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LEGAL FORM OF SELF-DETERMINATION IN INTERNATIONAL LAW

Abstract: The paper aims to address the right of peoples to self-determination through one of the perspectives of critical legal thinking, namely the concept of the legal form. The theory of the legal form remains one of the most productive paradigms within Marxist approaches to the law. A hundred years since it was proposed in 2024 by Evgeny Pashukanis, it can be creatively developed to grasp paradoxes of self-determination. China Miéville's influential proposal opens some avenues, but they require further deepening. As the paper demonstrates, three dimensions encompassed within the tradition of the legal form can be applied to self-determination. First, the understanding of the legal subject as imposed through procedures of interpellation. The right to self-determination contains, as its foreground, a set of ideologemes aimed at offering a people's identity. Communities which 'recognise' their 'selves' in this interpellation can become legal subjects of self-determination. At the same time, national identity is welded with imagery of sovereignty and statal expression. Second, the concept of the legal form allows of grasping the process of exchange of recognition which develops through the right of self-determination. This process is based on internal inequality, as peoples are structurally divided between statal and non-statal ones. The right to self-determination, although posited as mediating between these two, effectively freezes its non-statal subjects before the gate to the community of states. Third, the right to self-determination demonstrates a high level of singularity in international law. Singularity is expounded as what perturbs the relations between the universal and the particular, the rule and its cases. Especially after the era of decolonisation instances in which self-determination is invoked do not form a graspable chain of cases. Instead, singularity of this right appears in its suspended applicability and practical non-enforceability.

Keywords: self-determination, critical legal theory, legal form, Evgeny Pashukanis, peoples in international law

1. Introduction

Self-determination of peoples constitutes one of the most problematic and paradoxical areas in international law. Unsurprisingly, statements of content comparable to the previous sentence typically open treatises and articles on the subject.[1] Various authors highlight this right's vagueness,[2] ambiguity,[3] polysemy[4] or even inherent absurdity.[5] At the same time, it seems to occupy a crucial role in the post-WWII corpus of law adopted under the aegis of the United Nations – including its instrumental position in both 1966 UN Covenants[6] (where it appears in twin Articles 1) and the Friendly Relations Declaration.[7] Its prominence by far exceeds the written letter of international law or, occasionally, domestic constitutions in which it may be enshrined.[8] Self-determination is an active political principle and an ideal which transcends its formal legal incarnations. Having become a matter of the heart, to paraphrase James Summers' quip,[9] it churns popular emotions, catalyses resistance against various forms of foreign domination and offers a politico-legal framing for nationalism.

1 Summers, *Peoples and International Law*, 1; Cass, "Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories", 21-22.

2 Oklopcic, "Populus Interruptus: Self-Determination, the Independence of Kosovo, and the Vocabulary of Peoplehood", 679.

3 Summers, ibidem, 1.

4 Thürer, *Das Selbstbestimmung der Völker. Mit einem Exkurs zur Jurafrage*, 11.

5 Berman, "Sovereignty in Abeyance: Self-Determination and International Law", 60; Crawford, *The Creation of States in International Law*, 124.

6 United Nations (General Assembly) (1966), *International Covenant on Civil and Political Rights*, UN Treaty Series, 999, 171; *International Covenant on Economic, Social and Cultural Rights*, UN Treaty Series, 993, 3.

7 Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations (GA Res. 2625(XXV)), 1970.

8 van den Driest, "Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law", 335; von Auen, "Das Selbstbestimmungsrecht der Völker", 62. Fisch, *The Right of Self-Determination of Peoples. The Domestication of an Illusion*, 43-45; Demissie, "Self-Determination Including Secession vs. the Territorial Integrity of Nation-States: A Prima Facie Case for Secession", 183; Stankovski, "Implications of Kosovo Independence for the Doctrine of Constitutional Self-Determination", 97; Summers, ibidem, 493-497; Busquets, *Morality and Legality of Secession. A Theory of National Self-Determination*, 211-217; Weller, "Settling Self-determination Conflicts: Recent Developments", 154--158; Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation*, 286-291.

9 Summers, ibidem, 196.

Consequently, there are few other areas in international law where a formal legal right would not only be ravaged by internal paradoxes to such a high extent, but also maintained a complex and strained relation with its socio-political basis. The idea of self-determination, firmly anchored in the very construction of the modern state and co-responsible for the biopolitical production of the idea of the 'nation' or 'people',[10] is historically much older than its legal embodiment. Typically, self-determination is presumed to have been forged in the political laboratories of the American and French Revolutions.[11] Yet to speak about the *right* of peoples to self-determination in a substantiated manner we need to leap forward more than 160 years.[12] Although the perspective of the doctrine of international law, highly tainted with presentism, aims to portray this right as the aim and virtually final crystallisation of socio-political processes that have traversed modernity,[13] the reverse is true.

The right of peoples to self-determination in international law is rather an obfuscating legal simplification of highly complex claims, mechanisms and structures from which it evolved. To make the issue even more problematic, what we currently know as the right to self-determination is largely a co-product of decolonisation – not only significantly obsolete after the decolonisation is mostly over,[14] but also purposefully tacit on a number of crucial and practical questions.

The most symptomatic of them – in fact, the crown question of the field of self-determination – concerns the dilemma whether any group that could try to 'prove' itself to be a 'people' (using the criteria readily adduced in the doctrine, but conspicuously absent from written international law[15]) can claim external self-determination, that is, demand creation of 'its own' state through secession.[16] In the current state of international law, this dilemma is obfuscated by the need to reconcile the state-centric taboo,

10 Foucault, *Security, Territory, Population. Lectures at the Collège de France 1977-78*, 1-86.

11 Senaratne, *Internal Self-Determination in International Law. History, Theory and Practice*, 14; Cobban, *The Nation State and National Self-Determination*, 35.

12 Pomerance, *Self-Determination in Law and Practice. The New Doctrine in the United States*, 11-14; Knop, *Diversity and Self-Determination in International Law*, 32-37.

13 Velasco, "Self-determination and Secession: Human Rights-based Conflict Resolution", 78-79.

14 Fisch, *The Right of Self-Determination of Peoples. The Domestication of an Illusion*, 219.

15 Moltchanova, *National Self-Determination and Justice in Multinational States*, 71-76.

16 Brilmayer, "Secession and the Two Types of Territorial Claims", 325.

manifestly revealed in the ICJ's *Kosovo* Advisory Opinion,[17] paying lip service to the general idea of self-determination. Aristide Briand famously quipped that the right of peoples to self-determination is not a right of states to commit suicide.[18] In other words, no state would wish to support unconditional external self-determination of any 'people' for the sheer stake of protecting the club to which it itself belongs. Therefore treating this right as a given, underdetermined as it may be, and use its vague and fragile expression in written law to 'solve' the legal matters – while leaving the greatest challenged unanswered – is positivism at its highest.

The doctrine of international law typically does not fail to notice the dependence of the right to self-determination on its rich practical context, but rarely addresses it head on. One of the more common strategies is to acknowledge at the beginning that this right is paradoxical and helplessly mired in socio-political structures, but later on proceed to extracting as many formalistic legal problems as possible from this field. Even if results of such analyses may prove almost fetishist in their alienation from socio-political reality, they offer a comforting mirage of solving 'legal questions'.

One of the ways out of this entanglement is to seek avenues in critical legal theory, with the insightful help of the recent theoretical turn in international law.[19] What they can provide is a rich theoretical insight into legal, political and biopolitical structures behind self-determination norms of international law, with a particular focus on this right's problematic effectiveness. Given that I already offered a hopefully comprehensive study of the right of peoples to self-determination from the critical perspective in a separate book,[20] in this paper I will focus on a theoretical perspective that I have not previously explored in relation to self-determination.

Namely, while remaining within the family of approaches of critical legal theory, I will use the well-known and influential concept of legal form in order to enquire into the status of the right to self-determination of peoples. The legal form was fruitfully tested out in international law by

17 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, 403.

18 Fisch, "Adolf Hitler und das Selbstbestimmungsrecht der Völker", 108.

19 Bianchi, *International Law Theories. An Inquiry into Different Ways of Thinking*; Rasilla, *International Law and History. Modern Interfaces*; Tzouvala, *Capitalism as Civilization. A History of International* Law.

20 Tacik, *Deconstructing Self-Determination in International Law. Sovereignty, Exception, Biopolitics*.

China Miéville's famous book,[21] yet self-determination deserves a deepened theoretical account. As we will see, the concept of the legal form will require significant reworking, but after this work is done it can shed important light on the right to self-determination.

To this purpose, I will begin by outlining the current role of the legal form in critical legal approaches with the aim of outlining its explanatory potential. Then I will pass to developing its relevance for international law. With thus constructed theoretical armoury, I will proceed to exploring the legal form of the right of peoples to self-determination.

2. Legal Form: the First and the Next Hundred Years

The concept of the legal form has proved one of the most intriguing explanatory ideas in the weaponry of critical legal thought. Its first use which carries with itself a deep theoretical intuition originates in the pivotal book *General Theory of Law and Marxism*, published by Evgeny Bronislavovich Pashukanis in 1924.[22] On the hundredth anniversary of its appearance, it seems to constitute one of the most – if not the most – influential and productive theoretical contributions of the Soviet legal theory.

It still preserves the conceptual effervescence of post-revolutionary rethinking the law and aims to frame Marxist legal theory in a structure informed by socialist experiments with legality. As such, it also contains aporias, paradoxes and in-built inertias of the Marxist conceptualisation of the law. In particular, it clings – with fruitful reinterpretations – to the idea of the 'withering away of the law',[23] firmly rooted in the legacy of late Marx,[24] but is already marked by opposing the positivist turn in Soviet that will eventually deliver a fatal blow to Pashukanis's work and life. Pashukanis consistently identified all contemporary law with bourgeois law, excluding

21 Miéville, *Between Equal Rights. A Marxist Theory of International Law*.

22 Пашуканис, *Общая теория права и марксизм* in *Избранные произведения по общей теории права и государства*, 32-181. English translation: Pashukanis, *The General Theory of Law & Marxism*, transl. Barbara Einhorn, New Brunswick and London: Transaction Publishers 2002. Pashukanis's text originally had two main editions; the German one is more conceptually developed and puts stronger emphasis on the concept of the legal form. The English edition is based on the German one and, consequently, inherits its theoretical edge over the original Russian version. On a general context of Pashukanis's theory and main polemics about it see: Head, *Evgeny Pashukanis. A Critical Reappraisal*.

23 Kivotidis, "The Withering Away of the Legal Form: Revisiting Past Debates for Future Movements", 234-257.

24 Marx, *The Critique of the Gotha Programme*, 87.

the possibility of 'proletarian law'.[25] Yet the growing Stalinist totalitarian doxa needed not only to use the state and the law, but also to substantiate their existence. Pashukanis's eventual death in Stalinist purges, after previous humiliations in recanting his theory,[26] proved an ominous resolution of the inner contradiction of state Marxism.

Still, the concept of the legal form remains one of the few productive ideas of this period of Marxism.[27] It gradually became a gravitational point of Marxist theory of the law, condensing its main approaches to the relation between the law and social relations. Pashukanis's foundational assumption – indeed, the guiding principle of his thought – is that *the legal form connotes structural internal insufficiency of the law as such*. The form assumes the existence of matter; in case of the law, the matter are social relations that the law aims to regulate and uphold. The aim of critique is, Pashukanis claims, not only "legal form itself", but also 'exposing its sociological roots, and demonstrating the relative and historically limited nature of the fundamental juridical concepts'.[28] Approaching the law through the lens of the legal form not only describes its dependence on the socio-political context, but also puts into question the very act of transposing social relations onto the legal dimension. In other words, this concept allows us to ask why and how certain aspects of certain relations are petrified in normative frames.

With a more updated look on Pashukanis, the process of transposition into the legal dimension can be seen as first and foremost *a management of visibility.*[29] Modern law harbours the ideal of not only regulating social life, but also reproducing it normatively in a possibly coherent and all-encompassing system.[30] In this process of transposition, some aspects of the social relation are rendered legally pertinent and some irrelevant. The law portrays social life in a peculiar, unequal way, distributing personhood and structures of legal relations according to tacit patterns of domination and hierarchy.

Pashukanis's own biggest novelty in theorising the legal form consists in positing an analogy between legal form and commodity form. Part of the Marxist doxa was to assume the subsidiary character of the law, which aims to uphold, enforce and ideologise relations of capitalist exchange.

25 Pashukanis, *The General Theory of Law & Marxism*, 61.
26 Head, ibidem, 153-168.
27 Tacik, Cercel and Fusco, "Introduction: the legal form as a conceptual event", 1-21.
28 Pashukanis, *The General Theory of Law & Marxism*, 34.
29 Tacik, Cercel and Fusco, "Introduction: the legal form as a conceptual event", 7-14.
30 Hegel, *Philosophy of Right*, 15-35.

Famously, Marx himself downplayed the role of the law apart from his early discussions around Hegel[31] and later occasional remarks in *Capital*[32] as well as in *Critique of the Gotha Programme*.[33] Pashukanis understood the law as meriting a serious and autonomous answer, although he obviously sought a link to the economic critique. The analogy between the legal form and the commodity form – which, as it is well-known, underpins Marx' analysis of capitalism – is based on the idea that both forms sanction *a seemingly equivalent exchange*. No mass-scale social exchange can be dubbed equal *per se*; it can be at best equivalent, that is, equal according to a selected measure of comparison. Naturally, adoption of such a measure renders all other aspects of the exchanged objects (turned into 'commodities') secondary, if not invisible in the lens of the law.

Therefore the legal form can be understood as a general process of *equivalisation of social relations according to selective criteria*. As Pashukanis observes,

> [t]he development of the legal form ... reaches its peak in bourgeois capitalist society ... . One can also characterise this process as the disintegration of organic patriarchal relations and their replacement by legal relations, that is to say by relations between formally equal subjects. The dissolution of the patriarchal family, in which the *pater familias* was the owner of his wife's and his children's labour power, and its transformation into a contractual family in which the spouses conclude between themselves a contract of their estate, and the children (as is the case, for example, on the American farm) receive wages from the father, is one of the most typical examples of this development. The development of relations based on the commodity and on money carries this evolution still further.[34]

Consequently, the legal form is not only the result – a legally upheld equivalence between different objects of exchange – but also the process, through which capitalism transforms social relations. As Marx noticed very early,[35] the most impressive feature of capitalism is its merciless destruction

31 Marx, "Debates on the Law on the Theft of Wood", 224-263; Marx, *Critique of Hegel's 'Philosophy of Right'*.

32 Marx, *Capital. A Critique of Political Economy*, 163-177.

33 Marx, *The Critique of the Gotha Programme*, 75-99.

34 Pashukanis, *The General Theory of Law & Marxism*, 41.

35 Marx, Engels, "Manifesto of the Communist Party", 98-112.

of old social relations (including their accompanying forms of morality, customs and ideological representations) which takes place surreptitiously, paving the way for unprecedented creativity and effectiveness. The legal form partakes in this storm of destruction and creation precisely by filtering social relations – as well as its elements, subjects and objects – through criteria of value and relevance. In effect, *the legal form contains in itself a primordial form of domination and power.*

In order to understand this claim better, we need to distinguish between power-through-law and power-in-law. The former connotes explicit or implicit asymmetrical relations between participants of a legal relation. For example, norms of private law may give a stronger position to the landlord rather than to the tenant. Critical legal thinking has offered many ways of identifying the imbalance inscribed either in legal norms or in judicial decision-making.[36] Nonetheless, power-in-law is a much more subtle form of domination which concerns the very way of how the law represents social reality – what actors it creates, how it distributes legal personhood and what legal relations it creates out of the richness of aspects that each social relation entails. Power-in-law is clearly manifested in the Althusserian act of interpellation,[37] through which human beings find themselves already defined as subjects of the legal order. The very act of being subjected to a legal avatar of subjectivity, entangled in legal relations, contains a particular form of power. To a certain extent, it resembles Molière's Jourdain learning to speak prose, but the person realising to be a legal subject tries speaking a language alien to herself and is thus put at a structural disadvantage.

Pashukanis – almost as if to refute later critiques of his reputed negligence of alienation of labour – posits the transition between human labour and labour force as one of the crucial power-in-law interventions of the legal form:

> In a society where there is money, and hence individual private labour becomes social labour only through the mediation of a universal equivalent, the conditions for a legal form with its antitheses between the subjective and the objective, between the private and the public, are already given.[38]

36 Kennedy, *A Critique of Adjudication (fin de siècle)*.
37 Althusser, *Sur la reproduction*, 311.
38 Pashukanis, *The General Theory of Law & Marxism*, 42.

The legal form thus completes Marx' theory of surplus value by demonstrating how the law facilitates, upholds and obfuscates the equivalence of exchange of labour and its remuneration. The pivotal division between private and public law as well as the way in which legal subjects are established by the law fits the process of capitalist exchange between the worker and the employer. The equivalence between remuneration and labour force becomes the critical axis of the legal form's work.[39]

Pashukanis's theory of the legal form suffers from the shortcoming which is an obvious price for its attempt to provide the 'truly Marxist' theory of the law. Namely, by being based on the analogy between commodity form and the legal form, Pashukanis's concept is like Antaeus whose feet always need to touch the ground of civil law. Although Pashukanis devoted a lot of his attention to international law[40] – and in *The General Theory of Law & Marxism* attempted to account for other branches of the law, esp. criminal one[41] – his perception remains skewed towards capitalist relations of exchange, in respect to which he needs to view other areas of the law as subsidiary and superstructural. Nonetheless, the legal form is an underdetermined concept which offers many avenues of theoretical development. Before analysing what the legal form can offer to international law, let us fish out the last remaining points of this theory that will be of interest for our further explorations.

Crucially, Pashukanis develops Marx' observation on the inexistence of the 'law' as such (in lieu of particular systems of law).[42] But instead of aiming at a general anti-idealist and nominalist critique, he notices that the legal form involves the inherent movement towards abstraction – which corresponds to capitalism's own propensity to develop abstractions.[43] It is not just an excrescence of legal ideology, but a *means of exchange*: in order to establish equivalence as its basis, the law needs to expand its abstract laws as far as possible. Such abstractions, when turned into legal actions, become 'objective fact[s]' that have 'place outside the consciousness of the parties to it in just the same way as the economic phenomenon' that they mediate.[44] Legal form is not the cap on economic relations of power, but its active means.[45] In

39 Ibidem, 110.
40 Ibidem, 134-163.
41 Ibidem, 169-188.
42 See also Marx, *Grundrisse*, 100-108.
43 Pashukanis, *The General Theory of Law & Marxism*, 43-44.
44 Ibidem, 44.
45 Ibidem, 45, 60.

this sense, Pashukanis greatly reduces the scope of treating the law as 'mere' ideology:[46] it is not an ornament to exchange, but its social medium.

Moreover, Pashukanis notices that 'the law-court and the judicial process' represent 'the most consummate manifestation of the legal form'.[47] They arise out of the need to settle conflicting interests by means of establishing decideable equivalence:

> It is dispute, conflict of interest, which creates the legal form, the legal superstructure. In the lawsuit, in court proceedings, the economically active subjects first appear in their capacity as parties, that is, as participants in the legal superstructure. Even in its most primitive form, the court is legal superstructure par excellence.[48]

As the legal form is aimed at creating and deciding between interests of private subjects,[49] it lives off the dispute and offers to it a settlement based on an abstract representation of social relations. In particular, the most crucial relation is property, based on the exclusion of others and rules of exchangeability.[50] Settlement of disputes is followed by various forms of coercion, from direct application of state power, reputational losses or reciprocity as a motivational factor.[51] Legal form exists precisely not only to decide these disputes, but to offer an autonomous, self-legitimising dimension in which such decisions appear as substantiated and just.

Finally, the legal form is marked by profound historicity:[52] its construction depends on the historical form of socio-economic relations it aims to uphold (*pace* discussions on the autonomy and inertia of the law[53]). Although Pashukanis himself seems suspended between the historical concreteness imperative anchored in the Marxist thought and abstracting, trans-historical speculations, he always – at least declaratively – attempted to make it clear that any work of abstraction on the part of the legal theorist corresponds to the work of abstraction already in process in the legal form

46 Ibidem, 78.
47 Ibidem, 43.
48 Ibidem, 93.
49 Ibidem, 103-104.
50 Ibidem, 127.
51 Ibidem, 162.
52 Ibidem, 63-64, 71.
53 Chia, "On the 'relative' autonomy of the modern form of law: from Marx and Engels to Althusser", 119-148.

itself. The historical riddle is not solved in his thought, but it was a paradox that he inherited to which the greatest thinkers of modernity could not find a definitive solution.

As I argued elsewhere,[54] the concept of the legal form should not be approached as a fossil of Marxist orthodoxy (which in fact it never was), but rather as a live source of critical legal thinking, subjected to flexible developments. As we will see, in order to become truly explanatory for the issues of self-determination in international law, it will require significant adaptations. Before we proceed to them, let us enquire into how this concept has so far been used in international law in general.

3. Legal Form of International Law

Critical legal theory in international law, partly due to its relative underdevelopment, has displayed eclectism in methods and approaches to an even greater extent than in its other fields. For this reason, it is difficult to speak of a larger critical research tradition of adapting the legal form proper to international law. Although general guidelines were given by Pashukanis himself, the most significant attempt in this area is still China Miéville's *Between Equal Rights*, where the concept of the legal form is pioneeringly offered as a promising theoretical avenue, even if it still remains to be developed.

Naturally, to bring the concept of the legal form to international law must involve solving the principal dilemma at the onset: the legal form was coined in order to theoretically conjoin legality and commodity exchange. As a result, its base is civil law, the closest area of contact between the law and machinery of equivalenting and exchanging. The further from civil law, the feebler explanatory power of the classic understanding of the legal form, propped up with various theories of the state and explanations that for long have been marked by the vague and often misleading concept of 'superstructure'.[55] As a consequence, transposing the concept of the legal form onto the dimension of international law must include a fundamental choice. The first option means international law is entered through the idea

54 Tacik, Cercel and Fusco, "Introduction: the legal form as a conceptual event", 1-4.

55 For key discussions on the concept of superstructure as applied to the law see: Collins, *Marxism and Law*, 22-24, 77-91; Kinsey, "Marxism and the Law: Preliminary Analyses", 206; Klare, "Law-Making as Praxis", 126-127; Brophy, "An Uneven and Combined Development Theory of Law: Initiation", 179-182; Cohen, "Base and Superstructure: A Reply to Hugh Collins", 95-99; Stone, "The Place of Law in the Marxian Structure-Superstructure Archetype", 48-56.

of the state, and thus analysed through the chains of subsidiary derivations from the original concept of the legal form. In this case, we mire in substantiating why international law props up the construction of the modern state, which in turn remains a necessary bulwark for capitalist exchange. This path, although possible and sometimes fruitful, opens up an abyssal reservoir of past Marxist discussions on the nature of the state and the degree of its superstructural character. Moreover, it somehow necessarily posits the state and international role in an inherently subsidiary role. The second alternative is to reframe the very concept of the legal form by using it more flexibly and autonomously in the field of international law. The price to be paid for this approach is loosening the ties between the legal form and the heart of capitalist exchange. Still, a hundred years after Pashukanis's theory, it is high time to use his thought more creatively and in a less orthodox manner.

Miéville begins his work with Pashukanis on discussing the so-called derivationist theory of the state which aims to re-frame classic Marxist claims on the subsidiarity of the state vis-à-vis capitalist exchange.[56] In this approach, the state is understood as a peculiar *form of power*, which is used in class domination. Consequently, such a theory aims to either *deduce* the state from capitalist exchange and the class domination inherent therein, or at least *relate* one to the other.

Yet Miéville notices that Pashukanis – himself trained in international law – was far from such reductionism.[57] The concept of the legal form does not remove the autonomy of international law. On the contrary, in times where the legal status of this law was still broadly discussed, Pashukanis did not hesitate to recognise its legal character, although acknowledging relatively unorganised coercion largely based on reciprocity.[58] The legal form assumes priority of socio-economic and political relations underneath legal norms; accordingly, the status of international law is enquired not in terms of *whether* it is law (such question, as inherent to legal ideology, remains secondary if not irrelevant), but rather *why* international relations are framed in such a particular form.

As Miéville points out, the lack of a universal centralised body enforcing norms of international law from a supranational position does not detract from this law's legality.[59] Nonetheless, when power and violence are

56 Miéville, *Between Equal Rights*, 122.
57 Ibidem, 128-132.
58 Pashukanis, *The General Theory of Law & Marxism*, 162.
59 Miéville, ibidem, 132-133.

analysed, it requires a shift of focus from the enforcing agent to the violence contained in the very form of international legal norms:

> Where, then, does the coercive violence in law without an abstract state come from? I have argued against Pashukanis that violence and coercion *are* immanent in the commodity relationship itself. If this is accepted, the conundrum disappears as it is clear that in legal systems without superordinate authorities self-help – the coercive violence of the legal subjects themselves – regulates the legal relation.[60]

In other words, international law exhibits a different map of distributing violence within the legal form than domestic law: in lieu of establishing a central enforcing agent and regulating its exercise of power, it relies more strongly on what we can call *the threshold of legality* – the violence inherent in the imposition of the form itself. To this violence corresponds particular violence applied by sovereigns, applied both within the law and outside of it. 'In the absence of an abstract 'third force', the only regulatory violence capable of upholding the legal form, and of filling it with particular content, *is the violence of one of the participants*', notices Miéville in his interpretation of Pashukanis.[61]

Therefore one could claim that the particularity of international law makes its legal form not less, but even more visible. The threshold of legality in domestic law is usually already obfuscated: social relations appear in the frame of their legal expression. Moreover, even if the interpretation of particular domestic norms can be disputed, the general authority of the law-giver is unquestionable unless the country in question is ravaged by legal anarchy or civil war. In international law, however, two issues regularly appear as problems of the application itself: the binding character of a norm and the effectiveness of its application. In domestic law, they appear much more rarely and usually can be solved quite easily, at least from the intra-legal point of view. In contrast, international law turns them into a permanent issue of the threshold of legality. As a result, its legal form is visible at work in its very welding with the facts. Within this broad border zone violence of individual states and other actors often operates *preater*, if not *contra legem*.

60 Ibidem, 133.
61 Ibidem, 136.

Miéville notices that in international law 'coercion *remains embedded in the participants*', as a result of which 'morphological proximity of the legal subject and the armed unit is nowhere more clear than in international law'.[62] Morphological analogies between international law and civil law are not conjectural: a state inherits the position of an individual subject that exists within the boundaries of normatively upheld social relations. While it is quite typical in the doctrine of international law to assume that this law makes sometimes futile efforts to impose moderation, non-violence and co-operation on structurally anarchic international relations, in which power and force are the common languages, such an opposition is in itself obfuscating. Anarchy, force and violence are part and parcel of the same framework of relations in which international law plays the crucial role. Both numerous lacuna of this law and its often decried ineffectiveness are inherent in its legal form.

In Miéville's reading of Pashukanis the particularity of the legal form in international law is an overlap between the public and the private:

> in the absence of a sovereign authority, *precisely because* the coercive violence inherent in the commodity/legal relationship between abstract equals must inhere in the participants themselves, 'public' political relations *are* exchange relations. The public and the private are inextricable here.[63]

Therefore, unlike the legal form of domestic law, international law offers a peculiar machine producing subjects that are both public (almost tautologically, as states) and private (in their mutual relations and construction of their legal subjectivity). Violence is enmeshed in the threshold of legality of international law – and in the construction of its subjects. International legal form perturbs the relations between the general and the particular that are known in domestic law. As Miéville claims, 'the *particular* contents and norms that actualise the *general* content of competitive social relations are invested into the legal form'.[64]

To develop this statement beyond Miéville's remarks, it seems pertinent to use Hegel's terms:[65] the universal and the particular are – in international law – replaced by *singularity* of its legal form. For Hegel the universal is composed of particular items: they match seamlessly, each particularity is

62 Ibidem.
63 Ibidem, 137.
64 Ibidem, 141.
65 Hegel, *The Science of Logic*, 505.

an item of some universality. This is, indeed, the usual product of the legal form of domestic law, which aims to represent individual subjects and situations as cases of law-application. Nonetheless, beyond each pair of universality/particularity, there is the third, final term – singularity, which reflects this pair's own determination vis-à-vis some unknown totality. As Hegel notices, '*singularity* is the concept reflecting itself out of difference into absolute negativity'.[66] In other words, the structural problems of international law can be summarised by the fact that its universality never manages to establish itself in a way that would entirely obfuscate its outside. This outside is typically described as 'politics', 'facts' or 'international relations', decried for the lack of respect for international norms. In contrast to domestic law, which usually manages to grasp and absorb the political – chiefly by the concept of the rule of law – international law remains singular as a whole order.

The singularity of the legal form of international law is like sand thrown into the gears of its legal apparatus. Amongst every legal order's attempts to establish regularity of application – the predictable calculus between the universal and the particular (the rule and the case) bound by the concept of subsumption – international law finds itself in a difficult position. The singularity of its legal form taints acts of its application with an additional quality, warping the relation between the rule and the case. Precisely through singularity this relation cannot establish itself as exhaustively dualist: the excess accompanying subsumption of cases under international rules is discernible in the question of their effectiveness, binding interpretation[67] and enforceability. It would be erroneous, however, to assume the inexistence or purely idealist status of international law, as it was often done in times of Pashukanis (probably most famously by Hans Kelsen[68]). The legal form of international law makes it a singular order, but still – a legal order. Apart from the long discussion that ensued since Kelsen's disparaging remarks on international law, one argument is particularly pertinent in the critical context: denouncing the legal character of international law – through its unsubstantiated simplification – removes the entire riddle instead of explaining it.

66 Ibidem, 530.

67 As Miéville notices, '[d]omestically, lawyers may well argue with the state that their client is not guilty of a particular crime, but it is virtually impossible for them to argue that the *category of action itself* is not in fact a crime. This, however, is not so for international law, where there is no monopoly even on that primary level of interpretation'. Miéville, ibidem, 143.

68 Kelsen, *Principles of International Law*, 20

Consequently, the legal form of international law blends what in domestic legal orders is typically separated: public and private, legal and political, legal subject and law-enforcing agent. Its structure is overdetermined and thus excessive. Singularity permeates to the relations between the universal and the particular, perturbing the very *iterability* of international law. In other words, the establishment of comparability between different cases – seen in the light of one and the same norm – is defective: cases are often too variegated to be able to embody one coherent norm. Naturally, there are obvious areas of international law where this apparatus is able to establish iterability and comparability to a high degree (for example, the ECHR control system), but in many central areas – such as self-determination or the use of force – they are flawed. It is in them that the work of the legal form of international law exhibits its specificity: it moulds every case in a way that adds a momentum of singularity to each particularity. When the cases are to be compared, they do not produce a coherent norm, but rather an often discontinuous chain of tangential norms, each deducible from a case affected by singularity. This mechanisms only add complexity to the plurality of interpretations backed up by force and power of states.

Such an account of the legal form in international law allows for moving beyond the ultimately barren disputes between defenders of international law as a legal order and those pointing out to its ineffectiveness and manifest political abuse. International law should be seen neither as a solid legal order which is often infringed or ignored (due to political interests of states) nor as an idealist obfuscation of the brutal inter-state relations. International law is a legal order, whose form blends the pair general-particular with indelible admixture of singularity. If sovereignty is ultimately a negative power – of resistance and exercising exceptionality – the sovereign will always retain the possibility of effectively suspending the norm applied to itself. This possibility makes international law – as a legal order applicable to the community of sovereign states – singular and internally disseminated. The triad consisting of the establishment of a written norm, its interpretation and enforcement can never be fully sequenced and stabilised in the axis general/particular. The *possibility* of sovereign refusal of respecting a norm, unenforceable from a metasovereign level, forever binds international law to its outside: politics, interests, international relations.

Consequently, the right to self-determination of peoples, when seen from the perspective of its legal form, must necessarily be investigated in its links with what constitutes its outside. This will be the task of the following part of the paper.

4. The Right of Peoples to Self-determination and its Legal Form

Thus developed theoretical apparatus of the legal form allows for a new critical framing of the right of peoples to self-determination. Before I proceed to its exposition, there is a caveat. Since Pashukanis, the theory of the legal form aims to maintain – in various ways, sometimes critically[69] – its link with commodity exchange as basis of capitalism. In this paper I will treat the legal form in its relative conceptual autonomy. Rather than explaining how it mediates *between* international law and capitalism (which is the path successfully explored by Miéville and developed in other recent accounts[70]), I will use it as a condensation of abstract structural traits, which ultimately allow – or correspond to – capitalist exchange, but give international law its particular shape and relation to the outside. Especially in case of self-determination, this 'outside' cannot be reduced to socio-economic relations only. It necessarily involves the issues of nationalism as part of social imagery, the biopolitical role of the state as well as the problems of popular sovereignty and democracy. Therefore self-determination in international law offers an opportunity to move beyond the dependence of the concept of the legal form on economy.

In what follows, I will enquire into the right of self-determination through the lens of three ideas that are well-anchored in the legacy of the legal form: subject, exchange and singularity. The first part will allow for grasping how this right moulds its potential and real subjects, assuring a binding between a certain population and 'its' statal subjectivity. The second part will enquire into how these subjects are involved in an abstract pattern of exchange. Finally, the concept of international law's singularity elaborated above will frame the peculiarities of enforcement of self-determination.

4.1. Subjects of Self-determination: the Legal Form of Peoples

Before passing to the subject of the right to self-determination, let us make a brief introduction into what the conceptual legacy of the legal form has established on legal subjectivity as such.

In a famous claim Pashukanis noticed that '[t]he subject is the atom of legal theory, its simplest, irreducible element' necessary to establish

69 See for example Anderson, Greenberg, "From Substance to Form: The Legal Theories of Pashukanis and Edelman", 72-73.

70 Tzouvala, ibidem; Knox, "Marxism, International Law, and Political Strategy", 413-436.

exchange.[71] Capitalist exchange requires owning the means of production, whose monopoly creates a necessity of entering a labour relationship for those who have nothing but their work. Still, ownership requires its legal subject: an agent within the law who exercises economic power through a relation to things (means of production and commodities produced through them).[72] At the same time, a worker is posited by the law as a legal subject, through their construction abstractly equal to the employer as a subject. Before equivalised exchange can take place, the subjects who enter it must be legally posited on the same level. That is why the legal form necessitates the existence of legal subjects in the first place. Yet *being recognised as a legal subject* is the most typical way of how individuals experience the formatting violence of the legal form. In order to be visible to the law, one needs to present oneself as a legal subject, bearer of entitlements and obligations. The discrepancy between the legal subject as an abstract category and the lived world of an individual is irremovable, although typically not visible in the law itself (as a result of which the doctrine of civil law carries a particular vision of humanity: interest-pursuing economically rational individuals voluntarily entering into contracts).

Louis Althusser grasped – on a much more philosophical level – the process of being rendered a subject through the category of *interpellation*. As he noticed, interpellation is not just an imposition of an abstract subjectivity on an individual, but this individual's self-recognition in this imposed identity:

> [S]ujet signifie en effet 1) une subjectivité libre : un centre d'initiatives, auteur et responsable de ses actes ; 2) un être assujetti, soumis à une autorité supérieure, donc dénué de toute liberté, sauf d'accepter librement sa soumission. Cette dernière notation nous donne le sens de cette ambiguité, laquelle ne réfléchit que l'effet qui la produit : l'individu *est interpellé en sujet (libre) pour qu'il se soumette librement aux ordres du Sujet, donc pour qu'il accepte (librement) son assujettissement*, donc pour qu'il « accomplisse tout seul » les gestes et actes de son assujettissement. *Il n'est de sujets que par et pour leur assujettissement*.[73]

71 Pashukanis, *The General Theory of Law & Marxism*, 109.
72 Ibidem, 109-112.
73 Althusser, *Sur la reproduction*, 311.

In Althusser's perspective, ideology creates the subject as already given. The subject recognises *itself* in the discourse pre-emptively provided through ideology: '[o]n n'interpelle jamais qu'un sujet présumé existant – et on lui fournit ses pièces d'identité pour lui prouver qu'il est bien *ce* sujet qu'on a interpellé'.[74]

In international law's legal form the right of peoples to self-determination plays a crucial and complex role. It is precisely the device through which communities are interpellated into 'peoples', that is, legal subjects who – at least nominally – can claim the right to self-determination. The current state of international law is, in this respect, a result of a long-lasting evolution. This legal order still recognises states as its primary subjects; yet at least since the emergence of the legal *right* of peoples to self-determination – usually located in the two decades after the adoption of the UN Charter[75] – states as subject of international law have, as their shadows, 'the peoples'. The relation between states and peoples constitutes the heart of how the legal form of self-determination interpellates the latter.

Generally speaking, the position of peoples as such in international law is rather limited; their role and entitlements are usually correlated with the position of states. Accordingly, there are two types of peoples in international law. In the first type, they can be understood as entire populations of existing states – and in this sense they 'have' their 'own' states, through which they exercise their right to self-determination. This exercise is itself paradoxical, because two aspects that overlap in it have been addressed separately in the legal doctrine: for some, the right to self-determination is exercised once, when a people constitutes 'its own' state (and can be at best revived when this state is abolished);[76] for some, this right is exercised permanently through the actions of the state.[77] In many respects the right of such peoples reinforces and coincides with the principles of international law which protect states: general prohibition of the use of force, equality and respect of territorial integrity.[78]

The second category of peoples in international law, undoubtedly more significant and more problematic in practice, encompasses fractions of populations of existing states (sometimes being trans-border fractions

74 Althusser, "Trois notes sur la théorie des discours", 138.
75 Summers, ibidem, 70-71.
76 Velasco, ibidem, 76; Rabl, *Das Selbstbestimmungsrecht der Völker*, 500.
77 Espiell, *The Right to Self-Determination. Implementation of United Nations Resolutions*, 22.
78 Liu, "Two Faces of Self-determination in Political Divorce", 358-359.

in many countries at the same time, like the Basques or the Kurds). In the discourse of nationalism, they do not have their own state – or do not have it *yet*. The right to self-determination which applies to them calls for some form of statalisation. The doctrine of international law has traditionally distinguished two of them: internal and external.[79] Whereas the first one pertains to all types of intra-statal recognition of the population's autonomy (such as self-government, linguistic or educational particularities etc.), the latter connotes creation of the group's 'own' state.[80] Naturally, external self-determination condenses the crucial problems of international law: secession (including remedial secession[81]), legality of *de iure* or *de facto* infringement of the parent state's territorial integrity[82] and enforcement of such a right.

Instead of addressing these problems, already discussed elsewhere,[83] let us focus on the work of interpellation contained in the legal form of self-determination. What should stun us at the beginning is that no binding norm of international law determines what a 'people' is.[84] Although the legal doctrine typically presents it as an underdevelopment,[85] it is indeed a functional part of the legal form of self-determination. What this form offers is in fact a bifurcation of a people's identity: it can have either a pre-statal form – undefined, outlined only doctrinally with a big admixture of political imagery borrowed from nationalism – or a target incarnation, the people that fully overlap with the population of an existing state. Crucially, between these two forms there is a vector: the first is structurally posited as tending towards the latter. The impossible end state of international law would be the total overlap between peoples and states: a fantasy ravaged by the irremovable excess of peoples. This excess was famously experienced by none other than Woodrow Wilson, a single-hearted proponent of self-determination (in response to its earlier use by the Bolsheviks[86]), who soon after brandishing

79 Senaratne, "Beyond the Internal/External Dichotomy of the Principle of Self-Determination", 463-479.

80 Summers, ibidem, 63; 341-343.

81 Cátala, "Remedial Theories of Secession and Territorial Justification", 74-75.

82 Eisner, "A Procedural Model for the Resolution of Secessionist Disputes", 408-410.

83 Tacik, *Deconstructing Self-Determination in International Law. Sovereignty, Exception, Biopolitics*, 293-436.

84 Cassese, *Self-Determination of Peoples. A Legal Reappraisal*, 326.

85 Hofbauer, *Sovereignty in the Exercise of the Right to Self-Determination*, 21-23.

86 Fisch, *The Right of Self-Determination of Peoples. The Domestication of an Illusion*, 137.

his new principle was unpleasantly surprised by how many nations there were in the world ready to take his words seriously.[87]

At the same time, however, despite this postulated vector, the most typical situation for the current state of international law is to put non-state peoples in a permanent limbo as a space of creating their subjectivity. Typically, the doctrine of international law supplements the inexistence of a binding definition of a people by listing 'sociological' criteria that allow of identifying one. In a majority of accounts these criteria are divided into two groups: objective (such as the existence of a common standardised language, shared historical imagery, common cultural traits etc.) and subjective (self-identification of a people as a people).[88] This split embodies the interpellation of a people performed by the right of self-determination. The 'definitions' acts in the foreground of this right, creating the largely false promise that if a given entity *recognises itself as a people, while meeting 'objective' criteria*, it will receive some actual entitlements offered by international law.

As Althusser noticed, interpellation requires an instance that addresses a potential subject (in this case, with the promise of acquiring self-determination entitlements that are given to entities that meet objective criteria) which, however, needs to recognise itself as a subject (this is what the legal doctrine effectively understands by subjective criteria). Naturally, the formation of individual subject happens differently than of a collective subject, but the creation of subjectivity involves organisation of discourse on the self as a member of a broader symbolic framework. This is precisely what the right to self-determination offers to such peoples: *an imagination of themselves as potentially equal members of the international community*. Yet at the same time the promise which triggers self-recognition is suspended: after decolonisation very few non-statal peoples manage to acquire self-determination

87 According to Robert Lansing, Wilson's Secretary of State, the president remarked: "When I gave utterance to those words I said them without the knowledge that nationalities existed, which are coming to us day after day .... You do not know and cannot appreciate the anxieties that I have experienced as the result of these many millions of people having their hopes raised by what I said. Thus even in its origins self-determination was a right based less on jurisprudential consistency than on political instrumentalism". Text of a meeting between President Wilson, Frank P. Walsh and Edward F. Dunne in Paris, June 11, 1919, *quoted in* Wilson, "Ethnic Groups and the Right to Self-Determination", 458.

88 Coleman, *Resolving Claims to Self-Determination. Is There a Role for the International Court of Justice*, 35-37; Nichelmann, "Paquée, Schutz nationaler Minderheiten und das Prinzip der Selbstbestimmung der Völker: Zeitbindung durch Recht oder Risiko?", 54-55.

and they are frozen before the wall of international law protecting territorial integrity of states.

The interpellation performed by self-determination produces further consequences. First, it frames statiality as the main form – and desired goal – of communal life. Through this act it cements the state-centrism of international relations, making the nation-state the unquestionable and impassable fact of reality. It thus corresponds to nationalism as a set of discursive practices organising communal and individual life around sovereignty-inspired imagery. Kwame Nkrumah's famous saying: '[s]eek ye first the political kingdom, and all other things shall be added unto you'[89] epitomizes the priority that sovereignty – as the ultimate binding between the people and 'its' state – takes in communal discourses. Being 'at home', that is, having an expression through apparatuses of the state, is posited as a people's primary goal and a condition for being a 'self'.

Second, the legal form of people's subjectivity always obfuscates the violence that takes place in the process of creating a national 'self'. A self-determination process often entails persecution of minorities, which no longer match the dreamed state based on an imaginary unity with its people. Ethnic cleansing is a procedure that often accompanies exercise of self-determination, usually in the name of reaching a proper home for the nation.[90] Still, there are also other, even less visible forms of violence. Self-determination – with its typical eruption of nationalism and obsession about the state's biopolitical apparatuses – prioritises national identity over all other forms of identity. In this atmosphere of national obviousness the whole complexity of human life – as well as myriads of unobvious, dispersed, experimental identities – are overshadowed by forced and violence-backed simplicity. Crucially, national mobilisation often beats an anti-feminist and patriarchal drum.[91]

Third, the creation of a national 'self' through the mediation of the state requires a complex formation of discourse on what the community is. No community can recognise 'itself' as subject without imposing a network of power and domination on its members. Statal apparatuses are also coveted for their irreplaceable role in shaping communities into nations, as well

89 Ibhawoh, "Seeking the Political Kingdom. Universal Human Rights and the Anti-colonial Movement in Africa", 35.

90 Weller, *Escaping the Self-Determination Trap*, 13.

91 Knop, ibidem, 3.

described by Eric Hobsbawm.[92] Self-determination also acts as a springboard for the creation of new, pro-national elites, and the adequate – not necessarily just – redistribution of power and resources.

In sum, the creation of subjectivity remains the crux of the legal form of self-determination. Before the strictly legal form of self-determination there is a foreground, composed of promises, imageries and structures that form communities out of individuals and project them into the statal division of the world. The difference between the people and the state – which Foucault enquired through the lens of biopolitics[93] – is the grey area of interpellation. The right to self-determination obfuscates the whole process of how its subjects come into being and become welded with states. What a people is remains unclear as long as it is not conjoined with a state: then it acquires its awaited form.

4.2. Exchange in Self-determination: Legal Form of Recognition

The structure of the legal form assumes that concurrently with the creation of legal subjects they are posited within a structure of exchange. As we saw in Chapter 2, Pashukanis's own theory of exchange was based on the recognition of affinity between the legal form and commodity form: legal structures uphold the exchange value of things turned into commodities by assuring their universal assessibility and comparability. The status of a commodity splits things into two aspects. One is the abstraction inherent in a thing (its exchangeability, price, applicability of general rules of ownership, selling, letting etc.) and the other corresponds to the use value, that is, the remainder of the role that the thing had played for individuals as a consumable good.

If exchange – as an aspect of the legal form – is transferred onto the ground of international law, the typical way would be to explore ways in which this law conditions and facilitates global commodity exchange. When applied to self-determination, however, it would make it subsidiary, if not inconsequential. What we rather need is understanding the exchange as *a general process of abstraction* which finds a particular embodiment in the right of self-determination.

92 Hobsbawm, *Nations and Nationalism Since 1780: Programme, Myth, Reality.*
93 Foucault, ibidem, 1.

In his canonical book on nationalism as a modern discourse, Benedict Anderson noticed that one of the paradoxes that theories of nationalism aim to address is the opposition between:

The formal universality of nationality as a socio-cultural concept – in the modern world everyone can, should, will 'have' a nationality, as he or she 'has' a gender – vs. the irremediable particularity of its concrete manifestations, such that, by definition, 'Greek' nationality is *sui generis*.[94]

Nationalism preserves an antinomy between a universalist grid for nations (in which each of them is fashioned as having a state which offers a variant of the universal x: its own flag, language, motto etc.) and the remainder, some 'x-ness' (Greekness, Germanness etc.) that can potentially develop into exclusionary chauvinism. In other words, nationalism has a dimension in which *exchange* – comparability and assessability – exists, making nations variants of an identity specimen, but beyond this exchange there is also an excess. This excess, which we could name – extrapolating classic Marx's analysis[95] – *the use value of a nation*, plays a crucial role in the interpellation described previously. Nonetheless, it remains a defused bomb set around an identitarian abyss.

Both aspects of nationalism – universalist and exclusionist – have been addressed in the legal doctrine focused on self-determination.[96] Given that the right of peoples to self-determination is a form of inscription of nationalism into international law, the two aspects also appear there. In this respect the right to self-determination is a profoundly paradoxical device. As James Summers noticed, it is 'subject to two notably different standards: those of nationalism and international law'[97] and aims to mediate between them. Here we come to a proper Pashukanisian claim: *the right to self-determination is a legal form of exchangeability of recognition between peoples*.

For peoples having 'their' own state, it sustains them in their statality and offers patterns of expression of identity. For non-statal peoples, it can either be a legal path leading them to acquiring a state (as in the case of decolonisation) or, especially nowadays, *a blocked promise of statality*.

94 Anderson, *Imagined Communities. Reflections on the Origin and Spread of Nationalism*, 5.
95 Marx, *Capital*, 125-136.
96 Coleman, ibidem, 32; Summers, ibidem, 571; Roshwald, "The Post-1989 Era as Heyday of the Nation-State?", 18.
97 Summers, ibidem, 13.

The Catalonians offer a telling example here.[98] The Catalonian independentists present themselves as representatives of a people that merits self-determination and creation of its own state. For the Spanish state, however, they are typically understood as members of the civic Spanish nation. The Spanish Constitutional Court famously found that the people who merit self-determination on the Spanish soil are only the Spanish people, a community of citizens.[99] As this example demonstrates, a blockade of self-determination for a non-statal people is typically presented not in the opposition between this people and the parent state, but rather as a conflict of two peoples, the statal and the non-statal. Its members are thus doubly interpellated. The existing statal nations get a natural priority. The chain of recognition effectively distinguishes between statalised and not-yet (or not-ever) statalised peoples. Such an implicit distinction is inscribed in the right to self-determination, although on the surface – for example, in both UN Covenants or in the General Assembly Res. 1514[100] – it pertains to *all* peoples, regardless of their statality. This right – just as Pashukanis's legal form in relation to commodity exchange – models the chain of recognition of peoples after the legal exchange between states. This understanding of recognition is broader and more abstract than the concept of recognition in international law, although the latter is a crucial element in guarding the statal control over the club of peoples.[101]

The right to self-determination therefore acts not only in its interpellative foreground, tempting communities to follow the path of 'self-recognition', but also in the dimension of the exchange of recognition offered to peoples. The Catalonians did not meet with support from EU countries, despite all the lip service paid to self-determination in acts of international law. Recognition of a statal people in such a conflict entails lack of recognition of the non-statal people. The politico-legal struggle is therefore not between non-statal peoples and states, but within the legal form of peoples themselves. This is particularly visible in how various military conflicts

98 See Scotoni, "Exercising Self-Determination without Jeopardising the Rights of the Others: The Catalan Model", 402-403; Blanke, Abdelrehim, "Catalonia and the Right of Self-Determination from the Perspective of International Law", 532-537, 560-564.

99 Tribunal Constitucional de España, Judgment of 25 March 2014, 42/2014, 2. See also Hoyos, *El derecho de autodeterminación. Constitución y normas internacionales*, 133-139.

100 UN General Assembly, Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), A/RES/1514(XV).

101 For discussions on whether there are international norms imposing the obligation of recognition of states see: Czapliński, "Recognition and non-recognition beyond the ICJ's Advisory Opinion", 174-175.

of today's world, esp. the Russian aggression against Ukraine, are substantiated by rhetorical rebuttal of the weaker opponent's identity as a people (and, consequently, its right to self-determination).

In the right to self-determination, we can thus see the permanence of the binding between states and peoples, which only occasionally can be used by non-statal peoples to gain independence instead of just autonomy. The proper status of the people occurs when 'its' state is recognised. Outside of this grid of exchange the right to self-determination leaves non-statal peoples, often blocked for indefinite time with the promise of exercising self-determination, as well as the socio-political aspects of nationalism. In this way, it inscribes the biopolitical order of organising national communities into the legal order of equal states. Under the masking written letter of peoples' equality the right to self-determination conceals effective division between statal and non-statal, as well as between exchange and use 'value' of a people.

4.3. Singularity of Self-determination: Legal Form of (non-)Enforcement

The last aspect of our analysis will be the singularity of self-determination's legal form. As we remarked earlier, international law is a legal order afflicted by noticeable singularity in many of its areas. Given that it cannot often stabilise itself as a set of universal rules smoothly recalculable into particular cases, it rather *stands next to cases* as one of the power orders in the light of which they are assessed. The legal form of self-determination demonstrates that the exchange that it produces is imperfect and ravaged by singularity. It should not be, however, taken for some factual shortcoming: as we will see, singularity in this case is part and parcel of how the right to self-determination does not work on purpose.

It has been noticed in the doctrine that the instances in which the right to self-determination has been invoked do not form proper 'cases',[102] understood as variables of the same order subsumable under one *x*. The closest it came to regularity was the period of decolonisation, esp. in the case of India and Pakistan as well as the African wave in the 1960s. Nonetheless, already then the clear norm of decolonialising self-determination was marred by ambiguity in recognising its subjects. Especially in the case of Biafra and Katanga, two territories which claimed further self-determination from their

102 Trinidad, *Self-Determination in Disputed Colonial Territories*, 3-4.

newly emerging parent states (itself exercising self-determination – Nigeria and DR Congo, respectively), it appeared that self-determination easily spirals into claims of the next level,[103] with international law clearly supporting the colonial structures under the *uti possidetis* principle.[104] Blockades against infringement of territorial integrity have been inscribed in numerous acts of self-determination acts from this period (cf. par. 7 of Res 1514). Still, the relative regularity of decolonial self-determination gave rise to what we know now as the UN corpus of self-determination norms, developed and mastered in subsequent rulings and advisory opinions of the ICJ (esp. in *South West Africa*,[105] *Western Sahara*,[106] and *East Timor*[107]). The most recent AO in this matter – in *Chagos*[108] – confirmed two circumstances: first, decolonial self-determination is ruled by a relatively comprehensive and quite honed set of norms, and second, this corpus is no longer able to withhold self-determination in its current form. *Chagos* concerned a particular entanglement of territorial circumstances which required settlement, although its broader applicability is very limited.

Decolonisation in a 20th century understanding is over apart from a small number of territories. The UN corpus of self-determination is now as perfect as no longer practically relevant. It does not offer practical answers in cases of modern self-determination like these of the Catalonians, the Scots, the Kurds or the Tibetans. Although the legal doctrine expressed some rapture over the legal beauty of *Chagos*,[109] it should rather return to the apparent mess of the *Kosovo* Advisory Opinion.[110] The latter, typically lambasted in the doctrine (although from various positions),[111] expressed the paradox

103 Castellino, *International Law and Self-Determination. The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial 'National' Identity*, 169.

104 Peters, "The Principle of *Uti Possidetis Juris*. How Relevant is it for Issues of Secession?' Force", 121-137.

105 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, 16.

106 *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, 12.

107 *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, 90.

108 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, 95.

109 Amann, "Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965", 784-791.

110 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, 403.

111 For a representative overview of critiques see: Hilpold, *Kosovo and International Law. The ICJ Advisory Opinion of 22 July 2010*.

of the current era much better than *Chagos* and augured the conflicts of the future.

What the AO in *Kosovo* demonstrates is that the 'exercise' of self-determination by non-statal communities (esp. the external self-determination) takes place in an extra-legal space, being a part of the right to self-determination as a legal device. It is a space where facts (like the unilateral declaration of independence) and proportion of forces decide. Although the ICJ made some observations on the right to self-determination,[112] it decided not to treat the independence of Kosovo as its *application*, but rather the result of a lack of prohibition for unilateral declarations of independence in international law.[113] Skipping here a broader discussion of this Opinion and its reception in the doctrine that I offered elsewhere,[114] suffice it to say that the right of peoples to self-determination – at least in non-decolonisation contexts – is ravaged by a structural paralysis between its norm and application. As a norm, it enjoys broad recognition and a prominent place in international law. But it seems that after decolonisation – and at least since Kosovo – *it is impossible to link it to a set of acts that would constitute its 'application'*.

What rather happens is that the right of peoples to self-determination remains an umbrella which can cover successful acts of gaining autonomy or performing secession,[115] once they happen, but does not determine or substantially help the actions of those who want to claim it. Thus it produces a retroactive effect: it can explain or substantiate the acts that have already happened, but not necessarily future ones. For this reason, the ICJ in *Kosovo* noticed an internal hiatus within this right that escaped the attention of many critics of this Opinion.

The right to self-determination lacks enforceability. As well noted in the doctrine, there is no international body of adjudication or even non-judicial decision-making that would decide which community is a people and merits some forms of self-determination.[116] This is not, however, an underdevelopment, but a direct consequence of the current model of state creation in international law and the primary, significantly factual character

112 Advisory Opinion in *Kosovo*, §§ 82-83.

113 Ibidem, §§ 91-105.

114 Tacik, *Deconstructing Self-Determination in International Law. Sovereignty, Exception, Biopolitics*, 222-234.

115 Unless secession is conceptually disjoined from self-determination and assumed to be a method of its exercising rather than an entitlement inherent therein. See Perkowski, *Samostanowienie narodów w prawie międzynarodowym,* 81.

116 Fisch, „Adolf Hitler und das Selbstbestimmungsrecht der Völker", 96.

of the emergence of a state. But consequently, the independentists cannot count on any practical mechanism of enforcement – apart from a possible help from befriended states to strengthen their military effort, like in the case of Bangladesh and India.[117]

As a result, the right to self-determination – in its post-decolonisation stage – displays a level of singularity high even for international law. Although this right is sometimes presented as having the statal peoples as cases of its 'exercise',[118] its practical meaning which does not overlap with protection of territorial integrity is granting autonomy or independence to non-statal peoples. Here none of the non-decolonisation instances of its invocation can be presented as a 'case'. The relation between the universal and the particular is thus structurally disturbed at its foundation. The right of peoples to self-determination appears in all its singularity: every one of its contemporary 'cases' is a unique bundle of factual, political and legal circumstances that cannot be legally solved. To make this claim clear: it is not that the right to self-determination is a good, but underdeveloped right which loses in confrontation with the nitty-gritty of state interests and international politics. On the contrary, in itself it contains a high level of singularity which perturbs its relations to any situation that can be presented as its case.

In summary, this singularity makes the legal qualities of self-determination evaporate quite quickly nowadays. Part of the success of the international system in the mid-20th century was the ability to frame the infinitely complex set of political, emotional and identitarian discourses centred around the national 'self' into the right to self-determination. In other words, the UN corpus of self-determination norms managed to offer a legal form to nationalism. Regardless of how it effectively worked, it now seems that this legal form, ravaged by high singularity, is no longer able to withhold its content. If predictions can be made, the legal aspect of self-determination will lose in invocability – apart from its most general slogan – exactly in contrast to its mounting practical and political relevance.

5. Conclusion

The right of peoples to self-determination presents a peculiar legal form. Its link with its socio-political outside – nationalism, independentist

117 Summers, ibidem, 510.
118 Anaya, "Indigenous Rights Norms in Contemporary International Law", 35.

struggles, ethnic tensions and populist politics – is highly visible and hardly obfuscable by its inner legal ideology. If we ask the question that Pashukanis posed in relation to the law as such – why do certain social relations, in some of their aspects, gain a legal form? – to self-determination, we will see that it is a right that means to include populations in the state-centric system of international law. Statalism still has priority; very rarely the will of populations can alter states' borders. The right to self-determination frames nationalism into a legal form, but at the same time performs a few crucial operations. As we saw in this paper, it separates legitimate and illegitimate self-determination claims, rightful peoples (most typically, the statal ones) and nefarious impostors (most typically, the non-statal peoples). The legal form of self-determination is based on a pragmatic recognition of the importance of peoples in contemporary life, but with the will to give them only what is necessary and what contributes to the stability of the global orders of state.

The analysis of the legal form of self-determination demonstrated the way in which it interpellates communities into pre-legal – and then legal – subjects. It provides a deliberately vague grid through which communities can build their own 'selves' and perform self-recognition. These subjects participate in the system of exchange of recognition, which supports some peoples and blocks others. Finally, this right is ravaged by singularity: lack of enforceability and effective suspension of its norm – recognisable only retroactively – makes it difficult to have 'cases' of application. Especially after the ICJ's *Kosovo* the right to self-determination appears as part of the context of such 'cases', but little more. As deducible from the Court's argumentation, even potentially successful instances of self-determination (as of Kosovo itself) are not *directly linkable* to the self-determination norm.

The UN corpus of self-determination norms is an edifice that may impress some, but the socio-political life of self-determination takes place elsewhere. The singularity of this right will only increase, either calling for its new legal form or expanding the vacuum of factual fights that will break out in the name of self-determination.

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