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## ARTICLES

# Marxism, International Law, and Political Strategy

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**Abstract**
The question of international law's role in progressive politics has become increasingly important. This is reflected in an upsurge in scholarship dealing with international law's relationship to imperial power and its progressive potential. There has also been an increase in the number of Marxist accounts of international law, with China Miéville's *Between Equal Rights* being particularly important. Miéville's book is very pessimistic as to the progressive potential of international law. This article contests Miéville's claims by examining his accounts of legal subjectivity, violence, and indeterminacy, and argues that international law's content is open to progressive appropriations. However, the 'form' of international law limits its ability to criticize systemic or structural problems, so that it has very little transformative potential. A progressive politics of international law must therefore take advantage of content without falling foul of form. The article finally enquires whether in some extraordinary situations international law might be transformative.

**Key words**
commodity; imperialism; Marxism; Miéville; Pashukanis

Over the course of the last decade, international law has come to play an increasingly visible role in international politics. International law has been at the heart of numerous international conflicts and issues – the NATO bombing of Kosovo, the US invasion of Afghanistan and the 'war on terror' more generally, the two wars in Iraq, the Israeli assault on Lebanon, the Georgia crisis, and the recent events in Gaza, to name but a few. More important than the mere 'involvement' of international law in these issues has been the public and media recognition of this involvement (even if this importance is confined only to international law's 'violation').

Given this prominence, it is perhaps unsurprising that international law has also come to inform the political mobilizations of various left and progressive groups.

* LL M (Cambridge). Many of the ideas in this article grew out of a paper I delivered to the 2007 Historical Materialism Conference, so my thanks go to the audience, my co-participants, and the conference organizers, particularly James Furner. I also owe a great deal of gratitude to China Miéville, Susan Marks, Daniel Warents, and the reviewers at the LJIL for their comments on various drafts of this article. As ever, all errors of style and substance are mine alone.

This was especially evident in the mass protests against the 'illegal war' in Iraq and the opposition to Israeli 'war crimes' committed in its recent assault on Gaza. Invoking international human rights law and international humanitarian law has also been integral to much of the opposition to the 'war on terror'. These developments have been reflected in international legal scholarship. Many international lawyers have attempted to theorize the role of international law in these events – with some arguing that they were violations of international law[1] or that we are in a lawless 'state of exception'[2] and others arguing that these events are in fact *products* of international law.[3] There has also been increased attention to the broader considerations of international law's relationship with imperial power.[4] Of course, this has given rise to the related question – especially in critical circles – of what role international law can play in progressive politics.[5]

It is against this background that the re-emergence of a distinctively Marxian current in international legal theory must be viewed. In recent years a number of works interrogating international law from a Marxist perspective have been published, many of them dealing directly with international law's relationship with our current conjuncture and its progressive potential.[6] Among these works one stands out for its systematicity and the trenchant nature of its critique – China Miéville's *Between Equal Rights*. In a rather brutal turn of phrase Miéville concludes that '[t]he chaotic and bloody world around us *is the rule of law*'[7] – with international law being absolutely central to imperialism and as such ineffective in opposing it. Of all the arguments in his book, it is this claim that has proved most controversial, sparking a lively debate.[8] Of course Miéville's conclusion is not simply arbitrary, but is instead the rigorous product of sustained jurisprudential and historical reflection.

Given the above, the task of theorizing international law's relationship to imperialism and how it might be used in progressive politics has become vital. The relentless nature of Miéville's argument, as well as its careful grounding in theory and history, makes addressing it an important aspect of this task. Miéville's work also throws light on the nature and character of international law, as well as its relationship to violence – both questions which have perpetually haunted the enterprise of international law.

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1 P. Sands, *Lawless World: America and the Making and Breaking of Global Rules* (2005).
2 M. Hardt and A. Negri, *Multitude* (2004).
3 F. Johns, 'Guantánamo Bay and the Annihilation of the Exception', (2005) 16 EJIL 613; and S. Marks, 'State-Centrism, International Law, and the Anxieties of Influence', (2006) 19 LJIL 339.
4 See, e.g., A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005); and S. Marks, 'Empire's Law' (2003) 10 *Indiana Journal of Legal Studies* 449.
5 See, e.g., B. Rajagopal, 'Counter-hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy', (2006) 27 *Third World Quarterly* 767; and M. Craven et al., 'We Are Teachers of International Law', (2004) 17 LJIL 363.
6 C. Miéville, *Between Equal Rights: A Marxist Theory of International Law* (2005); B. Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (2008); and S. Marks (ed.), *International Law on the Left: Revisiting Marxist Legacies* (2008).
7 Miéville, *supra* note 6, at 319 (emphasis in original).
8 See Bowring, *supra* note 6, at 21–30; S. Marks, 'International Judicial Activism and the Commodity Form Theory of International Law', (2007) 18 EJIL 199; U. Özsu, 'Book Review', (2008) 72 *Science and Society* 371; and M. MacNair, 'Law and State as Holes in Marxist Theory', (2006) 34 *Critique* 211.

Following a brief summary this article will engage with some of Miéville's key claims about international law, arguing that the content of international law is much more contestable than Miéville allows. It will then be argued that Miéville's pessimism has a 'rational kernel', insofar as the *form* of law shapes its content in such a way that international law's transformative potential is severely curtailed. The article will then trace the implications that these claims about the form and content of international law have for legal strategy. Finally, the article will ask whether – in extraordinary conjunctures – international law might serve a revolutionary role.

## 1. Koskenniemi and Pashukanis

Although Miéville's book draws upon many different theorists, it is primarily shaped by an engagement with the work of Evgeny Pashukanis and Martti Koskenniemi; unless one understands how Miéville uses these two theorists, it is impossible to evaluate his analysis of the progressive potential of international law.[9]

Koskenniemi's masterpiece *From Apology to Utopia* serves as the theoretical engine of Miéville's work. Although Koskenniemi's work is by now a familiar feature in the critical legal landscape, it seems wise to dwell upon those aspects of it on which Miéville chooses to focus. Koskenniemi famously argues that international law constantly oscillates between the two mutually opposed poles of sovereignty and world order. Every international legal argument can be phrased in either an ascending manner (proceeding from particular state interests) or a descending manner (proceeding from the interests of the 'international community').

These two positions are 'both exhaustive and mutually exclusive' since '[e]ither the normative code is superior to the state, or the state is superior to the code'.[10] Yet because both sovereignty and world order are embedded arguments in international law, and since neither can be preferred over the other, there is a problem. Any argument in international law can legitimately refer to either of these positions and therefore justify any result, as Koskenniemi later put it:

> [E]ven a valid, clear rule may be inapplicable due to the need to apply a narrow exception or a standard so as to realize the purpose of the rule. Because rules are no more important than the purposes for which they are enacted, and because there is disagreement about those purposes . . . it is always possible to set aside a rule.[11]

This particular argument forms the core of Miéville's ideas about what constitutes the content of international law. However, Miéville notes that Koskenniemi's 'idealist' approach is unable to explain *why* it is that this contradiction is embedded in international law. Koskenniemi attempts to locate the contradiction within the

9 'Progressive' is a difficult word to define. Here, the supersession of capitalism is seen as the 'primary' progressive goal, with moves towards it also being progressive. Furthermore, measures that advance the interests of oppressed constituencies – subaltern classes, oppressed races and genders, etc. – are also taken as being progressive.

10 M. Koskenniemi, *From Apology to Utopia* (2005), 59.

11 M. Koskenniemi, 'By Their Acts You Shall Know Them (and Not by Their Legal Theories)', (2004) 15 EJIL 839, at 851.

political form of liberalism,[12] but – according to Miéville – he cannot explain 'where or why those arguments are generated'.[13] Furthermore, Miéville finds Koskenniemi's approach deficient because it cannot explain *how* particular arguments are resolved and does not tell us very much about what international law *is*.

To answer these questions Miéville turns to the Bolshevik legal theorist Evgeny Pashukanis. Pashukanis's 'basic materialist strategy is to correlate commodity exchange with the time at which man becomes seen as a legal personality'.[14] His argument is a complex one, rooted in both history and Marxist theory, but a simple summary can be made here. In order that commodities may be exchanged, 'their guardians must place themselves in relation to one and another, as persons whose will resides in those objects', this means that they must 'mutually recognise in each other the rights of private proprietors'.[15] Accordingly, each commodity owner must recognize the other as an equal, in an abstract, formal sense. But since within any exchange there is the possibility of dispute, it must be possible to regulate these disputes. Hence the law arises as a form of regulation as between formally equal, abstract individuals.

The idea of individual legal subjects as formally equal sovereigns is of course central to international law. Pashukanis notes that '[s]overeign states coexist and are counterposed to one another in exactly the same way as are individual property owners with equal rights.'[16] In international law each state is conceptualized as 'owning' their territory, with the concomitant rights and duties attaching to this ownership.[17] It was only with the expansion of international trade that international law began to 'universalize',[18] as nation-states were directly faced with other nation-states who existed as 'commodity owners'.

Pashukanis's position is useful for several reasons. First, he is able to identify law as a specific form of social regulation, or – as he puts it – a 'mystified form of some *specific* social relationship'.[19] For Miéville, Pashukanis's conception of the legal form (as a normative relationship between two formally equal individuals) is able to demarcate the 'specifically legal' character of international law, and can account for the commonality between municipal and international law.[20] This position also proves especially helpful because it does not make law dependent on the state or any other superordinate body. Miéville sees this as a key insight into the nature of international law, which of course lacks any single, overarching sovereign body that exists to posit and enforce the law.[21]

Miéville's main usage of Pashukanis is in resolving the problem of indeterminacy. Since Koskenniemi argues that ascending and descending arguments are equally

12 Koskenniemi, *supra* note 10, at 4–6.
13 Miéville, *supra* note 6, at 54.
14 C. Arthur, 'Editor's Introduction', in C. Arthur (ed.), *Law and Marxism: A General Theory* (1978), 9, at 11.
15 K. Marx, *Capital: Volume One* (1999), 51.
16 E. B. Pashukanis, 'International Law', in Pashukanis, *Pashukanis: Selected Writings on Marxism and Law*, ed. P. Beirne and R. Sharlet (1980), 168, at 176.
17 Miéville, supra note 6, at 191.
18 C. Miéville, 'The Commodity-Form Theory of International Law: An Introduction', (2004) 17 LJIL 271, at 285.
19 E. B. Pashukanis, 'General Theory of Law and Marxism', in Pashukanis, *supra* note 16, at 58 (emphasis in original).
20 Miéville, *supra* note 6, at 275.
21 Ibid., at 128.

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important to international law, he cannot say how it is that particular interpretations are made to 'stick' in any given instance. In order to resolve this question Miéville analyses the relationship between law and coercion, and it is here that he advances Pashukanis to a significant degree. Miéville argues that the commodity-form is a contradictory beast; although it posits individuals as formally equal, these individuals have radically opposed interests. These opposed interests can only be resolved through violence, which means that the possibility of violent resolution is inherent in the commodity form. As Miéville puts it,

> [V]iolence – coercion – is at the heart of the commodity form, and therefore the contract. For a commodity meaningfully to be 'mine-not-yours' – which is, after all, central to the fact that it is a commodity to be exchanged – some forceful capabilities are implied. If there were nothing to defend its 'mine-ness', there would be nothing to stop it becoming 'yours', and then it would no longer be a commodity, as I would not be exchanging it.[22]

This interpenetration of violence and the commodity form carries over into the legal form, as the violence required to maintain ownership of commodities is violence in vindication of legal rights.[23] Once it is acknowledged that international law has a deep structural connection with violence, the solution to Koskenniemi's conundrum is that – in Marx's words (from which Miéville takes the title of his book) – 'between equal rights force decides'.[24]

Much of Miéville's book is concerned with showing the historical and material connections between international law and violence. Miéville argues that the violence which gives international law its content is that of imperialism. Imperialism in the Marxist canon is not confined to colonialism or formal empire. In fact, imperialism on the Marxist reading only reaches its most mature stage with the *end* of formal empire.

## 2. Progressive international law?

This brief perusal of the two main theoretical inspirations for *Between Equal Rights* helps to set the scene for Miéville's contention that international law is a dead end for progressive social change. The starting point for Miéville's claim is the radical indeterminacy of the law. Indeterminacy does not per se guarantee that law will emerge on the side of the powerful. Indeed, as Susan Marks has argued, the indeterminacy of international law can serve an emancipatory purpose, since the contradictory principles of international law allow scholars and activists to find 'counter-systemic logics' within legal discourse.[25]

This leads on to the second point; contra the argument above, Miéville argues that effective assertions of international law can only be made to 'stick' through the use of coercion, which is embedded within the legal form itself. Finally, Miéville argues that the primary subjects of international law are independent, sovereign states. When this is all added up, it suggests that the only interpretations of law that can be made

22 Ibid., at 126.
23 Marks, *supra* note 8, at 204.
24 Marx, *supra* note 15, at 151.
25 S. Marks, *The Riddle of All Constitutions* (2007), 144.

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to stick are those which are backed up by force, and since nation-states are the main subjects of international law it is only those powerful (imperialist) nation-states that will be able to push through their particular interpretations. These arguments serve to nullify claims as to the progressive potential of indeterminacy, as critical scholars and activists are not legal subjects and in any case lack the force to back up their own interpretations.[26] Thus in contesting the meaning of indeterminate law they can only hope 'for occasional [ideological] victories in a constant struggle over categories'.[27]

Miéville's argument can be separated into two distinct but interrelated claims. The first claim is that nation-states are the primary actors in international law. The second claim is that by and large it will only be imperialist states that will be able to deploy the necessary amount of force to back up their particular 'interpretation' of the law. This claim also involves a specific notion of what constitutes force or violence. In this article I shall examine these two claims and argue that Miéville has severely underestimated the degree to which progressive forces might be able to assert their claims in international law.

First, Miéville's claims as to the centrality of the state in international law will be assessed. Here it will be argued that Miéville pays insufficient attention to the role of struggle and politics in the constitution of legal subjects. It will be argued that while states may be the primary actors in international law, this is not necessarily the case, and through sustained struggle progressive groups might be able to constitute themselves as legal subjects. However, this argument alone does not do much to undermine Miéville's conclusions, for even if progressive forces are able to constitute themselves as subjects, they must still deploy coercion to make their interpretations 'stick'.

The next section of the article deals with Miéville's claims as to the type of coercion embedded within the legal form. Here it will be argued that Miéville focuses excessively on the role of military violence, the type of violence generally exercised by imperialist states. It will be argued that more importance should be granted to economic and ideological forms of 'force'. Finally, I shall turn to Miéville's particular version of the indeterminacy thesis. Here it will be argued that Miéville fails to focus sufficiently on the reasons why a state might adopt a particular legal argument (and deploy force in support of it); a greater focus on this would allow him to see the ways in which progressive non-state actors might impact upon such decisions.

## 2.1. Subjects of international law

### *2.1.1. Who is a subject?*

Miéville argues that '[*s*]*tates*, not classes or other social forces, are the fundamental contending agents of international law'.[28] Right from the outset one ought to note that it is not enough that 'states ... are the fundamental contending agents of

26 Miéville, *supra* note 6, at 296.
27 Ibid., at 304.
28 Ibid., at 317 (emphasis in original).

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international law', it must be shown that this is necessarily the case. If it could be shown that 'classes or other social forces' might be made into the 'fundamental contending agents of international law', it might be that international law could be turned to their (presumably progressive) purposes. At this point it is necessary to turn to Miéville's defence of Pashukanis and his treatment of domestic law, in particular his analysis of labour law.

One might question the relevance of labour law to a discussion of public international law. While there is by no means an a priori connection between the two, in the context of *Between Equal Rights* the connection becomes vital. One of the many criticisms that have been levelled against Pashukanis is that his theory is not able to account for the developments in twentieth-century law. As Hunt argues, '[t]he history of modern law has involved a significant extension of the range of social entities recognized as "legal subjects"', which means that 'it is simply wrong to contend that the legal form restricts recognition to atomized economic agents'.[29]

Typically, then, this criticism has focused on the fact that contemporary law is characterized by legal subjects that are not individual human beings, but collectives of individuals treated as a single legal subject. Miéville's account of labour law is an attempt to explain these developments on the basis of the commodity-form theory. The connection here should be obvious; international law is a system which – at the very least – is composed of a large number of collectivities treated as individual legal subjects. The conceptual and theoretical apparatus Miéville develops in his discussion of labour law is that which underlies his (more historical) discussion of international law and the centrality of the sovereign state.

Miéville argues that we can only conceptualize the developments in modern labour law on the basis of Pashukanis's theory itself.[30] Utilizing the work of Kay and Mott, Miéville argues that as capitalism has developed it has become more and more socialized. On this basis, the process of accumulation is now realized through collective bodies, leading to the development of the corporation as a legal person. This process was also manifested on the part of labour, which organized itself into collective units; as Miéville puts it,

> With the move to the juridical acknowledgement of the agency of abstract entities of accumulation, the same tendency manifested on the side of the working class, where abstract entities of production were necessarily legally recognised . . . The legal formalisation of capital's agent, the company, had its flipside in the formalisation of labour's agent, the collective organisation of workers, the trade union.[31]

Miéville's position is, of course, logical. If the legal form is coextensive with commodity exchange, then any development in commodity exchange (in this case its socialization) necessarily leads to change in the legal form. But what this position would seem to indicate is that 'the fundamental contending agents of international law' change depending on their material context. It is here perhaps that Miéville's position on subjects can be challenged. Miéville uses a Marxist truism, that capital is

29 A. Hunt, 'A Socialist Interest in Law', (1992) 192 *New Left Review* 105, at 116.
30 Miéville, *supra* note 6, at 103.
31 Ibid., at 108.

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a 'social power',[32] to develop Pashukanis's theory. But what he seems to ignore is the fact that capital and labour are both also international. Marx constantly emphasizes the fact that the bourgeoisie 'has given a cosmopolitan character to production'[33] and that '[w]orking men have no country.'[34] What these developments might seem to indicate is that the working class, in the form of unions or other groupings, could themselves be constituted as international legal subjects. One might perhaps see the beginnings of such a development in the emergence of transnational unionism.

Of course, it might be said that Miéville's use of the term 'imperialism' is derived from the tradition of Bukharin and Lenin.[35] But one would imagine that neither Bukharin nor Lenin would deny the increasing internationalization of the working class, or the possibility of a union of these forces in a similar way to trade unions nationally. Ultimately, this is only hypothetical and is perhaps not particularly convincing. One might say that Lenin's model of imperialism does not suggest that labour could internationalize to the degree that it has an international collective representation engaged in trade. As such, although a 'political' union of the working class might take place internationally, such a union would never form the collective possessor of labour power.

### *2.1.2. Politics, economics, and legal subjectivity*

The above was merely an internal critique of Miéville; if one broadens the scope of the argument it is possible to undermine further Miéville's contention that states are necessarily the primary actors in international law. One argument which has been levelled at Pashukanis is that his theory of law is insufficiently political, since although he may view the *content* of law as being determined by politics, he views the *form* of law as being determined by purely 'economic' considerations (the commodity form). This can be well illustrated by again looking at how Miéville engages with domestic labour law in the United Kingdom.

Miéville's basic argument is that 'a shift in the atoms of the juridical relationship' has occurred 'on the basis of the commodity relationship under changing conditions of mass industrialisation and the commodification of labour-power itself'.[36] There are several problems with this account, but the most relevant is that Miéville fails to note the strong opposition to union recognition manifested on the part of employers and the struggle that workers have had to undertake to gain it.[37] Rather than merely being the 'flipside' to the legal formalization of the corporation, the recognition of unions was – at least in part – the product of concerted political action on the part of the working class.

This failure to consider the political dimension of union recognition makes it very difficult to account for contemporary UK labour law. While Miéville's account

32 F. Engels and K. Marx, 'Manifesto of the Communist Party', in Marx and Engels, *The Marx-Engels Reader*, ed. R. Tucker (1978), 469, at 485.
33 Ibid., at 476.
34 Ibid., at 488.
35 See Miéville, *supra* note 6, at 225–30.
36 Ibid., at 109.
37 W. Brown and S. Oxenbridge, 'Trade Unions and Collective Bargaining', in C. Barnard and S. Deakin (eds.), *The Future of Labour Law: Liber Amicorum Sir Bob Hepple QC* (2004), 63 at 66.

can explain the development of labour law prior to the government of Margaret Thatcher, it has real trouble explaining the current, post-Thatcher order. The type of labour law that Miéville envisages and describes is commonly dubbed 'collective laissez-faire', a system which 'comprised collective organizations of employers and workers, which negotiated collective agreements for the regulation of terms and conditions of employment and the management of the workplace'.[38] This system depended upon the ability of trade unions to strike without incurring any legal liability. This was guaranteed by the so-called 'golden formula', which gave striking unions immunity for any liability they might incur, providing the strike was 'in contemplation or furtherance of a trade dispute'.[39]

Under the Thatcher government this system was progressively dismantled, sympathy strikes and the closed shop were both rendered illegal, and many of the immunities were removed or made subject to complex ballot procedures. This left the system of collective laissez-faire in complete disarray, a situation that New Labour has largely maintained,[40] leading to a position whereby the 'collective' element of labour law has been marginalized in favour of its 'individual' element.

The question is, how can Miéville's theory explain this? Has capitalism in the United Kingdom become less socialized? And, if this is the case, why do corporations still assume such a pivotal role in its economy? The better explanation is surely that the working class (and its collective organizations) lost a political battle, which decreased the strength of unions to such a degree that it was possible to marginalize severely their status as legal subjects.

Furthermore, it is difficult to see how such a theory can account for environmental and public interest litigation. Such distinctions cannot simply be read from an examination of the peculiarities of commodity exchange; instead, it is necessary to look at broader political circumstances.[41] On this reading the 'economic' aspect of the legal form can be seen as a centrifugal tendency or a predisposition, but not the determining factor in who or what becomes a legal subject.[42] This would let us look at Miéville's claims about unionization in a different light. Marx puts it particularly well:

> [W]ith the development of industry the proletariat not only increases in number; it becomes concentrated in greater masses, its strength grows; and it feels that strength more . . . Thereupon the workers begin to form combinations (Trade Unions) against

38 H. Collins, 'The Productive Disintegration of Labour Law', (1997) 26 *Industrial Law Journal* 295, at 298.
39 Trade Union and Labour Relations (Consolidation) Act 1992, s.244.
40 S. Fredman, 'The Ideology of New Labour Law', in Barnard and Deakin, *supra* note 37, at 9.
41 These considerations are also suggestive of a Marxist analysis of the 'fragmentation' of international law; especially relevant in this respect is Miéville's attempt to account for the particularities of administration: 'Administration is the necessary "particularistic", "political" corollary of the legal form's abstract formality, and it is continually thrown up. The attempt to apply abstract laws in particular conjunctures, in a developing history of class conflict, will always leave gaps that must be plugged by the capitalist state.' Miéville, *supra* note 6, at 111. See also M. Koskenniemi and P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', (2002) 15 LJIL 553.
42 To some degree Miéville recognizes this; he argues (in a footnote) that 'there is a tendency towards juridically free wage-labour in capitalism, but that countervailing tendencies come into play to negate', and as such 'liberal-democratic forms of capitalism represent . . . centres of gravity'. Miéville, *supra* note 6, at 94, n. 94. But this argument is not followed through.

> the bourgeois; they club together in order to keep up wages; they found permanent associations in order to make provision beforehand for these occasional revolts.[43]

Marx's position therefore is much more dialectical than Miéville's. He sees 'political' and 'economic' relations as part of an interpenetrating whole, whereby the workers are brought together through the specific development of commodity exchange but it is only through political action that their collective body is constituted as a legal subject.

These problems are reflected in Miéville's discussion of statehood. Miéville argues that 'relations between sovereign states are . . . relationships of abstract equality inhering between owners of private property'.[44] Thus, as above, a collectivity becomes a legal subject insofar as it is capable of engaging in exchange.[45] This leads Miéville to characterize self-determination as 'the *culmination of the universalising and abstracting tendencies in international – legal – capitalism*'[46] and the '*self-actualisation* of international law'.[47] As Bill Bowring has persuasively argued,[48] this position fails to account for the fact that many of the imperialist powers of the day resolutely opposed self-determination, and 'only in the context of victories of the national liberation movements' did 'the principle of self-determination become a right in international law'.[49]

Pashukanis came to recognize that this might serve as a weakness in his argument. In *Economics and Legal Regulation* Pashukanis asks the question, 'how must one conceive of the relationship between the elementary laws of economics and the forceful intervention of social organization?'[50] He argues that while the Marxist method does conceive of the economic and 'social' as existing in unity, this unity can be taken too far. He notes that 'abstract' economic categories are ultimately only instantiated through concrete *political* struggle:

> Marx proposed searching out the class struggle in a place where the doctrinaires saw merely the task of delimiting economic categories . . . [T]he economic result, and the degree to which one category or another is embodied purely, will depend upon the practical result of the class struggle. The abstract categories of political economy indicate only general and rather broad limits.[51]

What this suggests to us, then, is that the first component of Miéville's argument is flawed. Nation-states are not necessarily the primary actors in international law, and progressive actors may be able to constitute themselves as legal subjects. This can perhaps be observed in the development of human rights law, which has moved away from the state as vindicator for its subjects and towards the direct interpellation of

43 Engels and Marx, *supra* note 32, at 480.
44 Miéville, *supra* note 6, at 141.
45 Ibid., at 191.
46 Ibid., at 267 (emphasis in original).
47 Ibid., at 268 (emphasis in original).
48 Bowring, *supra* note 6, at 9–38.
49 Ibid., at 30.
50 E. B. Pashukanis, 'Economics and Legal Regulation', in Pashukanis, *supra* note 16, 241.
51 Ibid.

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individuals as subjects of international law. Most significant, perhaps, is the growing importance of non-governmental organizations and international institutions.

### 2.2. Violence and indeterminacy

If the above arguments do hold good, it does not necessarily follow that international law can be used for progressive ends. Even if progressive forces are able to become international legal subjects, international law will only be turned to their ends if they are able to make their particular interpretations 'stick'. Miéville argues that in order for a particular interpretation to be enforced it is necessary for it to be backed up with violence. Since imperialist nation-states are the possessors of the greatest capacity for violence, it will almost inevitably be their interpretation which triumphs:

> Intrinsically to the legal form, a contest of coercion occurs, or is implied, to back 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.[52]

Even if Miéville were to concede that progressive forces might be able to become international legal subjects, he would still be able to argue that international law will be on the side of the powerful imperialist nations. The first thing to note about this claim is that it is an empirical one. It might therefore be possible to argue that imperialists will not always possess the greatest capacity for military violence. Furthermore, there is an argument to be made that 'progressive' states with a large military capacity can arise on the world stage. Although these issues are of great importance, I do not intend to address them directly in this article. Rather, I intend to look at the conceptual claims Miéville makes about coercion and indeterminacy.

#### *2.2.1. The meaning of coercion*

The strength of Miéville's contention that imperialist states are usually (and will usually be) in a position to enforce their particular interpretations of the law hinges upon the idea that the 'force' which determines a particular legal outcome is military violence or the threat thereof. In the particular context of the world order 'the political coercion in the economic form *is precisely expressed in war*'.[53]

It is by no means a priori that the 'force' needed to resolve legal disputes ought to be limited to war, and so it is first necessary to explore how Miéville arrives at its importance. In the opening chapter of *Between Equal Rights* Miéville discusses the Realist school of international relations. He criticizes Realism for its failure to 'contextualise the very different forms "the struggle for power" takes in different historical epochs'.[54] Miéville's focus on war can be seen as an attempt to contextualize 'force'.

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52 Miéville, *supra* note 6, at 292.

53 Ibid., at 222 (emphasis in original). Miéville makes similar claims throughout the book, arguing that '[w]ar is simultaneously a violation of international law *and international law in action*' (at 148); '[t]he morphological proximity of the legal subject and the *armed unit* is nowhere more clear than in international law', (at 136 emphasis added); and '[i]nternationally, law's violence of abstraction *is* the violence of war' (at 318).

54 Ibid., at 22.

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Miéville sees a deep connection between the world order, international law, and imperialism. So, for him, the historical context of the 'force' that 'decides' international law is the imperialist world system. The question is, how does he move from 'imperialism' to 'war'? Miéville quotes Callinicos to the effect that imperialism is composed of two tendencies – the concentration and centralization of the integration of monopoly capital and the state and the internationalization of the productive forces, which compels capitals to compete for markets, investments, and raw materials. Callinicos argues that this has three main consequences:

> (i) competition between capitals takes on the form of military rivalries among nation-states; (ii) . . . a small number of advanced capitalist states . . . dominate the rest of the world; (iii) uneven and combined development under imperialism . . . gives rise to war.[55]

This is combined with Bukharin's analysis of monopoly capitalism. Bukharin argued that late capitalism is marked by an increasing monopolization of capital; ever larger firms would buy each other up until they become trusts, which tend to become state-capitalist trusts. Thus the state and capital are increasingly interpenetrated. But in the struggle for accumulation the arms industry becomes ever more important, tending to militarize competition. Ultimately, then, 'military competition in monopoly capitalism' is an expression of the 'competitive dynamic associated with capitalist economics'.[56]

But this position is open to question. First, it ought to be noted that there is nothing in this analysis that indicates that war has become – in any way – a hegemonic form of international relations. All that this work indicates is that the role of war becomes more important under imperialism. Second, Miéville's analysis feels like a self-fulfilling prophecy. The dynamic he identifies is a dynamic of imperialist states. But even if Miéville is correct in ascribing a fundamental role to the nation-state, he does not argue that every one of these states is an imperialist one. In selecting 'war' as the form of coercion embodied in the international legal form, Miéville's analysis seems destined to emphasize the superiority of imperialist states in international law.

Finally, in emphasizing 'war' as the central form of coercion Miéville is elevating the 'political' aspects of international society over the economic one, something one would not necessarily associate with a Marxist approach to international relations. Of course, this is not sufficient reason simply to dismiss Miéville's approach; instead, it is necessary to show that 'economic coercion' is also a force on the international stage. In this respect it is counterintuitive that Miéville does not even mention economic forms of coercion, since, as Rajagopal has argued,

> In the latter half of the twentieth century the physical violence of the western intervention was replaced by the economic violence of structural adjustment and the debt crisis, mediated by the International Monetary Fund (IMF) and the World Bank.[57]

55 Ibid., at 228, quoting A. Callinicos, 'Marxism and Imperialism Today', in A. Callinicos et al. (eds.), *Marxism and the New Imperialism* (1994), 11, at 16–17.
56 Ibid., 223.
57 B. Rajagopal, *International Law from Below* (2003), 34.

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It is perhaps rather telling that throughout Miéville's book there is no mention of the World Bank or the International Monetary Fund, despite their increasing importance and their prominence in a number of Third World critiques of international law.[58] Furthermore, Miéville makes little or no mention of the prominent usage of economic sanctions in international law and their role in the enforcement of Security Council resolutions and foreign policy more generally. Miéville could plausibly argue that the point of his analysis is to reveal the political that is embedded within the economic. But this perhaps misses the way in which the economic can be deployed politically.

In fact, this explanation also seems to underlie Callinicos's examination of imperialism. According to Callinicos, it is only by virtue of their 'productive resources' that a small number of advanced capitalist countries are able to dominate the globe. But if military power is dependent on economic power then it may the case that military coercion can be bested by economic coercion. This is well exemplified by the actions in the 1970s of the Organization of the Petroleum Exporting Countries (OPEC), which refused to sell oil to states that supported Israel following the 1973 Yom Kippur war, triggering a political and economic crisis in the West.[59]

Of course, it is still the case here that even if economic coercion is an important form of coercion, imperialist states would nonetheless often win economic contests, especially as imperialist countries can secure economic resources through the use of force. But the point of this analysis is not to deny the role of military coercion in international law. Rather I argue for the complex interdependency of military force and economics on the world stage. It is also the case that there are most certainly more than simply these two logics operating, as will be explored below.

### *2.2.2. Commodity form and coercion*

None of the foregoing explains *why* Miéville does not see that the 'force' needed to resolve legal conflicts need not be limited to violent coercion. In order to understand this, it is necessary to look at his attempt to recast Pashukanis's position on violence and the legal form. As previously outlined, Miéville argues that 'coercion' is implied in the commodity form since '[i]f there were nothing to defend its "mine-ness", there would be nothing to stop it becoming "yours", and then it would no longer be a commodity, as I would not be exchanging it'.[60] While the basic thrust of this argument is correct, it is unwarranted to say that the 'something to defend its mine-ness' needs to be violent coercion. In any given situation it is possible to think of a number of different reasons why ownership is respected; there may be – *inter alia* – economic reasons (if you steal someone's property they will not trade with you again) or ideological reasons (you genuinely believe that private property is sacrosanct) for abstaining from theft.

This is true not only at the level of individual commodity exchanges but also at the 'general level'. Miéville argues – citing Barker – that since commodity production

58 Ibid., at 41, and Anghie, *supra* note 4.
59 See, e.g., J. S. Olson, *Historical Dictionary of the 1970s* (1999), 325.
60 Miéville, *supra* note 6, at 126.

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separates ownership from need, those 'in need' will attempt to fulfil those needs by taking from those who own. This means that 'force must be a general condition for the maintenance of commodity relations'.[61] This is true to some degree. However, force is not the only general condition for the maintenance of commodity exchange, and indeed cannot be the primary one. For, as Marxists have long recognized, those whose needs go unfulfilled are much greater in number and, by consequence, possess a much greater potential capacity for violence than those who 'own'. If violence were the only, or primary, guarantee of commodity exchange, then it would have been overthrown long ago. Again, Miéville's position is at odds with Marx's, who argued two points, first that '[t]he advance of capitalist production develops a working class, which by education, tradition, habit, looks upon the conditions of that mode of production as self-evident laws of Nature'.[62] Second, he argues,

> The dull compulsion of economic relations compels the subjection of the labourer to the capitalist. Direct force, outside economic conditions, is of course still used, but only exceptionally. In the ordinary run of things, the labourer can be left to his dependence on capital, a dependence springing from, and guaranteed in perpetuity by, the conditions of production themselves.[63]

The point of these arguments is not to deny that there is a necessary connection between the commodity form (and the legal form) and violent coercion. Instead, what is put forward is that the commodity form – at both the individual and the general level – is guaranteed by a complex interrelation of, *inter alia*, violence, ideology, and economics. While it is impossible truly to know how these different logics operate (to do so would require an insight into people's internal motivations), several things can be noted. First, these modes are distinctive and cannot be reduced to one another. Second, it is impossible to say that any one of these factors guarantees commodity exchange 'in the last instance', as there are situations in which any of them might represent 'the last instance'. Third, the relative importance of these factors is context-dependent, with no one logic overriding the others. If one keeps Miéville's insight but extends it in line with the foregoing analysis, one can see that the 'resolution' of indeterminacy is achieved through diverse combinations of these factors. It might be argued that these factors are all themselves 'modes' of coercion. Although this may stretch the definition somewhat, in the end this is not massively relevant; in widening and complicating the types of 'coercion' that resolve legal disputes, it becomes much more difficult to argue that these will almost always be won by imperialist states.

### *2.2.3. Indeterminacy*

Some of the deficiencies in Miéville's approach can also be attributed to his understanding of legal indeterminacy. In order to point out some of these weaknesses it is necessary to outline the classical theory of indeterminacy. In simple terms, the theory of indeterminacy holds that

61 Ibid., at 127.
62 Marx, *supra* note 15, at 372.
63 Ibid., 372.

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> [T]he existing body of legal doctrines – statutes, administrative regulations, and court decisions – permits a judge to justify any result she desires in any particular case. Put another way, the idea is that a competent adjudicator can square a decision in favor of either side in any given lawsuit with the existing body of legal rules.[64]

So the first point in the theory is to say that 'legal arguments' are never the deciding factor in cases. The next step in the indeterminacy thesis is the most important. This step asks what, if legal reasons cannot guarantee determinate outcomes, the 'real reasons' are that do so. Finally, in this model the particular decision reached by the court is enforced by the state – through coercion or the threat thereof.

What is particularly useful about this approach is that it allows us to separate conceptually the different elements of a given legal decision. So on this reading we can see that each legal decision is composed of three 'moments': the legal argument or arguments justifying the decision, the 'real reasons' for the decision, and the actualization of this decision (through the use or threat of force). So here one continues to adhere to the line that between equal rights force decides – but an additional layer of complexity is added: why does force decide in the way it does?

This seems to be a step that is missed by Miéville. Miéville's argument is that once it has been established, 'force decides' that there is no further need for analysis. In fact, Miéville tends to blur into one issue the 'real reasons' for the decision and the fact that 'force decides'. I would argue that this is because Miéville's focus is almost exclusively on international law, and within this focus he devotes virtually no time to the analysis of judgments. In these instances (where a state 'actualizes' its own interpretation of the law) there is no difference between the body that 'interprets' the law and the body that 'enforces' the law, which makes the distinction between the reasons for the decision itself and the body that enforces the decision more difficult to pin down.

To put it simply, then, in his analysis Miéville seems to hold that if interpretation needs to be backed by violent coercion, then those with the greatest capacity for violent coercion will put forward the interpretation that most favours their interests. But this is by no means certain; instead, it is necessary to look at what reasons a state might have for adopting a particular legal position. Although the distinction outlined above may seem petty or pedantic, it actually takes on a greater force within the context of Miéville's argument. A failure to inquire into the reasons for particular interpretations, combined with Miéville's contention that only states can be participants in international law, tends to mean that progressive non-state actors have no impact whatsoever upon the content of international law.

But once the force of interpretation and the reasons for interpretation are separated, it becomes possible to imagine ways in which progressive non-state actors can shape the content of the law, even if my contentions on the possibility of their gaining legal subjectivity are ignored. When a state makes an interpretation of the law it has to bear in mind a particular balance of forces – which includes those of non-state actors – even if its military coercive power greatly outstrips that of the said

64 L. Solum, 'On the Indeterminacy Thesis: Critiquing Legal Dogma', (1987) 54 *University of Chicago Law Review* 462, at 462.

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forces. It is here that the different types of 'force' outlined above might make a return to our analysis. This is because economic and ideological considerations originating from progressive non-state actors can affect the way in which 'force decides', even if they do not wield this force.

How such situations might come about is of course a subject which deserves greater attention than I can pay it in this text. However, some brief considerations might be made. First, progressive forces often wield a great deal of economic power internal to the bourgeois state (and internationally). It is possible to imagine a situation in which a pattern of economic 'sabotage', strikes, and so on by these actors could force a state to adopt a particular 'interpretation' of the law.[65] Second, there is the argument that a concern with legitimacy and consistency might be manifested on the part of those interpreting the law. This position is perhaps best exemplified with the oft-quoted position advocated by E. P. Thompson in his *Whigs and Hunters*:

> If the law is evidently partial and unjust, then it will mask nothing, legitimise nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just.[66]

Notice that this position does not commit one to claiming that the law is determinate. All that it argues is that particular interpretations cannot be seen to be too favourable to a particular set of interests. Thus it may be that a particular interpretation of the law will not be taken, because it obviously favours a particular class interest, or is inconsistent with a stated ideological justification for a given course of action. It may be that in instances where such an interpretation is put forward, progressive social forces are able to seize on such inconsistency and mount an immanent critique of the interpretation. In response to such action, or in order to avoid it, force may 'decide' in a manner consistent with the wishes of progressive forces.[67]

To some degree Miéville concedes this, stating that the question of 'how to understand the capitalist state becomes very important, to make sense of the final arbiter of law domestically and the very *unit* of law internationally', and acknowledging that '[t]he scope of this enormous debate can only be touched upon here'.[68] Yet if Miéville is willing to acknowledge this, how is it that he can make such broad claims about the progressive potential of international law?

### 2.3. Conclusion

In this section I have advanced a series of interconnected arguments that I feel seriously problematize Miéville's claim that international law remains, in almost all circumstances, a practice devoid of progressive content. Provided one accepts that Miéville overplays the role of military violence in international affairs, it is

65 For a theorization of the 'violence' of a strike see W. Benjamin, 'Critique of Violence', in Benjamin, *Reflections: Essays, Aphorisms, Autobiographical Writings*, trans. E. Jephcott, ed. and with an introduction by P. Demetz (1978), 277, at 281.
66 E. P. Thompson, *Whigs and Hunters* (1975), 263.
67 See Marks, *supra* note 25.
68 Miéville, *supra* note 6, at 122 (emphasis in original).

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necessary to recognize that progressive forces might influence international law, either through becoming subjects themselves or through forcing states to adopt particular interpretations of international law.

In this regard it is a shame that Miéville makes very little mention of Pashukanis's later work on the law. Pashukanis's most explicit treatment of the role of law in revolutionary strategy is to be found in 'Lenin and the Problems of Law',[69] which is not mentioned at all in *Between Equal Rights*. What makes this especially puzzling is that the work was written between Pashukanis's *General Theory* and his entry on international law in the *Encyclopaedia of State and Law*. Since Miéville uses both these texts extensively, it would seem difficult to argue that the work was a product of 'Stalinist degeneration'.

'Lenin and the Problems of Law' is particularly important in our case because of the perspective Pashukanis develops on the progressive potential of law. Whilst obviously remaining a stern critic of law, Pashukanis also castigates those who fail to understand the positive role that legality can play in given concrete circumstances:

> [F]or the petit bourgeois revolutionary the very denial of legality is turned into a kind of fetish, obedience to which supplants both the sober calculation of the forces and conditions of struggle and the ability to use and strengthen even the most inconsequential victories in preparing for the next assault. The revolutionary nature of Leninist tactics never degenerated into the fetishist denial of legality . . . On the contrary . . . he firmly appealed to use [*sic*] those 'legal opportunities' which the enemy . . . was forced to provide.[70]

Pashukanis envisaged an important role for legal struggle. This was not simply confined to the domestic sphere either, as he makes explicit reference to international treaties[71] and self-determination.[72] Nevertheless, it does not follow that we should uncritically embrace international law. Pashukanis does not take such a position, and in this respect there are many areas where Miéville is precisely right. In the next section I deal with the 'rational kernel' of Miéville's critique of legality.

## 3. The rational kernel of Miéville's critique

### 3.1. The limits of the legal form

Although the above analysis focused primarily on the content of international law, by necessity it also focused upon its form. Much of Miéville's account of why the content of international law is seldom progressive is premised on the argument that the form embeds imperialist military coercion. Therefore in contesting Miéville's claims on the content of international law I have also – to some degree – contested some of his claims about the legal form, in particular what subjects it can represent, how these subjects come to be represented, and the type of force embedded in the legal form.

69 E. B. Pashukanis, 'Lenin and the Problems of Law', in Pashukanis, *supra* note 16, at 133.
70 Ibid., at 138.
71 Ibid., at 139.
72 Ibid., at 156–62.

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There is another, more fundamental sense in which I agree with Miéville on the legal form. In this respect I suggest that many of his claims regarding the systematic and transformative potential of international law are a useful corrective to the enthusiasm of some legal theorists.[73] The starting point here is, once again, the legal form and its impact upon legal content. Both Miéville and Pashukanis argue that the particular character of the legal form will shape legal content, since legality is not 'an empty sack that can be filled with a new class content'.[74]

There are numerous ways in which form can affect content. One way in which this process can occur is the one which I have just criticized, whereby the form prevents particular groups from articulating their demands within it. What I wish to focus on is the way in which the legal form shapes the demands articulated within it, irrespective of who makes them. This is obviously a more profound interaction of form and content, because if the legal form is capable of rendering any particular content 'bourgeois', then it matters little whether or not a progressive group is capable of 'winning the argument'.

It is a virtual truism of Marxist theory that any particular content is dramatically shaped by the social forms in which it is situated.[75] As already noted, Pashukanis sees the legal form as a relationship between two abstract, formally equal individuals. Furthermore, for Pashukanis, dispute, controversy, and violation are central to the law. He argues that the 'real movement' of law could only be found in dispute, since '*the juridical element in the regulation of human conduct enters where the . . . opposition of interests begins*'.[76] For Pashukanis, then, legal argument centres on the disputes between abstract, formally equal subjects. The focus produced by the legal form has definite consequences for legal content.

The problems with which progressives are confronted – poverty, war, disease – do not simply just 'happen', they are manifestations of 'background', structural factors – be they political, economic, or ideological; '"moment[s]" in a larger structure of meaning that can be known, analyzed, and potentially defeated'.[77] But legal argument is both too abstract and at the same time too specific to deal effectively with these problems. Legal argument frames its participants as abstract, self-contained individuals; as such it treats their actions, rather than the reasons for these actions, as decisive. Moreover, these actions become relevant only inasmuch as they form the content of a dispute or violation of the law. Legal argument therefore resolves the particular disputes of abstract individuals without ever touching on the logics which shape and condition their actions, and in this sense it is too abstract.

Although legal argument may be able to deal with effects, it proves incapable of dealing with causes; this is where legal argument proves too specific. Legal argument resolves specific 'violations', 'disputes', or 'instances', but it never questions the general structural logics that lurk beneath them, and so cannot fully eradicate the

73 See Bowring, *supra* note 6; and B. Fine, *Democracy and the Rule of Law* (2002), at 129.
74 Pashukanis, *supra* note 69, at 144.
75 K. Marx, *Wage Labour and Capital* (1978), 29.
76 Arthur, *supra* note 14, at 13 (emphasis in original).
77 J. Sanbonmatsu, *The Postmodern Prince* (2004), 193.

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problems it addresses.[78] This is not to say that those who adopt legal argument are unaware of the systemic logics that underlie particular actions, simply that in adopting a legal strategy they act as if they were unaware of such logics and so cannot address them.[79]

These limits are well illustrated by looking at the Iraq war. This example is pertinent – and somewhat remarkable – since it saw international lawyers (including several critical legal scholars) make an organized, legalistic intervention against the war.[80] What is perhaps more remarkable is the document that the critical scholars produced reflecting on that intervention and the problems it raised.[81] Looking at this document, as well as at the general opposition to the war in Iraq, helps to illustrate the limits of legal argument.

First, then, is the abstract character of the argument; this was most obviously manifested in the focus on the actions of state officials and the complete lack of reference to the systemic logics that drove these officials. Much of the popular opposition to the war in the United Kingdom focused on the role of Tony Blair (dubbed 'Bliar') and tended to characterize the war as a result of the action of war criminals – perhaps the most spectacular example of this was George Monbiot's attempt to arrest John Bolton (at the time of the war US Under Secretary of State for Arms Control and International Security) as a war criminal[82] – with very little attention paid to the forces that shaped these actors and their decisions. As the collective of critical scholars put it, 'the anti-war activists were mimicking the logic of those they sought to oppose, simply substituting Bush and Blair for Saddam Hussein and Osama bin Laden'.[83]

Second is specificity. This was made manifest in two distinct but interconnected ways. In focusing specifically on violation and dispute, attention was placed squarely on whether or not Security Council Resolution 1441 (2002) authorized the use of force. But focusing on this argument was incredibly problematic. First, it meant that the anti-war campaigners could criticize only the Iraq war; they could not link this criticism to a broader one of the 'war on terror' and the conflicts that resulted from it. Second, and more importantly, a general anti-imperialist strategy could not be pursued, since all that could be focused on was the specific legality of the Iraq war.

Let us imagine for a moment that legalistic opposition to the war had succeeded and that the United States had declared that it would refrain from the use of force

78 This particular phenomenon has been well documented under a number of different rubrics: a fixation on crisis, on exceptionalism, etc. While these approaches have been extremely fruitful, they do not locate the deficiencies in legal argument within the law itself. The strength of the approach just outlined is that it is able to explain the pervasiveness of these problems. Of course, it may be objected that critical scholarship is able to avoid them, and this is true, but these scholars utilize an avowedly inter-disciplinary framework and as such are rejecting strict 'legal argument'. See, e.g., S. Marks, 'Apologising for Torture', (2004) 73 *Nordic Journal of International Law* 365; and H. Charlesworth, 'International Law: A Discipline of Crisis', 2002 *Modern Law Review* 377.

79 Marks, *supra* note 25, at 23.

80 U. Bernitz et al., 'War Would Be Illegal', letter, at www.guardian.co.uk/politics/2003/mar/07/highereducation.iraq.

81 Craven et al., *supra* note 5.

82 G. Montbiot, 'War Criminals Must Fear Punishment. That's Why I Went for John Bolton', at www.guardian.co.uk/commentisfree/2008/jun/03/usforeignpolicy.usa.

83 Craven et al., *supra* note 5, at 369.

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in Iraq, since such use would breach international law. While this would have been a laudable achievement, it would – in the long run – have done very little. The structural tensions that give rise to war would have remained untouched and future wars would be just as likely, all of which would then have to be opposed individually. Indeed, one practical outcome might simply have been that the United States would vigorously pursue Security Council approval for its future wars.

This suggests that the transformative potential of international law is severely lacking, as legal argument can never address systemic or structural causes.[84] In fact, as Miéville notes, this argument can be extended. Many of the problems in the international sphere (war, poverty, etc.) are the results of global capitalism. But if we agree that the legal form is a result of commodity exchange – and international commodity exchange is global capitalism – then unless the legal form is used to abolish its own conditions it will never be able to overcome these problems.[85] This argument dovetails quite neatly with a second concern with the impact of the legal form on the content of the law. As already noted, there are some very incisive critiques which argue that legitimation is an important function of the legal form. While this argument can be used to undermine some of Miéville's arguments, it may also serve to vindicate his more fundamental critique of the legal form.

Let us return to the possibility of stopping the war in Iraq. As already noted, while this would have been a creditable outcome, it would have left the structural causes of the war in place. Stopping the war would also have led to a certain valorization of legal struggle as sufficient to secure progressive aims. But if legality is ultimately produced by global capitalist relations, then valorizing legality ultimately valorizes global capitalism. And if legal victories are seen as sufficient, then ultimately so is global capitalism.

There is a final linked consequence of the legal form that needs to be examined. If – as I have argued – the legal form is primarily actualized through disputes between abstract, formally equal individuals fighting particular cases, then it seems somewhat opposed to the idea of mass movements. If a battle is waged primarily through the legal form, it is likely to be composed of individual cases and struggles.[86] When considered with the second point this trend might become even more pronounced; if struggle is mainly thought of in legal terms, then individual legal victories may be seen as sufficient; this tends towards creating an individualist perspective, undercutting solidarity and community.[87]

This is linked with the fact that legal struggles are almost of necessity mediated through a professional class of lawyers. This article is not the place to discuss the particular social position and role of lawyers, but at this point it is useful to note two things. First, access to lawyers tends to be mediated by access to money – this obviously tends to undercut their utility in progressive struggle. Second, the

84 See, e.g., D. Kennedy, 'The International Human Rights Movement: Part of the Problem?', (2002) 15 *Harvard Human Rights Law Journal* 101.
85 Miéville, *supra* note 6, at 316.
86 S. Picciotto, 'The Theory of the State, Class Struggle and the Rule of Law', in Bob Fine et al. (eds.), *Capitalism and the Rule of Law: From Deviancy Theory to Marxism* (1979), 164.
87 Ibid., at 171.

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necessity for a professionalized, specialized, bureaucratic, and ultimately alienated mediation in this respect is profoundly disempowering and demobilizing.[88]

*3.1.1. Conclusion: principled opportunism*

The above analysis suggests a two-pronged strategy for the progressive use of international law. The content of international law is contestable by progressive non-state actors. Utilizing their economic, ideological, and sometimes coercive power these groups may be able to turn the content of international law to their own ends, either by constituting themselves as formal actors in the international sphere or by forcing particular states to adopt an interpretation that favours their interests. This is compounded by the fact that with the increasing commodification of social life under capitalism, social life is also increasingly juridified, with any social struggle generating immediate legal consequences. At best it would prove short-sighted simply to ignore these consequences, and at worst it would prove impossible. Accordingly, this article has suggested that progressive forces can take advantage of 'legal opportunities' and may successfully realize their aims through international law.

However, the transformative power of this struggle is limited by the legal form. By virtue of the 'shape' of this form, legal strategy cannot address the social structures that give rise to the world's problems. This indicates that the best route for international lawyers is to engage in 'concrete forms of political commitment',[89] abandoning any utopian hopes of the law's role in social transformation. International law might be used 'defensively' – perhaps invoking it in a national trial to defend otherwise criminal actions.[90] Equally, it could be used offensively, for example in attempting to secure the trial of war criminals, which would also help to publicize the 'truth' of a particular situation.[91]

Even with such a modest strategy there are real risks. The shape of the legal form means that pursuing a legal strategy can break up collective solidarity, and renders progressive forces unable to address the systemic causes of social problems. Indeed, to mount a legal strategy is to risk legitimating the structures of global capitalism. Thus what needs to be articulated is a strategy which is able to take advantage of the possible progressive content of the law, whilst avoiding the problems of the legal form. International law, then, must never be pursued because it 'is law', but only insofar as its content can advance the aims of progressive constituencies.

What must be pursued is a 'principled opportunism', where – in order to undercut the individualizing, legitimating perspective of law – international law is consciously used as a mere tool, to be discarded when not useful. As Lukács put it,

> The question of legality or illegality reduces itself then for the Communist Party to *a mere question of tactics* . . . In this wholly unprincipled solution lies the only possible and practical rejection of the bourgeois legal system . . . For the proletariat can only be

88 MacNair, *supra* note 8, at 236.
89 M. Koskenniemi, '"Intolerant Democracies": A Reaction', (1996) 37 *Harvard International Law Journal* 231, at 234.
90 *R v. McCann and Others*, [2008] NICA 25
91 Bowring, *supra* note 6, at 205.

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> liberated from its dependence upon the life-forms created by capitalism when it has learnt to act without these life-forms inwardly influencing its actions.[92]

The strategic question of international law's progressive potential is – as a matter of principle – reduced to the tactical, instrumental deployment of legal argument.

### 3.2. Beyond the rational kernel?

Even in this slightly pessimistic conclusion there is a glimmer of Leninist hope. In *Lenin and the Problems of Law*, Pashukanis makes a startling observation on self-determination:

> Lenin understood what his opponents failed to understand: that the 'abstract', 'negative' demand of formal equal rights was, in a given historical conjuncture, simultaneously a revolutionary and revolutionizing slogan, and also the best method of strengthening the class solidarity of the proletariat and of protecting it from infection by bourgeois—national egoism.[93]

The idea that an assertion of 'formal equal rights' can be revolutionary grants legal struggle a much more important role than principled opportunism. Moreover, Pashukanis appears to be at odds with Miéville's argument that self-determination is the '*culmination of the universalizing and abstracting tendencies in international – legal – capitalism*'.[94] Yet Miéville's position does seem to be within the 'rational kernel' of both his and Pashukanis's theory, since insofar as self-determination is a drive for legal subjectivity it remains within the co-ordinates of global capitalism. The question must therefore be – is Pashukanis inconsistent?

I would argue that provided one takes account of the 'given historical conjuncture', there is no inconsistency with arguing that self-determination can be both a moment in a revolutionary struggle and a continuation of the universalizing trends of international capitalism. In the historical conditions in which Lenin was writing ('on the eve of the Imperialist War'[95]) it was necessary to support the abstract right of self-determination, so as to mobilize the people of the colonial countries against the imperialist system and perhaps to overthrow it. Yet once these conditions changed, '[t]he imperialist bourgeoisie . . . tried to mask their policy of oppression and robbery . . . by empty "Wilsonian" phrases on the equality of peoples',[96] and to adopt these slogans would simply play into their hands.

Thus it is possible, in a given concrete conjuncture, to mobilize a mass of people around an abstract, formal, legal demand. If the existing order is unable or unwilling to grant this demand, then the masses mobilized around this demand can be made to question and even overthrow the existing order. But should the existing order manage to accommodate this demand, it will emerge stronger and more secure. As

92 G. Lukács, *History and Class Consciousness* (1990), 264 (emphasis in original).
93 Pashukanis, *supra* note 69, at 161.
94 Miéville, *supra* note 6, at 264 (emphasis in original).
95 Pashukanis, *supra* note 69, at 159.
96 Ibid., at 160.

Žižek notes,

> A certain particular demand possesses, at a specific moment, a global detonating power; it functions as a metaphoric stand-in for the global revolution: if we unconditionally insist on it, the system will explode; if, however, we wait too long, the metaphoric short-circuit between this particular demand and the global overthrow is dissolved and the system can, with sneering hypocritical satisfaction, make the reply 'You wanted this? Here, have it!', *Augenblick* . . . is the art of seizing the right moment, aggravating the conflict *before* the system can accommodate itself.[97]

Pashukanis and Miéville are able to add a great deal of substance to this observation. Pashukanis's work suggests that a specifically legal demand (a 'demand of formal equal rights') can motivate people in a way that others cannot. To substantiate this claim fully would require another article, but, briefly, Pashukanis proposes that a world saturated with commodity relations is a world also saturated with legal relations. On this basis the role of law under capitalism cannot simply be confined to a narrow sphere; it also operates ideologically, contributing to the formation of human subjectivity.[98] Because of this, legal arguments will – under capitalism – become especially compelling. However, this very power also means that to 'seize the moment' at the wrong time will strengthen legality and the relations that underlie it – those of global capitalism.

Of course, this brings with it its own problems, as, rather than consciously avoiding the legal character of a demand, it seeks to embrace it. What this suggests is a two-track strategy, where in normal circumstances 'principled opportunism' is pursued but in extraordinary circumstances 'legality' once again becomes important. Even in these extraordinary circumstances there would always be a 'conscious' element, those who have engaged in principled opportunism, who remain 'aware' of the limits of legality.

We can identify several problems with this strategy. First, it will inevitably be a gamble and should this gamble fail, then the existing order will be buttressed. Second, the invocation of legality would necessarily be in 'bad faith', with the demand only invoked so as to fail, which entails problems of 'revolutionary honesty'.[99] This leads on to the third and final point, that this double strategy entails the division of progressive forces into 'conscious' and 'unconscious' elements. Such a division raises important questions about the role of theory and specialist knowledge, as well as the role of political parties more generally. These remain genuine problems, which, for reasons of space, cannot be addressed here. But it should be noted that in many respects these problems occur whenever Marxists attempt to relate to a mass movement that is not Marxist.

97 S. Žižek, 'Postface', in G. Lukács, *A Defence of History and Class Consciousness: Tailism and the Dialectic* (2006), 151 at 164 (emphasis in original).

98 R. Kinsey, 'Marxism and the Law: Preliminary Analyses', (1978) 5 *British Journal of Law and Society* 202, at 218–20.

99 Thanks to China Miéville for this formulation.

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## 4. Conclusion

In this article I have attempted to show that the content of international law is much more open for contestation than Miéville allows. This means that progressive forces can – through their economic, ideological, and coercive power – advance their interests through international law. Here I have emphasized the importance of political, economic, and ideological considerations, both in the formation of legal subjects and in the 'resolution' of indeterminacy. However, in the short space of an article these could only be brief considerations, and more work certainly needs to be done on the different types of 'force' which are involved in law; particularly needed is an examination of structural violence.

I have also argued that the form of international law is a limiting one, which curtails its ability systemically to transform the world and, as such, embeds and legitimates relationships of exploitation and domination. The challenge, then, is to take advantage of the content of international law in such a way as to mitigate the effects of its form. I think that principled opportunism is one way of doing this, although there may be others. Finally, there is also a sense in which – as a uniquely important factor in capitalist society – the power of the legal form might be harnessed so as to surpass itself, but this is a gamble fraught with tension and danger. Ultimately, these decisions only make sense as practical and contextual ones; hopefully, in laying out the salient issues, this article has been able to make a small contribution to such practical decisions.