



Lauri Hannikainen

University of Helsinki

lauri.hannikainen@helsinki.fi

RUSSIA AND INTERNATIONAL LAW

Nowadays, Western scholarship dominates heavily in leading international law books, journals etc. One seldom finds the writings of Russian scholars in those publications. It appears that Russian scholars confine most of their activities to their home country. Correspondingly, only a very small number of Western scholars are familiar with what happens in Russian scholarship of international law. It would appear that the language barrier is the main reason.

One of the few Western experts who has extensive knowledge of Russian international law scholarship is Professor Lauri Mälksoo, from Tartu University, Estonia. Recently, he published a monograph 'Russian Approaches to International Law' (2015).¹ In it, Mälksoo focuses mostly on Russian scholars. This compact book contains a lot of relevant information and analyses in its 195 pages. He dedicates one chapter to the practice of the Russian Federation. In the first half of this article, I will introduce and analyze Mälksoo's book and will then proceed to discuss most recent developments in Russian studies of international law.

Russian scholarship before the Creation of the Russian Federation

In Mälksoo's Chapter 2, which deals with history, a central theme is the study of two different approaches to international law in imperial Russia – the West-oriented and the Slavophile/Eurasian schools. Mälksoo addresses this theme through the examination of the works of five important scholars. The first scholar is N.Y. Danilevsky, who, in his book on Europe and Russia (1865), regarded Europe and Russia as two distinct and mutually hostile historical-cultural civilizations. The second scholar, F.F. Martens (from Estonia), is regarded by Mälksoo

¹ L. Mälksoo, *Russian Approaches to International Law*, Oxford University Press 2015.

as the founder of the European school of Russian international law. When Martens died in 1909, his successor as professor of international law at Saint Petersburg Imperial University, and a proponent of Russia's belonging to Europe, was M. von Taube. After the Bolshevik revolution, von Taube emigrated from Russia and dedicated his research to the history of international law in Russia and Byzantium. He himself was strongly Europe-oriented but regarded the Russian population as too uncivilized to attain European legal consciousness. The revolution had plunged Russia back to the Muscovite period of its history. The fourth scholar is F.I. Kozhevnikov, who was quite influential in the Soviet Union. He argued that during the eighteenth and nineteenth centuries Russia had selflessly served the interests of the balance of power in Europe. Mälksoo concludes that Kozhevnikov supported the 'Eurasianist' idea of Russia's civilizational distinctiveness and, in particular, its moral superiority to Germanic Europe. Kozhevnikov's study was written under the overwhelming emotional influence of World War II, which had caused unprecedented human suffering and material damage in the Soviet Union.

Mälksoo's last writer is V.E. Hrabar, whose encyclopedic study of the history of international law scholarship in Russia was published in 1958, in Moscow. Whereas Martens, von Taube and Kozhevnikov primarily analysed the history of international law and Russia's role in it, Hrabar's main focus was directed to the history of international law scholarship in Russia. Hrabar did not take a clear stand on the question of Russia as a European State, or as something distinct from Europe, but Mälksoo estimates that he was closer to the European school of thought. After the five writers, Mälksoo introduces later views on the history of international law in Russia. He concludes that, historically, international law has been a thoroughly 'civilizational' affair in Russia, i.e. that it has had a civilizing effect in Russia. This appears to have been true even elsewhere: Martti Koskeniemi's analysis of important Western scholars of international law between 1870 and 1960 (published in 2009) bore the main title 'The Gentle Civilizer of Nations'.

Mälksoo gives reasons why he did not go into details of the Soviet concept of international law: excellent, detailed Western Studies on the subject already exist – from the 1970's. He briefly discusses the Soviet theory of international law on several occasions, but I regret that he did not add the unquestionably leading international law expert of the Soviet Union, Grigory Tunkin, as the sixth writer in his study of leading theoreticians. This would have been appropriate, since the Russian Federation appears to have inherited quite a lot of its international law doctrine from the Soviet Union.

'Conservative' v. 'Progressive' in Russian/Soviet Scholarship

One leading theme in Mälksoo's Chapter 3 is his view on the relationship between, on one hand, State sovereignty and, on the other hand, human rights and the individual's status as a subject of international law. Mälksoo considers that, like the Soviet Union, the Russian Federation emphasizes the leading status of State sovereignty. He regards this position as *conservative* (in the case of Russia this is correct). Instead, it is more *progressive* to emphasize the importance of human rights and not to dismiss out of hand the individual as a subject of international law, even though he admits that there is no single correct and universal answer to the question whether individuals, non-governmental organizations and transnational corporations can be subjects of international law. There is much truth in Mälksoo's view, but I find it too simplistic to make the discrepancy between sovereignty and human rights such a central question, without any discussion on the contents of the category of human rights. I myself have been a human rights activist for decades and want to emphasize the broadness of the category of human rights. Many Western States understand this category in a fairly narrow sense and emphasize only the obligatory nature of traditional civil and political rights – which is very important as such. Although, from a personal perspective this limited category would be enough for experts like Mälksoo and myself, who were born on the sunny side of the street, but it is not enough for the majority of people in the world.

The conservative/progressive question rises again, when Mälksoo discusses State sovereignty vs. the powers of transnational corporations in international economic law. Though he faithfully explains the critical views of Russian authors on the overwhelming role of leading Western States and their big corporations in economic relations, he seems to think that the role of corporations is progressive and that to defend sovereignty is conservative. He admits that even in the West a 'legitimacy crisis' in investor-State arbitration has emerged, because private interests appear to be predominant. However, Mälksoo does not discuss at all the contemporary problems of tax havens and tax evasion by transnational corporations (perhaps Russian experts have not discussed tax havens). It appears to me that globalization, based on neo-liberalist ideology, has resulted in serious problems for many national economies or the lower classes in societies. There is ample reason to defend State sovereignty. In the words of Shumilov, as quoted by Mälksoo: "The main problem today is to accommodate sovereignty with the need to lower administrative thresholds in conditions where globalization is carried out by the financial-economic rule of a narrow group of countries of the Western type of civilization".

A third case where the conservative/progressive character of Russia's attitude emerges is when Mälksoo discusses the prohibition on the use of force. He writes

that in Soviet times and the immediate post-Soviet period, Russian scholars took a straightforward conservative view on what Article 2 para. 4 and Articles 42 and 51 of the United Nations Charter imply. In their view, the use of military force is only legal if it is carried out in self-defence against an armed attack, or when authorized by the SC. At least until Russia's invasion and annexation of Crimea in March 2014, this position was the view shared by the majority of international law scholars in Russia.

Now, in 2018, I am puzzled by Mälksoo's characterization of the strict interpretation of the UN Charter's prohibition of the use of force as conservative. His text provides no clues as to what a progressive interpretation would be. In another context, Mälksoo expresses support for the responsibility to protect (humanitarian intervention), which he apparently regards as a progressive innovation. I would do the same, if I could be convinced that the intervening States would have the patience to limit their armed activities strictly to humanitarian purposes – that appears to have been true only in some rare cases. I regard one armed intervention – the NATO States' intervention into Kosovo/Serbia in 1999 – as humanitarian even though, admittedly, many scholars do not share this view. On the other hand, when the Security Council authorized a humanitarian intervention in the Libya crisis, what did the NATO States do? They did not limit themselves to humanitarian action but their main goal became the removal of Muammar Gaddafi from power. That meant, at least for the time being, the death of humanitarian intervention in international law. Mälksoo refers to the opinion of Primakov, who argues that the West went too far from the mandate of the Security Council in Libya. I conclude that most experts of international law in the world support the strict interpretation of the UN Charter's prohibition on the use of force. It is vain to characterize it as conservative.

How about the Soviet Period?

I wish that Mälksoo had taken the Soviet period more comprehensively into consideration in his analysis, since the Russian Federation appears to have inherited quite a lot of its international law doctrine from the Soviet Union. I myself would divide the last hundred years of Russia's role in the international arena into the following time categories:

- 1) The post-revolution years, when the Soviet Union was excluded from international relations.
- 2) The Stalinist era, when the Soviet Union was very authoritarian and at times aggressive but had, during World War II and for several years after it, good relations with the West.

- 3) The first part of the Cold War period, when the Soviet Union was recognized as one of the two superpowers. This period started with heightened tensions, but as early as the 1960s led to peaceful coexistence and even cooperation between the West and the East.
- 4) The 1970s and early 1980s, when the socialist countries united with the non-aligned movement of new States and together held a powerful position at the United Nations. Leading Western States – most of which had been colonial masters – were pushed to the defensive. A telling sign was the USA's defeat in Vietnam, notwithstanding massive bombing and devastation of the people and environment of Vietnam. This was the period when the non-Western States were demanding equal rights, for example by adopting the New International Economic Order and the Charter on Economic Rights and Duties of States over the opposition of leading Western States. These instruments were, however, only non-binding resolutions of the UN General Assembly.
- 5) The years of weakness during the first fifteen years of the existence of the Russian Federation, when Russia assumed the role of protector of international law. The West, as the only meaningful power block, assumed leadership in international relations.
- 6) The years from 2007 onwards, when Russia felt that it had grown strong again and could challenge the leading role of the United States. The Russian leadership also concluded that since the West was ready to violate the prohibition on the use of force, Russia could do the same to pursue its interests. This culminated in the annexation of Crimea, a gross violation of the sovereignty of Ukraine. Has Russia become a troublemaker in the sphere of international law?

The fourth period in the above list was perhaps the best period of the Soviet Union. The West was no longer dominating, and cooperation between the socialist bloc and the movement of non-aligned States led to a situation in which the international community of States was more democratic than ever. The Soviet Union was a world power, which helped newly independent States to realize their *de facto* sovereignty. At that time, it was possible to regard the Soviet Union as a progressive promoter of changes to international law that would lead to a more equal community of States, whereas the West tried to defend its privileged position, which had been created before the decolonization period. Mälksoo's characterization of the Soviet Union as "the main propagandist and flag bearer or the anti-colonial and anti-Western camp in the context of international law" has a biased tone.

For the Socialist countries of Eastern Europe, the fourth period was not very positive. Or should one take as a positive sign the Soviet Union's abstention from staging a military intervention in Poland in the early 1980's? I know that the

Poles will answer no. Only when Mikhail Gorbachev came to power did the the Soviet Union adopt a more respectful policy towards Poland.

The Russian Federation and International Law

In Chapter 4 of his book, Mälksoo focuses on the practice of the contemporary Russian State. He outlines the Russian view that the Russian Federation is, in fact, the protector of international law. This view is reflected in Russia's official Foreign Policy Concept and National Security Strategy. Mälksoo estimates that no permanent member of the Security Council has referred so consistently to international law in its national security documents as Russia. When Mälksoo moves to examine Russian practice in more detail, Russia's reliance on international law diminishes. Russia has submitted to the compulsory jurisdiction of international courts only to a very limited extent, and in those cases in which it has been a party to a legal dispute it has often behaved inappropriately.

Mälksoo's book examines three examples in more detail. Regarding human rights and Russia's ratification of the European Convention on Human Rights, Mälksoo reports that Russia has been almost constantly on record as a source of controversies, problems, tensions and human rights backlashes in the Council of Europe. Over recent years, the member with the biggest share of pending applications in Strasbourg has been the Russian Federation, although it does not have the largest share of cases compared to the size of its population.

The second example concerns international economic law – Russia's takeover of foreign assets in a way that did not treat Western investors and trade-partners fairly. Mälksoo reports that leading Russian scholars have concluded that Russian legislation on foreign investment is not always compatible with that country's obligations under treaties. That is proved by the fact that Russia has suffered several defeats before international arbitration tribunals.

The third example focuses on the prohibition on the use of force and discusses its violations by the Russian Federation. Mälksoo, of course, takes a very critical view on Russia's role in the armed conflict with Georgia in 2008 and Russia's annexation of Crimea in 2014. Mälksoo also discusses Russia's role in the so-called frozen conflicts in the territory of the former Soviet Union.

Leaving Mälksoo aside now, I quote here the English summary of a study report that was written by my junior colleague Tero Lundstedt and myself to the Finnish Ministry of Defence in 2015-16 on the role of international law of Russia. In the summary we write about the Russian Federation as follows:

Contemporary Russian foreign and defense policy has three main goals: 1) safeguarding its vital defensive interests in the former USSR area; 2) domination of its 'near

abroad', consisting of ex-USSR states (excluding the Baltic states), by reintegrating them in certain international organizations – most importantly the Collective Security Treaty Organization and the Eurasian Union – and at the same time preventing these states from joining NATO or the EU; and 3) to safeguard its Great Power status in the future multipolar world. To accomplish the first and second goals, Russia has resorted to distorted interpretations of international law.

A prime example of such distorted interpretations is Russia's 'special rights' in the near abroad states over their sovereignty, demanding that they take Russia's Great Power status into account when making important foreign policy decisions. At the same time that Russia insists that Western powers have to treat it as an equal, it rejects the equality of former Soviet states. This view has no basis in contemporary international law. The former Soviet states are sovereign UN member states without any kind of legal subordinate role to Russia.

Russia has seen the Russian diaspora communities in the near abroad countries of close to 30 million people as a useful tool to increase its influence in these states. It has used the need to protect its citizens or 'compatriots' (an appropriately ambiguous formulation) as a pretext, or as an exaggerated justification, for armed intervention to mask its real, imperialistic goals. To corroborate its legal position Russia has been dealing out passports to minority peoples in several states that are not on good terms with Moscow.

Previously, Russia's stance on the self-determination of peoples was that this principle is subordinated to the territorial integrity of states – therefore for example Chechnya had no right to secede from Russia. However, after Russia was disappointed with Kosovo's declaration of independence and the International Court of Justice's advisory opinion on the matter, it has changed its stance radically. Russia has been applying the alleged Kosovo 'precedent' in some territorial conflicts in the countries of the near abroad in an arbitrary manner when it suits its political goals. Russia is at the same time interpreting this 'precedent' in a deliberately false manner in order to be able to claim to have a right to actively assist separatist minorities to secede and to achieve independence.

These Russian views have received very limited international support. Manifestations of this can be seen in the collective non-recognition of the Abkhazian, South Ossetian and Crimean independences. Additionally, the Russian initiative in 2014 for an international conference with a goal of 'rewriting international law' has been ignored.²

² L. Hannikainen, T. Lundstedt, *Kansainvälisen oikeuden rooli nyky-Venäjän ulkopolitiikassa – erityisesti valtiosuvereenisuuden, asevoiman käytön kiellon ja kansojen itsemääräämisoikeuden valossa*, Puolustusministeriö 2016. The English summary is at the beginning of the report on pp. v-vii, the quotation is from p. vi. See https://www.defmin.fi/files/3498/Tutkimusraportti_Hannikainen_Lundstedt_2016.pdf.

New Worrying Developments

After the Russian Federation annexed Crimea in 2014, experts outside Russia began to wonder how their Russian colleagues would analyze the takeover. After a few months, we received the collective answer from the leading Russian scholars. In June, the Russian Association of International Law sent an open letter to the prestigious International Law Association. The open letter, signed by Professor Anatoly Kapustin, expressed the collective opinion of leading Russian international law scholars on the Ukraine crisis and the annexation of Crimea. They subscribed fully to the view of the Russian President and the Government on the legality of the annexation, even going beyond international law and accusing the West of not respecting the Crimean people's right to self-determination. No criticism was directed at the hasty manner the referendum had been organized. Nothing was said about the critical views of the UN and OSCE.³ The open letter meant a full U-turn from the analyses that had been made by Russian experts before the Ukraine crisis.

The open letter signified a total scholarly sell-out, reflecting the 'right or wrong, my country' thinking. In the view of non-Russian scholars, their Russian colleagues simply discredited themselves and did, as scholars, a disservice to themselves outside Russia. The open letter may become a classic example of how scholars of international law sell out the principles on which they have built their analyses.

The Russian leadership and leading scholars have developed certain 'legal' concepts to increase Russia's ability to control its smaller neighbors that belonged to the Soviet Union before its dissolution – all others (11) apart from the three Baltic States. Russia has produced two key concepts – 'color revolution' and the 'destruction of statehood'. My colleague Tero Lundstedt gives definitions to these two concepts⁴, first for that of color revolution: "color revolution means an externally funded and directed illegal regime-change used to remove pro-Russian politicians from power under the guise of democracy".

Russia has in mind such revolutions as the one that took place in Georgia in 2003 (the rose revolution) and in Ukraine in 2014 (the orange revolution) when massive demonstrations led to the withdrawal of pro-Russian leaders and to their replacement with pro-Western leaders. Russia regards all popular revolutions in the countries mentioned as movements instigated and directed by the West. It excludes the possibility that the people were simply fed up with their

³ Circular letter to the Executive Council of the International Law Association (June 2014), <http://www.ilarb.ru/html/news/2014/5062014.pdf>.

⁴ T. Lundstedt, *The Destruction of Statehood and the Color Revolutions under the Russian International Law Doctrine*, a manuscript for an article, August 2018.

corrupt leaders, as happened in Ukraine in 2014. The Russian government is also worried about mass demonstrations against itself.

In the light of international law, it is not forbidden for a government in power to invite an external State to send in armed troops to help the government to put down a rebellion or maintain public order in the country. Traditional international law viewed this as legitimate and no rules denying this right have been accepted in general international law. However, an external State must deliberate carefully on whether it is advisable to answer affirmatively to the invitation. If the inviting government is corrupt and very unpopular, an external State interfering in the conflict may end up of being regarded by the people as their enemy. The action of Russia in Ukraine is a telling example: now it is regarded as the worst enemy by the Ukrainians (with the exception of the ethnic Russian minority).

Lundstedt provides the following definition of the destruction of statehood: "Russia reserves its right to 'un-recognize' a target State if it categorizes the situation as an illegal regime change that has destroyed its statehood".

Russia was of the opinion that the revolution in Ukraine in 2014 led to an illegal situation and to the destruction of the statehood of Ukraine. This gave the grounds for Russia to declare that all its treaties with Ukraine had lost their force, since the other party to them had ceased to exist. This view is completely at odds with the practice of the UN. In a number of cases, the UN has denied the regime of some State the right to represent that State in UN organs, but the question of destruction of statehood has come up only in such cases when a State has dissolved. International law does not deny people the right to bring about a revolution. After President Yanukovich fled, an acting president was immediately nominated by the parliament. Presidential and parliamentary elections soon followed. The statehood of Ukraine was not destroyed.

A New Strategy Declared by the Collective Security Treaty Organization

Russia is the leading member in a number of regional organizations created after the dissolution of the Soviet Union to bring together a number of newly independent States. These organizations are the Commonwealth of Independent States (CIS), the Collective Security Treaty Organization (CSTO) and the Eurasian European Union (EAEU). CSTO has six members: Russia, Armenia, Belarus, Kazakhstan, Kyrgyzstan, and Tadjikistan. EAEU has the same membership as the CSTO except Tadjikistan. CIS is the largest organization, which, in addition to the six CSTO members, also has Azerbaijan, Moldova and Uzbekistan as members.

In October 2016, the CSTO accepted a new Collective Security Strategy⁵, according to which the organization shall not tolerate threats to its member States – neither from outside nor from inside. The Strategy is meant to be in force until 2025. The key political matters are hidden inside the long text. According to the Strategy paper, the members of the CSTO are ready to prevent activities aimed at disorganizing the State power and changing the constitutional order in these States (section 3.1). They are also ready to prevent destructive efforts to influence the socio-political and socio-economic environment, as well as manipulating public consciousness in them (section 3.2).

The Strategy paper also provides (in section 6.6) that in the sphere of counter-acting modern, combined forms of influence on the CSTO member states with the aim of destroying their statehood, destabilizing the internal political situation or changing political regimes, the following actions will be carried out: 1) to study and analyze the practice of applying the so-called ‘color revolutions’ and ‘hybrid wars’ technologies, and 2) to form a collective response system.

The leading purposes in the Strategy are to react in a collective way to external threats and to threats against the governments in power by demonstrators, preventing such revolutions as took place in Ukraine in 2014 and in Georgia in 2003. Armed force would be used if necessary. All the member States of CSTO have autocratic governments and do not appear to have fair elections. These governments want to ensure that the people do not succeed in ousting them. It is grim that one of these members is Belarus, which, due to its dictatorship, is prevented from becoming a member of the all-European Council of Europe (with 47 member States) – Belarus being the only such State in Europe.

Russia pays a lot of lip-service to its respect for international law, but in fact it has violated international law, and is ready to violate again, notwithstanding the poor quality of its arguments that do not convince the international community and experts on international law.

⁵ The original Russian text of the Strategy can be found on CSTO’s web-page http://odkb-csto.org/documents/detail.php?ELEMENT_ID=8382. (The information provided here about the Strategy is based on an informal English translation done by my colleague Tero Lundstedt. We do not guarantee that all the terms used here are the best English translations of the terms of the original Strategy paper).

Lauri Hannikainen

RUSSIA AND INTERNATIONAL LAW

The starting point of the article is Lauri Mälksoo's recent book 'Russian Approaches to International Law'. He focuses on Russia before and after the period of the Soviet Union. Mälksoo knows his theme extremely well and discusses both the scholarship and State practice. Regarding the period of the Russian Federation, the Author of the article picks up his understanding of 'progressive' and 'conservative' in Russian thinking – in human rights law, in economic law, and regarding the use of armed forces – and disagrees with him to some extent. Unlike Mälksoo's book, this article also comments on the position of international law in the foreign policy of the Soviet Union and divides its 70 years – together with the Russian Federation's 25 years – into six different periods. The Author then leaves Mälksoo and focuses on international law in the foreign policy of the Federation during this decade, including the full U-turn of the leading Russian experts to support the illegal Russian annexation of Crimea. The latest cause for concern comes from the Russian-led international Collective Security Treaty Organization (CSTO – having six members), where, according to the new Collective Security Strategy, the parties agree to take joint action to prevent any 'color revolutions' like the Maidan revolution in Ukraine, where the people challenged the corrupt President. None of the members of the CSTO are democratic.