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Case Law in Russian Textbooks of International Law:

Understanding the Status of International and Domestic Judgments

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1. Introduction

In her comparative study on the use of case law in international law textbooks, Anthea Roberts demonstrates a number of structural differences between textbooks in different countries.¹ For example, international law textbooks in the UK and US make lots of references to case law as do, although already to a somewhat lesser extent, textbooks in Germany and France. At the same time, textbooks in these Western countries vary in terms of proportions between international, domestic and foreign case law. Although there can also be substantive differences between different textbooks in the same country, generally US textbooks tend to emphasize national cases related to international law and foreign relations law while such domestic cases are rarer in textbooks of other Western countries. In contrast, international law textbooks in China and Russia refer altogether much less frequently to case

¹ A. Roberts, 'Comparative International Case Citation', forthcoming in *AJIL* 2015.

law in general and for example in Chinese textbooks domestic cases are essentially missing when international law is presented.²

In this article, I examine further the Russian situation regarding the status of case law in textbooks of international law. It is an interesting moment in time to do this because some Russian international law scholars have recently been pushing for more case law in the teaching of international law in Russia and also critically re-examined Russian textbooks from this viewpoint.³

In the first section of the article, I examine the status and use of case law in Russian textbooks of international law, also drawing from other examples of international legal literature in the country. In the second section, I discuss what factors explain the current status of case law in Russian textbooks of international law. There and in the concluding section I discuss the question whether and in what sense it actually matters whether case law is emphasized when international law is presented. An alternative hypothesis to the one that it indeed matters might be that the difference is less of substantive and more of methodological-stylistic kind; that different roads still lead to essentially the same destination and similar understanding of international law. It would so-to-speak still be the same international law; just narrated somewhat differently. If so, then the methods of induction (case law) and deduction (deriving rules and one's narrative from treaties and doctrine) would in the final result still do the same job. But do they? The question that needs to be answered is whether the emphasis on or distance from case law in the context of international law actually reveals us anything significant regarding the respective perception of the law of nations.

² Ibid.

³ I.V. Fedorov, 'Mezhdunarodnyi iuridicheskii protsess i sudeb'naia praktika – opyt otechestvennykh uchebnikov', in: V.L. Tolstykh (ed.) *Instituty mezhdunarodnogo pravosudia* (Moscow: 'Mezhdunarodnye otnoshenia', 2014) 485-498; A.V. Dolzhikov, 'Keis-metod v prepodovanii mezhdunarodnogo prava i analiz reshenii mezhdunarodnykh sudov, in: V.L. Tolstykh (ed.) *Instituty mezhdunarodnogo pravosudia* (Moscow: 'Mezhdunarodnye otnoshenia', 2014) 469-485.

2. The Use of Case Law in the Russian Scholarship of International Law: An Overview

Today's Russia comes inevitably from the Soviet period in the sense that all today's international law scholars and textbook authors were educated during that time, or in the case of a few younger textbook authors, were educated by scholars trained during the Soviet time. In Soviet legal theory, there was a considerable skepticism both regarding the value of the judgments of the ICJ and judgments of national courts on international law. For example, the leading international law scholar of the late Soviet period, Grigory Tunkin (1905-1993), argued in his main theoretical treatise with leading British international law jurists such as Lauterpacht and Fitzmaurice on the proper role of the ICJ judgments in the hierarchy of sources of international law. Tunkin's main point was that in the context of the ICJ, the court's judgments could not themselves be precedents like in common law and to argue otherwise, as British scholars had done in his understanding, was *ultra vires* in terms of the ICJ's Statute.⁴ Moreover, Tunkin also argued that national court judgments, even when they concerned international relations, could be important only in the context of national law of the particular state, not international law generally.⁵

Thus, during perestroika one of the things that was considered ripe for substantive revision in Russian international legal scholarship was the previously very cautious attitude regarding the possibility of international law being applied by both international and domestic courts. Mark Entin from MGIMO University in Moscow published an article in which he suggested for new Russia a much more open attitude towards the ICJ.⁶ After the collapse of the USSR, Igor

⁴ G.I. Tunkin, *Teoria mezhdunarodnogo prava* (Moscow- Zertsalo M, 2015; original 1970) 159-163.

⁵ Tunkin, *ibid.*, 164.

⁶ M.L. Entin, 'Sovetskaya doktrina mezhdunarodnogo prava o sudebnykh sredstvakh razresheniya mezhdunarodnykh sporov', *Soviet Year-Book of International Law 1989-1990-1991* (St Peterburg: 'Rossiya-Neva', 1992) 100-114.

Lukashuk (1926-2007) from the Institute of State and Law of the Russian Academy of Sciences published a monograph entitled “International Law in Domestic Courts” in which he carried out an important act of transfer of knowledge from the West to Russia by examining at length the existing literature and court practice in English and other Western languages, and altogether endorsed the idea of applying international law in domestic courts more extensively.⁷ The two-volume textbook of international law authored by Lukashuk was also written in the ‘Western style’ – it has dozens of detailed references to a variety of cases of the ICJ, PCIJ and ECJ but also national cases in so different countries as the US, Japan, Austria, Germany, Poland – and also a few from new post-Soviet Russia.⁸

However, Lukashuk’s work has remained an exception in Russia and in terms of uses of case law, the more representative mainstream is indeed captured well in the statistics provided in the comparative study of Anthea Roberts.⁹ For example, from the point of view of comparative international law a Russian textbook that is quite open to other legal systems and families and in this sense follows the open-minded approach of Lukashuk is that of Kazan State University which has even a separate chapter on the perception of international law in different legal systems of the world.¹⁰ However, as collective textbook it is quite unevenly developed in terms of references to case law. While it has some interesting and even ‘exotic’ references to case law of foreign countries (Japan, Zambia)¹¹, it also manages to cover areas such as jurisdiction and state responsibility with very few references to international cases.¹²

⁷ I. I. Lukashuk, *Mezhdunarodnoe pravo v sudakh gosudarstv* (St Petersburg: ‘Rossiya-Neva’, 1993).

⁸ I. I. Lukashuk, *Mezhdunarodnoe pravo*, Vol 1 (General part) and Vol 2 (Special part), 2nd ed. Moscow: Beck, 2001.

⁹ Roberts, *ibid.*

¹⁰ R.M. Valeev, G.I. Kurdyukov (eds.) *Mezhdunarodnoe pravo. Obshaya chast’* (Moscow: Statut, 2011) 167 *et seq.*

¹¹ *Ibid.*, 168, 174.

¹² *Ibid.* 371 *et seq.*

Only the area of international human rights law has a few references to ICJ cases whereas some other areas like international economic law go without cases altogether.¹³

In Russian textbooks, a certain skepticism regarding the importance of case law in the context of international law as already expressed by Tunkin during the Soviet period continues to live on. Article 38 of the ICJ Statute labels “judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of the rules of law”. In Russian doctrinal works, this is usually understood literally – judicial decisions are seen as ‘subsidiary’ in the sense of ‘not most essential’.

To illustrate this, the textbook of the Russian University of the Friendship of Peoples explains that the ‘subsidiary’ nature means that there is no law of precedent in the ICJ and in this sense, former judgments of the ICJ are only of ‘secondary’ importance.¹⁴ Anatoli Kapustin, the President of the Russian Association of International Law, writing the respective section in the textbook of the Russian University of the Friendship of Peoples, emphasizes:

“The principle of *stare decisis* that is characteristic to the English law of the precedent, is not applied by the ICJ which is why many of its judgments present only a limited interest.”¹⁵

While according to Kapustin, some ICJ judgments are more important than others, in the end no ICJ judgment is by itself a source of international law but has the respective authority only if it reflects “positive norms of international law” which must be established separately.¹⁶

¹³ R.M. Valeev, G.I. Kurdyukov (eds.) *Mezhdunarodnoe pravo. Osobennaya chast'* (Moscow: Statut, 2010) 52-53, 221 *et seq.*

¹⁴ A.Ya. Kapustin (ed.) *Mezhdunarodnoe pravo* (Moscow: Gardariki, 2008) 83.

¹⁵ *Ibid.*, 84.

¹⁶ *Ibid.*, 84.

Nevertheless, in its narrative, the textbook of the Peoples' Friendship University refers to a number of the ICJ and PCIJ cases.¹⁷

The same textbook explains that the study of the judgments of highest national courts is not a universal phenomenon – it is especially characteristic to the US and UK although the practice has recently also started to spread to other countries.¹⁸ Consequently, the textbook does not pay attention to the use of international law by Russian courts.

The textbook of MGIMO University has references to international case law when covering areas such as territory, arbitration and use of force in international law.¹⁹ It refers to the fact that there has been a theoretical debate in Russia on how important international judgments really are.²⁰ At the same time, the MGIMO textbook is decisively skeptical on the use of judgments of national courts in the context of international law emphasizing that such judgments cannot be “sources of international law”:

“It is without justification what Western international lawyers do, namely singling out specific countries (UK, US, etc.) in which judgments of national courts are then supposed to be sources of international law. First of all, the Statute of the ICJ does not give ground to such differentiated approach towards states. Secondly, in each country judges may have different qualifications and moral qualities, and court judgments may also differ based on their reasoning.”²¹

Along the same line, the leading post-Soviet theoretician of international law in Russia, Stanislav Chernichenko from the Diplomatic Academy of the Russian MFA, also writes that the view of some Anglo-Saxon scholars that courts may create international law can be

¹⁷ Kapustin (ed.) *Mezhdunarodnoe pravo*, 73 et seq., 222 et seq.

¹⁸ A.Ya. Kapustin (ed.) *Mezhdunarodnoe pravo* (Moscow: Gardariki, 2008) 86.

¹⁹ A.N. Vylegzhanin (ed.) *Mezhdunarodnoe pravo* (Moscow: Yurait, 2009) 95, 482, 506-521, 704, 830.

²⁰ *Ibid.*, 95.

²¹ *Ibid.*, 96.

challenged – even if in common law countries some such judgments are treated as precedents, they can only be precedents in terms of domestic law which is not binding to other countries.²²

A different type of international law textbooks in Russia are the ones that are short on international case law but at the same time elaborate quite extensively on the interpretation of international law in Russian courts. Two textbooks – that of the Diplomatic Academy of the Russian MFA in Moscow and the one edited by late Gennady Ignatenko (Yekaterinburg) and Oleg Tiunov (former judge of the Constitutional Court of the Russian Federation) are the main examples of this approach.

In the textbook of the Diplomatic Academy of the Russian MFA, beside MGIMO University the other institution in Moscow where Russia's future diplomatic and state elites are educated, there is only a limited number of references to judgments of international courts.²³ In principle, the textbook of the Diplomatic Academy recognizes that judgments of international courts are central in establishing international customary law but when exemplifying this, it does not go much beyond the ICJ's *Nicaragua* case.²⁴ For example, the textbook manages to discuss key questions such as state responsibility, WTO dispute settlement mechanism or international environmental law without any references to case law.²⁵

At the same time, one can find in the textbook of the Diplomatic Academy separate and lengthy sections on international law as it is applied by the Russian Constitutional Court, by courts of general jurisdiction and the so-called *arbitrazh* courts as well as the practice of the

²² S.V. Chernichenko, *Kontury mezhdunarodnogo prava* (Moscow: Nauchnaya kniga, 2014) 169.

²³ S.A. Egorov (ed.), *Mezhdunarodnoe pravo*, 5th ed. (Moscow: Statut, 2013) 81, 249, 251, 254, 718, 725, 1002-3.

²⁴ Egorov (ed.), *ibid.*, 81, 934-5.

²⁵ *Ibid.*

European Court of Human Rights regarding Russia.²⁶ Probably it is no coincidence that the part on the Constitutional Court has been written by Judge Bakhtiyar Tyzmukhamedov, former adviser of the Constitutional Court of the Russian Federation and, among other things, holder of an LL.M. degree from Harvard Law School.

Similarly, in the textbook edited by Ignatenko and Tiunov, beyond the mentioning of some key international cases in the narrative most ICJ cases are actually given not in the context of what rules of international law they specified or exemplify but ... in one list, as description of the kind of work that the ICJ does.²⁷ At the same time, the same textbook discusses quite extensively the application of international law by the Constitutional Court, Supreme Court, Higher Arbitrazh Court and other courts in the Russian Federation.²⁸

Although Vladimir Shumilov from the All-Russian Academy of Foreign Trade in his textbook writes that the textbook of Lukashuk is ‘undoubtedly the best’ in Russia²⁹, he himself pays only marginal attention to the practice of international courts and tribunals – even though his own main academic specialty is international economic law which has plenty of judicial and arbitration activity going on. Throughout his textbook, Shumilov is not so interested in what courts are doing but rather what governments have undertaken. He also mentions some key contextual starting points in terms of understanding the ICJ:

“From the countries of CIS only Georgia has recognized the mandatory jurisdiction of the ICJ, and of the permanent members of the UN SC, only the Great Britain.”³⁰

²⁶ Ibid., 128-187, 417-435.

²⁷ G.V. Ignatenko, O.I. Tiunov (eds.) *Mezhdunarodnoe pravo*, 6th ed. (Moscow: Norma, 2013) 409; also 118, 282, 287, 433.

²⁸ Ibid., 212-261 but also 107, 143, 214-5, 543.

²⁹ V.M. Shumilov, *Mezhdunarodnoe pravo*, 2nd ed. (Moscow: ‘Mezhdunarodnye otnoshenia’, 2012) 105.

³⁰ Ibid., 496.

The list of Russian international law textbooks where the role of case law is far from extensive can be continued.³¹

Nevertheless, in contemporary Russian scholarship beyond textbooks, one cannot say that the discussion of international or domestic case law would be missing. Rather, this is the focus of some specific monographs and studies. Beyond the recent works written or edited by Vladislav Tolstykh from Novosibirsk State University³², judgments of international courts have received focused scholarly attention in Russia also in specific contexts such as for example the international law of the sea.³³ As far as the use of international law by domestic courts is concerned, predictably the main academic attention has gone to the application of the European Convention on Human Rights in Russian courts.³⁴

3. Explaining the Treatment of Case Law in Russian Textbooks of International Law

In the previous section, I demonstrated empirically how things are featured in contemporary Russian textbooks of international law, also against the backdrop of some other academic treatises published in the field. However, the next and obvious question is: how have things come to be the way they are? What explains the relative scarcity of case law in Russian academic approaches to international law and the somewhat fluctuating attitude towards case

³¹ See e.g. L.P. Anufrieva, K.A. Bekyashev (eds) *Mezhdunarodnoe publichnoe pravo*, 2nd ed. (Moscow: 'Prospekt', 2003); G.M. Melkov (ed.) *Mezhdunarodnoe pravo* (Moscow: RIOR, 2009); I.V. Get'man-Pavlova, *Mezhdunarodnoe pravo* (Moscow: Yurait, 2013).

³² V. L. Tolstykh, *Mezhdunarodnye sudy i ikh praktika* (Moscow: 'Mezhdunarodnye otnosheniya', 2015); V.L. Tolstykh (ed.) *Instituty mezhdunarodnogo pravosudia* (Moscow: 'Mezhdunarodnye otnosheniya', 2014).

³³ A.N. Vylegzhanin, 'Vklad Mezhdunarodnoga Suda OON v progressivnoe razvitie morskogo prava (1949-1990)', in: R.A. Kolodkin, S.M. Punzhin (eds.) *Mezhdunarodnoe morskoe pravo. Stat'i pamiati A.L. Kolodkina* (Moscow: Statut, 2013) 40-60; *Reshenia Mezhdunarodnoga Suda OON po sporam o razgranichenii morskikh prostranstv* (Moscow: 'Iuridicheskaya literatatura', 2004).

³⁴ See A.L. Burkov, *Konventsia o zashite prav cheloveka v sudakh Rossii* (Moscow: WolterKluwer, 2010); O.A. Egorova, Y. F. Bespalov, *Evropeiskaya konventsia o zashite prav cheloveka i osnovnykh svobod v sudebnoi praktike* (Moscow: Prospekt, 2015).

law? And: if the ‘big picture’ of international law is not so much explained with the help of international or domestic case law, with the help of what is it then explained instead?

3.1. Civil law tradition and center-periphery relations

Starting from the last question, the bulk of the contemporary Russian academic discussion of international law does not fundamentally differ from the late 19th century when Fyodor Martens (1845-1909), the professor of international law at St Petersburg University and legal adviser at the Russian MFA, compiled the impressive collection of imperial Russia’s treaties and equipped it with his own historical-legal commentaries.³⁵ The international law that emerges based on reading the treaty collection compiled by Martens is that of Emperors and Ambassadors, Foreign Ministers, searches of and battles for the balance of power between the Great Powers. The main characters of this international law are sovereigns, not courts.

Reading international law textbooks in contemporary Russia, one is usually also left with the impression that international law is first of all what executives and legislatures do. It is the UN Security Council and General Assembly rather than the ICJ. In textbooks, there are lots of references to state practice – but it is primarily the political-diplomatic practice, not the practice of courts. In such a fashion, international law appears as deeply political law (and discourse), not so much the more technical-legalistic realm of the application of its norms in courts.

In this context, Vladislav Tolstykh has observed about Russian legal education:

³⁵ F. Martens, *Sobranie traktatov i konvetsii, zakliuchennykh Rossieyu s inostrannymi derzhavami*, 15 volumes (St Petersburg: Tipografia Ministerstva putei soobshenia/A. Böhnke, 1874-1909).

“International courts practice has so far not become a mandatory element in the educational process. In international law textbooks the emphasis is put on normative material to the detriment of material related to the application of law.”³⁶

Besides references to political-diplomatic practice of states, what also replaces court cases in the narrative of international law in Russia are discussions of doctrine and theory – in other words, references to what other legal scholars, especially in Russia and previously in the USSR, have written about the subject matter. In sections where in Anglo-Saxon countries a considerable attention of the textbook author would go to court practice, like jurisdiction and state responsibility, for example – in Russian textbooks the attention is on reciting codification efforts or what points these or other scholars have previously made. In these instances, international law appears as *Buchrecht* and *Professorenrecht*, as Germans might have historically called it – not necessarily the law applied by courts. Tolstykh himself, perhaps the main promoter of international case law in contemporary Russian scholarship of international law, builds his own narrative of international law primarily as conversation between international law scholars, ancient and contemporary, foreign and native.³⁷

We should now come to the question why in most Russian textbooks of international law there is a relative scarcity of court cases compared with references to treaty norms and legal doctrine. For the sake of clarity, we should also ask the opposite question – why do Western and especially Anglo-Saxon international lawyers when explaining their subject matter refer relatively extensively to court cases, international and domestic? For example, is it perhaps because unconsciously they still attempt to respond to the challenge presented by John Austin

³⁶ V. L. Tolstykh, *Mezhdunarodnye sudy i ikh praktika* (Moscow: 'Mezhdunarodnye otnoshenia', 2015) 138.

³⁷ V.L. Tolstykh, *Kurs mezhdunarodnogo prava: uchebnik* (Moscow: Wolters Kluwer, 2009).

in the 1830-s that international law is a ‘law not properly called so’³⁸ by making it appear as similar to their domestic common law as possible?

The distinction between civil law and common law countries remains relevant also today in the construction of international law. Traditional civil law scholars are historically not used to look for the law as such in court cases – instead they look for a code or generally legislative acts issued by the legislature. Consequently, in Russian textbooks of international law, there is lots of emphasis on treaty norms, fundamental principles of international law (usually constructed with the help of the UN Charter and the 1970 UN GA Friendly Relations declaration) as well as on numerous domestic legislative acts of the Russian Federation. The first instinct of traditional civil law lawyers goes out for the legislature not for the courts which are by domestic analogy only ‘applying’, not making (international) law. In this sense, courts just are less important in civil law countries than in common law countries. A specific Russian phenomenon are quasi-legislative ‘*postanovlenia*’ issued by the highest courts such as the Supreme Court of the Russian Federation – in which the highest court essentially instructs lower courts on how certain aspects of international law and treaties are to be applied. The genre is not too different from scholarly commentaries in continental European countries. Thus, the legal-cultural expectation of legislation rather than following path-breaking judgments of the highest courts is culturally so deep-rooted that even highest courts themselves become to act like quasi-legislators.³⁹

³⁸ See J. Austin, *The Province of Jurisprudence Determined* (1832). On the constant distinction between foreign and native scholars in the Russian doctrine of international law, see L. Mälksoo, *Russian Approaches to International Law* (Oxford: Oxford University Press, 2015) 87 *et seq.*

³⁹ Plenum of the Supreme Court ruling “On Application of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and Additional Protocols thereto by Courts of General Jurisdiction”, 27 June 2013, http://www.supcourt.ru/vscourt_detale.php?id=9155 ; Plenum of the Supreme Court of the Russian Federation ruling “On Application by Courts of General Jurisdiction of the Commonly Recognized Principles and Norms of International Law and the International

However, what still needs to be explained further is the difference between France and Germany on one hand and Russia on the other hand in the context of the use of international and foreign case law, based on the example of international law textbooks. These three are all civil law countries and historically, Russian law has been much influenced in particular by the German law and legal thought. Yet references to international, European and domestic adjudication in the context of international law have penetrated the French and German academic works much more profoundly.

The main answer explaining differing reliance on case law was actually already revealed in some Russian leading textbooks themselves – ideological skepticism regarding the importance of case law, both of international courts and foreign, especially Anglo-Saxon ones, in Russia.⁴⁰ The most important question here is what are the main roots and sources of this skepticism.

Russia has been a semi-peripheral great power in the history of international law that has had an ambivalent attitude towards Europe and the West.⁴¹ Russia has never in recent history been subjugated by foreign powers but neither has it played the first violin in the ideational construction of international law. As Western states, France and post-World War II Germany have been mentally much closer to institutions like the ICJ than Russia, as they always were closer to The Hague and Geneva geographically. For example, this semi-peripheral status of Russia affects the choice of language - Russian is a big language enough to support a relatively strong native and regional culture of international law scholarship but not central enough in order to make its discourse of international law dominant globally. As a consequence, some Russian international law scholars point out that a significant number of

Treaties of the Russian Federation”, 10 October 2003,
<http://www.supcourt.ru/catalog.php?c1=English&c2=Documents&c3=&id=6801>.

⁴⁰ Cf Fedorov, in: Tolstykh (ed.) *Instituty mezhdunarodnogo pravosudia*, 498.

⁴¹ See further Mälksoo 2015.

their colleagues are not proficient in English or French and therefore large parts of international and foreign case law remain outside their attention not necessarily for any deep-rooted ideological reasons but for the simple reason that linguistically, they are unable to access these materials.⁴² Thus, the situation reflects center-periphery relations in the practice of international law which has a significant linguistic dimension. This center-periphery dynamics has impact on the actual practice in international adjudication as well:

“The interests of Russia in international courts are sometimes represented by foreign lawyers which testifies of the lack of qualified native specialists.”⁴³

3.2. Russia’s path in international adjudication

In addition, I would also point out that being relatively minimalistic on the international court practice as most Russian textbooks of international law are is actually honest because it reflects quite adequately the country’s actual practice regarding international courts over the last century. Mostly, this approach has been cautious and even isolationist. In order to situate the use of case law of international courts and tribunals in Russian textbooks, a short summary of Russia’s own attitudes to international adjudication is necessary.

Contemporary Russian scholars have inferred that Russian 19th international law experts, especially Professor Martens of St Petersburg⁴⁴ and Professor Leonid Kamarovskii of Moscow University with his monograph “On the International Court” (1881), were worldwide

⁴² Cf V.L. Tolstykh, ‘Iazyk i mezhdunarodnoe pravo’, *Rossiiskii iuridicheskii zhurnal* No 2, 2013, 44 at 61; V. L. Tolstykh, *Mezhdunarodnye sudy i ikh praktika* (Moscow: ‘Mezhdunarodnye otnoshenia’, 2015) 138; A.V. Dolzhikov, ‘Keis-metod v prepodovanii mezhdunarodnogo prava i analiz reshenii mezhdunarodnykh sudov’, in: V.L. Tolstykh (ed.) *Instituty mezhdunarodnogo pravosudia* (Moscow: ‘Mezhdunarodnye otnoshenia’, 2014) 478.

⁴³ Tolstykh, *ibid.*, 138.

⁴⁴ See A.M. Solntsev, ‘Vklad rossiikh uchenykh kontsa XIX-nachala XX v. v utverzhdenie i razvitie idei mezhdunarodnogo pravosudia’, in: V.L. Tolstykh (ed.) *Instituty mezhdunarodnogo pravosudia* (Moscow: ‘Mezhdunarodnye otnoshenia’, 2015) 116-121.

forerunners in propagating the idea of establishing a permanent international court.⁴⁵ This trope has been so popular that when President Putin held a speech at a festive anniversary gathering in the ICJ in November 2005, he even claimed the honor of conceiving of the ICJ to the Russian internationalist tradition: “This innovative idea was born in our country and it was self-denyingly propagated by progressive representatives of the Russian legal science.”⁴⁶

However, there was a gap between dreams and reality, between ideas propagated by Russian international law scholars and the country’s actual practice in the context of international adjudication. For example, when Count Kamarovskii predicted and propagated the establishment of an international court he explained this future with legal-political developments in Western Europe, explicitly making the point that Tsarist Russia had stood apart from these progressive developments, mainly because of the lack of political freedom.⁴⁷ But Count Kamarovskii also argued with John Stuart Mill about the importance of practice of the US Supreme Court in the evolution of international law; he disagreed with Mill’s characterization that the US Supreme Court constituted “the first example of real international jurisdiction which the contemporary civilized society needs so much”.⁴⁸ Thus, different approaches in different “civilized” countries at the time regarding the importance of case law and domestic courts were already articulated in the context of international law.

In 1884, another Russian international law scholar, Nikolai Korkunov (1853-1904), observed that by that time the US had participated in 30 arbitrations, England in 21 but Russia,

⁴⁵ See L.A. Kamarovskii, *O mezhdunarodnom sude* (Moscow: Zertsalo M, 2015). See also A.N. Vylezhzhanin (ed.) *Mezhdunarodnoe pravo* (Moscow: Yurait, 2009) 484-5; A. Kh. Abashidze, A.M. Solntsev, K.V. Ageichenko, *Mirnoe razreshenie mezhdunarodnykh sporov: sovremennye problemy* (Moscow: Rossiiskii universitet druzhby narodov, 2011) 120.

⁴⁶ V.V. Putin, ‘Vystuplenie na zasedanii Mezhdunarodnogo Suda Organizatsii Ob’edinennykh Natsii’, 01.11.2005, http://archive.kremlin.ru/appears/2005/11/02/2202_type63376type63377type82634_96617.shtm.

⁴⁷ L.A. Kamarovskii, *O mezhdunarodnom sude* (Moscow: Zertsalo M, 2015) 375. Translation in French: *Le tribunal international* (Paris, 1887).

⁴⁸ Ibid. (2015), 332.

Germany, Austria, Sweden, Denmark, Belgium, Greece, Serbia, Romania, Chernogoria and Turkey in none.⁴⁹ Nevertheless, before World War I, one arbitration involving the Russian Empire was carried out in the context of the PCA, concerning Ottoman debts to Russia.⁵⁰ A decade before that, in 1902, the Dutch arbiter Tobias Asser issued judgments in cases of the arrest of US fishing vessels near the Russian coast in Far East.⁵¹

If Tsarist Russia had not been as active in international arbitrations as the US and the UK, Soviet Russia was outright isolationist and hostile towards international adjudication. The USSR recognized neither the jurisdiction of the PCIJ nor (unlike previously Tsarist Russia) that of the PCA.

The same trend continued after the ICJ was created in 1945. Since the end of World War II, the USSR could permanently send a judge to the ICJ but at the same time, Moscow regarded the court not as a body where it would have been willing to settle its own international legal disputes. In his autobiographical note, the Soviet judge in the ICJ in 1953-1961 and the most influential international law professor of Moscow during the two immediate post-World War II decades, Fedor Kozhevnikov (1893-1998), explained that the majority at the bench of the ICJ could not be ideologically trusted because of its Western and bourgeois leanings and confessed that his own role there sometimes was to “look in the eyes of the adversary”.⁵² The

⁴⁹ M.N. Korkunov, 'Lektsii po mezhdunarodnomu pravu, chitannye v Voенno-Yuridicheskoi Akademii v 1883-1884 godu', in: *Zolotoi fond rossiiskoi nauki mezhdunarodnogo prava*, Volume 1 (Moscow: Mezhdunarodnye otnosheniya, 2007) 361.

⁵⁰ Permanent Court of Arbitration, Russian Claim for Interest on Indemnities (Damages Claimed by Russia for Delay in Payment of Compensation Owed to Russians Injured during the War of 1877-1878), Russia v Turkey, 11 November 1912, <http://www.haguejusticeportal.net/Docs/PCA/Ethiopia-Eritrea%20Boundary%20Commission/Award%20English%20PCA.pdf> .

⁵¹ Cases concerning vessels „Cape Horn Pigeon“, „James Hamilton Lewis“, „C.H. White“, „Kate and Anna“. On these cases, see Tolstykh (2015) 121-123.

⁵² F.F. Kozhevnikov, 'Iz zapisok diplomata', in: A.N. Vylegzhanin, Y.M. Kolosov (eds) *Rossia i mezhdunarodnoe pravo. Materialy mezhdunarodnoi konferentsii, posvyashtshennoi 100-letiu F.I. Kozhevnikova* (Moscow: „MGIMO-Universitet“, 2006) 27, 30.

USSR managed to avoid the ICJ and also turned down some US suggestions for solving their mutual disputes in an *ad hoc* manner.⁵³

Writing in 2002, the then Russian judge in the ICJ, Vladlen Vereschetin, concluded that although no particular love could be detected on the side of the Americans regarding the ICJ, the US had by that time nevertheless been in the ICJ as plaintiff or defendant 20 times, Britain 13, France 10, Germany 6 – but Russia (or former USSR) 0.⁵⁴

Finally in August 2008 the Russian Federation also got its first case in the ICJ – although in the way that, as two Russian diplomats-international lawyers later put it, “none of us imagined the premier to be”.⁵⁵ During the war between Russia and Georgia, Georgia filed at the ICJ a lawsuit against the Russian Federation, trying to take advantage of the window of opportunity that was created in 1989 when the USSR denounced its former reservations to six UN human rights treaties.⁵⁶ Concretely, the human rights treaty in question was the UN Convention against Racial Discrimination. However, because of inherent difficulties regarding jurisdiction the Georgia-Russia case in the ICJ never proceeded further from the jurisdiction phase.⁵⁷

Altogether, there aren't that many international court cases where Russia as state would have been involved. Studying international court cases as Tolstykh and his colleague propagate is

⁵³ V.L. Tolstykh, 'Mezhdunarodnyi Sud Organizatsii Obedinennykh Natsii', in: V.L. Tolstykh (ed.) *Instituty mezhdunarodnogo pravosudia* (Moscow: 'Mezhdunarodnye otnoshenia', 2014) 142.

⁵⁴ See Vereschetin, *op. cit.*, 25.

⁵⁵ I.A. Volodin, D.S. Taratukhina, 'Rossiisko-gruzin'skoe razbiratel'stvo v Mezhdunarodnom Sude', in: *Russian Year-Book of International Law* 2008 (St Petersburg, 'Russia-Neva', 2009) 28.

⁵⁶ Ukaz Prezidiuma VS SSSR ot 10 fevralya 1989.g No 10125-XI „O sniatii sdelannykh ranee ogovorok SSSR o nepriznanii obyazatel'noi iurisdiktsii Mezhdunarodnogo Suda OON po sporam o tolkovanii i primenenii riada mezhdunarodnykh dogovorov“, *Vedomosti Verkhovnogo Soveta SSSR*, 1989 No 11, p. 79.

⁵⁷ *Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, Preliminary Objections, ICJ, Judgment of 01.04.2011, <http://www.icj-cij.org/docket/files/140/16398.pdf> . See further P. Okowa, 'The International Court of Justice and the Georgia/Russia Dispute', 11 *Human Rights Law Review* 2011, 739-757.

then also in the main part akin to studying what other nations have been up to in the practice of international law.⁵⁸ Emphasizing such – one way or another ‘foreign’ – court judgments would highlight further Russia’s semi-peripheral situation in the practice of international law and indicate that the control over the creation of international law has been to a considerable extent outside the country. Perhaps this is another reason why it has not been done too extensively. Ignoring case law of international courts and especially Western courts can then also be understood as Russia’s as semi-periphery’s intellectual resistance against the Western core.

But the ultimate difference between Germany and France on one hand and Russia on the other hand – all civil law countries – might still be the state of democracy and the situation with the separation of power, especially the judicial branch at home. Attitudes to international courts may instinctively also reflect popular attitudes to courts generally, i.e. domestic courts. In 2009 University of Maryland researchers asked respondents in 21 countries: when a case in the ICJ would be initiated against their country whether they would believe that the judgment of the ICJ would be just and impartial. The ‘yes’ and ‘no’ responses came out in the following way – the US 57/42, Germany 74/21, Poland 73/16, France 69/25, Great Britain 68/30, and Russia 25/49.⁵⁹ Thus, Russian popular attitudes regarding the ICJ turned out to be significantly different from Western countries. It is possible that concerning Russia, the results of this poll were partly influenced by the Georgia-Russia case in the ICJ where Russia was on the defensive and received considerable criticism in the West.

At the same time, it is noteworthy that Russian citizens do not trust their country’s domestic courts very much either. In September 2014 the Russian President was fully trusted by 79

⁵⁸ See Tolstykh (2015).

⁵⁹ V.L. Tolstykh (ed.) *Instituty mezhdunarodnogo pravosudia* (Moscow: ‘Mezhdunarodnye otnoshenia’, 2015) 143.

percent of the respondents but courts merely by 26.⁶⁰ A year before that, in 2013, before the annexation of Crimea, the President's approval rating had been 55 % and that of courts 21 %.⁶¹ By Western standards, these are very low numbers concerning courts. Yet if domestically one is not accustomed to the idea that courts get to make the really important decisions then how easy would be to accept such an idea on the international level?

3.3. On international law-related domestic case law in Russia

Another side of the coin is the application of international law by Russia's domestic courts and the discussion of such domestic cases in contemporary Russian textbooks of international law. This is a more difficult area for foreign lawyers to judge because most foreign scholars cannot make up their mind on the Russian court practice regarding international law easily. Understanding Russian court cases on a more sophisticated level requires at least some knowledge of the Russian law and language. Historically, one needs to keep in mind what the Soviet legacy was in that regard. Sergei Marochkin from Tyumen State University has pointed out that in the USSR the few court cases in which references to international law were made concerned bilateral treaties on family matters, adoption, transportation issues, etc⁶² - in other words only the less political realm of international law, private and public. But now, as previously discussed, the Diplomatic Academy textbook of international law and the textbook edited by Ignatenko and Tiunov discuss the practice of the Constitutional Court and the Supreme Court of the Russian Federation quite extensively. Yet most Russian textbooks continue to be relatively minimalistic on this practice focusing as usual mainly on diplomatic-political practice of states and the scholarly doctrine.

⁶⁰ Levada Centre, 13.11.2014, 'Doverie institutam vlasti', <http://www.levada.ru/13-11-2014/doverie-institutam-vlasti> .

⁶¹ Ibid.

⁶² S.Y. Marochkin, *Deistvie i realizatsia norm mezhdunarodnogo prava v pravovoi sisteme Rossiiskoi Federatsii* (Moscow: Norma, 2011) 14.

William E. Butler from the US has offered a very enthusiastic picture of the use of international law in domestic courts in contemporary Russia:

“The role of Russian domestic courts has been veritably revolutionary [in terms of the use of international treaties] during the past fifteen years. Individuals and juridical persons may invoke treaty rights directly in Russian courts pursuant to Article 15 (4) of the Russian Constitution. Judges are encouraged as part of their training to draw on international legal acts when appropriate (and are not necessarily dependent on counsel directing their attention to them).”⁶³

Butler points out that the Constitutional Court has cited various UN documents “in more than fifty cases”.⁶⁴ In one example, the Constitutional Court of the Russian Federation relied *inter alia* on UN human rights conventions and declared Article 405 of the Code of Criminal Procedure unconstitutional.⁶⁵ Butler further refers to two cases where a Russian court ruled against the government on the basis of a treaty. One involved a British legal person that successfully invoked a bilateral tax treaty in the Supreme Arbitrazh Court.⁶⁶ In another case, the Supreme Arbitrazh Court ruled against a customs collector who had imposed an import duty in violation of Moldova-Russia free trade agreement.⁶⁷

With all due respect, it may be doubted whether these cases really sound ‘veritably revolutionary’ in the context of the application of international law by domestic courts. David Sloss in whose edited volume Butler’s study has been published also questions whether we should not approach such Russian cases with bigger caution:

⁶³ W.E. Butler, ‘Russian Federation’, in: D. Sloss (ed.) *The Role of Domestic Courts in Treaty Enforcement* (Cambridge: CUP, 2009) 410.

⁶⁴ *Ibid.*, 414.

⁶⁵ *Ibid.*, 415.

⁶⁶ *Ibid.*, 422.

⁶⁷ *Ibid.*, 436-437.

“...if domestic courts in Russia consistently enforced the [European Human Rights] Convention in cases where private parties alleged human rights violations by the government, there would not be so many cases against Russia in the European Court, and Russia would have a better win-loss record in those cases. Therefore, Russia’s record before the European Court demonstrates that Russian courts have not been enforcing treaty-based human rights constraints on government actors.”⁶⁸

Along the same line, in an empirically-oriented study, Anton Burkov from Yekaterinburg has maintained that the interestedness of Russian courts (and lawyers) to apply the European Convention on Human Rights has remained relatively low.⁶⁹

Indeed, although Russian courts are more likely to refer to international law than Soviet courts were, going seriously against the ‘vertical of power’ has altogether happened rarely if at all. In politically important cases, Russian courts and judges do not seem to claim the role of being the counterweight to the executive and the legislative powers, especially in foreign affairs. In foreign affairs and questions of national interest, the authority of the judiciary has been recently put out to support the political decisions made by the executive, not to challenge them.⁷⁰ In Congyan Cai’s terms, the ‘deference approach’ rather than the ‘check approach’ clearly continues to dominate in contemporary Russia.⁷¹

This takes us to the actual importance of national court cases in the context of international law. One can count many domestic cases with references to international law in a textbook of

⁶⁸ D. Sloss, ‘Treaty Enforcement in Domestic Courts. A Comparative Analysis’, in D. Sloss (ed.) *The Role of Domestic Courts in Treaty Enforcement. A Comparative Study* (Cambridge: Cambridge University Press, 2009) 42-43.

⁶⁹ A. L. Burkov, *Konventsia o zastshite prav cheloveka v sudakh Rossii* (Moscow: Wolters Kluwer, 2010) 270.

⁷⁰ See e.g. a political-philosophical essay of the Chairman of the Constitutional Court, Valery Zorkin, in support of the legality of Russia’s annexation of Crimea in 2014, V. Zorkin, ‘Pravo – i tol’ko pravo’, *Rossiiskaya gazeta*, 23.03.2015, <http://www.rg.ru/2015/03/23/zorkin-site.html>.

⁷¹ C. Cai, ‘International Law, Domestic Courts, and the Rise of China’.

international law but what is the actual significance of such cases? What transformation did they contain? For example, in the context of post-Soviet Russia, a significant references to court practice are not to actual cases but to the previously-mentioned quasi-judicial ‘postanovlenia’. In a number of actual court cases, citations to international treaties seem to have supported conclusions that were already reached based on domestic law. There are also superficial and formal references – for example like lists of foreign treaties that should somehow be taken into account by lower courts (but how?).⁷² My point is that the occasional Western scholarly enthusiasm regarding post-Soviet Russian domestic court cases mentioning or applying international law may give a distorted picture of the actual practice. Yes, there have been court cases in Russia, especially in the area of human rights where international law has been helpful, sometimes even transformative. And no, such cases have not changed Russia’s general outlook at international law which has traditionally been dominated by the executive; they have just helped to bring international law a bit closer to Russian citizens. In Russia, even the highest courts still do not ‘make’ international law or even explicitly express the country’s approach to international law, they just apply international law. Therefore, in comparative international law, counting references to international law made by domestic courts does not bring us too far. We need to work out a way of understanding how important such court cases actually were, what exactly was the use of international law in such court cases, and what is the relative importance of such cases in the big picture of the country’s approach to international law.

4. In Conclusion

Beside obvious factors such as differences between common law and civil law countries, there is a very significant, probably the most significant reason why Russian textbooks of international law tend to be relatively cautious regarding the use of case law: this actually

⁷² See S.A. Egorov (ed.) *Mezhdunarodnoe pravo*, 5th. dd. (Moscow: Statut, 2014) 148-9.

reflects quite accurately Russia's own very modest state practice in terms of adjudication in the context of international law. In the annals of international law, there are not that many international law court cases where Russia or the USSR would have been participants. The numerous cases that have emerged over the last 15 years, especially in the context of the European Court of Human Rights and some in investor-state arbitration, are usually also bypassed in Russian textbooks because more often than not the Russian Federation has lost in these court cases and making them major object of study in textbooks might have been a bit too masochistic. For example, the textbook of Kazan State University only mentions the ECtHR's *Ilaşcu* case only in the context that the Russian political branches of power expressed their protest against the judgment.⁷³

In the end then, emphasis or lack of interest on case law in the context of textbooks of international law reveals partly different concepts and realities of international law – with emphasis on different actors. Much has been written on international law as historically mainly Western construct. Apparently this phenomenon also has repercussions in the question of international adjudication. Onuma Yasuaki from Meiji university in Tokyo has criticized the “‘domestic model (of Western society) approach’ in international legal studies, represented by excessive judiciary-centrism”.⁷⁴ However, as Russia's case demonstrates, this observation also works the other way around – in countries where judiciary has historically not been an equal power to the executive and the legislative branches, it has been counterintuitive to see courts as decisive players in the context of international law. Whether courts and judges are key players or not in the construction of international law changes the picture. The difference is not just about using different methods for finding out what international law is or dictates. International law with less court cases is usually a much more

⁷³ R.M. Valeev, G.I. Kurdykov (eds) *Mezhdunarodnoe pravo. Obchaya chast'* (Moscow: Statut, 2011) 45.

⁷⁴ Y. Onuma, *A Transcivilizational Perspective on International Law* (Leiden: Martinus Nijhoff, 2010) 245.

political law and process where at the same time the actual remedies beyond political negotiations are relatively modest. Therefore, international law textbooks are nothing but mirrors for different countries and their historical experiences. Where the Western lawyer looks for judge and the judicial remedy, the Russian lawyer seems still to be skeptical about whether this can actually be true in the context of international law.