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Citation for this version:

Bowring, B. 'Positivism versus self-determination: the contradictions of Soviet international law.' In Marks, S. (ed.) - *International Law on the Left: Re-examining Marxist Legacies*, pp.133-168
London: Birkbeck ePrints. Available at: <http://eprints.bbk.ac.uk/856>

Citation for publisher's version:

Bowring, B. 'Positivism versus self-determination: the contradictions of Soviet international law.' In Marks, S. (ed.) - *International Law on the Left: Re-examining Marxist Legacies*, pp.133-168 – 2008, Cambridge University Press

International Law on the Left: Revisiting Marxist Legacies

Susan Marks (editor)

Positivism versus self-determination: the contradictions of Soviet international law

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1. INTRODUCTION

The Soviet theory and practice of international law, if it is the subject of any consideration today at all, is usually dismissed as a purely historical example of an extreme species of positivism, and of no contemporary interest. Most often it is ignored. For example, in his article ‘What Should International Lawyers Learn from Karl Marx?’,¹ Martti Koskenniemi does not mention Soviet international law at all. Even an avowed Marxist scholar of international law does little more. In his article², ‘An Outline of a Marxist Course on Public International Law’³ B. S. Chimni contrasts the definition of ‘treaties’ in what he terms ‘Mainstream International Law Scholarship’:

“... with the definitions offered by the Soviet scholars Korovin and Pashukanis: ‘Every international agreement is the *expression of an established social order, with a certain balance of collective interests*’;⁴ ‘A treaty obligation is nothing other than a *special form of the concretization of economic and political relationships*’.⁵ These definitions, through drawing in extra-textual reality, offer greater insight into the meaning of a treaty than the formal definition offered by MILS. They refer us to both the fact of an established (capitalist) social order and to its concretization as economic and political rules embodying a certain balance of collective (class) interests.”⁶

However, these authors are not introduced save as ‘Soviet scholars’, no context at all is given, nor the fact that they were bitter enemies. Soviet international law even in

¹ M. Koskenniemi ‘What Should International Lawyers Learn from Karl Marx’ (2004) vol.17 *Leiden Journal of International Law* 229-246

² in the same special issue of a progressive international law journal, the *Leiden Journal*

³ B. Chimni ‘An Outline of a Marxist Course on Public International Law’ (2004) vol.17 *Leiden Journal of International Law* 1-30

⁴ E. Korovin, ‘Soviet Treaties and International Law’, (1928) vol.22 *American Journal of International Law* 753, at p.763 (emphasis added).

⁵ E. Pashukanis, *Pashukanis: Selected Writings on Marxism and Law* (eds. Bierne and R. Sharlet) (London: Academic Press, 1980) at p.181 (emphasis added).

⁶ B. Chimni *Ibid* at p.12

this Marxist account barely exists; in the standard genre of the history of international law it is mentioned only to be dismissed.

I wish to take a very different position. I seek to argue in the following paragraphs that the contradictions of Soviet international law have generated some of the most important propositions and principles of contemporary international law, and are of continuing relevance.

This chapter starts with a typical description in the standard genre, by a distinguished contemporary international legal scholar. I then trace the development of Soviet international law through a double refraction: what it said about itself, in some bitterly fought theoretical struggles; and what was said about it by the attentive scholars of the United States. For this purpose I trace the trajectory of Yevgeny Pashukanis, the best known Marxist theorist of law in the west, in part as refracted in the writings of US scholars of international law. I show that despite following developments in Soviet international law with close interest, these observers entirely misunderstood what they sought to analyse. It should be said that the leading Soviet theorists did so too. This tradition of misunderstanding has continued until the present day. I contend that this is true also of the most sophisticated and committed of contemporary Marxist scholars of international law, China Mieville. I engage respectfully with his impressive work.

More importantly however, there was on my contention a clear-cut contradiction between the positivism of the legal text-books, and the actual practice of the Bolshevik and then Soviet doctrine of the ‘Right of Peoples to Self-Determination’. Thus, the USSR gave enormous material and moral support to the National Liberation Movements, and led the successful drive to see the principle and then right to self-determination placed at the centre of public international law in the 20th and 21st centuries.

2. ‘TAKING THE DOGMA FOR A WALK’

Western scholars are familiar with what is generally termed the “Marxist-Leninist theory” in international law, and with its standard characterisation.⁷ Ian Scobbie in a

⁷ I. Scobbie ‘Some Common Heresies about International Law: Sundry Theoretical Perspectives’ in Malcolm Evans (ed) *International Law* (Oxford: Oxford University Press, 2nd ed, 2006) , 83-112 at p.84

recent comparison of Soviet and 'New Haven' theories refers to “the Soviet theory of international law propounded by G I Tunkin.”⁸ For Scobbie, Soviet theory amounted to a “constitutive” (rather than a “facilitative”) theory.⁹ It relied on “the objective rules of societal development and the historical inevitability of socialism.”¹⁰ That is, it was thoroughly mechanical in spirit and exposition.

There can be no surprise that Scobbie refers only to Tunkin. William Butler’s translation of Tunkin's textbook made available to a Western audience the only substantial Soviet text in English on international law.¹¹ Tunkin, born in 1906, died aged 87 in 1993, while completing the last edition of his *Theory of International Law*, and having just submitted an article – on customary international law - to the *European Journal of International Law*. Here he wrote of the attempt “... to create a new world order based on the rule of law”.¹²

Scobbie comments that Soviet theory was structurally highly traditional, and firmly rooted in Marxist-Leninist theory to the extent that “at time, it seems simply to amount to taking the dogma for a walk.”¹³ This was certainly true of Tunkin’s textbook. It was also very conservative, recognising only rules and State consent to rules: as Damrosch and Müllerson explained it, Soviet theory treated “the existing corpus of international law as a system of sufficiently determinate principles and norms which all states are obliged to observe in their mutual relations...”¹⁴ As a direct consequence, Soviet theory rejected “the general principles of law recognised by the civilised nations”¹⁵

The existence of two opposed social systems meant that the only norms of “customary” or “general” international law could be those which were neither socialist nor capitalist. Tunkin asserted that: “only those international legal norms which embrace the agreement of all states are norms of contemporary general

⁸ I. Scobbie *Ibid* p.92

⁹ I. Scobbie *Ibid* p.92

¹⁰ I. Scobbie *Ibid* p.96

¹¹ G. Tunkin *Theory of International Law* (Cambridge MA: Harvard University Press, 1974)

¹² G. Tunkin ‘Is General International Law Customary Only?’ vol.4, n.4 *European Journal of International Law* 534-541, at p.534

¹³ I. Scobbie *Ibid* at p.97

¹⁴ L. Damrosch and R. Mullerson ‘The Role of International Law in the Contemporary World’ in J.F.Damrosch, G.M.Danilenko, and Mullerson R (eds) *Beyond Confrontation: International Law for the Post-Cold War Era* (1995) at p.9

¹⁵ Article 38(1)(c) of the Statute of the International Court of Justice

international law.”¹⁶ Thus, Soviet theory recognised only treaties and custom – narrowly defined as above – as sources of international law.

The US scholar Alwyn Freeman (1910-1983)¹⁷, writing much earlier, also noted that Soviet international law embraced:

“...the most extreme form of positivism... The Soviet brand of positivism is much more restricted, much narrower, and is, in sum, a rejection of a great portion of international legal principles... Soviet positivism has been distinguished by the exclusion of customary practice as a source of international obligations. It views international law as embracing only those principles to which states have expressly consented through an international agreement or have otherwise manifested their acquiescence.”¹⁸

Indeed, writing in 1948, at the time of his frenetic activity in the United Nations as leader of the Soviet delegation, the notorious Andrey Vyshinsky¹⁹ wrote that “... the Soviet theory of international law regards the treaty, resting on the principles of sovereign equality of peoples and the respect for mutual interests and rights as the basic source of international law. This secures for international law and its institutions full moral as well as juridical force since at their base will lie the obligations agreed to and voluntarily assumed by nations.”²⁰

There is, however, a point at which this conservatism shows another, opposite side. Freeman did not fail to notice it, in his discussion of sovereignty. He explained that the Soviets “... retain the classical, strict conception of states alone as the subjects of

¹⁶ G. Tunkin *Theory of International Law* (Cambridge, MA: Harvard University Press, 1974) at pp.250-251

¹⁷ Freeman was an editor of the *American Journal of International Law* from 1955 to 1972, worked on international claims cases while in the US State Department, and served in the Army Judge Advocate General's Office in WW II, on the staff of the Senate Committee on Foreign relations, and as an official of the IAEA.

¹⁸ A. Freeman ‘Some Aspects of Soviet Influence on International Law’ (1968) *American Journal of International Law* vol.62, n3, 710-722, at p.713

¹⁹ Andrey Vyshinsky was born in Odessa, Russia, on 28th November, 1883. As a young man he joined the Social Democratic Party. In the 1903 split, he sided with the Mensheviks. Vyshinsky became a lawyer and after the October Revolution he joined the Bolsheviks. He taught law at Moscow State University until becoming a state prosecutor. Between 1934 and 1938 Vyshinsky was the leading prosecutor in the “show trials” of Stalin's opponents. In 1940 he was given the responsibility of managing the (illegal) occupation of Latvia. He also helped establish communist rule in Romania before becoming Soviet foreign minister in March, 1949. He survived the purge that followed the death of Joseph Stalin in 1953 and continued as the Soviet representative in the United Nations. Vyshinsky died in New York on 22nd November, 1954.

²⁰ A. Vyshinsky ‘Mezhdunarodnoye pravo i mezhdunarodnaya organisatsiya (International Law and International Organisation)’ (1948) No.1 *Sovetskoye gosudarstvo i pravo (Soviet State and Law)* 22, cited in J. Triska ‘Treaties and Other Sources of Order in International Relations: The Soviet View’ (1958) vol.52 n.4 *American Journal of International Law* 699-726, at p.713

international law, with a rigid insistence on sovereignty in its most extreme form, a form which must deny the paramount nature of international law over national law. They do, however, recognise an exception in favour of peoples fighting for “national liberation.””²¹ It is very odd, however, that Freeman did not notice the basis for such a claim: the right of peoples to self-determination. This “principle” had become a “right” as the common first article of the two International Covenants of 1966 – the “International Bill of Rights”.

Scobbie quite rightly notes the notorious so-called “Brezhnev doctrine”, that relations between socialist states are not based on “peaceful co-existence”, but on “proletarian internationalism”. This hypocritical policy justified the invasions of Hungary in 1956, Czechoslovakia in 1968, and Afghanistan in 1980.²² But, curiously, he says nothing about the application of the “right of peoples to self-determination” to Soviet support for the national liberation struggles of three decades from WWII.

In the next section of this chapter, therefore, I analyse the origins of the Soviet doctrine of the right of nations to self-determination. It should be noted that in Russian as in many other languages, “nation” and “people” are practically synonymous.

3. THE BOLSHEVIKS AND INTERNATIONAL LAW

3.1 Bolshevism versus Austro-Marxism

The Bolshevik and then Soviet doctrine of the right of nations to self-determination had its origin in the uncompromising pre-WW I struggle between Lenin, Stalin and Trotsky (and orthodox Marxists with Karl Kautsky at their head) on the one side, and the Austro-Marxist theorists such as Karl Renner and Otto Bauer on the other.²³

Austro-Marxist ideas of non-territorial personal autonomy, developed as a possible antidote to the dissolution of the multi-national Austro-Hungarian Empire, found a ready audience among the Jews of the Russian Empire. The Jews had no “historic” or

²¹ A. Freeman ‘Some Aspects of Soviet Influence on International Law’ (1968) vol.62, n3 *American Journal of International Law* 710-722, at p.716

²² I. Scobbie *Ibid* at p.99

²³ B.Bowring ‘Burial and Resurrection: Karl Renner’s controversial influence on the ‘National Question’ in Russia’ in E. Nimni (ed) *National-Cultural Autonomy and its Contemporary Critics* (London: Routledge, 2005)

“consolidated” territory. The Jewish “Bund” (*Algemeyner Yidisher Arbeter Bundin Lite, Poyln un Rusland*) was founded in Vilna (now Vilnius, capital of Lithuania) in 1897, as a Jewish political party espousing social democratic ideology as well as cultural Yiddishism and Jewish national autonomism.²⁴ The First Congress of the Russian Social Democratic Labour Party in 1898 decided that the Bund “is affiliated to the Party as an autonomous organisation independent only in regard to questions specifically concerning the Jewish proletariat.”²⁵ It was from the start influenced by the ideas of Renner and Bauer, although Renner’s model did not allow for diasporas or scattered minorities.²⁶ As Yves Plasseraud points out:

“The leaders of the Bund and the Jewish Socialist Workers Party therefore took on the task of adapting Renner’s ideas to the situation of the Yiddish-speaking Jews of Central and Eastern Europe... The Bundist leaders proposed that Russia, like the Austro-Hungarian Empire, should become a federation of autonomous peoples.”²⁷

Vladimir Ilich Ulyanov (Lenin), the leader of the Bolsheviks following the split in the RSDLP in 1903, was a bitter opponent of the Bund and of the Austro-Marxist prescription. In October 1903 he published an article entitled “The Position of the Bund in the Party”.²⁸ He was especially critical of the Bund’s idea of a Jewish nation. He argued that: “Unfortunately, however, this Zionist idea is absolutely false and essentially reactionary. ‘The Jews have ceased to be a nation, for a nation without a territory is unthinkable’, says one of the most prominent of Marxist theoreticians, Karl Kautsky.” Lenin was wholly in agreement with Kautsky on this point.

Lenin thus adopted Kautsky’s orthodox “scientific” definition of the concept “nationality”, with two principal criteria: language and territory.²⁹ Both Lenin and Kautsky were in favour of Jewish assimilation.

At the January 1912 Conference of the RSDLP(B), the Jewish Bund declared that it had been influenced by Austro-Marxist theories of personal or non-territorial national

²⁴ In the Bund Archive at the Russian State Archive of Social and Political History (GRASPI), Moscow

²⁵ *The CPSU in Resolutions and Decisions of Its Congresses, Conferences and Plenary Meetings of the Central Committee* (Moscow: Progress, 1954) Part 1, 14

²⁶ Y. Plasseraud “How to solve Cultural Identity Problems: Choose your own nation” *Le Monde Diplomatique* May 2000, p.4 at www.globalpolicy.org/nations/citizen/region.htm

²⁷ Y. Plasseraud *Ibid* p.4

²⁸ V.I.Lenin *Complete Collected Works* (2nd ed) Vol 7 Moscow: Progress, 1968), 92, first published in *Iskra* 22 October 1903, n.51

²⁹ K. Kautsky, *Neue Zeit*, 1903, No.2

cultural autonomy. Consequently, at the August conference of the RSDLP(B), it adopted a resolution “On National Cultural Autonomy”, including it in the programme of the Bund.³⁰

Lenin’s reply was uncompromising. In 1913, in his "Draft Platform of the 4th Congress of the Social Democrats of the Latvian Area", he denounced the "bourgeois falsity of the slogan of "cultural national autonomy". He asserted that in Russia only the Jewish Bund members – “together with all the Jewish bourgeois parties” - had so far defended this concept.³¹ Later that year he devoted an article to "Cultural-National Autonomy"³². He once more denounced this plan, as “an impossibility”:

“A clear grasp of the essence of the “cultural-national autonomy” programme is sufficient to enable one to reply without hesitation – it is absolutely impermissible. As long as different nations live in a single state they are bound to one another by millions and thousands of millions of economic, legal and social bonds. How can education be extricated from these bonds? Can it be ‘taken out of the jurisdiction of the state’, to quote the Bund formula?”

Lenin particularly mocked the references to Austria:

“... why should the most backward of the multinational countries be taken as the *model*? Why not take the most advanced? This is very much in the style of the bad Russian liberals, the Cadets, who for models of a constitution turn mainly to the backward countries such as Prussia and Austria, and not to advanced countries such like France, Switzerland and America!”

3.2 Stalin’s “scientific” contribution

Also in early 1913, J. V. Stalin published, under Lenin’s instruction, his one substantial work of theory, *Marxism and the National Question*.³³ This devoted a whole chapter to “Cultural-National Autonomy”, and was primarily designed as a reply to the Bund. Stalin attempted his own definition of a nation:

³⁰ V Filippov “Natsionalno-Kulturnaya Avtonomiya: klassicheskaya kontseptsiya i yeyo sovremennaya interpretatsiya (National-Cultural Autonomy: the classical conception and its contemporary interpretation), 63-84 in Ye. Filippova (ed) *Natsionalno-Kulturnaya Avtonomiya: problemy i suzhdeniya (National-Cultural Autonomies: problems and evaluation)* (Moscow: Etnosfera 1998) - Materials from the Round Table organised by the “Etnosfera” Centre; at p.66

³¹ V. Lenin *Complete Collected Works* (2nd ed. 1968) Vol 19 p.117, first published in *Za Pravda* 28 November 1913, n.46

³² V. Lenin *Ibid* p.503 n.30

³³ J. Stalin *Marxism and the National Question* nos 3-5 *Prosveshniye (Enlightenment)* March-May 1913, at www.marxists.org/reference/archive/stalin/works/1913/03.htm

“A nation is a historically constituted, stable community of people, formed on the basis of a common language, territory, economic life and psychological make-up manifested in a common culture.”

It is noteworthy that Stalin’s definition of the nation is not so far from contemporary orthodoxy. Anthony D. Smith defines *ethnie* as:

“... a named unit of population with common ancestry myths and shared historical memories, elements of shared culture, a link with a historic territory, and some measure of solidarity, at least among the elites.”³⁴

Note the importance of the link to territory. Again, he defines the modern nation, in ideal-typical terms, as “... a named human population sharing a historic territory, common myths and historical memories, a mass, public culture, a common economy and common rights and duties for all members.” John Hutchinson, too, contends that “... Nations are distinguished in addition by a commitment to citizenship rights, and the possession of a high literate culture, a consolidated territory and a unified economy.”

They are all agreed on the importance of territory.

Stalin’s next move was a critique of Renner and Bauer, insisting on the importance of territory: “Bauer’s point of view, which identifies a nation with its national character, divorces the nation from its soil, and converts it into an invisible, self-contained force.” Stalin answer was as follows: “... there is no doubt a) that cultural-national autonomy presupposes the integrity of the multi-national state, whereas self-determination goes outside the framework of this integrity, and b) that self-determination endows a nation with complete rights, whereas national autonomy endows it only with cultural rights.”... and he further warned that “Springer’s and Bauer’s cultural-national autonomy is a subtle form of nationalism.”

3.3. The Bolshevik origins of the right to self-determination

Applying his definition and critique to the national question in Russia, Stalin started from the assertion that “the *right of self-determination is an essential element* in the solution of the national question.” For “crystallised units” such as Poland, Lithuania,

³⁴ A. Smith “Nations and History” in M. Guibernau and J. Hutchinson (eds) *Understanding Nationalism* (London: Polity, 2001), pp.9-31, at p.19. See also A. D. Smith “Dating the nation” in D. Conversi (ed) *Ethnonationalism in the Contemporary world: Walker Connor and the study of nationalism* (London: Routledge, 2002), pp.53-71

the Ukraine, the Caucasus etc he believed that *national* autonomy could not solve the problem, and the only correct solution was *regional* autonomy, for a definite population inhabiting a definite territory. The national minorities in each of these territories need not fear the result: “Give the country complete democracy and all grounds for fear will vanish.” This would include equal rights of nations in all forms – liberty of conscience, liberty of movement, languages, schools, etc.

In December 1913 Lenin began himself to write on the question of the “right of nations to self-determination”. In a short polemic³⁵ on the question of independence for Ukraine, he insisted on “... *freedom* to secede, for the *right* to secede”, while conceding that “... the *right* to self-determination is one thing, of course, and the *expediency* of self-determination, the secession of a given nation under given circumstances, is another.” Later in December 1913³⁶ he again declared that “A democrat could not remain a democrat (let alone a proletarian democrat) without systematically advocating, precisely among the Great-Russian masses and in the Russian language, the “self-determination” of nations in the political and not in the “cultural” sense.” The latter, he said, meant only freedom of languages.

In April-June 1914 Lenin published his own substantial work on the question, a polemic against Rosa Luxemburg, who opposed the break-up of the Tsarist Empire, “The Right of Nations to Self-Determination”.³⁷ In the first chapter, he insisted that “... it would be wrong to interpret the right to self-determination as meaning anything but the right to existence as a separate state.”³⁸ Furthermore, “... the national state is the rule and the “norm” of capitalism: the multi-national state represents backwardness... from the standpoint of national relations, the best conditions for the development of capitalism are undoubtedly provided by the national state.”³⁹

His understanding of the historical significance of the demand is highly significant for this chapter:

³⁵ V. Lenin ‘The Cadets and “The Right of Nations to Self-Determination”’, *Proletarskaya Pravda* No.4, 11 December 1913, *Collected Works* (1977) vol.19, 525-527, at <http://www.marxists.org/archive/lenin/works/1913/dec/11.htm>

³⁶ V. Lenin ‘National-Liberalism and the Right of Nations to Self-Determination’ *Proletarskaya Pravda* No.12, 20 December 1913, *Collected Works* (1972) vol.20, pp.56-58, at <http://www.marxists.org/archive/lenin/works/1913/dec/20.htm>

³⁷ published in the journal *Prosveshcheniye* Nos.4, 5 and 6, *Collected Works* (1972) vol.20, pp.393-454, at <http://www.marxists.org/archive/lenin/works/1914/self-det/index.htm>

³⁸ <http://www.marxists.org/archive/lenin/works/1914/self-det/ch01.htm>, p.2

³⁹ <http://www.marxists.org/archive/lenin/works/1914/self-det/ch01.htm>, p.5

“The epoch of bourgeois-democratic revolutions in Western, continental Europe embraces a fairly definite period, approximately between 1789 and 1871. This was precisely the period of national movements and the creation of national states. When this period drew to a close, Western Europe had been transformed into a settled system of bourgeois states, which, as a general rule, were nationally uniform states. Therefore, to seek the right to self-determination in the programmes of West-European socialists at this time of day is to betray one’s ignorance of the ABC of Marxism.

In Eastern Europe and Asia the period of bourgeois-democratic revolutions did not begin until 1905. The revolutions in Russia, Persia, Turkey and China, the Balkan wars - such is the chain of world events of *our* period in our “Orient”. And only a blind man could fail to see in this chain of events the awakening of a *whole series* of bourgeois-democratic national movements which strive to create nationally independent and nationally uniform states. It is precisely and solely because Russia and the neighbouring countries are passing through this period that we must have a clause in our programme on the right of nations to self-determination.”⁴⁰

Thus, Lenin’s conception of self-determination in 1914 was wholly and necessarily relevant not only to the Tsarist Empire but also to the European colonial empires.

He spelt this out further in 1915, in a polemic with his fellow revolutionary Karl Radek:

“We demand freedom of self-determination, i.e., independence, i.e., freedom of secession for the oppressed nations, not because we have dreamt of splitting up the country economically, or of the ideal of small states, but, on the contrary, because we want large states and the closer unity and even fusion of nations, only on a truly democratic, truly internationalist basis, which is inconceivable without the freedom to secede. Just as Marx, in 1869, demanded the separation of Ireland, not for a split between Ireland and Britain, but for a subsequent free union between them, not so as to secure “justice for Ireland”, but in the interests of the revolutionary struggle of the British proletariat, we in the same way consider the refusal of Russian socialists to demand freedom of self-determination for nations, in the sense we have indicated above, to be a direct betrayal of democracy, internationalism and socialism.”⁴¹

Finally, in 1916, in a long article entitled ‘The Discussion on Self-Determination Summed Up’⁴², Lenin wrote, with regard to the colonies:

⁴⁰ <http://www.marxists.org/archive/lenin/works/1914/self-det/ch03.htm>

⁴¹ V. Lenin “The Revolutionary Proletariat and the Right of Nations to Self-Determination”, *Collected Works* (Moscow: Progress, 1974) Vol.21, pp.407-414, at <http://www.marxists.org/archive/lenin/works/1915/oct/16.htm>

⁴² *Sbornik Sotsial-Demokrata* No.1, October 1916, *Collected Works* (Moscow: Progress 1974) Vol.22, pp.320-360, at <http://www.marxists.org/archive/lenin/works/1916/jul/x01.htm>

“Our theses say that the demand for the immediate liberation of the colonies is as “impracticable” (that is, it cannot be effected without a number of revolutions and is not stable without socialism) under capitalism as the self-determination of nations, the election of civil servants by the people, the democratic republic, and so on—and, furthermore, that the demand for the liberation of the colonies is nothing more than “the recognition of the right of nations to self-determination””

It is, therefore, perfectly clear that Lenin’s conception of self-determination had nothing in common with that propounded by US President Woodrow Wilson after WWI. It should be recalled that standard texts on international law usually refer only to Wilson as progenitor of the concept. For Wilson, self-determination applied – and applied only – to the former Ottoman, Austro-Hungarian and Russian empires. The British, Belgian, French, Dutch, Spanish and Portuguese Empires were in no way to be threatened. And American interests in Puerto Rico and the Philippines were also sacrosanct. Lenin’s approach, on the other hand, was consistent, and revolutionary.

4. THE SOVIET PRACTICE OF SELF-DETERMINATION

I wish to maintain strongly that, for Lenin at least, self-determination was not a mere slogan, but a principle he put into practice with immediate effect within the former Russian Empire following the Bolshevik Revolution. According to Igor Blishchenko (1930-2000), one of the best Soviet scholars of international law⁴³, in a text published, ironically, in 1968, the year that the USSR crushed the “Czech Spring”, Lenin’s Decree on Peace of 26 October 1917, for the first time extended the principle of the right to self-determination to all peoples, thereby discarding the imperialist distinction between “civilised” and “uncivilised” nations.⁴⁴

In fact, the Decree declared that:

“By annexation or seizure of foreign territory the government, in accordance with the legal concepts of democracy in general and of the working class in particular, understands any incorporation of a small and weak nationality by a large and powerful state without a clear, definite and voluntary expression of agreement and desire by the weak nationality, regardless of the time when such forcible incorporation took place, regardless also of how developed or how backward is the nation forcibly attached or forcibly detained within the

⁴³ I worked with Blishchenko for a number of years, in particular on the draft of the Rome Statute of the International Criminal Court; for a touching obituary by the International Committee of the Red Cross, see <http://www.icrc.org/Web/eng/siteeng0.nsf/html/57JREV>

⁴⁴ I. Blishchenko *Antisovyetizm i mezhdunarodnoye pravo* (Antisovietism and international law) (Moscow: Izdatelstvo IMO, 1968) 69

frontiers of the [larger] state, and, finally, regardless of whether or not this large nation is located in Europe or in distant lands beyond the seas.

If any nation whatsoever is detained by force within the boundaries of a certain state, and if [that nation], contrary to its expressed desire whether such desire is made manifest in the press, national assemblies, party relations, or in protests and uprisings against national oppression, is not given the right to determine the form of its state life by free voting and completely free from the presence of the troops of the annexing or stronger state and without the least desire, then the dominance of that nation by the stronger state is annexation, i.e., seizure by force and violence.”⁴⁵

In his article, Blishchenko moved next to answer a series of Western scholars who argued that the Decree was entirely hypocritical, first having no application to peoples within the USSR, and second, having been applied only to Finland in the former Tsarist Empire. He pointed to the substantial autonomy, if short of secession, enjoyed by Union and Autonomous Republics in the USSR in accordance with Article 17 of its Constitution. More importantly, he underlined the extent to which the principle was indeed put into practice by Lenin in the early years of the USSR. What he failed to point out, not surprisingly in 1968, is the fact that one of Lenin’s most bitter struggles with Stalin concerned independence for Georgia.⁴⁶

In a much later text⁴⁷, Blishchenko showed that the early Soviet government was entirely consistent in implementing self-determination. On 4 (17) December 1917 the Soviet government recognised the right to self-determination of Ukraine. In response to the request of the Finnish government, the Soviet of Peoples’ Commissars on 18 (31) December 1917 resolved to go to the Central Executive Committee with a proposal to recognise Finland’s independence. In fact, it was the Whites, seeking to restore the Empire, who opposed Finnish independence. By a Decree of 29 December 1917 (11 January 1918) the right of the people of “Turkish Armenia” to self-determination was recognised. In answer to a request from the government of Soviet

⁴⁵ <http://www.firstworldwar.com/source/decreeonpeace.htm>

⁴⁶ See M. Lewin *Lenin’s Last Struggle* (Ann Arbor, MI: University of Michigan Press, 2005)

⁴⁷ I. Blishchenko ‘*Soderzhaniye prava narodov na samoopredeleniye* (The content of the right of peoples to self-determination)’, in A. Ossipov *Pravo Narodov na Samoopredeleniye: Ideya i Voploshcheniye* (Right of Peoples to Self-Determination: Idea and Realisation) (Moscow: Zvenya 1998), p.71; see also, on national liberation movements: D. I. Baratashvili ‘*Natsionalno-osvoboditelnoye dvizheniye i razvitiye mezhdunarododnovo prava* (The national liberation movement and the development of international law)’ (1967) No. 9 *Sovetsoye gosudarstvo i pravo* (Soviet state and law) 69-75

Estland, on 7 December 1918 Lenin signed a Decree on recognition of the independence of Estonia, Latvia and Lithuania.

On 5 February 1919 the Presidium of the All-Union Central Executive of Soviet Russia insisted, in a principled manner, that in implementing the principle of self-determination, the issue was resolved by the self-determining nation itself, by the people itself. The dictatorship of the proletariat was not a condition for self-determination, which applied equally to bourgeois independence movements. Thus, the Soviet government recognised the republics of Bukhara and Khorezm, which were not socialist.

This was the profoundly significant historical context in which Yevgenii Pashukanis became the acknowledged theoretician and leader of a Marxist account of law and of international law

4. SOVIET LEGAL DOCTRINE: YEVGENY PASHUKANIS

4.1 Pashukanis' history

Pashukanis was born in what is now Lithuania in 1891, and was liquidated in 1937, condemned as a member of a “band of wreckers” and “Trotsky-Bukharin fascist agents”.⁴⁸ He was a pupil of the Latvian-born legal theorist Piotr I. Stuchka, his senior by 25 years (Stuchka lived from 1865 to 1932, when, unusually for those times, he died of natural causes)⁴⁹. Chris Arthur has described Pashukanis’ “important contribution to the materialist critique of legal forms” as “to this day the most significant Marxist work on the subject”.⁵⁰ I do not disagree. At the same time I hope to demonstrate that the paradoxical effects of Soviet practice (as opposed to the positivist theory they propagated) played a key role in developing and putting in place one of the most important principles of international law, the right of peoples to self-determination.

Pashukanis was, from 1925 to 1936, the leading theorist of law in the USSR, recognised as such by none other than Stuchka himself, who wrote that the *General*

⁴⁸ C. Arthur ‘Introduction’ to Y. Pashukanis *Law and Marxism: A General Theory. Towards a Critique of the Fundamental Concepts* (London: Pluto Press, 1983), p.10

⁴⁹ I. Stuchka *Selected Writings on Soviet Law and Marxism* (edited, annotated, translated and introduced by R. Sharlet, P. Maggs and P. Beirne) (Armonk: M.E.Sharpe, 1988), p.x-xi

⁵⁰ C. Arthur *Ibid* p.9

Theory of Law and Marxism was “to the highest degree a valuable contribution to our Marxist theoretical literature on law and directly supplements my work, which provides only an incomplete and greatly inadequate general doctrine of law.”⁵¹ This was a period of “passionate legal debate”, well analysed by Michael Head.⁵²

Pashukanis was the Director of the Institute of Law of the Soviet Academy of Sciences, and effectively the country’s director of legal research and legal education. He made significant changes to legal education, including the virtual elimination of civil law subjects from the educational curriculum, and replacing them with an emphasis on economics and economic administration.⁵³ John Hazard (1909-1955)⁵⁴, who studied under him, recalled another side of his character: in the Institute the situation where he “...projected a theory said to be infallible, and where those who strayed from Pashukanis’ line were castigated like Korovin or denied faculty appointments, promotions and salary raises was novel to me.”⁵⁵ That is probably disingenuous of Hazard, a native of American academe; but seems to be accurate.

Edwin Garlan, writing in 1954 for an American audience during the Cold War, identified two conclusions reached by Pashukanis on the basis of his analysis of basic legal categories. First:

“Only bourgeois-capitalist society creates all the conditions essential to the attainment of complete definiteness by the juridic element in social relationships”⁵⁶

⁵¹ P. Stuchka *Ibid* p.xvii

⁵² M. Head “The Passionate Legal Debates of the Early Years of the Russian Revolution” (January 2001) Vol. XIV, No.1 *Canadian Journal of Law and Jurisprudence* 3-27. See also the extracts from Pashukanis and Stuchka in Z. Zile *Ideas and Forces in Soviet Legal History: A Reader on the Soviet State and Law* (Oxford: Oxford University Press, 1992)

⁵³ E. Garlan ‘Soviet Legal Philosophy’ (review of J. Hazard (intr) *Soviet Legal Philosophy* (1951)) (1954) vol.51, n.10 *The Journal of Philosophy* 300-307, at p.303

⁵⁴ Hazard was a founder of the field of Soviet legal studies in America who taught at Columbia for 48 years. Upon his graduation from Harvard Law School, he was sent by the Institute of Current World Affairs as the first American to study Soviet law at the Moscow Juridical Institute. Only a handful of scholars were concerned with Russian diplomacy and business then, and scholarship on Russia was limited principally to historical studies. He approached the field of Soviet law as a pioneer and received the certificate of the Juridical Institute in 1937. He was the author of widely used textbooks and studies of Soviet law and public administration, and served the U.S. government during World War II, helping to negotiate the Lend-Lease agreement with the Soviet Union.

⁵⁵ J. Hazard ‘Memories of Pashukanis’, Foreword to *Evgeny Pashukanis, Selected Writings on Marxism and Law* (London: Academic Press, 1980), pp.273-301. at <http://www.marxists.org/archive/pashukanis/biog/memoir.htm> Hazard (1979)

⁵⁶ Y. Pashukanis *The General Theory of Law and Marxism* (1924) in *Evgeny Pashukanis, Selected Writings on Marxism and Law* (London: Academic Press, 1980), pp.168-83, at p.110

And second:

“The dying out of the categories... of bourgeois law by no means signifies that they are replaced by new categories of proletarian law – precisely as the dying out of the category of value, capital, gain and so forth will not (with the transition to expanded socialism) mean that new proletarian categories of worth, capital rent and so forth appear. The dying out of the categories of bourgeois law will in these conditions signify the dying out of law in general: that is to say, the gradual disappearance of the juridic element in human relations.”⁵⁷

As Garlan notes, it follows from these propositions that the transition period of the dictatorship of the proletariat had to take the form of bourgeois law. Thus, the task of transition law was to eliminate itself, by way of a rapid movement to policy – technical - administration as opposed to civil and criminal law.⁵⁸

4.2 Pashukanis revived: China Miéville

China Miéville, with his re-working of the “commodity-form theory of international law,”⁵⁹ has provided the most serious and sophisticated attempt in recent years at a Marxist account of international law⁶⁰. The final sentence of his powerful book truly sums up his conclusion: “The chaotic and bloody world around us *is the rule of law*.”⁶¹ International law and human rights are at best distractions, on his account, and at worst potent weapons in the hands of the enemy. As he points out in his Introduction to *Between Equal Rights*, Miéville draws extensively from Pashukanis, who was one of the most serious Marxist legal theorists of the USSR or anywhere. Miéville traces and explains his arguments in Chapter Three, and seeks, through “immanent reformulation”, to answer some criticisms of Pashukanis.⁶²

China Miéville identifies in Critical Legal Studies and other so-called “New Stream” theories of international law an “implicit theory of the social world, an idealist

⁵⁷ Y. Pashukanis ‘The General Theory of Law and Marxism’ (1924) in Evgeny Pashukanis, Selected Writings on Marxism and Law (eds. Beirne & R. Sharlet), (London: Academic Press, 1980) pp.168-83, at pp.184-5. translated by Peter B Maggs, pp.40-131, at p.122

⁵⁸ E. Garlan ‘Soviet Legal Philosophy’ (review of J. Hazard (intr) *Soviet Legal Philosophy* (1951)) (1954) vol.51, n.10 *The Journal of Philosophy* 300-307, at p.303

⁵⁹ C. Miéville Chapter 3 in this book

⁶⁰ C. Miéville *Between Equal Rights: A Marxist Theory of International Law* (Leiden: Brill Academic Publishers, 2005)

⁶¹ C. Miéville *Ibid* p. 319

⁶² C. Miéville *Ibid* p. 6-7

constructivism.”⁶³, in which international law is sometimes depicted as a “constraining myth” inherited from the past, or where structures of everyday life such as international law are deemed to be “the accretion of ideas.” For Miéville, this privileges “...abstract concepts over the specific historic context in which certain ideas take hold, and how.”

Miéville upholds a resolutely “classical” version of Marxism.⁶⁴ As it happens, I agree with this. However, as explained by Miéville, Pashukanis argues that *the logic of the commodity form is the logic of the legal form*. In commodity exchange, he continues, “each commodity must be the private property of its owner, freely given in return for the other... Therefore, each agent in the exchange must be i) an owner of private property, and ii) formally equal to the other agent(s). Without these conditions, what occurred would not be commodity exchange. The legal form is the *necessary form* taken by the relation between these formally equal owners of exchange values.”⁶⁵ For Miéville, law is called forth as a “specific form of social regulation... *That form is law*, which is characterised by its abstract quality, its being based on the equality of its subjects and its pervasive character in capitalism.”⁶⁶ Miéville refers with approval to Pashukanis’ “... assertion that private law, rather than public law, is the ‘fundamental, primary level of law’. The rest of the legal superstructure can be seen as essentially derived from this.”⁶⁷

In fact, Pashukanis’ assertion goes rather further, and is as follows:

“Yet while civil law, which is concerned with the fundamental, primary level of law, makes use of the concept of subjective rights with complete assurance, application of this concept in public-law theory creates misunderstandings and contradictions at every step. For this reason, the system of civil law is distinguished by its simplicity, clarity and perfection, while theories of constitutional law teem with far-fetched constructs which are so one-sided as to become grotesque. The form of law with its aspect of subjective right is born in a society of isolated bearers of private egotistic interests...”⁶⁸

⁶³ C. Miéville Chapter 3 in this book

⁶⁴ C. Miéville *Ibid*

⁶⁵ C. Miéville *Between Equal Rights: A Marxist Theory of International Law* (Leiden: Brill Academic Publishers, 2005) p.78

⁶⁶ C. Miéville *Ibid* p. 79

⁶⁷ C. Miéville Chapter 3 in this book; and in his 2005 book, at p.86

⁶⁸ Y. Pashukanis *Law and Marxism: A General Theory. Towards a Critique of the Fundamental Concepts*. Edited and introduced by Chris Arthur (London: Pluto Press, 1983), p.103

It is clear that Pashukanis knew Marx' *On the Jewish Question*⁶⁹, and it must be said that the passage just cited is highly reminiscent of what Marx had to say about the "rights of man":

"None of the so-called rights of man, therefore, go beyond egoistic man, beyond man as a member of civil society, that is, an individual withdrawn into himself, into the confines of his private interests and private caprice, and separated from the community."⁷⁰

Later in the same passage, Marx expressed ironic puzzlement that in the French Declaration of 1789 "... finally, it is not man as *citoyen*, but man as *bourgeois* who is considered to be the *essential* and *true* man."

5. PASHUKANIS' LIMITATIONS

I am also a great admirer of Pashukanis' early work. However, I doubt very much that his work on the commodity theory of law can really serve as the basis for a new theory of international law. Miéville himself at several points recognises Pashukanis' limitations and contradictions. Here are some important objections.

First, Pashukanis' theory strongly suggests that there was no law as he defines it before the development of the commodity form, which only appeared with the development of capitalism. That must be either wrong or circular, a definition that depends upon itself. Miéville does not neglect this problem, and effectively criticises Pashukanis for "eliding" the distinction between the *logical* movement from simple to capitalist commodity exchange, and the *historical* movement from exchange of commodities under pre-capitalist societies to that in capitalism itself⁷¹. Miéville is forced to assert that: "A history of the development of the legal form *can* be developed using Pashukanis' theory."⁷² Chris Arthur notes this problem from a different point of view in his *Introduction*:

"A difficulty that arises from a Marxist point of view is that the bourgeois regime is one of *generalised* commodity production; that is, it treats labour-power as a commodity and pumps out surplus labour from the wage-workers.

⁶⁹ See Y. Pashukanis *Ibid* p.132, note 43

⁷⁰ K. Marx 'On the Jewish Question', in Karl Marx Friedrich Engels *Collected Works* (New York: International Publishers, 1975), Vol 3 pp.146-174 at p.164

⁷¹ C. Miéville *Between Equal Rights: A Marxist Theory of International Law* (Leiden: Brill Academic Publishers, 2005) p.96-97

⁷² C. Miéville *Ibid* p. 97

Yet Pashukanis makes reference to commodity exchange without taking account of the various forms of production that might involve production for a market...⁷³

In other words, Pashukanis has failed to take into account the whole of human pre-capitalist history.

Second, Miéville, it seems to me, takes insufficient notice of Bob Fine's critical remarks, which go to the heart of this particular re-appropriation of Pashukanis. First, as Fine points out, "Whereas Marx derived law from relations of commodity production, Pashukanis derived it from commodity exchange."⁷⁴ This, according to Fine, leads Pashukanis to a conclusion that was plainly wrong:

"Instead of seeing both the content and the forms of law as determined by and changing with the development of productive relations, Pashukanis isolated law from its content and reduced quite different forms of law, expressing qualitatively different social relations, to a single, static and illusory 'legal form'."⁷⁵

And any 'legal form' must be bourgeois. As Fine explains, this led Pashukanis in 1924 to argue that the Soviet Union of the New Economic Policy (NEP) was not yet ready for the abolition of law, and that, since law is in any event bourgeois, there can be no such thing as proletarian law. More to the point, Pashukanis was obliged by the logic of his own position to see the transition from capitalism to socialism simply as the replacement of commodity exchange by planned production, that is, the replacement of bourgeois (legal) forms by socialist (technical forms).⁷⁶ Thus, as Fine points out, in 1929 he accepted Stalin's view that communism was being achieved through the first Five-Year Plan.⁷⁷ Miéville has read Fine⁷⁸; but seems entirely to have missed the point of his criticism.

⁷³ C. Arthur *Ibid* at p. 29

⁷⁴ B. Fine *Democracy and the Rule of Law. Marx's Critique of the Legal Form* (Caldwell, NJ: The Blackburn Press, 2002), at p.157

⁷⁵ B. Fine *Ibid* at p.159

⁷⁶ B. Fine *Ibid* at p.167

⁷⁷ B. Fine *Ibid* at p.168

⁷⁸ See C. Miéville *Between Equal Rights: A Marxist Theory of International Law* (Leiden: Brill Academic Publishers, 2005) at p.101, note 122, 123

Third, Miéville's reprinting and discussion of Pashukanis' short essay on international law⁷⁹ from 1925, fails to take account not only of the fact of Pashukanis' intellectual trajectory until his death at the hands of Stalin in 1937, but, more importantly, the way in which that trajectory was already determined by Pashukanis' early accommodation to Soviet technicism. Indeed, the essay formed part of the three volume *Encyclopedia of State and Law* which was launched and edited by Stuchka. Pashukanis contribution was entirely consistent with Stuchka's overall line and policy. But the reasons for this went deeper than a mere desire for conformity, which in any event was not in Pashukanis' character. As Fine explains, "Not only did Pashukanis invert the relationship between law and bureaucracy envisaged by Marx, he lost all sight of the democratic nature of Marx's critique of the state, according to which its withering away was to be the result of its ever more radical democratisation."⁸⁰

6. PASHUKANIS' OFFICIAL TRAJECTORY

Pashukanis was a staunch loyalist in relation to the regime – by conviction rather than any sort of pressure. Thus, by 1932, Pashukanis, by then editor in chief of the official law journal *Soviet State*, was able to write a "hallelujah" in response to Stalin's letter "Some questions on the history of Bolshevism".⁸¹ Pashukanis' major work on international law, *Essays in International Law*, appeared in 1935⁸². Within two years he was dead, following *Pravda*'s announcement on 20 January 1937 that he had been found to be an enemy of the people – just two months after he had been named by the regime to supervise the revision of the whole system of Soviet codes of law. Michael Head's analysis leads to a critical assessment of Pashukanis' legacy:

"He offered profound insights into the economic roots of the legal form, even if displaying several basic confusions in Marxist economics. However, he was weaker on the ideological and repressive role of law and the state apparatus.

⁷⁹ C. Miéville *Ibid* 321-335; Y. Pashukanis (1925) *Mezhdunarodnoe pravo, Entsiklopediia gosudarstva i prava* (International Law, Encyclopedia of state and law) (Moscow: Izd. Kommunisticheskoi akademii) vol.2, pp.858-874.

From Evgeny Pashukanis, *Selected Writings on Marxism and Law* (eds. Beirne & R. Sharlet), (London: Academic Press, 1980), pp.168-83, at pp.184-5. translated by Peter B Maggs
At <http://www.marxists.org/archive/pashukanis/1925/xx/intlaw.htmpp> 184-5

⁸⁰ B. Fine *Ibid* at p.169

⁸¹ Y. Pashukanis 'Pismo tov. Stalina i zadachi teoreticheskovo fronta gosudarstvo i pravo (The letter of comrade Stalin and the tasks of the theoretical front of state and law)' (1932) No. 1 *Sovetskoe gosudarstvo* (Soviet State) 4-48, cited in E. A. Skripilev 'Nashemy zhurnalu – 70 let' (Our journal is 70 years old)' (1997) no.2, 17 *Sovetsoye Gosudarstvo i Pravo* (Soviet State and Law) p.17

⁸² Y. Pashukanis *Ocherki po Mezhdunarodnomu Pravu (Essays in International Law)* (Moscow: Izd. Kommunisticheskoi akademii, 1935)

And key aspects of his theory served the interests of the emerging Stalinist bureaucracy, with whom he aligned himself against the Left Opposition.”⁸³

Indeed, scholars such as Christine Sypnowich, who presents Pashukanis as an orthodox Marxist, coupling “Marx and Pashukanis”⁸⁴, and Ronnie Warrington⁸⁵, for whom, following the US scholar Robert Sharlet, Pashukanis was an orthodox “Old Bolshevik”⁸⁶, miss the extent to which Pashukanis’s theories led him inexorably to support for Stalin’s policies.

As I show below, Pashukanis also entirely missed the revolutionary context for his analysis of international law. Moreover, his denunciation in 1937 and, posthumously, for the remainder of the Stalin period was based on the assertion that he failed to point out that “international law must be defined as class law in terms so simple and expressive that no one could possibly be deceived.”⁸⁷ According to the US scholar Hazard, the Soviet reader was supposed by Soviet orthodoxy to be able to find “simple proof of the theoretician’s argument that foreign policy is shaped to fit the demands of the struggle between the classes, and that international law as the tool of that policy is no more than a reflection of class conflicts calling for some attempts at solution.”⁸⁸

As against Korovin, for whom a change of form must follow a change of substance, so that the Soviet Union had brought with it a new form of international law, the “international law of the transition period”, Pashukanis had argued for a continuation of old forms, including diplomatic immunity, the exchange of representatives, and the customary law of treaties, not least since these gave the Soviet Union considerable protection.

Pashukanis roundly condemned Korovin’s doctrine:

⁸³ M. Head “The Rise and Fall of a Soviet Jurist: Evgeny Pashukanis and Stalinism” (July 2004) Vol.XVII, No.2 *Canadian Journal of Law and Jurisprudence* 269-293, at p.272

⁸⁴ C. Sypnowich *The Concept of Socialist Law* (Oxford: Clarendon Press, 1990), 8

⁸⁵ R. Warrington “Pashukanis and the Commodity Form Theory” (1981) v.9 *International Journal of the Sociology of Law* 1-22, at p.3, in C. Varga (ed) *Marxian Legal Theory, International library of Essays in Law and Legal Theory* (New York: New York University Press 1993), at p.181

⁸⁶ This, as Michael Head shows, is quite wrong – Pashukanis, like Vyshinsky, was a Menshevik and only joined the Bolsheviks in 1918 – see M. Head “The Rise and Fall of a Soviet Jurist: Evgeny Pashukanis and Stalinism” (July 2004) Vol.XVII, No.2 *Canadian Journal of Law and Jurisprudence* 269-293, at p.274

⁸⁷ J. Hazard ‘Cleansing Soviet International Law of Anti-Marxist Theories’ (1938) vol.32 n.2 *American Journal of International Law*, 244-252, at p.246

⁸⁸ J. Hazard *Ibid* at p. 246

“... scholars such as Korovin who argued that the Soviet Government should recognise only treaties [as a source of] international law and should reject custom are absolutely wrong. An attempt to impose upon the Soviet Government a doctrine it has nowhere expressed is dictated by the patent desire to deprive the Soviet Government of those rights which require no treaty formulation and derive from the fact that normal diplomatic relations exist.”⁸⁹

Pashukanis also came in for particular criticism because he called the principle *rebus sic stantibus* “healthy”.⁹⁰

Most copies of the *Essays* were destroyed after he was denounced in 1937, but in this culminating work he declared that any attempt to define the “nature of international law” was scholastic.⁹¹ In his view, such attempts were the result of the continuing influence of bourgeois legal methodology, which, he said, rested on the association of law with substance developing in accordance with its own internal principles. For him, in 1935, international law was a means of formulating and strengthening in custom and treaties various political and economic relationships between states, and that the USSR could use international law to further Soviet interests in the struggle with capitalist states. He saw no reason to believe that in using these principles of international law for its own purposes the USSR was compromising its principles, in a world in which most states were capitalist. For Pashukanis there was no point in seeking to determine whether international law was “bourgeois” or “socialist”; such a discussion would be “scholastic”.⁹²

This approach to international law is as far as it could be from a “commodity-form” theory. It is utterly positivist in its approach, in precisely the manner described by the “standard genre” to which I referred above. For Pashukanis, international law is composed simply of the treaties concluded by states, and such customary law as every state could agree on.

⁸⁹ Y. Pashukanis *Ocherki po Mezhdunarodnomu Pravu (Essays in International Law)* (Moscow: Izd. Kommunisticheskoi akademii, 1935) Ch.2, cited in J. Triska ‘Treaties and Other Sources of Order in International Relations: The Soviet View’ (1958) vol.52 n.4 *American Journal of International Law* 699-726, pp.704-5

⁹⁰ J. Hazard *Ibid* 250

⁹¹ Y. Pashukanis *Ocherki po Mezhdunarodnomu Pravu (Essays in International Law)* (Moscow: Izd. Kommunisticheskoi akademii, 1935) p.16, cited in J. Hazard ‘Pashukanis is No Traitor’ (1957) vol.51, n.2 *American Journal of International Law*, 385-388, at p.387

⁹² See J. Hazard ‘Pashukanis is No Traitor’ (1957) vol.51, n.2 *American Journal of International Law* 385-388 at p.387

It should be no surprise that Pashukanis' apparent theoretical stance changed as it did between 1925 and 1935. The context had completely changed. In his 1925 essay, Pashukanis was writing when the world appeared to be divided into two camps, capitalism and workers' power, and when much of the planet was subject to colonialism. He wrote, quite correctly: "The historical examples adduced in any textbook of international law loudly proclaim that *modern international law is the legal form of the struggle of the capitalist states among themselves for domination over the rest of the world.*"⁹³ In the 1935 textbook he said that international law as practised between capitalist states was one of the forms with the aid of which imperialist states carry on the struggle between themselves for territory and super-profits.⁹⁴ He also declared that the earliest international law appeared with the earliest class society, that is, with the development of the slave holding state which grew out of the tribal civilisation of primitive man as division of labour and acceptance of the concept of private property stratified society into classes.⁹⁵

Vyshinsky, Pashukanis' nemesis – and Stuchka's theoretical successor - was diametrically opposed to this:

"Only one who is consciously falsifying history and reality can perceive in capitalist society the supreme and culminating point of legal development... Only in socialist society does law acquire a firm ground for its development.... As regards the scientific working out of any specific problems, the basic and decisive thought must be the aspiration to guarantee the development and strengthening of Soviet law to the highest degree."⁹⁶

Indeed, Pashukanis' 1935 textbook is absolutely standard in the ordering and style of its presentation. The exception is Chapter III, "*Istoricheskii ocherk mezhdunarodnoi politiki i mezhdunarodnovo prava* (Historical sketch of international policy and international law)"⁹⁷, presents, with some references to Comrade Stalin, and "the

⁹³ Y. Pashukanis 'Mezhdunarodnoe pravo, Entsiklopediia gosudarstva i prava (International Law, Encyclopedia of state and law)' (1925-1926), Izd. Kommunisticheskoi akademii, Moscow, vol.2, 858-874.; from E. Pashukanis, *Selected Writings on Marxism and Law* (eds. Beirne & R. Sharlet), London & New York 1980, 168-83, 184-5. translated by Peter B Maggs Pashukanis (1925) 1 ??

⁹⁴ Summarised at J. Hazard 'Cleansing Soviet International Law of Anti-Marxist Theories' (1938) vol.32 n.2 *American Journal of International Law*, 244-252, at pp.245-246

⁹⁵ Y. Pashukanis *Ocherki po Mezhdunarodnomu Pravu (Essays in International Law)* (Moscow: Izd. Kommunisticheskoi akademii, 1935) p.20, cited in Hazard *ibid* at p.251

⁹⁶ Cited in E. Garland 'Soviet Legal Philosophy' (review of J. Hazard (intr) *Soviet Legal Philosophy* (1951)) (1954) vol.51, n.10 *The Journal of Philosophy* 300-307, at p.304

⁹⁷ Y. Pashukanis *Ocherki po Mezhdunarodnomu Pravu (Essays in International Law)* (Moscow: Izd. Kommunisticheskoi akademii, 1935) at pp.24-64

thesis of the victory of socialism in a single country”, a strictly factual account of the history of international law and policy from ancient times to “International relations in the period of the breakdown of capitalist stabilisation and the struggle of the USSR for peace”, with the most attention given to the October Revolution of 1917 and the post WWI period.

Pashukanis’ 1925-27 conception that “The real historical content of international law, therefore, is the struggle between capitalist states”⁹⁸ rapidly gave way to “socialism in one country” and “peaceful co-existence”. As Hazard pointed out in 1938, “throughout the whole of any future discussion, the (Soviet) writer must re-emphasise the struggle for peace which is being waged by the USSR, and show how this struggle rests upon the sanctity of treaties and the observance of international obligations.”⁹⁹ The political context for this new orientation was the fact that the USSR was admitted to membership of the League of Nations on 18 September 1934, and, up to its aggression against Finland in December 1939 it was the leading protagonist of the League and of “collective security”.¹⁰⁰

Within a year the Molotov-Ribbentrop pact and Hitler’s attack on the Soviet Union would bring an end to such political and scholarly imperatives.

In the circumstances, Pashukanis could not possibly have predicted the thoroughly contradictory developments which followed WWII, in particular the creation and transformation of the United Nations, the development of the great multilateral, in some cases universal, international treaties, and the consolidation of political principles such as self-determination into fundamental principles – legal rights - of international law. Indeed, it was his own theoretical position which prevented him from doing so. His great protagonist E A Korovin, writing as early as 1923, placed particular emphasis on “Sovereignty as national self-determination”, “The legal form of self-determination”, “Bourgeois self-determination and the method of

⁹⁸ C. Miéville *Between Equal Rights: A Marxist Theory of International Law* (Leiden: Brill Academic Publishers, 2005) at p.325

⁹⁹ J. Hazard ‘Cleansing Soviet International Law of Anti-Marxist Theories’ (1938) vol.32 n.2 *American Journal of International Law*, 244-252, at p.252

¹⁰⁰ C. Prince “The USSR and International Organisations” (1942) vol.36 n.3 *American Journal of International Law* 425-445, at p.429

‘Balkanisation’”.¹⁰¹ Korovin was much more a Bolshevik – a Leninist – than Pashukanis ever was.

7. WHY DID PASHUKANIS MISS SELF-DETERMINATION?

At this point there is an absence in Pashukanis’ work which is key to the argument of this chapter. He made only one reference to the “right of nations to self-determination”, despite the fact that this was the centre of Lenin’s approach to international policy in the immediate post-1917 period. A factual account of “imperialist usurpation” is analysed only in relation to Lenin’s work on “imperialism as the highest stage of capitalism”. On Pashukanis’ 1935 account, the “basic fact of world history” after the October Revolution is the “struggle of two systems”: capitalism, and socialism as constructed in the USSR. The most important feature of the “Decree on Peace” of 8 November 1917 is the rejection of secret treaties. At this point Pashukanis introduced the following: “The declaration of the rights of the peoples of Russia proclaimed the right of each people to self-determination right up to secession and forming an independent state.”¹⁰² Pashukanis said nothing about any significance this might have for the imperialist and colonial systems.

Pashukanis noted the creation of several new states on the ruins of the Austro-Hungarian and Ottoman Empires, and the existence in most of them of significant national minorities – but he did not breathe a word on self-determination. The same is true of his account of the recognition by the USSR and conclusion of treaties with Estonia (2 February 1920), Lithuania (12 July 1920), Latvia (11 August 1920), and Finland (14 October 1920).¹⁰³ The whole analysis is centred on the USSR and its interests. Thus, Pashukanis related that “the sympathy of the oppressed peoples of the colonies for the Soviet Union aroused the anger of the imperialists.”¹⁰⁴ The Soviet Union, on the other hand, was “guided by support for the workers within the countries and in the whole world.”¹⁰⁵

¹⁰¹ E. Korovin (1923) *Mezhdunarodnoye pravo perekhodnovo vremeni (International law of the transitional period)* (Moscow: Izd. Kommunisticheskoi akademii, 1923), Chapter IV, part 2, 26-35

¹⁰² Y. Pashukanis *Ocherki po Mezhdunarodnomu Pravu (Essays in International Law)* (Moscow: Izd. Kommunisticheskoi akademii, 1935) at p.38

¹⁰³ Y. Pashukanis *Ibid* at p.44

¹⁰⁴ Y. Pashukanis *Ibid* at p.49

¹⁰⁵ Y. Pashukanis *Ibid* at p.50

Pashukanis was quite clear that the many bilateral treaties concluded by the USSR from 1932, when Hitler came to power, onwards, were not directed against any third state, but were based on the policy of supporting peaceful relations with all states “and guaranteeing our socialist construction against the threats of intervention”.¹⁰⁶ Thus, the culmination of Soviet diplomatic efforts by 1935 was the invitation by 34 states on 15 September 1934 for the USSR to join the League of Nations, and its accession on 18 September 1934, with only 3 states voting against and 7 abstentions.¹⁰⁷ According to Pashukanis, the “brilliant success” of Soviet foreign policy, was based on the internal policy of strengthening the dictatorship of the proletariat and construction of a classless socialist society. The “thesis of the possibility of the victory of socialism in one country” had determinate significance for resolving the problems of foreign policy. A list of principles contains, after breaking with the policy of the Tsarist and Provisional Governments, exit from the wars, proposing peace to all warring countries, publishing and denouncing all secret treaties, cancelling debts: “... winning the trust and sympathy of the proletariat and oppressed peoples of the whole world, the proclamation of the principle of self-determination of nations and brotherly solidarity of the proletariat and the colonial peoples of the whole world...”.¹⁰⁸

Pashukanis was incapable of recognising the significance of self-determination for international law. In my view, this was not simply the result of the limitations imposed by the period in which he was living, or the necessity to adapt to Stalin’s ideology, but was the direct consequence of his own theoretical position, worked out in the early 1920s.

Miéville does of course notice these developments, in particular the fact that the UN Charter proclaimed the ‘equal rights and self-determination of peoples’.¹⁰⁹ However, although he acknowledges that the struggles for de-colonisation after World War II represented a radical change in international law in relation to colonisation, he argues that in its *content* it is a mere continuation of the universalising trend in the *form*. By this he means that the logic of international law is and was “universalising”, or, in

¹⁰⁶ Y. Pashukanis *Ibid* at p.55

¹⁰⁷ Y. Pashukanis *Ibid* at p.62

¹⁰⁸ Y. Pashukanis *Ibid* at p.63

¹⁰⁹ C. Miéville *Between Equal Rights: A Marxist Theory of International Law* (Leiden: Brill Academic Publishers, 2005) at p.264

other words, imperialist. Following Eric Hobsbawm's 1994 *Age of Extremes*, Miéville notes the fact that waves of decolonisation struggles broke out first in Asia, then North Africa and the Middle East, then Sub-Saharan Africa. This was the point at which the United Nations General Assembly, twice the size that it was at the foundation of the UN, adopted the watershed *Declaration on the Granting of Independence to Colonial Countries and Peoples*¹¹⁰.

Miéville fails to note the following salient points. First, as I have already outlined, "self-determination of nations" was the principled position thoroughly worked out by V I Lenin before the First World War, and put into practice by him in the context of the former Russian empire after WW I. Second, the principle was anathema to the Western imperialist powers, which were content for the former Russian, Austro-Hungarian and Ottoman Empires to break up into new nations. Self-determination limited to these case was quite acceptable to the major imperialist powers. Third, the UN Charter contains a statement of principles including self-determination, but does not proclaim a right. This was a victory of the Western allies over the USSR and its partners. Fourth, it is significant that only in the context of victories of the national liberation movements did the principle of self-determination become a right in international law.

In fact, both Pashukanis and Miéville seem to overlook the significance of the principle, then right, to self-determination. Pashukanis' emphasis on the commodity form, and insistence that law only comes into its own in the context of capitalism, blinded him to the importance for international law of the political events in the midst of which he lived and worked. This may well have been a consequence of the perspective given to him by his own time and place. But it was much more the inevitable consequence of his own theoretical position.

8. THE USSR AND SELF-DETERMINATION AFTER WWII

8.1 De-colonisation

Blishchenko, writing in 1968, celebrated the break-up of the colonial system of imperialism, and the broad national liberation movements in Asia, Africa and Latin

¹¹⁰ UN Resolution 1514 (XV) 947th plenary meeting, 14 December 1960, text at <http://www.gibnet.com/texts/un1514.htm> (accessed 19 March 2006)

America after WWII, which had posited the right of peoples to self-determination with new force. He asserted, with reason, that the USSR had done everything to ensure that the right became one of the fundamental principles of contemporary international law. This was due in part the work of the Soviet Delegation at the San Francisco Conference¹¹¹ which drafted the Charter of the UN, as a result of which Article 2(1) of the Charter refers to “respect for the principle of equal rights and self-determination of peoples...”¹¹²

As Morsink points out¹¹³, in 1914 Lenin calculated that more than one half of the world’s population lived in colonies, which covered $\frac{3}{4}$ of the world’s territory, a calculation that was still roughly correct at the end of the 1940s. The UN’s Universal Declaration on Human Rights was drafted just as the European empires began to break up. Two leading participants, Malik from Lebanon and Romulo from the Philippines, were from countries which became independent in 1946, together with Syria. India, Burma, Pakistan gained their independence in 1947, together with Ceylon in 1948. India and Pakistan were both active players in the drafting process.

Andrei Zhdanov, Stalin’s favourite, delivered the key speech at the founding meeting of the Cominform (Communist Information Bureau), and announced that the world was divided into two camps, “the imperialist and anti-democratic camp” led by the United States, and the “democratic and anti-imperialist camp” led by the USSR. He asserted that there was a “crisis of the colonial system” and that “the peoples of the colonies no longer wish to live in the old way. The ruling classes of the metropolitan countries can no longer govern the colonies on the old lines.”¹¹⁴ Cassese relates that the Dumbarton Oaks Proposals, the basis for the UN Charter, did not contain any reference to self-determination, but this was reconsidered at the end of April 1945, at the UN Conference on International Organisation in San Francisco – at the insistence

¹¹¹ United Nations Conference on International Organisation, 1945, v. III, 622; and see G. I. Tunkin, ‘*Leninskiye printsipi ravnopraviya i samoopredeleniya narodov i sovremennoye mezhdunarodoye pravo* (Lenin’s principles of equal rights and the self-determination of peoples in contemporary international law)’ (1970) No.2 *Vestnik Moskovskovo Universiteta* (Bulletin of Moscow University) 62-71, at p.67

¹¹² I. Blishchenko *Antisovyetizm i mezhdunarodnoye pravo* (Antisovietism and international law) (Moscow: Izdatelstvo IMO, 1968) at p.75

¹¹³ J. Morsink *The Universal Declaration of Human Rights. Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1999) at p.96

¹¹⁴ cited in Morsink *Ibid* at p.97

of the USSR.¹¹⁵ Thus, a draft was presented referring to “...respect for the principle of equal rights and self-determination of peoples.”

As Tunkin noted in 1970, at the II Session of the UN General Assembly the Soviet delegation proposed an article for the Universal Declaration on Human Rights as follows: “Each people and each nation has the right to national self-determination. A state which has responsibility for the administration of self-determining territories, including colonies, must ensure the realisation of that right, guided by the principles and goals of the United Nations in relation to the peoples of such territories.” However, under pressure from the colonial powers this proposal was rejected, with the result that the principle of self-determination does not appear in the UDHR.¹¹⁶

Dmitrii Grushkin notes¹¹⁷ that one key factor at the end of WWII was the strengthened role of the USSR and the appearance of a whole bloc of states oriented towards it. Further, a bi-polar system took shape in international relations in which the contradictory interests of the two sides could be clearly traced. Third, the role of the mass character of politics significantly grew during WWII: 110 million people from 72 states took part. It was a war of peoples, not of governments. Fourth, in place of the League of Nations a global international organisation appeared with real resources and much more effective instruments. The UN sought to create on the basis of new principles (human rights, self-determination, sovereign equality of states) a powerful and effective international legal system. In the documents adopted by the UN, the idea of self-determination received new support, but also aroused bitter disputes. However, the USSR, with the support of the socialist countries and the newly independent states of Asia campaigned for the establishment of practically unlimited right to self-determination of colonial and dependant countries and peoples.

At the X session of the UNGA in 1955 the opponents of including the right to self-determination into the Covenants argued that the UN Charter only refers to a

¹¹⁵ A. Cassese *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University press, 1995) at p.38

¹¹⁶ G. I. Tunkin ‘Leninskiye printsiipi ravnopraviya i samoopredeleniya narodov i sovremennoye mezhdunarodoye pravo (Lenin’s principles of equal rights and the self-determination of peoples in contemporary international law)’ (1970) No.2 *Vestnik Moskovskovo Universiteta (Bulletin of Moscow University)* 62-71, at p.69

¹¹⁷ D. Grushkin ‘Pravo Narodov na Samoopredeleniye: Istoriya Razvitiya i Voploshcheniye Ideyi (Right of Peoples to Self-Determination: History of the Development and Realisation of the Idea)’ in A. Ossipov (ed) *Pravo Narodov na Samoopredeleniye: Ideya i Voploshcheniye (Right of Peoples to Self-Determination: Idea and Realisation)* (Moscow: Zvenya, 1997) at p.10

“principle” and not a “right” of peoples to self-determination, and that in various instruments the principle is interpreted in different ways. To the extent that the right to self-determination is a collective right, then it was inconsistent to include it in a document setting out the rights of individuals. Supporters however responded that despite the fact that the right to self-determination is collective, it affects each person, and that to remove it would be the precondition for limiting human rights. Furthermore, a state accepting the UN Charter and recognising it, must respect the “principle of self-determination” and the “right” flowing from it. The latter point of view triumphed, and the new “right” found its way into the common Article 1 of both the International Covenants on Civil and Political Rights, and Social, Economic and Cultural Rights, respectively.¹¹⁸

8.2 The right to self-determination in international law

Heather Wilson reminds us¹¹⁹ that the admission of seventeen newly independent States at the opening of the fifteenth session of the General Assembly had a decisive effect on the UN. On 23 September 1960, the Soviet Union, grasping the opportunity presented by this dramatic development, requested the addition of a ‘declaration on the granting of independence to colonial peoples and countries and peoples’ to the agenda.¹²⁰ This is a truly climactic moment in the development of contemporary international law.

It was the USSR which submitted to the XV Session of the UN General Assembly the draft of the historic Resolution 1514 (XV) of 14 December 1960, the “Declaration on the granting of independence to colonial countries and peoples”. This historic resolution aroused a whole wave of reactions and protests, but, none the less, was adopted. This document noted the connection between the right of peoples to self-determination and individual freedoms. Following on the heels of Resolution 1514 (XV) came a whole series of documents of a similar type: Resolution 1803 (XVII) of 14 December 1962 on “Inalienable sovereignty in relation to natural resources”; Resolution 2105 (XX) of 20 December 1965 “On the realisation of the Declaration on the granting of independence to colonial countries and peoples” – the General

¹¹⁸ D. Grushkin *Ibid* p.12

¹¹⁹ H. Wilson *International Law and the Use of Force by National Liberation Movements* (Oxford: Clarendon Press, 1988) pp.67-68

¹²⁰ UN Doc A/4501, 23 September 1960

Assembly recognized the legitimacy of the struggle of colonial peoples against colonial domination in the exercise of their right to self-determination and independence, and it invited all States to provide material and moral support to national liberation movements in colonial territories. Dmitrii Grushkin notes¹²¹ that one key factor at the end of WWII was the strengthened role of the USSR and the appearance of a whole bloc of states oriented towards it. Further, a bi-polar system took shape in international relations in which the contradictory interests of the two sides could be clearly traced. Third, the role of the mass character of politics significantly grew during WWII: 110 million people from 72 states took part. It was a war of peoples, not of governments. Fourth, in place of the League of Nations a global international organisation appeared with real resources and much more effective instruments. The UN sought to create on the basis of new principles (human rights, self-determination, sovereign equality of states) a powerful and effective international legal system. In the documents adopted by the UN, the idea of self-determination received new support, but also aroused bitter disputes.

In the 1966 Covenants on human rights, which to begin with were developed as a single document, it was decided that the provision on self-determination be included on the basis that:

- a) it "...is the source or essential foundation for other human rights, since there cannot be authentic realisation of individual rights without realisation of the right to self-determination"
- b) in drafting the Covenants the realisation and protection of the principles and goals of the UN Charter must be taken into account, including the principles of equal rights and self-determination of peoples
- c) a series of provisions of the Universal Declaration of Human Rights are directly connected to the right to self-determination
- d) if the right was not included in the Covenants, they would be incomplete and ineffective.¹²²

Writing in 1970, Tunkin also pointed out that if in 1919 as many as 64% of the population of the planet lived in colonies and semi-colonies, then at the start of 1969 only 1% of humanity remained in colonies. It was on this basis that both the

¹²¹ D. Grushkin *Ibid* at p.10

¹²² D. Grushkin *Ibid* at p.12, citing A. Kristesky *Pravo narodov na camoopredeleniye: istoricheskoye I sovremennoye pazvitiye* (Right of peoples to self-determination: historical and contemporary development (New York: UN ECOSOC, 1981)

International Covenants have a common Article 1, on the right in international law of peoples to self-determination. This was a remarkable achievement by the USSR and its allies in the de-colonised world.¹²³

8.3 The National Liberation Movements

The success of the USSR and its allies in the 1960s had momentous consequences for the legal and political process of decolonisation. Later resolutions of the UNGA ensured that the so-called “national liberation movements”¹²⁴ were recognised as the “sole legitimate representatives” of the relevant peoples. In other words, ex-territorial social and political organisations were in fact made equal to sovereign subjects of international law. Examples were the Palestine Liberation Organisation (PLO), the South West African Peoples Organisation (SWAPO), the ANC (African National Congress) and PAC (Pan African Congress). In 1973 the UN declared that it recognised SWAPO as the “sole authentic representative of the people of Namibia.” And in 1974 the PLO was recognised by the majority of member states of the UN as the lawful representative of the Palestinians, with corresponding status at the UN.

There are writers such as Christopher Quaye, who ignore the Soviet role in promoting the legal right to self-determination or supporting the national liberation movements.¹²⁵ However, Galia Golan, although seemingly unaware of the international law dimension, wrote in the context of national liberation movements that: “The term preferred by the Soviets [to “independence”] as an overall, all-inclusive type of objective was self-determination.”¹²⁶ Her book demonstrates the huge resources devoted by the USSR to support of all kinds for a very wide range of national liberation movements in the Third World. Tables she prepared list 43 movements in 26 countries, with 13 instruments of “Soviet behaviour”.¹²⁷ Roger Kanet noted that “Soviet trade with the developing nations increased more than eleven

¹²³ G. Tunkin ‘*Leninskiye printsiyi ravnopraviya i samoopredeleniya narodov i sovremennoye mezhdunarodoye pravo* (Lenin’s principles of equal rights and the self-determination of peoples in contemporary international law)’ (1970) No.2 *Vestnik Moskovskovo Universiteta* (Bulletin of Moscow University) 62-71 at p.70

¹²⁴ See G. Golan *The Soviet Union and National Liberation Movements in the Third World* (Boston: Unwin Hyman, 1988)

¹²⁵ C. Quaye *Liberation Struggles in International Law* (Philadelphia: Temple University Press, 1991)

¹²⁶ G. Golan *Ibid* at p.136

¹²⁷ G. Golan *Ibid* at pp.262-267

times from 1955 to 1970". In 1970 it increased an additional 15.7 percent.¹²⁸ Furthermore, Bhabani Sen Gupta pointed out that "in cultivating friendly, viable forces, the Soviet union has persistently tried to satisfy some of the *felt* needs of the power elites of Third World societies. In South Asia, they have come forward to provide aid for industrialisation programs in India, for which the Indians could not secure resources either domestically or from Western nations..."¹²⁹

I would contend, contrary to these authors, that it was not as a result of Soviet propaganda, but through the logic of the new international law, developed through the efforts of the USSR and its allies, that a people with the right to self-determination faced with aggressive attempts to deny that right enjoyed the right of self-defence under Article 51 of the Charter, and was in all respects to be considered a subject of international law. Thus, Portugal was at that time waging war against the peoples of Angola and Mozambique; those peoples were therefore victims of aggression and enjoyed the right of self-defence, and third party states had the right and duty to come to their assistance.¹³⁰ G I Tunkin, a year earlier, in a more formal article, defending the dubious concept of "proletarian internationalism", also linked the "struggle for international peace and security" with the "struggle for the freedom and independence of peoples", with reference especially to Resolution 1514 (XV).¹³¹

9. VIETNAM AND THE CZECH SPRING: FURTHER CONTRADICTIONS IN SELF-DETERMINATION

1968 was not only the year of the Soviet invasion of Czechoslovakia, but also a crucial moment in the US war in Vietnam. The invasion of Czechoslovakia took place against the background of the emergence of a new "socialist international law", with a new approach to traditional concepts of sovereignty. G. I Tunkin published a revised second edition of his textbook on *International Law*.¹³² According to him, it

¹²⁸ R. Kanet 'The Soviet Union and the Colonial Question 1917-1953' in R. Kanet (ed) *The Soviet Union and the Developing Nations* (Baltimore: Johns Hopkins University Press, 1974), pp.1-26, at p.1

¹²⁹ B. Gupta 'The Soviet Union in South Asia' in R. Kanet *Ibid* pp.119-152, at p.123

¹³⁰ I. Blishchenko *Antisovyetizm i mezhdunarodnoye pravo* (Antisovietism and international law) (Moscow: Izdatelstvo IMO, 1968) at pp.76-77

¹³¹ G. Tunkin '*Borba dvukh kontseptsii v mezhdunarodnom prave* (The struggle of two conceptions in international law' (1967) 11 *Sovetsoye Gosudarstvo i Pravo* (*Soviet State and Law*) 140-149, at pp.144-146

¹³² G. Tunkin *Teorii Mezhdunarodnovo Prava* (*The Theory of International Law*) (Moscow: Izdatelstvo Mezhdunarodnoye otosheniia, 1970, 2nd revised edition), and G. I. Tunkin *Theory of International Law* (Butler, W. E. (trans) (London: George Allen & Unwin, 1974)

appeared to commentators in the United States that the new Soviet position could be dated back to Pashukanis' conclusion in the 1920s that the Soviet Union could and did utilise generally accepted norms of domestic and international law both in the administration of the state affairs and in conducting relations with foreign states. Through this practice, it gave the bourgeois norms a new Socialist content.¹³³

Dealing with the Czechoslovak events, Tunkin argued that these were a logical extension of the concept already well developed and applied in Hungary in 1956. This was the legal prevention of inroads by capitalist influences into a socialist state.¹³⁴ The international law framework is provided through an analysis of the concept of sovereignty. Tunkin noted that both general and socialist international law respected the concept of "sovereignty", but concluded that respect is not the same thing in the two systems.¹³⁵ Socialist states would continue to insist on respect for the principle as developed in general international law when speaking of the relationships between themselves and capitalist states so as to prevent capitalist states from intervening in the internal affairs of Socialist states, but the concept of sovereignty had evolved within the conceptual framework of "proletarian internationalism" as regards the mutual relationships of socialist states. His translator, William Butler, commented: "The Soviet invasion of Czechoslovakia plainly was a difficult moment for his approach to international law, and his treatment of a "socialist international law" impressed, rightly or wrongly, as something less than enthusiastic."¹³⁶

Tunkin's arguments should be contrasted with what, in the same year, the US scholar Alwyn Freeman was able to write:

"In the years following World War II increasing interest has been evidenced in the extent to which Soviet theory and practice may have influenced the development of the law of nations. This is to be expected in view of the

¹³³ J. Hazard 'Renewed Emphasis Upon a Socialist International Law' (1971) v.65, n.1 *American Journal of International Law*, 142-148, at p.143

¹³⁴ G. Tunkin *Teorii Mezhdunarodnovo Prava (The Theory of International Law)* (Moscow: Izdatelstvo Mezhdunarodnoye otosheniia, 1970, 2nd revised edition), at p.493, cited in J.Hazard "Renewed Emphasis Upon a Socialist International Law" (1971) vol.65, n.1 *American Journal of International Law*, pp.142-148, at p.145

¹³⁵ G. Tunkin *Teorii Mezhdunarodnovo Prava (The Theory of International Law)* (Moscow: Izdatelstvo Mezhdunarodnoye otosheniia, 1970, 2nd revised edition), at p.495

¹³⁶ W. Butler 'The Learned Writings of Professor G I Tunkin' (2002) vol.4 n.2 *Journal of the History of International Law* 394-423, at p.394

prominence and power which the USSR has come to enjoy in the world community.”¹³⁷

Freeman denounced what he saw as a “political dogma dressed in treacherous legal trappings”, namely the official Soviet doctrine of “peaceful coexistence”. He referred, as do so many American scholars of the period, as well as President Kennedy in his post-inauguration speeches, to an alleged address by Khrushchev to a Soviet Communist Party audience on 6 January 1961.¹³⁸ In one account:

“Soviet Premier Nikita Khrushchev delivered a speech behind closed doors in which he asserted that “a mighty upsurge of anti-imperialist, national-liberation revolutions” was sweeping through the “third world.” He went on to say that “Communists fully and unreservedly support such just wars . . . of national liberation.”¹³⁹

The impact of Khrushchev’s words was felt in the US itself and in its subsequent policy:

“The speech, published in the Soviet press just two days before the newly elected President John F. Kennedy took his oath of office, had a profound effect on the new administration which regarded it as a portent of wars to come. Kennedy and his advisers concluded that the Cold War was entering a new phase which would take place in the “third world,” and would be characterized by guerrilla wars. Accordingly, they sought to improve the nation’s ability to conduct counter insurgency warfare by dramatically expanding the Army’s Special Forces or, “green berets.” Before Kennedy’s assassination in Dallas in 1963, he had dispatched over 16,000 of them to South Viet Nam in order to engage in just such a conflict. The war for the “third world,” and a new phase of the Cold War had gotten under way in earnest.”¹⁴⁰

This address may well be apocryphal; it has proved impossible for me to track down a definite reference. But there is every reason to believe that its effect was as described.

It had its effect on the scholars too. For Freeman, while accommodations of mutually acceptable principles were possible in 1968, no progress in international law was possible until “the Soviet Union is prepared to abjure its messianic and compulsive

¹³⁷ A. Freeman ‘Some Aspects of Soviet Influence on International Law’ (1968) vol.62, n3, *American Journal of International Law* 710-722, at pp.710-711

¹³⁸ Quoted in the American Bar Association (1964) *Peaceful Coexistence: A Communist Blueprint for Victory*, 14

¹³⁹ <http://hnn.us/roundup/comments/19470.html>

¹⁴⁰ R. Speed “Review of Christopher Andrew and Vasili Mitrokhin *The World Was Going Our Way: The KGB and the Battle for the Third World* (New York: Basic Books, 2005), posted on Saturday, December 17, 2005 at George Mason University, History News Network at <http://hnn.us/roundup/comments/19470.html>

espousal of the doctrine of world revolution.”¹⁴¹ Freeman was of course writing at the height of the Vietnam War: he expresses outrage that the public opinion barrage orchestrated by the USSR “...actually inhibited the United States from using tear gas where such use was in the interest of humane treatment of the civilian population.”¹⁴²

The leading Soviet scholars were, in the end, obliged to abandon both positivism and the revolutionary content of self-determination. Writing in 1991, just before the dissolution of the USSR, and using the new language of “perestroika”, “common human values” and “common European home”, Blishchenko also argued for “re-thinking the periodisation of the contemporary history of international law, and for reading its formation not in the October Revolution of 1917 but the French bourgeois revolution, for the first time promoting such generally recognised norms and principles of international law as the right of peoples to self-determination...”¹⁴³

However, the principle, then right, of self-determination played in my view a much more significant role, both in its practical effects in the international order, and as the “obscene other” of Soviet positivism in international law.

This paradoxical, dialectical aspect of Soviet international law is entirely missed by Miéville. In this, it has to be said, he takes his place in a well-established tradition of the critique of “socialist law”. It seems to me that a radical re-working of Pashukanis’ contribution is required in order to account satisfactorily with the role of law in a world in which capitalism has – as it must, and as Marx predicted – spread to every corner. Turbulence has grown proportionately with interdependence. The Iraq adventure is a compelling example not of the omnipotence of US power, but of its radical limitations, and the indomitable human spirit.

What Miéville quite rightly draws from Pashukanis is what he terms “materialism”, that is, the crucial importance of economic and political investigation and analysis for analysing developments in law, without forgetting law’s real existence and relative autonomy as a constant but endlessly metamorphosing aspect of human existence – like religion, with which, as a human construct, it has so much in common.

¹⁴¹ A. Freeman *Ibid* at p.722

¹⁴² A. Freeman *Ibid* at p.720

¹⁴³ I. Blishchenko ‘*Nekotoriye problemy sovetskoi nauki mezhdunarodonovo prava* (Some problems of the Soviet science of international law)’ (1991) No.3 *Sovetskoye gosudarstvo i pravo* (Soviet state and law) 134-175, at pp.135-136

The right of peoples to self-determination in international law achieved the status of a right in the context of de-colonisation and – thoroughly paradoxical and hypocritical – Soviet support both for the principle and for national liberation movements. It was law, indeed a pillar of the international rule of law.

CONCLUSION – ANOTHER ACCOUNT

At this point I would like to propose an alternative reading to China Miéville’s relentlessly pessimistic account of the post-WWII movements for de-colonisation, and “peoples’ rights”, especially the right to self-determination and the right to development – the *New International Economic Order* which he mentions in passing.

Here a thoroughly dialectical case can be made. There is no question that the movements for colonial freedom and de-colonisation were, as shown above, bitterly opposed by all the imperialist powers. In each case – France in Vietnam and Algeria, Britain in Kenya and Malaysia, the US, to this day, in Puerto Rico, Portugal in Mozambique and Angola, the South African and Israeli experiences – the response of imperialism was ferocious and bloody. It is not enough to note that some of these became petty imperialisms in their own right, or in many ways simply served the interests of the former colonial power.

For me, it is vitally important to note that the demand for self-determination became a vitally important part of the external legitimation and ideological self-empowerment of these movements. In a paradoxical – and dialectical – fashion, the USSR, despite the profound deracination of its approach to international law, as exemplified by Vyshinsky¹⁴⁴ and Tunkin¹⁴⁵, found itself obliged to give very considerable material support to self-determination struggles, despite the fact that this was not only materially costly but often contrary to its own geo-political self-interest. I mean dialectical in the following way: the content of the proposed norm often came into sharp conflict with its juridical form, and in the process the content was imbued with a new significance, in due course transforming the form as well.

¹⁴⁴ A. Vyshinsky *The Law of the Soviet State* (Tr. H.W. Baab) (Westport, CT: Greenwood Press, Publishers, 1979)

¹⁴⁵ G. I. Tunkin *Theory of International Law* (Butler, W. E. (trans) (London: George Allen & Unwin, 1974)

In every case the process was not ideal – it was not the work of professors – but thoroughly material. This is what Patricia Williams in *The Alchemy of Race and Class* refers to as the subversion and appropriation of bourgeois legal norms – a process of alchemy¹⁴⁶. Thus, the United Nations itself was transformed, not in effectiveness or ultimate independence, but in the unique possibility it gives for the less powerful states – and international civil society – to gather and speak.

¹⁴⁶ P.Williams *The Alchemy of Race and Rights* (Cambridge, MA: Harvard University Press, 1991)