Lauri Mälksoo, *Russian Approaches to International Law*, Oxford University Press, Oxford: 2015, pp. 240

ISBN 978-0-198-72304-2

THE SCHRÖDINGER'S CAT OF "RUSSIAN INTERNATIONAL LAW"

The book *Russian Approaches to International Law* (Oxford: Oxford University Press, 2015) by Lauri Mälksoo reveals many little-known aspects of post-Soviet international law in today's Russia, and as such should certainly be of interest to anyone with an interest in the legacy of the Soviet Union, which is still felt today in many places.

The author should first of all be praised for the attention and effort he has devoted to deconstructing the workings of Russia's "science of international law" and for such a timely publication: he commenced his research in 2009, about five years before the international community's attention was turned to Russia in connection with the events in Ukraine in 2014.

One of the key questions raised by Lauri Mälksoo, namely "whether the Soviet Union really went away in everything that people at home or abroad associated it with" (p. 9), has been a critical issue for much longer than just the past few years. On a personal note, as a Russian law student in the late 1990s and early 2000s with an interest in international law, I soon realized that I was on the receiving end of the "intellectual disservice" (p. 91) of the teaching of international law in Russia, an effect deduced by Mälksoo which he correctly projected on to Russia's international law students of the next generation (ibid.). Hence the answer to the question was obvious even back then: as far as public international law was concerned, at the end of the Russian "free 1990s" the iron curtain still remained largely in place.[1]

Back then, there was hardly anyone inside or outside Russia who expressed more than a passing interest in this type of question. As Mälksoo notes, interest in legal thinking and practice of the post-Soviet Russia faded together with Russia's declining importance in the international community, which "was at its low" in the 1990s (p. 8). *Russian Approaches to International Law* therefore offers a much-needed and timely exposition – including a verifiable answer to the question of what lies behind key aspects of Russia's approach to international law today.

There is, however, one very important area that is missing from the book, and that is a chapter on independent thought and how it has been forming in Russia over the course of the past twenty-five years. Such thinking has had to find its way through (or

[1] As I argue elsewhere: M. Issaeva, *Twelfth Anniversary of Russia's Participation in the Jessup Competition: A View from Behind the Curtain*, 3(7) Mezhdunarodnoye Pravosudiye (2013), available at: http://www.threefold.ru/files/12_years_of_the_Jessup_in_Russia_eng.pdf (accessed 20 April 2016).

around) the extremely isolated, self-referential and dehumanized post-Soviet approach to the teaching of public international law, whose "authoritative discourse"[2] has largely remained unchanged since Soviet times.

Mälksoo touches upon both the historical and current scholarly approaches to international law in Russia, and also devotes a separate chapter to state practice, as shaped by the ideas that have been developed under such theoretical approaches. In the book the author endeavors to achieve a deeper understanding of the "ideas and ideology" on which Russia's international law practices are predicated (p. 2). The main focus of the study lies precisely in, as the author himself indicates, the "ideas and scholarship behind the discourse of the power elite" (p. 22).

The authoritarian tradition in Russia of the government influencing and restraining legal thought is of course reflected in the book, with some emphasis on the Soviet totalitarian times: Mälksoo notes the previous "almost axiomatic observation that international legal scholarship had historically not been 'free' in Russia" (p. 78), while observing himself that "at least in international law scholarship there was more scholarly freedom in late Tsarist Russia than in the USSR" (ibid.).Borrowing the language of Carlo Focarelli, Mälksoo concludes that Russian international law scholars "tend to align" with the views of their government, and notes that this is a phenomenon that can be seen in other countries as well (p. 84).

However, it appears that the language chosen by Mälksoo and some of his conclusions in the chapter devoted to this issue do not entirely reflect the key difference between those societies in where there is at least some degree of freedom, and totalitarian societies. In the Soviet Union the totalitarian state pervaded the law, universities, and the international law profession, including all its representatives. There was simply no separation between international law scholarship and the Soviet state.

The collapse of the USSR had no immediate impact on the teaching of public international law in Russia, and the consequences of the "all-pervasive Soviet state" were never addressed through revisions in Russian international law scholarship. The same holds true for many fields in Russia related to public law. Mälksoo himself asks the question whether the post-Soviet courts "ever truly did" separate from the all-powerful executive branch. It appears that the answer is negative, and that this also applies to the post-Soviet school of international law (represented by the Russian Association of International Law ("RAIL")). RAIL "old school" members continue to think of the international legal profession as absorbed by the state, and they continue to teach this way of thinking to Russian law students in an extremely "nationalized"[3] setting. In particular, the Russian academic response to the annexation of Crimea has made it clear that the "old school" continues to speak with unity of voice, and that that voice continues to purport to be that of the Russian state. The continued lack of separation from the state

[2] A. Yurchak, *Everything Was Forever, until It Was No More: The Last Soviet Generation*, Princeton University Press, Princeton: 2006, p. 53.

[3] A. Roberts, *Is International Law International?*, Oxford University Press, Oxford: 2017 (forthcoming).

explains numerous problems and idiosyncrasies inherent in the Russian international law doctrine, which are observed by Mälksoo in his book. They include, among many others, the difficulties in accepting human rights, or differing scholarly opinions or the evolving understanding of state sovereignty.

The language used by Mälksoo to describe the "choice" by Russian scholars to serve the state thus appears to be inaccurate. Given the mentality of the Soviet generation of international lawyers, there was simply no choice to be made.

While the implications of the Soviet totalitarian tradition are still observable today, it is open to question whether there are really sufficient grounds to conclude that these implications are a continuation of a "Russia's historical tendency to authoritarianism" (p. 193), which results in what Mälksoo appears to describe as a historically predetermined need of the Russians for a "strong hand" (p. 187).

Mälksoo appears to be certain that they are, building his findings on an uninterrupted historical connection from Tsarist Russia through the Soviet Union and to present-day Russia. I would argue, however, that there is an inherent fallacy in this logic.

In a hypothetical reality where the 1917 Bolshevik revolution did not happen, the Russian imperial or post-imperial environment would have shaped international law doctrine in Russia, which most likely would have been characterized by a significant degree of conservatism and authoritarian tradition, including a certain inflexibility of university structures and institutional approaches – as indeed happened in the German school of law during the Weimar Republic.[4] The Bolshevik revolution, however, broke the natural flow of the historical process. The perverse reality of Soviet times, where the social sciences served the interests of the infamous ideology of Marxism-Leninism, left no room for any discourse on the merits of "conservative versus liberal" approaches to any area of public life. So it appears that by treating the Tsarist and Soviet past on a more-or-less equal footing, the author has introduced a fallacy into his argument. It is analogous to an attempt, for example, to discern a standing predetermined "tendency" toward Nazism in Germany, or toward totalitarian rule among the former Socialist bloc countries based on their experience in Soviet times (including Estonia, the home country of Mälksoo), or to discern a "tendency" to be terrorized among countries hit by grave terrorist attacks.

We know that in the Soviet approach to international law, national interests were pursued based first on the idea of world revolution, and then on the principle of peaceful co-existence, which essentially meant that the Soviet Union had a *carte blanche* to defend and disseminate its purported anti-bourgeois values. The entire legal discourse became controlled by the state, thereby turning it into a purely ideological discourse. Methodology and knowledge were subjected to socialist goals, and the field of study was limited to socialist sources, with their heavy bias against bourgeois sources of law. The latter included general principles of law (taught in the Soviet Union as "generally recognized principles of international law") and, to a large extent, customary international

[4] D.F. Vagts, *International Law in the Third Reich*, 84 American Journal of International Law 661 (1990), p. 667.

law. Judgments of international courts and tribunals were mostly ignored by the Soviet international law doctrine, and thus the main (and possibly only) interpreter of international law for Soviet scholars was the Soviet state itself.

Mälksoo touches upon many traces of the Soviet past in the current Russian scholarly works. For instance, he notes the lack of references to judgments of international courts in most of the writings. He also quotes *International Law* by Shinkaretskaya and Usenko (2005) (p. 94), who criticize international tribunals for not always "correctly" making "the distinction between general principles of law and general principles of international law", thus duplicating the Soviet view. Furthermore, many Russian international law textbooks (which the author used as the primary source of his research) still refer to the undeniable progressive influence of the Bolshevik revolution on the development of international law, while Russian universities do not welcome the use of foreign textbooks. Another aspect of the Soviet legacy is that most Russian textbooks and monographs are self-referential, i.e., they tend to be limited to a systemic study of Soviet and Russian sources. All these facts are discussed in Mälksoo's observations, but he uses them to describe only the existing Russian approaches, stopping short of referring to their original, Soviet roots.

What Mälksoo fails to mention in this regard is that, importantly, the post-Soviet method of teaching international law generally does not include informing law students of any alternative interpretations of the core concepts of international law that can be found elsewhere, including in the practice of international courts and international law scholarship, or even informing them that such varying interpretations do exist in principle.

Various concepts and interpretations of what Mälksoo calls "Western international law" can be "spoofed" quite easily in Russia, due to, for example, the tendency for footnotes not to be used in Russian textbooks. In this way, "old-school" Russian scholars avoid incorporating the results of research of international legal scholarship into their writings (there have also been allegations that some of them do incorporate such research, only without attribution). It is very typical for references to refer to a "Western example" or a "Western doctrine". This may partly be due to linguistic difficulties and a certain pride in being different, but it begs the question of whether a modern-day scholar can really have a grasp of international law if he or she does not have at least a reasonable grasp of English-language and French-language international law scholarship.

In his book, Mälksoo divides Russian academics into "statist" and "liberal", but with regard to the "old school", as long as such authors share the same old fallacies and mentality of the Soviet times, they all form part of the same old Soviet discourse. In this sense, attempting to assess diversity in Russian international law scholarship today purely on the basis of whether a given Russian scholar includes "individual" as a possible "subjects" of international law (and is therefore considered more "liberal") can indeed lead to the conclusion that there is no real diversification of views within Russian scholarship. The Crimean situation has conclusively shown that one of the

most important changes from the "monolithic" Soviet doctrine noted by Mälksoo – the supposed pluralism of opinions – has remained little more than cheap talk, at least in the minds of the leading Russian scholars of international law.

Another legacy of the communist period is the many unsolved riddles – which have become part of the Russian public discourse – stemming from the fact that in the Soviet Union the meanings of various core concepts of the social sciences were deliberately misplaced or substituted. As Mälksoo notes, in Russian international law "[t]he words are the same but the meanings are different, and, from the Western point of view, even distorted". In his view, this creates the effect of a simulacrum, or parallel world, to that of the West. Here the author again attaches importance to the historical nature of this phenomenon, which he argues goes back to at least the 19th century and possibly as far back as relations between the Byzantine Empire and the Latin world (p. 185).

Some academic commentators in Russia, however, have suggested a different concept, seemingly more precise, to describe the modern reality of Russian political institutions and their current discourse: the concept of imitation. They argue that there are various aspects of such imitation in present-day Russia, ranging from "imitation" democracy and "imitation" elections to "imitation" academic life.[5] Relying on the research and interpretation of late socialism by Alexey Yurchak,[6] it can be argued that such imitation on many levels in modern-day Russia is a consequence of certain highly specific processes that emerged and took shape during the period from the 1960s to the 1980s. According to Yurchak, public discourse in the late USSR (which he refers to as an "authoritative" or "ideological" discourse) mutated from "breaking with the established conventions of language, as was the case during the revolutionary period,"[7] to becoming "hyper-normalized", that is, extremely circular and completely devoid of "constative meaning"[8], in an attempt to implant and fix a declared idiosyncratic aim of late socialism, which Yurchak formulates as "total liberation by means of total control."[9] Such "hyper-normalization" influenced the language of Soviet officialdom and the "routine practices of everyday life",[10] and involved such techniques as "collective writing",[11] "mutual imitation"[12], "block-writing" (i.e. reproducing "relatively fixed 'blocks' of discourse ... from text to text"),[13] etc. The model of language that emerged

[5] *See e.g.* V. Inozemtsev, *Великие имитаторы* [Great Imitators], available at: http://www.gazeta.ru/comments/2015/04/03_a_6624321.shtml; V. Inozemtsev, *Имитация российской науки* [Imitation in Russian Science], http://www.mk.ru/social/2014/05/12/imitatsiya-rossiyskoy-nauki.html (both accessed 20 April 2016).

[6] Yurchak, *supra* note 2.

[7] *Ibidem*, p. 93.

[8] *Ibidem*, p. 64.

[9] *Ibidem*, p. 298.

[10] *Ibidem*, p. 63.

[11] *Ibidem*.

[12] *Ibidem*.

[13] *Ibidem*.

"was closed to unexpected ruptures and shifts".[14] Soviet officialese became "increasingly citational and circular at all levels of structure"[15], and resulted in "fixed and cumbersome forms of language that were often neither interpreted nor easily interpretable at the level of constative meaning."[16]

Without delving further into this complex topic in this review, suffice is to say that it seems a more accurate picture of reality in today's Russia can be formed by treating earlier Russian history and tendencies as having been irreversibly deformed, reshaped, or even negated by Soviet totalitarianism.

In an era of growing skepticism among international lawyers as to the universality of international law, the "Russian school" might indeed be lucky enough to have a strong case. Building upon a legacy of strong Soviet rhetoric, the guardians of this closed system continue to view it as the leading "science" of international law in the world – a world that unfairly fails to accord it such status. Yet acknowledging the strength of the case for regionalism generally is far from acknowledging its ability to evince legal argumentation.

In his work, Mälksoo has specifically chosen a narrow focus on the post-Soviet academic international law environment in Russia, which in reality does not hold a monopoly over the theory and practice of international law in Russia (although that environment itself would probably claim otherwise). There are various independent practitioners, including lawyers working at both international and Russian law firms and attorneys representing clients at the European Court of Human Rights (ECtHR) and some other international courts where Russia is involved, as well as lawyers on the registry of the ECtHR and domestic human rights lawyers. There are also some younger Russian international law academics who clearly do not adhere to "the Party line" of the post-Soviet school. The diverse nature of this category of independent international lawyers in Russia – the new generation – indeed makes it difficult to include them in any study, as they do not represent any formal "school". It should also be noted, for the sake of a balanced argument, that this new generation of international scholars and practitioners in Russia never enjoyed the benefits of the old Russian school, which at all times had been backed by various Soviet structures, well-known to the world, and which survived the collapse of the totalitarian regime; such as for example the Soviet Association of International Law, which was simply renamed in 1991 (now RAIL, a branch of the International Law Association).

In this regard, it is worth quoting Oscar Schachter and his well-known piece on the invisible college of international lawyers: "[o]ne would hesitate today to assume that the individual members of a particular nationality shared the same political outlook and the same order of values by virtue of their nationality. We are aware of the diversification of views within most national societies, and there is ample evidence of this in the ranks of international lawyers."[17]

[14] *Ibidem*, p. 298.

[15] *Ibidem*, p. 64.

[16] *Ibidem*.

[17] O. Schachter, *The Invisible College of International Lawyers*, 72 Northwestern University Law Review 217 (1977), p. 219.

The temptation to treat Russia as an exception to "most national societies" – i.e. one in which no diversification of views exists – might be high, but this would hammer a solid nail in the coffin of international law in Russia, indiscriminately locking all Russian international law scholars and practitioners inside the coffin. Finally, it seems very striking and counter-productive that while the author is prepared to distinguish a Russian pre-determined tendency towards authoritarianism and a need for a "strong hand" (p. 187), at the same time he appears to be indulging proponents of the post-Soviet legal doctrine. As Mälksoo puts it, "since Putin's Russia is increasingly seen as an autocracy and the freedom of NGOs as well as academia has recently been restricted, it would be naive to presume that no political constraints exist for international law scholarship in Russia" (p. 82). However, Mälksoo arrives at this conclusion without taking into account the fact that the autocracy characteristic of Russian universities and the lack of academic freedom among Russian international law scholars in the 1990s and early 2000s were mutually constitutive. It was in fact the Russian international law scholars themselves and the academic system they inherited from the USSR that were responsible for most of the restrictions, self-limitations, and dehumanization in post-Soviet academia during that time.

Holders of dissenting opinions on any matter of importance in the post-Soviet academic international law school in Russia put themselves at risk of not being conferred their Russian degree and of ostracism within the system. Most Russian universities are apparently still quite hostile to foreign professors and disdainful of degrees obtained outside Russia, and this becomes a serious obstacle for the new generation of Russian international law scholars whose chosen career is to teach in Russia and to improve the level of public international law at Russian universities.

In the "backstage" of Russian academic life a new trend has emerged in recent years, namely the issue of "funding" of scholars. Scholars who express an opinion critical of any actions on the part of the Russian government from the standpoint of international law are now likely to face pointed questions about the sources of funds supposedly paid to them to make such statements (it is generally presumed that the money "comes from the West"), and their works and commentaries are likely to be disparaged as "articles for pay". Strikingly, a scholar's previous reputation and integrity apparently has no bearing on these presumptions. The stance that academic affiliation with a state-funded university should preclude "affiliated" scholars from raising arguments critical of the government is also being increasingly voiced. Importantly, such voices are heard on a "horizontal" level, that is, within the Russian legal and academic community itself. They represent an uninterrupted continuation of the post-Soviet "horizontal" tradition in academia (at least in the area of public international law in Russia) of *ad hominem* attacks on those who express a dissenting or simply a differing opinion. The very presence of such attacks, and their recent intensification, indicates however that independently thinking scholars and practitioners of international law in Russia are very much in the picture, and suggests that their voices may be starting to be heard.

To conclude, *Russian Approaches to International Law* is an extremely useful resource that details many historical aspects and current trends in the field of international law in post-Soviet Russia. The book may also be taken as an invitation for Russian lawyers to revisit their concepts of international law as taught in Russia, and for international law scholars and practitioners to frame the argument that professional integrity and ethical conduct are a *sine qua non* conditions of our profession.

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DOI 10.7420/pyil2015n

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