Geopolitics dressed in the language of law and morals

The case of Ukraine

Rein Müllerson
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Reckless military interventions in other countries' affairs are becoming the norm globally. So what hope for international law? After all, argues Rein Müllerson, when it comes to bending and breaching international law, Russia has no lack of excellent examples to follow.

Methods of research in social science disciplines differ in many ways from those used in the natural sciences. However, it is advisable, even necessary, for the former to try to emulate the methods of the latter in at least one important respect: one should attempt to get as far away as possible from the viewpoint of an activist and as close as possible to the viewpoint of an impartial researcher.

Can it really be that some chemists favour certain molecules, whose interests, wellbeing and importance they promote at the expense of other molecules? Having put the question to my natural science colleagues, such chemists would seem to be the exception rather than the rule. In the social sciences, the opposite seems to be true. I am not speaking of journalists who often do not intend so much to inform their audience as mobilize public opinion for a specific cause. Taking sides is widespread, almost automatic, among social scientists too. For example, Paul Saunders – a clear-minded American analyst of the realist school, being critical of Obama’s foreign policy, writes: “What would a realist foreign-policy strategy look like? It would start with the recognition that maintaining America’s international leadership – without incurring costs that neither our political system nor our economy can sustain – is the best way to protect US national interests”. [1] Hence, there is a clear agenda – looking for the best way to protect US national interests in the world, notwithstanding that Saunders, in contradistinction to many other American commentators, understands that without taking account of the positions of other powers (e.g., China and Russia) whose interests and world outlooks may not necessarily coincide with those of Washington, the United States cannot efficiently protect its national interests.
However, quite a few who call themselves researchers, or have the word in their job-description, are indeed blatant activists or apologists. Their approaches are almost invariably either, say, pro-Palestinian or pro-Israeli, pro-Ukrainian or pro-Russian, pro-American or anti-American, and so on and so forth. Their intentions may be quite respectable and their moral outrage may be justified or even necessary but these positions are not those of a researcher. Such activism often helps change the world for the better. Sometimes, however, it may lead the masses astray. Therefore, the world is also in need of researchers who study, for instance, states or other international actors as molecules that may well have different sizes, agendas and functions but to which the researcher does not have any emotional attachment. It is certainly difficult, for many simply impossible and for some even repulsive, to have such a detached approach to morally loaded issues that demand action. However, there are usually enough, often even too many, activists and very few researchers. Therefore, I try as much as possible to approach all the actors involved in the Ukraine crisis as molecules, such that their roles, interests and visions do not affect me emotionally.

Since international law has been my métier for decades, it is only natural that I should comment on the developments in and around Ukraine from the legal point of view. However, if any additional proof of the inadequacy of a purely legal approach analysing the most important and sensitive issues of world politics were needed, then the current crisis provides just that. At the same time, I still hesitate to completely brush aside international law, as did for example Dean Acheson – the distinguished American diplomat and lawyer – when commenting on the 1962 Cuban missile crisis, which started with the Soviet Union’s attempt to install missiles with nuclear warheads next to the American mainland: “The power, position and prestige of the United States had been challenged by another state; and law simply does not deal with such questions of ultimate power – power that comes close to sources of sovereignty”. [2] A frank admission. Today Russian politicians and diplomats could use the same language in justification of their behaviour vis-à-vis Ukraine. And they would be not very wrong. As president Putin of Russia said 18 March 2014, “[Y]ou know, I cannot imagine that we will visit NATO marines based in Sebastopol. Though most of them are good guys, we prefer to invite them to visit us in Sebastopol”. [3] And though the Russian annexation of Crimea is illegal under international law, for Russia, Crimea is quite different from Ukraine as a whole, even from eastern Ukraine. And first of all, emotionally, since most Russians consider the idea that Crimea is part of Ukraine as Nikita Khrushchev’s folly. Secondly, from a rational standpoint. For it has become increasingly clear that Washington and Moscow have rather different visions of the future world order (unipolar versus multipolar). Russia could have hardly risked having a NATO naval base in the Crimea. This would have been akin the scenario in which the Soviets had nuclear missiles on Cuba but in reverse.

However, given that all the parties involved in the Ukrainian tragedy have suddenly rediscovered the existence of international law (as distinct from approaches concisely expressed in the slogan “all the options are on the table”), I still nurture fledgling hopes that international law may play a role, even if rather modest, in the resolution of conflicts with geopolitical implications. Yet, it is not the time (if it ever was) to act as some naive blue-eyed “experts” do, repeating mantras about the promotion of democracy and western (i.e. universal) values. Or even worse, advocating the use of military force to protect human lives, be it in Kosovo in 1999 or in Ukraine fifteen years later, not to
mention quite a few other places in between. As Al Jazeera’s Marwan Bishara writes on the role of Washington and Moscow in the genesis and escalation of the Ukrainian tragedy: “Both have cynically pulled and shoved this country in the name of freedom and security, euphemisms for imperial interests, and pretexts for intervention”. [4]

But international law doesn’t work well, if at all, on matters of vital interest (or works only as a propaganda tool). So the question remains as to what can be done to restore its credibility on issues of peace and security. But first my short hypothesis: every legal system, especially its constitutive components (in this case, mostly expressed in or stemming from the United Nations Charter), works well in a relatively stable, that is, non-revolutionary environment: after all, law as a normative system is meant to function, as if by definition, in normal circumstances. So long as the dust that rose after the collapse of the bipolar world has not settled and the struggle between competing visions of the future continues, international law simply cannot play its role properly where the most sensitive issues of our time are concerned. Competing visions of the world also create competing interpretations of international law and it’s à la carte application – bending and choosing whatever pleases one’s taste or best suits one’s vision of the world.

There are many causes of the current conflict in and around Ukraine. Due to the presence of all-pervading corruption that, since 1991, has constantly increased from president to president, from administration to administration, and the absence of any meaningful efforts to bridge the country’s potentially explosive historical, religious, ethnic and geographic divides, Ukraine was on the verge of becoming a failed state even before it finally exploded on the Maidan. Neither the Ukrainian political elite nor those external actors that have supported or continue to support the respective governments or oppositions have ever acted in the best interests of the Ukrainian people as a whole.

Now, let us try to perceive what developments in and around Ukraine may look like if one were indeed to take international law seriously.

1. Ukraine and western disregard of international law

When, after president Yanukovych’s U-turn on the Association Agreement with the European Union, the mass protests in Kyiv started (this being an internal matter for Ukraine), it was the representatives of Western states who completely ignored one of the cornerstone principles of international law – the non-interference in the internal affairs of other states. Their ignorance of it was so natural that had anyone mentioned international law in their speeches supporting the cause of the opposition and assistance promised to them by, for example, senator John McCain or assistant secretary of state Victoria Nuland as well as a host of officials from various EU member states on the Maidan, it would have likely only revealed their utter lack of understanding of the problem. However, such unconditional support for the opposition not only constituted a flagrant interference in the internal affairs of Ukraine but also raised expectations and made uncompromising revolutionaries even more intransigent. Any form of compromise became impossible since the revolutionaries believed (misguidedly, given that the hoped-for scale of foreign support usually proves to be exaggerated), that outsiders would do everything necessary for their cause to prevail. Therefore, a power-sharing deal, the like of which has historically often been the only way of avoiding conflicts in ethnically and culturally divided societies such as that found in Ukraine, also became impossible to
achieve.

In the context of non-interference in internal affairs, a short reference to a historic parallel may be appropriate. Ending his speech delivered on the balcony of Montreal City Hall in July 1967, president de Gaulle of France became so carried away by the warm welcome of the Quebecois that he shouted: “Vive le Québec libre!” Ottawa launched an official protest to the French embassy and relations between France and Canada remained strained for quite a while. This diplomatic incident seems very minor in comparison to what was happening on the Maidan over the course of many weeks. During the Cold War, most experts and states at least paid lip service to the non-interference principle. Usually, it was even observed, though sometimes only in the following form: you don’t intervene in my sphere of influence, I don’t do that in your backyard. And when states intervened, as Washington and Moscow nevertheless did, including in each other’s backyard, they usually did it surreptitiously, not proudly flouting their ignorance of or disrespect for international law. This in itself put interventionist policies on a back burner in several cases. Today, however, some politicians and experts consider this principle to be out-dated and believe that only those who are on the wrong side of history cling to it in order to slow down the march of history towards its inevitable end – the worldwide triumph of liberal democracy and the free market.

Besides the motley concerns (without wishing to rule out the possibility of noble ones) and interests (usually self-serving) that may motivate those who are eager to put aside the non-interference principle, there is a more general reason behind such a negative attitude towards it. If the world, as disciples of Fukuyama believe (notwithstanding that the author of the “end of history” doctrine has recognized its shortcomings), is indeed moving towards the worldwide triumph of liberal democracy then encouragement, assistance and support for those who undermine regimes that don’t correspond to liberal-democratic standards does not constitute interference at all, where interference can only be correctly interpreted as interference in the inevitable march of history.

However, there are at least two serious problems with such an approach. Firstly, long-term historical predictions have usually been wrong and we really don’t know where world history leads. No social, economic or political system has existed forever. There is nothing in the history of humankind that would indicate that liberal democracy and the free market economy are exceptions in this respect. Doubting Thomas may not be everybody’s hero but does at least seem to have been the world’s first social scientist. Secondly, if indeed liberal democracy were to be the Promised Land of quite a few societies that are not yet there (and I believe there is both room for the expansion of liberal democracy and, in particular, for the deepening of its democratic achievements), attempts to quicken its advance are wrought with serious conflicts and upheaval, including civil or even international wars. Instead of the expansion of liberal democracy, the world may see its constriction. Moreover, social experiments in far-away places, instead of experiments and necessary radical reforms at home, risk the loss of millions of lives and tend to amount to quite an indecent and selfish practice. And though the observance of the non-interference principle may indeed help shield some dictators, this is a relatively small price to be paid. Post-Gadaffi Libya, Iraq after Saddam Hussein: these are not democracies as promised by those who advocated regime change in these countries. Afghanistan still awaits its Calvary, if I am permitted to use a Christian term when speaking of a Muslim country. There is no “mission accomplished” through the use
of military force.

Furthermore, the non-interference principle does not preclude interference, even military interference, in cases where crimes against humanity or acts of genocide are committed, especially if it has the Security Council’s authorization. The problem is that in the clearest of cases crying out for intervention – Rwanda in 1994 – neither a single state nor the world community as a whole were up to the task. Besides, when interventions in similar situations have taken place – in eastern Pakistan in 1972, in Idi Amin’s Uganda of 1979, and in Pol Pot’s Democratic Kampuchea the same year – it was not western democracies that intervened and put an end to the massacres. One of the reasons why those interventions succeeded, that is, when military intervention turned out to be a lesser evil in comparison to the larger evils of genocide or crimes against humanity, was that the intervening states (India, Tanzania, and Vietnam, respectively) did not perform exercises in regime change, which would have failed just like recent western interventions in Afghanistan or Iraq have failed.

Be this as it may, as regards the march of history, international law seems to be strongly against attempts to artificially accelerate that march. In the 1986 judgement in the case of Nicaragua versus the United States, the International Court of Justice declared that it “has to consider whether there might be indications of a practice illustrative of belief in a kind of general right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified. For such a general right to come into existence would involve a fundamental modification of the customary law principle of non-intervention”. [5] Having scrupulously studied the practices and legal approaches of states, the Court concluded: “The Court therefore finds that no such general right of intervention, in support of an opposition within another State, exists in contemporary international law”. [6]

The principle of non-interference, though with modifications that take into account, inter alia, the emergence and development of international human rights law, remains a necessary foundation of international order. It may have a rather limited role in supra-state entities like the European Union, where EU law, and not so much international law, prevails. But so long as states remain the main actors of international relations and there is no world government, the non-interference principle corresponds to the character and needs of international, i.e. in substance inter-state, society. Attempts to put it aside create chaos from which only disorder, not a new world order, emerges.

Unfortunately, in the context of today’s geopolitical conflicts, legal arguments do not carry much weight in the face of such lacklustre and even frivolous attitudes to international law (law is whatever we interpret it to be, our cause is just, therefore what we do has nothing in common what you do, etc.). At best (or worst), they give verbal ammunition to the current information warfare, where the first victim, as always, is the truth. The strategy is more or less thoroughly employed on all sides. While it is true that some segments of the quality western media sometimes give voice to the other side, in the context of the Russian media (or at least TV), dissenting views are simply never heard. But even in the West if you weren’t Henry Kissinger then you’d have to at least be John Mearsheimer to have balanced views on matters concerning Ukraine expressed in the mainstream media. Mearsheimer has recently written an article entitled “Why the
Ukraine crisis is the West’s fault”, where he remarks: “the United States and its European allies share most of the responsibility for the crisis. The taproot of the trouble is NATO enlargement, the central element of a larger strategy to move Ukraine out of Russia’s orbit and integrate it into the West.” [7]

Only specialists read quality sources such as Foreign Affairs, Stratfor, The National Interest or Russia in Global Affairs, where in-depth analysis that goes beyond slogans and name-calling can be found. However, in general, even western media misinforms rather than informs the people about the developments in and around Ukraine. Western politicians, media and experts, accusing president Putin of living in an unreal world, also inhabit a world that is created by their own brainwashing system. Therefore, Henry Kissinger’s warning that “for the West, the demonization of Vladimir Putin is not a policy; it is an alibi for the absence of one” [8] hits the nail on the head. The danger is that the clash of two opposing reductive visions of the world exemplified by the mindsets of such firebrands as John McCain or Vladimir Zhirinovsky, spill over into the real world.

The undermining of the principles of the non-use of force and non-interference in internal affairs of states has already reached an alarming level. The latter principle seems to have entirely fallen into desuetude. Before the (well-deserved) fall of president Yanukovich – Ukraine’s thief-in-chief – Russia and the western powers competed in a rush to intervene in Ukraine, reminiscent of the nineteenth-century scramble for Africa by European empires. Russian arguments in defence of its stand on Ukraine are similar to the justifications used by western powers when they bend international law. Don’t NATO countries understand that in a different context and in other places China, or Russia for that matter, may also resort to any or all of the options on the table? However, this is not the table of international law.

2. Russia’s disregard of international law vis-à-vis Ukraine or the use of the Kosovo precedent?

Now, how does Russia’s behaviour look in the light of international law? In 2004, just before the Orange revolution in Ukraine, Russia rather energetically intervened in Ukrainian affairs. For example, the then president of Russia Vladimir Putin stood next to Viktor Yanukovych on the podium in Kyiv during the latter’s pre-election rally, thereby expressing the Kremlin’s support for its favourite candidate. Such flagrant political interference, contrary to international law, seems to have backfired and in the end another Viktor, Yushchenko, was elected. Yushchenko, though pro-western, was even more corrupt and inept than his predecessors. When in 2010 Yanukovych was elected president (by more or less free and fair elections, as certified by international observers), his rule continued the downward trend in the evolution of Ukraine’s political and economic systems. Even during Yanukovych’s presidential tenure Russia continuously tried to influence Ukraine’s behaviour, widely using gas supplies as an instrument of pressure. These policies, though unpleasant and unfriendly, especially given that they were applied towards what Russian politicians call “their Slavonic brothers”, could hardly have qualified as illegal interference since firstly, this is what powerful states, especially the United States, do all the time, and secondly, Ukraine did indeed constantly default on payments for Russian gas and continuously attempted vis-à-vis Russia to pursue a policy of eating their cake and having it too.
Then, there is the issue of Crimea. The 16 March 2014 referendum on the status of Crimea, the string of events that led to it as well as subsequent decisions of the Crimean authorities and of Moscow are all of doubtful legality. It is true that international law, though it does not encourage secession (the right to self-determination and secession may overlap only partly), does not prohibit it either. Thus neither the two referenda in Quebec nor the Scottish referendum violate international law (it should be mentioned, however, that were third party states to recognize successful secessionist outcomes in such referenda before Canada or the United Kingdom did so, that would constitute interference in these countries’ domestic affairs).

NATO’s Kosovo operation, which many western politicians and experts refer to as an example to be followed in order to save lives in places like Libya or Syria may, however, serves also as a different, much more negative, precedent. German journalist Alexander Rar has written that in the aftermath of Kosovo, NATO suffered a loss of prestige even among many liberally minded people in Russia, who started to profess doubts in democracy as a form of political regime. [9] Perhaps even more disturbing, according to Rar: “Many Russians suddenly lost their antipathy towards use of force by their own country. They sincerely started to believe that if the civilized West is not averse to violence, then Russia with her existential problems simply has to do the same”. [10]

An additional fly in Kosovo’s anointment was what happened later, after years of manipulative administration by the international community, including the United Nations and the European Union. The recognition of the independence of Kosovo by the majority of western states, notwithstanding a clause in all Security Council resolutions on Kosovo both before NATO’s invasion [Res. 1199 (23 September 1998), Res. 1203 (24 October 1998)] as well as after the invasion [Res. 1244 (10 June 1999)], emphasized the importance of guaranteeing the territorial integrity of Yugoslavia. For example, Resolution 1244 reaffirmed “the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2”. Notwithstanding all these clauses, most NATO and EU member states recognized the declaration of independence of Kosovo, which, in turn, made it easier for the Kremlin to recognize the two Georgian breakaway provinces of Abkhazia and South Ossetia as independent states. This, together with other gung ho approaches to international law, contributed to the undermining of the foundations of the latter. The advisory opinion delivered by the International Court of Justice on 22 July 2010 stating that Kosovo’s declaration of independence “did not violate general international law” (quoted by president Putin in his speech to the both houses of the Russian parliament on 18 March), though formally correct, is anodyne in content, and potentially explosive in its consequences. Even if I were to declare my house with its small plot of land in Tallinn independent from Estonia, I would not be in breach of general international law since international law simply does not deal with such matters. However, if third states were to recognize my extravagant declaration, it would certainly violate general international law; this would be a clear-cut interference in the internal affairs of my country. The declaration of independence by Kosovo may not have violated international law, but the fact that it became possible only as a result of NATO’s bombardment of Serbia adds credence to the declaration of independence of Kosovo being of doubtful legitimacy.

The referendum in Crimea was also marred by the presence of the armed forces of the
Russian Federation in Crimea, even if we assume that only those forces that were stationed in Sebastopol in accordance with the Agreement between Russia and Ukraine were involved. One need only ask: would the 16 March referendum have been possible without Russian forces being in the Crimea (and not quietly sitting in their bases which would have been a necessary requirement if Russia had indeed done everything to avoid interference in Ukrainian affairs)? Were the answer no, and in my opinion this would be the only possible answer, Russia would be in breach of international law. And this remains the case notwithstanding that the huge majority of Crimeans genuinely chose integration with Russia instead of remaining within Ukraine. There is no doubt that most Crimeans, like most citizens of Russia, welcome the reunification of the Crimea with Russia. In respect of which, this may even be seen as legitimate, albeit contrary to international law. Here too we see a clear parallel with NATO’s military intervention against Serbia over Kosovo in 1999, which the Report of the Independent International Commission on Kosovo headed by judge Richard Goldstone defined as “illegal but legitimate”. And pay attention, Russia has also started to widely use the term “legitimacy” instead of “legality”. Legitimacy – a more illusive and subjective criterion than legality – is usually in the eye of the beholder.

That NATO’s concern in 1999 was not the fate of the Kosovars but something else is by now well documented, though it is not easy to find such documents or their analysis in mainstream western media. For example, it seems to be a generally accepted assumption that it was president Milosevic’s refusal to sign the so-called Rambouillet agreement presented by Washington that led to the war. However, as former United States secretary of state Henry Kissinger has declared, “The Rambouillet text, which called on Serbia to admit NATO troops throughout Yugoslavia, was a provocation, an excuse to start bombing. Rambouillet is not a document that an angelic Serb could have accepted. It was a terrible diplomatic document that should never have been presented in that form”. [11] Similarly, in the United Kingdom, Lord Gilbert stated in the House of Lords: “I think the terms put to Milosevic at Rambouillet were absolutely intolerable; how could he possibly accept them? It was quite deliberate”. [12] One can only conclude that it was not so much humanitarian concerns as the wider intransigence of president Milosevic of Yugoslavia that was the main cause of NATO’s bombardment of the Former Republic of Yugoslavia in 1999. As John Norris, Strobe Talbott’s director of communications during the Kosovo crisis, has written: “it was Yugoslavia’s resistance to the broader trends of political and economic reform – not the plight of Kosovar Albanians – that best explains NATO’s war. Milosevic had been a burr in the side of the transatlantic community for so long that the United States felt that he would only respond to military pressure”. [13]

Speaking of concrete legal norms breached by Russia I would, first, refer to the 1974 Definition of Aggression, which is also part of customary international law. Article 3 provides that “any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression”, the relevant act being in this case, “The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement”.

It is rather obvious that Russian armed forces in Crimea have been used in contravention of the Agreement. And the 16 March referendum in Crimea is deficient from the point of
view of international law but not because it breaches the constitution of Ukraine or because the principle of self-determination of peoples is less applicable in Crimea than in Scotland or Quebec. Its illegality stems from the fact that the referendum in Crimea was held in the context of the violation of the principle of non-use of force by Moscow (as was the bombardment of Serbia of Kosovo and the recognition of the latter’s independence). Even the genuineness of the desire of the absolute majority of the Crimeans expressed, _inter alia_, at the 16 March referendum, to join Russia, doesn’t make it lawful. At best, it may be considered as legitimate.

There is little doubt, however, that Crimea will remain part of the Russian Federation, whatever the legality, illegality or legitimacy of the process of its annexation. And if one wants to establish whom to blame for that, I would recommend looking far and wide. Villains are in the East as well as in the West but the main responsibility lies with the political elite and leaders of Ukraine – past and present. If the past Ukrainian administrations, especially the last one led by Viktor Yanukovych, contributed to the Maidan, the post-Maidan leaders have been even less able and willing to find peaceful ways to deal with the discontent of the people of eastern Ukraine. And this discontent was as foreseeable as was the anger of the people of western Ukraine in the wake Yanukovych’s volte-face from the EU towards Russia. Kyiv responded to the popular discontent in the East of Ukraine by way of mortar and air bombardments of densely populated cities and towns of their own country. And though Russia’s sympathy to the rebels’ course goes beyond what is permitted by the norms of international law, the West’s encouragement of Kyiv to carry out so-called “counter-terrorist”, that is, military operations against their own people, makes them co-responsible for crimes committed by Kyiv. The demonization of Putin and Russia as well as the use of “sanctions” [14] against the latter also serves to hide the fact that what is going on in eastern Ukraine is a civil war, in which various players, including Russia, have interfered and continue to do so. It is not a war of Russia against the Ukraine, as leaders in Kyiv try to make out. It is however a “war”, though thankfully not yet hot but cold, or rather a geopolitical struggle between the West and Russia over the future configuration of the international system, including the nature of international law.

Today, it is often repeated in the West that Russia’s foreign policy has become unpredictable, that it is a brainchild of former KGB officer’s deranged mind who is not able to understand a world in which there are no more spheres of interest. However, Russia’s foreign policy is quite predictable if one sees it as rooted in the Westphalian balance of power, and within the nation-state paradigm that emerged and evolved in Europe, precipitating the long peaceful century from the Congress of Vienna in 1815 until World War I. As Henry Kissinger has recently written, these were attempts to radically change the nineteenth-century balance of power system, [15] i.e. attempts to replace it with a universal system, which constituted threats peace. Today the enlargement of NATO, an organization whose very _raison d’être_ had previously been to contain the USSR and is now to contain Russia, is seen by the latter not only as the continuation of the Cold War policy of containment but also as the attempt to retain, prolong and perpetuate the unipolar moment, and thus to prevent the emergence of a multipolar world founded upon maintaining the balance of power. President Obama’s claim that in today’s world there is no place for spheres of interests may sound nice in abstract terms but in practice, if we take account of Washington’s claim to be the leader of the free world and the capital of an indispensable nation, such a vision amounts to an imperial dream of the world.
In international relations, the balance of power plays a role similar to the separation of powers within a state as one of the guarantees of democracy; in international relations, it is the balance of power that prevents the arrogation of power by any one, single centre. If many smaller countries, some enthusiastically, others less so, go along with the dominant tendency, bigger states, especially those that take pride in their historical greatness at the same time feeling hurt by their recent humiliation at the hands of western powers (remember the results of Germany’s humiliation after World War I), oppose such a trend. Moscow’s foreign policy, including behaviour in and around Ukraine, is mostly reactive and defensive. But what bothers me more than foreign policy of Moscow are domestic developments in Russia. However, the rise of authoritarian tendencies and a Russian nationalism that relies on the “siege mentality” results, at least partly, from the western policy of the containment of Russia. The Kremlin refuses to play by the rules that would allow it to be encircled by states belonging to an organization created for its containment. Unwillingly and thoughtlessly, the West is also playing into the hands of Vladimir Putin. Very few Russian intellectuals, who oppose Putin’s domestic policies (Michael Gorbachev being the most prominent exception in this respect), are able to distinguish between Kremlin’s reactive and defensive foreign policy and reactionary trends in Russia’s domestic politics. Being rightly critical of Putin’s domestic politics, they transfer their sweeping criticism over to Russia’s foreign policy too. Thus, the West has become Putin’s unwilling de facto ally, helping him to tighten the screws on Russia’s domestic politics and marginalizing Russia’s opposition at the same time as contributing to the destruction of Ukraine and rapprochement between Russia and China.

3. Geopolitics and international law

Just as the world’s oceans are reflected in a drop of water, the scramble for Ukraine reflects a clash of competing visions of the future of the world. On the one hand, there is a desire to force humankind to move towards a unipolar (or non-polar) world system ruled from one centre (Washington, with the supporting role of Brussels). This path should lead via a string of regime changes to a worldwide triumph of liberal democracy at “the end of history”. Opposing this trend is the struggle of others to achieve a multipolar world where regional powers have their own respective spheres of influence, and the world order results from a kind of world concert somewhat similar to the nineteenth century post-Napoleonic “Concert of Europe”, which guaranteed the longest peaceful period in the history of the continent (1815-1914). Naturally, there are various other players who like neither of these competing claims. Quite a significant number of smaller states (I would call them “anarchophiles”) fiercely protect their independence while some stateless nations try to achieve statehood (like Catalonia, Quebec, Scotland and a host of others), using the Kosovo and Crimean cases as precedents. There are also “spoilers” who would prefer world disorder to any existing or potential order, or to “fish in the muddy waters” as a Russian proverb says.

Washington’s, and more generally but less pointedly, western support for so-called “colour revolutions”, and western activities in and around Ukraine during 2014 continue what started ten years earlier with the short-lived “Orange” revolution. In geopolitical terms, what took place then was an ongoing exercise in the containment of Russia, i.e. the attempt to encircle Russia, wherever possible, with Washington’s allies. This continues to take place today. Of course, the United States may say, and this is not completely wrong either, that it is not about geopolitics but about freedoms, democracy
and economic development. It is difficult, even impossible, to deny that former Soviet allies in eastern and central Europe as well as the Baltic states are today freer and more prosperous than previously. And closer ties between Ukraine and the rest of Europe would, in principle, be beneficial to Ukraine too. However, there is no realistic chance, either now or in the foreseeable future, of Ukraine becoming a EU member. Meanwhile, Washington’s policies vis-à-vis Ukraine are less about democracy and freedoms, if they are about these at all. Washington has a proven track record in overthrowing or helping to overthrow democratically elected governments (in Iran in 1953, Guatemala in 1954, Chile in 1973 - to name but the few) and today it continues to be closely allied with some of the worst autocracies (the Gulf monarchies being a case in point). This is not to say that the United States has never contributed, anywhere on Earth, to the advance of democracy and human rights. It has, but this has always been secondary or collateral to its geopolitical calculations.

However, Ukraine under president Yushchenko, like Georgia under Mikheil Saakashvili, was about to sign a Membership Action Plan (MAP) with NATO that would have led to the full membership. NATO, in contradistinction to the EU, is a geopolitical and military alliance and its advancement toward Russian borders serves geopolitical aims. George Friedman writes: “There are those in the West who dismiss Russia’s fears as archaic. No one wishes to invade Russia, and no one can invade Russia. Such views appear sophisticated but are in fact simplistic. Intent means relatively little in terms of assessing threats. They can change very fast. So too can capabilities.” [16] Things that don’t change as fast as intents and even capabilities are geography and geopolitics. They are relative constants in world politics and therefore Russia is certainly worried by NATO’s advance.

And Moscow is responding. In 2008 it did so in Georgia. Now it’s doing so in Ukraine. This is in concreto. But in grosso modo Russia is responding to the encroachment of the United States and its NATO allies closer and closer to Russian borders. As John Mearsheimer writes of the Ukrainian crisis, “Washington played a key role in precipitating this dangerous situation, and Putin’s behaviour is motivated by the same geopolitical considerations that influence all great powers, including the United States”. [17] And Russia, in responding to Washington is also breaching various norms of international law, as shown above. When it comes to bending and breaching international law, Russia does not lack excellent teachers.

If in geopolitical terms Washington has mostly got away with its violations of international law (though in the longer term such policies have undermined its principles, and we already see their boomeranging effects), Russia will almost certainly suffer. And the main reason, in my opinion, is that Moscow is showing its teeth too early. In that respect it should have learned from its larger neighbour, China, and especially from the advice that Deng Xiaoping gave his successors: “observe developments soberly, maintain our position, meet challenges calmly, hide our capacities and bide our time, remain free of ambition, never claim leadership”. [18] This would have meant: develop the economy, fight corruption, cultivate so-called “soft power” and then gradually increase the military budget, if necessary. I am saying “if necessary” since a stronger and more prosperous Russia would have also had a stronger bargaining position, including on matters of arms control. At the same time, it is necessary to recognize that Moscow is not Beijing and Russia is not used to measuring time in centuries. Moreover, in contrast to China, which
started flexing its muscles in an attempt to enlarge its spheres of “vital interest” (a respectable term used by Washington when talking, for example, about the Middle East or a host of other regions), Moscow has had to struggle against the constriction of its spheres of “vital interest” close to its borders. Not responding now would have meant that regaining lost ground later would have been more difficult, if not impossible.

The truth of the matter is that Russia is too big to be led by any outside power. This has to be understood; otherwise there would be constant misperceptions and conflicts. As British expert Richard Sakwa wrote some years ago: “The international system today does not have a mechanism for integrating rising great powers. This applies to China, as well as to Russia and some other countries”. [19] I believe there is a deep truth in this short remark, which is not limited to countries as big as Russia or China. In a 2012 pre-election article, Vladimir Putin wrote that “Russia has practically always had the privilege of pursuing an independent foreign policy and this is how it will be in the future”. [20] Such a statement may have been a response to president Yeltsin’s failed attempts to have Russia accepted by Washington and the West as an equal independent player with its own interests, different from those of the United States, but who nevertheless may be a partner of, and on good terms with, Washington and Brussels. This remark also expresses the truth that nations react differently to attempts to “civilize” them, to induce them to conform to a dominant trend. One could have hardly expected Russia to practise the politics of bandwagoning that many smaller states have happily (or not so happily) practised and continue practising today. That Russia’s foreign policy (which has been mainly reactive and defensive) and, even more so, its internal politics are both characterized by anti-democratic tendencies is due to a certain extent to western pressure.

Jack Matlock Jr., formerly Washington’s ambassador to Moscow, writes that Vladimir Putin also “initially followed a pro-Western orientation. When terrorists attacked the United States on 11 September 2001, he was the first foreign leader to call and offer support. He cooperated with the United States when it invaded Afghanistan, and voluntarily removed Russian bases from Cuba and Cam Ranh Bay in Vietnam”. [21] But in return, as Matlock rightly observes, Putin got “colour revolutions” supported by or instigated from Washington, the invasion of Iraq without Security Council approval, withdrawal from the Anti-Ballistic Missile Treaty, Kosovo and so on. The bipolar world ended with the collapse of the Soviet Union and victory of the West led by the US. The expansion of NATO to the Russian borders and Ukraine’s potential membership in a military organization whose raison d’être had been to face the Soviet Union and which continues to see Russia, which has failed to jump onto Washington’s bandwagon, as an enemy, has contributed to the current world crisis. Washington, in its triumphalism, had forgotten a history lesson – don’t humiliate your defeated enemy, be it in a hot or a cold war. Negotiators in Vienna in 1815 had been more farsighted than those of 1919 in Versailles.

4. On the future of international law

So, what about international law, its fate and future role? In my opinion, the future of international law in the most sensitive and politically loaded areas (it works and hopefully will continue to do so relatively well on matters less sensitive and more technical) depends on which of the two above-mentioned visions of the international system
prevails. Will we have an international law whose basic assumptions and characteristics are founded upon inter-state law, or a kind of worldwide EU law, that is, a supra-national world law corresponding to a unipolar world? One of the twentieth century’s greatest legal minds, Wolfgang Friedmann of Columbia University, predicted as long ago as in the 1960s a trend towards the development of two strands in international law - the law of coexistence and the law of cooperation. If the first corresponds to a traditional inter-state international society where states, their sovereignty and independence are free from outside interference, the latter would correspond more to what Friedmann believed to be an emerging world society where not only or not even so much states but also individuals enjoy rights along with various other entities, including supranational ones, and become influential actors in their own right. [22] Indeed, since then the development of international law has bifurcated. In Europe, instead of international law we have EU law. And human rights don’t belong any more exclusively within the domestic jurisdictions of states (something that applies not only in Europe but worldwide); we have even international criminal courts and tribunals, though so far proceedings taking place in these have shown that mechanisms which work rather well within states have relatively limited, sometimes even distorted, effects when transplanted into the domain of international relations.

We live in a world that has become Lockean in some places (Europe) but remains Hobbesian in many other regions, or as Victoria Nuland’s husband Robert Kagan has written, “Americans are from Mars, Europeans are from Venus”. If in Europe the law of cooperation, or even supranational law, has emerged, in the wider – Hobbesian – world where men from Mars act, the world still needs stricter observance of the law of coexistence. Otherwise this world would become even more Hobbesian where life, at least for many, would be even more “solitary, poor, nasty, brutish, and short”. For this kind of international law to work well one needs a kind of balance of power. In his new book World Order, [23] Henry Kissinger reminds us that in 1971, Nixon told the editors of Time that it would be desirable to have an interlocking set of ambitions among great powers: “I think it will be safer world and a better world if we have a strong, healthy United States, Europe, Soviet Union, China, Japan, each balancing the other, not playing one against the other, an even balance”. [24] And though Kissinger’s diplomacy and Nixon’s visit to China in 1972 served, inter alia, also the purpose of balancing against the Soviet Union, the realism of the Nixon-Kissinger tandem stands in stark contrast to Woodrow Wilson’s (or Lenin’s for that matter) utopian-messianic idea of the betterment of the world through a process in which societies are destroyed and thousands, if not millions, killed. And Kissinger warns us that a stable balance of power remains as crucial now as in the era of Westphalia.

International law, especially in its most sensitive and politically loaded areas, doesn’t work well in a world with unipolar tendencies since in such a world international law (a result of bargaining and compromises) and its interpretation is dictated from a unipolar centre. Until the beginning of the 1990s international law had evolved as a normative balance of power system, though the bipolar system was not the best environment for this to happen. The subsequent unipolar moment also led to attempts to transform existing law into a unipolar normative system controlled from a single centre, where there should be no room for counterbalances. For a while, it seemed that international law may indeed evolve in that direction. However, starting at the beginning of the twenty-first century, it was not only the “usual suspects” in western eyes – China and Russia –,
but other emerging powers that started to act as counterbalances: multipolar elements in the system began to emerge. The normative effect of these developments has been that while in the most sensitive areas, existing norms were undermined, new ones couldn’t crystallize. Hence, today we live in the atmosphere of increased normative uncertainty.

The world is not ready for a unipolar system and law dictated from a single centre. I doubt it ever will be. World government remains a distant prospect indeed. The world is simply too big, complex and diverse for that. Its rich tapestry cannot be flattened into a carpet with a single pattern, be it of a Judeo-Christian, Anglo-Saxon, Confucian, Muslim or even secular liberal-democratic weave. Therefore, the international law of coexistence, with its principles of non-use of force and non-interference in internal affairs, has to cautiously tame the Hobbesian world, helping it to move closer to a Lockean (or maybe Confucian, who knows) one.

Footnotes


3. Statement of the President of the Russian Federation, 18 March 2014 (official site of the President of Russia, eng.kremlin.ru/)


5. ICJ, Nicaragua v. USA, Judgment of 27 June 1986, para. 206

6. Ibid., para. 209


9. Alexander Rar, Vladimir Putin: The best German in the Kremlin, Moscow, Algoritm, 2012 (Russian translation from German), 174

10. Ibid., 175

11. Daily Telegraph, 28 June 1999

12. Select Committee on Defence. Minutes of Evidence, June 2000,

14. I put the word "sanctions" in inverted commas since, strictly speaking, neither western measures against Russia, nor Russian counter-measures, can be considered sanctions in the context of international law. They are unilateral unfriendly acts that, depending on the circumstances, may or may not be in breach of international law. Sanctions can be applied by the UN Security Council or by some specialized international organizations on matters within their competence. The EU can impose sanctions on their member states in situations provided for by respective EU documents, but not on any third state.


24. Ibid.

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