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The History of International Legal Theory in Russia: a Civilizational Dialogue with Europe

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Shafirov, P. P. **Rassuzhdenie, kakie zakonnyye prichiny Petr I, tsar’ i povelitel’ vserossiiskii, k nachatiu voiny protiv Karla XII, korolja shvedskogo, v. 1700**

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godu imel. Redaktor V. A. Tomsinov; vstupitelnaya statya W. E. Butlera. Moscow: Zertsalo, 2008.

Abstract

This review essay examines the main breaks and continuities in the history of international legal theory in Russia. In particular, it draws on works by leading Russian international law scholars: Peter Pavlovich Shafirov (1670–1739), Fyodor Fyodorovich Martens (1845–1909), Baron Mikhail Taube (1869–1956), Vladimir Emmanuilovich Hrabar (1865–1956), Fyodor Ivanovich Kozhevnikov (1893–1998) and Grigori Ivanovich Tunkin (1906–1993). The reception of these theoreticians' works in today's Russia is also examined. The history of the discipline in Russia opens itself up as a civilizational dialogue with (Western) Europe. The main questions have been: Is international law universal or fragmented; what is the progressive force in international law? The Russian theory of international law has moved from proving that 'we too are civilized/European' in the early 18th century to an aspiration towards Western European civilization in the 18th and 19th centuries to the break with the West and an affirmation of Russia's own distinctiveness and primacy in the 20th century. Those who hurriedly celebrated Russia's reunion with Europe (and Western liberal theory of international law) following the end of the Cold War should not lose sight of the longer historical perspective and especially the experiment of the 'civilizing'/Europeanizing/liberalizing project in 19th century Russian and Baltic German international law scholarship.

1 Introduction

What has the history of international law scholarship been like in Russia? What role did Russian theorists play in the development of international legal ideas? To what extent have Russian approaches to international law been similar to or differed from international legal theories in the West, particularly in Western Europe? Does the Russian tradition of international law form a genuine part of European tradition(s)?

These questions are not new – in fact, different responses to them given in the scholarship already have their own history.¹ At the same time, they have not lost their topicality either. First of all, there is a global surge of interest in the history of international law and its scholarship. Partly, this interest can be explained by the fact that history and theory have again become practical. Since international law enshrined in the UN Charter is eroded by the process of globalization, different hegemonic aspirations, and

¹ See, e.g., B. Meissner, *Sowjetunion und Völkerrecht. Eine bibliographische Dokumentation* (1963). More generally for the history of international law scholarship in Eastern and Central Eastern Europe see also 7 *Baltic Ybk Int'l L* (2007), (special ed. L. Mälksoo).

new types of conflict, international law is currently in need of defence, or renewal, or both, whatever position one takes. The history of international law can offer further insights into the field's current condition and future prospects, and at least enlighten us about the question 'what of this has occurred before?'. It is not incidental that some of the most exciting recent work in the history of international law has been done on the question of how hegemonic projects and international law have collaborated rather than excluded each other in the past.²

Another factor that has recently shaped interest in the history of international law has been the revival of debates about the importance of culture, religion, and civilization in international affairs. Translated into the field of international law, there is an emerging understanding that there is no single history of international law; instead, there are many histories. There is now greater willingness to learn about the history of international law from non-Western and 'peripheral' perspectives. Programmatic in this context is a sentence written by David Kennedy: international law is different in different places.³ While it seems hard to disagree with this thought on a descriptive level, the idea that 'international law is different in different places' may lead to controversial normative outcomes.

In this review article, I will approach the question whether international legal theory has been 'different' in Russia on the basis of central texts in the history of Russia's international legal theory. Just as almost anywhere else in the world, there has recently been a surge of interest in the history of international law scholarship in Russia. The revival of interest in historical sources has resulted in new editions of landmark texts by old masters such as Shafirov, Martens, Kozhevnikov, and Tunkin, particularly in the books in the 'Russian Juridical Legacy' series. Altogether, one gains the impression that these works are meant to represent a Russian tradition of, a Russian continuity in, international law scholarship.

At the same time, Russian theory of international law has historically been influenced by the same political break-throughs that the country has made. Reading these works one after another and in dialogue with each other reveals that, instead of harmonious continuities, we are in fact dealing with at least two major breaks and discontinuities in the Russian tradition of international legal theory: in 1700 and 1917. The breaks are of course closely connected to the all-pervasive question in the political and intellectual history of modern Russia: in what sense and to what extent is Russia a 'European' country? The conscious or unconscious dealing with this ideological background question constitutes the most visible continuity between the very different Tsarist, Soviet, and post-Soviet Russian international legal theorists.

In around 1700, Russia broke out of her previous self-inflicted isolation and entered the European state system. During the 19th century, Tsarist Russian theoreticians of international law saw themselves as translators and transferors of Western European international law scholarship. However, after 1917, Bolshevik Russia adopted an

² See Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order', 16 *EJIL* (2005) 369 and A.W.B. Simpson, *Great Powers and Outlaw States* (2004).

³ Kennedy, 'The Disciplines of International Law and Policy', 12 *Leiden J Int'LL* (1999) 9, at 17.

outspoken anti-Western/anti-liberal stance. Soviet Russian international legal theoreticians constructed a special ‘socialist international law’, the sphere of application of which ‘incidentally’ coincided with Moscow’s spheres of control and interest. Today’s international legal theory in Russia cannot be understood without an appreciation of these earlier breaks.

2 Brief Overview of the Reviewed Treatises and the Historical Role of International Law Scholarship in Russia

Most treatises discussed here are new editions of original works by outstanding Russian international lawyers, academicians, and/or advocates: Shafirov, Martens, Kozhevnikov, Hrabar, and Tunkin. The importance of each of these individuals to international legal theory in Russia was quite different from that of others. Peter Pavlovich Shafirov (1670–1739) wrote the first printed argument in Russian in the international law of ‘civilized nations’ (1717). Fyodor Fyodorovich (Friedrich) Martens (1845–1909) wrote the first comprehensive Russian textbook on international law (1882) and can be considered the leading international lawyer of the Tsarist period. Vladimir Emmanuilovich Hrabar (1865–1956) was the only significant international law professor of the Tsarist period who was able to continue as an international law professor in Soviet Russia. His main treatise was the history of international law scholarship in Tsarist Russia, first published posthumously in 1958. Fyodor Ivanovich Kozhevnikov (1893–1998) was the dean of the Faculty of Law of Moscow State University during World War II, the Soviet judge at the ICJ, and author of patriotic interpretations of Russia’s role in the history of international law (1947, 1948). Grigori Ivanovich Tunkin (1906–1993), whose rise is sometimes associated with Khrushchev’s thaw, was the most influential Soviet theoretician of international law during the last decades of the Soviet period.

Another type of recently (re-)published work discussed here is memoirs of leading Russian international lawyers. Baron Mikhail Taube (1869–1956) was Martens’ successor to the international law chair at the Imperial St Petersburg University. His memoirs were previously unpublished in Russian; the French version, which was published in 1928, differs in several significant details and emphases from the now available Russian version. The peak of Taube’s productivity as an international law scholar was in his post-1917 exile. Taube and his fellow Russian émigré colleagues, Baron Boris Emmanuilovich Nolde (1876–1948) and André N. Mandelstam (1869–1949), were actively lecturing in The Hague Academy of International Law during the 1920s and 1930s. Taube’s main works from that period were his histories of international law in Eastern Europe (particularly in Russia) and in Byzantium. Undoubtedly, Taube was the most outstanding Russian international lawyer of the post-1917 emigration.

The book edited by A.N. Vylegzhanin, Y.M. Kolosov, and E.S. Krivchikova and dedicated to the memory of Fyodor Kozhevnikov is interesting mainly for the same reason that Taube’s Russian memoirs are considered relevant here: it contains (*inter alia*) short memoirs of Kozhevnikov.

A third category of works taken into account here is new original scholarship on the history of international law in Russia, particularly with biographical emphasis. Vladimir Pustogarov's biography of Friedrich Martens was published in Russian in 1993, but a more complete and updated English version of this book edited by William E. Butler was published in 2000. Grigory Starodubtsev's study on Russian international lawyers in the post-1917 emigration, also published in 2000, opens up a fascinating and previously neglected topic for research.

Some of the international legal scholarship in Russia has been a world apart from Western scholarship. Several books, especially those first printed during the Soviet period, prove that there has been a certain linguistic barrier between Russia and Western Europe. This has been mutual: not only have Western authors usually ignored treatises in Russian but knowledge of Western sources by Russian authors also tends to be limited and fragmentary. Kozhevnikov quoted many Western sources in different languages, but the purpose of his quotations was usually to demonstrate the falseness of the positions expressed by Western scholars. The same was to a lesser extent true of Tunkin. Among post-Soviet authors Starodubtsev's analysis of Taube in emigration does not substantively discuss the latter's major publications which were in French. This neglect is in contrast to the leading Tsarist international lawyers, Martens and Taube, who took pride in quoting from a wide variety of sources in modern and historical languages.

Hrbar, who spoke many languages, did not have access to most post-1917 Western publications on the history of international law. The (Soviet) Russian–Western linguistic divide has thus been connected to mental divide. This Soviet and still occasionally continuing post-Soviet tendency creates the impression that international legal scholarship in Russia lives in the illusion of Russia's intellectual self-sufficiency. Unfortunately, this tendency does not always work in favour of the breadth and depth of the analysis. One of the results is that few Russian authors have tried to analyse the history of international law in general; it has usually been Russia's role and contributions to international law that have caught scholarly attention. The ever-returning *Leitmotiv*, especially since 1917, is that Russia and Russian scholars were 'at least as good as scholars in the West', and generally 'played an important role' in the history of international law and its scholarship. Being an international law scholar has been a potentially dangerous job in Russia. The stakes have been high; many fell out of favour with the autocrat or the party (Shafirov, Taube and other post-1917 emigrants, Pashukanis). Quite often, there has not been the kind of scholarly freedom enjoyed in the West; rather, the noblest task of being the leading Russian internationalist has been to help the State with legitimizing arguments. At least in Kozhevnikov's memoirs this aspect of helping one's country with legitimizing arguments appears more important than scholarship as such.⁴

As far as historical international law treatises in the Russian language are concerned, Professor William E. Butler, previously in London and currently at Pennsylvania State University in the US, has done a great service to the scholarship by translating

⁴ A.N. Vylegzhanin, Y.M. Kolosov, and E.S. Krivchikova (eds.), *Rossia i mezhdunarodnoe pravo. Materialy mezhdunarodnoi konferentsii, posvjashchenoi 100-letiu F.I. Kozhevnikova (Moscow, 15.10.2004)* (2006), at 18.

some key Russian texts into English. Besides translating Pustogarov's biography of Martens, Butler has introduced Shafirov and Tunkin to English readers and undertaken the huge work of translating Hrabar's monumental text. Furthermore, what has gone around has already come around: Butler's dedication to the Russian historical international law texts has been so fruitful that the recent Russian edition of Hrabar is already based on extensive bibliographical supplements completed by Butler.

Thus, the history of international legal theory in Russia is not a novel topic to legal scholars working in English. Butler has followed in the footsteps of Hrabar, and both together have completed what is essentially a comprehensive bibliographical encyclopaedia of international law scholarship in pre-1917 Russia. However, a downside of the encyclopaedic approach is insufficient discrimination between those authors whose ideas weighed more and those who were of lesser importance. If everybody was equally significant, who really was? Researchers could not do much without the archival-bibliographical work that Hrabar and Butler completed, but in the future we also need further comparative, critical, and problem-oriented studies on the history of international legal theory in Russia.

In what follows, I will turn to some continuing substantive themes in the history of the theory of international law in Russia.

3 International Law in Russia: Universal or 'Different in Different Places'?

From Shafirov and Martens to Kozhevnikov and Tunkin, there is an important continuity in Russian international law scholarship – the constant preoccupation with Europe/the West, particularly through the concept of 'civilization' and the question whether international law is universal or not. The Russian theory of international law has moved from proving that 'we too are civilized' in the early 18th century via the admiration of and aspiration towards Western European civilization in the 18th and 19th centuries to the break with the West and the affirmation of Russia's own civilizational primacy in the 20th century.

Before the reforms of Peter the Great (1672–1725) and the military success in the Great Nordic War (1700–1721), Russia was not seen as a member of the European state system, as part of the *respublica christiana*. The rift between Muscovy and 'Latin' Europe was not based just on Western arrogance or prejudices; rather, it was mutual. The Tsars of Muscovy had either an overtly hostile attitude to the 'Latins' and/or considered their rapidly expanding state as an isolated universe of its own.⁵

With Peter the Great's forced Europeanization, Russia was a latecomer in *ius publicum europaeum*. Obviously, before Peter's reforms, there could have been no Russian international law scholarship. Vladimir Hrabar has suggested that with Peter Shafirov's arguments (1717) international law scholarship was introduced in Russia 400

⁵ See, e.g., M.T. Poe, 'A People Born to Slavery'. *Russia in Early Modern European Ethnography, 1476–1748* (2000).

years after it had started to develop in Western Europe.⁶ (Hrabar held the view that international law scholarship was born in Italy during the late Middle Ages.)

It is interesting to see that in Peter Shafirov's arguments, the appeal to 'law of nations' is equal to the appeal of Western European public opinion. Proving that Russia had acted in conformity with international law was only a function of the real challenge: to prove that Russia was a normal, European, 'civilized' country. Shafirov lamented that this was not seen as self-evident in the West:

[F]or several decades the Russian people and state have been discussed and written about in other European States as are the Indians and the Persians and other peoples which have no communication with Europe except some trade. Russia was not seen as participant in European matters of peace and war and was even rarely counted among the European nations.⁷

The law of nations that Shafirov talked about was not 'universal'. Russia made efforts to be part of the club of 'civilized nations' precisely because it was exclusive and granted privileged status. Thus, while on the one hand trying to prove that Russia's military actions corresponded to the law of nations of 'civilized peoples', Shafirov with the same breath turned the argument of the law of nations against Turkey, which as an Islamic nation would be 'uncivilized' and organically not entitled to invoke the law of nations.⁸

It seems that Hrabar and Butler are simplifying matters when they see Shafirov's treatise simply as 'the first Russian contribution to the literature of international law'.⁹ The significance of Shafirov's arguments goes beyond that. I would suggest that we should see Shafirov's work primarily as semi-voluntary/semi-forced acceptance of an alien 'language', an entirely novel normative-conceptual framework for arguing about right and wrong in inter-state relations.

Some examples of the way Shafirov and Peter approached the law of nations prove that they saw it 'differently in their different place'. Take the example of the principle of sovereign equality of civilized states connected with the idea of the balance of power. These principles became enshrined in *ius publicum europaeum* since neither Catholic nor Protestant kings could establish their predominance in the Thirty Years' War (1618–1648). But Muscovites had grown accustomed to universalistic state concepts such as Pskov monk Filofei's doctrine of 'Moscow as third Rome'. The question remained whether Russia could switch from one mode of 'language' (Muscovy-centrism) to another (equality of states, solidarity between the European states) by an order of the Emperor. Although Shafirov's publicist effort was directed towards showing that Russia was a 'civilized' European country, Peter I, who wrote

⁶ V. Hrabar, *Materialy k istorii literatury mezhdunarodnogo prava v Rossii (1647–1917)* (2005, reprint of 1958), at 1.

⁷ P.S. (P. Shafirov), *A Discourse Concerning the Just Causes of the War between Sweden and Russia: 1700–1721*, with an introduction by W.E. Butler (1973), at 2.

⁸ See *ibid.*, at 290.

⁹ See V. Hrabar, *Materialy k istorii*, at 85; Butler, 'On the Origins of International Legal Science in Russia: The Role of P.P. Shafirov', 4 *J History of Int'l L* (2002) 1. See also a similar critique in Püirimäe, 'Russia, the Turks and Europe: Legitimations of War and the Formation of European Identity in the Early Modern Period', 11 *J Early Modern History* (2007) 63.

the conclusion to Shafirov's treatise, was proud that the rest of Europe had grown afraid of Russia:

[B]y the Assistance of Almighty God, Russia is become [sic.] so formidable that we now see a Nation who were the Terror of almost all Europe, vanquished by the Russians. And I dare say, Thanks to God alone, they dread no Power whatsoever so much as Russia.¹⁰

Another aspect was the position of the individual *vis-à-vis* the ruler (the state) in the European language of international law and in its 'standard of civilization'.¹¹ Some initial signs of what later in the 20th century developed into a full scale ideological confrontation on freedom rights between the West and Russia can be discovered in Shafirov's treatise. The relationship between the ruler (Tsar) and the subjects had evolved differently in Catholic/Protestant 'Latin' Europe from in Russia. A small expression of this was that in the Russian edition of Shafirov's book the author (P.S.) referred to himself as the 'slave' (*rab*) of Tsarevich Alexei (to whom the work was dedicated), and to the Russian people as Alexei's 'slaves'.¹² In Western Europe, the appropriate polite formulation in the post-Reformation pre-Enlightenment period would have been 'servant' at most.¹³

Yuri Mikhailovich Lotman (1922–1993), the founder of the Tartu–Moscow school of semiotics, has explained that while Western Europe had developed a 'contractual' understanding of the relationship between the ruler and the ruled, in Russia the relationship was more directly based on religious metaphors and analogies, and could be likened to the metaphor of 'giving oneself over' rather than 'having a contract'.¹⁴ The Tsar was akin to the God; the man giving himself to the Tsar was not a contracting party but 'belonged to the Tsar'. When Shafirov was on a mission in Constantinople he wrote a letter to Peter I suggesting that he undertake acts of sabotage against Turkey: '[f]or Russia nothing will happen except that I will suffer here'.¹⁵ Shafirov was considering it natural, even honourable, that his life would be sacrificed for the Tsar.

Finally, a striking aspect of Shafirov's argument was the reasoning with which he dismissed the previous treaties that had been in force between Sweden and Russia before 1700 (especially the Peace Treaty of Stolbova of 1617). Although Shafirov did not deny that such treaties existed, he easily dismissed their significance because they had been 'unjust' towards Muscovy:

[The Tsar] was obliged to reunite to his Crown by his just Arms a Property, of which it had been robbed by Fraud and all sorts of unfair means, at a time when the Russian Empire was at a very low Ebb and on the Brink of Ruin.¹⁶

¹⁰ Shafirov, *supra* note 7, at 349.

¹¹ See further G.W. Gong, *The Standard of 'Civilization' in International Society* (1984), at 106 ff, concerning Russia.

¹² Shafirov, *supra* note 7, at 8 and 10.

¹³ Since the 16th century, Western visitors to the Russian court had pointed out that Russian subjects lived 'in the slavery of the Tsar' and were supposed to call themselves slaves. See Poe, *supra* note 5, at 52–71. Poe also points out a paradox: that only elite servitors in Russia were permitted to call themselves slaves of the Tsar: see M.T. Poe, *The Russian Moment in World History* (2003), at 52.

¹⁴ Y.M. Lotman, *Semiosfera* (2004), at 377.

¹⁵ *Ibid.*, at 377.

¹⁶ Shafirov, *supra* note 7, at 271–272.

Dismissing previous treaties or liberally using the argument of *clausula rebus sic stantibus* has certainly not been unique to Russia. But it seems that in the context of Shafirov's argument regarding previous treaties with Sweden, a historical mistrust towards the West was strongly in play, a mistrust carried over from the times of Alexander Nevsky and the frequent wars with the Catholic Polish–Lithuanian Kingdom. A treaty with a party that one feels a certain affinity or solidarity with is more likely to be honoured. During the 16th and 17th centuries, Russian treaties with neighbouring Western powers had been truces rather than treaties based on trust and solidarity.

Moreover, domestic analogies with contracts might have been of some influence here. Yuri M. Lotman argued that Western historic consciousness had developed on the basis of the sanctity of contracts based on reciprocity. At the same time, the place of contract in Russia was not so high in the traditional value system. In mediaeval Russia, the contract was perceived as a purely human matter, in the sense of juxtaposing 'human' with the 'divine'. In all cases in which the contract was concluded with an impure force, honouring it was sinful, violating it was salvific.¹⁷ Only from the time of Peter I – mostly based on the ideas of Grotius and Pufendorf – was the importance of contracts and treaties emphasized in Russia.¹⁸

Russian acceptance or imitation of the European language of international law did not bring an end to the European arguments about whether Russia was a truly European and civilized or 'polite' (*poliché*) country.¹⁹ Many Western European authors in the 18th and 19th centuries continued to see Russia as either backward or dangerous or both. At least in the mid-20th century interpretation of Kozhevnikov, Russophobia and denying Russia's 'normality' were sometimes translated into Western international legal textbooks as well – for example, in the work of the French author Pradière-Fodère.²⁰ Many Russians felt that the Western alliance against the country during the Crimean war (1851–1856) or the Balkan wars of the 1870s were not the 'usual' clashes between European Great Powers – they were alliances specifically against the influence of Russia and its dangerous 'otherness'.

After Shafirov, nothing much happened in Russian international legal theory until the mid-19th century. The attitude towards the theory of international law was passive, a phenomenon that was later characteristic also of other countries which adopted European ideas about international law.²¹ Some works by Grotius and Pufendorf were translated into (although, not always published in) Russian. Vattel was not translated until the mid-20th century, but it was used in Russia in the original French. There was not much international law or legal theory in the Russian language.

However, the number of international law textbook translations, particularly from the German, started to grow remarkably in the mid-19th century. Paradoxically,

¹⁷ Y.M. Lotman, *Istoria i tipologia russkoi kultury* (2002), at 25.

¹⁸ *Ibid.*, at 30.

¹⁹ See M. Malia, *Russia under Western Eyes. From the Bronze Horseman to the Lenin Mausoleum* (1999), at 27 ff.

²⁰ See Kozhevnikov, *Russkoe gosudarstvo i mezhdunarodnoe pravo*, at 78.

²¹ See, e.g., Onuma, 'Japanese International Law in the Prewar Period – Perspectives on the Teaching and Research of International Law in Prewar Japan', 29 *Japanese Annual of Int'l L* (1986) 23, at 42 and Aral, 'An Inquiry into the Turkish "School" of International Law', 16 *EJIL* (2005) 769.

the Russian international law scholarship at that time was particularly advanced by Baltic German scholars and diplomats who had secured for themselves influential positions in St Petersburg and at the University of Dorpat.²² The most outstanding representative of this group of scholars—*Kulturträger*s was Friedrich Martens (1845–1909), whose international law textbook was first published in 1882.

Martens' ideas were strongly influenced by who he was: a man from the 'border'. Although he was of ethnic Estonian origin, what mattered in Russia was that he came from a cultural soil cultivated by the (Baltic) Germans. When the dean of St Petersburg Faculty of Law suggested in the 1840s that the young Martens should continue his studies in international law and later become a professor, he told him: '[t]hen we will have our own Martens'.²³ (Russia already had had her Pufendorf – Peter the Great used to think of himself as the 'Russian Pufendorf'.²⁴)

In a striking parallel, Yuri M. Lotman observed that for Byron to enter Russian culture a cultural double, a 'Russian Byron', was needed, who was immersed in both cultures: as a 'Russian' he was an organic part of the internal processes of Russian culture and spoke its 'language'. But at the same time he was Byron, an organic part of English literature, and in the context of Russian literature he would fulfil his function only if he was experienced as Byron, i.e. as an *English* poet. Lotman insisted that this is the context in which we should understand Lermontov's exclamation, 'No, I am not Byron, I am another...'.²⁵

Just as Shafirov's law of nations had not been universal, nor was the international law of Friedrich (also known as Fyodor Fyodorovich) Martens. Subsequent scholars have often pointed out that Martens was one of the most vehement 19th century defenders of the idea that international law applied only to civilized nations. Non-Christian Asian nations, not to speak of savage African tribes, could not be subjects of international law with full rights. What, however, has clearly not been emphasized enough is the fact that Martens used the idea of international law as 'gentle civilizer of nations' also – and maybe even particularly – in the Russia domestic context. It was Russia herself who had to be gently civilized in the hands of Martens and other Baltic German/Russian international law scholars—Westernizers. 'Civilization' for Martens was not just plain racism, the idea of one's superiority over the others, but the liberal notion that the more rights a society/nation granted to its subjects, the more advanced and therefore civilized it was. Thus, it so happened that the rights of the individual were best secured in Europe and in the West.

²² See 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/Iur'ev/Tartu 1855–1985', 76 *British YB Int'l L* (2005) 383, and V. Ilyashevitch, *Pribaltiitsy na rossiiskoi diplomaticheskoi sluzhbe* (2005).

²³ The dean was referring to the leading international lawyer of the late 18th–early 19th century, Georg Friedrich von Martens of Göttingen University. See further V.V. Pustogarov, *Our Martens. F.F. Martens International Lawyer and Architect of Peace* (ed. and trans. W.E. Butler, 2000), at 19.

²⁴ D.W. Treadgold, *The West in Russia and China. Religious and Secular Thought in Modern Times, Vol. I Russia 1472–1917* (1973), at 89.

²⁵ Y. M. Lotman, *Universe of the Mind: a Semiotic Theory of Culture* (trans. A. Shukman, with introduction by U. Eco, 1990), at 137.

Martens essentially suggested that before Peter I Russia had been an ‘uncivilized’ country. However, for him this turned out to be an encouraging, not a discouraging, example – if Russia could ‘civilize’ herself through Europeanization, so could other, even Oriental, nations. Martens explained that although pre-Petrine Muscovy had concluded treaties and exchanged ambassadors with West European nations:

[I]t would be erroneous to consider Muscovy as member of international exchange and to maintain that the Russian people and its government already at that time understood the necessity of international communication with Western powers. The foreign relations of Russia of that time were factual; in terms of its cultural conditions, social and political structure, Muscovy could not possibly have entertained steady legal relationships on the basis of equality and reciprocity. Such relations started only in the time of Tsar Peter the Great and only in the time of Catherine II received a firm basis.²⁶

Martens further argued that it was only then that the Russian Empire put aside the earlier Messaianic doctrine according to which Muscovy had to be recognized as being ‘higher and better than other States’.²⁷ Only after that were the Russian people no longer afraid that when Russians went abroad, they would lose their own faith and customs:

On the contrary, the Russian people begin to understand their deficiencies, their backwardness, become aware of themselves and seek to achieve the level of civic life and culture on which stand *other more enlightened peoples*.²⁸

Who, according to Martens, were these other more enlightened peoples? Not surprisingly, he held that the Germans had advanced international law scholarship most.²⁹

Although Martens was the most prominent representative among the Russian international law scholars of the second half of the 19th century, he was not unique with his ideas of individual rights and liberalism. Hrabar pointed out that almost all Russian international law scholars at that time could be considered liberals; some were active Westernizers (as opposed to the opposite intellectual camp, the Slavophiles).³⁰ The big question was whether they really represented Russia in European international law or rather European international law in Russia.

Russian intellectual resistance to Eurocentrism grew out of the Slavophile camp. Slavophile Russian cultural and political figures had come to realize that the standard of civilization was not ‘European’ – it was Western European. Nikolai Danilevski (1822–1885) argued in his influential book, *Russia and Europe*, that Russia was not a European country – it was a distinct civilization.³¹ While Martens and his school had hoped further to Europeanize/‘civilize’ Russia, Danilevski defined Western Europe (‘Franco-German cultural-historical type’) and Russia as the head of Slavdom as two different

²⁶ Martens, *Sovremennoe*, at 157–158.

²⁷ *Ibid.*, at 158.

²⁸ *Ibid.*, at 158 (emphasis added).

²⁹ *Ibid.*, at 137.

³⁰ Hrabar, *Materialy*, at 473.

³¹ N. Danilevski, *Rossia i Evropa. Vzgljad na kulturnyya i politicheskiya otnosheniya Slavyanskogo mira k Germano-Romanskomu* (3rd edn., 1888), quoted in I.B. Neumann, *Russia and the Idea of Europe: a Study in Identity and International Relations* (1996).

and even hostile ‘cultural-historical types’.³² Danilevski explained that the reason for Europe’s Russophobia had to be sought in the incompatibility of the European and the Slav cultural-historical types, and in the fact that old Europe sensed how Europe would be overtaken by young Russia. Since Russia and Europe were two different cultural-historical types, it was impossible to adapt European models to Russian conditions.³³

Contrasting the ideas of the international lawyer Martens with those of the pan-Slavist publicist Danilevski is necessary because it reveals how controversial the Martens’ civilizational project was in the wider Russian context. Liberalism (together with pan-Slavism and socialism) was just one of the three main competing political streams in pre-1917 Russia and, at least in the retrospective interpretation of the religious philosopher Nikolai Berdyaev, the least likely to govern traditional Russian conditions.³⁴

Martens died in 1909 so he did not witness the total overturn of his ideas about civilization and subjecthood in international law in Russia after 1917. It fell to his disciple, Baron Mikhail Taube, to analyse what exactly had gone wrong with the Europeanizing/liberalizing/civilizing project. It was Taube who, starting from the same ideological platform as Martens, provided additional historical explanations about what happened to liberalism in Russia, a liberal swansong and a response to Danilevski and other protagonists of the ‘Russian idea’ (the idea that Russia, rather than being part of Europe, would have a unique mission in the world).

In his Hague Academy lectures of 1926, Taube portrayed Russia’s historically complex on and off relationship with Europe.³⁵ Here Taube corrected the simplistic historical position of his mentor Martens: it was imprecise, even wrong, to suggest that Russia was uncivilized before the Petrine reforms. Taube demonstrated that Russia *had* an idea of international law before Peter the Great’s reforms – it was just that this international law had been different from and perhaps in some aspects inferior to international law developed in Western Europe. Taube seemed retrospectively to hint that Martens, his fellow Russian Westernizers, and disciples might have underestimated the strength and resistance of non-European ideas and elements before 1917.

According to Taube, mediaeval (Western) Europe and Byzantine and pre-Petrine Russia had been distinct civilizations.³⁶ Only in modern times had a new synergetic civilization, ‘new Europe’, emerged on the basis of Romano-Germanic Western Europe and Russia. Taube relied on a notion of an earlier Russian émigré, Sir Paul Vinogradoff (1854–1925) – historical types of international law³⁷ – and distinguished between two different ‘worlds’ in the history of international law in Europe: the Latin world of mediaeval Western Europe and the Greco-Slavonic world of Eastern Europe.

³² *Ibid.*, at 56.

³³ *Ibid.*, at 56–57.

³⁴ See N.A. Berdyaev, *Istoki i smysl russkogo kommunizma* (1955; originally 1937). See also N. Berdjaev, *Das neue Mittelalter. Betrachtungen über das Schicksal Russlands und Europas* (1927).

³⁵ See Taube, ‘Etudes sur le développement historique du droit international dans l’Europe orientale’, 11 *Recueil des Cours* (1926-I) 341. See also M. Taube, *La Russie et l’Europe à travers dix siècles* (1926).

³⁶ Taube, ‘Etudes’, *supra* note 35, at 349.

³⁷ See Vinogradoff, ‘Historical Types of International Law’, in his *The Collected Papers of Paul Vinogradoff* (1928), ii, at 248–318.

Taube claimed that in order to understand the historical specificities of international law in Russia one had first to understand the Byzantine. Through her contacts with the Islamic world, Byzantium developed into an essentially Oriental 'historical type' or, more precisely, a Eurasian (half-European, half-Asiatic) type.³⁸ In Byzantium, Basileius was seen as the leader of the whole World, as representative of the God. While in Latin Europe divine and secular power became separated, Byzantine political philosophy was Caesaropapist. Crimes against the state were simultaneously crimes against religion and God.³⁹

Taube maintained that in Catholic Europe the separation of the powers of the Pope and the Emperor enabled the just war (*bellum justum*) doctrine to develop and flourish. War against another Christian nation was essentially evil; only the Church could exceptionally decide when it was just. At the same time, in Byzantium thinking was determined by Caesaropapism: all wars led by Byzantium were legitimate.⁴⁰ Taube did not see any trace of the *bellum justum* doctrine in the Byzantine writings of the Middle Ages. This in his view also had an impact on practice – wars led by Byzantium were among the cruellest and there were no constraints of law with respect to the enemy.⁴¹

All these aspects influenced international law in Russia because Russia received her 'civilization' through baptismal by Byzantium in 988. Taube held that before the rise of Muscovy in the 15th century Russia was not a unitary state, but rather an international alliance of independent principalities. Any arguments to the contrary had, according to Taube, been a Russian 'politically inspired fantasy' of later times.⁴² Thus, relations among the Russian principalities before the Tartar invasion in the early 13th century were governed by regional treaties and thus 'international law'.

Taube strongly emphasized that the Russia of the 11th and 12th centuries was open and internationalist, and played an active role in European affairs. In his opinion, it would have been wrong to see pre-Mongol invasion Rus' as completely detached from the rest of Europe (even though it was a distinct civilization).⁴³ However, certain differences from Latin Europe started to take hold. For example, the Russian principalities inherited the Byzantine approach to war – i.e., there was no *bellum justum* concept. There was also no distinction between combatants and non-combatants, prisoners of war were enslaved, even the churches of the enemy were destroyed, etc.⁴⁴ Moreover, there was no arbitration or formalized dispute settlement in Byzantium or ancient Rus'; mediation as a more diplomatic and 'softer' method of conflict resolution was preferred.⁴⁵

In Taube's view the Byzantine legacy was not the real root of Russia's modern evils. The real cause of its ills was what happened to Russia during the Tartar rule. According to Taube, Russia developed further into a distinct semi-European/semi-Oriental

³⁸ Taube, 'Etudes', *supra* note 35, at 354.

³⁹ *Ibid.*, at 364.

⁴⁰ *Ibid.*, at 366.

⁴¹ *Ibid.*, at 368.

⁴² *Ibid.*, at 405.

⁴³ *Ibid.*, at 421.

⁴⁴ *Ibid.*, at 425.

⁴⁵ *Ibid.*, at 464.

civilization in consequence of the Tartar rule, which lasted from the early 13th to the late 15th century. Muscovy lived in isolation from and in a spirit of hostility towards the rest of Europe.

According to Taube, mainly because of the Russian Messaianism, the 16th century was the time of the worst hostility between the two historical types of international law, the Russian and the West European. In these times, there was no juridical or moral community between Russia and Western Europe; no more international law *between* them.⁴⁶ What enabled Muscovy to develop into not just a different but a hostile civilization towards Europe was the Tartar influence.

Taube's vision of the role of Russia in the history of international law could be called Western Europe-centric. For example, the historian M.T. Poe explains that the Russian myth of the Tartar Yoke was born in the 19th century when an explanation was needed for the 'failure' of Russia, for ideological reasons taken to be a European nation, to evolve in a European manner.⁴⁷ For Taube, the times when Russia was better connected with the rest of Europe were 'good' and progressive, while those when Russia was isolated and/or hostile towards Latin Europe were 'bad'. For Taube, Moscow, unifying other Russian principalities, was 'despotic, oriental, half-Tatar, half-Byzantine, with orthodox mysticism and arrogant and aggressive nationalism'.⁴⁸ Taube held that the worst Tsar from the point of view of respect for international law and peaceful relations among nations was Ivan Grozny (who was so much praised by Kozhevnikov in 1947). Ivan Grozny's barbaric wars in Northern Europe were not so much a legacy of Byzantium but rather the result of a deep 'Asianisation' of Russia during the Mongol rule.⁴⁹

In Taube's account, the 17th century became for Russia a preparation for the return to Europe. Tsar Peter I's Grand Embassy to Europe (1697–1698) was like his – and simultaneously Russia's – baptism into European civilization. Since the early 18th century, there had been only one international law for Russia and the other members of the European concert.⁵⁰

Taube emphasized that the existence of different historical types of civilization did not imply that such civilizations, and concretely historical Russia and Europe, were determined to live in a state of 'natural hostility'. In different periods of history, civilizations developed a different intensity of symbiosis or animosity with each other.⁵¹ Taube blamed Slavophiles, pan-Slavists like Danilevski, and his own contemporary 'Eurasianists' for not having let Russia melt completely into one whole with Western Europe.⁵²

⁴⁶ *Ibid.*, at 487.

⁴⁷ See M.T. Poe, *The Russian Moment* (2003), at 24.

⁴⁸ Taube, 'Etudes', *supra* note 35, at 473.

⁴⁹ *Ibid.*, at 481.

⁵⁰ *Ibid.*, at 492.

⁵¹ *Ibid.*, at 506.

⁵² *Ibid.*, at 438, 416, 473, and 506.

Like Martens, Taube originated from the Baltic German cultural milieu.⁵³ Reading his description of how the Russian and Western European civilizations, with their historical types of international law, met, one obtains the strong impression that the West European historical type, with its developed *bellum iustum* doctrine (as opposed to the Russian developed art of diplomacy, borrowed from Byzantium), was a more progressive, more ‘civilized’ one. It remains unclear what and how much a Russia that had opened her eyes after the period of ‘Asianisation’ and that had not gone through the Reformation could offer to Western Europe; where the Russian part of the synergy was.

The first impression of Western Europe-centrism of Taube’s thinking grows stronger when one reads his memoirs. While Taube considered himself to be a true Russian patriot, he distanced himself from some ‘typical characteristics’ of the Russians.⁵⁴ Taube believed that ‘real’ Russians lacked the *Pflichtgefühl* that was characteristic of the Baltic Germans, tended to defend their position against all logical argument, and that Russian thought characteristically got lost in a ‘vague mist’.⁵⁵ From Taube’s point of view, it was a catastrophe that Russia, which had already almost absorbed the ‘right’ principles, still fell from the enlightened path of (Western) European liberal civilization in 1917.

4 The Nexus between the ‘Russian Idea’ and the Theory of ‘Socialist International Law’

During, and even before, the Cold War, many efforts were made to understand Soviet socialist theories of international law.⁵⁶ Now when we can already see the Soviet theories from a temporal perspective, it becomes ever clearer that Soviet socialist theories of international law cannot be properly understood without what was discussed and happened in the discipline of the Tsarist period first being appraised.

Soviet socialist theories of international law were not just outgrowths of communist ideology. They were simultaneously expressions of the ‘Russian idea’, of the idea that the time had come to define Russia as unique and separate from decadent liberal Europe.

⁵³ See M. Taube, *La politique russe d’avant guerre et la fin de l’empire des Tsars (1904–1917)*, (1928), at 380 and 387 and M. Taube, *Zarnitsy* (2007), at 5.

⁵⁴ See further on the distinction between patriotism and nationalism in the Russian historical context A. Yanov, *Patriotizm i natsionalizm v Rossii 1825–1921* (2nd edn., 2002).

⁵⁵ Taube, *Zarnitsy*, *supra* note 54, at 16, 62, and 107.

⁵⁶ See, e.g., T. Taracouzio, *The Soviet Union and International Law. A Study Based on the Legislation, Treaties and Foreign Relations of the Union of Socialist Soviet Republics* (1935); J.Y. Calvez, *Droit international et souveraineté en U.S.S.R. L’évolution de l’idéologie juridique soviétique depuis da la Révolution de l’Octobre* (1953); J.F. Triska and R.M. Slusser, *The Theory, Law and Policy of Soviet Treaties* (1962); E. McWhinney, *Peaceful Coexistence and Soviet-Western International Law* (1964); B. Maurach and B. Meissner (eds), *Völkerrecht in Ost und West* (1967); T. Schweisfurth, *Der internationale Vertrag in der modernen sowjetischen Völkerrechtstheorie* (1968); K. Grzybowski, *Soviet Public International Law. Doctrines and Diplomatic Practice* (1970); W.E. Butler, *The Soviet Union and the Law of the Sea* (1971); T. Schweisfurth, *Sozialistisches Völkerrecht? Darstellung – Analyse – Wertung der sowjetmarxistischen Theorie vom Völkerrecht ‘neuen Typs’* (1979); E. Tomson, *Kriegsbegriff und Kriegsrecht der Sowjetunion* (1979).

In international legal theory, the break with Europe and the idea of (European-defined) universal international law were independently declared by the arch-enemies Yevgeni Korovin and Yevgeni Pashukanis in the early 1920s. For example, Korovin wrote:

In reality, there is currently no 'general' international law. Since long ago and also today, international law is divided in a number of legal circles. ... Today too the theory of 'universal' and 'global' international law is nothing more than a myth and at that unfortunately not a very beautiful one. What in our times is called international law, encompasses in reality only a circle of a group of European powers and in particular the Great Powers. In parallel there exists a separate system of American international law that solves a number of problems not only differently from Europe but in contradiction to it. ... When we give up the old legend of universal international law as not corresponding to international legal realities, and put ourselves on the position of legal pluralism, the notion of Soviet international law or international law of the transitory period as one of the special systems of international law does not present any further theoretical difficulties.⁵⁷

It follows from this passage from Korovin that the break with Europe was not only based on a particularly dogmatic interpretation of Marxist ideology but was also a Russian spatial break. It is interesting that Korovin referred to the situation in the Americas, for example, the Monroe doctrine and the ideas of Alejandro Álvarez (1868–1960) who advocated a distinct 'American international law'.⁵⁸ The Soviet theory of special socialist international law as opposed to universal international law was in the final result not very different from the *Großraumtheorie* of Carl Schmitt (1888–1985). It is quite telling that Yasui Kaoru, a leading Japanese international scholar at that time and an ideologist of the Japanese war effort, relied *inter alia* on the Japanese translations of Schmitt, Korovin, and Pashukanis in order to argue that classical international law was not universal, but particular and European-imperialist.

The idea of socialist international law pioneered and led by Russia was an expression of the Russian *Sonderweg* from the rest of Europe. Initiated by Korovin and Pashukanis, this thinking in international law reached its culmination with the Soviet victory in World War II. Russian Messaianist ideas about international law reached their peak in the work of Fyodor Kozhevnikov.

In two related books, *The Russian State and International Law (until the 20th century)* (1947) and *The Soviet State and International Law* (1948), the first written during and the second immediately after the war, Kozhevnikov offered a Messaianic concept of Russia as the most progressive civilizational force in the history of humankind and international law. While he shared with Korovin the view that Soviet Russia was special and had developed her own type of international law, Kozhevnikov emphasized the Russian nationalist rather than the Marxist-Leninist aspect of Russia's specialness. Korovin in his review article even criticized Kozhevnikov for having shown too much understanding towards the achievements and 'kindness' of Russian Tsarism.⁵⁹

⁵⁷ E.A. Korovin, *Das Völkerrecht der Übergangszeit. Grundlagen der völkerrechtlichen Beziehungen der Union der Sowjetrepubliken* (1929), at vii, 7–8, 13. The original Russian edition was published in 1923.

⁵⁸ See the thematic issue on Álvarez in 19 *Leiden J Int'l L* (2006).

⁵⁹ F. Kozhevnikov, *Russkoe gosudarstvo i mezhdunarodnoe pravo* (2006), at p. iv (from the foreword by L.N. Shestakov).

Nevertheless, in terms of rejecting the idea of the universality of international law, Kozhevnikov came to the same conclusion as Korovin and Pashukanis had come to earlier:

[O]ne cannot but emphasize the extremely important aspect that contemporary international law is not a uniform and in all of its aspects generally recognized set of rules for state behavior. Neither historically nor spatially is international law uniform ... many norms are interpreted differently in different parts of the world.⁶⁰

Kozhevnikov emphasized that the USSR was Russia with a new name:

After October 1917, Russia is Soviet socialist State, it is the mighty USSR. ... Instead of old Russia appears new, socialist Russia, but in any case it is Russia, not anything else. ... Russia was, is and will be.⁶¹

Kozhevnikov postulated that international law *was* international law of civilized nations – just that who was civilized and who uncivilized had now been completely restated. Russia now appeared to be at the top of progressive civilization; Germany, however, was at the very lowest ladder:

Progressive humankind in the times of class society worked out a number of principles of international law that from that time on are recognized by all civilized nations. ... From then, international law is an attribute of culture and civilization. ... In the period of the Great Patriotic War, the peoples of the USSR fulfilled a grand historical mission of fighting for international peace, saving the European civilization from the German and the Japanese barbarians. ... Nowadays even people who stand quite far from the Soviet ideology start to realize that the USSR set a foundation to the new civilization.⁶²

The purpose of the first volume, *The Russian State and International Law (until the 20th century)*, was to deliver the evidence that during the Tsarist period too Russia's role in international law had been 'exclusively great':⁶³

Belonging to the advanced nations on Earth, the Russian people, the Russian state occupy one of the first places, and in certain periods even the leading place.⁶⁴

In his understanding of the history of international law, Kozhevnikov clashed with the earlier Western Europe-centric direction of the St Petersburg tandem, Martens and Taube. When for Taube pre-Petrine Muscovy was barbaric, cruel, and dangerous, for Kozhevnikov the place in history of any given Russian Tsar depended directly on by how much he succeeded in enlarging the state's territory. Western chroniclers and travellers who had portrayed Ivan Grozny's Muscovy as aggressive and 'uncivilized' – Staden, Russow, Fletcher, and others – were simply 'enemies of the Russian state'.⁶⁵

⁶⁰ F. Kozhevnikov, *Sovetskoe gosudarstvo i mezhdunarodnoe pravo 1917–1947 gg* (1948), at 25.

⁶¹ *Ibid.*, at 6, 31, and 35.

⁶² F. Kozhevnikov, *Russkoe gosudarstvo i mezhdunarodnoe pravo* (2006), at 22 and 23

⁶³ *Ibid.*, at 302.

⁶⁴ *Ibid.*, at 19.

⁶⁵ *Ibid.*, at 31.

Kozhevnikov also discussed the historical theory of Muscovy as the Third Rome and commented approvingly:

Thus, Constantinople was the Rome of the East, Muscovy – the successor of Byzantium and the Muscovy Tsar the successor of the emperors of Byzantium.⁶⁶

Kozhevnikov rejected Martens' ideas that Russia had played only a passive role in international affairs before the 18th century,⁶⁷ and that there had been no noteworthy Russian international law scholarship before Martens.⁶⁸ In particular, D.I. Kachenovsky's *Course of International Law* (1863) was, in Kozhevnikov's opinion, one of the best works of his time, especially in comparison with German works 'that are distinguished, as is well known, through being pedantic, difficult and one-sided'.⁶⁹ Moreover, Kozhevnikov rejected Taube's idea that during the Middle Ages the Graeco-Slavonic world did not have an advanced idea of international law and that Russia became part of international law only once she started to communicate with and imitate the West:

This conception of Taube gives evidence that he did not appreciate the role of Russia in international relations and mirrors the negative influence of the German school on some representatives of the historical science in Russia.⁷⁰

The main theme of Kozhevnikov's book is Russia's historical relationship with the nations of Western Europe in the field of international law. The *Leitmotiv* is again Messianic:

In his well-known speech at the Pushkin celebration of 1880, the genial Russian writer Dostoevsky, characterizing the nature of interaction of the Russian people with Western Europe, remarked that after Peter I, Russia almost during two centuries 'served Europe perhaps much more than herself'.⁷¹

Thus, Kozhevnikov suggested that with the victory of socialism in 1917 Russia had finally started to serve her own interests instead of Europe's. Surprisingly from the point of view of the usual atheism of Leninist classics, Kozhevnikov also emphasized the historically progressive role of the Russian Orthodox Church, especially in helping to gather the country's forces against the Nazi invaders.

It would be wrong, of course, to see the whole of Russian socialist theory of international law as monolithic. There was fierce competition about how best to catch the spirit of the time: To what extent was (Russian) socialist international law peculiar, and to what extent could one still speak about the universality of international law? The unofficial doyens of the field were appointed according to their success in answering this question.

The approach of Grigory Ivanovich Tunkin (1906–1993) was clearly more liberal than Kozhevnikov's. With Tunkin, the international legal theoretical views in Russia

⁶⁶ *Ibid.*, at 85.

⁶⁷ *Ibid.*, at 34.

⁶⁸ *Ibid.*, at 122.

⁶⁹ *Ibid.*, at 129.

⁷⁰ *Ibid.*, at 120–121.

⁷¹ *Ibid.*, at 44.

towards the West took a more compromising trajectory. The problem that Tunkin faced was that word of the Soviet government's and theory's (Korovin, Pashukanis, Kozhevnikov) break with the unity of international law had spread round the West. Now there were a number of Western international lawyers, not just the German theoreticians of the 1930s and the 1940s, who argued that to have universal international law with the USSR was inconceivable. This would have presupposed having basic common values. Since there were no such common basic values between the West and the USSR, the unity of international law was indeed broken. Tunkin now reversed the argument and made a conciliatory plea for the unity of international law:

The Soviet doctrine of international law proceeded and proceeds from the idea that general international law, the norms of which regulate relationships between all States independently from their social system, exist and possibilities of its further progressive development increase with the rise of the powers of peace.⁷²

Tunkin held that from 1917 on international law had become universal.⁷³ Thus, it had only been the Russian socialist revolution that had made it universal. Tunkin emphasized that after the Great October Revolution of 1917, there was no longer room for the concept that international law belonged exclusively to 'civilized' or Christian states. Socialist Russia had been the progressive force in international law.

Although in comparison with Kozhevnikov Tunkin appeared almost like a Soviet liberal, his discussion of international legal concepts revealed elements of the 'Russian idea'. For example, very prominent in his work is the distinction between 'old' and 'new' international law. For example in *Ideological Struggle and International Law* (1967), Tunkin wrote:

Changes happening in international law after the Great October Revolution give a justification to speak of *contemporary* international law as of *new* international law. ... International law until the Great October revolution that we call old international law was in essence the law of the stronger; it recognized and legally strengthened the rule of force in international relations. ... New international law that is directed against the war, is a weapon in the hands of peaceloving forces in the fight for peace. ... Old international law recognized two equal legal conditions between states: state of peace and state of war. In our time the triggering of war is the most heinous violation of international law. ... Old international law served the policy of colonialism while new international law was anti-colonial.⁷⁴

And so on with the repetition of 'old' and 'new', like a litany.⁷⁵ Tunkin's concept of 'new vs old international law' can be analysed in the light of Yuri M. Lotman's last book, *Culture and Explosion* (1992).⁷⁶ Lotman argued that while Western European

⁷² G.I. Tunkin, *Voprosy teorii mezhdunarodnogo prava* (1962), at 24–25. It is fascinating evidence of politics in the legal theory of the USSR that among the Soviet works Tunkin quoted in support of this view was Kozhevnikov's *The Soviet State and International Law* (1948).

⁷³ G.I. Tunkin, *Pravo i sila v mezhdunarodnom sisteme* (1983), at 31. See also G.I. Tunkin, *Voprosy teorii mezhdunarodnogo prava* (1962), at 65.

⁷⁴ G. I. Tunkin, *Ideologicheskaya borba i mezhdunarodnoe pravo* (1967), at 119–122.

⁷⁵ See also G. Tunkin, *Pravo i sila v mezhdunarodnoi sisteme* (1983), at 166–169.

⁷⁶ Lotman, 'Kul'tura i vzryv', in: Y.M. Lotman, *Semiosfera* (2000), at 147.

cultures were characterized by their ternary nature, Russian culture had historically developed a binary structure. In Russian culture, the juxtaposition of ‘good’ and ‘evil’, ‘old’ and ‘new’, was historically more absolute and maximalistic than in the West; no ‘third ways’ for societal development were recognized. When Peter I started to ‘Europeanize’ Russia, the old Russian opposition of ‘old vs new’ was replaced by the dichotomy of Russia vs the West.⁷⁷ Russia inclined towards the total ‘apocalyptic’ remake of the old social world. According to Lotman, the self-consciousness of Russian culture has been that old development would be unconditionally destroyed and the new order emerge apocalyptically.⁷⁸ Lotman claimed that in Western Europe religious ideas propagating the creation of a ‘new sky’ and ‘new Earth’ were also historically present but had remained marginal in comparison with doctrines emphasizing continuity. However, Lotman argued that Russian culture tends to perceive itself by means of revolutionary explosion.⁷⁹ In Tunkin’s theory too, the idea of the Russian revolution of 1917 as explosion in the service of civilization and international law had a central place.

5 1991/1998: A New Break, ‘Return to Europe’?

In one of his last writings in 1992, Yuri M. Lotman, himself a Soviet veteran of World War II, hoped that political changes in Eastern Europe would bring Russia back to the mainstream European tradition and convince her to give up the old binary ideal of destroying the old world in its totality. Lotman believed that ‘to miss such an opportunity would be a historical catastrophe’.⁸⁰

It would be tempting to consider the collapse of the USSR in 1991 as another Russian significant historical break, as a ‘return to Europe’ – which in the legal sphere would perhaps best be symbolized by the accession of the Russian Federation to the European Convention on Human Rights in 1998. In fact, today’s mainstream Russian treatises on international law no longer conceptualize Russia as a special subject of international law. International law is again universal without the Russian or Soviet contributions being over-emphasized in a caricature-like manner. The coverage of European integration and, for example, European human rights instruments is sometimes cautious but generally quite positive.⁸¹ At least in the mainstream, there has thus been a certain return to Martens and liberal ideas about what international law is about and how best to improve domestic conditions in the Russian Federation.

⁷⁷ Lotman, ‘Rol’ dualnykh modelei v dinamike russkoi kultury’ (1977), reprinted in: Y.M. Lotman, *Istoria i tipologiya russkoi kultury* (2002), at 103.

⁷⁸ Lotman, Kul’tura i vzryv, in: Lotman, *supra* note 77, at 147.

⁷⁹ *Ibid.*, at 148.

⁸⁰ Lotman, *Semiosfera*, *supra* note 77, at 148.

⁸¹ See, e.g., R. Valeev *et al.*, *Mezhdunarodnaya i vnutrigosudarstvennaya zashita prav cheloveka* (2007) and A. Golovistikova and L. Grudtsyna, *Prava cheloveka* (2006).

One tendency, however, is the use of the cultural exception argument, at least as far as human rights are concerned. It is instructive to read one after the other *The Socialist Concept of Human Rights* (1986) published under Elena Andreevna Lukasheva's co-editorship and *Human Rights and Processes of Globalization of the Contemporary World* edited by her in 2007.⁸² When in 1986 Lukasheva argued that the situation of human rights differed in Soviet Russia from in the West because of a different (and higher) political ideology, Marxism-Leninism, then in 2007 the situation in Russia would be different because human rights would be culturally conditioned and Russia would culturally not be the same as the West.

The rebirth of liberalism in Russia has been accompanied by the rebirth of its archrival, conservative nationalism. One particular ideological branch of it, Eurasianism, emphasizes that Russia is a Eurasian rather than European power. That Russia should have a different human rights agenda from Europe has been argued by the leading current theoretician of Eurasianism, Alexander Dugin. Dugin demands a 'massive reorganization of Western international law' and attacks the West's liberalism and individualism:

The legal theory of human rights serves the interests of the philosophy of individualism that is ruling in the West. Eurasian theory brings into play rights of peoples or communities. 'People' should become the main subject of international and civil law. Individual is responsible to its people and its historically formed legal order.⁸³

As far as the history of international legal theory in Russia is concerned, there is a certain tendency to remember 'only the good', leaving behind open contradictions and some black holes. For example, the book edited by scholars from Moscow's MGIMO University and dedicated to the legacy of Kozhevnikov contains his bibliography – without mentioning a notorious book edited by him on Stalin's progressive contributions to international law.⁸⁴ It seems that there still may be too many contradictions and dangers in the history to just lay it all at once at the table.

An example of contradicting messages would be that in 1996 Lev N. Shestakov of Moscow State University optimistically re-introduced Martens' text. Ten years later he reintroduced Kozhevnikov's text, in the introduction *inter alia* attacking Russian liberals for their lack of patriotism as far as Russia's history was concerned, and praising the fact that Kozhevnikov had very well served 'fatherland and the scholarship of international law'. Professor Shestakov also suggested that Kozhevnikov's *The Soviet State and International Law* (1948) should be reprinted: '[t]here is much instructive there and not only for the older generation'.⁸⁵

⁸² See V.M. Chikvadze and E.A. Lukasheva (eds), *Sotsialisticheskaya kontseptsia prav cheloveka* (1986); E.A. Lukasheva (ed.), *Prava cheloveka i protsessy globalizatsii sovremennogo mira* (2007). See also E.A. Lukasheva, 'Prava cheloveka: konflikt kultur', in: V.G. Grafskii (ed.), *Nash trudnyi put k pravu: Materialy filosofsko-pravovykh chtenii pamyati akademika V. S. Nersesyantsa* (2006), at 241–255.

⁸³ A. Dugin, *Proekt 'Evrazia'* (2004), at 156–157.

⁸⁴ F.I. Kozhevnikov and D.A. Gaidukova (eds), *Voprosy mezhdunarodnogo prava v trudakh Y.V. Stalina* (1950).

⁸⁵ Kozhevnikov, *supra* note 60, at p. vi (foreword by L.N. Shestakov); Y.M. Kolosov (ed.), *Europeiskoe mezhdunarodnoe pravo* (2005).

It is still too early to tell conclusively in which direction post-Soviet Russian international legal theory is developing and consolidating itself – towards more unity with the Western mainstream, if such still exists – or towards a renewed Russian *Sonderweg*. In the end, however, modern Russia's legal theory may need to choose between the two very different traditions, those of Martens and Kozhevnikov. Or perhaps Russians will somehow manage to reconcile for use in their own country conservative-national (or even imperial) thought and elements of liberalism and human rights ('sovereign democracy', etc.). The choice is of course for the Russians themselves to make.