

CICERO FOUNDATION GREAT DEBATE PAPER

No. 17/03

May 2017

WHAT IS INTERNATIONAL LAW?

THE COGNITIVE DISSONANCE BETWEEN RUSSIA AND THE WEST

LAURI MÄLKSOO

Professor of International Law

University of Tartu

Director, Estonian Foreign Policy Institute

Tallinn

Estonia

Cicero Foundation Great Debate Paper No. 17/03

© Lauri Mälksoo, 2017

All rights reserved

The Cicero Foundation is an independent pro-Atlantic and pro-EU think tank.

www.cicerofoundation.org

The views expressed in Cicero Foundation Great Debate Papers do not necessarily express the opinion of the Cicero Foundation, but they are considered interesting and thought-provoking enough to be published. Permission to make digital or hard copies of any information contained in these web publications is granted for personal use, without fee and without formal request. Full citation and copyright notice must appear on the first page. Copies may not be made or distributed for profit or commercial advantage.

WHAT IS INTERNATIONAL LAW?

THE COGNITIVE DISSONANCE BETWEEN RUSSIA AND THE WEST

Lauri Mälksoo

Lauri Mälksoo is Professor of International Law at the University of Tartu in Estonia and Director of the Estonian Foreign Policy Institute, a think tank in Tallinn. In 2013 he was elected member of the Estonian Academy of Sciences. He is the author of the book *Russian Approaches to International Law* (Oxford: Oxford University Press, 2017).

RUSSIAN AND WESTERN VIEWS OF INTERNATIONAL LAW: DIFFERENT PLANETS?

One of the important areas where the current tensions between Russia and the West play out is international law. Sometimes it even seems that Russian and Western statements on international law come from (mentally) different planets. For example, the West has been unanimous in condemning Russia's 2014 occupation and annexation of Ukraine's Crimea as illegal. However, when one reads the recent version of the Russian Foreign Policy Concept which was approved by President Putin on 30 November 2016, one is struck by how often the Russian government emphasizes 'international law' as something which is presented as a particular trump card of *Russia* in international relations.¹ In Russian official documents like the Foreign Policy Concept, it is the US and other NATO countries that are portrayed as problematic actors and even systematic violators of international law. For example, many in the West would be surprised to learn that according to the Russian government's position, any sanctions that were not authorized by the UN Security Council – like those adopted by the Western nations against Russia since 2014 – would necessarily be 'illegal' under international law. It is always the others who are the violators of international law, who are the bad guys.

¹ See http://www.mid.ru/en/foreign_policy/official_documents/-/asset_publisher/CptlCk6BZ29/content/id/2542248.

Essentially, we have one and the same normative language – international law – but it is addressed and dealt with quite differently in the West and Russia. In my book “Russian Approaches to International Law” which recently came out as paperback at Oxford University Press², I have tried to dig deeper and understand where this cognitive dissonance between Russia and the West regarding international law might come from.

We usually think that international law is or must be ‘universal’ in the sense that it could not mean completely different things for different countries. At the same time, there are numerous national and regional nuances in the ways how international law is understood and applied in the state practice. The cognitive dissonance between Russia and the West regarding the meaning and content of international law also belongs to this category. Such differences in the context of international law are primarily reflections of differences in identity and political philosophy. Because these are deep-going issues, this makes them usually quite difficult to tackle in the state practice.

The main aim of this Great Debate Paper is to point out some factors that have shaped the understanding of international law in Russia and contributed to the differences of understanding of this normative language, compared to the West.

HISTORY: RUSSIA AS A RELATIVE LATECOMER IN INTERNATIONAL LAW

The history of international law as normative system is quite Euro-centric. Russia was a latecomer to this system and when it joined the so-called *jus publicum europaeum* in the late 17th or early 18th century, it initially must have confronted it as foreign language of sorts. International law remained the business of a narrow European-minded elite in St Petersburg (although it was an elite field elsewhere in Europe as well). On the one hand, in order to stay the European course, Russia had to suppress certain cultural aspects that were alien to the European language of international law. On the other hand, to the extent that its domestic

² <https://global.oup.com/academic/product/russian-approaches-to-international-law-9780198808046?q=ma%CC%88lksoo&lang=en&cc=ee> .

legal culture did not support European ideas of international law which had taken centuries to mature, it had to speak the language of international law as imitation of sorts.

Why is this still relevant today? There are moments when the Russian government gives the impression that for it the language of international law still remains a foreign language, that it does not 'own' this language along with other nations, especially the Western ones, but it is merely a normative language to advance one's arguments the way the significant others want to hear about these issues. One can, of course, overdo things in such a way – a pertinent example would be when in 2008 Russia accused Georgia of 'genocide' in South Ossetia without bothering much about evidence, especially proving the intent to destroy an ethnic group as such. Moscow neglected that in the West genocide was seen as one of the most serious crimes of crimes and using this label too easily, without bothering much about actual evidence, could actually backfire in terms of credibility of the country's legal position, as it did.

Secondly, in the context of Russia's membership of the European Court of Human Rights there are elements of imitation mixed with open resistance. Russia joined the Council of Europe in 1996 and ratified the European Convention on Human Rights in 1998, but today it has become obvious that Moscow perceived a number of cultural-legal assumptions underlying the European human rights protection system as alien and hostile.

THE IMPACT OF DOMESTIC LEGAL IDEAS ON THE COUNTRY'S CONCEPT AND PRACTICE OF INTERNATIONAL LAW

The leading Russian international lawyer of the Tsarist era (who happened to be of Baltic-Estonian origin), Friedrich Martens (1845-1909) thought that a country's understanding of international law inevitably reflected its domestic understandings and practices of law. Being a liberal, Martens thought that nations which respect the rights of their citizens, were more 'civilized' than those who did not and that, accordingly, respecting citizens' rights was the main feature of the country's 'civilization'. In this concept, the point of sovereignty was to defend civilization understood in such a way, i.e. based on rights of the individuals.

It is important not to forget that the Bolsheviks gave up on this liberal concept of international law. Their vision was statist and totalitarian, and this was reflected in Soviet international legal thinking and practice. State sovereignty was always given priority over human rights. Any foreign criticism of the Soviet domestic ideas or practices was seen not only as illegitimate but also as illegal under international law. Today's Russian elites have still inherited much from this period in terms of its concept of international law. For example, leading international law theoreticians in Russia have argued against including individuals as subjects of international law and have made efforts to keep international law and domestic law at safe distance from each other.

Upon reflection, it should not come as surprise that liberal and illiberal states emphasize different values in international law and in this sense also see the 1945 UN Charter differently from each other. In Russia, an additional aspect is that the executive has historically not been much bound to other powers, such as the legislative or the judiciary. Moreover, in the Russian domestic context there is a long debate about the so-called 'legal nihilism'. There is an opinion, expressed by some leading Russian legal thinkers, that law has not been a high value in the ordering of the society. Can we really assume that a leader who is not very constrained by law domestically would feel very constrained by law internationally? In any case, before 2014 Russia had criticized any use of military force without the authorization of the UN Security Council as illegal. In 2014, Moscow made a U-turn and argued that there were no international legal problems in the annexation of Crimea. There is a certain amount of legal nihilism in such an argumentation. Moreover, the annexation was not accompanied by any critical questions from the Russian Constitutional Court which is based in St Petersburg and led by the now famous Valery Zorkin.

THE RISE OF THE CIVILIZATIONAL DEBATE

Over the last decade, the former Communist resistance to Western ideology has been replaced by a nativist, conservative, and traditionalist ideology, according to which the world is divided in autonomous civilizations that have a legal and ethical right to remain separate and decide their own fate. It is interesting how Russian legal thought has recently also been

penetrated by such civilizational ideas. Moscow is a major advocate of multipolarity, whereas this seems to be a 21st century word for the 19th century idea of balance of powers. However, the implications of this thinking are important – according to this vision, universal international law is thin and is controlled by the veto power (in the UN Security Council) of each multipolar great power such as Russia or China. Civilizational differences are the best ethical justification for widespread powers of the permanent members of the UN Security Council. Very often when Moscow emphasizes the importance of international law, what it primarily means is its own special status in the UN Security Council. However, it is also important to understand that this concept of international law and the international community is more based on raw regional power than any common constitutional ideals and values such as human rights or democracy. Probably Russia would argue that the main constitutional value of the international community remains state sovereignty, which for the permanent members of the UN SC remains absolute sovereignty. This idea too reflects Russia's domestic state of mind because in the Western political philosophy it strikes as historically slightly antiquated, as an expression of power without legitimacy and justification.

CONCLUSION

In conclusion it can be said that one of the issues that the West and Russia still have to figure out is how to express their positions in the context of international law. Russia has developed a partly different concept of international law which the West tends to ignore or to ridicule, because, among other things, it threatens the universality of international law. In turn, Russia argues that it is *her* understanding of international law that is correct and universal. Absent a universal normative language, there is a real danger that international law becomes 'different in different places' not in a trivial sense but in a deeper structural sense in which regional normative orders prevail over universal concepts of international law. If so, then for example Russia's departure from under the jurisdiction of the European Court of Human Rights would only be a matter of time.

The Cicero Foundation

Independent Pro-EU and Pro-Atlantic Think Tank Founded in 1992

Hondertmarck 45D

6211 MB MAASTRICHT

The Netherlands

Tel. +31 43 32 60 828

Tel. +33 1 41 29 09 30

Fax: +33 1 41 29 09 31

Email: info@cicerofoundation.org

Website: www.cicerofoundation.org

Registration No. Chamber of Commerce Maastricht 41078444