Zur Theorie der Warenform des Völkerrechts
-Reader-

A. Marx

Karl Marx, MEW, Band 23, “Das Kapital”, Bd. I, Dietz Verlag, Berlin/DDR 1968

1) Die Waren können nicht selbst zu Markte gehn und sich nicht selbst austauschen. Wir müssen uns also nach ihren Hütern umsehn, den Warenbesitzern. Die Waren sind Dinge und daher widerstandslos gegen den Menschen. Wenn sie nicht willig, kann er Gewalt brauchen, in andren Worten, sie nehmen. Um diese Dinge als Waren aufeinander zu beziehn, müssen die Warenhüter sich zueinander als Personen verhalten, deren Willen in jenen Dingen haust, so daß der eine nur mit dem Willen des andren, also jeder nur vermittelst eines, beiden gemeinsamen Willensakts sich die fremde Ware aneignet, indem er die eigne veräußert. Sie müssen sich daher wechselseitig als Privateigentümer anerkennen. Dies Rechtsverhältnis, dessen Form der Vertrag ist, ob nun legal entwickelt oder nicht, ist ein Willensverhältnis, worin sich das ökonomische Verhältnis widerspiegelt. Der Inhalt dieses Rechts- oder Willensverhältnisses ist durch das ökonomische Verhältnis selbst gegeben. Die Personen existieren hier nur füreinander als Repräsentanten von Ware und daher als Warenbesitzer. Wir werden überhaupt im Fortgang der Entwicklung finden, daß die ökonomischen Charaktermasken der Personen nur die Personifikationen der ökonomischen Verhältnisse sind, als deren Träger sie sich gegenübertreten.

Erster Abschnitt: Ware und Geld, Zweites Kapitel: Der Austauschprozeß, S. 99 f.

2) Von ganz elastischen Schranken abgesehn, ergibt sich aus der Natur des Warenaustausches selbst keine Grenze des Arbeitstags, also keine Grenze der Mehrarbeit. Der Kapitalist behauptet sein Recht als Käufer, wenn er den Arbeitstag so lang als möglich und womöglich aus einem Arbeitstag zwei zu machen sucht. Andrerseits schließt die spezifische Natur der verkauften Ware eine Schranke ihres Konsums durch den Käufer ein, und der Arbeiter behauptet sein Recht als Verkäufer, wenn er den Arbeitstag auf eine bestimmte Normalgröße beschränken will. Es findet hier also eine Antinomie statt, Recht wider Recht, beide gleichmäßig durch das Gesetz des Warenaustausches besiegelt. Zwischen gleichen Rechten entscheidet die Gewalt.

Dritter Abschnitt: Die Produktion des absoluten Mehrwerts,
Achtes Kapitel: Der Arbeitstag, S. 249

B. Paschukanis

Eugen Paschukanis, Allgemeine Rechtslehre und Marxismus – Versuch einer Kritik der juristischen Grundbegriffe, (1924/1929), Rudolf Haufe Verlag, Freiburg Berlin 1991

3) Die marxistische Kritik der allgemeinen Rechtslehre steckt noch in ihren Anfängen. (…) Es wird wohl genügen, darauf hinzuweisen, daß die marxistische Kritik solche Gebiete, wie zum Beispiel das Völkerrecht, überhaupt noch nicht berührt hat. Dasselbe gilt für das Prozeßrecht und, wenn auch in geringerem Grade, für das Strafrecht. Auf dem Gebiete der Rechtsgeschichte haben wir nur das, was uns die allgemeine marxistische Geschichtslehre darüber liefert. Nur das Staatsrecht und das Zivilrecht stellen in dieser Hinsicht eine einigermaßen glücklicke Ausnahme dar.

Vorwort zur zweiten russischen Auflage, S. 16

4) Ähnlich wie der Reichtum der kapitalistischen Gesellschaft die Form einer ungeheuren Anhäufung von Waren annimmt, stellt sich die ganze Gesellschaft als eine unendliche Kette von Rechtsverhältnissen dar.

Drittes Kapitel “Verhältnis und Norm”, S. 75

5) Die Rechtsordnung unterscheidet sich gerade dadurch von jeder anderen sozialen Ordungsart, daß sie mit privaten isolierten Subjekten rechnet.

Drittes Kapitel “Verhältnis und Norm”, S. 96

6) Jedes Rechtsverhältnis ist ein Verhältnis zwischen Subjekten. Das Subjekt ist das Atom der juristischen Theorie, deren einfachstes nicht weiter zerlegbares Element.

Viertes Kapitel “Ware und Subjekt”, S. 106

7) Der Rechtsverkehr setzt “seiner Natur nach” einen Zustand des Friedens keineswegs voraus (…). Recht und Selbsthilfe, diese einander entgegengesetzt scheinenden Begriffe sind in Wirklichkeit aufs engste miteinander verbunden. (…) Das moderne Völkerrecht umschließt ein recht ansehnliches Maß von Selbsthilfe (Retorsionen, Repressalien, Krieg usw.).

Fünftes Kapitel “Recht und Staat”, S. 138

8) Warum bleibt die Klassenherrschaft nicht das, was sie ist, d.h. die faktische Unterwerfung eines Teils der Bevölkerung unter die andere? Warum nimmt sie die Form einer offiziellen staatlichen Herrschaft an, oder – was dasselbe ist – warum wird der Apparat des staatlichen Zwanges nicht als privater Apparat der herrschenden Klasse geschaffen, warum spaltet er sich von der letzteren ab und nimmt die Form eines unpersönlichen, von der Gesellschaft losgelösten Apparats der öffentlichen Macht an?

Fünftes Kapitel “Recht und Staat”, S. 45

Evgeny Pashukanis, International Law, in: Selected Writings on Marxism and Law (eds. P. Beirne & R. Sharlet), London & New York 1980, pp. 168-83, 184-5, https://www.marxists.org/archive/pashukanis/1925/xx/intlaw.htm

9) International law (*ius gentium*, *droit des gens*, *Völkerrecht*) is usually defined as the totality of norms regulating the relationships between states. Here is a typical definition: “International law is the totality of norms defining the rights and duties of states in their mutual relations with one another”. (…) But absent from this formal, technical definition, of course, is any indication of the historical, i.e. the class character of international law. It is extremely clear that bourgeois jurisprudence consciously or unconsciously strives to conceal this element of class. (...)

10) Every struggle, including the struggle between imperialist states, must include an exchange as one of its components. And if exchanges are concluded then forms must also exist for their conclusion. But the presence of these forms does not of course alter the real historical content hidden behind them. At a given stage of social development this content remains the struggle of capitalist states among themselves. Under the conditions of this struggle, every exchange is the continuation of one armed conflict and the prelude to the next. Here lies the basic trait of imperialism. (...)

11) The real historical content of international law, therefore, is the struggle between capitalist states. International law owes its existence to the fact that the bourgeoisie exercises its domination over the proletariat and over the colonial countries. The latter are organized into a number of separate state-political trusts in competition with one another. (...)

12) Turning now to consider the legal form of international law, we will first note that orthodox theory considers the subject of international legal relations to be the state as a whole, and only the state. “Only states are subjects of international law, the bearers of international legal obligations and powers.” The real historical premise for this viewpoint is the formation of a system of independent states which have, within their boundaries, a sufficiently strong central power to enable each of them to act as a single whole. (...)

13) It may be said that the state only fully becomes the subject of international law as the bourgeois state. (…) 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. Collisions between tribes, territorial disputes, disputes over borders – and agreements as one of the elements in these disputes – are found in the very earliest stages of human history.(...)

14) Bourgeois private law assumes that subjects are formally equal yet simultaneously permits real inequality in property, while bourgeois international law in principle recognizes that states have equal rights yet in reality they are unequal in their significance and their power. (...)

15) 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. (...)

16) The open denial of international law is politically unprofitable for the bourgeoisie since it exposes them to the masses and thus hinders preparations for new wars. It is much more profitable for the imperialists to act in the guise of pacifism and as the champions of international law. (...)

17) From the Marxist perspective this nihilist criticism of international law is in error since, while exposing fetishism in one area, it does so at the cost of consolidating it in others. The precarious, unstable and relative nature of international law is illustrated in comparison with the largely firm, steady and absolute nature of other types of law. In fact, we have here a difference in degree. For only in the imagination of jurists are all the legal relationships within a state dominated one hundred per cent by a single state “will”. In fact, a major portion of civil law relationships are exercised under influence of pressures limited to the activities of subjects themselves. Furthermore, only by taking the viewpoint of legal fetishism is it possible to think that the legal form of a relationship changes or destroys its real and material essence. (...)

C. Miéville

China Miéville, Between Equal Rights, A Marxist Theory of International Law, Brill, Leiden Boston 2005

I. Zusammenfassende Thesen (S. 5 -7)

18) In Chapter One, I start by offering an overview of mainstream textbook positions and jurisprudential debates, and formulating a critique of the prevalent notion that international law is a body of rules. However, though I argue that the alternative position of Myres McDougal, that law is a process, is much superior, I show that it leaves unanswered the question of why the process of decision-making takes the legal form. This recurs throughout this work as the central problem for critical scholarship of international law.

19) In the second chapter, I examine two streams of radical international-law scholarship: the Marxist, and that deriving from the school known as Critical Legal Studies (CLS). Most of the self-proclaimed 'Marxist' writings of Soviet jurists, I argue, shares the inadequacies of mainstream 'managerialist' writing. (…) In contrast, the CLS approach offers a truly revelatory look at the internal contradictions of international law, and is a paradigm that gets at the indeterminacy of international law. However, the approach fails to ground its sometimes-brilliant analyses in material reality, and, like McDougal, cannot get to grips with the legal form itself. The CLS attempt to deploy international law at the service of a socially transformative agenda is sharply contradictory of the school's own insights.

20) In Chapter Three I go back to the works of the Marxist legal theorist Evgeny Pashukanis. I put forward his argument that law – and more specifically the legal form – is an expression of the relations of abstract commodity owners in commodity exchange. Given the central importance of Pashukanis to my argument, I examine his theory and those of his critics at some length, though their focus is on domestic rather than international law. There are problems and inconsistencies within Pashukanis's work, which I argue can best be answered by reference to the work itself – an immanent reformulation. This theory is a major step forward, which can not only accommodate the CLS insights about indeterminacy, but embed them in a theory of modernity for which material reality and property relations are key. I argue that the most trenchant criticisms of his theory, though answerable, are not directly germane to international law, which in some ways presents an excellent case of his model in its simplest form. There is, however, a recurring critique of Pashukanis, which is that he is unable to explain how the legal form is filled with particular norms and social content. This is the problem of politics and coercion.

21) In Chapter Four I argue that this criticism is misplaced. Pashukanis, without addressing specific cases, does indeed have a theory of the political, coercive determination of the content of laws. What is more, it is a theory embedded in the very categories of his supposedly 'formalistic' legal writings. Reaching it requires losing some common misconceptions about his theory, foremost among them that he 'derives' a theory of the state from juridical categories.
This chapter is the theoretical heart of the book. I argue not only that the mechanisms of coercion are present in Pashukanis's commodity-form theory, but that because of its lack

of an overarching sovereign, international law is uniquely suitable for illustrating and examining this. As well as being better explained by Pashukanis's theory than others, international law is an invaluable optic for developing that theory. His frequent references to international law in his major work, and his essay on the topic for the Soviet Encyclopedia of State and Law make clear that relations between independent agents without an overarching state are central to Pashukanis's work. I attempt to show that the embeddedness of violence in law, and the contingency of an arbitrating sovereign to the legal form, are key to the commodity-form theory.

II. Über die *Critical Legal Studies* (S. 46-60)

22) The CLS movement is united in its critical attitude to mainstream legal theory and the liberal agenda and philosophy of which it is part. (….) This critique of liberalism and its legal system is the central shared tenet of CLS, and of the New-Stream theorists in international law. (…) Whatever internal disagreements there are in the New Stream, this stress on the contradictions of liberalism is its most systematic and important insight. In critically evaluating the CLS/New Stream tradition, it is the most developed exposition of this insight that must be engaged with.

23) (…) 'the most complete book-length synthesis of CLS and international law' is Martti Koskenniemi's extraordinary 1989 volume, *From Apology to Utopia* (…) Koskenniemi's basic claim is straightforward. (…) international law 'pursues an unachievable resolution of the dichotomy between sovereign will and world order'. (…) The conclusions Koskenniemi draws are severe.

> *International law is singularly useless as a means for justifying or criticizing international behaviour. Because it is based on contradictory premises it remains both over- and underlegitimizing: it is overlegitimizing as it can be ultimately invoked to justify any behavior (apologism), it is underlegitimizing because incapable of providing a convincing argument on the legitimacy of any practices (utopianism).*

24) The profusion of influences has left CLS scholars with powerful critical tools, but a poverty of systematic *theory*. (…) This lack of systematicity, and its cost, can be seen most clearly in the disparity between CLS's analysis and its project – the 'alternatives' it purports to offer. (…) Koskenniemi's hard-headed critique of the 'normativity' of international law does not sit with his suggestions for action (many of the critiques of which he has latterly accepted).

25) (…) the CLS theorists share the fundamental failure of the mainstream theorists with whom they break. For all their devastating and persuasive analysis of the failures and contradictions of liberalism and international law, they offer no theory of the legal form itself. They offer a good, 'thick description' of the indeterminacy of the *content* of international law, but they cannot get to grips with i) the tenacity (or even existence) of the international legal form, ii) offer a persuasive analysis of *why* international law and liberalism are contradictory, or iii) see that 'normatively transformative law' they prefer to the 'Rule of Law' is a chimera. (…) Given their own evidence of its irredeemable instability, the CLS writers' insistence on maintaining some commitment to international law illustrates the refusal to countenance the possibility of denial in the third form described above: the possibility of taking international law seriously, while refusing to see in it hopes for transformative politics.

III. Über die sowjetische Lehre (S. 60-62)

26) One body of writing that 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, the ‘debates’ in the USSR tended to revolve around the extent to which a new and separate sphere of ‘socialist international law’ was operational. The first major writer to claim that it was was Korovin, in his 1924 book *The International Law of the Transition Period*, who posited ‘a “pluralistic” theory of international law based on the idea of almost completely separated juridical “spheres”’ including an international law of the Western ‘great powers’, another of the smaller capitalist states and their colonies, and another of inchoate ‘socialist international law’.

27) (…) the notion of ‘socialist international law’ resurfaced after 1960: it ‘had to await political events and, in particular, the Soviet invasion of Hungary’. This new version of the theory, most systematically articulated by Grigory Tunkin, was ‘a recognition of the existence of two systems of international law, the socialist law based on principles of (modified) proletarian internationalism, and the general international law of peaceful co-existence.’ According to Tunkin, in fact, international law constitutes both the ‘general’ international law, ‘the result of the co-ordination of the will of all states’, and ‘particular’ international law, which governed the relations between local groups of states sharing socio-economic structure.

28) (…) This theory lacks any serious consideration of the legal form. It posits as ‘law’ a supposed variety of systems of regulation, one ‘socialist’, another capitalist, and an overarching framework of general international law that ‘has no single class essence’.

29) (…) Tunkin and the Soviet writers offer nothing new: theirs is a slightly modified variant of mainstream, bourgeois international legal theory, with the addition of the peculiar and untheorised addendum of ‘socialist international law’. This is 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’.

IV. Über Paschukanis (S. 115-135)

30) We need Pashukanis to make sense of international law and the legal form: and we need international law to make better sense of Pashukanis. (S. 115)

31) There is a conundrum for Pashukanis. On the one hand he stresses the ‘lawness’ of legal relationships without superordinate authorities. On the other, we have seen that at one point he alleges that coercion ‘as the imperative addressed by one person to another, and backed up by force’ is inimicable to commodity relations. Law, on the other hand, clearly requires force, as Pashukanis makes clear. Where, then, does the coercive violence in law without an abstract state come from?
I have argued against Pashukanis that violence and coercion are immanent in the commodity relationship itself. If this is accepted, the conundrum disappears as it is clear that in legal systems without superordinate authorities self-help – the coercive violence of the legal subjects themselves – regulates the legal relation. (…) this solution to Pashukanis’s paradox (…) is key to understanding the mechanisms of international law and the legal form, and is at the heart of the analysis of international law and imperialism(…). (S. 133)

32) (…) a solution to Pashukanis's paradox outlined above, is that other remark of Marx's: 'between equal rights, force decides'. (S. 135)

IV. Über die Perspektiven des (Völker-)Rechts

1. Allgemeines (S. 2-319)

33) It is my contention (…) that certain of the lacunae in the field exist because although there are writers who are sceptical about international law's impact on the international system – who claim, for example, that it is merely a moralistic gloss on power-politics – there are very few who take law seriously as a structural component of lived relations, and who yet are fundamentally critical of it – and of those, even fewer see it as 'unreformable'. For most, it is more or less taken for granted that if one believes law has an effect, one sees it as a force for stability and order; potentially even emancipatory change. Where there is a problem of disorder or violence, it is deemed a failure of law: the main problem about law is that there is not enough of it. It is rare to theorise international law as an important, effective regulatory force, and yet not to defend its normative, or potentially normative, impact. (S. 2 f.)

34) (…) I am a 'denier' in the alternative sense that I see no prospect of a systematic progressive political project or emancipatory dynamic coming out of international law. (S. 316)

35) It would obviously be fatuous to deny that law could ever be put to reformist use. (…) However, at an international level, the struggle over the legal form is far more mediated. States, not classes or other social forces, are the fundamental contending agents of international law, and while their claims and counterclaims are informed by their own domestic class struggles, they do not 'represent' classes in any direct way. It is generally the opposing ruling classes of different states that clash with the legal form, each with their own class agenda.These internecine battles between the 'warring brothers' of the ruling class make up a great swathe of the international legal structure, and in them there is little purchase for a fundamentally progressive, subversive or radical legal position. (S. 317)

36) (…) the fact is that the lack of a stated alternative to law in no way invalidates the commodity-form analysis. (S. 319)

37) Of all the insights that the commodity-form approach offers, none is more important than the unapologetic response 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*. (S. 319, allerletzter Satz)

2. Der Irak-Krieg 2003 als Beispiel und die Kontroverse mit Susan Marks

38) On Friday 7 March 2003, 16 scholars of international law signed a letter in *The Guardian*, arguing that 'there is no justification under international law for the use of military force against Iraq'. The letter was an attempt to use the language and argumentative structures of international law for a progressive end, against (…) the imperialist ambitions of the US and UK.
What makes this letter so interesting for the theory of international law, (...) is that several of the signatories are associated with critical currents in the field. This raises the question, if a

scholar acknowledges the indeterminacy of international law, say, how can and why would she claim that a particular act is ‘illegal’? (...)

39) Fundamental problems (…) remain. At the simplest level, these writers cannot back up their interpretations with force. The Iraq War went ahead, with the British and American governments insisting it was legal: this was actualised international law, or more precisely, juridical politics. It is unclear what the legal critique has achieved.
One could argue that it has shifted the debate and delegitimated the action. (…) One problem is that even if this is true, if the ideological triumph of ‘progressive’ international law occurs outside the arena of international law, then no logical reason is adduced that the desired change in discourse is due to the specific ‘international-law-ness’ of the argument. In other words, it is quite possible that such a legitimation or delegitimation of a particular action might as well or better have been carried out by a non-international-legal argument – based on principles of justice, for example. Even where the legal nature of such a position does seem to strengthen its power, it does so by undermining the structures and even legitimacy of international law itself. This is the Pyrrhic, extra-legal victory of progressive international law. (S. 295)

Susan Marks, International Judicial Activism and the Commodity-Form Theory of International Law, in: European Journal of International Law, Volume 18, Issue 1, 1 February 2007, Pages 199–211, https://doi.org/10.1093/ejil/chm002

40) (...)Let me start with Miéville's contention that, since there is a counter-claim for every claim, international law resolves nothing. Force decides, and the fact that the 2003 Iraq War happened means that arguments supporting its legality, as distinct from arguments denying that legality, were actualized international law. I wonder about this word ‘actualized’. What exactly does it signify?
(...)Miéville contends that international law's anti-imperialist successes are only ever in the court of public opinion, and that that involves a step outside the arena of international law. But if, as I believe he is right to maintain, international law is not simply a body of rules, then surely nor is it simply a collection of formal legal procedures and institutions. I am not so clear that international law's anti-imperialist successes are only ever in the court of public opinion, but even if they were, public opinion is not simply a response to or judge of international legal developments; it partly constitutes those developments. Miéville's account gives very little sense of what might be called the public-cultural dimensions of international law, its mutually determining relationship with the media, and so on. The sharp line he draws between international law's inside and its outside does not seem to do justice to his own characterization of international law as a part of political processes.(…)

41) (…) At one point Miéville refers to the experience of those, like myself, who in early 2003 argued that it would be illegal to wage war on Iraq, and then later on sought to call attention to the ways in which international law could provide support not only for opposition to the war and subsequent occupation, but also for defence of the coalition's actions. (…) To Miéville this shows that formal legal argument is ‘self-defeating’. For myself, however, I prefer to think of this experience as bringing into relief a communicative challenge. How can we find a language that can hold together both formal legal arguments and arguments that criticize legal formalism? How can we express things in a way that makes it clear that determinacy and indeterminacy are not properties of international law, but are themselves *arguments* which we use in different contexts for different ends?