# Class Structure of International Law*

Faruk Yalvaç

**ABSTRACT**
This article analyses the implications of commodity form theory in explaining international law. It argues that international law reflects the underlying social relationships of inequality in the world system and plays an essential role in the reproduction of capitalist relations of production. International law is seen as having an ideological function in concealing social contradictions and actual content of social relations. This argument is demonstrated through a critique of the commodity form theory developed by Pashukanis whose views on international law are different from the instrumentalist understanding of law prevalent in Marxist literature. According to Pashukanis, to understand the class basis and class specificity of law requires a critical analysis of the legal form itself. Law is a historical form, is the product of a particular type of society and expresses certain social relationships. What are therefore necessary are a materialist explanation of the legal form and the explanation of the material conditions which brought legal categories into being. This is as true for law in general as it is for international law.

**Key Words:** International law, Pashukanis, Commodity Form Theory, Marxism, Ideology.

## Introduction

This paper attempts to assess the contribution of commodity form theory to our understanding of international law. Modern international law developed as a consequence of the changes that have occurred with the decline of feudalism, the rise of the capitalist world economy and the formation of nation states in Western Europe in the 16th and 17th centuries.[1] It aims primarily to regulate relations between sovereign states. Indeed, if there were no sovereign states, there would be no international law. The Treaty of Westphalia in 1648 for the first time legitimated the state as the primary unit of politic organization in the world economy and

*This article is a chapter from Faruk Yalvaç's unpublished PhD thesis *Sociological Aspects of Inter-State Relations: System, Structure and Class*, London School of Economics and Political Science, June 1981. The chapter is kept in its original form not to change the argument since the subject has become increasingly popular twenty years after it has been first written.

[1] For a general history of law and its relation with capitalism see Michael. E. Tigar, *Law and The Rise of Capitalism* (New York: Monthly Review Press, 1977)

stablished the first rules of international law. The world economy has since then reproduced itself as a state system.

The main features of international law are related to the structure of the inter-state system which this law reflects. There is no external authority above states corresponding to the state in municipal law. From this follows the three crucial features of the international legal system: "the most exclusive power of states to make the legal rules by which there are bound; their no less significant power to interpret the obligations so assumed; and their ultimate responsibility for securing the observance of their legal rights".[2] It is precisely these distinctive features of international law that have led many jurists to question whether in the absence of any coercive authority, international law deserves to be called law: sometimes the sovereignty of the state is sacrificed to international law, sometimes international law is sacrificed to secure the sovereignty of the state.

The doubt as to the existence of international law is the outcome of a more fundamental question in the theory of international relations: how can law and order exist without authority? It is at this point that the comparison with primitive societies is invoked to prove that order can exist without authority and law can be binding without sanctions. World polity is then called a 'primitive system' and international law 'primitive law'[3]

The analogy with primitive societies is generally used to invalidate the positivist criterion which associates the reality of any legal norm with its power of sanction. For instance according to Austin who defines law as a 'species of commands', the term "international law" is a contradiction in terms: "to the extent that it is law, it is not international law; to the extent that it is truly international, it is not law". [4]

No matter how much this view is criticized, it still touches upon a fundamental truth: that there is no coercive authority above states. It

[2] J.G. Merrils, *Anatomy of International Law* (London: Sweet and M., 1976), p.2.
[3] Roger Masters, "World Politics as a Primitive Political System", *World Politics* (Vol. 16, No. 4, 1964), pp. 595-619; Hans Kelsen, *Principles of International Law*, Robert Tucker (ed.), (New York: Holt, Reinehart and Winston), p. 20. This analogy is generally invoked without always questioning its underlying premises. It is based on the fact that both primitive and international societies are without a state. As Pierre Clastres argues, "primitive societies are without a state. This factual judgment, a value judgment…What the statement says in fact is that primitive societies are missing something-the state- that is essential to them, as it is to any other society our own for instance…that every society is condemned to enter into that history and pass through the stages which led from savagery to civilization". Pierre Clastres, *Society Against the State* translated by Robert Hurley, (Oxford: Oxford University Press, 1977), p. 169. This we can argue is the basis of the distinction in international law between the civilized and barbarian nations of the world, as it still is the premise of the idea of the world state.
[4] Evgeny B. Pashukanis, in Chris Arthur (ed.), *Law and Marxism-A General Theory* (London: Ink Links, 1978), p. 180.

follows from this fact that first, the effectiveness of international law ultimately depends on the balance of forces with the state system, and second that states resort to international law as long as their interests correspond to it. But it is generally agreed this does not change the legal character of international law itself.

There is however, one serious shortcoming of the positivist criteria: what is important in law is not only its coercive character but as Marx above all has shown also its ideological role in legitimating the power structure of a society. This brings me to the centre of my arguments in this chapter; in what sense can international law be considered ideological?

**Approaches to International Law**

In claiming that law is ideological and therefore obscures social contradictions and actual content of social relations, the Marxist view of law is fundamentally different from the orthodox view of international law. According to the received understanding, international law refers simply to the sum total of the rights and duties of states. The rights and duties of individuals within municipal law are taken for granted and transposed as equally applicable (with qualifications deriving from the structure of 'international society' and from the differences in the subjects of law) to the relations between the states. Rather than conceiving' 'law to be the result of one particular kind of society',[5] its fundamental premises is *ui-societas ibi jus*- where there is society, there is law.

Law is presented here as an ahistorical category, its social and historical character is reduced to 'general categories of control, repression, imperative-coordination, sanction, power, regulation, and so on". [6] In so far, as law is given any social content, this is sought in " 'the idea of law', 'justice', 'reason', 'the idea of order', conscience'," (as in the tradition of natural law) or law is divorced from any social content in being treated as a 'self-contained-pure theory",[7] (as in the positivism of Kelsen). The main feature of bourgeois legal science, as Turkin argues, is to deny the class character of law.[8]

In contrast to the orthodox view, the primary aim of the Marxist approach to law is to establish the class character and class specificity of

[5] Isaac D. Balbus, "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy of Law", *Law and Society Review* (Vol. 11, No. 3, 1977), p. 583.
[6] Ben Fine, "Law and Class" in Ben Fine (ed.), *Capitalism and the Rule of Law: From Deviancy Theory to Marxism* (London: Hutchinson, 1979), p. 168.
[7] Grigory I. Tunkin, *Theory of International Law*, translated by William E. Butler (London: George Allen & Unwin Ltd., 1976), p. 226.
[8] Ibid.

law.[9] It tries to relate law to the material conditions of social life to show that law is primarily a social relation of class which functions to protect and preserve not common and shared values but dominant interests in society. Law is considered not as an inevitable aspect of social life (*ubi-societas ibi jus*) but as a product of a particular type of society and therefore a historical category.

In so far as the study of international law is concerned, there is no satisfactory Marxist analysis yet existing. In current Marxist literature, written mostly by Chinese and Soviet scholars, international law is generally explained simply as the superstructure of an economic base. The interpretation of law and politics in terms of the base/superstructure model can be found in such texts of Marx and Engels as *The German Ideology, The Poverty of Philosophy* and *Capital*. [10] Its clearest expression is in the famous Preface of 1859 to *A Critique of the Political Economy,* where Marx argues that the totality of the relations of production constitutes "the real foundation on which the legal and political superstructure arises". [11]

This view of law as an epiphenomenon of an economic base has been put forward, for instance by Tunkin:

> "International law, just as law in general, is a category of the superstructure. Therefore, the general law of the development of human society having the closest relationship to international law is the law of the dependence of the social superstructure on the base; that is the economic structure of society".[12]

In this conception international law is sometimes considered the superstructure of capitalism, sometimes of socialism. The difficulties of characterizing international law as the superstructure of a double economic base have been expressed in the following way:

> "There exist only two fundamentally mutually opposed economic systems: the socialist economic system based on the system of public ownership of the means of production and the capitalist economic system based on

[9] Maureen Cain and Alan Hunt, *Marx and Engels on Law* (London: Academic Press, 1979), p. 62.
[10] Karl Marx and Freidrich Engels, *The German Ideology*, Chris Arthur (ed.), (London: Lawrence and Wishart, 1974); Karl Marx, 'The Poverty of Philosophy', in *Marx and Engels: Collected Works* (London: New York and Moscow: International Publishers, Vol. 6, 1977); Karl Marx, *Capital*, 3 Volumes (London: Lawrence and Wishart, 1974).
[11] Karl Marx, *A Contribution to the Critique of Political Economy* (London: Lawrence and Wishart, 1971), p. 3.
[12] Tunkin, op.cit. in note 8, p. 232.

> the system of private ownership of the means of production… 'World law' then is the superstructure of which economic base? What type of economic development does it reflects?"[13]

Closely related to this conception is the instrumentalist thesis according to which international law is merely an instrument of the ruling classes of different states within the world system. Such an approach can again be found in Marx's early as well as later writings. Indeed, Marx had developed such a view in *On the Jewish Question* and in his article on the *Debates of the Law of Thefts of Wood.* We can distinguish several variants of the instrumentalist thesis. A Chinese scholar, for instance, argues in the following way:

> "…as norms of international law are enacted through agreements among states, international law reflects not only the will of the ruling class of a state, but also the will of the ruling classes of the respective states participating in the agreement".[14]

This instrumentalism is sometimes expressed through the class origin and background of international lawyers:

> "…every international law scholar starts from the interests and practical necessity of his own class and attempts to make international law serve the foreign policy of his own class".[15]

And sometimes it is articulated through an instrumentalist concept of foreign policy and an instrumentalist concept of rules:

> "…International law serves the external policy of a country and is the legal form for realizing a country's external policy".[16]
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> "Although the bourgeoisie has never practiced the principle of sovereignty and the principle of equality, and the principle of non-intervention, they were all originally proposed by the bourgeoisie. The socialist states have not only accepted these principles, but

[13] Jerome A. Cohen and Hungdah Chiu (eds.), *People's China and International Law: A Documentary Study* (New Jersey: Princeton University Press, 1974), p.56.
[14] Ibid., p. 33.
[15] Ibid., p. 56.
[16] Ibid., p. 52.

> they have also infused new democratic substance into them. Although these international norms have changed with the change of socio-economic base, they have continued to exist as the superstructure created by the base and exclude all elements created by historical development".[17]

## Form and Content of Law

No doubt, the demonstration of the *economic and class content* of international law is an important step in its critique, however it is not sufficient to understand the class nature of international law. It is here that Pashukanis has made an important contribution to legal theory, and it is to his contribution and the implications of his views for the study of international law that the remaining of his character will be devoted. The reduction of legal norms to their economic content, Pashukanis argues, cannot explain how law itself mediates class relations. Pashukanis accepts that law is a category of the superstructure and that it can indeed be manipulated by the ruling classes to defend their interests. However, to understand the class basis and class specificity of law requires, according to Pashukanis, a critical analysis of the legal form itself.[18] Against Stuchka, for instance, he argues that it is not sufficient to "disclose the class content comprised in juridic forms", it is also necessary to explain why this content takes such a form, for it is not only the content but also the form of law which is inherently bourgeois.[19] Pashukanis admits that bourgeois legal theorists such as those in the natural law tradition or the formalist school also recognize the specificity of the legal form, but he accuses them of failing to analyze law as corresponding to certain relations in society. Law is a historical category, is the product of a particular type of society, and expresses certain social relationships. What is therefore necessary is a materialist explanation of the legal form, the explanation of the material conditions which brought legal categories into being.

It is necessary to analyze the form of law Pashukanis argues, otherwise it would not be possible to understand the difference between legal forms and other social relationships that involve regulative norms. He

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[17] Ibid.

[18] The relative autonomy formulation which has been put forward to rescue the base/superstructure metaphor from its determinist implications would equally be inadequate from this perspective for it still conceives of legal relations as external to relations of production where they are seen as "limited to the narrow sphere of direct production of commodities." i.e. immediate process of production, rather than as a "total connected process, i.e. as a process of reproduction". Sol Picciotto, "The Theory of the State, Class Struggle and the Rule of Law", Ben Fine et.al. (eds.), *Capitalism and the Rule of Law: From Deviancy Theory to Marxism* (London: Hutchinson, 1979), p. 168.

[19] Pashukanis, op.cit. in note 5, p. 140.

is interested in why the regulation of social relationships takes a legal form for it is only under certain conditions that relationships assume a legal character and rules become legal rules.[20]

The juridical factor in human conduct arises, historically, with the differentiation and opposition of interests accompanying *commodity exchange.* Commodity exchange is inherently conflictual where each commodity owner pursues his self interests: "it is disputes, conflicts of interest which create the legal form".[21] Therefore, the economic relation of exchange must be present for the legal regulation of the contracts and purchase and sale to arise.[22] In this way, the economic relation becomes the source of the legal relation and is reflected in the form of law.

The relation between commodity exchange and legal regulation is not only a historical but also a logical relation. The logic of legal concepts corresponds to the logic of social relationships of commodity production. Pashukanis shows this logical connection by drawing an analogy between the commodity form and the legal form.

**The Commodity Form and the Legal Form**

The importance of this analogy consists in showing the inequality concealed by the legal form. In developing his analogy, Pashukanis relies on Marx's analysis of the commodity in *Capital.* Commodities are things that satisfy human wants. Each commodity has two aspects. First, a commodity has a use value which lies in its capacity to satisfy different wants. But the fact that a thing has a use value does not in itself mean that it is a commodity. To become a commodity, use values must be exchanged. Use values are exchanged because they have incommensurable values, in other words, they cannot be substituted with each other. In the process of exchange, the product acquires a second characteristic which specifically differentiates it as a commodity. Marx calls this feature of the commodity Exchange value, which is an expression of a commodity's capacity to Exchange with other commodities. Exchange value which is usually expressed in monetary terms gives different commodities a common form.

[20] As Pashukanis argues, "There is a collective life among animals too which is also regulated in one way or another. But it would not occur to us to assert that the relations of bees and ants are regulated by law... Even in bourgeois society there are things like the organization of the postal or rail services, of the military and so on, which cannot be related in their entirety to the sphere of legal regulation unless one views them superficially and allows oneself to be confused by the outward form of laws, statues and degrees. Train time tables regulate traffic in quite a different sense, than, let us say, the law concerning the liability of the railways regulating its relations with consigners of freight. The first type of regulation is predominantly technical, the second primarily legal". Ibid., p. 79.
[21] Ibid., p. 93.
[22] Ibid., p. 75.

In the process of Exchange, their differences as use values lose their significance. All commodities appear as equal despite the different concrete needs to which they correspond.[23]

Wherever commodity production prevails, objects are produced for their exchange value. The ability to be exchanged with other commodities "appears as an intrinsic natural property of objects themselves… which operates behind people's backs quite independent of their will".[24] The exchange value of a commodity is seen as a natural property of the commodity rather than a product of man's labour. Commodities, including Money, acquire a life of their own, dominating the human subjects who in fact have produced them. Taking, in this way, social relationships or the product of social relationships as the universal properties of things is called as we have already discussed in Chapter 1, commodity fetishism by Marx.

According to Pashukanis, law arises at the same time as Exchange value and regulates the realm of social relationships accompanying it. Each commodity must be exchanged with another since "commodities cannot send themselves to a market and perform exchange in their own right".[25] It must be the commodity owners who will Exchange them. Therefore, it is when the product of labour assumes the quality of a commodity and has a bearer of value that people become the bearer of rights and acquire the quality of legal subjects.[26] The constant transfer of property rights in the market creates the notion of an immobile bearer of these rights and forms the basis of the subject as a general legal category.

The "cell form" of the legal system is the subject for "every legal relation is a relation between subjects" [27] The subject in law is generally thought of as having certain rights. Rights of the subjects, in the argument of Pashukanis, appear to be derived from the relations of economic possession, in other words, relations of property: at the basis of the legal regulation lies relations of Exchange, and since Exchange presupposes private property, then property is the basis of the legal form. The legal subject becomes "the abstract owner of commodities raised to the heavens".[28]

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[23] For purposes of simplification, I have omitted in this discussion the distinction between abstract and concrete labour. Marx calls the labour involved in the production of use values concrete or useful labour. "Abstract" labour on the other hand, is the basis of exchange value. See Derek Sayer, *Marx's Method: Ideology, Science and Critique* (Brighton: Harvester Press, 1979), chp. 1, whose arguments I follow in this secton. See also Balbus, op.cit. in note 6, p. 574.
[24] Pashukanis, op.cit. in note 5, p. 112.
[25] Ibid., p. 112.
[26] Ibid., p. 113.
[27] Ibid., p. 109.
[28] Ibid., p. 121.

Economically the object dominates man, while legally the man dominates the object: the first because the social relationship embodied in the commodity is not under the authority of man, the second because as the possessor and owner of commodities, man becomes merely "the personification of the abstract impersonal legal subject, the pure product of social relations".[29] Man is compensated for his economic subservience to the object by a juridically constituted will 'which makes him absolutely free and equal to other owners of commodities like himself'.[30]

The will and freedom of the commodity owner is expressed in his relationships with other commodity owners. In order for commodities to be exchanged, owners must recognize each other: Exchange or the circulation of commodities is predicated on the mutual recognition of one another as owners by those engaged in Exchange.[31] Exchange therefore, operates on the principle that there is an accord of independent wills, i.e. on the basis of contract. Contract represents one of the necessary legal expressions of the commodity owners' capacity to use and exchange their commodities. The parties to the contract appear as equal in the market (as in the relation between wage labour and capital) and the juridical framework recognizes only this sphere of equality (ignoring for instance the unequal power of competition between the wage labour and capital). Law takes the form that it does for guaranteeing this sphere of exchange relationships.

It is now possible to summarise the relation between the commodity form and the legal form in Pashukanis' framework in the following way: Law deals with the formal equality of citizens (i.e. the analogue of exchange value) and ignores substantive inequalities between citizens (i.e. the analogue of use value).[32] The commodity form and the legal form both equalize relationships in their content.

## Commodity Exchange and International Law

Although not located entirely within his overall theoretical framework, Pashukanis' views on international law can be seen as extensions of his commodity exchange theory. The significance of his argument for international relations lies in the demonstration that we can not take as given the category of law just as we have argued that we cannot take as given the state or the state system. Both law and state are historical categories, therefore presuppose certain relations, and no adequate

[29] Ibid., p. 113.
[30] Ibid., p. 114.
[31] Ibid., p. 161.
[32] Ronnie Warrington, 'Pashukanis and the Commodity Form Theory', *International Journal of the Sociology of Law* (Vol. 9, No. 1, 1981), p. 12.

understanding of either of them is possible without the analysis of these relations.

Pashukanis criticizes the definition of international law as "the totality of norms defining the rights and duties of states in their mutual relations with one another". This definition ignores the historical and the class character of international law. The class character of international law is traced in Pashukanis' argument to the fact that many of the institutions of international law are base on private law emanating from commodity exchange. The essential feature of the law of nations *(ius gentium*) was its establishment of universal rules which were nothing other than a reflection of the general conditions of exchange transactions, i.e. they were reduced to the bases of equal rights of owners, the inviability of ownership and consequent compensations for damages and freedom of contract.[33]

With the development of bourgeois state, the rules of *ius gentium* are applied to relations between states. This is systematically approached for the first time by Grotius, who considers relations between states to be similar to those between the owners of private property (Grotius) declares that the necessary conditions for the execution of exchange, i.e. equivalent exchange between private owners, are the conditions for legal interaction between states. Sovereign states co-exist and are counterposed to one another in exactly the same way as are individual property owners with equal rights. Each state may "freely" dispose of its own property only by means of a contract on the basis of compensation: *do ut des*.[34] The basic or absolute rights of the state formulated by Grotius still form, according to Pashukanis, the basis of international law.

There is a close relationship both between the structure of civil society and international society and civil law and international law. It is the apparent equality in the sphere of circulation of the citizens and the states that forms the basis of both civil law and international law. The basis of civil law relationships in equality between the parties also forms the basis of international law in the form of equality between the states. Just as bourgeois "private law assumes that objects are formally equal yet simultaneously permits real inequality in property", bourgeois international law likewise recognizes that states have equal rights yet in reality they are unequal in their significance and their power.[35] And again, just as private law abstracts from the real inequalities of individuals, international law likewise abstracts from the inequalities of states. The individualism and

[33] Evgeny B. Pashukanis, 'International Law', in Piers Beirne and Robert Sharlet (eds.), *Selected Writings on Marxism and Law* (London: Academic Press, 1979), p. 176.
[34] Ibid.
[35] Ibid.

egotism of the commodity-exchangers-owners of private property- are replaced with the individualism and egotism of the states. Formal equality in both instances goes hand in hand with unequal relationships in their content.[36]

## Criticisms and Conclusion

I now want to turn to the criticisms that can be made of commodity exchange theory. The first problem with the commodity exchange theory is that it is too imprecise. Different modes of production involving production for the market cannot be distinguished merely by reference to commodity exchange.[37] Pashukanis is correct to start his analysis, following Marx, with the sphere of circulation. In the first volume of *Capital*, the emergence of juridical relations is also seen as the "immediate effect" of commodity exchange. However, Marx also demonstrates that unless exchange relationships are related to relations of production (narrowly defined as those relationships involving the extraction of surplus value) the unequal relation between the capital and wage labour remains unexplained.[38] The sphere of commodity circulation or commodity exchange, Marx writes, is the "very Eden of the innate rights of man'" It is the "excusive realm of Freedom, Property and Bentham".[39] The exchange of equivalents that takes place between capital and wage labour shows itself only as an 'apparent exchange' once we turn to the sphere of production,

> "Since firstly the capital which is exchanged for labour power is itself merely a portion of the product of labour of others which has been appropriated without an equivalent; and secondly, this capital must not only be replaced by its producer, the worker, but replaced together with an added surplus. *The relation of exchange between capitalist and worker becomes a mere form which is alien to the content of the transaction itself, and merely mystifies it".*[40]

[36] Charles Beitz correctly notes that the way students of international relations have explained the relations between states have been influenced by the domestic/ international society analogy more than anything else. He gives for example, the principle of non-intervention and argues that this is exactly similar to the individual's right to his body. But his analysis seriously suffers from failing to locate the rights of individuals themselves in its social context, so consequently constraining his analysis of "international society". Charles Beitz, *Political Theory and International Relations* (Princeton NJ: Princeton University Press, 1979).
[37] Christopher J. Arthur, "Towards a Materialist Critique of Law", *Critique* (Vol. 7, No. 1, 1976) pp. 31-46.
[38] Just as unequal exchange within the world economy cannot be explained merely with reference to the sphere of circulation but has to take into account relations under which surplus value is produced.
[39] Karl Marx, *Capital* , Vol. 1 (London: Lawrence and Wishart, 1974) p. 172.
[40] Ibid., p. 547.

It is therefore the "substance" of exchange (the constant reproduction and expropriation without return) which gives law its class character and is not 'hidden in the form itself'. The class basis of law accordingly cannot be understood merely with reference to commodity exchange but law must also be related to relations of production.

It can also be argued against that too much emphasis on the form of law ignores its content, and that the form and content of law form a unity which cannot be separated from each other. Such an objection, however, 'is just as problematic as that which would assume that any content can be 'poured' into a certain form'. If we are at all able to distinguish between form and content, "it must be precisely that we can abstract from the different contents a certain form".[41] The necessity which Pashukanis sees in a materialist analysis of the legal form does not ignore the content of law, but "establishes the limits" to what can be achieved through the legal form. 'The proletariat may well utilize the existing legal forms' Pashukanis argues "but that in no way implies that they could be permeated by a socialist content. These forms are incapable of absorbing this content and must wither away in an inverse ratio with the extent to which this content becomes a reality".[42]

However, it is inevitable that such a standpoint will lead to the rejection of all that can be achieved within the existing system of law. By arguing that all law nature is bourgeois, Pashukanis' argument underestimates for instance, the achievements of the Third World States in bringing about important changes in the content and rules of international law (just as it underestimates the struggle between different classes in bringing about changes in municipal law). The principles of self determination of peoples, prohibition of aggressive war, respect for state sovereignty, non-interference in internal affairs (thought not fully respected in practice and so in this respect not too different from any other legal norm) are not mere ideological masks. They are principles whose (limited) recognition (in practice is certainly better than no recognition at all.

The problem not only with the kind of explanation which Pashukanis puts forwards but also with many Marxist explanations, is that, one the underlying mechanisms that cause a social form is identified (in the critical realist sense), then it is assumed that, everything that can be said about that form is explained. But clearly such an explanation cannot account for the developments of that form of the kind we have just identified. Explaining the actual practice of the reproduction of a form is something different than the explanation of its origins.

[41] Arthur, op.cit. in note 38, p. 45.
[42] Pashukanis, op.cit in note 5, p. 160.

It is also possible to argue that the terms of the relation between economic and political exchange emphasized by commodity exchange theory have changed with the rise of state monopoly capitalism and the internationalisation of the relations of production. Pashukanis' theory relies partly on Marx's distinction between the use value and the exchanged value of a commodity. He argues that just as the market functions by ignoring use value and concentrates on exchange value, so law operates in a similar way: it deals with the formal equality of citizens and ignores substantive inequalities between citizens.[43] But is this correct? Can be legitimacy of the state and international institutions be secured merely with reference to the rule of law? Does not law deal (especially today) with substantive inequalities as well? Indeed, just as the contradictions of capitalism which have come to the forefront can no longer be offset by exchange equivalence in the sphere of circulation,[44] and therefore have resulted in the production of use values by the state (welfare services in general), so relations between states are also no longer maintained on the basis of exchange equivalence and have therefore led to the development of an "inter-national law of welfare' (as witnessed for instance in the formation of (institutions like) ILO, which is concerned with the regulation of the conditions of labour.[45]

We have already referred to the argument above that the late capitalism is characterized by a transition from the sphere of circulation to the sphere of reproduction where struggles for the distribution of surplus value takes prominence and relations within the civil society can no longer be managed by equality in the sphere of circulation. I think, in view of increasing importance of the issues of welfare in determining the content of international law, the same argument can equally be extended to the international sphere where the equality in the sphere of circulation (sovereign equality of states) is being replaced by a sphere of reproduction as witnessed by the struggle for distribution for the global surplus value is the subject of the New International Economic Order.

If this argument is accepted, then the consequences of the transition from the *sphere of circulation* to the *sphere of reproduction* can be summarized in the following way.[46]

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[43] Warrington, op.cit. in note 33, p. 12.
[44] Picciotto, op.cit. in note 19, p. 174.
[45] Wolfgang Friedman, "Human Welfare and International Law: A Reordering of Priorities", in W. Friedman et.al. (eds.), *Transnational Law in a Changing Society: Essay in Honor of Philip C. Jessup* (New York: Columbia University Press, 1972), p. 12.
[46] I follow here the arguments of John Urry, *The Anatomy of Capitalist Societies: The Economy, Civil Society and the State* (London: Basingstoke: Macmillan, 1981), ch. 6 which are developed in the context of domestic societies.

1. Once legal equality is achieved, relative deprivation among the states comes to assume a more important source of conflict and dominate the agenda of international politics. This is expressed in conventional terminology as the dominance of issues of Welfare, as opposed to issues of high politics, or in the words of Friedman to the "vertical extension of international law".[47] Consequently, there is an increasing politicisation of issues which were considered as not subject to political conflict in the past.

2. One major consequence of the dominance of welfare issues in international politics is, as we have already indicated, a more intense struggle over the global distribution of surplus value. This in turn brings forward collective forms of struggle –as in UNCTAD- to prominence.

3. All these have the effect of increasing the number of international institutions as well as the scope of their action (referring to the horizontal extension of international law). The international institutions are more and more subject to different demands of various groupings.

4. This in turn is forcing changes in the very nature of the representation in international institutions (as witnessed for instance in the increasing power of the Third World States in the General Assembly).

5. The same process which increases the power of the third world states in international *politics* will further mobilize and popularize the obvious contradiction between legal equality and unequal relations between the states. When legal equality can no longer be denied, more informal means of domination through the international institutions assume significance, as in the functioning of international institutions through selective mechanisms. This is very important, for the surplus value that has to be directed for the fulfillment of new demands inevitably comes from the tax payers and if more surplus value is allocated to ensure hegemony globally, the more it becomes difficult to ensure it domestically, since the state itself is the locus of increasing demands which it can no further fulfill.

6. Consequently international institutions may lose more and more of their legitimating functions globally. It is this emerging and

[47] Wofgang Friedman, *The Changing Structure of International Law* (New York: Stevens, 1964), pp. 206-210.

increasingly irresolvable contradiction that may mobilize forces for substantial change in the world system.

In evaluating these changes outlined above, it is essential to underline that the internal structure of the third world states may not and in general does not enable the equal distribution of benefits that may be achieved internationally. The significance of the changes occurring the international sphere therefore cannot be understood if we confine our analysis merely to that level alone, and that the precondition for the development and effectiveness of new international norms may be structural changes of a radical kind in 'domestic societies'.

I want to conclude by pointing to one very important implication of the commodity exchange theory for the study of international law (and more generally for the study of international relations). The commodity exchange theory shows that the relations between states take place within a sphere dominated by bourgeois legal norms. It is important to recognize that these norms are established through prior abstraction from the real social inequalities of a class (capitalist) society. Law in its origin (in Pashukanis' as well as in the Marx's argument) is related to the division of labour and the development of private property. It is therefore rooted in inequality. The formation of international law involves a second abstraction from the inequalities between states. In this sense, relations between states in their totality presuppose (and have the effect of reinforcing) a set of social relations which makes it impossible for genuine equality and community to flourish.

The founding of international relations on bourgeois legal norms can be seen in the way relations between the states are conducted as if they were contractual relations. Indeed, these relations depend "in particular on a legal instrument-international agreement- and on a legal principle- that agreements must be carried out".[48] –*pacta sund servanda*. In this way, the idea of contract is universalized (and here lies its ideological significance) and extended to other spheres which are not directly connected with economic reproduction and contractual transactions. At the root of the idea of contract are relations of exchange and therefore relations of property. These too are taken for granted in the relations of exchange between states (especially in trade and financial relations). As Louis Henkin argues,

> Property rights are taken for granted in all international trade and finance... the relations of one national with one another, as soon as they begin, are permeated by basic legal concepts:

[48] Louis Henkin, *How Nations Behave* (USA: Library of Congress, 1979), p. 320.

> nationality, national territory, property, torts, contracts, rights and duties and responsibilities of states. These do not commonly occupy the attention of diplomats. They too are taken for granted because they are rarely an issue.[49]

While it is true that property rights are taken for granted in the trade and financial relations of one nation with one another, this too presupposes the prior political suppression (through selective mechanisms of the state) of the questions of private property and/or class inequalities associated with it. Of course, as I have argued above, international institutions also function in a similar way. However, this is, so to speak, a second order selection which presupposes the selection mechanisms of the first kind.

The dominance of bourgeois legal norms in international relations can also be seen in the practice of socialist states. As Beirne and Sharlet argue "the legal practice of most, if not all, social formations dominated by the political rule of the proletariat have included the form and very often the content of the legal rules associated with the capitalist mode of production".[50] Indeed, the commitment to these bourgeois rules can be witnessed in the development of a socialist international law. It can also be seen in the replacement of the notion of international law of transition (which Pashukanis emphasizes) with that of international law of co-existence.[51]

One of the implications of the Marxist view of law that is presented (here) is to show that a socialist society is one where legal forms are transcended since the objective necessity for legal intercourse (i.e. commodity production) would disappear.[52]

Another implication of this view is that the existing legal norms, no matter how they are utilized by the proletariat or the socialist states, cannot be permeated by a socialist content. Consequently, one of the primary aims of the proletarian revolution becomes the end of rule of law altogether. In the Marxist view; the "equality" expressed in the legal form conceals the

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[49] Ibid., pp. 17-18.
[50] Beirne and Sharlet, op.cit. in note 34, p. 64.
[51] Chris Osakwe, "Socialist International Law Revisited", *American Journal of International Law* (Vol. 66, No. 3, 1972), pp. 596-600.
[52] Note that I am saying commodity production and not capitalist mode of production. Commodity production achieves its full expression in the capitalist mode of production with the rise of "free labour" and when labour power itself becomes a commodity, but cannot simply necessarily entail the rule of capital. See Philip R. D. Corrigan and Derek Sayer "How the Law Rules: Variations on Some Themes in Karl Marx" in B. Fryer et al (eds.), *Law, State, and Society* (London: Croom Helm, 1981), pp. 21-53.

inequalities out of which it originates.[53] A socialist world system therefore entails not only the abolition of the state, but also the abolition of the rule of law.

[53] "Equal right" Marx argues "is a right of inequality in its content like every right. Right by its very nature can consist only in the application of an equal standard; but unequal individuals.. are measurable only by an equal standard in so far as they are brought under an equal point of view, are taken from one definite side only. To avoid all these defects, right instead of being equal would have to be unequal." Karl Marx, *Theories of Surplus Value,* Vol. 2 (London: Lawrence and Wishart, 1968), p. 320.

## Postscript to *Commodity Form Theory and Class Structure of International Law*

The above paper was written thirty years ago as part of my PhD thesis submitted at the London School of Economics in 1981. The main aim of the thesis was to develop a sociological understanding of international relations compatible with the principles of critical realism.[1] Against this background, the present chapter published here on international law attempted to analyse the arguments of Pashukanis to develop a sociology of international law. The thrust of my argument was to demonstrate the class character of law by elaborating on Pashukanis' commodity form theory using the insights of critical realism. Therefore, international law is taken more as a case study for developing a sociology of international law. For instance, as my main focus was to place commodity form theory in the context of different approaches to international law, the paper does not deal with the question of the *law-ness* of international law or its main features emanating from the absence of an overarching authority in the relations between the states.

Despite its far reaching importance and implications for developing a sociology of international relations, scientific realism or critical realism as the term is used in the context of social sciences, has drawn the attention of only a few scholars in the international relations discipline. The principles of critical realism are important for the development of a sociology of international law in three main respects: First it provides a critique of the positivist tradition dominant in the mainstream IR and the study of international law. The scientific realist criticism of positivist arguments started at the beginning of the 1980s by bringing in the issue of the centrality of ontology as opposed to epistemology in understanding social forms such as the state and the law. The implication of this is the questioning of the social forms, tracing their historical nature and the constraints which these forms put on emancipatory human action. Secondly, critical realism helps provide an ideology critique of international law by demonstrating that the apparently egalitarian structure of international law is based on an objective reality of unequal relations. Finally, critical realism underlabours an historical materialist analysis of international law to fill in the gap within IR theory of the absence of an historical materialist analysis. By demonstrating the importance of the legal form and of international law for the reproduction of capitalist relations of production, critical realism draws attention to the importance of ideology, in addition to economics and politics, in the reproduction of capitalism. This makes it possible to analyse

[1] An important literature emerged on critical realism especially in the 2000s. See particularly Jonathan Joseph and Colin Wight (eds.), *Scientific Realism and International Relations* (New York: Palgrave Macmillan, 2010).

capitalism in terms of an interrelated complex totality and unity of economic, political and ideological relations.

Recent decades have seen an incredible spur of literature on critical international law especially the rise of what is commonly known as Critical Legal Studies and "New Stream" of critical legal scholarship.[2] However, the commodity form theory and its implications for international law and international relations has attracted the attention of only a few scholars like Chine Miéville[3] and B.S. Chimni,[4] As Miéville argues, "one of the limitations of the New Stream approach is in its implicit theory of the social world, an idealist constructivism... privileging abstract concepts over the historical context in which certain ideas take hold" "leave(ing) 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". [5] It must be underlined that this is a failure shared by traditional definitions of IL as well as more postmodern versions which ignore the form of law.[6]

The basis of my argument developed in the piece above about the significance of the specificity of the legal form still remains valid. 1. To understand the class character of international law, it needs to be studied as part of a totality of social relations distinctive of the capitalist mode of production. As Pashukanis argues, "modern internatonal law is the legal form of the struggle of the capitalist states among themselves for domination over the rest of the world".[7] 2. Similar to domestic law, international law is part of capitalist property relations. States interact with

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[2] Nigel Purvis, "Critical Legal Studies in Public International Law*" Harvard International Law Journal* (Vol. 32, No. 1, 1991), pp. 81-127; Anthony Carty, "Critical International Law: Recent Trends in the Theory of International Law", *European Journal of International Law* (Vol. 2, No. 1, 1991), pp. 1-27; Deborah Cass, "Navigating the Newstream: Recent Critical Scholarship in International Law", *Nordic Journal of International Law* (Vol. 65, No.3-4, 1996), pp.341-383; William Aceves, "Critical Jurisprudence and International Legal Scholarship: A Study of Equitable Distribution", *Columbia Journal of Transnational Law* (Vol. 39, No. 2, 2001), pp. 299-394.

[3] China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Netherlands: Brill- Leiden, 2005) which was also based on a PhD thesis submitted at the International Relations Department of the London School of Economics twenty years later.

[4] B.S. Chimni, *International Law and World Order* (New Delhi: Sage, 1993); "Marxism and International Law: A Contemporary Analysis", *Economic and Political Weekly* (6 February 1999), pp. 337-349; "Toward a Radical Third World Approach to Contemporary International Law", *ICCLP Review* (Publication of the International Center for Comparative Law and Politics) (Vol. 5, No. 2, 2002), pp. 14-26.

[5] China Miéville, "The Commodity- form theory of international law", in Susan Mark (ed.), *International Law on the Left: Reexamining Marxist Legacies* (Cambridge: Cambridge University Press, 2008) pp. 92-97.

[6] For example Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Lakimiesliiton, Kustannus, 1989).

[7] Evgeny Pashukanis, "International Law", in Piers Beirne and Robert Sharlet (eds.), *Pashukanis: Selected Writings on Marxism and Law* (London: Academic Press, 1980), 273-301.

each other similar to property owners. This implies that law whether domestic or international law emerges as a result of similar social mechanisms of domination and is therefore interconnectetd with each other in diverse ways. 3. To develop a Marxist theory of law and to understand the class character of a social form, it is not possible just to insert an element of class struggle into the analysis of law. [8] The instrumentalist approach to the state widely discussed in the 60s until late 70s[9] have still some proponents as can be seen in the approach adopted by Chinmi and criticized by Mieville. For instance, to demonstrate the class character of international law, Chimni argues that "a transnational capitalist class is shaping international law and institutions in the era of globalization".[10] He argues that "CIL may be characterized as bourgeois imperialist internationalist law which codifies the interests of an emerging TCC (transnational capitalist class) at the expense of interests of TOC and substantially global democracy." [11] This understanding however does not question "why these interests or functions should have been served by the *legal* form of regulation". [12] However, Chimni wants to avoid a determinist approach in answering this question when he argues that "CIL (capitalist international law) has both a constitutive function and a degree of independence from dominant class interests."[13] 4. As Pashukanis argues, it is not enough to understand the class character of IL only by analysing its content but it is necessary to analyse its form. Here again it is possible to site Chimni who emphasizes the importance of the ideological content of international law rather than its structure.[14] A similar criticism can be directed to the CLS alternative. As Mieville argues, "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".[15]

[8] Evgeny Pashukanis, *Law and Marxism: A General Theory* (London: Link Inks, 1978).
[9] The famous state debate between Ralph Miliband and Nicos Poulantzsas raised certain problems in Marxist state theory that is still not totally resolved. Nicos Poulantzas, "The Problem of the Capitalist State," *New Left Review* (No. 58, 1969), pp. 67-78; Ralph Miliband, "The Capitalist State: Reply to Poulantzas" *New Left Review* (No. 59, 1970), pp. 53-60; and Nicos Poulantzas, "The Capitalist State: A Reply to Miliband and Laclau" *New Left Review* (No. 95, 1976), pp. 63-83.
[10] B.S. Chimni, "Prolegomena to a Class Approach to International Law", *European Journal of International Law* (Vol. 21, No. 1, 2010), pp.57-82 http://ejil.oxfordjournals.org/content/21/1/57. full, Accessed on 13.04.2011, p. 1.
[11] Ibid., p.5.
[12] Ben Fine, "Law and Class", in B. Fine et.al. (eds.), *Capitalism and the Rule of Law* (London: Hutchinson, 1979), p. 36.
[13] Ibid.
[14] Chimni, *International Law and World Order*, op.cit. in note 4, p. 102.
[15] Miéville, op.cit. in note 5, p. 97.

The scholarly work done after 1990s under what is called the Third World Approaches to International Law (TWAIL)[16] is a reflection of the changing emphasis of third world countries concerning the content of international law under new globalised capitalism. TWAIL has been one of the main instruments of critique in demonstrating the effects of international law in reproducing capitalist forms of domination, racism, hierarchy and injustice among states[17] but it has not been totally able to go beyond a major critique of Eurocentrism dominant in mainstream international law.[18] As I have argued in my paper, the changes in the content of law, although important, are not enough to bring about changes in the structure of capitalist inequality. Chimni's comment is relevant here: legal sphere is "not the area from which the struggle for radical changes could be launched". [19] The incorporation of decolonisation into the content of IL represents "universalisation of the legal form" inherent in the form of law itself and it is a form of capitalist imperialism. As Miéville argues, "specifically in its universalised form predicated on juridical equality and self determination, international law assumes imperialism".[20] The crucial aspect of commodity form theory and a Marxist analysis of international law lies in its emancipatory implications. Commodity form theory demonstrates the limited liberating potential of law, that law is imbued with violence and imperialism and that recourse to law and the rule of law is not enough to bring about the changes necessary for a "world rule of law". [21]

***Faruk Yalvaç is lecturer in the International Relations Department at the Middle East Technical University***

[16] Makau wa Mutua, "What is TWAIL?" *Proceedings of the 94th Annual Meeting of the American Society of International Law* (April 5-8, 2000), pp. 31-38; David P. Fidler, "Revolt Against or From Within the West? TWAIL, the Developing World, and the Future Direction of International Law", *Chinese Journal of International Law* (Vol. 31, No. 2, 2003), pp. 29-75.

[17] See James Thuo Gathii, "Imperialism, Colonialism and International Law", *Buffalo Law Review* (Vol. 54, No. 4, 2007), pp. 1013-1066; "International Law and Eurocentricity", *European Journal of International Law* (Vol. 9, No. 1, 1998), pp. 184-211.

[18] Anthony Angie and B.S. Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts", *Chinese Journal of Internaitonal Law* (Vol. 2, No. 1, 2003), pp. 77-103.

[19] Chimni, *International Law and World Order*, op.cit. in note 4, p. 208.

[20] Mieville, op.cit. in note 5, p.127.

[21] The expression is from Martti Koskenniemi, op.cit. in note 6.