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International Law in Russian Textbooks: What's in the Doctrinal Pluralism?

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Table of Contents

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Abstract

This review essay examines four leading Russian textbooks of public international law. It is noteworthy that doctrinal pluralism has been established in the international law doctrine as represented by the Russian scholars. One particular doctrinal question of heavy symbolic significance – whether individuals have become subjects of international law beside states – is examined. It turns out that different answers given to that question in the scholarship are linked with a general attitude towards the Soviet legacy.

K.A. Bekyashev (ed.) *Mezhdunarodnoe publichnoe pravo*, 2nd edition, Moscow: Prospekt (2003) (the textbook of Moscow State Juridical Academy).

Y.M. Kolosov & E.S. Krivchikova (eds) *Mezhdunarodnoe pravo*, 2nd edition, Moscow: Mezhdunarodnye otnoshenia (2005) (the textbook of Moscow's MGIMO University).

A.A. Kovalev & S.V. Chernichenko (eds) *Mezhdunarodnoe pravo*, 3rd edition, Moscow: Prospekt (2008) (the textbook of Moscow's Diplomatic Academy).

V.I. Kuznetsov & B.R. Tuzmukhamedov (eds), *Mezhdunarodnoe pravo*, 2nd edition, Moscow: Norma (2007) (the textbook written under the auspices of the Russian Association of International Law).

A. Introduction

One way to get an idea about how international law is understood in a certain country is to take a closer look at its international law textbooks. Of course, the scholarly doctrine that is reflected in the international law textbooks is not the same as the international legal views of the state itself as expressed in its international communication and interpretation by domestic institutions such as courts. Nevertheless, besides giving evidence of prevailing trends of thinking, the study of leading textbooks can be a useful shortcut to learn about the practice and views of the respective state. Moreover, it

is a professional characteristic of the "invisible college of international lawyers" that their more outstanding representatives usually have some sort of a role in, or proximity to, the formulation of their country's international legal positions. Who, in the country that made famous Fyodor Fyodorovich Martens (1845-1909), should mind that international law professors would also advise the Prince?[1]

The important news from the Russian Federation is that there is no longer a monolithic, "one and only state-approved" theory of international law. A doctrinal pluralism has emerged in the contemporary international law scholarship of the Russian Federation. Even in the Soviet period, the Russian international law doctrine was not always as monolithic or dictated by the Kremlin as it usually must have seemed abroad (although, in comparison to the relative pluralism of the Western doctrine, quite monolithic and dictated from the Communist Party it was indeed). Russian students of international law can nowadays choose between different doctrinal viewpoints concerning the discipline. Although not everything that is nowadays written and published in the field of public international law bears the stamp of timeless quality, one finally has a choice. Indeed, my Estonian teacher of international law once in the mid-1990s caught the postmodernist spirit of the time when he told us that things had changed fundamentally for international law scholarship: "Once there was a time when there was only one Anzilotti. Now every university has its own Anzilotti". This was a paradox, of course, since to say that now every university has its own Anzilotti means nothing else but that there is no more Anzilotti.

As in every other European university, liberals and conservatives among international law professors have emerged in the post-socialist Russia. Perhaps the meaning of liberalism and conservatism remains slightly idiosyncratic in the Russian context, but this point will be elaborated on later. However, the main trend is noteworthy: the relative freedom that has embraced Russia after the collapse of the USSR has started to do its work. The more outstanding scholars, who were formerly all required to be mem-

[1] See further (and back) L. Mälksoo, 'The History of International Legal Theory in Russia: a Civilizational Dialogue with Europe', 19 *European Journal of International Law* (2008) 1, 211-232; L. Mälksoo (ed.), 7 *Baltic Yearbook of International Law* (2007), a symposium issue dedicated to the history of international law scholarship in Eastern Europe; L. Mälksoo, 'The Science of International Law and the Concept of Politics. The Arguments and Lives of the International Law Professors at the University of Dorpat/Iurev/Tartu 1855-1985', 76 *British Year Book of International Law* (2005), 383-502.

bers of the Communist Party of the USSR, are now thinking differently about phenomena that they were trained to think about in a more or less identical fashion back in the USSR. What is also noteworthy, although it is almost self-evident, is that doctrinal choices are not accidental; they seem to come along with a more conservative or more liberal vision about the world and the Russian Federation's role in it.

This is a review essay based on four leading Russian textbooks of international law: the 2003 textbook edited by Professor Bekyashev at Moscow State Juridical Academy, the 2005 textbook edited by Professors Kolosov and Krivchikova at Moscow's MGIMO University, the 2007 textbook edited by Professor Kuznetsov and Professor Tuzmukhamedov under the auspices of the Russian Association of International Law and the 2008 textbook edited by Professors Kovalev and Chernichenko from the Diplomatic Academy.

In today's Russian Federation, following the Soviet tradition, international law textbooks are usually collective works (the textbook written by the late Igor Ivanovich Lukashuk is a noteworthy exception).[2] The collectives of authors are usually formed around universities and around other institutional affiliations but also - and connected with the latter - along doctrinal inclinations that seem to have their roots in the realm of the political. As there is now a number of competing Russian international law textbooks on the market, this race of writing textbooks is in itself fascinating. It must partly have material reasons: students in the faculties of law of the Russian Federation make up a huge educational market and one can earn something in addition to one's salary with a well-selling textbook.

Even more, however, there seem to be reasons of prestige explaining this "race of writing textbooks": universities and chairs compete with each other for influence and resources. Whatever the exact mix of reasons, the result is competition and this cannot be harmful when looking at it from the students' perspective. Although everybody knows in theory that *tempora mutantur et nos mutamus in illis*, change is not always easy to master. In the foreword to the textbook of the Diplomatic Academy, the editors express their slight disappointment with the fact that the Diplomatic Academy and the MGIMO University (two prestigious universities in Moscow with close ties to the Ministry of Foreign Affairs) used to have a common textbook until the MGIMO professors took their colleagues by surprise and published their own textbook. Thus, according to the professors of the Diplomatic

[2] I. I. Lukashuk, *Mezhdunarodnoe pravo*, 2nd ed. (2001).

Academy, they were left no other choice but to take up the "creative challenge presented by the colleagues".[3]

Another interesting aspect is that the textbook published under the auspices of the Russian Association of International Law is introduced by the Minister of Foreign Affairs, Mr Sergey Lavrov. This is a warm and mainly non-ideological introduction, dedicated to one of the editors, Professor Kuznetsov, who had deceased.[4] But since some of the leading authors of this textbook are well-linked with the Ministry of Foreign Affairs – especially Mr Roman Kolodkin, the Legal Advisor at the Ministry of Foreign Affairs and member of the International Law Commission elected from the Russian Federation – one may speak of a certain touch of "official authorization" here. What is even more fascinating is that this is among the two of the more liberal of the four textbooks of international law discussed here. The Russian politicians and institutions around President Medvedev and Prime Minister Putin, such as the Foreign Minister Lavrov, tend to appear hawkish, nationalistic and resolute in their communication with the outside world – and yet, at least in a number of contexts, represent a relatively liberal and reformist civilizational agenda in the Russian domestic setting.

During the 2006 Paris conference of the European Society of International Law, one of the invited speakers, Professor Yuri M. Kolosov from MGIMO, was asked from the audience what in the Russian doctrine of international law had changed since the collapse of the USSR. I am obliged to rely on my memory, but Professor Kolosov's answer went something like this: references to Marxism-Leninism have been abandoned, but otherwise most things have remained the same, especially as far as the predominance of positivism is concerned. But this point raises the question as to what, if anything, besides Marxism-Leninism, could have been different in the Soviet international law doctrine when compared to the Western understanding of international law. For if these things have not since changed then the Russian doctrine still differs from the Western mainstream.

One such key aspect was the low ideological standing of human rights vis-à-vis state sovereignty in the USSR. Human rights law is therefore a topic of symbolic importance in any new scholarly analysis of international law in the Russian Federation. One of the key questions of symbolic importance that has to be solved by the doctrine is the reach of the circle of sub-

3 A. A. Kovalev & S. V. Chernichenko (eds), *Mezhdunarodnoe pravo*, 3rd ed. (2008), 9.

4 V. I. Kuznetsov & B. R. Tuzmukhamedov (eds), *Mezhdunarodnoe pravo*, 2nd ed. (2007), 15-16.

jects of international law. More precisely, can individuals be subjects of international law beside states and intergovernmental organizations?

In the following, I will demonstrate that this doctrinal question is an indicator of the wider attitude towards the Soviet legacy and Russia's role in international law. Scholars who in their minds have raised the individual to the status of a subject of international law generally have a more critical opinion about Soviet history while authors who are reluctant to grant the individual such a status both continue to see the Soviet legacy in less critical tones and conceptualize the world in Manichean tones of "we" (encircled Russia) *vs*. "they" (NATO, the US).

B. Concrete Examples: The Link between the Status of Individuals in International Law and the Attitude towards the Soviet Legacy

The textbook edited by Professor Kamil Abdulovich Bekyashev from Moscow State Juridical Academy clearly recognizes that individuals have become subjects of international law.[5] Moreover, it suggests that in the 21st century, the reach of this subject status will be further widened.[6]

In addition, let us now look at how the textbook edited by Professor Bekyashev sees the historical role of the USSR. While emphasizing a number of positive contributions of the USSR, the authors maintain:

> "One should not over-idealize the influence of the events of 1917 in Russia, the ideas and practices of the Soviet State. […] The international legal practice of the USSR was not in everything consequently progressive. Let us remember the infamous Soviet-German Pact of Non-Aggression of 23 August 1939 (Molotov-Ribbentrop Pact) and especially its secret protocols. The activities of the USSR on the international plane did not correspond to the progressive development of international law either ("liberation campaigns" of the Red Army in 1939-1940; war with Finland in 1939-1940; the entry of the Soviet forces in Hungary in 1956 and in Czechoslovakia in 1968; the fulfillment by the Soviet forces of "international debt" in Afghanistan in 1979-1989, etc). This triggered a negative reaction in the inter-

5 K. A. Bekyashev (ed.), *Mezhdunarodnoe publichnoe pravo*, 2nd ed. (2003), 120.
6 *Id.*, 120.

> national community. Thus, in 1940 the USSR was excluded from the League of Nations because of the war against Finland and from 1980 to 1988, the General Assembly of the UN adopted resolutions condemning the entry of the Soviet forces in Afghanistan."[7]

As far as the textbook edited by Professor Valeri Ivanovich Kuznetsov and Professor Bakhtiar Raisovich Tuzmukhamedov is concerned, the authors submit an extensive discussion on the broadening of the circle of subjects of international law. The inclusion of physical and juridical persons into the circle of the subjects of international law corresponds to the contemporary understanding of international law.[8] The authors of the textbook edited by Kuznetsov and Tuzmukhamedov admit that in Russia, the acceptance of individuals as subjects of international law has met heavy resistance by leading scholars such as Lukashuk or Chernichenko.[9] Finally, the authors conclude that the inclusion of international non-governmental organizations, transnational corporations, juridical persons and individuals in the circle of the subjects of international law seems "completely real".[10] Finally, the authors of the textbook edited by Kuznetsov and Tuzmukhamedov give a detailed overview of the exact ways in which individuals can have international legal status.[11]

When we now turn to the history of the USSR and international law, the account in the textbook of Kuznetsov and Tuzmukhamedov is fairly balanced and critical of the Soviet period. In the introductory chapter, Roman Kolodkin admits that for a considerable time during the Soviet period, the Soviet doctrine did not recognize the existence of universal international law and scholarship itself was not autonomous from political power.[12] Quite similarly to the textbook of Bekyashev, the authors write that the USSR did not necessarily follow its own theoretically progressive ideas in the 1930s – e.g. when it attacked Finland in 1939 and was as a result excluded from the League of Nations. The main difference between the textbooks of Bekyashev and Kuznetsov/Tuzmukhamedov is that according to the latter, the secret protocol of the Hitler-Stalin Pact of 23 August 1939 was not illegal

7 *Id*., 51.
8 Kuznetsov & Tuzmukhamedov (eds), *supra* note 5, 70.
9 *Id*., 72-73.
10 *Id*., 74.
11 *Id*., 102-107.
12 *Id*., 34.

under international law.[13] This viewpoint looks like a regrettable "compromise" with the truth – especially in light of the later claim that the Munich agreement of 29 September 1938 (the separation of Sudetenland from Czechoslovakia) was invalid *ab initio*.[14]

In the main part, however, the textbook of Kuznetsov/ Tuzmukhamedov makes a clear break with the Soviet legacy. It admits that the ideology that governed the USSR was not always favourable to international law.[15] Roman Kolodkin, the author of the pertinent chapter in the textbook, argues:

> "A characteristic feature of the foreign policy of contemporary Russia and its attitude towards international law is pragmatism and non-dogmatism. Our country no longer fights for the victory of some kind of ideology or system of views in the whole world. […] Contemporary Russian international law scholarship is independent from the State and maintains a positive continuity with the Soviet scholarship, especially as concerns the systematic treatment of international law. At the same time, it differs from the Soviet scholarship because of the pluralism of views."[16]

Thus, the textbooks of Bekyashev on the one hand and Kuznetsov/Tuzmukhamedov on the other hand share certain 'liberal' premises – for example that individuals are included in the circle of subjects of international law and that the USSR deserves to be remembered quite critically. The representatives of the more conservative spectrum are the textbooks written and edited by the MGIMO University and the Diplomatic Academy. However, it is noteworthy that both universities are leading in training future diplomats in the Russian Federation.

Both textbooks share the viewpoint that individuals cannot be subjects of international law.[17] Furthermore, how the authors of the textbook edited by Professor Aleksandr Antonovich Kovalev and Professor Stanislav Valentinovich Chernichenko think about human rights law can be well revealed from the following passage:

13 *Id*., 35.
14 *Id*., 174.
15 *Id*., 36.
16 *Id*., 39-40.
17 Y. M. Kolosov & E. S. Krivchikova (eds), *Mezhdunarodnoe pravo*, 2nd ed. (2005), 20, 107; Kovalev & Chernichenko (eds), *supra* note 4, 170.

> "The principle of the respect of human rights does not stand in opposition to other principles of international law but corresponds to them harmoniously. Therefore, no calls to protect human rights can justify attempts to violate such principles as sovereign equality of States, non-intervention of States in each others' matters, or prohibition of the threat of use of force. It follows from the principle of sovereignty that the State's relationship with its own population is a domestic question, regulated at the national level. It is necessary to de-politicize and de-ideologize the use of human rights in inter-State relations."[18]

This comes quite close to saying that concerns for human rights could only be expressed when and to the extent that the concerned state does not perceive its sovereignty to be attacked.

Moreover, in the textbook edited by Kovalev and Chernichenko, the Russian and Western doctrines are occasionally clearly distinguished. For example, the authors maintain that:

> "In the Western doctrine and practice of international law, there is a widespread point of view, according to which only intervention in the narrow sense is illegal, i.e., a "dictatorial" intervention, the use of force or threatening with it. In the Russian doctrine and practice another view has always been predominant, according to which any intervention is non-permissible, even including putting a question that relates to the internal authority of a state to discussion within an international organ."[19]

Is that really so? Some former satellites, member republics of the USSR or countries illegally annexed by the USSR can probably tell slightly different or at least more nuanced accounts of how the Russian state practice relates to the principle of non-intervention, especially in its self-proclaimed "near abroad". Another example where the authors juxtapose the Russian and Western understanding of the practice of international law is when they on eight (*sic!*) pages criticize the International Criminal Tribunal for the

[18] Kovalev & Chernichenko (eds), *supra* note 4, 277.
[19] *Id.*, 52.

former Yugoslavia (ICTY) for being illegally constituted,[20] politically biased and fundamentally unjust.[21]

The textbook of Professors Kovalev and Chernichenko also addresses the issue of negative aspects of the Soviet legacy. Consider, for example, the following passage:

> "The inward-looking nature of the first Soviet constitutions [of 1924 and 1936] in terms of international relations and norms was a means of the self-preservation of the State. For a long period when law and legality were trampled underfoot in the USSR, this kind of inward-lookingness also ensured that the State apparatus could not be punished because the victims could not turn to remedies provided by international law. At the same time, the Constitution of 1936 during the operation of which the State carried out cruel repressions among its own citizens, guaranteed formally a quite broad and progressive selection of rights and freedoms, such as freedom of conscience (Article 124) and freedom of expression (part "a" in Article 125)."[22]

Since self-preservation is not necessarily a bad thing or rather, to the contrary, is a very natural or normal thing from the particular state's point of view, it is unclear whether this kind of explanation simply explains or partly also justifies the Soviet isolationist attitude towards what had remained from classical international law after 1919. And should it not be stated more outrightly that the Soviet Constitution of 1936 was doubly cynical, dangerous and perverse when under its beautifully formulated rights guarantees the worst repressions against the country's own citizens could be carried out? Maybe Hitler was morally a step less evil because at least he repeatedly made the point that he did not give a damn about law or legality? Or should one still somehow remember the 1936 Soviet Constitution as a "progressive" legal document, against the letter and spirit of which mass repressions were carried out?

Coming finally to the MGIMO textbook edited by Professor Yuri M. Kolosov and Professor Elena S. Krivchikova, it argues in at least two differ-

[20] The liberal Minister of Foreign Affairs Andrei Kozyrev who was in charge in the early 1990s must then be co-responsible for this illegality since Russia did not veto the Security Council decision to establish the ICTY.

[21] *Id.*, 574-581.

[22] *Id.*, 103.

ent sections that the use of force by the US and its allies against Yugoslavia in 1999, Afghanistan in 2001 and Iraq in 2003 was illegal.[23] Thus, this clear and unqualified triad differs from the majority of Western analyses according to which the intervention against Yugoslavia in 1999 was "maybe not legal but nevertheless legitimate" and that the US use of force against the Taliban-led Afghanistan in 2001 was covered by the right to self-defense as it is enshrined in the UN Charter letter and practice (a clear majority of international law experts in the West would agree that the use of force against Iraq in 2003 was illegal). At the same time, the authors of the textbook affirm that pre-emptive use of force is supported both in the US and Russian official military doctrines in cases when the threat of attack is imminent (in reality, the Bush doctrine notoriously went further than responding to imminent threats along the lines of the Caroline doctrine).[24] The authors around Professors Krivchikova and Kolosov maintain that "there is no right to intervention as argued by some foreign international law scholars, especially no 'humanitarian intervention'".[25] To drive the larger point home once again, the authors maintain that NATO is dangerous for Russia and its eastward expansion in 2004 has been bad; the organization's declared goals do not correspond to its over-militarized and expansive reality.[26]

Human rights law remains somewhat in the shadow of such statements. But at least the reader learns that the Great October Revolution of Russia in 1917 contributed significantly to the formation of the second generation of human rights in international law.[27]

C. Conclusion

It is a highly interesting and generally laudable phenomenon that we can nowadays witness a race of international law textbooks in the Russian Federation. These textbooks have many things in common and yet reveal a number of significant small and sometimes big differences. Yet, considering how big a country the Russian Federation is and, correspondingly, how vast its intellectual resources should be, one could expect even more from Russian scholars. The nuances and differences between authors are mostly of a

23 Kolosov & Krivchikova (eds), *supra* note 18, 70, 428.
24 *Id*., 69.
25 *Id*., 177.
26 *Id*., 427.
27 *Id*., 534.

political nature and sometimes even relate to pseudo-problems in the scholarly ivory tower.

There are not yet different competing schools of international law in the sense that these schools would have a fully developed – and diverging – understanding of what international law is and what it is not. Notwithstanding the existing differences, the Russian doctrine of international law remains largely positivist and oriented towards textual interpretation; if necessary, willing to bend the contested rule or historical event favorably towards one's own state rather than against it.

Yet, I would not think it right to end this short review here with overly critical tones. The positive efforts towards the rapprochement of the Russian international law doctrine with the Western one, made especially by the authors around Professor Bekyashev and Professors Kuznetsov and Tuzmukhamedov, but occasionally also by the authors of the other two textbooks discussed here, must be acknowledged. Mentally relinquishing the empire has been a long and painful process for Russia; a much longer one than the relatively quick collapse of the USSR in 1991 was. Even though the explanatory work is so far only half-done, the individual international law scholars who, partly with the help of the concept of human rights, try to explain to the Russian students why the collapse of this kind of empire was inevitable and good rather than bad, deserve recognition for their open-mindedness and courage.