SECURITY AND HUMAN RIGHTS MONITOR

Boundaries and Rights after 2014

Helsinki at a Crossroads

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Abstract

In its Decalogue, the Final Act of the Conference on Security and Co-operation in Europe reflects the centrality of the territorial settlement to public order in Europe. It also reflects the hope that human rights will become more deeply entrenched across all state parties to the Act. The intertwining of territorial provisions and human rights was no mere coincidence: it was at the heart of the compromise that enabled the parties to agree to the text as adopted. The events of 2014—in particular the forcible seizure of Ukrainian territory—raise questions as to the continuing vitality of the compromise that was reached in 1975 and long maintained. The new foreign policy of the Russian Federation, by 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 each other must 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 Act[2] reflects a twofold concern of its parties. It reflects their wish to preserve the stability of the territorial settlement among Europe's states and their wish to establish at least a basic standard of human rights subject to the prerogative of every state with respect to matters within its domestic jurisdiction. 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 that 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 with respect to territory and human rights. It is timely to recall these provisions, given the change in politics and law in Russia and in light of Russia's new policy of territorial aggrandizement. The essay then considers 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 programme relates to Russia's present foreign policy.[3] The essay concludes with observations about the Cold War and the very different international relations that now appear to be emerging.

The Territorial Settlement and Human Rights in the Final Act

The incorporation into the Helsinki Final Act of provisions that acknowledge the primary importance of territorial stability and acknowledge at least a basic regime of human rights was a compromise. The West, though also understanding that stable boundaries are 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.

2 Final Act of the Conference on Security and Co-operation in Europe, 1 Aug. 1975: reprinted at1975, 14 ILM 1292.

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

It indeed had been a Soviet idea, expressed starting in the 1950s, that Europe needed a general instrument to affirm territorial integrity and the inviolability of frontiers.[4] 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 adopted text.[5]

The text 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. Human rights 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". By 1975, self-determination in the colonial setting had an international aspect (colonial peoples being by definition outside the state's national boundaries); the international aspect developed after the adoption of the Charter 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".[6] The internal aspect is reflected in the drafting history of Principle VIII.[7] As a number of jurists and policy-makers since have also done,[8] 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

4 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.

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

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

7 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 ConflictResolution", 2013, 24 Security and Human Rights 392. With respect to self-determinationand 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.

8 See, e.g., Strobe Talbot, 'Self-Determination in an Interdependent World', 118 Foreign Policy 152, 2000, pp. 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', 603 Annals of the AmericanAcademy of Pol. and Soc. Science 2006, pp. 24, 25–26; Frederic L. Kirgis, Jr., 'The Degrees ofSelf-Determination in the United Nations Era', 88 Amer. J. Int'l L. 1994, pp. 304, 307–308. For an earlier iteration of the linkage see Quincy Wright, 'Human Rights and Charter Revision', 296 Annals of the American Academy of Pol. and Soc. Science 1954, pp. 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 throughfree elections or other manifestation of consent of the governed, and such consentcannot 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.

which no popular self-determination was conceivable.[9]

In 1988, this was a controversial extension of the idea. It remains so.[10] Undemocratic regimes may be widely condemned, but it remains far from obvious that general international law entails an obligation to condemn them.[11]

Whatever international law says or does not say about democracy, the larger point is sound. The Helsinki Final Act contains provisions to address territorial stability. It also contains provisions to address human rights. The presence of both in the instrument reflects 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",[12] 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 with respect to one matter (here, it was East Germany calling for most-favoured nation treatment), then it is dubious for that state to adopt a piecemeal approach with respect to others. The intertwining of the principles of the Final Act is reflected in the text (and in the travaux préparatoires),[13] and the parties—including those sceptical of the humanrights principle—acknowledged at least in a general way that the provisions of this instrument are to be interpreted in their context and in the light of the object and purpose of the instrument.[14] The Final Act is not a buffet from which each state is free to select the items it pleases while passing the others by.

In two clauses, the Final Act expressly indicates a relation between security and rights. In the fifth paragraph of Principle VII, the Final Act indicates 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, indicates 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 themselves as among all States" (emphasis added). Thus, the Final Act draws a link between, "human rights and fundamental freedoms" and between "friendly relations and co-operation" among all states. It also draws a link between "equal rights and self-

9 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, on the contrary, is in many cases frustrating, not realizing self-determination. JamesCrawford, 'Democracy in International Law', 64 Brit. Ybk. Int'l L. 113, 1993, pp. 127–128 (based on his Inaugural Lecture as Whewell Professor, 5 March 1993).

10 For a compilation of some of the main writings, see Richard Burchill (ed.), Democracy andInternational Law, Aldershot: Ashgate, 2006.

11 See especially, with citations to literature, Gregory H. Fox and Brad R. Roth, 'Democracyand International Law', 27 Rev. Int'l Studies 327, 2001, pp. 343–348.

12 Comments of Member States, organs of the United Nations, specialized agencies andother 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.

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

14 Which is not to say that the instrument was necessarily legally binding as a treaty. It waswidely understood not to be. See with citations to literature Jordan J. Paust, 'TransnationalFreedom of Speech: Legal Aspects of the Helsinki Final Act', 45 Law and ContemporaryProblems 53, 1982, pp. 55–57. Whether the rules of treaty interpretation are to be appliedwhen 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.

determination" (with its at-least implicit domestic dimension) and friendly relations. This does not say expressly that respect for human rights is indispensable to the preservation of the territorial settlement. It does, however, reflect that rights and the general public order do not exist in mutual isolation. The Decalogue in these clauses ties them together.

A Twofold Challenge to the Decalogue

As suggested above, 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 the idea that others could call them to account for breaches of those obligations, but even the sceptics accepted that human rights belong in some way to the public order of Europe.

A new situation emerged in 2014. This situation has three elements. First, there is a resurgence of the Soviet-era position that it is an act of unlawful intervention to call a state to account for human-rights breaches. 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; then their interconnections may be considered.

Measures in Support of Human Rights as Unlawful Intervention

The first element in the new situation is that Russia and its allies reject the idea 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 disappeared) 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" are a violation of the Helsinki Final Act.[15] In 2014, the president of the Russian Federation took states to task for raising questions about the treatment of minorities in Crimea: "One 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".[16]

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 protests that the sanctions are unlawful. It does not necessarily deny that the rule which the sanctioning state claims it has violated is a real rule that is applicable to it. The sanctioned state may well accept that the rule exists and that it applies, but it will protest that it has not violated the rule and/or that other rules exist which prohibit sanctions. A considerable body of literature has developed on the question of the accordance of sanctions with other

15 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.

16 http://www.reuters.com/article/2014/05/16/us-ukraine-crisis-crimea-tatars-idUSBRE-A4F0LS20140516.

international obligations (in particular, trade obligations).[17] The Russian Federation now goes further than merely rejecting 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 that even if they were, that the sanctioning states would have 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 human-rights breaches constitutes an unlawful intervention. The East Bloc States, when called upon to answer for human-rights violations, almost from the start referred to Principle VI of the Final Act: "Non-intervention in internal affairs". The U.S. 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".[18] 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".[19] 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, though 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 this view, the human-rights system poses a threat that cannot be addressed by domestic measures alone. The present turn in Russia occurs in tandem with a shift in international policy as well.

Rejecting Human Rights as Such

In his address to the Federal Assembly in December 2013, the President of the Russian Federation 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

17 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 and Rajeev Sharma, 'The National Security Provision—GATT Article xxi', in Patrick F.J. Macrory, Arthur E. Appleton and Michael G. Plummer (eds.), TheWorld Trade Organization: Legal, Economic and Political Analysis, Springer: 2005, p. 1571;Raj Bhala, 'National Security and International Trade Law; What the GATT Says, and whatthe 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 ChristineChinkin and Freya Baetens (eds.), Sovereignty, Statehood and State Responsibility. Essays inHonour of James Crawford, Cambridge: Cambridge up, 2014, p. 389.

18 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).

19 U.S. Embassy (Stockholm) to Department of State, 22 Feb. 1977 (Confidential), D770062-0471, 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).

> anti-democratic, since it is carried out on the basis of abstract, speculative ideas, contrary to the will of the majority, which 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.[20]

Roy Allison, in his 2013 study of Russia and international law, traces the current backlash against human rights to the early 1990s.[21] This is by no means to exclude the existence of earlier antecedents. The writer Nikolai Berdyaev, to whom the president referred, was expelled from Russia by the Bolsheviks in the 1920s. Berdyaev's works espouse Orthodox Christianity and Russian culture and argue that Western political ideas cannot meet the needs of Russian society.[22] The president reportedly instructs regional governors to read Berdyaev.[23]The president's address in December 2013 was a manifesto of Berdyaevian principles. It 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, "the values of traditional families, real human life, including religious life" on the one hand, and "abstract, speculative ideas" on the other.

What these ideas might be the president did not say, but what he had 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 favoured over individuals; national cohesion is to take precedence over the modern international legal order. The president said that more or less organized forces exist that 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 is to 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.

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

21 Roy Allison, Russia, the West and Military Intervention, Oxford: Oxford University Press, 2013, p. 18. And also with respect to democracy promotion, ibid., 110, 133–138.

22 Berdyaev's political career has been described as one of conversion "from Marxism to 'Christian Socialism.'" Edward B. Richards and William R. Garner, 'The Political Implications of Nicholas Berdyaev's Philosophy', 31 J. History of Ideas 121, 1970, p. 125. He did most of his work in exile in the West: Nicholas Zernov, 'Berdyaev', 27 Slavonic and East Eur'n Rev.1948, pp. 283–284. He 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 ofBerdyaev', 21 Russian Review i, 1962, pp. 121–123.

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

Representatives in the Russian legislature and semi-official individuals have been more explicit, suggesting, for example, that Russia should quit the European Convention on Human Rights.[24] Russia's representatives in the un and European human-rights institutions have indicated the direction of change for some time.[25] 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) over another (e.g., political rights). It is instead the wholesale rejection of the human-rights project and its replacement with an historically-based concept of national identity.

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 more than international jurists in mind. Nevertheless, this element of Russia's position also has antecedents in earlier international-law positions. In 1980 and 1981, the USSR and other East Bloc states, together with the non-aligned states, influenced the drafting of a declaration on the inadmissibility of intervention and interference in the internal affairs of states.[26] 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. The definition included provisions asserting that the, "cultural interests and aspirations" of a state could be protected by the state against "information" and "mass media" from other states on the ground that these influences constitute unlawful intervention.[27] 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 affirms 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".[28] Russia's position today, however, is a return to the 1981 position, which encountered heavy objections at the time.[29] 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 threat of force to create a protective barrier against lawful international dialogue in matters of culture and human rights. 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 was anathema to the Soviet Union at that time: that a state may overturn a settled boundary by diktat.

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24 E.g., Ilya Kharlamov and Vaughne Miller, 'Russia and the Council of Europe', Briefing Note,UK House of Commons, International Affairs and Defence Section, 4 Aug. 2014 (StandardNote: sn/iq/6953), pp. 14–15.

25 Russia has reacted in particular against the international scrutiny of legislation concerning"propaganda of homosexuality". As to the scrutiny, see the determination by the HumanRights 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/1932/2010,19 Nov. 2012; and by the ECtHR 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, 20 June 2013, A 338/13. See also pace res. 1948, 27 June 2013, paras. 6–7.

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

27 See especially Parts i (c) and II (j) of the 1981 Declaration.

28 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States),

Judgment, 27 June 1986, ICJ Rep. 1986 p. 14, 108 (para. 205).

29 a/36/pv.91, 9 Dec. 1981 (120–22:6). For a detailed account of the discussions in the FirstCommittee, see Thomas D. Grant, 'The Yanukovych Letter: Invitation and the Limits ofIntervention', (2015) 2 Indonesian J. Int'l and Comp. L. 281.

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. For decades, the USSR sought to 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. After the emergence of new states in the former USSR, the Russian Federation repeatedly and in numerous instruments and forums reaffirmed the territorial settlement. The annexation of Crimea in March of 2014 thus ruptured a consistent practice 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 has entailed the seizure of territory and its annexation to the intervening state.[30] 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".[31] In truth, the ICJ in the Kosovo advisory opinion 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 (i.e., the Council recognized that the situation as of 1999 was not permanent), and that "the specific contours, let alone the outcome, of the final status process were left open" under that resolution.[32] This was an international disposition, and one that 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 with respect to Crimea. As for the question the court did answer, this is much narrower than the status question. The question is whether a declaration of independence with respect to Kosovo accorded with international law. The court had concluded that general international law has nothing to say about the matter.[33]

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".[34] Some political scientists, considering the two situations, have said that the president was right: they are "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.[35] It is legally very different as well.

30 See further Grant, Aggression against Ukraine, 2015, Chapter 8.

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

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

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

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

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

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 Crimea in 2014—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, was 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 was no sign of serious difficulty—certainly no sign sufficient to draw the formal attention of any international institution.[36] In Kosovo, by contrast, the difficulty had escalated over a decade. The first crisis in constitutional order to attract international concern occurred in 1989, and a wholesale collapse of public order at the hands of the central government occurred in 1998. The assessment of the situation was not subject to real controversy; a range of states arrived at the same assessment—as did the main multilateral institutions that considered 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. In 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 is Serbia's abrogation of the legal guarantees that had been a basic requirement for a settlement.[37] Ukraine in the days of crisis surrounding Crimea, in contrast, enhanced the guarantees for minority languages.[38]

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 that was 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, 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.

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

37 See Serbia's 'Platform on the future status of Kosovo and Metohija' of 5 Jan. 2006, aboutwhich see Kosovo advisory proceedings, Written Statement of the United Kingdom, 17 April 2009, p. 59 para. 3.47. See also 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), OpinionNo. 405/2006, cdl-ad (2007)004, 19 March 2007.

38 See Note verbale dated 19 March 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), 20 March 2014: a/HRC/25/g/19.

The developments in Serbia that took place between 1999 and 2008, in other words, were confined to the 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 two 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.)[39] By contrast, the changes that Russia seeks to entrench against Ukraine involve the overthrow of an international boundary that had long been 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 to consider 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 to take a state's international legal positions at face value rather than 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. 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 has in recent years placed emphasis on the particularities. It is not unique in shifting in that direction; other states have also done so at times. 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: 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 that promote those rights have grown so potent as to divide the community. The repeal of individual rights and the ejection of those influences are thus 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 foreign influence. The external policy that 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.

39 See, e.g., SC res.1239, 14 May 1999.

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 it is 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 conception of border to fruition.

This is not the only way in which Russia's new programme is turning the modern legal order back 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 that protect other identities. Writers who think about politics and jurisprudence have said that identity endangers other values when it is conceived as a property of a group or a culture. 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.[40]

The politics of identity may also result in opposition between groups. Jeremy Waldron notes that one group often thinks that another's solution to a given social or political problem "is silly or unholy or just plain wrong". Thus, if group identity is the primary identity around which public life is organized, society will find it difficult if not impossible to reconcile such differences.[41] Waldron suggested (in 2000) that opposition between groups—which is inherent in identity politics—can have consequences at the international level, though he holds out hope that it will not: "I don't mean opposition in the sense that the cultures are necessarily competing for territory, power or resources…"[42] With the territorial settlement as deeply entrenched as it was after 1945, it was indeed reasonable to suppose that identity politics would not lead to territorial conflict. But the settlement now has weakened. The risk now is 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.[43] 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".[44] He was referring to Russia and 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-

40 Daniel Weinstock, 'Is 'Identity' a Danger to Democracy?' in Igor Primoratz and AleksandarPavković (eds.), Identity, Self-Determination and Secession, Aldershot: Ashgate, 2006, pp. 15, 21, 22.

41 Jeremy Waldron, 'Cultural Identity and Civic Responsibility' in Will Kymlicka and Wayne Norman (eds.), Citizenship in Diverse Societies, Oxford: Oxford up, 2000, pp. 155, 162.

42 Id. (emphasis added).

43 Marlene Laruelle, 'Conservatism as the Kremlin's New Toolkit: an Ideology at the Lowest Coast', 138(8) Russian Analytical Digest, 8 November 2013, p. 4.

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

Atlantic community, in the form of NATO,[45] have constrained Russia's strategic space and that Russia therefore has a right to push back for purposes of cultural and civilizational self-preservation,.

International law might seem to have little or nothing to say in response to such a claim. John Mearsheimer, prominent among writers to advance this position, has said that, "such liberal principles as the rule of law, economic interdependence, and democracy" have clouded Western strategy, which would do better if it embraced a realism free of "liberal delusions".[46] 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 that others may invoke against the state if it acts in breach. To invoke the obligation 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 of 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 that Russia intends to 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 equates, in Russia's view, to a right to dismember the state. Modern international law can scarcely 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".[47] 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.[48] What the court suggested is that, even so— even given the system-destroying effects of a nuclear attack—the use of such weapons might be open to a state that itself faces

45 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 'toinvestigate the origins and the course of the conflict in Georgia': Art. 1, para. 2, and n. 2, Council Decision 2008/901/cfsp, 2 December 2008.

46 John J. Mearsheimer, 'Why the Ukraine Crisis is the West's Fault. The Liberal DelusionsThat Provoked Putin', in Foreign Affairs, Sept./Oct. 2014.

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

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

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).[49] The force which has been threatened and used is nevertheless against a core value— indeed, it is against the value Russia itself so vigorously asserted after the foundation of the post-1945 legal order and that 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".[50] 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, however, then this right exists only 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 this view, divide society and destroy the values that are indispensable to national and personal existence. Accordingly, the divisions must be mended, the rights repelled. Moreover, in this view, the act of repair cannot succeed if it is restricted to Russia, given the state's present territorial limits.

Modern international law rejects the notion that a state may use force to establish a sphere of influence;[51] 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.[52] It is true that conventional provisions exist that provide for measures to protect the cultural heritage of a state.[53] Human-rights provisions have their savings clauses in deference to the rights of states.[54] But on no principle of international law may a state

49 See, e.g., Tayler, Foreign Policy, 4 Sept. 2014; Sharkov, Newsweek, 16 October 2014.

50 ICJ Rep. 1996 at, p. 263, para. 96.

51 See Charter of Economic Rights and Duties of States, Chapter i (l), gar 3281 (xxix), Dec.12, 1974. See also Letter dated 11 January 1988 from the Permanent Representative of theUSSR 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 institutiongoes at least as far back as Franklin D. Roosevelt in the formation of the UN. See MichaelHoward, 'The Historical Development of the U N's Role in International Security' in Adam Roberts and Benedict Kingsbury (eds.), United Nations, Divided World, Oxford: Clarendon Press, 1993, p. 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 with respect to the sphere of influence theory in particular ibid., 684.

52 See the use of the term, e.g., by Anne Orford, 'Moral Internationalism and the Responsibility to Protect', 24 EJIL 2013, pp. 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 pp. 25, 41–49, paras. 21, 89–116; reference to British and German spheres of influence in South-West Africa: Kasikili/Sedudu Island(Botswana/Namibia), Judgment, 13 Dec. 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 and Paul

J. Leaf, 'Modern Threats and the United Nations Security Council', 62 Stanford L. Rev. 2010,pp. 1395, 1433.

53 Though cultural protective measures are subject to international obligations, includinghuman-rights obligations, e.g., Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 20 Oct. 2005, entered into force, 18 March 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 theUNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions', 66 ZaöRV 819, 2006, pp. 851–853.

54 See, e.g., European Convention, 4 Nov. 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, 8 July 1999; Sürek andÖzdemir v. Turkey, Judgment, 8 July 1999; Sürek v. Turkey (No. 4), Judgment, 8 July 1999. Theexception nevertheless protects certain government restrictions: see, e.g., Sürek v. Turkey(No. 1) and Sürek v. Turkey (No. 3), 8 July 1999.

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".[55] 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 is scarcely compatible with all of its neighbours' choices.

Conclusion

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

Since the start of 2014, the effects of Russia's policies, internal and external, include the following. 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 merit 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 will remain as they were settled in 1945. 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 embodies two policy objectives. These 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 adopted text.

Constituents of a system configure its public order through compromises and practice. The Helsinki Final Act, to the extent that it is an instrument of the public order of the Euro-Atlantic world during the Cold War, reflects the two main policy objectives of the states that adopted it. Since the start of 2014, the Russian Federation has challenged both of these objectives. A new domestic politics of reaction against international human rights is now well developed, but it is as yet not far enough advanced to indicate its endpoint.

The new international policy also appears not yet to have run its course. Nevertheless, 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 a part.

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

This essay suggests that Russia's domestic political shift—the shift against international human rights—has close, if imprecise, connections with 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 is now married to a new disregard for the systemic effects of the forcible change of borders. Thus, long-standing resistance against the progressive development of international law now exists together with a territorial revisionism that Soviet policy previously rejected.

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 super-powers 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.[56]

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 of disrupting that balance could be catastrophic.

And the Cold War was a period not of shrinking sovereign rights but of a radical expansion of the communities that possess 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". On 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 to expand territorial power—was at the foundation of the stability that characterized the period after 1945. That stability continued after 1989.

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 once 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.

56 Nico Krisch, 'Crimea and the Limits of International Law', 10 March 2014, EJIL Talk!

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