushing period of theoretical stagnation was ushered in in 1939. '[T]he imposition of A. J. Vyshinskii's legal concept on the scholarly community at the meeting of the Institute of State and Law of the Soviet Academy in 1939 meant a full stop to (and practically a deadly reprisal against) any sign of further innovation' (C. Varga, 'Introduction', in C. Varga (ed.), *Marxian Legal Theory* (New York: New York University Press, 1993), p. xv).

²⁸ This crude, tendentious and apologetic theory, expounded to serve the perceived needs of foreign policy, raises the question of what kind of political-economic dynamics were at work in these states, though this question – what kind of societies and formulations were the Stalinist states? – ranges well beyond the scope of this chapter. My own research has led me to identify with that body of theory which holds that the dynamic of competitive accumulation in the USSR and its satellites (originally a competition with the west over the means of destruction – military hardware – as well as means of production – the heavy industry needed to produce them) subordinated the inchoate movement toward grass-roots democracy and workers' control of the state, and that therefore far from being 'socialist' or even a 'degenerate workers' state', the USSR can best be described, certainly after 1928, as 'bureaucratic state capitalism', whatever its propaganda claimed. See among many expositions of this theory especially T. Cliff, *State Capitalism in Russia*, (1948 available at www.marxists.org/archive/cliff/works/1955/statecap/intro.htm) and A. Callinicos, *Trotskyism* (Buckingham: Open University Press, 1990), section 5.1.

²⁹ G. Tunkin, 'International Law in the International System' (1975) IV *Recueil des Cours* 3; G. Tunkin, *International Law: A Textbook* (Moscow: Progress Publishers, 1986). For the history of this theory, including its early exposition by Korovin, see V. Kubálková and A. Cruickshank, *Marxism and International Relations* (Oxford: Oxford University Press, 1989), pp. 160–7, and more generally on Soviet international legal theory at pp. 158–92.

³⁰ Chimni, *International Law and World Order*, p. 247.

2.3. *Alternative Marxisms*

In 1983, Maureen Cain demanded ‘nothing less than . . . a political economy of international law’.³¹ Since then, debates about globalisation and the relation between states and international markets has forced questions of international regulation onto the agenda and some historical materialists have drawn attention to specific trans/international legal issues arising from considerations of the ‘international state’.³² However, this work has so far been somewhat tentative. It is true that a new generation of writers, such as Claire Cutler, is beginning to pick up this theoretical baton,³³ but there is a dearth of Marxist or historical-materialist writing on international law.

Sol Picciotto is one of the few Marxists to have taken seriously the injunction to formulate a theory of the changing nature of international law, but with the exception of an invaluable short essay on international law *tout court*,³⁴ his impressive work has tended to focus on the immediate interrelation between international regulation and economic neoliberalism.³⁵ His work, with its analysis of the role of state-sponsored international legislation in bleeding ‘stateness’ across national boundaries, has been a powerful antidote to the widespread and simplistic assertion that globalisation is eroding the nation-state. However, without any analysis of the intrinsic limits of international law, he vacillates between arguing that international regulation is desirable for increasing democracy (a politically progressive move) and for ‘underpin[ning] the security and confidence on which markets depend’³⁶ – hardly a self-explanatory good for a Marxist writer. Essentially, in the absence of an articulated theory

³¹ M. Cain, ‘Introduction: Towards an Understanding of the International State’ (1983) 11 *International Journal of the Sociology of Law* 1 at 2.

³² Most importantly, in 1983, issue 11 of the *International Journal of the Sociology of Law* was a special issue devoted to this issue.

³³ See, for example, C. Cutler, ‘Globalization and the Rule of Law: Reconstituting Property, Capital and the State’, paper delivered at ‘Now More than Ever: Historical Materialism and Globalisation’ Workshop at Warwick University (1999); and C. Cutler, ‘Critical reflections on the Westphalian assumptions of international law and organization: a crisis of legitimacy’ (2001) 27 *Review of International Studies* 133.

³⁴ S. Picciotto, ‘International Law: The Legitimation of Power in World Affairs’, in P. Ireland and P. Laleng (eds.), *The Critical Lawyers’ Handbook 2* (1997), p. 13.

³⁵ See, for example, S. Picciotto, ‘Jurisdictional Conflicts, International Law and the International State System’ (1983) 11 *International Journal for the Sociology of Law* 11; S. Picciotto, ‘The Control of Transnational Capital and the Democratisation of the International State’ (1988) 15 *Journal of Law and Society*, 58.

³⁶ S. Picciotto, ‘Globalisation, Liberalisation, Regulation’, paper presented at conference on globalisation at Sussex University (1998), p. 13.

of the parameters of the legal form, it is unclear to what extent Picciotto sees international law as a force for social transformation.³⁷

There has been one book-length exposition of international law from a Marxist perspective. B. S. Chimni's trailblazing work³⁸ is indispensable for any serious student of international law and of Marxism. Chimni's periodisation of the epochs of international law, his attention to history and imperialism, and his critique of traditional theories all repay careful attention. Despite his sophistication, however, Chimni's theory is still predicated on rules as the fundamental particles of international law, explicitly opposing the indeterminacy thesis.

If rules are assigned no significant place within the legal system . . . the result can only be free competition between different ideological interpretations . . . This state of affairs is guaranteed to ensure the collapse of the international legal system. In so far as its formal presence is yet retained it cannot but become an instrument of oppression in the hands of the more powerful states. It is important, therefore, to uphold the central place of rules within the international legal system.³⁹

Elsewhere, Chimni is clear on the limitations of international law for an emancipatory project: the realm of law, he says, is 'not the arena from which the struggle for radical changes could be launched'⁴⁰ and that 'international law is class law'.⁴¹ However, based in part on his belief in the 'relative autonomy that the legal sphere enjoys',⁴² Chimni expresses cautious optimism about the progressive potential of international law.⁴³ At the very least he sees the application of 'legal rules' as contributing to stability,⁴⁴ and – as the above quote makes clear – as a brake on the instrumentalisation of law in the hands of the powerful states.

Contra Chimni, I have argued (after Koskeniemi *et al.*) that the 'free competition' between interpretations he describes does not ensure the destruction of the international legal system but is in fact a constitutive feature of that system. Chimni, too, has no theory of the legal form, so the fundamental specifics of law itself are contingent, and the limits or otherwise of law's supposed 'progressive' 'emancipatory' project are unclear.

³⁷ *Ibid.*, p. 11–14. ³⁸ Chimni, *International Law and World Order*. ³⁹ *Ibid.*, p. 103.

⁴⁰ *Ibid.*, p. 208. ⁴¹ *Ibid.*, p. 102. ⁴² *Ibid.*, p. 143. ⁴³ *Ibid.*, p. 205.

⁴⁴ *Ibid.*, p. 205.

2.4. *Law as ideology*

Some Marxists (and others) have seen law as ‘an ideological fiction, imposed on a social reality to which it has no correspondence by some organ of centralised authority’.⁴⁵ This view finds ‘the origins of law in ideology, in the “heads of people”, rather than in real, socioeconomic interactions or the material relationships of people’.⁴⁶

Of course, it would be absurd to counterclaim that law does not have an ideological function. One modulation of this ideology can easily be seen, for example, in the enormous surge in publishing on human rights in international law. This often articulates a vision of ‘rights’ that:

1. derives from bourgeois ‘first-generation’ rights (‘negative rights which protect the individual from arbitrary state action and are associated with Western liberal democracies’)⁴⁷ and thereby tacitly takes bourgeois capitalism for granted;⁴⁸
2. updates the notion of the civilising mission of the West by producing what Orford calls a ‘heroic narrative’ in which the West ‘is associated with attributes including freedom, creativity, authority, civilization, power, democracy, sovereignty and wealth’,⁴⁹ and is the only agent capable of injecting them into a Third World cast as a passive object; and
3. by showing that the attempt to support ‘human rights’ involves international action, implies that human rights problems are intrinsically foreign, and that there are no abuses at home: ‘Many Americans thus believe and perpetuate the quaint fiction that human rights problems exist only in places that must be reached by crossing large bodies of saltwater.’⁵⁰

⁴⁵ B. Fine, ‘Law and Class’, in B. Fine *et al.* (eds.), *Capitalism and the Rule of Law* (London: Hutchinson, 1979), p. 36.

⁴⁶ R. Sharlet, P. Maggs and P. Beirne, ‘P. I. Stuchka and Soviet Law’, in P. Beirne (ed.), *Revolution in Law* (Armonk, NY: Sharpe, 1990), p. 51.

⁴⁷ P. Cheah, ‘Posit(ion)ing Human Rights in the Current Global Conjuncture’ (1997) 9 *Public Culture* 233 at 235.

⁴⁸ This is expressed, in arid Althusserian form, in J. Lenoble, ‘The Implicit Ideology of Human Rights and its Legal Expression’ (1986) 8 *Liverpool Law Review* 153.

⁴⁹ A. Orford, ‘Muscular Humanitarianism: Reading the Narratives of the New Interventionism’ (1999) 10 *European Journal of International Law* 679 at 687.

⁵⁰ J. Donnelly, ‘Human Rights in the New World Order’ (1992) 9 *World Policy Journal* 249 at 254–65.

Ideology critique can thus be of great importance in international law scholarship, as Susan Marks has argued.⁵¹ However, there are serious limitations in focusing exclusively on law as ideology. Shirley Scott, for all the insights in her discussion of international law as ideology,⁵² is, like so many of the New Stream writers, idealist, seeing the power of international law inhering in its ‘ideas’, which ‘do seem to constitute a form of power’.⁵³

One is left with no sense of why this ‘idea’ of international law should have arisen at a certain time and political-economic context. Ideology here is a posited structuring category rather than an expression of an underlying logic. The weakness of Scott’s idealism is visible in her failure to contextualise historical change, most starkly in her depiction of decolonisation, in which the self-activity of those at the sharp end of colonialism is ignored for a claim simply that there was a ‘rejection of the ideology of colonialism’, seemingly out of the blue.⁵⁴

Again, at heart the limitations of the critique of law as ideology lie in the failure to theorise the legal form. Pashukanis did not deny that law can have an ideological function – he saw there to be ‘no argument about this’⁵⁵ – but he disputed that that is all, or even primarily or most interestingly what there is to it.

Having established the ideological nature of particular concepts in no way exempts us from the obligation of seeking their objective reality, in other words the reality which exists in the outside world, that is, external, and not merely subjective reality.⁵⁶

Actually existing law is manifestly not ‘merely’ ideological, but impinges on and regulates everyday life at all levels. As Pashukanis points out, the afterlife exists ‘in some person’s minds’, as does the state. But:

[u]nlike the afterlife, Pashukanis observes, the concepts of law and state reflect not only a particular ideology but the objective reality of the court system, the police and the military, the administrative and fiscal

⁵¹ S. Marks, ‘Big Brother is Bleeping Us – With the Message that Ideology Doesn’t Matter’ (2001) 12 *European Journal of International Law* 109.

⁵² S. Scott, ‘International Law as Ideology: Theorizing the Relationship between International Law and International Politics’ (1994) 5 *European Journal of International Law* 313.

⁵³ *Ibid.*, 317. ⁵⁴ *Ibid.*, 317.

⁵⁵ E. Pashukanis, *Law and Marxism: A General Theory* (London: Ink Links, 1978), p. 74.

⁵⁶ *Ibid.*, p. 75.

organizations of the state, and so forth . . . Legal concepts are embodied in various forms of regulations demanding compliance rather than mere belief.⁵⁷

Scott's claims that 'the power of international law can only be the power of the idea of international law'⁵⁸ is insufficient. The power of international law is also, of course, the armed might of powerful states enforcing their interpretation of legal rules with cluster bombs and gunships. International law's power is emphatically not only the power of ideas, it is the power of violent coercion, as will become clear.

2.5. *Law as iniquitous content*

An alternative conception of law, much-favoured by Marxists of Pashukanis's time, was the 'sociological' theory of law, which 'treat[ed] law as the product of conflict of interest, as the manifestation of state coercion'.⁵⁹

This position is essentially positivist, in that law is seen as the will of the state. Enforcement – coercion – is definitional to this theory. Of course, for Marxists like Stuchka or Plekhanov, the state was not a neutral body but an organ of ruling class control, which was why '[m]any Marxists assumed that by simply adding in the element of class struggle to . . . [positivist] theories, they would attain a genuinely materialist, Marxist theory of law'.⁶⁰

In the international law sphere, one can see as an example of this 'content-oriented' Marxism, Chimni's discussion of international law's 'class basis'.

From the Marxist perspective it is this resort to principles, policies and other standards which facilitates the continuous development of the law on a class basis. For they manifest . . . the ethical-political hegemony of the ruling classes. And if international law is class law, as it is . . . then after peculiar features of the international context have been accommodated this understanding holds good for it as well.⁶¹

Here, the class nature of international law derives from 'principles' and 'policies': in other words, it is the content of particular legal rulings, as laid out and enforced by 'ruling classes', that makes law a class weapon,

⁵⁷ S. Von Arx, 'An Examination of E. B. Pashukanis's *General Theory of Law and Marxism*' PhD thesis, State University of New York, (1997), p. 35.

⁵⁸ Scott, 'International Law as Ideology', 317. ⁵⁹ Pashukanis, *Law and Marxism*, p. 53.

⁶⁰ *Ibid.*, p. 53. ⁶¹ Chimni, *International Law and World Order*, p. 102.

rather than anything in the structure of international law. Chimni sees the progressive counterpoint to this tendency as manifest in ‘rules’.

Compared to the ‘high-sounding phrases about the “eternal idea of law”’, Pashukanis was clear that this kind of left positivism was a source of ‘particular satisfaction’.⁶² However, it remained a source of ‘disappointment’ to him, because it ‘exclude[d] the legal form as such from . . . [the] field of observation’.⁶³ As has been argued above, this kind of theory is unable to explain the specific *legalness* of law:

[A] sociological approach which looks to the economic and political interests behind specific legal and penal measures appears as a significant advance over . . . formalism. But here again there is a disappointment. For exclusive attention is directed towards the class interests served or the economic functions performed by one or other measure of law or punishment; in other words, exclusive to the question of content. Why these interests or functions should have been served by the *legal* form of regulation or by *penal* repression remains a question unaddressed . . .

This exclusive focus on the content of law leaves the social and historical character of its form unexamined . . .⁶⁴

3. The commodity-form theory of law

3.1. *The General Theory of Law and Marxism*

Pashukanis’s reputation was won with his book, *The General Theory of Law and Marxism* (GTLM),⁶⁵ published in 1924. Pashukanis saw his book as only the starting point for Marxist jurisprudence. He described it as a ‘sketch’, as ‘a first draft of a Marxist critique of the fundamental juridical concepts’.⁶⁶ The fundamental thrust of the theory that Pashukanis

⁶² Pashukanis, *Law and Marxism*, p. 53. ⁶³ *Ibid.*, p. 53.

⁶⁴ Fine, ‘Law and Class’, pp. 34–5.

⁶⁵ Peter Maggs’s translation of the first edition is printed in P. Beirne and R. Sharlet, *Pashukanis: Selected Writings on Marxism and Law* (London: Academic Press, 1980), pp. 40–131. *The General Theory of Law and Marxism* ran to a second edition in 1926. This second edition, though without substantial revisions, ‘was a corrected and supplemented edition’, which, for example, expanded on the ‘underdeveloped topic’ of the state (Beirne and Sharlet, *Pashukanis*, p. 38). This second edition also included a useful and theoretically interesting foreword (Pashukanis, *Law and Marxism*, pp. 37–45). The second edition is available in English translated by Barbara Einhorn from the German translation of 1929 (*Ibid.*). I refer to both these English editions of the *General Theory* (the first English translation, in J. Hazard (ed.), *Soviet Legal Philosophy* (Cambridge, MA: Harvard University Press, 1951), pp. 111–225, is not well translated, with eccentric renderings of Marxist terminology: commodity fetishism becomes ‘goods fetishism’ for example).

⁶⁶ Pashukanis, *Law and Marxism*, p. 36.

outlined was an ‘attempt to approximate the legal form to the commodity form’.⁶⁷

‘The basic thesis’ of the commodity exchange or commodity-form theory of law, Pashukanis claimed, ‘namely that the legal subject of juridical theories is very closely related to the commodity owner, did not, after Marx, require any further substantiation’.⁶⁸ This is modest to the point of coy. Not only are the wisps of jurisprudence throughout Marx’s oeuvre far from systematic, but Pashukanis claims far more than the vague ‘close relation’ between the commodity owner and the legal subject. He argues that the logic of the commodity form is the logic of the legal form. Chris Arthur puts it very well:

Pashukanis argues that *the juridical element in the regulation of human conduct enters where the isolation and opposition of interests begins*. He goes on to tie this closely to the emergence of the commodity form in mediating material exchanges. His basic materialist strategy is to correlate commodity exchange with the time at which man becomes seen as a legal personality – the bearer of rights (as opposed to customary privileges). Furthermore, this is explicable in terms of the conceptual linkages which obtain between the sphere of commodity exchange and the form of law. The nature of the legal superstructure is a fitting one for this mode of production. For production to be carried on as production of commodities, suitable ways of conceiving social relations, and the relations of men to their products, have to be found, and are found in the form of law . . .

As the product of labour takes on the commodity form and becomes a bearer of value, people acquire the quality of legal subjects with rights . . .

For Pashukanis, legal forms regulate relationships between autonomous subjects – it is the subject that is the ‘cell-form’ of the legal system . . . [T]he basic element in legal regulation is contestation – two sides defending their rights. In deliberately paradoxical fashion he says that historically law starts from a law-suit.⁶⁹

Pashukanis argues that for exchange to be exchange, each commodity must be the private property of its owner, given in return for the commodity owned by the other. Each agent in the exchange must be an owner of private property, and formally equal to the other agent(s). Otherwise, what occurred would not be commodity exchange. In the opposition and equality of the legal subjects, whether the exchange is peaceable or not, contestation is implied and is at the heart of the legal form. Where there is the potentiality of disputation between two sovereign, formally

⁶⁷ *Ibid.*, p. 38. ⁶⁸ *Ibid.*, p. 39. ⁶⁹ Introduction to *ibid.*, pp. 13–15 (emphasis in original).

equal individuals implied by commodity exchange a specific form of social regulation is necessary. It must formalise the method of settlement of any such dispute without diminishing either party's sovereignty or equality. That form is law, which is abstract, based on the equality of its subjects and pervasive in capitalism.

Pashukanis relates the necessary, actually existing, materially effective legal form with the system of wider social relations. He takes his starting point from Marx. 'In as much as the wealth of capitalist society appears as "an immense collection of commodities", so this society itself appears as an endless chain of legal relations.'⁷⁰ Nor is this appearance illusory.

The exchange of commodities assumes an atomised economy . . . The legal relationship between subjects is only the other side of the relation between the products of labour which have become commodities. The legal relationship is the primary cell of the legal tissue through which law accomplishes its only real movement. In contrast, law as a totality of norms is no more than a lifeless abstraction.⁷¹

It is the focus on law as a real regulatory force which explains why the legal norm – the rule – cannot be the basis of the legal form. The legal form is the form of a particular kind of relationship. Rules can only be derived from that relationship. They are secondary, and in fundamental jurisprudential terms, their specific content is contingent.

In material reality a relationship has primacy over a norm. If not a single debtor repaid a debt, then the corresponding rule would have to be regarded as actually non-existent and if we wanted nevertheless to affirm its existence we would have to fetishize this norm in some way.⁷²

According to the alternative, norm-driven position, in the words of one of its adherents:

[i]t is not because creditors generally demand repayment of a debt that the right to make such a demand exists, but, on the contrary, the creditors make this claim because the norm exists; the law is not defined by abstraction from observed cases, but derives from a rule posited by someone.⁷³

However, this leaves unanswered why some such 'posited' rules should be generalised and not others, and the norm-driven paradigm cannot

⁷⁰ Pashukanis, *Law and Marxism*, p. 85. The quotation is from K. Marx, *Capital*, vol. 1 (New York: Vintage, 1976), p. 125.

⁷¹ Pashukanis, in Beirne and Sharlet, *Pashukanis*, p. 62. ⁷² *Ibid.*, p. 63.

⁷³ Shershenevich, quoted in Pashukanis, *Law and Marxism*, p. 86.

explain why one apparently ‘valid’ law is effective and another is not. For Pashukanis, given that the subject for analysis is actually existing law, that law inheres inasmuch as it regulates social behaviour.⁷⁴

In locating the legal form in the ‘economic’ relationships of commodity exchange, rather than the superstructure of political power, as suggested by the norm-derivation theory, Pashukanis locates ‘the moment of dispute’ as at the basis of the legal form.⁷⁵ ‘The law differentiates itself from the social relations of production in the resolution of disputes, in particular through the medium of the lawsuit.’⁷⁶

This is the basis of Pashukanis’s assertion that private law, rather than public law, is the ‘fundamental, primary level of law.’⁷⁷ The rest of the legal superstructure can be seen as essentially derived from this. The concept of public law, for example:

can only be developed through its workings, in which it is continually repulsed by private law, so much that it attempts to define itself as the antithesis of private law, to which it returns, however, as to its centre of gravity.⁷⁸

A complex legal system regulating all levels of social life can be thrown up which appears to differentiate itself sharply from private law, but it ultimately derives from the clash of private interests. The legal form is that form which regulates the legal relationship: dispute is central, because without dispute there would be no need of regulation. The legal subject is part of this legal relationship, as ‘[e]very legal relation is a relation between subjects. The subject is the atom of legal theory, its simplest, irreducible element.’⁷⁹

The juridical relation exists in the interface between humans’ relations with their commodities and concomitant relations with each other. This, Pashukanis takes from Marx.

In order that these objects may enter into relation with each other as commodities, their guardians must place themselves in relation to one another as person whose will resides in those objects, and must behave in such a way that each does not appropriate the commodity of the other, and alienate his own, except through an act to which both parties consent. The guardians must therefore recognise each other as owners of private property. This juridical relation, whose form is the contract, whether as part of a developed legal system or not, is a relation between two wills which mirrors

⁷⁴ Pashukanis, *Law and Marxism*, p. 88.

⁷⁵ *Ibid.*, p. 93.

⁷⁶ Von Arx, ‘An Examination’, p. 48.

⁷⁷ Pashukanis, *Law and Marxism*, p. 103.

⁷⁸ *Ibid.*, p. 106.

⁷⁹ *Ibid.*, p. 109.

the economic relation. The content of this juridical relation . . . is itself determined by the economic relation.⁸⁰

The importance of this passage to Pashukanis can hardly be overstressed. ‘By asserting that exchange requires mutual recognition of private property rights, Marx clearly acknowledges that the legal relation between subjects is *intrinsic* to the value relation.’⁸¹ The legal subject is defined by virtue of possessing various abstract rights – ‘[t]he isolated, abstract, impersonal legal subject . . . cannot be identified with the specific attributes or roles of any particular social actor’.⁸² This formal equality of distinct and different individuals is an exact homology with the equalisation of qualitatively different commodities in commodity exchange, through the medium of abstract labour (the stuff of value). Thus with the generalising of legal relations, ‘[l]egal fetishism complements commodity fetishism’.⁸³

The historical generalisation of ‘equal rights’ is the generalisation of the abstract legal subject, ‘an abstract owner of commodities raised to the heavens’.⁸⁴ This is why contract is so vital to Pashukanis’s theory of law. Legal subjects relate to each other through contract, which is the formalisation of mutual recognition of equal subjects. Without a contract, Pashukanis writes, ‘the concepts of subject and of will only exist, in the legal sense, as lifeless abstractions. These concepts first come to life in the contract.’⁸⁵

The history of international law is beyond the bounds of this essay, but it should be clear that Pashukanis’s categories become germane to international law with the early rise of capitalism, at a time when states, categorised as the owners of their own territories, consolidated their power in a context of increasing international interaction and conflict.

The seventeenth and eighteenth centuries saw the massive expansion of international trade, and this trade was central to the structure of the most powerful European states. It is during this period that the categories concomitant on that trade – the legal forms – begin to universalise. This was the birth of true international law. As trade became global, and definitional to the sovereign states, the international order could not but become an international legal order.

Often considered the epoch of the Absolutist state, this was even more the epoch of the Mercantilist state. Mercantilism was crucial for the consolidation of the sovereign state (absolutist or otherwise), and was a vital part of a transition to a capitalist world economy. The ‘shifting

⁸⁰ Marx, *Capital*, vol. 1, p. 178. ⁸¹ Von Arx, ‘An Examination’, p. 66 (emphasis added.)

⁸² *Ibid.*, p. 69. ⁸³ Pashukanis, *Law and Marxism*, p. 117. ⁸⁴ *Ibid.*, p. 121.

⁸⁵ *Ibid.*, p. 121.

combination of tendencies' which characterised different mercantilist theories varied with political context: what they were all geared towards, however, was 'the increase of national power'.⁸⁶ 'The core of mercantilism is the strengthening of the State in material resources; it is the economic side of nationalism.'⁸⁷ This underlying conception was intrinsically international.

From their initial position in 'the pores' of society, commodity relations generalised, both between individuals and between states, and the abstracted, reified relations that follow – including law – generalised also.

3.2. *From form to content*

3.2.1. The excesses of state derivation

As we have seen, Pashukanis himself was concerned to stress the importance of not fetishising the politics, the content of law as the source of class inequality. Focusing on the legal form, he stressed that:

the fundamental juridical categories cited above are not dependent on the concrete content of its legal norms, in the sense that they retain their meaning irrespective of any change in this concrete material content.⁸⁸

However, this does not mean that the analysis of the content of law is unimportant – only that it must proceed on the right basis. Though Pashukanis's is a theory of the legal form, it does not follow that it is a theory inimical to examinations of particular legal contents.⁸⁹ Even one of his critics observes that '[t]he theoretical achievement of Pashukanis . . . has been to steer a course between the fetishism of form and the fetishism of content'.⁹⁰ What is missing, however, is a systematically outlined relation between form and content.

Domestically, the state has a monopoly on authoritative legal interpretation, and internationally the states are the very subjects whose

⁸⁶ P. J. Thomas, *Mercantilism and the East India Trade* (London: P. S. King & Son, 1926), p. 3.

⁸⁷ *Ibid.*, p. 3. The theory of mercantilism as at core about state-building was seminal expressed by Schmoller in 1884 (reprinted G. Schmoller, *The Mercantile System and its Historical Significance: Illustrated Chiefly from Prussian History* (New York and London: Macmillan, 1967)). The most influential modern reformulation of Schmollerian ideas is Heckscher's monumental 1932 work (reprinted E. Heckscher, *Mercantilism* (London: Routledge, 1994)). For a harsh critique of Heckscher, see D. C. Coleman, 'Eli Heckscher and the Idea of Mercantilism', in D. C. Coleman (ed.), *Revisions in Mercantilism* (London: Methuen, 1969).

⁸⁸ Pashukanis, *Law and Marxism*, p. 47.

⁸⁹ As implied, for example, in R. Warrington, 'Standing Pashukanis on his Head' (1984) 12 *Capital and Class* 102.

⁹⁰ Fine, 'Law and Class', p. 34.

interpretations are key to coercively actualising specific contents of the legal form. An understanding of the state is therefore important to theorising politics and coercion in law. It is sometimes claimed, by the school known as the ‘capital logic’ or ‘state derivation’ school, that as part of his theory of law, Pashukanis ‘derived’ – theorised the necessity for and existence of – the bourgeois state.

The principal concern of the so-called ‘capital logic’ school is to derive the *form* of the capitalist state from the nature of capital and/or to establish those *functional prerequisites* of accumulation whose satisfaction must be mediated through state activity.⁹¹

Pashukanis’s status as a progenitor of this school is widely accepted,⁹² as supposedly he ‘tried to derive the specific historical form of bourgeois law *and its associated state* from the essential qualities of commodity circulation under capitalism.’⁹³ The starting point for many of the state-derivationists is Pashukanis’s formulation of the question:

[W]hy does class rule not remain what it is, the factual subjugation of one section of the population by the other? Why does it assume the form of official state rule, or – which is the same thing – why does the machinery of state coercion not come into being as the private machinery of the ruling class; why does it detach itself from the ruling class and take on the form of an impersonal apparatus of public power, separate from society?⁹⁴

The argument goes that Pashukanis derived the bourgeois state, with its apparent neutrality, its abstract nature, its irreducibility to a set of particularistic interests, from the necessities of generalised commodification. In Jessop’s summary:

Pashukanis tried to derive the form of the bourgeois state as an impersonal apparatus of public power distinct from the private sphere of civil society. He argued that the legal form of the *Rechtsstaat* (or constitutional state based on the rule of law) characteristic of bourgeois societies is required by the nature of market relations among free, equal individuals. These must

⁹¹ B. Jessop, *State Theory* (Cambridge: Polity, 1990), p. 52 (emphasis in original).

⁹² Von Arx, ‘An Examination’, p. 6. ‘The “capital logic” school in Germany is perhaps most directly indebted to Pashukanis’s work.’ For essential overviews, see J. Holloway and S. Picciotto (eds.), *State and Capital: A Marxist Debate* (London: Edward Arnold, 1978); S. Clarke (ed.), *The State Debate* (London: Macmillan, 1991).

⁹³ Jessop, *State Theory*, p. 52 (emphasis added). See also J. Holloway and S. Picciotto, ‘Introduction: Towards a Materialist Theory of the State’, in Holloway and Picciotto, *State and Capital*, p. 18: ‘Pashukanis . . . was concerned to derive the form of law and the closely related form of the state from the nature of capitalist commodity production.’

⁹⁴ Pashukanis, *Law and Marxism*, p. 139.

be mediated, supervised and guaranteed by an abstract collective subject endowed with the authority to enforce rights in the interests of all parties to legal transactions.⁹⁵

There is no doubt that Pashukanis, at various points, does seem to imply this. There is also no doubt that much of the ‘derivationist’ theory is fascinating and extremely theoretically fecund.⁹⁶ However, Pashukanis’s theory of law and his theory of the state are, in fact, extricable. Most of the claims made in his chapter on ‘Law and the State’⁹⁷ are historical and more or less contingent. For example:

thanks to its new role as guarantor of the peace indispensable to the exchange transaction, feudal authority took on a hue which had hitherto been alien to it: it went *public*.⁹⁸

This, and other similar claims,⁹⁹ are historical and suggestive, not statements about the logical necessity or the derivation of the bourgeois state form.

And nor were they intended to be. At the very heart of his supposed derivation, after he has asked the ‘classical question’¹⁰⁰ as to why class dominance takes on the form of an impersonal mechanism, Pashukanis insists that what must be explained is how the abstract bourgeois state ‘*could*’, not ‘*did*’ or ‘*must*’, arise.¹⁰¹ He is demanding a sufficient, not a necessary, theory of the bourgeois state.

When Pashukanis does make stronger claims for the derivation, attempting logically and systematically to derive the necessity for an abstract state, a third force, to act as guarantor of legal relations, he bases his theory on a false premise. ‘Coercion’, he writes, ‘as the imperative addressed by one person to another, and backed up by force, contradicts the fundamental precondition for dealings between the owners of

⁹⁵ Jessop, *State Theory*, p. 53.

⁹⁶ Particularly the essays in Holloway and Picciotto, *State and Capital*, esp. J. Hirsch, ‘The State Apparatus and Social Reproduction: Elements of a Theory of the Bourgeois State’; B. Blanke, U. Jürgens and H. Kastendiek, ‘On the Current Marxist Discussion on the Analysis of Form and Function of the Bourgeois State’; and C. von Braunmühl ‘On the Analysis of the Bourgeois Nation State within the World Market Context’.

⁹⁷ Pashukanis, *Law and Marxism*, pp. 134–50. ⁹⁸ *Ibid.*, p. 136 (emphasis in original).

⁹⁹ See, for example, *ibid.*, p. 136 on ‘the “modern” state’, and p. 138.

¹⁰⁰ Blanke, Jürgens and Kastendiek, ‘On the Current Marxist Discussion’, p. 121.

¹⁰¹ See Pashukanis, *Law and Marxism*, pp. 139–40. See also his crucially revealing footnote – Beirne and Sharlet, *Pashukanis*, fn 47 at p. 130 – in which he states that the ‘authority standing above classes’ – the state – can be banished or banish itself at times of ‘intensified revolutionary struggle’.

commodities.’¹⁰² This is absolutely untrue, and is a characteristic slip – sometimes, Pashukanis’s excessive formalism lead him to neglect the ‘succulence’ of dialectical contradictions inherent in seemingly stable categories.

Contrary to some of Pashukanis’s claims, disputation and contestation is implied in the very form of the commodity, in the fact that its private ownership implies the exclusion of others. Violence – coercion – is at the heart of the commodity form. For a commodity meaningfully to be ‘mine-not-yours’ – which is, after all, central to the fact that it is a commodity that will be exchanged – some forceful capabilities must be implied. If there were nothing to defend its ‘mine-ness’, there would be nothing to stop it becoming ‘yours’. Coercion is implicit.

If the category of contract, a joint act of will founded on mutual recognition, is considered to be the original modus of law, then it is clearly a form that cannot exist without constraint.¹⁰³

In other words, and contrary to Pashukanis’s claim, coercion backed up by force is implied in a generalised form and ‘addressed by one person to another’ – i.e. by all owners of commodities to all other owners of commodities. In the realisation that violence is integral to commodity exchange, ‘politics’ – coercive force, violence – is brought closer, but its specific form – here the bourgeois state – can be seen to be not so fundamental, and certainly not ‘necessary’.

It is worth noting that some of the most interesting of the state-derivationist theorists acknowledge that Pashukanis’s theory, while crucially asserting the necessity of coercion and politics, does not imply the bourgeois state form:

These arguments [Pashukanis’s focus on the freedom and equality of the subjects of exchange] lead . . . to the category of the *form of law* and to the necessity of a force to guarantee the law, a force which we will call *extra-economic (coercive) force*. By this we mean not so much the organised apparatus (or an instrument) but essentially only a basic function which can be derived on the conceptual level of form analysis. With that we have by no means arrived at ‘the state’, but at different forms of social relations, namely economic and political relations, which are peculiar to the bourgeois mode of production.¹⁰⁴

¹⁰² *Ibid.*, p. 143.

¹⁰³ Blanke, Jürgens and Kastendiek, ‘On the Current Marxist Discussion’, p. 123.

¹⁰⁴ *Ibid.*, p. 121 (emphasis in original).

3.2.2. The contingency of superordinate authority and the 'law-ness' of international law

Pashukanis's theory does imply coercion and politics, but does not imply the necessity of a particular form of organisation of that coercion. We can go further: for Pashukanis at his systematic and theoretical best, the state as an abstract arbiter, in fact any overarching public authority, is radically contingent to the legal form itself, and it is this which makes Pashukanis such a vital theorist for international law.

He makes clear time and again that the lack of a sovereign does not make international law any less 'law'. Pashukanis does not deny the need for coercion, but is clear that superordinate and abstract coercion, while it does 'inject stability' and is functional to capitalism, is contingent to the legal form itself:

It is obvious that the idea of external coercion, both in its idea and organization, constitutes an essential aspect of the legal form. When no coercive mechanism has been organised, and it is not found within the jurisdiction of a special apparatus which stands above the parties, it appears in the form of so-called 'inter-dependence'. The principle of inter-dependence, under the conditions of balance of power, represents the single, and it can be said, the most unstable basis of international law.¹⁰⁵

Similarly, in his excellent and neglected essay on international law, Pashukanis excoriates bourgeois jurisprudence for the amount of ink spilt on the question of whether the lack of a superordinate authority means international law is not law.

No matter how eloquently the existence of international law is proved, the fact of the absence of an organizational force, which could coerce a state with the same ease as a state coerces an individual person, remains a fact. The only real guarantee that the relationships between bourgeois states . . . will remain on the basis of equivalent exchange, i.e. on a legal basis (on the basis of the mutual recognition of subjects), is the real balance of forces.¹⁰⁶

Each time Pashukanis points out the contingency of organised external coercion to law, international law is exemplary.

[M]odern international law recognises no coercion organised from without. Such non-guaranteed legal relations are unfortunately not known for their stability, but this is not yet grounds for denying their existence.¹⁰⁷

¹⁰⁵ Pashukanis, in Beirne and Sharlet, *Pashukanis*, p. 108.

¹⁰⁶ E. Pashukanis, 'International Law', in Beirne and Sharlet, *Pashukanis*, p. 179.

¹⁰⁷ Pashukanis, *Law and Marxism*, p. 89, n. 9.

However, he goes further than this. For Pashukanis, law itself – in its earliest, embryonic form – is a product precisely of the *lack* of an overarching authority or particular state form, historically:

The development of law as a system was evoked not by the requirements of the state, *but by the necessary conditions for commercial relations between those tribes which were not under a single sphere of authority*. . . . Commercial relations with foreign tribes, with nomads, and plebeians [in Rome] . . . ushered in the *ius gentium*, which was the prototype of the legal superstructure in its pure form. In contrast to the *ius civile*, with its undeviating and ponderous forms, the *ius gentium* discards all that is not connected with the goal – with the natural basis of the economic relation.¹⁰⁸

For the international legal scholar, this is a stunning theoretical illumination. An interminable question for the discipline has been how, with the lack of a superordinate authority, international law can be law. Pashukanis has here, in passing, solved the most tenacious problem of the legality of a decentralised legal system. Pashukanis's claim that (proto-)international law historically predates domestic law has nothing to do with any putative ontological primacy of the international sphere: it is, rather, because law is thrown up by, and necessary to, a systematic commodity exchange relationship, and it was between organised but disparate groups without such overarching authorities rather than between individuals that such relationships sprang:

As a separate force which set itself off from society, the state only finally emerged in the modern bourgeois capitalist period. But it by no means follows from this that the contemporary forms of international legal intercourse, and the individual institutions of international law, only arose in the most recent times. On the contrary, they trace their history to the most ancient periods of class and even pre-class society. To the extent that exchange was not initially made between individuals, but among tribes and communities, it may be affirmed that the institutions of international law are the most ancient of legal institutions in general.¹⁰⁹

3.2.3. 'Club law is law': self-help as legal regulation

There is a conundrum for Pashukanis. On the one hand, he stresses the 'law-ness' of legal relationships without superordinate authorities. On the other, we have seen that at one point he alleges that coercion 'as the

¹⁰⁸ Pashukanis, in Beirne and Sharlet, *Pashukanis*, p. 69 (emphasis added).

¹⁰⁹ Pashukanis, 'International Law', p. 175.

imperative addressed by one person to another, and backed up by force' is inimical to commodity relations.¹¹⁰ If law requires force, as it clearly does, and as Pashukanis makes clear that it does,¹¹¹ then where does the coercive violence in law without an abstract state come from?

I have argued that violence and coercion are immanent in the commodity relationship itself. Once this is accepted, the conundrum disappears as it is clear that self-help – the coercive violence of the legal subjects themselves – will regulate their legal relation. The importance of this solution to Pashukanis's paradox cannot be overstated. It is also abundantly clear that, notwithstanding his own occasional comments to the contrary, Pashukanis throughout his work – particularly when discussing international law – realised this. He cites 'inter-dependence' or 'reciprocity' 'under the conditions of the balance of power'¹¹² or 'the real balance of forces'¹¹³ – a backdrop of force-mediated relations – as at the basis of international legal regulation.

Contradicting his own later assertion that coercion is antipathetic to the commodity relationship, Pashukanis claims that:

[l]egal intercourse does not 'naturally' presuppose a state of peace just as trade does not . . . preclude armed robbery, but goes hand in hand with it. Law and self-help, those seemingly contradictory concepts are, in reality, extremely closely linked.¹¹⁴

To understand, as Pashukanis clearly does, that robbery (non-consensual possession of another's commodity) goes 'hand in hand' with trade (consensual exchange of commodities), is to understand that violence is implicit in the commodity – and therefore legal – form. If 'mine' implies force to keep it from becoming 'yours', then robbery is the failure of that force, and the success of someone else's. '[O]rder is actually a mere tendency and end result (by no means perfected at that), but never the point of departure and prerequisite of legal intercourse',¹¹⁵ Pashukanis makes clear. Coercion is fundamental to his theory of the legal form.

¹¹⁰ Pashukanis, *Law and Marxism*, p. 143.

¹¹¹ Pashukanis, in Beirne and Sharlet, *Pashukanis*, p. 108 and elsewhere. For example, stressing the distinction between legal and moral conduct, Pashukanis observes that legal conduct is such 'irrespective of the motives which produce it. Whether a debt is repaid because "in any event I will be forced to pay it", or because the debtor considers it his moral obligation to do so, makes no difference from the juridic perspective. It is obvious that the idea of external coercion . . . constitutes an essential aspect of the legal form' (p. 108).

¹¹² *Ibid.*, p. 108. ¹¹³ Pashukanis, 'International Law', p. 179.

¹¹⁴ Pashukanis, *Law and Marxism*, p. 134. ¹¹⁵ *Ibid.*, p. 135.

Compared to this, the failure of mainstream international legal theory to make sense of sanctions and violence is marked. One senses a petulance at the very tenacity of this problem, and a concomitant evasion of analysis dressed up as a high-minded refusal to be bogged down in vulgar details. Akehurst claims that:

[i]t is unsound to study any legal system in terms of sanctions. It is better to study law as a body of rules which are usually obeyed, not to concentrate exclusively on what happens when the rules are broken. *We must not confuse the pathology of law with law itself.*¹¹⁶

Here the abject failure of mainstream undialectical analysis is stark. The notion that breaches of law, disputes moderated by coercion, are pathological to law, rather than inextricable elements of the legal fabric, is remarkable. In contrast, as Pashukanis points out, ‘deviation from a norm always constitutes their premise’.¹¹⁷

Pashukanis understands that law and violence are inextricably linked as regulators of sovereign claims. He can therefore square two seemingly opposed points of view in Marx. One is the stress on juridical equality and exchange of equivalents; the other is Marx’s claim that ‘[e]ven club law is law’.¹¹⁸ The solution is to be found in another remark of Marx’s that spans those two conceptions: ‘between equal rights, force decides.’

On the one hand, law is an abstract relationship between two equals; on the other, the naked imposition of power is claimed as a legal form. ‘This is not a paradox’, Pashukanis makes clear – against his own occasional oppositions between coercion and contract – because ‘law, like exchange, is an expedient resorted to by isolated social elements in their intercourse with one another’¹¹⁹ – as is violence. In the absence of an abstract ‘third force’, the only regulatory violence capable of upholding the legal form, and of fleshing it out with a particular content, is the violence of the participants. This is why ‘[l]aw and self-help . . . are, in reality, extremely closely linked’¹²⁰ and that is why, in the absence of a sovereign, ‘[m]odern international law includes a very considerable degree of self-help (retaliatory measures, reprisals, war and so on)’.¹²¹

¹¹⁶ M. Akehurst, *A Modern Introduction to International Law* (London: Unwin Hyman, 1987), p. 7 (emphasis added).

¹¹⁷ Pashukanis, in Beirne and Sharlet, *Pashukanis*, p. 110 (emphasis added).

¹¹⁸ Marx, quoted in Pashukanis, *Law and Marxism*, p. 134. The original is in K. Marx, *Grundrisse* (New York: Vintage, 1973), p. 88. In this translation, it reads: ‘[t]he principle of might makes right . . . is also a legal relation’. I have chosen to quote the former, as it is a starker formulation.

¹¹⁹ Pashukanis, *Law and Marxism*, p. 134. ¹²⁰ *Ibid.*, p. 134. ¹²¹ *Ibid.*, p. 134.

Violence is intrinsic to law, but in the absence of a sovereign the violence retains its particularistic, rather than abstract impersonal (state) character:

[T]he armed individual (or, more often, group of people, a family group, a clan, a tribe, capable of defending their conditions of existence in armed struggle), is the morphological precursor of the legal subject with his sphere of legal power extending around him. This close morphological link establishes a clear connection between the lawcourt and the duel, between the parties to a lawsuit and the combatants in an armed conflict. But as socially regulative forces become more powerful, so the subject loses material tangibility.¹²²

Where there is no such ‘socially regulative forces’, however, that coercion remains embedded in the participants, and their sanctions such as self-help. Though it is shared at all levels of law, the morphological proximity of the legal subject and the armed unit is much closer and more clear in international law.

3.2.4. Putting the content in the legal form: power and its political economy

In his essay on international law, Pashukanis makes clear what the specific social content of particular international laws is:

The historical examples adduced in any textbook of international law loudly proclaim that *modern international law is the legal form of the struggle of the capitalist states among themselves for domination over the rest of the world.*¹²³

That struggle is the ‘real historical content hidden behind’ the legal form.¹²⁴

Pashukanis never systematically theorises the interests being pursued by the capitalist states. However, on this topic he quotes Lenin’s *Imperialism* approvingly¹²⁵ (although unaccountably ending his quote just before the nub of the matter):

The epoch of modern capitalism shows us that certain relations are established between capitalist alliances, based on the economic division of the world; while parallel with this fact and in connection with it, certain relations are established between political alliances, between states, on the basis

¹²² *Ibid.*, p. 118. ¹²³ Pashukanis, ‘International Law’, p. 169 (emphasis in original).

¹²⁴ *Ibid.*, p. 169. See also p. 172. ¹²⁵ *Ibid.*, pp. 169–70.

of the territorial division of the world, of the struggle for colonies, of the 'struggle for economic territory'.¹²⁶

The struggle between capitalists is based on the economic division of the world, and that economic division will be brought about politically by the state, which relies in turn on the capitalist economic system. This is a preliminary theoretical justification for the intuition that the struggle between capitalist states is more than a struggle between states that happen to have capitalist internal economies. It is a struggle for resources for capital. That is what makes the state a capitalist state.

If we agree with Pashukanis, therefore, that the 'real historical content of international law' is an ongoing and remorseless struggle for control over the resources of capitalism, that will often as part of that capitalist ('economic') competitive process spill into 'political' violence:

[E]ven those agreements between capitalist states which appear to be directed to the general interests are, in fact, for each of the participants a means for jealously protecting their particular interests, preventing the expansion of their rivals' influence, thwarting unilateral conquest, i.e. in another form continuing the same struggle which will exist for as long as capitalist competition exists.¹²⁷

What has emerged is a fascinating circularity. Capitalism is based on commodity exchange and, contrary to appearances (and to some of Pashukanis's comments), such exchange contains violence immanently. However, the universalisation of such exchange has tended to lead to the abstraction of a 'third force' to stabilise the relations, and that force has been the state. Thus politics and economics have been separated under the generalised commodity exchange which reaches a zenith under capitalism. In the same moment, the flipside of that separation and the creation of a public political body was the investiture of that body – the state – as the subject of those legal relations which had long inhered between political entities, and which now became bourgeois international law. But that process itself necessitated the self-regulation of the legal relation internationally by its own subjects, which was a simultaneously 'political' and 'economic' function, and a manifestation of the collapse of the distinction between politics and economics inherent in the very dynamic which had separated them.

¹²⁶ V. I. Lenin, *Imperialism* (New York: International Publishers, 1939), p. 75.

¹²⁷ Pashukanis, 'International Law', p. 170.

We have identified the social relations – the competition between capitalist states – which make up the content of international law. We have also seen that ‘might makes right’, that the necessary coercive force will be held by the participants to the legal relations. And, of course, it will not be held equally:

[B]ourgeois international law in principle recognizes that states have equal rights yet in reality they are unequal in their significance and their power. For instance, each state is formally free to select the means which it deems necessary to apply in the case of infringements of its right: ‘however, when a major state lets it be known that it will meet injury with the threat of, or the direct use of force, a small state merely offers passive resistance or is compelled to concede.’ These dubious benefits of formal equality are not enjoyed by those nations which have not developed capitalist civilization and which engage in international intercourse not as subjects, but as objects of the imperialist states’ colonial policy.¹²⁸

Although both parties are formally equal, they have unequal access to the means of coercion, and are not therefore equally able to determine either the policing or the content of the law. The policing of the form and therefore its interpretation – its investiture with particular content – is down to the subjects themselves. This is why a less powerful state either ‘offers passive resistance or is compelled to concede’. And that is how the particular contents and norms that actualise the general content of social relations are invested into the legal form.

4. Imperialism and international law

4.1. ‘Serving two masters’: the imperialism of freedom

Imperialist actions are framed in juridical terms. And not just for propagandist reasons, but more fundamentally because the imperialism and the international law are part of the same system. Modern capitalism is an imperialist system, and a juridical one. International law’s constituent forms are constituent forms of global capitalism, and therefore of imperialism.

Nevertheless, the mainstream view is still one that sees imperialism as incidental or opposed to the equal sovereign state form which underpins international law. Joseph Lockley, discussing the US policy of

¹²⁸ *Ibid.*, p. 178. The quote (emphasis mine) is from V. E. Grabar, *The Basis of Equality between States in Modern International Law* (1912).

‘pan-Americanism’, the crucial element of which was ‘the independence and equality of the American nations’,¹²⁹ expressed this starkly:

The one [policy] is expressly intended to create and maintain a community of equal, cooperating nations; and the other is intended, presumably, to create and maintain an empire. The two policies, the two courses of action, lead in different directions. In which of these directions does the United States move? It cannot move in both at one and the same time. It cannot serve two masters.¹³⁰

Of course, it had long been evident that there is in fact no contradiction between the spread of the sovereign state form and imperialism. States categorically can serve the two masters of pushing for regional or even world dominance and of supporting the independent sovereign state form on the basis of their own overwhelming power. The United States has for decades been uniquely placed to succeed in this strategy.

Internationally, there is no authority to act as final arbiter of competing claims, and no body with a monopoly of violence with which to enforce them, and the means of violence remains in the hands of the very parties disagreeing over the interpretation of law. ‘There is here, therefore, an antinomy, of right against right, both equally bearing the seal of the law of exchange. Between equal rights, force decides.’¹³¹ And, of course, that force, the capacity for coercive violence which has underpinned the legal relation, is not distributed equally.

This is why strong states are able to enforce their own interpretations of law. Intrinsic to the legal form, a contest of coercion occurs, or is implied, to back up the claim and counterclaim. And in the politically and militarily unequal modern world system, the distribution of power is such that the winner of that coercive contest is generally a foregone conclusion. The international legal form assumes juridical equality and unequal violence – the political violence of imperialism.

International disputes are part of the juridical system of sovereignty and are assiduously legally argued on both sides, by formally equal subjects – even when one side’s interpretations represent an extremely minority position.¹³² Their outcomes are expressed in legal terms and establish legal facts on the ground. And these outcomes are rarely in doubt, given

¹²⁹ J. Lockley, ‘Pan-Americanism and Imperialism’ (1938) 32 *American Journal of International Law* 233 at 234.

¹³⁰ *Ibid.*, 234. ¹³¹ Marx, *Capital*, vol. 1, p. 344.

¹³² To take just one example, see the ingenious applications of international law by the US to justify ‘Operation Just Cause’, the invasion of Panama, at the end of 1989. Despite the bulk of international legal opinion being against them, the US legal case was carefully worked out, involving a descending claim about the necessity for humanitarian intervention; an

the unequal military coercion one side can use to enforce its legal interpretation. This, of course, is never more the case than when the United States is one of the parties to a dispute.

4.2. *Post-imperial international law?*

In the face of the opposition of the colonised, ‘by the late 1950s it had become clear to the surviving old empires that formal colonialism had to be liquidated.’¹³³ ‘After the cataclysm of World War II the nation-state tide reached full flood. By the mid-1970s even the Portuguese Empire had become a thing of the past.’¹³⁴ ‘What began as a sort of Euro-American club [the UN General Assembly] . . . has become a predominantly African and Asian organisation.’¹³⁵ As Benedict Anderson argues, ‘[t]he “last wave” of nationalisms, most of them in the colonial territories of Asia and Africa, was in its origins a response to the new-style global imperialism made possible by the achievements of industrial capitalism.’¹³⁶

‘The need of a constantly expanding market for its products chases the bourgeoisie over the whole face of the globe. It must nestle everywhere, settle everywhere, establish connections everywhere.’¹³⁷ So with the juridical relations that this market implies. For the establishment of independent territories in opposition to direct colonial rule, this must mean the establishment of sovereign states, the subjects and agents of international law.

International law has been profoundly changed by this historical shift, exemplified in the proclamations of the UN. ‘Instead of a special colonial international law, there was now only a multitude of independent and formally equal member-States.’¹³⁸ Though the colonial powers – or,

ascending claim about sovereign rights of a state during war (based on Noriega’s hyperbolic declaration that a war existed between the countries); a principle of ‘intervention by invitation’, claiming the sanction of Endara, the opposition candidate; and a claim of legitimate intervention as part of a campaign against drugs by the ingenious application of a 50-year-old Arbitration between the US and Canada designed to minimise cross-border air pollution.

¹³³ E. Hobsbawm, *Age of Extremes* (New York: Pantheon Books, 1994), p. 221.

¹³⁴ B. Anderson, *Imagined Communities* (London and New York: Verso, 1991), p. 113. For a comprehensive and chronological list of the expansion of the UN from 51 members in 1945 to 185 by 1997, see M. Marín-Bosch, *Votes in the UN General Assembly* (Leiden: Martinus Nijhoff, 1998), pp. 7–8.

¹³⁵ Marín-Bosch, *Votes in the UN*, p. 12. ¹³⁶ Anderson, *Imagined Communities*, p. 139.

¹³⁷ K. Marx and F. Engels, *The Communist Manifesto* (New York: Pathfinder Press, 1987), pp. 19–20.

¹³⁸ W. Grewe, *The Epochs of International Law* (Berlin and New York: Walter de Gruyter, 2000), p. 649.

more exactly, certain sections of the ruling class in each colonial power – resisted the changes,¹³⁹ ‘the vast majority of UN members sought to set in motion an irreversible process of decolonization’.¹⁴⁰ The United Nations, the ‘raison d’être’ of which is ‘[t]he codification of International Law’,¹⁴¹ ‘has . . . striven for universality’.¹⁴²

It is not enough to claim that ‘international law is now more open and cosmopolitan’, or that it ‘promoted the process of decolonization by formulating doctrines of self-determination where once it formulated doctrines of annexation and *terra nullius*’:¹⁴³ this tends to imply that the emphasis is on the differences between pre- and post-war international law. The continuities are even more important, as they trace the dynamic of international legal development. Embedded even in colonialist international law doctrines was the germ-seed of self-determination and sovereignty.

This sense of a tendential logic is expressed in Jackson’s observation that ‘[e]quality is infectious’,¹⁴⁴ and Miller’s claim that once sovereignty

¹³⁹ See the discussion of Portugal and France in Marín-Bosch, *Votes in the UN*, pp. 50–2.

¹⁴⁰ *Ibid.*, p. 52. ¹⁴¹ *Ibid.*, p. 151. ¹⁴² *Ibid.*, p. 9.

¹⁴³ A. Anghie, ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law’ (1999) 40 *Harvard International Law Journal* 1 at 75. Though they are not his conclusions, it is interesting and somewhat surprising to see Anghie make such claims: it would be obnoxious not to point out, as an earlier draft of this article unfortunately failed to do, that arguments over these formulations notwithstanding, overall Anghie’s work is indispensable precisely for its vivid stress on the embeddedness of colonialism in the fabric of international law.

¹⁴⁴ R. Jackson, ‘Quasi-States, Dual Regimes, and Neoclassical Theory: International Jurisprudence and the Third World’ (1987) 41 *International Organization* 519 at 538. Jackson distinguishes between juridical sovereignty and ‘empirical statehood’, and sees the modern international legal system of juridical equality as based on ‘the contemporary moral-legal framework of the accommodative juridical regime’ (at 536), in contrast to the ‘traditional empirical foundation of the competitive states-system’ of ‘positive sovereignty: the national will and capacity to become and remain independent’. ‘International law in this sphere’, he claims, ‘is an acknowledgement of real statehood that is a consequence of successful state-building’ (at 536). He sees the focus on the ‘juridical’ rather than the ‘real’ aspects of sovereign statehood as underlying many of the problems of the third world – essentially, this is a problem of an ‘accommodative’ system. For a devastating critique of Jackson’s liberal construction which completely writes out the complicity of the colonial powers in the very problems of underdevelopment that he terms ‘quasi-statehood’, see S. Grovogui, *Sovereigns, Quasi-Sovereigns and Africans* (Minneapolis, MN: University of Minnesota Press, 1996), pp. 182–4 and 202–3. While, of course, Jackson is right that the various states of the world have vastly different capabilities, it is not a pathology or mistake that has led them to be treated as juridically equal – such a coexistence of real inequality and juridical equality is precisely the condition of capitalist modernity that must be explained. He describes the situation as a ‘new dualism’ (Jackson, ‘Quasi-States’, p. 536) which it emphatically is not. To that extent, his putatively ‘liberal’ solutions, revolving around the move away from juridical equality towards ‘a greater variety of international

is granted to some politically weak polities, ‘the tendency is irresistible to qualify still other members of the society as well’.¹⁴⁵ With the theoretical tools developed throughout this thesis we can more exactly express this: the post-war drive to self-determination is thus not merely a change in the structure or content of international law, but the culmination of the universalising and abstracting tendencies in international – legal – capitalism.

Though for many years formal colonialism was expressed in international legal terms, and without for a moment downplaying the struggles of the colonised to achieve self-determined status, the recent conversion of international law to decolonisation also represents the self-actualisation of international law – the universalisation of the abstract juridical equality of its subjects. With the end of formal empire comes the apogee of the empire of sovereignty, and of international law.

With the universalisation of the legal form, modern international law is usually deemed antipathetic to imperialism:

There is in existence today a peremptory norm of general international law, a rule, that is to say, of *jus cogens*, which provides for the right of self-determination and thus prohibits colonial domination.¹⁴⁶

This position does not have to equate to a naïve belief that with the new international legal epoch, imperialism domination comes to an end. Umozurike, for example, warns of ‘neo-colonialism’, and is perfectly hard-headed about its coexistence with universal international law and self-determination.¹⁴⁷ However, he still sharply counterposes such ‘neo-colonialism’ from international law itself.

statuses including more intrusive forms of international trusteeship’ (R. Jackson, *Quasi-States: Sovereignty, International Relations, and the Third World* (Cambridge: Cambridge University Press, 1991), p. 202 are profoundly conservative, and conservatively utopian, harking nostalgically back to the mandate era.

¹⁴⁵ L. Miller, *Global Order: Values and Power in International Relations* (Boulder, CO: Westview Press, 1985), p. 49.

¹⁴⁶ E. Udechuku, *Liberation of Dependent Peoples in International Law*, 2nd edn (London: African Publications Bureau, 1978), p. 15. For an almost identical formulation, see U. Umozurike, *International Law and Colonialism in Africa* (Enugu, Nigeria: Nwamife Publishers, 1979), p. 85: ‘[i]n present international law, colonialism is illegal for it runs against the *jus cogens* rules of self-determination and respect for fundamental human rights.’

¹⁴⁷ Umozurike, *International Law and Colonialism in Africa*, pp. 126–38. See also Chimni, *International Law and World Order*, p. 235: ‘[i]mperialism, it bears repeating, is just not another word for “colonialism” but refers to a particular stage in the global development of capitalism . . . For those who associate imperialism with colonialism, the former phenomenon was extinguished with decolonisation or continues only in so far as decolonisation is not complete. Such a view veils the fact that colonialism not only existed before what is termed “the monopoly stage of capitalism” but is survived today by neo-colonialism.’

International law, he says:

must now provide the legal framework within which the New International Economic Order [of more equitable distribution] can be achieved. Though the main actions to redress neo-colonialism must be internal, international law is an additional medium.¹⁴⁸

Here, ‘neo-colonialism’ – the continued existence of imperialism – is held to be a political phenomenon which can be remedied, in part, by recourse to international law, which by its nature is held to oppose imperialism. However, this construction is supported neither by the facts of post-war history, nor by the analysis of international law and the legal form.

This is not to say that the ending of the era of formal colonialism was not a historically progressive moment: as Koskenniemi puts it, ‘[f]ormal sovereignty is useful . . . as an absolute barrier by a weak community against a more powerful one’.¹⁴⁹ This is why, though ‘[s]overeignty is a dry, legal question for those nations who have acquired statehood . . . [it is] a passionate crusade for those who do not have it’.¹⁵⁰

However, imperialism outlasts the transition to universalised juridical sovereignty, and not because postcolonial sovereignty is incomplete.¹⁵¹ Such imperialism is not something international law can successfully oppose – it is embedded in the very structures of which international law is an expression and a moment.

The imperialism of international law, then, means more than just the global spread of an international legal order with capitalism – it means that the power dynamics of political imperialism are embedded within the very juridical equality of sovereignty. Formal equality is a powerful weapon in the hands of the state whose overwhelming coercive power will actualise content in the legal form. For the state that knows its interpretation will ‘win’, that it has the power to effect authoritative interpretation, the spread of juridical equality is not only no block to domination: it can be conducive of it.

This coexistence of formal freedom and imperialist subjugation has long been a fact of the international system, and where it has been invisible to many international lawyers, it has been obvious to the agents of imperialism themselves. In 1824, when the countries of Latin America

¹⁴⁸ Umozurike, *International Law and Colonialism in Africa*, p. 138. See also pp. 128–9.

¹⁴⁹ M. Koskenniemi, ‘International Law and Imperialism’, the Josephine Onoh Memorial Lecture 1999 (2000), p. 16.

¹⁵⁰ L. Farley, *Plebiscites and Sovereignty: The Crisis of Political Illegitimacy* (Boulder, CO: Westview Press, 1986), p. 9.

¹⁵¹ Grovogui, *Sovereigns, Quasi-Sovereigns*, p. 196: ‘The current postcolonial crises suggest that the results of the dominant African had significant political and theoretical implications.’

were winning independence from Spanish control, Britain was quick to recognise the new states (over which it had a great deal of economic control). The ‘flexible’ foreign secretary Canning¹⁵² straddled the dialectic of formal freedom and factual control in the new imperialism admirably: ‘Spanish America is free, and if we do not mismanage our affairs sadly she is *English*.’¹⁵³ Formal sovereign independence not only does not preclude domination but can be the very institution by which domination is exercised.

This is not about the ultimate triumph of some hypostatised ‘power politics’, a Morgenthau-ist claim that ‘[p]olitics is focal and law secondary’.¹⁵⁴ The point, rather, is that the ‘power politics’ of modernity are the power politics of a juridically constructed system. The most realist, cynical, power-maximising state in the modern world-system is a realist, cynical and power-maximising juridical form. The agents of what realists might fondly suppose is ‘pure power’ are, in fact, defined by the abstract, juridical structures of generalised commodity exchange. There is no separation of these juridical forms from ‘pure politics’ because there is no pure politics: there are instead the politics of juridical units.

5. From commodity form to class law

The violence in the legal form shows that the legal subjects must also be the agents of violence. However, at this level of abstraction, this is the violence of the market, of the commodity and of the legal form, but it is not class violence. The necessity of coercion inheres in the exchange of commodities, not on a particular mode of production and exploitation.

Here, the insights of Lenin – and Bukharin, on whose towering analysis Lenin based his own more pamphleteering account of the state-capital relation in capitalism¹⁵⁵ – on the structure of the imperialist state can inform Pashukanis’s legal theory. In an epoch of mature capitalism, of the consolidation and monopolisation of capitals, the state cannot be understood as autonomous from those capitals. The penetration of capitalist concerns into the state remains vital to explain imperialism. As imperialist

¹⁵² E. Hobsbawm, *The Age of Revolution* (Cambridge: Cambridge University Press, 1967), p. 131.

¹⁵³ Quoted in J. Rosenberg, *The Empire of Civil Society* (London: Verso, 1994), p. 170 (emphasis in original). Of course, British ambitions were dashed. ‘In point of fact, the British did mismanage their affairs very sadly’ (C. Hitchens, *Blood, Class and Nostalgia* (New York: Farrar, Straus & Giroux, 1990), p. 154).

¹⁵⁴ Koskenniemi, *From Apology to Utopia*, p. 168.

¹⁵⁵ N. Bukharin, *Imperialism and World Economy* (New York: International Publishers, 1987).

states, they are powered by capitalist economics, and operating according to capitalist concerns. The very imperialism of each state is a function of its capitalist nature. When it comes to international law, then, the point is that the more powerful state, with the coercive force to enforce its own interpretation of the legal rules, is a more powerful *capitalist* state. Its interpretations and its coercive efforts are deployed for capital, which is predicated on class exploitation.

This is emphatically not to say that the more powerful state in an international legal relation is taking the role of 'capitalist' and its opponent that of 'proletarian', nor that in any crudely instrumentalist way capitalist states only come to blows over narrowly economic issues. It is only to say that the strategic logic of capitalist states, including of course the powerful imperialist states, is ultimately derived from the exploitative logic of capitalism.

The international legal form assumes juridical equality and unequal violence. In the context of modern international capitalism, that unequal violence is imperialism itself. The necessity of this unequal violence derives precisely from the juridical equality of the sovereign states: one of the legal subjects will make law out of the legal relation by means of their coercive power – their imperialist domination.

In other words, specifically in its universalised form, predicated on juridical equality and self-determination, international law assumes imperialism. At the most abstract level, without violence there could be no legal form. In the concrete conjuncture of modern international capitalism, this means that without imperialism there could be no international law.

6. The rule of law

6.1. *The new cosmopolitan advocates*

Among the various criticisms levelled at Pashukanis, one is the accusation that his theory 'is ultimately a theory against law'.¹⁵⁶ It would be possible in defending Pashukanis to point out that he stressed that the legal form would continue to inhere in the USSR for some time after the revolution of 1917, that he did not advocate the active destruction of law, that his work as a jurist showed his commitment to the progressive application of law, and so on. All this is true, but it rather misses the point. Pashukanis was,

¹⁵⁶ Von Arx, 'An Examination', p. 8.

absolutely, hostile to law, inasmuch as he understood it to be a reflection of capitalist property relations, an integral part of a class society where the market had a commanding role, and he did not believe that it would last as communism flowered. To criticise Pashukanis for this view is to decide in advance that law is to be defended.

Given the widespread though mistaken belief that law is counterposed to power and war, the desire for a rule of law makes sense. The extension of the rule of law is held to be an emancipatory project, both internationally and domestically. The rule of law 'is necessary to achieve a well-ordered society in which the problems of knowledge, interest, and power are handled'.¹⁵⁷ According to one writer, in fact, it 'could . . . make possible the birth of a new civilization of unparalleled brilliance and enlightenment'.¹⁵⁸

Recently, calls for an international rule of law have been deployed by the critical modern liberal project known variously as 'cosmopolitan democracy',¹⁵⁹ 'global governance', 'democratic governance',¹⁶⁰ but that I follow Peter Gowan in terming 'liberal-cosmopolitanism'.¹⁶¹ Humanitarian intervention is seen as having 'chipped away'¹⁶² absolute sovereignty in the search for a just international law:¹⁶³ for the liberal-cosmopolitans the rule of law must 'involve a central concern with distributional questions and matters of social justice'.¹⁶⁴

¹⁵⁷ R. Barnett, *The Structure of Liberty* (Oxford University Press, 1998), p. 325.

¹⁵⁸ G. Walker, *The Rule of Law* (Melbourne: Melbourne University Press, 1988), p. 406.

¹⁵⁹ D. Archibugi and D. Held, *Cosmopolitan Democracy* (Cambridge: Polity and Blackwell Publishers, 1995).

¹⁶⁰ See Global Governance Reform Project, *Reimagining the Future: Towards Democratic Governance* (Bundoora, Australia: La Trobe University, 2000).

¹⁶¹ P. Gowan, L. Panitch and M. Shaw, 'The State, Globalisation and the New Imperialism: A Roundtable Discussion' (2001) 9 *Historical Materialism* 3 at 4. The choice of terminology is important. In Gowan's words: '[t]hese people are not talking about a global democratic state. They are not, therefore, talking about cosmopolitan democracy . . . What they are talking about is global governance . . . That's why I say that these people are cosmopolitan liberals, not actually democrats, even though they may well say that they are democrats, and no doubt they are good democrats when it comes to domestic activities' (at 5). Panitch points out that '[t]here are . . . cosmopolitan liberals who are liberal democrats' (at 12), citing David Held, but this does not undermine Gowan's point, and neither does Shaw's attempt to distinguish himself from Held (at 21–2).

¹⁶² K. Mills, *Human Rights in the Emerging Global Order: A New Sovereignty?* (London: MacMillan Press and New York: St Martin's Press, 1998), p. 41.

¹⁶³ This is clearly exemplified in the title of M. Glennon, 'The New Interventionism: The Search for a Just International Law' (1999) 78(3) *Foreign Affairs* 2.

¹⁶⁴ D. Held, *Democracy and the Global Order* (Cambridge: Polity, 1995), p. 248.

The notion that this represents a new era is predicated on the erroneous claim that the ‘traditional’ view of sovereignty was ‘anti-interventionist’.¹⁶⁵ In fact, of course, sovereignty has always been overridden by intervention. ‘Great Powers’, Callinicos says, ‘have always asserted a right of intervention in the affairs of small countries’:¹⁶⁶ international law presumes the capacity for the organised violence of intervention, sovereignty assumes its own abnegation, and it is the Great Powers which are particularly able to effect that. And though the ideology of humanitarianism has recently been particularly stressed, it is in no way a new justification for intervention: “‘Humanitarian intervention’ played an increasingly important role in the numerous cases of intervention which occurred during the nineteenth century.”¹⁶⁷ The ‘apology’ of state sovereignty operates in a contradictory unity with the ‘utopia’, a normativity the power of which inheres in its constant penetration of sovereignty.

6.2. *Against the rule of law*

Whether envisaged by the liberal-cosmopolitans or more traditional writers, the rule of law is not a self-evident good. It is a concept that needs unpacking, and it has long had its critics.¹⁶⁸ Generally speaking, these criticisms revolve around the fact that the rule of law is an abstract, formal construction that is not only incapable of reflecting the complexities of reality, but actually serves to obscure them. ‘[T]he formal conception of the rule of law was always a mask for substantive inequalities in power.’¹⁶⁹ This criticism – that the rule of law is abstracting – is quite correct, if itself rather abstract. With the analysis that has been constructed here,

¹⁶⁵ Glennon, ‘The New Internationalism’, p. 2.

¹⁶⁶ A. Callinicos, *Against the Third Way* (Cambridge: Polity, 2001), p. 93.

¹⁶⁷ Grewe, *Epochs of International Law*, pp. 489–490.

¹⁶⁸ For an overview of the debates, see P. Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ (1997) *Public Law* 467. Perhaps most famous of the critics is Roberto Unger, in R. Unger, *Law in Modern Society* (New York: Free Press, 1977), pp. 176–81. See also the writers collected with A. Hutchinson and P. Monahan (eds.), *The Rule of Law: Idea or Ideology* (Toronto, Carswell, 1987), particularly the editors themselves. For a particularly splenetic attack on the Critical Legal Studies movements approach to the rule of law, see Walker, *The Rule of Law*, pp. 256–87. Walker produces very much more heat than light, but is interesting as an example of the defensive outrage with which mainstream jurisprudence is capable of reacting to attacks on the fetishised object of its attention. Some of Walker’s claims – for example, that there is a ‘CLS-clerisy monopoly of legal coverage in the mass media’ (p. 378) – are nothing short of absurd.

¹⁶⁹ Craig, ‘Formal and Substantive Conceptions’, p. 474. See also A. Hutchinson and P. Monahan, ‘Democracy and the Rule of Law’, in Hutchinson and Monahan (eds.), *The Rule of Law*, p. 114.

that critique can be brought to bear on the desire for an international rule of law between states, and can also be concretised.

The question of legal nihilism, or the ‘deniers’, to use Lachs’s phrase, has ‘often confused the question of whether international law is “law” with the problem of the effectiveness and enforcement of international law’¹⁷⁰ (Lachs himself blurs that distinction).¹⁷¹ Obviously, in focusing precisely on the specific ‘law-ness’ of the legal form, and in elaborating that the international state system is intrinsically constituted by the juridical forms that underpin international law, I do not see international law as a weak or non-existent force between states, and am a denier in neither of those senses. However, I am a ‘denier’ in an alternative sense – one also touched on by Lachs and others, but never with a sense of its specificity¹⁷² – in that I see no prospect of any systematic progressive political project or emancipatory dynamic coming out of international law.

International law is made actual in the power-political wranglings of states, ultimately at the logic of capital, in the context of an imperialist system. In other words, the very social problems which liberal-cosmopolitan writers want to end are the result of the international system, which is the international legal system. The forms and relations of international law are the forms and relations of imperialism.

Attempts to reform law can only ever tinker with the surface level of institutions. It would, obviously, be fatuous to deny that law could ever be put to reformist use. Marx himself discusses the Factory Acts of the nineteenth century and certainly sees in them ‘progress’. But the recourse

¹⁷⁰ Malanczuk, *Akehurst’s Modern Introduction*, p. 5.

¹⁷¹ He describes as deniers those for whom ‘the prevailing lawlessness offered no evidence of any rule of law among nations’ (M. Lachs, *The Teacher in International Law* (The Hague: Martinus Nijhoff, 1987), p. 10), but he lumps together Austin, who famously denied that international law was law ‘properly so-called’, asserting instead that it was only ‘positive morality’ (p. 15), and Morgenthau, who asserts that ‘law will give way to politics’ (H. Morgenthau, *In Defense of the National Interest* (New York: Knopf, 1981), p. 144).

¹⁷² When Lachs says that ‘at the opposite end of the spectrum’ from the deniers are the Utopians (Lachs, *The Teacher*, p. 18), those utopians are writers who envisage ‘an ideal State or world’ (p. 19) brought about by that law. They are therefore, in fact, the ‘opposite’ neither of those who do not believe that international law is law, nor those who believe that international law has a negligible effect on states’ actions, but of those who believe that international law can never systematically be used to improve the world. When Schachter considers ‘the sceptics of international law’ it is this third strand of denial that he focuses on: he is concerned with ‘those who doubt . . . that international law can contribute significantly to international order’ (O. Schachter, *International Law in Theory and Practice* (Leiden: Martinus Nijhoff, 1991), p. 5).

to law can only ever be of limited emancipatory value, and not just, as Marx argues, because such ‘progress’ is always hedged by ‘retrogression’.¹⁷³

One limiting factor is specific to international law. For Marx, the ‘formulation, official recognition and proclamation by the state . . . [of the Factory Acts was] the result of a long class struggle’.¹⁷⁴ Very crudely, the contending classes fought quite directly to fill the legal form with specific content, and at particular points the working class triumphed. That the ruling class was often able to turn these triumphs to its own advantage does not mean the battles were not worth having, or that the successes were not manifest in ‘progressive law’. However, at an international level, the class struggle over the legal form is far more mediated. States, not classes or other social forces are the fundamental contending agents of international law – though of course other agents are sometimes the subjects of such law – and while their claims and counterclaims are certainly informed by their own domestic class struggles, they do not ‘represent’ classes in any direct way – it is generally the opposing ruling classes of the different states which are clashing with the legal form. This is certainly not to foreclose any possibility of a ‘progressive’ international legal decision, but it is to argue that such moments will be more tenuous, unstable and unlikely than their domestic counterparts, because, exceptional circumstances aside, every international legal decision represents the triumph of (at least) one national ruling class – it is they, after all, who have had recourse to the legal form – rather than of any exploited classes or oppressed groups at all.

There is also a more fundamental sense in which radical change, or even the systematic amelioration of social and international problems, cannot come through law. As Pashukanis’s form-analysis shows, the system which throws those problems up is the juridical system which underpins the law attempting to solve them. Law is a relation between subjects abstracted of social context, facing each other in a relationship predicated on private property, intrinsically dependent on coercion. Internationally, law’s ‘violence of abstraction’ is the violence of war.

Fundamentally to change the dynamics of the system it would be necessary not to reform the institutions but to eradicate the forms of law – which would mean the fundamental reformulation of the political economic system of which they are expressions. The political project to achieve this is the best hope for global emancipation, and it would mean the end of law.

¹⁷³ Marx, *Capital*, vol. 1, p. 395.

¹⁷⁴ *Ibid.*, p. 395.

The commodity-form theory of international law is in its early stages, and might hopefully be built on with examinations of specific historical moments and fields within international law, as part of a wider research project. But of all the insights that this approach offers, none is more important than the unapologetic response offered to those who call for the rule of law. The attempt to replace war and inequality with law is not merely utopian – it is precisely self-defeating. A world structured around international law cannot but be one of imperialist violence.

The chaotic and bloody world around us *is the rule of law*.