# TOWARDS A MATERIALIST THEORY OF INTERNATIONAL LAW

*Thesis Submitted to Jawaharlal Nehru University in fulfillment of the requirement for the award of the degree of*

**DOCTOR OF PHILOSOPHY**

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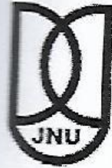
**2017**



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**July 24, 2017**

## DECLARATION

I declare that the thesis entitled, **"TOWARDS A MATERIALIST THEORY OF INTERNATIONAL LAW"**, submitted by me for the award of the degree of **DOCTOR OF PHILOSOPHY** of Jawaharlal Nehru University is my original work. This thesis has not been previously published or submitted for any other degree of this University or any other University.

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## CERTIFICATE

We recommend that this thesis be placed before the examiners for evaluation.

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***Acknowledgments***

*The writing of this thesis is one of the most significant academic challenges I have ever had to face. Though only my name appears on the cover of this thesis, a great many people have contributed to its production. I owe my gratitude to all those people who have made this thesis possible, and because of whom my research experience has been one that I will cherish forever.*

*My deepest gratitude is to my Supervisor,* ***Prof. B.S. Chimni*** *who undertook the work of supervising despite his many other academic and professional commitments. I have been amazingly fortunate to have a supervisor who gave me the freedom to explore on my own and at the same time the guidance to recover when my steps faltered. He taught me how to question thoughts and express ideas. His patience and support helped me overcome many crises and finish this thesis. I am deeply grateful to him for the long discussions that helped me to a high research standard and enforcing strict validations for each research result, and thus teaching me how to do research. I am also thankful to him for encouraging the use of correct grammar and consistent notation in my writings and for carefully reading and commenting on countless revisions of this manuscript. I would like to thank him for encouraging my research and for allowing me to grow as a research scientist.*

*I would also like to thank* ***Prof. Y. K. Tyagi****,* ***Prof. B. H. Desai*** *and* ***Dr. V. G. Hegde*** *for the courses they offered in M. A and M. Phil. Their lectures have given me the great insight to comprehend the theoretical debates in the subject of international law, and on which the thesis is built upon. It is noteworthy to mention* ***Prof. B. H. Desai****'s unrelenting critical questions made me to see the subject more critically. I cannot forget to thank the staffs of the centre,* ***Savitri Madam*** *and* ***Hariom*** *as they never hesitated to help when needed.*

*I am thankful to* ***Comrade Yatendra Kumar****, who in his busy schedule spent valuable time in clearing my theoretical questions. My sincere thanks also go to* ***Comrade Manabhanjan*** *for his insightful comments and suggestions.*

*Many friends have helped me stay sane through these difficult times. Their support and care helped me overcome setbacks and stay focused on this research. I greatly value their friendship and I deeply appreciate their belief in me. I would like to thank* ***Gideon Shadang, Iqbal Bhat, Dinesh Kumar, Ragul*** *for proof reading various chapters of my thesis. I am also indebted to my friends particularly* ***Lata, Tabobrata, Suraj, Sayantika*** *and* ***Chandrasekar.***

*Most importantly, none of this would have been possible without the love and patience of my family. My family has been a constant source of love, concern, support and strength all these years. I would like to express my heart-felt gratitude to my family.*

*I would also like to thank the JNU library staffs for their patience in helping me to find the materials for my research. Finally, I appreciate the financial support from UGC that helped me to cover my expenses, especially during my research works.*

***S. Anandha Krishna Raj***

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## ABBREVIATIONS

| | |
|---|---|
| **ANC** | **African National Congress** |
| **BITs** | **Bilateral Investments Treaties** |
| **CLS** | **Critical Legal Studies** |
| **CPSU** | **Communist Party of Soviet Union** |
| **CPC** | **Communist Party of China** |
| **ECOSOC** | **Economic and Social Council** |
| **EU** | **European Union** |
| **FtAIL** | **Feminist Approaches to International Law** |
| **GATS** | **General Agreements on Trade in Services** |
| **GATT** | **General Agreements for Tariffs and Trade** |
| **IBRD** | **International Bank for Reconstruction and Development** |
| **ICC** | **International Criminal Court** |
| **ICJ** | **International Court of Justice** |
| **IFI** | **International Financial Institutions** |
| **IHRO** | **International Human Rights Organisations** |
| **IMAIL** | **Integrated Marxist Approach to International Law** |
| **IMF** | **International Monetary Fund** |
| **IO** | **International Organisation** |
| **MIGA** | **Multilateral Investment Guarantee Agency** |

| | |
|---|---|
| **MILS** | **Mainstream International Law Scholarship** |
| **NAIL** | **New Approaches to International Law** |
| **NATO** | **North Atlantic Treaty Organisation** |
| **NGO** | **Non-Governmental Organisation** |
| **NIEO** | **New International Economic Order** |
| **PCIJ** | **Permanent Court of International Justice** |
| **PLO** | **Palestine Liberation Organisation** |
| **PSNR** | **Permanent Sovereignty over Natural Resources** |
| **R2P** | **Responsibility to Protect** |
| **RCP(B)** | **Russian Communist Party (Bolsheviks)** |
| **RSFSR** | **Russian Soviet Federative Socialist Republic** |
| **SWAPO** | **South West Africa People's Organisation** |
| **TCC** | **Transnational Capitalist Class** |
| **TOC** | **Transnational Oppressed Class** |
| **TRIMS** | **Trade Related Investment Measures** |
| **UN** | **United Nations** |
| **US** | **United States** |
| **USA** | **United States of America** |
| **USSR** | **Union of Soviet Socialist Republic** |
| **WB** | **World Bank** |
| **WTO** | **World Trade Organisation** |

**To the Petrograd Soviet Workers**

**(On the Centenary year of the October Revolution, 2017)**

# CHAPTER I

# INTRODUCTION

## 1. Background

In recent years critical legal theory is gaining increasing importance as mainstream legal theory (positivism and liberalism) has failed to explain and respond to global problems adequately. The term critical legal theory in the field of international law is usually used to indicate feminist approaches to international law, postcolonial approaches to international law, postmodern approaches to international law, the third world approaches to international law and Marxist approaches to international law. Of these, the Marxist approaches to international law have received the least attention. Marxist theory of international law is also called the materialist theory of international law. Materialism as a philosophy existed from the ancient times. It evolved against the philosophy of idealism. Marxism is the new materialism of the contemporary era. In other words, Marxism is the scientific extension and completion of the materialist theory.

The essence of Marxism is dialectical materialism. The superstructure of law, as well as international law, can be analysed through dialectical materialism. Dialectics, like materialism, also has a philosophical history. It was a counter to the metaphysical thought of understanding things in nature. The metaphysical observation of law as the eternal and divine origin is opposed by the dialectical understanding of society. According to the traditional Marxist approach to law, economy is the real foundation on which legal and political superstructures arise. However, as Engels clarified, elements of the superstructure like law exercise influence upon the course of the historical struggles and in many cases, to an extent, determine the course of the economy. The base and superstructure debate in Marxism have held sway for more than a century. Western Marxist thinkers from Raymond Williams to Louis Althusser have complicated this model and offered increasingly sophisticated models of Marxism. Yet none of these has been brought to bear on the field of international law.

When it comes to the Marxist approach to international legal theories, over the last century, many Marxist legal scholars have made substantial contributions. One strand of scholars from the former Soviet Union includes Peter Stuchka, Evgeny Pashukanis,

Evgeny A. Korovin and Grigory Tunkin. Of particular importance is Pashukanis' commodity theory of law which was extended to international law. Other than scholars from the former Soviet Union there are only a few Marxist international law scholars. The most important among them is B.S. Chimni whose writings are either directly connected to Marxism or written using a Marxist approach. China Mieville, in his book *Between Equal Rights - A Marxist theory of International Law*, follows in the footsteps of Chimni but uses Pashukanis' commodity theory of law to articulate a Marxist theory of international law. Besides Chimni and Mieville there are other Marxist scholars such as Bill Bowring, Anthony Carty, A. Claire Cutler and Susan Marks who have made significant contributions.

Unlike mainstream approaches to international law, a materialist approach attaches much importance to the history of international law. It emphasises that to extract the philosophy of international law as an ideology, history of international law is required. There is a need to delve deep into history from a materialist perspective in order to derive the essence of international law. In contrast the idealist conception of history states that the primary determining factor in social development is to be found in the ideas and institutions of society.

While writing history, the division of period is an important question. It has to be an imaginary line drawn considering some aspects of the history. It can be based on geographical areas such as European, Asian, African, American history of international law. It can also be based on different historical time periods. But it should make some logical sense while writing the history. At the same time, the history of international law cannot be written as separate isolated units whether it is based on geographical areas or different historical periods. In the mainstream history, the chronology is of many different historical time periods. It is divided into ancient, medieval and modern. David J. Bederman while writing the history of ancient international law under the title *International Law in Antiquity* has divided his study into state relations, religion, diplomacy, etc. Obviously, these phases have a bearing on different areas of international law, but at the same time can we make any generalisation of these regions? What is the dialectical connection between these various areas of international law? Is it just the ancient or is it more than that? For that, we have to move to the methodology of historical materialism.

The materialist conception of history argues that international law is closely connected with the development of different modes of production from ancient society to contemporary global capitalism. In its view, the doctrines, norms and principles of modern international law have evolved during different phases of capitalism. The mode of production includes the means of production, primarily the instruments of production. The mainstream ancient period of history is mainly divided into the age of different metals used in various times. Thus, Stone Age is followed by Bronze Age and then the Iron Age. These are the instruments of production man used for his survival. However, this cannot give a complete picture of the ancient society. Because along with the new instruments of production; the new relationship of production and forces of production are also developed. So the history of the world is not only the change in instruments of production but also the change in human society as well. Considering this chronology as a method while writing the history of international law will lead to new research.

Norms of international law evolved in different historical periods and later developed into principles of international law. Some of the principles are unique to a particular mode of production. For example, the right to wage war as a sovereign principle is related to the middle ages, during the feudal mode of production. Similarly, some principles are peculiar to the socialist mode of production, such as the principle of peaceful co-existence, proletarian internationalism and the right to self-determination of people. In the mainstream understanding, peaceful co-existence is the existence of states together with a different economy. On the other hand, the materialist theory says peaceful co-existence is the presence of antagonistic states staying together. It is not only a political enmity, but social and cultural enmity; otherwise called as class antagonism. This exceptional situation happened when one-third of the world population lived under the socialist mode of production. The next principle proletarian internationalism, which later developed into socialist internationalism, is also peculiar to the materialist theory of international law. The concept of uniting the working class of the world was formulated by Marx and his comrades in the First International. This principle is primordial for the principle of socialist internationalism in international law, which unites the proletariat of the world to fight against the imperialism. The principle of self-determination originates from the capitalist countries, along with

liberal ideology.[1] It was practised in the capitalist countries, but not universally applied. The principle of self-determination of the people, without differentiating the oppressing and the oppressed countries were made possible only when the world witnessed the socialist mode of production in many countries. This principle played a significant role in decolonising the world.

Coming to the sources of international law the Materialist approach has a distinctive understanding of the basic doctrines of international law including sources and subjects. The sources of international law are authoritatively stated in the Statute of International Court of Justice. These include treaties, international customs, and general principles of law, judicial decisions and the teachings of highly qualified publicists. However, the definition and understanding of different sources in international law differ from the mainstream approach. For instance, unlike the formal definition of a treaty given in the Vienna Convention of Law of Treaties 1969, Marxist scholar Korovin had seen international agreements as the expression of an established social order in which certain social forces and states are dominant acting with a certain balance of collective interest.[2] In the case of the secondary source of highly qualified publicists, Marxists contend that it is biased in celebrating western scholarship. With respect to soft law, the Marxist international law scholarship argues that the resolutions passed by the majority of states in the UN General Assembly should be treated seriously. In sum, in the materialist view, the norm creating process of international law is biased towards hegemonic states.

In so far as subjects of international law are concerned, the mainstream approach rightly contends that states are the principal subjects of international law, but do not differentiate between different kinds of states regarding assessing the character of international law. In contrast, the materialist approach focuses on the nature of the state which in its view is an instrument to serve the interests of a particular class or classes. In the contemporary period, international organisations are also a significant subject of international law. Mainstream scholarship has always argued that international organisations have a separate legal personality. The International Court of Justice came to the same conclusion in the Reparation case (1949). While speaking

[1] See further, Keitner, *National Self-Determination in Historical Perspective: The Legacy of the French Revolution for Today's Debates*, International Studies Review, Vol. 2, No. 3 (Autumn, 2000), pp. 3-26.
[2] Cited in Chimni, *An Outline of a Marxist Course on Public International Law,* p.12.

of the international organisations, Soviet scholars maintained that international organisations are not subjects of international law but are subjects of international relations. The Marxist international law scholarship argues that the international class interests are enforced with the help of international organisations.

## 2. Review of Literature

The review of literature is undertaken with respect to five themes: materialist approach to law, materialist approach to international law, materialist history of international law, materialist approach to socialist international law principles and materialist approach to sources and subjects of international law.

### 2.1. Materialist Approach to Law

Marx (1859) maintained that law is part of the superstructure along with the state which arises from the real foundation, i.e., the economic structure of society. Marx never succeeded in developing an understanding of the law about the mode of production and commodity form of capitalism (Balbus, 1977). However, in the writings of Marx and Engels, a theory of law is not elaborated although there are numerous reflections which can be used for developing it. In the case of international law, there is almost no direct statement on the subject. But a theory of international law can be developed through the use of the Marxist method. Lenin (1917) differentiates bourgeois law in a socialist society. He describes the nature of the state as well as law in *State and Revolution*. The bourgeois law continues only in recognising the private property of the individuals, not in its entirety. According to Michael Head (2007), Lenin viewed the Soviet law as a socialist law, not the remnant of the bourgeoisie.

Pashukanis (1924) adopted the Marxist method to argue that there is a homology between the logic of the commodity form and the logic of the legal form. According to him, both are universal equivalents which in appearance equalise the manifestly unequal. He averred that the social organisation of collectivities as diverse as bees and primitive peoples require rules. But not all rules are legal rules. Rules in pre-capitalist societies are customary and traditional have their basis in moral and utilitarian considerations. It is only in a capitalist society when labour power itself becomes a commodity that legal relations come into being. Later, Vyshinsky (1948) gave a

definition of Soviet law that it is the aggregate of the rules of conduct established in the form of legislation by the authority of the toilers and expressive of their will. He was close to a Marxist theory of law by saying that there is no eternal, final and immutable moral law.

### 2.2. Materialist Approach to International Law

Pashukanis' (1925) applied the commodity exchange theory of law to international law. He noted that sovereign states co-exist and are counterposed to one another in the same way as individual property owners with equal rights. Pashukanis observed that international law in principle recognises that states have equal rights yet, in reality, they are unequal in their significance and their power. Pashukanis thus unmasked the true nature of international law and explained in the process why the open denial of international law is politically unprofitable for capitalist states. It is much more profitable for them to act as the champions of international law. He further argued that international law is the legal form of the struggle of the capitalist states among themselves for domination over the rest of the world. In sum, he correctly pointed out that the spread and development of international law occurred by the spread and development of the capitalist mode of production.

Tunkin's (1974) theory of international law can be termed as international law for a divided world. He argued that after the October Revolution of 1917, a new international law began to take shape out of the ideas and principles that emerged from it. This international law was more democratic than traditional international law. The impact of the Socialist Revolution led to three fundamental principles of Soviet International law. The first was the principle of socialist internationalism that governs the relations between the socialist states. The second principle was the principles of equality and self-determination of nations and peoples and the third was the principle of peaceful coexistence between states, considered as the primary principle of Soviet foreign policy. Tunkin argued that general international law was the law of peaceful coexistence. It is the law of international cooperation as well as the law of peaceful competition between socialist and capitalist states.

In his article *Marxism and International Law*, Chimni (1999) argues that contemporary international law is an instrument of safeguarding the interest of transnational capital. Chimni (1993) writes that 'the basis of international law is

constituted by the economic structure of each state in dialectical interaction with international economic relations that has its foundation in the division of labour and a world market.' He disagreed with Tunkin that the international law is not a bourgeois (imperialist) international law but a bourgeois democratic international law. However, he agreed with Tunkin that contemporary international law 'does not possess a single class essence'.

Mieville in his book *Between Equal Rights-The Marxist theory of International Law* (2005) rejects both positivism, the idea that the practice of states constitutes the primary source of international law and naturalism, which regards fundamental principles of law as derived from universally valid principles of justice. He argues that neither of them is persuasive from a materialist point of view. He develops Pashukanis commodity theory of law that the necessary conditions for the execution of exchange are to enforce them with force if needed. He further noted that at the very moment of legal action, a subject implies political measures in the form of direct coercive violence. Examining the history of international law, he describes at some length the changing relationship between international law and coercive violence in the shape of imperialist adventure and colonial rule. In his assessment, the chaotic world around us is the rule of law.

### 2.3. Materialist History of International Law

Lenin (1916) uncovered the laws and characteristics of imperialism as the highest stage of capitalism. He correctly identified the transformation of competition to the monopoly as one of the most important phenomena of the modern capitalist economy. He further argued that the uneven and spasmodic development of individual enterprises, individual branches of industry and individual countries are inevitable under the capitalist system. According to Lenin, the Treaty of Versailles, called as the peace treaty exposed the brutal nature of imperialism. He described the Versailles peace treaty as 'unprecedentedly predatory' and as the first case in world history of the legal approval of plunder, slavery, dependence, poverty and exploitation. Lenin also called for that the secret treaties to be published while concluding the Report on Peace of November 8, 1917 (cited in Tunkin, 1974). He also argued that provisions concerning annexations must be abrogated.

While discussing international law Pashukanis (1925) writes that 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 conflicts which are found in the very earliest stages of human history. The tribal pre-state life of the Iroquois, and of the ancient Germans, saw the conclusion of alliances between tribes. Pashukanis, however, argued that international law only spread and developed with the arrival of the capitalist mode of production.

According to Chimni, (1993) the history of modern international law can be divided into four phases. First, the transition from feudal to the bourgeois international law from the period of 1600-1760 called as old colonialism. Second, the bourgeois colonial international law from 1760-1875 called as new colonialism. Third, the bourgeois (imperialist) international law from 1875-1945 called as imperialism. Fourth, the bourgeois democratic international law from 1945 onwards termed neo-colonialism.

## 2.4. Materialist Approach to Socialist International Law Principles

The principle of peaceful co-existence has two interpretations, one by the Soviet Union during the period of Khrushchev and the other by the Chinese Communist Party as Mao as the Chairman. Tunkin (1970) following the line of Khrushchev said that peaceful co-existence is applicable only to relations among states. He differentiated the class struggle within a country and the contradictions or struggle among the capitalists as well as between the capitalist and socialist countries. Tunkin justified by taking Lenin’s policy of peaceful co-existence. However, Lenin (1920) on the other hand, called the nations living together peacefully is a petty-bourgeois illusion.

Mao (1963) criticised USSR principle of co-existence as all-round cooperation with imperialist countries and in particular with the United States. Further, he said that the Soviet Union and the United States will be able to find a basis for concerted actions and efforts for the good of all humanity' and can march hand in hand for the sake of consolidating peace and establishing real international co-operation between all states is anti-Marxist-Leninist.

Regarding proletarian internationalism, in *The Communist Manifesto*, Marx and Engels (1847) explained that the communists, against the present system, support every revolutionary movement all over the world. Proletarian internationalism was practised by various communist parties and revolutionary groups by forming the First International called as 'The Communist League' at 1847. Second and Third International followed after the First International with some ideological differences.

The principles of socialist internationalism were explained in the communiqué concerning the special session of the Council of Mutual Economic Assistance (April 1969). They are mutual economic, scientific and technical ties with the socialist countries, which is a new type of international relations called socialist internationalism. It further adds complete equality, respect for sovereignty, mutual advantage and comradely mutual assistance with the other socialist countries.

Rosa Luxemburg (1908) published series of articles named as *The National Question and Autonomy* in the journal of the Polish social democratic party. Rosa argued that the right to self-determination is an abstract and metaphysical right and in reality, helps the bourgeois nationalism. Pannekoek, a Dutch Marxist and theorist published a book named *Class struggle and Nation* in 1912. The Same year, another book published by Strasser called *Worker and Nation*. Both the authors uphold class interest over national interest. Lenin (1895-96) in his *Draft and explanation of a programme for the Social Democratic Party* demanded the freedom of religion and equality of all nationalities. Tunkin (1970) said that the materialist position should be in selective of supporting the struggle for self-determination. The class that leads the struggle for the self-determination is necessary to calculate whether the struggle is progressive or not.

### 2.5. Materialist Approach to Sources and Subjects of International Law

Korovin and Pashukanis both admitted that custom and treaties were sources of international law. However, Pashukanis (1925) contended that both the sources reflected the legal ideology of capitalist states. Korovin saw international law (treaty and custom) as the law of coexistence, the law of competition and cooperation among states of diverse social systems (Erikson, 1972). It seems that he gave more importance to treaties than custom.

Tunkin (1974) defined a law-making treaty as treaties creating abstract norms which are recognised or established by states as norms of conduct for the future. In contrast treaty contracts are between limited numbers of states - either two or three states. Treaty contracts are very rarely sources of international law. If the purpose is to create international norms, then it is a law-making treaty, if not then it is a treaty contract.

Korovin had earlier contended that the division of treaties into law-making and contractual treaties are unfounded, since any treaty, as an act originating with states-subjects of international law, has a particular law-making significance. As Korovin put it, every international agreement is the expression of an established social order with a certain balance of collective interests (cited in Tunkin, 1974). However, Tunkin (1974) observed that while any valid international treaty has legally binding force for its parties and in this sense is law-making, the significance of general treaties, in which all or nearly all states participate, and of treaties containing provisions relating to narrow and less-important questions and of short-term validity, should be taken into account.

Turning to general principles of international law, Tunkin (1974) observed that only those decisions of the International Court of Justice in which judges representing the different social and legal systems have voted and which frequently are cited in the practice of relations among states actually have a chance of being consolidated as a source of international law.

Chimni (2004) points out that the mainstream international law scholarship does not take serious of the extra-textual reality of ultimate sources, consist of social structures, change of economic and political conditions, etc. In contrast, a Marxist approach to international law, marries international political economy to a historical sociology to explain systematically the basis of international law norms. Chimni calls for re-examining and highlighting the *rebus sic stantibus* or material change in circumstances doctrine and making it integral to the concept of a balanced and just treaty albeit in its consensual form.

Mainstream international law scholarship offers a formal definition of the state. It is confined to indicating the criteria of statehood. Article 1 of the Montevideo Convention defines a state as a person of international law that possesses the following qualifications: a permanent population, a defined territory, government, and

capacity to enter into relations with the other states. On the other hand, Lenin (1917) defined that state as a product and a manifestation of the irreconcilability of class antagonisms. Tunkin (1974) also criticised the colonial powers for viewing Non-Western states as unequal to the Western Christian states and therefore not subjects of international law.

The Soviet scholar V. Shurshalov maintained that international organisations are not subjects of international law but are subjects of international relations (cited in Tunkin 1974). Tunkin (1974) defined international organisations as entities created by the states through the conclusion of international treaties and operate by such treaties. The states remain sovereign and equal both within and without an international organisation. He further argued that the mechanism of an international organisation is brought into operation by states and member states have the right to withdraw from the organisation. He contended that the basic resolutions of international organisations are of only a recommendatory nature.

By reading the available literature, it can be seen that there are gaps and difficulties in the materialist approach to international law. The Soviet Scholars mostly adopted a positivist approach to international law. Other than in the instance of Pashukanis the literature was primarily concerned with state practice more than theory. Subsequent scholarship has taken necessary steps in articulating a Marxist approach to international law, but these have only been partially successful. Thus there is a need for Marxist scholarship to elaborate at greater depth and in detail approach to contemporary international law.

### 3. Definition, Rationale and Scope of the Study

The thesis will attempt to understand and provide a detailed analysis of select aspects of a materialist approach to international law. The theory of law according to the classical writings of Karl Marx and others will be analysed. The materialist theories of international law developed by the Soviet scholars and later by others will be critically studied and examined. An attempt will be made to narrate the history of international law from a materialist perspective to illustrate the importance of the Marxist approach. The materialist principles of international law will be reviewed critically. The doctrine of sources and subjects of international law will also be examined from a Marxist perspective. In so far sources are concerned; the focus will

be on customs, treaties, general principles and the phenomenon of 'soft law'. After that, the subjects of international law will be discussed. The primary subjects of international law like state and international organisations will also be analysed from a Marxist perspective.

## 4. Research Questions

The following research questions will be explored:

1. Is international law a superstructure that arises from the economic conditions of the global system?
2. Was the Soviet international law scholarship helpful in developing a Marxist theory of international law?
3. What are the differences between the positivist approach, critical legal theories and the materialist approach to international law?
4. How does historical materialism help in understanding different phases of international law?
5. What is the Marxist perspective on basic doctrines of sources and subjects of international law?
6. What are the developments in the Marxist approach to international law after the end of the cold war?

## 5. Hypotheses

The proposed hypotheses are:

- International law is a class law as the economic conditions of the global system determine the nature and character of international law.
- The contradictions of capitalism are sharply reflected in the contradictions of international law.

## 6. Research Methodology

The proposed research will be a doctrinaire one, materials for which will be collected from both primary and secondary sources. The primary sources are various treaties in

international law signed from the ancient times to the modern period. The decree and declaration passed by the former Soviet Union consisted the main primary sources. The thesis will apply the method of dialectical and historical materialism to critically evaluate the structure and process of international law. The secondary sources include the writings of Karl Marx, Fredrick Engels, V. I. Lenin, Evgeny Pashukanis, Vyshinsky, G. I. Tunkin, B.S. Chimni, Anthony Carty, A. Claire Cutler, Bill Bowring, Susan Marks, China Mieville and other international law scholars whose writings are related to developing a materialist theory of international law. The secondary sources include sociological, political and economic writings of Marxist scholars and others. Primary sources will be referred to wherever it is necessary.

### 7. Chapterisation

The Chapterisation scheme is as follows. This chapter discusses the basic framework of the materialist theory of international law.

**Chapter II** deals with materialist approach to law broadly. This chapter is divided into two different parts. The first part will discuss the materialist approach to law in comparison with other approaches of law from ancient to modern. The other part will explore the various theories of law in Marxism. The primary focus of this chapter is to explore and develop a Marxist theory of law. The philosophical history of law from the ancient times to the contemporary will be inspected. The writings of Plato, Aristotle, Cicero, Austin, and Kelsen are debated with the materialist theory of law. In particular, the laws of dialectics are enquired with the notion of law. The classic writings of Karl Marx, Fredrick Engels and other scholars such as Pashukanis discussed while discussing the various trends of Marxist theory. From this perspective, the Marxist concepts of materialism, base and superstructure, mode of production will also be critically examined.

**Chapter III** deals with the materialist approach to international law. This chapter provides an overview of the understanding of international law developed by the former Soviet scholars such as Evgeny Pashukanis and Grigory Tunkin. Other than former Soviet Scholars, the writings of B.S. Chimni and China Mieville will also be analysed. Four Marxist scholars of international law and their theories of international law are examined. The examination would be of some important theoretical positions of the above-mentioned scholars. For instance, while discussing Pashukanis

‘commodity theory of law’, his writings on the history of international law, compromise between two systems, tribal international law, disappearance of bourgeois international law, etc. are the areas scrutinised with comparing other scholars writings to conclude the correct theoretical positions. In Tunkin’s theory of international law, general and particular international law, the class essence of the general international law, the relation of general international law with the base-superstructure dichotomy, the origin and withering away of international law are critically examined.

B.S. Chimni’s work of *International Law and World Order* explains the theoretical positions on international law. From both editions of his book, major theoretical categories are discussed. Some of them are the theory of imperialism, the theory of the state, world economy - base of international law and contradictions, etc. An attempt is made to compare the positions of Chimni with other Marxist scholars. China Mieville is discussed only in relation to his book, *Between Equal Rights – A Marxist Theory of International Law*. Some of his theoretical positions are critically scrutinised with the materialist theory of law.

**Chapter IV** narrates about the materialist history of international law from ancient to modern times. This chapter is divided into four parts. Each part is based on the different mode of production. After discussing the rules and regulations close to today’s international law in the primitive society briefly, it continues with the ancient mode of production of slavery. The ancient society is discussed with the different geographical areas of Mesopotamia, Greece, Rome and India. Later, it is followed by feudal society, capitalist society, which includes briefly the socialist society in between. The feudal and the beginning of capitalist society is analysed with the change in economics, politics and religion.

In **Chapter V** an attempt is made to analyse the materialist approach to socialist international law principles. Three primary and unique principles are selected and discussed in three different parts. They are peaceful co-existence, proletarian internationalism and self-determination. The first part of peaceful co-existence tried to differentiate the Leninist principle of peaceful co-existence with the Khrushchev’s policy of peaceful co-existence. It tried to include the criticisms and comments of the

Chinese policy of peaceful co-existence, the third world countries and the imperialist countries policy towards peaceful co-existence.

**Chapter VI** will undertake a materialist analysis of sources and subjects of international law. It will provide an alternative approach to the mainstream understanding of the sources and subjects of international law. Also, an attempt will be made to analyse the nature and character of the subjects of international law. Subjects such as state, international organisations and individuals will be discussed from the materialist standpoint by comparing with the mainstream understanding.

**Chapter VII** will contain the main findings and conclusions of the study.

# CHAPTER II

# MATERIALIST APPROACH TO LAW

## 1. Introduction

Marxism is the system of views and teachings of Marx.[1] The scholars who follow the beliefs and teachings of Marx are called Marxists, and the theory of Marxism includes their writings. Nevertheless, the Marxist perspective of looking at law varies with different scholars. Despite that, all of them agree on a fact that Marxism is a materialist philosophy. In this chapter, law is analysed with the same. Here not only materialism but the formula of dialectical materialism (often called as a synonym with Marxism) which is the highest evolutionary form of materialism is applied to understand the superstructure of law with the base - mode of production. The first part consists of the philosophical question of law with concepts of materialism, dialectics, critique of natural law and positive law. The principles of dialectical materialism have applied to law to prove that it is not a separate and isolated phenomenon, but a product of the mode of production, a will of the ruling class and sanctioned by the state. Historically the perspective of law changes in various mode of production starting from ancient to socialist. This chapter highlights the historical understanding of the law in different societies and tries to show that law is the reflection of those particular societies and not otherwise. The second part consists of the perspectives of the Marxist scholars starting from Marx to the contemporary. It has been discussed not only the theory of the law of those scholars but also the practice of law in the society.

## 2. Materialism and Idealism

In the history of knowledge, from the very beginning, everything was dealt under philosophy including scientific thoughts. There are two trends in the history of philosophy to look the world. Both are opposite and antagonistic in nature. These are called idealism and materialism. In the ancient philosophy, idealist thoughts were ruling over the material thoughts because of the least development of science. Despite this, materialist ideas often erupt to challenge the hegemony of idealism. Two

[1] Lenin, *Teachings of Karl Marx,* p.10.

examples of materialist views can be taken from the Eastern philosophy as well as Occidental. In the ancient Indian sub-continent, the materialists were called Carvaks, Lokayata and Barhaspatya.[2] Kapla who was a materialist, lived 2500 years ago arrived at the conclusion that there exists some material which can neither be created nor destroyed and of which all things are formed namely matter. In ancient Greece too philosophers like Thales, Anaxagoras (ca. 500 BC – 428 BC), Epicurus and Democritus argued that matter is eternal, indestructible and unchangeable bodies.

Materialism is the philosophical theory which has world view of looking things materially. It means that the matter always existed and nothing was created from nothing, i.e., emptiness. If we put it in crude way of a simple question that in the beginning of the universe there existed a matter or a spirit (God). The Materialists argue that it was matter, not spirit or idea (an absolute idea in Hegelian notion). On the other hand, idealists will claim that God or an absolute idea or a spirit existed. Modern materialism is defined as it is rather a way of interpreting, conceiving of, explaining every question.[3] There is an idealist way of interpreting, conceiving of, explaining every question which is opposed to materialism. These two opposite approaches while applying over anything and everything, give us two different and opposite conclusions concerning functional activity. Law, as we view in a purely materialistic perspective is created by human, not by some divine power. The ancient philosophers including Socrates, Plato and Aristotle, looked law in connection with divinity. It was even considered equal to God. Greek philosophers' opinion about law comes through 'an exhortation addressed by Demosthenes to an Athenian jury. Men ought to obey the law, he said, for four reasons: because laws were prescribed by god, because they were a tradition taught by wise men who knew the good old customs, because they were deductions from an eternal and immutable moral code…'[4] Plato in his *Eighth Letter* says, 'either servitude or freedom, when it…goes to extremes is an utter bane…The due measure of servitude is to serve God. The extreme of servitude is to serve man. The god of sober men is law'.[5] In Homer's work, kings received the law from the God, (Zeus) who is the divine source of all human justice. In opposition to the idealist, the materialist understanding of law is the creation of man (a material

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[2] Chattopadhyaya, *In Defence of Materialism in Ancient India*, p.22.
[3] Cornforth, *Dialectical Materialism – An Introduction*, p.17.
[4] Pound, *An introduction to the Philosophy of Law*, p.5.
[5] Letwin, *On the History of the Idea of Law*, p.9.

person) not a spiritual being (God). Historically arguing, in the Old Testament, it is written that God created the Ten Commandments and given to Moses on Mount Sinai. The materialists claim that it was the creation of man probably Moses if it is not a Myth.

The idealist understanding of the law in other words called as natural law theory. It not only suffered from idealism but with a metaphysical idealism. Cicero gave this classic definition, which identified three components of natural law which defines the idealist theory of law. Drawing on Stoic philosophy, he argued

> 'True law is right reason in agreement with Nature; it is of universal application, unchanging and everlasting. . . . It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. . . . [God] is the author of this law, its promulgator, and its enforcing judge.' [6]

In summing up, the materialist understanding of the law is against the idealist understanding of the law. Idealism argues that law is the creation of divine power while materialism explains as it is the product of human society. This definition is very crude and straightforward form, not the one we are going to discuss later. The one we are going to discuss below is the modern materialism called the dialectical materialism which is scientific.

### 3. Metaphysics of Law

The ancient materialism was the beginning of philosophical tradition of materialism. It was in a very immature way, attempted to oppose the idealist thought. It could not answer most of the modern scientific questions. Metaphysical and mechanical defects were its weakness which lasted for a long time. Metaphysical is the way of thinking that things remain constant and eternal. For example, the metaphysical materialist would say Sun is a matter, and it existed from the beginning and will exist forever. In the same way, law is argued as eternal through the creation of God or a product of man. We have to remember that an idealist can also argue in the same way with only difference of the creation of Sun by a divine power. Mao *On Contradiction* writes that

[6] Wacks, *Philosophy of Law – A very short introduction*, p.3.

> 'Metaphysicians hold that all the different kinds of things in the universe and all their characteristics have been the same ever since they first came into being. All subsequent changes have simply been increases or decreases in quantity. They contend that a thing can only keep on repeating itself as the same kind of matter and cannot change into anything different. In their opinion, capitalist exploitation, capitalist competition, the individualist ideology of capitalist society, and so on, can all be found in the ancient slave society, or even in primitive society, and will exist forever unchanged. They ascribe the causes of social development to factors external to society, such as geography and climate.'[7]

Hence in metaphysics law is eternal, existed always even in the primitive society, unchanged. As we have seen in Cicero, the metaphysical way of thinking is both in materialism and idealism. It is defined as the way of 'thinking in abstraction'. Cornforth defines

> 'Metaphysical way of thinking, is, then, that way of thinking which thinks of things 1) In abstraction from their conditions of existence, and 2) In abstraction from their change and development. It thinks of things in separation one from another, ignoring their interconnections and 3) As fixed and frozen, ignoring their change and development.'[8]

The metaphysical way of thinking law - is considering the law in the same way, as a separate thing apart from state, economy, religion and culture. It is to ignore the facts that its evolution of change and development happened on its own without the impact of material circumstances. It is like arguing domestic law has no connection with international law, and both are two distinct separate and isolated institutions of law (Dualism). In the same way, while analysing the domestic law, the civil law is looked in complete isolation and abstraction from criminal law. The metaphysics is abstracting law from its material conditions of the society. Though the different branches of law deal with different areas, it does not mean that there is no connection between them. International law is converted into domestic law, and international policies like globalisation impact the domestic law. The civil law and criminal law both reflects the social conditions of the society where crime is an outcome of social conditions, not from an individual. We will see this more when we discuss the history

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[7] Mao, *Selected Readings from the Works of Mao Tse-Tung*, p.87.
[8] Cornforth, *Dialectical Materialism – An Introduction*, p.58.

of international law. Hence law changes and develops with the development of society. In other words, we should not try to think of law in abstraction from real social relations and the real change and development of society. The metaphysical way of law is criticised in various historical times. For example in Goethe's *Faust,* Mephistopheles criticised the unchanging law while having a dialogue with his student and protesting for a law which suits for the modern period and built on reason.

> ‘All rights and laws are still transmitted
> Like an eternal sickness of the race,
> From generation unto generation fitted.
> And shifted round from place to place.
> Reason becomes a sham, Beneficence a worry:
> Thou art a grandchild, therefore woe to thee!
> The right is born with us, ours in verity,
> This to consider, there’s alas! No hurry.’[9]

Here law is called as an eternal sickness because of its unchanging nature that transmitted through generations. In fact, the dialogues of the poem are proof to the metaphysical nature of law and the poem was against it. Let’s set aside materialism and idealism, for the time being, and discuss the metaphysical interpretation of law in the ancient times. The metaphysical interpretation of law is called as natural law theory. The natural law theory was backed by the religious institutions. Roscoe Pound argued that ‘transition from the idea of law as a device to keep the peace to the idea of law as a device to maintain the social *status quo* may be seen in the proposition of Heraclitus, that men should fight for their laws as for the walls of their city,[10] shows that the metaphysical interpretation of law is used in maintaining the order of society and its exploitation.

## 4. Natural Law

Plato in *Statesman* argued that ‘the legislator must have a particular sort of knowledge that transcends the human world. It is knowledge of something eternal, of the eternal

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[9] Cited by Friedmann, *Legal Theory*, p.86.
[10] Pound, *An introduction to the Philosophy of Law*, p.35.

form of justice, which he must endeavour to copy in framing laws.'[11] Here law was considered something as eternal, a permanent form of justice discovered. The concept of the eternal form of justice is a myth as every society has its justice. For example in ancient society slavery is justified and the ruling of non - Greeks by Greeks was just according to Aristotle. Engels while speaking about the morality of law argues that 'from the moment when private property in movable objects developed, in all societies in which this property existed there must be this moral law in common: *Thou shalt not steal*.' [12] Hence punishing a person who stole is justice to the victim who lost his property. Aristotle too while speaking about particular and universal laws, says the universal law is the 'law of nature' and 'a natural justice and injustice that is common to all because everyone to some extent divines.'[13] Here the eternity of law is applied universally to all human beings because they are the creation of a divine power. Again the Roman Philosopher Cicero's definition of law is an ultimate example of metaphysical idealism. Cicero, in *De Officiis*, writes that 'law is not a product of human thought' nor any enactment of people, but 'something eternal which rules the whole universe by its wisdom.'[14] Its commands and prohibitions are one with 'the primal and ultimate mind of God, whose reason directs all things either by compulsion or restraint'.[15] Moreover, while speaking about *jus naturale*, he strictly argues that it is not allowable to neither alter this law nor deviate from it, nor can't be abrogated. Nor can we be released from this law, either by the senate or by the people.[16] Here Cicero was speaking about eternal rules for the whole universe; means never ending laws, not only for the Rome but for the entire world and cannot be changed forever even by the people or the representatives of the people. The argument given for the unchanging of natural law is because it requires that justice should be preserved, which is a 'never-failing principle.'[17] The perspective of the metaphysical materialism of law is accepting legal rules as the products of man but arguing that will continue forever and last until the end of humanity. However, the reality is, laws too change in different societies starting from the ancient to the modern times as well as in different geographical areas and even person to person. Letwin succinctly puts up

[11] Cited by Letwin, *On the History of the Idea of Law*, p.16.
[12] Cited by Cornforth, *Dialectical Materialism – An Introduction*, p-203; emphasis in original.
[13] Cited by Letwin, *On the History of the Idea of Law*, p.28.
[14] Cited by Letwin, see ibid., p.28.
[15] Cited by Letwin, see ibid., p.44.
[16] Cited by Letwin, see ibid., p.44.
[17] Cited by Letwin, see ibid., p.77.

that 'but just what laws justice requires cannot be known with certainty and is bound to change with time and place.'[18] Engels falsifies the theory of eternal justice by the method of dialectical materialism. For him, the jurists and the philosophers

> 'Assumes something common to them all, and this the jurists find by summing up that which is more or less common to all these legal systems as natural law. However, the standard which is taken to determine what is natural law and what is not, is precisely the most abstract expression of law itself, namely, *justice*. From this point on, therefore, the development of law for the jurists, and for those who believe them uncritically, is nothing more than the striving to bring human conditions, so far as they are expressed in legal terms, into closer and closer conformity with the ideal of justice, eternal justice. And this justice is never anything but the ideologised, glorified expression of the existing economic relations, at times from the conservative side, at times from the revolutionary side. The Justice of the Greeks and Romans held slavery to be just. The justice of the bourgeois of 1789 demanded the abolition of feudalism because it was unjust. For the Prussian Junker, even the miserable Kreisordnung [legislation establishing distinct local authorities.-Ed.] is a violation of eternal justice. The conception of eternal justice, therefore, varies not only according to time and place, but also according to persons, and it belongs among those things of which Mülberger correctly says, "everyone understands something different.'[19]

Hence laws are not constant, eternal and not exist beyond time and space, and therefore it is dialectical in nature. In the later part of the chapter, law is dealt with dialectical materialism.

When the Christianity ruled the Western philosophy in the medieval period, church and saints played a hegemonic role in shaping it. St. Augustine defines eternal law as 'the divine order or will of God which requires the preservation of natural order, and forbids the breach of it.'[20] The ancient philosophers like Plato and Aristotle though treated law as divine, but somehow identified the natural law with reason. Nevertheless, later it exalted further than that by identification with God. In the later period St. Thomas Aquinas declared natural law is a part of divine law, that part

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[18] See ibid., p.77.
[19] https://www.marxists.org/archive/marx/works/1872/housing-question/ch03.htm, retrieved on 21.5.2017.
[20] Cited in Friedmann, *Legal Theory*, p.104.

which reveals itself in natural reason. If we see the history of natural law, instead of the philosopher's wishes, it changes through different periods. Hence the natural law theory mostly based on the idea of divinity is an ideal example of looking law in the perspective of idealism. Despite that in various historical moments, it was argued along with reason and justice, the reality of it was considered along with the divinity. Soviet scholar Tunkin explains that

> '(The) essence of natural law theory inevitably leads to religion in one form or another. Believing that natural law does not depend upon the wills of people, is not created by people, the proponents of these theories take the path which leads to a religious explanation of the origin and content of law. They either end in ultimate logical conclusions which refer expressly to God as the ultimate Creator of law or they do not reach the end but stop halfway, which all the same leads to religion.'[21]

Against natural law, some theories came up in the modern period which argued theorising law in a scientific way. One among them is the theory of positivism.

**5. Positivism**

Positivism holds that the source of law is the state and it is counterposed to natural law or naturalism which holds that 'the basic principles of all law . . . [are] derived, not from any deliberate human choice or decision, but from principles of justice which had a universal and eternal validity.'[22] This is how positivism is suffering from the metaphysical understanding of 'universal and eternal'. 'Positivism begins from certain premises, that the state is a metaphysical reality with a value and significance of its own, and that endowed with such reality the state may also be regarded as having a will.'[23] Considering state as a metaphysical reality destroys its scientific notion. For Pashukanis, 'the positivist theory was the revolutionary banner under which bourgeoisie conducted its revolutionary battle with feudal society.' [24] Natural law is the evolution of the ancient and feudal society where positivism is the product

[21] Tunkin, *Theory of International Law*, p.228; emphasis mine.
[22], Malanczuk, *Akehurst's Modern Introduction to International Law*, p.15
[23] Cited in Mieville, *Between Equal Rights – A Marxist Theory of International Law*, p.33.
[24] Pashukanis, *Selected Writings on Marxism and Law*, p.97.

of modern capitalist society. Nevertheless, it has the deficiency of metaphysics which made it incomplete. We will discuss this further in the following paragraphs.

To put simply, the modern theory positivism argues that it is in opposition to idealism and metaphysical. However, in reality positivists approach to law is one of the metaphysical ways of dealing with it. Positivists argue that we cannot assert anything other than known to our sense perceptions. They reject any theory which claims to seek the ultimate constituents of the universe and call those theories as metaphysical. At the same time, they too reject the idea of law as the creation of some divinity. Positivists claim that their theory is scientific and based on the strict division of 'is' and 'ought'. Maurice Cornforth said they are extremely in metaphysical abstraction than any other philosophers. He questions 'what could be more metaphysical than to imagine, as the positivist philosophers do, that our sense experience exists in abstraction from the real material world outside us? Indeed, they themselves make 'sense-experience' into a metaphysical 'ultimate'.[25]

The mainstream legal theory claims that there are two types of positivist legal theory – analytical and functional or pragmatic positivism. We are going to discuss analytical positivism and two theories of the analytical positivism; John Austin of the Vienna school and Kelsen's 'Pure Theory of Law'.

Austin defines law as 'a rule laid down for the guidance of an intelligent being by an intelligent being having power over him'.[26] Here, Austin clearly rejects the natural law theory which needs a divine power for the law. Instead of divine power, he substitutes it with a human being who lay down law for the welfare of the other beings. That human being is none other than the sovereign who has command over the subjects. Thus his theory is called the command theory of law. In other words, he defines 'the matter of jurisprudence is a positive law: law, simply and strictly so called: or law set by political superiors to political inferiors.'[27] The human being may be an intelligent being, but is politically inferior to the politically superior - the sovereign. His contribution to the legal theory was his substitution of the command of

[25] Cornforth, *Dialectical Materialism – An Introduction,* p.60.
[26] Friedmann, *Legal Theory*, p.258.
[27] Austin, *The Province of Jurisprudence Determined*, p.18.

the sovereign (i.e., State) for any ideal of justice in the definition of law. These elements were present in the Byzantine theory of law. 'In a stage of legal maturity it was suited to the Byzantine theory of law as the will of the emperor and of the judge as the emperor's delegate to apply and give effect to that will.'[28] Likewise, Austin characterised positive law in just four elements – command, sanction, duty and sovereignty. 'In summary, therefore, Austin's version of law requires a command which is both express and general, which is issued from a sovereign to a subject, and non-compliance with which results in the sovereign imposing a sanction on the subject.'[29] These elements later developed into Vienna School of Law. This school denies the distinction between public law and private law because both norms are derived from the one ultimate sovereign norm. For him 'the science of jurisprudence is concerned with positive law', or with laws strictly so called, as considered without regard to their goodness or badness' and 'all positive law is deduced from a clearly determinable law-giver as sovereign'.[30] The development of positivism from natural law is substituting divinity by a sovereign. Otherwise, we can find a lot of similarities between positive law and natural law.

Austin has made a theory of law with his sense perceptive observations about the reality. However, he could not see the politically superiors as the ruling class which also economically exploits the so-called 'politically inferior.' In a metaphysical way, he argues that the sovereign is eternal as well as the political superior. Historically the political superior comes from different class, sometimes from the feudal class and sometimes from the capitalist class and it is not constant. He mostly speaks of an individual sovereign that is the monarch. He failed to see that the law of a sovereign favours a particular class or community of the people or speaking in materialist terms, a particular mode of production.

Another Positivist and a renowned scholar Kelsen developed a new philosophical trend called 'a pure theory of law' which is not contaminated by politics, ethics, sociology and history. Though it seems metaphysical, for Kelsen, 'the pure theory

[28] Pound, *An introduction to the Philosophy of Law*, p.53.
[29] Mcleod, *Legal Theory*, p.71.
[30] Friedmann, *Legal Theory*, p.258.

refuses to be metaphysics of law'.[31] He rejects the theory of law with causes and effects, like natural law. According to him in essence, it is in continuity with Austin's analytical school of law. He justified the separation of law from other disciplines by arguing that 'only by separating the theory of law from a philosophy of justice as well as from sociology it is possible to establish a specific science of law.'[32] The mechanical approach to law exactly sounds the way in which Kelsen has written his 'pure theory of law'. Mechanical approach is looking things in an isolated, mechanical way without the relationship with the other factors. In the metaphysical tradition, law is conceived as an autonomous principle playing a causal role in the historical process. Marx made his thought provoking statement in *Capital* that 'revolutions are not made by laws'[33] against this metaphysical understanding of the law. The basis of Kelsen's pure theory of law is Neo-Kantianism. The 'most important trend of bourgeois legal science formed under the immediate influence of Kant was normativism, which most sharply expressed Kant's fundamental idea, the separation of the juridical form from its social content. The most eminent representative of normativism is Hans Kelsen.'[34] For him, the law is a science with the hierarchy of normative relations. The theory of law should reduce the chaos and multiplicity in legal theories and brings unity. The legal theory of norms should be concerned with the effectiveness of such norms. His idea about the state is a classic example of metaphysical thinking. The pure theory of law is a monistic theory and it 'eliminates the dualism of law and justice and the dualism of objective and subjective law, [so] it abolishes the dualism of law and state.'[35] Instead of looking state and law from a vantage point, he argues that state is nothing but a legal construction and rejects the sociological understanding of the state. For him, it would lead to the biological conceptions of the state. Moreover, also he denies any difference between a physical and juristic person, and it is irrelevant, and all juristic persons are artificial deriving his validity from superior norms. Materialist conception explains the relationship between the state and law is a dialectical relationship. Kelsen observes that the state is a 'social order' but not the product of class divisions in the society. He defined state

[31] Kelsen, *General Theory of State and Law*, p.xv.
[32] See ibid., p.xv.
[33] Marx, *Das Capital*, p.703.
[34] Vyshinsky, *The Law of the Soviet State*, p.32.
[35] Kelsen, *General Theory of State and Law*, p.xvi.

‘as a relationship where some command and rule and the others obey and are ruled.’[36] The pure theory of law of Kelsen looks law as everything including the state. In positivist theory sovereign is the ultimate, and it is more of a state-centric theory. It lacks the sociological understanding of the state. The materialist understanding of state is dealt in the following pages in detail.

**6. Dialectics against Metaphysics**

Against the metaphysical method of dealing with matters and ideas, the dialectical method of dealing stands on the other side. Like materialism, metaphysics and idealism: dialectics also has a long history begins from ancient India to Greece. Dialectical method is nothing but dealing things with their real change and development. It is the means of studying and understanding things as Lenin said in his *Philosophical Note books* that the understanding of the ‘contradictory parts' of every phenomenon was ‘the essence of dialectics'.[37] He further explained that it consists in ‘the recognition of the contradictory, mutually exclusive, opposite tendencies in all phenomena and processes of nature, including mind and society'[38]. Hegel's dialectics of law too argues the dialectical nature of law but regarded the law as the concrete embodiment of reason in history. For Hegel, the dialectical process starts from the absolute spirit and leads to the subjective spirit of feeling, thinking and consciousness, i.e., reason as the thesis and the objective spirit and the legal and social institutions as the anti-thesis. Hence though dialectical but not materialistic is Hegel's legal philosophy. On the other hand, the dialectical materialism or materialistic dialectics argues that law is the part of the superstructure which is the reflection of the base, i.e., mode of production. It further claims that the civil society rather than the state which is the key to understand the historical development of man must be sought.[39] We will discuss this more below while discussing base and superstructure. To sum up, the remaining parts of this chapter is looking at law in the perspective of dialectical materialism which is otherwise called Marxism. The discovery of the method of dialectical materialism by Marx is not a simple method of argument by the word

[36] See ibid., p.186.
[37] https://www.marxists.org/archive/lenin/works/cw/volume38.htm, retrieved on 22.5.2017.
[38] https://www.marxists.org/archive/lenin/works/cw/volume38.htm, retrieved on 22.5.2017.
[39] Vyshinsky, *The Law of the Soviet State*, p.7.

which it came from the ancient Greek, but a method of investigation applicable to both nature and society.

## 7. The Laws of Dialectics

Four basic laws are there in the Dialectical Materialism – Transition process, reciprocal action, and contradiction, qualitative and quantitative changes. Law is always in the transitional phenomenon which was neither constant in the past nor going to be in future from its origin. There is a contradiction of process inside law because of the change in mode of production. It impacts on law results in reciprocal action. The dialectical materialism helps to understand the law, not isolated from the material historical condition, rather interdependent consisting of contradictions which make qualitative and quantitative changes in it. This shows that the law, which closely evolves from the dialectical material condition in the international relations, not in the imagination of some authors or intellectuals in the field of law. This is also true in the case of international law. Lets' see these principles in applicability with the law in a detailed manner.

### 7.1. Connected, Dependent and Determined by Each Other

> 'Contrary to metaphysics, dialectics does not regard nature as just an agglomeration of things, each existing independently of the others, but it considers things as "connected with, dependent on and determined by each other". Hence it considers that nothing can be understood taken by itself, in isolation, but must always be understood "in its inseparable connection with other things, and as conditioned by them".'[40]

According to this principle, we have to consider law not by itself, but always in their interconnection with other things and with the circumstances. Unlike metaphysical law, it is always connected, dependent and determined by other factors. For example, we can take the laws which supported slavery. Hitherto the law in favour of slavery is prohibited all over the world domestically as well as internationally. No civilised society can pass laws in favour of slavery. It can never be under the just law today. However, at that particular period, it was a just law. From the Greek Philosophers to the modern international lawyers like Grotius, admitted slavery in one or the other

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[40] Cornforth, *Dialectical Materialism – An Introduction*, p.71.

way. Though the justification for slavery differed at various times in various ways, slavery was not considered illegal. To understand this, we need to connect it with the material conditions of the ancient society which was based on master-slave mode of production. The mode of production determined the law in favour of slavery. Hence law has to be considered about actual conditions and circumstances not apart from that as a separate thing in a mechanical way like the 'pure theory of law' as we have seen. Moreover, at the same time, the law has an inseparable connection with other things like religion, state, culture, etc., and dependent as well as dominated by each other. It is the dialectical connection between the superstructures as well as with the base. Again taking the ancient law in favour of slavery that was imposed by the state and justified by religion. Slavery law could not have survived alone without the sanction of the state, religion, culture, and so forth. Hence all are dependent and dominated by each other. In other words, we should not try to think of law in abstraction from real social relations and the real change and development of society.

### 7.2. Movement and Change

> 'Contrary to metaphysics, dialectics considers everything as in "a state of continuous movement and change, of renewal and development, where something is always arising and developing and something always disintegrating and dying away". Hence it considers things "not only from the standpoint of their interconnection and interdependence, but also from the standpoint of their movement, their change, their development, their coming into being and going out of being".'[41]

Dialectics of law has a continuous movement which starts from the origin of the state and going to exist till the withering away of the state. It is not only a continuous process but also a changing process. The ancient laws cannot be applicable in the modern times as it has changed, and it has changed to the extent of one extreme to the other end. Even the Indian constitution and other laws have been amended, changed so many times. For example of continuation, it's a fact that the old Roman law in Europe was very much used in the development of bourgeois law. Of course, it was not the same but changed, altered modified to fit into the modern bourgeois society, along with its content of protecting private property. Moreover, the second principle of dialectics further says that something is always disintegrating and dying away. So

[41] See ibid., p.71.

some principles of Roman law like treating humans as slaves disintegrated in the feudal period and died down eventually in the capitalist society. At the same time, some new laws take birth in different historical periods.

### 7. 3. Quantitative and Qualitative Changes

> 'Contrary to metaphysics, dialectics does not regard the process of development as "a simple process of growth", but as "a development which passes from…..quantitative changes to open, fundamental changes, to qualitative changes", which occur "abruptly, taking the form of a leap from one state to another". Hence it considers development as "an onward and upward movement, as a transition from an old qualitative state to a new qualitative state, as a development from the simple to the complex, from the lower to the higher".'[42]

In continuation of the second principle, when the change occurs it can be both quantitative and qualitative. If we look into the laws in different historical periods, we can very well understand this process. The quantity of laws changes often. It can very well increase as well as decrease. For example, after independence in 1947, we followed the British rules and still follow it with some changes and amendments. However, at the same time, many new laws were enacted to strengthen the modern capitalist society like universal suffrage, property to women, etc. and many of the old laws enacted during the British period as well as after that also gets out-dated. These are the quantitative changes. In sum, the quantitative changes are updating the already existing law according to the newly arising conditions.

The qualitative changes are the direct, abrupt laws which oppose and counter the thousand year's practice of law. For example abolition of slavery, the abolition of untouchability and abolition of private property, etc., are the qualitative changes. Moreover, at the same time, the qualitative change is progressive and move society forward. Laws like right to freedom of speech, right to liberty and equality, the right to eight hours working time, right to free health, housing and education are enacted for the first time after the qualitative change happened in the mode of production. These progressive laws move the society forward from a lower end to higher end. Now no state in the world can enact a law in favour of slavery or in favour of untouchability. These are all accepted universal concepts.

[42] See ibid., p.71.

A question remains about the former socialist states which abolished the right to private property and later it got established after the disintegration. This is the law of contradiction which is dealt in the next part. Till the history of the progressive and regressive laws, it goes back to regressive again in many times. Though slavery abolished in the medieval period and Christianity preached slavery against its own brethren's - it was practised in the United States till recently if we compare to the long period of the history of slavery. The hard earned fruits of French revolution liberty, equality are not gone in vain. Moreover, today primitive kind of state like ISIS still follows slavery. The principle of equality neither abandoned and the progressive principles nor gone forever. Hence it happens that sooner or later, the right to private property will be considered as regressive law universally and get abolished.

### 7. 4. **Contradiction and Unity of Opposites**

> 'Contrary to metaphysics, dialectics "holds that the process of development from the lower to the higher takes place…as a disclosure of the contradictions inherent in things…as a struggle of opposite tendencies which operate on the basis of these contradictions".'[43]

The law of contradiction in things, that is, the law of the unity of opposites, is the basic law of materialist dialectics.[44] Lenin called this law the essence of dialectics; he also called it the kernel of dialectics.[45] The materialist theory of law looks law as a superstructure along with the state. In the modern parliamentary democracy, the legislature enacts the law. However, at the same time there arise some necessities to enact the law. In the system of laws, there always exists a contradiction. Engels explains the contradictions in bourgeois law.

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[43] See ibid., p.71.
[44] Mao, *On Contradiction*, p.85.
[45] In his essay "On the Question of Dialectics", Lenin said, "The splitting in two of a single whole and the cognition of its contradictory parts (see the quotation from Philo on Heraclitus at the beginning of Section 3 'On Cognition' in Lassalle's book on Heraclitus) is the essence (one of the 'essentials', one of the principal, if not the principal, characteristics or features) of dialectics." (Collected Works, Russ. ed., Moscow, 1958, Vol. XXXVIII, p. 357.) In his "Conspectus of Hegel's The Science of Logic", he said, "In brief, dialectics can be defined as the doctrine of the unity of opposites. This grasps the kernel of dialectics, but it requires explanations and development." (Ibid., p. 215.). See further: https://www.marxists.org/archive/lenin/works/1915/misc/x02.htm, https://www.marxists.org/reference/archive/mao/selected-works/volume-1/mswv1_17.htm, retrieved on 3.7.2017

> ‘In a modern state, law must not only correspond to the general economic position and be its expression, but must also be an expression which is *consistent in itself,* and which does not, owing to inner contradictions, look glaringly inconsistent. ….Thus to a great extent the course of the “development of law” only consists: first in the attempt to do away with the contradictions arising from the direct translation of economic relations into legal principles, and to establish a harmonious system of law, and then in the repeated breaches made in this system by the influence and pressure of further economic development, which involves it in further contradictions.’[46]

Engels strips the bourgeois theory of law which always tried to make law as ‘blunt, unmitigated, unadulterated, expression of the domination of a class’ but failed. The contradiction between bourgeois and proletariat increases day by day and the pure conception of right got adulterated by amending laws or enacting new acts in favour of the proletariat. This was called by Engels as the development of law. Hence the development of law happens due to the contradiction between the two opposite forces. However, will it lead to an end of development? No. Instead of bringing harmony it creates further contradictions, and will not stop. For example, when the proletariat protested for ten hours work time, it got passed as an act in the British parliament, but this did not stop the proletariat to ask for eight hours work time as their next demand. Hence the contradiction exists in all systems of law either it is in capitalism or socialism. In the capitalist system of law Engels example of Napoleonic code tried to be ‘unadulterated' and ‘unmitigated' system of bourgeois law but while implementing and in reality, it gets more and more adulterated to infringe the bourgeois mode of production in the base.

The principle unity of opposites is the unity of bourgeois and proletariat law in a single legal bourgeois system. In other words, we come to the conclusion that the legal system as a whole is not a separate law of the bourgeois society but the unity of opposites of two internal contradictions of laws i.e. the progressive and regressive law. As the struggle exists in the base, it also gets reflected in the superstructure level. The labour welfare laws are the effort from the ruling class i.e. the bourgeoisie to solve the contradiction but always went in vain. Hence the bourgeois legal system is the system of unity of the opposites of two opposite ideological reflection of law. It

[46] Marx and Engels, *Marx and Engels on Law*, p.57.

cannot survive without each other. Like there is no proletariat without a bourgeois, and likewise, there is no bourgeois without a proletariat, there is no regressive legal system without an element of progressive in it as well as there is no progressive legal system without some elements of regressive elements in it.

If the mode of production tries to produce a pure system of law simply reflecting the benefits of the dominant class, it is not possible to exist. If it tries, it fails every time as Engels explained. Same as a pure system of proletariat law too cannot exist during the transition period of socialism which carries some elements of the bourgeois law. In the proletariat mode of production that is after the October Revolution was the arrival of New Economic Policy which consists of the dominant proletarian law and its contradiction; the bourgeois law. As Lenin said in *State and Revolution* that

> 'in the first phase of communist society (usually called socialism) "bourgeois law" is not abolished in its entirety, but only in part, only in proportion to the economic revolution so far attained, i.e., only in respect of the means of production. "Bourgeois law" recognises them as the private property of individuals. Socialism converts them into common property. To that extent--and to that extent alone--"bourgeois law" disappears.'[47]

In the higher stage of communism as the class is abolished the law would wither away along with state but remains only as an administrative rules and regulations - more of regulations.

We have seen how the law can be looked in the perspective of dialectical materialism. Many Marxists have already looked law through this point of view. The coming part of the chapter is dealing with how Marx and other Marxists have dealt with the law. Before that, a short glance on how the mainstream contemporary scholars defined the law follows. The mainstream or bourgeois definition of law paints it as a neutral element for the betterment of society. The bourgeois law speaks in the language of 'general will', 'social solidarity' and 'popular interests' to show that it is neutral and for the welfare of the people. It explained that law encourages some actions and prohibits others, creates motives either to act or to restrain, educates people in the

[47] Lenin, *The State and Revolution*, p.78.

consciousness of their rights and duties, breed citizens or slaves.[48] The evolution of law starts from philosophy and ends in politics for the mainstream scholars. Historically law was considered as part of the ethical system. Religion is inseparable in the history of law. It is not possible to separate law and religion as we have seen the dialectical relationship between the superstructures. As we observed, the earlier law was considered as divine – given by the Almighty for the people. Hence the sacredness of law cannot be questioned. The rulers justified their rule in the name of God. The Kings are considered as the son of God or the representatives of God to rule the people. And somewhere, the king is regarded himself as God and in Asia as an avatar of God. Likewise, we have seen the whole idea of natural law evolved from this concept of God made law. Later this idea was developed into human-made law. Unlike the mainstream definition, a materialist definition argues that law is a historical element always imposed by the ruling class over their subjects.

## 8. The Ideology of Law

An ideology can be briefly called as a system of beliefs. But Marxism is a scientific theory which cannot be called as an ideology, but the law can be called. Raymond Williams writes that ideology is not originated in Marxism and still in no way confined to it.[49] He gives three common versions of the concept of ideology. An ideology is a system of beliefs characteristic of a particular class or group, a system of illusory beliefs-false ideas or false consciousness which can be contrasted with true and scientific knowledge and the general process of one production of meanings and ideas.[50] He has extended the concept of ideas by Marx.

Marx while speaking about ideas, he says

> 'The ideas of the ruling class are in every epoch the ruling ideas. i.e., the class which is the ruling material force of society is at the same time its ruling intellectual force. The class which has the means of material production at its disposal, consequently also controls the means of mental production, so that the ideas of those who lack the means subject to it'[51]

[48] Guins, *Soviet Law and Soviet Society – Ethical Foundations of the Soviet Structure*, p.2.
[49] Williams, *Marxism and Literature,* p.55.
[50] See ibid., p.55.
[51] Marx and Engels, *German Ideology*, p.67.

With the help of Marx's statement, we can see how law is an ideology, and it can be called as the matured and completed form of ideas. It is the intellectual force of the ruling class to continue its mode of production. Before going to law as an ideology, we need to discuss more on ideologies. In a society, different ideologies exist. But out of those contradictory ideologies, the dominant one is the ruling class ideology. Hence Marx observes,

> 'The production of ideas, of conceptions, of consciousness, is at first directly interwoven with the material activity and the material intercourse of men, the language of real life. Conceiving, thinking, the mental intercourse of men, appear at this stage as the direct efflux of their material behaviour. The same applies to mental production as expressed in the language of politics, laws, morality, religion, metaphysics, etc. of a people.'[52]

The mental force of the ruling class which is the dominant ideology is not beneficiary to the working class and contradictory to their welfare. Marx called this as the false consciousness of the majority of the working class, by which the ruling class continued its domination over them and sustained. However, this sustainment of ruling class ideology cannot continue for long as the mode of production changes.

By following Marx, Maurice Cornforth defines ideology as

> '…more or less systematic views, which are historically evolved by definite social groups in definite stages of social development, and which vary according to their social origin, are called ideologies. …Ideology is essentially a social rather than an individual product.'[53]

Here Cornforth succinctly puts up that ideology is the product of society, not an individual product and this ideology differs in the different historical period and develops from different stages of social developments. When we call law as an ideology, then it is necessarily political and has to be looked in par with social too. The ideology of law as Cornforth argues, is a social product rather than an individual product, and not invented by the individual authors like Bentham, Austin, Kelsen and so forth. For Bentham, law is a 'sinister interest' which means it serves the interest of a particular group or class that systematically conflict with the broader public interests

[52] Marx and Engels, *German Ideology*, p.42.
[53] Cornforth, *Dialectical Materialism – An Introduction*, Volume 3, p.67.

and in particular with the interests of oppressed groups. Law is ideological in this narrower sense if it is a pervasive fact about law that it serves narrow interests of a dominant class.'[54] According to Gerald J. Postema 'this robust version, to regard the law as ideology involves a complex claim with at least three components.

> 1. The service thesis: law protects and promotes social and political relations that are coercive, hierarchical, and harmful or contrary to the interests of ordinary subjects of law. More specifically, it serves the interests of the socially dominant class at the expense of all others.
>
> 2. The mystification thesis: law masks its own basic operations and the relations its supports and serves, persuasively portraying them as natural and necessary. In this way, those who are in subordinate or powerless positions are encouraged to reconcile themselves to their condition and regard it and the law as legitimate.
>
> 3. The jurisprudential thesis: the service and mystification theses are true of law in general and tell us something about the fundamental nature of law. That is, a) they are true of the legal system as a whole, not merely of specific laws or domains of law—service and mystification are pervasive; b) they are true in virtue of structural, rather than merely accidental, features of law; and c) they are not mere side effects of these features of law, but are deeply implicated in the nature of law: law has these structural features because it enables law to serve dominant class interests while appearing legitimate in the eyes of those subject to it.'[55]

This explanation about the different thesis of law as an ideology tries to argue generally that it serves the interest of the socially dominant class and looked upon law as a whole system not as a specific laws or codes. While writing to Mehring, Engels argued,

> 'Ideology is a process accomplished by the so-called thinker consciously, indeed, but with a false consciousness. The real motives impelling him remain unknown to him; otherwise it would not be an ideological process at all.'[56]

And in letter to Schmidt, he further said that

> 'The reflection of economic relations in the form of legal principles is likewise bound to be inverted: it goes on without the person who is acting being conscious of it; the

[54] Postema, *Legal Philosophy in Twentieth Century - The Common Law world*, p.216.
[55] See Postema, ibid., p.216.
[56] Marx and Engels, *Marx and Engels on Law*, p.118, emphasis original.

> jurist imagines he is operating with a *priori* propositions, whereas they are really only economic reflection'[57]

Engels wrote that ideology is the product of class society and it is a ruling class ideology. This ideology makes a person follow it consciously, but for Engels, it is false consciousness. He gave an example of a jurist who thinks that he is honest and just following the laws to give a judgment, but at the same time, he is unconscious of following the ruling class ideology which is out of the economic conditions and not being neutral.

Law as an ideology which is part of the ruling class ideology gives an illusion that it is neutral to all. This is the false consciousness of the working class to think that law is neutral and trapped in some of the welfare laws which they consider totally in favour of them. Marxism revealed the pseudo-scientific character of law developed by the bourgeois theories such as Kant and Hegel. It is called pseudo-scientific because it was incapable of disclosing and formulating the basic laws of social development. Marxism put an end to the abstract idealism prevalent in the conceptions of formal jurisprudence.[58] Thus the pseudo-scientific character of law develops the false consciousness among the people and helps the system to survive.

Coming to the socialist society, i.e., the transition period to communism; the part played by law as an ideology is important to understand. After the revolution, the socialist state is formed, and the ruling class is the working class. And the working class ideology is the ruling ideology. Law will be there in the socialist state in favour of the working class, here the ruling class. There is no need to create an illusion about law i.e. neutral. Because the majority is ruling now and the minority will become part of the working class by way of confiscating their property. Hence democracy is for the working class/majority and proletariat dictatorship for the capitalist/minority. In this place, as we have seen above that law works openly in favour of the working class and against welfare of the bourgeoisie to continue as a bourgeoisie.

Here we can say that there are no false consciousness's in the socialist state. Hence there can be no false consciousness about the ruling ideology for the bourgeoisie. So they protest by all means. There comes the dictatorship and hegemonic ideology as a

[57] See ibid., p.57.
[58] Vyshinsky, *The Law of the Soviet State*, p.8.

mental production is not required. But the contradiction of different ideologies exists between the two antagonistic classes in the socialist society too.

Likewise, the law as an ideology favours the interest of the working /ruling class in socialist society. Nevertheless, that law in socialist society does not pretend or create an illusion that it is neutral to all classes because it is not necessary to convince the majority as it is in favour of the majority; the working class. Finally, we can say that false consciousness does not exist in a socialist society.

### 9. Marxist Theory of Law

Many Marxists scholars developed a Marxist theory of law. Marx and later Engels were more concentrated on developing a theory of state than a theory of law. We cannot say Marx and Engels failed to develop the theory of law, but one can argue that they have given less importance to the theory of law. According to Hugh Collins Marx treated law as a peripheral concern.[59] The theory of state itself satisfies the purpose of creating a theory of law in Marxism. Marx's writings on state are helpful in creating a theory of law. It was criticised that Marx and Engels had not developed a theory of law. It is because of utter ignorance and the failure to understand Marxism, such criticism arises. Marx and Engels established a scientific theory called Marxism. They laid the foundations for a theory which expressed scientific notion for the change of society. By applying the Marxist method, it can be extended to other fields including law and international law. Hence Marxism is a continuing project which has to be extended and developed. In this part of the theses, it is going to be discussed about the writings of Marx and Engels on law and how it led to the theory of law by later Marxists.

#### 9. 1. Marx and Engels

In brief, the Marxist perspective argues that the origin of law happened after the origin of private property and state. It gets consolidated by the sovereign as a sanction by the state as whoever disobeys the law. The entire course of civil law formed with the protection of private property and the criminal law as a law of sanction who disobey the civil law. While writing about Marx and Engels theory of law, the theory of state inevitably comes into the picture. The theory of state and law has to be looked

[59] Collins, *Marxism and Law*, p.10.

in parallel. The political scientists of the bourgeois theory of state contend that state existed from the beginning of humanity and will exist for eternal. This eternity of state is entirely an idealistic notion about the origin of the state. Nothing eternal is the Marxist science of dialectics. Everything has an origin and an end and according to that state also originated in the ruins of tribal society. The Marxist materialist conception of state removed the decoration of idealistic romanticism and exposed the true nature of the state as it is an instrument of the dominant classes. It was originated when the production forces of the society developed and reached another stage along with the rise of class and the social division of labour. Engels in his *Origin of Family, Private Property and State* described how state comes into existence in the demise of primitive communist society or the tribal society. He writes that the 'gentile constitution' was out of a public opinion and not of any coercion, regulated the life in the tribal community. Later the society was split into freemen and slaves, exploiting rich and exploited poor led to the contradiction which is irreconcilable. Therefore, 'the gentile constitution was finished. It had been shattered by the division of labour and its result, the cleavage of society into classes. It was replaced by the state.'[60]

Unlike the bourgeois theory, the scientific theory of Marxism explains that law cannot be studied separately without considering the state. It presents a strictly scientific explanation of the origin and development of law and state. The nature of state defines the nature of law, i.e. the class character of law whether it is a bourgeois law or socialist law. The basic theory of state was formulated by Marx and Engels and later completed by Lenin in his book *State and Revolution*. In between, the nature of state has to be studied. According to Marx, the state is the form of a dominant will so do law. Law is not the product of the state, indeed the reflection of the social conditions. However, one should understand the difference between state and government. The legislation passes laws mostly by the majority ruling party members which comprise the government. There is a fundamental difference between state and government. The state is a permanent structure or a system, which is only replaced by a revolution while governments not necessarily to be. Even without any government, the state can function. Hence state and law are two different superstructures with a dialectical relationship between them. But at the same time, the theory of state can be very much applicable to the theory of law. In any of the superstructures like religion,

[60] Engels, *Origin of Family, Private property and State*, p.165.

culture, and literature – state and law have a close dialectical relationship comparing to other superstructures. It is because one survives out of the role of other. State and law will wither away first but not the other superstructures like culture for a long time. ‘In the transition from socialism to communism, the other domains of the superstructure - art, morality, philosophy, the humanism of religion - will be gradually stripped of their ideological phenomenality and enter into a new process of relations with the base, becoming ever more closely integrated into the fundamental level of history. By contrast, law and the state will wither away.’[61]

Marx criticised the idealistic philosophy of law by Hegel which came from the idealistic interpretation of the relationship between state and civil society. Hegel contends that state produces the society or in Marx’s term civil society. Marx denies in a materialistic way that the main components as well the active forces of state are the family and civil society. As argued by Hegel that the family and civil society are made by the actual idea, Marx argued, on the contrary, the real idea was created by them. The family and civil society believed that their existence is from a mind, determined by a third party not self-determined. For Marx, ‘the purpose of their existence is not this existence itself, but rather the idea separates these presuppositions off from itself in order to rise above its ideality and become explicit as infinite actual mind.’[62] Hence the state cannot exist without the family and civil society. But it is established that ‘the determining as the determined, the producing as the product of its product.’[63] Hegel's philosophy was standing upside down, and because of that, the producing forces of the idea are made into the products of its idea.

Thus Marx disproves the dialectical idealism of Hegel and establishes the scientific world outlook of dialectical materialism which further extends to the other complicated questions such as law, history, etc. Engels wrote about Marx that how he arrived at that new world outlook as

> ‘Criticism of the debates in the Rhineland Landtag compelled Marx to the study of questions of material interests. He arrived at original views anticipated neither by jurisprudence nor by philosophy. Starting from Hegel’s legal philosophy Marx came

[61] *The Poulantzas Reader: Marxism, Law and the State*, edited By James Martin, p.26.
[62]https://www.marxists.org/archive/marx/works/download/Marx_Critique_of_Hegels_Philosophy_of_Right.pdf, retrieved on 12.4.2017.
[63]https://www.marxists.org/archive/marx/works/download/Marx_Critique_of_Hegels_Philosophy_of_Right.pdf, retrieved on 12.4.2017.

> to the conclusion that not the state (portrayed by Hegel as the 'crown of the whole building') but rather civil society (which Hegel so disdained) was the sphere in which the key to an understanding of the process of man's historical development must be sought.'[64]

Hence according to Engels' Marx developed the theory of state from Hegel's legal philosophy that civil society gives rise to state and it is not the other way round. So studying of society, i.e., civil society helps to understand the process of human development in the history.

Marx explained about the civil society in *Holy Family* as,

> 'Natural necessity, qualities of the nature of man (however estranged they seem), interest – these are what bind the members of civil society to each other. The real bond between them is not political life but civil life. Moreover, it is not the state which unites the atoms of civil society, but precisely the fact that they are atoms (only as it seems in the heaven of their imagination, whereas in reality, they are beings differing most markedly from atoms) and the fact that they are not divine egoists but egoistic people. In our time it is sheer political prejudice to continue to imagine that the state unites civil life. The reverse is the fact: civil life unites the state.'[65]

Hence the state is the product of civil society, and it is not formed as a representative of the whole people but out of the civil society. He differentiates materialism into old and new in his *Theses on Feuerbach* writing, 'the standpoint of the old materialism is civil society; the standpoint of the new is human society, or social humanity.'[66] Here he differentiates how the materialistic conception of history has to be studied from the new materialism and not from the old materialism, that is nor from the mechanical materialism of Feuerbach neither from the dialectical idealism of Hegel. These views of Marx changed the entire discourse previously prevalent in science as well as jurisprudence theory of Kant and Hegel. Marxism has put an end to pseudo-scientific theories of state and law which were under the influence of bourgeois science that was of formal jurisprudence and abstract idealism.[67]

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[64] Vyshinsky, *The Law of the Soviet State*, p.7.
[65] Cited in Vyshinsky, ibid., p.7.
[66] Marx, Engels, Lenin, *On Historical Materialism*, p.13.
[67] Vyshinsky, *The Law of the Soviet State*, p.8.

The contribution of Marxism to the theory of the state is that it gives the scientific explanation of the origin and end of the state. According to that the state originated in the tribal society out of the contradictions happened, the contradictions were of class contradictions, and it had the irreconcilable nature. The state was controlling the conflict in the tribal society by imposing an ‘order' which came from an authority that subordinates all persons in its influence. The authority's strength came from the legal base which is sacred and inviolable by way of statutes that made the society in ‘order'. In detail, the materialist theory of the state is discussed later in this chapter.

### 9. 1. 1. Law as Superstructure

Law along with state is the superstructure determined by the mode of production, i.e., the base. The theory of historical materialism which is an application of dialectical materialism to the society gives the place of law as a superstructure. In Marx’s words ‘relations of production constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure and to which correspond definite forms of social consciousness’. [68]

Marx in many of his writings insisted that the ideology of state and law are the products or reflections of the material conditions of the society. While speaking about a penal code, he insisted again saying,

> ‘This Code Napoleon, which I am holding in my hand, has not created modern bourgeois society. On the contrary, bourgeois society, which emerged in the eighteenth century and developed further in the nineteenth, merely finds its legal expression in this Code. As soon as it ceases to fit the social conditions, it becomes simply a bundle of paper.’[69]

This statement of Marx clearly emphasises the development of law according to the material conditions of the different society whether it is a bourgeois democracy or proletarian democracy. Hence the history of law has to be in association with the history of the evolution of production relations or the mode of production. The legal superstructure grows out of and by them. Marx makes it more simplified in another statement that the ‘society does not rest on law. That is a phantasy of jurists. On the

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[68] Marx, *A Contribution to the critique of political economy*, p.20.
[69] https://www.marxists.org/archive/marx/works/1849/02/25.htm, retrieved on 13.5.2017.

contrary law in contrast to the arbitrariness of the separate individuum - must rest on society, must be an expression society's general interest and needs, as they emerge(d) from a given material means of production.'[70] In detail, that the relations of production which are master-slave, land lord-serf, capitalist-proletariat in the capitalist society, is the real foundation, the base. The superstructure arises from that are the religion, state, law, etc. which corresponds to the definite forms of social consciousness. Law, a reflection of the base is criticised as deterministic or reductionist because the base determines the superstructure, a necessary consequence of it. Hence all the superstructure elements can be reduced to base or determined by the base. This is a mechanical or metaphysical understanding of the base - superstructure theory. This statement, as well as other writings of Marx, was frequently shown by various scholars to argue that Marxism is a deterministic and reductionist approach. As the base decides the nature of the superstructure including law sounds like the base determines everything. Hence all the knowledge of the superstructure can be reduced to base or derived from the base. But the writings of Marx and Engels up to an extent show us that it is not totally deterministic or constrained or reductionist to the base as it seems. In Engels' famous letter to J. Bloch, he clarifies that the various elements of superstructure like law exercises influence upon the course of the historical struggles and in many cases preponderate in determining the course of the economy.[71] In detail,

> 'The economic situation is the basis, but the various elements of the superstructure — political forms of the class struggle and its results, to with constitutions established by the victorious class after a successful battle, etc., juridical forms, and even the reflexes of all these actual struggles in the brains of the participants, political, juristic, philosophical theories, religious views and their further development into systems of dogmas — also exercise their influence upon the course of the historical struggles and in many cases preponderate in determining their form. There is an interaction of all these elements in which, amid all the endless host of accidents (that is, of things and events whose inner interconnection is so remote or so impossible of proof that we can regard it as non-existent, as negligible), the economic movement finally asserts itself as necessary. Otherwise, the application of the theory to any period of history would be easier than the solution of a simple equation of the first degree.'[72]

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[70] Cited in Vyshinsky, *The Law of the Soviet State*, p.37.
[71] Marx, Engels, Lenin, *On Historical Materialism*, p.294-296.
[72] https://www.marxists.org/archive/marx/works/1890/letters/90_09_21.htm, retrieved on 22.4.2017.

This is a complete understanding of the fundamental laws of motion of the social development. Marxism discloses the origin and the nature of state and law and rests on the material conditions of the society. Therefore, it cannot be said that as an element of the superstructure, the law has no impact on the affairs of the state; instead, it can greatly influence state behaviour. Engels here explains the dialectical relationship of the base with the superstructure of law. He claims

> 'In a modern state, law must not only correspond to the general economic condition and be its expression, but must also be an internally coherent expression which does not, owing to internal conflicts, contradict itself. And in order to achieve this, the faithful reflection of economic conditions suffers increasingly. ….. The reflection of economic relations in the form of legal principles is likewise bound to be inverted: it goes on without the person who is acting being conscious of it……ideological outlook, influences in its turn the economic basis and may, within certain limits, modify it. The basis of the right of inheritance is an economic one, provided the level of development of the family is the same. It would, nevertheless, be difficult to prove, for instance, that the absolute liberty of the testator in England and the severe and very detailed restrictions imposed upon him in France are due to economic causes alone. But in their turn they exert a very considerable effect on the economic sphere, because they influence the distribution of property.'[73]

The superstructure of law cannot be the faithful reflection of the base forever, and it cannot maintain the purity of the base. That is the contradiction in the law which we have already discussed. Engels trying to contend from this argument is about the 'relative autonomy' of law. Though he argued, nevertheless, he did not compromise the position of law as the general expression of economic condition. Engels though discussed the 'relative autonomy' of law; he argues that the last determinant part is the economy; he found that how the theory of base-superstructure is taken into a crude form. In his later writings, he tries to resolve it by explaining more and more dialectically as the base and superstructure has a dialectical relationship which infringes each other. Treating the development of the superstructure on its economic basis as an automatic process is nothing but vulgarisation. In the same letter to Bloch, he insists that 'Marx and I are ourselves partly to blame for the fact that the younger

[73] Marx and Engels, *Marx and Engels on Law*, p.57.

people sometimes lay more stress on the economic side that is due to it. We had to emphasise the main principle vis-à-vis out adversaries, who denied it'.[74] He explained how a superstructure like the law which is a faithful reflection of the economy could infringe the base up to a certain extent and make the base suffer. He even agreed to the point that the superstructure can influence the base and can modify to a certain limit. Cornforth further clarifies this as

> 'More remotely connected with the economic basis and more directly related to the current institutional and political conflicts, there arise further ideological processes – religious, legal, philosophical, artistic and so on – and the institutions associated with them…..the relation of "basis" and "superstructure" is essentially a dynamic not a static relation.'[75]

He further maintains that '…the ideas and institutions which are developed on the basis of the economy are not simply a "reflex" or by-product – they are not simply passive consequences, but play an active role in relation to the economy.'[76] This is a further blow to the mechanical view of looking superstructure criteria as merely a by-product or reflection of the base.

Engels pointed out the development of legal ideas while explaining how law always reflects the economic conditions. He marked that not only the state and public law is determined by the economic conditions but also the private law. The private law only sanctions the economic relations between individuals. The form of this can vary considerably. When the economic conditions changed to the mode of capitalism, the change in laws happened not abruptly but using the old feudal laws. Though the modes of production were different, the relevant, primary content is that of acknowledgement of private property. Either it can be an ancient law, feudal law or bourgeois law, the main content of private property flows through all over it as these societies are based on private property. The relationship made out of private property which includes contracts of selling and buying etc. continues all through those laws because of these modes of production was built under the notion of private property. Engels narrated that the old feudal laws were given exposed content, it was in reality

[74] https://www.marxists.org/archive/marx/works/1890/letters/90_09_21.htm, retrieved on 22.4.2017.
[75] Cornforth, *Dialectical Materialism – An Introduction*, p.86.
[76] See ibid., p.87.

to a feudal name, and a bourgeois meaning was intended.[77] The Roman law was taken as the foundation in Western continental Europe because it consists of the practised legal relations of the simple commodity owners. Nevertheless, when the society turning into capitalist society, in its prerevolutionary stage, the remnants of feudal society remains and sometimes, though the mode of production is bourgeois, still the society can be semi - feudal. Engels explains this factor as

> 'in which case, for the benefit of a still petty-bourgeois and semi-feudal society, it can either be reduced to the level of such a society simply through judicial practice (common law) or, with the help of allegedly enlightened, moralizing jurists it can be worked into a special code of law to correspond with such social level — a code which in these circumstances will be a bad one also from the legal standpoint (for instance, Prussian Landrecht).'[78]

After the revolution of the bourgeois, it is still possible to make the ancient Roman law as the foundation for the newly formed, now classic law such as French Civil Code. If the superstructure of law after the bourgeois revolutions 'merely express the economic life conditions of society in legal form, then they can do so well or ill according to circumstances.'[79] Here Engels speaks about the contradictions happens in law due to the circumstances and contradictions happen within the bourgeois society. In sum, the laws have not changed automatically when the capitalist society comes into existence. In England, the old feudal laws were given the capitalist content. As we have seen, in the socialist society the old bourgeois law remained to a certain extent. Hence the 'legal ideas and codes of law arose, not as a direct product of economic conditions, but by process of working upon and adapting the already existing law, which belonged to a past epoch, into forms suitable for the new epoch.'[80]

Therefore, the metaphysical understanding of separating the base and superstructure as a separate isolated form leads to the distorted understanding of Marxist theory of law. Hence what is needed is the dialectical approach through which Marxism

[77] https://www.marxists.org/archive/marx/works/1886/ludwig-feuerbach/ch04.htm, retrieved on 1.3.2017.
[78] https://www.marxists.org/archive/marx/works/1886/ludwig-feuerbach/ch04.htm, retrieved on 1.3.2017.
[79] https://www.marxists.org/archive/marx/works/1886/ludwig-feuerbach/ch04.htm, retrieved on 1.3.2017.
[80] Cornforth, *Dialectical Materialism – An Introduction*, p.93.

proposes the formula to understand material things around us. If dialectical materialism is applied over the base-superstructure theory of law we can find out that the legal superstructure is not an isolated one from the base, but it is dialectically attached with the base and the relationship is dialectic. Here comes a question, in that case, can a superstructure change the mode of production or the base? The answer is negative as Marx said revolutions are not made by laws. But artificially with the help of international law, the mode of production can be changed. It is like a scientific evolution, or a natural revolution can be stopped for some time by the external factors. Here the international law can be used to change the economic basis of a country. It can either by force or by treaties. As Engels said in his letter to Schmidt, the superstructure can modify and influence the base within certain limits. But of course, at the same time, the material conditions which include the subjective and objective conditions will be in favour though the contradictions exist. The international treaties through which the conditionality's of World Bank, IMF, WTO, etc., as a mechanical discipline imposed from outside. It is the artificial imposition in the natural process of development of society. The external imposition cannot extend for a long time as it faces contradictions leads to the further evolution of the society which is moving forward.

### 9. 1. 2. Law as Will of Economic Relations

Law is called the will of the ruling class in the materialist theory. In the mainstream theory of law, it is called as 'general will' or 'free will' or 'basic norm' or 'categorical imperative' or 'social solidarity' and so forth. The famously celebrated term of Rousseau in his *Social Contract* is the 'General Will'. 'The general will is the source of law and is willed by each and every citizen. In obeying the law each citizen is thus subject to his or her own will, and consequently, according to Rousseau, remains free.[81] In his *Social Contract*, he equates law with the sovereign. For him 'sovereignty is indivisible for the same reason that it is inalienable. For either the will is general, or it is not. It is the will of either the people as a whole or of only a part. In the first case, this declared will is an act of sovereignty and constitutes law. In the second case, it is merely a private will, or an act of magistracy. At most it is a decree.'[82] The will of the whole people is an act of sovereign and it constitutes law. Following this, later, the

[81] https://plato.stanford.edu/entries/rousseau/., retrieved on 13.12.2016.
[82] Rousseau, *Basic Political Writings*, p.154.

*French Declaration of the Rights of Man and Citizen* (1789) declared in its Article 6 as 'Law is the expression of the general will; all citizens have the right to concur personally, or through their representatives in its formation; it must be the same for all, whether it protects or punishes. All citizens being equal before it are equally admissible to all public offices, positions, and employments, according to their capacity, and without other distinction than that of virtues and talents.'[83] Following Rousseau and the French Declaration after the bourgeois revolution, the mainstream or bourgeois law theorists see the 'general will' as the will of the people without any differences of class. Theorists like Duguit sees the 'general will' as the 'social solidarity'; the basis of state and law alike, asserting that people are united by bonds of a social solidarity which embraces all members of the human race and is the source of law itself.[84] Vyshinsky contends that this concept of 'social solidarity' or 'general will' is artificial and metaphysical because this principle considers that solidarity is the life element of the society of every sort.[85] The bourgeoisie and the proletariat cannot live in solidarity, and the interests of the proletariat are subordinated while the interests of the bourgeoisie are upheld in this notion of 'social solidarity'. Though, many definitions of law developed by the bourgeois scholars, there was no accepted results according to the Italian scholar Del Vecchio. The idealist theory of law, thus, could not solve the cardinal and fundamental problem in the theory of law, satisfactorily. Marxist theory of materialism was the one which revealed the true essence of law.

In a particular mode of production, the dominant class or the class which controls the mode of production - has common interests and goals. The will of this dominant class develops into a common will of the particular class, which in turn, supports, consolidates and protects the particular mode of production. Thus the will of the dominant class is also the will of the state helps that class to strengthen their economic, political spheres by various means, and one among them is law. Hence the will of the state creates the law.

Marx criticised and rejected the bourgeois law - as the will of the ruling class of bourgeoisie, not a 'general will'. In *The Communist Manifesto*, Marx and Engels

[83] Jackson J. Spielvogel, *Western Civilization*, p.581.
[84] Vyshinsky, *The Law of the Soviet State*, p.21.
[85] See ibid., p.22.

contesting the bourgeoisie by their arguments said ‘your very ideas are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into a law for all, a will, whose essential character and direction are determined by the economic conditions of existence of your class.'[86] Again in *The Poverty of Philosophy* Marx explains that the ‘legislation, whether political or civil, never does more than proclaim, express in words, the will of economic relations.’[87] Elsewhere (In *The German Ideology*) Marx and Engels writes,

> ‘In actual history, those theoreticians who regarded might as the basis of right were in direct contradiction to those who looked on will as the basis of right... If power is taken as the basis of right, as Hobbes, etc., do, then right, law, etc., are merely the symptom, the expression of other relations upon which state power rests. The material life of individuals, which by no means depends merely on their "will", their mode of production and form of intercourse, which mutually determined each other — this is the real basis of the state and remained so at all the stages at which division of labor and private property are still necessary, quite independently of the will of individuals. These actual relations are in no way created by the state power; on the contrary, they are the power creating it.
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> The individuals who rule in these conditions — leaving aside the fact that their power must assume the form of the state — have to give their will, which is determined by these definite conditions, a universal expression as the will of the state, as law, an expression whose content is always determined by the relations of this class, as the civil and criminal law demonstrates in the clearest possible way.’[88]

The will is not on its own but is determined by the material conditions. The individual will is not merely created by their own wish, but by the various things like mode of production and intercourse. Marx and Engels exposed the bourgeois state and bourgeois law in *The German Ideology*, by arguing that

> ‘the state is the form in which the individuals of a ruling class assert their common interests, and in which the whole civil society of an epoch is epitomized, it follows that all common institutions are set up with the help of the state and are given a

[86] Marx and Engels, *The Communist Manifesto*, p.67.
[87] Marx, *The Poverty of Philosophy*, p.78.
[88] Marx and Engels, *The German Ideology*, p.348.

> political form. Hence the illusion that law is based on the will, and indeed on the will divorced from its real basis – on free will.'[89]

Hence the will which is the reflection of economic relations determines the legislation and the law. It is not a free will, but it is out of the social conditions, which is favour of a particular class. The social condition here is the mode of production or the economic condition. Marx agrees with the argument of law is the will of the people, but that is not the free will but the will of the false consciousness. The will of the ruling class in bourgeois society is made into law for all of the society. With the ruling class 'will' as the common will and the institutions created by it as the common systems claim to be characterised as for the whole society. Engels beautifully narrated the class nature of those institutions like judiciary which in reality works in favour of the ruling class. While speaking about *The Condition of the Working Class* he exposes the so-called neutral nature of law and established that laws practiced by judiciary discriminate between classes. This is the 'attitude of the bourgeoisie towards the proletariat'. He writes,

> "If a rich man is brought up, or rather summoned, to appear before the court, the judge regrets that he is obliged to impose so much trouble, treats the matter as favourably as possible, and, if he is forced to condemn the accused, does so with extreme regret, etc., etc., and the end of it all is a miserable fine, which the bourgeois throws upon the table with contempt and then departs. But if a poor devil gets into such a position as involves appearing before the Justice of the Peace – he has almost always spent the night in the station-house with a crowd of his peers – he is regarded from the beginning as guilty; his defence is set aside with a contemptuous "Oh! we know the excuse", and a fine imposed which he cannot pay and must work out with several months on the treadmill. And if nothing can be proved against him, he is sent to the treadmill, none the less,"as a rogue and a vagabond". The partisanship of the Justices of the Peace, especially in the country, surpasses all description, and it is so much the order of the day that all cases which are not too utterly flagrant are quietly reported by the newspapers, without comment. Nor is anything else to be expected. For on the one hand, these Dogberries (Inferior Judges) do merely construe the law according to the intent of the farmers, and, on the other, they are themselves bourgeois, who see the foundation of all true order in the interests of their class. And the conduct of the police corresponds to that of the Justices of the Peace. The

[89] Marx and Engels, *The German Ideology*, p.99.

> bourgeois may do what he will and the police remain ever polite, adhering strictly to the law, but the proletarian is roughly, brutally treated; his poverty both casts the suspicion of every sort of crime upon him and cuts him off from legal redress against any caprice of the administrators of the law; for him, therefore, the protecting forms of the law do not exist, the police force their way into his house without further ceremony, arrest and abuse him; and only when a working-men's association, such as the miners, engages a Roberts, does it become evident how little the protective side of the law exists for the working-man, how frequently he has to bear all the burdens of the law without enjoying its benefits." [90]

Not only in capitalist society but every society starting from slave owned society to the modern bourgeois society the legal principles are the will or the reflection of the economic relations. The laws of the bourgeoisie and other societies are oppressive because it was based on the system of exploitation by a human to human.

So the law is not of a 'general will' as Rousseau argued, but the 'particular will' of a dominant class, which is made into the will of all the people, as a general will. When the working class gets class consciousness, leaving their false consciousness, they become the ruling class with their particular will, which can also be called in a Marxist sense during the time of the dictatorship of the proletariat.

Crimes in the society are not arbitrary but are generated by the conditions of production forces in the society like law and legislation. In *The German Ideology*, Marx with extraordinary profundity reveals,

> 'Like right, so crime, i.e., the struggle of the isolated individual against the predominant relations, is not the result of pure arbitrariness. On the contrary, it depends on the same conditions as that domination. The same visionaries who see in right and law the domination of some independently existing general will on in crime the mere violation of right and along. Hence the state does not exist owing to the dominant will, but the state, which arises from the material mode of life of individuals, also has the form of a dominant will. If the latter loses its domination, it means that not only the will has changed but also the material existence and life of individuals, and only for that reason has their will changed. It is possible for rights and laws to be "inherited", but in that case, they are no longer dominant, but nominal,

[90] https://www.marxists.org/archive/marx/works/1845/condition-working-class/ch13.htm, retrieved on 13.5.2017

> of which striking examples are furnished by the history of ancient Roman law and English law.'[91]

Here Marx questions the existence of the state and the form of state. The very existence of the state is not because of the dominant will, but because of the material conditions. However, the state is the form of dominant will. When the dominant will loses its domination, it means the material existence has changed. Hence the material life changes the dominant will and not the other way round. The change of material existence leads to the inheritance of law of the previous society which is no longer dominant but nominal. This is how the basic notion of private property is carried from the Roman law to the modern English law.

In summary, Marx and Engels theory of law states that law is the will of the ruling class but not the will of the people. This will of the ruling class expressed as the will of the state and in turn made to the law through legislation, etc. The bourgeois concept of 'general will' is an illusion and does not have any class content.

### 9.2. Lenin

As we have seen the theory of the state is inevitably connected with the theory of law, Lenin's intellectual work *The State and Revolution* developed a Marxist theory of the state. It is a valuable guide to come to the conclusions about the socialist theory of law. Law is politics argued Lenin.[92] Lenin contends with the support of Marx and Engels writings about the nature of state which is going to be formed after the proletarian revolution. By using Marx words, he called it as dictatorship of the proletariat. The reason for why it is called the dictatorship of the proletariat explained by him as

> 'And the dictatorship of the proletariat, i.e., the organization of the vanguard of the oppressed as the ruling class for the purpose of suppressing the oppressors, cannot result merely in an expansion of democracy. Simultaneously with an immense expansion of democracy, which for the first time becomes democracy for the poor, democracy for the people, and not democracy for the money-bags, the dictatorship of the proletariat imposes a series of restrictions on the freedom of the oppressors, the exploiters, the capitalists. We must suppress them in order to free humanity from

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[91] Marx and Engels, *The German Ideology*, p.349.
[92] Guins, *Soviet Law and Soviet Society*, p.4.

> wage slavery, their resistance must be crushed by force; it is clear that there is no freedom and no democracy where there is suppression and where there is violence.'[93]

In this statement of Lenin about the dictatorship of proletariat, we can assume the part played by law. The general nature of law is the reflection of the mode of production, as the reflection of the ruling class. Here in the dictatorship of the proletariat, law collaborates with state and helps in achieving the goals of the state. Hence the law is used to put a restriction of liberty in the case of oppressors, the exploiters and the capitalists. Lenin was clear about the status of law after the socialist revolution. He was sure that law is necessary even under the proletarian rule.[94]

Lenin by profession a lawyer, write little about the socialist law. Pashukanis observed that a series of isolated observations and thoughts relating to the law are scattered throughout his work.[95] Lenin in a letter to Stalin on 1922 spoke about the importance of law. In that letter, Lenin looks law along with culture and tends to protect the uniformity of law and respect for the law.[96] He understood the importance of superstructures dialectical role with the base. For Lenin 'law is nothing without a mechanism capable of compelling the observance of legal norms'[97]. That mechanism is the state. Hence law cannot stand alone without the mechanism of the state. Anarchists, on the other hand, contend that the law can be imposed in a stateless society. In *Anarchy and Legal Oder* Gary Chartier contested that legal authority can exist in a stateless society. It 'would be vital to the maintenance of order in a stateless society.'[98] 'Order' is maintained in a class society. In this stateless society, class exists without state which is highly utopian and metaphysical understanding.

If we look generally, it seems like the law will play a violent role in the dictatorship of the proletariat. It is and not only in the proletarian state but also in any kind of state. A deep observation of this will lead us to find that the majority working class for the elimination of class itself is using the law as a weapon. In earlier kinds of state, this used to be in reverse. The capitalists state though it is called as democracy used the law to impose its minority interests over the majority with the same violent force.

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[93] Lenin, *The State and Revolution*, https://www.marxists.org/archive/lenin/works/1917/staterev/ch05.htm, retrieved on 18.6.2017.
[94] Guins, *Soviet Law and Soviet Society*, p.86.
[95] See further, Pashukanis, *Selected Writings on Marxism and Law.*
[96] https://www.marxists.org/archive/lenin/works/1920/may/20.htm, retrieved on 17.5.2017.
[97] Vyshinsky, *The Law of the Soviet State*, p.5.
[98] Chartier, *Anarchy and Legal Order*, p.242.

Lenin not only a theorist but he was the one who applied theory into practice. His understanding of using law and legal ways even in the bourgeois state to win over struggles is an example of his dedication and knowledge about praxis. Pashukanis put forth two incidents in Lenin's life – one is related to domestic law, and the other one is related to international law. The incident regarding the domestic law is where Lenin filed a complaint against a ferry owner, used to detain the passengers who used another ferry for transport. Lenin's complaint leads to a guilty verdict against the ferry owner despite all the efforts of the head of the former district council on behalf of the accused. Here Lenin did not reject the bourgeois law and its institutions claiming as the products of the bourgeois state. He used the liberal and progressive elements of the bourgeois law in favour of justice.

The incident which relates to international law was the compromise with the Axis powers, particularly with the Germany by signing the Brest-Litovsk Treaty. The concluding of the treaty with an imperialist power may seem reactionary, but applying dialectics practically Lenin protected the hard-won victory of October Revolution. Pashukanis admires Lenin's 'incomparable political instinct unerringly guided him to an understanding of the limits of which it was fully possible to use the legal form imposed by the course of the struggle.'[99] In sum we can see Lenin's use of legal opportunity wherever necessary shows real application of dialectical materialism. It also sends us a message that Lenin was not given less importance to the legal superstructure, and he knows how necessary it is.

After the October revolution, the question of the nature of the state and law arose. In his *The State and Revolution* Lenin describes the nature of the state as well as law.

> '…in the first phase of communist society (usually called socialism) "bourgeois law" is not abolished in its entirety, but only in part, only in proportion to the economic revolution so far attained, i.e., only in respect of the means of production. "Bourgeois law" recognizes them as the private property of individuals. Socialism converts them into common property. To that extent--and to that extent alone--"bourgeois law" disappears.
>
> However, it persists as far as its other part is concerned; it persists in the capacity of regulator (determining factor) in the distribution of products and the allotment of labor among the members of society. The socialist principle, "He who does not work

[99] Pashukanis, *Selected Writings on Marxism and Law,* p.139.

> shall not eat", is already realized; the other socialist principle, "An equal amount of products for an equal amount of labor", is also already realized. But this is not yet communism, and it does not yet abolish "bourgeois law", which gives unequal individuals, in return for unequal (really unequal) amounts of labor, equal amounts of products.'[100]

In the transition period of socialism, i.e., the proletariat dictatorship the nature of law is of the socialist orient. The bourgeois law exists even after the socialist revolution because of the existence of class struggles between the capitalist and the proletariat during the leadership of the proletariat state. Because of the existence of class struggle in the socialist society, the communist principle of 'each according to his/her needs' could not be realised. The bourgeois law will wither away with the ending of class struggle; it means the dissolution of class itself. It cannot be fixed in a particular time period having the experiences of the history of origin of class in the society.

Lenin's observation of withering away of law not in the socialist society but in the communist society along with the withering away of state gives an idea about the future of international law. The Soviet international law scholars like Pashukanis expected the withering away of law in a very short period of time during the stage of transition, the dictatorship of the proletariat, which was utopian. The class contradictions will exist during the period of socialism, till it transforms itself and lead to the higher stage of communism. The last phase of the progressive mode of production is the communist mode of production. The state withers away and only remains the people's administration units. Explaining international law at a communist society would be utopian and imaginative, because we have not experienced it. The primitive communist society can be taken as a model then international law supposed to wither away when there is no state structure.

Lenin claims that the law in the first phase of communism is still a bourgeois law. He calls it bourgeois law because it has characters of the capitalist society to allow private property in a smaller level and it is same oppressive like the bourgeois law because of its oppression towards the capitalists and the other exploiters. Other than that the socialist law converts the private property into common property. To that

[100] Lenin, *The State and Revolution*, https://www.marxists.org/archive/lenin/works/1917/staterev/ch05.htm, retrieved on 26.6.2017.

extent, bourgeois law disappears. But that extent is in itself a major, vast and important change. In his words,

> 'In its first phase, or first stage, communism cannot as yet be fully mature economically and entirely free from traditions or vestiges of capitalism. Hence the interesting phenomenon that communism in its first phase retains "the narrow horizon of bourgeois law". Of course, bourgeois law in regard to the distribution of consumer goods inevitably presupposes the existence of the bourgeois state, for law is nothing without an apparatus capable of enforcing the observance of the rules of law.'[101]

Here the reason for the existence of bourgeois law in the first stage of communism is clarified by Lenin. The taint of capitalism led to the survival of 'bourgeois law'. According to one of the laws of dialectics, the society is divided into contradictions. Hence in the first phase of communism in the legal field, the contradiction is between the capitalist and socialist law. The state is in favour of the socialist law. Hence capitalist law is in a defensive position. It would be utopian to say the very next day of revolution the socialist law comes into existence. To that point, people are not habituated for the socialist culture and the way of life. Hence the fundamental changes in the property relations by way of changing that from private property to common property was made. So Lenin says to that extent alone socialist law exists. He argues 'if we are not to indulge in utopianism, we must not think that having overthrown capitalism people will at once learn to work for society without any rules of law. Besides, the abolition of capitalism does not immediately create the economic prerequisites for such a change'.[102] Hence law play an important role in the socialist society. Further, the abolition of capitalism after the revolution does not automatically end economic rudiments of capitalism.

Lenin mentions 'bourgeois law' in a sense it will also act in favour of a particular class, the working class. This 'bourgeois law' on the distribution of articles of consumption, inevitable presupposes, of course, the existence of the bourgeois state, for the law is nothing without an apparatus capable of enforcing the observance of law. By 1922 in a letter sent by Lenin to Justice Commissar Kursky, he viewed the

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[101] Lenin, *The State and Revolution*, https://www.marxists.org/archive/lenin/works/1917/staterev/ch05.htm, retrieved on 26.6.2017.
[102] Lenin, *The State and Revolution*, https://www.marxists.org/archive/lenin/works/1917/staterev/ch05.htm, retrieved on 26.6.2017.

Soviet law as socialist in character and not as a bourgeois remnant.[103] Hence a socialist law can be in practice in a socialist state where the antagonism of classes still exists between the proletariat and bourgeoisie. The only difference is now the working class is the ruling class.

Lenin not only spoke but made efforts to change the legal structure using his position as Chairman of the Peoples Commissar to propose specific changes to legislation. In May 1918, Lenin instructed the Justice Commissar, Kursky to draft a bill to punish bribery by imposing ten years minimum sentence to protect the young Soviet state from corruption.[104] He not only made legal efforts for the benefit of the Soviet people but also serious about the party members. He demanded special penalties be imposed on party members such as triple penalties for communists comparing to the non-party members. These are the efforts by Lenin to cleanse the remnants of the capitalist society by using the capitalist law of punishment. The implementation of the socialist law in property relations and the mode of production will day by day eliminate the capitalist remnants of corrupted habits and practices in the society.

Lenin considered law can be a tool in elevating social and cultural consciousness.[105] As Michael Head simplified, Beirne's version of Lenin's understanding of the law is expressed in five theses.

1. Bourgeois law, albeit founded on unequal relations, provided a significant arena of struggle to secure concessions from the ruling classes.
2. Law is a minor but useful educative vehicle in disseminating the socialist programme under the dictatorship of the proletariat.
3. Under the dictatorship of the proletariat, 'socialist legality' – characterised by informality, flexibility and political content – can help realise the emancipatory capacity of the popular masses.
4. For both the immediate and long-term achievement of the transition to communism, there must be a complete rupture with the political and legal institutions of capitalism, and their replacement by Soviets and other forms of socialist democracy.
5. Because communism abolishes the conditions that produce law and also greatly simplifies and extends participation to all citizens, communist society will be a non-legal social order.[106]

[103] Head, *Evgeny Pashukanis-A Critical Reappraisal*, p.52.
[104] See ibid., p.54.
[105] See ibid., p.56.

## 9. 3. Pashukanis

The well-known Soviet Marxist scholar and the most prominent representative of the Soviet legal theory in its early years was Evgeny B. Pashukanis (1891 – 1932). He had been the only Soviet Marxist legal philosopher known well outside USSR at that point of time and till now. He joined the Bolsheviks after the revolution. In 1918 he served as a local and circuit judge and in the early 1920s worked as a legal advisor in the people commissariat of foreign affairs.

Pashukanis period can be divided into three essential phases of socialism in the Soviet Union. It is the first phase of War Communism, the second phase of NEP period (New Economic Policy) and the third phase of the establishment of socialism in one country during the period of Stalin's leadership. In the period of War Communism, the primary motive was to destroy the old social structure. The Soviet legislation of this period was moving through the concept that law as a bourgeois ideology which will wither away according to the theory of withering away of the state. In his *General Theory of Law and Marxism*, Pashukanis concludes his argument by opposing the proletarian system of law after the October revolution of 1917. However, he has not foreseen the fact that state exists after the revolution and the nature of state during that period is the dictatorship of the proletariat. The Marxist theory of state strongly establishes the fact that state won't be abolished after the revolution but exists till the class exists and withers away in a period. E. H. Carr explains aptly the change in legal system after the revolution. In his words,

> 'A change of attitude towards law is a natural sequel to any revolution. Revolution is a revolt against legal authority, and is directed to the overthrow of an existing legal order. But, once this order is destroyed, and the victorious revolutionaries have usurped the seats of power, they quickly experience the need to set up a legal authority of their own; and they have to transform themselves from challengers and opponents of law into upholders and makers of it. … Law was an emanation and instrument of the state, which was the instrument of a class,'[107]

Pashukanis ignored the fact of strengthening the proletarian state and argued in favour of the process of withering away of state and law. He tried to take support from

[106] See ibid., p.46.
[107] Carr, *Socialism in one Country 1924-1926*, p.66.

Marx's writings *The Critique of Gotha Program* which argues the inner connection between commodity form and legal form, the dying out of legal form in general but not shifting to new legal forms. The transition to the higher level of communism is conceived to take place gradually after the revolution and not immediately.

Some of his works are *General Theory of Law and Marxism*' and the *Encyclopedia of State and Law*, which he edited. His *General Theory of Law and Marxism* argues that the private law is the beginning of all law and the commodity exchange happened between individual, in which one individual must recognise the right of the other individual as having ownership over the property. Therefore, 'every legal relation is a relationship between subjects. A subject is the atom of legal theory, the simplest and irreducible element.'[108] He further notes that law evolves out of an individual relationship, having commodity ownership recognising the other as an equal in an abstract formal sense. Instead of looking law as the product of the economic conditions of the society, he perceived law from the individual perspective. Here individual, not the society, not the state where the law origins. The sequence according to Engels would be private property, state and law. For Pashukanis it is private property, law, and state which denies the theory of state and law. For him, private property is enough to create a law between the individuals without the necessary origin of state or the role of society. According to him, the source of law arises from the regulation of disputes between the individuals when they are in commodity exchange; the law became a form of the rules as between formally equal abstract individuals. With the quotes of Marx and Lenin, he tried to establish his theory. In *The German Ideology* Marx notes that 'civil law develops simultaneously with private property out of the disintegration of the natural community'.[109] Private property is one, which has an exchange value and when a commodity gets traded, then it becomes private property. As Lenin points out while criticising Mikhailovsky on the question of the nature of the right of inheritance that 'in fact, the institution of inheritance already presupposes private property and the latter arises only with the appearance of exchange.'[110] With these arguments Pashukanis tried to establish that right after the origin of private property, the origin of law happened. It happened

[108] Pashukanis, *Selected Writings on Marxism and Law*, p.74.
[109] Marx and Engels, *The German Ideology*, p.99.
[110] https://www.marxists.org/archive/lenin/works/1894/friends/01.htm, retrieved on 26.6.2017.

when the private property came to the market for individual exchange. For Pashukanis theory of law, the state is not necessary for the origin or development of law. It is true that the civil law develops simultaneously with private property as Marx noted, but only after the disintegration of the natural community. Lenin's argument of inheritance presupposes private property is the continuation of the understanding of Engels as the origin of the family, private property and state. This confusion steered Pashukanis for a wrong conclusion of the origin of law during the tribal society. In the tribal society, for hunting and grazing, land was used by the whole community (not an individual, as there is no notion of the individual in the community in the primitive period) is not private property, but communal property. Pashukanis observed that 'the exchange was not initially made between individual, but among tribes and communities.'[111] Communal property is opposite to the private property. Communal property is owned by the community, not the individual. In the meantime, he did not clarify whether commodity exchange between tribes can also be included in the commodity exchange theory of law. Pashukanis starts the origin of law with the individuals which are giving importance to the individual instead of the society. Since there was no individual ownership, there was neither private property and nor state, the communal property was not exchanged between the tribes. Tribal wars lead to the capturing of the movable and immovable property of the other community, not by peaceful exchange in an organised level most of the time. While discussing international law, Pashukanis writes that the exchange between tribes and communities in the ancient period shows that the international law institutions are the ancient legal institutions. He shows that the dispute between tribes over borders and etc. lead to agreements. The example of these can be seen the conclusion of alliances between the ancient Germans and Iroquois.[112]

In this statement, he has taken international law even to a pre-state society. However, he is not clear whether the private property originated or not at that point of time. Two questions arise. One is whether commodity exchange between the communities led to the origin of law or the commodity exchange between individuals resulted in the origin of law as Pashukanis argued. Two, whether international law predates the domestic law? Did international law emerge between the communities due to the

[111] Pashukanis, *Selected Writings on Marxism and Law*, p. 175.
[112] See ibid., p.175.

exchange, collisions between tribes, territorial disputes, and disputes over borders and agreements out of these disputes or the domestic law with the individual exchange? Though Pashukanis did not give answers to these questions, it is understandable that the emergence of the notion of private property along with the origin of law gets consolidated in pre-state society.

The General Theory of Law of Pashukanis implies that the exchange is the base for all the development of legal structures. He contests that

> 'The economic relationship of exchange must be present for the legal relationship of the contract of purchase and sale to rise. In its real movement, the economic relationship becomes the source of the legal relationship, which first emerges at the moment of a controversy. A dispute, a conflict of interest, elicits the form of law, the legal superstructure. In a dispute, i.e. in a lawsuit, the parties engaged in economic activity already appear as parties, i.e. as participants in the legal superstructure; the court in its most primitive form – this is the legal superstructure par excellence. Through the judicial process, the legal is abstracted from the economic, and appears as an independent element.'[113]

The 'economic relationship becomes the source of the legal relationship', albeit the judicial process becomes independent of the economy, and the law becomes an independent element. Finally, the cat is out of the box as Pashukanis established his theory as a total distortion of Marxism by arguing mechanically that the law is independent of the economy. No wonder the bourgeois scholars celebrate Pashukanis and his theory.

### 9. 4. Vyshinsky

After the demise of Pashukanis, the tall figure and successor of Pashukanis in the Soviet Union in the legal scholarship was Vyshinsky. He was a critique of Pashukanis and stated that law is neither a system of social relationships nor a form of production relationships. For him the law is the aggregate of rules of conduct or norms, yet not of norms alone but also of customs and practices community living confirmed by state authority and coercively protected by authority. In his words about Soviet law,

[113] See ibid., p.67.

> 'Soviet law is the aggregate of the rules of conduct established in the form of legislation by the authority of the toilers and expressive of their will. The effective operation of these rules is guaranteed by the entire coercive force of the socialist state in order to defend, to secure, and to develop relationships and arrangements advantageous and agreeable to the toilers, and completely and finally to annihilate capitalism and its remnants in the economic system, the way of life, and human consciousness in order to build a communist society.'[114]

In this argument, Vyshinsky tried to contend that law does evolve from authority of the toilers and confirmed, connected and protected by the state. In the meantime, he criticises the bourgeois political scientist, 'in his own fashion, to prove that the state existed from the beginning. They assert that it stands above life and history, as it was – an eternal category of some sort.' [115] He clearly differentiates the metaphysical idealist theory of state from the materialist perspective. He explains the relationship between state and law as a close relationship. Both are like twins which cannot be understood separately.

> 'The nature of the state is the most important question in the science of public law. The theory of the state is the basis not only of the science of state law but also of law in general, inasmuch as a scientific understanding of law is impossible without a correct understanding of the state. Law and state cannot be studied separately and apart from each other.'[116]

His definition of law is aimed at criticising Pashukanis general theory of law which defines that the law is the outcome of the commodity exchange. Vyshinsky in this definition related law close to the state. The theory of state is applicable to the theory of law. Both origins from the civil society as Marx said that the state is the outcome of civil society and not the civil society formed by the state. He correctly pointed out the purpose of the socialist law as to annihilate the capitalist remnants in the economic system and so forth. He recognises the importance of legal institutions like the judiciary and its role in annihilating the bourgeois remnants. The bourgeois theory of state and law contends that state is a neutral organ and law flows out of it for the welfare of people. The theory of 'welfare state' is a bourgeois description of the nature

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[114] Vyshinsky, *The law of the Soviet state*, p.50.
[115] See ibid., p.10.
[116] See ibid., p.5.

of the state. The bourgeois law disguises itself by phrases like ‘the general welfare’, ‘social’ and ‘popular’ interests but defends the interests of the exploiters by being oppressive and hostile to the people. In the capitalist society, according to Vyshinsky the bourgeois theory of state and law serves the purpose of exploitation and gratifying the exploiters in order to perpetuate capitalist exploitation.[117]

Vyshinsky further noted about the Soviet socialist law that it is the will of the people elevated to the rank of the statute.[118] In this definition, Vyshinsky contradicts himself from his general definition of law. He differentiated the bourgeois law and Soviet socialist law by arguing that the bourgeois law is imposed by the state, not by the system of social relationships that is a civil society. Initially, he defines socialist law as the will of the toiling masses. But later he describes Soviet law during his contemporary period as the will of the people. It is again an incorrect statement that it is not the will of the people, but the will of the working class, i.e. the will of the ruling class in the Soviet State and it is imposed and protected by the proletarian dictatorship. The background for Vyshinsky's statement is the announcement of Stalin's theory for the end of classes in the Soviet Union. Though classes are eliminated in the Soviet Union, nevertheless, Stalin maintained that class struggle was not over. The statement was made because it has to be fought in the superstructure level. This announcement by Stalin led to the wrong definition of Vyshinsky, that law as the will of the people.

He further maintains that the condition for the existence of Soviet Socialist law is ‘to finish off the remnants of the dying classes and to organise defence against capitalist encirclement'.[119] In this statement, the first half is little problematic as he mentioned about the remnants of the dying classes. There seems to be hurry in moving the Soviet Society to a classless society, which is not possible immediately, if we compare the history of class struggle over the period of eras. The class cannot be eliminated in a short period. When class is not there, then the necessity of state fails and state withers away. The second half makes sense as the law has to be used to organise the defense against capitalist encirclement. The justification of the socialist law with a proletariat

[117] See ibid., p.5.
[118] See ibid., p.13.
[119] See ibid., p.62.

dictatorship state in the Soviet Union was the reason of capitalist encirclement. Instead of withering away the Soviet state was strengthened for the above-mentioned reason. If it is true, then the domestic law would have withered away in the Soviet Union and only international law exists because of the capitalist encirclement. Vyshinsky's' contention was because of the Stalin's policy of intensifying state that the withering away of the state will come not through a weakening authority but its maximum intensification. The withering away cannot be postponed but naturally occurs till, 'all will learn to get along without special rules defining the conduct of people under the threat of punishment and with the aid of constraint; when people are so accustomed to observe the fundamental rules of community life that they will fulfill them without constraint of any sort.'[120] Law exists till the class exists. Strengthening leads to withering away is agreeable, as the purpose of the proletarian state (which is the dictatorship of the proletarian) is the annihilation of class. For this annihilation of class, the strengthening of state mechanism is inevitable.

The connection between law and policy is intimate according to Vyshinsky. He stated that 'law is nothing unless connected, with a definite policy' and not accepting 'the contention that policy ends where law begins. Law is an instrument of politics.' [121] He argues that law serves a purpose of fulfilling the policies of the state. It either can be a bourgeois state or a proletarian state. He notifies the capitalist politics or the socialist politics which law serves as an instrument to fulfill the goals of those politics.

Vyshinsky while arguing about law and morality; rejected any eternal, final, immutable moral law. This argument is based on the materialistic perspective of law. He correctly claims that 'all existing moral systems are definitely the product of corresponding economic conditions' and 'morals have always had a class character.'[122] Socialist law and socialist moralities are one and the same, and there are no contentions between them. There is a coincidence of moral principles and legal provisions. In his words, 'moral principles and legal provisions coincide in socialist society because of their common cause and common nature.'[123] The morality and law have close connections, though morality seems more cultural. Every society has its

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[120] See ibid., 52.
[121] Cited in Guins, *Soviet Law and Soviet Society*, p.4.
[122] See ibid, p.27.
[123] See ibid, p.32.

morality, as capitalist has its capitalist morality and socialist has its morality. Here morality develops simultaneously after the mode of production along with the law. While speaking about justice and morality, Vyshinsky contends that

> 'The concept of justice is a historical concept, since its content depends on definite historical conditions, or, to put it more precisely, on those moral and political principles prevalent in a certain society, which, because of the influence of the class dominant in this society, also became the leading principles for the overwhelming majority of the population. Because of this influence, such principles acquire a national character and remain such up to the time when the consciousness of some single social class exposes them to critical analysis, removes them to the background, and even replaces them with their own new principles and concepts.'[124]

This argument is linked to the theory of historical materialism and in conformity with the Soviet conception of morals and justice. The morality and immorality, the just and unjust, good and bad are not eternal principles existed in the history forever. These principles cannot be established once for all and are always relative. Moreover, every society has different classes. Each has its morality. Engels speaks of the three different kinds of morality in capitalist society, i.e., the morality of the feudal aristocrat, the bourgeoisie and the proletariat. But the mainstream morality would be a bourgeois morality.[125] Same as in socialist society there exist bourgeois and proletariat morality and the mainstream would be a proletariat morality.

## 10. Summary

The philosophy of idealism dominated the natural law theory for a long time. The natural law derives law from the divine. The religious law is unchangeable and eternal. Positivism which arose against the natural law theory shifted the origin from the divine to the sovereign. However, the positivist approach suffered from the metaphysics of law. For instance, Kelsen argued for a 'pure theory of law' which is not contaminated from sociology, economics, etc. On the other hand, the materialist theory approaches law in a scientific method. It contends that the law is not the divine origin and eternal. It changes according to material conditions of the society. The mode of production plays the determinant role in shaping the law. However, the dominant role could be played by any of the other superstructures such as religion,

[124] Cited in Guins, *Soviet Law and Soviet Society*, p.27.
[125] https://www.marxists.org/archive/marx/works/1877/anti-duhring/ch07.htm, retrieved on 21.4.2017.

etc. The relationship of law with the base as well as with other superstructures is dialectical. Marxism enriched the philosophy of materialism. The Marxist theory of law argues that the law is the will of the particular class. It is not the 'general will' as contended by Rousseau but a particular will of the ruling class. The tribal society has rules and regulations, which was also sanctioned. The element which differentiates the common norms and rules is the exploitation of one class by another. Hence, law originates along with state after the origin of class. The initial period of socialist society had the law with some bourgeois character, till the class struggle happens. The dissolution of class leads to the withering away of state and law.

# CHAPTER III

# MATERIALIST APPROACH TO INTERNATIONAL LAW

## 1. Introduction

The materialist theory of international law is an extension of the materialist theory of law. The concepts of dialectical materialism are applied to international law as well. It is a superstructure of the world economic base. The origin of international law, like law, is also connected with the formation of the state. The theory of state and law here converted to the theory of states and international law. Instead of one state, here multiple states play a role in the development of international law. In both cases, the state plays an important role. In other words, there is no international law without states.

Regarding the materialist theory of international law, quite some Marxist theoretician has been there in the field. Most of them were from the Soviet Union such as Stuchka, Pashukanis, Korovin, Reisner, Tunkin, etc. Among them, Pashukanis was the most celebrated one particularly out of the Soviet Union. In this chapter, four important Marxist international law scholars and their theories are discussed. They are E.B. Pashukanis, G.I. Tunkin, B.S. Chimni and China Mieville. The important theoretical themes have been taken, and the authors' position on that is discussed.

## 2. E. B. Pashukanis

The well-known Soviet Marxist scholar and the most prominent representative of the Soviet legal theory in its early years were Evgeny B. Pashukanis. Some of his works are *General Theory of Law and Marxism* and the *Encyclopedia of State and Law*, which he edited. Major contributions by Pashukanis to the Soviet literature on international law were the above mentioned *Encyclopedia of State and Law* published in 1929 and a textbook of International Law published in 1935. Pashukanis position on international law has changed over a period. He rectified his mistakes by correcting his positions, but still considered problematic in the former Soviet Union.

### 2.1. History of International Law

Although his essay on international law is only fifteen pages, the depth of that writing gives us an idea about the richness of Marxist approach. He tried to give a picture of the history of international law from tribal society to the modern times. However, Pashukanis' writings about international law are mostly related to the capitalist society. He correctly pointed out that 'the spread and development of international law occurred by the spread and development of the capitalist mode of production.'[1] He would have said about the modern international law, which is based on the capitalist mode of production, spread and developed through colonialism and later imperialism. Nevertheless, international law is not the sole invention of the European or the capitalist countries. It was practised in the oriental world long before the European states started practicing it. However, one model of international law, a Judea-Christian model was spread and developed and became hegemonic through European colonialism.

Pashukanis correctly captures the class nature of international law in the feudal society. He identifies the difference of application of international law which was only relevant to the war among the states i.e. between the knights, but not during the inter-class war with the peasants and burghers.[2] It seems he meant to say that rules of international law of war were not applied in the domestic civil wars. In this contemporary world, even the insurgent groups and the armed resistance against the state in the same country have to follow the Geneva conventions of humanitarian law. But during the period of feudalism, this was not followed.

Pashukanis defined 'modern international law as the legal form of the struggle of the capitalist states among themselves for domination over the rest of the world.'[3] This definition has an element of truth in it but cannot be generalised. Pashukanis mechanically applied the materialist conception to international law in the era of capitalism. He could not see the other aspects of the feudalism and the colonial struggle. He did not even consider the role of the Soviet Union during that time. The

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[1] Pashukanis, *Selected Writings on Marxism and Law,* p.172.
[2] See ibid., p.172.
[3] See ibid., p.169.

materialist theory views that everything in this world is dialectical in nature and international law is not an exception. Even today, there is a contradiction in international law between the capitalist state, later developed into the contradiction between socialist and capitalist states. Now the primary contradiction is between the first world and the third world. While arguing for his definition of international law, Pashukanis' observes 'the real historical content of international law, therefore, is the struggle between capitalist states'.[4] This definition of international law suiting well for that particular period but cannot be eternally applied. At that point of time, imperialism had divided the world among the capitalist countries. After Second World War and by 1960s almost all the colonised countries got independence from colonial rule. The states that got independence from colonialism are not capitalist states but mostly semi-feudal and feudal states. The Soviet socialist state itself turned into a Soviet social imperialist state and played a critical role in international law and the international organisations. Hence, Pashukanis' definition of international law cannot be correct in all periods of society. However, the struggle does take place among different kinds of states. At present, the Asian, African and South American countries, also called the Third World, play a significant role in the international legal process. It is true that the struggle between capitalist states is still going on. At the same time, the struggle is also going on between the first world and the third world.

The origin of bourgeoisie led to new rules and new institutions in international law. These new rules and new institutions have general and fundamental interests of protecting the bourgeois i.e. bourgeois property. Pashukanis analysed that the key to all bourgeois wars is of protecting the bourgeois private property.[5] His analysis of bourgeois war was not up to the mark of Marxism. He gives a crude economic approach to the wars. Wars happened to protect the private property starts from the ancient times, not particularly in the era of capitalism. But capitalist wars are not only for protecting its property; albeit, it is also to increase the private property by way of searching markets and resources. He ignored the connection of capitalism and colonialism and later monopoly of trade i.e. imperialism, the highest stage of capitalism.

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[4] See ibid., p.172.
[5] See ibid., p.172.

Pashukanis correctly criticised the division of states into civilised and semi-civilised, integrated and semi integrated. For him, this 'reveals the second peculiarity of modern international law as the class law of bourgeoisie.'[6] He understood the applicability of the modern international law which treats the civilised states equally and the semi-civilised states differently. Hitherto, the United Nations Charter also speaks about the civilised country while speaking about the sources of international law. Hence the civilised and uncivilised notions continue. Overviewing the civilised and uncivilised concepts seems to be racial in nature, but the underlying crux is the class nature of international law identified by Pashukanis is appreciable.

Pashukanis unmasked the true nature of international law as formally equal to all and in principle recognises the equal rights of states because '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'.[7] E. P. Thomson, a British Marxist historian in his *Whigs and Hunters* interestingly, came to the same kind of conclusion about the law. While speaking about the rule of law, he points out the true nature of law by saying,

> '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. It cannot seem to be so without upholding its own logic and criteria of equity; indeed, on occasion, by actually being just.'[8]

He puts up the reality on the table saying the jurists who deny international law and preach the cult of force in international relations are useless and dangerous to the bourgeoisie, 'because they conceal the irreconcilability of the contradictions of capitalist society, and they compromise peace and tranquility needed even by a thief when he has had his fill and is digesting his spoils.'[9]

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[6] See ibid., p.172.
[7] See ibid., p.180.
[8] Thompson, *Whigs and Hunters,* p.263.
[9] See ibid., p.180.

While criticising Renner for his 'descends to sophistry', Pashukanis argued that international organisation cannot ensure the general interests of all states. And

> 'even those agreements between capitalist states which appear to be directed to the general interest are, in fact, for each of the participants a means for jealously protecting their particular interests, preventing the expansion of their rivals' influence, thwarting unilateral conquest, i.e. in another form continuing the same struggle which will exist for as long as capitalist competition exists.'[10]

He gives examples of the international commissions for the supervision of navigation of rivers, the international administration of Tangiers and the reparation commission for Germany. In all those cases the international organisations formally seem to be maintaining equality between states but in reality 'a struggle among the imperialist states for domination of the rest of the world is thus a basic factor in defining the nature and fate of the corresponding international organisations.' [11] The imperialist country's hegemony of international organisations is real in the contemporary scenario also.

### 2.2. Compromise between Two Systems

The struggle for protecting the bourgeois property among the capitalist states through international law entered a new stage when the socialist state comes into existence. The bourgeois states continue its domination over the proletariat as well as in its colony without any challenge before the October revolution. Now because of socialist states, the international law assumes a different significance. While Pashukanis was discussing the relations between the Soviet Union and other imperialist states, he said international law is a temporary compromise between these two systems. He states

> 'It becomes the form of a temporary compromise between two antagonistic class systems. This compromise is effected for that period when one system (the bourgeois) is already unable to ensure its exclusive domination, and the other (proletarian and socialist) has not yet won it. It is in this sense that it seems possible, to us, to speak of

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[10] See ibid., p.180.
[11] See ibid., p.171.

> international law in the transitional period. The significance of this transitional period consists in the fact that open struggle for destruction (intervention, blockade, non-recognition) is replaced by struggle within the limits of normal diplomatic relations and contractual exchange. International law becomes inter-class law, and its adaptation to this new function inevitably occurs in the form of a series of conflicts and crises.'[12]

The compromise is because the socialist system and the states are not dominant enough to challenge the bourgeois system. He calls this period as a transitional stage and quotes Korovin in his support. He agrees with Korovin about the transitional stage of international law from 'open struggle for destruction (intervention, blockade, non-recognition)' into a 'struggle within the limits of normal diplomatic relations and contractual exchange.'[13] Calling international law as a compromise between two systems sounds more like Khrushchevite Peaceful co-existence and co-operation of two systems. This was correctly identified by Bill Bowring in his essay.[14] Khrushchev announces the peaceful co-existence with the imperialist state after the declaration of the end of class struggle in the Soviet Union. But during Pashukanis period there was no such statement by the Soviet State. Here too he ignores Lenin's understanding of the linkage between domestic law and international law. The domestic law is a socialist law which is for the working class and struggles against the bourgeois class. At the same time, it is not possible that the international law of the socialist state and the bourgeois state could be a compromise. By this way of fixing international law above classes, he forgets law as a superstructure and ignores that law cannot function in isolation without the base. It has a relative autonomy but not mere autonomy. He later repudiated this by correcting the mistakes.

### 2.3. Tribal International Law

In his *Encyclopedia*, Pashukanis found the origin of international law in total contradiction to the materialist theory of International law. While discussing international law, Pashukanis writes by upholding Korovin's writings, saying,

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[12] See ibid., p.173.
[13] See ibid., p.173.
[14] The essay named, 'Positivism versus self-determination: the contradictions of Soviet international law', speaks about the Soviet contributions to the international law. The contributions also have some contradictions, which was neutrally analysed by the author. See further, Susan Marks (eds), *International law on the left: Re-examining the Marxist legacies,* p.155.

> '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. The tribal pre-state life of the Iroquois, and of the ancient Germans, saw the conclusion of alliances between tribes.'[15]

This statement of Pashukanis has raised two questions. First, it is whether commodity exchange between the communities led to the origin of law or the commodity exchange between individuals resulted in the origin of law as Pashukanis argued. Second, whether international law predates the domestic law? Did international law emerge between the communities due to the exchange, collisions between tribes, territorial disputes, and disputes over borders and agreements out of these disputes or the domestic law with the individual exchange? Though Pashukanis did not give answers to these questions, it can be said that the emergence of the notion of private property along with the origin of law gets consolidated in pre-state society. Thus he made international law as a classless law and pointed out that class elements are not necessary for international law. This will repudiate the whole theory of materialist understanding of international law. Series of rules were formed among the tribes for solving the dispute among them as well as for commercial exchange. According to Pashukanis, these developed into private international law. Hence for him, both public and private international law developed before the formation of classes and state. Quoting the Roman private law, he argues that 'many of the international institutions of international law had private law foundation.'[16] For Pashukanis, international law developed from private law. Critics in the Soviet Union called that Pashukanis mouthed socialist phrases while espousing bourgeois ideas.[17] The idea of viewing international law above the classes and not understanding the class elements in it is, of indeed a bourgeois thought. He criticised the Second International for abandoning the class character of international law. He wrote 'abandoning the class conception of the state, they were naturally compelled to discover in international law an instrument,

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[15] Pashukanis, *Selected Writings on Marxism and Law,* p.175.
[16] See ibid., p.177.
[17] Hazard, *Cleansing Soviet International Law of Anti-Marxist Theories*, p.251.

standing outside and above classes, for the co-ordination of the interests of the individual states and for the achievement of peace'.[18] But Pashukanis understanding of the origin of public and private international law does not have any class conception.

Tunkin indirectly, without mentioning Pashukanis argued against the origin of law in the pre-class society. He wrote

> 'In a pre-class society, where this community between people was more significant, there was no law; only with the emergence of class contradictions, with the destruction of the tribal community, does law emerge… Law, including international law, emerged not as a result of an increase in community among people, but as a result of the division of society into classes and the formation of new class contradictions unknown to tribal society. International law, just as municipal law, is a phenomenon peculiar to a class society.'[19]

Thus the pre-class society – the tribal community rules and regulations could not be compared with the law which originated along with the state. The state sanctions the implementation of the law and has an element of favouring a particular class, which is missing in the tribal society.

### 2.4. Disappearance of International Law

In the discussion about the international law among the proletarian states, Pashukanis concludes that 'international law assumes an entirely different meaning as the inter-state law of the Soviet state.'[20] The international law between the socialist states ceases to be a compromise, and the 'modern' international law become inapplicable to them. Here Pashukanis confuses the notion of withering away of law and international law among the socialist states. He expected not only the withering away of international law among the socialist state, but also the withering away of domestic law inside the Soviet Union itself. He wrote

[18] Pashukanis, *Selected Writings on Marxism and Law,* p.169.
[19] Tunkin, *Theory of International Law*, p.27.
[20] Pashukanis, *Selected Writings on Marxism and Law,* p.173.

> 'The withering away of the categories (but not the injunctions) of bourgeois law does not signify their replacement by new categories of proletarian law. Similarly, the withering away of the categories of value, capital, profit etc. during the transition to socialism, will not mean the appearance of new proletarian categories of value, capital, rent etc. The withering away of the categories of bourgeois law will under these conditions signify the withering away of law in general, i.e. the gradual disappearance of the juridic element in human relationships.'[21]

Thus he applied the withering away of law theory both into domestic and international law in a metaphysical way. He failed to see the dialectical nature of the various socialist states and the ongoing class struggle in the Soviet Union. His ideas resemble more of an anarchist view. He expected the immediate withering away of law after the revolution in the domestic sphere and the quick withering away of international law after the arrival of socialist states.

### 2.5. The Principle of Sovereignty

Coming to the sovereignty question in international law, he found that the arrival of capitalism and nation states is the reason for the development of sovereign states. Earlier in the feudal society which was controlled by the Papal authority, the states did not have full sovereignty. The emergence of nation states after the Treaty of Westphalia, as Pashukanis observes, considered as a fundamental fact in the historical development of modern international law. The narration of the growth of modern international law and the concept of sovereignty was well explained by Pashukanis by various incidents in history. He critically examines the relationship between international law and sovereignty. He observes that international law is nothing, if there are no sovereign states because states are the subjects of international law. He views international law as an external restraint to the sovereign states which limit its sovereignty.[22] Finally, he concluded that for the existence of international law then 'it is necessary that states not be sovereign.'[23]

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[21] See ibid., p.46.
[22] See ibid., p.178.
[23] See ibid., p.178.

However, international law limits the sovereignty of some states and increases the sovereignty of some other states. The imperialistic state often violates international law, but later comes out with a new justification in the arena of international law. For example, US imperialistic intervention is justified in the name of bringing democracy, responsibility to protect, etc. Whenever an international law is violated by the imperialistic state, new norms are created to justify its violation. The unfortunate thing is that only the powerful state can practice those norms, but not all the states particularly not the third world countries. Hence the bourgeois democratic international law accepts the sovereign equality of states as an ideal principle, but not in practice.

### 2.6. Commodity Exchange Theory

Pashukanis is known for his commodity exchange theory of law. He traced his commodity exchange theory in Marx's writings in *Capital* which states, ‘commodities cannot send themselves to a market and exchange themselves with one another. Accordingly, we must turn to their custodian, to the commodity owner.’[24] An exchange between two private property owners with equal rights turns into a contract. For Pashukanis contract is the central point of law. He applied commodity exchange theory of law to the international law. Like two persons enter into a contract with equal rights, two states enter into a treaty with equal rights. Hence for Pashukanis private civil law is the basis for the international law. We have to remember that he was not arguing domestic law developed into international law. The domestic law, as well as international law, evolves from the society, not from the individual. Same as the international law evolves from the states which are a collection of people and the attitude of the state is not decided by the individual but by the ruling class. He noted that ‘sovereign states co-exist and are counter posed to one another in exactly the same way as one individual property owners with equal rights.'[25] Pashukanis quote Hugo Grotius for his support. He noted that,

> ‘Hugo Grotius…whole system depends on the fact that he considers relations between states to be relations between the owners of private property; he declares that

[24] See ibid., p.9.
[25] See ibid., p.176.

> the necessary conditions for the execution of exchange, i.e., equivalent exchange between private owners, are the conditions for legal interaction between states.'[26]

According to China Mieville, 'treaties which institutionalise the inequality of their parties, then, do not necessarily impair the sovereignty of either party: equality and sovereignty were not mutually constitutive.'[27] Hence for Mieville 'Pashukanis is therefore wrong to claim that in Grotius system, 'sovereign states… are counterposed to one another in exactly the same way as are individual property owners with equal rights'.[28] In a more precise way, Mieville is arguing that the states may be equal but not necessarily sovereign.

Therefore, first, the individual versus society debate in Marxism has to be briefly addressed. Society stands above the individual, and the individuals are not above the society but a part of society. To quote Marx 'it is not the consciousness of men that determines their existence, but their social existence that determines their consciousness.'[29] Hence, the society determines the consciousness of the individuals' social existence; that is the individual itself. As is seen in Pashukanis' commodity exchange theory, the individual is playing role in the origin of law. The individual is made conscious by the society and that society legalises and justifies the right of the individual. Marx observes in *The German Ideology*

> 'In actual history, those theoreticians who regarded might as the basis of right were in direct contradiction to those who looked on will as the basis of right... If power is taken as the basis of right, as Hobbes, etc., do, then right, law, etc., are merely the symptom, the expression of other relations upon which state power rests. The material life of individuals, which by no means depends merely on their 'will', their mode of production and form of intercourse, which mutually determined each other — this is the real basis of the state and remained so at all the stages at which division of labor and private property are still necessary, quite independently of the will of individuals. These actual relations are in no way created by the state power; on the contrary, they are the power creating it.'[30]

[26] See ibid., p.176.
[27] Mieville, *Between Equal Rights - A Marxist Theory of International Law*, p - 190
[28] See ibid., p.190.
[29] Marx, *A Contribution to the Critique of Political Economy*, p.21.
[30] Marx and Engels, *The German Ideology*, p.348.

Like that, will or consciousness of the individual and individual sovereign states is out of the class society and out of the mode of production. Hence, the will of the individual is determined by the mode of production and form of intercourse and not vice versa.

However, as Pashukanis noted that the sovereign state behaves like an individual. The question arises whether the two can be compared since the individual is the subject of domestic law whereas the sovereign state is the subject of international law. Though the law treats everyone equal, in reality, they are not equal. In the same way that international law treats every state equally but in reality they are not equal.

Pashukanis compares international law with the bourgeois private law saying 'bourgeois private law assumes that subjects are formally equal yet simultaneously permits real inequality in property.'[31] Pashukanis observes that international law 'in principle recognises that states have equal rights yet in reality, they are unequal in their significance and their power.'[32] Against the argument of international law protecting the smaller and weaker state he argues that 'the benefits of formal equality are not enjoyed at all by those nations which have not developed capitalist civilisation and which engage in international intercourse not as subjects, but as objects of the imperialist states' colonial policy.'[33] But one difference he puts up, between the individual and a sovereign state, which is the coercive element. The individual is coerced by the state, but there is an absence of such force in the international arena which forces a sovereign state with the same ease. Hence without the coercive force, 'the sovereign states will remain on the basis of equivalent exchange.'[34] For Pashukanis 'equivalent exchange' in the period of capitalist state and 'compromise' during the period of the existence of both capitalist and socialist states. This is how Pashukanis saw the relationship between the capitalist and socialist states through exchange and compromise. He missed the main element, the mode of production which decides the law and exchange is merely a process in the production. Some norms are followed when the interest of the particular state in it or when the very existence of a state is at stake.

[31] Pashukanis, *Selected Writings on Marxism and Law,* p.178.
[32] See ibid., p.178.
[33] See ibid., p.178.
[34] See ibid., p.179.

### 2.7. Pashukanis Shift and Rectifying the Mistakes

Pashukanis theory of international law has changed over a time period. His understanding of international law is that law is a class tool, and international law as an extension of internal law must likewise perform its part in the struggle between classes.[35] He repudiated the theory of compromise and rectified his mistakes by saying that international law as used in the relations between the Soviet Union and imperialist states were not a compromise but one of the forms in which the struggle between the two systems flows along.[36] In his second theoretical pronouncement after the criticisms, he defined that international law serves as an instrument in the struggle between socialist and capitalist state, i.e. a single law for all states with each state using the legal forms to serve its own ends.[37] In the *Outlines for international law*, he envisioned

> 'the new quality which international law has acquired as a tool and formulation of the policies of the proletarian state is to be found in the fact that for the first time in history a state has appeared in the international arena where power belongs to the proletariat, a state which reflects the interests of the toilers and sees in the international solidarity of the toilers one of its chief supports.'[38]

He rejects the bourgeois definition of international law which defines 'international law is the totality of norms defining the rights and duties of states in their mutual relations with one another'.[39] He found the abstention of the class character of international law in the bourgeois definition and it to be a struggle of capitalist states among themselves, organised into several isolated competing state political trusts in order to put into practice their rule over the proletariat and over colonial countries.[40] In the text book, he varied this, although not essentially, to say that international law as practised between capitalist states was one of the forms with the aid of which imperialist states carry on the struggle between themselves, consolidating the division

[35] Hazard, *Cleansing Soviet International Law of Anti-Marxist Theories*, p.245.
[36] See ibid., p.247.
[37] Ramundo, *The (Soviet) Socialist Theory of International Law*, p.4.
[38] Cited in Hazard, *Cleansing Soviet International Law of Anti-Marxist Theories*, p.245, footnote.5.
[39] Pashukanis, *Selected Writings on Marxism and Law,* p.168.
[40] Hazard, *Cleansing Soviet International Law of Anti-Marxist Theories*, p.245.

of booty, i.e. territory and super profits.[41] He left to mention that the proletariat of the world is affected by the international law. Critics pointed out that he made a great mistake of failing to show that the struggle of the capitalist states, although having the outward manifestations of a division of profits and territory, is certainly not carried on with that as its ultimate aim.[42] Of course, colonialism is to make the profit, but at the same time, it is not without purpose. The increase of capitalist production, the search of markets, etc. played a role as the reason for colonialism. He further got criticised by not following Lenin's understanding of foreign policy which ‘cannot be separated from domestic policy and international law is practised by capitalist states in their relations among themselves is directed towards a consolidation of the ruling position of capital.’[43]

### 3. G. I. Tunkin

Tunkin’s *Theory of International Law* can be called as international law in a divided world of two antagonistic modes of production.  When Tunkin was writing his theory of international law, the Soviet Union established itself as a hegemonic super power and the restoration of capitalism was slowly started under the leadership of Khrushchev. It was considered that there was no threat to the very existence of it. Hence the term ‘peaceful co-existence and co-operation’ was propagated by the scholars of the Soviet Union with the capitalist world. Tunkin’s theory of international law too was based on the central theme of ‘peaceful co-existence and co-operation’. It was more of a Soviet theory of international law than a Marxist theory of international law. However, the foundation of the theory is Marxism – Leninism, which continues to inform Russian approaches to the theory of international law. According to Chimni the Soviet approaches ‘were less dictated by Marxism – Leninism than by the need to rationalise the foreign policy of the former Soviet Union'.[44] In his view, Tunkin has ‘advanced a number of questionable formulations which call for debate from within Marxist tradition.’[45] It was the time the Soviet Union was criticised by the Marxist Scholars and communist parties as Soviet Social

[41] See ibid., p.245.
[42] See ibid., p.246.
[43] See ibid., p.246.
[44] Chimni, *International Law and World Order,* p.212.
[45] See ibid., p.212.

Imperialism, particularly by the Chinese and the Albanian communist parties. Hence there is no wonder that the theory is less dictated by Marxism and Leninism.

The translator of *Theory of International Law* William Butler described Tunkin's treatise as the 'most profound and comprehensive study of international legal theory yet produced by a Soviet jurist.'[46] In his theory, subjects such as: the impact of the Great October Socialist Revolution of 1917 on the development of general international law; the nature and essence of contemporary general international law; the international law of peaceful coexistence; international norm-creating processes; the interaction of international law, foreign policy, and diplomacy; the law of general international organizations; state responsibility under contemporary international law; and the essence and nature of the evolving socialist international law were given importance. The historical part of Tunkin's theory of international law starts with the development of international law since the October Socialist revolution. He argues about the changes and new developments in legal ideas formed during the Great October Socialist Revolution. First of its kind in the world, after Paris Commune, the Socialist state put forward new guiding principles for relations between states and among the state and its people. The important principles formed after the October Revolution is socialist internationalism, peaceful co-existence, equality and self-determination of nations. These three principles are separately dealt by him in his theory of international law.

### 3.1. Sovereign Equality of States

This is one of the principles on the sovereignty and equality of other states, whether it is stronger or weaker. This principle was created and consolidated after the Treaty of Westphalia. Before the Treaty of Westphalia, there was no such concept of treating the states equally. Tunkin explains that the principle is the product of the transfer of the society from feudalism to capitalism. The sovereign equality of states is a bourgeois concept. But before the arrival of Soviet Union, this concept was often violated by the norms and principles of the bourgeois international law. The state even has the right to wage war which contradicts with the sovereign equality of states.

[46] Tunkin, *Theory of International Law,* Introduction, p.xv.

Though, the treaty of Westphalia concluded among the European states only, the rest of the African, Asian countries were not treated with sovereignty.

Soviet Russia after the revolution, having its primary principle of treating all the nations equally, concluded treaties confirming those principles. This is one major contribution by the Soviet Russia in the field of international law stated by Tunkin. His claim of the Soviet Union was the reason for the established principle of sovereign equality of nations, particularly with the Asian, African and Latin American countries is true. The Soviet Union played a significant role in decolonisation of the third world countries as well as the sovereign equality of those states.[47]

### 3.2. General International Law and the Base-Superstructure Dichotomy

In 1956 itself Tunkin defined international law as a 'totality of norms, developed on the basis of agreements between the states.[48] This simple definition posed no contradiction when he developed his theory of general international law. There were criticisms, especially from Korovin that it was independent of class character. Other critics find that it did not fit into the base superstructure model. Nevertheless, Tunkin argued in his *Theory of International law* that 'international law, just as law in general, is a category of the superstructure. Therefore, the general law of the development of human society having the closest relationship to international law is the law of the dependence of the social superstructure on the base; that is, the economic structure of society.'[49]

Tunkin rejected the theory of two international laws. One was bourgeois international law and the other as socialist international law put forward by earlier Soviet scholars like Korovin. He contended that there are two bases, i.e., capitalist and newly developing socialist base, during the period of the co-existence of two diametrically opposed systems, capitalist and socialist. He refutes the Western scholar's argument that 'since according to Marxist-Leninist theory the character of the superstructure is determined by the basis, it logically follows that a division of general international

[47] See Tunkin, *Theory of International Law*, pp.60-69.
[48] Grzybowski, *Theory of International Law for the Seventies*, p.867.
[49] Tunkin, *Theory of International law*, p.232.

law into two parts is inevitable as is the formation of two systems of international law corresponding to two separate bases.'[50] His answer to them was that

> 'International law is not simply a reflection of a basis: its norms do not develop directly from economic relations. Different bases exert an influence on international law through the wills of states rather than directly. Ultimately, the influence of the basis on the wills of corresponding states in the process of creating norms of international law is decisive, since it affects the will of the State both directly and through various parts of the superstructure (domestic law, ideology, etc). But the influence of the basis is not the only one. The entire system of individual States and also the international system itself exert an influence on the wills of States.'[51]

The contradiction in Tunkin's theory of base and superstructure of the world is about the existence of two fundamental bases. While arguing about the relationship between state and law, he writes,

> 'State and law, as part of the superstructure, change with a modification of the base, and the state and law correspond to each socioeconomic formation. How does this law of the dependence of the superstructure on the base operate with regard to international law? In contemporary conditions there exist two fundamental bases; the capitalist and the new socialist base coming to replace it. And at the same time there exists a general international law common to the socialist and capitalist states.'[52]

Two bases but a general international law seems contradictory. There are two problems in the theory of the international law of Tunkin. First, as the critique's argued, Tunkin's theory of general international law is out of the base and superstructure model. Second, it is about the existence of two bases. Even according to Tunkin's understanding there are not only two bases at that point of time but majorly three bases: the capitalist, socialist and feudal. Many of the Asian, African, and Latin American countries were feudal or semi-feudal. The feudal or semi-feudal base also impacts the role of international law. Chimni explains his disagreement with Tunkin's base and superstructure dichotomy as 'the basis of international law is

[50] Tunkin (eds), *International law – A text book*, p.16.
[51] See ibid., p.16.
[52] Tunkin, *Theory of International law*, p.233.

constituted by the economic structure of each state in dialectical interaction with international economic relations that has its foundation in the division of labour and a world market.'[53] Chimni's alternative to base and superstructure model of Tunkin is that there are multiple bases in the world, like many states. The base of each state plays a role in shaping the international law which is in dialectical interaction with each other.

The base of the mode of production cannot be two in a single world same as the base in a state. International law is the extension of domestic law and not the other way round. Hence as a single world base, there is dialectical interaction, and this is the contradiction between the antagonistic systems. The practice of the socialist states led to the evolution of new principles in the superstructure of single international law. It was all about Tunkin's support to the view of single and traditional international law, which could be used for the advancement of the Soviet Union and the socialist countries during that period. Tunkin's argument for a general international law made him argue for the development and strengthening of the old democratic principles. He divided the international law principles into new progressive principles and old democratic principles. For him, the old democratic principles are respect for state sovereignty, non-interference in internal affairs, equality of states, good neighbourly fulfilment of international obligations (pacta sunt servanda) and so forth. The new progressive principles are the peaceful co-existence, socialist internationalism etc. He further contended that 'the struggle of the Soviet Union, and later also of other socialist countries, the developing countries, and all progressive forces, to strengthen and to develop these democratic principles of international law further has produced results.'[54]

After the Second World War, new socialist states came into existence. In this scenario, the Soviet international lawyers were developing a concept of socialist international law, between newly formed socialist countries. Prof. F. I. Kozhenikov, in 1948, stated that the relationship of the Soviet Union with the new People's Democracies was creating a new socialist international law. But this has to be

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[53] Chimni, *International law and world order*, p.245.
[54] Tunkin, *Theory of International Law,* p.86.

differentiated from the Korovin's version of the socialist international law in the transition period.

In a collective work written by the Soviet authors about the socialist international law said that the treaties between USSR and the countries of people's democracy are of a new type of collaboration. This international law was based upon the new progressive base opposite to the capitalist structure of states. Capitalist states which do not promote peace but this new collaboration will promote peace and the common security of the world. 'International law in the practice of countries of the anti-imperialist camp serves as the prototype of that international law which in time will become law for all mankind.[55] Tunkin found the 'democratic camp' of the countries which is based on shared aims and interests was developing that prototype. His argument shows that not of a new law coming into being, but the democratic principles in the traditional body of law which can be useful for the socialist camp. He developed this position later in his analysis of 'peaceful co-existence and international law' and criticised Prof. E.A. Korovin for his early writings in the Soviet period arguing that states of one social structure would have inherent in their relations, one set of legal principles and norms, and states of another social structure a different set of principles. He concluded that international law had become increasingly a law for the entire world.

The base of international law is developing as well as progressing day by day. The independence of the erstwhile colonial countries in Asia and Africa added for those developments instead of dividing the world states into developed countries and developing countries. In Tunkin's words,

> 'the emergence of the socialist states and the formation of the world system of socialism and the appearance in the international arena of new Asian and African states are by no means leading either to a split of general international law or to a contraction of its developmental base. On the contrary, the growth of the forces of peace supporting international law as a means of ensuring peace signifies that the

[55] Cited in Hazard and Lipson, *Soviet Socialism as a Public order system*, p.33.

> developmental base of general international law is expanding and growing in strength.'[56]

Therefore, the Soviet science of international law theory tried to establish the fact that, albeit different systems come into existence, the then contemporary international relations between states were regulated by the same universally recognised norms of international law binding all the subjects of international law without any variation. In sum, the arguments of Tunkin while stressing the general international law was based on three points. In spite of the two camps existed, it argued for the unity of international law as a universal system, the unity of international law as governing the international community at large and unity of legal science on international relations.[57] Following Tunkin, in a few years, the Soviet scholars have produced some studies based on two singular features of the Soviet understanding. One was that the Soviet Union, socialist countries and its allies in the third world establish an importance force in the international relations and the other was that the Soviet scholars were better equipped with Marxism, Leninism than any other scholars to analyse the development of international law and international relations. [58]

### 3.3. General International Law and Class Struggle

Tunkin, on the other side, declared that general international law 'has no single class essence'.[59] He contended that international law is the relation between the states and not between the classes. The class struggle only happens inside the state. This class struggle inside the state manifests itself in relations among states and not directly between classes.[60] By this way he distanced international law from the class struggle. This interpretation is the justification of the policy of peaceful co-existence and co-operation with the imperialist countries. If the class struggle is extended to the international arena, then this policy becomes a failure. China Mieville criticises that by saying 'it is surely devastating to the theory that these supposedly sharply

[56] Tunkin, *Theory of International Law,* p.33.
[57] Grzybowski, *Theory of International Law for the Seventies*, p.863.
[58] See ibid., p.863.
[59] Tunkin, *Theory of International Law* p.249.
[60] See ibid., p.37.

contrasting systems share so many fundamental features.'[61] For Mieville, the general international law is idealist and non-partisan because it tends to show that international law is neutral and do not reflect any particular group interest. The general international law was especially dominated by the bourgeois character, because of the world base that time, dominantly bourgeois. Though socialist state existed, it was not the dominant mode of production. In the general international law, the contradiction of bourgeois norms and socialist norms exist and struggle with each other. Socialist norms play a dominant role when the mode of production of the world majorly turns into socialist. The contradiction and struggle exist even after that. Korovin's analysis of the two types of international law is utopian as the socialist states have to deal with the capitalist state. Isolation is not possible as both the systems are contradictory and antagonistic in nature.

Tunkin analyses the role of domestic law, the state and its ruling class in international law. The primary base of the state is its economic structure. The economic structure of a state defines its international legal position. The economic structure not only defines its international legal position, but it also defines the 'class nature of a state, the fundamental principles of its internal and foreign policy, the major features of its national law, and all other parts of the superstructure'.[62] At the same time, the international legal position is not directly influenced by the economic structure of a particular state. In other words, the economic structure and its societal laws make a determinative influence if not a direct influence. In reality the process is a dialectical one. Not only the economic structure and societal laws influence the internal legal position, but various forms of the superstructure of a state like ideology, national law, and international legal doctrine also influence the international legal position. The influence of international legal position cannot be reduced to the societal base of the state, without considering other influences.

The international economic relations are the basis of international law, however, is a secondary basis, which is determined by the fundamental bases, but are themselves the basis of international law. Here Tunkin differentiates fundamental basis and secondary basis. Fundamental bases are the various bases like socialist, capitalist and

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[61] Mievielle, *Between equal rights – A Marxist theory of international law*, p.61.
[62] Tunkin, *Theory of International law*, p. 236.

other third world countries mixed bases. The secondary basis is the international economic relations. Despite the growth of international economic relations day by day, 'the decisive basis influence in forming the international legal position of states is the direct influence of the fundamental bases and the characteristics of the superstructure resting on these bases'.[63] Tunkin gives more importance to the base of the individual states. The international economic relations play only a secondary role (basis) in shaping international law. International law is more influenced by the fundamental bases that are the mode of production of an individual state than the overall international economic relations. In summary,

> 'Thus, the influence of the economic structure of society and its societal laws affects the process of creating norms of international law through the will of a state, since the content of this will basically is determined by the economic conditions of the existence of the ruling class in a given state. the economic structure of society exerts a decisive influence in the process of creating norms of international law upon the wills of states not only through 'direct action' but also through other categories of the superstructure, whose operation in general cannot go beyond the limits determined by the economic structure of society.'[64]

Hence, the class struggle of a state influence the will of the state which further affects the norm creating process of international law. It is through direct action as well as through the influence of other categories of superstructure.

### 3.4. Origin and Withering Away of Law

Tunkin argument on the origin of law follows the Marxist understanding of the origin of the state. He differs from Pashukanis that national law predates the international law and it was the product of class society. The basic reasons for the origin of both international law and national law are the same.

> 'When there was no law in general, there could be no international law. Since law emerged as a result of the division of society into classes and of the rise of the state, in the beginning it was national law. In the course of time, international law

[63] See ibid., p.237.
[64] See ibid., p.237.

> regulating relations among states began to be formed. The same basic reasons which led to the formation of national law also gave rise to the emergence of international law.'[65]

Unknown or known he was using national law instead of domestic law or state law. International law and the national law may sound similar and related, but neither national law nor the international law originated after the society was divided into exploiting and exploited classes. The first origin was state (domestic) law and later interstate law. Even after the withering away of state and law, the concept of the nation exists in the superstructure.

Tunkin compares international law and national law as both inherent in a class society. The class society only exists in a particular period in the history of mankind. The classless society, in the beginning, was to a low level of the development of productive forces. But the upcoming communist society will have a high level of developed productive forces. This high level of productive forces inevitably leads to the disappearance of classes, the state and law. Thus he concluded in a Marxist way that the development of the high level of productive forces will slowly replace the class society into a classless society. He further says that the 'mankind is approaching a new organisation of society which will not have a law, and therefore, not international law. This, of course, does not mean that the society of the future will have no rules of conduct. A highly organised human society, as communist society will be, inevitably presupposes the existence of rules of conduct.'[66] Tunkin replaces the notion of law into rules of conduct during the stateless communist society. He had come to this conclusion by following the program of the Communist Party of the Soviet Union which says "Communist society will be a highly organised commonwealth of labouring people. There will be formed uniform generally recognised rules of communist communal life, whose observance will become an internal need and habit of all people."[67]

He criticises the mainstream bourgeois theory which does not differentiate between rules of conduct of the tribal society and the law of the class society. He differentiates

[65] See ibid., p.238.
[66] See ibid., p.238.
[67] See ibid., p.239.

the norms of law and the rules of conduct of the tribal society. While discussing the maxim *ubi societas ibi jus*, he argues that the maxim is incorrect. He draws an alternative, and said that 'the maxim 'where there is society, there are rules of conduct' would be correct, but the maxim 'where there is society, there is law' (*ubi societas ibi jus*) is incorrect. The rules of conduct which will exist in communist society will by their nature be different from norms of law.'[68] He questions the notion of the community without class differences. Community or society existed even before the formation of classes. Hence the maxim 'where there is society, there is law' cannot be applicable for all communities particularly to a classless society. With the help of history, he proves that law appears only with the origin of classes. About the origin of law, he writes,

> 'Bourgeois scholars point out that the existence of law in general and of international law in particular would be impossible without a specific community among people. Of course, the existence of human society, and therefore of law, is inconceivable without a specific community among people. But it does not follow from this that the community is the reason for the emergence of law or is reflected in law. History shows exactly the opposite: in pre class society, where this community was more significant, there was no law, and law appears only with the emergence of class contradictions, with the disturbance of the tribal community.'[69]

Somewhere else, unlike Pashukanis, Tunkin explains international law is the product of a class society, unknown to the classless primitive tribal society. He wrote

> 'Law, including international law, emerged not as a result of an increase in community among people, but as a result of the division of society into classes and the formation of new class contradictions unknown to tribal society. International law, just as municipal law, is a phenomenon peculiar to class society.'[70]

### 3.5. Soviet Foreign Policy and the Contradiction of Tunkin

Tunkin stated that after the Great October Socialist Revolution of 1917, a new international law began to take shape out of the ideas and principles. This

[68] See ibid., p.239.
[69] See ibid., p.239.
[70] See ibid., p.27.

international law is more democratic than the old one. The impact of the Socialist revolution led to three fundamental principles in Soviet international law. One is the socialist internationalism between the socialist states. Second is the principles of equality and self-determination of nations and peoples. The third is the principle of peaceful coexistence between states, which was considered as the primary principle of Soviet foreign policy. According to Tunkin, the Soviet Union around 1970's followed three kinds of international law for three different kinds of states. The principle of socialist internationalism led the Soviet Union to intervene in Hungary, Czechoslovakia and later in Afghanistan. However, Tunkin contradicts himself.

> 'In rejecting the 'absurd leftist' Trotskyist 'permanent revolution,' V.I. Lenin resolutely opposed the concept of extending the socialist revolution to other countries by force of arms. In an article, 'Strange and Monstrous,' published in Pravda on February 28 and March 1, 1918, V.I Lenin wrote in appealing to the authors of a resolution adopted by the Moscow Regional Party Bureau: 'Perhaps the authors suppose that the interests of the international revolution require that it be given a push, and such a push can be given only by war, never by peace, which might give the masses the impression that imperialism was being 'legitimized.' Such a theory would break completely with Marxism, which always has opposed 'pushing' revolutions, which develop with the growing acuteness of the class antagonisms that give birth to revolutions.'[71]

The intervention was justified by 'general' and 'particular' law that socialist countries have their own international law. 'Brezhnev Doctrine' which said peaceful co-existence for capitalist states and proletarian internationalism for socialist countries. With this principle it justified the intervention of Czechoslovakia says that 'when the internal [emphasis supplied] and external forces hostile to socialism seek to halt the development of any socialist country and restore the capitalist order, when a threat to the cause of socialism in that country or a threat to the security of the socialist community as a whole emerges, this is no longer only a problem of the people of that country but also a common problem, concern for all socialist countries.'[72] This is against the doctrine of Marxism – Leninism that the people cannot be externally

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[71] Tunkin, *Theory of International Law,* p. 15,

[72] Glazer, *The Brezhnev Doctrine*, p.170.

forced to adopt any particular mode of production as it is based on the 'growing acuteness of the class antagonisms that give birth to revolutions' as Lenin said.[73]

Tunkin argued that contemporary general international law is the law of peaceful coexistence. It is the law of international cooperation as well as the law of peaceful competition between the socialist and capitalist states and the essence of transition from capitalism to socialism. He wrote

> 'Peaceful coexistence serves as the basis of peaceful competition between socialism and capitalism on an international scale and is a specific form of class struggle between them. . . . [I]t does not and cannot mean cessation of the ideological struggle between them. . . . A specific feature of this form of struggle is the fact that compromises and agreements here are impossible' [74]

After the great October Revolution, Lenin formulated the theory of peaceful co-existence between socialist and capitalist countries. Lenin in 1915 – 16 pointed out that 'socialism cannot achieve victory simultaneously in all countries. It will achieve victory first in one or several countries, while the others will remain bourgeois or pre-bourgeois for some time.'[75] This statement shows that the concept of permanent revolution was unexpected by Lenin after the victory of October socialist revolution. It led to the view that the socialist countries have to live side by side with capitalist or pre-capitalist systems. Lenin further said

> Only the working class, when it wins power, can pursue a policy of peace not in words . . . but in deeds.'[76] International imperialism . . . could not… live side by side with the Soviet Republic, both because of its objective position and because of the economic interests of the capitalist class which are embodied in it. . .[77] ... the existence of the Soviet Republic side by side with imperialist states for a long time is unthinkable. One or the other must triumph in the end. And before that end supervenes, a series of frightful

[73] Cited in Tunkin, *Theory of International Law,* p,15.
[74] Tunkin, *Theory of International law,* pp. 36-38.
[75] The War Program of the Proletarian Revolution, Selected Works, Foreign Languages Publishing House, Moscow, 1950, Vol. 1, Part 2, p. 571.
[76] Draft Resolution on the Current Moment in Politics, Collected Works, fourth Russian ed., Gospolitizdat, Moscow, Vol. 25, pp. 291-92.
[77] Report on War and Peace, delivered to the Seventh Congress of the Russian Communist Party (Bolsheviks), Selected Works, FLPH, Moscow, 1952. Vol. 2 Part 1, p. 422.

> collisions between the Soviet Republic and the bourgeois states will be inevitable. [78]

These are the views of Lenin, which constitute the theoretical basis of the policy of peaceful coexistence.[79] He advanced the policy of peaceful coexistence towards countries of different social systems when the proletariat is in power. According to him, peaceful coexistence can never be a socialist country's foreign policy. Only proletarian internationalism can be the policy of a socialist country. The Draft Programme of the Seventh Congress of the Russian Communist Party drafted by Lenin said 'support of the revolutionary movement of the socialist proletariat in the advanced countries' and 'support of the democratic and revolutionary movement in all countries in general, and particularly in the colonies and dependent countries' constituted important aspects of the Party's international policy.[80] Tunkin's theory of peaceful coexistence and co-operation of international law shows the social imperialist nature of the then Soviet Union, which he supported and strengthened in the name of Leninist theory of peaceful coexistence. In other words, as Chimni's said, it was 'less theoretical exercises and more attempts at justifying Soviet foreign policy in the vocabulary of international law'.[81] Tunkin understanding of the Marxist approach to sources and subjects of international law will be discussed in further chapters. The principle of peaceful co-existence is separately dealt in one of the following chapters in detail.

### 4. B.S. Chimni

Contemporary renowned Marxist international law scholar B.S. Chimni has written many articles and books adopting a critical materialist approach to international law. However, we are going to engage with few of his articles and books which dealt with

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[78] Report of the Central Committee of the Russian Communist Party (Bolsheviks) at the Eighth Party Congress, Selected Works, New York, Vol. 8, p. 33.

[79] The Leninist principle of 'peaceful co-existence' turned revisionist in the 20th Congress of the CPSU, which Mao called it two diametrically opposed policies of peaceful co-existence. He called one as Lenin and Stalin's policy of peaceful coexistence and the other as the anti-Leninist policy of peaceful coexistence, the so-called general line of peaceful coexistence advocated by Khrushchev and others. Tunkin's principle of peaceful coexistence is the later one.

[80] Lenin, *Extraordinary Seventh Congress of the R.C.P.(B.),* March, 6-8, 1910, Section 18, Rough Outline Of The Draft Programme. http://www.marxists.org/archive/lenin/works/1918/7thcong/18.htm Retrieved on 29.6,2013.

[81] Chimni, *International law and World order*, second edition, p.462, foot note.79.

Marxism directly. As a departure from the point in the discussion, some of the works that shall be discussed here are *International Law and World Order – A Critique of Contemporary Approaches* and its recent second edition, *Marxism and International Law*, and *Prolegomena to a Class Approach to International Law* etc. The discussed topics are mostly of theoretical notions such as contradiction, base and superstructure, the theory of state, historical materialism, etc.

After the demise of the 'actually existing socialism' as Chimni calls it, his book *International Law and World Order* came as a morning star in the world of international law where every international scholar, international lawyers, even the Marxist scholars were highly disturbed and lost hope after the pronouncement of the so-called 'end of history'[82]. In the second edition, as he said, 'the end of the Cold War did not turn out to be the 'end of history,' making students of international relations look for answers to endemic conflicts.'[83] In his book, Chimni tried to argue that the 'field to international legal theory still gives the appearance of a wasteland'[84] and 'the need to develop a Marxist theory of international law'.[85] The entire book has been dedicated to the critique of the contemporary approaches proposed by Morgenthau, Mc Dougal – Laswell, Falk and Tunkin. Except for Tunkin all are non-Marxist scholars. The final chapter is dedicated to the Marxist theory of international law after the critique of the contemporary approaches. Albeit, the entire book is argued in defence of Marxism, we concentrate more on the last chapter *A Marxist theory of international law*. The second edition, though followed the basic structure of the book, it can be considered as a new book in itself. Like the first edition, the entire book is written from the Marxist perspective. Here it is called as the IMAIL (Integrated Marxist Approach to International Law), 'combining the insights of Marxism, socialist feminism and postcolonial theory'[86] and 'is advanced on the assumption that Marxism, socialist feminism and postcolonialism or more accurately particular versions of each are not only congruent but helpfully complement each other.'[87] New chapters of NAIL (New Approaches to International Law), FtAIL (Feminist Approaches to International Law) have been added, and the last chapter is

[82] See further Fukuyama, *The End of History And The Last Man*, The Free Press.
[83] Chimni, *International Law and World Order*, second edition, p.40.
[84] Chimni, *International Law and World Order,* p.15.
[85] See ibid., p.17.
[86] Chimni, *International Law and World Order*, second edition, p.2.
[87] See ibid., p.2.

modified and titled as *Towards an Integrated Marxist Approach to International Law* which newly included the critique of China Mieville's book on the Marxist theory of international law.[88]

### 4.1. Ideal and Mechanical Approach of Realism

It starts with the critique of the realist theory of international law. While criticising Morgenthau's realist approach to international law, Chimni argues against the mechanical, isolated argument of the fragmentation of international law. According to Chimni, he 'fails to recognise that the real problem is to delimit the political from other spheres while defining and articulating moments of unity and refraction.'[89] As a Marxist, he argues that the mode of production is the fundamental basis. He identifies that 'law is surely not a neutral and non-partisan device'[90] as it is looked along with the state as both are superstructures. Hence keeping power and interest outside the production process is problematic. State which legislating the rules is not 'superimposed upon the power struggle taking place in society, rather than being a product of that struggle'.[91]

The human nature is discussed in the topic *Abstract and Timeless Human Nature*. The debate is mainly revolving around two binaries; self and society, in materialist terms ideal and material, which is discussed in detail. In Morgenthau framework, man is a mere biological substance. If we agree with the argument then, 'social injustice, conflicts and wars are the product of innate features of human nature rather than the result of a particular set of social forces.'[92] Chimni rejected this argument as deterministic and without foundation. He noted that the institution of private property is the reason for the antagonistic human nature. Thus in materialist terms, human nature is shaped by the society, and it is the outcome of the material changes in the society and vice versa. When Morgenthau applied this human nature to the nature of the state, he comes to the conclusion that all the states organise foreign policies which reflect its national interest either it is Czarist Russia or the Soviet Union. Chimni refuted this view and succinctly put up that the national interest of a particular state 'is

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[88] See further, the book named *Between Equal Rights – A Marxist Theory of International Law*.
[89] Chimni, *International Law and World Order,* p.32.
[90] See ibid., p.35.
[91] See ibid., p.35.
[92] See ibid., p.37.

by taking cognizance of the particular socio-economic system over which it presides.'[93] The particular socio-economic system could be feudalism, capitalism or socialism, etc. Hence though Czarist Russia's foreign policy reflects the national interest, it was not as a whole nation, but of a particular class, especially the ruling class. Same in the Soviet Union which reflects the interest of the ruling class which differs drastically from the ruling class of the Czarist Russia. Henceforth, the national interest of a particular state varies, and it is decided by the ruling class of that nation.

### 4.2. Theory of Imperialism

The 'theory of imperialism' of Morgenthau stands purely of power dominance by one state over the other, and the economic angle is only a byproduct of that power struggle. The First and Second world wars were for the dominance of Europe and indeed political wars. Morgenthau rejected the eternal relationship between capitalism and imperialism. Chimni with the support of the Lenin's theory of imperialism refuting the argument of Morgenthau and concludes that the relationship between politics and economics is best captured in Lenin's dictum that 'politics is a concentrated expression of economics'.[94]

In the second edition, Morgenthau's idea of imperialism was contended adding Rosa Luxemburg. Rosa Luxemburg, for Chimni 'understood the significance of 'logic of territory', but did not view it in isolation from the 'logic of capital' that both capitalism and imperialism is related to the very survival of the other. [95] At the same time economics does not mean crude economic profits and gains but according to the Marxists, 'the reference is to economic space as a whole'.[96] Same in Morality that it is not replaced by power politics but by the class struggle. Morality is always class morality which is presented as universal morality.[97] For Chimni, 'there is no independent, authoritative procedure to determine the content of international morality'.[98] As there is no by a single morality in the international arena, it's hard to finalise the standard morality for all because 'what may be morally wrong by one

[93] See ibid., p.41.
[94] See ibid., p.44.
[95] Chimni, *International Law and World Order*, second edition, p.61.
[96] Chimni, *International Law and World Order,* p.44.
[97] See ibid., p.62.
[98] See ibid., p.66.

standard may be justified by another.'[99] Hence in the period of colonialism, the sovereign equality of states was rejected as a universal morality, and 'the ethics of imperialism openly declared as universal ethics.'[100] The advice of Chimni to the Marxists scholars is that they 'need to pay greater heed to the 'logic of territory'.[101] The successful integration of 'the phenomenon of cultural domination with a theory of imperialism in the manner of postcolonial thinkers such as Edward Said and Dipesh Chakrabarty'[102] in the theory of Marxist approach to imperialism is necessary.

## 4.3. Contradiction

The contradiction is the inevitability in all the process of evolution and law is not an exception. Here Chimni explains the law in a dialectical way. One of the laws of dialectics is a contradiction, and Lenin calls it as the kernel of dialectics. The contradictions are the reason for the evolution of anything – in this case, law. In two sentences Chimni illustrates the contradiction and the negation of negation process in law and how it leads to more contradictions later.

> 'Such contradictions as exist within the body of law reflect the internal contradictions which mark society in the process of evolution. Their resolution is a function of the self-development of the system: contradictions sharpen and eventually dissolve into one of the opposites (of course only to give rise to a different set of contradictions).[103]

The societal contradictions reflect the law structure. Contradictions are not eternal, as, at some point, it disappears and end up with a new set of contradictions. This is the basic rule of dialectics.[104]

## 4.4. Theory of State

The state for Chimni is 'an organ of class rule which seeks to introduce order in society through mediating the conflict between classes.'[105] Not only mediating but to

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[99] See ibid., p.67.
[100] See ibid., p.67.
[101] Chimni, *International Law and World Order*, second edition, p.63.
[102] See ibid., p.63.
[103] Chimni, *International Law and World Order,* p.98.
[104] See further, chapter 2, for laws of dialectics and contradiction, ibid.

continue the hegemony of one class over the other. He correctly points out that the 'state does not represent the society as a whole; only its economically and politically dominant classes; it does not seek to realise 'national interest' but the interests of those classes which wield state power. However, it does not mean that the state, for instance, in capitalist societies, defends the 'narrowly corporate interests' of the ruling class but rather the fundamental interest of perpetuating the capitalist system.'[106] In sum, the state itself won't declare that it is defending the interest of the dominant class, except the socialist state. The socialist state openly declares and defends the working class of the country.

Chimni accuses Falk of adopting the anarchist theory of the state. Falk rejects the classification of states based on its class character. He did not differentiate between a socialist state and a capitalist state though he 'take cognizance of social forces like class in his analysis of societies and the state but assigns to them a different level of signification i.e., a secondary level.'[107] The autonomous role of the state apart from its class, particularly the mode of production is advocated by Falk in his argument. He criticised the liberals and Marxist for underestimating the autonomous role of the state. Chimni correctly identifies the core of Falk thesis as 'the autonomous role of the state having its own set of interests'. Chimni refutes by two points of this autonomous role of the state. Particularly, he said Marxists cannot accommodate Falk's thesis because the state can never be treated outside the class. Falk's analysis of autonomy of state is pure of a liberal character though he refutes it. Liberal describes the nature of the state as independent from classes and neutral to all.

Milliband, supporting Falk concluded that there is no economically dominant class and hence 'state assumes a very high degree of autonomy indeed.'[108] Chimni answers it by saying that 'apparently greater autonomy is a function of transitional and multi-structural societies in which the state superstructure is not an instrument of continued dominance within a single type of production relations.'[109] State, according to Chimni is not always dominated by a particular mode of production but a matrix of interacting

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[105] See ibid., p.217.
[106] See ibid., p.217.
[107] See ibid., p.163.
[108] Cited in ibid., p.164.
[109] See ibid., p.165

structures like pre-feudal, feudal and capitalist. It is true the nature of state changes in a period. But its nature is decided by the mode of production not by itself as Milliband contend that 'state for itself'. At the same time Chimni suggested that 'more space needs to be created in Marxist theory to consider the implications of Falk thesis in the matrix of the existing state system' because 'Marxists have tended to concern themselves more with the state than the states system' and 'neglected the territorial basis of the state and the fact that its relationship with such other territorially based states constitutes, however partially, the structure and character of both.'[110] Chimni analyses the difference between the anarchists and Marxists version of the theory of state. As he rightly argues that anarchism claims any form of state is a hindrance to the liberty and equality of the society. Hence anarchists argue that there should be any state after the revolution. On the other hand, Marxists argue the state is necessary even after the socialist revolution because of the existence of the exploiting classes. To eliminate the class differences and to form a just, equal society the role of the state is necessary. In Chimni's word, 'the socialists believe that revolutionary forms of state can and will play a positive role in the transition to a just world order.'[111] Marxists starting from Engels to Lenin were against the state, but, however, understood the necessity of the state in the transition period to communism. It is true, as Chimni argues, that 'there is a family resemblance between anarchist and socialist thought in as much as both have the removal of state from the stage of history as their eventual goal.'[112] Marxists position is to use the state for the purpose of elimination of classes which will wither away along with the disintegration of class.

### 4.5. Socialism and Democracy

Chimni finds the relationship between socialism and democracy and said 'socialism and democracy are compatible for there is nothing in Marxist theory which prevents them growing together. Rather they presume the other.'[113] Socialism is the real democracy, and it is not two different things. The real democracy is called the proletarian dictatorship. In the history of the existence of states in different modes of production democracy never existed neither in ancient period nor the capitalist period.

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[110] See ibid., p.165
[111] See ibid., p.167
[112] Chimni, *International Law and World Order*, second edition, p.198.
[113] Chimni, *International Law and World Order*, p.168.

Surprisingly, the word democracy existed till the ancient time. The Greek society is a better-known example of the practice of democracy. But the Greek democracy was practised only within the minority ruling class, not with the working class of the society. Later the so called champion of democracy ‘the capitalist system' by outlook seems to be extended the democracy to the common man; the universal suffrage and the right to contest. It is the freedom and choice given to the proletariat to work in any factory according to his wish or even not to work under any capitalist. This seems to be the real freedom. But it is evident that without work he cannot survive. He has no choice but to sell his labour in the market of industries. Likewise, the democracy in all other societies including the capitalist society is an illusion. The democracy in its true sense is possible only in socialism.

When the society moves forward to a different society, it carries some of its elements along with it. The new community is not independent of the values and system of the old one. Every society produces a system of values according to its need. Thus, for example, capitalist society produced its value of liberty and equality and in the case of international law, equality of states and its sovereignty. It has to be carried forward to the socialist society but of course with necessary critiques. Similarly, the traditions of the past have not to be ignored but looked critically to find out which is necessary and useful to carry forward. When Falk gives too much importance to the ‘past' and tradition, Chimni correctly intervenes by saying ‘usable past' and not, it is made clear, to romanticise past social orders.'[114]

### 4.6. Historical Materialism

Historical Materialism is the core Marxist concept to analyse the history of the world. The materialist conception of history is otherwise called as the historical materialism. Chimni noted ‘to write the historical materialism of jurisprudence or the Marxist theory of jurisprudence, the core categories of ‘class’, ‘state’, ‘law’ and ‘world economy’ need to be clarified.’[115]

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[114] See ibid., p.173.
[115] See ibid., p.213.

In his article *Marxism and international law*, Chimni speaks about how international law turns to be an instrument for safeguarding transnational capital. He argues that there are three overlapping features in the growth of international law in the past two decades (1980s and 1990s). [116] One is the rule of private property extended in the world economy.[117] Second is the means by which the transnational capital safeguarded and third, is the role of the international institutions to enforce the interests of transnational capital.[118] Under historical materialism and international law, he discusses the supranational character of capitalism in the contemporary period. First, he criticises the mainstream bourgeois international law, which looks at international law as a 'neutral device which stands above states and classes'. [119]

Chimni divides the history of the world economy after the birth of capitalism into four phases – Old colonialism (1600-1760), new colonialism (1760-1885), imperialism (1845-1945), and imperialism (neo-colonialism) (1945 onwards). Chimni has made the division based on the material determination of different historical contexts. However, it has to be updated with the present scenario of the re-colonisation process and the history of the law of nations (states) before the birth of capitalism. Chimni agrees that the 'history of modern international relations is closely interwoven with the history of capitalism and its different phases.'[120] The 'neo-colonial practices represent a negation of the general principles. And these need to be taken into account in arriving at a characterization of contemporary international law.'[121] A brief account of the historical phase of international law after the origin of capitalism is provided. A period of transition from feudal to bourgeois international law, followed by bourgeois colonial international law, which turned into bourgeois imperialist international law and later bourgeois democratic international law. He saw the period from 1945 onwards was a progressive period per se because of the world's one-third population lived in a different mode of production and the bourgeois international law does not have any choice, otherwise to be liberal. For Chimni because of the Soviet Union and Socialist countries, bourgeois (imperialistic) international law into bourgeois (democratic) international law. He writes 'the UN Charter represented an important

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[116] Chimni, *Marxism and International Law*, p.337.
[117] See ibid., p.337.
[118] See ibid., p.337.
[119] See ibid., p.337.
[120] Chimni, *International Law and World Order,* p. 221
[121] See ibid., p.250.

transitional moment in the transformation of the imperialist law into its bourgeois democratic form.'[122] At the same time, we cannot forget the US as a new powerful imperial state after the Second World War wants its equal share of exploitation of the world together with the imperial countries. After the demise of the already distorted socialism of the Soviet Union, which challenged the unlimited powers of US imperialism, the process of re-colonisation started.

In the re-colonisation process, international law is the main weapon in the hands of imperialism, which is used to curb the sovereignty altogether. In the above-mentioned article, Chimni strengthened this argument with the support of Fine and Harris, that international economic institutions are regulating the national economic life. The 'commanding heights of state decision making are shifting to supra-national institutions'[123] is nothing but taking away the sovereignty of the country. He mentioned the re-colonisation process as globalisation. Under globalisation, he has discussed the issue of privatisation very deeply and explained how international law used for pragmatism rather than nationalism. He stated that the primary role of international law in the process of globalisation (re-colonisation) is achieved mainly through international economic law such as MIGA, BITS, TRIMS and GATS and even the global technology regime has been privatised. By the analysis of historical materialism of international law, Chimni stated that the impact after 1990's, the international law become regressive in all of its fragments like refugee law, international humanitarian law and international human rights law.

In a very detailed manner, the change in international law has been explored by Chimni that the contemporary international law is regressive and lost the hope of mid-1970s optimism. He further argued that these laws are structured and imposed through the international institutions, which play an active role in this globalised world along with the capitalist imperial states and playing the role of the early capitalism as in removing local impediments to the process of accumulation. He concludes that the international legal strategy must, in turn, form an integral part of a transnational counter-hegemonic project through national struggle, which in his account is possible only through the change in the mode of production that is not possible without a

[122] See ibid., p.254.
[123] Cited in, Chimni, *Marxism and International Law*, p.342.

revolution. As he points out that the realm of law is 'not the arena from which the struggle for radical changes could be launched'[124] and the real battle should be initiated in all political, economic and social parts that automatically change the dimension of international law.

### 4.7. World Economy - Base of International Law

International law forms part of the superstructure like the internal law. Now the quest starts for Chimni to find the basis of international law and he finalises as the world economy as the basis for international law.

Chimni criticises the base-superstructure dichotomy of Wallerstein and Tunkin's understanding based on international law. He sums up the basis of international law is constituted by the economic structure of each state in dialectical interaction with international economic relations that has its foundation in the division of labour and a world market. He disagrees with Tunkin that the international law is not a bourgeois (imperialist) international law but a bourgeois-democratic international law. However, he agrees with Tunkin that contemporary international law 'does not possess a single class essence'.[125] But at the same time he argues that 'such a view fails to appreciate the fact that a group of states representing particular forces may be able to influence to a greater degree than the other development and content of international law' and 'this may be able to do because of their predominant position within the world economy'.[126] 'In sum, it is submitted that the basis of international law is constituted by the economic structure of each state in dialectical interaction with international economic relations which has at its foundation a world division of labour and a world market.'[127]

As we have seen already that Chimni did not agree with the division of International law into 'general' and 'particular' by Tunkin, he argues that 'the procedure of not characterising international law but of characterising 'general' international law was

[124] Chimni, *International Law and World Order,* p.208.
[125] Tunkin, *Theory of International Law*, p.249.
[126] Chimni, *International Law and World Order,* p.249.
[127] See ibid., p.245.

erroneous.'[128] The base of the entirety of international law has to be found, instead of finding a different basis for 'general' and 'particular' international law. He, in a concluding remark, said,

> 'there was the need to identify the basis of the entirety of international law i.e., general international law along with particular international law. For there was no reason why the basis of general international law was to be deemed the basis of international law. In other words, there was no justification for attempting to identify the basis of general international law rather than the entirety of international law.'[129]

Chimni found that the idea of 'general' and 'particular' norms of Tunkin problematic. He argued that 'the Soviet claim to such a privilege was therefore subversive of a system which rests on the assumption that such an argument cannot be advanced'.[130] He was analysing the problem of 'general' and 'particular' norms that is not a socialist international law, but socialist practices of bourgeois democratic international law. He is correct in one sense because by that time the Soviet Union was turned in to Soviet social imperialistic state. Khrushchev revisionist regime made the Soviet Union an armed competitor with imperialist states. In the name of protecting the proletariat internationalism, Czechoslovakia faced intervention from the Soviet Union. The 'particular' international law was mostly meant to the socialist countries in the name of socialist internationalism. In the name of 'fraternal mutual assistance,' the above mentioned invasions happened. This invasion was justified by Tunkin by the 'particular' international law for socialist countries. Another interesting thing is all the self-imperial activities of Soviet Union were justified by the basic principles of Marxism like dialectics etc. The particular international law of socialist internationalism: argued by Tunkin as a new higher type of international law. This higher type is philosophically explained by Marxian dialectics as the dialectical negation which leads to a higher stage and a transition to a new stage. Chimni writes,

> 'Here the attempt to use the law of negation of negation represented a clear abuse of the laws of dialectics. The chief error in this regard was to misrepresent the object of cognition. The law was wrongly used to justify the parallel existence of two systems

[128] See ibid., p.247.
[129] See ibid., p.244.
[130] Chimni, *International Law and World Order,* p.256.

> – general and socialist international law – because the object of cognition cannot be one part of the system of international relations but those relations in their totality. The basis of international law is singular–the international law system. It was surely marked by the reality of two opposed social orders with distinct internal essences. But the international legal superstructure articulates the dynamics of the whole system.'[131]

It is not that the dialectics, negation of negation cannot be applied to international law. As Chimni stated that this could be applied in a developed stage, which could give birth to a new system. 'In concrete historical terms it means that the law could only have been invoked if international law had been characterised as socialist international law'.[132]

However, in materialist terms, the form of the Marxian principles taken by Tunkin is progressive in nature. But the content was reactionary, imperialistic to satisfy the hegemonic needs of the Soviet Union and nothing more. Socialist internationalism should not be out rightly rejected as well as the law of the negation of the negation. When the Soviet Union followed revisionism during the period of Khrushchev, the restoration of capitalism started. In the later part, the Marxist principles were bent for its welfare of the Soviet bureaucratic ruling class. This is how Tunkin used the Marxist principles of dialectics, negation, and contradiction to justify and hide its revisionist nature.

Today the international class contradictions can be divided into three types. One is between the proletariat and bourgeoisie of the first world. Second is between the first world bourgeoisie and the third world masses. The third is between the imperial bourgeoisies themselves. International law is affected by these kinds of contradictions as each tries to shape the international law, and the impact can be seen in international relations. Chimni elucidates

> 'In this regard, the foremost requirement of revolutionary politics, endorsed by international law, is that the class struggle within the nation-state is not disturbed-apropos the principles of sovereignty and non-intervention. These principles cannot be enforced if one international class demands a right to violate them in the name of

[131] See ibid., p.260.
[132] See ibid., p.260.

> class struggle and progress. Such a perspective tallies with the interest of the peoples of the developing countries, in particular, the working class movement, faced as they are with the constant threat of armed intervention and subversion from imperialism.' [133]

Soviet social imperialism distorted the scientific theory of Marxism and tried to create or to maintain the socialist mode of production. A progressive mode of production cannot be created by an intervention but by a revolution of the masses of the country. By involving in intervention, Soviet Union proved that it also behaved like an imperialistic country in the name of socialism at the time of 'Cold War' politics.

After discussing 'Language, logic and interpretation' and 'Man, human rights and international law' in the vision of Marxism, Chimni concludes by analysing the Soviet international law that the 'Soviet international law jurisprudence had offered an impoverished alternative to its bourgeois counterparts.'[134] 'The enshrinement of the principles of sovereign equality of states, the principle of non-use of force, and the reference to the principle of self-determination all bear out the contribution of the former Soviet Union.'[135]

### 4.8. International Law is a Class Law

In his *Prolegomena to a Class Approach to International Law* (2010), he argues against the thesis of 'death of class' and shows how class approach continue to be relevant in international law. In this article, the category of class is approached not only through Marxian perspective but also with other perspectives. The global character of capitalism has led to the emergence of a Transnational Capitalist Class (TCC), which dominates state structures and influence policies in the major developed and developing countries.

However, as Chimni noted, the TCC exists not only in the European countries but also in the third world countries 'to play the role of junior partners of developed country

[133] See ibid., pp. 261-262.
[134] See ibid., p.296.
[135] See ibid., p.253.

counterparts.'[136] As he quotes *The Communist Manifesto* that the bourgeois class wants 'one nation, with one government, one code of laws, one class interest, one frontier and one customs tariff,' the TCC today seeks the same.[137] He further stated that the codified international economic law serves the interest of TCC more than any other branch of international law is a clear example of the economic importance of the Marxist perspective.[138] Against this TCC, the transnational oppressed class (TOC) struggle arises globally. He concludes that the class approach to international law offers critical insights into the structure and process of international law and elaborates the field of international law through a class approach.

## 5. China Mieville

China Mieville, in recent times, theoretically followed the footsteps of Pashukanis and B.S. Chimni, has written a book on the Marxist theory of international law. It is his PhD thesis, developed into a full-fledged Marxist theory of international law, but not without its weakness. The central theme of the book, as Chimni[139] said is an attempt to open a black box in the jurisprudence of international law, the relationship between legal and political form. In his book, *Between Equal Rights – The Marxist theory of International Law* (2005) he rejects both positivism as the idea that the practice of states constitutes the primary source of international law and naturalism, which regards basic principles of law as derived from universally valid principles of justice. He rightly argues that neither of them is persuasive from a materialist point of view. At the same time, his view is biased with Euro- centrism, as Chimni argues, 'in a sense the proposition is no different from the routine statement that modern international law originated at Westphalia.'[140]

### 5.1. Materialism and Dialectics

For Mieville, being an idealist is 'a position that is underpinned by a notion of ideas and ideational structures (such as those of law) ontologically distinct from material

[136] Chimni, *Prolegomena to a Class Approach to International Law*, p.70.
[137] See ibid., p.71.
[138] See ibid., p.74.
[139] Chimni, *International law and World Order*, second edition, p.473.
[140] See ibid., p.473.

circumstances – objective reality – and often understood as in some way driving it.'[141] Mieville follows Anthony Chase who argues 'materialist jurisprudence is concerned with the social and economic forces directing the course of legal development'.[142] In brief, the idealist is the one having ideas distinct from material circumstances and understood as the ideas driving the objective reality. In legal discourse, materialism is concerned with the objective reality, i.e., the social and economic forces.

In the beginning, he makes a survey of the earlier theories mainly the liberal and conservative in international law and finds them unacceptable. The liberal and conservative approach to international law is either idealistic or policy oriented, not the dialectics of the materialist theory. While discussing Kelsen's pure theory of law, he argues 'the edifice of the pure theory is utterly idealist.'[143] It is an idealist to that extent, the pure theory of law is not part of the positive law itself. Positive law or positivism is the product of capitalism, stands in materialist platform. Mieville contends, pure theory of law is not even considered in the realm of materialism, as 'it sacrifices its applicability in the real world.'[144] By quoting Gramsci, he writes that an attempt should be made to the theory of 'impure law' in contradiction with the 'pure law' theory of Kelsen. Thus it becomes an idealist and utopian project.

Next, he took up McDougal-Lasswell school of law and posed it counter to Kelsen's pure theory of law. However, at the same time, he placed the same critique of being idealist and abstract to the concept of power in McDougal-Lasswell school of law.[145] He narrated the critics of the school and agreed that McDougal-Lasswell jurisprudence is not known as 'the process theory of law' but as the 'policy school', or 'policy-oriented jurisprudence'. [146] In some other place, while comparing Pashukanis and McDougal-Lasswell theory, he blamed that it 'is based on idealist and nebulous notions of power and politics, a reductionist, untheoretical individualism.'[147]

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[141] Mieville, *Between Equal Rights - A Marxist Theory of International Law*, p.4.
[142] See ibid., p.4.
[143] See ibid., p.35.
[144] See ibid., p.35
[145] See ibid., p.42
[146] See ibid., p.40
[147] See ibid., p.141

Though Koskenniemi's work is impressive and illuminating, for Mievielle, his theory also suffers from idealism because 'there is not much sense of the underlying political economic dynamics that the contradictory edifice of liberalism might be expressing.'[148] Koskenniemi's methodology may be idealistic, but can be easily and invaluably be marshalled as part of a materialist analysis;[149] despite it is overtly Derridean post-modernist. He concludes that Koskenniemi's writing is a radical idealist philosophy, because of 'privileging abstract concept over social life itself,' with no theory and it is ahistorical.[150]

### 5.2. Law Straddles both Levels of Society

There are various contentions and confusions that Pashukanis commodity theory of law comes in base or superstructure. Mievielle tried to look on both sides, and at the beginning, he writes, 'it is clear that according to Pashukanis, the law cannot be relegated to the superstructure. Regarding Marx's base-superstructure analogy, the legal form under capitalism is an integral part of the relations that constitute the base.'[151] The exchange of commodities happens in the base, though the exchange is secondary in the economic base, where production comes primary. Hence we can assume that Pashukanis assessment of legal relations comes out of exchange can be placed in the base. In another place, as Mievielle points out, Pashukanis, for instance, argues that the historical origin of law evolves as a superstructure. Here Mieville comes to help Pashukanis confusion and clarify that legal form and legal superstructure are two different things.[152] He justifies it by saying, 'that the legal subject is the juridical expression of the commodity owner, as the property relation 'stands in such close contact "with the existing relations of production" that it "is but a legal expression for the same thing". At the level of the legal subject existing in relation to other legal subjects, the legal relationship, the legal form itself is part of the economic base.'[153] He gives a clarification by way of a footnote, explaining that

[148] See ibid., p.54
[149] See ibid., p.55
[150] See ibid., p.59.
[151] See ibid., p.88.
[152] See ibid., p.95.
[153] See ibid., p.95.

> 'It is true that at times Pashukanis seems to imply that the legal relations come after the economic relation, describing the economic relation as the 'source of the legal relation, which comes into being only at the moment of dispute' (Pashukanis). But this is an undialectical slip. For in the commodity form itself, dispute, coercion and violence are inherently implied. The notion of 'mine' necessary to ownership and commodity exchange is only meaningful inasmuch as it is 'mine-not-yours'. The fact that something is 'mine' necessarily defines it in opposition to a counterclaim, whether or not that counterclaim is in fact made. Disputation, and hence the legal form itself, lurks at the heart of the most peaceful private property relation. Accordingly, and against some of Pashukanis's own assertions, as an expression of relations of exchange which under capitalism inhere in the base, the legal form itself must also be so located.'[154]

Pashukanis was not clear in his analysis of base-superstructure metaphor of law. Mieville tried to clarify but failed poorly. At last, he concluded that 'it is thus misleading to claim that Pashukanis looked 'law' as part of the base, or part of the superstructure. 'Law' is a complex of social relations, norms, rules and formal proceedings which, under capitalism, straddles both levels of society.'[155] Mieville comes out of the metaphor of base and superstructure and placed law connecting neither with the base nor with superstructure and concluded as a complex phenomenon. By this way, he proved that his understanding of law according to base-superstructure metaphor is abstract. His observation is neither dialectic nor materialism.

### 5.3. No Alternative to Bourgeois International Law

In withering away of law, Pashukanis and Mieville stand together. Pashukanis commodity theory of law cannot extend and continue in a socialist society, where selling of commodity is somehow prohibited ideally. Even the labour power is not a commodity in socialist society. Hence in a socialist society, Pashukanis expected the withering away of law. Mieville admits

> 'I have repeatedly argued that we must allow the possibility of a theory which posits the legal form as a real and active factor in social relations, yet denies that it can be a

[154] See ibid., pp.95-96, foot note no. 99.
[155] See ibid., p.96.

> force for progressive change, or even the maintenance of order (itself only self-evidently a good for conservative critics). In Pashukanis's theory, we have precisely such a theory. Although Pashukanis attempted to make theoretical peace with Stalinist entrenchment, it was ultimately his theory's hostility to law, and his insistence on its ultimate withering away, that led to Pashukanis's murder.'[156]

China Mieville's nihilism is expressed here. Susan Marks correctly noticed and said 'I cannot accept his contention that international law has no emancipatory potential.'[157] Law can be a real and active factor, but it cannot be a force for progressive change. The problem lies in this mechanical approach of generalising things without observing in a dialectical way. Even during the capitalist period, the law does not exist as a pure promoter of capitalism. Naked capitalism is some form of fascism in a sense. Therefore, the progressive elements can be found in the capitalist law itself. Same in the socialist period, some regressive elements do exist. Lenin expressed in *State and Revolution* that the socialist law is certain extent bourgeois. Both Mieville and Pashukanis expected the withering away of law in socialism as they consider the law in itself cannot play a progressive role and reformed for the downtrodden. For Mieville, 'the international rule of law is not counter posed to force and imperialism: it is an expression of it'[158] and it cannot be 'fundamentally unreformable'.[159] It is more of an anarchist position than Marxist. Anarchists expect the disintegration of class and class struggle, immediately after the revolution. Even the existence of a proletarian state is unacceptable for them. However, in reality, the class exists, and the class struggle continues even after the revolution. It is a prolonged battle which leads to the communist society, where law withers away along with the state. Mieville following the vision of Pashukanis argued law as the product of a capitalist society. Mieville is correct in saying that, 'in its very neutrality, law maintains capitalist relations. Law is class law, and cannot but be so.'[160] Law is not static, and it is dialectic. Though the content of law is primarily capitalistic, the form can be visible as neutral. The form can be reformed, but to change the content, a revolution is required. Mieville's position ignores the reform in the form, which later at a particular historical junction leads to the change in content. He, by way of arguing the change is useless and not

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[156] See ibid., p.98.
[157] Marks, *International Judicial Activism and the Commodity-Form Theory of International Law*, p.202.
[158] See ibid., p.8.
[159] See ibid., p.3.
[160] See ibid., p.99.

possible, sounds more and more metaphysical. He even criticised Pashukanis search to find an alternative to law with technical regulations, saying

> 'Pashukanis's vision of an alternative to law was problematic. He counterposed legal regulation with technical regulation which does not abstract from context. The move from capitalism to socialism would entail a move from economic relations driven by the anarchy of the market to democratic planning. As this generalises, and resources become allocated according to need, the opposition of private interests that characterise a commodity economy would dissolve. Technical regulation, which Pashukanis saw as based on the premise of '[u]nity of purpose', 'is undoubtedly strengthened over time through being subjected to a general plan of the economy'.[161]

In fact, Pashukanis was speaking about the status of law in a communist society, which takes unlimited period during the transition from socialism. As already discussed, there would be more of regulations than rules in the communist society, where state along with law withers away. Here, Mieville takes purely anarchist position, albeit being a revisionist Marxist like Pashukanis.

### 5.4. Modern International Law

The origin of modern international law is out of the colonial encounter with the non-European states. Mieville admits this point as a dialectical process. Thus, he systematically narrated, that

> 'A new order was created, in which the inchoate legal forms between polities began to be conceptualised as a universal international law. It is a world historic result of the early colonial experience of transatlantic and eastern trade. International law is not one Western system, not one Western plus one Eastern system – it is the dialectical result of the very process of conflictual, expanding inter-polity interaction in an age of early state forms and mercantile colonialism. That is the way in which East and West, New World and Old World are inextricable in the formation of international law. ……it is that international law is colonialism.'[162]

Though Mieville agrees the de-colonisation movement is progressive, he 'comes close to suggesting that the anti-colonial struggles were in some sense unnecessary as

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[161] See ibid., p.99.
[162] See ibid., p.169.

imperialism was slowly working towards the grant of independence to create the perfect conditions for imperialist exploitation.'[163] Rosa Luxemburg argued in the same line while opposing the self-determination of Poland from Tsarist Empire. There she argued that the independence of Poland was nothing but bourgeois nationalism. Mieville here claims that it is perfect for imperialist exploitation. His views cannot be rejected in total, as there was some truth in it. The United States support of self-determination of colonial countries has the main reason of imperialist exploitation. Here Mieville contradicts his words, i.e., de-colonisation is progressive, but the anti-colonial struggles were unnecessary.

Imperialism is international law today for Mieville. He says 'at the most abstract level, without violence there could be no legal form. In the concrete conjuncture of modern international capitalism, this means that without imperialism there could be no international law.'[164] Therefore, according to him, international law exists today because of the existence of imperialism. And that imperialism has to be overthrown by violent means, and after that, from this statement, we can assume international law will disappear. In sum, he takes an abstract position, which argues till the world revolutions and the overthrowing of imperialism, there cannot be any reform or improvement for the TOC (Transnational Oppressed Class). This position is close to the argument put up by Trotsky after the October Revolution. Trotsky after the October Revolution in Russia, vehemently argued that socialism cannot be achieved in one country, unless and until a world revolution happens. Mieville argues in the same line that till then imperialism exists, international law cannot be reformed.

### 5.5. Metaphysics of Mieville

China Mieville then moves on to the scholarship produced by Critical Legal Studies (CLS) and within Marxism itself. Within CLS he discusses Martti Koskenniemi and goes on to discuss the Marxist legal theories of the former Soviet Union. Like Martti Koskenniemi, Mieville feels international law is impossible in bringing progressiveness. Koskenniemi argues

[163] Chimni, *International Law and World Order*, second edition, p.506.
[164] Mieville, *Between Equal Rights - A Marxist Theory of International Law*, p.293.

> 'International law will not bring about world revolution. Perhaps no such revolution is possible, or necessary. But it might support just causes in the international world and become an object of progressive political commitment.'[165]

However, Mieville goes further and sees 'no prospect of any systematic progressive political project or emancipator dynamic coming out of international law',[166] because 'the attempt to replace war and inequality with law' is both 'utopian' and 'self-defeating'.[167] Imperialist violence is a structural element of international law. He argues at the end that the chaotic and bloody world around us is the rule of law. It shows that international Law is central to imperialism and it cannot be opposed. Korovin rejected this same kind of nihilism by Stuchka and said 'one cannot brush away [international law] by simple negation, by relegating, with one sweep of the pen, the whole complex of norms of contemporary international law into the archives of bourgeois anachronisms'.[168] He feels the Soviet legal theory is inadequate to deal with the theory of international law. He criticised Korovin's *The international law of the Transition Period* as 'extraordinary formalism without any fundamental jurisprudence'[169] and not an analysis. He rightly criticises the 'peaceful coexistence of states with different socio-economic systems' declared by the 20th CPSU Congress. That was the period of Khrushchevite revisionist regime, which compromised with imperialism and jumped into competition for hegemony.

Tunkin, another Soviet scholar, observes that the existence of two systems of international law, one is the socialist law based on principles of (modified) proletarian internationalism, and another one is the general international law of peaceful co-existence. According to him general law is the result of the co-ordination of the will of all States and, particularly international law, governs the relations between local groups of states sharing socio-economic structure. Mieville argued that this 'theory lacks any serious consideration of the legal form' and

> '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

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[165] Marks (eds), *International law on the left: Re-examining the Marxist legacies,* p.31.
[166] See ibid., p.130.
[167] See ibid., p.132.
[168] Mason, *Towards indivisible international law? The Evolution of Soviet Doctrine*, p.63.
[169] Mieville, *Between Equal Rights - A Marxist Theory of International Law*, p.60,

> single class essence'. It is undoubtedly devastating to the theory that these supposedly sharply contrasting systems share so many fundamental features. The view of general international law collapses back into an idealist view of a non-partisan structure of rules that are 'neutral' regulators, rather than reflections of any particular group interest. '[T]he Soviet conception of international law was . . . remarkably Grotian in nature'.[170]

He sticks to his position entirely with the Soviet Marxist scholar E. Pashukanis. However, at some point, Mieville subjects Pashukanis to criticism. Pashukanis writings are mostly on state, law, and not much about international law. Mieville mission was to bring that with international law.

However, he contends that international law cannot be progressive and is a dead end for progressive social change; we have seen that international law can be progressive when there is a significant shift in the mode of production happened in the early Soviet period. Mieville overlooked the Soviet practice of international law. From a historical perspective, Bowring criticises Mieville's approach for ignoring the Soviet practice on self-determination and the relevance of Bolshevik and Soviet international legal theory. Mieville's approach is the total rejection of international law.

Another important point he raises is the term 'force' that decides international law at the period of imperialism. Therefore, he sees a connection between the international law, imperialism and the world order. Anthony Carty says that the idea of force by Mieville as a fundamentally Hegelian ideology.[171] Even Mieville did not discuss the acts of WTO, IMF and WB as the staunch supporters of imperialism. He did not go with the Marxian view that law is an ideological superstructure, instead he said 'the legal form is itself as part of the base'.[172] Further, he argues that the modern legal form of the sovereign individual subject who freely comes to market, capitalist exchange could not take place and so capitalism itself could not exist which is a clear exaggeration of law, make law as a basis of the capitalism itself. Law came as a reflection from the mode of production, and it is not legality created the mode of production.

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[170] See ibid., p.61.

[171] Anthony Carty, *Marxist International Law Theory as Hegelianism*, pp. 122-125.

[172] Mieville, *Between Equal Rights - A Marxist Theory of International Law*, p.95.

Mieville finds no optimism in international law and rejects international law can never be progressive. This problem arises when he sees law as part of base not in superstructure. Law is an outcome from the base, and when the base is changed, the superstructures are bound to change. When the progressive base is established, automatically the international law will become progressive. At the same time, the contradiction and the struggle of the oppressed class worldwide, as well the third world countries protest against imperialist countries hegemony also move international law to the progressive side.

## 6. Summary

Four international law scholars and their theories were discussed in this chapter. Albeit, there are flaws and weaknesses in those arguments, it is a considerable contribution to the materialist theory of international law and its development. The attempts by these theorists need a detailed elaboration and continuation of the journey, extending the theory of materialism to various fields of international law. Pashukanis' commodity theory of law analyses the law and state in the bourgeois period. The extension of commodity theory of law to international law has raised questions about the individual and individual states in international law. Pashukanis problem of keeping international law above classes made him to do the mistake of finding international law in the tribal society. The same fault let him expect the withering away of law, immediately after the formation of socialist state. Pashukanis theory seems little close to Marxism-Leninism than to Anarchism. Tunkin's theory of international law is written on the ideological frame of Marxism – Leninism, but more of a Soviet approach to international law. His theory of international law, has some contributions, albeit, it's more of a justification of the Soviet foreign policy. The materialist theory was used to justify the principle of 'peaceful co-existence and co-operation' with the capitalist countries, is considered as a betrayal and a revision to the restoration of capitalism.

B.S. Chimni's writings enlighten us on the Marxist understanding of international law. His views on the history of international law, especially in the capitalist period are analysing the nature of capitalism in a Marxist way. Chimni criticised the idea of

'general' and 'particular' norms of Tunkin and argued that it is subversive of a system. He rightly analysed the problem of 'general' and 'particular' norms which is not a part of a socialist international law, but socialist practices of bourgeois democratic international law. He is correct in a sense because by that time the Soviet Union was turned into the Soviet social imperialist state. The second edition of his book *International Law and World Order* is extended to the new areas of 'Feminist approaches to international law' and 'New approaches to international law.' The entire writing is a combination of integrated Marxist approach with the other approaches of socialist feminism and post-colonialism. China Mieville's writing is an extension of the Soviet Marxist scholar E. Pashukanis. However, at some point, Mieville subjected Pashukanis to criticism. Pashukanis writings are not much of international law, and Mieville tried to bring the commodity theory to international law. His contention of international law can never be progressive overlooks the part played by the Soviet Union. Mieville continued the same mistakes of Pashukanis and went to the extreme of saying 'the chaotic and bloody world around us is the rule of law'.[173] Pashukanis started the journey with his non-materialist, mechanical, anarchist position and Mieville completed it.

[173] Ibid., p.319.

## CHAPTER IV

## MATERIALIST HISTORY OF INTERNATIONAL LAW

### 1. Introduction

In the history of international law most of the international law textbooks only briefly deal with its history. The mainstream international law scholarship (MILS) has always tried to avoid narrating the historical development of international law.[1] A historical perspective or the development of international law is often mentioned in a few pages. In those pages, the contribution of third world countries to the development of international law is not included.[2] Even Soviet international law scholar Tunkin in his book *Theory of International Law* mentions the development of international law after October revolution but not about its evolution in the ancient and feudal stages, at least not in a detailed manner.

Neglecting history of any subject prevents its deeper understanding. In the core international law, the history is important to understand the development of norms and customs, in a particular historical period. If the norms of international law are related only to the authors (such as Grotius, Gentili, Vittoria), who have been considered as the reason for the creation of norms, and not about the economic conditions prevailed at that historical point in time, the result is a distorted understanding. In Onuma's words,

> 'International law was not born either with Grotius, Vitoria, or Vattel. Nor was it created by the Treaties of Westphalia. International law as we assume it to be today is the law of international society covering the globe, and it was around the end of the nineteenth century when this society came into existence. What existed before were regional normative systems, each of which claimed its universal validity based on its universalistic world image. Sino centric, Islamocentric, and Eurocentric systems were leading examples. Together with the subjugation of competing powers in other

[1] For example, see Brownlie, Bricks and Shaw. Their writings on international law did not speak about the history of international law.
[2] Some others like George Graston Wilson, Georg Schwarzenberger, who wrote history as part of their writings in international law, did not go deep inside the history of international law and there was no mentioning of third world history and colonialism.

> civilizations by European powers, European international law became the global standard.'[3]

To study the history of international law through a Marxist approach, the application of historical materialism is required. Historical materialism is the extension and application of the principles of dialectical materialism to the study of social life, society and its history. As the international law is the product of organisation, the study of the history of society, the dialectical relations between the law and the society and the dialectical nature of the society that produces synthesis out of thesis and antithesis - the formula to understand the history of international law; is essential. The Marxist approach to the history of international law is based on the socio-economic formations as Marx says; 'the economic form is the real foundation on which arise legal and political superstructures.'[4] Thus the history cannot be reduced to the actions of kings and generals, conquers and subjugations of states but above all to the history of the producers of material values, the history of the labouring masses, the history of peoples. The decisive role in history belongs to the producers of the material goods. They are called differently in different historical periods. They are slaves in the ancient society, serfs in the feudal society and proletariat in the capitalist society. The first society after the evolution of apes into a human being was the primitive communist society. The primitive communist society was a classless, stateless society that did not have a notion of private property. The property owned by the community suppressed the formation of the class in the human society. When the concept of private property came into existence, it led to a monogamous patriarchal family and later resulted in the formation of the state. This is not the occasion to discuss how the private property or the state came into existence. The idea is to find out how the relation between international law and various societies that were formed at different stages of human development.

## 2. International Law and Primitive Society or Stateless Society

This part of the chapter discusses the elements of international law in the primitive communist societies. The term international law is not used here in its real term as a

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[3] Onuma, *The Birth of International Law as the Law of International Society*, p.44.
[4] Marx, *A contribution to the critique of political economy*, p.20.

law between nations. Instead, the search will be of some standard rules and regulations existed between the tribal groups as well as the treaties and contracts between a primitive society and a civilised state. Technically speaking international law cannot exist in a stateless society. Nevertheless, a system of rules and regulations existed even before the formation of states but in between two tribal groups. Meanwhile, we cannot, however, confuse it with today's international law. The Soviet Marxist law scholar, Pashukanis observed that international legal institutions are the ancient ones. It developed because of the disputes between tribes over various issues like territory.[5] Hopefully, Pashukanis would not have argued international law in the tribal society with the understanding of the contemporary international law. Primitive society is called as the primitive communist society. It was not communist by sharing the wealth with them, but they did not have the concept of property, in fact, any wealth at all. There was no production, and the survival was only by hunting and gathering. Whatever hunted and gathered was shared among them. At the same time, there were different tribal groups with the head of a mother, later turned into patriarchy even during the tribal period. 'In temperate Europe, with Neolithic equipment, pastoralism combined with hunting was the most productive rural economy, and with pastoralism are associated a patriarchal social organisation, differentiation of status, and warfare.'[6] Constant fights and disputes were regular among them. Hence, some arrangements or agreements between the different tribal groups were possible. We can be sure that most of the agreements between those tribes were oral agreements. More of it can be called as an arrangement between them not to disturb each other's territory or their hunting areas. As there was no private property and only communal property that the domestic law among the tribes would be limited with some rules. But at the same time, the whole community of the tribe owns the communal property. It can be hunting/grazing land or cattle which the tribal community intend to protect from the other rival tribal community. Hence there is a probability that the agreements were necessary between two tribal communities to avoid disputes over the communal property. The agreements were made mostly between the chieftains of the tribal community. We have to be careful here to

[5] Pashukanis, *Selected Writings on Marxism and Law*, p.175.
[6] Childe, *The Dawn Of European Civilization*, p.173.

differentiate the chieftain of tribal community with the king of a state. Both have a difference of a hill and a mound.

While discussing the history in the method of historical materialism, we have to consider the mode of production as the core factor. In that case, it would be appropriate to discuss the primitive societies along with the civilised states. The evolution of society is not to be seen as mere mechanical growth and development but as a complex structure. The fact is the ancient society did not come all over the world in one day. There existed tribal communities along with civilized states, and it is still prevalent. We can see that still, many African tribes like ‘Bushman' has many remnants of primitive society without private property. Marx said in the Manifesto that capitalism would bring even the barbarians to civilisations, and it has done to almost. Today we can rarely find the primitive society even among the tribes. But the evidence of once been a primitive community has spilt all over them. Hence we will discuss the treaties happened between the tribal communities and the civilised states also in this section.

In the pre-Islamic Arabia, there were nomadic tribal groups who used to make contracts with the traders. Will Durant writes that the political organisation of pre-Islamic Arabia was a primitive kinship structure of families united in clans and tribes. Tribes were named after their common ancestor. There was no proper state system among them. The tribal chieftains used to make the contracts with the traders who pass the Arabian Peninsula. The contracts were mostly about the safety of the goods. Because of the lack of cultivation in the desert, the primary occupation was to dacoit the goods passed through the peninsula. Hence the trader has to make contracts with the tribal chiefs to protect their goods from the dacoits. Out of these agreements, two months were treated as a peaceful month. Though the agreements were with the tribal chiefs, it was strictly followed. During this period that dacoit was totally prohibited, and the traders were allowed to pass the peninsula peacefully. The sacred months of the Islam are the follow up of that practice existed during that time.

During the period of colonialism, the European powers made treaties with the native Chieftains of Africa. In Congo, itself four hundred treaties were made. These treaties were not made to the benefit of both the parties. As one party – the tribal chieftains

were not in a position to know the hidden agenda between the documents. It was well known to the colonisers too, and the colonisers did not give the equal sovereign status to the tribal chieftains. Then a question arises that what was the purpose of the treaties. The purpose was to satisfy the fellow colonial powers that because of these treaties they got a legal right among the tribal groups than the one who did not have any treaty. We will see in detail while discussing about the international law in the colonial period.

### 3. International Law in Ancient Society

We can say that the roots of international law are very long and ancient. One of the oldest international treaties was between the Egyptian Pharaoh Rameses II with Khattushilish III, the king of the Hittites. The original birthplace of international law was in the eastern states like India, China, Egypt and Mesopotamia and not the European continent as argued by the mainstream international law scholarship. However, we can say that the modern international law is the subsequent product of the European Judea-Christian tradition.

There are many theories regarding the formation of the state in the antiquity. The conquest theory of Franz Oppenheimer describes an ancient state as an oppressive instrument designed to perpetuate hegemony. According to Marx ‘the state is an organ of class rule, an organ for the oppression of one class by another; it is the creation of ‘order', which legalises and perpetuates this oppression by moderating the conflict between classes'.[7] Marx and Engels argued that the origin of the state is the necessary outcome of the origin of private property ownership. Following this Lenin similarly, describes the state as a product and a manifestation of the irreconcilable class antagonisms. Durkheim contested that division of labour in the ancient society and the notion of cohesions in primitive societies formed in organic solidarity give rise to a state.[8] Weber's theory of legitimate authority combined to emphasise the network of allegiances and responsibilities that are the basis of any complex social

[7] Cited in Lenin, *State and Revolution*. https://www.marxists.org/archive/lenin/works/1917/staterev/ch01.htm, retrieved on 21.3.2017.
[8] See further, Durkheim, *Division of Labour in Society.*

organisation.[9] The clear understanding of the nature of the state is, therefore, important for the analysis of international law, because the international law cannot be imagined without the state.

While speaking about the ancient international law, Onuma points out that, 'whenever human beings organise groups or societies such as clans, tribes, ethnic groups, religious groups, nations and the like and are engaged in commercial and cultural intercourse or armed conflicts among such groups, it is always necessary to make agreements.'[10] Therefore when a trade happens (including slave trade) between different groups at the preliminary stage of the formation of the state, international law comes into play. As an institution, state originated in many parts of the world at that period. The completion of international law with an agreement between states would have taken centuries. There was no organised international law between those states; at least there was no single system of international law. It developed in the later period when trade established between different states particularly in parts of Mesopotamia, Egypt, Indian sub-continent, China and Rome. Calling it as 'international' law cannot be a proper term for that period because the modern concept of 'nation' is formed and consolidated around 16th and 17th century primarily in Europe. Therefore, state existed before the formation of the nation-state and the law between those countries could be called as 'interstate law.'

The origin of international law begins after the formation of the state. The state, after the origin of private property inevitably comes into existence to protect the interest of one class when the society divided into irreconcilably antagonistic classes. The historical materialism states that the second form of society was the ancient society, formed out of the union of several tribes, accompanied by slavery.[11] As the mode of production is slavery in the ancient society, the role of international law between slave-owning states is very rudimentary in nature. The new state had the features of recent developments of its political structure and kingship. International law during that point of time was not developed as the international legal relations were not regulated by law. The humans moved from the primitive tribal clan society. 'In each

[9] Bederman, *International Law in Antiquity*, p.19.
[10] Cited in Mieville, *Between Equal Rights - A Marxist Theory of International Law,* p.166.
[11] Marx, Engels, Lenin, *On Historical Materialism – A collection*, p.19.

country there existed specialised craftsmen who, whether free or servile, were emancipated from the bonds of the primitive clan and would gravitate in accordance with purely economic laws to the centres where trade and wealth were concentrated.'[12]

### 3.1. Mesopotamia

This part of the chapter is dealing with the geographical area of Mesopotamia includes the Egyptian state too. The society was almost the same, and they were existed alongside. In the Mesopotamia during 2500 – 2335 B.C, we can see such structures. Like the Greek city-states, the Mesopotamia also consisted of city states. The city-state and its countryside and towns were considered as the property of the extended divine family. The King of the City States who was selected by that God was to take care of his earthly property. Here we can see the development of the notion of private property which was legalised through God as the owner. Enlil, the chief god of Nippur, was called as the 'king of heaven and earth' and 'king of all lands'.[13] Enlil duty is to fix the boundaries of the territory for each lower god. The treaties were made between the kings as God as their witness as well as the executor that he will punish the one who disobeys the treaty. Most of the treaties during that period carry the clause of boundaries and territories. This sounds more of a tribal society newly organised into a state, legalised by the authority of God with the follow-up of private property. As we have seen in the tribal society, the agreements were all about the territory of their grazing and hunting land. When the state formed the primary responsibility given to their gods through their laws was to protect the same. The head of the tribe was no more a tribal chieftain but a king with his property of slaves and estates. These are the remnants of the elements of tribal society extended to the ancient state.[14] Many of them were abolished by the newly formed state. For example, King Urukagina, a king of one of the city-states named Lagash who gave the legal code which supposed to be the first one of that kind in the recorded history, abolished polyandry and passed repressive laws against women in

[12] Childe, *The Most Ancient East - The Oriental Prelude to European Prehistory*, p.198.
[13] Altman, *Tracing the Earliest Recorded Concepts of International Law*, p.7.
[14] See ibid., p.7.

his country.[15] Moreover, there were no laws against the man involving in polygamy. Another interesting thing about his laws is that he passed laws against corruption. These things show that corruption had a long history of more than 4000 years and started with the origin of private property and state. Ur-Nammu, the one of the oldest code of law, speaks in the same way in article 7 as 'If the wife of a man followed after another man and he slept with her, they shall slay that woman, but that male shall be set free.'[16] Code of Hammurabi also mentioned about the abolition of polyandry in law 129 as 'If the wife of a free man is caught lying with another man, they shall both be tied up and drowned in the water; but if the husband decides to let his wife live, than the king shall let the man live.'[17] These are the evidence in various ancient law codes which show that the society was moving into a monogamous family with an established patriarchy.

Later during the 15th century BC, there were five independent states of equal rank according to the *Encyclopaedia of Public International Law*. They were Egypt, Babylonia, the Hittite Kingdom of Asia Minor, the Mitanni from the North West of Mesopotamia and the Assyrian Empire.[18] There were treaties between those equals. The Hittite Emperor recognised the kings of Egypt, Babylonia, Assyria and the Mitanni as his equals.[19] Peace treaties were made between them particularly on rendering assistance against rebel subjects. Here rebel subjects were the one who protested against the newly formed state machinery with legalising slavery. Slaves were mainly procured by attacking the nearby kingdom. The Hittite laws of war speak about the 'submission at the place of conflict' which means to preserve the besieged town from destruction and its inhabitants from being taken into captivity.[20] The Sargonic inscriptions show us how the conquered communities were treated. In the Early Dynastic IIIb inscriptions, there was no mentioning of captives were taken, but in the later one and for the first time that people were taken as captives. This shows us that the use of slaves as human labours was profitable in the production of wealth which was not acknowledged in the earlier. The importance was only given to their

[15] See further, ibid., p.8.
[16] http://realhistoryww.com/world_history/ancient/Misc/Sumer/ur_nammu_law.htm, retrieved on 21.5.2017.
[17] King, *The Code of Hammurabi*, p.29.
[18] *Encyclopaedia of public international law* 7, p.134.
[19] See ibid., p.134.
[20] See ibid., p.134.

properties and not for the human beings as slaves. Amnon Altman while writing about the Ancient Near East was sure that the captives were placed in a forced labour camp.[21] The practice of taking captives at war and made them slaves and involved in productive work was followed during the second and first millennia.[22] The code of Ur-Nammu, the code of Hammurabi, Hittite laws, Hebrew laws speaks about the treatment of slaves in various articles. For example, forty sections of the Hittite Law talks about the labour assigned to the slaves. The Hittite king assigned fields to war captives for cultivation. The provincial governor was instructed to take care of these captives by settling them with land and provide them with seeds, cattle, etc.[23] Mostly the women and children who were captured during the war were offered to the temples. Though individuals had slaves mostly the slaves were in control of the state.[24] Amnon gives information that the conquered territories were organised into temple property, royal property and the private property of individuals which was not known to the primitive society. When a war gets over, there were negotiations to exchange the captives.[25] The captives can be substituted mostly by other peoples and sometimes ransom money.[26] The treaty between the city states of Sadlas and Nerebtum put some restrictions on who can be slaves. According to this treaty, a person cannot be enslaved by the individual who gave refuge to them in another country during the times of war. This reminds us that the slaves were mostly out of the wars and less by other means. Such treaties try to put restrictions on the anarchic way of capturing slaves and given importance to organised way were state takes the upper hand and made decisions. The state reminds their citizens that it is here now to deal with slaves unlike the end of primitive society where slaves were taken by the powerful. The treaties related to refugees and runaways include a clause of runaway slaves. Declarations of war were sent as messages between the kings to return the runaway subjects; if not then leads to war. The runaway subjects must be runaway slaves or the rebels who oppose the kingdom; otherwise, there was no purpose of going to war. The war regularly happened between the enemy countries as well as with the surrounding tribal communities. Amnon argues that Hittites did not differentiate them and leaving the dead combatants, the non-combatants and

[21] Altman, *Tracing the Earliest Recorded Concepts of International Law*, p.33.
[22] See ibid., p.43.
[23] See ibid., p.109
[24] See ibid., pp.43-44.
[25] See ibid., p.64.
[26] See ibid., p.64.

combatants were taken as captives.[27] Parity treaties are the one which happened between a fully sovereign ruler and a semi-sovereign ruler. Amnon concluded that the parity treaties were mainly concerned with the runaway slaves and trespasses which were a frequent problem during that period.[28] He gives an example of a parity treaty devoted entirely to the extradition of fugitive slaves is the one concluded between Idrimi of Alalah and Pilliya of Kizzuwatna. In the next generation treaty between Niqmepa of Alalaḫ and IR.dIM of Turnip runs more elaborately like below:

> '22 If a fugitive slave, male or female, flees from my country to yours, 23 you must seize him and return him. If anyone else seizes him 24 and delivers him to you, you [shall keep him] in your prison, 25 and when his owner arrives, you shall hand him over. 26 If the slave is not residing (there), you shall provide (the owner) an escort, and in whatever town he is residing 27 he (the owner) may seize him. (In any town where) he is not (found) residing, the mayor and five elders 28 shall be sworn in (by the owner): "If my slave stays among you, you must notify me." 29 If they do not agree to swear, but return the slave, [they go free]. 30 If they take the oath, and later he discovers his slave [among them], 31 they are thieves and their hands shall be cut off, 32 (and) they will pay 6,000 (shekels of) copper to the palace.'[29]

Another interesting fact in all the treaties which was created during those periods is the kings addressed along with their father and grandfather. After the titles like 'Great King', 'King of Egypt', 'Hero of all lands' followed by the son of so and so and grandson of so and so. This seems to be considered as a proud factor for the kings. Earlier in the primitive society as we have seen mother was the leader, and there was no monogamous family system. All the members of the tribal group know their mother and grandmother but not their fathers. First time in the history of humankind the matriarchal society changed into a patriarchal family with the man as the leader of the monogamous family. For the first time, the children are related to their fathers. They were called as the son of so and so, because during those days only by strict monogamous family a son can be identified with his father. The treaty between Hattusili III and Ramesses II runs like this:

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[27] See ibid., p.103.
[28] See ibid., p.126.
[29] See ibid., p.152.

> 'A obv. 3–7 Thus says Ramesses Meriamun, Great King, King of Egypt, Hero of All Lands; son of Minmuarea (=Seti I), Great King, King of Egypt, Hero; grandson of Minpaḫtarea (=Ramesses I), Great King, King of Egypt, Hero; to Ḫattušili, Great King, King of Ḫatti, Hero; son of Muršili, Great King, King of Ḫatti, Hero; grandson of Šuppiluliuma, Great King, King of Ḫatti, Hero:'[30]

The treaties of international law at that point of time carries the evidence of the transformation of society from the primitive communist to the slavery includes the fact of origin of the family, private property and state.

### 3.2. Greece

The law as superstructure reflects the base i.e. society. The international law existed at that point of time, which sprang out of the mode of production that was a master-slave relationship. Rome can be the best example for this society. Before going into Rome let's have a look of the Greek society. From the tribal gents, the Greek society later formed. In the beginning, 'from a purely legal standpoint Greek law was in the stage of primitive law. Law and morals were still largely undifferentiated.'[31] Rosa Luxemburg narrated as

> 'At the moment the Greeks enter history, their situation is that of a disintegrated gens. Though there are strong vestiges of the gentile law remaining, nevertheless there already exists a rural system of private property and the free right to dispose of that land. The peasantry is already in a state of deep indebtedness. Along with them, there is an aristocracy. Its representatives can already be found in the gentile constitution.'[32]

The Greek society of city-states that predates the Roman society has been described, as the ancient democratic society by the western authors, was nothing but a society of slavery. The origin of state came along with its laws. Evidence of this is in the literature of Greek that is in 'Greek tragedy'. Theseus says in Oedipus at Colonus, 'A

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[30] Altman, *Tracing the Earliest Recorded Concepts of International Law*, p.128.
[31] Pound, *An introduction to the Philosophy of Law*, p.7.
[32] *The Complete Works of Rosa Luxemburg,* Volume I Economics Writings 1, p.268.

state that rules by law and by law only',[33] which means the state can only rule by law and not by any lawless anarchy. This clearly differentiates the stateless primitive communist society's rules and regulations from the established order called law from the authority of the state. Shirley R. Letwin argued that the rule of law is the mark of high civilisation and the lawless tyranny has the characteristic of barbarism.[34] Whoever does not obey the law were called savages, barbarians and tyrant. Even the Greek god Zeus could not escape from this description. In Prometheus Bound, Prometheus called Zeus 'a savage'.[35] Interestingly another factor of describing custom as the source of law was opposed in the beginning. What the reason said was that the law contrasted to custom because it was held that the rules of law had to be recorded.[36] But as we can understand custom has the remnants of the primitive communist society's culture during that period. The new law was the outcome of the slave state does not have agreed with the old practices of matriarchy and common property. The custom was also opposed because of its unwritten nature. The real reason could be that custom was seen as the remains of tribal society which was in contradiction with the newly formed civilised class society. Socrates in *Crito* postulates a sharp distinction between a *polis* and a tribe and sure about following a tribal law is self-contradictory. These examples clearly show that the contradiction between the newly formed classes with the practices of the old classless society. At the same time, we can hear opposition to the newly made law. Callicles in the *Gorgias* argued that the law is a contrivance for enabling the weak to triumph over the strong and is therefore opposed to nature, where the strong rule over the weak.[37] Thrasymachus in *Republic* argues the opposite that law is made by the most powerful to serve their interests. Callicles might have said about the physical strength, and Thrasymachus argued in the sense of politically influential persons. One thing is clear from Plato's dialogue that there were opposition and realisation of the true nature of law and its purposes. Among the Greek city-states, there were treaties for the assistance against the insurgent slaves. Aristotle, the teacher of Alexander the Great, says in his book *The Politics* that Non-Greeks and slaves are equal and by nature they

[33] Letwin, *On the History of the Idea of Law*, p.2.
[34] See ibid., p.2.
[35] See ibid., p.3.
[36] See ibid., p.4.
[37] See ibid., p.15.

cannot rule, it is proper that Greeks should rule Non-Greeks.[38] Nevertheless, the real reason is not of racist superiority as the postmodernists argue, but the economy as the Greeks considered that the tribal society around them was not civilised and fit to be slaves. Even though, many treaties were made among Greeks and non-Greeks. The second Athenian League was established in 377 B.C. by way of a treaty which invited both 'Hellenes and barbarians' to join the League.

The written law code by Draco or Draconian in the 7th century B.C tried to codify the unwritten laws in Athens. He made death penalty for most of the offences, and it was an inhuman law. From his name the modern term of calling brutal or cruel laws as Draconian laws came into existence. Solon, another law maker tried to make the laws more humane, in the later period. It does not mean that he was against slavery. He argued that even if it is slavery, there should be some justification. This was some effort to normalise the rising class war between the slaves and the masters in Greek society.

Also inn Greek literature, we can find evidence of the slave society and about the slaves captured during wars. As we have seen in the Mesopotamia, wars were mainly held to capture slaves. In Greek too this was the primary purpose. Wars happened to capture slaves and to get the ransom for the captives. Homer confirmed this in his *Iliad and Odyssey*. In the Trojan War, though the reason said was for Helen, the real reason was for the above-mentioned reason. After the attack on Troy City, slaves were captured. The dispute between Greek Hero Achilles and the leader of Greek Army Agamemnon was about a female slave. Hectors wife and mother spoke through Homer about the treatment of captives of war as slaves. Here too Homer and his many characters proudly call Greek as a Father Country and the first line of *Iliad* starts with this line 'Sing, goddess, the anger of Peleus' son Achilleus'.[39] This indicates the same like Mesopotamia, the transfer of matriarchy to patriarchy.

### 3.3. Rome

Rome followed Greek as city state but later turned into an Empire and an imperialist state. The main commerce in Rome was slave trade as slaves were treated as

[38] Aristotle, *The Politics*, p.57.
[39] Homer, *Illiad*, http://classics.mit.edu/Homer/iliad.1.i.html, retrieved on 21.5.2017.

commodities. Slaves were considered as property by Roman law. Slave trade went to its peak during the Roman period. In Rome, we can see the uprisings of slaves, unlike the Greek society. Rome has different classes called as patrician, plebeians and slaves. When the slave uprising happened, there were also wars between the patrician and plebeians. Roman law carried strict rules and regulations in dealing with different classes. Even the marriage between a patrician and plebeians was prohibited in Roman law. Apparently, the slaves did not carry any rights. For dealing foreign affairs, a concept evolved in Roman law called as Jus Gentium. Jus Gentium which means 'law of nations' in Latin is an important concept in international law derived from the Roman law. In fact, j*us Gentium* has the ingredients of the Old Italian tribal laws. Maine, the author of *Ancient Laws* throws some light on the Roman concept of *jus Gentium*, as

> 'Jus Gentium was, in fact, the sum of the common ingredients in the customs of the old Italian tribes, for they were all the nations whom the Romans had the means of observing, and who sent successive swarms of immigrants to the Roman soil. Whenever a particular usage was seen to be practised by a large number of separate races in common it was set down as part of the Law common to all Nations, or Jus Gentium. Thus, although the conveyance of property was certainly accompanied by very different forms in the different commonwealths surrounding Rome, the actual transfer, tradition, or delivery of the article intended to be conveyed was a part of the ceremonial in all of them. It was, for instance, a part, though a subordinate part, in the Mancipation or conveyance peculiar to Rome. Tradition, therefore, being in all probability the only common ingredient in the modes of conveyance which the juris consults had the means of observing, was set down as an institution Juris Gentium, or rule of the Law common to all Nations.'[40]

Though it is called as the law of nations, they were actually to differentiate the outsiders who were sent to settle in Rome. The domestic rules were called *jus civilie* and for the Romans and foreigners; *jus gentium*. When some rules are common to all races settled in Rome, then comes the term the law of all nations. The basic need to create such rule was related to commerce and trade. Because the trade happens between the various races in and around Rome carries the need to create such rules. Later it resulted in an institution for the rule of law of nations called as *juris gentium*.

[40] Maine, *Ancient Law*, p.20.

Hermogenianus, a Roman jurist of the second half of the 3rd century, described the *jus gentium* [41] as comprising wars, national interests, kingship and sovereignty, rights of ownership, property boundaries, settlements, and commerce, 'including contracts of buying and selling and letting and hiring, except for certain contractual elements distinguished through *jus civile*.'[42] Slavery, for instance, was supported by the *jus gentium*, even though under the natural law all are born free (*liberi*).[43] The *jus gentium* was thus in practice important in facilitating commercial law as we have seen above through the words of Maine. As slavery existed in Rome, the law was in favour of slavery. Romans according to their customs of war destroyed cities, seized property belonging to the citizens of enemy states and made their captives slaves. The Rome economy was slave economy that was built out of Rome's slave-owning power and the relation was mainly founded on subordination and inequality (*pax romana*).[44] The Roman state was a kind of universal state and the kings had declared that they are the citizens of the universe; to maintain the domination of Rome slave-owning power.

The Roman society reflects the crisis of slave economy due to the mass slave revolts that shook the very foundation of the slave state, which later led to the formation of feudal society. There were no rules of law while suppressing the slave revolts. The wars against slave uprising are called servile wars in the Roman Republic. There were three servile wars ("servile" is derived from "servus", Latin for "slave"). First one happened in 135 BC – 132 BC in Sicily, led by Eunus, a former slave claiming to be a prophet, and Cleon from Cilicia, the second servile war in 104 BC – 100 BC in Sicily, led by Athenian and Tryphon and the third one in 73 BC – 71 BC in mainland Italy, led by Spartacus. Karl Marx listed Spartacus as one of his heroes,[45] and described him

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[41] The *jus gentium* or *ius gentium* (Latin, 'law of nations') is a concept of international law within the ancient Roman legal system and Western law traditions based on or influenced by it. The *jus gentium* is not a body of statute law or legal code, but rather customary law thought to be held in common by all gentes ('peoples' or 'nations') in 'reasoned compliance with standards of international conduct.' Following the Christianization of the Roman Empire, canon law also contributed to the European *jus gentium*. By the 16th century, the shared concept of the *jus gentium* disintegrated as individual European nations developed distinct bodies of law, the authority of the Pope declined, and colonialism created subject nations outside the West. See further: Engels, *The Origin of family, private property and the state*.

[42] Winkel, *The Peace Treaties of Westphalia,* Digest 1.1.5; pp.225–226.

[43] Tierney, *The Idea of Natural Rights*, Digest 1.1.4; p.136.

[44] See further: Edward Gibbons, *The decline and fall of Roman Empire*, Wordsworth classics of world literature. Chapter 2.

[45] Marx. *Karl Marx's Confession*,

as ‘the most splendid fellow in the whole of ancient history and a real representative of the ancient proletariat.’[46] Unlike the earlier Mesopotamia or Greek were we have not come across many mass slaves uprising. There were rebels and runaway slaves but not as something happened in Rome. It may be due to the slaves would have thought that instead of getting killed being enslaved is better. In the primitive wars occurred between tribes as well as between the earlier kingdoms all the captives were killed.  But later when the idea of using slaves for the production instead of killing seems beneficial. At the same time, a Roman kind of Republic was not eligible to handle the slave society. It needs a strong empire with an Emperor. Though Julius Caesar was stopped by way of assassinating him, the Rome Senators could not stop Augustus Caesar to become the Emperor. Because that was the necessity of time for an Emperor or else it could not have remained as a slave society.

Religion has a pervasive influence on law in the ancient Roman society. Henry Wheaton in his ‘*History of the Law of Nations*’ (1845) argued that ‘the ancient nations of Greece and Italy, law, both public and private, so far as depending on penal sanctions, was exclusively founded on religion’.[47] It can be better called ‘justified by the religion’ rather than ‘founded on the religion’. Counter arguments followed saying that international law is shaped by religion only. Coleman Phillipson wrote that ‘because a certain code of conduct in international relations draws its sanction from religion, it cannot, therefore, be described as possessing the character of international law.... The religious sanction did not impair but added force to the legal and political sanction’.[48] Hence something else is always there to decide the real nature of law and international law though religion and other factors added force to it. To put it correctly, religion, state and law always have a dialectical relationship. Sometimes religion dominates the law, and sometimes law governs the religion in various societies.  It is evident that religion played a dominant role in ancient Rome. The role of religion was interconnected in forming the law and international law in the Roman society. The earliest form of international law was religious and pertained to the concept of the ‘just war’ (*bellum justum*), which should only be undertaken with a

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http://www.marxists.org/archive/marx/works/1865/04/01.htm  retrieved on 28.06.2013.
[46] Marx. *Letter from Marx to Engels In Manchester,* Marxists.org retrieved on 28.06.2013.
[47] Bederman, *International Law in Antiquity*, p.53.
[48] See ibid., p.53.

ritualised declaration of war by the fetial priests.[49] Fetials were a class of priests to whom the sacred laws of Rome was devoted according to Dionysius of Halicarnassus.[50] Foreign ambassadors were protected by the *jus gentium*, and it was a religious violation to harm an envoy.[51]

### 3.4. India

Ancient India better to call Indian sub-continent consists of the glorious Indus Valley Civilisation which existed during the period of Bronze Age. The historians still claim only ten percentage knowledge about the Indus civilisation. It is not clearly known what kind of society they lived in and what they called themselves. It is an agreed fact that they involved in trade with other civilisations like Sumerians. 'The most dramatic proof of extensive commercial relations is however the discovery in several pre-Sargonic sites in Mesopotamia of seals, differing altogether in design and fabric from the countless native seals, but identical with specimens unearthed in prehistoric sites in the Indus valley.'[52] Sumerian text often refers to a Meluhha as their trading partner. Finnish scholars Asko and Simo identify 'Meluhha' are of the Indus people. The word 'Mleccha' in old Sanskrit literature means foreigner and the Aryan Sanskrit texts indicates their neighbour in that name same as the Greeks indicate the neighbour as barbarians.[53] Even Sir John Marshall called the Indus Valley Civilisation as Indo-Sumerian Civilisation because of the close connection between them.[54] There are three kinds of theory revolve around the statehood of Indus Valley Civilisation. One is of they had one central ruler, and another one is of different rulers for different cities like Harappa and Mohenjo-Daro. The third theory indicates that there were no rulers and everyone enjoyed an equal status. Evidence confirms more of the third theory. It can be more of a Republic like Greek. At the same time, there is no conformity

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[49] See ibid., pp. 231-239.
[50] See ibid., p.234.
[51] Sextus Pomponjus (2nd century AD), in his commentary on the jus civile of Q. Mucjus Scaevola: 'If someone strikes an ambassador of the enemy (legatus hostium), he is regarded as having acted against the law of nations (jus gentium), because ambassadors are regarded as sacred (sanctus)'; Daniel Peretz, 'The Roman Interpreter and His Diplomatic and Military Roles,' Historia 55.4 (2006), p. 454; Bederman, *International Law in Antiquity*, pp.104-105, 114-115.
[52] Childe, V. Gordon. *The Bronze Age*, p.40.
[53] Parpola, Asko; Parpola, Simo (1975). *On the relationship of the Sumerian Toponym Meluhha and Sanskrit Mleccha*, p.205-238. Studia Orientalia Electronica, [S.l.], v. 46, p. 205-238, apr. 2015. ISSN 2323-5209. Available at: <https://journal.fi/store/article/view/49874>. Date accessed: 06 july 2017.
[54] Possehl, *The Indus Civilisation: A Contemporary Perspective*, p.5.

whether slavery existed in the Indus Valley Civilization. The Indus civilisation can be considered as a unique civilisation which lived for almost 1000 years peacefully. There was an extensive trade, and various seals were used in contracts and agreements. Interestingly the Sumerians mentioned the Indus Valley People as traders, and there was no mentioning of war with other kingdoms. The weapons discovered at the Indus Valley site are more of offensive weapons then defensive. The truth is defensive weapons like a shield is used during war with the fellow human beings. A hunting society does not need defensive weapons as the offensive weapon is enough to hunt. Not only in hunting but weapons can be used for various purposes from cutting a tree to sacrifice an animal. As we have seen in ancient world slaves were mostly came from the captives in war. If there was no war, it's hard to believe that the mode of production was of slavery. As the Indus Valley Script is yet to be read, we cannot say about what kind of treaties they had during the trade. But the usage of seals and the involvement of inter-civilizational trade confirm there were some treaties between them, particularly with the Sumerian Civilization.

The later period of Vedas mentioned about slaves as Dasas or Dashus in the Vedic literature. The code of Manu, which speaks little about foreigners,[55] strictly strengthened the slave-owning society of ancient India based on caste hierarchy and the exploitation of lower castes by the upper castes Brahmin, Kshatriya and Vaishya under the authority of the Vedic religion. The Sudras who come as the fourth category where meant to work for the above three castes without any remuneration or benefit reminding the slave society of Rome. According to Manusmriti, there are seven kinds of slaves: a man captured in war, a man who makes himself a slave to receive food, a slave born in the house, a purchased slave, a gifted slave, a hereditary slave, and a man enslaved for punishment.[56] Even the indebted persons were slaves. The story of King Harichandra who sold his wife and son as a slave as well sold himself later explains about the inhuman system of slavery in ancient Vedic India.

Worse than this the Panchamas or the outcast, who were not even allowed to come in front of the upper castes can defile them by look and touch. This, inhuman practice of untouchability is still practised in a semi feudal society like India. The slavery was

[55] The Code of Manu says Brahmins obligations to provide hospitality to foreigners.
[56] Manu, *The Law Code of Manu – A new translation by Patrick Olivelle,* p.153.

justified by the code of Manu. Instead of critically looking at Manu, Judge Nagendra Singh praises Manu as one of the greatest among the law-givers to mankind.[57] He argues that Manu has given his code of law not for any particular nation or state but for the entire humanity. In the eyes of Manu, the whole humanity is not equal to each other. In reality, there is no concept of whole humanity in the code of Manu. He differentiates humanities into different Varna as we have seen above. The ancient concept of Dharma is nothing but Varnasrama Dharma where everyone has to follow their duty imposed upon them. Nagendra Singh cleverly translates 'Jatidharma' as community law (more relevant translation can be caste) while speaking about different kinds of customs and laws like Lokachara as the local custom, Kula dharma as family law and Deshdharma as the law and usage of governing a country. Varnasrama Dharma is the basic for all these dharmas. Varnasradharma will explain what would be the dharma for family, a country, and the local custom. What is a Dharmasastra? Let's hear it from the voice of Valmiki in Ramayana. Dasaratha was hunting one day and carelessly threw an arrow, and it hit Karana, the son of a sage. Karana was about to die, and through Valmiki, he explains the true nature of Dharmasastra to Dhasaratha, 'Oh King! Perhaps you are worried that the sin of killing a Brahmin will affect you. I am not a Brahmin, you know! I was born to a Sudra woman and a Vysya man. The sin of Killing a Brahmin will not affect you. Take heart! Don't Worry!'[58] and died. Thus the traditional codes of Dharmasastra do not treat all human beings equally, and they have a different rule for different castes, and the Manu Dharma is such dharma.

It is often glorified that the Vasudhaiva Kutumbakam in the Maha Upanishad stands for the universal brotherhood. The translated meaning is of 'the world is one family'. Vasudhaiva refers to Lord Mahavishnu, the protector of the world. The Maha Upanishad is considered to one of the Vaishnavite text. It contends with the other gods like Shiva and Brahma and concluding Vishnu is above all the gods (Family with hierarchy?) Historical Materialism says the family is the smallest exploiting unit while the state is the biggest. Hence family does not mean everyone has to be equally treated. In this Vasudhaiva Kutumbakam there is no place for the lower castes, particularly for Sudras and Untouchables.

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[57] Encyclopaedia of public international law 7, p.240.
[58] Ranganayakamma, *Ramayana – The Poisonous Tree*, p.20.

Judge Nagendra Singh quotes Manusmriti's rules of war as very humanitarian.

> 'Manu lays down: "one who surrenders or is without arms or is sleeping or is naked, or with hair untied [i.e. unprepared] or is an onlooker (non-combatant) must never be killed", irrespective of whether he was a believer (Arya) or an alien non-believer (Yavana) or whether he was fighting a just war or not (Manusmrti, VII, 91, 92). The dictates of humanity coupled with universality of application irrespective of religious or political considerations promoted the development of the law of war in ancient India on a basis as it is known today.'[59]

Actually, in Manusmriti it was laid as the duty of the king not to kill the above-mentioned person. At the same time, the other primary duty of the king is to protect the Varna at any cost. King cannot be from other castes but exclusively from Kshatriyas. Following these principles, Rama killed Sambhuka, a Sudra who started reading and learning which was forbidden and only belong to the upper castes. Mercy at war towards the non-combatants but cruel to the one who started reading and questioning the Vedas? What is the connection between these? In battle, only one Varna is involved that was the Kshatriyas. Hence killing another Kshatriya has to be justified. It's not applied universally. Nagendra Singh in the same page accepted that the people outside civilisation can be treated differently. He justified killing of Ravana as a Demon king who waged an unjust war. Surprisingly Justice Nagendra Singh believes in mythology and the existence of Demons. Modern research has proved that the people who were called demons and apes where the indigenous people of this country. Valmiki Ramayana says Ravana has a well-established kingdom. Surpanaka, the sister of Ravana was the authority of the northern part of his kingdom. We can compare it to contemporary governorship of a state. When Rama and his family were roaming around, she had every right to interrogate them. But she was humiliated, and her organs were mutilated by saying that she tried to kill Sita and trying to seduce Rama. Rama was following the so-called Dharma and can't treat a woman as equal to men, and the society shifted from the matriarchal to patriarchal in the Vedic times. Manusmriti is an example of how women were treated as a property among other things. Article 96 says 'Chariots and horses, elephants, parasols, money,

[59] Encyclopaedia of public international law 7, p.240.

grain, cattle, **women** (emphasis mine), all sorts of (marketable) goods and valueless metals belong to him who takes them (singly) conquering (the possessor).'[60] The king has the jurisdiction in his territory to allow and disallow certain kind of things. When Rama was protecting the yagas (Vedic fire ritual) done by the Rishis, it is said in Ramayana that the Rakshasas disturbed them. Vedic yagas were not only opposed by Ravana's Governors and Generals but Buddha and Buddhism too in the later period. Vedic Yagas are a particular culture of the Vedic Aryans, which is still followed, and a Brahmin can only perform that. Justice Nagendra Singh while praising the Kingship of Rama escapes from mentioning the coward act of Rama by killing Vali from behind the tree, which is totally forbidden in the just war and even there is a mention in Manusmriti that a king cannot kill the one who is fighting with another (Article 92). But maybe that Manusmriti is arguing rightly because the Dharma or Justice of Manusmriti of righteous war is only with the person of same Varna. As Sukriv and Vali were considered as Apes, Ram could do that unjust. Here Justice Nagendra Singh writes about just and unjust war (Dharma Yuddha and Adharma Yuddha). Hence with Vali what kind of warfare Rama did. Is it unjust to kill a person who is not aware of the hidden, unexpected enemy and fighting with someone else? Better Justice Nagendra Singh does Justice for this question. The literal translation of Dharma Yuddha and Adharma Yuddha can be translated as just and unjust war. The ancient 'just war' can be 'just' to a particular class of people and 'unjust' to a particular class of people. In India, the 'just war' can be made to protect the Varna. In Mahabharata, Arjuna got confused during the Kurukshetra war particularly on this factor of mixing of Varna. His primary question to Krishna was about the mixture of Varna when the Kshatriya clans killed each other in the war. The conversation between Arjun and Krishna runs as follows:

> Kulakshaye pranashyanti kuladharmaah sanaatanaah; Dharme nashte kulam kritsnam adharmo'bhibhavatyuta.
>
> 40. In the destruction of a family, the immemorial religious rites of that family perish; on the destruction of spirituality, impiety (Adharma) overcomes the whole family.

[60] Manu, *The Laws of Manu*, translated by George Bühler, p.68.

COMMENTARY: Dharma pertains to the duties and ceremonies practised by the family in accordance with scriptural injunctions.

Adharmaabhibhavaat krishna pradushyanti kulastriyah; Streeshu dushtaasu vaarshneya jaayate varnasankarah.

41. By prevalence of impiety (Adharma), O Krishna, the women of the family become corrupt and, women becoming corrupted, O Varsneya (descendant of Vrishni), there arises intermingling of castes!

Sankaro narakaayaiva kulaghnaanaam kulasya cha; Patanti pitaro hyeshaam luptapindodakakriyaah.

42. Confusion of castes leads to hell the slayers of the family, for their forefathers fall, deprived of the offerings of rice-ball and water.

Doshair etaih kulaghnaanaam varnasankarakaarakaih; Utsaadyante jaatidharmaah kuladharmaashcha shaashwataah.

43. By these evil deeds of the destroyers of the family, which cause confusion of castes, the eternal religious rites of the caste and the family are destroyed.[61]

The first question has to be observed carefully. The Kurukshetra war in Mahabarata is accepted as a war between Dharma and Adharma. But here Arjun surprisingly called the war as an unjust war, and the Dharma will be destroyed if the war is fought. Krishna answered Dharma would be lost by anyway. In the next question, he gives a definition of Dharma and elaborates how Dharma can be destroyed by 'admixture of castes'. Hence it can be concluded that the 'Dharma Yuddha' is the one which is waged to protect the 'Varnasrama Dharma' and 'Adharma Yudhha' is the one which will make the Varnasrama Dharma collapse. Justice Nagendra Singh glorifies the dharma concept in Manusmriti, and he even accepts giving punishments to uphold Dharma. Varnasrama dharma is the real meaning of dharma here. Quoting the incident of Sambhuga's murder as a punishment provided by Rama to defend the Dharma can be a suitable example. As Jawaharlal Nehru and other scholars argued

[61] Sri Swami Sivananda, *Bhagavad-gita*, p.15.

that Ramayana and Mahabharata are nothing but a struggle between the invading Aryans and the indigenous Dravidians as well the ancient Naga tribes. Hence international law in those periods should be looked carefully with the above-mentioned factors.

In ancient India, the unique concept of Varna system is the system of slavery. It is called unique because the slavery was imposed by birth and only in the rebirth a person can attain liberation from slavery. In Greek too we can see this kind of system that Greeks can enslave Non-Greeks, but was not continued for long. Another example can be of the Whites treated Blacks as slaves. The slavery in Greek and the later form of Europeans treating Blacks as slaves becomes part of the history. In India because of the rigid caste system this inhuman practice is still followed as caste is not abolished legally and practically.

## 4. International Law in Feudal Era

In this chapter, we will mostly concentrate on the formation of feudalism in Europe. Though feudalism developed in many parts of the world including Asia and remained for a long time even after the formation of capitalism in Europe, the classical feudalism developed in Europe only.

### 4.1. Economic Factor

After thousands of years of slavery, feudalism came into existence. Will Durant define 'feudalism was the economic subjection and military allegiance of a man to a superior in return for economic organisation and military protection'[62] Marxism defines feudalism as the third form of ownership with feudal or estate property [63] consists of feudal lords and serfs. In this age, the land becomes the primary means of production. Cultivation of large scale of land developed. Human exploitation was not stopped; instead, they were added along with the vast agricultural land, which turns into primary means of production. The scale of productive land is according to the availability of human labour and instruments of production. Less human with

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[62] Will Durant, *Age of Faith*, p.553.
[63] Marx, Engels, Lenin, *On Historical Materialism,* p.21.

imperfect instruments of production could not be possible to cultivate a vast area of land. In the period of 680 A.D to 1500 A.D the rice production was increased in China. The reason for that is the invention of new technology. This technology later came to Europe which was the improvement in harnessing of animals in the plough. Now horse was used instead of Oxen. Another notable improvement was the change in the technology of the sharp blade at the tip of the plow. It was designed to turn the soil with a minimum drag where the European plow was of simply pushing the soil. Again this technology too came from China to Europe.

The improvements in plough technology lead to the cultivation of large area possible. There comes the next problem of human labour. In the beginning, slaves were appointed to do labour in this large cultivable land. To supervise the slaves, a lot of supervisors were required, because the slaves were naturally not interested in increasing the production. The reality was that the slaves would get nothing out of the increased production. In the meantime the increased incidents of slave revolts also let the masters think. It was necessary to find out a cheap method to increase the production; the serfdom came into existence. The serfs were allowed to keep a part of the production, and the rest has to be given to the landlord. The political conditions changed according to the serfdom.

### 4.2. Political Factor

The Roman Empire was divided into Eastern and Western Roman Empire. During the period of Constantine, Christianity becomes the religion of the state. In some time the Western part of the Empire was begun to disintegrate, and some small states were like Germanic Kingdoms, Burgundians on the Middle Rhine, Tolosan Visigoths in south-west Gaul and the Vandals in North Africa formed. To keep them intact the new states were maintained the legal position of foederati but did not continue for a long time. Coming to the Eastern Side, the code of Justinian, enacted by the Eastern Roman Emperor Justin had the seeds of the emerging feudalism. Justinian ruled the Eastern Roman Empire from 527 A.D to 565 A.D. He made peace treaties such as Treaty of Perpetual Peace in 532 A.D and the 50-year peace Treaty in 562 with the Sasanian Emperor Chosroes I or Khosrow I of Persia. Though the first treaty was violated, the second one continued for a long time mainly because the Persians did not want to lose

the annual payments made by Rome. The payments were made for the Persians in defence of the Caucasian passes against the Central Asian Tribes who were a threat to both. With the help of that peace, Justinian tried to restore and reform things inside his Empire, which lead to the codification of laws. The code gave primary importance to the Christian religion and Roman Church and ordered all Christian groups to submit to her authority.[64] Earlier the freed slaves were considered as a separate community in the ancient period. But Justinian gave their rights in par with the independent man, and he can become a Roman citizen so that immediately can go and work with a landlord. The code of Justinian speaks about different classes of the exploited. It says

> '3. Freedmen were formerly divided into three classes. For those who were manumitted sometimes obtained a complete liberty, and became Roman citizens; sometimes a less complete, and became Latins under the lex Junta Norbana; and sometimes a liberty still inferior, and became dedititii, by the lex Mlxa Sentia. But this lowest class, that of the dedititii, has long disappeared, and the title of Latins become rare; and so in our benevolence, which leads us to complete and improve everything, we have introduced a great reform by two constitutions, which re-established the ancient usage; for in the infancy of the state there was but one liberty, the same for the enfranchised slave as for the person who manumitted him; excepting, indeed, that the person manumitted was freeborn. We have abolished the class of dedititii by a constitution published among our decisions, by which, at the suggestion of the eminent Tribonian, quaestor, we have put an end to difficulties arising from the ancient law. We have also, at his suggestion, done away with the Latini Juniani, and everything relating to them, by another constitution, one of the most remarkable of our imperial ordinances. We have made all freedmen whatsoever Roman citizens, without any distinction as to the age of the slave, or the interest of the manumittor, or the mode of manumission. We have also introduced many new methods by which slaves may become Roman citizens, the only kind of liberty that now exists.'[65]

The code of Justinian treated slaves in a liberal way, and chances existed for the slaves to become a free citizen. It was liberal enough, even sometimes that if the landlord gives consent; a slave can marry a free woman. It is written that 'it is certain

[64] Durant, *Age of Faith,* p.112.
[65] Thatcher, Oliver J. (eds), *Library of original sour*ces, Volume 3, p.105.

that the relationship of slaves is an impediment to marriage, even if the father and daughter or brother and sister, as the case may be, have been enfranchised.[66]

For rape, the punishment was the death sentence, and it won't differentiate a slave woman and free women. In his code, it was explicit about binding the man with the land. Without the permission of the landlord, if a serf becomes a priest or runaway, he can be brought back like a slave. A peasant who worked on a piece of land for 30 years can't get separate from the land. With his descendants, to remain forever attached to the land. If an independent peasant situation was this; we can imagine the situation of the serfs.[67]

When a master slave is replaced by landlord and serf, it needed a new state structure. A kind of pyramid-like structure was formed. The king at the top of the pyramid and serfs at the end of the pyramid was created. In between were the nobles, vassals, landlords and independent big peasants. 'When the Roman system of colonial administration was replaced by feudal system practically eliminated the corporate personality of the individual state by identifying political authority with land tenure.'[68]

Thus, the alteration brought the individual to the direct dependence upon his landlord rather bound by the more comprehensive and abstract law of the state earlier in ancient society. The king had no responsibility towards the serfs and independent big peasants. Fenwick describes that

> 'the internal organisation of the state was fundamentally altered by reducing the individual to a position of immediate dependence upon his overlord, to who he owed personal allegiance, whereas before he had been bound by the more comprehensive and abstract law of the state. The state thus ceased to be based upon a community of interest between citizens and became a successive series of personal relations to the feudal lord.'[69]

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[66] Library of original sources, Volume 3, p.108.
[67] Durant, *Age of Faith*, p.113.
[68] Fenwick, *International Law*, p.11.
[69] See ibid., p.11.

Both ends of the pyramid were turned into two different poles. The nobles had the responsibility towards the king to organise and collect soldiers during war times as a military service. Hence king had the responsibility towards the nobles. The serfs were left to the mercy of the nobles. A noble was not only a land owner but also an administrator and a judge delivering justice. The serfs were dependent on the nobles as the representative of the legal and administrative power.[70] The serf's situation was better than the slaves. Comparing to the slave-owning society this society was progressive. Serfdom is hereditary that it continued from generations to generations. The feudal laws somehow protect some of the rights of serfs considering him as a human being. Fenwick claims that there was the least possibility of the development of the law of nations as well as domestic law because of the fewer community feelings among the feudal states. But the Soviet scholar Korovin contends this fact and argues that the legal relations between states were at a more advanced stage than in the slave-owning period.[71] The reason he gives is that because of the disintegration of the Roman state many new states comes into existence. Hence Feudal society's legal relations are better than the slave owning societies. In the beginning, Fenwick was correct about the least development of international law, but very soon the international law developed and reached its peak in the Treaty of Westphalia. After the disintegration of Roman Empire, there were no central and local administrations, because of the Kings handed over the management to the feudal lords or nobles. This power gave the nobles to attend the local assemblies where the legal proceeding where conducted. The nobles maintained law and order in the particular area. As a reward for this service, the nobles get the revenue received from penalties. In the height of classical feudalism, the king was *primus inter pares*. He was just an inch above the princes, dukes, marquises and counts and dependent on the feudal lords during war and peace. To please them the king granted more and more estates to them. He could not even interfere or prevent the feudal lords when they minted their coins, have their courts and police. Worse than this the nobles made independent treaties and separate war without the concern of the king.[72] Meanwhile, as the feudal lords could not maintain order among themselves and they need a superior authority to maintain order between them, they needed a king. Another factor was that the

[70] *Short history of the world*, Institute of History, Academy of Sciences of the USSR, p.146.
[71] Korovin, *International law: a textbook for use in law schools*, p.31.
[72] Durant, *Age of Faith*, p.565.

continuous wars like Crusades, the Hundred Years war, and the war of the roses drain the feudal lords' blood [73] which continued the monarchy. The territory of the feudal kingdoms extended to a large area due to the conquest of new lands by war. The population, which was widely spread and scattered, contrasted with the ancient society. The old society starts from the town and related areas, but the middle ages start from the countryside.[74]

### 4.3. Influence of Religion

When the change of economy took place from ancient to feudal society, the ideology of religion had to change. The gods of the ancient society had to fall with the fall of the ancient society. The Roman gods were confined only to the city of Rome. There was a need for an adaptation of a universal institutionalised religion, to make Rome, a global empire. Christianity satisfied this purpose of bringing the universal unity. In 800 AD, Charlemagne as Emperor of the Western Roman Empire was coronated by Pope Leo III. He was recognised by the Easter Roman Emperor Michael 1 in the Treaty of Aix-In-Chapelle, and the Frankish Empire was not a universal Empire like Rome. In the name of bringing universal peace and order, the bond of Christian faith was required to support the empire. The pope was able to promise the Western world and the new Emperor, peace and unity among the people and the feudal lords. The Emperor and the Pope held the temporal sword to make the rebellious individuals to obedience and spiritual sword to enforce the observance of those universal principles of morality that lay behind the law respectively. Engels stated:

> ‘The need to complement the world empire by means of a world religion was clearly revealed in the attempts made to recognise all foreign gods that were the least bit respectable and provide altars for them in Rome alongside the native gods. But a new world religion is not to be made in this fashion, by imperial decree. The new world religion, Christianity, had already quietly come into being, out of a mixture of generalised Oriental, particularly Jewish theology, and vulgarised Greek, particularly Stoic philosophy. …In the Middle Ages, in the same measure, as feudalism developed,

[73] See ibid., p.565.
[74] See ibid., p.21.

Christianity grew into the religious counterpart to it, with a corresponding feudal hierarchy.' [75]

According to him the law, as well as the international law, is attached to the religious ideology as a subdivision. 'The class monopoly, which had at first been imposed by mere practical necessity, began to pass into law.'[76] The character of feudal society is the domination of religion more than the ancient society. Religion, in the way of religious institutions like Church, played a greater role in forming the structure of jurisprudence, politics and ideology. The personal relationship to the feudal lord developed against the community of feelings between the citizens, as well as the feudal states. It leads the way for the development of treaty and ambassadorial law. Except by war, the feudal lords could not obtain more land, leading to the extensive use of force and the regulation of war. The Church played the role here by way of mediation and arbitration between the Princes and Feudal Lords in times of disputes. As we have already seen the binding force of the church was moral rather political. It leads to the highest record of arbitral cases decided either by Popes themselves or under their influence where the petty dynastic wars were all too frequent.[77] In 1190 Gerhoh of Reichersburg proposed that the Pope should forbid all wars among Christians and that all disputes among Christian rulers should be submitted to Papal arbitration.[78] Another important reason was that the Church itself needs to protect its property from these frequent feudal wars. Institutions like 'God's peace' or 'God's truce' (pax or treuga Dei) were created, which led to the forbidden of fighting wars on particular days.[79] Durant narrates that at a particular time the kings and princes want peace from the frequent wars. Church along with the Norman dukes worked in bringing peace. Church organised Church Peace Councils from 989 to 1050 A.D in France and decreed *Pax Dei* or Peace of God and warned against violence and excommunication if somebody involves in it. The peace movement by the Church in France called all the Princes and Dukes to join the movement to outlaw war. It was expected to get success within five years of time. The Church following the Islamic culture of the prohibition of war during the pilgrimage, it prohibited war during the

[75] Marx, Engels, Lenin, *On Historical Materialism*, p.235.
[76] Bloch, *Feudal Society Social Classes and Political Organisation*, p.10.
[77] See ibid., p.12.
[78] Durant, *Age of Faith*, p.572.
[79] Korovin, *International law: a textbook for use in law schools*, p.32.

harvesting season. The ‘Truce of God' allowed 80 days of the war in a year. This helped in decreasing the war between the nobles and let to the increase of international wars.[80] Certain arms were restricted in the wars targeting against two of the antagonistic classes. The Lateran Council prohibited the use of firearms mainly because it was made by the urban growing capitalist. The bows and Arbalests were banned because these were the weapons available to the serfs and were directed against the peasant revolt.[81] As we have seen in the ancient society, the wars happened for the slaves, and now, the feudal wars happened for the agricultural land. These feudal wars also helped to grow the budding nationalisms among the European nations.

Christianity comes to existence during the ancient times of slavery. It accustomed slavery as part of it and justified it. Later during the feudal period St. Thomas Aquinas argued and defended slavery that man becomes a slave because of the sin caused by Adam, and some must toil so that others may be free to defend them. It is more in the line of Aristotelian differentiation of Greeks and Non-Greeks. [82] The religion as a superstructure does not hesitate even to use the pagan philosopher's ideology to defend the base. No wonder serfdom continued as part of the institution of the Church. The Canon Laws calculated the wealth of Church by counting the serfs instead of money. The captivities of war were distributed to the monasteries. ‘This canon law was taught in the schools, which were completely in the hands of the clergy. Secular law was nowhere included in the curriculum. It is true that knowledge of the old law-books would not have been completely lost if a legal profession had existed. But the procedure did not call for advocates, and every chief was a judge. This meant in practice that the majority of judges were unable to read—a state of affairs unfavourable to the maintenance of a written law.’[83] Hence we can say the main ideological force in feudal society, and the largest feudal ruler was the Catholic Church. A period of upheaval and political instability covered Europe with the fall of Rome and its empire. Alliances were formed on the local level due to the threat from the north and east. This led to the formation of an early version of feudalism. The kings and nobles exercised control over relatively small areas due to the unstable

[80] Durant, *Age of Faith*, p.572.
[81] Korovin, *International law: a textbook for use in law schools*, p.33.
[82] Durant, *Age of Faith*, p.334.
[83] Bloch, *Feudal Society, The Growth of Ties of Dependence*, p.110.

conditions after the Roman *pax romana* ended. In exchange for protection and security, the local peoples swore loyalty to a noble or a king. There was a need of a universal body in comparison to *pax romana* after the failure of Rome to provide it. The Roman Catholic Church out of all the institutions of the middle ages replaced the role once held by Rome. The voice given by the Roman Catholic Church was moral but did not have the military and political power to impose orders. It had a great influence on the theory and practice of the law of nations in the middle ages. The adopted Roman law to protect the feudal property was highly influenced by the Church. The philosophers of the feudal State interpreted war as a legal duel (court of God).[84] The influence of the Church came by way of the religious philosophers such as St. Augustine and Thomas Aquinas. Augustine's distinction between just and unjust wars and Thomas Aquinas writings influenced the law of the nations, strengthening the authority of the Catholic Church and papal authority that covers the sanctity of treaties, the right to make war, and arbitration of disputes.[85] Augustine argued that only legitimate rulers for the right reasons can fight a war to bring peace and was the first one to reject the theory that victory is the evidence of a just war, a judgment by God. Most of his ideas about international law got some recognition in the code of Justinian.

The Canon Law theory – 'the law of the rule' of Church was a slow accretion of old religious customs, scriptural passages, opinions of the Fathers, laws of Rome or the barbarians, the decrees of Church councils and the decisions and views of the Popes.[86] The Justinian code of conduct was also included as part of the clergy. The Canon law not only dealt with the civil matter but issues of regulation of war, particularly of the Crusades. Gratian, a monk of Bologna, too contributed the Canon Law. St. Augustine's ideas could not influence his contemporary period, but later Aquinas and Gratian developed these ideas. These ideas become the core of the Christian International law. Gratian developing the concepts of Old Testament (Romans 13, 4: 'But if you do wrong, be afraid, for he [who is in authority—here referring to the party waging war justly] does not bear the sword in vain; he is the servant of God to execute his wrath on the wrongdoer') and argued that waging war is not a sin, if the

[84] Korovin, *International law: a textbook for use in law schools*, p.32.
[85] War and International Law – A brief history of the law of war, Constitutional rights foundation; http://www.crf-usa.org/war-in-iraq/war-and-international-law.html, retrieved on 10.7.2013
[86] Durant, *Age of Faith*, p.754.

war is just.[87] According to him, Just war is waged to punish a wrong committed by the other party and in self-defense. For St. Thomas war could only be just if three conditions were met. A lawful authority with the power to wage war must wage war. A war must have a just cause. A war must be intended to accomplish good or avoid evil. The term 'lawful authority' aims here to stop wars not only between the feudal rulers but also stops any possible arming of the serfs against their landlords. Lawful authority evolves into an important concept in international law later as sovereignty. The kings were fighting against the Emperors and the Popes for the supremacy and independence to be a sovereign in the process of the formation of national states in Europe.[88] The term 'sovereignty' which is the basis for the nation-state was seemed to be developed from the writings of the Christian scholars. Hence there is no wrong in calling the modern international law as a product of Western Christian civilisation. Not only has St. Thomas intended to stop the private war among the feudal lords but also to organise the war of the 'legal authority' with the other non-believer state like Islamic states. As the church was the only power to decide what is just and what is unjust, 'just cause' could be converting the non-believers to Christianity and waging war against them if they oppose. The later thinkers like Grotius were profoundly influenced by these concepts.

The rise of Islam leads the Arabs to the formation of an Islamic State. The Arab states played a critical role in the medieval history of international law. Meanwhile, they are closely linked with the theology of Islam. Under the Caliphate of the Abbasids, legal relations were developed with the Non-Islamic States, without harming the Islamic principles. The ancient Arab practice of hospitality leads to the development of diplomacy. In settlement of disputes, arbitration resorted and in war certain definite rules were observed. Slaves converted to Islam were given freedom, but at the same time, Islam was not principally against slavery. This was also a moral blow to Catholic Church which still maintained slavery and kept hundreds of slaves in the Churches. The Islamic or the Arab culture influenced the Western world through trade but most particularly because of the crusades.

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[87] Encyclopaedia of public international law 7, p.147.
[88] Korovin, *International law: a textbook for use in law schools*, p.33.

## 5. International law in the Capitalist Era

The capitalist era of international law starts from the advent of capitalism, followed by colonialism, imperialism and so on. Chimni divided the modern international law according to the historical materialism into four phases. First, the transition from feudal to the bourgeois international law from the period of 1600 - 1760 called as old colonialism. Second, the bourgeois colonial international law from 1760 - 1875 called as the new colonialism. Third, the bourgeois (imperialist) international law from 1875 - 1945 called as the imperialism. Fourth, the bourgeois democratic international law from 1945 onwards called as the neo-colonialism. Even though after 1945 some states remained in neo-colonialism, but most of the third world were semi-colonial countries. The colonial masters were replaced by the comprador class of the (pseudo) independent third world countries, which were not in counter opposition to the imperialists but as their junior partner.

The feudalism or as the mainstream ‘medieval ages' fall because of the end number of factors starting with the failure of crusades, the link with Islam, the loss of Constantinople, Voyages of Columbus, a challenge to the Pope's authority by the nation states, printing machine, etc. The growing peasant war all over Europe in the 14$^{th}$, 15$^{th}$, 16$^{th}$ century marked the end of dying feudalism. The peasant war of Germany in 1524, showed the unrest of the serfs against their feudal lords. The emergence of Protestant religion side by side challenged the authority of the church. All these factors played a decisive role in shaping international law. The modern international law is strictly connected with the formation of nation-states and the colonialism. But which made the necessity of the formation of nation states and the need to the discovery of new lands? There arises a new mode of production called the capitalism. As we have seen in the last part, the capitalist features were emerging during the period of feudal absolutism.

### 5.1. Economic Factor

The development of modern international law is firmly connected and greatly influenced by the capitalist mode of production. After the French Revolution and the like bourgeois revolutions all over Europe, it was declared the sovereignty of the people in place of sovereignty of the feudal monarch. After the invention of spinning

jenny and steam engine, the change in the instruments of production, revolutionised the means of production led to the industrial revolution, first in England and later Europe. Marx said about the English factory act enacted after the industrial revolution, to strengthen the capitalist production, that they are, 'just as much the necessary product of modern industry as cotton yarns, self-actors and electric telegraph and they develop gradually out of the circumstances as natural laws of the modern mode of production.' [89] Marx according to historical materialism explains the history of the development of courts and the increase of powers of them, when the forces of productions and the production relationship developed. He categorically describes how the association of juridical relationship and the production relationship coming together. In his words,

> 'How close is the connection between juridical relationships and the development of these material forces arising out of the division of labour, is evident from the example of the historical development of the power of the courts and from complaints of feudal seigneurs against the development of the law. It was precisely in the transitional epoch between the dominance of the aristocracy and the dominance of the bourgeoisie, when the interests of both were clashing when trade relationships between European races were growing, and international relationships began accordingly to take on a bourgeois character that the power of the courts began to increase. It attains the highest point under the dominance of the bourgeoisie when this broadly developed division of labour becomes absolutely necessary. What those in bondage to the division of labour, the judges, or – most particularly – the professors of law, conceive therein is a matter of the utmost indifference.'[90]

The technological developments of the instruments of production made revolution in the production. The surplus is created with the help of raw materials from the colonial world. It was sent back as produced goods to the large markets in Asia, Africa etc. The accumulation of capital happened in Europe in the beginning. Colonialism became the means to increase the profit.

### 5.2. Political Factor

The bourgeois concept of liberty in the real sense, it is 'liberty' for the serfs from their landlords and their bonds to the lands. '[Liberty] Freedom in capitalist society always

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[89] Marx, *Capital,* Vol 1, p.451.
[90] Vyshinsky, *The Law of the Soviet State*, p.15.

remains about the same as it was in the ancient Greek republics: freedom for the slave-owners.'[91] Liberty means freedom to choose their means of livelihood by working in an industry as the working class. French revolution that was bourgeois revolution creates the famous saying of liberty and equality. These rights are not founded on the relations between man and man but rather on the separation of man from man. Rousseau in his Social Contract went to extreme saying, 'to be driven by appetite alone is slavery, and obedience to the law one has prescribed for oneself is liberty.'[92] He contends liberty is provided by law and not by disobedience to it. On the other hand, Marx developed a theme of opposition between the political state and civil society and analysing this with the difference between political rights and the rights of man; the so-called 'natural rights' of liberty and equality in the French and American constitutions. He clarifies that the bourgeois ideas of liberty and equality are not the liberty and equality of man but the liberty of property and security of his property. Liberty is explained in these constitutions simply as non-interference in his private property. It is the liberty of the bourgeoisie to develop his profit and exploitation. 'Equality is nothing but a hollow phantom when the rich, through monopoly, exercise the right of life and death over their fellow creatures. The right to existence prevails over the right to property.'[93] Saint-Simon, utopian socialist and a predecessor of Marx, 'totally rejected the French Revolution's principle of liberty and equality as individualist and leading to competition and economic anarchy.'[94] The limits drawn within each individual can act without harming others determined by law, just a boundary mark between the two fields. The right of property is similarly, a right of self-interest and 'leads every man to see in other men, not the realisation, but rather the limitation of his own liberty.'[95] What we meant by equality is the freedom for the free competition without the intervention of the state. The open competition was considered as part of the 'natural law' by the overwhelming majority of the economists at the period of Marx, where Marx correctly points out that 'free competition gives rise to the concentration of production, which, in turn, at a certain stage of development, leads to monopoly.'[96] Thus, the idea of freedom of seas developed and consolidated in Grotius (1583-1645) much-celebrated book *The*

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[91] Lenin, *State and Revolution*, p.72.
[92] Rousseau, *Basic Political Writings*, p.151.
[93] Soboul, *Understanding the French Revolution*, p.154.
[94] Hobsbawm, *How to Change the World- Marx and Marxism 1840-2011*, p.28.
[95] Bottomore, (eds)., *Karl Marx Early Writings,* p.10.
[96] Lenin, *Imperialism, the Highest Stage of Capitalism,* p.20.

*Freedom of Seas* published in 1609, it should be looked in the light of the bourgeois concept of freedom. Equality in a bourgeois sense equally exploits the seas without any hindrance or obstacles from the state. His freedom particularly insists for the freedom of trade and travel.[97] 'His broader framing of the argument also ensured that *Mare Liberum* would be understood as a general statement of the right to freedom of trade and navigation.[98] Grotius extended this equality to non-Christian nations as well.[99] When Grotius wrote the book on *The Law of War and Peace* (*De jure Belli et pacis*) published in 1625, he expressed the interest of the bourgeoisie that was coming to power. The book was on the list of prohibited books until the 20th century because of its anti-cleric position and Catholicism.

After the industrial revolution in England, the French Revolution was the sudden change of feudal French monarchy into a bourgeois parliamentary representative assembly, which greatly influenced the international law. Albert Soboul writes that 'the French Revolution, along with the English revolutions of the 17th century, constitutes the crowning achievement of a long economic and social evolution that made the bourgeoisie the master of the world.'[100] As England and France, the bourgeois revolution happened in Holland (1566-1609) and America (1775-1973) which expressed the interest of the new ruling class, the bourgeoisie. The new principles of international law were reflected in the declarations of Constantin-François Volney, Henri Grégoire and Maximilien Robespierre in the revolutionary French constitution. The territory of Avignon was declared as a part of France, because of its inhabitants spoke the French language, and was a direct infringement of international law since the territory belongs to Pope for many centuries.[101] In the subject of international law, state territory, citizenship, and law and customs of war and other concepts were interpreted in new ways that challenge the authority of Pope. The French constituent assembly openly disregarded the earlier treaty obligations.[102] It declared, 'that pre-revolutionary treaties could no longer be regarded as binding upon France. This was on two grounds: they had been agreed between what were now

[97] Grotius, *The Freedom of the Seas or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade*, p.8.
[98] Grotius, *The Free Sea*, p.xv.
[99] Chimni, *International law and World Order*, p. 227.
[100] Soboul, *Understanding the French Revolution*, p.15.
[101] Morse, *A History of French Revolution,* p. 418.
[102] See ibid., p.418.

deemed to be illegitimate rulers and they had not received the express consent of the French nation. Both arguments were advanced on numerous occasions in the first four years of the Revolution whenever an existing treaty appeared to obstruct French interests.'[103] The sovereignty of the people was proclaimed in place of the sovereignty of the feudal monarch. The feudal concept of 'subject' gave way to the idea of the citizen; not only with responsibilities towards state and other individuals but also with his rights to contribute to the expression of the general will of the people. The formulation of the principle of 'non-intervention' in international law was adopted in the revolutionary constitution of France. Article 119 of the French Constitution of 1793 declared that the French people 'do not interfere in the domestic affairs of other nations and will not tolerate interference by other nations in their affairs.'[104] Henri Grégoire often referred to Abbé Grégoire, a revolutionary presented the 'Declaration of the rights of the peoples' in the National Convention, consisting of 21 articles. It said that in time of peace, 'peoples must do as much good for each other as possible and in times of war as evil as possible'; 'everything that is being used harmlessly and without depletion, such as the sea, belongs to all and cannot become the property of any one people'; 'treaties among peoples are sacred and inviolable'.[105] 'The Declaration clearly implied, as universal norms, that the only fully legitimate states were those in which basic rights were guaranteed, that state sovereignty belonged to the people, and that popular consent was required to validate any laws. To these central ideas about the nature of legitimacy both in the state as such and in obligations undertaken by the state was added the later principle that a state had the right to exist within its 'natural boundaries'.'[106]

The birth of modern international law can be sensed only through the changing nature of the historical situations or real material conditions such as the industrial revolution,

[103] Armstrong, *Revolution and World Order - The Revolutionary State in International Society*, p.209.
[104] The Constitution of 24 June 1793 (French: Acte constitutionnel du 24 juin 1793), also known as the Constitution of the Year I, or the The Montagnard Constitution (French: Constitution montagnarde), was the constitution instated by the Montagnards and by popular referendum under the First Republic during the French Revolution. Drafted by the Committee of Public Safety which was enlarged with the purpose of producing it, the text was presented to the National Convention on 10 June and subsequently accepted by that body on 24 June. 1793 See the web link for the whole text of the constitution. Retrieved on 10.7.2013
http://oll.libertyfund.org/index.php?Itemid=264&id=862&option=com_content&task=view
[105] See further, ibid., p.418.
[106] Armstrong, *Revolution and World Order - The Revolutionary State in International Society*, p.209.

the bourgeois national revolution all over Europe, the religious war between Catholic and Protestant religion, the development of norms such as liberty and equality.

### 5.3. Influence of Religion

The rise of the new class named bourgeoisie needs a new religion, for which the protestant religion served its purpose. Like Christianity serviced to feudalism, in the same way, Protestant became a catalyst of capitalism in opposition to feudal Catholicism.[107] Engels explained:

> And when the burghers began to thrive, there developed, in opposition to feudal Catholicism, the Protestant heresy…The Middle Ages had attached to theology all the other forms of ideology — philosophy, politics, **jurisprudence** (emphasis mine) — and made them subdivision of theology.'[108]

Engels has noted that 'the ineradicability of the Protestant heresy correspond to the invincibility of the rising burghers. When these burghers had become sufficiently strengthened, their struggle against the feudal nobility, which till then had been predominantly local began to assume national dimensions.'[109] Calvinism which is a part of the Protestant Christianity played a significant role. 'Calvinism justified itself as the true religious disguise of the interests of the bourgeoisie of that time' observed by Engels[110] may be noted here. Max Weber further elaborates this in his book, *The Protestant Ethic and the Spirit of Capitalism*. He noted the fact that in modern Europe business leaders and owners of capital, as well as the higher graders of skilled labour and even more the higher technically and commercially trained personal of modern enterprisers were overwhelmingly Protestant.[111] After the origin of the Protestant religion, the separation of the state and Catholic Church increased. The nation states grow independently without the influence of Church.

The Congress of Westphalia concluded in the Treaty of Westphalia (1648) called as 'Peace Treaties' came as a significant development in international law and it is

[107] Marx, Engels, Lenin, *On Historical Materialism,* p.235.
[108] See ibid., p.235.
[109] See ibid., p.236.
[110] Marx, Engels, Lenin, *On Historical Materialism,* p.237.
[111] Weber, *The Protestant Ethics and the Spirit of Capitalism,* p.35.

claimed that it marked the birth of modern international law. It established permanent diplomatic relations among the states, the orientation on resolving disputes among states at international congresses, the affirmation of the independence of secular power from the spiritual power and the equality of states ended the thirty years war among the European nations (1618-1648). The very idea of modern nationalism and nationality came into the picture at that point of time. The treaty also put an end to the religious war between the Catholics and Protestants. The international law as a superstructure evolved from the base of the mode of production leads to a new religion, new norms and values to the new concepts of international law. Capitalism is comparatively more progressive than the feudal society. It destroys feudal values and voices the values of liberty and equality. The struggle against the feudal order necessitated the assertion of the equality of states and the divorce of secular from spiritual power.[112] The role played by the Church was declined at last.

## 6. The Rise of Modern International Law

The modern international law evolved mainly thorough colonialism. Albeit, capitalism originated and evolved in Europe, the modern international law formed with the encounter of the other countries of Asia, Africa and America.

### 6.1. Colonialism and International Law

Colonialism covers the earlier stage of colonialism, which is the transition from feudalism to capitalism, and mercantile, and the later stage of colonialism that developed into imperialism. The colonial period can be called as the exact time of the development of international law, because of the encounter with the third world or the colonised world. Anand R.P argues that 'much of western laws including international law, has developed in response to the requirements of the Western Business Civilization and naturally biased in their favour.'[113] Earlier the development of international law happened mostly inside the territories of Europe out of the contradiction between the feudal state and the emerging bourgeoisie. Now it came out

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[112] Chimni, *International law and World Order*, p.227.
[113] Anand, *New States and International Law*, p.44.

to sell the surplus production and to get raw materials that made the Western world to face the countries and people no way related to the Western Christian civilisation.

The Industrial Revolution in Britain paved the way for surplus production. With the industrial revolution and the production of a steadily growing amount of surplus value by the proletariat of Western Europe, the direct plundering of overseas countries became a secondary source of enrichment for the bourgeois classes of the west.[114] Thus the primitive accumulation happened in Europe, due to the emergence of capitalism, led to imperialism later which exploited the Asian resources, 'through military plunder, unequal trade and forced labour',[115] and resulted in the growth of surplus in the European countries subsequently.

At the same time manufacturing led to the search for raw materials. According to Anand, 'the demand for raw material and tropical and subtropical products such as cotton, rubber, coffee, cocoa, tea and sugar, founded new empires.'[116] The vast industrial expansion and huge profits earned from factories and trade, in turn, led to the accumulation of huge surplus capital which could not be profitably spent in Europe, thus sought investment in safe places that would return high-interest rates i.e. colonies.

Before the industrial revolution, trade was primarily an import trade into Europe of rare Eastern products like precious stones, spices, delicate fabrics, etc., and therefore it was a luxury trade. The east-west relations totally changed after the industrial revolution.[117] Now Western Europe exported manufactured goods. It was not so easy to the young capitalist industry[118] to acquire markets. India and China continued to be the chief exporters of textiles at the time. British industry succeeded in dominating the world market only by carrying on an extreme protectionist policy. The Europeans, particularly the Britain's goods were protected by high tariffs and the overseas countries products mainly from India and China opened their markets to minimum tariff levels. These were achieved not only by economic means but also by using

[114] Mandel, *Marxist Economic Theory,* p.445.
[115] Anand, *New States and International Law,* p.26.
[116] See ibid., p.26.
[117] Mandel, *Marxist Economic Theory,* p.446.
[118] See ibid., p.446.

force. The unequal treaties, which were imposed on China and India, made this possible. It enabled Britain to conquer the world market.[119] Rosa correctly argued that 'what particularly distinguishes the capitalist mode of production from all its predecessors is that it has the inherent impetus to extend automatically across the whole of the earth, and drive out all other earlier social orders.'[120]

The late colonial period witnesses the firm establishment of bourgeois order in the European countries. During this period, Britain emerged as a victorious empire of the colonised countries defeating its main rival France. The French bourgeois revolution and the other bourgeois revolutions all over Europe led to the open competition for colonies. The Congress of Vienna declared the abolition of slave trade, gave first expressions to the principle of free navigation on international rivers, regulated the rank of diplomatic envoys and introduced the system of permanent neutrality. Britain stood in favour of the 'freedom of seas' though no state can challenge her strong naval power. This democratic bourgeois international law was only within the European powers, not to the colonised world particularly to the Non-Christian world. Chimni argues that the 'bourgeois international law shrank from a universal law of nations to being a Christian law of nations.' [121] 'The slave trade might be contrary to the law of nature, but that did not mean it was contrary to the law of nations.'[122] The unequal treaties made with China led to the opening of five ports and cede Hong Kong to Great Britain after the Anglo-Chinese war of 1839-42. In Africa, four hundred treaties were made in Congo itself with the native chieftains, who were illiterate in the Western language and the import and export procedures of Europe. As Anand wrote

> 'All these half-understood treaties of cession of territory concluded by deception or under threats of force and certainly lacking free consent on the part of chiefs or rulers were considered as valid, legal and binding according to the European law of the times.'[123]

The treaties were made on the gun point literally in many cases. But at the same time, there was the least possibility the tribal chieftains would be aware of the content of

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[119] See ibid., p.447.
[120] *The Complete Works of Rosa Luxemburg,* Volume I Economics Writings 1, p.261
[121] Chimni, *International Law and World Order,* p.230.
[122] Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, p.94.
[123] Anand, *New States and International Law,* p.32.

the treaty. The valid treaty is one which gets signed without any coercion or fraud. This is the fundamental principle of treaty law. And another important concept is the idea of sovereignty. Did the Europeans consider the tribal chieftains as sovereigns? According to the Western International law, treaty has to be in between two sovereigns. The chieftains were not sovereigns according to the Europeans. Then it is interesting to know what made the colonisers make a treaty with the tribal chieftain. The reason could be though the tribal chieftain was not a sovereign the treaty signed by him would be proof against the other colonisers. It was evident that only this particular colonial power was eligible to exploit the particular geographical area and the people residing in that. Still, it led to the fight among the colonial powers in the greediness of exploiting Africa. Berlin conference of 1884 was called by Portugal and organised by Germany to settle down the disputes. Out of that the Berlin Act of 1885 was passed. After the Berlin Act of 1885, it was partitioned and subjugated, that led to the thorough exploitation of Africa. Antony Anghie argues

> 'The tensions arising from the scramble were such that the European powers held the Berlin Conference of 1884–5 to try and resolve matters. Here, diplomacy and the traditional balance of power politics combined with international law, as the imperial powers of Europe attempted to create a legal and political framework, to ensure that colonial expansion in the Congo Basin took place in an orderly way which minimised tensions among the three most powerful European states at the time, England, France and Germany.'[124]

The Berlin Act ended the autonomy and self-governance of the African tribal communities. Congo becomes the private property of the Belgian King Leopold as he acquired many treaties entered with the African Chieftains which helped him to claim sovereign rights over the lands. In return, Belgium will give access to the European powers for free trade inside the Congo. The historical joke of Non-Sovereign tribes giving the sovereign rights to the Europeans who discovered the so-called sovereignty happened. The Berlin Act through article 9 emphasised the prohibition of slavery. It abolished the slave trade from Africa by the European powers and the United States of America. Joseph Conrad in his novel *Heart of Darkness* called this act of abolishing slavery Berlin conference by the European colonial powers as suppressing

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[124] Anghie, *Imperialism, Sovereignty and the Making of International Law,* p.91.

customs of savagery [125] and what he means is the real savages where the European powers, not the African tribes. The Berlin conference and the Berlin Act could not save the European Colonisers from going into a world war within the 30 years of period. Attempts to solve the contradiction among the imperialist states failed and ended in First World War. The cause of First World War was among other things, the competition among the imperial colonial powers to monopolise the colonised continents of Asia and Africa. Germany that time was one of the super powers but had fewer colonies comparatively to its rivals England and France.[126] This resulted in the competition among the imperialist powers means the completion between the national bourgeoisies of the particular nation to exploit more than the other nation bourgeoisie. But during the colonialism, the bourgeois of the European states tried to make it legally because of the Westphalia treaty. They sought to apply the democratic rules in between them. Hence the bourgeois international law was democratic among the colonial powers.

The reason behind the bourgeois international law being considered democratic on one side (to the European countries) and most undemocratic on another side (the Third World countries) is not surprising. The compromise between the bourgeoisie to exploit the world peacefully leads to the bourgeois international law because of the threat of the competition between the capitalists. To Europe - the bourgeois democratic international law was applied; to the colonised third world - the colonial imperial international law was applied. To justify this exploitation the ideas of ‘state responsibility' primarily based on ‘civilised and uncivilised' concepts developed in international law to the ‘disadvantage of the non-European world.'[127] It is not the racial superiority that led to colonisation to develop the uncivilised world, but the mode of production, economy and exploitation led to the concept of ‘standard of civilisation' and the ‘white man's burden'.

The formula that the capitalism used to subjugate the third world countries is the age-old concept of ‘civilised' categorisation, and new ideas were developed out of the

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[125] See further, Joseph Conrad, *Heart of Darkness*, Icon Classics.

[126] Lenin, describes the First World War in his book *Imperialism, The Highest Stage of Capitalism* as ‘It is proved in the pamphlet that the war of 1914-18 was imperialist (that is, an annexationist, predatory, war of plunder) on the part of both sides; it was a war for the division of the world, for the partition and repartition of colonies and spheres of influence of finance capital, etc.' at p.10.

[127] Chimni, *International Law and World Order,* p.230.

contradiction between the colonised world and the colonial world. Therefore, the modern international law is not of a purely Western system but 'it is a dialectical result of the very process of conflictual, expanding inter-polity interaction in an age of early state forms and mercantile colonialism'[128] which developed the international law into a further stage. The international law in the colonial period developed because of the encounter with the third world which was colonised. There are two reasons for the development of international law during that time. One was to maintain the democratic international law in between the colonial powers in Europe, and the other one was out of encountering the colonised countries. To do justice according to both contradictions between the colonial powers as well as the colonised countries, the international law should be of managing both. So can we conclude that the modern international law is emerged out of the encounter with the colonised world? Yes, we can. The current international law is out of the encounter with the so-called uncivilised world of the colonised countries mostly than the contradictions among the colonised countries and the role of international law in the colonial period 'had legitimised the colonial exploitation.'[129]

### 6.2. Imperialism and International Law

In the last quarter of the 19th century, capitalism entered its monopoly phase.[130] It is an unavoidable nature of the capitalism to reach the stage of monopoly capitalism that is imperialism. The classical capitalism of Adam Smith and Ricardo finds capitalism will lead to a healthy competition in which the fittest will survive. That is the capitalist who is better will have more profit and leads the market. But by way of monopoly capitalism, the healthy competition is avoided. To continue the monopoly capitalism, it inevitably turns into imperialism. Lenin uncovered the laws and characteristics of imperialism as the highest stage of capitalism. He correctly identified the transformation of competition to the monopoly as one of the most important phenomena of modern capitalists' economy.[131] 'The uneven and spasmodic development of individual enterprises, individual branches of industry and individual

[128] Mieville, *Between Equal Rights-A Marxist Theory of International Law,* p.169.
[129] Anghie, *Imperialism, Sovereignty and the Making of International Law,* p.2.
[130] Chimni, *International Law and World Order,* p.231.
[131] Lenin, *Imperialism, the Highest Stage of Capitalism,* p.17.

countries is inevitable under the capitalist system.'[132] Lenin specifies five basic features that were central to imperialism of his times:

> (1)the concentration of production and capital has developed to such a high stage that it has created monopolies which play a decisive role in economic life; (2) the merging of bank capital with industrial capital, and the creation, on the basis of this 'finance capital', of a financial oligarchy; (3) the export of capital as distinguished from the export of commodities acquires exceptional importance; (4) the formation of international monopolist capitalist associations which share the world among themselves, and (5) the territorial division of the whole world among the biggest capitalist powers is completed.[133]

Further, Lenin said, 'typical of the old capitalism when free competition held undivided sway was the export of goods. Typical of the latest stage of capitalism when the monopolies rule is the export of capital.'[134] This is how Lenin differentiates between the old capitalism or the mercantile colonialism and the imperialism as the highest stage of capitalism - a phase in which neo-colonisation and re-colonisation follows. In international law, Lenin argues the development of capitalism through various international agreements led to the international trade law.

> 'Monopolist capitalist associations, cartels, syndicates and trusts first divided the home market among themselves and obtained more or less complete possession of the industry of their own country. But under capitalism, the home market is inevitably bound up with the foreign market. Capitalism long ago created a world market. As the export of capital increased, and as the foreign and colonial connections and 'spheres of influence' of the big monopolist associations expanded in all ways, things 'naturally' gravitated towards an international agreement among these associations, and towards the formation of international cartels.'[135]

The necessity of the capitalism is to find the world market. Otherwise, capitalism cannot survive inside the nation states. When the export of capital increased to the colonised parts led to the forming of large monopolist associations and the

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[132] See ibid., p.59.
[133] See ibid., p.89.
[134] Lenin, *Imperialism, the Highest Stage of Capitalism,* p.59.
[135] Lenin, *Imperialism, the Highest Stage of Capitalism,* p.64.

international treaty among those associations. Thus, imperialism became the international phenomenon, and the international law turned into imperialistic law.

The result of the First World War made Great Britain, America to share the 'booty'. Lenin describes how the two or three powerful world plunderers armed to the teeth, drawing the whole world into their war over the division of their booty, plundered from the colonised world.[136] The First World War ended with Treaty of Versailles, signed on June 28, 1919, by USA, Britain, France, Italy, Japan and other allied powers on the one hand and Germany on the other. This treaty called as the Peace Treaty exposes the real brutal nature of imperialism, which comes in sweet-coated words like democracy and peace. Lenin attacked the imperialist ideologues as hired coolies who argued that peace could be possible under imperialism, by showing the Treaty of Versailles and its brutal nature.[137] Lenin described the Versailles Peace Treaty as 'unprecedentedly predatory' and as 'the first case in world history of the legal approval of plunder, slavery, dependence, poverty and hunger in relation to 1,250 million people.'[138] The interest of the bourgeoisie was well recognised and established in the treaty for the limitation of naval armament that restricted the use of submarines against merchant ships.

After a brief era of peace, the Second World War took place. Not only did the colonial imperial power become weaker, but the world scenario also turned more in favour of democracy. The role of US in the First world already gave it a position of a powerful actor, which could not be neglected. The US President Woodrow Wilson vehemently argued against the annexation of Non – European territories of Asia, Africa and Latin America by the victorious powers. Such action would have been contrary to the principles of freedom and democracy.[139] Wilson proclaimed that decolonization was one of the principles for which the United States entered the Second World War on the side of France and Britain.[140] The reason for Wilson's vehement argument is that the USA had no colonies comparative to the European powers. 'Wilson was calling, in effect, for free competition among the capitalist countries in access to the third

[136] See ibid., p.11.
[137] See ibid., p.11.
[138] Lenin, *V. I Lenin Collected Works*, vol. 31, pp. 301 and 199.
[139] Anghie, *Imperialism, Sovereignty and the Making of International Law,* p.119.
[140] Quigley, *Soviet Legal Innovation and the Law of the Western World,* p.48.

world.'[141] Wilson's freedom and democracy were that the US should get its freedom in exploiting the market and resources of the colonial countries. It wanted an open door policy, in the mandate territories, especially in the Middle East, rich in oil resources.

> 'Wilson insisted that in the administration of the mandate territories, 'there should be no discrimination against the members of the League of Nations, so as to restrict economic access to the resources of the district.' Wilson expected the United States to be a member, and he wanted U.S. companies to be able to operate in the territories. In line with Wilson's proposal, a provision was written into the League Covenant that countries administering a mandate territory must 'secure equal opportunities for the trade and commerce of other Members of the League.'[142]

However, Wilson's voice to self-determination was not universal. 'For Wilson, self-determination applied – and applied only – to the former Ottoman, Austro-Hungarian and Russian empires. The British, Belgian, French, Dutch, Spanish and Portuguese Empires were in no way to be threatened. And American interests in Puerto Rico and the Philippines were also sacrosanct. Lenin's approach, on the other hand, was consistent, and revolutionary.'[143] The US as a total bourgeois state championing the rights of the individual at the end of Second World War wants its equal share that cannot be possible without the end of colonialism. When the countries got independent (just legally in the international arena) officially and legally the US has no obstacles in the exploitation of the third world. Therefore, after the Second World War the international law that was purely built on the values of capitalism, finished the remnants of feudal effects in it and moved towards a more liberal international law.

### 6.3. Socialism and International Law

In the 20th century, particularly after Second World War, one-third of the world population lived under socialism and socialism was practised in almost thirty countries. This had a great impact on international law. The socialist states moved the

[141] See ibid, p.139.
[142] See ibid., p.139.
[143] Marks (eds), *International law on the left: Re-examining the Marxist legacies,* p.143.

international law in a progressive direction and led to the formation of crucial principles and norms still followed in the contemporary period.

Bill Bowring in his essay *Positivism versus Self-determination: the contradictions of Soviet international law* notes that the 'Soviet international law has generated some of the most important propositions and principles of contemporary international law and continuing relevance.'[144] In this chapter, we will concentrate more on the Soviet role in making international law favour of the oppressed and weak countries.

After the October Revolution, Soviet Union stood against colonialism uncompromisingly. It gave the self-determination status for all the colonial countries which were occupied and kept as a colony by the then Tsar. It not only proposed self-determination for the struggling nationalities but also implemented in its territory. The Soviet Union followed the words of Stalin. He wrote '*equal rights of nations in all forms (language, schools, etc) is an essential element* (Emphasis original) in the solution of the national question. Consequently, a state law based on complete democratization of the country is required, prohibiting all national privileges without exception and every kind of disability or restriction on the rights of national minorities.'[145] The empire of Tsar consisted of more than 100 nationalities extended from Pacific coast of Siberia into central Europe, including Finland and Poland.[146] 'The Declaration of the Rights of the Peoples of Russia' was passed right after the revolution, which said that all the nationalities had a right to decide their own political freedom.[147] It called colonialism as enslavement[148] and it cannot be getting ridden without a peoples struggle. Immediately after the revolution, it called the world struggling masses at the period of First World War, 'to begin immediate negotiations for a just democratic world.'[149] Bill Bowring concludes:

> Thus, USSR gave enormous material and moral support to the National Liberation Movements, and led the successful drive to see the principle and then right to self-

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[144] Marks (eds), *International law on the left: Re-examining the Marxist legacies,* p.134.
[145] Daniels, *A Documentary History of Communism in Russia from Lenin to Gorbachev*, p.37.
[146] Quigley, *Soviet Legal Innovation and the Law of the Western World*, p.48.
[147] Declaration of the Rights of the Peoples of Russia, SURSFSR (No. 2 item 18 (1919).
[148] Quigley, *Soviet Legal Innovation and the Law of the Western World*, p.47.
[149] Decree on Peace, SURSFSR, no 1, item 2 (1917).

> determination placed at the centre of public international law in the twentieth and twenty-first centuries.[150]

Lenin in 1913, while speaking about self-determination on the question of independence for Ukraine, noted that 'freedom to secede, for the right to secede.'[151] He keeps stressing that self-determination of nations in the political sense and not in the cultural sense in his *National Liberation and the Right of Nations to self-determination*. Lenin, not only in theory but implemented it in practice. On 4 (17) December 1917, the Soviet Government recognised the right to self-determination of Ukraine. When a request came from the Finnish government to recognise its independence, the Soviet peoples' commissars on 18(31) December 1917 resolved to go to the central executive committee with a proposal to recognise Finland's independence. The right of the people of 'Turkish Armenia' to self-determination was recognised by a decree on 29 December 1917 (11 January 1918). Lenin signed an order on recognition of the independence of Estonia, Latvia and Lithuania in answer to a request from the government of Soviet Estland on 7 December 1918.[152]

Later in the drafting of the UN Charter, the Soviet government argued for language on self-determination.[153] The Soviet delegates while discussing the issue of colonies stressed that self-government is not adequate but emphasised the importance of independence.[154] As a result, in Article 1 Section 2 of the UN Charter, the principle of 'self-determination of peoples' is recognised, though it did not expressly call colonialism as unlawful.

The Soviet Union, under art 51 of the UN Charter even declared that the colonial people could use 'collective self-defense' against the colonisers.[155] The UN General

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[150] Marks (eds), *International law on the left: Re-examining the Marxist legacies,* p.134.
[151] Lenin, *The Cadets and The Right of Nations to Self-Determination*, (1913) 4 Proletarskaya Pravda; *Lenin Collected Works*, vol. 19, pp. 525–527, www.marxists.org/archive/lenin/works/1913/dec/11.htm, retrieved on 5.7.2013.
[152] Marks (eds), *International law on the left: Re-examining the Marxist legacies*, p.145.
[153] Documents of the United Nations Conference on International Organization, San Francisco, 1945 (London and New York: United Nations Information Organizations 1945), vol. 8, p.56.
[154] See ibid., vol. 10, p. 441 (Commission II, General Assembly).
[155] R. A. Tuzmukhamedov, *Mirnoe sosushchestvovanie i natsional'noosvoboditel'naia voina'* [Peaceful coexistence and war of national liberation], SGP, p. 87, at p. 91 (no. 3, 1963). See also Kazimierz Grzybowski, Soviet Public International Law: Doctrines and Diplomatic Practice (Leyden: A. W. Sijthoff, 1970), p. 499.

Assembly later decided that ‘All armed action or repressive measures of all kinds directed against dependent peoples, shall cease in order to enable them to exercise peacefully and freely their right to complete independence and the integrity of their national territory shall be respected.’[156] Even after the independence of colonies, Soviet Union argued in their favour. With the backing and support of Soviet Union, the UN General Assembly adopted two resolutions which are in favour of third world countries; one is the ‘declaration on the establishment of a New International Economic Order’ and the other ‘Charter of Economic Rights and Duties.’

In the international humanitarian law too, Soviet Union made many progressive developments. When Germany occupied the Western Soviet Union during Second World War and made the hostage of the civilian population, Soviet Union denounced this practice as a violation of the laws of belligerent occupation.[157] At that time, taking hostages was not unlawful in international law. Hostage taking was common in prior wars in occupied territory – had been practised by Germany during First World War and Britain during Boer War.[158] Soviet Union[159] argued vehemently that taking hostage of civilians other than combatants was violating accepted international rules by engaging in the practice.[160] When the Geneva civilian convention happened after the Second World War, the Soviet view of hostage taking as illegal was incorporated and was proclaimed that ‘the taking of hostages is prohibited.’[161] Not only hostages the Soviet Union argued in favour of the position of guerillas that when they are captured, should be treated as prisoners of war. In the international humanitarian law earlier, guerillas were not treated as ‘combatants', but as criminals and summarily executed without trial. The Soviet Union further argued that when the guerillas observed the laws of warfare, they should be treated as ‘combatants’.[162] It even included the guerillas who are fighting against colonialism and for national liberation. At last, the effort of Soviet Union got reflected in the international treaties, when the law of warfare was revised in 1977. The definition of ‘combatants’ also covered

[156] Declaration on the Granting of Independence to Colonial Countries and Peoples, para 4.
[157] Entry *‘Zalozhniki’* [Hostages], in P. I. Kudriavtsev, ed., Iuridicheskii slovar’ [Legal Dictionary] Moscow: State Publishing House of Legal Literature, 1956 vol. 1, p.334.
[158] Quigley, *Soviet Legal Innovation and the Law of the Western World*, p.149.
[159] Read former Soviet Union ( this chapter as well as the following chapters).
[160] See ibid., p.149.
[161] Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, art. 34, UNTS 75: 287.
[162] Quigley, *Soviet Legal Innovation and the Law of the Western World,* p.150.

members of irregular forces seeking self-determination or resisting belligerent occupation. [163]

Treaties can be seen as a product of class interests, where ‘collective interests’ of the bourgeoisie can be imposed over the socialist or third world countries. The young socialist state of Soviet Union faced this problem in the treaty of ‘Genocide Convention' in 1948. The Soviet Union want to ratify it, but with some reservations due to the danger of ‘collective interests' of the capitalist states turning against it. When the General Assembly sought the advisory opinion of the ICJ, the majority judges decided that ratification with reservations was acceptable, at least within some limits.[164] This became an international standard. ‘It was thus, the Soviet Union’s use of the reservation tool that led to solidification of the rule that reservations to treaties are acceptable, that a state that files a reservation may nevertheless become a party.’[165]

Secret treaties were not considered as against the norms of the international law in the earlier period after Westphalia. This was the situation where the people were considered ‘subjects' and not ‘citizens.' Before the First World War, there was an era of secret diplomacy. It was during this time the states were not responsible towards the people, an uncompleted bourgeois task. The then US President Wilson in his Fourteen points mentioned in the first point that ‘Open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind, but diplomacy shall proceed frankly and in the public view'.[166] Wilson's intentions were different from the Socialist understanding of secret treaties. Wilson was against colonialism because it monopolises the exploitation of single imperialist power and the secret treaties were the outcome of such exploitation against each other. The socialist understanding of secret treaties is that it is against the people. The endless argument of the Soviet Union against ‘secret treaties' that were against the interest of not only to the young socialist state but also colonised countries led to the

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[163] Protocol (I) Additional to the Geneva Conventions of 12 August 1949, June 8, 1977, arts. 43–44 (Geneva: International Committee of the Red Cross, 1977), pp. 30–32. International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Geneva: Martinus Nijhoff, 1987), pp. 507–08, 522–25.
[164] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (advisory opinion), International Court of Justice, Reports, p. 15 (1951).
[165] Quigley, *Soviet Legal Innovation and the Law of the Western World*, p.159.
[166] http://avalon.law.yale.edu/20th_century/wilson14.asp, retrieved on 12.6.2017.

registration of treaties. While concluding the Report on Peace of November 8, 1917, Lenin said:

> 'The secret treaties must be published. The provisions concerning annexations and contributions must be abrogated. There are various provisions, comrades – why the predatory governments not only agreed about the plunderings, but amidst such agreements, they also accommodated economic agreements and various other provisions concerning good-neighborly relations… We reject all provisions regarding plunder and coercion but all provisions where good-neighborly terms and economic agreements have been concluded we heartily welcome, we cannot reject these.'[167]

The secret treaties were not even justifying in the bourgeois terms. The secret treaties mentioned frankly about plundering and annexations of territories illegally. The treaties were made between two powers to overthrow the third one. The internal contradictions of capitalism and the capitalists of each nation state was the reason behind these secret treaties. Lenin's opposition and strong condemnation for the secret treaties were because exposing the secret treaties reveals the real nature of exploiting nature of the capitalists. Openly capitalists have to behave as a welfare state with human rights and all. On Wilson's understanding that if treaties were made part of the public record and thereby submitted to public scrutiny, states would have trouble in covering unethical activities against others with the cloak of legality and they would be dissuaded from concluding treaties which were sure to encounter public disapproval.[168] But the secret treaties were brutally exposing the imperialism. Later, the provision of the UN Charter, which says 'Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretary and published by it.' If the registration of treaties is not in compliance with the UN Charter, it provided, 'No party to any such treaty or international agreement which has not been registered . . . may invoke that treaty or agreement before any organ of the United Nations.'[169]

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[167] Cited in Tunkin, *Theory of International Law,* p.29.
[168] See further, *Wilson's Fourteen points*, http://www.newworldencyclopedia.org/entry/Fourteen_Points, retrieved on 12.5.2017.
[169] UN Charter, art. 102.

### 6.4. Contemporary International Law

The contemporary international law is analysed and defined by various Marxist international law scholars. It would be better to take a brief look at their writings. *International Law on the Left: Re-examining Marxist Legacies* where Susan Marks observes that the contemporary relevance of Marxism is now a staple of the social sciences and humanities.[170] In the editor's introduction, she notes that 'the collapse of Eastern bloc communism clearly released the grip of orthodox Marxism as an unchallengeable body of doctrine, and created an opening for fresh consideration of Marxist texts by a new generation of readers.'[171] Eric Hobsbawm too expressed the same in his essay 'that the end of the official Marxism of the USSR liberated Marx from public identification with Leninism in theory and with the Leninist regimes in practice.'[172] There can be revisionism in the practice of Marxism in the Soviet Union, but, in reality Soviet experience of Marxism enriched the Marxist theory. It's hard to reject the entire Soviet experiment and the achievements. Further, Marks highlights the legacies of the left in the contemporary era as the materialism, capitalism, ideology, imperialism, totality and the importance of re-examining these legacies and finds five common features, though the essays have a difference of focus, standpoint analysis and style. Susan Marks' speaks about the necessity of a Marxist perspective in the contemporary period. Giving importance to Marxism, she writes about the privileges enjoyed by the beneficiaries out of the violation by perpetrators and seeks to unveil some liberal assumptions by focusing on the 'classic' Marxist concept of exploitation.[173] While international lawyers readily use the concept in relation to topics such as sexual trafficking or slavery, they do not register its meaning of deprivation linked to someone else's privilege: 'exploitation belongs with the normal functioning of a system in which capital accumulation depends on labour exploitation'.[174] She argues that those who have benefited from patent revenues remain comfortable out of view and criticises the liberal illusion that international law is neutral in the contemporary period.[175]

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[170] Marks (eds), *International law on the left: Re-examining the Marxist legacies*, p.1.
[171] See ibid., p.1.
[172] Hobsbawm, *How to Change the World- Marx and Marxism 1840-2011*, p.5.
[173] See further her essay ibid., titled, *Exploitation as an International Legal concept*,
[174] Marks (eds), *International law on the left: Re-examining the Marxist legacies*, p.300.
[175] See further her essay ibid., *Exploitation as an International Legal concept*, p.300.

The modern international law is infected with a disease of postmodernism. Anthony Carty criticised postmodernism and *The Empire* by Hardt and Negri. In his view, a Marxist analysis is much better placed to explain why international law is regularly violated. He further notes that it is not 'new imperialism' as the postmodern argument but because of the same old capitalist one personified by the United States.[176] Claire Cutler while focusing on international trade law and the GATS agreement, she notes that contemporary international law should be termed transnational law because it won't suit all the countries of the world, but for the welfare and hegemony of particular countries (developed, first world countries) to continuously dominate the rest of the world. She argues that there is 'an analytical link between the classical imperialism of the past and the new imperialism of the present.'[177] Agreeing with Mieville's commodity form of law, she writes the commodity form of law operates to fetishize services regarding the GATS agreements.

After the disintegration of the Soviet Union, the western imperialism turns naked. The project of imposing the Neo-Liberal policies such as liberalisation, privatisation and globalisation through international institutions like WTO, World Bank made the third world countries lose their remaining sovereignty. Imperialism has created new rules and regulations after distorting the national sovereignty of third world countries. Disabling the third world country's control over its territory, natural resources, industries, economy, citizens social life, culture, international relations makes them as puppets in the hands of the dominant powers by losing its nominal sovereignty, is called re-colonization. Re-colonization is in the process, but not completed, and the role of international law is favourable to it. As Chimni by quoting Stoler noted

> 'that even in the colonial era there were 'gradated variations and degrees of sovereignty and disenfranchisement.' The loss of economic sovereignty to international institutions is a contemporary variant. For Third World countries, including emerging economies, it means the loss of crucial policy space in the realm of monetary, industrial, technology, trade, and environmental policies. The result of these developments is that Third World countries cannot adopt suitable policies for the advancement of the welfare of its people.' [178]

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[176] See ibid., p.187.
[177] See ibid., p.209.
[178] Chimni, *Capitalism, Imperialism, and International Law in the Twenty-First Century,* p.31.

The re-colonization process 'is seeing to return to the colonial vision of development for the global south.'[179] Chimni calls it the global imperialism that 'is marked by the dominance of international finance capital de-linked from production.'[180] He further argues that the protection of property is not only done by the national laws and institutions but by international laws and institutions leading to the 'internationalization of property rights.'[181] The comprador ruling classes of the third world countries legally welcome their imperial master to take over the resources by way of passing legislation in the parliament. The colonial period saw the tough resistance by the national bourgeoisie of the third world as all the national liberation movements are a bourgeois movement, the situation now turned upside down and the semi-sovereign states of the third world countries are subjected under the WTO ministerial conference, which decides the fate of a particular country. The need of capitalism today as Marx and Engels said in *The Communist Manifesto* follows:

> 'The bourgeoisie keeps more and more doing away with the scattered state of the population, of the means of production, and of property. It has agglomerated population, centralised the means of production, and has concentrated property in a few hands. The necessary consequence of this was political centralisation. Independent, or but loosely connected provinces, with separate interests, laws, governments, and systems of taxation, became lumped together into one nation, with one government, one code of laws, one national class-interest, one frontier, and one customs-tariff .'[182]

This correctly reminds the contemporary scenario, which is applied through globalisation includes free trade.

> 'Is that to say that we are against Free Trade? No, we are for Free Trade, because by Free Trade all economical laws, with their most astounding contradictions, will act upon a larger scale, upon a greater extent of territory, upon the territory of the whole earth; and because from the uniting of all these contradictions into a single group,

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[179] See ibid., p.30.
[180] See ibid., p.28.
[181] See ibid., p.29.
[182] Marx and Engels, *The Communist Manifesto,* p.7.

> where they stand face to face, will result the struggle which will itself eventuate in the emancipation of the proletarians.'[183]

These are the words of Marx on 9 January 1848 about free trade at Brussels. He gives his opinion about the free trade in the European countries. This is exactly happening now at the international level. Thus, the period of re-colonization otherwise called globalisation as the last stage of capitalism will eventually lead to the emancipation of the working class all over the world.

## 7. Summary

A Marxist approach to international law, unlike the mainstream approaches, gives much importance to the history of international law. The Marxist method of historical materialism divides the history of humanity into the different mode of productions. The transition from one stage to another stage by international law happened from slave-owning society to the modern bourgeois society. The international law of the slave-owning society transforms itself to the circumstances of the feudal society. The slave-owning societies are not compatible with the later development of means of production and the evolution of society. It has to inevitable move to the feudal society because of the development of material conditions. As the international law is part of the superstructure, evolves from the economic situation, analysis of the economic condition is necessary. Without analysing the history of the particular historical period, it leads to a wrong conclusion of ending international law with few individual authors. International law is not an exception to this variation, as it arises from the same economic conditions.

The origin of private property leads to the origin of the state. As the international law is a class law, it evolves with the origination of class interests along with the state. The nature of the state is same from its origin, but not its interests. The feudal states' interest varies from the capitalist state as well as the socialist state. The benefit of the feudal state is of the landlords, and the interest of the capitalist states lies with the bourgeoisie. In the ancient period, international law was in favour of slavery. The

[183] Marx, *Speech of Dr Marx on Protection, Free Trade, and the Working Classes,* http://www.marxists.org/archive/marx/works/1847/09/30.htm Retrieved on 7.6.2013

example of Greek, Rome and India proves that slavery was one of the practices of the state. The feudal state abolishes slavery but presented in a different form of serfdom mostly controlled by religion. The religious institutions were powerful and dominant during the feudal stage, and its impact can be seen in international law at that period. The capitalist mode of production wants the working class to be free, that there should not be any bondage of land to the labour. The liberty, equality concepts arose out of that capitalist mode of production, which can be seen in the modern international law. Thus, international law closely evolves from the dialectical material conditions of international relations, and not in the imaginations of some authors or scholars in the field of international law.

# CHAPTER V

# MATERIALIST APPROACH TO SOCIALIST INTERNATIONAL LAW PRINCIPLES

## 1. Introduction

Three important principles of international law which are based on the materialist theory are taken for an elaborate discussion in this chapter. They are peaceful co-existence, proletarian internationalism and self-determination. These principles originated and evolved after the materialistic theory is established as a scientific principle. Moreover, this was practised as a state policy when the socialist mode of production based states formed in the international arena. Albeit, many other materialist principles evolved and developed in international law, like permanent sovereignty over natural resources, the sovereignty of the people, etc., these three principles are considered necessary and were practised during the period of transition from capitalism to socialism towards communism.

## 2. Principle of Peaceful Co-existence

Peaceful co-existence is the existence of states with different political ideology and living together in peace and harmony. The materialist concept of peaceful co-existence is the presence of various states with the leadership of antagonistic classes, one is led by the leadership of bourgeoisie, and the other one is run by the proletariat. In history, we have many instances where this concept of peaceful co-existence is practised in international law. Peaceful co-existence historically evolved during the era of Buddhism in India. Emperor Asoka's rock edict speaks about the enjoyment of peace by co-existence and 'not by mutual interference and recrimination'.[1] Later it reflected in India's foreign policy during Prime Minister Nehru's period as Pancha Sheel.

Nevertheless, the materialist concept of peaceful co-existence was evolved after the application of the theory of Marxism to practice. The method resulted in the October Socialist Revolution in Russia. First time in the history of the world, a state aroused after a revolution which was directed towards a classless society and led by the majority of the people. Till then all the existed states were in favour of the minority

[1] Encyclopedia of public international law 7, p.241.

exploiting classes whether it is a slave state, feudal state or a bourgeois state. A slave state is not antagonistic to a feudal state, same as a feudal state is not hostile to the capitalist state. But a capitalist state is hostile to the socialist state because one is to continue to exploitation and the other one is to annihilate the exploitation. When the first state came into existence, there aroused a question of how the state which is unique in the history of the world is going to survive with the encirclement of states which were antagonistic in nature. There was an imminent threat to the young socialist state from the imperialist bourgeois states. The requirement of the concept of peaceful co-existence was necessary to protect the young socialist state from the encirclement. Hence, the peaceful co-existence of the past was altogether different from the new peaceful co-existence which emerged after the October Revolution.

### 2.1. Background of the Principle of Peaceful Co-existence

After the October Revolution, the real and complicated necessity of peaceful co-existence was required. In the Report of the central committee to the Eighth Congress of the RKB(b) on March 18, 1919, Lenin said,

> 'We live not only in a state, but in a system of states, and the existence of the Soviet Republic side by side with the imperialist states for a prolonged period is inconceivable. Ultimately either one or the other shall be victorious. And when this end comes, a number of terrible conflicts between the Soviet Republic and bourgeois states are inevitable.'[2]

Lenin was practical in warning the young socialist state. He was not utopian that the encircled capitalist countries will live peacefully with the young socialist state. He expected conflicts and even the end of the young socialist state and the continuation of the encircled capitalist states. Out of Lenin's prediction, one thing is clear that the socialist state was not going to live peacefully among the capitalist encirclement.

Lenin further said,

> 'All nations will arrive at socialism, this is inevitable, but not all will so in exactly the same way, each will contribute something of its own in one or another form of democracy, one or another variety of the dictatorship of proletariat, one or another rate at which socialist transformations will be effected in the various aspects of social

[2] Cited in Tunkin, *Theory of International Law*, p.16.

> life. There is nothing more primitive from the viewpoint of theory or more ridiculous from that of practice than to paint 'in the name of historical materialism', this aspect of the future in a monotonous grey. The result will be nothing more than Suzdal doubing.'[3]

After the October revolution, there could not be a 'permanent revolution' and the change of the world into socialism at a go. History teaches us lessons about the change of society. We have seen that the struggle of capitalism to overthrow feudalism took hundreds of years. It tried again and again in fighting with feudalism even now we cannot say that has succeeded all over the world. Hitherto, it has failed to reach most of the world as seen from the remnants of feudalism visible in many regions of the world. But capitalism is continuing along with feudalism with some compromises in many places. Slavery legally existed in one or another form in the United States till the 'civil war' which happened during the Abraham Lincoln presidency. We have seen the existence of primitive communist societies still in some parts of the world. Hence Lenin was not utopian, and he was brilliant in applying the historical materialism not in a mechanical way but in a dialectical way.

Lenin's prediction was true that soon enough the imperialist countries started attacking the young socialist state. The materialist doctrine of peaceful co-existence includes the fundamental right to self-defense. It does not mean that being in peace when there is an attack from the antagonistic states. The young socialist state involved in a war with the imperialist countries, till 1920. However, a treaty was signed in 1918 with the Germany with its draconian terms called the Brest-Litovsk treaty, to protect the young socialist state. Though Lenin did not support the deal ideologically that a socialist state signing a treaty with an imperialist country, the necessity of signing such treaty was required to protect the young socialist state. Warren Lerner argues that practically the Soviet state was in peaceful co-existence with the Imperial Germany during that time.[4] Same happened when Fascism arose in Germany; the USSR signed a non-aggression pact with the Fascist Germany, which gave enough time to protect and strengthen the Soviet Union from Fascist attack. Even during the Second World War, the Soviet Union was in alliance with the Imperialist countries like Britain and the United States against the Fascist Germany - a primary

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[3] Great Debates, Volume 1, p.34.
[4] Lerner, *The Soviet Impact on International Law*, p.21.

contradiction. Same thing happened in China, as the Chinese Communist Party was in alliance with the Chiang Kai Shek's Kuomintang Party to defeat the Japanese imperialism.

## 2.2. Some Theoretical Enquiry

By applying the materialist conception to the concept of peaceful co-existence of states we have to go slightly further to analyse the nature of the state. A state originates due to the formation of exploiting and exploited classes when the classes are in irreconcilable antagonism. According to that formula, can an exploiting class's state co-exist peacefully with a non-exploiting state or an exploited state? The states also have to be considered in irreconcilable antagonism. Then how the states can co-exist peacefully? Let's take the different classes inside a state. It's not necessary that class war happens inside the country all the times. In history, we can see in many times peace existed in different geographical areas, but actually, it won't survive for long. Peace can be carried in the state through violent means of suppressing the class struggle or ideologically injecting the slave mentality agreeable to the exploited masses. Mostly both methods are employed to prolong the peace but the percentage may vary at times. Sometimes peace could be unjust. Master remains masters and slave remain slaves in a peaceful society. That can also be called as peaceful co-existence.

Coming to the states whether this formula can be applied or not, let's hear the words of Tunkin. He differentiates states and classes by arguing

> 'States, not classes, enter into international relations, [and] international relations are the relation among states. But the foreign policy of states is determined by the predominant classes in these states, this is class policy. Therefore the struggle of the two systems, socialist and capitalist affects relations among socialist and capitalist states. Thus the specific feature of this 'class struggle' consists, first and foremost, in the fact that this struggle manifests itself in relations among states, and not directly between classes.'[5]

Here Tunkin differentiates the category of class from a state. In fact, he makes states above classes in the international arena. Classes necessarily remain antagonistic but not states according to him. The class struggle manifests the state and also its relations

[5] Tunkin, *Theory of International Law*, p.37.

with the other states. Hence he argues an exploiting state can co-exist with a non-exploiting state though each state exhibited by the ruling classes of the respective states. In addition to physical struggle, there are other forms of struggle like political and ideological that has to be overcome in order to achieve peaceful co-existence. Tunkin further argues

> 'Peaceful co-existence is applicable only to relations among states. It does not mean class struggle in individual countries or the struggle of colonial people for their independence. Class struggle within a state is an internal affair and cannot be regulated by international law'.[6]

Tunkin disconnects the international law from the class struggle inside a country. To him, the class struggle which is happening inside the country has nothing to do with the international law. Tunkin's argument forgets the dialectical connection between the international law and domestic law. He was isolating international law from the class struggle that happens inside the country. This mechanical application of Marxism is not dialectical materialism but metaphysical. The separation of base and superstructure as two different isolated things without any relations. Tunkin's argument has an actual situation that he has to justify the imperialist policies of the Soviet Union. Therefore, his argument is not based on materialism.

During the Soviet period many international law principles give rights to the struggling masses of the world. International law guarantees principles like self-determination and rights of many oppressed sections of the society. In the contemporary period, international law dominating the domestic law implements the policies of globalisation. Because of this, the class struggle is getting increased in the states, particularly in the third world countries. The International Non-Governmental Organisations again control the rising class struggle. Hence we cannot say that international law has any impact on the class struggle happening inside each country.

> 'Peaceful co-existence, while debarring 'the unleashing of a thermonuclear world war' is 'an integral part of the revolutionary struggle against imperialism'. Thus 'Revolutionary national liberation wars, like class struggle in any capitalist country,

[6] Tunkin, *Theory of International Law*, p.38.

> do not clash with co-existence and can be brought to success only under peaceful co-existence.'[7]

According to this the peaceful co-existence will help the national liberation wars and the class struggle in any capitalist country. The capitalist state will not remain calm when a state is turning into socialism, and the history shows it. The imperialist intervention from Cuba to Vietnam happened during the period of peaceful co-existence against the formation of socialist states.

Brezhnev in the Twenty-Third Congress of the Communist party in 1966 declared

> 'There can be no peaceful co-existence where matters concern the internal processes of the class and national liberation struggle in the capitalist countries or in colonies. Peaceful co-existence is not applicable to the relations between oppressors and oppressed, between colonialists and the victims of colonial oppression.'[8]

From the above statement and few other statements made by renowned international law scholars, it is getting clear that if two diametrically opposed systems of two countries practice peaceful co-existence between them, it won't be a hindrance to the development of productive forces in the country like the national liberation struggle or the class struggle inside the country. It means two countries agree that I don't disturb you and you don't bother me. This situation is possible only with the armed might of the state. It also means if there is a revolution in your country, I am not responsible and don't blame me for that. Therefore, revolution cannot be exported from outside and only depends on the internal contradiction of a country. Yes, it is true that revolution cannot be exported from outside. But at the same time, the internal contradictions have close connections and links with the external contradictions. We cannot see things inside the country in an isolated way, and that is not a dialectical way of looking at things. If the base of the world is both capitalism and socialism, both gets reflected in the superstructure like the international law with its contradictions. Hence, there is a dialectical connection between the internal and external contradictions as well as between domestic law and international law.

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[7] Cited in Schwebel, *The Brezhnev Doctrine Repealed and Peaceful co-existence enacted*, p.818.
[8] Cited in Schwebel, ibid., p.818.

The exported revolution by communist countries failed in places like Bolivia, Congo, etc. At the same time the mercenaries exported by the imperialist countries also failed like Bay of Pigs, Nicaragua, etc. but *coup de etat* has succeeded in many countries like Chile, Iran, etc. Here a question arises. Is it just intervening directly with the physical force like armed intervention comes against peaceful co-existence but also with other methods like conspiring, bribing, encircling, threatening with an economic blockade, supporting a third country in the war (like Vietnam) also against peaceful co-existence?

In principle, the international law speaks about the sovereign equality of states, but it never existed practically in the history of states. The powerful states always troubles and exploit the small states. The wars happen mostly to conquer and use the wealth of other states. Co-existence was peaceful only when both the states have more or less equal military strength. In the contemporary world too, the states are divided into superpower hegemonic states, oppressed nations, third world countries and so on. So there are exploiting states as well as exploited states. The protest of the exploited states against the exploiting state is natural and justified. Can there be a peaceful co-existence between them? Or can we say peaceful co-existence happens only between two different social systems or two opposed systems? Lenin repeatedly pointed to the hypocrisy of what the imperialists called the equality of nations. He said:

> 'The League of Nations and the whole postwar policy of the Entente reveal this truth more clearly and distinctly than ever, they are everywhere intensifying the revolutionary struggle both of the proletariat in the advanced countries and of the masses of the working people in the colonial and dependent countries, and are hastening the collapse of the petty-bourgeois national illusion that nations can live together in peace and equality under capitalism.'[9]

The world was divided into imperialist oppressing country, the third world oppressed countries and the non-oppressing socialist countries. The non-oppressing socialist country could not let it be oppressed by any other country as the ideology is against oppression and exploitation. Oppressing nations and oppressed nation criteria and division are different from the state based on exploitation and a state based on anti-exploitation. The ideology of a country which relies on anti-exploitation cannot be an

[9] Lenin, *Preliminary Draft of Theses on the National and Colonial Questions*, p.464.

oppressing country. There is a threat to an exploiting state by the state which is based on anti-exploitation. For obvious reasons the state based on anti-exploitation is a moral and physical support to the exploited state and the same state having the moral and physical support of the state based on anti-exploitation will oppose the exploiting state. This is a danger to the exploiting state that it can no longer exploit other states. If it no longer exploits and oppresses other states, then it turns to its people to exploit more and may let to the end of a state based on exploitation and transform it into another state based on anti-exploitation, i.e., a socialist state. As Machiavelli in his *The Prince* said that the new political order will be opposed by all who benefit from the old political order.[10] Now we can understand that there can be a peaceful coexistence between two diametrically opposed social systems. Let's see that in detail in the following pages.

### 2.3. Soviet View of the Principle of Peaceful Co-existence

The Soviet Union had two views on peaceful co-existence. The first view existed till the 20th Congress of CPSU. That was formed and followed after the October Revolution of 1917, under the Soviet Leadership of Lenin and Stalin. Khrushchev primarily propagated the second view at the 20th Congress. We have already seen the Leninist principle of peaceful co-existence. The Khrushchev propagated peaceful co-existence with major changes. First, it became the core foreign policy and general party line of the Soviet Union, which was not earlier during the Lenin and Stalin period. Second, along with peaceful co-existence, co-operation with the capitalist countries were added, which was considered as a revisionism from the Marxist principle. Let us see them in detail.

When the principle of peaceful co-existence started getting propagated by the Soviet leadership notably Khrushchev, it claimed that it is a 'Leninist Principle' and it was the foreign policy of Soviet Union from the beginning of the young socialist states. He often quoted Lenin's words about peace and the actions of peace treaties with imperialist countries. In the 20th Party Congress, Khrushchev speaks about the five principles of peaceful co-existence. The five are – 'mutual respect for territorial integrity and sovereignty, non-aggression, non-interference in each other's domestic affairs, equality and mutual advantage, peaceful co-existence and economic

[10]Machiavelli, *The Prince*, p.22.

cooperation are now subscribed to and supported by a score of states.'[11] He further says that he had in mind a proposal for the conclusion of the Treaty of friendship and cooperation between the USSR and the US which contained in the letter of Comrade N.A Bulganin to President D. Eisenhower.[12] Hence it was not only peaceful co-existence but also cooperation with the imperialist United States. The major and fundamental difference of Khrushchev's peaceful co-existence is the addition of co-operation with the imperialist countries like the US.

While he was speaking about the peaceful co-existence of the two systems, he argues that 'the Leninist principle of peaceful co-existence of states with different social systems has always been and remains the general line of our country's foreign policy'.[13] Chinese Communist Party and Mao opposed this by saying that it was not the general line but one of the policies of Lenin and Stalin. According to CPC, the peaceful co-existence is one aspect of the foreign policy of the socialist countries in dealing with the countries having different social systems.

During the 26th Congress of the CPSU, the Soviet leadership tried to justify the concept of peaceful co-existence and argued against the allegation of the imperialist countries that peaceful co-existence is not possible between different social systems. D.T Shepilov points out the claim of incompatibility of the ideology peaceful co-existence and says 'the unfounded thesis is dragged out alleging that the Marxist precept, that capitalism must inevitably be succeeded by socialism, is incompatible with the possibility of peaceful co-existence of the two systems – the capitalist and socialist systems'.[14] Malenkov speech at the 20th Congress argued about the two-way process of peaceful co-existence and 'it preservation depends not only on the Soviet Union but also on countries of the capitalist world.'[15] and 'the line of peaceful co-existence of the two systems is incompatible with the policy of negotiating 'from strength' and also with the policy of forming exclusive military combinations of one group of states obviously aimed against another group.'[16] He further added that 'there can be no reconciliation between the line of peaceful co-existence and the policy of negotiating from strength. The Soviet leadership was clear about one thing that the

[11] Great debate, p. 27.
[12] See ibid., p.27.
[13] https://www.marxists.org/subject/china/documents/polemic/peaceful.htm, retrieved on 15.6.2017
[14] Great Debate, Volume 1, p.106
[15] Great Debate, Volume 1, p.106
[16] Great Debate, Volume 1, p.108

peaceful co-existence and 'the policy of negotiating from strength cannot go together.'[17] The encirclement by the capitalist countries under the leadership of the US imperialism was considered as a threat to the Soviet Union.

Tunkin even went to the extent of calling the contemporary international law of his time was peaceful co-existence. Tunkin said in 1963, 'there is every ground to call present-day international law the law of peaceful co-existence.' [18] Tunkin while speaking about the imperialist aggression, argues about the peaceful co-existence and struggles as 'the first aspect of the problem being considered is what influence is exerted on international law by the very fact of the co-existence and struggle of the two opposed social system.'[19] One of the laws of dialectical materialism, as we have seen in the second chapter, is the unity and opposition of forces. It seems Tunkin based his theory of peaceful co-existence on this law of unity and opposition. Can we call Khrushchev's friendship and cooperation treaty with the US as unity? Vyshinsky before Tunkin put up a formula of 'struggle and cooperation' in international law. The concept of 'unity and struggle' in dialectical materialism has an example of the labourers and the capitalists working in the same system, industry. Capitalists cannot remain alone without the proletariat (industrial labourers) and proletariats cannot stay alone as proletariat without the capitalists. This is the unity between them. The imperialist capitalist country exploits the oppressed countries just like the capitalist who exploits the industrial labourer. If the imperialist-capitalist countries are not there, then there are no oppressed countries. Without oppressing others, an imperialist capitalist country cannot remain as imperialist. In this scenario of the capitalists and labourers, a trade union communist leader is appearing who is from an industry which was taken over by the labourers. Now the industry is run by the labourers, and they share the profits, or it can be a cooperative society. This trade union leader or the very labourers running industry is a threat to the capitalist because it will spoil the capitalists own labourers to do the same. And the trade Union leader is ideologically in support of the labourers of the industry run by a capitalist. The capitalist does not exploit the trade union leader, and he is equally powerful with his comrades against the capitalist. Can there be a unity, a friendship of the trade union leader and the capitalists here? If this happens can he anymore be in support of the oppressed

[17] Great Debate, Volume 1, p.109
[18] Baade (eds), *Soviet Impact on International Law*, p.27
[19] Tunkin, *Theory of International law*, p.21.

labourers of the industry? This example can be very well suited to the international law and international relations. The Soviet Union is the trade union leader. The capitalist and labourers are the imperialist country and the labourers respectively. A question arises here as what about the capitalist countries which are not imperialist, which won't exploit the other country? The imperialist countries are a threat to the capitalist countries as well as the oppressed countries and the socialist countries. A peaceful co-existence can happen between the capitalist countries against the imperialist countries and the socialist countries. A peaceful co-existence can occur with the socialist countries and the oppressed countries. But a peaceful co-existence, particularly in the Soviet words a ‘friendship treaty' with an imperialist country is not possible. The peaceful co-existence can be forced upon them sometimes by situations, but it will never last long. The unity among the countries having different social systems comes out of its very existence and not necessarily through peaceful co-existence by signing a friendship treaty.

### 2.4. Chinese View of the Principle of Peaceful Co-existence

China agrees with the term peaceful co-existence as a Marxist-Leninist principle. Even before the Soviet Union declared Peaceful co-existence as the foreign policy, China entered a treaty with other third world countries including India on the five principles of Peaceful co-existence or the Pancha Sheel. China towards the Soviet Union said that ‘the foreign policy of the Soviet Union has, in the main, conformed to the interests of the international proletariat, the oppressed nations and the peoples of the world.'[20]

The Chinese Communist Party criticised Soviet Union that it makes the advertisement that US imperialism supports peaceful co-existence. It differentiated there are two diametrically opposed policies of peaceful coexistence. One is Lenin and Stalin's policy of Peaceful co-existence, and the other is the anti-Leninist policy of Peaceful co-existence. It further argues with the support of Lenin's futuristic perspective of

> ‘Socialism cannot achieve victory simultaneously in all countries. It will achieve victory first in one or several countries, while the others will remain bourgeois or pre-

[20] Great Debate, Volume 1, p.357.

> bourgeois for some time' and ‘only the working class when it wins power, can pursue a foreign policy of peace…not in words… but in deeds’.[21]

The Chinese Communist Party considers these as the theoretical basis of the policy of peaceful co-existence. This theoretical basis expresses the fundamental law of the nature of the society that till exploitation is there, the struggle is there. When the working class comes to power with a majority all over the world, there is a possibility of peace. Hence it does not mean that the socialist countries engage in war and do not work towards peace. The effort is there to avoid war from the side of socialist countries. The party further argued

> ‘the socialist countries are persisting in their efforts for peaceful co-existence with the capitalist countries to develop diplomatic, economic and cultural relations with them, to settle international disputes through peaceful negotiations, to oppose preparations for a new world war, to expand the peace area in the world and to broaden the scope of application of the five principles of peaceful co-existence’.[22]

The Chinese Communist Party further said that ‘the relative equilibrium' comes into being between the imperialist countries and the Soviet Union come into being after a prolonged war. The Soviet Union stood its ground after several years of trials of strength. Then only Lenin advanced the policy of Peaceful co-existence, till then Lenin argued that ‘unless we defend the Socialist Republic by force of arms, we could not exist'.[23]

Lenin speaks about Peaceful co-existence with imperialism and the same time, he warned that the socialist state should maintain constant vigilance against imperialism. It happens in a particular situation during Lenin’s period, the equilibrium between imperialist countries and the Soviet Union was highly unstable. The Communist Party of China further argued that peace comes after the constant struggle. If the struggle stops and there is no peace as well as the young socialist state. The peace was the ‘result of repeated trials of strength between the imperialist countries and the Soviet state, which adopted a correct policy, relied on the support of the proletariat and oppressed nations of the world and utilised contradictions among the imperialists.'[24]

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[21] https://www.marxists.org/archive/lenin/works/1916/miliprog/i.htm, retrieved on 22.7.2017.
[22] Communist China 1955-1959: Policy Documents with Analysis, Volume 1, p-271, Harvard University Press, Cambridge, Massachusetts.
[23] https://www.marxists.org/archive/lenin/works/1919/rcp8th/02.htm, retrieved on 12.05.2017.
[24] https://www.marxists.org/subject/china/documents/polemic/peaceful.htm, retrieved on 12.5.2017.

According to CPC, Lenin followed different principles of peaceful coexistence with different countries. Lenin gave primary and particular importance to the countries which are affected by imperialism. He advocated friendly relations among the countries which were oppressed by imperialism. Lenin's draft programme of the party explicitly argues for the 'support of the revolutionary movement of the socialist proletariat in the advanced countries and 'support of the countries in general, and particularly in the colonies and dependent countries.'[25]

The CPC further stated that Lenin consistently held that it was impossible for the oppressed classes and nations to co-exist peacefully with the oppressor classes and nations.[26] The CPC accused the USSR principle of co-existence as 'all-round cooperation with imperialist countries and especially with the United States. Further 'the Soviet Union and the United States 'will be able to find a basis for concerted actions and efforts for the good of all humanity' and 'can march hand in hand for the sake of consolidating peace and establishing real international co-operation between all states.'[27]

The CPC differentiates Lenin's policy of peaceful co-existence as one aspect of the international policy of the proletariat in power, but the Soviet Union stretches peaceful co-existence into the general line of foreign policy for the socialist countries. Lenin's peaceful co-existence was directed against the imperialist policies of aggression and war, but Soviet Union's peaceful co-existence caters to imperialism and abets the imperialist policies of aggression and war. The difference is the international class struggle and international class collaboration.

### 2.5. Views from the Western Countries

The imperialist camp was doubtful about the term of peaceful co-existence from the very beginning. Leaving a model of non-exploiting state led by the proletariats is always a threat to their very existence. The imperialist camp never trusted the words of the Soviet leaders about the peaceful co-existence and in a sense; it was more practical and open about the nature of the Soviet state. More concern by the imperialist camp was about the technical use of the term and its implications. Sir

[25] https://www.marxists.org/subject/china/documents/polemic/peaceful.htm, retrieved on 12.5.2017.
[26] https://www.marxists.org/subject/china/documents/polemic/peaceful.htm, retrieved on 12.5.2017.
[27] https://www.marxists.org/subject/china/documents/polemic/peaceful.htm, retrieved on 12.05.2017.

Roger Makins, former British Ambassador to the US, has suggested that "modus vivendi," implying a balance of peace through strength, was a better term to be accepted practically. He notes 'it enjoys the decent obscurity of a dead tongue, perhaps has less risk of becoming a popular catch word.'[28] He added that 'for the Russians, it (peaceful co-existence) signifies a temporary détente during which they can build up communist strength and sap the will of the free world, a state of what has been called provisional non-belligerency.'[29] These statements from the imperialist camp express the non-willing of their co-operation and giving importance as an international legal principle.

Henry Cabot Lodge, United States Representative to General Assembly of the United Nations, told the General Committee on September 30, 1957, in a discussion on the inscription of the Soviet item on the Five Principles, that 'these principles, stated in another way, are what we are all committed to by our adherence to the Charter of the United Nations. All men of good will approve such ideas.'[30] By this way, the western powers try to equate with the principles of the UN Charter and try to establish that the principle of peaceful co-existence is nothing new.

The American scholars disagreed to define the term but interpreted as

> 'a concept requiring vigorous efforts to bring all peoples of the world closer together so that there may be an evolution of an informed, educated world public prepared to formulate policies designed to further the economic and political development of all peoples….. a concept opposed to forceful measures designed to impose the will of a strong power or group of powers upon a power or group of powers believed to be less strong.'[31]

This statement is vague and nothing more than the principle of equality of states. It is in a way self-contradictory, because that one way it argues for furthering the economic and political development of all people and another way it opposes effective measures. The very nature of capitalism and its highest stage imperialism survives out of effective action. To further capitalist economic model is itself effective means of imposing the will of a substantial power. Socialist states in nature

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[28] Cited in Fifield, *Five Principles of Peaceful co-existence*, p.509.
[29] See ibid., p.509.
[30] See ibid., p.509.
[31] Hazard, *Codifying Peaceful Co-Existence*, p.111.

cannot forcefully impose their economic program unless it turns out to be an imperialist state like former the Soviet Union. A socialist state's primary concern would be protecting the proletariat state from capitalist encirclement.

When Khrushchev started propagating the doctrine of peaceful co-existence, the Western countries, during the twelfth session of the General Assembly, expressed a negative opinion about it and said that Lenin and Stalin had and developed the idea of co-existence agreed as a phase in the goal of communism and never renounced their hostility towards the non-communist states. Therefore, the imperialist countries were clear in their position about the international law principle of peaceful co-existence and diluted the principle to become a mere policy of Soviet Union.

## 2.6. Peaceful Co-existence and the Third World Countries

The third world countries other than China were always in favour of the international legal principle on peaceful co-existence, though, the interpretation is different, and overall the intention would be the same. The third world countries other than China mostly had the mixed economy after the independence. They did not declare as a socialist state, nevertheless, in practice socialism was one of its primary principles. Meanwhile, they did not stop the growth of the capitalists. The big industries were mostly under the state control. By fact, it cannot be said that it is neither antagonistic to capitalist nor the socialist countries. They tried to establish a good relationship with both the countries and mostly dependent on the loans and technology from the first world. The modern beginning of the use of the principle peaceful co-existence happened between the third world countries only.

The word peaceful co-existence first found in an international treaty between India and Peoples Republic of China, on Tibet signed on April 29, 1954. The five principles of the treaty are called Pancha Sheel. Peaceful co-existence is the fifth principle of the treaty, but later the five principles become the extension of peaceful co-existence. The five principles are mutual respect for each other's territorial integrity and sovereignty, mutual non-aggression, mutual non-interference in each other's internal affairs, equality and mutual benefit and peaceful co-existence.[32] It seems though the treaty was between China and India, Burma also played a part in conceptualising it. The principles were worked out by the three prime ministers of India, China and Burma

[32] Fifield, *The Five Principles of Peaceful Co-Existence*, p.505.

according to Li Kao's writing in Peoples China. Former Prime Minister Nehru while speaking about Indonesia referred to Pancha Sheel that the expression has 'been used from ancient times to describe, the five moral percepts of Buddhism relating to personal behaviour. Peaceful co-existence is possible says Nehru, provided it is clearly understood that one country must not interfere with another and try to impose itself or its ideologies, political or economic on another.'[33]

These five principles of peaceful co-existence were again reaffirmed in a communique of the two leaders in New Delhi on June 28, 1954. It was further approved in a joint statement by premiers U Nu and Chou En-lai in Rangoon in the following days. Ho Chi Minh of the Democratic Republic of Vietnam added his support to the five principles.

A declaration was made both by the Soviet Union and China in Beijing on October 11, 1954. The declaration stated that the two countries would strictly follow and observe the five principles not only between them but with other countries too. Later India and Vietnam issued a joint statement, and the Vietnam leader Ho Chi Minh said that he would apply those principles to the neighbouring countries like Cambodia, Laos. When the Yugoslavia Premier Marshal Tito visited India and Burma, joint statements were issued declaring the five principles as the basis of the relation between them.

As a milestone, the Bandung conference or the Asian-African conference as it is called evolved these five principles of peaceful coexistence into adding more five principles into it. In the declaration, the word 'peaceful co-existence' was substituted into 'live together in peace'.[34] On June 26, 1956, India and Poland issued a joint statement supporting the five principles. As Yugoslavia developed one step further in defining the principle as peaceful and active co-existence, Prime Minister Nehru called for the same when he visited Yugoslavia. Prime Minister Nehru and Ho Chi Minh reassured their adherence to their Pancha Sheel in Ceylon and Eastern Europe respectively during their visits.

On December 14, 1957, the General Assembly, by a vote of 77 to 0, adopted the resolution submitted by India, Yugoslavia and Sweden. The nationalist China

[33] Deshpande, *Peaceful Co-existence*, p.37.
[34] http://franke.uchicago.edu/Final_Communique_Bandung_1955.pdf, retrieved on 12.05.2017.

abstained. The words of 'peaceful co-existence' were substituted here as 'peaceful and tolerant relations' and 'friendly and co-operative relation' among states.[35] Thus, the principle of peaceful co-existence which existed in the treaties between the third world countries gets diluted when it reached the United Nations. The primary reason for that was the pressure of the capitalist countries, and also the third world countries did not want to take a firm stand, which may affect the relations with the imperialist countries.

To conclude, there is no obstacle for the socialist countries to practice peaceful co-existence. The demand of peaceful co-existence from the socialist countries primarily was because of the aggression of war by the imperialist countries. This principle is much beneficial to the third world countries, which has an independent system of a national economy free from the imperialist exploitation. As the Soviet Union propagated peaceful co-existence and co-operation during the period of Khrushchev, otherwise, made the Soviet Union into an imperialist country by arms competition, led to the cold war. In sum, peaceful co-existence with the imperialist state cannot be a primary policy of a socialist state, albeit, can be one of the policies, but to be used carefully and tactically.

### 3. Proletarian Internationalism

Proletarian internationalism is a materialist concept of international law which unites the working class all over the world. The communist slogan 'Workers of the World Unite' resembles this concept. For a proletariat, there is no nation, no nationality. His welfare is connected with the proletariats of the world. Nationalism is a hurdle in the path to proletarian internationalism. Nationalism and patriotism of the proletariats of a particular nation stop them from opposing the exploitation of the working class of other countries by their nation. Communist Internationals were the beginning of the materialist principle of proletarian internationalism in an organised way. Socialist internationalism which is the enrichment of proletarian internationalism originated after the formation of socialist states. Nevertheless, both socialist internationalism and proletarian internationalism were betrayed many times, when the parties and states deviated from Marxism-Leninism.

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[35] Fifield, *The Five Principles of Peaceful Co-Existence*, p.510.

### 3.1. Marxism-Leninism on Proletarian Internationalism

Marx and Engels in Communist Manifesto, after discussing the necessary role of proletariat in the countries and in a concluding remarks said, that 'the Communists everywhere support every revolutionary movement against the existing social and political order of things' and 'finally they labour everywhere for the union and agreement of the democratic parties of all countries'.[36]. Lenin on the other hand defined

> 'Marxism cannot be reconciled with nationalism, be it even of the "most just", "purest", most refined and civilised brand. In place of all forms of nationalism Marxism advances internationalism, the amalgamation of all nations in the higher unity, a unity that is growing before our eyes with every mile of railway line that is built, with every international trust, and every workers' association that is formed (an association that is international in its economic activities as well as in its ideas and aims).'[37]

In some other place, he pointed out that since the domination of capital is international, the struggle of the workers of different countries for their liberation can be successful only if their efforts are unified and 'that is why' said Lenin, 'the German worker and the Polish worker and the French worker is a comrade of the Russian worker in the struggle against the capitalist class, just as the Russian, Polish, and French capitalists are his enemy.'[38] Nevertheless, he advocated the self-determination of the oppressed nationalities. We will see this in the next materialist principle of international law, the self-determination.

Nationalism is a concept developed by the capitalists. The capitalists of the particular nation state wanted to make profit without competition from capitalists outside the nation. But later when the production increases the capitalists has to look for markets beyond their national borders. In that way, they are compelled to break the national boundaries. When they break the national boundaries, they turn into monopoly capitalists. Hence, capitalists were the one who first break the national borders to make the profit. These monopoly capitalists intrude the weak nations and extract

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[36] https://www.marxists.org/archive/marx/works/1848/communist-manifesto/ch04.htm, retrieved on 15.6.2017

[37] Lenin, *LCW*, Vol. 20, p.34.

[38] Tunkin, *Theory of international law*, p.5.

profit which is called colonialism and this later turned into imperialism. The working class of the imperialists' countries is 'hegemonised' in the Gramscian term to support the exploitation of the poor countries in the name of patriotism. Thus the poor countries lose the sovereignty and become the exploiting ground. To make the working class of the imperialist countries realise that the enemy is the bourgeoisie, the ideology of nationalism has to be clarified as it is not in the welfare of the working class. The workers of all the countries have the only interest that is class interest and no other interests like nationality, race, language or colour.

However, the materialism does not view nationalism always in a critical manner and against the working class. According to Lenin's view of nationalism, it has a dual character. One character is in favour of the bourgeois, and the other one is in favour of the working class of the oppressed nations. The nationalism of the imperialist country can serve the bourgeois chauvinism, and the nationalism of oppressed country can serve the concept of revolutionary self-determination. For the working class of the imperialist countries, the Communist Manifesto guides that 'though not in content, yet in form, the struggle of the proletariat with the bourgeoisie is first a national struggle. The proletariat of each country must, of course, first of all, settle matters with its own bourgeoisie'.[39] The oppressed countries working class has a dual role to fight against their capitalist as well as the imperialists who are exploiting their country. In that struggle, the national bourgeoisie sometimes can be a friendly force in fighting against the imperialist – happened in the 'New Democratic Revolution' of China. Mao following Marxism and Leninism said

> Can a Communist, who is an internationalist, at the same time, be a patriot? We hold that he not only can be but also must be. The specific content of patriotism is determined by historical conditions. There is the "patriotism" of the Japanese aggressors and of Hitler, and there is our patriotism. Communists must resolutely oppose the "patriotism" of the Japanese aggressors and of Hitler. ………. Chinese Communists must, therefore, combine patriotism with internationalism. We are at once internationalists and patriots, and our slogan is, "Fight to defend the motherland against the aggressors." For us defeatism is a crime and to strive for victory in the War of Resistance is an inescapable duty. For only by fighting in defence of the motherland can we defeat the aggressors and achieve national liberation. And only by

[39] https://www.marxists.org/archive/marx/works/1848/communist-manifesto/ch01.htm, retrieved on 15.5.2017.

> achieving national liberation will it be possible for the proletariat and other working people to achieve their own emancipation. The victory of China and the defeat of the invading imperialists will help the people of other countries. Thus in wars of national liberation patriotism are applied internationalism.'[40]

In sum, proletarian internationalism is the unity of the working class of the entire world. This alliance is built not on the nationality question, but on the question of oppression. Hence, oppressed nations are the friendly ally of the international working class. It is an interesting juncture where the nationalism and internationalism stands in a same line. Both are united against the oppression and exploitation.

### 3.2. The Practice of Proletarian Internationalism

In theory, proletarian internationalism contradicts the peaceful co-existence principle of international law in some way. The line separating the practice of proletarian internationalism and peaceful co-existence is very thin. The proletarian internationalism demands the socialist state not to 'lend financial and technical assistance to governments that are engaged in suppressing the guerillas fighting for freedom and socialism.'[41] Not only stopping the lending of financial assistance but on the other hand actively helping the guerrilla movements in various countries who are fighting against the imperialists as well as the capitalist state. Lenin defines it clearly as what is the responsibility and duty of the Soviet state under proletarian internationalism. For Lenin protecting the Soviet fatherland is fighting for the world socialism. The national interest of Russia, the Soviet state comes after the benefit of socialism in the whole world. He declared

> 'It is not the Great Power status of Russia that we are defending—of that nothing is left but Russia proper—nor is it national interests, for we assert that the interests of socialism, of world socialism, are higher than national interests, higher than the interests of the state. We are defenders of the socialist fatherland.'[42]

Hence socialist state while practising proletarian internationalism as a principle in international law has the primary responsibility of supporting and aiding human and material sources for the development of socialism in the whole world and the national interests comes secondary. However, promoting socialism all over the world is again

[40] https://www.marxists.org/reference/archive/mao/works/red-book/ch18.htm, retrieved on 15.5.2017.
[41] Lajpat Rai, *Proletarian Internationalism and Socialist camp*, p.601.
[42] Lenin, *LCW*, Vol. 27, p.378.

helping the consolidation of the socialist state itself, which helps in furthering the socialism. The threat to the young socialist state reduces when more socialist countries join it. By way of promoting the creation of more socialist states is helpful in strengthening the own socialist state from the capitalist encirclement. Precisely Tunkin says that 'the guiding principle of the international workers' movement was the principle of proletarian internationalism, which signified the fraternal friendship, close cooperation and mutual assistance of the working class of various countries in the struggle for their liberation.'[43] This is the primary principle of the proletarian internationalism.

Proletarian internationalism as a principle in international law unites not only proletariats but also all the working class including the peasants. The industrial labour or the modern proletariat is a vanguard class. It not only fights and struggle against the capitalist class in the liberation of its own but also the release of the other oppressed section of the society including women, peasants, etc., from the clutches of oppression and exploitation. The goal of the proletariat class to form a socialist society will not only benefit the proletariat class but also benefits the other working and oppressed section.

### 3.3. The Communist Internationals

Proletarian internationalism was practised by various communist parties and revolutionary groups by forming the first international called as 'The Communist League' in 1847. This is the first international organisation formed by the materialist conception to unite the working class of the world under a single organisation. As already noted the organisation was based on the slogans 'workers of the world countries, unite'. In the meantime, in 1864, the International Workingmen's Association was formed to organise solidarity between workers engaged in strikes and struggles. Later it went into crisis and split between anarchists and socialists wings. The founding members of the first international were Karl Marx and Fredrick Engels. Marx wrote in the founding *Manifesto of the International Association* of the workers, that 'the experience of the past showed that a scornful attitude toward a fraternal alliance, which must exist among the workers of various countries and impel them to

[43] Tunkin, *Theory of International Law*, p.4.

stand behind each other firmly in their struggle for liberation, is punished by the general defeat of their un co-ordinated efforts.'[44]

They created the First International in the spirit of the proletarian internationalism. Marx in his book *Civil War in France* called the First International as 'the international counter organisation of labour against the world bourgeois conspiracy of capital'.[45] The First International laid the foundation for the proletariat in the international struggle for socialism. This organisation was the first of its kind as a revolutionary political world organisation to fight against the capitalism and to build a communist society. The international labour movement was supported by the first international by constant material and moral support for the striking and locked out workers in different countries, led to the popularity of the First International among the labourers.

The First International was much essential to the development of Marxism. Marxism influenced the first international and became a revolutionary theory for the working class of the world. It was leading the workers to gain their human rights in all the countries, and as a result, International Labour Organisation was formed in the later decades. It was the first organisation of the international proletariat which united the labour movement with scientific socialism. The first one combined the struggle for direct daily interests with the battle for the ultimate communist goals. With the First International, the core principles of *The Communist Manifesto* were implemented. The purposes are to protest in the contemporary movement and to fight crucially for the general interests of the entire world working class in future.

Later 'The Second International' was built in 1889 by the call of Belgian comrades. This international unlike the first was made of elected representatives properly elected by the left parties. The Second International was infected by the disease of patriotism. Split in to several groups, they were supporting the imperialist First World War in the international. 'The most obvious division was between those socialists who supported their respective countries' war efforts and those who opposed them. The first group, who were denounced by Lenin with the phrase 'social patriots', derived most of their following from the old right and centre of their parties, but also included men hitherto

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[44] Tunkin, *Theory of International Law*, p.5.
[45] Marx, *Civil War in France*, p.38.

considered as members of the left - such staunch Marxists as the Frenchman Guesde and the Russian Plekhanov.'[46]

The Third International from 1919 – 1943 was formed after the Soviet revolution. When the young socialist state was fighting for its survival, the party invited communist revolutionaries from all over the world to come to found a new revolutionary communist international. 'The Third International has before it the task laid down by Lenin of fulfilling Marx's legacy and translating it into life. It has undertaken this historical task in a situation which, after the Russian Revolution, reproduced all the political and economic effects that an event like the American Civil War of 1861-5 had on the European working class. These are now being felt by the exploited classes and oppressed people of Europe, America, Asia and the whole world on a far broader scale and with unparalleled intensity. The tocsin of world revolution is sounding from Soviet Russia'[47] after the October Revolution.

### 3.4. Socialist Internationalism

Proletarian internationalism is a wider term, whose origin can be traced from the writings of Marx and Engels itself. During that time there were no Socialist countries to develop the idea of socialist internationalism. Hence there was only talk about the proletarian internationalism or the unity of the working class of all nations. After the October revolution and after the formation of many socialist states all over the world after Second World War, a concept of socialist internationalism has emerged. Proletarian internationalism includes the idea of socialist internationalism, the relation between the socialist states. Both cannot be differentiated, but one includes the other. It is the development of proletarian solidarity into socialist solidarity. 'With the formation of the world socialist system, proletarian solidarity was enriched with such a new form of socialist solidarity'.[48] Thus socialist internationalism is not different from proletarian internationalism but a development of proletarian internationalism at the particular historical juncture. Lenin while speaking about the foreign policy of the socialist state, said, it is nothing but 'in alliance with the revolutionaries of the

[46] Watson, *From Lenin to Malenkov - The History of World Communism*, p.50.
[47] Korsch, *Marxism and Philosophy*, p.175.
[48] Marx and Lenin, *Marxism-Leninism on Proletarian internationalism*, p.17.

advanced countries and with all oppressed people,' 'against any and all imperialists,' and '… this is the foreign policy of proletariat.'[49]

The principles of socialist international law developed only in the 20th century particularly after the Second World War. The principles of socialist internationalism include mutual assistance in economic relations, complete equality among the socialist states, mutual respect for independence and sovereignty and fraternal mutual aid and cooperation among the socialist states. Mutual financial assistance was not a simple commercial relation. It is assisting the newly formed socialist state by the advanced and economically wealthy socialist states. Among the socialist countries, there was an international socialist division of labour developing. The Twenty-Third special session of the council of mutual economic assistance, which took place in Moscow on April 23-26, 1969, with the leaders of the communist parties and of governments of member countries of the Council of Mutual Economic Assistance participating, emphasised that the Commonwealth of Socialist states 'must rest upon the system of firm and stable international socialist division of labour which ensures the close interaction of the national economies of the member countries of CMEA.'[50]

The relations between the socialist states are the new and higher type of international relations. Compared to the old capitalist mode of production, the countries based on the socialist mode of production is a progressive step towards communist society. The capitalist state's relations are not based on mutual friendship but based on the inherent contradiction between them. The two world wars are the result of those inconsistencies. Naturally, the capitalist states contradict due to the competition and profit-making which lead to the relations antagonistic between them. But on the other side, as there is no private property, the socialist states were not a bend towards to exploitation and competition. The Moscow declaration of the 81 Communist parties, December 1960, pointed toward a socialist system secure against contradiction:

> 'In contract to the laws of the capitalist system, which is characterised by antagonistic contradictions between classes, nations and states leading to armed conflicts, there are no objective causes in the nature of the socialist system for contradictions and conflicts between the peoples and states belonging to it. Its development leads to

[49] Tunkin, *Theory of international law*, p.6.
[50] See ibid., p.428.

> greater unity among the states and nations and to the consolidation of all forms of cooperation between them.'[51]

In 1957, a Soviet spokesman declared that 'the world camp of socialism is a monolithic commonwealth of free and sovereign states with common interests and purposes in which there is not and cannot be antagonism.'[52] This is the ideal of socialist internationalism.

There was no such principle of international law evolved among the capitalist states as capitalist internationalism. Fundamentally there cannot be a friendly internationalism among the capitalist states. If there is some, then it would be for the benefit of one and not to the other or to benefit equally by exploiting the weaker countries. Many treaties of international law can be shown as an example like the Treaty of Versailles. Capitalists are united temporarily in many situations when there is a common threat to their very existence.

The principles of socialist internationalism were visible in each international treaties signed between the socialist states. The socialist countries of the world recognised those principles as the principles of international law. The Treaty of Friendship, Co-operation and Mutual Assistance of September 7, 1967, between the USSR and the Hungarian People's Republic argued for the friendship, fraternal mutual assistance and all round close co-operations between the USSR and HPR. It is based upon the 'firm principles of socialist internationalism.[53]

The joint Soviet-Polish statement of July 22, 1959, in connection with the arrival of the party governmental delegation of the Soviet Union in Poland says 'Friendship between the peoples of both countries, founded upon a profound community of ideology, upon the Leninist principles of proletarian internationalism is being strengthened and is developing even more.'[54]

Out of the principles of socialist internationalism, new international legal principles evolved as the most general predominant and characteristic principle of the new type of international relations. The 1957 'Declaration of the Meeting of Representatives of Communist and workers parties of the Socialist Countries' elaborates that the

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[51] Mitchell, *The Brezhnev Doctrine and Communist Ideology*, p.201.
[52] See ibid., p.201.
[53] Tunkin, *Theory of international law*, p.433.
[54] Tunkin, Theory of International Law, p.432.

> 'Socialist countries build their mutual relations upon the principles of complete equality, of respect for territorial integrity, state independence and sovereignty, and of non-interference in one another's internal affairs. These are the most important principles; however, they do not exhaust the entire essence of relations among socialist countries. Fraternal mutual assistance is an integral part of their mutual relations; the principle of socialist internationalism finds its true manifestations in such mutual assistance.[55]

Tunkin explains about the relation of proletarian and socialist internationalism. He defines, 'the principle of socialist internationalism is the result of applying the principle of proletarian internationalism to relations between states of the socialist type'[56] in inter-state relations. The primary purpose of proletarian internationalism is 'above all the unity of the proletariat of various countries in the class struggle against capital for a socialist reconstruction of society.'[57]

He further explains,

> 'Therefore the principle of socialist internationalism as a principle of relations among socialist states signifies above all the unity of the socialist state in that class struggle between socialism and capitalism which takes place in the international arena in specific forms and which comprises the basis content of contemporary international relations. An important part of this struggle is the joint defence of the socialist system from any attempts of forces of the old world to destroy or subvert any socialist state of this system.[58]

The joint defence mechanism of Warsaw pact was later developed during the Khrushchev period. This joint defence mechanism of the then Soviet Union had an aggressive nature which later led to the invasion of Czechoslovakia and Hungary in the name of socialist internationalism. The international socialist principles are not only a moral and political but also an international legal principle. These principles turn into an inevitable part in the foreign policies of the socialist state. The program of CPSU says

> 'the Marxist-Leninist parties and the peoples of Socialist states, proceed from the fact that the successes of the entire world system of socialism depend upon the

[55] See ibid., p.434.
[56] See ibid., p.434.
[57] See ibid., p.434.
[58] See ibid., p.434.

> contribution and effort of each country and they, therefore, consider the utmost development of the productive forces of its country to be an internationalist duty.'[59]

We have seen that some of the international socialist principles are already part of the general international law. The socialist principles of respect for state sovereignty, non-interference in internal affairs, etc., were according to Lenin 'were advanced earlier, even in the seventeenth and eighteenth centuries by the petty bourgeoisie.'[60] Every society carries forward the progressive principles of the old society. Hence some of the bourgeois principles of international law are strengthened by socialist and oppressed countries. The intention and aim of the bourgeois international legal principles may be different and not applicable universally. The real and complete usage and meaning of those legal principles have to be enriched by the oppressed and socialist countries. Tunkin clarifies that, though general principles of international law have the same principles of socialist internationalism they differ fundamentally. He puts up that

> 'the socialist principles of respect for state sovereignty, non-interference in internal affairs, and equality of states and peoples differ fundamentally from the corresponding principles of general international law; these socialist principles have another content; the rules of conduct themselves are changed partially as part of the content of the norms and, especially, the special aspect of the norm changes, on the sociological plane, socialist principles reflect the concordant wills of states of one social system and – of special importance – of the socialist system. The social consequences of the operation of socialist international legal principles differ completely from the consequences of the operation of norms of general international law. The immediate reason for this is the qualitative distinctiveness of the special aspect of socialist principles from the principles of general international law and the difference in the social relations which are regulated by socialist principles, on one hand, and by principles of general international law, on the other.'[61]

Tunkin's stress to the principle of socialist internationalism by differentiating from the general international law for the socialist countries has aggressive motives to justify the invasion of the socialist and third world countries.[62]

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[59] See ibid., p.437.
[60] See ibid., p.438.
[61] See ibid., p.438
[62] See Chapter III, for Tunkin's differentiation of 'General' and 'Particular' international law.

The principles of socialist internationalism was emphasised, in the communiqué concerning the special session of the Council of Mutual Economic Assistance held in April 1969, says

> ‘their mutual economic, scientific and technical ties are built upon the basis of principles of interstate relations of a new type – of socialist internationalism, complete equality, respect for sovereignty and national interest, mutual advantage and comradely mutual assistance. Historical experience has fully confirmed the living force of these Marxist-Leninist principles'.[63]

This paragraph defines the socialist internationalism better than Tunkin’s definition. The socialist internationalism is nothing but mutual help to the socialist and the third world countries. It is not for invading to bring the socialist system in a particular country and exactly not a division of labour among the socialist countries under Khrushchev's leadership.[64]

### 3.5. The Betrayal of Socialist Internationalism

The principles of socialist internationalism remained intact till the existence of the socialist states following the principles of Marxism-Leninism. After the revolution, the next Soviet was formed in Hungary in 1919. The Hungarian Soviet lived for a short time only. The Eighth Congress of the Russian Communist Party of Bolsheviks, convened in March 1919, greeted the Hungarian Soviet Republic, assured that the Russian working class in solidarity and assistance with Hungary and ‘shall not permit the imperialists to raise their hands against the new Soviet republic'.[65] The leader of the Hungarian Republic Bela Kun declared on March 23, 1919, that ‘we are pleased and proud that Hungary is the second Soviet republic…. We express gratitude and send greetings to the Russian Soviet Republic, which unfailingly has rendered assistance to us'.[66] This first socialist internationalism was ‘based upon friendship and mutual assistance’ as said by academician I. I Mints.[67] The relationships ‘were prototype of a fraternal relation which has been formed now among countries of the socialist common wealth’.[68] It collapsed in few months by surrendering to the

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[63] Tunkin, *Theory of international law*, p.439.
[64] http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=1163, retrieved on 19.5.2017.
[65] https://www.marxists.org/archive/lenin/works/1919/rcp8th/05.htm, retrieved on 19.5.2017.
[66] Tunkin, *Theory of International Law*, p.7.
[67] See ibid., p.7.
[68] See ibid., p.7.

Romanian forces. The Soviet Union did not send its armed forces to make the socialism continue.

Nevertheless, in 1956, Hungary was already a socialist state after Second World War, tried to liberate its economy, the Soviet Union made an armed intervention in the name of socialist internationalism and justified by Tunkin as a 'particular' international law for socialist states. Later the Soviet invasion of Czechoslovakia happened along with the other member of Warsaw Pact in 1968. It was justified in the name of the international law named as Brezhnev Doctrine, which was made to be part of socialist internationalism.

Brezhnev declared that

> 'The forces of imperialism and reaction seek to deprive the people now of this, now of that socialist country of their sovereign right they have gained to insure….. the well-being and happiness of the broad mass of the working people….And when the internal and external forces hostile to socialism seek to revert the development of any socialist country toward the restoration of the capitalist order, when a threat to the cause of socialism in that country, a threat to the security of the socialist community as a whole, emerges, this is no longer only a problem of the people of that country but also common problem… for all socialist states….that such an action as military aid to a fraternal country to cut short the threat to the socialist order is an extraordinary enforced step, it can be sparked off only by direct actions of the enemies of socialism inside the country and beyond its boundaries, actions creating a threat to the common interests of the camp of socialism.'[69]

He maintained that among the socialist countries the international law principle of sovereignty is unique and he called it as 'socialist sovereignty' by 'military aid to a fraternal country' which can be interpreted as military intervention. Kovalev, who was a columnist, justified the invasion and wrote in Pravda. He formulated a theory of sovereignty based on the socialist international law. He rejected the absolute sovereignty of the bourgeois international law and argued that 'laws and legal norms are subjected to the laws of the class struggle, the laws of social development. The act of invasion was justified by him as

[69] Cited in Schwebel, *The Brezhnev Doctrine Repealed and Peaceful Co-Existence Enacted*, p.816.

> ‘Naturally, the Communists of the fraternal countries could not allow the socialist states to be inactive in the name of an abstractly understood sovereignty when they saw that the country stood in peril of anti-socialist degeneration…Formal observance of the freedom of self-determination of a nation in the concrete situation that arose in Czechoslovakia would mean freedom of ‘self-determination' not of the popular masses, the working people, but of their enemies.[70]

A new definition of ‘intervention' has been given by Kovalev by saying

> ‘Socialism, by delivering a nation from the shackles of an exploiting regime, solves fundamental problems in the national development of any country that has embarked upon the socialist road. On the other hand, by encroaching upon the mainstays of socialism, the counter-revolutionary elements in Czechoslovakia undermined the very foundations of the country's independence and sovereignty'.[71]

Rejecting the absolute theory of sovereignty of bourgeois international law both Brezhnev and Kovalev implied that intervention is permitted under certain extraordinary circumstances. Kovalev's Pravda argument in support of Soviet intervention in Czechoslovakia has organised around four basic concepts: 1) The class basis of law 2) Two camps or the struggle between systems 3) The indivisibility of the socialist commonwealth and world socialism 4) Socialist self-determination and the socialist commonwealth as the guardian of sovereignty.[72]

China refused to accept the Soviet contention that Moscow had the right to intervene in any country where socialism might be threatened. Chinese Premier Chou En Lai on August 23 charged the Soviet Union with practising fascist politics, great power chauvinism, national egoism, and social imperialism. He compared it with German invasion during First World War and US intervention in Vietnam. The Eighth Central Committee of the CCP on October 31, condemned the attack.[73]

Mao in his writings spoke about the existence of contradictions within socialist countries. The contradictions occur because of the isolation of the leaders from the masses. The solution to this contradiction is the application of mass line and mass struggle against the leaders. Such struggles have to be waged in the Soviet Union. Till

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[70] Cited in Glazer, *The Brezhnev Doctrine*, p.170.
[71] Cited in ibid., p.172.
[72] See further ibid.
[73] Rea, *Peking and the Brezhnev Doctrine*, p.22.

then, the Russian leadership would continue to practice imperialism under the guise of 'proletarian internationalism.'[74]

In fact, when revisionism popped its head in the Soviet Union as well as in the international communist movement, the socialist states behaved like the capitalist countries. The national interest of the socialist state was given importance over the principle of socialist internationalism. During Second World War, when Yugoslavia under Marshall Tito, denied the Soviet aid to Greece Communist Party, the first betrayal of socialist internationalism happened. When Khrushchev announced the policies of revisionism in the Soviet Union like 'peaceful co-existence and Peaceful competition with the capitalist state' the ideological struggle occurred between the socialist countries. Albania and the Peoples' Republic of China criticised revisionism of the Soviet Union. As a result, the Soviet Union's assistance to China was withdrawn. The Soviet Union denied China the socialist international help in its struggle with economic scarcity, industrialisation and its cultural backwardness. The Soviet engineers and scientists, technologists were withdrawn back to the Soviet Union which pushed China ten years backwards. This was a betrayal of the principle of proletarian internationalism.

Contrary to Lenin's view which says 'to the Russian proletariat has fallen the great honour of beginning the series of revolutions which the imperialist war has made our objective inevitability',[75] The Soviet Union during the Khrushchev's period not only abandoned the aid for the support of the revolution in other countries but also stopped helping countries, where socialism has born already by the erroneous policy of peaceful co-existence and co-operation with the imperialist countries. Instead it helped the countries which are the supporters of imperialism.[76] The proletariat has to capture the power in separate countries, but the Soviet Union and the Russian Revolution was the inspiration for the revolutions in various countries which has international impact. Solidarity and material aid come as a significant contribution for the proletarian internationalism. Soviet Union justified the co-operation with imperialist countries by saying that the imperialism is different now. 'They

[74] See ibid.,p.23.
[75] https://www.marxists.org/archive/lenin/works/1917/mar/26b.htm, retrieved on 19.5.2017.
[76] Indo USSR treaty was to win over India from going to US side. It had patronising imperialist attitude. See further, http://www.mitpressjournals.org/doi/pdf/10.1162/JCWS_a_00006, retrieved on 15.6.2017

maintained that the nature of imperialism had changed and denied that imperialism was the source of war in modern times. They spread the notion that the ruling clique of U.S. imperialism and its chieftains 'do not hope for war' and 'worry about ensuring peace just as we do'.[77] Thus the Khrushchevite regime has distorted the Lenin's theory of imperialism.

The followers of Trotsky criticised the Soviet Union even from the period of Stalin onwards. The criticism comes from the slogan of 'Socialism in one country' which was the reason for the abandonment of Proletarian Internationalism and the permanent revolution of world socialism. This led to later Khrushchev's revisionism of external peaceful co-existence with the capitalist states and the internal co-existence of social classes inside the nations. Their argument is that after the Second World War, the survival of Soviet Union was not dependent on the revolutions in various countries and of capturing power by communist parties. Instead of following proletarian internationalism by aiding the newly formed socialist countries and newly independent countries from colonialism, it followed the peaceful co-existence with the capitalist countries and by having friendly competition, thus maintaining the status quo. The Trotskyites criticised the Soviet Union's policy of socialist internationalism of the Khrushchev regime. The socialist internationalism means 'in solidarity of the working class of various countries in capturing the power.' According to Trotskyites it turns upside down. They criticised that the socialist internationalism was loyalty to the Soviet Union by various socialist countries and the communist parties during that period. E. H. Carr mentioned this as 'internationalism becoming an 'internationalism' of a very 'special type', expressing as it did solidarity with to particular national expression' like the capitalist states.[78]

The slogan before the Second World War, which was 'defense of the Soviet Union' which has changed into 'solidarity of the socialist camp' after the war. In the waves of Fascist attacks on the Soviet Union, there was a necessity for raising the slogan in 'Defense of Soviet Union'. After the war, many socialist states came into existence and there arises a socialist camp. Hence 'solidarity of the socialist camp' evolved as the new slogan. But the Trotskyites criticised that the slogan means the Soviet Union

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[77] A Great Victory for Leninism – In commemoration of the 95th Anniversary of the birth of Lenin, Hongqi Editorial, No.4, 1965., p.3.

[78] Rai, *Proletarian Internationalism and Socialist camp*, p.604.

has to prevail over the rest[79] of the socialist states. The slogan ‘solidarity of the socialist states' was the extension and development of the principle of proletarian internationalism and led to the formation of trade relations between the socialist countries. The exchanges between the socialist countries was called as the ‘mutually beneficial trade'. Here Tunkin description of the ‘division of labour' among the socialist state has to be mentioned. Both has connections as the Trotskyists argue that the mutually beneficial trade means ‘that in commercial relations between socialist states – as between capitalist one – the economically more developed countries absorbed part of the surplus of the less developed one'.[80] This was criticised by Che Guevara, the staunch proletarian internationalist of his time, as the rich socialist developed countries exploitation of the less developed one in the name of ‘mutually beneficial trade’. In 1965, Che Guevara while speaking at the Afro-Asian Conference in Algeria said,

> ‘How can one describe as mutual benefit the sale, at world market prices, of raw materials produced with infinite suffering in the third world and the purchase at world market prices, of machines produced in the great automated factories of today? If we make this kind of comparison, then we are forced to conclude that the (rich) socialist countries are, to some extent, accomplices in the crime of imperialist exploitation…. The socialist countries have a moral duty to end their tacit complicity with the exploiting countries of the West.'[81]

Castro later extended the criticism and frankly said in one sentence that the ‘imperialists were more internationalist than some socialist state’.[82]

Chinese criticism of the Soviet Union for abandoning the principles of socialist internationalism came in the ‘sixth comment on the open letter of the Central Committee of CPSU, says the Russian revisionists of ‘revising and vulgarising' the Marxist-Leninist principles of proletarian internationalism and embarking on a policy of ‘national chauvinism and betrayal of the international working class movement'[83]

China too in the later period betrayed the socialist internationalism. The Chinese instead of supporting the Algerian Leader Ben Bella supported the Boumedienne who

[79] See ibid., p.604.
[80] See ibid., p.604.
[81] https://www.marxists.org/archive/guevara/1965/02/24.htm, retrieved on 19.5.2017.
[82] Rai, *Proletarian Internationalism and Socialist camp*, p.605.
[83] See ibid., p.605

by a coup overthrown Ben Bella and released an onslaught against the Algerian left. The betrayal of the communists in the Bangladesh war and the betrayal of the communist uprising in Srilanka under the JVP by China also fall under the same category.

The Vietnamese too criticised both China and Soviet Union of betraying the principle of socialist internationalism when Nixon visited China and the Soviet Union at the same time of US aggression over Vietnam. The Nhan Dan, the organ of the workers party of Vietnam warned the erring Chinese and the Russian leaders from socialist internationalism. It says, 'for a country to care for its immediate and narrow interests while shirking its lofty internationalist duty, not only is detrimental to revolutionary movement of the world but will also bring unfathomable harm to itself in the end….'.[84]

Similarly, when Albania criticised the so-called the De-Stalinisation in the Soviet Union and the peaceful co-existence with the capitalist countries, the Soviet Union along with the other socialist countries turned its effort to isolate Albania economically, politically and militarily. Enver Hoxha, the leader of the Albanian Communist Party, said, 'seeing that all his (Khrushchev) pressure, blockades and blackmail did not bring the result he derived, could not kneel down our party and people, from the rostrum of the 22nd Congress made an open call for the overthrowing by means of counter-revolutionary coup the leadership of the party of Labour of Albania'.[85]

The hegemony of Soviet Union reached its peak when E. Furtseva, a former member of the presidium bluntly declared in the 22nd Congress 'How can those persons call themselves communists who do not accept the decisions of the 20th congress of our party?'[86] Thus the hegemony of Soviet Union was first criticised as revisionism, state capitalism and later the Soviet social imperialism by the Chinese communist Party and other Marxist-Leninist parties, resulted in the formation of three world theory as Soviet Union, the enemy of the world people being in the first world along with the United States of America by Mao. He said in February 1974,

[84] See ibid., p.609.
[85] http://www.marx2mao.com/Other/SCPLA61.html, retrieved on 19.5.2017
[86] https://www.marxists.org/reference/archive/hoxha/works/nov1961.htm, retrieved on 19.5.2017

> 'In my view, the United States and the Soviet Union form the first world. Japan, Europe and Canada, the middle section, belong to the second world. We are the third world. The third world has a huge population. With the exception of Japan, Asia belongs to the third world. The whole of Africa belongs to the third world and Latin America too.'[87]

The betrayal of Socialist states to the principle of socialist internationalism leads to the breaking of the unity of socialist states that means breaking the socialist internationalism and the formation of three world theory. Hence, international law principle of socialist internationalism has been betrayed during its practice, by the socialist countries many times.

### 3.6. Permanent Revolution and Socialism in One Country

Is the theory of permanent revolution contrary to the theory of socialism in one country that the former more close to socialist internationalism than the later? The theory of permanent revolution was not formulated by Trotsky, but the glimpses were found in Engels writings itself. Not directly, but by saying, 'the communist revolution will not be a purely national one. It will be a revolution taking place simultaneously in all civilised countries. i.e., at least in England, America, France, Germany…it is a universal revolution and therefore it will also have a universal terrain.'[88] Lenin too in the fourth party congress, April 1906 said,

> '[The Russian Revolution] can achieve victory because the proletariat jointly with the revolutionary peasantry can constitute an invincible force. But it cannot retain its victory, because in a country where small production is vastly developed, the small commodity producers (including the peasants) will inevitably turn against the proletarians when they pass *from* freedom *to* socialism. To be able to retain its victory, to be able to prevent restoration, the Russian revolution will need non-Russian *reserves*, will need outside assistance. Are there such reserves? Yes, there are the socialist proletariat in the West.'[89] [Italics original]

Later Lenin theorised that if the world revolution could not happen, the socialism could not be a completed one but building socialism in one country is possible. In his words,

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[87] https://www.marxists.org/history/erol/ncm-5/theory-3-worlds/section1.htm, retrieved on 19.5.2017
[88] https://www.marxists.org/archive/marx/works/1847/11/prin-com.htm, retrieved on 19.5.2017.
[89] https://www.marxists.org/archive/lenin/works/1906/rucong/iii.htm, retrieved on 19.5.2017.

> '…when we are told that the victory of socialism is possible only on a world scale, we regard this merely as an attempt, a particularly hopeless attempt, on the part of the bourgeoisie and its voluntary and involuntary supporters to distort the irrefutable truth. The 'final' victory of socialism in a single country is of course impossible.'[90]

Hence the final victory, the achievement of communism in one country is impossible unless the world mode of production majorly progressed into socialism; nevertheless, the growth of socialism is possible in one country. Stalin only followed Lenin's position and continued his policy after the death of Lenin.

In contemporary international law, there is no socialist internationalism practised as there are no socialist countries per se. The existence of Cuba, North Korea and the People's Republic of China, Vietnam has almost shifted to the capitalist model. The socialism differs in between them, but more or less they cannot be called as socialist countries. Nevertheless, the above-mentioned countries do not follow socialist internationalism in any way. Now the enrichment of socialist internationalism of the principle of proletarian internationalism is no more practised. It reverts to the broader principle of proletarian internationalism, which has very little international legal value.

### 4. Principle of Self-Determination

The materialist principle of self-determination in international law is a complex phenomenon. It has different contentions by the materialists as well as international law scholars that are relevant or not in different historical time periods. The growth of the principle of self-determination comes from the nationalism as well the political sovereignty of the people. Briefly, self-determination means the people decides their political, cultural and economic factor without the external intervention. The materialist conception of the international law principle self-determination of the nationalities has different trends.

#### 4.1. The National Question

The question of nationalism seems to be in contradiction with the concept of proletarian internationalism. Nationalism is the criterion which is opposite to the class divisions. Unlike the class, nationalism comes into existence after the demise of

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[90] https://www.marxists.org/archive/lenin/works/1918/jan/10.htm, retrieved on 19.5.2017.

feudalism along with the rise of capitalism. The official Soviet Union position thus puts up like,

> 'the nation, as a new form of community, emerged when feudalism disintegrated to be superseded by capitalism…..Nations appear and develop as a result of the elimination of feudalism and the rise of capitalism, which established economic links and forms a home market, thus evolving a common economic life which unites the separate parts of a nation into a single whole.'[91]

The nationalism and internationalism of proletariat are considered contradictory because of the reason that the bourgeois interests are shown as the national interest, and the proletarians of various countries are divided on the basis of bourgeois national interest. At the same time, the materialist conception analyse nationalism in a dialectical way as it can be both progressive as well as reactionary, in a given economic circumstances and conditions. It is reactionary in a developed capitalist state because it hinders the class consciousness of the grown up proletarian class. It is progressive in a semi-feudal semi-colonial state because it helps the growth of the proletariat which leads to socialism. Marx support of the Irish nationalism and Poland's liberation from Tsar was based on this criterion. Proclamation on the Polish question drafted by Marx and endorsed by the London conference of the First International in 1865, speaks about the necessity 'to annihilate the growing influence of Russia in Europe by assuring to Poland the right to self-determination which belongs to every nation and by giving to this country once more a social and democratic foundation'.[92] Marx thought that the British colonialism would hinder the development of Irish domestic industry, as the same case with Poland. At that point of time, Irish industry was one of the least developed one in the world. Marx saw the liberation of Ireland as the condition for the liberation of the English proletariat. According to Michael Lowy, Marx writings on Ireland consist of three themes. These issues are essential for the principle of national self-determination, in its dialectical relationship with proletarian internationalism. First one is that 'only the national liberation of the oppressed nation enables national divisions and antagonisms to be overcome, and permits the working class of both nations to unite against their

[91] Conner, *The National Question in Marxist-Leninist Theory and Strategy*, p.21.
[92] See ibid., p.21.

common enemy, the capitalists.[93] Second, the ‘oppression of another nation helps to reinforce the ideological hegemony of the bourgeoisie over workers in the oppressing nations which mean any nation that oppresses another forges its own chains.'[94] Third, ‘the emancipation of the oppressed nation weakens the economic, political, military and ideological basis of the dominating classes in the oppressor nation and this contributes to the revolutionary struggle of the working class of that nation.'[95] From these conclusions, the principle of self-determination is carried forward by the next generation Marxist leaders.

### 4.2. Two Major Trends in Self-determination

In the materialist understanding of the international law principle of self-determination, two trends exist. One is the radical Marxist position followed by Rosa Luxemburg and other. The other one is the Leninist conception of ‘self-determination of a nation with a right to secession' propagated by Lenin and Stalin. The radical left consists of Rosa Luxemburg, Pannekoek, Trotsky and Strasser. Their varying degrees of opposition to the national self-determination and secession of a nation comes in favour of proletarian internationalism. The first trend has a mechanical approach of putting nationalism against the proletarian internationalism.

Rosa Luxemburg called the liberation of Poland as utopian. She has published series of articles named as *The National Question and Autonomy* in the journal of the Polish social democratic party during 1908. In summary, for Rosa, the right to self-determination is an abstract and metaphysical right and in reality, helps the bourgeois nationalism. Nevertheless, in 1905, in an essay named *The Polish question and the socialist movement*, she made a careful distinction between the undeniable right of every nation to independence and the desirability of this independence for Poland.[96] In her *Junius Pamphlet* and in *The Polish Question and the Socialist Movement*' she somehow recognises the importance of self-determination of nations.

Following Rosa, Trotsky till 1917, took a position of middle line regarding the principle of self-determination. He calls for the ‘collapse' and ‘destruction' of the

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[93] Löwy, https://newleftreview.org/I/96/michael-lowy-marxists-and-the-national-question, retrieved on 12.5.2017, *Marxists and the National Question*’, p.83.
[94] See ibid., p.83.
[95]See ibid., p.83.
[96] See ibid., p.89.

nation-state altogether and exist in future entirely as a 'cultural, ideological and psychological phenomenon'.[97] Trotsky, like Luxemburg, reduced the nation into the mere culture but forgotten to see the political question in it. Trotsky understands somehow better than Rosa Luxemburg, and unlike her, he recognised the self-determination of Poland from the Tsarist Russia.

Pannekoek, a Dutch Marxist and theorist published a book named *Class struggle and Nation* in 1912. In the same year, another book published by Strasser called *Worker and Nation*. Lowy argues that 'the common central idea of both writers was the superiority of class interest over national interest; the practical conclusion was the unity of the Austrian social democratic party and the refusal to divide it into separate or autonomous national section.'[98] Pannekoek noted that the idea of nationalism is a bourgeois ideological phenomenon and a Kantian, not materialist method. Like Luxemburg economic determinism was the central phenomenon in his critique of the right to self-determination.

Karl Renner, on the other hand, was to stop the disintegration of Austro-Hungarian Empire into nation states. He agrees the reforms like cultural rights, but the same time wanted to depoliticise the national question and reduce it to just an administrative and constitutional question.[99] Otto Bauer, an Austro-Marxist followed Karl Renner. His book *The National Question and Social Democracy* is highly influenced by Renner's writing. The peculiarity of Bauer was the psycho-cultural nature of his theory of the national question, which was constructed by the vague and mysterious concept of 'national characteristic', defined in a psychological term. It was purely metaphysical, of Neo-Kantian origin.[100]

### 4.3. Lenin and the October Revolution

Lenin developed Marxism in the period of imperialism. By Marx's writings, Lenin established the principle of self-determination. Before Lenin, but under the instructions of Lenin, Stalin has written the seminal work, *Marxism and National Question* in 1913, on the Leninist concept of national question and self-determination. Lenin's understanding was better than Rosa Luxemburg and the others in finding the

[97] See ibid., p.89.
[98] See ibid., p.91.
[99] See ibid., p.92.
[100] See ibid., p.93.

dialectical relationship between the right to national self-determination and internationalism. Rosa Luxemburg and Trotsky both believed only in the proletarian class for the revolution. But Lenin grasped the dialectical relationship between national democratic struggles and the socialist revolution and showed that the popular masses, not the just proletariat, but also the peasantry and petty bourgeoisie of the oppressed nation were the allies of the conscious proletariat.[101]

Lenin in his *Draft and explanation of a programme for the Social Democratic Party* demanded the 'freedom of religion and equality of all nationalities'.[102] For Lenin national oppression is one of the forms of political oppression. Though the objective essence of nationalism is bourgeois democratic, they are social in nature and historically progressive.

During 1915-16, Lenin's work, *The Revolutionary Proletariat and the Right of Nations to Self-determination*, *The Socialist Revolution and the Right of nations to self-determination*, *The Junius Pamphlet* contributed to the international discussion on the national question. It criticised the metaphysical views of Rosa Luxemburg, Anton Pannekoek, and Karl Radek. They were criticised for their opinion which rejected the right to self-determination as 'unpractical' and 'illusory'. He correctly identified that the imperialism is the highest stage of capitalism and explains that in the period of imperialism, all the significant political demands including the right of nations to self-determination, can be 'put into effect'.

> 'The demand for the immediate liberation of the colonies, as advanced by all revolutionary Social-Democrats, is also "impossible of achievement" under capitalism without a series of revolutions. This does not imply, however, that Social Democracy must refrain from conducting an immediate and most determined struggle for all these demands—to refrain would merely be to the advantage of the bourgeoisie and reaction.'[103]

In the age of imperialism, Lenin's contribution concerning national question was a profound substantiation of the theory and tactics of revolutionary Marxism. The national question is an integral part of the socialist revolution. This will get the support of the oppressed nations for the proletarian revolution, which is fighting

[101] See ibid., p.97.
[102] https://www.marxists.org/archive/lenin/works/1895/misc/x01.htm, retrieved on 13.5.2017.
[103] Lenin, *On National Liberation and Social Emancipation*, p.152.

against imperialism. But is it Lenin favoured the separation of nations into small units? Lenin says ‘to defend this right (to secession) does in no way mean encouraging the formation of small states, but, to the contrary, it leads to a freer…. wider formation of larger states – a phenomenon more advantageous for the masses and more in accord with economic development'.[104]

The October Revolution advanced the Principles of self-determination of nations and equality of nations. These principles can be seen in the European international law, but there is a wide difference between the socialist principle of international law of self-determination and the bourgeois principle of self-determination of international law. The principles mentioned above formed by the materialist theory of Marxism-Leninism aimed at a peaceful sovereign world. The principle of self-determination rose in the interest of the working class. The principle of self-determination of nations is regarded as a ‘consistent expression of the struggle against any national oppression'.[105] For Lenin, ‘the right of nation’s self-determination means solely the right of independence in a political sense, to free political separation from the oppressor nation’.[106] It includes the right of a nation to decide its affairs, foreign policy and the inadmissibility of coercion upon the will of the nation.

After the October Revolution, the ‘Decree of Peace’ was issue by the revolutionary state. It includes the right to self-determination. The materialist definition of annexation, part of the principle of self-determination was proclaimed. Annexation was defined as ‘every incorporation of a small or weak nation into large or powerful state without the precisely, clearly, and voluntarily expressed consent and wish of that nation, irrespective of the time when such forcible incorporation took place, irrespective also of the degree of development or backwardness of the nation forcibly annexed to the given state, or forcibly retained within its borders, and irrespective, finally, of whether this nation is in Europe or in distant, overseas countries.’[107] It further said, ‘If any nation whatsoever is retained within the boundaries of a given state by coercion, if despite its expressed desire it is not granted the right by a free vote,…..with the complete withdrawal of the forces of annexing or generally more powerful nation, to decide without the slightest coercion the question of the form of

[104] Cited in Conner, *The National Question in Marxist-Leninist Theory and Strategy*, p.34.
[105] Cited in Tunkin, *Theory of International Law*, p.8.
[106] Cited in Tunkin, ibid., p.8.
[107] https://www.marxists.org/archive/lenin/works/1917/oct/25-26/26b.htm, retrieved on 10.2.2016.

state existence of this nation, then its accession is an annexation; that is by seizure and coercion.'[108]

The appeal made by the 'All-Russian Executive Committee of workers; Soldiers', and Peasants' Congress', of the Petrograd Soviet of workers' and soldiers' deputies, of the Headquarters of the Red Guard, and of Trade Union representatives of December 22, 1917, the workers of all countries were called upon 'to struggle for a general armistice, for universal peace without annexations and indemnities on the basis of self-determination of nations.'[109]

Lenin said, 'the internationalism of the proletariat remains empty and verbal' if the proletariat of the colonial countries is not demanding the freedom of the colonised countries.[110] Lenin wrote to G.V. Chicherin who signed the Brest-Litovsk Treaty, designated as the People's commissar for foreign affairs, that

> 'Our international program must bring all oppressed colonial peoples into the international scheme. The right to separation or to home rule must be recognised for all peoples…The novelty of our international scheme must be in the fact that Negroes, as well as other colonial peoples, have participated on an equal footing with European peoples in conferences and committees and have had the right not to permit interference in their domestic life.'[111]

The following sentences such as 'other colonial peoples have participated on an equal footing,' 'not to permit interference' and 'on the margins makes the notation; 'Right' were highlighted by Lenin by way of underlining it.[112]

The Right to self-determination becomes part of the Soviet constitution. The first RSFSR constitution of 1918 confirmed the equality and sovereignty of the peoples of Russia, mentioned in the 'Declaration of Rights of the Peoples of Russia' on December 15, 1917. The new state of Soviet Union under Lenin broke completely with the policies of Tsarist Russia, saying those were colonial, annexationist, and of unequal character and by way of declaring the principles of equality and self-determination of the nations colonised by it.

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[108] Cited in Tunkin, ibid., p.9.
[109] Cited in Tunkin, ibid., p.9.
[110] Cited in Tunkin, ibid., p.10.
[111] Cited in Tunkin, ibid., p.10.
[112] Cited in Tunkin, ibid., p.10.

The principle of self-determination reflected in the treaties made by the Soviet Union. The treaty between Russia and Turkey of March 16, 1921, proclaimed, 'the principles of the fraternity of nations and the right of peoples to self-determination'.[113] The leader of Turkey, Ataturk appreciated Soviet Russia and said 'we are highly appreciative that Soviet Russia was repudiated the former treaties and put forward the principle of self-determination.[114]

In the London interallied conference during the Anti-Fascist War, the Soviet Union states declared that 'The Soviet Union has implemented and is implementing in its foreign policy the higher principle of respect for the sovereign rights of peoples. In its foreign policy the Soviet Union has been and is being guided by the principle of self-determination of nations….'[115]

### 4.4. The Struggle and Origin of the Principle of Self-Determination

Later during the United Nations charter writing, the Soviet delegation made an effort that the principle of self-determination of nations as a principle of contemporary international law. The USSR delegation proposed to supplement Art 1 of the charter by stipulating that one of the purposes of the organisation is the development of friendly relations among nations, 'based on respect for the principle of equal rights and self-determination of peoples.'[116] It was included among the four power amendments and adopted by the San Francisco conference.[117] There were different interpretations and the colonial powers argued and interpreted in their favour. Bill Bowring states;

> 'At the Tenth Session of the UNGA in 1955, the opponents of including the right to self-determination into the Covenants argued that the UN Charter refers only to a 'principle' and not a 'right' of peoples to self-determination and that in various instruments the principle is interpreted in different ways. To the extent that the right to self-determination is a collective right, then it was inconsistent to include it in a document setting out the rights of individuals. Supporters, however, responded that despite the fact that the right to self-determination is collective, it affects each person and that to remove it would be the precondition for limiting human rights.

[113] Cited in Tunkin, ibid., p.12.
[114] Cited in Tunkin, ibid., p.12.
[115] Cited in Tunkin, ibid., p.62.
[116] Cited in Tunkin, ibid., p.62.
[117] Cited in Tunkin, ibid., p.62.

> Furthermore, a state accepting the UN Charter and recognising it, must respect the 'principle of self-determination' and the 'right' flowing from it. The latter point of view triumphed, and the new 'right' found its way into the common Article 1 of the International Covenants on Civil and Political Rights, and Social, Economic and Cultural Rights, respectively.'[118]

The Soviet delegation again proposed this principle, while writing the Universal Declaration of Human Rights. The proposed article as follows:

> 'Each people and each nation has the right to national self-determination. A state which has responsibility for the administration of self-determining territories, including colonies, must ensure the realisation of that right, guided by the principles and goals of the United Nations in relation to the peoples of such territories.'[119]

Due to the pressure from the colonial powers this proposal was rejected, with the result that the principle of self-determination does not appear in the UDHR.[120] Tunkin noted:

> 'In the draft declaration of the declaration of human rights, the Soviet delegates' proposal of including the principle of self-determination was prevented by the colonial powers. Because of the continuous struggle of the Soviet Union and its UN representatives, the 8th session of the Commission on Human Rights in 1952, the proposal of Indian delegates to uphold the principle of self-determination was voted against only by the US representative.'[121]

The UN charter related to trusteeship system was proposed to include the principle of self-determination by the Soviet delegates that the objective of trusteeship is the development of trust territories not only in the direction of self-government but also in the direction of self-determination 'having the aim to expedite the achievement by them of the full national independence'.[122]

In many of the UNGA resolutions, the principle of self-determination was included. For example the resolutions adopted by the UNGA on February 5 and December 16, 1952, in the declaration of the UNGA on the Granting of independence of colonial countries and peoples, adopted December 14, 1960, upon the initiative of the Soviet

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[118] Marks (eds), *International law on the left: Re-examining the Marxist legacies,* p.160.
[119] Cited in Marks (eds), *International law on the left: Re-examining the Marxist legacies,* p.159.
[120] Marks (eds), *International law on the left: Re-examining the Marxist legacies,* p.159.
[121] Cited in Tunkin, *Theory of International Law*, p.30.
[122] Cited in Tunkin, ibid., p.63.

Union, in the Declaration of principles of international law of October 24, 1970, in the documents of human rights and in many other documents carried the principle of self-determination.

The principle of self-determination which was not included in the 1948 Declaration of Human rights later included in the covenants of ICCPR and ICESCR Article 1 of both covenant states

1. All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.[123]

### 4.5. Principle of Self-Determination in the Constitutions of Socialist Countries

Leninist national policy of ‘all states are equal' was present in the laws of the Socialist States. The Article 123 of the Soviet Union's 1936 constitution which stipulated that ‘equality of rights of citizens of the USSR irrespective of their nationality or race, in all spheres of economic, governmental, cultural, political and other social activity is an independent law.' The Chinese constitution conveys in Article 4 that ‘all nationalities in the PRC are equal.' The Chinese constitution Article 4 states that ‘all the nationalities have the freedom to use and develop their own spoken and written languages, and to preserve or reform their own customs and ways'. Poland's constitution, Article 69 proclaims that all citizens ‘irrespective of nationality, race or religion, enjoy equal rights in all spheres of public, political, economic, social, and cultural life.' The Albanian Constitution Article 39 states that national minorities

[123] See in detail, http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx, retrieved on 15.2.2017

‘enjoy all the rights, the protection of their cultural development and the free use of their language'. The Bulgarian constitution article 45 noted that citizens ‘in addition to the compulsory study of the Bulgarian language, are entitled to study also their own language'. The Mongolian constitution Article 83 ensures all nationalities that they have ‘the opportunity to develop their national culture and to receive tuition and conduct business in their own native language'. The Vietnamese constitution Article 4 promises that ‘all nationalities have the right to preserve or reform their own customs and habits, to use their spoken and written languages, and to develop their own national culture’.[124]

Language is one of the important criteria which develop into a nation. The constitutional right to develop the language and schools was given by various Marxist-Leninist states. The right to use or to study one's language is not, obviously the same as the right to study in one's own language, the latter usually implying the privilege of having one's own schools. The socialist states constitutionally guaranteed this right. Article 121 of the 1936 constitution ensured ‘the right to education….by instruction in schools in the native language'. The Rumanian constitution Article 22 is even more explicit on this point, stating that ‘the co-inhabiting nationalities are ensured the free utilisation of their native language as well as books, papers, magazines, theatres, and education at all levels in their own language'. The Yugoslavian constitution states that article 171 ‘members of the nations and nationalities of Yugoslavia shall, on the territory of each Republic and /or Autonomous province, have the right to instruction in their own language in conformity with statute'. The Hungarian Constitution Article 49 granting to all nationalities that ‘the possibility of education in their native tongue and the possibility of developing their native culture.'[125] The Czechoslovak Constitution of 1960 article 25 promised ‘citizens of Hungarian, Ukrainian and Polish nationality every opportunity and all means of education in their mother tongue and for their cultural development.[126]

The socialist states constitutionally prohibit political discrimination on the basis of nationality or race. Autonomous territories were granted as Stalin says autonomy only

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[124] See further, Conner, *The National Question in Marxist-Leninist Theory and Strategy*, p.211-212.
[125] See ibid., p.211-212.
[126] See ibid., p.211-212.

‘for crystallised units as Poland, Lithuania, the Ukraine, the Caucasus and so forth'.[127] There were twenty Autonomous Soviet Socialist Republics, eight Autonomous Regions and ten Autonomous Areas. Only the SSR has the right of sovereignty and to have the right to secession and to conduct foreign relations. ‘The administration of law had originally been reserved to the constituent republics of the USSR, each of which had its own courts and its own People's Commissariat of Justice.’[128]

The Soviet Union constitutions of 1924, 1936 and 1977 all referred to the constituent Soviet Socialist Republics as sovereign, and as earlier noted, granted them ‘the right freely to secede’. During 1944, in an attempt to gain separate membership for each SSR in the UNGA, this image of independent statehood on the part of the SSRs was further buttressed when they were extended the right to maintain diplomatic relations, enter into treaties, and otherwise conduct foreign policy directly with other countries.[129]

The Supreme Soviet as ‘the supreme body of state power' is composed of two houses, the Soviet of the Union and the Soviet of Nationalities. The former is elected by the citizenry without regard to exclusive categories. Article 110 stated as ‘the Soviet of Nationalities is elected according to the following norms; 32 Deputies form each Union Republic, 11 deputies from each Autonomous republic, 5 Deputies from each autonomous region and 1 Deputy from each autonomous area'.[130]

Instead of looking into the problems of the Eastern bloc in the light of dialectical materialism, total rejection of the experience of Soviet bloc as an orthodox Marxism is problematic, and Bill Bowring analysis of Soviet Legal Theory is, therefore, a welcome. Bill Bowring in his essay *Positivism versus Self-determination: the contradiction of Soviet International Law* argues the importance of Soviet legal theory when most of the international law scholars failed to see its contribution of self–determination to the international law. He rightly argues that the former USSR played an active role in securing the recognition of self–determination as a right and supported the independence of colonised people. He criticises China Mieville for overlooking the Soviet practice of self-determination and the relevance of Bolshevik

[127] Stalin, *SCW*, p.375.
[128] Carr, *The Russian Revolution from Lenin to Stalin*,p,121.
[129] Conner, *The National Question in Marxist-Leninist Theory and Strategy*, p.218.
[130] See ibid., p.222.

and Soviet international legal theory. Bowring notices the difference of the earlier Soviet practices and the later. He describes how the notion of self-determination was turned into contradiction with the later Soviet Union's positivistic foreign policy by noting the Soviet intervention in Czechoslovakia.[131] Nevertheless, he fails to account for how the Soviet Union later turned into a social imperialist state.

### 4.6. The Process of De-colonisation through Self-determination

Starting from the UN charter to numerous resolutions and treaties of UN paved the way for the complete de-colonisation of the world. The role of former Soviet Union was undeniable in the de-colonisation process and in the inclusion of the principle of self-determination in the UN Charter. The UN Charter, Art 1(2) says 'To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples and to take other appropriate measures to strengthen universal peace' and Article 55 says 'With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

> a. higher standards of living, full employment, and conditions of economic and social progress and development;
>
> b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
>
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

The definition is vague to place all the parties. By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

[131] See the essay of Bill Bowring, in Susan Marks (eds), *International law on the left: Re-examining the Marxist legacies.*

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.[132]

The above paragraph can be interpreted as if a state respects following the principle of equal rights and self-determination of peoples as said in the declaration, then the territorial integrity and political unity are guaranteed.

Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by General Assembly resolution 1514 (XV) of 14 December 1960, in the beginning it says, 'Conscious of the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples, and of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,…' Article 2 says 'All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'[133] At the same time Article 6 speaks that 'Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.'[134] The principle expressed in this phrase is aimed at outside intervention by States and not at liberation movements and are by the Principle of Non-intervention. The majority of countries in the UN interpret Para 6 as prohibiting secession from already existing states. There are numerous resolutions and treaties by the General Assembly of UN in favour of Self-determination including the Charter of Economic rights and duties that speak about the equal rights and self-determination of peoples.

[132] The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the Charter of the United Nations (GA Resolution 2625 (XXV), 1970).
[133] See ibid.
[134] See ibid.

The Friendly Relations Declaration,[135] which is one of the important treaties in international law, speaks about the principle of a right to self-determination. This declaration is in the history of international law, first time, substituted 'the states' for 'the people'. Albeit, it speaks of the state sovereignty, territorial integrity, political independence, unity, etc., it also speaks about the people's right to govern themselves, which can contradict with the territorial integrity of a state. This extended the principle of self-determination, which was till then only seen in the colonial context, now to every people who are subjected to exploitation and racial discrimination.

The International Court of Justice in East Timor case said, the right to self-determination has an erga omnes character, which means towards all and towards everyone. The court also said that the right of peoples to self-determination is one of the essential principles of contemporary international law.'[136]

Thus in international law, the materialist principle of self-determination is a well-established principle.

### 4.7. Relevance of Soviet Model

In the contemporary world, keeping aside the question of, whether self-determination applies to even the oppressed nationalities of the third world or only in a colonial context, legally in international law, we will move to the materialist position. The former Soviet Union, after a period, particularly in the Khrushchev regime, though turned into a Social imperialist state, maintained the right of the nationalities to secede from the Union peacefully. The USSR got disintegrated peacefully, as guaranteed in the Constitution of the Soviet Union. The class is the central point in identifying the progressiveness of the nationality movement. The forefront classes both in field and ideology have to be looked into. Tunkin in a clear and precise manner said

> 'A nation has the right to self-determination. But a nation in a capitalist society has been divided into antagonistic classes waging a bitter struggle among themselves. Realisation of the self-determination of nations is not only an all-national but also a class problem. Which class will stand at the head of the struggle for the self-

[135] See ibid.
[136] See further http://www.icj-cij.org/docket/index.php?sum=430&p1=3&p2=3&case=84&p3=5, retrieved on 216.2017

> determination of nations is of decisive significance. The content and the results of that struggle are dependent on this.'[137]

Yet self-determination has certain limits. In the name of self-determination, a state and its people cannot practice uncivilised practices. John Rawls in his master piece *The Law of Peoples* stated that 'no people has the right to self-determination, or a right to secession, at the expense of subjugating another people.'[138] He provides the example of the secession of the Southern part of United States, to perpetuate its domestic institution of slavery.

## 5. Summary

The materialist principles of international law like peaceful co-existence, proletarian internationalism and self-determination played an important role in various time periods. Sometimes one principle overlapped over the other. It has to be correctly applied in a materialistic way. For example, peaceful co-existence was used as both a tactics and principle, but become incorrect when it is combined with co-operation. The principle of proletarian internationalism is promoted and developed as an international legal principle, and reached the next level of socialist internationalism when the socialist states existed. At present, it went back to the proletarian internationalism once again as there are no socialist states exists.[139] The principle of self-determination is well established in international law and helped to end colonialism to a certain extent, but the neo-colonialism exists in different forms in various countries. The principle of self-determination sustained and relevant today, as it becomes one of the important principles for bourgeoisie itself.

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[137] Tunkin, *Theory of International Law*, p.8.
[138] Rawls, John. *The Law of Peoples – with 'The idea of Public Reason Revisited',* p.38.
[139] Cuba, Peoples Republic of China, North Korea has socialist leanings, but not considered to be socialist.

# CHAPTER VI

# MATERIALIST APPROACH TO THE SOURCES AND SUBJECTS OF INTERNATIONAL LAW

## 1. Introduction

This chapter deals with the sources and subjects of international law from a materialist perspective. In domestic law, the sources of law are definite and precise, created by either legislation or the interpretation of the legislation by the courts. In other words, legislation and the customary laws are the primary sources of domestic law. In contrast, the international law does not have a global legislative to pass laws. But considering the treaty contracts signed by the majority of states in the General Assembly or the resolutions passed by the Security Council and the various international treaties signed and adopted by the majority of states – we can say sources of international law is created by the primary subjects, the states.

The sources of international law are expressed authoritatively[1] in the Statute of ICJ, which is a treaty agreed and signed by the majority of states. This includes treaties, international customs, and general principles of international law, judicial decisions and the teachings of highly qualified publicists. It is not directly listing this as sources of international law but as a source of decision making while solving the international disputes. Article 38 of the statute says:

> 'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognised by civilised nations;

[1] Shaw, *International Law,* p.66.

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.'[2]

Per se, the Statute does not make any difference between the sources as primary and secondary but mentions certain subsidiary sources of international law. However, by way of listing it seems to give more importance to treaties than any other sources.

The will of the state later developed into norms of international law. Therefore, sources are the outcome of the norm creating process by various states in the international arena. In the contemporary period, given the growing influence of the international institutions, they play a role in the norm creating process. Now the sources have been informally extended to the normative resolutions of international organisations, but their roles are relatively limited and are called as 'soft law'. In this chapter, we will give more importance to the primary sources of international law: treaties, customs and general principles. We also touch upon the secondary sources; the judicial decisions and highly qualified publicists as well as 'soft law'.

In domestic law, the primary subject is the individual. Other than an individual, a corporation, company, association, etc. also bear 'legal personality' to advance a claim in domestic courts. However, in international law, individuals are secondary subjects. The state is the primary subject of international law. International organisations are also considered as secondary subjects.[3] The subjects which possess sovereignty are considered primary subjects while those possessing mere legal personality in international law are treated as secondary subjects' vis., international organisations, and individuals. Moreover, national liberation movements such as Palestine Liberation Organisation (PLO), South West Africa People's Organisation (SWAPO), and African National Congress (ANC) are also sometimes considered as subjects of international law. Such liberation movements are conferred the status of 'Observer States' by the United Nations.

[2] http://www.icj-cij.org/documents/index.php?p1=4&p2=2&, retrieved on 13.6.2017

[3] Therefore, the primary requirement in domestic law is 'legal personality', and the provision in the international law is 'sovereignty'.

## 2. Sources

Custom and treaty are considered as the primary sources of international law. In the materialist understanding, Korovin and Pashukanis both admit that custom and treaties are the sources of international law. Pashukanis agreed with Liszt that both of these sources might reduce to one and can be called as the 'general legal ideology of states' – 'partly decided by the legal practice and partly in the form of the direct and overt establishment of law by way of agreement.'[4] Korovin saw international law (treaty and custom) as the law of coexistence, the law of competition and cooperation among states of diverse social systems.[5] Both these understanding comes from their theory of international law in the transitional period, a transition from socialism to communism.

### 2.1. Treaties

Treaties among states create a majority of the norms in international law. The treaties are of different types such as universal treaties, where nearly all the states participate; multilateral treaties, where several states participate; and bilateral treaties between two states. Treaties are divided into two kinds, law making treaties and treaty contracts. The law making treaties are the one that creates norms in international law. Tunkin gives the definition for a law-making treaty as 'treaties creating abstract norms which are recognised or established by states as norms of conduct for the future comprise another group of treaties.'[6] Treaty contracts are among limited numbers of states - either two or three state.

The treaty contracts are never or very rarely sources of international law.[7] According to Bergbohm, the purpose of the treaty decides whether it can be a law-making treaty or a treaty contract. If the purpose is to create international norms, then it is a law-making treaty, if not then it is a treaty contract. The purpose is decided by the primary subject states whether to make a law-making treaty or a treaty contract. [8] There is a

[4] Pashukanis, *Selected Writings on Marxism and Law,* p.182.
[5] Erickson, *International Law and the Revolutionary State,* p.8.
[6] Tunkin, *Theory of International Law,* p.92.
[7] See ibid., p.92.
[8] Cited in ibid., p.92.

debate among international lawyers whether law-making treaty alone can be considered as a source of international law. The bourgeois lawyers argue that there could not be any differentiation of law-making treaty and treaty contracts as the source of international law. The Oppenheim-Lauterpacht treatise on international law points out that, although the division of treaties into 'law-making treaties' and 'contractual treaties' in a certain sense is of practical importance, it is 'theoretically faulty' and 'in principle, all treaties are law-making in as much as they lay down rules of conduct which the parties are bound to observe as law.'[9]Another bourgeois lawyer Kelsen completely rejects the division of treaties into law making treaties and treaty contracts. He says that 'the essential function of the treaty is to make law, that is to say, to create a legal norm, whether a general or an individual norm.' He further observes that 'the so-called law-making treaties are treaties creating general norms, whereas the others are law-making treaties creating individual norms.'[10] According to him, both are treaties creating norms.

The Soviet Marxist lawyer Korovin also states that the division of treaties into law-making and contractual treaties are 'unfounded, since any treaty, as an act originating with states-subjects of international law, has a particular law-making significance.'[11] However, Tunkin observes:

> 'Any valid international treaty has legally binding force for its parties and in this sense is law-making. However, the different significance in the international legal system of general treaties, in which all or nearly all states participate, of multilateral agreements with a limited number of parties, and of bilateral treaties; of treaties establishing norms of a general character, concluded for a long period, and of treaties containing provisions relating to narrow and less-important questions and of short-term validity, should be taken into account.' [12]

The bourgeois lawyers' analysis of a treaty contract and law making treaty is different from the analysis of Materialist international lawyers. While agreeing that all the treaties are law-making, Tunkin argues that at the same time the nature of the treaty,

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[9] Cited in ibid., p.94.
[10] Cited in ibid., p.94.
[11] Cited in ibid., p.95.
[12] See ibid., p.96.

that is, whether it is concluded by a small number of states or nearly all states of the world should be taken into account, for it provides the democratic way of creating norms. A treaty contract may be law-making, but it cannot be a norm-creating one. But at the same time for Tunkin, 'a treaty may reproduce and, consequently, affirm norms of prevailing international law, render them more concrete, develop them, or create new or liquidate old norms.' [13] To create an international norm there should be a major participation of states without differentiation of economic, social and political criteria. By way of arguing that there is no difference between treaty contracts and law-making treaties, bourgeois lawyers try to strengthen the hegemony of few imperialistic states over the majority of the weaker states. Hence, an international norm creating treaty should be the one that is signed and ratified by a maximum number of states and if there is a clash of norms while considering the sources of various treaties, the norm created by law-making treaties should be given preference. The role played by states in treaty making is reducing today as the international organisations also make treaties, both with states as well as with other international organisations. Nevertheless, the state still plays a leading role in the process of treaty making. In norm creating, Tunkin notes that 'from the viewpoint of the course of creating norms of international law, a regulation adopted by an international organisation is in the same position as the text of an international treaty adopted by an international organisation. The content of the norms already has been finally determined. But for the norms to become binding upon states, an expression of its will is necessary (express or tacit) to recognise such norms as international legal norms. The conclusion is that regulations are, in essence, international treaties.' [14]

When a state enters into a treaty, the treaty reflects the nature of the interests of the state. For example, theoretically speaking, when a socialist state enters into a treaty, the majority people's interests or the working class interests are fulfilled. Whereas when a bourgeois state or a feudal state enters into a treaty, the interests of the minority ruling class are satisfied. Hence, the class interests always reflect in the treaty whether bourgeois or proletariat. When a socialist state entered into a treaty with a bourgeois state and bourgeois state with a bourgeois state, there is a balance of both the ruling class interests. As Korovin puts it, 'every international agreement is

[13] See ibid., p.96.
[14] See ibid., p.106.

the expression of an established social order with a certain balance of collective interests'.[15] The established social order can either be capitalist, socialist, or even feudal. The collective interests can be of bourgeoisie, proletariat or landlord classes or a combination of them.

The formal definition of treaties is given in article 2(1) (a) of the Vienna Convention on the Law of Treaties, 1969. It defines a treaty as ‘an international agreement concluded between states in written form and governed by international law, whether embodied in a single legal instrument or in two or more related instruments and whatever its particular designation’.[16] This formal definition given by the treaty of Vienna is not looking into the international politics in which the ‘treaty game’[17] is played. There is always a bargaining between the powerful and weak states, which lead to coercion and undue influence on one state over another. However, the Vienna Convention pretends to be blind about looking into the reality of unequal states. Most of the third world states to sign the treaties without even the knowledge of the parliament. The entire act of signing a treaty happens and not after the discussion with the peoples elected representatives – who are supposed to be concerned about the welfare of the people and the impact of those treaties, but by the bureaucrats. Therefore, signing a treaty in the international arena, particularly on behalf of third world countries is totally on the wish of the comprador bourgeoisie. In India, there was no serious debate and discussion in the parliament before signing the WTO agreement. This fact shows that there is no democracy in signing the treaty, whereas the majority of people are directly affected by that act of the state. Hence, we can say that treaty making particularly on behalf of third world countries is not democratic, but represents the will of the ruling classes.

Materialist approach calls for a treaty between equally sovereign countries that should not be coerced either through diplomatic or economic means. The ‘unequal’ treaties cannot be considered as a legitimate source of international law. It further says that ‘treaties be negotiated and ratified with the consultation and consent of the elected

[15] Korovin, Cited in Chimni, *An Outline of a Marxist Course on Public International Law,* p.12.
[16] https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf, retrieved on 15.6.2017
[17] Chimni, *An Outline of a Marxist Course on Public International Law*, p.12.

representatives'.[18] This is possible only in a real democracy which is called as 'New Democracy' in the semi-feudal and semi-colonial structures of the third world countries and 'Proletariat Dictatorship' in the first world after the socialist revolution. Because whenever a bourgeois state or a semi-feudal state signs a treaty, it is understood that, it would be from a minority class interest than in the majority class interest of the working class.

Chimni calls for re-examining and highlighting of *rebus sic stantibus* or material change in circumstances doctrine and make it integral to the concept of a balanced and just treaty albeit in its consensual form. The rigors of *pacta sunt servanda* can be annulled by *rebus sic stantibus*. Hence, the principle of *rebus sic stantibus* should be given more importance than the principle *pacta sunt servanda* from a Materialist point of view. In the era of globalisation, the third world countries lose their sovereignty by way of re-colonisation. The acceptance of the *rebus sic stantibus* in its radical formulation is difficult. When the Nepal revolution went into a higher stage, it sought the cancellation of unjust treaties with India, and when it turned revisionist, the issue was dropped. Therefore, unless and until, the economy, i.e. the mode of production changes in some parts of the world, there is little hope for the progressive development of treaties in the international arena, particularly considering the third world countries. Every country should have the sovereign right to come out of a treaty as Mao did by coming out from the hegemony of GATT treaty. Otherwise, treaties in the international arena will remain unjust when there is an existence of the third world and first world states.

### 2.2. Customs

Custom becomes an international law when it is agreed by states by way of treaty contracts. Chimni points out that the mainstream international law scholarship does not take seriously of the extra-textual reality of ultimate sources, consist of social structures, change of economic and political conditions, etc. He notes that 'on the other hand', a Marxist approach to international law, 'marries international political economy to a historical sociology to explain systematically the basis of

[18] See ibid., p.13.

transformation of international law norms by reference to evolving social structures, forces, and classes that constitute the world economy and the states system, even as it does not deny that international legal rules are also constitutive of social practices.'[19] It would be very idealistic to speak about 'sources' without considering the above-mentioned areas.

Custom is less progressive compared to the norms created by treaties. A 'bourgeois character' is attributed to customary law.[20] The norms of customary international law before the socialist revolution were evolved out of capitalist state practices and primarily served capitalist interests. The Soviet view of custom was as follows:

> 'Neglect for international treaty law and an exaggeration of the importance of international custom is characteristic of many bourgeois jurists. This is in line with the policy of certain imperialist circles, a policy of violating treaty obligations and giving legal form to illegal international practices under the label of 'international custom'.[21]

Korovin, the former Soviet legal scholar, gives more important to treaties than custom, though he admits both. Considering custom as the primary source of the bourgeois international law, he contends that custom can only be 'fixed and codified' by treaties. He described treaty obligation as a 'special form of the concretization of economic and political relationships'.[22] The Soviet Union, as well as the newly independent third world states, felt uneasy to accept the customs formed before the existence of those states, which they were not part in making it. Later, the bourgeois character of custom changed, as the Soviet Union and the third world states started creating customary norms such as peaceful coexistence, self-determination, and permanent sovereignty over natural resources, etc. Another problem of custom is the very nature of customary law as unwritten law. Unwritten law is uncertain law as to principles, and as to the meaning of those principles, they reason.[23] Tunkin looking at the difficulties of a custom observes:

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[19] Chimni, *An Outline of a Marxist Course on Public International Law*, p. 11.
[20] Erickson, *International Law and the Revolutionary State,* p.28.
[21] Academy of Sciences of the USSR, Institute of Law, International Law, (Moscow) p.12.
[22] Korovin, Cited in Kelsen, *The Communist theory of law,* p.162.
[23] Erickson, *International Law and the Revolutionary State*, p.28.

> 'There may hardly be any doubt that the problem of customary international law is one of the most difficult of all the problems of international law. It is also one of the most important. Upon the solution of this problem [how custom is created and terminated] depends to a very great extent the whole concept of international law.'[24]

Societies starting from the primitive communist society to the modern capitalist and socialist societies develop certain norms. It restricts certain practices considered as bad and allows some practices considered as good. For example, Sati was permitted legally and practised as a custom in ancient India, as well as untouchability. These are the horrors of humanity that cannot continue in the name of custom. Tunkin pointed out that 'not every repetition creates a customary norm of international law.' [25] It can be called as usage or a norm of international morality, or a norm of international comity, which is not legally binding, unlike custom. For Tunkin interruption in custom may destroy when it is an informative process of norm, but non-interruption 'does not play a decisive role in the formative process of a norm of international law.'[26]

A customary norm reflects the economy i.e. mode of production of society. In the primitive societies, the custom was against the private property. In ancient society, the custom was in favour of slavery, patriarchy, etc. Feudal society broke the classic slavery model and introduced serfdom, and in the modern capitalist society, slavery is seen as a barbaric act though it was practised for a considerable period. When the society grows up from one stage to another, it breaks or modifies one type of custom to another and evolves continuously.

Coming to international law custom plays a dynamic role because of the lack of centralised legislative system. When there is no solution in the treaties for a dispute, the attention immediately shifts to customary principles. In international law, customary practices between states are practised after the origin of State. Respecting and not harming the ambassadors and diplomats, protecting foreign traders inside the territory, etc. The principle of sovereign equality of states existed through a long

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[24] Tunkin, *Coexistence and international law,* p.9, cited in Tunkin, *Theory of international law,* p.29.
[25] See ibid., p.114.
[26] See ibid., p.116.

period of history but only developed into a norm and an international custom during the transition period of feudalism to capitalism.

International customs also differs to various countries and regions. Making of a universal norm of custom is difficult. Creation of universal norm of customs is possible only by way of the hegemony of some states over the other. The powerful state's customary norm becomes norms of international law, while the weaker states norms get overshadowed. That is the reason for the Materialist approach to ask the significant question as to why certain norms are designed or evolved as norms of customary international law and others do not. [27] Tunkin argues that a customary norm of international law is not necessarily a legal norm[28] and the 'general practice' does not necessarily mean the practice of all states. He further noted:

> 'The establishment of a custom is a specific stage in the formative process of a customary norm of international law. This process is completed when states recognise a custom as legally binding; that is to say, recognise a customary rule of conduct as a norm of international law.'[29]

According to article 38, a custom should constitute 'evidence of a general practice accepted as law'. For that, there should be two essential elements. One is the actual behaviour of state and the other is the psychological or subjective belief (*opinio juris*). B. Cheng argues that 'international customary law requires only one single constitutive element, namely, the *opinio juris* of states.'[30] Tunkin said that 'very few bourgeois international lawyers adhere to the normativist concept that the international practice of states in and of itself is a norm of international law without the necessity of its being recognised by states as a legal norm.'[31] He further elaborates:

> 'The writers who deny the second element of an international legal norm lose sight of the specific features of legal norms. 'Universal practice' creates not merely legal, but also moral international norms and norms of international comity. But of the general

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[27] See ibid., p.15.
[28] See ibid., p.117.
[29] See ibid., p.118.
[30] Cheng, *United Nations Resolutions on Outer Space: Instant' International law?* p.45
[31] Tunkin, *Theory of international law*, p.120.

> mass of such international norms, only those become norms of international law which acquire the said second element – recognition by states as international legal norms.'[32]

A materialist approach to the criteria of 'actual behaviour of a state' as a custom argues that it is of the interest of the ruling class. The ruling class decides the behaviour of a state whether bourgeois or proletariat. A set of class interests is behind this 'behaviour of state'. Hence, we cannot say that the behaviour of a state can always be right or wrong. The conduct of states also differs in different economic, historical periods. At the time of colonialism, occupying the territories of other countries is inevitable for the growth of capitalism. To justify this exploitation, a superstructure legal norm was created as 'state responsibility'. 'In the colonial era, the entire law of state responsibility with respect to the rights of alien's was developed through customary international law to justify imperialist practices'.[33]

In international economic law, while nationalising the foreign capital, the principle of prompt, adequate and effective compensation developed into norms of international law, not the 'Clavo clause' and the 'Drago doctrine' which claims that there cannot be any discrimination between the domestic and foreign property – evolved into customary norms of international law. Private property, which is the fundamental thing to be abolished in a socialist state, claims that there is no reparation for the nationalisation of private property into collective property, an act of justice, never developed into an international customary norm, though one-third of the world population lived under socialism for a period.

In the international humanitarian law, a norm developed and evolved from 'state responsibility' to 'responsibility to protect' shows the clear bias of the international humanitarian law in favour of imperialist countries. Hence, Chimni points out that the norms of international customary law have been engendered that are against the interests of dependent and dominated states.[34] During the post-colonial period, we have seen the rise of third world countries leading to the development of norms such as 'Permanent Sovereignty over Natural Resources'. Hence, in the norms creating

[32] See ibid., p.122.
[33] See ibid., p.15.
[34] Chimni, *An Outline of a Marxist Course on Public International Law*, p.15.

process in international law has the class war in itself. The oppressing and the oppressing countries norms create the contradiction in the growth of international law.

The other factor *opinio juris* or the psychological or subjective belief is also considered as a factor in deciding international customary law. This subjective belief is not developed itself with the states, but the ruling class knowingly or unknowingly imposes the subjective belief through various modes like religion, morality etc. in the contemporary world. In Gramscian terms, it can be called as hegemony of the beliefs and ideas. For example, the international developing customary norm of R2P (Responsibility to Protect) developed by the capitalist media to justify intervention leads to the cry of the 'civil society' for humanitarian intervention. Only the Marxist as well as critical legal studies look in a sceptical way of the R2P principle and try to find out the real intention for the development of that norm. It provides the answer to the development of norm – like the economy, in favouring the developer of the norm to the detriment of the third world countries. The fact of *opinio juris* is closely connected with morality of the society as in R2P the moral responsibility of the powerful states to protect the weaker state.

### 2.3. General Principles of Law recognised by Civilised Nations

When there is no treaty or custom directly covering an issue, the court can move on to the other source 'the general principles of law'. This is the most controversial source of international law mentioned in Article 38 of the Statute of ICJ. The term 'recognised by civilised nations' gives the understanding that there exist uncivilised nations. There is no definition of this term in the Statute. A question arises here then as to who is to determine when these principles are sufficiently 'recognised' to be cited in support of a decision in a particular controversy.[35] Many socialist countries had rejected this source as a primary source of international law like the former Soviet Union.

The mainstream international law scholarship or the bourgeois international law scholarship has different interpretation of the 'general principles of international law'.

[35] Lauterpacht critically analyses the subject. See *The Development of Law by the International Court.* Chapter 9, Judicial legislation through application of general principles of law.

Some of them argue that the Statute is to enlarge the role of the international court and an attribution of functions to it, which resemble the law-making functions of courts in ‘common law' countries.[36] Other bourgeois authors argue that the ‘general principles of law’ do not have a significant place in international law. They point out that the Permanent Court of International Justice did not even once refer to its decisions to the corresponding paragraph of its own Statute, which speaks of ‘general principles of law.'[37] Tunkin while commenting the differences said that ‘as regards the character of these principles and their place in international law, there are greatly differing opinions in bourgeois international legal literature.’[38]

A possible materialist interpretation of this term is that the concept of civilised nations is mentioned in the notion of capitalist state, which includes the general principle of protection of private property and free trade capitalist mode of production. The principles ‘respect of private property and acquired rights of foreigners’, ‘unjust enrichment’ are considered as a general principle of civilised nations.[39] This was used vehemently during the period of post-colonialism when the postcolonial nationalist state tried to nationalise the foreign private property. In the *Chorzow Factory case* in 1928, which followed the seizure of a nitrate factory in Upper Silesia by Poland, the Permanent Court of International Justice declared that 'it is a general conception of law that every violation of an engagement involves an obligation to make reparation'. The Court also regarded it as:

> ‘a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured state have suffered as a result of the act which is contrary to international law.’[40]

Lord McNair in his writings on ‘The General Principles of Law recognised by Civilised Nations’ promptly identified the principle and noted that ‘respect the private

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[36] Lauterpach said that Article 38(1)(c) of the statute is an important landmark in the history of international law. See L. Oppenheim, International Law, ed. H. Lauterpacht, 8th edition (London: Longmans, 1955), I, 30

[37] Tunkin, *Theory of international law*, p.190.

[38] See ibid., p.191.

[39] Academy of Sciences of the USSR*, supra* note 16, p. 70.

[40] PCIJ, Series A, No. 17, 1928, p. 29; 4 AD, p. 258. See also the Chile-United States Commission decision about the deaths of Letelier and Moffitt: 31 ILM, 1982, pp 1, 9.

property and acquired rights of foreigners undoubtedly constituted one of the 'general principles.'[41]

In the *German Settlers in Poland case*, the Court, approaching the matter from the negative point of view, declared that 'private rights acquired under existing law do not cease on a change of sovereignty... It can hardly be maintained that, although the law survived, private rights acquired under it perished. Such a contention is based on no principle and would be contrary to an almost universal opinion and practice.'[42]

In the *US v. Parchman case* the then Chief Justice, Marshall stated that:

> '...that sense of justice and of right which is acknowledged and felt by the whole civilised world would be outraged, if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relations to their ancient sovereign are dissolved but their relation to each other, and their rights of property remain undisturbed.' [43]

This approach about the analysis of the relationship between state and the foreign-owned property has been followed in many decisions by the international tribunals and in various international law writings.[44] For example the Arbitration Tribunal in the *AMCO v. Republic of Indonesia case* stated that 'the full compensation of prejudice, by awarding to the injured party the *damnum* ernergens and *lucrum* cessans is a principle common to the main systems of municipal law, and therefore, a general principle of law which may be considered as a source of international law. Another principle would be that of respect for acquired rights.'[45]

The bourgeois international lawyers like Schwarzenberger interpret Article 38 (c) of the Statute of the ICJ as being, '…on the fringes of international law, the principle

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[41] Anghie, *Imperialism, Sovereignty and the Making of International Law*, p.228.
[42] PCIJ, Series R, No. 6, p. 36.
[43] quoted in Francesco Francioni, *Compensation for nationalisation, law and equity,* International comparative law quarterly vol 24, April 1975 p. 259.
[44] See Francesco Francioni, ibid.
[45] See, for example, the German Interests in Polish Upper Silesia case, PCIJ, Series A, No. 7, 1926, p. 22; Starrett Housing Corporation v. lmn, 85 ILR p. 34; the Sktlfeld claim, 5 AD, p. 179, and AMCO v. Republic of Indonesia, 89 ILR, pp. 366,496. See further below, p. 745.

tends already to be accepted as a general principle of law recognised by civilised nations.'[46]

A materialist approach to the 'general principle' argues that 'general principles' are imposed on the domestic laws of the capitalist countries, over the third world as well as socialist countries. The municipal law of the so-called 'civilised', capitalist countries – legitimised under 'general principles' to the detriment of the working class all over the world. For example, Lord Asquith observes, 'albeit English municipal law is inapplicable as such, some of its rules are in my view so firmly grounded in reason, as to form part of this broad jurisprudence – this 'modern law of nature'.[47] In this regard, a new natural law of contracts emerges by which the law of the third world state is in effect selectively replaced by the law of England through the invocation of 'general principles of law'. Tunkin while trying to find out the reason for the Article 38(1) (c) stated

> 'The meaning, which was placed in this point by the drafters of the Statute of the Permanent Court of International Justice, is only of historical importance for an understanding of the corresponding provision of the Statute of the International Court. Evidently the drafters, representing different types of bourgeois law, had in mind expanding the possibilities for the court in deciding cases by granting it the right to refer to principles common to the national legal systems of bourgeois states.'[48]

According to him, the general principles of civilised states mean nothing but the principles of the bourgeois states. Any other country which does not follow the bourgeois mode of production is considered as inferior and uncivilised. The critical legal theory and the post-colonial argument observe this source in a racial connotation. The materialists differ from this view a little and argue that it is more about the economy.

Tunkin further observes

> 'One cannot but note that there have been and are attempts to use this concept, irrespective of the wish or desire of the scholars and jurists who support it, against the

[46] Schwarzenberger*, International Law*, p.577.
[47] Asquith, *Abu Dhabi Award,* p.149.
[48] Tunkin, *Theory of international law*, p.197.

> socialist states and the new Asian and African states. The basic legal principles of the leading capitalist powers as, for example, the doctrine of 'acquired rights,' adequate compensation for nationalised property of aliens, and others usually are included among the 'general principles of law,' and they are proclaimed to be common to 'civilised peoples.' Here is manifested the desire to use 'general principles of law' in order to proclaim principles of the bourgeiois legal system to be binding upon all. Such efforts are juridically unjustified and politically harmful, for they can lead only to an aggravation of relations among states. '[49]

The reason to keep the concept of 'general principles of civilised nations' as a primary principle is the bourgeois mode of production, said Tunkin, and these general principles include the doctrines of 'acquired rights', adequate compensation, etc. Hence, if we try to find the root of this concept of general principles, it ends with the protection of private property.

While speaking about the two viewpoints on the question of the character of 'general principles of law, Tunkin argues:

> 'The normative principles of national legal systems can be material for the creation of corresponding principles of international law. But the principles of international law which have arisen in this way and which externally are frequently very similar to principles of national law are in fact,…their content and essence are changed…The conclusion is, therefore, that there cannot exist normative legal principles, which would be common to socialist and bourgeois law, nor normative legal principles, which would be common to contemporary international law and to national systems of law.'[50]

In conclusion, Tunkin states that the source 'general principles of civilised nations' cannot be 'general' for all nations which have a different economical system, particularly the socialist countries. It varies with the general principles of the national law of different economy, and thus, it serves the purpose of certain bourgeois states interest.

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[49] See ibid., p.198.
[50] See ibid., p.200.

Some third world scholars also argue that the principles emerged in the oriental world of China and India can also be applied through this ‘general principles of law' and it's a real opportunity here to speak about the ‘general principles' of the third world as such. Abi-Saab writes about general principles of law and observed:

> ‘This source of international law is very important from the point of view of the newly independent states. It is through it that they hope their legal systems will contribute to the development of international law.’[51]

Tunkin criticises this, as ‘it is very doubtful that Abi-Saab’s view reflected the true situation’.[52] Tunkin elucidates that ‘the experience of the International Law Commission, of the Sixth Committee of the General Assembly, and of international conferences in our view shows that the new states attach primary importance in this respect to the international treaty.’[53] Judge Weeramantry in his dissenting opinion in the ‘nuclear weapons case' quoted the principles of oriental world, of Buddhism, etc. However, attempts like these were defeated.

The fundamental nature of bourgeois international law is by form it seems democratic, but by content it is bourgeois. The structure of the bourgeois system of international law appears liberal enough to include the alternate views of third world countries. The protest in superstructure level will not produce much impact to the base unless the struggle is to change the base itself comes together.

## 2.4. Secondary Sources of International Law

Judicial decisions and writings of the highly qualified publicists are the subsidiary sources, in addition to the primary sources of custom, treaty and general principle according to Art 38 of the Statute of ICJ. The primary sources of custom, treaty and general principles are considered as law creating agencies; while the subsidiary sources of judicial decisions and highly qualified publicists are regarded as law determining agencies.[54]

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[51] Abi-Saab, *The Newly Independent States and the Rules of International Law: An Outline,* p,109.
[52] Tunkin, *Theory of international law*, p. 198, footnote 36.
[53] See ibid., p.198, footnote 36.
[54] Shaw, *International law*, p.67.

### 2.4.1. Judicial Decisions

It is mentioned in Art 38(d) of Statute of ICJ that ‘subject to the provisions of Art 59, judicial decisions ….as subsidiary means for determination of rules of law.’ The provision of the Art 59 says ‘the decisions of the court have no binding force except between the parties and in respect of that particular case’. Unlike the national courts, the international courts such as the decisions of PCIJ, ICJ, and international Arbitral tribunals do not create norms. Though Art 38(d) refers to the decisions of PCIJ and ICJ, it also encompasses international arbitrations and national courts decisions.

The bourgeois lawyers have argued both that judicial decisions are part as well not part of international law. According to Tunkin ‘there are two opposing points of view in bourgeois legal literature on the significance of decisions of international courts and arbitral tribunals as sources of international law.’[55] One viewpoint agrees that judicial decisions are part of international law and ‘exaggerates the role of judgments of the International Court.’[56]

Lauterpacht in his work, *The Development of International Law by the International Court*, argues ‘They state what the law is. Their decisions are evidence of the existing rule of law. That does not mean that they do not, in fact, constitute a source of international law. For the distinction between the evidence and the source of many a rule of law is more speculative and less rigid than is commonly supposed …insofar as they show what are the rules of international law they are largely identical with it.’[57] Tunkin criticised this view saying, ‘it by no means follows that decisions of the Court ‘are evidence of the existence of a rule of law.’ This concept, arising out of Anglo-American ‘common law’ doctrine, is inapplicable to international law. To ascribe such a role to the International Court is to go beyond the provisions of its Statute.’[58]

The other viewpoint expressed in bourgeois literature is that judicial decisions are not sources of international law. Oppenheim notes that ‘in the absence of anything

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[55] Tunkin, *Theory of international law*, p.179.
[56] See ibid., p.179.
[57] Lauterpacht, *The Development of International Law by the International Court*, 2nd edition, p.21.
[58] Tunkin, *Theory of international law*, p.181.

approaching the common law doctrine of judicial precedent, decisions of international tribunals are not a direct source of law in international adjudications.'[59] Kelsen also writes that a 'decision of the Court cannot have the character of a precedent.'[60]

While commenting on the judicial decisions, Tunkin rightly observed that '…only those decisions of the International Court for which judges representing the different social and legal systems have voted and which frequently are cited in the practice of relations among states actually have a chance of being consolidated.'[61] The judgments of the judicial bodies are not very different from the primary sources that are of treaty and custom. The international courts apply these two to come to a judicial decision. As the treaties and customs are mostly products of the ruling class and serve the purpose of imperialism and capitalism, we cannot expect the judicial bodies to act differently. However, exceptions are there like the *Nicaragua case*, but of no use, that the decisions are not strictly enforced like the decisions of the WTO Dispute Settlement Body that comes with sanctions. The *Nicaragua case* did not change any of the intervention and 'use of force' policies of the USA. In international investment law, the international commercial arbitration is a good ground to see the real effects of the judicial decisions in a Marxist perspective.

We can take the example of the *Dabhol Arbitration case*. It has been observed that the decisions of the arbitration can 'go beyond the usual remit of a commercial arbitration' and 'recast by the arbitrators as a mechanism for wide-ranging review of government policies and court decisions that are associated with third world interests.' It is argued that there are 'reasons to suspect regime bias[es]' in the 'institutional makeup of the tribunal and the content of its award'. [62]

Likewise, the ICC (International Criminal Court) decisions are biased against the third world countries, and 'the leaders and armed personnel of northern states would ever be dragged before the ICC.[63]

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[59] Oppenheim, *International Law*, ed H. Lauterpacht, 8th ed. (London: Longmans, 1955), I, 31.
[60] Kelson, *Principles of International Law*, p.394.
[61] Tunkin, *Theory of international law*, p.183.
[62] See further Gus Van Harten, *'TWAIL and the Dabhol Arbitration'*, Forthcoming: Trade, Law and Development (2011).
[63] Chimni, *International Institutions Today An empirical global state in the making,* p.13.

### 2.4.2. Highly Qualified Publicists

The other subsidiary sources of international law according to Art 38 are 'the teachings of the most highly qualified publicists of the various nations.' Individuals such as Gentilli, Grotius, Pufendorf, Bynkershoek, Vittoria and Vattal were the early publicists of the modern international law. Again, this shows that the western publicists who support the exploitation are highly celebrated in international law, not the critique of it if they are from the third world countries. Mainstream international lawyers consider very few third world international law scholars like R.P. Anand and quoted in ICJ Judgments.

The materialist approach to the subsidiary source of 'highly qualified publicists' critique that the individuals are celebrated, ignoring the society which they represented. The method of dialectical materialism helps us understand international law, not in isolation from the material historical condition, but rather interdependent with it. Thus, the publicists are the product of historical conditions and the writings evolve out of that. The norms are not evolved out of the imagination of some authors or intellectuals.

## 2.5. Soft Law

The source of international law is not limited to treaty and customs. Other than the primary and secondary sources of international law, there are resolutions, recommendations, and guidelines, codes of practice or standards in international law. The mainstream international law terms these as soft law.[64]Thus, for example, Schwarzenberger writes that 'whatever political or moral force such recommendations of the General Assembly may claim, they are not legally binding.'[65] Korovin wrote in 1957, 'resolutions of international organs and national organisation, if they have obtained international recognition may be regarded to a certain extent as a source of international law'.[66] Another Soviet legal Scholar S.B. Krylov wrote that 'sufficient

[64] Shaw, *International Law*, p.111.
[65] Cited in Tunkin, *Theory of international law*, p.166.
[66] Cited in Tunkin, ibid., p.162.

attention is not always devoted to this source of international law, whereas the role and significance of this source are great.'[67] Tunkin observes that:

> 'There is in these definitions the correct idea that resolutions of international organisations do not in themselves create norms of international law. To say, however, that resolutions of international organisations are sources of international law if they have been recognised by a state in no way defines the place of these resolutions in the process of forming norms of international law.'[68]

He further explains that 'resolutions of the General Assembly influence the development of international law by two means: within the framework of the Charter and in the process of creating norms of international law by way of custom'.[69] Hence, the resolutions of the General Assembly have to be considered as norm creating process, because 'the process of becoming a norm of international law begins only from the moment when the norm begins to be created as a norm of international law; that is, when the process acquires an interstate character'. [70]

The primary and secondary sources of treaty, custom, general principle, judicial decisions and highly qualified publicists have the bias of western bourgeois hegemony. Besides, they are formed out of the international law, which has its western origin and consists of norms favourable for the development of capitalism. On the other hand, the so-called 'soft law' is the reflection of the third world countries evolution in the arena of international law. 'Soft law' is the norm creating process of the third world in the field of international law. However, 'soft law' does not get recognition in the international arena, though they are the outcomes of the majority international community.

Chimni contends that by 'giving importance to 'soft law' would re-structure the international system to the disadvantage of the capitalist class'.[71] The real democratic nature is to accept the 'soft law' as the hard law, that is absent in the international arena albeit, it has the support of the majority of the sovereign states. While the

[67] Cited in Tunkin, ibid., p.162.
[68] See Ibid., p.163.
[69] See Ibid., p.172.
[70] See Ibid., p.173.
[71] Chimni, *An Outline of a Marxist Course on Public International Law,* p. 16.

minority Security Council resolutions are considered as ‘hard law', the majority General Assembly resolutions are considered as ‘soft law’, we can wonder to ask where democracy is in the international legal process. This shows the third world or the majority of the states are treated step motherly due to the comprador bourgeois of those countries, a loyal servant to their imperial masters. Some exceptions are there like Cuba, China, Venezuela, and Libya; however, these countries remained the same. As Chimni puts it ‘soft law’ reflects generalisable interests while ‘hard law’ reflects particular interest in a bourgeois world order[72] is true and continuing. It concludes, that the international law albeit being bourgeois, not democratic. The need for democratisation of international law through a long battle is required.

## 3. Subjects

### 3.1. States

The state is the primary actor of international law. It is even today the principal subject of international law. The mainstream international law scholarship offers a formal definition of state. It is confined to indicating the criteria of statehood.[73] Article 1 of the Montevideo Convention defines ‘state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.’[74] Irrespective of economic, social, political or other differences all the states possess identical basic rights and obligations.

#### 3.1.1 The Marxist Understanding of State

What is the Marxist understanding of a state? State, as well as law, is superstructures, which arises out of the base, the mode of production. International law is also superstructure, which evolves along with the state system. State evolves at a period

[72] See ibid., p.16.
[73] See ibid., p.5.
[74] Article 1 of Montevideo Convention on Rights and Duties of States, signed at Montevideo, December 26, 1993. UN Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, it is stated that ‘each state enjoys the rights inherent in full sovereignty’.

when the society is divided into irreconcilable antagonism of classes. Lenin defined a state as follows:

> 'The state is a product and a manifestation of the irreconcilability of class antagonisms. The state arises where, when and insofar as class antagonism objectively cannot be reconciled. And, conversely, the existence of the state proves that the class antagonisms are irreconcilable.'[75]

The primary nature and character of a state are to serve the interest of a particular class and maintain the continuation of the particular mode of production. The State in ancient society served the interest of the masters to the disadvantage of the slaves; in the feudal society, the landlords to the disadvantage of the serfs and in capitalist society the bourgeoisie to the disadvantage of the proletariat. In the socialist society, for a short period, the state served the interests of the proletariat that were of the majority working class. Lenin noted that 'the dictatorship of the proletariat, the period of transition to communism, will for the first time create democracy for the people, for the majority, along with the necessary suppression of the exploiters, of the minority.'[76] Therefore, the nature of international law changes according to what kind of states are in power.[77]

### 3.1.2. The Principle of Sovereignty

#### 3.1.2.1. In the Colonial Era

As noted earlier, sovereignty principle is the most important among other principles in so far as determination of subjects of international law is concerned. The notion of sovereignty varies at different historical periods. At the advent of colonialism, the sovereignty doctrine was used to colonise the third world states. Anghie wrote that

[75] Lenin, *State and Revolution,* p.4.
[76] See ibid., p.74.
[77] To strengthen this argument, Marx can be quoted here, as he says that the base gives rise to legal and political superstructure that is of law and state. The state is the power established for the purpose of keeping the conflict between the dominant and dominated class 'within the bounds of 'order', we can call the order as law – though different from political i.e. state, evolves from the same base i.e. economy. While speaking about law Marx said, it is only symptom, expression of other relationships, on which the power of the state is based. The real base is the relationships of production.' See further K. Marx, *Das Capital* pp. 302,307.For elaborate discussion on this subject, see chapter 2 and 3.

‘colonialism was central to the development of international law, and that sovereignty doctrine emerged out of the colonial encounter'.[78] The colonised third world states in the colonial period were not considered as subjects of international law. The treaties were made with the ‘uncivilised’ third world states only to confer sovereignty on the ‘civilised’ European states. Hence, the concept of sovereignty among other things evolved to respond to the problem of competition for colonies between European powers. Tunkin writes:

> ‘It should be mentioned that previously the said principles and norms of international law were operative essentially only in relations among ‘civilised,’ or ‘Christian’ countries. Almost all of Africa and a significant portion of Asia had colonial status. But even in relations with independent states of Asia and Africa, the colonial powers did not consider themselves bound by the principles and norms of international law, flagrantly flouting the sovereignty of these states, brazenly interfering in their internal affairs, rejecting with disdain the idea of complete equality of the eastern and western countries as subjects of international law.’[79]

The non-Christian state of Turkey and Japan was included in the European club of civilised nations only after proving their military strength. At the feudal stage, the sovereignty was with the king as it was an absolutist state. The state power was centralised and considered as supreme, unrestricted and independent of any other temporal or ecclesiastical power both internally and externally.[80]

In sum, the modern concept of sovereignty in international law is evolved and developed during the period of colonialism, when the ‘other’ was encountered by the European nations. However, the concept of sovereignty has been practised by the third world countries from ancient times.

### 3.1.2.2. In the Era of Imperialism

The birth of capitalism led to the development of new views over sovereignty. During the bourgeois revolutions, the growing bourgeoisie proclaimed the sovereignty of the

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[78] Anghie, *Imperialism, Sovereignty and the Making of International Law,* p.2. The whole sovereignty concept emerged with the hegemony of European supremacy. He further argues that the ‘third world sovereignty is quite distinctive as compared with the western sovereignty’.
[79] Tunkin, *Theory of International Law,* p.29.
[80] Academy of Sciences of the USSR, Institute of Law, International Law, (Moscow) p. 93.

masses or the sovereignty of the people against the feudal monarchs to win over the people. However, when bourgeoisie became the ruling class, they seized the sovereign power only to enhance their privileges.

According to a Soviet text, ‘popular sovereignty became a means of affirming the domination of the bourgeoisie, and a legal form of cloaking the dictatorship of the exploiting classes.’[81] Lenin wrote that ‘the proclamation of the equal rights of all nations became for the bourgeoisie a deception, while for us it will be the truth, which will facilitate and accelerate the drawing of all nations on to our side.’[82] State sovereignty can be defined according to a Soviet treaty as, ‘an independence of a state expressed in its right freely and at its own discretion to decide its internal and external affairs without violating the rights of other States or the principles and rules of international law.'[83] The Code of Decrees of the R.S.F.S.R in the Declaration of Rights of the Peoples of Russia stated that it had decided to base its policy on the national question on the principles of the equality and sovereignty of the peoples of Russia and their right to free self-determination up to and including secession and the formation of an independent state.[84]

The Marxist approach to the concept of sovereignty argues that sovereignty includes certain equal rights in par with other states and the sovereignty comes from the people. It can be further elaborated from the Soviet experience that categorizes the basic rights of the state as; 1) the right to enter into relations with other States and other subjects of international law; 2) the right to engage in diplomatic and consular relations with other states and to have representatives at international organisations in which they participate; 3) the right to conclude international treaties or participate in other ways in the creation of international legal norms; 4) the right to be members of international inter-governmental organisations and to participate in international conferences; 5) the right to protect their legal personality as well as to apply sanctions to violators of international legal norms.[85]

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[81] See ibid., p.94.
[82] Lenin, *LCW*, vol. 23, p.15.
[83] See the Declaration of the former Soviet Government regarding the relations between the FSU and the former German Democratic Republic, Pravda, March 26, 1954.
[84] The Code of Decrees of the R.S.F.S.R., 1917, No. 2, Article 18.
[85] Tunkin (eds) *International Law A text book*, p.104.

In the contemporary period, state according to international law is sovereign in nature, complete sovereignty. Sovereignty is an inseparable aspect of the state as a subject of international law.[86] Internationally sovereignty is a reliable means of defending the small states from the major imperialist powers. But in the era of globalisation, sovereignty is eroding.

### 3.1.3. The Doctrine of Recognition

Another important concept concerning subjects of international law is 'recognition'. Recognition of a state by other states or international institutions signifies its acceptance as a member of the international community. Recognition is more political than legal. There are two theories of recognition. One is the constitutive theory, and the other one is declaratory theory. The former theory maintains that only through the recognition of other states, a new state can come into existence, whereas the latter theory states that a simple declaration of announcement by the new state is enough once the factual criteria are satisfied. The dominant mainstream international law scholarship favours the former one and argues that the act of recognition of a state is decisive in creating a new subject of international law. It does not create any state, but just accepts the state for trade and other relations.

According to the mainstream international law scholarship, unless and until a majority of the countries in the world recognises a state as a sovereign state, the state lacks international personality, though it has all the criteria of territory, population, political structure and capacity to enter into relations with other states. Some exceptions are there like Kosovo, but again whether to recognise a state or not are decided by the class interest of the ruling classes of the recognising states. Moreover, these class interests differ among different states. [87]

The concept of recognition also varies in different historical periods. In the colonial period, 'recognition was granted by states not in accordance with any international

[86] Academy of Sciences of the USSR, Institute of Law, International Law, p.93.
[87] Though the states follow the same capitalist model of development, the interest of the capitalist in the various countries contradicts each other.

principle, but according to the powerful and unpredictable expediencies of competition for colonies.'[88]

> 'Recognition doctrine was one technique for accounting for the metamorphosis of a non-European society into a legal entity. In broad terms, the doctrine stipulated that a new state came into being when its existence was recognised by established states. The fact that a non-European society may have constituted a state was not in itself sufficient, because of the civilised--non-civilised distinction, to belong to the realm of international law. In its particular application to uncivilised states, recognition takes place when 'a state is brought by increasing civilisation within the realm of law'. But until this stage was reached, non-Europeans were excluded from the proper application of the doctrine as it operated in the European realm.'[89]

The materialist approach states that the declaratory theory of recognition emerged as a reaction to the constitutive theory. The declaratory theory evolved when the bourgeois national state struggled against absolutist feudal regimes. The period followed by the First and Second World War, the recognition doctrine was used against the young socialist countries. These countries suffered because of this concept of recognition. The same bourgeois national state refused to recognise the socialist countries like USSR and the People's Republic of China. The Soviet Union became a member of the League of Nations only in 1934, because of the recognition of United States of America in 1933 – almost seventeen years after being a state, while the Peoples Republic of China became a member of United Nations only in 1971, almost twenty-three years of being a state. The United States refused for many years to recognise either the People's Republic of China or North Korea, not because it did not accept the obvious fact that these authorities exercised effective control over their respective territories, but rather because it did not wish the legal effects of recognition to come into operation.[90] The UN membership of the People's Republic of China was enjoyed

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[88] Anghie, *Imperialism, Sovereignty and International Law*, p.78.
[89] See ibid., p.75. So, how to bring the 'uncivilised' states to civilisation? 'The expansion of commerce was the means by which the backwards natives could be civilised. In the name of civilising mission, trade was introduced to every interior part of the world. The base is trade, commerce and economy; the superstructure is the civilising mission. Only a capitalist country could be considered as civilised, sovereign and recognised. Even the progressive socialist mode of production cannot be recognised.
[90] Shaw, *International Law,* Fifth edition, p.368.

by Taiwan, including the permanent membership of the Security Council until 1971 though it did not have any control over the mainland China. [91]

### 3.2. International Organisations

The history of international organisations goes long back to the ancient period.[92] However, it can be said that the Congress of Vienna as the earliest precedent to modern international organisations. The Congress of Vienna, a multipurpose international organisation, was created by the great European powers to re-establish order and stability on the continent after the Napoleonic wars. The next important international organisation was the League of Nations, which was established after the First World War. The League of Nations embraced the idea of collective security where international security is directly tied to the security of member states. The UN system was created in 1945 following World War II.

The mainstream international law scholarship has always argued that international organisations have a legal personality. Mainstream scholars like Jessup, Lauterpacht, Scelle, etc. favour the international organisations as subjects of international law. The ICJ came to the conclusion in the *Reparation case* that the United Nations is a subject of international law, although this does not mean that the United Nations is recognised as a state, which it certainly is not. In other words, the legal personality of the United Nations is the same as the legal personality of a state.[93]

After the *Reparation case*, it is well established in principle, that international organisations may indeed possess objective international legal personality.'[94] Shaw notes that 'significant factors in this context will include the capacity to enter into relations with states and other organisations and conclude treaties with them, and the

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[91] The reason was that the People's Republic of China was a Socialist Country.
[92] It has probably been around since the advent of the first governments. From the writings of ancient Greek philosophers, for example, we learned of military alliances and international trading agreements. The early Greek city–states: Athens, Sparta and Macedonia once employed a common currency, which required a high degree of international cooperation. According to the Hathigumpha inscription of Kharavela in present day Orissa, the three ancient Tamil Kingdoms of Chera, Chola, and Pandya had an alliance among them against the central and north Indian kingdoms threat.
[93] ICJ, Reports of Judgements, Advisory Opinions and Orders, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of April 11, 1949. Quoted in G.I. Tunkin, *supra* note 8, p. 359.
[94] Cited in Tunkin, *Theory of International Law*, p.241.

status it has been given under municipal law. Such elements are known in international law as the indicia of personality.'[95] At the same time, the ICJ has agreed that 'the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights.'[96] It shows that the right of the international organisation as a subject of international law is not on par with the rights of states. The legal personality of the international organisations is after all decided by the states by way of agreements between themselves. In a way, the primary subjects are creating another subject of international law by way of mutual agreement. Hence, international organisation cannot be equated with the rights of a state.

But Soviet international law stated that 'no international organisations, still less physical persons, can be subjects of international law.'[97] A Soviet scholar V. Shurshalov maintained that international organisations are not subjects of international law but are subjects of international legal relations.[98] International organisations as subjects of international law have important theoretical and practical significance. Tunkin argued that 'the problem lies first of all in whether the international legal personality of international organisations and its scope are determined by general international law or whether the legal personality of each international organisation is based on its charter.'[99] The concept of inherent legal personality of international organisations has received some publicity in bourgeois international legal doctrine, after the question of certain expenses of the United Nations. The concept says that the international organisations are 'subjects of international law on the basis of general international law just as are states, and legal personality inheres in every international organisation to the same extent that it inheres in states.'[100] 'The charter of an international organisation, under this theory, has significance only in that it may serve the legal personality peculiar to any international organisation in conformity with the purposes of the organisation.'[101] Tunkin came to the conclusion that 'the legal personality of international

[95] See ibid., p.24.
[96] ICJ Reports, 1949, p. 178;16 AD, p. 321.
[97] Academy of Sciences of the USSR, Institute of Law, International Law, p. 89.
[98] Cited in Tunkin, Theory of International Law, p.357.
[99] See ibid., p.359.
[100] See ibid., p.359.
[101] See ibid., p.359.

organisations is not based on their charters, but directly on norms of general international law.'[102]

Tunkin characterised the international organisations by the following features. International organisations 'are created by states through the conclusion of international treaties and operate on the basis of such treaties; states remain sovereign and equal both within and without an international organisation; the mechanism of an international organisation is brought into operation by states; member states have the right to withdraw from the organisation; the basic resolutions of international organisations are of a recommendatory nature.'[103] This characterisation of international organisations gives it a secondary position in the international arena as a subject.

The class character and nature of the international organisations are worth looking into.[104] International organisations are created through hegemony and are instrumental in the development of modern capitalism. International organisations are crucial for linking evolving capitalism to evolving nation-states. The global governance by international organisations guides nation states through the rough waters of world industrial change. The international organisations like IMF and WB are political complements to capitalism. Financed and controlled by capitalist states, they promote a capitalist agenda. The political institutions of the UN, such as the Security Council and the General Assembly, are also hobbled by procedural rules that make them ineffective as organs of international governance. This enables capitalism to expand unchallenged.

### 3.2.1 The Hegemonic Role of International Organisations

#### 3.2.1.1 The International Financial Institutions

The international financial institutions had a greater role before and after colonial period. After the Second World War, the international financial institutions have

[102] See ibid., p.359.
[103] See ibid., p.344.
[104] See further Chimni, *International Institutions Today: An empirical global state in the making*.

taken the place of the private banking companies of the nineteenth century Europe and their power increased in the international arena. The more international organisations are getting powerful, the more the sovereign state loss their sovereignty. Especially the third world countries are compelled by the IFI's like WTO, IMF and WB to adopt the same laws irrespective of their stages of development.[105] The international financial institutions now filled the space of the imperial states and did the work of the same in hegemonising the Third World.

The Bretton Wood Institutions IMF, WB were established in 1944, before the establishment of UN. WTO, earlier named GATT, came into play later. The Bretton Wood conference happened to manage the post-Second World War problems. The IMF and WB are specialised agencies of UN, not WTO. The three organisations vis., IMF, WB and WTO, work under the presumption that the free trade is the only way for development. The conditionality issue is the core controversial issue with IFI's. It is an extension of the US policies which dominates the Bretton Wood institutions. The state, which contributes more, will have a significant voice in those institutions. The USA is the biggest subscriber of these two organisations, and therefore, carries a veto over most important decisions.[106]

Art IV (10) of the IBRD prohibits political activity. But there are 'clear political dimensions, due to the conditionality's direct, preponderant and clear effect on the country's economic development and accordingly the bank can support any good governance programs that satisfied this test of what constituted economic matters.'[107] Thus, the IFI's play an important role in global economic governance and are key actors in shaping the development trajectories in their developing member states, as well as their economic policies.

WTO, an international institution for trade is critiqued by many scholars for its hegemonic role in the erosion of democracy. WTO is seen as an institution which is driven by the force of corporate actors. It has emerged as a key institution to sustain global capitalist order to the advantage of an emerging transnational capitalist class

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[105] See ibid., p.7.
[106] The World Bank Inspection Panel may be a step forward, but it is a simple measure to run the business continuously and impose the conditionalities of free trade with the justification of morality.
[107] Bradlow and Hunter (eds), *International Financial Institutions and International Law,* p.14.

whose interests are articulated by powerful states.[108] As French Marxist Poulantzas said about the crystallisation of class powers, the international institutions do not have power of their own but crystallise class powers.[109] The organisations are created by the nation-states, with no real power, but with considerable influence in public affairs, as they become the space of negotiation and co-intervention for governments.

James Baccus, US representative to the WTO appellate body, has said that without the US, the WTO would weaken and wither away. It would become a commercial 'League of Nations' incapable of enforcing the rules of trade. The emerging rule of law in world trade would be replaced by a ruinous reign of commercial chaos, confusion and collapse. This shows that the US is backing the WTO for the advantage of its capitalist class. WTO is compelling the third world state, to the disadvantage of the subaltern classes, and emphasises markets and trade as a solution to social and environmental problems and does not consider that they might be part of the problem.[110]

### 3.2.1.2. The International Political Organisations

The UN may be described as the key international political institution in the world.[111] In the international political institutions, the role of economics and the role of economic class are important in shaping them. The role of international organisation has been to foster, promote and legitimise the aggressive policies of the leading capitalist states. International organisation under capitalism reflects the underlying economic order. Facilitating the expansion of market and the reduction of state intervention and regulation furthers the interest of dominant class, the national and international bourgeoisie.

The League of Nations served the interests of the colonial powers by establishing mandates, so too did the UN serve the interests of the newly dominant capitalist state,

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[108] Chimni, *The WTO/Democracy and Development: A view from the South,* p.5.

[109] Chimni, *An Outline of a Marxist course on Public International Law,* p.8.

[110] Within the WTO framework, there is no provision to co–ordinate multilateral environmental and trade negotiations. The WTO hearings are closed to the public and documents are classified, leads to the less input by the public and NGO's in the decision-making process. The reason for the not protesting too much of the principles of deliberative democracy in the third world is that the ruling classes in the third world are comfortable with the ideology of WTO.

[111] Chimni, *International Institutions Today: An empirical global state in the making,* p.14.

i.e. the US when the UN was established. This order was based on the end of formal colonialism, self-determination, democracy, free trade, and free markets.

Through the free trade and free market agreements, American and European oil companies controlled almost all of the Arab and Iranian oil by 1954. The UN imposed the West's will on Arab countries from the beginning. The creation of Israel in 1948 signalled the permanent USA presence through a strategically located client. When the cold war tensions prevented future UN political action, UN conservatism did little to correct the injustices of colonialism. Its very orientation is to maintain the status quo, which is unjust and exploitative of most of the world's population. The UN did nothing while the capitalist states attacked developing States, both politically and militarily, when they sought to chart their own courses or deviated from capitalism. Thus, international organisations or organs within them operating on the basis of majority voting have sometimes been seen as a threat to sovereignty, particularly when these are authorised to legally binding action over the objection of a dissenting state.[112]

### 3.2.1.3. The Regional Organisations

As far as regional organisations are concerned, NATO (North Atlantic Treaty Organisation) was created to stabilise capitalism in Western Europe and to threaten the former USSR and its allies. The USSR was perceived as a threat to those markets and the capitalist way of life because it represented a viable alternative to the war and poverty caused by capitalist competition. After the Cold War, NATO's priorities remain the same – stabilise markets from civil unrest and contain external threats to those markets. The only difference is that the main external threats to expanding markets are nationalism and fundamentalism rather than communism. The expansion of NATO serves the economic and political interests of Germany. NATO plays a major role in controlling Germany militarily. However, the German government and German firms are the largest investors in Central and Eastern Europe. NATO expansion provides a mechanism for Germany to guarantee its investments and to exercise political influence without raising international concern. The world does not

[112] Alvarez, *International Organisations as Law –makers*, p.10.

necessarily fear German territorial expansion; however, its influence is extended through international organisations such as the EU and NATO, which in turn facilitates its economic dominance.

Western Europe and the USA have also expressed an interest in extending NATO to the Central Asian republics. NATO's Secretary General Javier Sloana toured several Central Asian republics in 1997, again raising concern about NATO motives.[113] The vast oil and natural gas reserves of the Central Asian republics are of particular interest to the West, which wants to reduce its dependence on Middle Eastern oil. Therefore, NATO expansion is more closely related to economic considerations than it is to security, and Western officials all but admit it. The candidates for NATO membership have no immediate security threats. Rather, these states are the ones most economically poised to become members of the EU. They hold the lion's share of Western economic investments. Also, they have instituted market reforms, provided political and civil rights on paper and attracted direct foreign investment. Now they are being rewarded with NATO membership. NATO will help stabilise these emerging markets as they experience the internal unrest caused by the inevitable financial crisis and the cyclical booms and busts associated with capitalism.

### 3.2.1.4. International Environmental Institutions

International efforts to protect the environment reveal widening differences between rich and poor. These differences relate to the causes of environmental degradation and the best strategies for environmental protection. Global warming is a consequence of the economic development of the North. The capitalist mode of production with its emphasis on private property, wage labour and markets has undermined the natural environment. There is an absence of an effective implementation of the principle of common but differentiated responsibility based on the premise of the historic responsibility of the north in causing environmental damage. Thus, the operation of international environmental institutions and laws involve the redistribution of property rights in favour of the advanced capitalist countries.[114] Northern societies benefited from the unrestricted use of their resources and access to resources in

[113] See further NATO press release 1997. Retrieved on 16.7.2013 http://www.nato.int/docu/pr/1997/
[114] Chimni, *The WTO/Democracy and Development: A view from the south,* p.5.

colonies in the south. They charred millions of square kilometres of forest without any regard to the environmental consequences. The global capitalist economy is based on the consumption of fossil fuels by industries and consumers. The UN emphasis on sustainable development is just a euphemism for sustaining the privileges of the dominant capitalist states or classes.

The recent emphasis of IFI's on environmental protection is more rhetoric than reality. The Kyoto protocol is a victory for capitalism and international industries because it accomplishes very little, which is precisely what industry wants. The US has signed it but not intend to ratify. Industries that can externalise their pollution costs can achieve higher rates of profits for their owner and shareholders. The global private rights are granted to polluters now. Developing countries are asked to agree to a redistribution of those property rights without compensation for already depleted resources. The environmental laws out of Kyoto protocol are irksome to the operation of transnational capital are therefore disregarded.

#### 3.2.1.5. International Organisations and its Humanitarian Activities

International organisations play crucial roles relating to social and humanitarian issue. International organisations like the UN, EU and the Arab League deliver humanitarian and emergency assistance to societies in crisis. NGO's often work with international organisations to provide food aid and health, education and legal services. Social and humanitarian crises are intertwined with political violence, environment degradation and gross abuse of human rights. The Western capitalist countries used civil and political human rights to criticise the Soviet Union and to justify cold war policies. The former Soviet Union criticised racial discrimination in the US and accentuated economic and social rights –rights to which the US paid little attention. On the one hand, the West criticised the east for systematically denying civil and political rights; on the contrary, it supported brutal authoritarian governments as bulwarks against communism. The North consistently ignored the basic needs of people in the developing world and denied that any 'right to development' exists. Indeed the

emphasis on civil and political rights allows the pursuit of the neo-liberal agenda by privileging private rights over collective social and economic rights.[115]

### 3.2.1.6. International Human Rights Organisations

The proponents of the cultural relativist approach argue that human rights as conceptualised by the UN are Eurocentric. That is the notions of political, civil, economic, social and cultural rights found in western European political and economic thought ignore non-Western approaches to human rights. The philosophical and the religious traditions of the Middle East, the Indian subcontinent, China and South East Asia are ignored or marginalised by human rights discourses. The lag between the Universal Declaration and an actual binding international law was the result of the very real political divisions within the UN.

Several UN bodies and agencies are integrally involved in promoting and protecting human rights. The UN Commission on Human Rights, which reports to the ECOSOC, was created shortly after the inception of the UN itself. This commission drafted the 1948 UN Declaration of Human rights and actively worked to institutionalise the international convention. Traditionally, recognition, promotion and protection of human rights have involved the use of diplomacy and political pressure to persuade and challenge states to improve their human rights records.

Since the end of the Cold War, however, international enforcement of human rights has emerged as a controversial feature in international politics. UN humanitarian actions in Iraq, Somalia and Bosnia renewed interest in the notion of ‘humanitarian intervention’. Broadly, speaking, humanitarian intervention refers to dictatorial interference in the internal affairs of a sovereign state to secure and enforce human rights. The controversy surrounding humanitarian intervention revolves around a central question: when is it permissible for international organisations to override state sovereignty to provide or protect internationally recognised human rights? The UN according to Article 2(7) of the UN Charter is enjoined from intervening in the domestic jurisdiction of member states, and no member is required to submit such

[115] Alvarez, *International Organisations as Law –makers*, p.11.

matter to the UN for settlement. The task of IHROs appears to be, in other words, more damage control than the production of welfare states.[116]

### 3.3. Individuals

Individuals are sometimes considered as subjects of international law, particularly in human rights context, not only by capitalist countries but also by the socialist countries. There are two opposing standpoints between bourgeois international lawyers. One argument rejects individuals as subjects of international law. Oppenheim supports this argument. He argues:

> 'Since the Law of Nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are the subjects of international law. This means that the Law of Nations is a law for the international conduct of States, and not of their citizens…An individual human being …is never directly a subject of international law.[117] But what is the real position of individuals in international law, if they are not subjects thereof? The answer can only be that they are objects of international law.'[118]

The others argue that the modern practice does demonstrate that individuals have become increasingly recognised as participants and subjects of international law.[119]

Individuals while representing a nation get sovereign immunity. These persons are accredited as diplomats. Whatever privileges are available to a state, are also available to a state diplomat. This does not make an individual a subject of international law. Mere representation is not the same for another individual can replace an individual diplomat. Physical persons may represent a state in international relations only in their official capacity. The positivist doctrine argues that an individual has rights and obligation within his or her country or within another country where he or she happens to live. The individual relationship is regulated by private and public

[116] See ibid., p.11.
[117] Oppenheim, *International Law*, par. 13, 18f.
[118] See ibid.,para. 290, p.344.
[119] Shaw, *International Law*, p.132.

municipal law and in foreign affairs partly by private international law. However, that too was construed as part of municipal law.[120]

The socialist countries did not agree that individuals are subjects of international law but accepted that they acquire rights and obligations. A Soviet text notes about war criminals that:

> 'Physical persons can acquire rights and obligations in regard to foreign States, in the main on the basis of international agreements concluded by states. The rights of the individual citizen flow from the international legal protection, which a state affords its citizens although they may be abroad. While not subjects of international law, physical persons may however be subjects of an infringement of international law and order and as a result bear a certain responsibility. This was the basis for the sentences passed on the chief war criminals by the Nuremberg and Tokyo military tribunals.'[121]

In international law, the individual is treated as a criminal, sometimes victim, rather than as subject to rights. The Nuremberg and Tokyo trial and various war crime tribunals such as former Yugoslavia, Rwanda are examples of these. The Nuremberg Trial was probably the first time in the history of modern international law that individuals were punished for war crimes. The judgment speaks about the position of individual in international law as follows:

> 'It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon the States has long been recognised. …Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'[122]

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[120] Cited in Strupp, *The position of the individual in international law according to Grotius and Vattel*, p.4.
[121] Academy of Sciences of the USSR, Institute of Law, International Law p.90.
[122] Judgment was given on October 1, 1946, by the International Military Tribunal at Nuremberg, transcript of Proceedings, p. 16878, cited in *The position of the individual in international law according to Grotius and Vattel*, p. 5.

The war criminals should be punished. However, the justice is often a victor's justice. The allied forces notably the United States killed millions of civilians in Nagasaki and Hiroshima of Japan. However, the perpetrators of that crime never got punished by a war crime tribunal. Same as today's ICC (International Criminal Court) which targets mostly third world countries. It does not mean that the individuals being tried are innocent and the punishment should not be given. The point is that all those who commit war crimes or crimes against humanity should be tried. [123]

Other than these, some human rights treaties have given rights to the individuals to direct access international courts and tribunals. Some of them are European Convention on Human Rights, 1950; The Inter-American Convention on Human Rights, 1969; The Optional Protocol to the International Covenant on Civil and Political Rights, 1966; International Convention for the Elimination of all forms of racial discrimination, 1965; and the Convention on the Settlement of Investment Disputes, 1965.

What would be a Marxist approach towards an individual as a subject of international law? It gives more importance to the society rather than individual. The welfare of the society leads to the welfare of every individual. However, in capitalist society, the welfare of all individuals in a society is not possible. For that to ensure individual rights, laws are enacted to create an illusion that equal rights are there in capitalist society. Nevertheless, in reality, the liberty and equality of rights are enjoyed only by few in the capitalist society and not by all. Marx in his writings on individual freedom *On Jewish question* and *Critique of Gotha Program* criticised the bourgeois revolutionary achievements of 'political emancipation' and equal rights as embodying an incomplete- and therefore, in a sense false-freedom.[124]

This can be compared to the international humanitarian law and its rights given to the individual for the violation of such rights. In this overwhelming bourgeois world order, international human rights and humanitarian law offer plenty of rights and

[123] Nevertheless, the perpetrators were delivering the justice towards the criminals of the third world countries. The chaos in the third world countries is due to the colonial conspiracy of divide and rule.
[124] Marks (eds), *International law on the left, Re-examining Marxist Legacies,* p.223.

protections. However, the primary subject, the state is supposed to protect the individual and ensure these rights. When the state itself violates the human rights law or the humanitarian law, it is not punished, but some individuals are.

### 4. Summary

A materialist approach to the sources of international law differs variably from the mainstream approaches. It takes cue from the Soviet approach that treaty is more reliable source than the custom, as custom is problematic and unwritten. The other source 'general principles' is interpreted by bourgeois lawyers in ways which are favourable to the protection of private property, capitalism and helps to maintain the hegemony of the western model of economic system. A Marxist approach does not attach the same significance to the 'general principles' but accepts when it is agreed by the majority of states by way of treaty.

Judicial decisions as a source of international law are mostly in favour of the hegemonic states and its ruling class. Exceptions like *Nicaragua case* happens in the ICJ, but cannot be implemented. Tunkin's argument of accepting the judicial decisions when the proportion of the judges from the majority of the states participated - is convincing. However, the majority of the state's judges are not necessarily representing the majority of the people. The other source of highly qualified publicists is biased in celebrating western authors and the authors who write in compliance with the western model of development. This hegemony is continuing as the third worlds scholars are still countering the views of the western bourgeois authors. The so-called 'soft law' is not law declared by the bourgeois writer's shows that the norm creating process in international law is undemocratic. The resolutions passed by the majority of states cannot be termed as norms or legally binding, but the minority Security Council resolutions are legally binding. This shows that the norm creating process in international law is hegemonic, one-sided, biased towards a particular economic system.

A materialist views the subjects of international law from a class perspective, which is missing in the mainstream approach. Both the state and the international organisation are not above the society but evolve from the society. The contemporary international

organisations do the bidding of the imperialist state, which cannot directly use force like the feudal State. Hence, the imperialist state needs international organisations by which it can realise its interests. Giving importance to international organisation equal to the level of states will be in detriment of the weaker states. International organisations are hegemonic in nature and help in evolving a nascent global state having an imperial character. A network of economic, social, international organisation has been established or repositioned at the initiative of the first world to make success of this project. The transnational capitalist class is behind the project and is comprised of the owners of the transnational capital. UN continues to pay observance to the global power, by actively promoting the interest of transnational capital and makes futile appeals to it to serve the cause of international justice.[125]

The global networks of the sub-national institutions erode the sovereignty of the third world states from below. Hence, international organisations should be held accountable for the erosion of sovereignty over the state. The lack of individual accountability made the international organisation the perfect vehicle for exploitation and dominance of subaltern states and peoples. The relocation of sovereign powers from states to international organisation has transformed the meaning of democracy in the third world.[126] International law and organisations are today institutionalising polyarchy or formal democracy in third world countries. By way of enforcing unjust rules, it is legitimising hegemony. There is an urgent need for the progressive forces to make alliances with new social movements, consumer movements, community initiatives to counter the growing power of international organisations. Like that, individuals cannot be a subject of international law. When they represent any particular state, they have the rights and obligations. However, in the contemporary period, individuals have more obligations than rights. The result is as Tunkin observes that the mainstream approach which 'was close to rejecting the sovereignty of states, to recognising individuals as subjects of international law, to transforming an international organisation into some likeness of a super state, and to sanctioning broad interference in the internal affairs of states.'[127]

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[125] Chimni, *International Institutions Today: An empirical global state in the making*, p.15.
[126] See ibid., p.22.
[127] Tunkin, *Theory of International La*w, p.255.

# CHAPTER VII

# CONCLUSION

Historically, from ancient times, the law is considered as the creation of the divine. It was considered as eternal and unchangeable. St. Augustine defined law as the divine order or will of God and forbid its breach. This may be called the idealist approach to law. For a long time, the philosophy of idealism dominated natural law theory. The natural law theory was countered by Positivism. It shifted the origin from the divine to the sovereign. However, the positivist approach suffered from the metaphysics of law. Metaphysics is thinking the law in abstraction from its conditions of existence and its evolution and development. It views law in separation from other factors, ignoring its interconnections with society. For instance, Kelsen argued for a 'pure theory of law' which is not contaminated from sociology, economics, etc. It looked at international law in isolation from the world economy. On the other hand, the materialist philosophy of law denies the divine origin and eternity of law. It contends that law is the result of particular social conditions.

Marxism enriched the philosophy of materialism. It describes the path of law starting from the ancient to the socialist society. The tribal society had rules and regulations, which was also sanctioned like the law. The element which differentiates the law with the common norms and rules is the exploitation of one class by another. Hence, law originates along with state after the origin of class. Class and law are inseparable. The dissolution of class leads to the withering away of state and law. Hence the law is not eternal. Law is an ideology, and the ideology of law is a social product. In class society, it protects and promotes the social and political relations that are coercive and hierarchical. Albeit, it shows itself as natural, necessary and legitimate, it serves the interests of the socially dominant classes at the expense of others. Engels called this illusion of law as equal and neutral to everyone as false consciousness. The jurists imagine that they are operating with priori propositions, but, in reality, it is an economic reflection. Marxism exposes this pseudo-scientific character of law by saying that the nature of law develops the false consciousness among people and helps the system to survive.

It is ignorance to argue that Marx and Engels treated the law with less importance and not developed a full-fledged theory of law. Marxist theory of the state is enough to draw up a theory of law. The scientific theory of Marxism guides us that law cannot be studied separately without the state. The nature of state defines the nature of law whether it is bourgeois or socialist. However, law is not the product of state, but both are the reflection of the social conditions. Marxism criticises the idealist philosophy of state and law by Hegel. For Hegel, state produces the civil society, for Marx; it is the other way round. Civil society is not representing the majority of the people, but the ruling minority. Marx differentiated it as the old and new materialism, where the former represents the civil society and the new represents the human society or social humanity. Law is a superstructure having a dialectical relationship with other structures like state, religion, culture, etc. However, it is not always the faithful reflection of the base and could infringe the base up to a certain extent and makes the base suffer. It is a dynamic relationship and not a static connection. The Marxist theory of law argues that the law is the will of the particular class. It is not the 'general will' as contended by Rousseau but a particular will of the ruling class. The social solidarity is artificial and metaphysical because this principle claims that solidarity is the life element of the society of every sort.

Lenin did not ignore law after the October Revolution. He took it seriously and used to punish the class enemies. He handled international law to bring peace to the young socialist state by way of signing a treaty with Imperialist Germany. He accepted the fact that in the first phase of communism, the elements of the bourgeois law will persist because it still protects the private property of individuals. He considered law as a useful vehicle for disseminating the socialist programme under the dictatorship of the proletariat. Pashukanis commodity theory of law failed to follow the footsteps of Lenin. He opposed the proletarian system of law after the October Revolution and even against the notion of proletarian law. The legal is abstracted from the economy and appears as an independent element in his theory. Later, Vyshinsky differentiated the metaphysical idealist theory of state from the materialist perspective. He criticised Pashukanis understanding of law as a separate element. For him, law and state cannot be studied separately and apart from each other. His deviation from Marxist theory of law is reflected in his conclusion that the socialist law that manifests the will of the

people. Socialist law also has the class character which cannot be called as the will of the people but the will of the proletariat.

International law is an extension of the domestic law. It is also about the mode of production of the world. International law reflects the dominant mode of production in the world and reflects the particular class interests. International law is progressive and regressive according to the material conditions existing in the world economy. However, the mainstream or the bourgeois definition of international law is that 'international law is the totality of norms defining the rights and duties of states in their mutual relations with each other'.[1] A materialist approach to international law puts several questions to the mainstream definition such as in whose interests are norms created? Which group or class at the national and global levels benefit from them? How is an unequal power of states accounted for it? Thus, a materialist theory refers external factors such as the economic conditions of the world, the contradiction between various classes in the international arena and between the First world and the Third world, to understand and define the structure and process of international law. The method of historical and dialectical materialism helps understand international law, not in isolation from material conditions, but rather as being interdependent with it.

Even though there have been past attempts to analyse the history, sources and subjects of international law through a Marxian perspective, contemporary developments are in need of a detailed elaboration. The materialist theory of international law is a continuing project. The contribution of the former Soviet Union serves little purpose for the project. Despite the extraordinary contributions of Pashukanis and Tunkin, it has theoretical flaws. For example, Pashukanis' commodity theory of law was based on individual commodity exchange that cannot be directly applied to international relations. Production relations are more primary than exchange relations. For instance, even if we take labour as a commodity in capitalist relations, it is not exchange but exploitation. His definition of modern international law as 'the legal form of the struggle of capitalist states among themselves for domination over the rest of the world' ignores the presence of Soviet Union as a contradiction. However, his criticism of the criteria of states as civilised and uncivilised and exposing the true nature of

[1] Bonfils, *Traite de droit international public*, Paris.

bourgeois international law is appreciable. He followed Marxian critique of the bourgeois notion of equal rights of states and concluded that open denial of international law is unprofitable for the bourgeoisie. His theory about the origin of international law during the tribal period predates the origin of state. This happens when the law seems like an independent element without connecting with the base. Though later, rectifying his mistakes did not help him to consolidate his position as the legal authority of Soviet Union.

Despite Tunkin's theory of international law being written on the ideological frame of Marxism-Leninism, it was more in defence of foreign policies of the former Soviet Union. The use of the principle 'peaceful coexistence' by Tunkin is more positivist than Marxist. Tunkin's differentiation of 'general' international law for the capitalist countries and 'particular' international law for the socialist countries is problematic. In the name of particular international law, the Soviet invasion of Hungary, Czechoslovakia and later Afghanistan was justified. While criticising the untenable Trotskyites position of 'permanent revolution' by saying revolution cannot be exported, he supported the invasion for the continuation of socialism. Moreover, his 'general' international law without class essence shows the infection of revisionism in the Marxist theory of international law. The argument is class struggle does not happen in the international arena, but only inside the state, a distortion of Marxist international relations theory. The 'general' international law for the two bases, i.e., capitalist and socialist seem contradictory. The world has a single base with the overwhelming of capitalist mode of production. It also has a vast but subservient base of feudal and semi-feudal, which he ignored. However, the theoretical understanding of origin and withering away of law by Tunkin shows his correct position. He equates the cause of international law with the origin of classes and withering away of international law with the abolition of class suits the Marxist method.

The non-Soviet materialist theories of international law tried to fulfil the flaws of the Soviet theories of international law. Chimni's writings enlighten us in the Marxist understanding of international law and international institutions. He has offered a critique of contemporary approaches to international law and institutions from a Marxist perspective. The contribution by B.S. Chimni in his recent work is a new hope. It tried to analyse the other critical approaches to international law such as feminist approach, post-colonial approach and the new approaches to international

law, etc. with Marxist approach and correctly identifies the dialectical relation among those approaches. He rightly criticised the realist theory of international law as idealism. He contests that law is not a neutral and a non-partisan device. Morgenthau's blaming of innate human nature for the contradiction of the world is perfectly countered by Chimni, as deterministic and without foundation. In a materialistic way, the answer provided was the institution of private property for the contradiction.

China Mieville's contribution is no less but hardly serves the purpose. His writing overlooks the progressive elements in the Soviet international law. Though he subjects Pashukanis to criticism, his theory is an extension of the Soviet Marxist scholar E. Pashukanis. Pashukanis' writings are not many on international law, and Mieville tries to bring the commodity theory to international law. His conclusion seems to be the extension of the fault of Pashukanis commodity theory of law. His work on a Marxist theory of international law ends up in nihilism, which is in a way contradictory to the materialist approach. Marxist theory gives tactics and methodology to work in any adverse situation, but never goes along with nihilism.

A materialist approach to international law, unlike the mainstream approaches, gives greater importance to the history of international law. The Marxist method of historical materialism divides the history of humanity into different mode of productions. The transition from one stage to another stage transforms international law as for instance, from slave-owning society to feudal society to the modern bourgeois society. As the international law is broadly a part of the superstructure and evolves from economic conditions, the analysis of history is necessary. Thus, feudal states' interest varies from the capitalist state.

The tribal society or the primitive communist society was a stateless society. There was a possibility of arrangements or agreements between two tribal groups regarding the hunting grounds and territory. It cannot be called as international law, as international law originated after the origin of states. The interest of the feudal state is that of the landlords, and the interest of the capitalist states lies with the bourgeoisie. In the ancient period, international law was in favour of slavery. The role of international law was very rudimentary in nature during the ancient period. The treaty between the ancient states was mostly about the territory, seems an extension of the

tribal period. It also speaks about the return of runaway slaves and the treatment of slaves. The captives of war were placed in a forced labour camp show us that enslavement of prisoners was profitable instead of killing them. The conquered territories were organised into temple property, royal property and the private property of individuals. Negotiations after the war happened to exchange captives with slaves and ransom money. The treaty between the city states of Sadlas and Nerebtum was about the enslavement of persons. An individual may not be enslaved by the person who gave refuge to them in another country during the times of war. This shows that the state organised the slave system. The situation was same in the ancient Greece. Homer's *Illiad* and *Odyssey*, speaks about the capturing of slaves through war. The dispute between Achilles and Agamemnon was about a female slave. Homer speaks through Hector's mother and wife about the treatment of slaves. Another interesting factor in the ancient treaties was that the king's name mentioned along their father and grandfather indicates the society's shift from matriarchy to patriarchy. Hermogenianus, a Roman jurist of the second half of the 3rd century, described *jus gentium* includes the contract of buying and selling slaves. Ancient Rome was built on slave trade. There was constant slave uprising challenging the Roman state, lead to the Roman Empire. In ancient India, slavery was practised as Varna in the beginning and later as caste. The slaves were called Dasas or Dashus. The ancient law code of Manu codified the rules and regulations of slavery. It speaks about seven kinds of slaves. The story of King Harishchandra indicates us the worst situation of slaves in ancient India.

Later due to the change in means of production and technology, the feudal state abolishes slavery but presented it in the form of serfdom. The Roman Empire was controlled by Church in the later period. The code of Justinian relaxed the conditions of slavery and was liberal enough to make a slave, a free citizen. The serfs were attached to the land. Even after a peasant worked on a piece of land for 30 years, he could not get separated from the land and thus remained forever attached to the land. The feudal system of the Roman Empire eliminated the corporate personality of the individual state by identifying political authority with land tenure. In the feudal period, the international law was more influenced by the clergy. The Justinian code becomes part of the Canon law. The ideas of Aquinas and Gratian become the code of the Christian international law. Waging war is not considered as wrong if the war is

just. A war must be intended to accomplish good or avoid evil. A Just War must be for a just cause, which could be converting non-believers to Christianity and waging war against them if there is an opposition. This concept greatly influenced later scholars like Grotius.

The fall of feudalism happened because of end number of factors such as failure of Crusades, the loss of Constantinople, over sea voyages, challenge of Pope's authority by the newly formed nation states, etc. Albeit being failed in Crusades, the knowledge of Islamic civilisation reached Europe. The peasant war in Germany and other countries depicts the unrest of serfs. The emergence of Protestant religion side by side challenged the church. These factors played a decisive role in shaping the international law. The invention of spinning jenny and steam engine, the change in the instruments of production, revolutionised the means of production led to the industrial revolution, first in England and later Europe. The English factory act had enacted to strengthen the capitalist production. The liberty, equality concepts arose out of that capitalist mode of production, which can be seen in the modern international law. The bourgeois revolutions such as French and American caused a political change favourable to the growth of capitalism. The revolutionary constitutions of France and America explained liberty as non-interference in the private property. Equality is the freedom for the free competition without the intervention of the state. The idea of freedom of seas developed by Grotius should be looked in the light of this bourgeois concept of liberty. Capitalism was followed by colonialism because capitalism cannot survive without crossing its borders. Colonialism covers the earlier stage of colonialism, which is the transition from feudalism to capitalism, and mercantile, and the later stage of colonialism that developed into imperialism. The colonial period can be called as the exact time of the development of international law, because of the encounter with the third world or the colonised world. In the last quarter of the 19th century, capitalism entered its monopoly phase. After the October Revolution, Soviet Union stood against colonialism uncompromisingly. The contribution of Soviet Union in various fields such as self-determination of colonial countries, treaty laws, human rights and humanitarian laws shaped international law in a progressive direction. Thus, international law strictly evolves from the material conditions of international relations, not in the imagination of some authors or intellectuals in the field of international law.

Turning to the specific topics, a Marxist approach has been used in the thesis to analyse the principles of international law. Three important principles related to the materialist theory are peaceful co-existence, proletarian internationalism and self-determination. Peaceful co-existence is unique to the co-existence of two antagonistic systems, one ruled by the oppressor and the other ruled by the oppressed. It is more of a tactical measure. There cannot be co-operation among the oppressor and the oppressed. Peaceful co-existence is necessary to develop socialism in one country. The Soviet view of peaceful co-existence had two views. One is the Leninist concept of peaceful co-existence and the second, is the concept developed by Khrushchev. Khrushchev's idea of peaceful co-existence had added co-operation to it. It was criticised as revisionism from Marxism-Leninism, by various communist parties particularly, the CPC. The imperialist countries never agreed with the concept of peaceful co-existence of Khrushchev. However, it was more popular in the Third World countries including China. The Third World countries like China, Vietnam, India, Burma, Indonesia, etc. signed treaties with the idea of peaceful co-existence. Albeit, it got diluted from peaceful co-existence to live together in peace, during the Asian-African Conference in Bandung due to the imperialist countries pressure, it became an important principle of international law during those periods.

Proletarian internationalism is the solidarity with all the working and oppressed class of the world. According to Tunkin, the guiding principle of the international workers' movement was the principle of proletarian internationalism, which signified the fraternal friendship, close cooperation and mutual assistance of the working class of various countries in the struggle for their liberation. This was first developed by Marx and his comrades in the First International. The Second International followed this, but the imperialist war split the international into national lines, a blow to the proletarian internationalism. After the October Revolution, the Third International was formed. The Bolshevik party invited communist revolutionaries from all over the world to come to found a new revolutionary communist international. Thus the proletarian internationalism became a principle practised by a state. It was later couched as socialist internationalism to capture the relationship between socialist countries. It was however wrongly used to yield a separate international law between socialist countries and justified the invasion of Czechoslovakia and Hungary. In

reality socialist internationalism is nothing but the mutual aid, scientific and technological help to the socialist countries to move forward to communism.

In the materialist understanding of the international law the principle of self-determination, has received two different interpretations. One is the radical Marxist position followed by Rosa Luxemburg and other. The other one is the Leninist conception of 'self-determination of a nation with a right to secession' propagated by Lenin and Stalin. The radical position opposed the principle of self-determination saying that it will divide the international working class. On the other hand, Lenin and Stalin contended that the oppressed nationality has the right to self-determination. The Leninist conception of self-determination played a significant role in decolonisation of the world. Self-determination, though originated as a bourgeois right, extended to the oppressed and colonial countries by the materialist theory. It is now a well-established principle in international law, inherited by various international multilateral treaties, where the oppressed nation has the legal right to protect their economic, social and cultural rights.

Turning to the sources and subjects of international law, it has been contended that treaties are more reliable sources than customs. Korovin argued that customs could be codified only by treaties. He had earlier contended that the division of treaties into law-making and contractual treaties are unfounded, since any treaty, as an act originating with states-subjects of international law, has a particular law-making significance. As Korovin put it, every international agreement is the expression of an established social order with a certain balance of collective interests. Treaties can be seen as a product of class interests, where 'collective interests' of the bourgeoisie can be imposed over the socialist or third world countries. Custom is less progressive compared to the norms created by treaties. A 'bourgeois character' is attributed to customary law. The customary norms in international law articulate the norms of hegemonic and exploitative international law of imperialist countries. The change in material conditions is the only possibility to make custom progressive. As custom, the other source 'general principles' is problematic as it is interpreted by the mainstream lawyers in favour of capitalism to help maintain the hegemony of the Western capitalist model of development. Many countries have rejected this source as a primary source of international law like the former Soviet Union. A possible materialist interpretation of this term is that the concept of civilised nations is

mentioned in the notion of capitalist state, which includes the general principle of protection of private property and free trade capitalist mode of production. The principles 'respect of private property and acquired rights of foreigners', 'unjust enrichment' are considered as a general principle of civilised nations. This was used vehemently during the period of post-colonialism when the postcolonial nationalist state tried to nationalise the foreign private property.

In so far as subsidiary sources are concerned, judicial decisions as a source of international law are mostly in favour of the hegemonic states and its ruling class. Exceptions like Nicaragua case happens in the ICJ, but cannot be implemented. Tunkin's argument of accepting the judicial decisions when the proportion of the judges from the majority of the states participated - is convincing. However, the majority of the state's judges are not necessarily representing the majority of the people. The decisions of the commercial tribunals further the interest of the capitalist class. The writings of highly qualified publicists are mostly from West who with exceptions apart writes in compliance with the western capitalist model of development. This hegemony is continuing as the scholars of the third world are still countering the views of bourgeois authors of the West. The non-acceptability of 'soft law' as a secondary source shows that the norm creating process in international law is undemocratic. The resolutions passed by the majority of states cannot be termed as norms or legally binding, but the minority Security Council resolutions are legally binding. This shows that the norm creating process in international law is hegemonic, one-sided, biased towards a particular economic system.

Coming to subjects of international law, the primary subject state reflects the 'will of state' in international law. This "will" evolve from the ruling class interests. The original nature and character of a state is to serve the interest of a particular class and maintain the continuation of the particular mode of production. Therefore, the nature of international law changes according to the kind of states in power. Sovereignty principle is the most important among other principles in so far as determination of subjects of international law is concerned. The notion of sovereignty varies at different historical periods. At the advent of colonialism, the sovereignty doctrine was used to colonise the third world states. The colonised third world states in the colonial period were not considered as subjects of international law. The treaties were made

with the ‘uncivilised’ third world states only to confer sovereignty of the ‘civilised’ European states. Hence, the concept of sovereignty among other things evolved to respond to the problem of competition for colonies between European powers. In the contemporary period, state according to international law is sovereign in nature, complete sovereignty. Sovereignty is an integral aspect of the state as a subject of international law. According to the mainstream international law scholarship, unless and until a majority of the countries in the world recognise a state as a sovereign state, the state lacks international personality, though it has all the criteria of territory, population, political structure and capacity to enter into relations with other states. The materialist approach states that the declaratory theory of recognition emerged as a reaction to the constitutive theory. The declarative theory evolved when the bourgeois national state struggled against absolutist feudal regimes. The period followed by the First and Second World War, the recognition doctrine was used against the young socialist countries. These countries suffered because of this concept of recognition. The same bourgeois national state refused to recognise the socialist countries like USSR and the People’s Republic of China.

The secondary subjects of international law, the international organisation's influence is growing day by day. One consequence is that the third world countries sovereignty is diminishing. The mainstream international law scholarship has always argued that international organisations have a legal personality. Mainstream scholars like Jessup, Lauterpacht, and Scelle favour the international organisations as subjects of international law. Soviet international law scholars stated that no international organisations, still less natural persons, can be subjects of international law. They maintained that international organisations are not subjects of international law but are subjects of international legal relations. A Marxist approach views the subjects of international law from a class perspective, which is missing in the mainstream approach. Either the state or the international organisations are not above the society but evolve from society.

Individuals are sometimes considered as subjects of international law, particularly in human rights context, not only by capitalist countries but also by the socialist countries. Individuals during the representation of a nation get sovereign immunity. These persons are accredited as diplomats. The privileges available to a state, are also available to a state diplomat. This does not make an individual a subject of

international law. When they represent any particular state, they have the rights and obligations, as diplomatic immunity is a principle of international law. In international human rights law, some of the treaties have given rights to the individual to have direct access to international courts and tribunals. The socialist countries did not agree that individuals are subjects of international law but accepted that they acquire rights and obligations.

The critical legal approaches to international law, particularly materialist approach is getting importance today, as the crisis of capitalism gets worse day by day. Due to the present global economic process, the international law is getting more regressive. The contemporary international law has championed globalisation characterised by liberalisation and privatisation without differentiating the economy of various countries makes the contradictions more intense. Dialectical materialism teaches that the society moves progressively in an extended period, which makes the downfall of capitalism and the rise of socialism inevitable. There is no need for abolition of law as the law continues as long as the class continues. The state withers away when there is no class to exploit, followed by withering away of law as well as international law.

Even after decades of the fall of the socialist camp, the critical scholars of international law are turning their interest towards Marx. As a consequence, the amount of literature on Marxism and international law has increased. The materialist theory of international law has produced comprehensive alternative to international law by way of sufficiently identifying loopholes and weaknesses of mainstream international law scholarship. Also, it gives a futuristic and more balanced interpretation to international law, which can be dwelled upon by scholars for equal and democratic future international society.

## REFERENCES

**(* Indicates Primary Sources)**


Abi-Saab, G.M. (1962), *The Newly Independent States and the Rules of international Law: An Outline*, *Howard Law Journal*, VIII. 109.

*A Great Victory for Leninism* – In commemoration of the 95th Anniversary of the birth of Lenin, Hongqi Editorial, No.4, 1965., Foreign Languages Press, Peking 1965.

Anand, R.P. (2008), *New States and International law*, Gurgaon: Hope India Publications.

Altman, Amnon. (2012), *Tracing the Earliest Recorded Concepts of International Law Ancient Near East (2500–330 bce)*, Legal History Library, VOLUME 8, Studies in the History of International Law, Martinus Nijhoff Publications, Leiden • Boston.

Anghie, Antony. (2004), *Imperialism, Sovereignty and the Making of International Law*, New York: Cambridge University press.

Aristotle, (350 BC), *The Politics*, translated by T. A. Sinclair, revised and represented by Trevor J. Saunders, (1981), Penguin Books Limited.

Armstrong, David. (1993), *Revolution and World Order - The Revolutionary State in International Society*, Clarendon Press · Oxford

Austin, John. (1995), *The province of jurisprudence determined*, Edited by Wilfrid E. Rumble, Cambridge University Press.

Baade, Hans W. (eds), *The Soviet Impact on International Law*, Oceana Publications, 1965.

Bederman, David J. (2001), *International law in Antiquity*, Cambridge: Cambridge University Press.

Bloch, Marc. *Feudal Society, The Growth of Ties of Dependence*, Volume I, translated from the French by L.A.Manyon, Routledge & Kegan Paul Ltd, London, 1961, 1962.

Bloch, Marc. *Feudal Society, Social Classes and Political Organisation*, Volume II, translated from the French by L.A.Manyon, Routledge & Kegan Paul Ltd, London, 1961, 1962.

Bonfils, H. (1908), *Traite de droit international public*, (Trafficking of Public International Law), Paris: A Rousseu.

Bottomore, T.B. (Translated and edited) *Karl Marx Early Writings,* New York: McGraw-Hill.

Bradlow, Daniel D. and Hunter, David B. (eds), (2010) *International financial Institutions and International law,* Austin/Boston/Chicago/New York/ The Netherlands: Wolters Kluwer.

Carty, Anthony. *Review: Marxist International Law Theory as Hegelianism*, Reviewed Work(s): Between Equal Rights: A Marxist Theory of International Law by China Mieville, International Studies Review, Vol. 10, No. 1 (Mar., 2008), pp. 122-125, Wiley on behalf of The International Studies Association.

Cain, M. and Hunt, A. (eds) (1979), *Marx and Engels on Law*, Academic Press: London, New York, San Francisco

Carr, Edward Hallett (1958), *Socialism in one Country 1924-1926*, Volume One, The Macmillan Company, New York

Carr, Edward Hallett. (1979), *The Russian Revolution from Lenin to Stalin*, The Free Press, A Division Of Macmillan Publishing Co., Inc.New York

Chattopadhyaya, Debiprasad. *In Defence of Materialism in India*, first print 1989, second reprint 2008, People's Publishing House, New Delhi

Cheng, Bin, (1965), *United Nations Resolutions on Outer Space: 'Instant' International Customary Law?* Indian Journal of International Law, Vol. 23.

Childe, V. Gordon. *The Most Ancient East - The Oriental Prelude to European Prehistory*, Alfred A. Knopf, New York, 1929

Childe, V. Gordon. *The Dawn of European Civilization*, Sixth Edition, Revised, Alfred A. Knopf, New York, 1958

Childe, V. Gordon. *The Bronze Age*, Cambridge University Press. Fetter Lane, London

Chimni, B. S. (1993), *International Law and World Order – A Critique of Contemporary Approaches*, New Delhi: Sage Publications.

Chimni, B.S. (1999), *Marxism and International Law A contemporary Analysis*, Economic and Political Weekly, 337-349.

Chimni, B.S. (2004), *International Institutions Today: An empirical global state in the making*, European Journal of International Law, 15: 1-37

Chimni, B.S. (2006), *The WTO, Democracy and Development: A View from the South*, Journal of World Trade, 40(1): 5-36.

Chimni, B.S. (2010), *Prolegomena to a Class Approach to International Law*, *European* Journal of International Law, 21(1): 57-82

Chimni, B.S. (2012), *Capitalism, Imperialism, and International Law in the Twenty-First Century*, Oregon review of international law, Vol. 14,17: 17-46.

Chimni, B.S. (2017), *International Law and World Order – A Critique of Contemporary Approaches*, Second Edition, Cambridge University Press.

Collins, Hugh. (1982), *Marxism and law*, Oxford: Clarendon Press.

*Communist China 1955-1959: Policy Documents with Analysis, Volume 1, p-271, Harvard University Press, Cambridge, Massachusetts.

Conner, Walker. (1984), *The National Question in Marxist-Leninist Theory and Strategy*, Princeton University Press

Conrad, Joseph. (1899), *Heart of Darkness*, Icon Classics.

*Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, art. 34, UNTS.

Cornforth, Maurice, *Dialectical Materialism – An Introduction, Volume 1-3*, Aakar books, Delhi

Daniels, Robert V. (eds) (1993), *A Documentary History of Communism in Russia from Lenin to Gorbachev*, University of Vermont Press, Burlington, Vermont, Published by University Press of New England, Hanover and London.

*Declaration of the Former Soviet Government Regarding the Relations between the FSU and the Former German Democratic Republic, Pravda. ( March 26, 1954)

*Declaration of the Rights of the Peoples of Russia, (1919), SURSFSR

*Declaration on the Granting of Independence to Colonial Countries and Peoples, December 14, 1960, General Assembly Resolution 1514 (XV), UN GAOR, 15th sess., Supplement No. 16, p. 66, UN Doc. A/4684 (1961).

*Decree on Peace, (1917), SU RSFSR.

Deshpande, N. R. *Peaceful Co-existence*, The Indian Journal of Political Science, Vol. 17, No. 1 (January-March 1956),pp. 35-42, Indian Political Science.

*Documents of the United Nations Conference on International Organization, San Francisco, (1945), London and New York: United Nations Information Organizations.

Durant, Will. (1950), *The age of faith: a history of medieval civilization--Christian, Islamic, and Judaic from Constantine to Dante: A.D. 325-1300*, The story of civilisation Series 4, Simon & Schuster, New York.

Durkheim, Emile. (1933), *The Division of Labour in Society,* translated by George Simpson, Fourth Printing, September, 1960, The Free Press of Glencoe, Illinois.

East Timor case, [Online: web] Accessed on 21 June 2017 URL: http://www.icj-cij.org/docket/index.php?sum=430&p1=3&p2=3&case=84&p3=5.

Encyclopedia of public international law, History of International Law: Foundations and Principles of International Law· Sources of International Law· Law of Treaties, Elsevier Science Publishers B. V., 1984.

Engels, F. (1884), *Origin of Family, Private Property and State,* reprinted in 2009, New Delhi: Peoples Publishing house (P) Ltd.

Engels, F. (1845), *The Condition of the Working Class in England*, the English edition (authorised by Engels) was published in 1887 in New York and in London in 1891; From text provided by the Institute of Marxism-Leninism, Moscow. [Online: web] Accessed on 13 May 2017 URL: https://www.marxists.org/archive/marx/works/1845/condition-working-class/ch13.htm

Engels, F. (1886), *Ludwig Feuerbach and the End of Classical German Philosophy*, first published: 1886, in Die Neue Zeit; Progress Publishers edition; translated: by Progress Publishers in 1946; Online Version: Marx Engels Internet Archive 1994. [Online: web] Accessed on 1 March 2017 URL: https://www.marxists.org/archive/marx/works/1886/ludwig-feuerbach/ch04.htm

Engels, F. (1872), *The Housing Question*, Published: (and re-published) as a pamphlet. Reprinted by the Co-operative Publishing Society of Foreign Workers. [Online: web] Accessed on 21 May 2017 URL: https://www.marxists.org/archive/marx/works/1872/housing-question/ch03.htm

Erickson, Richard J. (1972), *International Law and the Revolutionary State – A case study of the Soviet Union and Customary International Law*, New York: Oceana Publications, Inc.

Fenwick, C.G. (1965), *International Law*, New York: Meredith Publishing Company.

Fifield, Russell H. *The Five Principles of Peaceful Co-Existence*, The American Journal of International Law, Vol. 52, No. 3 (Jul., 1958), pp. 504-510, American Society of International Law.

Final Communiqué of the Asian-African conference of Bandung (24 April 1955), The Ministry of Foreign Affairs, Republic of Indonesia (Ed.). Asia-Africa speak from Bandung. Djakarta: 1955, pp. 161-169. [Online: web] Accessed on 12 May 2017 URL: http://franke.uchicago.edu/Final_Communique_Bandung_1955.pdf

Francioni, Francesco. (1975), Compensation for nationalization, law and equity, *International comparative law quarterly,* Vol 24.

Friedmann, W., *Legal Theory*, Fifth edition, Sixth Indian reprint 2013, Universal Law Publishing Co. New Delhi.

Fukuyama, Francis. (1992), *The End of History And The Last Man*, The Free Press, A Division Of Macmillan, Inc.

Gary Chartier (2013), *Anarchy and Legal Order - Law and Politics for a Stateless Society*, Cambridge University Press

Gibbons, Edward. *The decline and fall of Roman Empire*, Antony Lentin and Brian Norman (eds), Great Britain: Wordsworth classics of world literature.

Glazer, Stephen G. *The Brezhnev Doctrine*, The International Lawyer, Vol. 5, No. 1 (January, 1971), pp. 169-179, American Bar Association.

Grotius, Hugo, *The Freedom of the Seas or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade*, translated with a revision of the Latin text of 1633 by Ralph Van Deman Magoffin, Oxford University Press, 1916, Batoche Books Limited, Kitchener, 2000

Grotius, Hugo, *The Free Sea*, translated by Richard Hakluyt with WilliamWelwod's Critique and Grotius's Reply, Liberty fund, Inc. 2004, Indianapolis.

Guevara, Che. (1965), *At the Afro-Asian Conference in Algeria*, The Che Reader, Ocean Press, 2005. [Online: web] Accessed on 19 May 2017 URL: https://www.marxists.org/archive/guevara/1965/02/24.htm

The Documents of the Great Debate, Volume 1, First edition 2005, Antararashtriya Prakashan.

Grzybowski, Kazimierz. (1970), *Soviet Public International Law: Doctrines and Diplomatic Practice,* Leyden: A. W. Sijthoff.

Grzybowski, Kazimierz. *Theory of International Law for the Seventies*, The American Journal of International Law, Vol. 77, No. 4 (Oct., 1983), pp. 862-872, American Society of International Law.

Guins, George. C. (1954), *Soviet Law and Soviet Society*, Martinus Nijhoff, The Hague, Netherlands

Hammurabi (1795-1750 BC), *The Code of Hammurabi*, Translated by L. W. King, 1910

Harten, Gus Van. (2011), *TWAIL and the Dabhol Arbitration*, Forthcoming: Trade, Law and Development [Online: web] Accessed on 29 June 2013 URL: http://ssrn.com/abstract=1923859

Hazard, John N. *Codifying Peaceful Co-Existence*, The American Journal of International Law, Vol. 55, No. 1 (Jan., 1961), pp. 109-120, American Society of International Law.

Hazard, John N. *Cleansing Soviet International Law of Anti-Marxist Theories*, The American Journal of International Law, Vol. 32, No. 2 (Apr., 1938), pp. 244-252. American Society of International Law.

Hazard, John N. and Lipson, Leon, *Soviet Socialism as a Public order system*, Proceedings of the American Society of International Law at its Annual Meeting (1921-1969), Vol. 53, Diverse Systems of World Public Order Today (April 30-May 2,1959), pp. 30-48, American Society of International Law.

Head, Michael. (2008), *Evgeny Pashukanis - A Critical Reappraisal*, Routledge-Cavendish.

Hobsbawm, Eric. (2011), *How to Change the World- Marx and Marxism 1840-2011*, Little, Brown.

Homer (800 B.C.E), *The Iliad*, Translated by Samuel Butler, [Online: web] Accessed on 21 May 2015 URL: http://classics.mit.edu/Homer/iliad.1.i.html

*ICCPR and ICESCR, [Online: web] Accessed on 15 February 2017 URL: http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx

*ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of April 11, 1949.

*International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (1987), Geneva: Martinus Nijhoff.

*ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, (1951), ICJ Reports.

*International Law*, Academy of Sciences of the USSR, Institute of Law, Moscow.

Jose E. Alvarez, (2005), *International Organizations as Law Makers,* New York: Oxford University Press.

Koskenniemi, Martti. (2004), *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, Cambridge University Press.

Keitner, Chimène I. *National Self-Determination in Historical Perspective: The Legacy of the French Revolution for Today's Debates*, International Studies Review, Vol. 2, No. 3 (Autumn, 2000), pp. 3-26.

Kelsen, Hans. (1945), *General Theory of Law and State*, translated by Anders Wedberg, 20th Century Legal Philosophy Series, Vol. 1, Harvard University Press.

Kelson, Hans. (1952), *Principles of International law*, New Jersey: The Law Book exchange Ltd.

Kelson, Hans. (1955), *The Communist Theory of International Law*, New York: Frederick A. Praeger Inc.

Korovin, Y.A. & Krylow, S.B., *International law: a textbook for use in law schools*, translated from the Russian by Dennis Ogden, Moscow : Foreign Languages Pub, 1960.

Korsch, Karl. (1970), Marxism and Philosophy, Translated and with an Introduction by Fred Halliday, Monthly Review Press, 2008

Kudriavtsev, P. I. ed., (1956) *Iuridicheskii slovar* [Legal Dictionary] Moscow: State Publishing House of Legal Literature.

Lauterpacht, H. (1958), *The Development of International Law by the International court*, 2nd edition, London: Stevens and sons, Ltd.

Lenin, V. I. (1910), *Rough Outline of the Draft Programme,* Extraordinary Seventh Congress of the R.C.P. (B.) March, 6-8, 1910, Section 18, [Online: web] Accessed on 29 June 2013, URL: http://www.marxists.org/archive/lenin/works/1918/7thcong/ 18.htm

Lenin, V. I. (1924), *Draft and Explanation of a Programme for the Social-Democratic Party*, [Online: web] Accessed on 13 May 2017, URL: https://www.marxists.org/archive/lenin/works/1895/misc/x01.htm

Lenin, V. I. (1919), *Wireless Message Of Greeting On Behalf Of The Congress To The Government Of The Hungarian Soviet Republic*, Eighth Congress of the R.C.P.(B.) [Online: web] Accessed on 19 May 2017, URL: https://www.marxists.org/archive/lenin/works/1919/rcp8th/05.htm

Lenin V. I. (1917), *Farewell Letter to the Swiss Workers*, Published in the magazine Jugend-Internationale No. 8, May 1, 1917. Lenin Collected Works, Translated: M. S. Levin, The Late Joe Fineberg and and Others, Progress Publishers, 1964, Moscow, Volume 23, pages 367-374. [Online: web] Accessed on 19 May 2017, URL: https://www.marxists.org/archive/lenin/works/1917/mar/26b.htm,

Lenin, V. I. (1913), *The Cadets and The Right of Nations to Self-Determination,* 4 Proletarskaya Pravda; Lenin Collected Works, vol. 19, pp. 525–527, [Online: web] Accessed on 20 July 2013, URL: www.marxists.org/archive/lenin/works/1913/dec/11.htm.

Lenin, V. I. (1916), *Imperialism, the Highest Stage of Capitalism*, New Delhi: Peoples Publishing House (P) Ltd, reprinted at 2010.

Lenin, V. I. *Preliminary Draft of Theses on the National and Colonial Questions*, Selected Works, Vol. 2, Part 2. Moscow: Progress Publishers.

Lenin, V. I. *On National Liberation and Social Emancipation*, [Online: web] Accessed on 10 February 2013, URL:https://www.marxists.org/archive/lenin/works/1917/oct/25-26/26b.htm

Lenin, V. I. (1917), *State and Revolution*, New Delhi: Peoples Publishing House (P) Ltd, reprinted at 2011.

Lenin, V. I. (1920), *V. I Lenin collected works*, Vol. 20, 23, 27, 31, Moscow: Progress Publishers.

Lenin, V. I. *Report of the Central Committee of the Russian Communist Party (Bolsheviks) at the Eighth Party Congress*, March 18-23, 1919, Selected Works, New York, Vol. 8. [Online: web] Accessed on 12 May 2013, URL: https://www.marxists.org/archive/lenin/works/1919/rcp8th/02.htm.

Lenin, V. I. *Report on War and Peace delivered to the Seventh Congress of the Russian Communist Party (Bolsheviks),* Selected Works, FLPH, Moscow, Vol. 2 Part 1.

Lenin, V. I. *The Military Programme of the Proletarian Revolution*, [Online: web] Accessed on 22 July 2013, URL: https://www.marxists.org/archive/lenin/works/1916/miliprog/i.htm

Lenin, V. I. *What the "Friends of the People" Are and How They Fight the Social-Democrats* (A Reply to Articles in Russkoye Bogatstvo Opposing the Marxists) [Online: web] Accessed on 26 June 2017, URL: https://www.marxists.org/archive/lenin/works/1894/friends/01.htm

Lenin, V. I. *"Dual" Subordination and Legality*, Dictated by phone: 20 May 1922, first published in Pravda No. 91, April 23, 1925; Lenin's Collected Works, 2nd English Edition, Progress Publishers, Moscow, 1965, Volume 33, pages 363-367, Translated: David Skvirsky and George Hanna [Online: web] Accessed on 17 May 2017, URL:https://www.marxists.org/archive/lenin/works/1920/may/20.htm

Lenin, V. I. (1895-1916*), Philosophical Notebooks*, Lenin's Collected Works: Volume 38, [Online: web] Accessed on 22 May 2017, URL: https://www.marxists.org/archive/lenin/works/cw/volume38.htm

Lenin, V. I. (1915), *On the Question of Dialectics*, Lenin's Collected Works, 4th Edition, Moscow, 1976, Volume 38, pp. 357-361, Progress Publishers. Accessed on 3 July 2017, URL: https://www.marxists.org/archive/lenin/works/1915/misc/x02.htm

Lenin, V. I. (1914), *The Teachings of Karl Marx*, fifth printing 1935, International Publishers, New York.

Lenin, V. I. (1908), *Draft Resolution on the Current Moment in Politics*, Collected Works, Vol. 25, fourth Russian ed., Moscow: Gospolitizdat.

Letwin, Shirley Robin (2005), *On the History of the Idea of Law*, Edited By Noel B. Reynolds, Cambridge University Press.

Löwy, Michael. *Marxists and the National Question*, [Online: web] Accessed on 12 May 2017, URL: https://newleftreview.org/I/96/michael-lowy-marxists-and-the-national-question.

Machiavelli, Niccolo. *The Prince*, translated and edited by Peter Bondanella, Oxford World's Classics, Oxford University Press.

Maine, Henry Sumner. *Ancient Law*, John Murray (eds) (1861), ASIN: B0013ZIRC4

Mandel, Ernest. (2008), *Marxist Economic Theory,* Vol. II, Delhi: Aakar Books

Manu, *The Law Code of Manu – A new translation by Patrick Olivelle,* Oxford University Press (2004)

Manu, *The Laws of Manu*, translated by George Bühler, Sacred Books of the East, Volume 25.

Mao Tse-tung, *Selected Readings from the Works of Mao Tse-Tung*, Rahul Foundation, 2006.

Mao Tse-tung, *Quotations from Mao Tse Tung*, [Online: web] Accessed on 15 May 2017, URL: https://www.marxists.org/reference/archive/mao/works/red-book/ch18.htm

Mao Tse-tung, Peaceful Coexistence -Two Diametrically Opposed Policies-Comment On The Open Letter Of The Central Committee Of The CPSU (VI) December 12, 1963, Editorial Departments of Renmin Ribao (People's Daily) and Hongqi (Red Flag), Foreign Languages Press, Peking. [Online: web] Accessed on 12 May 2017, URL: https://www.marxists.org/subject/china/documents/polemic/peaceful.htm

Marks, Susan. (ed) (2008), *International Law on the left: Re-examining the Marxist legacies*, New York: Cambridge University Press.

Marks, Susan. (2007) *International Judicial Activism and the Commodity- Form Theory of International Law*, The European Journal of International Law Vol. 18 no. 1, pp.199–211.

Marx, Engels, Lenin. (1972), *On Historical Materialism – A Collection*, compiled by Borodulina, Moscow: Progress Publishers.

Marx, K and Engels, Friedrich. (1848), *The Communist Manifesto*, New Delhi: Peoples Publishing House (P) Ltd.

Marx, K and Engels, Friedrich. (1848), *The Communist Manifesto*. [Online: web] Accessed on 15 June 2017. URL: https://www.marxists.org/archive/marx/works/1848/communist-manifesto/ch04.htm

Marx, K. (1847), *Speech of Dr. Marx on Protection, Free Trade, and the Working Classes,* [Online: web] Accessed on 7 June 2013. URL: http://www.marxists.org/archive/marx/works/1847/09/30.htm

Marx, K. and Engels, F. (1847), *The German Ideology,* reprinted in 2010, New Delhi: Peoples Publishing House (P) Limited.

Marx, K. (1859), *A Contribution to the Critique of Political Economy*, New Delhi: Peoples Publishing House (P) Ltd, reprinted at 2010.

Marx, (1871), *Civil War in France*, English Edition of 1871; Transcription/Markup: Zodiac & Brian Baggins; Proofed and corrected by Mark Harris, 2010.

Marx, K. (1847), *The Poverty of Philosophy*, New Delhi: Peoples Publishing House (P) Ltd, 2010.

Marx, K. (1861), *Letter from Marx to Engels in Manchester*, [Online: web] Accessed on 28 June 2013. URL: http://www.marxists.org/archive/marx/works/1861/letters/61_02_27-abs.htm

Marx, K. (1865), *Karl Marx's Confession*, [Online: web] Accessed on 28 June 2013, URL: http://www.marxists.org/archive/marx/works/1865/04/01.htm

Marx, K. (1867), *Capital,* Vol. I, New Delhi: Left word publications, reprinted at 2010.

Marx, K. (1849), *The Trial of the Rhenish District Committee of Democrats*, The Neue Rheinische Zeitung, Neue Rheinische Zeitung No. 231 and 232, translated by the Marx-Engels Institute, [Online: web] Accessed on 13 May 2017. URL: https://www.marxists.org/archive/marx/works/1849/02/25.htm

Marx, K. (1843), *Critique of Hegel's Philosophy of Right*, translated: Joseph O'Malley, Oxford University Press, 1970, [Online: web] Accessed on 12 April 2017. URL: https://www.marxists.org/archive/marx/works/download/Marx_Critique_of_Hegels_Philosophy_of_Right.pdf

Marx, Lenin & Ors, *Marxism-Leninism on Proletarian Internationalism*, Progress Publishers, Moscow, 1972.

Malanczuk, Peter. (1970), *Akehurst's Modern Introduction to International Law*, Seventh Edition 1997, Taylor & Francis Group, Routledge

Mason, G. M. *Towards indivisible international law? The Evolution of Soviet Doctrine*, Social Research, Vol. 23, No. 1 (SPRING 1956), pp. 57-88, The New School.

Mastny, Vojtech. *The Soviet Union's Partnership with India*, [Online: web] Accessed on 15 June 2017, URL: http://www.mitpressjournals.org/doi/pdf/10.1162/JCWS_a_00006.

Mcleod, Ian. (1999, 2003), *Legal Theory*, Second Edition, Palgrave Macmillan

Mieville, China. (2005), *Between Equal Rights – A Marxist Theory of International Law*, Historical Materialism Book Series, Chicago: Haymart Books.

Mitchell, R. Judson. *The Brezhnev Doctrine and Communist Ideology*, The Review of Politics, Vol. 34, No. 2 (Apr., 1972), pp. 190-209, Cambridge University Press for the University of Notre Dame du lac on behalf of Review of Politics.

**Montevideo Convention on Rights and Duties of States*. (December 26, 1993)

Morse, Stephens H. (1902), *A history of French Revolution,* New York: Charles Scribner's Sons.

Onuma, Yasuaki. *The Birth of International Law as the Law of International* Society, Proceedings of the Annual Meeting (American Society of International Law), Vol. 94 (April 5-8, 2000), American Society of International Law.

Oppenheim, L. (1955), *International law*, H. Lauterpacht, (ed), 8th edition, London: Longmans.

Oppenheim, L. (1905), *International Law,* London: Longmans Green & Co.

Pashukanis, E. (1980), *Selected Writings on Marxism and Law*, Piers Beirne and Robert Sharlet (eds), Translated by Peter B. Maggs, London: Academic Press.

*Permanent Court of International Justice, Series A, No. 17, 1928, p. 29; 4 AD.

*Permanent Court of International Justice, Series R, No. 6.

**Petroleum Development Ltd. v. The Sheikh of Abu Dhabi,* (1951) 18 I. L. R. 144.

Parpola, Asko; Parpola, Simo (1975). *On the relationship of the Sumerian Toponym Meluḫḫa and Sanskrit mleccha*, Studia Orientalia Electronica, [S.l.], v. 46, ISSN 2323-5209. Available at: <https://journal.fi/store/article/view/49874>.

*The Poulantzas Reader: Marxism, Law and the State*, edited By James Martin, Verso, 2008.

Possehl, Gregory L. (2002), *The Indus Civilisation: A Contemporary Perspective*, Rowman and Littlefield Publishers, Inc.

Postema, Gerald J. (2011), *Legal Philosophy in Twentieth Century - The Common Law world*, A Treatise of Legal Philosophy and General Jurisprudence, Volume 11, Springer.

Pound, Roscoe., *An introduction to the Philosophy of Law*, Sixth Indian Reprint 2012, Universal Law publishing Co. Pvt. Ltd. New Delhi.

**Protocol (I) Additional to the Geneva Conventions of 12 August 1949, June 8,* (1977) Geneva: International Committee of the Red Cross.

Quigley, John. (2007), *Soviet Legal Innovation and the law of the Western World,* Cambridge: Cambridge University Press.

Rai, Lajpat. *Proletarian Internationalism and Socialist Camp*, Economic and Political Weekly, Vol. 8, No. 12 (Mar. 24, 1973), pp. 601+603-609.

Ramundo, Bernard A. *The (Soviet) socialist theory of international law*, Washington, D.C.: Institute for Sino-Soviet Studies, George Washington University, 1964.

Ranganayakamma, *Ramayana – The Poisonous Tree*, English translation B.R. Bapuji, Sweet Home Publications, 2004.

Rawls, John. *The Law of Peoples – with 'The idea of Public Reason Revisited',* Second Indian Reprint 2012, Universal Law Publishing Co. Pvt. Ltd. New Delhi.

Rea, Kenneth W. (Sep. - Oct., 1975), *Peking and the Brezhnev Doctrine*, Asian Affairs, Vol. 3, No. 1 pp. 22-30, Taylor & Francis, Ltd.

Remec, Peter Pavel. (1960), *The Position of the Individual in International Law according to Grotius and Vattel*, The Hague: Martinus Nijhoff.

*The Complete Works of Rosa Luxemburg: Volume I: Economics Writings 1*, Edited by Peter Hudis, Translated by David Fernbach, Joseph Fracchia and George Shriver, Verso. 2013

Rousseau, Jean-Jacques. *Basic Political Writings - Discourse on the sciences and the arts, discourse on the origin of inequality, discourse on political economy on the social contract*, translated and edited by Donald A. Cress, introduced By Peter Gay, Hackett Publishing Company, Indian Apolis/Cambridge.

Rousseau, Jean-Jacques, Stanford Encyclopedia of Philosophy, First published Mon Sep 27, 2010; substantive revision Fri May 26, 2017. [Online: web] Accessed on 28 June 2017, URL: https://plato.stanford.edu/entries/rousseau/

Schwarzenberger, Georg. (1945), *International law*, London: Stevens & sons, limited.

Schwebel, Stephen M. *The Brezhnev Doctrine Repealed and Peaceful co-existence enacted*, The American Journal of International Law, Vol. 66, No. 5 (Oct., 1972), pp. 816-819, American Society of International Law.

Shaw, Malcom N. (2003), *International law,* fifth edition, Cambridge: Cambridge University press.

*Short history of the world*, Institute of History, Academy of Sciences of the USSR, Moscow: Progress Publishing House, 1950.

Sivananda, Sri Swami. (2003), *Bhagavad-gita*, Published by A Divine Life Society Publication.

Soboul, Albert. *Understanding the French Revolution*, Indian edition 1989, People's Publishing House (P) Ltd.

Spielvogel, Jackson J. (2009), *Western Civilization*, Volume C: Since 1789, Seventh Edition, Thomson Wadsworth.

Thatcher, Oliver J. (eds), *Library of original sour*ces, Volume 3, University Research Extension Co. Milwaukee: Wisconsin

*The Code of Decrees of the R.S.F.S.R., 1917, No. 2.

*The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the Charter of the United Nations (GA Resolution 2625(XXV), 1970). [Online: web] Accessed on 28 June 2017, URL: https://www.google.co.in/#q=The+Declaration+on+Principles+of+International+Law+concerning+Friendly+Relations+and+Cooperation+among+States+in+Accordance+with+the+Charter+of+the+Charter+of+the+United+Nations+(GA+Resolution+2625+(XXV),+1970).

The International Socialist Division of Labor (June 7, 1962) [Online: web] Accessed on 19 May 2017, URL http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=1163

**The War Program of the Proletarian Revolution* (1950), Selected Works, Vol. 1, Part 2, Moscow: Foreign Languages Publishing House.

Thompson, E. P. (1975), *Whigs and Hunters,* London: Penguin Group.

Tierney, Brian. (1997), *The Idea of Natural Rights*, Atlanta: Scholars Press for Emory University.

Tunkin, G. I. (1974), *Theory of International Law*, Translated by William E. Butler, London: George Allen and Unwin Ltd.

Tunkin, G.I. (eds), *International law: a textbook*, Moscow: Progress Publishers, 1986.

Tuzmukhamedov, R. A. (1963) '*Mirnoe sosushchestvovanie i natsiona l'noosvoboditel 'naia voina'* [Peaceful coexistence and war of national liberation], SGP.

*United Nations Charter, Article. 102.

Ur-Nammu (1792-1750 BC), *The Ur-Nammu Law Code*,

[Online: web] Accessed on 10 July 2013 URL: http://realhistoryww.com/world_history/ancient/Misc/Sumer/ur_nammu_law.htm

Weber, Max. (1930), *The Protestant Ethics and the Spirit of Capitalism,* New York: Routledge Classics

Wacks, Raymond. (2006), *Philosophy of Law – A very short introduction,* Oxford University Press.

War and International Law – A brief history of the law of war, Constitutional rights foundation; [Online: web] Accessed on 10 July 2013 URL: http://www.crf-usa.org/war-in-iraq/war-and-international-law.html.

Watson, Hugh Seton. (1953), *From Lenin to Malenkov - The History of World Communism*, Frederick A. Praeger, New York

Williams, Raymond. (1977), *Marxism and Literature*, reprinted 2010, Oxford University Press

*Wilson's Fourteen points*, [Online: web] Accessed on 12 May 2017, URL: http://www.newworldencyclopedia.org/entry/Fourteen_Points.

*President Woodrow Wilson's Fourteen Points*, 8 January, 1918, [Online: web] Accessed on 12 June 2017, URL: http://avalon.law.yale.edu/20th_century/wilson14.asp

Winkel, Laurens. (2004), *Peace Treaties and International Law in European History,* Cambridge: Cambridge University Press.

Vyshinsky, Andrei Y. (1948), *The Law of the Soviet State*, translated from the Russian by Hugh W. Babb, Works translated under the Russian Translation Project of the American Council of Learned Societies, The Macmillan Company.