THE REVIVAL OF COMPARATIVE INTERNATIONAL LAW

This panel was convened at 1:00 p.m., Thursday, April 9, by its moderator William W. Burke-White of the University of Pennsylvania Law School, who introduced the panelists: Congyan Cai of Xiamen University School of Law; James Gathii of Loyola University Chicago School of Law; Neha Jain of the University of Minnesota Law School; and Lauri Mälksoo of the University of Tartu (Estonia).[*]

Comparative International Law: Lessons Learned from Russia

By Lauri Mälksoo[†]

Comparative international law (CIL) is an especially important area of the law when differences in interpreting and applying international law are obvious and not marginal; particularly when there is a clear ideological and perhaps also cultural component to different understandings of international law. In these moments, it is necessary that nations viewed as ''others'' when it comes to interpretations of international law be considered powerful enough that their perspectives are worth studying. There was not much CIL in the nineteenth century because at that time, Europe was powerful enough that it could afford to dismiss the major differences it perceived in the rest of the world as not relevant for international law, which it considered exclusively as its own realm. For ages, international law has not just been a language of justice but also, and perhaps more so, power—something that we international lawyers sometimes tend to underestimate.

It is in this sense that one can currently see a revival of CIL. The world is much less homogenous and much more conflicts-ridden than was presumed and hoped in the immediate post-Cold War era. At the same time, there is a sense in the west that the world is changing rapidly and that the position of the west in the world order is decreasing economically, demographically, and generally power-wise. This, among other reasons, also triggers the curiosity: what do ''others'' actually think and do, inter alia, in the normative context of international law? When speaking of CIL, I am referring to the study of the *reality* of international law—both at the level of scholarly doctrine and state practice—in different countries and power centers in the world.

Russia has been an important country, perhaps the most important country, in the history of CIL in the twentieth century. In a certain sense, the beginning of CIL as an intellectual project goes back to when the Bolsheviks came to power in Russia in 1917 and developed their own theory and doctrine of international law. The Boviet theory was highly critical of the capitalist west and its theory and practice of international law. The Soviet theory, at least during some periods, also directly challenged the unity and universality of international law. Even though the USSR collapsed in 1991 and Marxism/Leninism lost its ideological appeal in Russia, this did not result in a complete convergence of views on and usages of international law in the west and Russia. To the contrary, with the Russian annexation of Crimea and the war in Eastern Ukraine, normative differences between Russia and the west are bigger than they have ever been since the collapse of the USSR.

Recently, Russian politicians, and some international law scholars as well, rely increasingly on civilizational ideas in order to explain and justify Russia's specific stance and claims in

[*] Mr. Burke-White, Mr. Cai, Mr. Gathii, and Ms. Jain did not contribute remarks for the *Proceedings.*

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international law, i.e. that Russia is a different civilization from the west, based on different values inherited from Orthodox Christianity and messianic political ideas about Russia as ''third Rome,'' or at least a geopolitical counterbalance to the maritime west. In a recent monograph entitled *Russian Approaches to International Law*,[1] I studied in detail and, I believe, demonstrated quite extensively how contemporary Russian approaches to international law differ from the western mainstream, not just in the doctrinal details but also in some more fundamental aspects, including how the ''big picture' of international law is constructed. Dealing extensively with the Russian and Soviet empirics has raised my awareness regarding how international law is actually constructed in different ''places'' and also how domestic law and domestic legal cultures influence and shape the perception of international law much more than is generally presumed, or at least studied, in the field of international law.

The understanding of international law in each country cannot be detached from the understanding of law generally. For example, in Russia, there has been an historical tendency to see in law a means in the hands of the powerful rather than an autonomous end in itself—the cultural-philosophical fixation has been on the idea of justice rather than law. This partly helps to explain the obvious fluctuations and contradictions in Russian international legal positions and arguments in *jus ad bellum* over the last years—from Kosovo to Crimea. International legal arguments change when state interests change (or are interpreted in a new way)—consistency of arguments over time is not seen as a key problem because international law, in the end, is about defending national interest, not about consistency over time. I imagine that some western realists would counter that this is what all great powers do—they violate international law if it is in their interest and they can afford it, so to speak. Yet a study of legal culture also reveals that international law is even easier to violate if domestic constraints to the executive are weak, the mass media can more easily be manipulated, and cultural expectations to law as an autonomous field are not high to start with—like in Russia, for example.

If CIL, at least the way I see it, has any specific philosophical-methodological starting point, it is realism in the sense that the picture that the ideology of the universality that international law offers does not seem to explain the reality of international law in a fully satisfactory way. International law may be one language at some level, but at the same time it is spoken in different regions of the world with occasionally quite thick accents. CIL is interested in these accents and takes them seriously rather than discarding them as unimportant or deviations from a norm. In order to understand these accents better, international lawyers must then also become historians and, in a way, anthropologists or sociologists—or students of the respective legal culture(s)—in their analyses. At the same time, we all know that interdisciplinarity, as convincing as it sounds in theory and as much as it is generally encouraged in contemporary scholarship, is not always easy to execute in practice. Methodological risks abound and what lawyers might accomplish as historians and anthropologists may seem amateurish from the perspective of these disciplines. Yet, I am convinced that this kind of merging of perspectives of law, history, and sociology is absolutely necessary for developing an honest and realistic picture of how international law actually works in the contemporary world, not just in the west.

Moreover, CIL is a project that is culturally open, in the sense that in order to study the ''others'' and try to understand them or their approaches to international law, one must take

[1] Lauri Mälksoo, Russian Approaches to International Law (2015).

the ''others'' seriously. At the same time, taking the ''others'' seriously is not the same thing as promoting or approving of, for example, Russian or Chinese approaches to international law. I would say that CIL as a method is agnostic about whether to approve of or criticize specific approaches to international law; the outcome will depend on the specific researcher. It also requires realization that not all politically or intellectually important activities in the field of international law take place in the English (or French) language.

There has been some relatively simple CIL in standard western textbooks of international law as well—for example, when countries are divided into monist and dualist categories regarding their understanding of the interrelationship between international law and domestic law. We know, for instance, that the UK is a dualist country and the Netherlands is a monist country, and so on. Yet often such comparisons are taken just from within the west, from Europe. For me, current understandings of CIL might recognize that the most defining differences in the world (or international law) are between western and non-western countries such as China and Russia. But it also means that in the future, western international lawyers may need to improve their knowledge of the non-western world and study Chinese, Russian, or Arabic.

The fragmentation project of the International Law Commission examined functional fragmentation of international law. Yet a certain regional fragmentation of international law—or cultural understandings of international law—has been around much longer. It is not necessary that CIL would overemphasize such differences between countries and certainly not that it would try to ''kill'' the idea(l) of the universality of international law. However, blending the study of international law with attention to how international law actually works out in specific places can give a far more realistic understanding of international law than in those accounts where international law is primarily a conversation between western states and/or mostly Anglo-Saxon scholars in English.