

Marxism and International Law: A Contemporary Analysis

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Marxism and International Law

A Contemporary Analysis

B S Chimni

Changes in international law over the past two decades have made it an instrument for safeguarding transnational capital. International law today creates and congeals inequities in the international system. It reflects the domination of bourgeoisie which profits at the expense of working classes and disadvantaged groups in both the developed and developing countries. This article attempts to fill the gap left by Marxists' neglect of the study of international law. It calls for an international legal strategy that would form an integral part of a transnational counter-hegemonic project.

I Introduction

INTERNATIONAL law is today playing an unprecedented role in creating and congealing inequities in the international system. The period after the second world war has witnessed the exponential growth of international law.¹ No longer confined to questions of war and peace or diplomacy, international law has, on the one hand, come to govern the use of oceans and outer space, and on the other, regulate core aspects of national economic, social, and cultural life. Recent years in particular have seen the adoption of a network of laws which seek to establish the legal and institutional framework favourable to the accumulation of capital in the era of globalisation.

Generally speaking, three overlapping features can be said to mark the growth of international law in the last two decades. First, it is the principal instrument through which the rule of private property is being extended in the world economy. Second, it is the means through which the rights of transnational capital are being safeguarded, among other things, by prescribing uniform global standards – ignoring the phenomenon of uneven development – in key areas such as technology and foreign investment. Third, it guarantees the observance of these standards through endowing international institutions with the means to enforce them.

But despite the critical role international law has come to play in building and sustaining the contemporary international system Marxists have entirely neglected its study.² While an attempt was made in the former Soviet Union to articulate a Marxist approach to international law, its content was dictated less by Marxism-Leninism than by the need to rationalise Soviet foreign policy.³ The principal task of Soviet international lawyers was seen as providing post facto justifications for the acts of omission and commission of the state in its external relations. No serious

effort was undertaken to engage with bourgeois international legal scholarship in order to highlight the distinctive nature of the Marxist approach. Consequently, the field of international law still represents a wasteland insofar as Marxism is concerned. In this essay we make a preliminary attempt to fill the gap in the literature by reflecting on the condition of international law and institutions at the end of the twentieth century. However, the paper opens with a few theoretical considerations on the subject of historical materialism and international law.

II Historical Materialism and International Law

The statement of a Marxist approach in any area of social science usually involves reference to, and exposition of, the relevant texts of Marx, Engels and Lenin. In the case of international law this is ruled out for the simple reason that they never directly addressed the subject. Instead, what follows is an attempt to apply the insights of Marxist methodology and sociology to the field of international law and institutions.

Four interrelated features may be said to characterise bourgeois international law writings. First, they offer a formal and technical definition of international law as comprising norms which govern the relations between states.⁴ Bourgeois writings tend to study the phenomenon of international law in abstraction from international society, ignoring its specific features in various phases of history, its social content, and its corresponding forms. Second, bourgeois writers proceed on the assumption that the state stands above particular groups, interests and classes within a nation state. A key role of the state is said to be to regulate the conflicts between them in order to realise 'national interests' [Miliband 1977:66]. Together, these two assumptions facilitate the portrayal of international law as a neutral

device which stands above states and classes, a depiction clearly belied by the history of international law and institutions. Albeit, the class content of modern international law has undergone transformation over the last three centuries of its existence. Third, bourgeois scholarship, like the dominant realist tradition in international relations, "is premised on the recognition of a fundamental disjuncture between internal political life which is carried on under the co-ordinating and pacifying sovereignty of the state, and external politics, which is governed by the irresistible logic of anarchy".⁵ This makes it ignore the links between the internal organisation of a state and its external policies which it hopes to write into international law. Fourth, bourgeois writings fail to recognise the supranational character of capitalism and conceive the interstate system as a relationship between states which is independent of the functioning of the capitalist world economy.

In contrast to the approach of bourgeois scholarship four general overlapping propositions constitute the matrix within which a Marxist approach to international law is to be articulated. First, a Marxist approach to international law is inextricably related to its theory of international relations whose essence is in the final analysis determined by the manner in which states are internally organised. In the words of Marx and Engels (1976:38), "the relations of different nations among themselves depend upon the extent to which each has developed its productive forces, the division of labour and internal intercourse". Second, it follows, the foreign policy of a state is integrally linked to its domestic policy and is articulated and executed in the matrix of a specific socio-economic formation based on a definite and dominant mode of production. Of course in turn, as Gramsci noted (1971: 182), "international relations intertwine with these internal relations of nation-states, creating new, unique and historically

concrete combinations". Third, it rejects the abstract and vacuous concept of 'national interest' and contends that the state in its external relations does not seek to realise 'national interests' but rather the interests of particular groups and classes. Fourth, it does not view the contemporary international system as a mere sum of its parts but as possessing a distinct identity created by the supranational character of capitalism which is rooted in a world market and an international division of labour which together constitute the world economy.⁶ Together, these propositions point towards a perception of international law and institutions as a device which serves sectional global interests. The history of international law bears out this understanding.

The evolution and growth of modern international law is bound with the different phases of global capitalism. It is thus no accident that the different phases in the historical evolution of international law match the evolution of the world economy. In lieu of the fact that "capitalism from the very beginning has been imperialist" [Patnaik 1997:183]. The history of the world economy may be divided into the following phases:

- (1) 1600-1760 Old colonialism
- (2) 1760-1875 New colonialism
- (3) 1875-1945 Imperialism
- (4) 1945- Neo-colonialism

It is interesting that scholars of international law have arrived at the same break-up from a study of international legal sources. For example, Ian Brownlie (1984: 357-70) of Oxford University mentions the following phases: 1648-1750, 1750-1850, 1850-1950, and 1950-.

The different phases of the world economy yield appropriate international legal superstructures which can be classified thus:

- (1) 1600-1760: Old colonialism – Transition from feudal to bourgeois international law.
- (2) 1760-1875: New colonialism – Bourgeois (colonial) international law.
- (3) 1875-1945: Imperialism – Bourgeois (imperialist) international law.
- (4) 1945- : Neo-colonialism – Bourgeois democratic international law.⁷

Two clarifications are in order here. First, each of the phases of international law which has been identified is not an undifferentiated whole. For example, the neo-colonial period, dating from 1945, has seen both a progressive phase – a period which saw the decolonisation process unfold and the adoption of texts such as the Programme and Declaration of Action on the New International Economic Order (NIEO) and the Charter of Economic Rights and Duties of States (CERDS) – and a regressive phase dating from 1975. It is fascinating that the con-

clusions from a review of legal materials again coincide with that of dependency scholars like Samir Amin (1994:106) who also identifies 1975 as the turning point in that the third world returned to playing a comprador role abandoning bourgeois nationalist projects.⁸ The year also saw the defeat of the upward trend in resistance in the advanced capitalist world which started in France in 1968 [Callinicos 1996: PE-11]. Likewise, beginning with the subversion of the Allende regime in Chile, repressive states in the third world, with the backing of imperialism, launched a fierce attack against working class movements [for a detailed review see Petras and Vieux 1994: 1-34]. It is this setback which facilitated the move from nationalism to pragmatism.⁹ The regressive phase has itself seen, since the early 1980s, the restructuring of international law and institutions to facilitate the globalisation process.

Second, in stating that the different phases of the world economy have yielded corresponding superstructures of international law the idea is not to offer a deterministic and unidirectional interpretation of the evolution and growth of international law. While it does suggest that international economic relations have in crucial ways shaped the international legal system it does not contend either that the particular content and form it assumes is directly determined by it or that it does not in turn influence processes and events in international affairs. The Marxist categories of base and superstructure do not allow this complex reality to be captured. Three points may be made in relation to the contemporary international legal system.

First, productive relations regulated by law are in part meaningful only in terms of their definition in law. Marx himself stressed the fact that 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" [Pashukanis 1978:91]. In the case of international law the regulation of productive relations is, it is true, mediated by internal law. But it would be a mistake for this reason to represent all international law as ideology for it can directly control the content of internal law.¹⁰

Second, the international legal system possesses its own internal structure and dynamics which shapes its content and discourse.¹¹ It develops, for example, only through certain recognised 'sources of international law'.¹² The particular form international law thus assumes defines its boundaries; anything falling outside it is designated as non-law. Its distinctive nature has served to sustain the status quo and prevent the substantive transformation of the content of international law in favour

of third world states.¹³ For example, it has allowed near unanimous resolutions repeatedly passed by the UN General Assembly on restructuring international economic relations to be designated as 'soft law' since resolutions of international institutions are, among other things, not listed as a source of international law [Bedjaoui 1979]. Thus, as Bedjaoui (1979:99) has noted, "only the form of a legal concept is considered, while its content – the social reality it is supposed to express – is lost sight of".¹⁴ The specific characteristics of its form also give it the appearance of neutrality. For instance, treaties are in the contemporary international system arrived at between parties who, vide the principle of state sovereignty, are equal in the eyes of international law. This principle of formal equality tends to automatically inject an international agreement with the elements of fairness and equity. Whereas, in reality the substantive inequality of parties almost always shapes the content of the agreement.¹⁵

Third, once international legal rules are adopted they possess a degree of autonomy from the states which have agreed upon them. While power plays a crucial role in shaping the content of the law, it imposes serious constraints on the behaviour of states once it comes into existence. A whole range of international (and national) mechanisms are in place to compel compliance with international obligations. The task of international institutions set up to ensure observance of rules is not the defence of the interests of individual powerful states but rather to safeguard the interests of a coalition of dominant global social forces and states. Thus, even the most powerful actor in the international system has to justify its actions with reference to international law. The fear of undermining the legitimacy of the international legal system through suggesting at all times that there is one law for the powerful and another for the weak also refrains dominant states from openly flouting the authority of international law and institutions. While such a dual structure characterised colonial and imperialist international law its open assertion is no longer acceptable. To put it differently, the idea of rule of law is not a vacuous one in the contemporary international system. It is not merely an ideological device which is manipulated by powerful states to their advantage. It has real significance. In this regard it is often forgotten that the idea of rule of law has come to be embedded in the international system through the historic struggles of colonial peoples for independence as also democratic forces within the former metropolitan countries. To dismiss the idea of rule of law then is to belittle these struggles and to fail to understand that it was far from being the

reality for centuries in the sphere of international relations. Of course, it would be equally mistaken to forget that international law and institutions serve the interests of the dominant social classes and states in the international system. Formal equality in it goes hand in hand with material inequality, and democratic principles and norms with neo-colonialism. In this essay it is this latter dimension of international law which is elaborated. In the sections to follow we review, at both the economic and political levels, the recent developments in international law and institutions which manifest the policies of neo-colonialism in the era of globalisation. However, for a correct portrayal of international law, and in order to avoid legal nihilism, both the aspects need to be borne in mind.

III Globalisation and International Law-I

International law and institutions are today being transformed to facilitate the process of globalisation. Globalisation may be said to refer "to the shift of the principal venue of capital accumulation from the nation-state to the global arena" [Teeple 1997:15].¹⁶ There is, as Teeple points out, "an historical parallel to the present shift":

The development of national forms of capital in the 18th and 19th centuries required the destruction of local and regional jurisdictions. Numerous differences in laws, standards, currencies, weights and measures, taxes, customs duties, political and religious rights and privileges made trade and commerce over a large geographic area extremely difficult. Just as these barriers to the expansion of capital had to be overcome to make the modern nation-state, so today the systems of governance in the nation-state have to be dismantled in order to remove the barriers to accumulation for global corporations. It follows that laws, regulations, standards, and governing agencies since World War II have been and continue to be reconstituted at the global level [Teeple 1997:16].

Since the early 1980s, the advanced capitalist world has, under the guidance of the hegemonic transnationalised fractions of its national bourgeoisies, and with the assistance of the transnationalised fractions of national capital in the third world, pushed through a series of changes in international economic law which lay the legal foundation for capital accumulation in the era of globalisation [Robinson 1996:13-31]. These changes appear to have two principal objectives: (i) to extend and deepen worldwide the rule of capital through the removal of 'local' impediments; and (ii) to dismantle international laws of distribution which

are based on the principle of market intervention. We identify below the different measures which have been taken in the world of international law to translate these objectives into reality.

(A) EXTENDING AND DEEPENING THE REIGN OF CAPITAL

A series of developments in the past two decades have sought to deepen and extend the reign of capital.

First, reference may be made to the privatisation of the public sector in the third world. This objective is being achieved through the instrument of international monetary law which legitimises and enforces conditionalities imposed by international financial institutions.¹⁷ As has been pointed out, "forced privatisation was the standard feature of all structural adjustment programmes" [Hoogvelt 1997:138,172]. By 1992 more than 80 countries around the world had privatised some 6,800 previously state-owned enterprises, mostly monopoly suppliers of essential public services like water, electricity, or telephones [Hoogvelt 1997:138].¹⁸

Second, a growing network of international laws seek to free transnational capital of all spatial and temporal constraints. The trend towards strengthening the rights of foreign capital, initiated in the mid-1970s (the move from nationalism to pragmatism), continues unabated. The concerns of transnational capital have been met through the establishment of a Multilateral Investment Guarantee Agency (MIGA)¹⁹ and through concluding bilateral investment protection treaties (BITS) between the industrialised and the third world countries.²⁰ By 1996 more than 1,000 BITS had been concluded, mostly between the industrialised world and the third world countries [Schrijver 1997:191]. More recently, there have been the agreement on Trade Related Investment Measures (TRIMs) and the General Agreement on Trade in Services (GATS) adopted as a part of the GATT Final Act of the Uruguay Round of Trade Negotiations (hereafter the 'Final Act'). If these texts are examined in conjunction with the World Bank Guidelines on Foreign Investment (1992)²¹ and the proposed OECD multilateral agreement on investment (MAI), the basis on which a global MAI is to be negotiated in the World Trade Organisation (WTO),²² it becomes clear that the trend is towards removing all fetters on the entry, establishment and operations of capital. This is confirmed further by the September 1997 statement of the IMF Interim Committee – issued at the behest of what Bhagwati has called the 'Treasury-Wall Street-IMF Complex' – endorsing a move towards capital account convertibility despite all evidence showing

the grave consequences for the economies embracing it (ibid). This is in contrast with original obligations contained in the 1944 Articles of Agreement which called for the "avoidance of restrictions on payments for current transactions" [Bhagwati 1998:7-12]. What is of significance is that while the noted texts confer or hope to bestow a number of rights on transnational capital they impose no corresponding duties on them. Indeed, the Draft Code of Conduct on Transnational Corporations which imposed certain duties – respect for host country goals, transparency, respect for environment, etc – has yet to be adopted. Finally, the UN Centre for Transnational Corporations which was bringing some transparency to the functioning of TNCs was shut down in 1993.

Third, the global technology regime has been privatised.²³ The adoption of Agreement on Trade related Intellectual Property Rights (hereafter the TRIPs Text) as a part of the GATT Final Act has been a crucial step in this regard with its preamble baldly stating that "intellectual property rights are private rights". There is little justification for such a pronouncement. Indeed, a review of the literature on intellectual property rights (IPRs) reveals that such a view is difficult to sustain [Chimni 1994:315-33]. As one noted expert has put it,

the language of property is ill considered here... Knowledge is not a scarce resource. It is infinite in time and space. It can be used by all without depleting its value. In fact, the more it is used, the more valuable knowledge often is. Allocating property rights in knowledge makes ideas artificially scarce and their use less frequent—and from a social viewpoint, less valuable [Waver 1994:259].

The history of the negotiation of the international patent regime in particular is extremely interesting. Between 1980 and 1985 four international conferences were called under the auspices of WIPO to negotiate changes to the Paris Convention on Industrial Property, 1883. The Paris Convention, which can be termed an empowering document when compared to the TRIPs Text – it leaves to individual member states to define the subject matter of patentability, the duration for which a patent is to be granted and the scope of rights of patent holders – was sought to be revised in order to take into account the concerns of third world countries. But a year later, in 1986, the GATT Uruguay Round of Trade Negotiations was inaugurated in which the Paris Convention was revised in the reverse direction of strengthening the hands of patent holders *vis-a-vis* states in the poor world. The TRIPs Text gives more rights to patent holders, mostly transnational corporations

(TNCs), disregarding the fact that it will have grave consequences for the health of the poor in the underdeveloped world through sharply raising the prices of drugs, including essential life saving drugs, that are already beyond the pocket of the poor [Chimni 1993; 1994]. The absurdity of the TRIPs Text is revealed by the mere fact that it requires countries ranging from Rwanda and Nepal to the US and the UK to legislate the same patent regime. Thus, a principal objection of the third world countries to the TRIPs Text was that a global uniform patent regime did not allow individual countries the freedom – a privilege exercised by the industrialised countries to advance their own technological development – to adopt patent regimes in accordance with the developmental interests of the individual countries [Ricupero 1990:198-99]. They of course also questioned individual provisions whose substance is to subvert the goal of technological self-reliance that countries like India and Brazil are pursuing [Chimni 1994; Bifani 1990; UNCTAD 1991; Patel 1989; Nair and Kumar 1994]. The response to the resistance offered was the invocation of the US Omnibus Trade and Competitiveness Act, 1988 under which sanctions were threatened against countries unwilling to bring their IPR regime in line with its demands. Finally, like in the instance of transnational capital few duties are imposed on the technology or patent holder in the TRIPs Text. The only text to do so, viz. the Draft Code of Conduct on the Transfer of Technology has yet to be adopted despite being a subject of negotiations for more than two decades.

Fourth, the global commons have been subjected to the process of privatisation. Consider the developments in the Law of the Sea which regulates the use of the oceans. In 1982, after a decade of negotiations, the Third United Nations Conference adopted the Law of the Sea Convention. It was widely welcomed by the international community – despite the scepticism of some of us – as a legal regime which was fair to all the participants. Under the convention the principle of common heritage of (hu)mankind applies to the non-living resources of the ocean floor and its subsoil beyond the limits of the Exclusive Economic Zone (extending to 200 miles) and the Continental Shelf. It is to be operationalised through a parallel regime which requires (vide Article 153) every exploitable site to be divided into two parts, one for the mining company that has made a claim, and the other for UN's Enterprise, the operational arm of the International Sea-Bed Authority established by the convention. Writing in 1982 we had contended that the revolutionary concept of common heritage of mankind

harboured reactionary content as it essentially envisaged the private exploitation of the resources of the seabed beyond national jurisdiction [Chimni 1982:407-12]. But such criticism was rejected as the parallel regime envisaged the transfer of technology from private mining consortiums to the enterprise. In 1994, through a subsequent agreement, the obligations relating to the transfer of technology were however dropped [Schrijver 1997: 191]. What is more the operations of the Enterprise have been constrained in other ways.²⁴ Thus, as one observer puts it, “the ... international law with respect to the global commons remains dominated by the rights of corporate property” [Teepie 1997:32].

Fifth, the idea of the global commons is sought to be extended by the industrialised world to the environment, including resources (e.g. forests) which are located within the territory of third world countries [Imber 1994:58ff]. In addressing the issue intertemporal considerations are not given due weight implying a change in the distribution of property rights to the detriment of the third world countries. For “as industrial countries developed, global private rights were granted to polluters; now, developing countries are asked to agree to a redistribution of those property rights without compensation for already depleted resources” [Uimonen and Whalley 1997:66]. This ‘redistribution’ of course goes hand in hand with an IPR regime which makes environment friendly technology costly to access. On the other hand, there is a push to universalise northern regulatory norms since they promote the interests of transnational capital: the leading 50 environmental corporations in the world are located in the advanced capitalist countries [for details see Pratt and Montgomery 1997: 75-96].

Sixth, there have been established alternative dispute settlement mechanisms which seek to eliminate the role of national courts in resolving disputes between TNCs and the state. Today, international commercial arbitration is the preferred mode of settling disputes for TNCs. Since the late 1970s there has been a tremendous growth in the number of arbitration centres, arbitrators and arbitrations [Dezelay and Garth 1996]. “By the mid-1980s”, according to a close observer, “it had become recognised that arbitration was the normal way of settlement of international commercial disputes” [Lalive 1995:2]. International commercial arbitration, it needs to be underlined, is essentially a private interests regime in which parties have ‘autonomy’ in terms of the selection of the arbitrators, the substantial law to be applied, and the place of arbitration. Support for it rests on a

certain assumption of the proper sphere of state activities. In fact it reproduces the public/private divide in international law. Community policy comes into play only at the time of enforcement of an award and that too in the exceptional circumstance that the ‘public policy’ of a state has been violated, a concept increasingly narrowly interpreted. While, without doubt, international commercial arbitration has a significant role to play in routine cases involving international business transactions, it is not a suitable method for resolving disputes in core areas of national economic life like, for example, the exploration and exploitation of natural resources [Sornarajah 1991:79]. Third world countries were therefore for long suspicious of international commercial arbitration (ibid). For despite claims to the ‘autonomy’ of parties only a select and elite group of individuals serve as international arbitrators and the law applied is invariably traditional (colonial and imperialist) international law with its clear bias in favour of capital (ibid). But institutions pursuing the interests of capital (the World Bank and the International Chamber of Commerce, for example) have relentlessly promoted international commercial arbitration.²⁵ The increasing competition in recent years between third world countries to promote foreign direct investment has helped this effort as it has pressurised them to accept the preferences of TNCs in dispute resolution.

(B) REMAKING THE INTERNATIONAL LAWS OF DISTRIBUTION

Accompanying the network of laws which extend and deepen the reign of capital have been attacks on principles and agreements which attempted to inject, as a part of the effort to usher in a NIEO, the traditional international law of distribution with elements of equity and justice. Two examples would suffice. First, is the rejection of the special and differential treatment (SDT) principle which calls for preferential treatment to be given to third world countries. Beginning with the late 1950s, the industrialised world had, under pressure from the newly independent countries – its institutional expression being UNCTAD and the Group of 77 – grudgingly accepted the SDT principle. For example, in 1966 GATT was amended to include Part IV of the agreement (entitled ‘Trade and Development’) which sought to give expression to the SDT principle. While it did not place hard legal obligations on the industrialised states they were compelled to accept a formal commitment to the SDT principle. Pursuant to it a voluntary Generalised System of Preferences (GSP) scheme was launched in 1970. It was introduced under the auspices of UNCTAD

for the industrialised countries strongly resisted "giving the GSP the form of an amendment to Article I of the General Agreement [the MFN clause] and thus ensured the maintenance of the juridical status quo" [Berthoud 1985:78]. The GSP scheme brought little benefit to third world countries [Nicolaidis 1995:309]. Beginning with the late 1970s the principle itself came under attack and attempts began to dilute even the soft law commitments. In the GATT Tokyo Round of Trade Negotiations which concluded in 1979, the industrialised world pushed through, despite the opposition of the poor world, a decision which introduced the notorious graduation clause into the SDT principle [GATT 1980:203-05]. A few months before the conclusion of the Tokyo Round the Group of 77 had issued a declaration in UNCTAD in which they expressed their "rejection of the concept of 'graduation' ... which would allow developed countries discriminate among developing countries in a unilateral and arbitrary manner" [Berthoud 1985:83]. It however failed to persuade the industrialised countries. The biggest blow came in the Final Act of the Uruguay Round when a number of agreements and understandings adopted drastically curtailed the grant of SDT. In the balanced language of Trebilcock and Howse, while the Final act "reflect[s] developing country concerns in a number of areas, the tendency has not been to grant developing countries broad exceptions to compliance with GATT rules. In some instances developing countries may be given a somewhat longer period of time to phase in domestic compliance with the new rules, but the Uruguay Round result reflects, in large measure, a rejection of the view that developing countries should not be required to make reciprocal commitments to trade liberalisation" [Trebilcock and Howse 1995:324]. The new texts adopted on key provisions like Article 18-B, the safeguard clause and subsidies represent a clear set back for the SDT principle.²⁶ Its dilution has been justified in the name of deepening the integration of the third world countries in the world economy and on the belief that "the insistence of on S and D and the refusal to engage in reciprocal negotiations meant that the benefits of GATT membership was substantially reduced" [Hoekman and Kostecki 1995:244]. In actuality, the denial seeks to squeeze the space for independent self-reliant development of third world countries.

Second, dating from the arrival of the Reagan and Thatcher administrations in the US and UK respectively, an all out attack was launched on international commodity agreements (ICAs) whose primary aim is to stabilise the prices of primary commodities by intervening in

the world market through the use of export quotas and/or buffer stock mechanisms [Chimni 1987:ch 3]. It may be recalled that the NIEO programme of action had recommended the "expeditious formulation of commodity agreements" and CERDS had stated that "it is the duty of states to contribute to the development of international trade in goods" through concluding ICAs [ibid:3-4]. These instruments were however represented by the Reagan and Thatcher administrations as distorting free markets. The timing of the offensive was impeccable. It came at a point when primary commodity prices were at the lowest since the great depression.²⁷ The unfortunate collapse of the Fifth International Tin Agreement in 1985 was used to completely discredit the instrument of ICAs disregarding their role in ensuring a more equal distribution of gains from the sale of raw materials, as also the fact that the idea of free market was a myth [ibid:197-212]. What the industrialised world wanted to ensure was that prices of primary commodities remained low through staving off intervention in markets through ICAs. It both increased the profits of capital as also allowed the industrialised world to tackle the problem of inflation at home. While in the beginning of the 1980s there were five ICAs in operation (covering cocoa, coffee, natural rubber, sugar and tin), at the end of the decade only one was in existence. On the other hand, by the early 1990s the average level of non-oil commodity prices was "the lowest for over a century" [Maizels 1994:54]. By 1991 "the total terms of trade loss on all non-oil commodity exports from developing countries amounted to about \$60 billion..." (ibid). Over the period 1980-91 "the cumulative loss totalled some \$290 billion" [ibid:56].

Yet the hostility to ICAs did not cease. Rather, the end of the cold war eliminated the strategic considerations for supporting ICAs. The US had started supporting ICAs in the early 1960s only in the wake of the Cuban revolution. The Latin American Task Force set up by president Kennedy, concerned at the spread of 'Castroism', had *inter alia* recommended that the US co-operate in establishing co-operative arrangements in order to reduce the potential political consequences of violent fluctuations in the prices of Latin America's exports [Fisher 1972:27]. In March 1961, in his famous Alliance for Progress Speech, president Kennedy stated that the US was ready to "co-operate with the Latin American and other producer country governments in a serious case-by-case examination of the major commodities and to lend its support to practical efforts to reduce extreme price fluctuations" [ibid:28]. Thus, the collapse of 'actually

existing socialism' has taken away the principal reason for the support of ICAs by the US.

IV Globalisation and International Law-II

The changes which have been introduced in international economic law have been accompanied by an emerging international 'political' law which *inter alia* seeks (i) to legitimise a system of global apartheid in a bid to preserve unbelievable privileges for a section of citizens in the advanced capitalist countries. In this regard international law rules have been rewritten to limit voluntary and forced migration to the west [Richmond 1994]; and (ii) to promote "low intensity democracies" in the third world to sustain favourable conditions for foreign investment. New international law norms are being established to promote 'democratisation' and 'good governance' in order to confer legitimacy on collaborating regimes at a historical juncture when authoritarian regimes no longer need to be supported, as in the past, to fight communism. These two developments are analysed in some detail below.

(A) TOWARD AN INTERNATIONAL LAW OF EXCLUSION: ASYLUM UNDER THREAT

While capital and services have become increasingly mobile in the era of globalisation, labour has been spatially confined despite the urgings of consistent free trade economists [Bhagwati 1989: 243-44]. But what is even more disturbing are recent developments in the advanced capitalist world in relation to the institution of asylum [Chimni 1994;1995a]. For here we are talking of the forced migration of people, i.e., of individuals and groups fleeing untold misery and suffering. Since the early 1980s there has been a concerted attempt by the western countries to dismantle the liberal international refugee regime which was established after the second world war. In particular, the post cold war era has seen a whole host of restrictive practices being put in place to prevent refugees fleeing the under-developed countries from arriving in the west.

The international refugee regime was from the beginning a product of the cold war. It was seen as an instrument with which to embarrass the former Soviet Union and its allies. "The refugee definition was carefully phrased to include only persons who have been disfranchised by their state on the basis of race, religion, nationality, membership of a particular social group, or political opinion, matter in regards to which East bloc practice ha[d] been historically been problematic" [Hathaway 1991:8]. The import of the definition

becomes clear from, among other things, the fact that nearly 95 per cent of refugees given asylum in the US in this period came from the former communist bloc countries [Robinson and Frelick 1990: 298]. The end of the cold war meant that the refugee lost both ideological and geopolitical value. Identified below, albeit in a summary fashion, are a few of the legal measures and interpretations which have been mobilised for the containment of refugees in the last two decades.²⁸ They violate either in letter or in spirit the UN Convention on the Status of Refugees, 1951 to which all the western states are parties.

First, there are the restrictive visa policies and carrier sanctions; the latter making airline carriers liable to fines for carrying passengers without proper papers. Second, 'international zones' have been demarcated in airports where physical presence does not amount to legal presence and from where summary and arbitrary removal is permissible. Third, safety zones have been created inside countries – as in northern Iraq and former Yugoslavia – to stop asylum seekers moving out and seeking refuge. As it turned out, these safe zones were the most unsafe you could imagine [Chimni 1995b: 823-54]. Fourth, the fundamental principle of non-refoulement, enshrined in Article 33 of the 1951 UN Convention, has been given an extremely narrow interpretation. According to the principle of non-refoulement "no refugee should be returned to any country where he or she is likely to face persecution or torture" [Goodwin-Gill 1996:117]. An example of an extremely retrogressive interpretation is the decision of the US Supreme Court in *Sale v Haitian Centres Council* [113 S Ct 2549 (1993)]. In it the US Supreme Court decided that the act of interdicting Haitian refugees on the high seas and returning them to their country of origin irrespective of the claims to having a well founded fear of persecution was not violative of Article 33 of the 1951 Convention. This decision met with near universal disapproval and has been described by the high commissioner for refugees as "a setback to modern international refugee law". Fifth, most countries in Europe, and the US since April 1, 1997, are implementing the 'safe third country' concept whereby an asylum seeker is denied access to a comprehensive asylum determination procedure because they could apparently have sought protection in countries they passed through to reach their ultimate destination. The concept has grave consequences for the asylum seeker as it has led to chain deportations, often back to the country from which the refugee fled. In an unfortunate decision the German Federal Constitutional Court in May 1996 upheld the German safe third country law

legitimising its practice in other countries as well. A recent report of the United States Committee on Refugees (USCR) – a privately funded public information programme of Immigration and Refugee Services of America – has however recommended that "the use of national safe third country national laws and practices should be discontinued immediately" [US Committee for Refugees 1997:32]. Sixth, still on the same theme, mention may be made of attempts to harmonise internal procedures in Europe which has led to the adoption of two conventions known as the Dublin and Schengen Conventions which have recently come into force. The USCR has also recommended the scrapping of these conventions insofar as the criteria used for determining claims of asylum seekers is concerned. It recommends that "the country where the asylum seeker first chooses to seek asylum, rather than the country of first arrival, should normally assume responsibility for adjudicating the asylum claim" (ibid). Seventh, asylum seekers have been held in offshore camps which have been effectively declared rights free zones. For example, when the US started holding Haitian and Cuban refugees at Guantanamo Bay, a territory leased out from Cuba, a US Court of Appeals ruled in *Cuban American Bar Association (CABA) v Christopher* [43 F 3d 1412 (11th Cir 1995)] that refugees in 'safe haven' camps outside the US did not have constitutional rights of due process or equal protection, and were not protected against forced return. This is, according to Bill Frelick of the USCR, "an open invitation for abusive and arbitrary conduct". Eighth, where an asylum seeker manages to cross these hurdles a very restrictive interpretation is given to the definition of 'refugee' contained in the 1951 Convention. For example, asylum seekers fleeing former Yugoslavia, most of whom met the 1951 Convention definition, have been denied refugee status. Some countries (Canada, for example) have also invoked the internal flight alternative (IFA) test to deny refugee status. Together, these interpretations and measures manifest a language of rejection which threatens the very institution of asylum. They epitomise the international law of exclusion.

(B) POLYARCHY, INTERVENTION AND INTERNATIONAL HUMAN RIGHTS LAW

It has however not prevented the advanced capitalist world from mobilising international human rights law to support global economic expansion without committing itself to the pursuit of equity in its international economic relations.

First, a particular perspective on international human rights law has been advanced to support the idea of 'low

intensity democracy' or 'polyarchy' with the idea of legitimising internal orders which favour foreign investment and provide stable social and political conditions for its operation [Evans 1997:99]. Polyarchy refers "to a system in which a small group actually rules and mass participation in decision-making is confined to leadership choice in elections carefully managed by competing elites" [Robinson 1996:49, 57]. Under it "a system can acquire a democratic form without a democratic content" [Ibid; see also Evans 1997:98-99]. International law experts like Franck claim that there is an emergent right to democratic governance linking the legitimacy of governments with 'free and fair' electoral processes [Franck 1992:46; Fox 1992:539; Teson 1995:91-92]. This limited concept of legitimacy suits the interests of transnational capital which is keen to see the rule of law prevail without it translating into the participatory rights of people.²⁹ It is therefore no accident that despite accepting at a formal level the fact that economic and social rights have the same significance as political and civil rights the industrialised world has done little to put this view into practice on the international plane. For example, the right to development was declared by the UN General Assembly in 1986 as 'an inalienable human right'.³⁰ But little has been done to give substance to the right. If anything attempts have been made to empty it of content. The SDT principle is said to be "central to a new international development law" and "at the heart of a new legal method" to inject an element of equity in international economic relations [Carty 1993:88]. But the SDT principle, as we saw, has been given short shrift in the GATT/WTO regime. Further, the advanced capitalist world has authored the structural adjustment policies being implemented by the international financial institutions which have led to the massive violation of the economic and social rights of the working peoples of the underdeveloped world [Bello 1994; Cornea 1992; Development Gap 1993; Ghai 1991; Cornea, Jolly and Stewart 1987].

Second, in the matrix of international human rights law a right to humanitarian intervention has been shaped which legitimises intrusions in the sovereign political space of third world countries. To put it differently, where 'low intensity democracies' collapse ('failed states') the industrialised world has given to itself the right to intervene (often through the UN) to restore 'polyarchy'. As Orford has noted, in this view "collective humanitarian intervention is legitimate if it ensures that the criteria of formal procedural democracy are met even in sharply polarised societies where large groups are excluded from decision-making power" [Oxford 1997:

461]. Powerful northern states also use the language of human rights for the moral condemnation of states which are not low intensity democracies ('rogue states') to take punitive action against them. In the Nicaragua case the International Court of Justice held that it "cannot contemplate the creation of a new rule opening up a right to intervention by the one State against another on the ground that the latter has opted for some particular ideology or political system". ('Case Concerning Military and Parliamentary Activities in and Against Nicaragua', *Nicaragua v United States of America, ICJ Reports*, 1986, para 283.) However, in recent years, precisely such a right of intervention is being shaped in the matrix of human rights law [for justification see Teson 1988].

V

Globalisation and International Institutions

In the corpus of literature which constitutes international legal studies there is little reflection on the role of international institutions in sustaining a particular vision of world order. While international law experts have concerned themselves with international institutions, the discussion has largely been confined to the rules of law which govern their legal status, structure and functioning, with matters of power and influence left to political scientists.³¹ This is in contrast to the significance of 'international state apparatuses' (ISAs) in any national context. The ISAs serve, as Fine and Harris have pointed out, several functions. First, they help mitigate inter-imperialist rivalries. This does not mean international institutions remain neutral to these rivalries. Rather "they will be constructed and forced to promote the internationalisation of capital according to the relative strengths of different blocs of capital in competition ..." [Fine and Harris 1979:154]. Second, they help implement imperialist domination through the international control of finance, tariffs, etc. Third, "the working classes of all national states can be disciplined and moderated in class struggle by the economic control exercised by these bodies, a control that is remote from the struggles at the point of production" [ibid:153]. In other words, according to Fine and Harris,

... there exists a complex structure of national and international capitalist state apparatuses, some of which are more distanced from the site of class struggles (the national social formation) than others. Those which are more distanced are more freely able to pursue the class interest and class positions of the dominant bourgeois fractions than is the national state. Because they have mechanisms (laws, treaties,

agreements) for enforcing policies onto their constituent national states this structure of international institutions is able to exert what appears as an outside pressure on national states in favour of the interests of internationalised capital [ibid:160].

The Fine and Harris conclusions were perhaps not entirely appropriate for the time they were writing. In the 1970s international institutions still played a relatively peripheral role within the international system [Kirdar 1977: 24-25]. This was a time in which the third world countries were still avoiding going to the IMF as it imposed onerous conditionalities on the state, and the GATT was a long distance away from being transformed into the WTO, an octopus like organisation regulating critical areas of national economic life. But today, as one observer notes, "the 'commanding heights' of state decision-making are shifting to supranational institutions" [Robinson 1996:18].

The nature and character of these international institutions cannot be understood from within a bourgeois legal framework with its emphasis on formalism. In order to make sense of the functioning of international institutions we need to locate them within the larger social order, in particular the historical and political contexts in which they originate and function. Such an approach contends that only when a coalition of powerful social forces is persuaded that an international institution is the appropriate form in which to defend their interests is it brought into existence, albeit through state action, and it survives only if it continues to serve these interests [Murphy 1994:25, 44; Cox 1996]. The class which exercises the most influence in these institutions today is the transnationalised fractions of national bourgeoisies with the now ascendant transnationalised fractions in the third world playing the role of junior partners. These fractions do not seek in these institutions to actualise 'national interests' but rather act as "transmission belts and filtering devices for the imposition of the transnational agenda" [Robinson 1996:19].³²

Three principal features characterise contemporary developments relating to international institutions. The first feature is the transfer of sovereign economic decision-making from nation-states to international economic institutions. Second, is the resistance to putting in place a decision-making process which is transparent and democratic. Third, is the gearing of the UN system towards promoting the interests of transnational capital, including increasing the role that the corporate sector can play within the organisation. Together, these features limit the possibilities of genuine democratisation

of both inter- and intra-state relations. But a contrary impression is sought to be created through steering the knowledge production and dissemination functions of international institutions; an ocean of literature is produced to justify their transformed role.

(A) EXPANDING ROLE OF 'INTERNATIONAL STATE APPARATUSES'

The GATT/WTO regime best exemplifies the shift in power to 'international state apparatuses'. The GATT/WTO regime now regulates not merely trade in manufactured goods but also trade in agricultural commodities, 'trade related' foreign investment, intellectual property rights and trade in services. Negotiations are to begin under the auspices of the WTO on other areas like the social clause, the trade-environment interface, and a multilateral agreement on investment. Guaranteeing the observance of the rules in these diverse areas is the WTO dispute settlement system (DSS) backed by a system of sanctions. The usual lament that international law is not law as it lacks enforcement mechanisms does not apply at least in the instance of the WTO.

In key areas of national economic life it will be the decisions of the DSS which will be final rather than, as in the past, the decisions of the highest court within a nation-state. The DSS has been considerably strengthened under the WTO through the inclusion of several new features not present in the GATT system. The essence of these new features is to have disputes settled within a short time framework and to ensure that the impugned state abides by decisions delivered by the DSS.³³ A complex system of sanctions (including a system of cross-retaliation across sectors) has been put in place to make a recalcitrant state agree to obey the decisions of the DSS.³⁴

It is true that the DSS has moved from a power oriented system under GATT to a rule oriented system in the WTO.³⁵ As Trebilcock and Howse note: "...the history of GATT dispute resolution has evinced a tendency towards greater reliance on a rule-oriented regime in resolving disputes" [Trebilcock and Howse:383]. They correctly point out that "the Uruguay Round Understanding on Dispute Resolution seeks to advance substantially the legal orders conception of the GATT" [ibid: 397]. To the extent that the new DSS reduces the role of power in arriving at solutions to international trade disputes it is certainly welcome. Surely, in a battle of briefs the less powerful countries have a better chance to have their views accepted than in negotiations which are openly visited by power.

However, the move to a rule of law model is placed in perspective if, first, the

DSS is evaluated in conjunction with the substantive agreements which constitute the Final Act. Since the rules they codify protect the interests of the industrialised states, in particular transnational capital, a rule oriented dispute settlement system only goes to enhance the inequities which they sanction. Second, the fact that unilateral sanctions continue to form a part of the system, as is reflected, for example, in the continuing use of super and special provisions of the 1988 Omnibus Trade and Competitiveness Act by the US, reveals that power continues to play a role in dispute settlement.³⁶ Third, where there is the possibility of the DSS seriously hurting the industrialised world attempts have been made to curb the move towards a rule oriented system. For example, special rules of interpretation have been included in the context of challenges to the imposition of anti-dumping duties (essentially used as a protectionist device by the industrialised states).³⁷

The relocation of sovereignty that the DSS involves has been achieved without making the WTO in any way accountable to the peoples who inhabit the states whose actions it proposes to surveil and supervise. There is the absence of democratic participation in the law-making and dispute settlement process. Important elements of civil society – interest groups, civic organisations, and legislatures – are denied any role in it. The WTO DSS does not allow non-state involvement and is secretive in hearings and documentation. Thus, the WTO clearly needs to be opened up to wider participation; the executive arm of the state alone should not be allowed to represent the state [Kingsbury 1994: 8-9, 14-17, 34]. The democracy deficit the WTO suffers from is a big blow to the attempts of third world peoples to inject greater democracy in the functioning of the international system.

(B) RESISTANCE TO DEMOCRATIC DECISION-MAKING: THE CASE OF IMF

The absence of democratic functioning also characterises the international financial institutions which have come to exercise unprecedented influence on the lives of ordinary people in the third world. The anti-democratic nature of its functioning is more primitive as here the problem is of allowing different groups of states equitable representation in the decision-making process of the organisation. To take the case of the IMF, the decision-making process in it is based on a system of weighted voting which excludes its principal users, the poor world, from a say in the policy-making.³⁸ The third world voice is not heard even as the policies of the Fund inflict enormous pain and death on the people who inhabit it [Bello 1994; Cornea 1992; Development

Gap 1993; Ghai 1991; Cornea, Jolly and Stewart 1987].

In 1993, the IMF boasted of a membership of 175 countries. Of these 23 were developed countries, 17 were east European countries including eight states of the former Soviet Union, and the remaining 135 countries were third world countries, including six central Asian countries of the former Soviet Union. Nearly 4.4 billion people or 78 per cent of the world's 1990 population live in the third world [Gerster 1993:121]. Despite constituting an overwhelming majority of the membership the third world countries as a whole had a voting share of 34 per cent in the IMF.³⁹ Without the OPEC countries (who act as creditor states in the institution) this share is reduced to 24 per cent.⁴⁰

Since the 1960s the third world countries have been concerned with their lack of effective participation in the decision-making process in the Fund.⁴¹ In the beginning their concern was essentially with the usurpation of the Funds' decision-making by the industrialised countries rather than the internal decision making authority [ibid:87]. But since the early 1970s a systematic challenge was launched to seek changes in the structure of Fund decision-making.⁴² CERDS stressed the need for full and effective participation in the decision-making process of international economic and financial institutions.⁴³ From the outset the third world countries were ready to concede that a one state-one vote formula was unrealistic insofar as the Fund was concerned. Besides the question of power politics, the need to safeguard the revolving nature of the Fund, and the viability of allowing borrower countries to have a majority in an international lending institution, an important constraint was the non-usability for the most part of currency resources of the developing countries [Ferguson 1988:100-02]. In other words, an increase in their quotas could mean a diminution in the lending capacity of the institution [ibid:101].

The third world countries are therefore willing to give a functional interpretation to the principle of equality. Instead of insisting on equality of voting between states they emphasise on the relative equality among groups of states.⁴⁴ In other words, they wanted the third world countries as a whole to have an effective voice in the decision-making process [Ferguson 1988:91-94].⁴⁵ This could be done by expansion of basic voting power and/or by establishing different criteria for establishing voting power other than the one used to determine quotas. For instance, by taking population into account.⁴⁶ There are many examples of using the concept of group as the basis for giving content to the principle of participatory equality

of states [ibid:104-06]. If accepted it would enhance the possibilities of effective participation of concerned states and increase the transparency of decisions, without taking away the dominant voice of the lender developed countries. Instead of looking to the long-term interests of the world economy in terms of the interests of the overwhelming population of the globe, the weak situation of the third world is being used to impose conditions which extend and deepen the role of private property and lead to the worsening of the conditions of the people. It is then understandable that the imperialist world resists the transformation of the decision-making process in a democratic direction.

(C) THE PRIVATISATION OF THE UN SYSTEM

In the present period all international institutions are being mobilised in favour of promoting the interests of transnational capital. Mention needs to be made of the important role that the UN system is coming to play in the global privatisation process as also the moves to 'privatise' the United Nations system itself. The UN secretary-general has gone so far as to suggest that "the very concept of intergovernmentalism as we know it is being altered as a result of the redefinition of the role of government..." [Annan 1997:68]. In his speech to the World Economic Forum in February 1997 Annan announced that "strengthening the partnership between the United Nations and the private sector will be one of the priorities of my term as secretary-general".⁴⁷ This vision is built on the "new universal understanding that market forces are essential for sustainable development (sic)" [ibid:1]. These pronouncements need to be read in the background of the shutting down of the Centre for Transnational Corporations, the fact that the UNCTAD has "repositioned itself" [Annan 1997:20], and the marginalisation of development issues in the UN system [South Centre 1996]. It becomes clear then that the agenda of the UN is being transformed from one supportive of restructuring extant international economic relations to one which is in the business of strengthening it. While it still continues to pay lip service to the global poor, its principal goal has come to be to promote the interests of private capital, both domestic and transnational, and make appeals to it to serve the cause of international justice.⁴⁸

The promotion of the corporate sector is taking place even within the UN system. While there has never been any doubt about the policy tilt of the international financial institutions, private interests have come to influence a larger segment of the UN system. Lee, Humphreys and

Pugh have, on the basis of the analysis of three UN organisations (viz, International Telecommunication Union, International Maritime Organisation and International Tropical Timber Organisation), drawn attention to the fact that "private companies are increasingly influencing decisions and activities that are nominally the prerogative of governments" [Lee, Humphreys and Pugh 1997:339]. Further, under discussion are terms of reference for business sector participation in the policy setting process of the UN, as also partnering in the use of UN development assistance funds and in the pursuit of the goal of sustainable development [Korten 1997]. These developments may eventually transform the character of the UN from a public to a private organisation.

(D) LEGITIMATION FUNCTIONS OF INTERNATIONAL INSTITUTIONS

A key omission of international legal studies has been the failure to study the ideological role of international institutions.⁴⁹ The ideological or what may be termed the legitimisation functions of international institutions assumes many forms. First, the organisation represents its institutional field and concerns to the outside world. Second, it actively promotes norms of international behaviour which facilitate the realisation of its objectives. Third, it frames issues for collective debate and proposes specific policy responses. Fourth, it identifies key points for negotiation in order to fill gaps in the normative framework and to adjust to changes in the external environment. Finally, it evaluates the policies of member states from the standpoint of their mandate and concerns. The knowledge production and dissemination functions of international institutions are steered by the dominant coalition of social forces and states to legitimise their vision of world order.⁵⁰ Only an oppositional coalition can evolve counter-discourses which deconstruct and challenge the hegemonic vision. This has been done in the past. For example, the entire debate on a NIEO was generated by the third world countries, with the support of the former Soviet Union, through either establishing institutions in which it exercised a dominant voice (like UNCTAD) or through a global coalitional politics which compelled the dominant states to listen to their voice in other institutions. The collapse of 'actually existing socialism', the crisis which has gripped third world economies in the past two decades, and the withering away of the Group of 77 has translated into the universal language of privatisation and markets. The forced consensus on this language needs to be urgently challenged.

VI International Law, Hegemony, and the Use of Force

The dominance of powerful states in the international system is thus sustained not through the use of force but through having a certain conception of world order accepted as a natural order by the ruling classes and peoples of states over which dominance is exercised. However, when necessary, threats to the system are countered through the use of force. This force is invariably sought to be legitimised through the language of international law. While the threat or use of force is outlawed by the UN Charter (Article 2 para 4), it permits its use in self-defence (Article 51). There are also questions relating to the meaning of aggression, the use of force, and self-defence which create space for dubious interpretations. Since there is no compulsory third party settlement of international disputes in international relations there is no forum in which the interpretations advanced by dominant powers to justify the use of force can be challenged. Where it has been possible, as was the case when Nicaragua took the US to the International Court of Justice (ICJ), the US refused to comply with the decision. In fact in the Nicaragua case the US refused to participate further in the proceedings of the case as soon as the ICJ, overriding US objections, accepted to exercise jurisdiction. Indeed, piqued by its decision the US terminated its acceptance of the compulsory jurisdiction of the court [for a discussion see Chimni 1986: 960-70]. However, the ICJ went ahead and found the US "in breach of its obligation under customary international law not to intervene in the affairs of another state" and "not to use force against another state" [ICJ Reports, 1986, para 292]. It was also found guilty of violating the sovereignty of another state [ibid]. The US, of course, refused to abide by the decision of the World Court. Nevertheless, it underlined the fact that the idea of a rule of law in international affairs is not an empty one. It cannot be dismissed as a mere ideological device used by dominant states to maintain order in the international system. This is not to deny the originary violence which marks the present international legal system or the periodic violence unleashed on states and peoples which seek to challenge the prevailing consensus but to avoid falling into the trap of legal nihilism through a general condemnation of law and legal institutions.

The Gulf war, on the other hand, is perhaps the best demonstration of the thesis that the hegemonic powers will not shy away from the use of force when serious challenges are mounted to the system. In this case demonstrative force was used to defend the neo-colonial character of the

existing international system.⁵¹ As Said has observed with respect to the Gulf war: "The entire premise was colonial: that a small third world dictatorship, nurtured and supported by the west, did not have the right to challenge America, which was white and superior. Britain bombed Iraqi troops in the 1920s for daring to resist colonial rule; 70 years later the United States did it but with a more moralistic tone, which did little to conceal the thesis that Middle East oil reserves were an American trust" [Said 1993:295, emphasis in original]. During the course of the war the UN Security Council was treated as an extension of the US state department and the legal framework for Security Council actions shown scant respect [Anand 1994:5-17; Schacter 1991:455; Weston 1991:522]. In fact the UN Security Council abdicated its responsibility inasmuch as it had no control over what were ostensibly UN operations [ibid].

The force used was clearly disproportionate, and eventually directed at the fleeing enemy. International humanitarian laws were thrown to the wind [ibid:46ff]. Iraqi civilians were consciously made to suffer for reasons unrelated to the defeat, surrender, or weakening of the Iraqi military [Normand and Jochnik 1994:410]. The barbarian/civilised dichotomy which characterised imperialist international law came into play. Said has noted how the western media suggested that "Arabs only understand force; brutality and violence are part of Arab civilisation..." [Said 1993: 295]. It suggested that the western powers "could go ahead and kill, bomb, and destroy, since what would be being attacked was really negligible, brittle with no relationship to books, ideas, cultures, and no relation either...to real people" [ibid: 298].⁵² What is equally significant is what got left out: "What got left out was enormous. Little was reported on oil company profits, or how the surge in oil prices had little to do with supply; oil continued to be overproduced" [ibid:296; see also Frank 1992:3-22]. In brief, the conclusion suggests itself that like in the colonial period, the laws of war are seen as imposing few constraints where the non-European world is concerned. As Bauman puts it, "since they are by definition violent, barbarians are legitimate objects of violence. Civility is for civil, barbarity for the barbaric" [Bauman: 143]. It is hardly surprising therefore that the US has recently voted against the establishment of the international criminal court [The Guardian Weekly 1998:3].

VII Conclusion

The aim of this paper was to draw attention to the crucial role international law and institutions have come to play in

the contemporary international system. With capitalism entering the phase of globalisation international law is playing a role akin to the one which internal law performed in the early stages of capitalism in removing local impediments to the process of accumulation. The international legal process is being used to control the content of national laws in crucial areas of economic, political, and social life, as also to relocate powers from sovereign states to international institutions in order to facilitate their surveillance and enforcement. These developments have considerably eroded the capacity of third world states to carry out independent and self-reliant development.

For a period of time in the 1970s there was optimism that international laws could be transformed by a global coalition of third world countries to meet their particular concerns. An equitable international law of distribution was sought to be shaped through the adoption of the SDT principle and by promoting ICAs to realise just prices. Negotiations were also initiated to draft codes of conduct to regulate TNCs and the transfer of technology, and to revise the Paris convention on industrial property. Radical concepts such as the 'common heritage of mankind' were advanced in the process of arriving at rules to govern the use of the oceans. Attempts were made to democratise the decision-making process in the IMF and the World Bank. But these initiatives floundered on the rock of neo-colonialism. From the beginning of the 1980s, an increasingly hostile international economic environment saw the third world countries abandon the strategy of global coalition, hoping to separately encash their dependent status.

Meanwhile, capitalism entered the phase of globalisation. It was now the turn of the advanced capitalist countries to seek changes in the body of international law. These changes involved, first, the rejection of the proposals which had emerged in the 1970s in the form of a programme and declaration of action on NIEO and CERDS. Second, it called for the adoption of legal instruments to free transnational capital of spatial and temporal constraints. Third, an international law of distribution based on market ethics was given shape, eliminating all chances of injecting equity into international economic relations. Fourth, changes were initiated in the relevant international legal regime to enable the strict control of voluntary and forced migration. Fifth, international state apparatuses were sought to be established to ensure the effective implementation of the rules which facilitate and promote accumulation in the era of globalisation.

These changes in the body of international law reflect the domination of the transnationalised fractions of the bour-

geoisie in the advanced capitalist countries. They have in this regard the active consent of their counterparts in the third world. The latter not only faithfully act as transmission belts for the ideas emerging from the advanced capitalist world but vigorously support it in a bid to profit from becoming junior partners in the global domination project. At the receiving end are the working classes and disadvantaged groups in the first and the third worlds. Their condition has seriously worsened in the last two decades.⁵³ On the other hand, as a result of the relocation of powers from nation-states to international institutions, the capacity of the left and democratic movements to resist developments which adversely affect their interests has declined [Robinson 1996:27]. If the global progressive forces hope to interrupt and thwart the reproduction of the relations of transnational domination then they must, among other things, think of ways and means to enhance their own role in the international law-making and law enforcement process. This calls for much greater attention to be paid to international legal developments than is being done at present. The international legal strategy must in turn form an integral part of a transnational counter-hegemonic project which, even as it continues to have its principal base in national struggles, comes to form transnational alliances in order to resist the vision of globalised capitalism.

Notes

- 1 "Perhaps the most important of the revolutions in the dimension of modern international law lies in its expanding scope, in the addition of new subjects to the field of international law" [Friedmann 1968].
- 2 Seven decades ago, in his preface to the second Russian edition of his book on law and Marxism, Pashukanis (1978:38) wrote that "...the Marxist critique has not even touched on such fields as that of international law yet". The situation is no different today.
- 3 For a critique of the Soviet International Law approach as articulated by its chief spokesman G I Tunkin in the period after the second world war see Chimni (1993:chapter V).
- 4 Oppenheim, for example, defines international law as "the body of rules which are legally binding on states in their intercourse with each other" [Jennings 1992:4]. Modern textbook writers often extend the definition to include the relations between states and organisations and non-state entities, and in some respect individuals. For instance, Starke (1989:3) defines international law "as that body of law which is composed for its greater part of principles and rules of conduct which states feel themselves bound to observe, and therefore, do commonly observe in their relations with each other, and which includes also: (a) the rule of law relating to the functioning of international institutions or organisations, their relations with each other, and their relations with states and individuals; and (b) certain rules of law relating to individuals and non-state entities so far as the

rights and duties of such individuals and non-state entities are the concern of the international community". However, Starke (1989:4) hastens to add that "from a practical point of view, it is well to remember that international law is primarily a system regulating the rights and duties of states *inter se*". But even the broader definition is a formal and technical definition. The general point was made long ago by Pashukanis [Bierne and Sharlet 1980:169].

- 5 Indeed, "exploring this logic of anarchy is held to be the distinctive task of IR theory – a task which must be kept separate from the study of domestic politics which is governed by fundamentally different principles" [Rosenberg 1994:4].
- 6 It, of course, raises the complex question as to whether the world economy is the basis of international law in the same way as the internal economic structure can be said to be the basis of internal law.
- 7 A central feature of bourgeois democratic international law is the universalisation of the principle of sovereign equality of states. For a detailed account of these phases see Chimni (1993:224-36).
- 8 The irony was not lost on Amin: "the 1975 turning point seemed striking to me because of the non-aligned movement and the Group of 77 proposal for a New International Economic Order".
- 9 After all, it was the struggles of the working class and other marginalised peoples which pushed third world elites to supporting radical moves on the international scene.
- 10 Post-structuralist scholars tend to fall into this trap. For example, David Kennedy of Harvard Law School writes: "Rather than a stable domain which relates in some complicated way to society or political economy or class structure, law is simply the practice and argument about the relationship between something posited as law and something posited as society" [Kennedy 1988:8].
- 11 In other words, insofar as international law is an ideological construct and possesses a distinct form, it also has an independent history. As Engels pointed out, "every ideology...once it has arisen, develops in connection with the given concept material further, otherwise it would not be an ideology, that is, occupation with thoughts as with independent entities, developing independently and subject only to their own laws" [Engels nd:372].
- 12 The sources of international law are seen as being articulated in Article 38 para (1) of the Statute of the International Court of Justice (ICJ). It reads:
The court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
(a) international convention, whether general or particular...;
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognised by civilised nations; and
(d) ...judicial decisions and the teachings of most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
- 13 As the present president of the ICJ has put it [Bedjaoui 1979:128], international law must "accept the challenge being made to it both by the structural disorder of the world economy and by the deeply felt desire of all peoples for

- a new international economic order. However, it is perfectly clear that to satisfy such hopes and to meet the needs of the international community seeking for this new order, international law cannot properly and effectively undertake its own transformation if it confines to its traditional sources alone, i.e. custom, treaties and general legal principles. The inadequacy of traditional ways of forming the rules of international law is very sharply felt at the present time. What is to be done if not to make use of other sources?"
- 14 Koskenniemi (1990:27) puts it this way: "the idea of an international Rule of Law has been a credible one because to strive for it implies no commitment regarding the content of the norms thereby established or the character of society advanced".
 - 15 It is true that the distinctive nature of the international legal process in which sovereign states negotiate ensures that even a group of powerful states cannot translate their economic interests directly into law. Other states have to agree to undertake certain obligations and even puppet states possess a degree of independence in shaping their external relations. International economic relations, in other words, is not passively mediated by particular national economies. However, this does not on the other hand mean that power does not write its interests into law. It merely defines the limits of its role in the international legal process.
 - 16 We recognise that 'globalisation' is an essentially contested concept [Hirst and Thompson 1995; Hoogvelt 1997]. What we adopt here is a working definition which highlights its general feature.
 - 17 It is often forgotten that the IMF/WB combine achieve their goals through imposing legal obligations on states. International Monetary Law has evolved through, among other things, the interpretation of the Articles of Agreement of the IMF. According to Dam (1982:117) "the history of interpretation of the Fund's Articles of Agreement is nothing more, and nothing less, than the record of the rules of the Fund". He then goes on to point out that "perhaps the most interesting evolution has occurred with respect to those rules dealing with access to Fund resources and, in particular, what has come to be known in Fund parlance as 'conditionality'. That term refers to the conditions that the Fund may impose on access to its resources and on their subsequent use by member countries." See also Gold (1984). At a later point in this article we discuss the anti-democratic nature of the decision-making process in the IMF.
 - 18 Hoogvelt (1997:172) cites one senior World Bank manager who resigned after 12 years as stating: "Everything we did from 1983 onwards was based on our new sense of mission to have the south 'privatised' or die: towards this end we ignominiously created economic bedlam in Latin America and Africa".
 - 19 MIGA insures foreign direct investments against non-commercial risks. For a summary see Petersmann (1988:50-62).
 - 20 BITS represent a clear retreat from CERDS; the latter laid down a restrictive basis for the payment of compensation for expropriated or nationalised property.
 - 21 The Guidelines recommend a 'general approach of free admission'. It then calls for 'fair and equitable treatment' of foreign investment. For the text of the World Bank Guidelines on the Treatment of Foreign Direct Investment see UN (1996:247-55).
 - 22 On the MAI see Dhar and Chaturvedi (1998:837-50) and *The Guardian Weekly* 1998.
 - 23 This is in contrast to the view that "technology is the archetypal common heritage of mankind since it is the expression of man's spirit, his holdness and his conquests, of the advance of science and human knowledge over the centuries and beyond state boundaries" [Bedjaoui 1979:231].
 - 24 'During the period 1990-94, 15 meetings were convened which resulted in a Draft Agreement Relating to the Implementation of Part XI of the UN Convention on the Law of the Sea of December 10, 1982. On July 28, 1994, the General Assembly adopted the Agreement by 121 votes to none, with seven abstentions. The Agreement substantially accommodates the US and other western nations' objections to the deep sea-bed mining regime...It eliminates major stumbling blocks, such as a production limitation in favour of land-based producers of minerals, and mandatory transfer of technology and significantly restrains the role of envisaged supranational mining company, the UN Enterprise' [Scrijver 1997:217-18].
 - 25 In 1965 the International Centre for the Settlement of Investment Disputes (ICSID) was established under the auspices of the World Bank. Those states which become members of ICSID agreed to have a dispute with a private entity settled before it.
 - 25 For example, Article 18-B allowed developing countries to impose quantitative restrictions to safeguard an adverse balance of payments situation. This has now become difficult as the new understanding on Article 18-B tightens the rules governing its invocation. See Dubey (1996:85ff).
 - 27 "...the general level of real commodity prices had fallen by 1986 to below the nadir reached in 1932 during the Great Depression of the inter-war era" [Maizels 1994:53].
 - 28 This section borrows heavily from my article 'The Law and Politics of Regional Solution of the Refugee Problem: The Case of South Asia', *RCSS Policy Studies 4*, Regional Centre for Strategic Studies, Colombo, July 1998.
 - 29 It has also been its experience during the cold war era that support for authoritarian regimes has inevitably led to a backlash which threatens foreign investment and property.
 - 30 GA Res 41/128. The declaration was adopted by a recorded vote: 146-1(US)-8.
 - 31 Schermers and Blokker (1995:4) in their well known work on international institutional law write that "the institutional law of international organisations comprises those rules of law which govern their legal status, structure and functioning". Schermers and Blokker go on to observe: "While, in the land of legal science, there is no strongly established tradition of developing theories of international organisations, this is different for the neighbouring discipline of political science...These studies, of course, approach international organisations from a different perspective; they pose different questions and use different methodology. They are more interested in matters of power and influence, while legal studies depart from rules." (pp 8-9).
 - 32 This agenda is resisted by what may be called the non-transnationalised fractions under the banner of 'nationalism'. Its critique of these institutions often coincides with that offered by left parties without, of course, partaking in the vision of establishing democratic socialism.
 - 33 This is done through incorporating the negative consensus system. Article 16.4 of the 'Understanding on Rules and procedures governing the Settlement of disputes' (DSU) states that a Panel Report would be adopted within 60 days unless one of the parties appeals the report or 'the DSB [Disputes Settlement Body] decides by consensus not to adopt the report'. It means that even if a single state votes in favour of the adoption of the report submitted under the DSS it will be binding on the parties to the dispute.
 - 34 See Article 22 of the DSU for the provisions on cross-retaliation.
 - 35 For a discussion on the two alternative paradigms see Jackson (1989:85-88).
 - 36 Even before the conclusion of the Uruguay Round of Trade Negotiations and the establishment of the new DSS, Bhagwati (1988: 93, 105) had pointed out that the 1988 legislation represented "pernicious bilateralism" and that Super 301 is 'like Judge Dee of mediaeval China becoming the plaintiff, judge and jury'.
 - 37 "AD is simply a packaging of protectionism to make it look something different... AD is a major loophole in the GATT, used strategically by firms" [Hoekmann and Kostecki 1995: 177-78]. Further, by allowing a unilateral national response (anti-dumping duties or countervailing duties) the more economically powerful nations can have a considerable impact on smaller trading nations, while the reverse may not be true (Ibid: 243). Article 17.6 (ii) of 'Agreement on Implementation of Article VI' (the Anti-dumping Code) states that where "a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations". As noted by Palmetier (1995), "a major goal of US user industries in the Uruguay round was to limit the ability of GATT panels to overturn domestic decisions. The standard of review embodied in the Agreement reflects the power of the industries supporting AD. The lobby was strong enough to make this specific issue a deal-breaker for the United States, and it obtained most of what it sought".
 - 38 'The extent to which developing countries rather than industrialised countries are dependent upon the financial assistance from the IMF is illustrated by the fact that the last time IMF loans were drawn by any of the industrialised countries was in 1979, namely, by Australia and New Zealand [Gerster 1993].
 - 39 Despite the fact that the developing country membership has increased from 93 in 1970 to 135 in 1993 the voting power has decreased from 37 per cent in 1970 to 34 per cent in 1993 [Gerster 1993:122]. The reason for this state of affairs is to be traced to the method of determining voting power. By becoming a member each state acquires a basic voting power consisting of 250 votes. The rationale for distribution of basic votes was, other than paying homage to the principle of sovereign equality of states, the need to prevent, in however small a way, control of the institution by a few countries, an objective at that point articulated and shared by the US. This role of basic votes has substantially eroded in the last five decades. While the membership of the

- organisation has increased from 44 in 1947 to 175 in 1993 the proportion of basic votes to total votes has decreased from 12.5 per cent in 1947 to 3 per cent in 1993 (Ibid:123). In addition to basic votes each state receives a further vote for every 1,00,000 SDRs of its IMF quota; quotas are determined (at least in theory) in accordance with the importance a particular country has in the world economy, and thus its capacity to contribute to the convertible financial resources of the Fund. The weight of subscription-based voting power, as would be evident, has increased from 87.5 per cent in 1947 to 97 per cent in 1993. It only needs to be added that decisions concerning stabilisation and adjustment programmes merely require an unqualified majority of 50 per cent.
- 40 This fact is of importance because countries like Saudi Arabia have most often the same interests as other creditor developed countries [Ferguson 1988:219].
- 41 The relative lack of concern in the period prior to that can be traced *inter alia* to the fact that the IMF "was peripheral to the broad operationalisation of international economic relations" [Ferguson 1988:84].
- 42 This was particularly after the unilateral decision of the US on August 15, 1971 regarding the convertibility of its currency and its negative impact on the third world countries (ibid 88 and 107).
- 43 Article 10 of the Charter stated: "All states are juridically equal and, as equal members of the international community, have the right to participate fully and effectively in the international decision-making in the solution of world economic, financial and monetary problems. *inter alia*, through the appropriate international organisations in accordance with their existing and evolving rules, and to share equitably in the benefits resulting therefrom".
- 44 On the notion of relative inequality see Zamora (1980:603) and Chimni (1987:95-98).
- 45 As Ferguson (1988:91) has noted, "In the Fund itself, by the end of the 1970s, they were arguing for a specific quantitative limit to the quantum of quotas they should be allotted, as a group. They pressed for 45 per cent of Fund quotas".
- 46 In these regards see Gerster (1993:126-27). As Ferguson (1988:99) has noted: "There are three ways, theoretically, to effect adjustments in voting power in the IMF. The first way is by changing the quantum of basic votes granted by each member—an approach that necessitates an amendment of the Articles. The second way is to obtain changes in the criteria that are used for the allocation of quotas... And, finally, an improvement in the relative economic performance of countries has traditionally been rewarded by increased quotas in the Fund."
- 47 *UN Newsletter*, vol 52, no 6, February 8, 1997, p 2. See for a list of 'achievements' 'The UN and Business: A Global Partnership', *UN Newsletter*, New Delhi, vol 53, no 28, July 11, 1998, p 8.
- 48 Indeed, transnational capital is able to influence the agenda-setting as was 'evident at the UNCED in June 1992'. According to Thomas, "transnationals played a formative role in shaping the Rio agenda, aided by their financial support for the conference, and the high-profile role and the access given to the Business Council for Sustainable Development by conference chairman Maurice Strong. At the behest of the US all references to transnational corporations were removed from Agenda 21" [Thomas:12].
- 49 According to Cox (1993:62), among the features of international institutions which express their 'hegemonic' role are the following: (1) they embody the rules which facilitate the expansion of hegemonic world orders; (2) they are themselves the product of the hegemonic world order; (3) they ideologically legitimate the norms of the world order; (4) they co-opt the elite from peripheral countries; and (5) they absorb counter-hegemonic ideas.
- 50 For an application of this understanding to the Office of the United Nations High Commissioner for Refugees (UNHCR) see Chimni (forthcoming).
- 51 This statement should not in any way be read to imply a defence of the actions of the Iraqi regime which clearly violated the norms of international law in invading Kuwait. Nor should it in any way be seen as excusing its terrible human rights record.
- 52 Said here makes reference to Fouad Ajami's article, 'The Summer of Arab Discontent', *Foreign Affairs*, vol 65, Winter 1990-91. See also [Aksoy and Robins 1992:202-13]. As they put it: "The war in the Persian Gulf was cast as a global confrontation between humanity and bestiality, a battle between civilisation and barbarism. This was a war to defend the principles of modernity of reason against the forces of darkness. It was in this cause that the smart weapons of the west meted out what was projected as a moral kind of violence. In this cause, the angels became exterminators" (p 202).
- 53 See the annual Human Development Reports in this regard.

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