

THE CONTESTED POLITICS OF HISTORY IN INTERNATIONAL LAW: A REPLY TO ANNE ORFORD

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I. INTRODUCTION

Professor Anne Orford of Melbourne University in Australia has written a remarkable book, a *Kampfschrift* of sorts, on the study of the history of international law and the ideological struggles related to it.¹ Before I turn to my own thoughts about and criticisms of the book, I will briefly summarize my understanding of its core arguments. Orford observes that empiricist historians who have taken an interest in the history of international law criticize international lawyers who produce historical scholarship on international law for failing to sufficiently contextualize their histories, for writing history through presentist lenses (i.e., anachronistically), and essentially for inadequately representing the history of international law for political reasons.² Orford specifically notes that sometimes these criticisms of empiricist historians have been directed against Third World Approaches to International Law (TWAIL) scholars or lawyers exploring the legacies of imperialism in international law.³

Orford criticizes the claims of historians to provide the “truth” about the history of international law and in a way advises her international law colleagues: relax, the study of the history of international law is inherently as political and subjective as arguments in contemporary international legal debates.⁴ Orford counsels her disciplinary colleagues to “[r]emember[] . . . that international law has always been and remains politics all the way down.”⁵ In this spirit, Orford proclaims programmatically that “[t]he language of facts or of truth is no longer a trump card. There is no authority to which we can appeal and no method that will establish that our account of facts or our version of the truth is the correct one.”⁶

Having developed this epistemological claim, Orford’s argument takes an additional step. She asserts that accepting the claims of empiricist historians to represent a certain objectivity and truth about the history of international law would bring neo-formalism to international law.⁷ After critical legal studies scholars have influentially argued that there was “ambiguity over [the meaning of] past texts,

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1. ANNE ORFORD, *INTERNATIONAL LAW AND THE POLITICS OF HISTORY* (2021).

2. *Id.* at 4–5, 75–78.

3. *Id.* at 77.

4. *Id.* at 10, 252–57.

5. *Id.* at 299, 320.

6. *Id.* at 320.

7. *Id.* at 295.

practices, cases, or decisions . . . “⁸ empiricist historians of international law would now bring back the historically correct interpretation of norms and institutions in international law, against which interpretations challenging such “historically correct” understandings would be in a disadvantaged position. If history is to be the new master discipline for international law, being or appearing “ahistorical” is clearly to a critical lawyer’s disadvantage.

The central move in Orford’s book is to apply the critical legal studies’ thesis—that international legal arguments are “indeterminate” from the context of contemporary arguments about international legal doctrine—to arguments over the history of international law. Orford calls on scholars to admit the politics of their studies of history and law are always—and inevitably—subjective and political, whether they are lawyers or historians who have turned their attention to the history of international law.⁹ In a sentence not without charm and beauty, she writes, “I ask what might be possible if we took responsibility for our own creativity in the project of making the law and making its history.”¹⁰

In her approach, Orford invokes what she calls a “cross-disciplinary hermeneutic of suspicion” to the relationship between the fields of international law and history¹¹ and is also critical of professional historians writing about the history of international law for not sufficiently appreciating that “international legal scholars exist in a complex relation to the world of legal practice.”¹² Of course, there are further details and examples in Orford’s book, but I think this short summary sufficiently summarizes her central claims.

There are points in the book with which I easily agree—for example, that the field of international law with its history is also a practical field, so that international lawyers often address history with a specific purpose.¹³ The book also contains several discussions from which I learned a great deal, including, for example, her detailed analysis of how various historians over time have regarded the study of history and works produced by international lawyers.¹⁴ Whether one agrees or disagrees with Orford’s main arguments, this rich synopsis and discussion of literature should be valuable reading for all international lawyers.

At the same time, I also realized that I disagree with the radical indeterminacy thesis which Orford embraces. My own credo would be quite the opposite of Orford’s,¹⁵ namely that the language of facts or of truth *can* remain a trump card in

8. *Id.* at 178.

9. *Id.* at 315.

10. *Id.* at 9–10.

11. *Id.* at 5–6.

12. *Id.* at 179.

13. I think my own Baltic study proves it too. *See generally* Lauri Mälksoo, *The Science of International Law and the Concept of Politics: The Arguments and Lives of International Law Professors at the University of Dorpat/Jur'ev/Tartu 1855-1985*, 76 *BRIT. Y.B. INT'L L.* 383 (2006) (supporting propositions that the field of international law with its history is a practical field and that international lawyers often address history with a specific purpose).

14. *See* ORFORD, *supra* note 1, at 253–83 (discussing how numerous historians have used international legal scholarship in their work).

15. *Id.* at 320 (“The language of facts or of truth is no longer a trump card. There is authority

international law. There are authorities to which we can appeal and methods that will establish that our—or somebody else’s—account of facts or version of truth is the correct one.

I must also admit that I have never perceived the clash between historians interested in the past of international law and international lawyers interested in the history of their field as sharply as does Orford in her book, indeed almost as two camps.¹⁶ To the contrary, in my experience the antagonism is less sharp in practice than she suggests, and international lawyers are not endangered by “supremacist” claims of historians in the power struggle between disciplines. I even wonder whether Orford’s book might, in part, have precisely the opposite effect to her expressed intentions. That is, by introducing and paraphrasing for international lawyers what historians have thought about histories of international law produced by lawyers, international lawyers can actually learn much from historians, indeed becoming less “amateurish” in their histories of international law. I do not see how international lawyers could ever assume that studying the history of their field is not a partly different matter from interpreting contemporary law. Either way, struggles about who is right and who is wrong in their interpretations will remain in both fields: contemporary law and its history.

To better understand what might be at stake in the debates that Orford analyzes, it makes sense to move from the abstract and general level of discussion on the study of the history of international law to the concrete and specific. For this purpose, I address further some of the issues raised in Orford’s monograph by analyzing another book,¹⁷ which Orford has recently co-edited, that discusses the impact of the 1917 Russian and Mexican revolutions on international law. The edited volume provides concrete examples of international law scholars writing and interpreting the history of international law. Since I am also a scholar of international law, this will not be a debate between historians and lawyers but rather one among international lawyers. I will focus on my comments and criticisms of parts of the book that address the legacies of the Russian/Soviet revolution, and finally I will come back to Orford’s monograph.

II. THE LEGACY OF THE RUSSIAN BOLSHEVIK REVOLUTION OF 1917 AND INTERNATIONAL LAW

Quite in the spirit of the main arguments of Orford’s monograph calling on scholars to own up to their subjectivity, the co-editors of the legacies of 1917 book make the following point in their introduction:

There is no one neutral method for thinking about the past and no innocent way of representing the revolutions of 1917. Rather, international law is

to which we can appeal and no method that will establish that our account of facts or our version of truth is the correct one.”).

16. See, e.g., *id.* at 4 (“The scholars involved in the turn to history in this second sense urged international lawyers to take a more professional, less instrumentalist, and less partisan approach to history.”).

17. *REVOLUTIONS IN INTERNATIONAL LAW: THE LEGACIES OF 1917* (Kathryn Greenman et al. eds., 2021).

one site of an ongoing struggle over what the revolutions of 1917 meant and may yet still mean for the future, and neoliberal internationalists are just one party in that struggle.¹⁸

In the same introduction, which also seems to serve as a conclusion of sorts, the co-editors paint a mutedly positive picture of the legacy of the Russian Bolshevik and Mexican revolutions in international law:

The two revolutions represented the possibility of radical social and economic change at the national level, created legal systems that survived for many decades, inspired transnational movements striving against imperialism and for social revolution, decisively changed international relations and motivated international legal innovators to create new forms, principles and institutions.¹⁹

Earlier, they had emphasized a further promising aspect of these revolutions: “In bringing the ‘social question’ to the forefront of international legal debates, the Mexican and Russian revolutions offered new ways of thinking about foundational concepts of property, statehood and non-intervention—and indeed about the very nature of law itself.”²⁰ This general approach—highlighting lasting positive legacies from the Bolshevik revolution in the international legal sphere—is in itself not new in Western scholarship.²¹ There remains one major problem though—the same Bolshevik revolution also became known for its extreme violence and many victims, arguably reaching millions in the Soviet Union and countries annexed by it during World War II.²²

Over recent years, the European Parliament has repeatedly adopted resolutions condemning the crimes of Soviet totalitarianism while simultaneously drawing attention to the Holocaust and other heinous crimes. For example, on September 19, 2019, the European Parliament adopted a Resolution on the Importance of European Remembrance for the Future of Europe.²³ The resolution declares that the Second

18. Kathryn Greenman et al., *International Law and Revolution: 1917 and Beyond*, in *REVOLUTIONS IN INTERNATIONAL LAW: THE LEGACIES OF 1917*, at 1, 5 (Kathryn Greenman et al. eds., 2021); see also *id.* at 3 (declaring that there is no neutral way to discuss the 1917 revolutions).

19. *Id.* at 2.

20. *Id.* at 1. Orford has elsewhere addressed the international law’s treatment of the social question. See generally ANNE ORFORD, *INTERNATIONAL LAW AND THE SOCIAL QUESTION* (2020).

21. See, e.g., JOHN QUIGLEY, *SOVIET LEGAL INNOVATION AND THE LAW OF THE WESTERN WORLD* (2007) (theorizing about impact of Soviet legal and political philosophy on Western governments).

22. See, e.g., Sarah Rainsford, *Russian Court Orders Oldest Civil Rights Group Memorial to Shut*, BBC (Dec. 28, 2021), <https://www.bbc.com/news/world-europe-59808624> (noting Soviet era marked by major persecution). Further groundbreaking historical research on the exact number of Soviet victims currently faces major obstacles as the key archives are in Russia and the current Russian authorities no longer encourage such research. *Id.* The famous NGO Memorial in Moscow, which has the most comprehensive catalogue of the names of the Soviet terror, was closed down by the Russian authorities in December 2021. Anna Smolchenko, *Memorial: NGO That Fought for Victims of Russian Repression*, MOSCOW TIMES (Dec. 28, 2021), <https://www.themoscowtimes.com/2021/12/28/memorial-ngo-that-fought-for-victims-of-russian-repression-a75945>.

23. Importance of European Remembrance for the Future of Europe, P9_TA(2019)0021 (EU), https://www.europarl.europa.eu/doceo/document/TA-9-2019-0021_EN.html.

World War was started as an immediate result of the Nazi-Soviet Non-Aggression Pact of August 23, 1939, and its secret protocols, “whereby two totalitarian regimes that shared the goals of world conquest divided Europe into two zones of influence”²⁴ The resolution further states that the “Nazi and communist regimes carried out mass murders, genocide, deportations and caused a loss of life and freedom in the 20th century on a scale unseen in human history” and therefore the Parliament “condemns in the strongest terms the acts of aggression, crimes against humanity and mass human rights violations perpetrated by the Nazi, communist and other totalitarian regimes”²⁵ The resolution also “[c]alls for a common culture of remembrance that rejects the crimes of fascist, Stalinist and other totalitarian and authoritarian regimes of the past as a way of fostering resilience against modern threats to democracy”²⁶ This resolution and other similar resolutions demonstrate how important this topic is in the politics of European countries.

It is instructive to examine how the co-editors of the legacies of 1917 book tackle the problem of Soviet crimes. Almost all of what the co-editors directly say about this problem is by referring to it in their introduction, almost like a caveat to their otherwise mutedly hopeful analysis of the Bolshevik legacy:

By proposing that the Mexican and Russian revolutions, as complex and multivalent events, should be understood as posing an ongoing challenge to the existing liberal and capitalist international order, this volume seeks to make those revolutions available for new analysis, without ignoring or effacing their violence or seeing them through rose-tinted glasses.²⁷

At the same time, several chapters in the edited book essentially look the other way and do not seriously engage with the problem of Communist crimes in Soviet Russia and the Soviet Union or, for example, with the role of the secret protocol of the Nazi-Soviet Non-Aggression Pact in the outbreak of World War II. For example, the meaning of the Nazi-Soviet Non-Aggression Pact and its secret protocol remains relevant for several chapters but is nowhere properly addressed in the book. Alison Duxbury’s chapter describes how the Soviet Union was expelled from the League of Nations in December 1939—the country had been member of the League only since 1934—after the Soviet military attack against Finland started on November 30, 1939 and which was a direct consequence of the Nazi-Soviet Pact, as Finland had been allocated to the Soviet “sphere of influence” in the secret protocol of the Pact.²⁸ While the central question remains whether the Soviet Union in 1939 honored its obligations according to the Covenant of the League of Nations, especially towards Finland as another League member—and the League concluded that it did not—Duxbury still laments that when the Soviet Union was expelled from the

24. *Id.*

25. *Id.*

26. *Id.*

27. Greenman et al., *supra* note 18, at 23.

28. See Alison Duxbury, *Excluding Revolutionary States: Mexico, Russia and the League of Nations*, in *REVOLUTIONS IN INTERNATIONAL LAW: THE LEGACIES OF 1917*, at 85, 104 (Kathryn Greenman et al. eds., 2021) (explaining USSR invasion of Finland and subsequent expulsion from League of Nations).

League in 1939, “there were certainly other motivating factors.”²⁹ She raises the question whether the League was easier on Hitler earlier, on the Rhineland question, than it was with Stalin in 1939.³⁰ However, Hitler’s Germany had already left the League in 1933, and as the Soviet Union was a member of the League in 1939, its conduct had to be measured by the League’s norms and principles.³¹ Moreover, the Soviet Union had concluded a number of bilateral and regional treaties with its neighbors in which aggression was defined widely and prohibited; all these treaties were also violated with the conclusion of the secret protocol of the Nazi-Soviet Pact and the ensuing aggressive acts by Moscow.³² Yet none of these aspects of Soviet behavior is addressed in the chapter.

In another chapter, Amanda Alexander discusses the legacy of Leninist ideas on imperialism and of the work of the Soviet international criminal lawyer Aron Trainin at the Nuremberg Trials.³³ However, she hardly mentions that at Nuremberg,³⁴ the Soviet government systematically suppressed attempts to refer to the Nazi-Soviet Pact.³⁵ This should have been a key issue as the Tribunal addressed the question of what constituted “crimes against peace” during World War II.³⁶ Moreover, when the Genocide Convention was negotiated at the United Nations in 1948, the Soviet government resisted attempts to include murderous acts “with the intent to destroy” targeted social and political groups in the definition of genocide.³⁷ It is also one of the legacies of 1917 that we rightly call the German attack against Poland on September 1, 1939, “aggression” but today’s Russian government can continue to deny that the Soviet invasion in Eastern Poland on September 17, 1939 was anything but aggressive.³⁸ Or we have the paradoxical situation that certain murderous acts in former Yugoslavia can rightly be called “genocide” because they were perpetrated against different ethnic groups, but we cannot as easily call “genocide” the mass murders which Pol Pot organized in Cambodia from 1975–1979 because those were targeted against hostile classes within the same ethnic and

29. *Id.* at 105.

30. *See id.* (noting League of Nations’ lack of response to Hitler).

31. *League of Nations*, HISTORY.COM (Mar. 5, 2020), <https://www.history.com/topics/world-war-i/league-of-nations>.

32. *German-Soviet Nonaggression Pact*, HISTORY.COM (June 7, 2019), <https://www.history.com/topics/world-war-ii/german-soviet-nonaggression-pact>.

33. *See* Amanda Alexander, *Lenin at Nuremberg: Anti-Imperialism and the Juridification of Crimes Against Humanity*, in *REVOLUTIONS OF INTERNATIONAL LAW: THE LEGACIES OF 1917*, at 56, 56–82 (Kathryn Greenman et al. eds., 2021) (detailing introduction of crimes against humanity into international law through Nuremberg Trials).

34. *Id.*

35. For the full story, see FRANCINE HIRSCH, *SOVIET JUDGMENT AT NUREMBERG: A NEW HISTORY OF THE INTERNATIONAL MILITARY TRIBUNAL AFTER WORLD WAR II* (2020) (describing full story of Soviet government’s attempts at suppression).

36. *Id.* at 73.

37. For additional information, see ANTON WEISS-WENDT, *THE SOVIET UNION AND THE GUTTING OF THE UN GENOCIDE CONVENTION* (2017).

38. *See, e.g.*, ROGER MOORHOUSE, *POLAND 1939: THE OUTBREAK OF WORLD WAR II* 252–80 (2020) (discussing the Soviet Invasion in Poland, brutalities during the campaign, and how the attack was coordinated with German forces).

national group.³⁹ This seems to me another legacy of 1917 in international law, but one that somehow goes relatively unnoticed in Alexander's chapter.

The co-edited book contains some excellent chapters on the Soviet Union as well, e.g., on the Lena Goldfields Arbitration⁴⁰ and on the emergence of international and European human rights law in response to Bolshevik crimes and atrocities (especially in the work of the Russian émigré lawyer André Mandelstam).⁴¹ The latter is not surprising because most Russian international lawyers who could leave Russia after the Bolshevik revolution were infuriated by the violence, horrors, and lawlessness of the revolution and kept referring to it in their writings.⁴² However, the insight that the emergent international human rights law's ideology—starting with a resolution adopted in 1929 at the Institut de Droit International and initiated by Mandelstam—also arose against the backdrop of Bolshevik atrocities is a very important one in terms of understanding the emergence of international human rights law in the twentieth century.

There is not enough space here to attempt a full review of the analysis of revolutionary legacies in the various chapters in Orford's co-edited volume, and I should be clear that I am not attributing arguments made by chapter authors to the book's editors. However, I would like to refer to one more chapter in which Owen Taylor raises the question whether the Soviet theory and practice of international law during the interwar period was so different from that of the other capitalist states.⁴³ Taylor refers to a book by Taracouzio on the United States in 1935⁴⁴ in which the author could not find much evidence that Soviet international legal practice was substantially different from that of capitalist states.

Were there really no warning signs in the Soviet theory of international law during the 1930s—something that could have indicated that the Soviets did not take *pacta sunt servanda* very seriously and were aggressively minded against their

39. See William A. Schabas, *Introductory Note to the Convention on the Prevention and Punishment of the Crime of Genocide*, UN AUDIOVISUAL LIBRARY OF INT'L L. (July 2008), <https://legal.un.org/avl/ha/cppcg/cppcg.html> ("Genocide is a crime of intentional destruction of a national, ethnic, racial and religious group, in whole or in part.").

40. See generally Andrea Leiter, *Contestations over Legal Authority: The Lena Goldfields Arbitration 1930*, in *REVOLUTIONS OF INTERNATIONAL LAW: THE LEGACIES OF 1917* 315, at 315–38 (Kathryn Greenman et al. eds., 2021) (contextualizing arbitration in history and analyzing role of legal forms attempting to mediate conflicting perspectives).

41. Anna Saunders, *Animated by the European Spirit: European Human Rights as Counterrevolutionary Legality*, in *REVOLUTIONS OF INTERNATIONAL LAW: THE LEGACIES OF 1917*, at 367, 367–400 (Kathryn Greenman et al. eds., 2021).

42. See, e.g., BORIS NOLDE, *LENINS RÄTEREPUBLIK: EIN BEITRAG ZUR GESCHICHTE DER POLITISCHEN UND WIRTSCHAFTLICHEN ENTWICKLUNG IM NEUEN RUßLAND* (1920) (detailing the horrors and lawlessness of the Bolshevik revolution); see also AXEL FRHRN. VON FREYTAGH-LORINGHOVEN, *RUSSLAND* 27–31, 37–38 (1919) (recalling sharp decline of the economy and resulting robbery and peasant uprisings during the Bolshevik revolution).

43. Owen Taylor, *Law and Socialist Revolution: Early Soviet Legal Theory and Practice*, in *REVOLUTIONS IN INTERNATIONAL LAW: THE LEGACIES OF 1917*, at 156, 163 (Kathryn Greenman et al. eds., 2021).

44. *Id.* at 162–65 (citing T.A. TARACOUZIO, *THE SOVIET UNION AND INTERNATIONAL LAW: A STUDY BASED ON THE LEGISLATION, TREATIES AND FOREIGN RELATIONS OF THE UNION OF SOCIALIST SOVIET REPUBLICS* (1935)).

capitalist neighbors, at least those which until 1917/18 had been part of the Russian Empire? The question is important in the context of the argument of Orford's monograph because it raises questions regarding methods of historical research rather than different authors' subjectivities and biases.

For example, the influential work of Evgeny Korovin (1892–1964) was translated from Russian into German⁴⁵ but never into English, and one cannot always be sure whether references to it actually reflect a careful reading of the original. Yet careful study of Korovin provides important insights into contemporaneous Soviet thinking. Writing in the 1920s, Korovin suggested that the “Babylonian tower of united humanity” had collapsed and there was no longer a “general” international law: “Since long ago and also today, international law is divided into a number of legal circles.”⁴⁶ Korovin postulated that if the right, progressive party (i.e., the Soviet Union) intervened militarily, it could be a historically positive force.⁴⁷ Korovin postulated that the very character of all Soviet wars was class self-defense.⁴⁸ Another significant element concerned the validity of international treaties after the social revolution. Namely, Korovin argued that in such instances *pacta sunt servanda* would no longer be the prevailing principle concerning treaties, but instead, it would be the *clausula rebus sic stantibus*. When the proletariat has come to power, using *clausula rebus sic stantibus* in denouncing earlier treaties was a “small correction towards the great revolution.”⁴⁹

Likewise, enthusiastic interpretations of the leading Soviet international lawyer Evgeny Pashukanis (1891–1937) have been published,⁵⁰ sometimes apparently without a proper study of the main international law work of Pashukanis published in 1935.⁵¹ This book has not been translated into English, but it provides important insights into Soviet thinking on international law in the 1930s. Specifically, Pashukanis defined international law as one of the forms of struggle between the capitalist and Soviet systems.⁵² International law had become a weapon of the politics of the proletarian state.⁵³ Pashukanis observed that bourgeois authors emphasised the sanctity of treaties (*pacta sunt servanda*)—at the same time perfectly well knowing that their imperialist countries never hesitated to violate their treaty

45. E.A. KOROWIN, *DAS VÖLKERRECHT DER ÜBERGANGSZEIT. GRUNDLAGEN DER VÖLKERRECHTLICHEN BEZIEHUNGEN DER UNION DER SOWJETREPUBLIKEN* (I. Robinson-Kaunas trans., Berlin: Walther Rothschild 1929).

46. Lauri Mälksoo, *The History of International Legal Theory in Russia: A Civilizational Dialogue with Europe*, 19 EUR. J. INT'L L. 212, 226 (2008).

47. KOROWIN, *supra* note 45, at 59.

48. *See id.* at 128 (discussing Russia's wars with border states as essentially one phase of a Russian civil war).

49. *See id.* at 107–09 (arguing countries offer many different reasons for unilaterally renouncing treaties—the law must always yield to fundamentally altered facts).

50. Miéville turns his attention to Pashukanis but apparently without references to his 1935 book. *See* CHINA MIÉVILLE, *BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW* (2005) (discussing work of Pashukanis without mention of 1935 book).

51. E. PASHUKANIS, *OCHERKI PO MEZHDUNARODNOMU PRAVU*, (Sovetskoe zakonodatel'stvo 1935), reprinted in E.B. PAŠUKANIS, *UMRISSE DES VÖLKERRECHTS* (Berlin Verlag 1971).

52. *Id.* at 15.

53. *Id.* at 18.

obligations in the crudest ways.⁵⁴ Pashukanis held that, in reality, the force of international treaties was determined by the material interests behind them and the power that lay behind such interests. No country would sign any treaty if either it had no interest in the treaty or no other power forced it to do so.⁵⁵ Pashukanis observed that there were no treaties that held “forever,” but instead many treaties lost their force in the course of events, wars, and revolutions.⁵⁶ Thus, *clausula rebus sic stantibus* was generally applied in international treaty relations but even more so was justified in a state born out of the socialist revolution such as the USSR.⁵⁷

It appears, based on a reading of Korovin and Pashukanis, that the conclusion of the secret protocol of the Nazi-Soviet Pact in 1939 was not such a surprise. Because treaties meant something else for the Soviets, the revolutionary State could always revise them if the new balance of power enabled it.⁵⁸ This is a fundamentally different approach from classical, “liberal” international law which has always emphasized the primacy of *pacta sunt servanda* (even if States have sometimes failed to follow this standard in practice). However, partly by not including analysis of important sources originally published in the Russian language, the book on revolutionary legacies co-edited by Orford both misses and bypasses this important insight.

Sources are vital in the study of history: For example, we would probably not value a historical study on Machiavelli’s contributions so highly if the contemporary interpreter of the famous Renaissance man could not use the Italian and Latin languages. Why would it then be different in the study of the history of international law? In the legacies of 1917 volume, the problem of access to sources in Russian could have been fixed by including in the project scholars with Russian-language skills. Is it then also not a form of “Orientalism” of which Owen Taylor writes critically in the context of Western perceptions of Soviet approaches to international law, when a book dealing with the legacies of 1917 does not include a single voice from the Soviet-dominated region in Central and Eastern Europe among its authors?⁵⁹ At least they could have addressed the relevant sources in the Russian language.

III. IN CONCLUSION

This review essay started with a synopsis of one book: Orford’s monograph on the politics of history. But I then proposed that we would obtain a richer understanding of what is at stake in the monograph by including analysis of another concrete act of historical interpretation in which Orford has recently participated as co-editor: a book on the revolutionary legacies of 1917. It is difficult to argue with the positions in these books, as Orford and her co-editors warn explicitly that “there

54. *Id.* at 154.

55. *Id.* at 155.

56. *Id.* at 160.

57. *Id.* at 161.

58. *Id.* at 160.

59. See Taylor, *supra* note 43, at 156, 161 (discussing Orientalism and Western states’ depiction of the Soviet Union).

is no one neutral method for thinking about the past and no innocent way of representing the revolutions of 1917.”⁶⁰ In a similar spirit, the introductory text to Orford’s monograph says that “there can be no impartial accounts of international law’s past and its relation to empire and capitalism.”⁶¹

These claims make it appear that any significant disagreement about history and legacies can ultimately be reduced to differences in politics—I have my politics (of history) and you have yours. My worry is that the radical indeterminacy thesis to an extent protects a party not telling the truth because the “language of facts or of truth” is called impossible. However, in a sense, the truth about historical facts still exists. For example, at the Nuremberg trials and during the subsequent decades, the Soviet Union argued that it was the German Nazis who killed approximately 20,000 detained Polish officers in the Katyn forest.⁶² Later on, it became impossible to hide the historical truth, and the Soviet government in the last years of its existence had to admit that the Soviets themselves, and not the Nazis, had committed this horrendous war crime.⁶³ Similarly, until December 1989, the Soviet government denied the very existence of the secret protocol of the Nazi-Soviet Non-Aggression Pact.⁶⁴ Who killed the Polish officers or whether the secret protocol existed cannot be a matter of endless opinion and subjectivity. Therefore, there must remain a “method that will establish that our account of facts or our version of truth is the correct one,” even though Orford suggests that this might be impossible.⁶⁵

Reading Orford’s monograph and the book on revolutions she co-edited also made me realize something that is noteworthy in the genealogy of ideas, as far as critical legal studies applied to international law are concerned. In her monograph, Orford emphasizes that international law is “politics all the way down.”⁶⁶ Because this is so, there cannot be neutral and objective accounts of its history either. Double-checking historical sources when reading the 1917 legacies book, I wondered who might have been the first in the field of international law to argue that international law was “politics all the way down.” My candidate would be the Soviet international lawyer Evgeny Pashukanis, who wrote in 1935: “One should not regard international law outside politics. In the epoch of imperialism, international law is one of the forms, one of the means, with the help of which imperialist States carry out struggle with each other, ensure the division of prey”⁶⁷ In another passage, Pashukanis

60. Greenman et al., *supra* note 18, at 5.

61. ORFORD, *supra* note 1, at i.

62. Michael Scollon, *After 80 Years, the “Katyn Lie” Lives on in Russia*, RFE/RL (Mar. 5, 2020, 1:11 PM), <https://www.rferl.org/a/after-80-years-the-katyn-lie-lives-on-in-russia/30470317.html>.

63. *See id.* (explaining how President Mikhail Gorbachev admitted guilt for Soviet Union’s executions in Katyn Forest).

64. *See* Keiji Sato, *Acknowledgement of the Secret Protocol of the German-Soviet Non-Aggression Pact and the Declaration of State Sovereignty by the Union Republics of the USSR*, 66 EUR.-ASIA STUD. 1146, 1162–63 (2014) (discussing process by which Soviet government came to acknowledge secret protocol of German-Soviet non-aggression pact).

65. ORFORD, *supra* note 1, at 320.

66. *Id.* at 315.

67. PASHUKANIS, *supra* note 51, at 9.

warns his readers:

We need to remember the submissive role of all kinds of juridical forms, in particular international legal ones. Questions of domestic and foreign policy are solved by the actual relationship of class forces, will be solved by sharpened class struggle. Anyone who denies it is either lying to himself or, as happens more often, is trying to lie to others.⁶⁸

Writing in 1935, Pashukanis also pointed out that international law was indeterminate and all scholarly authorities in international law were biased, consciously or unconsciously reflecting views beneficial to their class or nation at the given time.⁶⁹

Writing in her monograph, Orford is acutely aware of which influential historian came how close to the Nazis, or was intellectually influenced by people such as Carl Schmitt (as in the case of the German conceptual historian Reinhart Koselleck).⁷⁰ We need an equally honest discussion about the contemporary legacy of the Soviet and Communist approaches to law, including international law. This discussion must include the question of how to address the problem of mass violence which was inherent to Soviet practice from the very beginning because there is no other way to take away people's private property. However, my reading of the 1917 legacies book made me realize that, globally, we are only at the very beginning of this conversation.

68. *Id.* at 5–6.

69. *See id.* at 10 (discussing biases in international law).

70. *See* ORFORD, *supra* note 1, at 299–310 (discussing impact of Nazi ideology on European historian's perspectives).