Interview with Lauri Mälksoo
RUSSIAN INTELLECTUALS WERE MORE INTERESTED IN ISSUES OF JUSTICE THAN IN LAW AS SUCH

INSTEAD OF ABSTRACT

I don't have an impression that Russia is not interested in international law; but like any great power with imperialist ambitions or revisionist claims, it wants to make exceptions for itself to the existing international law. Therefore it has – throughout its history – emphasized many exceptions to the *pacta sunt servanda* principle. Yes, maybe *pacta* indeed *sunt servanda*, but this principle can be challenged when circumstances change.

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Prof. Mälksoo, you are the author of the important book "Russian approaches to international law". What empirical material supports your main thesis that not only Russia's practice but also its understanding of international law differs significantly from Western approaches? Is it the case that the West commits mistakes by looking at Russia through its own lenses?

– To answer your question I have to make a broader introduction.

I have been fortunate to study international law in various countries, which has made me a little bit of a comparativist. I had the privilege to study in Germany, in the United States, in Japan and, of course, in Estonia in the 1990s, so in a country that had just liberated itself from the Soviet system. And although I was a child in the 1980s, I still remember how Soviet society worked, what messages we were told, and what history we were taught. Whenever Russian tsars acquired a new territory, it was a good thing, a necessity for the Russian Empire. Never was it a conquest.

So, the sources of my interest in Russia and comparisons of its legal culture with the West were multiple. As a scholar, I noticed that Russia was pretty much absent in the Western discourse of international law. Of course, there was some literature, also in the West, which dealt with Soviet Union and international law, wondering whether the Soviets understand international law differently. Peaceful coexistence? The Brezhnev doctrine? What do they mean? What attitude did the Soviets adopt to treaties and all these things? I felt, however, that when the Soviet Union ceased to exist and Russia made genuine attempts to become part of Europe – acquiring, e.g., membership in the Council of Europe in 1996 – then interest waned in this comparative study of Russia and international law. Russia was simply in the position of pupil. One assumed that even if Russians had some sort of state-centric concepts of sovereignty, they would eventually have to adopt the doctrines of the mainstream in the West.

Over time, it became obvious that this expectation was not met, so Russia's problem was not only Marxism-Leninism. When one digs deeper in the studies of the history of international law from various periods, you see confirmation of a thesis put forward by one of the leading historians of international law, Wilhelm Grewe, in his book *The Epochs of International Law*. He made the point that, in the nineteenth century, the Central and East European Empires put different accents in the context of international law compared to Western European empires, which were more liberal and democratic.

What were these differences then?

– For example, the relationship to the will of the people, to revolutions, or to uprisings; to democratic ideas.

The basis of the nineteenth-century Russian authoritarian doctrine of international law was legitimacy, namely that the power of the kings or tsars is given by God, whereas illegitimacy is when people want to challenge God's will. In line with this, Russia exercised the role of the gendarme of Europe at certain moments in the nineteenth century: in Hungary, but particularly also in Poland.

International law and its doctrines are inevitably an interplay between international and domestic law. Thus, a big question concerning today's Russia is whether the lack of democracy or the downwards trend in terms of democracy are the main factors shaping Russia's approach to international law.

Then I'll ask my question in another way: what evidence allows you to claim that Russian international lawyers look at international law differently?

Surely, their public statements may lead us to such theses. On the other hand, their perspective might for them also be a means to avoid problems within the Russian system itself which could arise if their public statements were different from the foreign policy expectations of the Russian government. After all, international lawyers are somehow dependent on state financing as they work at state universities and their expertise is needed by the state, which also may nominate them to various international bodies.

So, perhaps they simply write what they think they should write, and thus they justify the policy of the Russian Federation exactly as Russian historians in the nineteenth century justified, e.g., the partitions of the Polish-Lithuanian Commonwealth?

Might it be that they privately understand international law in a way that is very similar to Western scholars? What do you think about these doubts of mine?

– Well, it's true that working at Russian universities, writing open pieces in which you call the war by its name instead of 'Special military operation', and sometimes even publishing in Western journals make you liable under Russian law. It is risky when you write freely and want to stay free in Russia.

It's also true that none of us knows how we would behave living in a totalitarian system or an authoritarian system, or what compromises we would make.

Having said that, I think we need to be able to rely on what someone says publicly, since it is impossible to verify what the author really

thought in each case. What matters is what we say in public. If you are saying something that you don't believe, then you become part of the problem and part of the system in any case.

Then let's remember that there were periods in Russian history when authors could express themselves more freely. When I compare, e.g., current Russian works on constitutional and international law against those from before 1914, then it seems to me that international lawyers in the late tsarist period almost had more freedom than in today's Russia. How telling are, for example, the public statements of Russian international lawyers nowadays? They often are silent. When the Russian invasion of Ukraine occurred in February 2022, the International Law Association (ILA) – one of the most respected organizations of international lawyers, which is already 150 years old – issued a statement condemning the invasion as aggression. In response, a letter was published by the Russian branch of the International Law Association, which is the Russian Association of International Law, or more precisely, by its presidium. The authors of that letter criticized the ILA's statement, repeating some of Putin's arguments. The thing is that no one signed this letter by name... Open the website of the Russian Association of International Law and check...

By the way, this kind of justification of actions taken by the Russian state is a very old pattern. When the Great Northern War broke out in 1700, one of Tsar Peter's main diplomats, Peter Shafirov – born in Smolensk to a Jewish family which had settled there when the city was in the Polish-Lithuanian Commonwealth – made the argument that Peter had many reasons to start the war. It is interesting that in Russia – as well as, to an extent, the Soviet Union – this text has been celebrated as the foundational text or the starting point of how reflection on international law began in Russia. But, *de facto*, it's a justification of an aggressive war; the challenge that Shafirov faced when making his arguments was that Muscovy had concluded with Sweden the peace treaty of Stolbovo in 1617 and the peace treaty of Cardis in 1661, the latter of which recognized the territories which Muscovy now desired as part of Sweden, so Sweden, of course, said that Muscovy had violated that and was acting against international law.

> **As a historian, I have an impression that Russia simply did not sign agreements in good faith, or 'bona fide', as it is called in Latin. So, Russian diplomats did not sign certain agreements or treaties on the assumption that both parties are obliged to observe them due to morality, honour, and interests: they signed these documents assuming that perhaps, sooner or later, times would come when they would be able to change them or would regain their losses by violating these treaties.**

From the perspective of Polish history, we see this pattern of thinking in the eighteenth century, when after the first and second partitions of the Commonwealth, Catherin II swore that she had no further claims to Poland. We saw it in 1939, when the Riga treaty – a compromise from 1921 that ended the Polish-Soviet war – was recognised by the Soviets as invalid, therefore Poland did not exist anymore as a state. We see it also in 1943, when the Soviet government headed by Stalin severed diplomatic relations with the Polish government, having been restored merely 20 months earlier. Good faith was always lacking when Russia signed agreements with Poland.

In your book you presented the development of Russia's perspective on international law since the seventeenth century. Do you agree with my observation that one of main differences between Europe and Russia is the lack of the notion of good faith in Russia?

– I've thought about this a lot, but more in the context of treaties. What does a treaty mean to Russia in the history of international law? As you know, the main principle of international treaty law is *pacta sunt servanda*. Treaties must be honoured. They must be kept, but throughout history powerful revisionist states have tried to use another principle, which lawyers call *clausula rebus sic stantibus.* If there is a fundamental change of circumstances, these states can try to rescind their earlier commitment. Of course, the Vienna Convention on the Law of Treaties from 1969 makes *clausula rebus sic stantibus* very small, almost powerless. Yet it has appeared throughout history, and I have an impression that it hasn't sunk to oblivion.

Definitely, Russia has – throughout various stages of its history – emphasized many exceptions to the *pacta sunt servanda* principle. So, the theory has been that, yes, maybe *pacta* indeed *sunt servanda*; but when circumstances change, then this principle is often challenged. One of the nineteenth-century developments in international law was the Treaty of London, signed in 1871 after Russia, having the momentum of the Franco-Prussian War in 1870, took its navy back to the Black Sea. That movement was, however, prohibited by the Paris Peace Treaty, signed in 1856 by Russia after it had lost the Crimean War. One of the main stipulations of that treaty was that Russia was not allowed to have a navy in the Black Sea.

Britain, which was really troubled by this step by the Russian Empire, convened a diplomatic conference that included Russia. The participants agreed that the *pacta sunt servanda* rule prevails over *clausula rebus sic stantibus*, but at the same time Russia got *de facto* recognition of the changes it had already made on the ground.

When we talk about Russia and the history of international law, then I will turn your attention to the fact that there are a lot of memories related to the Hague Peace Conference, which, by the way, took place after

Tsar Nikolas II had proposed initiating it in 1899. One of the diplomatic initiatives that Russia brought to the Hague peace conference was that states would recognize *clausula rebus sic stantibus* in order to weaken *clausula: pacta sunt servanda*. So, this a sort of imperial international law, but the proposal was not successful.

Jumping to the Soviets, you have the same approach in the works of authors such as Evgeny Pashukanis, who claims that a revolutionary state can abandon earlier treaties when it expresses certain kinds of class interests. Although authors in the late Soviet period, such as Grigory Tunkin, were usually more cautious, certain earlier Soviet authors who also reflected the Soviet practice at that time said that the Soviet state was a different kind of state that was run by the proletariat not the bourgeoisie, therefore it could change those bourgeoisie treaties. That, by the way, makes the secret protocols to the Molotov-Ribbentrop Pact more understandable, in a way. The Soviet authorities and diplomats said they were violating international law because the class interest demanded it in order to have more countries governed by communists, and so on. You can violate or abandon treaties, even if you recently promised something different. You can even violate the covenant of the League of Nations, of which the Soviet Union became a member in 1934.

So, I see this problem more in the light of a contradiction between *pacta sunt servanda* and *rebus sic stantibus* principles, because I think that good faith is to some extent a psychological concept which may mean various things for various countries because they read the situation from the perspective of their own interests.

It's interesting that Russia too sometimes uses good faith arguments. Think of the Minsk agreements of 2014 and 2015. In December 2022, former German chancellor Angela Merkel said that, well, those agreements bought time to prepare for the all-out Russian invasion of Ukraine. Russian propaganda immediately picked up on her comments: "You see, never have you been honest brokers; never have you wanted to implement the means provided by the Minsk agreements. You intended to fool us from the very beginning".

So, everyone can use elements of good faith arguments.

Your remark inclined me to ask another question. In your book, you pay attention to the fact that law in the Russian tradition is something more than a system of legal norms: it is also a reflection of justice, and law as such has to be just. Could you specify how Russian people understood law as such? Is law the same as in the Western concept, or is it inseparable from justice?

– I feel I'm only partly competent to answer that wider question, since there is research that deals with this topic in a more detailed way than I can. What I used for my 2015 study was observations of semiotician Yuri Lotman, who died in 1993 but spent his life studying the patterns in Russian culture. He was particularly interesting to me because he was professor at the same university where I teach, at Tartu in Estonia. He wrote that, in the history of thought, Russian intellectuals were more interested in issues of justice than in law as such. They also assumed that law cannot be fully just, and law is secondary to justice.

The problem of the relationship between law and justice is also connected with what some authors, including ones from Russia, consider within the scope of legal nihilism. This means that law can relatively easily be ignored or bypassed – sometimes by invoking even 'higher' principles such as justice. If you're only or mainly interested in justice, then it's also easier for you to violate the existing positive law or find excuses for its violations. After all, everything can be challenged from the perspective of justice.

Justice is a tricky thing also because as notion it is vague. Let's say that for Russian imperialists the diminishment of the territory of the Russian Empire might be deeply unjust, right? This is not the case, however, for Georgian, Moldovans, Latvians or Poles, whose nations also have spent some historically unpleasant time under the Russian Empire and under the Soviet hegemony during the Cold War.

Now I hope to write a kind of follow-up book to that 2015 one. So, I continue my studies on sources from the past and I want to also make more comparisons, but one of the things that I have already noticed from literature is that Russian literature on international law often speaks about great powers and small states, about *velikije derzhavy* and *malye gosudarstva.* Those *velikije derzhavy* are something positive, associated with responsibility and, obviously, with special rights for Russia as a *velikaja derzhawa*.

If you follow, for example, Vladimir Putin's thinking and what Sergey Lavrov says, or what the Russian permanent representative at the UN says about the UN, it's always irritation when someone wants to challenge Russia's unlimited power, particularly its veto power as a permanent member of the Security Council. I assume that their views are just from their perspective, because this is what belongs to great powers.

I wanted to ask you about the great Estonian lawyer who lived in the time of Russian Empire, Friedrich (or Fedor) Martens. He contributed significantly to the development of international law. Martens' famous clause was adopted at the Hague Convention of 1899 and has remained in force until now. It says that in cases which are not regulated by existing rules

of international law, populations and belligerents remain under the protection of principles derived from customs established between civilised nations, laws of humanity, and requirements of the public conscience.

What is the reception of Martens' thought now in contemporary Russia? During Russia's war against Ukraine, there is much evidence indicating that everything except requirements of the public conscience and humanitarian laws now dominate in Russia's actions. You wrote much about Martens in your book.

– Martens has continued to fascinate me personally. He has been used by different forces and by different powers throughout history. It is true that he's a kind of link as he symbolizes Russian international law at the time when Russia was part of Europe. It was Europe ruled by the Empires. However, Russia considered itself part of Europe, not actively positioning itself against 'Europe', as it is currently. Since the 1990s, when Russia was about to return to Europe, interest in Martens also increased because it could be used as a symbol of Russian Europeanness. Recently, Martens' diaries were published in Russia. About five years ago, Russia issued stamps depicting Martens in a series of famous Russian lawyers from history, which is evidence that the Russian state values him positively and has decided to promote knowledge about him. By the way, another lawyer remembered by the Russian state in the same stamp series was Roman Rudenko – the main Soviet prosecutor at the Nuremberg trials.

A problem appears when states become interested in certain personalities and make them symbolic figures for whatever reasons, being at the same time not interested in the full intellectual truth about their personality. So, a lot of energy has been expended to create this link between Martens and international humanitarian law, although Martens' clause was actually a diplomatic compromise between various powers. We must also remember that he was a man of the Russian Empire, someone who defended the Empire, who wrote in his textbook on international law that self-determination of peoples can be a very dangerous idea. Those pre-revolutionary Russian international and constitutional lawyers – even those with non-Russian ethnic and Protestant religious backgrounds, such as Martens – defended the Empire and advanced its glory.

I can tell you another story about Andrei Mandelstam, an important Russian international lawyer who was head of the legal department of Russia's ministry for foreign affairs during the Provisional Government and emigrated to Paris after the Bolshevik coup d'etat. One of the reasons why he's remembered nowadays is his authorship of the resolution adopted by the Institut de Droit International in 1929 during its session in New York. This was the first 'non-official' document referring to human rights in

international law, and it was the predecessor of the Universal Declaration of Human Rights, which the United Nations' General Assembly adopted in 1948.

Despite that, during the Paris peace conference in 1919, Andrei Mandelstam wrote a memorandum in which he laid out Russian republican views on the territorial integrity of the Russian Empire. He claimed that with the exception of Poland, which could be independent, although in 'just' (from the Russian perspective) borders, everybody else from Finland to the Baltic Republics to Ukraine must stay with republican Russia. In his view, they may be entitled only to autonomy, not to independence.

And did he somehow justify or explain this? Why, in his view, was Poland an exception to this general rule that all countries of the Russian Empire had to remain within the new borders.

– When I read his texts, I have this impression that his claim is partly due to the fact that West European nations (to whom he was appealing in a way) had by that time already recognized Poland. In addition, he, as a representative of Russian emigres, was simply obliged to take into account President Wilson's principles and new power relations. He also referred to the peculiar history that Poland had in the Russian Empire. Last but not least, although Western powers at that time were still hesitant about what to do with Finland and the Baltic states – not to speak of Ukraine – the thing with Poland was already decided.

It's interesting that Mandelstam argued that if these places – meaning the Baltic states and Finland – became independent, they would fall under German interests, and that is, of course, something that no one should want, he insisted. And in the end, Mandelstam also made a plea to the 'great Russian culture', Dostoevsky, Turgenev and so on, with suggestions that delegations in Paris cannot harm this great culture and Russia's vital interests.

It sounds familiar... and it also reminds me of Karl Marx. He was another opponent of national movements in our parts of Europe, let alone Central and Eastern European peoples' efforts for independence.

He called them *Völkerabfälle* [peoples being waste – ŁA]. Yet with the one exception of Poland, which – according to Marx – is a historic nation and thus has a right to exist... I have a final question, one which would cast certain light for the future.

What is the Russian Federation's interest now in international law? Is the Russian Federation going to change international law and, in this way, legalise the annexation of Crimea and the East-Southern part of Ukraine? Or rather, does the Russian government want to diminish the significance

of international law so that it is not taken seriously, and everybody has the right to interpret it according to their own assessments and values?

– That's a good question. I think Putin wants Russia to take its, so to say, proper shape. If he achieves that, and if he can make it clear to the world that no one can physically take these territories back from Russia, then he will recommend the world to recognize the new circumstances.

He definitely remembers history, which makes history in this war even more important than it usually is. For example, the United States only established diplomatic relations with the Soviet government in 1933, so between November 1917 and 1933 there were no diplomatic relations between the United States and Russia because Washington conducted a sort of non-recognition policy.

Russia has also learnt international law through its own history, and now it has concluded that sometimes great powers need time to enforce changes or achieve recognition.

So, I don't have this impression that Russia is not interested in international law; but, like any great power with imperialist ambitions or revisionist claims, it wants make exceptions for itself to the existing international law. And it definitely does not want to lose its privileged position in the UN Security Council, which, after all, is also an expression of international law (via the UN Charter). So, I think that we will see, on the one hand, a continued emphasis on international law which matters and which is violated by "others" – Russia's rivals. But when it comes to Ukraine, then the war is presented as a non-war, and aggression is presented not as an attack but as an enforced measure. I have the impression that by studying what Russian media write – what they report on what people think – we can already see that many Russians are told that it was Russia that was attacked in Ukraine. It is a duty of international lawyers to keep saying that this is not true.

I think one or two months after the beginning of the War, Patriarch Kirill said something very similar, namely that Russia had never attacked but had been attacked throughout its history and had to defend its lands. Also Vladimir Putin at the Valdai Club meeting last autumn said that international law has to be changed and adapted to "new realities", but as such it is needed, otherwise we would face permanent chaos. This only corroborates your diagnosis.

Dear Lauri, Dear Prof. Mälksoo, thank you very much for this wonderful, erudite interview and great analyses!

– The pleasure is mine.

Interview was conducted by ŁUKASZ ADAMSKI