

BOOK REVIEW NOTES

THE ILLUSIVE NATURE OF 'RUSSIAN INTERNATIONAL LAW'¹

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The monograph written by Estonian international law scholar Lauri Mälksoo is impressively well-timed. The record of recent international legal developments involving Russia is striking: the annexation of Crimea and the armed conflict in Ukraine, Russia's 'sanctions war' with the United States and the European Union, non-recognition and non-compliance with the international arbitral award in the *Yukos* case, and earlier, in 2013, Russia's boycott of the proceedings at the International Tribunal for the Law of the Sea. Most recently, already subsequent to the publication of *Russian Approaches to International Law*, in July 2015 the Russian Constitutional Court sent a message of open disregard to Strasbourg by declaring that the judgments of the European Court of Human Rights could not be implemented in Russia if they contradicted the Russian Constitution. In all these instances the Russian government relied on its own reading of international law, which appeared not only to be strikingly different from that of the vast majority of states, but often detrimental to the foundations of the discipline. One might wonder whether these events are just the excesses of authoritarian power-politics, or more fundamentally grounded. Specifically, is there any special Russian international school of legal thought (referred to below as 'Russian international law')? And if there is, may it serve as a plausible alternative to Western-centric contemporary international law? Lauri Mälksoo's book is the first genuine response to these questions.

For Mälksoo, recent events are hardly accidental. Starting by quoting a rather controversial assumption, that 'international law may be and actually is different in

¹ Reviewed book: Lauri Mälksoo, *Russian Approaches to International Law* (Oxford University Press 2015).

different places' (David Kennedy), the author maintains his main thesis throughout the book; that is, that the principal 'Russian idea' is Russia's 'civilizational distinctness,' understood as its 'otherness' from the West (p. 190).

In order to understand Russia's state practice in the context of international law, a deeper understanding is needed of the ideas that have lain behind it. In this regard, internal discourse and debates on international law within the country itself are often more revealing than messages sent to the outside world (p. 5).

Russian Government and / or Russia has a unique understanding of international law and its own (internal) international legal discourse, which together shape Russian theory and practice in international law.

The author's knowledge of the Russian language, coupled with his passionate interest in Russia, is a great advantage for this study. Fluency in Russian gave him the opportunity to follow various Russian legal developments and non-legal media sources unavailable to most Western researchers due to the language barrier (itself an important factor in the self-contained nature of Russian international law). During his research project, the author regularly visited events and seminars at Russian academic centers and participated actively in Russian academic life.

Mälksoo's research is based on an extensive bibliography of Russian international law, which includes textbooks and monographs, as well as selected articles in academic journals and non-legal publications, mostly in history, philosophy and politics.

To understand the ideas that shaped Russian international law, the author undertakes a long historical journey. He traces the origins of current Russian approaches to international law in the civilizational and cultural characteristics that have shaped the development of Russia since medieval Muscovy. Mälksoo is especially attracted to a cultural-philosophical debate over whether Russia belongs to Europe or has its own 'Eurasian,' or simply 'Russian,' civilization. Importantly, Mälksoo does not seem to take into account that even the most extreme Westernizers believe that Russia has a strong identity within Europe. He also does not differentiate between the XIX century 'Slavophiles,' who sought a new 'alternative' European civilization, and modern 'Eurasianists,' openly hostile to a European idea of Russia. For the author, Russia's 'political dilemma has been enormous: whether to construe itself as part of Europe or as an independent civilization and even hostile to ("Romano-Germanic") Europe' (p. 71). He doubts if, even in Tsarist times, Russia has ever been 'really European' (p. 63). This seemingly endless debate decides, in Mälksoo's view, whether Russia should accept international law as seen by other European countries, or continue to look for its '*Sonderweg*' and master its own 'Russian version' of international law.

In any approach to Russian law, the main obstacle for any theory based on historical continuity is the Soviet communist period (1917–91), often considered to

be an irreversible break with pre-revolutionary Russia. Mälksoo takes the opposite view, tracing the continuity of approaches of prerevolutionary Imperial Russia, the Soviet Union and modern Russia, underlining the similarity of the State's actions and scholarly views. In this regard the author supports the official narrative of the current Russian regime, which considers this historical continuity as one of its ideological principles and sources of legitimacy. This is not surprising, given that most of the cited current proponents of the Russian 'native' doctrine were raised in the Soviet period and built their careers during Soviet times. The author's indication of the scholars' birth year is very helpful indeed.

Another controversial issue is defining the meaning of the 1990^s for Russia. What was it: a missed opportunity to 'return' to Europe, or a mere illusion? The author's response is apparently the latter. For Mälksoo, the current Russian regime and its approach to foreign policy and international law is historically predetermined.

The author further proceeds with a critical survey of post-Soviet Russian scholarship and state practice in various areas of international law: human rights law, international economic law, international criminal law and *jus ad bellum*, showing the specific approaches of Russian government and scholars. Historical parallels as well as references to the old dilemma of Russian identity are used to show how history helps us understand current trends in Russian international law and practice.

Mälksoo believes that the key feature of Russian international law is its absolute and even 'extreme' statism. Indeed, the vast majority of Russian scholars undoubtedly share the statist approach. The author notes: 'There is something nineteenth-century Hegelian about these positions in the sense that they glorify the state as such, an embodiment of the Absolute Idea, often detaching the state from its democratic legitimacy' (p. 100). This extreme statist approach explains not only the negation of the international legal personality of individuals or mixing of state responsibility with individual criminal responsibility, but also, for example, the underdevelopment of international economic law in the works of Russian scholars.

Mälksoo points out some inconsistencies in the approaches of Russian scholars, in particular with regard to events in Crimea in 2014. In his view, the annexation constituted 'quite a U-turn in Russia's foreign policy and the government's rhetoric about international law' (p. 180). The days following the annexation were truly very dark for the reputation of Russian international law scholars. Those who argued in favor of territorial integrity over self-determination in the aftermath of the Kosovo crisis (that is, the absolute majority of Russian scholars) have changed their argument literally overnight, and have since been adamant that the 'reintegration' of Crimea fully complies with international law.² Even taking for granted the idea of the 'plurality' of international law, it is still difficult to see a coherent theory explaining how, in this instance, the

² See also Lauri Mälksoo, *Crimea and (the Lack of) Continuity in Russian Approaches to International Law*, EJIL: Talk! (Mar. 28, 2014), <<http://www.ejiltalk.org/crimea-and-the-lack-of-continuity-in-russian-approaches-to-international-law/>> (accessed Dec. 10, 2015).

Crimean annexation corresponds to the 'Russian approaches' to international law – unless the incoherence itself is an integral part of such approaches.

Concerning the methodology of Russian international legal scholarship, Mälksoo emphasizes the 'extensive scientism and theorizing' (p. 93) and lack of research based on courts' practice and other empirical evidence. To a large extent, this condition of the international law doctrine is explained by a permanent pro-government stance, as well as a lack of independence by Russian scholars and academia on the whole: it is much easier and safer to operate dogmas than to adjust arguments to (and distinguish them from) actual jurisprudence.

Mälksoo notes that 'leading lawyers of the older generation in Russia see it as their vocation to support the Kremlin with all the weight of the "science" of international law,' and have long appointed the government as 'the holder of the truth' (p. 81). In this regard, it is notable that the communication between the government and 'a native science' of international law functions only in one direction. What the Russian scholars say has hardly any impact on governmental decisions but, in contrast, any governmental action completely (and often momentarily) changes scholarly views.

Probably the most striking feature of Russian international law as masterfully identified by Mälksoo is its self-contained nature: 'Russian international law scholars are often first of all Russian international law scholars.' 'Almost all contemporary Russian academic works on international law distinguish between "Russian" and "foreign" or "Western" scholarship.' This is a very familiar and, unfortunately, inescapable reality for everyone in Russian academia. For international law scholarship with its global, competitive market of ideas, an 'invisible college of international lawyers' must be odd, to say the least. As Andrey Makaryshev and Viatcheslav Morozov (cited by the author in his book) rightly note, often such 'native' theories are just ways to escape global academic competition of ideas and arguments (p. 91).

Mälksoo concludes his study rather pessimistically, by writing that the Western perception of Russia as a 'flawed' or problematic European country is based on erroneous principles. The author even admits that the continuation of membership in the Council of Europe and other European institutions extends the dangerous illusion (p. 195). In his view, it may lead to naive diagnoses of the legal-political situation and, consequently, bad policies regarding international law and institutions. However, relying on 'the otherness' of Russia may similarly lead to misdiagnoses (which may prove to be equally naive), and mistakes that are equally dangerous. The latter – 'the otherness' – is, in fact, what the current Russian government desires, and manipulates public opinion in Russia into it by using advanced mass-media techniques. However, do we really have reliable empirical material to confirm this proposition? In this regard, Mälksoo's use of non-legal publications in his book merits a separate remark.

The author, perhaps excessively, relies on press articles from state-driven media and public opinion polls, which are generated mostly by the same state-driven propaganda machine. It should be borne in mind how flexible and easy to

manipulate public views on the matters of foreign policy are, and not only in Russia. While such sources are often more helpful than scholarly articles in law journals in understanding recent developments, they should be treated with more caution.

Furthermore, the very idea of 'otherness' hardly has any value today. To begin with, the whole 'civilizational model' is very far from being complete and consistent in explaining the differences in approaches to international law. The author accepts this, calling the civilizational approach 'historically ambiguous and laden concept' (p. 141). The claims of 'distinctness' are not unique and can be applied to any country, state, people, culture. Such propositions look more like a desperate attempt to resist globalization than a 'nativist' international legal concept. Promoting and defending 'its own way' is a possible and perhaps popular strategy, but it is unlikely to lead to any success in the foreseeable future.

In an effort to treat Russian international law 'seriously' (p. 35), Mälksoo approaches it with what appears to be excessive seriousness and reverence, neglecting its largely illusory nature as a 'simulacrum' (pp. 185, 187, 195).

Taking into account the low popularity of Russian international law among Russian law students in the past two decades, and the lack of involvement of Russian scholars as counsel in any Russian cases before the international courts³ the mostly responsive nature of 'Russian international law' which lacks any positive agenda, and with imitation as one of the main features of Russian social and political life in the 2000^s, one may wonder if it is fair to treat the 'official' Russian doctrine as the 'Russian school of international law.' It is suggested that the representatives of Russian international law can be more properly identified as a group of diligent servants of power players, and the excesses of the authoritarian power-politics should be identified and treated as such.

Lauri Mälksoo shall be praised for this book. It is the result of a thoughtful research which will serve as a perfect starting point for anyone who wants to 'understand Russia' in terms of international law. The book is also essential for Russian legal scholars, providing them with respectful but critical reflections.

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³ Maria Issaeva, *Does 'Russian International Law' Have an International Academic Future?*, EJIL: Talk! (Sep. 21, 2015), <<http://www.ejiltalk.org/does-russian-international-law-have-an-international-academic-future/>> (accessed Dec. 10, 2015).