

Contested understandings of sovereignty, the use of force and the wider international legal order: the political context

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The Russian 'pluralist' understanding of sovereignty

During the Putin presidencies Russia has consistently positioned itself among the sizeable group of states which may be described as adopting a 'pluralist' understanding of international order and of sovereignty more specifically. Among a spectrum of states in this group Russia may be considered centrist, not on a radical fringe, although Russia has sought to project itself increasingly as an international champion for this position. Pluralist states tend to privilege order over justice within states and the maintenance of international order over the pursuit of international justice. Russia has developed a particular narrative over international justice between states, but this seems essentially aimed at levelling down predominant Western power.¹

Pluralist states adopt a traditionalist interpretation of sovereignty, seeking to restrict extra-territorial 'intrusion' in the domestic political and judicial affairs of states; it is very much a territorialized view of sovereignty. Such states tend towards a restrictive interpretation of the UN Charter, which is frequently cited as providing the legal basis for this stance. Pluralist states acknowledge that evolving international norms, including the international human rights agenda, have eroded 'hard' sovereignty, but seek to limit this process. They are adamant that unconsolidated international norms, which have not been codified and generally acknowledged in the canon of customary international law have no legal force and create no legal obligation.

In contrast, 'solidarist' states, in brief, pay far greater attention to humans as the referent object of international law and qualify the rights of the 'sovereign' within states to conduct policies unconstrained by understandings and treaty commitments over international justice.

However, structural power in the international system plays a significant qualifying role in this schematic division between the pluralist and solidarist positions. Major powers, including Russia (certainly through its self-perception since the end of the Cold War) and the US also value 'decision-making sovereignty'. They do not wish to have their hands tied in advance through restrictions, especially ones that circumvent their UN Security Council veto power (of particular value to Russia as

¹ This is a theme developed in Roy Allison, *Russia, the West and Military Intervention*, Oxford, Oxford University Press, 2013. See my summary, pp. 15-18.

a major source of institutional power in the international system). So in the discussions on Responsibility to Protect (R2P) at the 2005 UN World Summit the centrist Russian position reflected concerns not only about territorial sovereignty but also decision-making sovereignty.²

Russian international conduct in many ways reflects a fixation on structural power and relative power rankings, a view that international order should be upheld and regulated (and those regulations should be interpreted) by a concert of great powers (in various clubs, with the UNSC at the apex), where Russia exerts not just influence but veto rights.

Russia talks of the sovereign equality of states, but as with other major powers this formal legal state is qualified by structural power relationships. In particular, since the breakup of the USSR Russia has asserted entitlements in its near neighbourhood formed of the former Soviet republics (less so with the Baltic States after the early 1990s). Whether termed the 'near abroad', 'post-Soviet space', or 'region of Russian privileged interests', Russia has claimed special rights and its relationship with these far weaker neighbours, which have various traditional commonalities with Russia, is clearly conceived in hierarchical terms – Russia seeks primacy at least.³

In its policies Russia has consistently qualified the sovereignty of these states in various degrees and this is reflected in Russian views on the application of international law – i.e it has developed region-specific interpretations, including the use of force. It has also tried to develop certain norms of conduct for the CIS region. The result is a hybrid approach, a dissonance: Moscow insists on a pluralist interpretation of sovereignty and legal constraint in the wider international system (and in other state's relations with Russia), and makes much of supposed Western abuses in this regard, while acting with discretion (that is quite inconsistently) in the region where it claims special entitlements. In other words Russia sought to carve out a field of exceptionality, which came most dramatically to be focused on Ukraine, even if for years Moscow had levelled the charge of exceptionalism against the US as a synonym for hegemonic behaviour.

Playing by the rules or breaking the rules

Despite tensions with Western states in this debate on sovereignty, outside the CIS in the wider system of states, Russia was on fairly solid ground in its conservative legal stance. For years Russia sought to recast the Western-dominated security architecture in Europe, to change the workings of the OSCE and acquire more meaningful agency in shaping the principles governing security policy relations between states throughout the Greater Europe. The approach was that of 'playing by the rules to revise the rules'.

However, for years Russian diplomacy has been permeated with a sense of resentment over 'who makes the rules'. Moscow found it increasingly unacceptable, despite suffering severely from the post- 2008 financial crisis, that its greater structural power in the international system, alongside the other BRICS states, was not much better reflected in the workings of international organisations in Europe and the wider international system, in rule-making processes and in shaping customary international law. Throughout Russia also feared its trump card, its UNSC veto, could once again (as in the cases of action over Kosovo, 1999 and Iraq 2003) be side-stepped by Western powers through the practice of liberal interventionism.

² *Ibid.*, pp. 65-8.

³ *Ibid.*, chapter 6, 'Contested norms in the CIS regional order', pp. 120-156.

Moscow accused Western states, especially the US, of trying to carve out a new sphere of legitimacy with separate standards lying outside the working of customary or UN Charter-based international law - expressed in the notion of 'democratic legitimacy' (which qualified the sovereignty of Russia and other states whose democratic credentials were called into question). This critical stance drew Russia support not only from authoritarian CIS leaderships, but also attracted sympathy in the wider UN General Assembly among illiberal states, most notably China.

However, the Russian annexation of Crimea, as well as military intrusions into eastern Ukraine, overthrow spectacularly the quite well-formulated line of attack Moscow had developed about the illegality of the Western use of force in those cases which lacked a credible case for individual or collective self-defence, or a UN Security Council Resolution acting under Chapter VII, in response to threats to international peace and security. This raises the core question whether Russia is overturning its longstanding commitment to the very limited exceptions to the UN Charter prohibition of the use of force, or whether action in Ukraine is just a particularly egregious but *sui generis* case of a large power breaking international law as large powers occasionally do (regardless of how the claims of international law, as the language of diplomacy, are spun).

Russian justifications for military intervention in Georgia in 2008 provide the backdrop. In this case Russia sought to exploit the loosening of the prohibition on the use of force provided previously both by Western claims ('legitimate if not legal') over humanitarian intervention and occasional Western (and other countries) practice of the forceful emergency rescue of nationals abroad. Russia presented a variety of justifications in a scattershot way, with the hope that they would gain traction with different audiences (domestic, CIS, Western and wider international). These claims included the need to protect Russian citizens (albeit ones mostly recently created), to respond to a genocide, and to fulfil R2P requirements. When examined the latter claims seem instrumental and abusive. But they left a narrow sliver of justification on self-defence grounds, linked to the deaths of a few Russian peacekeepers (though the timing of the Russian intervention and pre-preparation left many questions).⁴

If we compare intervention in Ukraine, Russia offered self-defence claims in the case of Crimea (related to the Sevastopol base), but these were wholly unpersuasive, and it blocked off the need to enter a legal defence in eastern Ukraine through the whole practice of 'deniable intervention'. But there was a major contrast to the claims presented in 2008 (which many in the West judged to be a Russian Foreign Ministry smokescreen in an exceptional case). First, in the case of Crimea what was at stake was the territorial aggrandizement of the Russian state at the expense of a neighbour state. Russia presented an unconvincing 'remedial secession' argument (the 'will of the people', albeit this was done in the context of the threat of the use of force). But secondly, Russia offered a spectrum of moral, political, psychological and historical claims, clearly with a domestic audience primarily in mind, which had no basis in traditional international law. Among these was the call to protect not just ethnic Russians (not Russian citizens as in 2008), but the highly fungible category of 'compatriots' and to rectify historic injustices (the basis for various irredentist claims in conflicts in past times).⁵

⁴ Roy Allison, 'The Russian case for military intervention in Georgia: International law, norms and political calculation', *European Security*, Vol. 18, No. 2 (2009), pp. 173-2000.

⁵ See Roy Allison, 'Russian "deniable" intervention in Ukraine: how and why Russia broke the rules', *International Affairs*, Vol. 90, No. 6 (November 2014), pp. 1261-8. A very full analysis of Russian legal claims can be found in Thomas D. Grant, *Aggression against Ukraine: Territory, Responsibility, and International Law*, Basingstoke, Palgrave Macmillan, 2015.

The question arises whether Russia now seeks to repudiate what it views as the 'western' legal order and to project some alternative as a means of asserting Russian regional dominance and global influence. In July 2014 a senior Russian official called for the convention of a global conference to rewrite international law, taking account of the influence of all major world powers, since 'there are no agreed rules and the world may become an increasingly unruly place.'⁶

It is hardly realistic, however, for Russia to expect major powers to come together to revise core principles of international law just in response to its challenge to legal principles in Ukraine. In the intricate web of interstate relations and intrastate arrangements with ethnic, religious and other minorities, major states would have no wish to unpick the carefully formulated language and structure of international communication formed by international law at the behest of one large aggrieved power. Lacking the support of many other states, through state practice, or international judicial opinion (*opinio juris*), Russia cannot propel any decisive shift in customary international law. Moscow might hope for some tacit support from large states privileging sovereignty over democratic governance and stability over human justice. But it is notable that even Russia's partners in the BRICS have not rushed to join the Russian call to rewrite the international legal order.

We may conjecture about the kind of principles for which Putin would seek greater legal endorsement: those helping to confirm Russian regional primacy in the CIS zone; those prioritising stable and strong state leadership, over democratic governance, to avert the spread of 'extremism' and 'anti-constitutional' state uprisings (the narrative on 'colour revolutions' which has become staple of Russian diplomatic addresses); those justifying the protection of Russian ethnic nationals, or perhaps even the loose notion of Russian compatriots (rather than civilians at large as assumed by the R2P discourse) beyond Russian borders. Yet such an agenda is too disruptive for current legal understandings and offers too many obvious affronts to the post-Cold War evolution of international norms, to have any realistic prospect of making headway in the wider community of states.

Perhaps what Russia seeks instead, therefore, is more hard-headed and practical – to compel the codification of a new European security dispensation, centred on but not confined to a resolution of the crisis around Ukraine. The implied objective of many Russian commentators is the recognition of hard spheres of regional influence, an updated version of the division of Europe agreed at the 1945 Yalta Conference, with the de facto zone of Russian (then Soviet) hegemony transferred geographically further east.⁷ Russian officials have heaped praise on the 'Yalta principles' of 1945 for reflecting the balance of military power and keeping the peace in Europe.⁸ Yet Russian hopes for some realignment to retrieve the clear cut divisions of the past, for a reworking of the European security order to suit an ambitious Russian perception of its rightful territorial reach and influence seem misplaced and over-ambitious, even if we adopt a Realpolitik view of European security. A policy

⁶ Eugenie Lukyanov, deputy secretary of the Russian National Security Council, in statement to RIA Novosti, 2 July 2014, cited in Pavel Felgenhauer, 'Ukraine as a battleground for a new world order according to Putin', *Eurasia Daily Monitor* 11; 121, 3 July 2014, <http://jamestown.org/programs/edm/archives/2014>, accessed 10 July 2014.

⁷ For example, Dmitry Suslov, 'For a good long while: global aspects of the new Russia-U.S confrontation', *Russia in Global Affairs*, December 2014, at <http://eng.globalaffairs.ru/number/For-a-Good-Long-While-17211>.

⁸ Comments by State Duma Speaker Sergei Naryshkin at a conference in Moscow in commemoration of the 70th anniversary of Yalta, *Rossiyskaya gazeta*, 25 February 2015. Polish parliamentary speaker Radoslaw Sikorski, has claimed even that during Polish Prime Minister Donald Tusk's visit to Moscow in 2008 President Putin proposed that they divide Ukraine between themselves; <http://www.rferl.org/articleprintview/26647587.html>, accessed 23 October 2014.

focused on shifting the centre of gravity of European security – tilting it eastwards - does not seem consistent with the military stalemate in eastern Ukraine, confirmed by Moscow's quiet abandonment by Moscow of its vision for Novorossiia and by its focus on extracting maximum advantage from the Minsk 2 Agreement. Nor is it consistent with Russia's deepening economic recession, stretching into 2016 and perhaps beyond, which challenges Russia's perception of itself as a rapidly strengthening pole in an emergent multipolar global order.