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Boundaries and Rights after 2014

Helsinki at a Crossroads

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Abstract

The Final Act of the Conference on Security and Co-operation in Europe reflected in its Decalogue the centrality of the territorial settlement to public order in Europe. It also reflected the hope that human rights would become more deeply entrenched across all States Parties to the Act. The intertwining of territorial provisions and human rights was not mere coincidence; it was at the heart of the compromise which enabled the parties to agree to the text as eventually adopted. The events of 2014—in particular the forcible seizure of Ukrainian territory—raise questions as to the continuing vitality of the compromise that had been reached in 1975 and long maintained. The new foreign policy of the Russian Federation, embracing a potentially far-ranging irredentism, places the territorial idea of the Final Act under stress. Simultaneously, a new domestic policy rejects not only the enforceability of human rights at the international level but also the applicability of human rights obligations in the national legal order. The new foreign and domestic policies in Russia have emerged in tandem. Their relation to one another needs to be considered if their effect on public order is to be understood.

Keywords

Helsinki Final Act – Decalogue – inviolability of frontiers – territorial integrity of states – human rights and fundamental freedoms – equal rights and self-determination of peoples – democracy – Ukraine – Russian Federation – Crimea – annexation – Vladimir Putin – Nikolai Berdyaev – Cold War – irredentism – identity politics

Introduction

The Helsinki Final Act¹ reflected a twofold concern of its parties. It reflected their wish to preserve the stability of the territorial settlement among Europe's States. And it reflected their wish to establish at least a basic standard of human rights subject to the prerogative of every State in respect of matters within its domestic jurisdiction. The year 2014 witnessed the first challenge to the territorial settlement in Europe since 1945—Russia's seizure of territory from Ukraine. This came amidst a shift, some years under way, in Russia's domestic policy: Russia had begun more systematically to challenge the applicability of the international human rights system under its laws and in its social order. The situation which emerged in 2014 thus presents a twofold challenge to the principles of the Final Act.

This essay starts by recalling the provisions of the Final Act in respect of territory and in respect of human rights. It is timely to do so in light of the change in politics and law in Russia and in light of Russia's new policy of territorial aggrandizement. It then turns to consider the domestic programme now in evidence in Russia—the programme that seeks to roll back the influence of international human rights; and it considers how this relates to Russia's present foreign policy.² The essay concludes with observations about the Cold War and the very different international relations that appear now to be emerging.

The Territorial Settlement and Human Rights in the Final Act

The incorporation into the Helsinki Final Act of provisions that acknowledged the primary importance of territorial stability and of provisions that acknowledged at least a basic regime of human rights was a compromise. The West, though also understanding that stable boundaries were needed for a stable Europe, chiefly hoped to establish human rights principles that would apply to all parties. The USSR and its East Bloc allies, ambivalent at best when it came to human rights, viewed the territorial provisions as the indispensable core of the Final Act.

1 Final Act of the Conference on Security and Co-operation in Europe, 1 Aug. 1975: reprinted at (1975) 14 ILM 1292.

2 This section is drawn from Chapter 7 of the author's forthcoming book, *Aggression against Ukraine: Territory, Responsibility and International Law* (New York: Palgrave Macmillan, 2015).

It indeed had been the Soviet idea, from the 1950s, that Europe needed a general instrument that affirmed territorial integrity and the inviolability of frontiers.³ The two ideas—the territorial idea and the human rights idea—were in play between the two Cold War camps. Their competing concerns were evident in the negotiations that led to the eventual adopted text.⁴

As to the text, it both implied and stated that territorial stability and human rights exist in close connection. Principles III and IV of the Decalogue—“Inviolability of frontiers” and “Territorial integrity of States”—set out the main idea of a territorial order in Europe guaranteed against coercion of any kind. The human rights idea found expression in Principles VII and VIII. Principle VII, under the title of “Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief,” addressed a range of rights, including, as in the 1966 Covenants, “civil, political, economic, social, cultural and other rights and freedoms.” Principle VIII addressed “[e]qual rights and self-determination of peoples.” Self-determination by 1975 in the colonial setting had an international aspect (colonial peoples being by definition outside the State’s national boundaries); the international aspect had developed since the adoption of the Charter and in particular in the decolonization practice of the General Assembly in the early 1960s.

There was another aspect, however. Arangio-Ruiz, discussing the Draft Code of Crimes against the Peace and Security of Mankind and referring to Principle VIII, said that self-determination “unquestionably [contains] an internal aspect as well.”⁵ The internal aspect is reflected in the drafting history of Principle VIII.⁶ As a number of jurists and policy-makers since have done as

3 United States Commission on Security and Cooperation in Europe, *The Helsinki Process: A Four-Decade Overview* (2014), p. 1. For Soviet Foreign Minister Molotov’s memorandum on the proposed General European Agreement on Collective Security in Europe, see V.M. Molotov, 26 March 1954, Foreign Policy Archives of the Russian Federation, F.6, Op. 13, Pap. 2, D.9, L1.56–59 (trans. Geoffrey Roberts): <http://www.wilsoncenter.org/publication/molotovs-proposal-the-ussr-join-nato-march-1954>.

4 For a review of the tension between the USSR and the West during negotiations in respect of human rights and the non-intervention principle, see Arie Bloed & Pieter van Dijk, “Human Rights and Non-Intervention” in Boed & Van Dijk (eds.), *Essays on Human Rights in the Helsinki Process* (Dordrecht: Nijhoff, 1985) 57, 66–71. See also Sarah B. Snyder, *Human Rights Activism and the End of the Cold War* (Cambridge: Cambridge University Press, 2011) 15–32.

5 Arangio-Ruiz, ILC 2053rd mtg, 31 May 1988, ILC Ybk 1988 vol. I, p. 62, para. 23.

6 For a superb review of the drafting history overall, with reference to CSCE records and to declassified State documents, see Rovshan Sadigbayli, “Codification of the inviolability of frontiers principle in the Helsinki Final Act: Its purpose and implications for conflict resolution,” (2013) 24 *Security and Human Rights* 392; and in respect of self-determination

well,⁷ Arangio-Ruiz went so far as to suggest that self-determination in this sense embodies a democratic entitlement. He said that self-determination...

inevitably implied condemnation of any régime which, being undemocratic, was constitutionally or by definition unable to guarantee the exercise of the freedoms without which no popular self-determination was conceivable.⁸

This (in 1988) was a controversial extension of the idea; it remains so.⁹ Undemocratic regimes may be widely condemned, but it remains far from obvious that general international law entails an obligation to condemn them.¹⁰

Whatever international law says or does not say about democracy, the larger point is sound. The Helsinki Final Act contained provisions to address territorial stability; and it contained provisions to address human rights; and the

and Principle VIII in particular, *ibid.* at 405–408. See also, regarding the Dutch contribution to Principle VIII's drafting, Sara Lambert, "The Dutch fight alone: The principle of self-determination," (2012) 23 *Security and Human Rights* 45.

7 See, e.g., Strobe Talbot, "Self-Determination in an Interdependent World," (2000) 118 *Foreign Policy* 152, 159–160. Cf. Sigrid Boysen, "Demokratische Selbstbestimmung? Zum Verhältnis von staatlicher Integrität und Gruppenrechten im Völkerrecht," (2009) 47 *Archiv des Völkerrecht* 427; Robert Post, "Democracy and Equality," (2006) 603 *Annals of the American Academy of Pol. & Soc. Science* 24, 25–26; Frederic L. Kirgis, Jr., "The Degrees of Self-Determination in the United Nations Era," (1994) 88 *Amer. J. Int'l L.* 304, 307–308. For an earlier iteration of the linkage see Quincy Wright, "Human Rights and Charter Revision," (1954) 296 *Annals of the American Academy of Pol. & Soc. Science* 46, 49:

The 'self-determination' of nations, demanded by colonial and subject peoples and supported by the United Nations Charter, can be achieved peacefully only through free elections or other manifestation of consent of the governed, and such consent cannot be manifested in the absence of at least moderate respect, within the territory to determine itself, for the human rights of freedom of opinion, communication, and association, and of due process of law in trials and investigations.

8 Arangio-Ruiz, ILC 2053rd mtg, 31 May 1988, ILC Ybk 1988 vol. I, pp. 62–63, para. 23. Arangio-Ruiz's successor as Special Rapporteur, James Crawford, hastened to add that this did not entail a right of forcible intervention to restore democracy; forcible intervention, to the contrary, in many cases frustrating, not realizing, self-determination: James Crawford, "Democracy in International Law," (1993) 64 *Brit. Ybk. Int'l L.* 113, 127–128 (based on his Inaugural Lecture as Whewell Professor, 5 March 1993).

9 For a compilation of some of the main writings, see Richard Burchill (ed.), *Democracy and International Law* (Aldershot: Ashgate, 2006).

10 See especially, with citations to literature, Gregory H. Fox & Brad R. Roth, "Democracy and International Law," (2001) 27 *Rev. Int'l Studies* 327, 343–348.

presence of both in the instrument reflected the intertwining of human rights with the territorial settlement in the public order that the parties hoped to secure. States of the East Bloc said that the “Final Act must be viewed in its totality,”¹¹ by which they did not intend to link their human rights performance to the security dimensions of the Final Act—but if a State espoused a holistic approach to the interpretation of the Act in respect of one matter (here, it was East Germany calling for most-favoured nation treatment), then it was dubious for the State to adopt a piecemeal approach in respect of others. The intertwining of the principles of the Final Act was reflected in the text (and in the *travaux préparatoires*);¹² and the parties—including those which were sceptical of the human rights principle—acknowledged at least in a general way that the provisions of this instrument were to be interpreted in their context and in the light of the object and purpose of the instrument.¹³ The Final Act was not a buffet from which each State was free to select the items it pleased, while passing the others by.

In two clauses, the Final Act indicated a relation between security and rights expressly. In the fifth paragraph of Principle VII, the Final Act indicated that “[t]he participating States recognize the universal significance of human rights and fundamental freedoms, *respect for which is an essential factor for the peace, justice and well-being necessary to ensure the development of friendly relations and co-operation among themselves as among all States*” (emphasis added). Principle VIII, paragraph 3, indicated that “[t]he participating States *reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination of peoples for the development of friendly relations among*

11 Comments of Member States, organs of the United Nations, specialized agencies and other intergovernmental organizations on the draft articles on the most-favoured-nation clause, comments of East Germany: ILC Ybk 1976 vol. II, Part Two, p. 165. Cf. comments of the Ukrainian Soviet Socialist Republic: ILC Ybk 1978, vol. II, Part Two, p. 172.

12 Sadigbayli at 406 (with references to States affirming “a clear relationship between all principles of the Final Act”).

13 Which is not to say that the instrument was necessarily legally binding as a treaty; it was widely understood not to be. See with citations to literature Jordan J. Paust, “Transnational Freedom of Speech: Legal Aspects of the Helsinki Final Act,” (1982) 45 *Law and Contemporary Problems* 53, 55–57. Whether the rules of treaty interpretation are to be applied when determining whether an instrument creates legal rights or obligations is a little-examined question. The practical solution has been to apply the rules, but without much analysis as to why. Opinion was divided in the drafting and negotiation that led to the Vienna Convention as to what the text should say, if anything, about political instruments. See Thomas D. Grant, “The Budapest Memorandum of December 5, 1994: Political Engagement or Legal Obligation?” (2014) 34 *Polish Ybk. Int’l L.* 89.

themselves as among all States" (emphasis added). Thus the Final Act drew a link between "human rights and fundamental freedoms" and "friendly relations and co-operation" among all States; and also between "equal rights and self-determination" (with its at least implicit domestic dimension) and the same. This did not declare in terms that respect for human rights was indispensable to the preservation of the territorial settlement. It did however reflect that rights and the general public order do not exist in mutual isolation. The Decalogue in these clauses tied them together.

A Twofold Challenge to the Decalogue

As suggested above, the differences between East and West notwithstanding, certain common ground existed between the blocs when it came to their understanding of the Final Act. The territorial order of Europe was to be respected as settled. Coercive changes in the boundaries of the States of Europe were to be inadmissible. A difference existed as to the opposability of human rights obligations; some States rejected that others could call them to account for breaches of those obligations, but even the sceptics accepted that human rights belonged in some way to the public order of Europe.

A new situation emerged in 2014. This has three elements. First, there is a resurgence of the Soviet-era position that to call a State to account for human rights breaches is an act of unlawful intervention. Second, and distinct from the Soviet position, human rights as such now are challenged as inimical to the national legal and social order. And third—most radically—the territorial settlement is now said to be open to revision by unilateral act. Each of the elements may be further described by reference to Russia's recent practice, and then their interconnections considered.

Measures in Support of Human Rights as Unlawful Intervention

The first element in the new situation is that Russia and its allies reject that States may call on other States to respect human rights obligations. This has antecedents in the Soviet period, and its present reappearance (if it ever altogether went away) began some time before Russia's intervention in Ukraine.

In 2011, for example, Belarus said that sanctions against certain Belarusian companies for "human rights abuses related to political oppression in Belarus" were a violation of the Helsinki Final Act.¹⁴ In 2014, the president of the Russian

14 Annex to the letter dated 25 Aug. 2011 from the Chargé d'affaires a.i. of the Permanent Mission of Belarus to the United Nations addressed to the Secretary-General, 26 Aug. 2011: A/66/323.

Federation took States to task for raising questions about the treatment of minorities in Crimea: “[o]ne must not defend the interests of Crimean Tatars who live in Russia, in Crimea, from within the parliaments of other countries. This is just nonsense, it’s a joke.”¹⁵

It is important to be clear here about what the president was saying. He was addressing the decisions, then taking form in a number of States, to put sanctions in place through national legislation against Russia for its annexation of Crimea. Typically, when a State is subject to sanctions, it will protest that the sanctions are unlawful. It will not necessarily challenge that the rule which the sanctioning State claims it has violated is a real rule applicable to it. The sanctioned State might well accept that the rule exists and that it applies; but it will protest that either it has not violated the rule; or other rules exist which prohibit sanctions; or both. A considerable body of literature has developed on the question of the accordance of sanctions with other international obligations (in particular trade obligations).¹⁶ The Russian Federation now goes further than merely to reject the lawfulness of measures taken in response to the breach of Ukraine’s territorial integrity and attendant human rights breaches. It asserts instead that the rules that the sanctioning States have applied to Russia are not applicable to Russia at all; and, in any case, even if they are, that the sanctioning States had no right to take steps in response to a breach.

This is not the first time that a State has said that human rights are a matter of domestic jurisdiction—and that criticism of breaches of human rights constitutes an unlawful intervention. The East Bloc States, when called upon to answer for human rights violations, referred to Principle VI of the Final Act – “Non-intervention in internal affairs”—almost from the start. The U.S.

15 <http://www.reuters.com/article/2014/05/16/us-ukraine-crisis-crimea-tatars-idUSBREA4F0LS20140516>.

16 See especially Martin Dawidowicz, *Third-Party Countermeasures in International Law* (forthcoming, Cambridge University Press). See also Maarten Smeets, “Conflicting Goals: Economic Sanctions and the WTO,” (2000) 2(3) *Global Dialogue*; Peter Lindsay, “The Ambiguity of GATT Article XII: Subtle Success or Rampant Failure?” (2003) 52 *Duke L.J.* 1277; Alan S. Alexandroff & Rajeev Sharma, “The National Security Provision—GATT Article XXI,” in Patrick F.J. Macrory, Arthur E. Appleton & Michael G. Plummer (eds.), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer: 2005) 1571; Raj Bhala, “National Security and International Trade Law; What the GATT Says, and what the United States Does,” (1998) 19 *U. Penn. J. Int’l Econ. L.* 263. As to countermeasures in investment law, see Kate Parlett, “The application of the rules on countermeasures in investment claims: visions and realities of international law as an open system” in Christine Chinkin & Freya Baetens (eds.), *Sovereignty, Statehood and State Responsibility. Essays in Honour of James Crawford* (forthcoming Cambridge: Cambridge UP, 2014) 389.

ambassador responsible for the CSCE process observed in 1977 that “the mere raising of matters related to human rights” led to objections “on the grounds that such discussion was interference in their internal affairs and thus was in violation of Principle VI.”¹⁷ The objections were sometimes sharp. Czechoslovakia, for example, called the Helsinki monitors in Czechoslovakia “counter-revolutionaries” and said that it failed to understand why a Western government “continued to prefer to accept the bleatings of the discredited Charter 77 group and to ignore the widespread popular reaction against them in Czechoslovakia.”¹⁸ So resistance to the application of human rights rules is nothing new.

It is submitted here, however, that the turn against human rights in the Russian Federation today is not just a reversion to a familiar argument, even as it contains some of the same reasoning. In the view that seems to be emerging, the human rights system as such is to be rejected. Moreover, in that view, the human rights system poses a threat that cannot be addressed by domestic measures alone. The present turn in Russia is taking place in tandem with a shift in international policy as well.

Rejecting Human Rights as Such

The president of the Russian Federation, in his address to the Federal Assembly in December 2013, made “culture, civilisation and human values” his principal theme. According to the president,

Today, many nations are revising their moral values and ethical norms, eroding ethnic traditions and differences between peoples and cultures. Society is now required not only to recognise everyone’s right to the freedom of consciousness, political views and privacy, but also to accept without question the equality of good and evil, strange as it seems, concepts that are opposite in meaning. This destruction of traditional values from above not only leads to negative consequences for society, but is also essentially anti-democratic, since it is carried out on the basis of abstract, speculative ideas, contrary to the will of the majority, which

17 Secretary of State to U.S. Embassy (Belgrade), 3 Dec. 1977 (Unclassified), D770448-0887 (information letter to NGOs on CSCE meeting in Belgrade quoting U.S. ambassador’s observations).

18 U.S. Embassy (Stockholm) to Department of State, 22 Feb. 1977 (Confidential), D770662-0471, p. 3, para. 3. Cf. U.S. Embassy (Prague) to Department of State, 1 Feb. 1977 (Confidential), D770035-0731 (Foreign Ministry Protests USG Statement on Human Rights).

does not accept the changes occurring or the proposed revision of values.

We know that there are more and more people in the world who support our position on defending traditional values that have made up the spiritual and moral foundation of civilisation in every nation for thousands of years: the values of traditional families, real human life, including religious life, not just material existence but also spirituality, the values of humanism and global diversity.

Of course, this is a conservative position. But speaking in the words of Nikolai Berdyaev, the point of conservatism is not that it prevents movement forward and upward, but that it prevents movement backward and downward, into chaotic darkness and a return to a primitive state.¹⁹

Roy Allison in his 2013 study of Russia and international law traces the current backlash against human rights to the early 1990s.²⁰ This was by no means to exclude the existence of earlier antecedents. Nikolai Berdyaev, to whom the president referred, was a writer expelled from Russia by the Bolsheviks in the 1920s. Berdyaev's works espoused Orthodox Christianity and Russian culture and argued that Western political ideas could not meet the needs of Russian society.²¹ The president reportedly instructs regional governors to read Berdyaev.²²

The president's address in December 2013 was a manifesto of Berdyaevian principles. This was not an exercise in the history of philosophy. The president appropriated Berdyaev's ideas (or at least Berdyaev's name) for modern political, and perhaps legal, purposes. The president posited an antagonistic relation between "traditional values... the values of traditional families, real human life, including religious life", on the one hand, and "abstract, speculative ideas", on the other. What those ideas might be the president did not say, but what he had

19 Presidential Address to the Federal Assembly, 12 Dec. 2013: <http://eng.kremlin.ru/transcripts/6402>.

20 Roy Allison, *Russia, the West and Military Intervention* (Oxford: Oxford University Press, 2013) 18. And also in respect of democracy promotion, *ibid.*, 110, 133–138.

21 Berdyaev's political career has been described as one of conversion "from Marxism to 'Christian Socialism.'" Edward B. Richards & William R. Garner, "The Political Implications of Nicholas Berdyaev's Philosophy," (1970) 31 *J. History of Ideas* 121, 125. He did most of his work in exile in the West: Nicholas Zernov, "Berdyaev," (1948) 27 *Slavonic & East Eur'n Rev.* 283, 284; and is said to have believed the "Russian idea" to be "the very antithesis" of a Western—in particular German—idea: Nikolai P. Poltoratzsky, "The Russian Idea of Berdyaev," (1962) 21 *Russian Review* 121, 123.

22 http://philosophynow.org/issues/101/News_March_April_2014.

in mind was implicit. The president identified “global diversity” as a desirable goal, which he placed in opposition to other forms of diversity. By “global diversity,” the president meant that nations or national groups are to be favored over individuals; national cohesion is to take precedence as against the modern international legal order. The president said that more or less organized forces exist which are “eroding ethnic traditions and differences between peoples and cultures” and “revising... moral values and ethical norms.” These are the supposed forces against which a new programme in Russia is emerging. Under that programme, the rights of the individual would yield to community rights. Personal identity would be shaped first by national identity. The legal implication is that international human rights rules should be curtailed, that their inroads into national jurisdiction should be reversed. National jurisdiction, in the emerging programme, is to impose itself with new force.

Representatives in the Russian legislature and semi-official individuals had been more explicit, suggesting, for example, that Russia should quit the European Convention on Human Rights.²³ Russia’s representatives in the UN and European human rights institutions have indicated the direction of change for some time.²⁴ The change does not arise in an historical vacuum; there is the practice of East Bloc States during the Cold War which rejected Western criticism of their human rights practices. It is submitted here, however, that the present position is qualitatively different. It is not merely a rejection of outside scrutiny. Nor is it the selection of one set of international human rights (e.g., economic rights) in preference over another (e.g., political rights). It is instead the rejection wholesale of the human rights project—and its replacement with an historically-based concept of national identity.

23 E.g., Ilya Kharlamov: Vaughne Miller, “Russia and the Council of Europe,” Briefing Note, UK House of Commons, International Affairs and Defence Section, Aug. 4, 2014 (Standard Note: SN/IQ/6953) pp. 14–15.

24 Russia has reacted in particular against the international scrutiny of legislation concerning “propaganda of homosexuality.” As to the scrutiny, see the determination by the Human Rights Committee of a breach by the Russian Federation of Art. 19, para. 2, of the ICCPR: *Fedotova v. Russian Federation*, Communication No. 1932/2010, CCPR/C/106/D/1932/2010, Nov. 19, 2012; and by the ECHR of breaches of Arts. 11, 13, and 14 of the European Convention: *Alekseyev v. Russian Federation*, Applications Nos. 4916/07, 25924/08, 14599/09, Judgment, Oct. 21, 2010. See also Committee on the Rights of the Child, Concluding observations on the combined fourth and fifth periodic reports of the Russian Federation, Feb. 25, 2014: CRC/C/RUS/CO/4-5, pp. 6, 14, paras. 24, 55; and Statement by the Spokesperson of European Union High Representative Catherine Ashton on LGBT rights in Russia, June 20, 2013, A 338/13. See also PACE res. 1948 (2013), June 27, 2013, paras. 6–7.

To be sure, there is an element of domestic political theatre to the international law positions that Russia now espouses. The cultural arguments in particular would appear to have the domestic audience in mind more than international jurists. Nevertheless, this element of Russia's position, too, has antecedents in earlier international law positions. The USSR and other East Bloc States, together with the Non-Aligned States, in 1980 and 1981 influenced the drafting of a Declaration on the inadmissibility of intervention and interference in the internal affairs of States.²⁵ Against the objections of Western States, the Declaration purported to define intervention (in the sense of an unlawful act) as embracing conduct that heretofore had not been understood as having anything to do with intervention. Included in the definition were provisions asserting that "cultural interests and aspirations" of a State could be protected by the State as against "information" and "mass media" from other States—on the ground that these could constitute an unlawful intervention.²⁶ Modern international law prohibits a State from using force or a threat of force to get another State to accept a cultural system. The ICJ in *Military and Paramilitary Activities* affirmed this in its famous statement about non-intervention: one of the matters in which each State is permitted to decide freely is "the choice of a... cultural system."²⁷ Russia's position today, however, is a return to the 1981 position—which met heavy objections at the time.²⁸ If accepted, it would be a hypertrophy of the right indicated in the *Nicaragua* judgment. A State has a right to choose its cultural system; it does not have a right to use force and a threat of force to create a protective barrier against lawful international dialogue in matters of culture and human rights. Herein, Russia's position in 2014 both recapitulates the Cold War Soviet view that the law of human rights constitutes an unlawful intervention and posits another view that had been anathema to the Soviet Union at that time: it says that a State may overturn a settled boundary by *dictat*.

The Rejection of the Territorial Settlement

The third element in Russia's shift in position in 2014 is to ignore the territorial settlement as central to public order. The USSR for decades had sought to

25 GA res. 36/103, 9 Dec. 1981, Annex.

26 See especially parts I(c) and II(j) of the 1981 Declaration.

27 *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States*), Judgment, 27 June 1986, ICJ Rep 1986 p. 14, 108 (para. 205).

28 A/36/PV.91, 9 Dec. 1981 (120–22:6). For a detailed account of the discussions in the First Committee, see Thomas D. Grant, "The Yanukovych Letter: Invitation and the Limits of Intervention," (2015) 2 *Indonesian J. Int'l & Comp. L.* 281.

solidify the boundary regime of Europe. This arguably was the main goal of Soviet foreign policy; at the very least it was one of Soviet foreign policy's principal strands. The Russian Federation after the emergence of new States in the former space of the USSR repeatedly and in numerous instruments and forums reaffirmed the territorial settlement. The annexation of Crimea in March 2014 thus ruptured a consistent practice which had been of seventy years' duration.

The Russian Federation's argument in 2014 was that Western interventions of the post-Cold War era opened the door to the forcible annexation of territory. This argument encounters the initial—and fatal—problem that no Western intervention in the modern era entailed the seizure of territory and its annexation to the intervening State.²⁹ It falls here to consider another matter: the linkage between the territorial *irredentism* that Russian foreign policy now pursues and the rejection of human rights. Before turning to the linkage, a word is in order about Kosovo, an intervention which Russia claims opened the door to its present policy.

Kosovo in Russia's Legal Argument

From the start, Russia and its surrogates referred to Kosovo in connection with the territorial changes being imposed on Ukraine. The Declaration of Independence by putative authorities in Crimea on 11 March 2014, for example, alluded to a “confirmation of the status of Kosovo by the United Nations International Court of Justice.”³⁰ The ICJ in the *Kosovo* advisory opinion, in truth, did nothing to confirm (or impugn) the “status of Kosovo”—except to observe that the Security Council, by SC resolution 1244 (1999), had established an *interim* arrangement, meaning that the Council recognized that the situation as of 1999 was not permanent; and that under that resolution “the specific contours, let alone the outcome, of the final status process were left open.”³¹ This was an international disposition, and one which had the support of the Russian Federation at the time, as well as the support (or at least acquiescence) of the other powers. No such disposition existed in respect of Crimea. As for the question which the Court did answer, this was much narrower than the status question. The question was whether a declaration of independence in respect of Kosovo had accorded with international law. The

29 See further Grant, *Aggression against Ukraine* (2015), Chapter 8.

30 http://www.rada.crimea.ua/news/11_03_2014_1.

31 *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion)*, Advisory Opinion, 22 July 2010, ICJ Rep. 2010 p. 403, 445 (para. 104).

Court had concluded that general international law had nothing to say about the matter.³²

The president of Russia also referred to the *Kosovo* advisory opinion. He referred to the “well-known Kosovo precedent—a precedent our western colleagues created with their own hands in a very similar situation.”³³ Some political scientists, considering the two situations, have said that the president was right: they were “very similar.” But this is unsustainable as a matter of politics or as a matter of law. Politically, the unilateral intervention by force in a State and the use of force to seize part of the territory of that State and attach it to one’s own is very different from establishing an international trusteeship over a territory.³⁴ It is legally very different as well.

Even if the fate of the territories had been the same—if, *quod non*, one of the NATO States had declared Kosovo a lost patrimony and annexed it; or if a multilateral administration had been installed in 2014 in Crimea—the circumstances surrounding the intervention; and the circumstances surrounding the separation of territory from the existing State were entirely dissimilar. First, those circumstances in Crimea were one and the same: Russia intervened and separated the territory from Ukraine at once. Kosovo, by contrast, had been the concern of a multilateral intervention in 1999; and remained a juridical unit of Serbia for close to a decade thereafter. None of the intervening States or their organizations (NATO and afterwards the EU) claimed its separation during that time. As for the international trusteeship, this resulted from different acts performed by different actors. It was not a single package deal presented by an intervening State.

Second, the situations in the two territories prior to intervention were starkly different. In Crimea, there had been no sign of serious difficulty—certainly no sign sufficient to draw the formal attention of any international institution.³⁵ In Kosovo, by contrast, the difficulty had escalated over a decade, the first crisis in constitutional order to attract international concern having

32 CJ Rep. 2010 at p. 438 (para. 84).

33 Address of the president of the Russian Federation, March 18, 2014: <http://eng.kremlin.ru/transcripts/6889>.

34 See generally Bernard Knoll, *The Legal Status of Territories Subject to Administration by International Organisations* (Cambridge: Cambridge UP, 2008); Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford: Oxford UP, 2008).

35 Russia itself in the Universal Periodic Review the year before had had nothing to say about the treatment of Russian-speaking persons in Crimea: HRC, Report of the Working Group on the Universal Periodic Review, Ukraine, Dec. 20, 2012, para. 28: A/HRC/22/7, p. 6. See further Grant, *Aggression against Ukraine*, Chapter 1.

occurred in 1989, and a wholesale collapse of public order at the hands of the central government occurring in 1998. The assessment of the situation was not subject to real controversy; a range of States arrived at the same assessment—and so did the main multilateral institutions which were seized of the matter. By contrast, only the intervening State alleged that a crisis existed in Crimea.

Third, the eventual separation of Kosovo—years after the intervention—resulted from the repeated failure of negotiations and other dispute settlement mechanisms to achieve a settlement within the constitutional framework of Serbia. By contrast, barely a word was exchanged, if even that, between the putative authorities of Crimea and the central government of Ukraine before the declaration of independence. A further striking fact in the late days of the search for a settlement in Serbia was Serbia's abrogation of the legal guarantees that had been a basic requirement for a settlement.³⁶ Ukraine in the days of crisis surrounding Crimea, by contrast, enhanced the guarantees for minority languages.³⁷

The intervention in Kosovo was not by one State; it was by many. The understanding of the facts that led them to intervene was not formed by those States alone; it was formed by the main central institutions of the international system. As for the separation of one part of Serbia to form a new State, this was not carried out by another State; it was impelled by the actions of Serbia itself; and the new State did not emerge at the instant of intervention but through a long course of development led by the people concerned.

There is also the contrast in international effects between Kosovo's emergence and the forced territorial changes now underway along Russia's borders. The emergence of Kosovo, like the emergence of any new State on the territory of an old one, has involved the creation of a new international border within what had been one State, not the change of an existing international border—i.e., an existing border between two States. The developments in Serbia that took place between 1999 and 2008, in other words, were confined within the

36 See Serbia's "Platform on the future status of Kosovo and Metohija" of 5 Jan. 2006, about which see Kosovo advisory proceedings, Written Statement of the United Kingdom, 17 April 2009, p. 59 para. 3.47; and the Constitution of Serbia adopted on 8 Nov. 2006, removing most guarantees of autonomy: *ibid.*, p. 61, para. 3.51, quoting Council of Europe, European Commission for Democracy through Law (Venice Commission), Opinion No. 405/2006, CDL-AD(2007)004, 19 March 2007.

37 See Note verbale dated March 19, 2014 from the Permanent Mission of Ukraine to the United Nations Office and other international organizations in Geneva addressed to the secretariat of the Human Rights Council, and Annex (Memorandum on the promotion and protection of the national minorities rights in Ukraine), March 20, 2014: A/HRC/25/G/19.

territory of that State. Indeed, one of the grounds for intervention in 1999 was to prevent the attacks upon the Kosovars from leading to the displacement of 2 million persons across borders and the likely long-term destabilization of several States in south eastern Europe. (This danger, too, was acknowledged by multilateral institutions).³⁸ By contrast, the changes that Russia seeks to entrench against Ukraine involve the overthrow of an international boundary, long recognized and to which Russia had never before legally objected. A domestic crisis in Serbia led to the emergence of a new State in that State's territory. In contrast to the forcible separation of Crimea, this did not infringe the international rights of another State.

Domestic crisis in Russia today, in contrast, evidently contributes to acts of external aggression. The relation between Russia's rejection of the territorial settlement and Russia's opposition to human rights now will be considered.

The New *Irredenta* and the Turn Against Human Rights

There are good analytic reasons for considering a State's foreign policy as a free-standing edifice—not as a structure with foundations in its domestic affairs. A practitioner of international law in particular has reason for taking a State's international legal positions at face value, not as manifesting other agendas. However, a wider appreciation of the development of a State's foreign policy, including its legal positions, may well prove elusive if it is taken in clinical isolation. It is to be considered that the development of Russia's irredentism—the annexationist policy which has thrown aside a long-standing tenet of Russian foreign policy—has something to do with Russia's domestic affairs.

More than one State has wrestled with how to balance the particularities of its culture, politics and law with the rules and with the more subtle influences that engagement in the wider world inevitably involves. Russia in recent years has placed emphasis on the particularities. It is not unique in shifting in that direction; other States have done so at times as well. What is distinct in Russia's emphasis is the drastic character of the steps that Russia now says must be taken to protect those particularities. A common theme winds its way through the new foreign policy and the new domestic policy of the Russian Federation. The theme is that unity amongst the people and their State must replace division if the security of the State is to be safeguarded. The domestic policy posits that individual rights and outside influences which promote those rights have grown so potent as to divide the community. The repeal of individual rights

³⁸ See, e.g., SC res.1239 (1999), May 14, 1999.

and the ejection of those influences thus are necessary to bring unity back to the State and its society.

The new foreign policy comes into sharper focus in light of this theme of unity against the foreign. The external policy which emerged in 2014 in Russia posits that geographic division of the community must similarly be reversed. Because unity will fail without ethnic cohesion, and because the main ethnic group comprising the State was divided among a number of States in 1990, the domestic moral-political programme (as articulated particularly in the December 2013 speech) is accompanied by territorial aims. Seen in this light, the annexation of Crimea in March 2014 is not only the precursor to further territorial acquisition but also a concomitant to changes in Russia's municipal legal order, and in particular to changes in how the municipal legal order relates to international law. The goal is a larger, more nearly self-sufficient State, encompassing all of its co-ethnics.

The State aims in this way to close itself off from legal and cultural influence from abroad. If the price of national cohesion is national isolation, then, in the new view, all the better to carve out a larger socio-economic—and territorial—space. If the State is to be an isolated and insular community, then better that it be larger than smaller. External borders will be redrawn so as to appropriate the resources which the State needs in order to control the society that it will recast. In short, Russia takes the modern concept of the border as relative and permeable and uses it to undermine the system of human rights that brought that concept to fruition.

This is not the only way in which Russia's new programme is turning the modern legal order back around on itself. It also employs the language of identity to attack legal rights, or, more particularly, to attack identity rights in their personal sense. In defence of one identity—the national identity as the State defines it—the State abrogates the rules protecting other identities. Writers who think about politics and jurisprudence have said that identity, when conceived as a property of a group or a culture, endangers other values. Identity in the group or cultural sense impinges upon individual rights. The loss of individual rights is a result that some have associated with the “monolithic character” of group identity.³⁹

The politics of identity equally may result in opposition between groups. Jeremy Waldron noted that one group often will think that another's solution to a given social or political problem “is silly or unholy or just plain wrong,” and

39 Daniel Weinstock, “Is ‘Identity’ a Danger to Democracy?” in Igor Primoratz & Aleksandar Pavković (eds.), *Identity, Self-Determination and Secession* (Aldershot: Ashgate, 2006) 15, 21, 22.

if group identity is the primary identity around which public life is organized then society will find it difficult if not impossible to reconcile such differences.⁴⁰ Waldron suggested (in 2000) that opposition between groups—which is inherent in identity politics—could have consequences at the international level, though he held out hope that it would not: “I don’t mean opposition in the sense that the cultures are *necessarily* competing for territory, power or resources...”⁴¹ With the territorial settlement as deeply entrenched as it was after 1945, it was reasonable to suppose that identity politics indeed would not lead to territorial conflict. But the settlement now has weakened. The risk now presents itself that competition over identity will equate to competition for power and resources as ascribed by the territorial limits of the State.

Some observers have questioned whether the shift toward cultural conservatism and identity politics in Russia’s domestic policy is sincere.⁴² Whether or not it is sincere, to connect the act of territorial aggression of March 2014 to that shift is scarcely speculative. The connection is reflected in Russia’s stated position. When the president of the Russian Federation addressed the coming annexation of Crimea, he said that “[s]tandards were imposed on these nations that did not in any way correspond to their way of life, traditions, or these peoples’ cultures.”⁴³ He was referring to Russia as well as to Ukraine and Georgia. The Russian Federation is clear that it sees the modern human rights project as justification for its present campaign. Opposition to human rights belongs to a more general argument that Europe, in the form of the European Union, and the Euro-Atlantic community, in the form of NATO,⁴⁴ have constrained Russia’s strategic space and that Russia thus, for purposes of cultural and civilizational self-preservation, has a right to push back.

International law might seem to have little or nothing to say in response to such a claim. John Mearsheimer, prominent among writers to take such a position, said that “such liberal principles as the rule of law, economic interdependence, and democracy” have clouded Western strategy, which would do better

40 Jeremy Waldron, “Cultural Identity and Civic Responsibility” in Will Kymlicka & Wayne Norman (eds.), *Citizenship in Diverse Societies* (Oxford: Oxford UP, 2000) 155, 162.

41 Id. (emphasis added).

42 Marlene Laruelle, “Conservatism as the Kremlin’s New Toolkit: an Ideology at the Lowest Coast,” 138(8) *Russian Analytical Digest*, Nov. 8, 2013, p. 4.

43 Address of the President of the Russian Federation, 18 March 2014: <http://eng.kremlin.ru/transcripts/6889>.

44 The EU’s Georgia Mission referred to the NATO dimension, which it said “deeply irritated” Russia: *Georgia Report*, vol. II, p. 25. The Mission was mandated by Council decision “to investigate the origins and the course of the conflict in Georgia”: Art. 1, para. 2, & n. 2, Council Decision 2008/901/CFSP, Dec. 2, 2008.

if it embraced a realism free from “liberal delusions.”⁴⁵ But Russia has articulated legal arguments. In particular, Russia posits a supposed infringement of national sovereignty by the modern system of human rights. Russia says that it holds a right of self-defence against a supposed onslaught of international values. International law certainly has something to say about this.

And international law has a simple answer. A State is free to adopt the commitments it chooses. Once adopted in legal form, a commitment is just that: a binding limit which others may oppose to the State if it acts in breach. To oppose the obligation to the obligee is not an intervention; it is a normal part of the interaction of States in an order governed by law.

Russia, however, goes a step further. Its position is that the human rights project is not simply a matter of treaty obligations—or even treaty in combination with a customary international law of human rights. In Russia’s view (as discernible so far), the system of human rights is an encroachment on States, an exertion of power by the West in the guise of law. Seen in this light, human rights is a provocation which Russia affirms it will resist.

The difficulty here is not that Russia might withdraw from, or even breach, widely-adopted treaties. The world can live with the defection of a State from the human rights project; incomplete participation has been a reality of human rights from the start. The difficulty is more serious than that. Russia now posits a right to determine whether, and to what extent, other States participate in that project as well—and to enforce its own determination in that regard.

In the case of Ukraine, this has equated, in Russia’s view, to a right to dismember the State. Modern international law scarcely can conceive of one State having such a right against another. The qualifier “scarcely,” if justified here at all, is justified in only one regard. The ICJ in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons* considered existential threats. It left open the possibility that extreme measures would be admissible “in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.”⁴⁶ The use of nuclear weapons (the extreme measure that concerned the Court) is otherwise understood to be incompatible with international law, for the reason that the use of weapons of such magnitude would destroy the core values of the legal order.⁴⁷ What the Court suggested was that, even so—even given the system-destroying effects of a nuclear attack—the

45 John J. Mearsheimer, “Why the Ukraine Crisis is the West’s Fault. The Liberal Delusions That Provoked Putin,” (Sept./Oct. 2014) *Foreign Affairs*.

46 Advisory Opinion, July 8, 1996, ICJ Rep. 1996 p. 226, 266, para. 105(2)(E).

47 A point evidently shared by dissenters from the Advisory Opinion: see, e.g., Dis. Op. Judge Schwebel, ICJ Rep. 1996 at p. 320; Dis. Op. Judge Higgins, ICJ Rep. 1996 at p. 587.

use of such a weapon might be open to a State, when that State itself faces the danger of extinction. Russia today posits a right of resistance such as a State might exercise at a time of existential threat

Nuclear weapons have not been threatened or used to date (though Russia has invoked its nuclear weapons repeatedly since March 2014).⁴⁸ The force which has been threatened and used is nevertheless against a core value—indeed, the value which Russia itself had so vigorously asserted since the foundation of the post-1945 legal order and which was further entrenched in the Helsinki Final Act. Russia has threatened, and in fact disrupted, the territorial settlement between States. International law contains a “fundamental right of every State to survival,”⁴⁹ but, if this entails the right to destroy another State or to abrogate the system of inter-State relations that has maintained the peace between States, then that would only be under extraordinary circumstances. Russia posits that such circumstances now exist. In Russia’s postulate, international human rights are an existential threat to the State and its people. Human rights, in that view, divide society and destroy the values that are indispensable to national and personal existence, and, accordingly, the divisions must be mended, the rights repelled. Moreover, in that view, the act of repair cannot succeed if it is restricted to Russia in the State’s present territorial limits.

Modern international law rejects the notion that a State may use force to establish a sphere of influence;⁵⁰ and a sphere of influence, though it may lawfully come into being as a social fact through trade, cultural transmission, and other peaceful means, is not a legal category.⁵¹ It is true that conventional provisions

48 See, e.g., Talyer, *Foreign Policy*, Sept. 4, 2014; Sharkov, *Newsweek*, Oct. 16, 2014.

49 *Ibid.*, p. 263, para. 96.

50 See Charter of Economic Rights and Duties of States, Chapter I (I), GAR 3281 (XXIX), Dec. 12, 1974. See also Letter dated 11 January 1988 from the Permanent Representative of the USSR to the United Nations addressed to the Secretary-General, with Answers by the General Secretary of the Central Committee of the Communist Party of the Soviet Union, A/43/88—S/19427, Annex, p. 3. The rejection of spheres of influence as a legal institution goes at least as far back as Franklin D. Roosevelt in the formation of the UN: see Michael Howard, “The Historical Development of the UN’s Role in International Security” in Adam Roberts & Benedict Kingsbury (eds.), *United Nations, Divided World* (Oxford: Clarendon Press, 1993) 63. This was not least of all a response to Nazi international law theory, about which see generally Vagts’ magisterial study, Detlev F. Vagts, “International Law in the Third Reich,” (1990) 84 *AJIL* 661 and in respect of the sphere of influence theory in particular *ibid.*, 684.

51 See the use of the term, e.g., by Anne Orford, “Moral Internationalism and the Responsibility to Protect,” (2013) 24 *EJIL* 83, 91. Its use in ICJ practice is limited to historical examples. See e.g., reference to the British and Dutch spheres of influence in Johor: *Pedra Branca/Pulau Batu Puteh*, ICJ Rep. 2008 at 25, 41–49, paras. 21, 89–116; reference to British and German spheres of influence in South-West Africa: *Kasikili/Sedudu Island (Botswana/*

exist which provide for measures to protect the cultural heritage of a State.⁵² Human rights provisions have their savings clauses in deference to the rights of States.⁵³ But on no international law principle may a State annex a *cordon sanitaire* against external influences on its culture. In no reading of any instrument, and on no application of customary international law, may a State carry out armed intervention because it wishes to arrest cultural change. When the International Court referred to the Final Act in the *Nicaragua* case, it was to recall that this “envisage[s] the relations among States having different political, economic and social systems on the basis of coexistence among their various ideologies.”⁵⁴ It follows that choices about the development of political, economic and social systems are not to be pre-empted by coercion. The unity that Russia now seeks, however, is scarcely compatible with all of its neighbours’ choices.

Conclusion

Russia’s acquisition of territory by force in 2014 was intertwined with rejection of the international human rights project. Invasion and annexation went hand

Namibia), Judgment, Dec. 13, 1999, ICJ Rep. 1999 p. 1045, 1054, para. 13. For a definition, see *Western Sahara*, Advisory Opinion, ICJ Rep. 1975 at 56, para. 126. As to spheres of influence in present-day Russian thinking, see Alexander Benard & Paul J. Leaf, “Modern Threats and the United Nations Security Council,” (2010) 62 *Stanford L. Rev.* 1395, 1433.

52 Though cultural protective measures are subject to international obligations, including human rights obligations, e.g., Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005, entered into force, March 18, 2007, Art. 2, para. 1; Art. 5, para. 1: 2440 UNTS 311, 348, 351; and trade law obligations, as to which see, e.g., *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Appellate Body Report, WT/DS363/R, Dec. 21, 2009, paras. 250–337. As to U.S. concerns over the abuse of governmental control over cultural life, see Rostam J. Neuwirth, “United in Divergency’: A Commentary on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions,” (2006) 66 *ZaöRV* 819, 851–853.

53 See, e.g., European Convention, Nov. 4, 1950, Art. 10, para. 2. The ECtHR has applied the paragraph 2 exception conservatively. Thus restrictions on political expression, where the expression nevertheless was said to relate to the integrity of the State, may constitute breaches of Art. 10. See, e.g., *Erdogdu and Ince v. Turkey*, Judgment, July 8, 1999; *Sürek and Özdemir v. Turkey*, Judgment, July 8, 1999; *Sürek v. Turkey (No.4)*, Judgment, July 8, 1999. The exception nevertheless protects certain government restrictions: see, e.g., *Sürek v. Turkey (No. 1)* and *Sürek v. Turkey (No. 3)*, July 8, 1999.

54 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, ICJ Rep. 1986 p. 14, p. 133, para. 264.

in hand with declarations that Russia will not tolerate the further entrenchment of human rights in Russia. To exclude the modern development of the law in one country, however, is not the full extent of Russia's claim. Russia has made clear that it will exert its power to expand its territorial sphere beyond its recognized borders. The connection between Russia's rhetoric in opposition to human rights and Russia's acts of territorial aggrandizement merits careful consideration.

Among the effects of Russia's policies, internal and external, since the start of 2014 are these. The old Soviet dedication to territorial security in Europe has given way to revisionism—that is to say, from a position that held any change of European boundary to be inimical to peace and security, the Russian Federation now adopts a policy of territorial aggrandizement by force and threat. And from the Soviet position that human rights merited acknowledgment at the international level (even if largely in political form rather than legal substance), the Russian Federation now identifies the rejection of international human rights as a centrepiece of its domestic political programme.

When it adopted the Helsinki Final Act, the USSR sought another assurance that the boundaries of States in Europe, settled in 1945, would remain so. The West hoped to promote human rights and related legal processes in the USSR and other East Bloc countries. The Final Act in this way embodied two policy objectives. The objectives were not shared equally by East and West. The West recognized the importance of the principle of settled borders (notwithstanding concern that the Final Act might imply a relaxation of the non-recognition of the unlawful annexation of the Baltic States). To the USSR, however, the territorial provisions were indispensable; the Final Act would not have been acceptable to the USSR without them. They were the *raison d'être* behind Soviet support for the diplomatic process and the resultant adopted text.

Constituents of a system configure its public order through compromises and practice. The Helsinki Final Act, to the extent that it was an instrument of the public order of the Euro-Atlantic world during the Cold War, reflected the two main policy objectives of the States which adopted it. The Russian Federation since the start of 2014 has challenged both of these. A new domestic politics of reaction against international human rights is now well developed, but as yet not far enough advanced to indicate its endpoint. The new international policy, too, would appear not yet to have run its course—but its effects to date have already done damage to the European security architecture—and to Russia's international standing—that will be difficult to repair. The violence of Russia's rejection of the territorial dimension of the Final Act suggests a wider disregard for the system of which it forms part.

The present essay has suggested that Russia's domestic political shift—the shift against international human rights—has close, if imprecise, connections to Russia's policy of external expansion. The old Soviet concern that the human rights project might challenge the prerogatives of the State over its domestic affairs now has been married to a new disregard of the systemic effects of the forcible change of borders. A long-standing resistance against the progressive development of international law thus now exists together with a territorial revisionism that it had been a pillar of Soviet policy to reject.

Some writers have suggested that the turn in Russia's policies means a reawakening of the Cold War:

[The situation in Crimea] seems to transport us back to past times when the superpowers did what they pleased and the others suffered what they must. The end of the Cold War, so we hoped, had ushered in a different era in which international law found greater respect. The post-9/11 years sowed doubts about this; now we're getting closer to certainty that the times haven't changed that much.⁵⁵

But the superpowers never quite “did what they pleased.” For one thing there was the mutually-reinforcing balance that they had struck with nuclear weapons. A rational appreciation existed in both States that the consequences if that balance were disrupted could have been catastrophic.

And the Cold War was a period not of shrinking sovereign rights but of a radical expansion of the communities which possessed those rights. Decolonization took place during this period of geopolitical rivalry, and the two Cold War protagonists, far from obstructing independence, competed to prove which was its better champion. Compared to the 19th century when the inhabitants of colonies and protectorates were subjugated one by one by the European empires in their untrammelled expansion, this was not a time in which non-European peoples “suffered what they must.” To the contrary, it was a time of State creation on an epic scale and a time of deepening equality under law.

It was also a time of settled boundaries. Whatever the sins of the Cold War superpowers, territorial aggrandizement was not one of them. And abstention in that respect—abstention from exerting military power in order to expand territorial power—lay at the foundation of the stability that characterized the period after 1945. That stability continued after 1989.

55 Nico Krisch, “Crimea and the Limits of International Law,” 10 March 2014, *EJIL Talk!*

In view of the considerations set out above, the shift in Russia's foreign and domestic policy in 2014 means something very different than a return to the Cold War. A recrudescence of rivalry between the main parties to the Cold War appears likely—but this will be without the stabilizing verities that had placed limits on their means and ends. The public order of which the Helsinki Decalogue formed a salient part could live with ambivalence about human rights if territorial stability was its lodestone. It is unclear what order will be left if both are rejected.

About the Author

Thomas D. Grant is a public international lawyer and writes on a range of topics in the field. His book *Aggression Against Ukraine: Territory, Responsibility and International Law* was published in June 2015.

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