

A NEW COLD WAR? COLD PEACE. RUSSIA, UKRAINE, AND NATO

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INTRODUCTION

The Cold War featured constant covert conflicts, such as terrorism and proxy wars ranging “from one end of the globe to the other.”¹ These conflicts repeatedly threatened to erupt into overt (nuclear) warfare. Russia and NATO are on the edge of a new cold war because of the illegal annexation of Crimea² and more than a half dozen other issues, such as Syria,³ gay rights,⁴ Magnitsky list,⁵ et cetera. I call the current situation a cold peace. This cold peace features isolated and exceptional regional conflicts as opposed to the systemic global conflict that was the Cold War. Furthermore, there is much less state-sponsored terrorism in the cold peace than occurred in the Cold War. Consequently, exceptional regional conflicts such as Ukraine, Georgia, and Syria may be manageable but must be understood as occurring in an asymmetric field, with zero-sum outcomes regulated more often by politics than by law. Although positive-sum outcomes remain possible in economic relations, they have become less likely due to Russia’s illegal annexation of Ukraine.⁶

Consequently, Russia will most likely be increasingly isolated politically and economically, and Russian foreign relations will be increasingly zero-sum or even negative-sum. However, Vladimir Putin and Sergey Lavrov, Russia’s President and Foreign Minister, respectively, are both rational actors and are not in fact “[i]n another world.”⁷ They pursue the Russian national interest following a realist theory of international relations.⁸ United Russia has crafted a coherent narrative and implements an alternative ideology that allows it to challenge global liberalism—to the detriment of the rule of law and protection

1. Aaron David Miller, *Five Myths About the Ukraine Crisis*, CNN (Mar. 14, 2014, 6:00 AM), <http://www.cnn.com/2014/03/08/opinion/miller-five-myths-about-ukraine-crisis/>.

2. See Fred Dews, *NATO Secretary-General: Russia’s Annexation of Crimea Is Illegal and Illegitimate*, BROOKINGS (Mar. 19, 2014, 2:49 PM), <http://www.brookings.edu/blogs/brookings-now/posts/2014/03/nato-secretary-general-russia-annexation-crimea-illegal-illegitimate>.

3. Holly Yan, *Syria Allies: Why Russia, Iran and China Are Standing by the Regime*, CNN (Aug. 29, 2013, 9:01 PM), <http://www.cnn.com/2013/08/29/world/meast/syria-iran-china-russia-supporters/>.

4. *Russia: Anti-LGBT Law a Tool for Discrimination*, HUM. RTS. WATCH (June 30, 2014), <http://www.hrw.org/news/2014/06/29/russia-anti-lgbt-law-tool-discrimination>.

5. Michael R. Gordon, *U.S. Imposes New Sanctions on 12 Russians*, N.Y. TIMES, May 21, 2014, at A8.

6. Dews, *supra* note 2.

7. *Contra* Peter Baker, *Pressure Rising as Obama Works to Rein in Russia*, N.Y. TIMES, Mar. 3, 2014, at A1 (quoting Chancellor Angela Merkel of Germany). Anne Applebaum wondered aloud whether Putin might be irrational: “[U]nless Russian President Vladimir Putin suddenly becomes irrational—which, of course, can’t be excluded—he must know that a full-scale invasion is entirely unnecessary.” Anne Applebaum, *Russia Puts on the Squeeze*, WASH. POST, Feb. 28, 2014, at A17.

8. RICHARD SAKWA, PUTIN: RUSSIA’S CHOICE 267 (2d ed. 2008).

of human rights. Russia presents a real risk to the global rule of law due to domestic corruption and international lawlessness, as most recently seen in Ukraine in Donetsk and Crimea, but also in Georgia and the various “frozen” conflicts in other former Soviet Republics (Moldova, Azerbaijan, and Armenia).⁹ However, that challenge is regional, not global, and cannot become global because Russian ideology is involuted and unattractive. Furthermore, though rational actors, President Putin and/or Foreign Minister Lavrov overestimate Russia’s power and possibilities and underestimate the resiliency of NATO Member States.

To reduce the risks of a new cold war with rampant proxy wars and state-sponsored terrorism and to effectively foster the rule of law, the protection of human rights, and democratic internationalism, NATO Member States must recognize the exact nature of the challenge with which they are confronted. A proper appreciation of Russia’s real strengths and weaknesses will enable the North Atlantic alliance to firmly and appropriately meet the challenge it now faces, neither overreacting nor underreacting. Some refer to the Russian challenge as “Soviet Union 2.0.”¹⁰ However, that overstates and misapprehends the challenge. To understand the challenge Russia presents and why it is not “Soviet Union 2.0,” we must understand the roots of the challenge in the Cold War and the collapse of the USSR.

I. THE COLD WAR

To understand the Cold War we must understand Russia and the Soviet Union; to understand the Soviet Union we must understand Marxism. Thus, we start our inquiry with an examination of Marxism, then the Soviet Union, and finally the transformation from cold war to cold peace. This inquiry proceeds in historical order.

A. *Marxism*

The Cold War was driven in theory by a pervasive and irreconcilable ideological conflict between liberal individualist capitalism versus collectivist authoritarian socialism. To understand the Soviet Union and why the Russian Federation is not “Soviet Union 2.0,” we must understand Marxist theory. Although Marxist ideology drove the USSR, Marxist thinking is remarkably absent in the ideology of Putin’s United Russia party. We examine Marxist theory first from the economic base, which is the foundation of the ideological

9. Volodymyr Valkov, *Expansionism: The Core of Russia’s Foreign Policy*, NEW E. EUR. (Aug. 12, 2014), <http://www.neweasterneurope.eu/articles-and-commentary/1292-expansionism-the-core-of-russia-s-foreign-policy>.

10. See Charles Clover, *Clinton Vows to Thwart New Soviet Union*, FIN. TIMES (Dec. 6, 2012) <http://www.ft.com/intl/cms/s/0/a5b15b14-3fcf-11e2-9f71-00144feabdc0.html> (“There is a move to re-Sovietise the region.” (quoting U.S. Secretary of State Hillary Clinton)).

superstructure in Marxist thought. After understanding Marxist economics, we then look at the Marxist ideological superstructure built on that base¹¹ in order to understand the USSR as the precursor and predecessor state to the Russian Federation.

1. Marxist Economic Theory

According to Marxism, history follows progressive development through successive stages in a dialectical spiral¹² of class conflict: thesis versus antithesis leading to their synthesis at a higher level of systemic order. Marx believed the numerous social classes in history had been reduced by economic progress to a bi-polar zero-sum conflict between capitalists and workers.¹³ Marxism holds that capitalism, with its inevitable economic cyclicality, fosters warfare to obtain access to resources, to increase market-share, and to employ the unemployed.¹⁴ Marx predicted the inevitable collapse of advanced capitalist economies in revolution due to ever-greater economic cyclicality: economic boom, panic, depression, and war.¹⁵ For Marxism, the *inevitable* tendency of capitalism is to monopolize¹⁶ because of brutal zero-sum competition: each capitalist wishes to *destroy* his or her competitor, legally if possible, illegally if necessary.¹⁷ Per Marx, capitalists are driven into destructive competition in order to obtain a larger market-share and more profits, even without “rent seeking,” though rent seeking also motivates brutal and destructive competition.¹⁸ Economies of scale, entry costs, and specialization are other factors that push capitalism toward monopolizing.

11. Often, when people analyze Al-Qaeda they note that the name Al-Qaeda means base. Most analysts recognize the name as referring to Al-Qaeda as originally a database of Mujahadeen and not as a reference to Marxist theory of the productive base and the ideological superstructure, or for that matter of Maoist theory of guerilla zones and guerilla base areas.

12. See JEAN RIVERO, *LES LIBERTÉS PUBLIQUES* 87–88 (1974) (“In addition, Marxism is historical materialism. It believes that man and society are at every moment, a reflection and product of history and of the dialectical movement behind it. In this perspective the existence of permanent rights, given once and for all, and removed the movement of history, is obviously unacceptable. Like all the laws, ‘human rights’ are only a reflection of the economic infrastructure. The expression of the power of the ruling class, and the means for it to impose its domination the exploited classes.”) (unverified source).

13. See KARL MARX & FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO* 25–26 (D. Ryazanoff ed., Eden Paul & Cedar Paul trans., Russell & Russell 1963) (1848).

14. See *id.*

15. See 1 KARL MARX, *CAPITAL: A CRITICAL ANALYSIS OF CAPITALIST PRODUCTION* 455–58 (Frederick Engels ed., Samuel Moore & Edward Aveling trans., Int’l Publishers Co. 1947) (1867).

16. IAN WARD, *INTRODUCTION TO CRITICAL LEGAL THEORY* 116 (2d ed. 2004) (citing Marx for the proposition that the natural tendency of capitalism is to monopolize).

17. See *id.*

18. See *id.*

Monopoly is terrible, per Marxism, because oligarchs can exploit workers who are essentially helpless in the face of concentrated economic power.¹⁹ This essential weakness of the exploited individual explains Marxist skepticism toward individualism. To Marx, “individual freedom” is not just the freedom to starve and be homeless while unemployed; it is also the paralysis of any effort to collectively organize the exploited so as to defend themselves from concentrated economic power.²⁰

History shows that the Malthusian predictions of Marxism—ever greater market cyclicality leading to global war and revolutions—are mostly inaccurate. Marxists underestimated the power of technological innovation and legal rationalization to reform capitalism out of deep depression and wars for markets and resources. Capitalism reformed itself out of self-destructive global wars for markets and resources in the post-war social democratic era due to the spate of social democratic legal reforms enacted to forestall another great depression and prevent another world war. The U.N., NATO, the EU, the UDHR,²¹ ICCPR,²² ICESCR,²³ CERD,²⁴ CEDAW,²⁵ GATT,²⁶ IMF,²⁷ IBRD,²⁸ as well as bank insurance (FDIC),²⁹ unemployment insurance, health insurance, and national pension plans such as social security were all intended to prevent another economic depression, mass unemployment, and consequent world war. Although the Malthusian predictions of Marxism proved false, the

19. See ANTHONY BREWER, *MARXIST THEORIES OF IMPERIALISM: A CRITICAL SURVEY* 50–51 (2d ed. 1990).

20. See, e.g., MICHAEL A. LEBOWITZ, *BEYOND CAPITAL: MARX’S POLITICAL ECONOMY OF THE WORKING CLASS* 122–23 (2d ed. 2003).

21. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/>.

22. International Covenant on Civil and Political Rights, *adopted and opened for signature, ratification and accession* Dec. 16, 1966, 999 U.N.T.S. 171, available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

23. International Covenant on Economic, Social and Cultural Rights, *adopted and opened for signature, ratification and accession* Dec. 16, 1966, 993 U.N.T.S. 3, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

24. International Convention on the Elimination of All Forms of Racial Discrimination, *adopted and opened for signature and ratification* Dec. 21, 1965, 660 U.N.T.S. 195, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>.

25. Convention on the Elimination of All Forms of Discrimination Against Women, *adopted and opened for signature, ratification and accession* Dec. 18, 1979, 1249 U.N.T.S. 13, available at <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>.

26. General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1700, available at http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf (forerunner to the World Trade Organization).

27. INT’L MONETARY FUND, <http://www.imf.org> (last visited Oct. 13, 2014).

28. INT’L BANK FOR RECONSTRUCTION & DEV., <http://go.worldbank.org/SDUHVGE5S0> (last visited Oct. 13, 2014).

29. FED. DEPOSIT INS. CORP., <http://www.fdic.gov> (last visited Oct. 13, 2014).

Marxist prediction of a natural tendency of capital to monopolize seems accurate because monopolistic production is generally more efficient.³⁰ Nevertheless, capitalist economies do not feature ever more extreme and ever more rapid economic cyclicality (hysteresis) triggering global war and global revolution, at least not since 1945.³¹ Capitalism in the developed world seems to have mostly tamed the business cycle and to have definitively de-linked economic cycles from war for markets and resources: the 2008 great recession did not unleash any war among the developed countries, at least not so far.

2. Marxist Legal Theory

Marxism argues that the economic base, the material conditions of production, generally determine the ideological superstructure, and that the ideological superstructure merely justifies and rationalizes the relations of productive forces.³² Marxism sees private property as the final mechanism of oppression and a source of separation between men.³³ To Marx the state is merely the executive committee of the bourgeoisie.³⁴ Capitalist law, per Marxism, is purely formal,³⁵ an illusion,³⁶ which justifies exploitation by a dominant class over a dominated class.³⁷ Thus, Marx wanted to abolish the state and its laws. Consequently, Marxist legal theory is fundamentally antinomian.³⁸ None of this is part of United Russia's worldview, but partly explains why Russia has difficulty forming itself as a rule of law state.

30. See BREWER, *supra* note 19, at 24.

31. See Steve Keen, *Is Capitalism Inherently Unstable?*, PIERIA (Apr. 29, 2013), http://www.pieria.co.uk/articles/is_capitalism_inherently_unstable.

32. See KARL MARX, A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY 20 (Maurice Dobb ed., S.W. Ryazanskaya trans., 1970).

33. JEAN-MARIE PONTIER, LIBERTÉS PUBLIQUES 136 (1997).

34. MARX & ENGELS, *supra* note 13, at 28.

35. JEAN-JACQUE VINCENSINI, LE LIVRE DES DROITS DE L'HOMME 186 (Robert Laffont ed., 1985) ("For Marxists, these freedoms are essentially 'formal' in the sense that they would be empty of any real substance, and therefore, pure form.").

36. Eric Engle, *Human Rights According to Marxism*, 65 GUILD PRAC. 249, 255 & n.10 (2008) ("Civil rights are merely the rights of the bourgeoisie." (quoting PHILOSOPHISCHES WORTERBUCH 780 (Georg Klaus & Manfred Buhr eds., 1974))).

37. JEAN ROCHE & ANDRÉ POUILLE, LIBERTÉS PUBLIQUES 11 (11th ed. 1995).

38. EVGENY BRONISLAVOVICH PASHUKANIS, THE GENERAL THEORY OF LAW & MARXISM 61 (Chris Arthur ed., Barbara Einhorn trans., Transaction Publishers 2002) (1978) ("The withering away of certain categories of bourgeois law (the categories as such, not this or that precept) in no way implies their replacement by new categories of value, capital and so on.").

B. *The Soviet Union*

1. Soviet Law

Having understood the basics of Marxist economics, we can now proceed to try to understand the USSR. We examine Soviet law to understand some of the reasons why contemporary Russia has difficulty forming a rule of law state.

a. Antinomianism in Soviet Law

The basic problem facing Soviet law was the fact that its teleology was the dissolution of the state into society. Antinomianism undermined the concept of the rule of law³⁹ in the Soviet system: Why build the rule of law if the objective of state power and the inevitable trend of history is the transformation of state power into social peace? Furthermore, for Pashukanis, the leading Soviet legal theorist, the rule of law is a mirage used to delude the working class.⁴⁰ Thus, “socialist legality,”⁴¹ the attempt to implement the formal rule of law⁴² to govern ordinary transactions of daily life⁴³ in the USSR, was doomed from the start due to dictatorship,⁴⁴ the absence of separation of powers,⁴⁵ political purges,⁴⁶ and a reign of systematic terror⁴⁷ during both the

39. Kazuo Hatanaka, *The “Rule of Law” State Notion in the USSR and the Eastern Europe—A Comparison with the Japanese Constitutional Experience*, RITSUMEIKAN L. REV., March 1991, at 1, 1 (“A generally accepted definition of the rule of law is that in order to protect the rights and freedoms of the people, the state power should be exercised under the objective law which is based on the will of the people.”).

40. PASHUKANIS, *supra* note 38, at 146.

41. Hatanaka, *supra* note 39, at 7 (“[T]he concept of socialist legality originally included the observance of the law and other legal norm by the people, as its essential component.”); Pierre Lavigne, *La Légalité Socialiste et la Développement de la Préoccupation Juridique en Union Soviétique*, REVUE D’ETUDES COMPARATIVES EST-OUEST, Sept. 1980, at 5, 8–14.

42. Hatanaka, *supra* note 39, at 4–5 (“[Socialist legality is] a principal of strict observance and exact exercise of constitution, laws and other acts by all state organ, public servants, social organization and citizen.”).

43. The Law of Nov. 30, 1918: On the People’s Courts, Collection of Laws of RSFSR, 1918, No. 85, art. 22 (noting that People’s Judges must decide on written law; lacunes to be covered via “revolutionary legal conscience”).

44. See Karl Marx, *Marx to J. Weydemeyer, March 5, 1852*, in KARL MARX & FREDERICK ENGELS: SELECTED WORKS IN ONE VOLUME 679, 679 (9th prtng. 1986) (“[T]he class struggle necessarily leads to the dictatorship of the proletariat . . . [and] this dictatorship itself only constitutes the transition to the abolition of all classes and to a classless society” (quoting Marx in a letter to J. Weydemeyer in New York)).

45. *Id.* at 291 (“The Commune was to be a working, not a parliamentary, body, executive and legislative at the same time.”); KONSTITUTSIJA SSSR (1936) [KONST. SSSR] [USSSR CONSTITUTION] arts. 35, 59, 67, 81, 91.

46. *But see* Harold J. Berman, *Principles of Soviet Criminal Law*, 56 YALE L.J. 803, 805 (1947) (containing no reference whatsoever to the trials of 1936 and 1937).

Lenin⁴⁸ and Stalin eras, which literally put the nails into the coffin of the rule of law, as shown by the execution of Pashukanis himself—among thousands of others. This history makes clear why Russia has difficulty attaining the rule of law to this day.

b. Human Rights to Soviet Law

Marxist legal theory, though antinomian, is not without teleology. Marxism seeks to subordinate the state to society and ultimately replace the state with society in order to end exploitation and war.⁴⁹ Marx saw capitalist human rights as progress relative to feudalism.⁵⁰ Marx regarded human rights as necessary for the achievement of socialism.⁵¹ Marxist human rights laws are collective⁵² social claims of all persons to substantive goods, subject however to the limitations imposed by the material facts and contextualized by history⁵³

47. *Id.* (“[T]he courts should not do away with terror—to promise that would be to deceive ourselves and others—but should give it foundation and legality, clearly, honestly, without embellishments.” (quoting 27 LENIN, COLLECTED WORKS 296 (3d ed. 1932))); N.V. KRYLENKO, LENIN ON COURTS 111 (1927).

48. Resolution of Council of People’s Commissars of Sept. 5, 1918, Collection of Laws of RSFSR, 1918, No. 710 (noting that enemies of the state are to be imprisoned; if necessary, shot). *See also White Terror*, IZVESTIA, Sept. 5, 1918, at 1.

49. KARL MARX, CRITIQUE OF THE GOTHA PROGRAMME 31 (C.P. Dutt ed., 1933).

50. Engle, *supra* note 36, at 254 & n.1 (“Already in his ‘On the Jewish Question’ Marx had proven that the so called Human rights are class rights—political emancipation is a great step forward but only progress within the exploitative society.” (quoting PHILOSOPHISCHES WORTERBUCH 780 (Georg Klaus & Manfred Buhr eds., 1974))).

51. *Id.* at 251–52; *see also* PHILOSOPHISCHES WORTERBUCH 782 (Georg Klaus & Manfred Buhr eds., 1974) (“Human rights are necessary for the transition from capitalism to socialism.”) (unverified source).

52. Engle, *supra* note 36, at 254 & n.1 (“The goal of socialist civil rights is neither absolute individualism or the loss of the individual within the masse. Rather, fundamental rights contribute to the formation of all-round developed harmonious persons.” (quoting PHILOSOPHISCHES WORTERBUCH 783 (Georg Klaus & Manfred Buhr eds., 1974))).

53. As Frederick Engels wrote:

Freedom does not consist in the dream of independence from natural laws, but in the knowledge of these laws, and in the possibility this gives of systematically making them work towards definite ends. This holds good in relation both to the laws of external nature and to those which govern the bodily and mental existence of men themselves—two classes of laws which we can separate from each other at most only in thought but not in reality. . . . Freedom therefore consists in the control over ourselves and over external nature, a control founded on knowledge of natural necessity. . . . The first men who separated themselves from the animal kingdom were in all essentials as unfree as the animals themselves, but each step forward in the field of culture was a step towards freedom.

FREDERICK ENGELS, ANTI-DÜHRING 157 (2d ed. 1959).

and the finality of the socialist construction: the abolition of law and the state⁵⁴ and the replacement of the state with society.⁵⁵ Early soviet legislation was consequently very open textured, seeking to exhort⁵⁶ and educate,⁵⁷ to teach the masses to read,⁵⁸ to participate in political discourse, and to grow as

54. EVGENY B. PASHUKANIS, *LAW AND MARXISM: A GENERAL THEORY* 61 (Chris Arthur ed., Barbara Einhorn trans., 1978) (“The withering away of certain categories of bourgeois law (the categories as such, not this or that precept) in no way implies their replacement by new categories of proletarian law, just as the withering away of the categories of value, capital, profit and so forth in the transition to fully-developed socialism will not mean the emergence of new proletarian categories of value, capital and so on. The withering away of the categories of bourgeois law will, under these conditions, mean the withering away of law altogether, that is to say the disappearance of the juridical factor from social relations.”).

55. See ROCHE & POUILLE, *supra* note 37, at 27 (“The freedoms of 1789 are linked to the capitalist regime, the freedoms of the rich.”).

56. Csaba Varga, *Lenin and Revolutionary Law-Making*, in *COMPARATIVE LEGAL CULTURES* 515, 516 (Csaba Varga ed., 1992) (“The main features typical of revolutionary legislation are its very general nature, the fact that the laws and statutory instruments frequently take the form of an appeal or a proclamation or a declaratory character or a statement of principle, the wording of the clauses, which is clear, fluid and direct, and the often almost total liberty of structure, to be noted in particular in the lack of separation between the ‘whereas’ clauses and the legal provisions. In general, such legislation has the character of an instrument of revolutionary propaganda designed to stimulate and educate, partly because of the language and structure adopted for the norms; in other words—to quote an expression of Lenin’s—it suffers from the ‘formal imperfections’ which characterize the sort of norms which scarcely meet the requirements of professional jurists.”).

57. 26 V.I. LENIN, *Report on the Activities of the Council of People’s Commissars January 11 (24)*, in *COLLECTED WORKS* 455, 464 (George Hanna ed., Yuri Sdobnikov & George Hanna trans., 1964) (“[W]e transformed the court from an instrument of exploitation into an instrument of education . . .”).

58. N. BUKHARIN & E. PREOBRAZHENSKY, *THE ABC OF COMMUNISM* 293 (Eden Paul & Cedar Paul trans., 1969). The following graph demonstrates the efforts towards literacy:

individuals in society.⁵⁹ The Soviet concept of human rights as hortatory claims of groups to collective resources entailing workers’ rights to housing, shelter, and medical care are different from the legally binding civil and political rights of the Anglo-American concept of human rights. This may partly explain why protecting basic human rights in Russia remains difficult even today.

c. The Soviet State

To understand the cold war, we must understand the Soviet state. The USSR was a one-party system, a workers’ and peasants’ dictatorship in name,⁶⁰ directed and led by the Communist Party of the Soviet Union (CPSU). The CPSU regarded itself as a vanguard party, the most advanced elements (intelligentsia) of the most advanced class (the proletariat), subject to democratic centralism and exercising a dictatorship on behalf of the proletariat (workers and peasants).⁶¹ The CPSU was a centralized, hierarchical party of elites directing a centrally planned economy via dictatorship.⁶² The party elite

Dynamics of Literacy 1897–1979: Population Aged 9–49, in Percentages

Population		1897	1920	1926	1939	1959	1970	1979
Rural	M	35.5	52.4	67.3	91.6	99.1	99.6	99.6
	F	12.5	25.2	35.4	76.8	97.5	99.4	99.5
	All	23.8	37.8	50.6	84.0	98.2	99.5	99.6
Urban	M	66.1	80.7	88.0	97.1	99.5	99.9	99.9
	F	45.7	66.7	73.9	90.7	98.1	99.8	99.9
	All	57.0	73.5	80.9	93.8	98.7	99.8	99.9
Total	M	40.3	57.6	71.5	93.5	99.3	99.8	99.8
	F	16.6	32.3	42.7	81.6	97.8	99.7	99.8
	All	28.4	44.1	56.6	87.4	98.5	99.7	99.8

Source: *Narodnoe obrazovanie, nauka i kul'tura v SSSR: Statisticheskii sbornik* (Moscow, 1977), 9; *SSSR i zarubezhnye strany, 1987: Statisticheskii sbornik* (Moscow, 1988), 83.

59. Varga, *supra* note 56, at 519 (“Lenin’s theory of the need for legislation to be general in character was intended to be applicable only during a transition stage, and carried with it the requirement that the subsequent legislation, based on an appraisal of past experience and making provision for specific matters, should be more directly dependent on the practical results achieved and on the political, social and technical experience acquired in the course of the enforcement of existent laws in a creative manner.”).

60. KONSTITUTSIIA SSSR (1936) [KONST. SSSR] [USSSR CONSTITUTION] art. 1 (“The Union of Soviet Socialist Republics is a socialist state of workers and peasants.”).

61. See Eric Engle, *From Russia with Love: The EU, Russia, and Special Relationships*, 10 RICH. J. GLOBAL L. & BUS. 549, 551 (2011).

62. *Id.*

of the CPSU (the “nomenklatura”) claimed to govern on behalf of and for the benefit of the workers and peasants, i.e. the peoples of the Soviet Union, to obtain the well-being of the workers and peasants⁶³ and to prevent the wars for market share that capitalism unleashed in economic crises at the trough of business cycles.⁶⁴ The USSR, following Marx’s prescription to transform the state into civil society,⁶⁵ sought to end market relations entirely⁶⁶ to attain the goal of peace and prosperity. The dictatorship of the party on behalf of the workers and peasants was justified as necessary to work revolutionary changes on their behalf.⁶⁷ The initial performance of the USSR was in fact remarkable. The CPSU ended famine and illiteracy⁶⁸ that characterized Tsarist Russia⁶⁹ in the USSR, doubling the average life expectancy⁷⁰ despite purges and a world war that in total killed about twenty million Soviet citizens.⁷¹ Leninism also instituted sex equality.⁷² In real human terms, such as average life expectancy and literacy rates, Leninism was unquestionably progress as compared to Tsarism.

Over time however, the Soviet system degenerated and increasingly worked to the benefit of the party establishment (the “nomenklatura”)⁷³ at the expense of the broad masses of workers and peasants. Meanwhile, the threat of

63. KONSTITUTSIIA SSSR (1977) [KONST. SSSR] [USSSR CONSTITUTION] art. 1 (“The Union of Soviet Socialist Republics is a socialist state of the whole people, expressing the will and interests of the workers, peasants, and intelligentsia, the working people of all the nations and nationalities of the country.”).

64. See, e.g., V.I. LENIN, STATE AND REVOLUTION 5 (Int’l Publishers 1932) (1917); V.I. LENIN, WHAT IS TO BE DONE: BURNING QUESTIONS OF OUR MOVEMENT 54–55 (Victor J. Jerome ed., Joe Fineberg & George Hanna trans., Int’l Publishers 1969) (1902); MARX, *supra* note 15; MARX & ENGELS, *supra* note 13, at 42–54.

65. See FREDERICK ENGELS, SOCIALISM: UTOPIAN AND SCIENTIFIC 68 (Andrew Moore ed., Edward Aveling trans., Mondial 2006) (1880).

66. See, e.g., KONSTITUTSIIA SSSR (1936) [KONST. SSSR] [USSSR CONSTITUTION] art. 4 (“The socialist system of economy and the socialist ownership of the means and instruments of production firmly established as a result of the abolition of the capitalist system of economy, the abrogation of private ownership of the means and instruments of production and the abolition of the exploitation of man by man, constitute the economic foundation of the U.S.S.R.”).

67. Engle, *supra* note 61.

68. *Id.*; see also Boris N. Mironov, *The Development of Literacy in Russia and the USSR from the Tenth to the Twentieth Centuries*, 31 HIST. EDUC. Q. 229, 243 (1991).

69. Engle, *supra* note 61; see also Jeff Coplon, *In Search of a Soviet Holocaust: A 55-Year-Old Famine Feeds the Right*, VILLAGE VOICE, Jan. 12, 1988, at 30.

70. Engle, *supra* note 61; see also STEPHEN WHITE, RUSSIA GOES DRY: ALCOHOL, STATE, AND SOCIETY 43 (1996).

71. THE CONCISE OXFORD DICTIONARY OF POLITICS 466 (Iain McLean ed., 1996).

72. See Engle, *supra* note 61, at 552; see also GAIL WARSHOFKY LAPIDUS, WOMEN IN SOVIET SOCIETY: EQUALITY, DEVELOPMENT, AND SOCIAL CHANGE 136 (1978).

73. Engle, *supra* note 61, at 552; see also MICHAEL VOSLENSKY, NOMENKLATURA: THE SOVIET RULING CLASS 240–45 (Eric Mosbacher trans., 1984).

invasion diminished. From this perspective, which I call dual de-legitimation, we can better understand the sudden, unexpected, and relatively bloodless restoration of capitalism⁷⁴ in Russia. The system, *in its own terms*, lost legitimacy as being no longer necessary (defense against a war which never came) or effective (consumer well-being was simply higher in the West, and the nightmare of Tsarist famine, illiteracy, and inequality was long past). These systemic facts help explain the near bloodless dissolution of the Soviet system.

2. Soviet Economics

a. The Planned Economy

The Soviet planned economy succeeded at shifting the USSR from a semi-feudal economy facing literal starvation and illiteracy producing but a score of basic goods into an industrial economy. However, the newly created industrial economy produced a myriad of different goods.⁷⁵ This production diversity doomed the centrally planned economy: an ever-greater variety of products made central planning increasingly complex and thus less efficient at coordinating production and consumption. The result was suboptimal economic performance.⁷⁶ The USSR's centrally planned economic production system was more appropriate for a semi-feudal industrializing society with few goods than for a highly developed industrial economy producing a myriad of goods.⁷⁷ As to the promised workers' paradise, leisure was assured, but consumer goods were always in short supply.⁷⁸ Quality of goods suffered from production deadlines at the end of the five-year planning cycles when

74. Capitalism is a system of economic production predicated on the private ownership of capital. It is distinct from state capitalism wherein capital is held by the state or through public-private partnerships. Capitalism is also defined as an industrial rather than a feudal mode of production. The Tsarist economy was semi-feudal and industrializing. Further, many of its economic projects involved heavy state participation (state capitalism). However, the ownership of capital in the hands of a financial elite distinguishes Tsarist semi-feudal (state) capitalism from the Soviet planned economy. Of course, strong state participation in the economy, directly and indirectly, remains a mark of the Russian economy. However, private ownership of capital and the role of the Orthodox Church as spiritual guide of the nation were definitively restored in the post-Soviet era. Thus I refer to this process as "capitalist restoration" rather than "capitalist instauration." See, e.g., Engle, *supra* note 61, at 552; see also STEVEN ROSEFELDE, *COMPARATIVE ECONOMIC SYSTEMS: CULTURE, WEALTH, AND POWER IN THE 21ST CENTURY* 183 (2002).

75. See Eric Engle, *A Social-Market Economy for Rapid Sustainable Development*, GUJARAT NAT'L L. U. J.L. DEV. & POL., Dec. 2009, at 42, 42–55.

76. See, e.g., WORLD BANK, *BELARUS: PRICES, MARKETS, AND ENTERPRISE REFORM* 1 (1997).

77. See LUDWIG VON MISES, *ECONOMIC CALCULATION IN THE SOCIALIST COMMONWEALTH* 4 (S. Adler trans., 1990).

78. See Engle, *supra* note 61, at 568; see also Robert Whitesell, *Why Does the Soviet Economy Appear to be Allocatively Efficient?*, 42 *SOVIET STUD.* 259, 260–68 (1990).

production goals had to be met.⁷⁹ In sum, the quality of Soviet life did not match Western European standards. This was mostly because so much of the government's resources were wasted on building a military-industrial complex that did not advance the well-being of Soviet citizens.⁸⁰

b. Autarchy

The Soviet leadership sought to create socialism in one country⁸¹ via economic autarchy.⁸² While historically justified by Russia's history of invasion after invasion, autarchy is suboptimal to trade. This, along with the inefficiencies of the planned economy, partly explains the collapse of the Soviet Union.

Pursuant to the policy of autarchy, a ruble currency economic zone was created—and the ruble with official exchange rates, not market rates.⁸³ Capital restrictions were the norm.⁸⁴ So were border controls such as customs duties and passport checks.⁸⁵ Autarchy complemented military security by enabling independent political choices.⁸⁶ The Soviet leadership saw military security as a precondition to economic security and well-being.⁸⁷ To circumvent the problem of a lack of foreign currency and the inability to use the ruble for currency exchanges overseas and related problems arising from the nature of a closed economic system, barter in and for real goods was taken up by and between the COMECON countries. For example, the USSR would barter with Cuba, trading sugar for finished Soviet goods, a practice known as countertrade.⁸⁸ Barter also occurred at the micro-economic level, though not as a legitimate *de jure* instrument of state policy, but as a *de facto* necessity of

79. See Engle, *supra* note 61, at 568; see also Zigurds L. Zile, *Consumer Product Quality in Soviet Law: The Tried and the Changing*, in 2 *SOVIET LAW AFTER STALIN: SOCIAL ENGINEERING THROUGH LAW* 183, 202 (Donald D. Barry et al. eds., 1978) (explaining the rising quality of Soviet goods between the 1960s and 1970s).

80. See Engle, *supra* note 75.

81. J.V. STALIN, *The October Revolution and the Tactics of the Russian Communists*, in *PROBLEMS OF LENINISM* 117, 121 (1976).

82. Ronald A. Francisco, *The Foreign Economic Policy of the GDR and the USSR: The End of Autarky?*, in *EAST GERMANY IN COMPARATIVE PERSPECTIVE* 189, 190 (David Childs et al. eds., 1989).

83. Engle, *supra* note 61, at 554.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. Engle, *supra* note 61, at 554; see also José F. Alonso & Ralph J. Galliano, *Russian Oil-For-Sugar Barter Deals 1989–1999*, in 9 *CUBA IN TRANSITION* 335, 335 (1999).

everyday life, albeit of questionable legality.⁸⁹ “Gifts” however could be justified as a “social” and “fraternal” act under the Marxist logic of transforming monetary economic compulsion into cooperative voluntary social acts.⁹⁰ However, with capitalist restoration, the primitive version of a “gift economy” became warped into generalized bribery, undermining the rule of law in the post-Soviet era.⁹¹

Preferential tariff treatment for the COMECON and Soviet client states was a key feature of the international trade policy of the Socialist bloc.⁹² High tariff barriers were created to protect the autarchic COMECON home market.⁹³ These tariff barriers would also encourage infant industries. Non-tariff technical barriers such as restrictions on imports for health and safety reasons also served the logic of autarchy. Intellectual property would be either unprotected or weakly protected in order to use Western innovation to support the USSR.⁹⁴ Software piracy of Western computer technology software and microchip technology was the norm during the Soviet era⁹⁵ and intellectual property law enforcement in Russia remains a sore spot to this day.⁹⁶ The centrally planned economy aimed to accumulate the surplus capital needed for economic development through the creation of infrastructure (e.g., housing,

89. Engle, *supra* note 61, at 554–55; see also JIM LEITZEL, *RUSSIAN REFORM* 128 (1995); Byung-Yeon Kim, *Informal Economy Activities of Soviet Households: Size and Dynamics*, 31 J. COMP. ECON. 532, 545 n.24 (2003).

90. Engle, *supra* note 61, at 555.

91. *Id.*

92. *Id.*; see also MARIE LAVIGNE, *INTERNATIONAL POLITICAL ECONOMY AND SOCIALISM* 174–75 (David Lambert trans., 1991); ADAM ZWASS, *THE COUNCIL FOR MUTUAL ECONOMIC ASSISTANCE: THE THORNY PATH FROM POLITICAL TO ECONOMIC INTEGRATION* 8 (1989).

93. Engle, *supra* note 61, at 555. COMECON (also known as the CMEA) was the USSR’s effort to form a common market within the Soviet bloc. See, e.g., JENNY BRINE, *COMECON: THE RISE AND FALL OF AN INTERNATIONAL SOCIALIST ORGANIZATION*, at xvi (1992).

94. Engle, *supra* note 61, at 555. Intellectual property remains but is weakly protected in the Russian federation and the USSR successor states. As noted by the European Union Commission:

[C]ounterfeiting and piracy activity in Russia remains on a high level. The lack of effective enforcement affect Russian markets on a large scale. To be fully integrated in the world trading system, to continue to attract foreign investment and to prevent major losses for right-holders, Russia has to implement all its international obligations, in particular the ones related to Intellectual Property Rights and their Enforcement.

Directorate-General for Trade, *Intellectual Property: Dialogues*, EUROPEAN COMM’N, http://ec.europa.eu/trade/creating-opportunities/trade-topics/intellectual-property/dialogues/#_russia (last visited Apr. 4, 2012).

95. Engle, *supra* note 61, at 555; see also Shane Hart, *Computing in the Former Soviet Union and Eastern Europe*, *CROSSROADS*, March 1999, at 23, 23–25.

96. Engle, *supra* note 61, at 555–56; see also REPORT ON THE PROTECTION AND ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN THIRD COUNTRIES, EUROPEAN COMMISSION 17 (2013), available at http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150789.pdf.

roads, airports) via forced saving⁹⁷ and also, more ominously, for military production in order to wage war.

C. *The Cold War*

As seen, there were essential fundamental differences between individualist capitalist liberalism and Marxist dictatorship. These ideological and economic differences manifested in the Cold War. The Cold War was characterized by constant conflict, overt and covert. Arms control was a perennial political issue of the Cold War to prevent or limit the arms race, and arms control remains a key issue with respect to Russia today.⁹⁸

The U.S. and U.S.S.R. expressed their Cold War conflicts through proxy wars, most notably in Korea, Vietnam, Israel, and Afghanistan, as well as in dozens of smaller conflicts over several decades.⁹⁹ State-sponsored terrorism was also a feature of the Cold War. The admitted examples are the U.S. funding of anti-Marxist rebels in Nicaragua (Contras) and Mujahadeen in Afghanistan,¹⁰⁰ but it is fairly obvious that groups such as the Red Brigades, the Japanese Red Army, and the Red Army Faction,¹⁰¹ as well as the Palestinian Liberation Organization, obtained covert funding, covert weapons deliveries, and covert training by the USSR¹⁰² and/or China (including the inter-Marxist conflict via covert action in the ZAPU, ZANU, and ANC). In the background was the constant threat of atomic war, and this is likely to feature in the cold peace. Each system sought to avoid such a war through the UN, alliance networks, and diplomacy, yet both were based on a military industrial complex, which fostered the conflict.

Geopolitically, the Soviet system can be described as a series of concentric rings. At the center was the USSR, then Eastern Europe,¹⁰³ then Third World

97. For a detailed explanation of the import substitution industrialization model in the context of Soviet development theory, see Engle, *supra* note 75.

98. Shannon N. Kile, *Mar. 10: Making a New START in Russian-U.S. Nuclear Arms Control*, STOCKHOLM INT'L PEACE RES. INST., <http://www.sipri.org/media/newsletter/essay/march10> (last visited Oct. 17, 2014).

99. Julia Gallivan, *U.S. Proxy War Policy During the Cold War*, INTRO TO GLOBAL SEC. (Feb. 26, 2013, 2:10 AM), <http://introglobalsecurity.blogspot.com/2013/02/us-proxy-war-policy-during-cold-war.html>.

100. Steve Galster, *Afghanistan: The Making of U.S. Policy, 1973–1990*, NAT'L SEC. ARCHIVE (Oct. 9, 2001), <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/essay.html>.

101. Nick Lockwood, *How the Soviet Union Transformed Terrorism*, THE ATLANTIC (Dec. 23, 2011, 8:30 AM), <http://www.theatlantic.com/international/archive/2011/12/how-the-soviet-union-transformed-terrorism/250433/>.

102. Andrew Campbell, *Moscow's Gold: Soviet Financing of Global Subversion*, NAT'L OBSERVER, Autumn 1999, at 19, 19–20.

103. See JOSEPH G. WHELAN & MICHAEL J. DIXON, *THE SOVIET UNION IN THE THIRD WORLD: THREAT TO WORLD PEACE?* 7–9 (1986).

Marxist states, and finally Third World non-Marxist allies.¹⁰⁴ The closer a country was geographically to the Soviet center, the greater the level of integration into the autarchic economy. Western efforts to “rollback” Marxism were generally unsuccessful,¹⁰⁵ perhaps because the Soviet system was autarchic. The failure of “rollback” ultimately led to the “Brezhnev doctrine,” wherein the USSR declared the attainment of “socialism” in any country as irreversible.¹⁰⁶ Russia today, incidentally, has no such global network, only regional partners in its defensive alliance the Collective Security Treaty Organization (CSTO).¹⁰⁷

The U.S. response to the failure of rollback and the Brezhnev doctrine was to compete in fields where the USSR could not compete due to technological inferiority or its structure as a closed dictatorship; prominent examples were computers and telecommunication.¹⁰⁸ Consequent to this asymmetric arms race, the USSR and its Warsaw Pact allies wasted almost all their surplus production on unproductive military spending,¹⁰⁹ trying to make up for quality differences with quantity, just as Russia today tries to use nuclear weapons to compensate for its technological inferiority. The U.S. aimed to bankrupt the USSR by forcing it into an unsustainable arms race, a policy that worked¹¹⁰—and in my estimate would work again. The arms race was most evident in the Strategic Defense Initiative (SDI or “Star Wars”) which sought to create a missile shield against the USSR.¹¹¹ The SDI certainly violated the spirit of the since-abrogated Anti-Ballistic Missile (ABM) Treaty and probably the letter of the treaty as well.¹¹² The U.S. also funded anti-Soviet insurgencies, most

104. Engle, *supra* note 61, at 553.

105. See PETER GROSE, OPERATION ROLLBACK: AMERICA’S SECRET WAR BEHIND THE IRON CURTAIN 210 (2000).

106. See MATTHEW J. OUMET, THE RISE AND FALL OF THE BREZHNEV DOCTRINE IN SOVIET FOREIGN POLICY 1–3, 6 (2003).

107. Richard Weitz, *Moscow’s Afghan Endgame*, HUDSON INST. (June 25, 2014), <http://www.hudson.org/research/10399-moscow-s-afghan-endgame>.

108. See Engle, *supra* note 61, at 557.

109. *Russian Military Budget*, GLOBAL SECURITY, <http://www.globalsecurity.org/military/world/russia/mo-budget.htm> (last visited Oct. 16, 2014) (“By the mid-1980s, the Soviet Union devoted between 15 and 17 percent of its annual gross national product to military spending Until the early 1980s, Soviet defense expenditures rose between 4 and 7 percent per year.”). See also ANDERS ÅSLUND, BUILDING CAPITALISM: THE TRANSFORMATION OF THE FORMER SOVIET BLOC 131 (2002).

110. 1 ENCYCLOPEDIA OF THE COLD WAR 862–63 (Ruud van Dijk ed., 2008) (unverified source).

111. 4 CATHAL J. NOLAN, THE GREENWOOD ENCYCLOPEDIA OF INTERNATIONAL RELATIONS 1600 (2002).

112. See Donald G. Gross, *Negotiated Treaty Amendment: The Solution to the SDI-ABM Treaty Conflict*, 28 HARV. INT’L L.J. 31, 31–32 (1987).

evidently in Afghanistan and Nicaragua.¹¹³ The economic strains on the Soviet system, which resulted from the arms race and proxy wars, led to constant shortages that seriously undercut the USSR's claim to be creating a workers' paradise with the highest standard of living for ordinary people on earth.¹¹⁴ "The party of Lenin," despite initial success, was ultimately unable to match capitalism in the quality and abundance of consumer goods.¹¹⁵ This, coupled with the increasing tendency of the nomenklatura to serve its own interest rather than to seek the well-being of all the Soviet peoples and the fact that the U.S. was not in fact threatening to invade the USSR to seize resources, led to a crisis of purpose, a crisis of legitimacy, and capitalist restoration resulting in chaotic and often criminal privatization.

II. FROM COLD WAR TO COLD PEACE

A. *Economic Collapse and Corruption*

The collapse of the USSR was marked by chaos, corruption, and economic failure¹¹⁶ and was followed by asset stripping and mafia wars, which resulted in *declining* average life expectancy in Russia during the 1970s.¹¹⁷ The U.S. at least tolerated criminal tendencies of certain Russian classes¹¹⁸ if only because much legitimate economic activity was defined as economic crime by Soviet

113. WOLFF HEINTSCHEL VON HEINEGG, CASEBOOK VÖLKERRECHT § 399 (Beck ed., 2005) (unverified source).

114. 31 V.I. LENIN, COLLECTED WORKS 516 (Julius Katzer ed., 1966) ("Communism is Soviet power plus the electrification of the whole country."). That is, the Soviet system justified itself as the fastest route to development, which it was for at least one generation. However, ultimately, the system lost legitimacy as it became clearer and clearer that the West produced better quality consumer goods and in greater numbers.

115. See ALEX F. DOWLAH & JOHN E. ELLIOTT, THE LIFE AND TIMES OF SOVIET SOCIALISM 182 (1997).

116. See *Privatization: Lessons from Russia and China*, INT'L LAB. ORGANIZATION, <http://www.ilo.org/public/english/employment/ent/papers/emd24.htm> (last visited June 25, 2014) ("By the beginning of 1997 the Russian economy had perhaps reached its lowest point. GNP fell by 6 per cent [sic] in 1996, compounding a decline of more than 50 per cent [sic] since 1991 (although the shadow economy has expanded). Many enterprises are on the brink of collapse; the proportion of loss-making enterprises in the main economic sectors is approximately 43 per cent [sic].").

117. See Donald A. Barr & Mark G. Field, *The Current State of Health Care in the Former Soviet Union: Implications for Health Care Policy and Reform*, 86 AM. J. PUB. HEALTH 307, 308 (1996).

118. See Carlos Escude, *When Security Reigns Supreme: The Postmodern World-System vis a vis Globalized Terrorism and Organized Crime*, in TRANSNATIONAL TERRORISM IN THE WORLD SYSTEM PERSPECTIVE 69, 85 (Ryszard Stemplowski ed., 2002); ALFRED W. MCCOY, THE POLITICS OF HEROIN: CIA COMPLICITY IN THE GLOBAL DRUG TRADE 385 (1991).

standards:¹¹⁹ All Russian economic actors in the early 1990s were “criminals,” at least according to Soviet law.

B. The Commonwealth of Independent States (CIS)

The CIS arose in the chaotic aftermath of the collapse of the USSR.¹²⁰ Unlike the USSR, the CIS never had well-articulated goals. The CIS leaders and the contending factions within and outside of the nomenklatura lacked a unifying ideology and policy program in the face of the literal bankruptcy of Marxism.¹²¹ Lacking a common teleology or goal, the CIS degenerated into the political overseer of the peaceful dissolution of the USSR¹²² and, to a certain extent, the introduction of market mechanisms to replace the planned economic system. The CIS is typically described as “moribund,”¹²³ and it failed to evolve into a viable transnational governing institution due to a lack of a common vision¹²⁴ and inexperience in transnational institutionalism,¹²⁵ particularly with

119. See WILLIAM A. CLARK, *CRIME AND PUNISHMENT IN SOVIET OFFICIALDOM: COMBATING CORRUPTION IN THE POLITICAL ELITE, 1965–1990*, at 9 (1993).

120. Michael Roberts & Peter Wehrheim, *Regional Trade Agreements and WTO Accession of CIS Countries*, 36 *INTERECONOMICS* 315, 315 (2001) (“Shortly after the collapse of the Soviet Union most of its successor states, with the exception of the Baltic States, joined the Commonwealth of Independent States (CIS). At the same time many CIS countries opened up their trade regimes by dismantling various trade restrictions, state trading monopolies, multiple exchange rate regimes as well as formal tariff barriers. However, in the course of the 1990s pressure for the protection of domestic industries has increased. Import tariffs on ‘sensitive imports,’ such as refined sugar, have started to pop up. By far the most serious barriers to trade and the ones most frequently used are non-tariff barriers. The ever more complex and constantly changing trade regimes of many CIS countries have also opened the door for corruption and smuggling.”).

121. STEPHEN K. BATALDEN & SANDRA L. BATALDEN, *THE NEWLY INDEPENDENT STATES OF EURASIA: HANDBOOK OF FORMER SOVIET REPUBLICS* 19 (2d ed. 1997) (discussing the factional conflict within the RSFSR at formation of the CIS); Georgi M. Derluguian, *The Process and the Prospects of Soviet Collapse: Bankruptcy, Segmentation, Involution*, in *QUESTIONING GEOPOLITICS: POLITICAL PROJECTS IN A CHANGING WORLD-SYSTEM* 203, 215 (Georgi M. Derluguian & Scott L. Greer eds., 2000) (discussing factionalism within the nomenklatura); Boris Grushin, *The Emergence of a New Elite: Harbinger of the Future or Vestige of the Past?*, in *THE NEW ELITE IN POST-COMMUNIST EASTERN EUROPE* 53, 57 (Vladimir Shlapentokh et al. eds., 1999) (discussing a lack of vision among Russia’s political parties and their leaders).

122. Roberts & Wehrheim, *supra* note 120, at 323 (“Ten years after the break up of the USSR, CIS countries are still struggling to find the appropriate format to govern their mutual trade relations. At present a patchwork of half-implemented bilateral agreements and a series of paper framework agreements govern intra-CIS trade relations. Most of the RTAs among CIS member states remain *de jure* agreements. If one were to characterise this institutional framework, one might term it ‘managed disintegration.’”).

123. See *Commonwealth of Independent States (CIS)*, GLOBAL SECURITY, <http://www.globalsecurity.org/military/world/int/cis.htm> (last visited Oct. 20, 2014).

124. Joop de Kort & Rilka Dagneva, *Department of Economics Research Memorandum 2006.03: Russia’s Role in Fostering the CIS Trade Regime* 9 (Leiden Univ. Dep’t of Econ. Res.

regards to market liberalization¹²⁶ and the rule of law. Moreover, some of the new managerial class were Soviet era “economic criminals,”¹²⁷ while others were former nomenklatura. The CIS’s failure is unsurprising, and was perhaps even inevitable given those conditions.¹²⁸ Lacking a common vision, the CIS defaulted into the role of the clearinghouse for the USSR’s remarkably peaceful dissolution via two distinct factors: (1) privatization, and (2) the devolution of former federal powers to individual Republics.¹²⁹

The institutional problems mentioned contributed to the breakdown of CIS. For example, the CIS’s transnational trade policy was characterized by incoherence. Numerous overlapping multilateral and bilateral treaties covered similar issues,¹³⁰ leading to economic disputes due to the contradictory obligations imposed by the various treaties. However, these overlapping multilateral and bilateral treaties also left many issues unaddressed.¹³¹ For example, the CIS’s agreements were not sophisticated enough to take into

Memorandum 2006.03), available at <http://ssrn.com/abstract=1440809> (“The CIS was burdened with ambivalent goals. On the one hand, it aimed to assist the newly independent countries to gain economic independence, while on the other hand it was the intended institution to bring the newly independent states together in an economic union. The ambivalent character of the CIS, and the increasing self-consciousness, both politically and economically, of the newly independent states, resulted in numerous bilateral and multilateral agreements at the same time.”).

125. See Margot Light, *International Relations of Russia and the Commonwealth of Independent States*, in *EASTERN EUROPE AND THE COMMONWEALTH OF INDEPENDENT STATES* 64, 65 (2d ed. 1994).

126. Philip Hanson, *The Economics of the Former USSR: An Overview*, in *EASTERN EUROPE AND THE COMMONWEALTH OF INDEPENDENT STATES*, *supra* note 125, at 43, 43.

127. See, e.g., Leonard Orland, *Perspectives on Soviet Economic Crime*, in *SOVIET LAW AND ECONOMY* 169, 169 (Olimpiad S. Ioffe & Mark W. Janis eds., 1987); Charles A. Schwartz, *Economic Crime in the U.S.S.R.: A Comparison of the Khrushchev and Brezhnev Eras*, 30 *INT’L COMP. L.Q.* 281, 281–82 (1981).

128. Nonetheless, its failure was remarkable in that it contributed to the peaceful transition from one-party dictatorships to independent republics with varying degrees of democratic participatory government. See Stephan Kux, *From the USSR to the Commonwealth of Independent States: Confederation or Civilized Divorce?*, in *FEDERALIZING EUROPE?: THE COSTS, BENEFITS, AND PRECONDITIONS OF FEDERAL POLITICAL SYSTEMS* 325, 325 (Joachim Jens Hesse & Vincent Wright eds., 1996).

129. *Id.* at 346–47. See also Stephan Kux, *Confederalism and Stability in the Commonwealth of Independent States*, 1 *NEW EUR. L. REV.* 387, 390–91 (1993).

130. de Kort & Dragneva, *supra* note 124, at 1 (“What can be observed in the CIS is that economic cooperation takes the form of overlapping bilateral and multilateral agreements of very distinct legal quality. From an economic point of view it does not make sense that countries that have concluded a multilateral free trade agreement, as the CIS countries did in 1994, an agreement that they amended in 1999, subsequently conclude bilateral free trade agreements with their partners as well. It creates overlap, it increases transaction costs, and it obfuscates the status of both the multilateral and bilateral agreement.”).

131. *Id.* (“The agreements that are concluded often are partial and selective, while their ratification and implementation also is a mixed affair . . .”).

account non-tariff trade barriers such as health, safety, and technical restrictions to trade.¹³² Ultimately, conflicting rules, gaps in rules coverage, and non-enforcement¹³³ gutted the CIS treaties of efficacy, created legal uncertainty, and increased transaction costs.¹³⁴ The CIS's institutions and rules were simply ineffective.¹³⁵ The CIS states were unable to effectively implement transnational trade governance due to incoherent rules, absent institutionalism, and corruption. Lacking effective rules and institutions, a political approach predominated, which only further impeded any effort by the CIS partners to maintain productive synergies such as a customs union, a common currency, and common health and safety standards. Moreover, the frequent use of reservations by CIS member states rendered the agreements pointless, impeding legal stability from taking root in CIS institutions.¹³⁶

Any effort to bring the USSR's customs and monetary union into the CIS era was thus doomed for several interlocking reasons. There was an absence of useful legal concepts such as "basic economic rights" (the four freedoms)¹³⁷ as a necessary means to the desirable end of economic integration to obtain peace and prosperity. The absence of legal concepts in the CIS treaties, such as subsidiarity, proportionality, and acquired community positions (*acquis communautaire*),¹³⁸ further crippled the CIS because those are methods of coordinating supranational and intergovernmental tendencies in order to attain

132. *Id.* at 3 ("The CIS trade regime can be described as a symbiosis between bilateral and multilateral regimes, both of which can be described as weak regimes. Bilateral agreements cover some key free trade rules, such as tariffs, but remain minimal and quite basic. Non-tariff barriers, for instance, are generally left out, as are liberalisation of services or intellectual property to name a few issues that have become important in international trade agreements. Disputes are generally resolved through consultations.").

133. Roberts & Wehrheim, *supra* note 120, at 319 ("Though most CIS countries have FTAs with each other on a bilateral basis, not all of them are practically implemented or enforced.").

134. de Kort & Dragneva, *supra* note 124, at 2 ("[F]ragmentation poses a danger of rule clashes, patchy implementation, and a non-transparent and complex administration of the regime.").

135. *Id.* at 1 ("[Ninety] per cent [sic] of all multilateral documents that create the legal base of the CIS, and there are more than 1,000 of them, are ineffective. According to many observers, the CIS seems to have failed in becoming an effective framework of economic cooperation and (re)integration.").

136. *Id.* ("[T]he CIS applies the 'interested party' principle, which implies that a state could choose not to participate in a certain agreement or decision without afflicting its validity.").

137. The central concept to the foundation of the European Union as an economic area is the four freedoms (basic rights): the free movement of goods, workers, capital, and enterprises among the Member States. See Eric Engle, *Europe Deciphered: Ideas, Institutions, and Laws*, FLETCHER F. WORLD AFF., Fall 2009, at 63, 75.

138. Knud Erik Jorgensen, *The Social Construction of the Acquis Communautaire: A Cornerstone of the European Edifice*, EUR. INTEGRATION ONLINE PAPERS, Apr. 29, 1999, at 1, 2, available at <http://eiop.or.at/eiop/pdf/1999-005.pdf>; *Acquis Communautaire*, BBC NEWS (Apr. 30, 2001, 11:52 AM), http://news.bbc.co.uk/1/hi/in_depth/europe/euro-glossary/1216329.stm.

by accretion the objectives of economic integration.¹³⁹ Finally, common institutions such as the Economic Court of the CIS were weak¹⁴⁰ because of an absent common will, an absent common goal, and absent common concepts and a general failure to form the rule of law state in former Soviet republics.

C. *The Eurasian Economic Community (EurAsEC)*¹⁴¹

Following the instauration of market mechanisms to replace the planned economic system, and because of the continual success of the EU as an institution of transnational governance, the Russian Federation, Belarus, and Kazakhstan together instituted a customs union known as the “Eurasian Economic Community,”¹⁴² which has become the “Eurasian Union.” Russian efforts to form something like the EU in the former Soviet Union have been criticized, notably by Hillary Clinton,¹⁴³ as “Soviet Union 2.0”¹⁴⁴ or a “dictators’ club.” Given that Belarus is still an overt dictatorship, the attempt by Yanukoyvich in Ukraine to restore dictatorship through draconian anti-

139. de Kort & Dragneva, *supra* note 124, at 1–3.

140. *Id.* at 2–3 (“[T]he CIS presents a mix of, often overlapping, bilateral and multilateral agreements. The picture gets even more complicated as bilateral and multilateral agreements often differ in the strength of commitment they require from the signatories. Bilateral agreements rarely envision a mechanism for resolving disputes between its parties, relying on negotiations to do so. Multilateral agreements on the other hand often do attempt to strengthen the bindingness of the commitments undertaken. In 1993, the Treaty of the Economic Union even went as far as to strengthen the role of the Economic Court, by requiring that ‘if the Economic Court recognises that [. . .] [sic] a member state has not fulfilled its obligation ensuing from the Treaty, this state is obliged to take measures connected with the implementation of the decision of the Economic Court’. A year later, in 1994, a Free Trade Agreement (FTA) was concluded which ‘undermines’ the position of the Economic Court . . .”).

141. *About EurAsEc*, ЕвразЭС, <http://www.evrazes.com/en/about/> (last visited Oct. 20, 2014) (“[H]eads of state Alexander Lukashenko, Nursultan Nazarbayev, Kurmanbek Bakiyev, Vladimir Putin, Emomali Rakhmon and Islam Karimov made a decision to establish a customs union within the EurAsEC framework, with the Republic of Belarus, the Republic of Kazakhstan and the Russian Federation as initial members. Other EurAsEC member states will join the customs union when their economies are ready to take this step.”).

142. Roberts & Wehrheim, *supra* note 120, at 321 (“Russia and two other CIS countries—Kazakhstan and Belarus—established a customs union (CU) in 1995. The Kyrgyz Republic joined in March 1996 and Tajikistan joined in 1999. The text of the customs union provided for discontinuation of all trade tariffs between member countries, tariffs for trade with other countries were adjusted to one level [i.e., harmonized into a common external tariff] and the system of privileges was unified. In addition, certain measures were taken to unify tax policy (tax rates and application of indirect taxes). The agreements on the customs union called for coordination of customs, excise, and value-added dues . . .”).

143. Clover, *supra* note 10.

144. *Janukowitsch-Vertrauter: Putin Will Die Sowjetunion neu Errichten*, SPIEGEL (Dec. 15, 2013), <http://www.spiegel.de/politik/ausland/janukowitsch-vertrauter-putin-will-die-sowjetunion-neu-errichten-a-939162.html>.

protest laws,¹⁴⁵ and the illegal annexation of Crimea by Russia, those criticisms now have credibility.¹⁴⁶ However, the fundamental ideological and economic differences between the Soviet Union and the Russian Federation explain why the Russian Federation and its alliances and trade networks are not “Soviet Union 2.0.” Russia is pursuing a rational policy of power maximization using both “hard” military power and “soft” cultural and economic influence, and Putin is consolidating political power through limitations on civil and political rights. However, United Russia is hardly a vanguard party exercising the all-around dictatorship of the proletariat, let alone atheist or even undemocratic.

III. THE COLD PEACE

A. *Differences Between the Cold War and the Cold Peace*

Although Russia and the West are once again in conflict, the conflicted character of current Russian-Western relations is fundamentally different from the Cold War. Consequent to these differences, I call this conflicted relationship “cold peace,” because as bad as the relations are, they could be much worse. The Cold War featured constant covert conflicts, such as proxy wars and state-sponsored terrorism throughout the world. It is unlikely that we will see a recurrence of such covert conflicts, though, if we do, they will be localized to Eurasia and not global. Great Russian corporatist orthodoxy is not an ideology that can claim global applicability or global and total antagonism to Western liberal democracy, and the Russian global network of bases, trading partners, and allies was thoroughly disrupted in the 1990s.¹⁴⁷ First we examine differences between the cold peace and the Cold War, then similarities.

1. A Market Economy

After the Cold War and collapse of the USSR, Russia abandoned communism as an ideal and central planning and became a market economy, albeit with the state as an important economic actor in key sectors such as petroleum (Gazprom, Rosneft) and arms (Rosoboron).¹⁴⁸ The absolute clash

145. Dmytro Gorshkov & Oleksandr Savochenko, *Ukraine Leader Signs Controversial Anti-Protest Law*, YAHOO NEWS (Jan. 18, 2014), <http://my.news.yahoo.com/ukraine-president-signs-anti-protest-bills-law-official-201313501.html>.

146. Sergei Guriev, *Corruption Has Laid Waste to the Russian Economy*, FIN. TIMES (Apr. 2, 2014, 7:21 PM), <http://www.ft.com/cms/s/0/939659ae-b67d-11e3-b230-00144feabdc0.html#ixzz33xhbdDx5> (“Once growth is gone, territorial expansion is an authoritarian regime’s tool of choice . . .”).

147. See Alexander A. Pikayev, *Russia’s Black Sea Military Bases*, in MILITARY BASES: HISTORICAL PERSPECTIVES, CONTEMPORARY CHALLENGES 165, 165 (L. Rodrigues & S. Glebov eds., 2009).

148. See *Russia Prepares to Attack the Petrodollar*, VOICE OF RUSS. (Apr. 4, 2014), http://voiceofrussia.com/2014_04_04/Russia-prepares-to-attack-the-petrodollar-2335/.

between two different economic models that characterized the Cold War is past. This is reflected in patterns of trade and investment.

a. Trade (Resources)

One key difference between the Cold War and the cold peace is the extent of trade between Russia and Europe. Whereas the USSR was largely autarchic, with very little trade and investment with non-Marxist states, Russia has significant trade ties outside of the former Soviet space and has been admitted to the World Trade Organization (WTO).¹⁴⁹

Russia trades intensively with the European Union (EU),¹⁵⁰ which is Russia's largest trading partner,¹⁵¹ although Russia is not Europe's largest trading partner.¹⁵² Prior to sanctions, trade between the EU and Russia had been growing rapidly,¹⁵³ due to Russia's comparative advantage in hydrocarbons¹⁵⁴ and, to a lesser extent, atomic energy, as well as the asymmetric European comparative advantage in certain industrial goods.¹⁵⁵ In contrast, trade and investment between Russia and the U.S. is virtually non-existent,¹⁵⁶ though U.S. trade with Russia had been growing.¹⁵⁷

149. Eric Engle, *The EU, Russia, and the Commonwealth of Independent States (CIS)*, in *RUSSIA, THE EUROPEAN UNION AND THE CIS* 1, 39–40 (Eric Engle ed., 2012).

150. In 2013 the EU exported €119.8 billion to Russia and imported €206.5 billion from Russia. Directorate General for Trade, *Russia Statistics*, EUROPEAN COMM'N (Sept. 10, 2014), http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_111720.pdf.

151. *Trade: Russia*, EUROPEAN COMM'N, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/russia/> (last visited Oct. 20 2014). The EU is Russia's main trading partner. It is also by far the most important investor in Russia.

152. *Id.*

153. Memorandum from the Brussels European Council, Review of EU-Russia Relations (Nov. 5, 2008), available at http://europa.eu/rapid/press-release_MEMO-08-678_en.htm (“*Trade and investment* between the EU and Russia are substantial and growing, and it is in our mutual interest that this trend should continue. Russia is our third most important trading partner and we see growth rates of up to 20% every year. Energy is a major factor, but impressive growth figures have also been seen in services. With its sustained high growth rates and emerging middle class, Russia is an important emerging market on our doorstep that offers opportunities to EU enterprises. The EU is the major investor in Russia, accounting for 80% of cumulative foreign investment.”).

154. *Balance Human Rights & Energy With Russia says Knut Fleckenstein MEP*, EUROPEAN PARLIAMENT (June 23, 2010), <http://www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IM-PRESS&reference=20100618STO76329> (“The European Union's relationship with Russia is one of its most important and most complicated. Strong trade and energy ties bind both although many in the EU are concerned about Moscow's human rights record.”).

155. See *Trade: Russia*, *supra* note 151.

156. In 2013, U.S. exports to Russia were just over ten billion dollars (\$11.1B) and imports just over twenty-seven billion dollars. *U.S. Trade in Goods with Russia*, U.S. CENSUS BUREAU (2013), <http://www.census.gov/foreign-trade/balance/c4621.html>.

157. Michael A. McFaul, *Message From Ambassador McFaul*, U.S. EMBASSY, <http://moscow.usembassy.gov/acs-amb-message.html> (last visited Aug. 24, 2014).

Most Russian exports are resources,¹⁵⁸ particularly petroleum, but also gold and diamonds. Russia exports few finished goods.¹⁵⁹ However, Russia is an energy powerhouse, a key producer of natural gas, oil, and petroleum products. Russia's natural gas reserves account for roughly a quarter of the world's total proven reserves.¹⁶⁰ Russia also exports uranium and nuclear power plant technology.¹⁶¹ Much of Russia's petroleum resources are in regions with significant minority Muslim populations (local majorities, but federal minorities).¹⁶² Consequent to the separatist war in Chechnya, led by Muslim separatists and fought over oil,¹⁶³ Russia, like the West, faces terrorism.¹⁶⁴ Thus, Russia and NATO Member States have a common interest in the suppression of terrorism, specifically Jihadist terrorism,¹⁶⁵ a possible point of future cooperation.

158. Gunther H. Oettinger & Sergey I. Shmatko, *Opportunities for Our Future Energy Partnership*, EU-RUSSIA ENERGY DIALOGUE 2000–2010, Nov. 2010, at 62, 62, available at http://ec.europa.eu/energy/publications/doc/2011_eu-russia_energy_relations.pdf (“The Russian Federation is the 3rd biggest world trade partner of the EU (9.7 %), following the US (15.2 %) and China (11.4 %). Energy represents 65 % of total EU imports from Russia. Russia is the biggest oil, gas, uranium and coal supplier to the EU, and the third biggest electricity supplier. 31% of total EU gas imports, 27 % of total EU crude oil imports, and 24 % of total EU coal imports are supplied from the Russian Federation. In 2009, Russia supplied 30 % of total EU uranium imports. 24 % of total EU gas sources are supplied from Russia. For several EU Member States, Russia is the only gas source and supplier. At the same time, the EU is by far the largest trade partner of the Russian Federation: 45 % of Russia imports originate from the EU, and 55% of its exports go to the EU, including 88 % of Russia's total oil exports, 70 % of its gas exports and 50 % of its coal exports. The export of raw materials to the EU represents around 40 % of the Russian budget, and the EU represents 75 % of cumulative foreign investments in Russia. In terms of infrastructure, Europe is the natural destination for Russian energy exports.”) (from a presentation delivered in Brussels/Moscow in November 2010).

159. ANDREW WILSON, *VIRTUAL POLITICS: FAKING DEMOCRACY IN THE POST-SOVIET WORLD* 57 (2005) (“Russia doesn't have many export industries.”).

160. U.S. ENERGY INFORMATION ADMINISTRATION, *RUSSIA: COUNTRY ANALYSIS BRIEF 10* (2014), available at <http://www.eia.gov/countries/analysisbriefs/Russia/russia.pdf>. Russia holds the world's largest natural gas reserves and the second largest coal reserves. *Id.* at 10, 16. Russia was the third largest producer of liquid fuels in 2012. *Id.* at 1. Russia is the second-largest producer of natural gas. *Id.* Russia is also one of the top producers and consumers of electric power in the world, with more than 220 gigawatts of installed generation capacity. *Id.* at 14.

161. See Summer Said, *U.A.E., Russia Sign Nuclear Deal*, WALL ST. J. (Dec. 17, 2012, 2:09 PM), <http://online.wsj.com/news/articles/SB10001424127887324407504578185101605699498>.

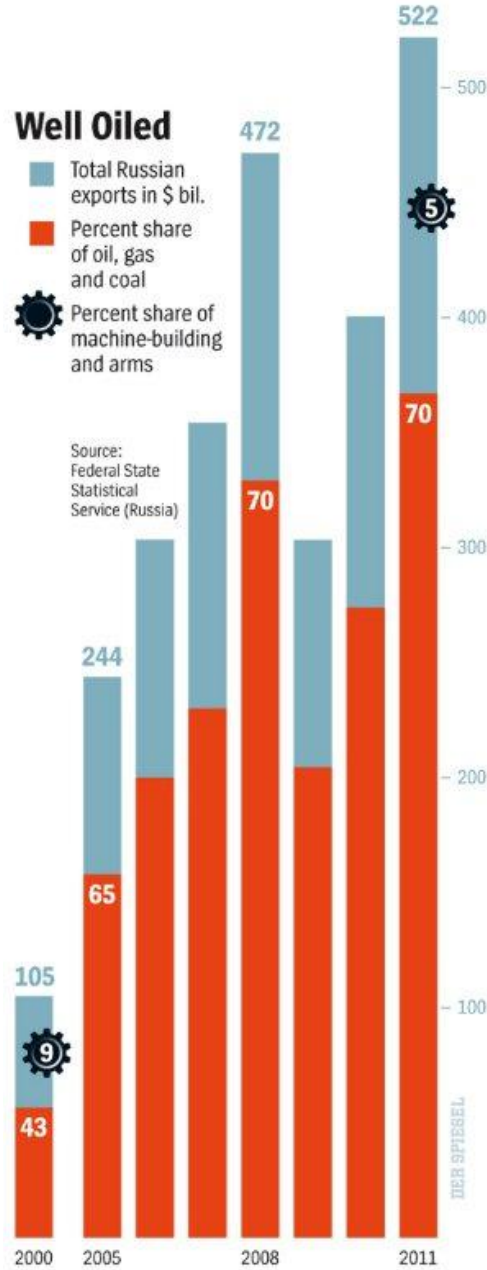
162. See Dipak Basu, *The Conflict of Chechnya: The Cause*, IVARTA (Sept. 13, 2004), http://www.ivarta.com/columns/ol_040913.htm.

163. See Craig Pirrong, *Russia's Chechen War: It All Comes Down to Energy Rents*, SEEKING ALPHA (Apr. 4, 2010, 7:47 AM), <http://seekingalpha.com/article/196964-russia-s-chechen-war-it-all-comes-down-to-energy-rents>.

164. See Basu, *supra* note 162; see also MARX & ENGELS, *surpa* note 13.

165. See Simon Shuster, *How the War on Terrorism Did Russia a Favor*, TIME (Sept. 19, 2011), <http://www.time.com/time/world/article/0,8599,2093529,00.html>.

The following chart shows the growth of the Russian economy during the Putin era, and also the fact that Russia's exports are mostly raw materials, particularly petroleum products, not finished goods.¹⁶⁶



166. Dinah Deckstein et al., *Promising but Perilous: German Firms Put Off by Russian Corruption*, SPIEGEL (Apr. 3, 2013, 11:53 AM), <http://www.spiegel.de/international/europe/german-investors-discouraged-by-corruption-in-russia-a-892043.html>.

The existence of significant ties of trade between Russia and other states creates mutual dependence,¹⁶⁷ which makes covert conflicts such as proxy wars and state-sponsored terrorism less likely to occur in the current cold peace. While we are facing a new cold peace, we are not yet confronted with a new cold war.¹⁶⁸ Russia is comparatively autarchic, but unlike the Soviet Union it is not absolutely autarchic.

b. Investment (Sanctions)

Russia is a resource-based economy because the lack of rule of law repels foreign investment. Although Russia can and does sell resources, the investment climate in Russia is, frankly speaking, horrible. No prudent pension fund manager would invest in Russia for any of the following reasons:

- 1) Russia's sovereign debt default in 1998.¹⁶⁹
- 2) The quasi nationalization of Yukos.¹⁷⁰
- 3) The similar, though less serious, squeeze-out of British Petroleum.¹⁷¹
- 4) A climate of corruption, both public and private (e.g., "reiderstvo").¹⁷²
- 5) Imposed and possible economic sanctions.¹⁷³

Even speculative investors, who are not risk averse, recognize that investing in Russia carries real risks of selective taxation, extortion, nationalization, and corruption—and those risks of loss are not offset by the possibility of superior profits which might justify the risk. Consequently, Russia is undercapitalized, and thus, under industrialized. In an effort to industrialize, Russia attempts to force Europe to invest in Russia's secondary¹⁷⁴ and tertiary¹⁷⁵ markets for Russian energy¹⁷⁶ as part of trade-

167. See *Europe and Russia's Resources: "We Are Mutually Dependent on Each Other,"* SPIEGEL (July 14, 2006, 1:46 PM), <http://www.spiegel.de/international/spiegel/0,1518,426555,00.html>.

168. Other scholars disagree and believe we are already in a new cold war. See, e.g., SAKWA, *supra* note 8, at viii.

169. See Sebastian Walsh, *A History of Debt Defaults: Russia 1998*, FIN. NEWS (July 27, 2011), <http://www.efinancialnews.com/story/2011-07-27/a-history-of-debt-defaults-russia-1998?ea9c8a2de0ee111045601ab04d673622>.

170. Gregory L. White & Bhushan Bahree, *Russian Government Sets Plan to Nationalize Yukos's Chief Unit*, WALL ST. J., Dec. 31, 2004, at A1.

171. Julia Werdigier & Andrew E. Kramer, *BP to Exit Its Venture in Russia*, N.Y. TIMES, June 2, 2012, at B1.

172. Carl Schreck, *The Danger of Doing Business in Russia*, TIME (Dec. 19, 2009), <http://content.time.com/time/world/article/0,8599,1948140,00.html>.

173. Isabel Gorst, *Russian Economy Staggering as Sanctions Bite*, IRISH TIMES (May 2, 2014, 9:28 PM), <http://www.irishtimes.com/news/world/europe/russian-economy-staggering-as-sanctions-bite-1.1782208>.

174. Deckstein et al., *supra* note 166. As the authors argue:

deals. However, capital investments into Russia have repeatedly been shown to be a poor choice,¹⁷⁷ most famously in the case of British Petroleum's joint venture.¹⁷⁸

c. Sanctions

The Russian economy performs sub-optimally due to a lack of foreign investment¹⁷⁹ and now outright sanctions.¹⁸⁰ Since Russia's illegal annexation of Crimea, the Russian stock market has fallen drastically¹⁸¹ as foreigners have further disinvested.¹⁸² Capital flight from Russia is illustrated in the chart below:¹⁸³

Volkswagen, for example, is already producing VW and Skoda models in two Russian plants. VW CEO Martin Winterkorn negotiated directly with Putin about building additional plants. "There was a lot of back and forth and hemming and hawing over whether or not to do it," says Winterkorn. In the end, he decided that the company would build another engine factory in the western Kaluga region. But the decision was not entirely voluntary.

Id.

175. *Id.* ("With a law known as Decree 166, the Russia government compels foreign companies to build their own production plants in the country. High import duties increase the cost of models coming in from abroad. But starting in 2016, any automaker that produces at least 300,000 vehicles in Russia will be allowed to import additional cars at lower import duty rates.")

176. See *Europe and Russia's Resources: "We Are Mutually Dependent on Each Other,"* *supra* note 167.

177. Andreas Heinrich et al., *Foreign Investment and National Interests in the Russian Oil and Gas Industry*, 14 *POST-COMMUNIST ECONOMIES* 495, 503-05 (2002).

178. Marin Katusa, *Putin Is the New Global Shah of Oil*, *CASEY RES.* (Oct. 26, 2012, 8:29 AM), <http://www.caseyresearch.com/articles/putin-new-global-shah-oil>.

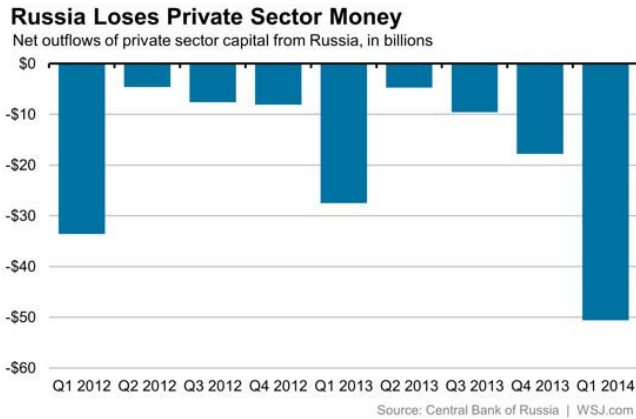
179. Anders Aslund, *Russia Is Losing Sources of Economic Growth*, *MOSCOW TIMES* (Jan. 22, 2014, 7:07 PM), <http://www.themoscowtimes.com/opinion/article/russia-is-losing-sources-of-economic-growth/493094.html>.

180. Gorst, *supra* note 173.

181. Kenneth Rapoza, *Post-Ukraine Election, Russia Stocks Fall Off a Cliff*, *FORBES* (May 27, 2014, 7:36 AM), <http://onforb.es/1jW6quT>.

182. *Russian Economy to Grow by 0.5 Percent in 2014—Central Bank's Nabiullina*, *N.Y. TIMES* (May 26, 2014, 6:46 AM), http://www.nytimes.com/reuters/2014/05/26/business/26reuters-russia-economy-cenbank.html?hp&_r=0 ("The economy is on the brink of recession after quarterly GDP fell by 0.5 percent in the first three months of the year, impacted by sanctions and instability resulting from the stand-off with Ukraine and wider emerging market uncertainty.")

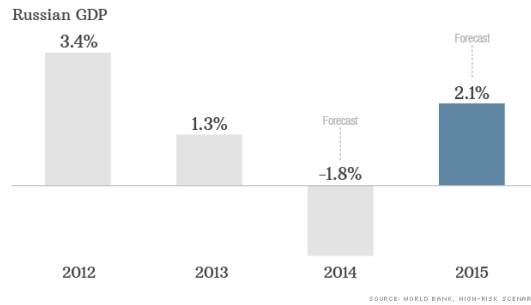
183. Erin McCarthy, *The Economic Cost of Crisis*, *WALL ST. J.* (May 6, 2014, 1:18 PM), <http://blogs.wsj.com/numbers/the-economic-cost-of-crisis-1349/>.



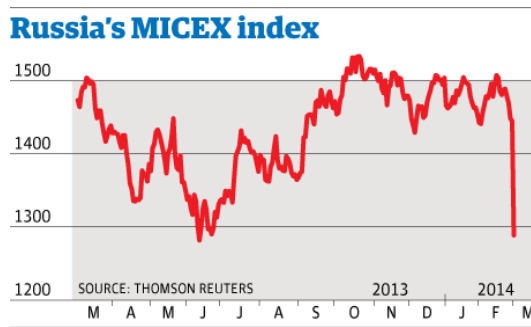
Sanctions and the crisis in Ukraine caused an economic recession in Russia, illustrated in the graphs below.¹⁸⁴



184. Kathrin Hille, *Russia Looks for Economic Self-Reliance*, FIN. TIMES (Apr. 22, 2014, 5:39 PM), <http://www.ft.com/intl/cms/s/0/ee5d9120-ca2f-11e3-bb92-00144feabdc0.html#axzz34Vo6l2H5>; Mark Thompson, *Recession Warning for Russia*, CNN (Mar. 26, 2014, 10:55 AM), <http://money.cnn.com/2014/03/26/news/economy/russia-economy-world-bank/>. Note: these estimates presume that sectoral sanctions will not be introduced, and that the global economic recovery will continue.



Sanctions also caused the Russian stock market to lose about 40 billion euros worth of value:¹⁸⁵



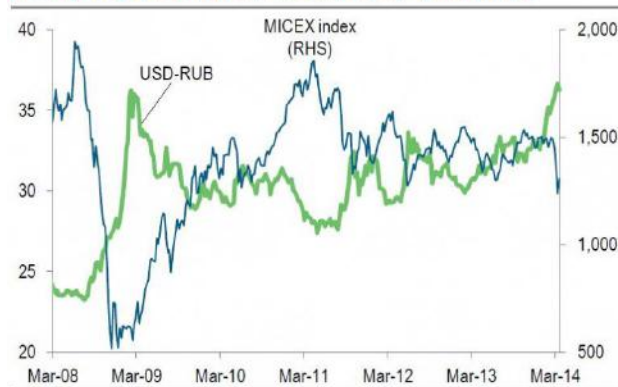
and have also led to a significant decline in value of the Russian ruble.¹⁸⁶

185. Phillip Inman et al., *Ukraine Crisis Sends Russian Stock Market Tumbling, £34bn Wiped Off Shares Listed in Moscow as Investors Respond to Russia's Intervention in Crimea*, THE GUARDIAN (Mar. 3, 2014, 1:58 PM), <http://www.theguardian.com/world/2014/mar/03/ukraine-crisis-russian-stock-market-falls/print>.

186. Moran Zhang, *Russia's 2014 Economic Outlook Bleak Amid Toughening Western Sanctions*, INT'L BUS. TIMES (Mar. 27, 2014, 11:31 PM), <http://www.ibtimes.com/russias-2014-economic-outlook-bleak-amid-toughening-western-sanctions-1563978>.

Figure 2: Russian assets have been hit by the crisis

Weekly USD-RUB (LHS), Russian equity index (RHS)



Source: Bloomberg, Standard Chartered Research

In the graph above, the USD-RUB line (upwards rising) indicates the rise of the U.S. dollar relative to the Russian ruble. The RHS line (slow downwards) indicates the decline in value of the Russian stock market.

Russia can always sell resources—but sanctions and the higher transaction costs associated with corruption lower the price Russia would otherwise have obtained for those resources. Although the sanction regime will not force Russia to abandon its illegal annexation of Crimea, nor lead to an ouster of President Putin, the sanctions may have deterred Russia from further illegal annexation of Ukrainian territory. If the sanctions do not deter Russia, they will be followed by sectoral sanctions of entire swaths of the Russian economy, and possibly also illegal countermeasures, with the aim of ruining Russia's economy, even at the risk of another global recession.

d. The Energy Weapon?

Some argue that Russia can use energy pricing and exports as a political weapon. However, that does not seem to be the case. For example, despite long-term delivery of low cost natural gas, Russian energy policy has had little or no influence on Ukraine.¹⁸⁷ Furthermore, Russian energy exports are not generally driven by geopolitical ambitions, but by the practical fact of who will pay the most.¹⁸⁸ Even during the Cold War, the USSR did not participate in the Arab oil embargos and continued to sell petroleum to the U.S.¹⁸⁹ This

187. See MARSHALL I. GOLDMAN, *PETROSTATE: PUTIN, POWER, AND THE NEW RUSSIA* 144–45 (2008).

188. See *id.* at 89–90.

189. See Dina R. Spechler & Martin C. Spechler, *The Soviet Union and the Oil Weapon: Benefits and Dilemmas*, in *THE LIMITS TO POWER: SOVIET POLICY IN THE MIDDLE EAST* 96, 96–98 (Yaacov Ro'i ed., 1979).

experience shows that energy issues are not determinative of foreign relations between the Russian Federation and other states but merely constrain outcomes because energy dependence is relative, not absolute.

Russia's ability to use energy as a political weapon is also limited by the fact that there are alternatives to Russian petroleum products. Fractured gas ("fracking"),¹⁹⁰ shale oil,¹⁹¹ and tar sands¹⁹² are potential alternatives to Russian hydrocarbons. Solar energy is another, and has become much more efficient in the past decades.¹⁹³ Wind turbines, too, are increasingly competitive.¹⁹⁴ Atomic energy is also an alternative to Russian hydrocarbons.¹⁹⁵ Although Germany, at least at present, rejects atomic energy for environmental reasons,¹⁹⁶ France uses nuclear energy extensively, obtaining thereby roughly eighty percent of her electricity.¹⁹⁷ It is also possible, albeit expensive, to liquefy coal into petroleum products,¹⁹⁸ and ethanol has been used successfully in Brazil as an alternative automotive

190. James Herron, *Shale Gas Could Fracture Energy Market*, WALL ST. J. SOURCE BLOG (May 29, 2012, 1:34 PM), <http://blogs.wsj.com/source/2012/05/29/shale-gas-could-fracture-energy-market/>.

191. John Funk, *U.S [sic] Shale Oil Production Growing, Gasoline Could Average \$3.38, Says U.S. EIA*, CLEVELAND.COM (June 11, 2014, 5:03 AM), http://www.cleveland.com/business/index.ssf/2014/06/us_shale_oil_production_growin.htm.

192. *About Tar Sands*, OIL SHALE & TAR SANDS PROGRAMMATIC EIS INFO. CTR., <http://ostseis.anl.gov/guide/tarsands/> (last visited Oct. 20, 2014).

193. FED. MINISTRY FOR THE ENV'T, NATURE CONSERVATION & NUCLEAR SAFETY, RENEWABLE ENERGY SOURCES IN FIGURES: NATIONAL AND INTERNATIONAL DEVELOPMENT 8 (2010), available at <http://www.folkecenter.dk/mediafiles/folkecenter/Renewable-Energy-in-Figures.pdf> ("The expansion of renewable energy sources in Germany has been an exemplary success. Since 2000, renewable energies' contribution to final energy supply has increased 2.5-fold to a level of 10.3%. In the electricity sector, the German Government had originally aimed to achieve a 12.5% renewables' share of gross electricity demand by 2010. This target was already surpassed, considerably, by 2007. In 2009, a share of over 16% had been reached.")

194. *Id.* at 9.

195. See Lisa Pham, *Considering an Alternative Fuel for Nuclear Energy*, N.Y. TIMES (Oct. 19, 2009), <http://www.nytimes.com/2009/10/20/business/global/20renthorium.html?pagewanted=all>.

196. Eben Harrell, *Germany Decides to Extend Nuclear Power*, TIME (Sept. 6, 2010), <http://science.time.com/2010/09/06/germany-decides-to-extend-nuclear-power/> ("Every [sic] since Chernobyl puffed its radioactive plume over Europe in 1986, Germany has been deeply suspicious of nuclear power. Opposition to *Atomkraft* is at the center of the country's green movement, and almost a decade ago the country decided to phase out its nuclear plants by 2021.")

197. *Nuclear Power in France*, WORLD NUCLEAR ASS'N, <http://www.world-nuclear.org/info/inf40.html> (last updated July 2014) ("France derives over 75% of its electricity from nuclear energy. This is due to a long-standing policy based on energy security.")

198. *Sasol's Synthetic Fuels Go Global*, SOUTHAFRICA.INFO (Mar. 16, 2007), http://www.southafrica.info/business/success/sasol-130307.htm#.U_pu4Ch3f0A.

fuel.¹⁹⁹ In sum, energy dependence of countries such as the United States or Germany on petroleum imports is only relative. There are alternative energy sources. Thus, energy policy is of limited use as a political instrument. Similarly, although Russia has large gold reserves and diamonds,²⁰⁰ selling those resources would flood the market and drive the price of gold and diamonds down. Russian gold reserves and diamonds are certainly valuable, but less valuable than one might estimate. In sum, Russia's resources do not seem to be particularly useful as instruments of Russian foreign policy.

2. Democratic Legitimation

The existence of genuine democratic legitimacy of the Russian government is another key difference between the Cold War and the cold peace. Putin has genuine support of a majority of Russians²⁰¹ and does not need to engage in systematic flagrant voting fraud²⁰² to win elections because he has developed a coherent Great Russian corporatist orthodox ideology, which appeals to a majority of Russian voters. Although the illegal annexation of Crimea came as a surprise to the West,²⁰³ it only strengthened Putin's domestic democratic legitimacy and increased Putin's approval rating from roughly sixty percent to roughly eighty percent of Russians surveyed.²⁰⁴

199. Larry Rohter, *With Big Boost from Sugar Cane, Brazil Is Satisfying Its Fuel Needs*, N.Y. TIMES, Apr. 10, 2006, at A1.

200. See R.J. Wilcox, *From Russia With Gold*, MINING.COM (Nov. 1, 2013), <http://www.mining.com/from-russia-with-gold-54907/>.

201. See, e.g., Richard Rose, *Putin in Perspective*, Presentation at the University of Strathclyde Glasgow and Centre for the Study of Public Policy Scottish Russia Forum (Mar. 22, 2012) (powerpoint notes available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2158614).

202. *But see* James Melik, *Russia's Growth Stifled by Corruption*, BBC NEWS (June 28, 2012, 7:05 PM), <http://www.bbc.com/news/business-18622833> ("But some foreign investors are worried about Mr Putin's return as head of state for another term of six years after allegations of vote-rigging and protests both before and following his re-election.").

203. Guriev, *supra* note 146.

Russia's annexation of Crimea came as a great surprise. After all, Russia was long thought to be a "normal" developing country. True, it was governed by an undemocratic regime—but it was well on its way to bridging the gap with the west.

However, what happened in Crimea is anything but "normal". The last country to annex a neighbour's territory was Iraq, which took over Kuwait in 1990. Russia is certainly not Saddam Hussein's Iraq. But it stands out in one respect—it is a high-income country that is also very corrupt. According to Worldwide Governance Indicators, Russia ranks among the top fifth of most corrupt countries—on a par with far poorer parts of the world.

Id.

204. *Putin's Approval Rating Rises to 80% –Poll*, RIANOVOSTI (Mar. 26, 2014, 5:21 PM), <http://en.ria.ru/russia/20140326/188776004/Putins-Approval-Rating-Rises-to-80--Poll.html>.

3. Market Economy

Another key difference between the old Cold War and the current cold peace is that the Russian economy, though still featuring significant state ownership,²⁰⁵ is a market economy. Ownership and transfers of capital are no longer completely forbidden or even heavily regulated, though Putin is seeking to compel repatriation of Russian owned capital which has fled Russia,²⁰⁶ arguing that doing so is an anti-corruption measure²⁰⁷ because offshore banking fosters tax evasion.²⁰⁸ The state is still an owner of some key industries, notably in the petroleum sector. However, state owned assets are being opened for partial private ownership by stock market offerings via initial public offerings,²⁰⁹ usually with retention of a Russian government owned “golden share.”²¹⁰ Thus, contemporary Russian state-capitalism is definitely not the “commanding heights” theory²¹¹ of Lenin’s “new economic policy”²¹² and is much closer to a social democratic corporatist model than to the planned economy of the USSR.

B. Similarities Between the Cold War and the Cold Peace

Despite the rise of democracy and the development of a market economy, deep divisions still separate Russia from the West and explain why we are currently in a cold peace. Visa travel restrictions,²¹³ espionage,²¹⁴ diplomatic

205. William Tompson, *Back to the Future? Thoughts on the Political Economy of Expanding State Ownership in Russia*, CAHIERS RUSSIE, no. 6, 2008, at 1, 3–4.

206. For a discussion of capital flight mechanisms, see Alena V. Ledeneva, ‘Underground’ Banking in Russia, 5 J. MONEY LAUNDERING CONTROL 268, 268–73 (2002).

207. *Russia Launches Crackdown on Government Worker’s Offshore Accounts*, RT (Apr. 4, 2013, 8:15 PM), <http://rt.com/business/offshore-russia-accounts-crackdown-353/>.

208. See *Putin Backs Foreign Capital Repatriation*, FOREXTRADING24 (Dec. 13, 2012), <http://forextrading24.co.uk/news/putin-backs-foreign-capital-repatriation/>.

209. Nadia Popova & Alexander Kolyandr, *Timing Is Key for Russia’s IPO Hopefuls*, WALL ST. J. (Mar. 30, 2011, 12:01 AM), <http://online.wsj.com/news/articles/SB10001424052748704559904576230653554503480>. RosNeft is one example. See Andrew E. Kramer, *Russia Polishes Rosneft IPO in Time for G-8 – Business – International Herald Tribune*, N.Y. TIMES (July 13, 2006), http://www.nytimes.com/2006/07/13/business/worldbusiness/13iht-rosneft.2194078.html?_r=0.

210. Neil Buckley, *Russia State Sell-Offs Must Offer Control*, FIN. TIMES (Sept. 27, 2012, 5:37 PM), <http://www.ft.com/intl/cms/s/0/7f3a088a-0886-11e2-b37e-00144feabdc0.html#axzz2uRcTWRrz>.

211. On Lenin’s New Economic Policy, see Nikolay Nenovsky, *Lenin and the Currency Competition: Reflections on the NEP Experience (1922–1924)* (Int’l Ctr. of Econ. Research, Working Paper No. 22, 2006), available at <http://www.icer.it/docs/wp2006/ICERwp22-06.pdf>.

212. RICHARD SAKWA, *RUSSIAN POLITICS AND SOCIETY* 6 (4th ed. 2008).

213. Robert Bridge, *US-Russia Visa Row Heats Up*, RT (July 28, 2011), <http://rt.com/politics/us-visa-russia-reset-washington-moscow/>.

collisions,²¹⁵ sporadic saber rattling,²¹⁶ blacklists of persona non grata, and even occasional exceptional proxy conflicts such as Georgia, Syria, and Ukraine²¹⁷ are features of the cold peace.

The first similarity between the Cold War and the cold peace we explore is ideological. Ideology influences all other issues both in their perception and in the actions the ideologue takes based on its ideology, at least to the extent the ideologue believes its own propaganda. Marxism-Leninism and historical materialism directed the Soviet system, at least in theory. Putin's Russia is similarly led by an ideology that I describe as Great Russian Orthodox corporatism, which sees itself in a "clash of civilizations."

1. Ideology: Great Russian Orthodox Corporatism in a Clash of Civilizations

Putin justifies Russia's conflicted foreign relations by an ideology of Great Russian Orthodox corporatism, which sees itself in a clash of civilizations.²¹⁸ I describe each of these elements below in detail.

a. Great Russian, Nationalist, Inclusive, Expansive

By *Great Russian* I mean *Rossiskiy*:²¹⁹ the Russian nation²²⁰ defined around language rather than around race. This is a nationalist, inclusive, and expansive ideology. *Nationalist* because it defines itself as a nation at least as much as a State—the nation constitutes the state, and the state defends the

214. See, e.g., Miriam Elder, *Russia Reveals Identity of CIA Moscow Chief Following Ryan Fogle's Expulsion*, THE GUARDIAN (May 17, 2013, 1:24 PM), <http://www.theguardian.com/world/2013/may/17/russia-reveal-identity-cia-moscow-chief>.

215. See Sean Sullivan, *Ambassador McFaul: Russians Have Leaked My Conversations*, WASH. POST (Feb. 9, 2014), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/02/09/ambassador-mcfaul-russians-have-leaked-my-conversations/>.

216. Andrew Higgins & Steven Lee Myers, *As Putin Orders Drills in Crimea, Protesters' Clash Shows Region's Divide*, N.Y. TIMES, Feb. 27, 2014, at A12. NATO likewise has recently held provocative drills. Adrian Croft & Aija Krutaine, *NATO War Games Worry Moscow*, REUTERS (Nov. 6, 2013, 6:51 PM), <http://www.reuters.com/article/2013/11/06/us-nato-exercise-idUSBRE9A517P20131106>.

217. See Spencer Kimball, *US-Russian Tensions over Ukraine Threaten Cooperation on Syria, Iran*, DEUTSCHE WELLE (May 14, 2014), <http://dw.de/p/1ByuX>.

218. See, e.g., Robert C. Blitt, *Russia's "Orthodox" Foreign Policy: The Growing Influence of the Russian Orthodox Church in Shaping Russia's Policies Abroad*, 33 U. PA. J. INT'L L. 363 (2011).

219. See Stephen Fidler, *Putin Depicts Russia as a Bulwark against European Decadence*, WALL ST. J. (Sept. 20, 2013, 11:42 AM), <http://blogs.wsj.com/brussels/2013/09/20/putin-depicts-russia-as-a-bulwark-against-european-decadence/>.

220. Russia is a vast multi-ethnic land with a population of over 140 million people and more than 190 different ethnic nationalities. See ALL-RUSSIAN 2010 CENSUS OF THE POPULATION, http://www.gks.ru/free_doc/new_site/perepis2010/croc/Documents/Vol4/pub-04-01.pdf (last visited Oct. 14, 2014).

nation.²²¹ *Inclusive* because the national idea seeks to include all Russian speakers²²² and even all Slavs in the idea of nation (“narod”). *Expansive* because this nationalist ideology seeks to express itself in the following ways:

1. Politically with hard power (including an information war)²²³ in places such as South Ossetia, Abkhazia, Crimea, and Novo Rossiya;
2. Culturally with soft power²²⁴ in other Slavic countries or indeed anywhere there is a Russian language minority,²²⁵ and
3. Economically, notably through the policies of Gazprom and RosNeft.²²⁶

This is a coherent ideology, not racist ravings or a conspiracy theory, but with no tenable claim as a universal model for global governance, unlike Marxism or liberalism.

221. See EARNEST GELLNER, *NATIONS AND NATIONALISM* 1 (1983).

222. *Russia Military Looks to Recruit More Foreigners*, RIANOVOSTI (Nov. 25, 2010, 2:02 PM), http://en.ria.ru/military_news/20101125/161492830.html.

223. Andrew Wilson, “*Virtual Politics*” in the *Ex-Soviet Bloc*, OPENDEMOCRACY (July 17, 2007), http://www.opendemocracy.net/article/democracy_power/ukraine_orange/soviet_political_technology. As noted by Wilson:

Information wars are alive and well in Russia, but in this sphere the Kremlin’s monopoly is less secure. Whereas the main oligarchs are in at least temporary retirement from running party “projects” since the arrest of Mikhail Khodorkovsky in 2003, they need to maintain media influence to run information wars for commercial purposes. Moreover, there is no logical reason why Putin’s settlement with the oligarchs could have been backdated to the destruction of *kompromat*. On the contrary, rival groups can be expected to have kept whatever materials they had, and the Kremlin has not been able to choke off the supply of new *kompromat*, which often comes through privatised KGB services. Also, the deliberately arbitrary nature of Russian law “enforcement” (the “principle of suspended punishment”) means it would be advisable to bolster up defences.

Id.

224. *Id.* (“New types of political technology and even ‘soft power’ have also been deployed. The authorities are now much better attuned to the use and abuse of the internet than they were in 2004. Russia allegedly launched a ‘cyberwar’ on Estonia in May 2007 during the row over the shifting of a Soviet war monument. Fake supporters for Russia-friendly initiatives now appear on the net. The Kremlin has promoted the *Proryv* (‘Corporation’), a sort of paramilitary NGO umbrella, in Russia’s ‘near abroad’; and the *Nashi* franchise, designed as a mirror-image of ‘coloured’ opposition youth movements such as Ukraine’s Pora or Georgia’s *Kmara!*.”)

225. See *Международный совет российских соотечественников выступил в защиту русского языка на Украине и выразил свой решительный протест против массированного наступления национал-радикалов на права русскоязычного населения Украины!*, МСРС Русский мир Русский язык Соотечественники Украина (Feb. 27, 2014, 9:20 AM), <http://www.msrs.ru/ournews/2014-02-14>.

226. See Isabel Gorst, *Rosneft and Gazprom: Two Behemoths Battle It Out*, FIN. TIMES (July 2, 2014, 2:26 AM), <http://blogs.ft.com/beyond-brics/2014/07/02/rosneft-and-gazprom-two-behemoths-battle-it-out/>.

b. Orthodox

I call United Russia's ideological mix *Orthodox* because Putin has placed the Russian Orthodox Church as the moral anchor and center of his policies²²⁷—thus setting Russia rather inevitably in conflict (but not necessarily armed conflict) with Islamic republics,²²⁸ and also as distinct from Catholic or Protestant Western Europe. I refer to Putin's ideology as *corporatist* because it has elements of state capitalism.²²⁹ This mix of ideas is meant to shore up the domestic legitimacy of Putin and United Russia²³⁰ by invoking Great Russian nationalism and the Orthodox Church to rally a majority of Russian people around Putin and United Russia in order to forestall any U.S. effort to instigate a “color revolution.”²³¹ I call this “authoritarian democracy”²³²—it is popular as in populist.²³³ However, it excludes those who

227. See, e.g., *Russia Moves to Enact Anti-Gay Law Nationwide*, DAILY HERALD (Jan. 21, 2013, 10:19 AM), <http://www.dailyherald.com/article/20130121/news/701219861/> (“The legislation being pushed by the Kremlin and the Russian Orthodox Church would make it illegal nationwide to provide minors with information that is defined as ‘propaganda of sodomy, lesbianism, bisexuality and transgenderism.’ It includes a ban on holding public events that promote gay rights. . . . The bill is part of an effort to promote traditional Russian values as opposed to Western liberalism, which the Kremlin and church see as corrupting Russian youth and by extension contributing to a wave of protest against President Vladimir Putin’s rule.”).

228. See Alexei Khlebnikov, *The Islamic World—‘The Clash of Civilizations’—Russia*, ISLAM.RU (July 18, 2011), <http://islam.ru/en/content/story/islamic-world-clash-civilizations-russia>.

229. See RICHARD SAKWA, *PUTIN: RUSSIA’S CHOICE* 242 (1st ed. 2004).

230. See Maria Shabanova, *Rights of LGBT Minorities in Russian Law and Practice*, in *RUSSIA AND THE EU: UNEASY RELATIONS: A LOOK FROM BELGIUM* 190, 194 (Nina Belyaeva ed., 2010). As Maria Shabanova noted in her article:

[C]reating a negative image of “the other” is a powerful method of consolidation LGBT people are an easy target as 70–80% of the Russian population expresses negative attitudes towards gays, lesbians, bisexuals or transsexuals. Stigmatization of this group also goes well with anti-Western rhetoric, with homosexuality being portrayed as a “Western vice” designed to corrupt the Russian population and its values.

Id.

231. Leonid Grigoriev, *Elites: The Choice for Modernization*, in *RUSSIA: THE CHALLENGES OF TRANSFORMATION* 191, 204–05 (Piotr Dutkiewicz & Dmitri Trenin eds., 2011); Andrew C. Kuchins, *The Obama Administration’s “Reset Button” for Russia*, in *RUSSIA: THE CHALLENGES OF TRANSFORMATION*, *supra*, at 323, 335–36.

232. Other scholars have noted the confluence of authoritarianism and populism in Russia. See, e.g., Richard Sakwa, *The Dual State in Russia*, 26 *POST-SOVIET AFF.*, no. 3, 2010, at 185, 187.

233. Craig Calhoun, *Foreword* to *RUSSIA: THE CHALLENGES OF TRANSFORMATION*, *supra* note 231, at xi, xi–xii (“The Russian state is beleaguered by its own transitional problems but has achieved considerable stability. Some leaders call for modernization and others for a new nationalism, but there is little doubt that most share a commitment to economic development led by a strong state.”).

are not Great Russian, Orthodox, and/or Slavs.²³⁴ Thus, though Putin's ideology definitely secures Putin's reelection, it is an inadequate base for global influence. Why would a Hindu nationalist *or* an Indian secular liberal see Great Russian corporate orthodoxy as at all relevant to his or her own living conditions or struggles? They would not.

As well as lacking global appeal, the ideology of Great Russian corporate orthodoxy does not address Russia's problems with economic and political corruption²³⁵ and the absence of the rule of law. "Vertical hierarchy," i.e., personal rule, which Putin sought to restore,²³⁶ is the opposite of the rule of law. In a rule of law state, the law is an objective, unbiased foreseeable prediction of what legal consequences are entailed by a given set of facts.²³⁷ "Vertical hierarchy" has greater legal uncertainty and thus increased transaction costs as compared with a rule of law state, resulting in suboptimal economic performance. "Vertical hierarchy" and corruption also lead to low protection of basic human rights²³⁸ and repel significant foreign capital investments.²³⁹ Why invest²⁴⁰ in Russia if you need to pay for a "крыша," bribe the police,²⁴¹ and face confiscation through tax penalties²⁴² or strict selective enforcement of ambiguous laws?²⁴³ In practice, foreign investors in

234. See Mikhail K. Gorshkov, *The Sociology of Post-Reform Russia*, in *RUSSIA: THE CHALLENGES OF TRANSFORMATION*, *supra* note 231, at 145, 149 (Siriol Hugh-Jones trans.).

235. See Melik, *supra* note 202 ("[Russia is] one of the most corrupt countries on earth.").

236. Stephen K. Wegren & Dale R. Herspring, *Introduction* to *AFTER PUTIN'S RUSSIA* 1, 8–10 (Stephen K. Wegren & Dale R. Herspring eds., 4th ed. 2010); see also Peter Rutland, *The Oligarchs and Economic Development*, in *AFTER PUTIN'S RUSSIA*, *supra*, at 159, 178.

237. See *BLACK'S LAW DICTIONARY* 1448 (9th ed. 2009).

238. Bill Bowring, *Russian Legislation in the Area of Minority Rights*, in *MANAGING ETHNIC DIVERSITY IN RUSSIA* 15, 16 (Oleh Protsyk & Benedikt Harzl eds., 2012) ("Russia's post-Soviet legislation in the field of minority rights bears the indelible traces of her Imperial and Soviet history, and is also the product of intense ideological and theoretical debates since 1991.").

239. Ledeneva, *supra* note 206, at 268 ("Lack of transparency, insufficient accountability and the consequent spread of corruption have often been identified as a main, and a self-reinforcing source of troubles. As a result, Russia's economy continues to be viewed as an economy with non-transparent rules of the game, unattractive for foreign investments.").

240. See *How bad is BP?*, *ECONOMIST*, Jan. 22, 2011, at 16 (discussing the advantages and disadvantages of BP's decision to invest in Russia).

241. Nataliya Vasilyeva, *Bribes Part of Everyday Life in Putin's Russia*, *HUFFINGTON POST* (Feb. 24, 2012, 4:18 AM), <http://www.huffingtonpost.com/huff-wires/20120224/eu-russia-living-with-corruption/>.

242. *US-Russia Economic Relationship: Implications of the Yukos Affair: Hearing Before the Subcomm. on Domestic and Int'l Monetary Policy, Trade, and Tech. of the H. Comm'n Fin. Servs.*, 110th Cong. 5–6 (2007) (testimony of Anders Åslund, Senior Fellow, Peterson Institute for International Economics), available at <http://democrats.financialservices.house.gov/hearing/110/htaslund101707.pdf>.

243. ALENA V. LEDENEVA, *HOW RUSSIA REALLY WORKS* 11–15 (2006); Ekaterina Drobinina, *Russian Search-Engine Yandex Passed Information to FSB*, *BBC NEWS* (May 3, 2011, 1:48 PM), <http://www.bbc.co.uk/news/mobile/business-13274443> ("The Russian legal

Russia soon discover that between private²⁴⁴ and official corruption their investment was unwisely made.²⁴⁵ These facts lead to a lack of foreign investment, which limits the economic growth of the Russian federation. Great Russian corporate Orthodoxy is sufficient for self-preservation but inadequate for growth, let alone global dominance.

c. Corporatism

The corporatist element of Great Russian Orthodox corporatism is the most complex and must be further exposed so that the reader can understand whether and to what extent Russia today is an example of state capitalism or a semi-planned economy. Putinism, like Peronism,²⁴⁶ is a form of corporatism.²⁴⁷ Corporatism is the idea that labor and capital, rather than being locked into a zero-sum competition, can and should relate to each other cooperatively,²⁴⁸ and that the role of the state is to mediate conflicts between labor and capital to obtain the greatest social well-being, however defined (usually, by

system is characterized in the document by . . . ‘selective enforcement of laws or regulations, sometimes in ways that have been perceived as being motivated by political or financial considerations.’” (quoting a prospectus issued by Yandex).

244. Alena Ledeneva & Stanislav Shekshnia, *Doing Business in Russian Regions: Informal Practices and Anti-Corruption Strategies*, *RUSSIE.NEI.VISIONS*, Mar. 2011, at 1, 6 (“Large and small companies suffer significant financial losses not only and—in many cases—not so much from corrupt officials, but also from their own managers and employees, who engage in a range of informal practices from taking vendors’ kickbacks to appropriating company assets for personal use.”).

245. Ledeneva and Shekshnia, in discussing these problems, state:

In a study of Swedish companies in Russia, analysts identify three modes of market entry for foreign companies: export, joint venture, and direct investment; as well as three stages at which anti-corruption strategies are formed: planning, implementation and operations. They found that Swedish companies operating in Russia attributed little importance to the issue of corruption during the planning stage. However, many of these firms did encounter corruption at later stages of market penetration, and were forced to rethink their strategies accordingly. According to the survey presented in the paper, 25% of respondents said that they had encountered corruption during implementation, and 42% said that they had encountered it during operation. The authors concluded that corruption is regarded as an important obstacle for conducting business by Swedish companies operating in Russia, and affects these companies’ strategies to a great extent.

Id. at 10.

246. James P. Brennan, *Introduction to PERONISM AND ARGENTINA*, at ix, ix (James P. Brennan ed., 1998).

247. SAKWA, *supra* note 229.

248. See, e.g., Guillermo A. O’Donnell, *Corporatism and the Questions of the State*, in *AUTHORITARIANISM AND CORPORATISM IN LATIN AMERICA* 47, 47–48 (James M. Malloy ed., 1977).

utilitarianism) to build the national economy.²⁴⁹ According to corporatism, economic activity should be organized into social bodies, such as trade unions, confederations of artisans, merchant associations, and companies.²⁵⁰ The formation of peak associations (grouping of these groups) enables each peak association to clearly articulate the precise goals of its group, which the state then mediates in the best interests of all.²⁵¹ Corporatism seeks to end labor-capital strife by creating a more secure economic system for all.²⁵²

Corporatism is associated with a semi-planned economy and state capitalism,²⁵³ both of which can be seen as features of the contemporary Russian economy, and is coherent with Keynesianism.²⁵⁴ However, caveat lector, Keynesianism in the West failed to end the recessions of 1974 and 1979–1982²⁵⁵ and would be no viable path for Russia to take for that reason. Corporatism is adapted to the pre-globalization world of autarchic national economies and is thereby involuted. No matter how much justice it may seek regarding the cancellation of usurious debts²⁵⁶ and labor organization,²⁵⁷ an involuted return to the pre-war world of isolated national economies and protectionism cannot meet the challenges or seize the opportunities of globalization and reverts to a world where there is a real risk of war for access to markets and resources.

Corporatism tends to be associated with the idea of the autarchic national economy²⁵⁸ and a union of state and economy, because corporatism developed prior to globalization, i.e., when the world was still organized into autarchic

249. See, e.g., Thomas J. Biersteker, *The "Triumph" of Liberal Economic Ideas in the Developing World*, in GLOBAL CHANGE, REGIONAL RESPONSE 174, 193 (Barbara Stallings ed., 1995).

250. See SAKWA, *supra* note 229, at 197–98.

251. See, e.g., MICHAEL J. GORGES, EURO-CORPORATISM? 6–7 (1996).

252. See Christian Joerges, *Sozialstaatlichkeit In Europe? A Conflict-of-Laws Approach to the Law of the EU and the Proceduralisation of Constitutionalisation*, 10 GERMAN L.J. 335, 351 (2009) (tracing out the history of corporatist thinking in a succinct yet incisive and accessible way).

253. Michael W. Doyle, *A Liberal View: Preserving and Expanding the Liberal Pacific Union*, in INTERNATIONAL ORDER AND THE FUTURE OF WORLD POLITICS 41, 50 (T.V. Paul & John A. Hall eds., 1999).

254. Calhoun, *supra* note 233, at xvi (“The financial crisis that came to a head in 2008 brought a renewal of Keynesianism with enormous financial bailouts and stimulus packages.”).

255. HARRY SHUTT, THE TROUBLE WITH CAPITALISM 39–41, 54–55 (1998).

256. See *Economia [Economy]*, CASA ROSADA, <http://www.presidencia.gob.ar/component/content/article/102-obra-de-gobierno/1162-obra-de-gobierno-gestion-publica> (last visited Oct. 24, 2014).

257. See *Trabajo y Seguridad Social [Labor and Social Security]*, CASA ROSADA, <http://www.presidencia.gob.ar/component/content/article/102-obra-de-gobierno/1251-trabajo-y-seguridad-social> (last visited Oct. 24, 2014).

258. See, e.g., HOWARD J. WIARDA, CORPORATISM AND COMPARATIVE POLITICS 59 (1997).

national economies rather than a world-market.²⁵⁹ Peronism²⁶⁰ in Argentina is currently the clearest contemporary example of corporatism.²⁶¹ Russia²⁶² and Singapore²⁶³ are also examples of current corporatist states. Germany and France historically were somewhat corporatist from the 1950s to the 1990s, featuring strong labor unions and other peak associations, including universities, broadcasting companies, and churches, as quasi-state institutions.²⁶⁴ However, Franco-German corporatism is less evident in recent decades. Corporatism is often, though not always, linked to religion²⁶⁵ and thus to religious concepts such as subsidiarity,²⁶⁶ the idea that local rule is best whenever possible and that the central authority must act only when no other better regional or local means can be found.²⁶⁷ Corporatism is also often expressed as a third way alternative between capitalism and communism.²⁶⁸

Contemporary corporatism should be distinguished from historical corporatism.²⁶⁹ Contemporary corporatists recognize that we now live in an interdependent world and that interdependence creates conditions of peace and prosperity for all.²⁷⁰ Thus, contemporary corporatists, unlike earlier corporatists, do not seek to build autarchic national economies or consider

259. WIARDA, *supra* note 258, at 16–17.

260. Cristián Buchrucker, *Interpretations of Peronism: Old Frameworks and New Perspectives*, in PERONISM AND ARGENTINA, *supra* note 246, at 3, 6–7.

261. KATHERINE ISBESTER, THE PARADOX OF DEMOCRACY IN LATIN AMERICA 345 (Katherine Isbester ed., 2011).

262. SAKWA, *supra* note 229, at 249–54.

263. Chris Leggett, *Trade Unions in Singapore: Corporatist Paternalism*, in TRADE UNIONS IN ASIA: AN ECONOMIC AND SOCIOLOGICAL ANALYSIS 102, 102 (John Benson & Ying Zhu eds., 2008).

264. See Edmund S. Phelps, *Corporatism and Keynes: His Views on Growth*, in 147 KEYNES' GENERAL THEORY AFTER SEVENTY YEARS 91, 91–92 (Robert Dimand et al. eds., 2010) (discussing economic institutions created in a corporatist economy).

265. For a critical view of first generation corporatism, outlining its link to fascism, see Thomas J. DiLorenzo, *Economic Fascism*, THE FREEMAN (June 1, 1994), <http://www.thefreemanonline.org/columns/economic-fascism/>.

266. JOSEPH M. PALACIOS, THE CATHOLIC SOCIAL IMAGINATION: ACTIVISM AND THE JUST SOCIETY IN MEXICO AND THE UNITED STATES 44 (2007).

267. The intellectual origins of the subsidiarity doctrine are found in Catholic social thought. There, too, we see theories of humanizing relations between labor and capital. See Pope Leo XIII, *Rerum Novarum*, LA SANTA SEDE (May 15, 1891), available at http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html.

268. SAKWA, *supra* note 8, at 95.

269. For a critique of neo-corporatism as a resolution to the problems of labor-capital and Member States-E.U. governance, see Blanca P. Ananiadis, *Globalization, Welfare and 'Social' Partnership*, 3 GLOBAL SOC. POL'Y 213 (2003).

270. For an overview of transnational influences shaping neocorporatism, see Wolfgang Streeck, *The Rise and Decline of Neocorporatism*, in LABOR AND AN INTEGRATED EUROPE 80 (Lloyd Ulman et al. eds., 1993).

themselves as functioning within an isolated autarchic national economy.²⁷¹ Autarchic national economies haven't existed in decades because autarchic national economies are poorer than networked interdependent specialized trading economies, and because economic isolation leads to conflicts over access to resources and markets. Increased productivity resulting from trade and specialization explain why economic interdependence leads to prosperity. Furthermore, economic interdependence discourages war.²⁷² As a consequence of interdependence through trade, the global "core" (first world, the developed countries) no longer suffers from recurrent wars for market share and territory. Territory has become much less relevant due to changes in production and because market share is no longer linked to a national (monopolistic and territorial) economic order. Seeing these realities, Putin seeks to implement a free trading economy (Eurasian Economic Union), inasmuch as that is coherent with his consolidation and concentration of political power, e.g. by way of corporatism.

d. Clash of Civilizations

Putin has clearly taken up the logic that the world is a "Clash of Civilizations."²⁷³ The clash of civilizations rhetoric unites Russians internally and expresses Russian ambitions on the world stage; its more helpful variant focuses on the idea of civilizational dialogue²⁷⁴ rather than civilizational conflicts. This logic of civilizations in conflict manifests in differences between concepts of law and human rights in Russian law and Western law and expresses itself through an authoritarian governance structure known as "vertical hierarchy."²⁷⁵ Putin is currently consolidating and concentrating political power in his own hands and in his party, United Russia. Authoritarianism and centralization of formal power are, of course, characteristics of the USSR; however, there are at least as many divergences in the Russian Federation from the USSR as parallels and continuities.²⁷⁶ Aspects

271. On neocorporatism in the context of Eastern Europe, see Dorothee Bohle & Béla Greskovits, *Neoliberalism, Embedded Neoliberalism, and Neocorporatism: Paths Towards Transnational Capitalism in Central-Eastern Europe*, W. EUR. POL., May 2007, at 443.

272. For a hard-nosed look at trade's influence on war, see Dale C. Copeland, *Economic Interdependence and War: A Theory of Trade Expectations*, INT'L SECURITY, Spring 1996, at 5.

273. See SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 321 (1996).

274. Vladimir L. Yakunin, *Russia and the West: Toward Understanding*, in *RUSSIA: THE CHALLENGES OF TRANSFORMATION*, *supra* note 231, at 433, 436 ("Mankind is currently going through a period of the 'restructuring' of the system of world organization that has engendered an intense 'dialogue of civilizations.'").

275. See *infra* notes 278–79 and accompanying text.

276. Alena Ledeneva, *Sistema, Power Networks and Informal Governance in Putin's Russia*, WORLD FIN. REV. (Jan. 14, 2013), <http://www.worldfinancialreview.com/?p=1040> ("Putin's

of this (supposed) “clash of civilizations” will be discussed in the next section as they manifest in various aspects of the consolidation of power.

2. Authoritarianism: “Vertical Hierarchy”

Personal power and the command theory of law is still the governance style in post-Soviet Russia because the rule of law concept is not recognized or taken seriously there.²⁷⁷ Consequently, Putin expresses political power through a governance model known as “vertical hierarchy”.²⁷⁸ populist authoritarianism resting on a mass base of genuine support, or at least acquiescence, of a majority of Russian people.²⁷⁹ Authoritarianism was also the Soviet model of governance. However, the presence of genuine support through democratic legitimation distinguishes Putin’s authoritarianism from the Soviet dictatorship and makes the Putin regime stable. Thus, U.S. and E.U. concern with democracy,²⁸⁰ the rule of law,²⁸¹ and human rights²⁸² in Russia is

sistema functions with some elements from the ‘administrative-command’ system of Brezhnev’s socialism. Administrative-command methods remain effective for mobilising new elites and allocating resources, adjusted to present-day objectives and priorities. But there are also significant differences: the party ideology has given place to market interests, state property to privatised assets, informal exchange of favours to monetised kickbacks, planning to the constraints of global finance, local-bound infrastructure to hi-tech technologies and overtly command methods to more subtle informal signals.”).

277. MARIE MENDRAS, *RUSSIAN POLITICS: THE PARADOX OF A WEAK STATE* 283 (2012) (“Under Yeltsin and Putin, Russia has been a patent failure of constitutionalism and the rule of law.”).

278. See Vladimir Ryzhkov, *The Church Has Replaced the Communist Party*, *MOSCOW TIMES* (Sept. 18, 2012), <http://www.themoscowtimes.com/opinion/article/the-church-has-replaced-the-communist-party/468302.html>.

279. RICHARD SAKWA, *THE CRISIS OF RUSSIAN DEMOCRACY: THE DUAL STATE, FACTIONALISM AND THE MEDVEDEV SUCCESSION*, at xiv (2011) (“From the perspective of the dual state model, it would be incorrect to label Putin’s Russia as an authoritarian regime *tout court*, since not only did it remain formally committed to constitutional democracy and liberal capitalism, and these remained the source of its popular legitimacy but these commitments moderated its behavior and allowed the formal constitutional frameworks to structure and influence the conduct of politics. Although many of the regime’s actions were authoritarian in spirit, the formal niceties of a constitutional democracy remained pre-eminent and the legitimating framework for the system as a whole.”).

280. See European Parliament Resolution of 17 June 2010 on the Conclusions of the EU/Russia Summit, 2011 O.J. (C 236E) 101, 102 (“[W]hereas, as a member of the Council of Europe and of the Organisation for Security and Cooperation in Europe (OSCE), Russia has committed itself to protect and promote human rights, fundamental freedoms and the rule of law, and to respect the sovereignty of its European neighbours; whereas EU-Russia relations have faced a number of serious challenges over the last few years, notably as regards concerns about democracy and human rights in Russia . . .”).

281. *Id.* at 103 (“Reaffirms its belief that Russia remains one of the EU’s most important partners in building long-term cooperation and a commitment to working together to address

somewhat miscast. Russia *is* a democracy—an *authoritarian* democracy²⁸³—with weak rule of law, and its own construction of “human rights.” The authoritarian regime however is rigid and suffers from systemic corruption which weakens the state through inefficiency and inflexibility: “The paradox of Russian politics is that of a strong power based on a weak state,”²⁸⁴ i.e. an inflexible corrupt state, which claims authoritarian power over its subjects.

a. The Concept of Law

Soviet²⁸⁵ and Russian law are both essentially based on a command theory of law:²⁸⁶ law as *lex (zakon)*, a clear command of the sovereign, rather than an objective unbiased objective neutral principle serving justice.²⁸⁷ Aristotle appears to be the earliest source of the ideas of the rule of law as a rational principle²⁸⁸ and the idea of democracy as alternating rule between factions of the ruling class.²⁸⁹ The idea of the rule of law as an objective standard in which transactions have predictable outcomes (foreseeability) is strikingly absent in Russian and Soviet law, despite a common Greek and Russian Orthodoxy. The Germanic idea of justice through law is likewise absent in Russian thinking. Law and justice are two different words with no necessary connection in

common challenges by means of a balanced, results-oriented approach based on democracy and the rule of law . . .”).

282. See *Europe and Russia: Building a Strategic Partnership*, DELEGATION OF THE EUROPEAN UNION TO RUSSIA, http://eeas.europa.eu/delegations/russia/eu_russia/political_relations/political_framework/index_en.htm (last visited Oct. 24, 2014) (“Being members of the United Nations, the OSCE and the Council of Europe, the EU and Russia are committed to upholding and respecting the fundamental values and principles of democracy, human rights, the rule of law and the market economy. These values underpin the EU-Russia relationship. The EU and Russia have an extensive dialogue on political issues around the world. Russia and the EU need to work together to combat new threats to security, as terrorism, organised crime, illegal migration and trafficking in people as well as illicit drugs. The Russian Federation is also a crucial partner in combating climate change.”).

283. Yakunin, *supra* note 274, at 439 (“[N]o one in Russia is opposed to democracy, but the sanctity of the authoritarian and paternalist principles are much more pronounced within the Russian people than in Europeans or Americans.”).

284. MENDRAS, *supra* note 277, at 7.

285. See PASHUKANIS, *supra* note 38, at 134.

286. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED*, at xvii–xviii (1832).

287. Others think that *zakon* and *pravo* coexist in Russia. See Sakwa, *supra* note 232, at 202 (“Thus, ‘rule by law’ coexists with ‘rule of law’ . . .”).

288. ARISTOTLE, *THE NICOMACHEAN ETHICS* 123 (David Ryoss trans., Oxford Univ. Press 1998) (350 B.C.) (“[W]e do not allow a *man* to rule, but *rational principle*, because a man behaves thus in his own interests and becomes a tyrant.”).

289. ARISTOTLE, *POLITICS* 283–84 (Ernest Barker trans., Oxford Univ. Press 1998) (350 B.C.).

Russian legal consciousness.²⁹⁰ At best, law in the Russian view is norms and commands, not a predictable structure for transparent governance with a serious divergence between “law in the books” and actual social practices.²⁹¹

The law-as-command theory took deeper root in Russia than the rule of law as a rational, neutral, objective principle because Russia has had a history of autocracy, dictatorship, and authoritarianism in response to the constant invasions from which Russia has suffered. Consequently, the Russian people *want* a strong authoritarian state that is able to resist foreign predation.²⁹² Thus, the rule of law in Russia, essentially absent in the Soviet era,²⁹³ remains weak in contemporary Russia. “Property rights are not guaranteed and can easily be violated via the corrupt police, courts and other government agencies. As a result, free markets cannot function and the best competitor is not the most efficient but the one with the best connections.”²⁹⁴ Again, to underscore the *economic* consequences of lawlessness: Does Crimean real estate look like a great bargain? No. Selective taxation, uncertain legality as to the title to such property, and undercompensated eminent domain are examples of the things which await foreign investors in Russian real estate. Legal uncertainty and corruption lead to sub-optimal economic performance²⁹⁵ and poor protection of human rights: “declining state capacity, fiscal austerity, and growing social inequality, characteristic features of many of the new democracies, translate into gross violations of the rights of socially vulnerable groups.”²⁹⁶ Legal certainty through the rule of law would result in economic growth through

290. ALENA V. LEDENEVA, CAN RUSSIA MODERNISE?: *SISTEMA*, POWER NETWORKS AND INFORMAL GOVERNANCE 159–60 (2013).

291. ALENA V. LEDENEVA, RUSSIA’S ECONOMY OF FAVOURS: BLAT, NETWORKING AND INFORMAL EXCHANGE 10 (1998).

292. GEOFFREY HOSKING, *RUSSIAN HISTORY: A VERY SHORT INTRODUCTION* 1 (2012).

293. Efforts at innovation within Western democratic rule of law rights theory to meet Russian conditions such as democratic centralism, socialist legality, and human rights as positive claims to tangible social goods often are ignored or misapprehended in most Western analysis. For an effort to grapple with Soviet legal theory, see ERIC ENGLE, *MARXISM, LIBERALISM, AND FEMINISM: LEFTIST LEGAL THOUGHT* (2010).

294. Oleg Kozlovsky, *Lessons of Russia’s Failed Liberalisation, in 20 YEARS AGO, 20 YEARS AHEAD: YOUNG LIBERAL IDEAS* 86, 88–89 (Ulrich Niemann & Neli Kaloyanova eds., 2009), available at http://www.freiheit.org/files/62/Publication_1989-2009-2029_20_Years_ago_20_Years_ahead-Young_Liberal_Ideas-PDF.pdf.

295. Lincoln C. Chen et al., *The Upsurge of Mortality in Russia: Causes and Policy Implications*, 22 *POPULATION & DEV. REV.* 517, 523 (1996) (“The transition in Russia has been accompanied by a *breakdown of political institutions*, the decay of state apparatus, and a general weakening of law and order.”).

296. Jonathan D. Weiler, *Human Rights in Post-Soviet Russia*, 10 *DEMOKRATIZATSIYA* 257, 257 (2002).

increased investment and trade, leading to effective human rights protection²⁹⁷ and attainment.²⁹⁸

In other words, there are several problems with the command theory of law (CTL). CTL is uncertain and unpredictable. It is impossible to know with certainty *what* the sovereign will decide or *how* the sovereign will decide. This makes CTL appear to be arbitrary and unfair. Since decision making is not transparent or predictable, the losing party to any outcome will be much less likely to accept the decision of the sovereign as legitimate. Furthermore, this lack of transparency and objectivity may justifiably lead one to conclude that the CTL sovereign's decisions are personal, based on family, clan, or bribery, rather than unbiased or objective, which again makes outcomes less likely to be accepted by losers. Moreover, lack of transparency in the CTL can cause or foster corruption. Another problem with CTL is error: What happens when the sovereign's decision is wrong? The CTL is simple: everyone knows what the command is, but it is also simplistic, opaque, and unpredictable and thus does not create conditions which enable economic prosperity. For all these reasons, Putin's model of governance through vertical hierarchy is, no matter how much intelligence, finesse, or good intentions Putin personally has, simply less efficient than the Aristotelian rule of law concept that took root by way of Lockean and Kantian liberalism.

If the rule of law state is the answer to the problems of CTL, we must look briefly at the concept of the rule of law state. Often, Eastern European jurists are uncertain about what is meant by "rule of law," or why and how to attain it. In a rule of law state, the law is an objective neutral means to the goal of justice; the rules are the same for everyone, and the rules operate in foreseeable and predictable ways.²⁹⁹ Another feature of the rule of law state is transparent governance: people know who makes decisions and how they make them and have an opportunity for notice of legal hearings and to a hearing of their claims.³⁰⁰ The rule of law thus generates the best decisions and attracts voluntary compliance of the governed. In a rule of law state, laws must be definite and certain, not vague or ambiguous, so people can foresee outcomes

297. *European Commission Country Strategy Paper 2007–2013: Russian Federation*, at 3 (2014), available at http://ec.europa.eu/external_relations/russia/docs/2007-2013_en.pdf ("The EU places emphasis on the promotion of democracy, the rule of law and good governance in general, as well as respect for human rights and fundamental freedoms.").

298. Murad Tangiev, *Political Leadership and Transitional Democracy in the Russian Federation: Challenges and Prospects*, J. PEACE, CONFLICT & DEV., Nov. 2007, at 1, 3 ("Democracy and human rights are considered to be fundamental prerequisites for a sustainable development and long-term peace.").

299. *European Commission for Democracy Through Law: Report on the Rule of Law*, at 6 (Apr. 4 2011), available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)003rev-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e).

300. *See id.*

and structure their transactions and investments according to their own desires, which is more efficient due to reduced conflicts and the enablement of long-term planning.³⁰¹ Transparent governance is required so that government may make the best decisions possible and so the people accept and comply with decisions that were fairly made. Compliance with legal decisions is likelier where the decision maker provides reasons for his or her decision.

In a rule of law state, legislation must be an *ex ante* general prediction, publically made and published.³⁰² Judicial decisions, unlike legislation, are *ex post* applications of specific facts in the actual case to the relevant rules that the legislator made.³⁰³ Similarly, in a rule of law state, parties to proceedings have a right to notice of the proceeding and to hearing of their argument.³⁰⁴ The essence of the rule of law is the idea that public power is a public trust (Treuhand)³⁰⁵ exercised by the government on behalf of and for the benefit of the people. All of these ideas are basically the opposite of vertical hierarchy: vertical hierarchy is unpredictable and not transparent. No one knows when the government may decide to actually enforce a law or for what reasons. Despite those criticisms one must note: Russian authoritarian democracy is much more transparent than the Soviet party dictatorship and has greater popular democratic legitimation as well as greater protections of civil and political rights (Bürgerrechte) than the USSR.

Another challenge facing the rule of law in Eastern Europe is that the basic ideas that justice can be obtained through law, and can be best obtained through law, are often absent there. This is because there may be no *necessary* connection between (positive) law and (natural) justice—especially under CTL. If there were no necessary connection between law and justice, then law would not necessarily be the only or best way to attain justice. Beyond this law-justice disconnect, Eastern Europe also faces the problem of the law-as-norms theory versus law-as-rules theory of law. In some cultures, laws are more often seen as flexible norms, rather than predictable rules.³⁰⁶ To the view of law as a norm, laws are what ought to happen, but not necessarily what in fact happens all, or even most, of the time.³⁰⁷ Rule of law cultures in contrast foster the law-as-rules theory in order to obtain legal certainty that in turn reduces transaction costs, encouraging trade and attracting long-term

301. *Id.* at 10.

302. *Id.* at 11.

303. *Id.* at 12.

304. *European Commission for Democracy Through Law: Report on the Rule of Law*, *supra* note 299, at 12.

305. *See id.* at 5.

306. *See supra* notes 292–98 and accompanying text.

307. *See* Kathryn Hendley, 'Telephone Law' and the 'Rule of Law': The Russian Case, 1 HAGUE J. RULE L. 241, 242, 247 (2009).

investment.³⁰⁸ In Russia, however, the rule of law is absent, and just one example of that fact is the political dependency of the prosecutors and even judges on the system, summarized with the rubric of “telephone justice.”³⁰⁹ “Telephone justice” is the idea that the vertical powers can at any time intervene in the case informally to indicate to the judiciary how the case should be decided.³¹⁰ Although the “telephone” is an anecdote, the dependency is not.

b. Corruption

Whether as cause or consequence of the lack of the rule of law, Russia is famous for endemic corruption.³¹¹ Corruption and the absence of the rule of law³¹² are partly a consequence of the absence of the rule of law during the Marxist era,³¹³ and partly a result of the chaotic privatization process in the 1990s marked by kleptocracy, which limited economic development.³¹⁴ However, corruption in Russia can also be seen as a governance strategy.

i. Corruption as a Governance Strategy

By keeping all businesses in a state of semi-illegality, the Russian government can crack down on any business, any time.³¹⁵ The illegality is obtained through dodgy documents (permits, licenses, visas, tax forms) which are not entirely correctly drawn up, tax breaks which are not quite correct and in order, improper visas for foreign workers,³¹⁶ or no papers at all for

308. See *European Commission for Democracy Through Law: Report on the Rule of Law*, *supra* note 299, at 10.

309. Alena Ledeneva, *Telephone Justice in Russia*, 24 POST-SOVIET AFF., no. 4, 2008, at 324, 325.

310. *Id.*

311. See, e.g., *Russian Central Bank Closes Three More Banks in Crackdown*, REUTERS (Dec. 13, 2013, 9:21 AM), <http://www.reuters.com/article/2013/12/13/us-russia-banks-idUSBRE9BC06720131213>.

312. *Russia Has Yet to Improve Rule of Law: Deputy PM Shuvalov*, REUTERS (Dec. 23, 2013, 1:51 PM), <http://uk.reuters.com/article/2013/12/23/uk-russia-economy-idUKBRE9BM0GF20131223>.

313. Martin Krygier, *Marxism and the Rule of Law: Reflections After the Collapse of Communism*, 15 LAW & SOC. INQUIRY 633, 634–35 (1990).

314. MENDRAS, *supra* note 277, at 284 (“The primitive aspects of the state and the predatory behaviour of its leaders will inevitably operate as an impediment to economic and social dynamism . . .”).

315. See Melik, *supra* note 202 (“Dozens of entrepreneurs are in prison on charges trumped up by officials trying to get their hands on their companies . . .”).

316. See, e.g., Sean Michaels, *Madonna and Lady Gaga Accused of Breaking Russian Visa Rules*, THE GUARDIAN (Aug. 2, 2013, 7:21 AM), <http://www.theguardian.com/music/2013/aug/02/madonna-lady-gaga-russian-visa>.

undocumented migrant laborers,³¹⁷ as well as ambiguities in the law.³¹⁸ These public law aspects of economic corruption are matched by private practices of corruption such as keeping two sets of accounts (real and official)³¹⁹ as well as the entire shadow economy (pilfering, bribery, barter of influence, drugs, prostitution, and illegal laborers from the Caucasus or China).³²⁰ All of these instruments of corruption enable the Russian government to legally shut down—or shake down³²¹—any business at any time, as can be seen from the Yukos affair³²² or in Madonna’s performance visa.³²³ At the same time, however, notice that these instruments are all financial corruption, not blood crimes.³²⁴ The blood crime era of the 1990s³²⁵ is mostly over,³²⁶ and even “mere” extortion has been waning for some years.³²⁷ Despite the murders of many journalists,³²⁸ murder is less and less a governance tactic in Russia. The

317. Tom Kelly, *Spread-Eagled Against the Wall and Marched off Single-File: How Russia Deals with Illegal Immigrants*, MAIL ONLINE (July 31, 2013, 7:52 PM), <http://www.dailymail.co.uk/news/article-2381878/How-Russia-deals-illegal-immigrants.html>.

318. See, e.g., Amiel Ungar, *New Law Would Demonize Foreign Funded Russian NGOs*, ARUTZ SHEVA (July 3, 2012, 4:40 AM), <http://www.israelnationalnews.com/News/News.aspx/157437#.Uw8D4dyrVGI>.

319. LEDENEVA, *supra* note 243, at 142–64.

320. *Id.* at 115–41.

321. As reported last year:

One such case was that of oil giant Yukos, which was privatized in 1996 and later accused of tax evasion in 2004. The company’s chief executive, Mikhail Khodorkovsky, was convicted of fraud and jailed. The Russian state then bought the company and its assets at a knock-down price, prompting widespread accusations that the charges were politically motivated.

Holly Ellyatt, *Is Russia Too Corrupt for International Business?*, CNBC (June 11, 2013, 5:30 AM), <http://www.cnbc.com/id/100805382>.

322. *Yukos Executive Khodorkovsky Charged with Fraud, Tax Evasion*, BLOOMBERG (Oct. 26, 2003), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=acD4lsuFwPy4>.

323. Michaels, *supra* note 316.

324. LEDENEVA, *supra* note 243, at 11 (“[O]rganized crime seems to be on the retreat . . .”).

325. See DAVID M. KOTZ & FRED WEIR, *RUSSIA’S PATH FROM GORBACHEV TO PUTIN: THE DEMISE OF THE SOVIET SYSTEM AND THE NEW RUSSIA* 267 (2007).

326. *But see* Melik, *supra* note 202 (“The case of Sergei Magnitsky, the lawyer employed by a western investment fund, who exposed corruption and then found himself thrown in prison by the very people he had accused, and who then died in prison, has served as a dire warning to all potential investors.”).

327. Ledeneva & Shekshnia, *supra* note 244, at 13 (“[T]he level of direct extortion attempts by organized criminal groups in such countries as Russia, Ukraine, and Belarus has declined significantly since 2000. Yet, government officials at all levels have increased pressure for economic gains and many former mafia figureheads have entered political life. Another tendency is that lump sum corruption has given way to more sophisticated, legalized forms of income such as shares in business and other forms of long-term participation.”).

328. See *56 Journalists Murdered in Russia Since 1992*, COMMITTEE TO PROTECT JOURNALISTS, <https://cpj.org/killed/europe/russia> (last visited Oct. 24, 2014).

fact that Putin instilled at least basic order creating conditions for economic growth³²⁹ and increased average life expectancy and population growth explains why he maintains majority support, despite suppression of political and personal freedom and despite the system of corruption as a governance tactic.³³⁰ The problem is that these mechanisms of governance repel foreign investors because corruption threatens the security of economic relations.³³¹ Lack of foreign investment in turn leads to suboptimal market performance.³³² Cold weather is not the only reason Siberia's vast mineral resources still remain largely underground. While vertical hierarchy might be justified as having been necessary to end the era of criminality that was the 1990s, it limits Russia's industrialization by repelling foreign investors. Russia, unlike the USSR, does not seek autarchy and even desires foreign investment³³³ and foreign trade. Thus, instituting the rule of law is both in the interest of the Russian people and of the Russian government. The West is neither able nor planning to overthrow Putin, and Putin should consider his own eventual succession since the system in place would probably collapse into mafia wars between rival clans if he were to die.

Corruption as governance strategy also includes corruption of the electoral process,³³⁴ whether by crude voting fraud, smearing reputations (*kompromat*),

329. Alexander Rahr & Nicolai N. Petro, *Our Man in Moscow*, FLETCHER F. WORLD AFF., Summer 2005, at 5, 6.

330. *Interview: How Russia's 'Sistema' Leads to the 'Modernization Trap,'* RADIO FREE EUR. (Apr. 1, 2013), <http://www.rferl.org/content/interview-russia-alena-ledeneva-sistema/24944910.html> [hereinafter *Interview*] (“The people’s view—I suppose they might be criticizing sistema, but they also assume its legitimacy in some way. And that is why, once Putin brought that order to the system, he has been supported. He is still supported for that because you could see that what he is getting or what his government is getting is trickling down in ways that are understandable to people. That’s why 62 percent vote for Putin, even for a third term, even if that negates the [spirit of the] constitution (i.e., the Russian Constitution limits presidents to two consecutive terms).”).

331. European Union Action Plan on Common Action for the Russian Federation on Combating Organized Crime, 2000 O.J. (C 106) 5, 7.

332. Melik, *supra* note 202 (“According to Angus Roxburgh, former BBC Moscow correspondent and later a public-relations adviser to the Kremlin, there is one overriding reason why Russia is failing to achieve its economic potential and failing to attract outside investors: corruption.”).

333. Igor Dunayevsky, *Russia Waiting for U.S. Investors*, RUSS. BEYOND HEADLINES (Feb. 27, 2014), http://rbth.ru/international/2014/02/27/russia_waiting_for_us_investors_34593.html.

334. As Wilson notes:

The post-Soviet states still practice forms of political manipulation that are more radical, more pervasive and more corrosive of real democracy than anything attempted by spin-doctors or K-Street consultants in the west. And they are still preferred to, though often combined with, cruder and more obviously authoritarian methods. The corruption of the political process is as important as the falsification of election results.

Wilson, *supra* note 223.

political extortion³³⁵ or more subtle manipulative campaigning³³⁶ and information warfare (disinformation, *maskirovka*), and various dissimulation strategies frequently described as “post-modern.”³³⁷ These governance technologies³³⁸ appear to be extensions and refinements of Soviet era practices³³⁹ made famous by the KGB.³⁴⁰ In Russia today the dual regime of state-and-party that characterized the Soviet era is replicated,³⁴¹ somewhat, with United Russia playing a role similar to the Communist Party of the Soviet Union. However, the system (*sistema*) is not merely a shadow state-within-a-state.³⁴² The system is also a complex network of interactions between different groups and individuals,³⁴³ which limits the ability of all actors to push “too far” due to uncertainty as to the rules of the game. The system is sub-optimal but sufficiently adaptive to survive and even create rudimentary prosperity, at least so far, which assures its popularity.³⁴⁴

335. LEDENEVA, *supra* note 243, at 58–90.

336. *Id.* at 28–57.

337. WILSON, *supra* note 159, at 8 (“The denial of truth in the Soviet Union throughout most of the twentieth century created many of the preconditions for virtuality in the twenty-first.”).

338. *Id.* at 29 (“As was traditional in the 1970s, the tactics adopted by the local KGB and Party Central Committee were open and crude to a degree that would have been unacceptable in Moscow. Divide-and-rule tactics and active measures to discredit the opposition scored some successes, while attempts to set up fake oppositions and support groups often fell at the first hurdle.”).

339. *Id.* at 33 (“Many of the active measures developed in the Soviet and even tsarist eras have been redesigned for contemporary use . . .”).

340. *Id.* at 10–11.

341. According to Sakwa:

There is a process of ‘dual adaptation’ in Russian politics, reflecting the bifurcated nature of the system in its entirety. . . . On the one hand, elections are held On the other hand, a parallel para-constitutional system operates, in which the regime imposes its preferences and where factions seek to influence outcomes through a closed and shadow political system. The most successful actors are those who can operate successfully at both levels.

SAKWA, *supra* note 279, at 3.

342. *See id.* at viii (“[A] dual state has emerged in which the legal-normative system based on constitutional order is challenged by shadowy arbitrary arrangements, dubbed in this book ‘the administrative regime’, populated by various conflicting factions.”).

343. *Interview*, *supra* note 330 (“[S]istema is not something very simple. It is an outcome of complex, anonymous, unpredictable, seemingly irrational forces. But it also glues society together. It distributes resources. It mobilizes people. It contributes to stability in people’s minds. It ensures its own reproduction.”).

344. As Ledeneva explains:

Sistema victims, as well as critics of Putin’s *sistema*, are emphatic about the negative features of his system of governance, but it is not exclusively dysfunctional. The network-based governance is complex, diffuse, unpredictable and seemingly unmanageable, but at the same time it serves to glue society together, to distribute resources and to mobilize cadres, to contribute to both stability and change and to ensure its own reproduction. . . .

ii. Political Prisoners and Amnesties

When Putin came to power, he offered other oligarchs a deal.³⁴⁵ They could either abandon politics and keep their wealth or go into exile.³⁴⁶ Putin's imposition of order rested on a sort of amnesty. Khodorkovsky chose to challenge Putin and keep his wealth, and so met ten years in Siberian prison.³⁴⁷ Putin ultimately amnestied his political rival Khodorkovsky.³⁴⁸ Likewise, Putin also finally amnestied his cultural rival Pussy Riot, as well as the ecological activists in Greenpeace—after giving them all a taste of Russian prison.³⁴⁹ Amnesties and deferrals of prosecution are typical tactics used in Western governments to root out and purge systemic corruption.³⁵⁰ In Russia one might question whether amnesties could or should be used to root out corruption and build the rule of law or would instead be but one more means to consolidate Putin's power or that of United Russia. In any case, political imprisonment with the possibility of amnesty strengthens Putin's rule. It enables Putin to gently remove political opponents who are a threat as needed and then to present himself as gracious and merciful when the opponent is no longer a threat. Notice moreover that Putin did not outright kill those opponents. So maybe Putin³⁵¹ did not kill Litvinenko,³⁵² Magnitsky,³⁵³ or any of the dozens of journalists who have died in Russia in the last two decades.³⁵⁴ Prison with

Russia cannot modernize without modernizing the network-based governance patterns referred to as *sistema*.

LEDENEVA, *supra* note 290, at 2.

345. *UK Police Probe Death of Exiled Russian Oligarch Berezovsky*, FOXNEWS.COM (Mar. 24, 2013), <http://www.foxnews.com/world/2013/03/24/russian-oligarch-berezovsky-found-dead-uk-police-say>.

346. *Id.*

347. *Putin 'to Pardon' Jailed Former Oil Tycoon Khodorkovsky*, BBC NEWS (Dec. 19, 2013, 10:54 AM), <http://www.bbc.com/news/world-europe-25450785>.

348. *Id.*

349. *Amnestie für Pussy-Riot-Musikerinnen und Greenpeace-Aktivisten*, SÜDDEUTSCHE.DE (Dec. 18, 2013, 3:40 PM), <http://www.sueddeutsche.de/politik/anordnung-von-putin-amnestie-fuer-pussy-riot-musikerinnen-und-greenpeace-aktivisten-1.1846629>.

350. *See, e.g., Samuel Rubinfeld, UK to Move Forward with Deferred-Prosecution Agreements*, WALL ST. J. (Oct. 23, 2012, 3:14 PM), <http://blogs.wsj.com/corruption-currents/2012/10/23/uk-to-move-forward-with-deferred-prosecution-agreements>.

351. *See* Duncan Gardham, *Russia 'Gave Agents Licence to Kill' Enemies of the State*, THE TELEGRAPH (Oct. 2, 2011, 10:23 PM), <http://www.telegraph.co.uk/news/worldnews/europe/russia/8802732/Leaked-document-reveals-plans-to-eliminate-Russias-enemies-overseas.html>.

352. *Litvinenko Murder: Coroner 'Said Russia Could Be Involved'*, BBC News (Jan. 21, 2014, 10:55 AM) <http://www.bbc.com/news/uk-25824904>.

353. *Magnitsky v. Russia*, OPEN SOC'Y FOUND., <http://www.opensocietyfoundations.org/litigation/magnitsky-v-russia> (last updated Oct. 17, 2012).

354. *See 56 Journalists Killed in Russia Since 1992*, *supra* note 328. The most famous of the dozens of murdered journalists in Russia is Anna Politovskaya. *See* Charles Clover, *Russia 'Close*

possible amnesty allows Putin to distance himself from cases where the security services or local leaders eliminate enemies permanently.

Although Putin has developed resilient tactics and an internally coherent popular ideology, United Russia has yet to even develop, let alone implement, a concept of the rule of law as objective foreseeable measures which attain procedural and substantive justice in order to attract voluntary compliance and create legal certainty so as to encourage and attract investment. Nor has Russia developed a model to root out corruption. That may not entirely be the fault of Russia.³⁵⁵

A sensible plan to purge corruption from the state would proceed step-by-step: first purge the judiciary, then the tax service, then the military, and finally police corruption. An effective anti-corruption campaign would also place priority on blood crimes and make a clear distinction between violent crime and property crime. However, the more famous amnesties Putin has granted were personal, individual, and arbitrary rather than a part of his anti-corruption campaign.³⁵⁶ Since Putin's amnesties were personal, individual, and politically arbitrary, they cannot be seen as part of the needed sustained struggle to attain the rule of law and transparent governance by ending corruption.

to *Solving Journalist's Murder*, FIN. TIMES (Aug. 24, 2011, 6:24 PM), <http://www.ft.com/intl/cms/s/0/a53c875a-ce68-11e0-b755-00144feabdc0.html>.

355. Combatting corruption in Russia may prove more difficult than imagined:

The global corruption paradigm that has prevailed since the 1990s is based on three premises: that corruption can be defined, that corruption can be measured, and that measurements can be translated into specific policies. Since then, significant advances in corruption studies and anti-corruption policies have been made all over the world. However, the current paradigm and the use of the term "corruption" do not facilitate an understanding of the workings of corruption in Russia for three reasons.

Firstly, corruption is an umbrella term for a variety of complex phenomena associated with betrayal of trust, deception, deliberate subordination of common interests to specific interests, secrecy, complicity, mutual obligation and camouflage of the corrupt act. In order to deal with such diverse practices in an effective way, we disaggregate "corruption" into clusters of informal practices, widespread yet specific for businesses in Russian regions.

Secondly, the concept of corruption that underlies international regulatory standards presumes completion of the transformation from what Weber described as "patrimonial power structures"—where decisions made on the basis of people's relationships and traditional forms of authority—to rational-legal systems, where institutionalized rules become the foundation of governance. . . .

Thirdly, majority of contemporary definitions of corruption presume that there is a clear distinction between public and private realms.

Ledeneva & Shekshnia, *supra* note 244, at 7–8.

356. Indeed, a series of arrests and firings may have less to do with politics than economics. See Ben Aris, *Putin's Anti-Corruption Campaign Begins to Bite*, RUSS. BEYOND HEADLINES (Feb. 28, 2013), http://rbth.co.uk/business/2013/02/28/putins_anti-corruption_campaign_begins_to_bite_23395.html.

In sum, Putin's contemporary amnesties, rather than a reform to attain the rule of law, are part of his consolidation of political power, which by definition will not outlive Putin. This has long been the lament of dictatorship: the death of the dictator creates chaos while his successor is selected and uncertainty reigns.³⁵⁷ If Putin wishes to assure the stability of Russia after his death and attract western capital investments, then Putin's Great Russian corporatist orthodoxy must ultimately comprehend the concept of law as an objective, unbiased measure serving justice and not merely as personal power or authoritative command.

c. The Patriarchal Family

When laws are weak or non-existent and you wish to build a system of moral governance and gain political legitimacy you must rely on other institutions.³⁵⁸ Family and religion have unquestionable legitimacy and can serve as moral anchors to secure state power. Thus, after the Second World War, the Basic Law for the Federal Republic of Germany gave special institutional protection to family³⁵⁹ and churches³⁶⁰ as well as to broadcasting³⁶¹ and schools.³⁶² These institutional guarantees were provided not only to prevent abuses of state power but also to rebuild state power on legitimate bases. In the case of Russia, a similar legitimation of state power through institutional guarantees of the patriarchal family³⁶³ and the Orthodox Church³⁶⁴ is clearly occurring. This reliance on Church and family as substitutes for the rule of law leads to various conflicts regarding basic human rights in Russia. The consequence of legitimating state power by reference to the patriarchal family and the Orthodox Church means that challenges facing those institutions are also indirect challenges to state power. This explains why the issue of LGBT rights and adoption are so contentious in Russia.

357. ARISTOTLE, *supra* note 289, at 120–132.

358. LEDENEVA, *supra* note 243, at 171 (“In a high-risk environment with underdeveloped legal institutions, which do not ensure contract enforcement and property rights, alternative forms of enforcement may become an integral part of the implementation of financial schemes, thus creating a niche for ‘progress pushers’—the enforcers of contracts, financial schemes, takeovers—to complement or substitute for the workings of the legal system by the use of informal practices.”).

359. BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY art. 6, at 41 (Christian Tomuschat & David Curry trans. 1998).

360. *Id.* art. 4, at 40–41.

361. *Id.* art. 5, at 41.

362. *Id.* art. 7, at 42.

363. THE CONSTITUTION OF THE RUSSIAN FEDERATION art. 38, at 16 (Finnish Lawyers' Publ'g 1994).

364. *Id.* art. 29, §2, at 14.

i. “The Family” and the Orthodox Church as Quasi-State Corporatist Institutions in Russia

The purpose of “family” and the Orthodox Church as a quasi-state institution is to legitimate the state and provide extra-legal institutions of social control, due to the failure to build the rule of law in Russia. Though reliance on these institutions *could* be used as it was in Germany to rebuild state legitimacy and the rule of law, to present that does not appear to be the case. Family and the Orthodox Church as quasi-state institutions are most evidently in conflict with individual human rights on the issues of sexual minorities. Marriage may only be contracted between a man and a woman³⁶⁵ under Russian law. Same-sex domestic partnership of any kind is not recognized under Russian law.³⁶⁶ Gay marriage is seen in Russia as a Western idea³⁶⁷ and a violation of natural law³⁶⁸ masquerading as “human rights.”³⁶⁹ Likewise, in practice, homosexuals cannot adopt children in Russia.³⁷⁰ Putin claims that gay rights are not violated by the Russian state:³⁷¹ “In the Russian Federation—so that it is clear to everybody—there is no infringement on the rights of sexual minorities. . . . These people, like everyone else, enjoy all the same rights and freedoms as everyone else.”³⁷² However, laws enacted by the Russian Federation,³⁷³ Russia’s federal republics,³⁷⁴ and several Russian cities³⁷⁵ and

365. SEMEINYI KODEKS ROSSIISKOI FEDERATSII [SK RF] [THE FAMILY CODE OF THE RUSSIAN FEDERATION] art. 12.

366. Alexander Kondakov, *Heteronormativity of the Russian Legal Discourse: The Silencing, Lack, and Absence of Homosexual Subjects in Law and Policies*, 4 SORTUZ: OÑATI J. EMERGENT SOCIO-LEGAL STUD., no. 2, 2010 at 4, 11–12, available at <http://www.sortuz.org/pdf/mayo2011/kondakov.pdf>.

367. Alexander Kondakov, *Odnopolyi Brak v Rossii: «Temnoe Proshloe», Ser’te Budni i «Svetloe» Posleavtra* [Same-Sex Marriage in Russia: Obscure Past, Dull Today, and ‘Bright’ Tomorrow], 20 GENDERN’TE ISSLEDOVANIĀ [GENDER STUDIES] 51, 51 (2010) (Russ.), available at <http://ssrn.com/abstract=1764387>.

368. See *id.* at 51–54.

369. See *id.* at 53.

370. *Den’ v Istorii* [Day in History], GAY RUSS., http://www.gayrussia.eu/day_in_history/7064 (last visited Oct. 24, 2014).

371. *Gay Rights Not Violated in Russia—Putin*, RIA NOVOSTI (Sept. 4, 2013, 1:13 PM), <http://en.rian.ru/russia/20130409/180521813/Gay-Rights-Not-Violated-in-Russia---Putin.html>.

372. Alexei Anishchuk & Thomas Escritt, *Gay Rights Activists, Topless Protesters Greet Putin*, REUTERS (Apr. 8, 2013, 3:22 PM), <http://www.reuters.com/article/2013/04/08/us-russia-germany-idUSBRE93707J20130408> (quoting Vladimir Putin).

373. A Russian Federation-wide ban on gay propaganda went into effect on June 30, 2013, following a federal law banning the promotion of non-traditional sexual relations among minors. *Den’ v Istorii*, supra note 370.

374. See FAMILY & DEMOGRAPHY FOUND., COMMUNICATION TO THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE CONCERNING *ALEKSEYEV V. RUSSIA* (APPLICATION NO. 4916/07), at 5 n.8 (2013), available at <http://en.familypolicy.ru/read/240> (“Republic of

regions³⁷⁶ restrict the rights of homosexuals³⁷⁷ to voice political protest³⁷⁸ and to adopt children.

The suppression of LGBT persons' political rights to protest³⁷⁹ and civil rights to family are supposedly justified as somehow necessary for the "prevention of riots and protection of health, morals and the rights and freedoms of others,"³⁸⁰ i.e. to maintain public order and/or to protect children³⁸¹ (from what?) and foster reproduction.³⁸² While the goals of

Bashkortostan Law N 581-z, 'On amending the Republic of Bashkortostan law 'On fundamental safeguards of the rights of the child in the Republic of Bashkortostan' passed July 23rd 2012.").

375. *Id.* at 5 n.4 ("St. Petersburg Law N 108-18 'On amending the St. Petersburg law 'On administrative offences in St. Petersburg' passed by March 7th 2012"); *Id.* at 4 n.2 ("Archangelsk Regional Law N 226-24-OZ, 'On specific means of protection of health and morals of children in the Archangelsk region' passed by September 30th 2011"); *Id.* at 5 n.3 ("Kostroma Regional Law N 193-5-ZKO, 'On amending the Kostroma regional law 'On safeguards of the rights of the child in the Kostroma region' passed by February 15th 2012"); *Id.* at 5 n.9 ("Krasnodar Territory Law N 2535-KZ, 'On amending specific legislative acts of the Krasnodar Territory as regards the stepping up of the protection of health and the moral and spiritual development of children' passed by July 3rd 2012"); *Id.* at 5 n.6 ("Magadan Regional Law N 1507-OZ, 'On amending specific Magadan regional laws as regards the protection of minors from factors affecting their physical, intellectual, psychological, spiritual, and moral development' passed by June 9th 2012"); *Id.* at 5 n.5 ("Novosibirsk Regional Law N 226-OZ, 'On amending specific laws of the Novosibirsk region' passed by June 14th 2012"); *Id.* at 4 n.1 ("Ryazan Regional Law N 41-OZ, 'On the protection of morals of children in the Ryazan region' passed by April 3rd 2006"); *Id.* at 5 n.7 ("Samara Regional Law N 75-GD, 'On amending the Samara regional law 'On administrative offences in the Samara region' passed by July 10th 2012").

376. *Kaliningrad zapryetil propagandoo pyedofilii i gomosyeksoolizma* [Kaliningrad has banned the promotion of homosexuality and pedophilia], POLITIKUS.RU (Jan. 25, 2013, 7:08 PM), <http://politikus.ru/events/3514-kaliningrad-zapretil-propagandu-pedofilii-i-gomoseksualizma.html>.

377. Putin signed the law banning gay propaganda on June 29, 2013. *Den' v Istorii*, *supra* note 370.

378. See Michael Schwartz, *Anti-Gay Law Stirs Fears in Russia*, N.Y. TIMES (Feb. 29, 2012), http://www.nytimes.com/2012/03/01/world/asia/anti-gay-law-stirs-fears-in-russia.html?_r=3&.

379. See Kondakov, *supra* note 366, at 7.

380. Kristen L. Thomas, Note, *We're Here, We're Queer, Get Used to It: Freedom of Assembly and Gay Pride in Alekseyev v. Russia*, 14 OR. REV. INT'L L. 473, 476 (2012).

381. Paul Johnson, 'Homosexual Propaganda' Laws in the Russian Federation: Are They in Violation of the European Convention on Human Rights? 8 (July 8, 2013) (working paper), available at <http://ssrn.com/abstract=2251005>.

382. As Putin stated:

I've tried to answer similar questions before. There is a rather acute demographic problem in Russia, as in the rest of Europe. We are making serious efforts to improve the situation, and we are having success. I think we have the best indicators in Europe in terms of the rate of improvement. For the first time in the last 10 to 15 years, we are seeing a sustainable trend of rising births, and the country's population has even increased somewhat this year.

protecting people from riots and fostering reproduction are desirable, the means the Russian Federation has chosen to those ends are inapt. Contraception remains legal in Russia, for example.³⁸³ Although it is questionable whether suppression of homosexuality is even possible, let alone whether that would somehow contribute to protecting or preserving the family or increased reproduction, the suppression of LGBT rights in Russia shores up the domestic legitimacy of Putin and United Russia.³⁸⁴ It invokes Great Russian nationalism and the Orthodox Church³⁸⁵ to rally a majority of Russian people around Putin and United Russia in order to forestall any U.S. effort to instigate a “color revolution.”³⁸⁶ However, the Russian government’s policy of ignorance and suppression in fact has deadly consequences. There are several documented cases of hate crimes against LGBT individuals and groups in

As for same-sex marriages, they do not produce offspring, as you know. So we are fairly tolerant toward sexual minorities, however we think that the state should promote reproduction, support mothers and children, and look after their health.

Transcript of Vladimir Putin’s Interview with CNN’s Larry King, RIA NOVOSTI (Feb. 12, 2010, 8:00 AM), <http://en.rian.ru/interview/20101202/161586625.html>.

383. Chloe Arnold, *Abortion Remains Top Birth-Control Option in Russia*, RADIO FREE EUR. RADIO LIBERTY (June 28, 2008), http://www.rferl.org/content/Abortion_Remains_Top_Birth_Control_Option_Russia/1145849.html.

384. According to Maria Shabanova:

[C]reating a negative image of “the other” is a powerful method of consolidation . . .

LGBT people are an easy target as 70-80% of the Russian population expresses negative attitudes towards gays, lesbians, bisexuals or transsexuals. Stigmatization of this group also goes well with anti-Western rhetoric, with homosexuality being portrayed as a “Western vice” designed to corrupt the Russian population and its values.

Shabanova, *supra* note 230.

385. See Thomas Grove & Steve Gutterman, *Russia’s Gays Fear More Violence After Brutal Murder*, REUTERS (May 13, 2013, 9:42 AM), <http://www.reuters.com/article/2013/05/13/us-russia-gay-idUSBRE94C0AX20130513> (“President Vladimir Putin has also overseen a religious revival that aims to give the Orthodox Church, whose leader has suggested that homosexuality is one of the main threats to Russia, a more public role as a moral authority. The number of documented cases of violence against gays in Russia is low. But there are no official figures on anti-gay crime in Russia, and gay rights campaigners say the numbers available mask the true number of attacks on gays, lesbians, bisexual and transgender people. Most go unreported, or are not classified as such by the police.”).

386. *Russia Moves to Enact Anti-Gay Law Nationwide*, DAILY HERALD (Jan. 21, 2013, 10:19 AM), <http://www.dailyherald.com/article/20130121/news/701219861/> (“The legislation being pushed by the Kremlin and the Russian Orthodox Church would make it illegal nationwide to provide minors with information that is defined as ‘propaganda of sodomy, lesbianism, bisexuality and transgenderism.’ It includes a ban on holding public events that promote gay rights. . . . The bill is part of an effort to promote traditional Russian values as opposed to Western liberalism, which the Kremlin and church see as corrupting Russian youth and by extension contributing to a wave of protest against President Vladimir Putin’s rule.”).

Russia,³⁸⁷ including Russian homosexuals who were murdered simply for being gay.³⁸⁸

ii. “The Family” as a Quasi-State Institution: Inter-Country Adoption

To further defend the patriarchal family and to express Russian grievances against the United States, Putin restricted foreign adoption of Russian children, first to the United States,³⁸⁹ then to those countries that recognize same sex marriage.³⁹⁰ These policies, though terrible for children, are politically popular in Russia.

The Russian government regards its views on gay rights and inter-country adoption, as well as its invasion and occupation of Georgia and Crimea, as somehow legal under international law. Although it is clear that Russia’s laws against gay propaganda are violations of Russia’s treaty obligations under the European Convention of Human Rights³⁹¹ and that its interventions in Georgia and Crimea are also illegal,³⁹² Russia has a much better case that it can prohibit foreign adoption of Russian children without violating Russia’s treaty obligations. Russia³⁹³ is not a signatory to the Hague Convention on Inter-Country Adoption,³⁹⁴ which holds that children should have families³⁹⁵ and

387. U.S. DEP’T OF STATE, 2010 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: RUSSIA 83–85 (2011), available at <http://www.state.gov/documents/organization/160474.pdf>.

388. See Grove & Gutterman, *supra* note 385 (“They beat him. They shoved beer bottles in his anus. They tried to set him on fire. Then they crushed his head with a heavy stone. A 23-year-old man in Russia’s southern city of Volgograd was tortured and killed after revealing he was gay during a drinking session last Thursday night, investigators said, taking a rare step by linking a murder to homophobia.”).

389. Kirit Radia, *Russian Lawmakers Pass Ban on Adoptions to U.S.*, ABC NEWS (Dec. 26, 2012, 8:22 AM), <http://abcnews.go.com/blogs/headlines/2012/12/russian-lawmakers-pass-ban-on-adoptions-to-us/>.

390. *Russia Bans Adoptions from Countries that Allow Gay Marriage*, THE TELEGRAPH (Feb. 13, 2014, 12:49 PM), <http://www.telegraph.co.uk/news/worldnews/europe/russia/10635821/Russia-bans-adoptions-from-countries-that-allow-gay-marriage.html>.

391. See Thomas, *supra* note 380, at 485; Paul Johnson, *Russian Ban on Homosexual Propaganda Violates Human Rights*, JURIST (Dec. 1, 2011, 8:00 AM), <http://jurist.org/hotline/2011/12/paul-johnson-russia-lgbt.php>.

392. James Joyner, *EU: Georgia ‘Triggered’ Russia’s Illegal Invasion*, ATLANTIC COUNCIL (Sept. 30, 2009), <http://www.atlanticcouncil.org/blogs/new-atlanticist/eu-georgia-triggered-russias-illegal-invasion>; UN: *Russia’s Annexation of Crimea is Illegal*, N.Y. POST (Mar. 27, 2014, 12:36 PM), <http://nypost.com/2014/03/27/un-russias-annexation-of-crimea-is-illegal/>.

393. *Convention Countries*, INTERCOUNTRY ADOPTION, http://adoption.state.gov/hague_convention/countries.php (last updated Aug. 2013).

394. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 1870 U.N.T.S. 167.

395. *Id.* (“Recognising that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.”).

establishes minimum standards and harmonizes procedures for the adoption of children throughout the world.³⁹⁶ Although Russia has signed the Convention of the Rights of the Child (CRC),³⁹⁷ the CRC does not oblige Russia to allow inter-country adoption, let alone adoption to sexual minorities. Article 21(b) of the CRC states: “[I]nter-country adoption *may* be considered as an alternative means of [a] child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin.”³⁹⁸ The treaty says “*may*” not “*must*.” The CRC centers children’s rights on the “best interests of the child,” referencing the concept in articles 9, 18, 20, 21, 37, and 40.³⁹⁹ The Russian government can well argue that the best interests of Russian children are to remain in the Russian language area, or even to be raised by heterosexual adoptive parents because the best interests standard is very vague. Are “best interests” defined culturally, materially, legally, or politically?⁴⁰⁰ The CRC does not answer that question⁴⁰¹ because the “best interests” standard is inadequately defined in the treaty itself.⁴⁰² The “best interests of the child” principle enables “governments to hide behind the veil of culture and avoid addressing human rights abuses of children in their countries.”⁴⁰³ Although “[i]t should be the goal of the international community to ensure that intercountry adoption is considered as a viable alternative in deciding the best interests of the world’s children,”⁴⁰⁴ the Russian government is under no international legal obligation to permit adoption of Russian children to foreign countries or to same sex couples.

d. Civil and Political Rights (Bürgerrechte)

Putin’s consolidation and concentration of political power also means suppression of formal freedoms and domestic dissent. Although the Russian

396. *Id.*

397. Boris Dittrich, *Who Speaks for Russia’s Children?*, HUMAN RTS. WATCH (Jan. 27, 2014), <http://www.hrw.org/news/2014/01/27/who-speaks-russias-children>; Peter Roudik, *Children’s Rights: Russian Federation*, L. LIB. CONG., <http://www.loc.gov/law/help/child-rights/russia.php> (last updated Sept. 16, 2014) (“The Federal Law on Basic Guarantees of the Rights of the Child in the Russian Federation of July 21, 1998 repeats all the provisions of the CRC.”).

398. Convention on the Rights of the Child art. 21(b), *adopted and opened for signature, ratification and accession* Nov. 20, 1989, 1577 U.N.T.S. 3 (emphasis added).

399. *Id.* at arts. 9, 18, 20, 21, 37 & 40.

400. Jonathan Todres, *Emerging Limitations on the Rights of the Child: The UN Convention on the Rights of the Child and Its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159, 173 (1998).

401. *See id.* at 172–73.

402. *Id.* at 173.

403. *Id.* at 175.

404. Linda J. Olsen, Comment, *Live or Let Die: Could Intercountry Adoption Make The Difference?*, 22 PENN. ST. INT’L L. REV. 483, 487 (2004).

constitution guarantees the rights to freedom of speech,⁴⁰⁵ peaceful public assembly,⁴⁰⁶ and to freedom of association,⁴⁰⁷ fundamental rights under the Russian constitution may be limited by ordinary federal legislation where such legislation is necessary to protect the constitutional system, morality, health, and national security.⁴⁰⁸ These exceptions are broad enough to enable the Russian government to suppress political expression. General clauses⁴⁰⁹ and “gaps in current Russian legislation . . . are misused to allow and justify discrimination.”⁴¹⁰ The freedoms of assembly⁴¹¹ and of speech⁴¹² are also suppressed by imposing substantial⁴¹³ fines,⁴¹⁴ supposedly justified by the paranoid neo-Stalinist excuse of “foreign agents,”⁴¹⁵ by vigilante attacks,⁴¹⁶ or

405. KONSTITUTSIYA ROSSIYSKOI FEDERATSII [Konst. RF] [CONSTITUTION] art. 29(1) (Russ.) (“Everyone shall be guaranteed freedom of thought and speech.”).

406. *Id.* at art. 31 (“Citizens of the Russian Federation shall have the right to assemble peacefully, without weapons, hold rallies, mass meetings and demonstrations, marches and pickets.”).

407. *Id.* at art. 30(1) (“Everyone shall have the right of association, including the right to establish trade unions for the protection of his (her) interests. The freedom of activity of public associations shall be guaranteed.”).

408. *Id.* at art. 55(3) (“Human and civil rights and freedoms may be limited by federal law only to the extent necessary for the protection of the basis of the constitutional order, morality, health, rights and lawful interests of other people, and for ensuring the defence of the country and the security of the State.”).

409. Shabanova, *supra* note 230, at 192–93.

410. *Id.* at 190.

411. *See, e.g., Gay Pride Parade Banned for 100 Years in Russia*, HUMAN RTS. FIRST (June 7, 2012), <http://www.humanrightsfirst.org/2012/06/07/gay-pride-parade-banned-for-100-years-in-russia/>.

412. Eugene Feldman, “Homophobia—the Religion of Cattle”: the Red Square Were LGBT Activists, NOVOYA GAZETA (July 14, 2013, 5:23 PM), <http://www.novayagazeta.ru/news/72407.html>.

413. *Another Saint Petersburg LGBT Agency Fined Half a Million*, RAINBOW NEWS (June 19, 2013), <http://english.gay.ru/news/rainbow/2013/06/19-26378.htm>. After the film festival “Side by Side,” the St. Petersburg LGBT NGO “Vikhod” (Exit, i.e. coming out) was fined 500,000 rubles (€11,600). *Id.*

414. *Zoornalistka “Novoy gazyeti” Yelyena Kostyochyenko oshtrafovana soodom na 20,000 rooblyey za uchastiye v Moskovskom gyey-praydye* [Novoya Gazeta Journalist, Elena Kostyuchenko, fined 20,000 rubles by Moscow Court for participating in the city’s Gay Pride Parade], GAY RUSS. (July 11, 2013), <http://www.gayrussia.eu/russia/7124/>.

415. *Head of “Coming Out” Fined For 300 Thousand as “a Foreign Agent,”* RAINBOW NEWS (June 27, 2013), <http://english.gay.ru/news/rainbow/2013/06/27-26412.htm> (“A court hearing of the case accusing the head of the ‘Coming Out’ Russian LGBT Organization in breaching of the law on ‘foreign agents’ took place on June 25. The judge Politova declared Anna Anisimova (director in charge of the LGBT organization) guilty and issued a fine in the sum of 300 thousand rubles (€7,000). A week earlier this entity was also declared guilty and obliged to pay 0.5 mln rubles (€11,700) in fines.”).

416. Thomas, *supra* note 380, at 478–79.

police abuse.⁴¹⁷ Some freedom of speech is tolerated in order to identify potential opponents and then discredit or co-opt them, which also was the tactic unsuccessfully tried by Gorbachev to create “a tame opposition.”⁴¹⁸ Whether despite or because of these measures and their flexibility, Putin is genuinely popular. This is because whether looking at income,⁴¹⁹

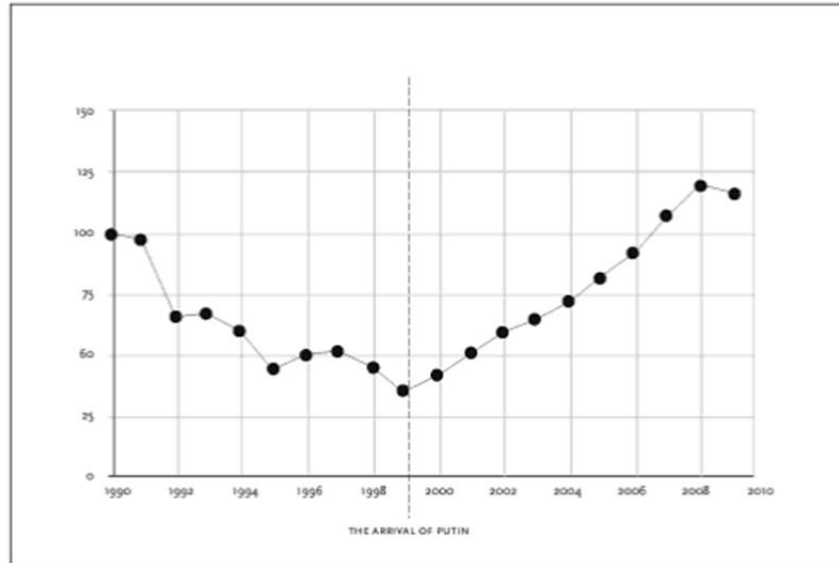
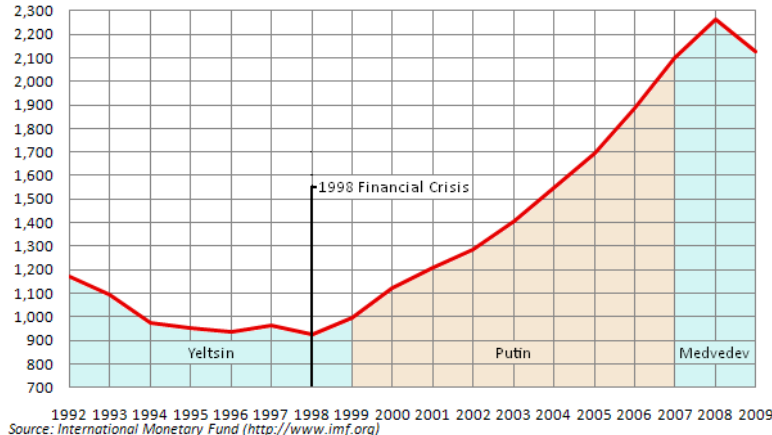


Figure 16.3 Indexes showing the average real-term wages of workers in Russia, 1990 = 100

Russian GDP (PPP) Since Fall of Soviet Union

Billions of International Dollars (2008)



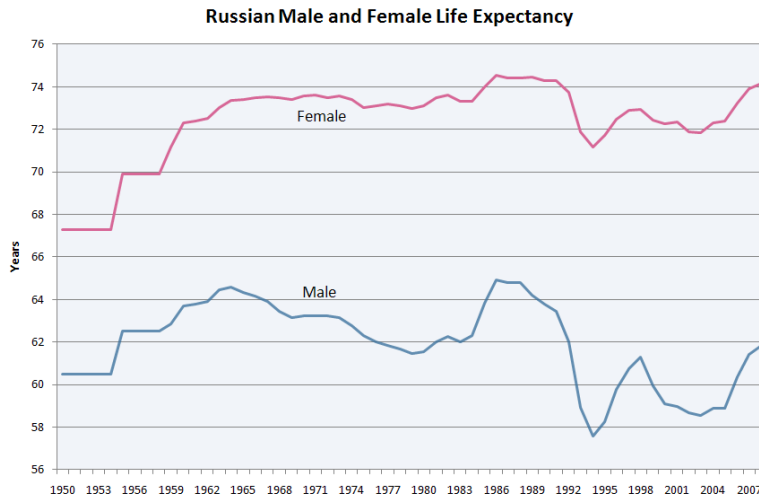
Source: International Monetary Fund (<http://www.imf.org>)

417. Alexander Tikhomirov, *Moscow Gay Pride Protests Blocked by Russia Police*, WORLD POST (May 27, 2012, 9:16 AM), http://www.huffingtonpost.com/2012/05/27/moscow-gay-pride-protests_n_1548992.html.

418. WILSON, *supra* note 159, at 22.

419. Yakunin, *supra* note 274, at 455.

life expectancy,⁴²⁰



or population.⁴²¹

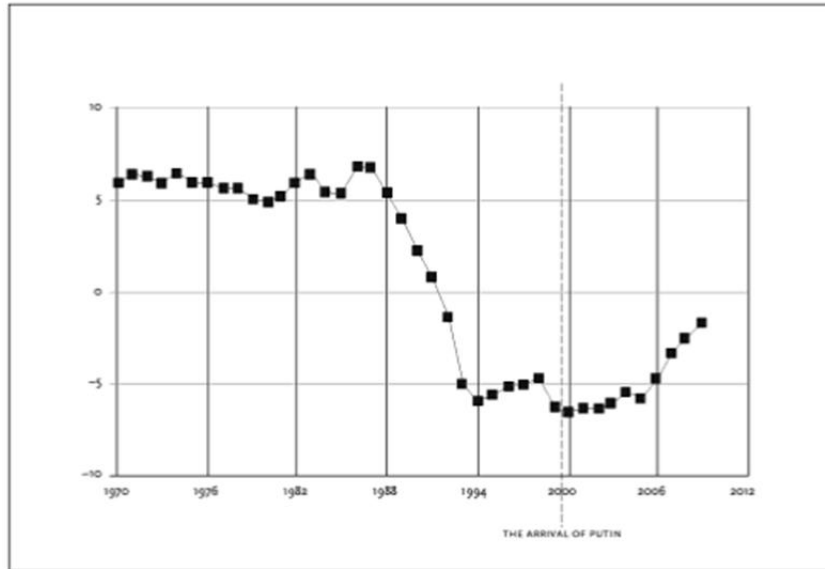


Figure 16.1 Natural growth (losses) among Russia's population (per 1,000)

420. *Russian Male and Female Life Expectancy*, ACADEMIC.RU, http://academic.ru/pictures/wiki/files/82/Russian_male_and_female_life_expectancy.PNG (last visited Oct. 24, 2014).

421. Yakunin, *supra* note 274, at 454.

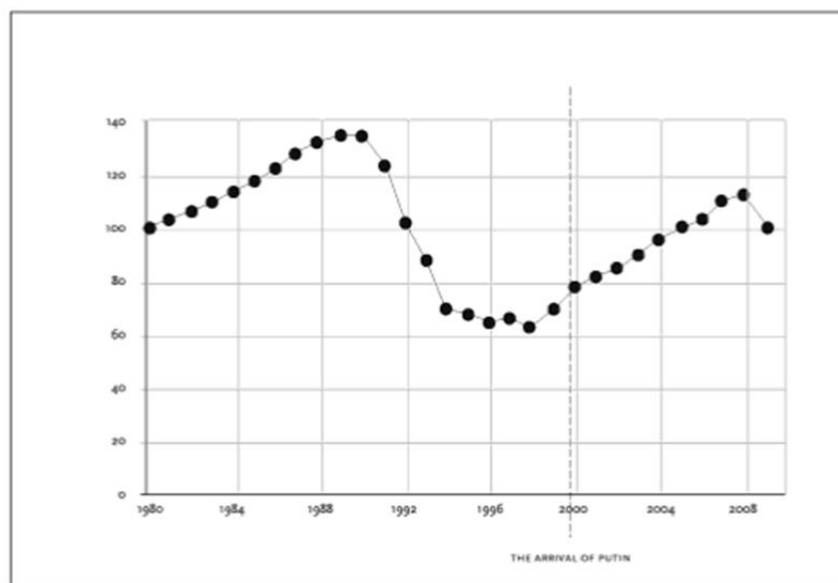


Figure 16.2 The volume of industrial production in Russia in comparable prices, 1980 = 100

Russia is better off under Putin than under Yeltsin.

e. Human Rights

Human rights in Western Europe and the United States are generally better protected than in Russia in part due to a poorer economy and the absence of the rule of law. Prisoners, conscripts, undocumented workers, and homosexuals are regularly abused in Russia, and political protest is often silenced.⁴²² The Russian ombudsman for human rights is well aware of such abuses,⁴²³ and naturally wishes to improve human rights protection in Russia.⁴²⁴ However,

422. See Alexander Kondakov, *Same-Sex Marriages Inside the Closet: Deconstruction of Subjects of Gay and Lesbian Discourses in Russia*, 1 OÑATI SOCIO-LEGAL SERIES, no. 1, 2011, at 1, 4.

423. *Russian Ombudsman: Gay Hate Law "May Lead to Human Losses and Tragedies,"* RAINBOW NEWS (June 12, 2013), <http://english.gay.ru/news/rainbow/2013/06/12-26356.htm> ("Vladimir Lukin, the Russian Ombudsman, believes that the gay hate law which was approved yesterday by the State Duma 'may have the high price to be paid for and may cause human tragedies.'" (quoting Vladimir Lukin)).

424. Kondakov, *supra* note 422 ("In the early summer 2010 the Russian ombudsman introduced his report about situation with human rights in Russia to the public (*The Ombudsman's Report 2009, 2010*). The report carefully covered a wide range of issues concerning claims to respect for human rights from different groups of Russian citizens: Prisoners, military servants, immigrants. Discursively the report contributes to the established practice of political talk in Russia: There are things one can say something about (especially

Putin's consolidation of political power and maintenance of public order often seriously infringe on human rights in Russia.

The lack of a rule of law state, evident in the problem of judicial subordination to vertical power,⁴²⁵ is a serious problem for Russia, not only in human terms but also in economic and political terms. Foreign investment is repelled by lawlessness, hampering Russia's domestic economy.⁴²⁶ The absence of the rule of law and the prevalence of human rights abuse in Russia result in less foreign investment, leading to suboptimal economic performance and emigration ("brain drain"), a vicious downward spiral.⁴²⁷ Trade and investment lead to prosperity, resulting in better protection of human rights.⁴²⁸ Increasing trade and investment also creates conditions under which the rule of law is likely to be increasingly respected for the following reasons: 1) increasing wealth reduces the relative incentive for law breaking (why break the law when you can get what you want legally?); 2) foreign investors do not wish to see their economic interests nationalized and thus press for functioning legal institutions; and 3) international commerce requires legal certainty⁴²⁹ so that contracts clear quickly and efficiently such that economic actors press for predictable legal institutions (procedural justice). Wealth creation also makes the real protection of human rights much likelier in practice by increasing life expectancy and quality of life, thereby reducing violent crime.

Lawlessness and poverty also make Russian governance no model for emulation in the developing world, thus hindering Russian foreign policy. Who wants to follow the Russian development model of institutionalized corruption and dependence on resource exports?

prisons, armed forces and international friendship) and there are things that must be kept in silence . . .").

425. MENDRAS, *supra* note 277, at 284 ("The subordination of the judges and the rulers' irresponsibility are major obstacles to the respect for basic rights . . .").

426. Ellyatt, *supra* note 321 ("As a result of cases like this and others, foreign direct investment in Russia remained low compared to other major Emerging Market economies.")

427. *Id.* ("Corruption is a big problem in Russia but it is not the biggest problem—the biggest problem is that investors don't trust Russia in the long-term."). In fact these are related problems: corruption leads to distrust which results in less foreign investment. *Id.*

428. See, e.g., Craig Forcese, *Human Rights Mean Business: Broadening the Canadian Approach to Business and Human Rights*, in *GIVING MEANING TO ECONOMIC, SOCIAL, AND CULTURAL RIGHTS* 71, 74 (Isfahan Merali & Valerie Oosterveld eds., 2001).

429. Deckstein et al., *supra* note 166 ("What German companies expect more than anything is legal certainty and economic reforms. For them, the Russian market, which, unlike many others, continues to grow, is both promising and potentially treacherous. Indeed, whether a business venture succeeds or fails in Russia is still largely determined by politics.").

3. International Law and Foreign Policy: Geopolitics and “Clash of Civilizations”

Russian foreign policy generally expresses itself as in conflict in a “clash of civilizations”⁴³⁰ between Great Russian Orthodox corporatism on the one hand and the non-Slavic world on the other. The logic of ideological conflict not only shores up domestic support for Russia United, but it also gives Russian foreign policy a flexible⁴³¹ inner logic with which to frame international differences in terms that Putin believes will favor Russian interests. However, pan-Slavic or Great Russian corporatist orthodoxy cannot present universal appeal and thus cannot present a global challenge to Western liberal democracy, whereas Western liberal democracy presents itself as a universally applicable model.

Russia’s conflicts range across the spectrum from trade policy, to terrorism, to inter-state conflicts, which we now examine.

a. Trade Policy

Economic interactions are usually positive sum. Nonetheless, judging by its actions, Russia sees trade policy in zero-sum terms. Though Russia has joined the WTO, Russia takes one-sided interpretations to trade disputes and uses non-tariff barriers as protectionist measures. For example, Russia’s claim that women’s underwear without a certain percentage of cotton is unhealthy

430. Alexander Rahr, *Pussy Riot Ushers in a New Clash of Civilizations*, RUSS. BEYOND HEADLINES (Aug. 10, 2012), http://rbth.com/articles/2012/08/10/pussy_riot_ushers_in_a_new_clash_of_civilizations_17221.html.

431. Pomerantsev explains it in this way:

[F]ar from being in transition towards democratic capitalism, 21st century Russian rulers have learnt to use the techniques of democracy for distinctly undemocratic ends. Russia has elections, but they are arranged so as to strengthen the Kremlin, rather than strengthen checks and balances. Russia has a civil society, but it is hard to know which non-governmental organisations (NGOs) are actually created by, and support the state, while genuinely independent bodies struggle to survive under evolving restrictions and harassment. Outside the federal TV channels, critical media does exist in Russia, but they are framed by the centre, so as to ultimately undermine any real opposition. Russia also has private companies, but they are controlled in a quasi-patrimonial manner.

... 21st century Russia takes a much more ‘postmodern’ approach to control. Postmodern in the sense that it uses many of the techniques associated with postmodern art and philosophy: pastiches of other’s narratives, simulacra (i.e. fake) institutions, and a ‘society of spectacle’ with no substance. The regime’s salient feature is a liquid, shape-shifting approach to power. Freed from the cumbersome body of ‘hard’ totalitarianism, the leaders of today’s Kremlin can speak like liberal modernisers in the morning and religious fanatics in the afternoon.

Peter Pomerantsev, *Russia: A Postmodern Dictatorship?*, LEGATUM INST., Oct. 2013, at 1, 3, available at <http://www.li.com/docs/default-source/default-document-library/2013-publications-russia-a-postmodern-dictatorship-.pdf?sfvrsn=4>.

and thus barred from import into Russia⁴³² is obvious nonsense, a clear violation of Russia's WTO obligations.⁴³³ Non-tariff barriers and technical barriers to trade are, and will be, used by Russia to delay suppression of Russia's illegal trade restrictions. In this case, the six percent cotton requirement is most likely intended to foster Kazakh cotton sales. Similarly, genetically modified organisms are another example of a trade conflict⁴³⁴ where we can expect Russian intransigence and non-compliance with rules that Russia supposedly agreed to—all the while complaining loudly about supposed Western double standards.⁴³⁵ One can likewise expect continued obstructionism by Russia at the European Court of Human Rights when it rules against the Russian government. One-sided legal interpretations are the consequence of the command theory of law, which does not see the law as an objective measure serving the interest of justice.

b. Rearmament and Arms Sales

The risk of a new cold war is also evident in Russia's military policies. Russia is rearming and consolidating power through corporatism in its military services.⁴³⁶ Putin is transforming the Russian military from a badly paid and abused conscript army into a smaller well paid and better armed force with motivated volunteers directed to elite units. Consistent with Great Russian Orthodoxy, Putin both permits the Russian army to recruit Russian-speaking foreigners⁴³⁷ and uses cossacks⁴³⁸ as police or quasi-police. Russia is asserting military power through the reintroduction of long-range (presumably nuclear-armed) bomber patrols,⁴³⁹ the stationing of Iskandar cruise missiles in

432. *Panty Riot: Eurasian Women Draw a Visible Line Against Lingerie Law*, THE GUARDIAN (Feb. 18, 2014, 8:33 PM), <http://www.theguardian.com/world/2014/feb/19/panty-riot-eurasian-women-draw-a-visible-line-against-lingerie-law>.

433. See, e.g., *Duma Seeks Moratorium on GMO Production in Russia*, RT NEWS (Feb. 26, 2014, 9:42 AM), <http://rt.com/politics/russian-duma-gmo-moratorium-804> (noting that since Russia joined the WTO, trade restrictions can only be imposed based on certain conditions).

434. *Id.*

435. *Russia Blasts PACE's 'Double Standard' Resolution on Ukraine*, RT NEWS (Jan. 30, 2014, 4:03 PM), <http://rt.com/news/russia-pace-ukraine-resolution-423/>.

436. *Russian Military Pay Rises, But Draft to Remain—Chief*, RIA NOVOSTI (Oct. 7, 2012, 7:10 PM), http://en.ria.ru/military_news/20121007/176467212.html.

437. *Russia's Military To Recruit More Foreigners*, RTT NEWS (Dec. 16, 2011, 12:57 AM), <http://www.rttnews.com/1782797/russia-s-military-to-recruit-more-foreigners.aspx>.

438. Jolie Lee, *Who Are Russia's Cossack Militiamen in Pussy Riot Beating?*, USA TODAY (Feb. 20, 2014, 3:08 PM), <http://www.usatoday.com/story/news/nation-now/2014/02/20/cossack-militiamen-pussy-riot-sochi/5636603/>.

439. *Russia Restores Bomber Patrols*, CNN (Aug. 17, 2007, 12:48 PM), <http://edition.cnn.com/2007/WORLD/europe/08/17/russia.airforce.reut/index.html>; see also *Russian Bombers to Continue Patrols Over South America*, RIA NOVOSTI (Nov. 1, 2013, 12:44 AM), <http://en.ria.ru/>

Kaliningrad Oblast,⁴⁴⁰ and testing RS-26 “Rubezh” missiles in violation of the Intermediate Nuclear Forces treaty.⁴⁴¹ Russia is also acquiring more and updated nuclear missile submarines,⁴⁴² TOPOL rockets with multiple independent reentry vehicles (MIRV),⁴⁴³ and the Mistral helicopter carrier from France,⁴⁴⁴ a historical Russian ally, as well as developing its T-50 fighter aircraft. Given these facts Russia—or the U.S.—may withdraw from the START treaty.⁴⁴⁵ Russia is also using arms sales to support its foreign policy, most evidently in its sale of an aircraft carrier to India.⁴⁴⁶ Russia is also seeking base options overseas, notably in countries where the USSR had military bases.⁴⁴⁷ These arms policies are intended to support Russian use of force in places like Abkhazia, South Ossetia, the Republic of Crimea, Donetsk National Republic, and elsewhere.

c. Terrorism

Russia and the U.S. claim a desire to cooperate in the fight against terrorism and narcotics.⁴⁴⁸ However, I have little hope for actual cooperation

military_news/20131101/184462190/Russian-Bombers-to-Continue-Patrols-Over-South-America.html.

440. *Eastern Europe: Russian Missiles in Kaliningrad Annoy Poland and Lithuania*, SPIEGEL (Dec. 16, 2013, 6:21 PM), <http://www.spiegel.de/politik/ausland/russische-iskander-raketen-in-kaliningrad-veraergern-polen-und-litauen-a-939430.html>.

441. Warren Mass, *U.S. Says Russia Violated INF Treaty with Test*, NEW AMERICAN (Jan. 31, 2014, 3:29 PM), <http://www.thenewamerican.com/usnews/foreign-policy/item/17525-u-s-says-russia-violated-inf-treaty-with-test>.

442. Vladimir Isachenkov, *New Russian Nuclear Submarine Enters Service*, YAHOO NEWS (Jan. 10, 2013, 11:48 AM), <http://news.yahoo.com/russian-nuclear-submarine-enters-160331789.html>.

443. *Russia's Missile Forces to Replace Topol-M with Multiple-Warhead RS-24*, RIA NOVOSTI (Nov. 30, 2010, 11:56 AM), http://en.ria.ru/military_news/20101130/161558446.html.

444. *First Russian Mistral-Class Helicopter Carrier Launched in French Town of Saint-Nazaire*, VOICE OF RUSS. (Oct. 15, 2013, 12:54 PM), http://voiceofrussia.com/news/2013_10_15/First-Russian-Mistral-class-helicopter-carrier-launched-in-French-town-of-Saint-Nazaire-4770/.

445. *Russia Threatens to Quit START as US Deploys Aegis Destroyer to Spain*, RT NEWS (Feb. 4, 2014, 9:22 AM), <http://rt.com/news/destroyer-us-poland-start-treaty-530/>.

446. *India's New Flagship: Russia Hands Over Modernized Aircraft Carrier to New Delhi*, RT NEWS (Nov. 16, 2013, 6:17 PM), <http://rt.com/news/russia-india-aircraft-carrier-834/>.

447. *Russia Seeks Several Military Bases Abroad—Defense Minister*, RIA NOVOSTI (Feb. 26, 2014, 7:56 PM), http://en.ria.ru/military_news/20140226/187917901/Russia-Seeks-Several-Military-Bases-Abroad—Defense-Minister.html.

448. *Cooperation with US, EU on Fighting Drugs Continues Regardless of Sanctions—FSKN Head*, VOICE OF RUSS. (May 14, 2014, 1:07 PM), http://voiceofrussia.com/news/2014_05_14/Cooperation-with-US-EU-on-fighting-drugs-continues-regardless-of-sanctions-FSKN-head-5402/.

given the cyber attacks Russia launched against Estonia,⁴⁴⁹ the bombings at Domodedovo⁴⁵⁰ and Boston,⁴⁵¹ as well as the conflicts in Syria and Crimea. I expect Russia and the U.S. to act as if they are fully cooperating in their struggle against terrorist violence, while simultaneously questioning if they should even bother or simply go back to state-sponsored terrorism, whether indirectly through Iran⁴⁵² and Saudi Arabia⁴⁵³ or directly. Of course, military professionals, who actually have a life to lose in such struggles—unlike the diplomats and politicians—find such considerations horrific.

d. The Use of Force Under International Law

The general principles of the sovereign equality of States,⁴⁵⁴ of non-interference in other States' domestic affairs,⁴⁵⁵ of non-intervention,⁴⁵⁶ and of national self-determination,⁴⁵⁷ along with the general prohibition of the use of force in Article 2 of the U.N. Charter, mean that military intervention is presumptively illegal unless authorized by the Security Council under Article 42 of the U.N. Charter or in self-defense.⁴⁵⁸ Article 2(4) of the U.N. Charter

449. Adam O'Donnell, *Russia Kinda-Sorta Owns up to Estonia Cyberwar*, ZDNET (Mar. 8, 2009, 3:43 PM), <http://www.zdnet.com/blog/security/russia-kinda-sorta-owns-up-to-estonia-cyberwar/2828>.

450. N.B., *The Domodedovo Airport Bombing: Did the Moscow Bomber Skip Security?*, THE ECONOMIST (Jan. 29, 2011, 4:56 PM), http://www.economist.com/blogs/gulliver/2011/01/domedovo_airport_bombing.

451. Eileen Sullivan & Matt Apuzzo, *Russia Wiretapped Boston Bombing Suspect, Recorded Conversation with Mother: Officials*, HUFFINGTON POST (Apr. 27, 2013, 5:18 PM), http://www.huffingtonpost.com/2013/04/27/russia-wiretap-bombing-suspect_n_3171102.html.

452. Greg Bruno, *State Sponsors: Iran*, COUNCIL ON FOREIGN RELATIONS (Oct. 13, 2011), <http://www.cfr.org/iran/state-sponsors-iran/p9362> (“The U.S. State Department considers Iran the world’s ‘most active state sponsor of terrorism.’”).

453. Declan Walsh, *WikiLeaks Cables Portray Saudi Arabia as a Cash Machine for Terrorists*, THE GUARDIAN (Dec. 5, 2010, 10:30 AM), <http://www.theguardian.com/world/2010/dec/05/wikileaks-cables-saudi-terrorist-funding>; see also Ted Galen Carpenter, *Terrorist Sponsors: Saudi Arabia, Pakistan, China*, CATO INST. (Nov. 16, 2001), <http://www.cato.org/publications/commentary/terrorist-sponsors-saudi-arabia-pakistan-china>.

454. Even in the Soviet era, this was the case. See GRUNDRISS VÖLKERRECHT 53 (Edith Poeser & Walter Poeggel eds., 1983) (unverified source).

455. *Id.* at 59; see also *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 19 (June 27).

456. HEINEGG, *supra* note 113, §§ 470–71. For a brief overview on these concepts, see MANFRED KÜNG & MARTIN ECKERT, REPETITORIUM ZUM VÖLKERRECHT § 424 (1993) (unverified source).

457. James Mayall, *Non-Intervention, Self-Determination and the ‘New World Order,’* 67 INT’L AFF. 421, 424 (1991).

458. See Karsten Nowrot & Emily W. Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT’L L. REV. 321, 373 (1998); *Any U.S. Attack on Syria Will Need U.N. Approval*, MIDDLE EAST IN

outlaws the use of force without Security Council approval.⁴⁵⁹ When can a state use force for humanitarian purposes?⁴⁶⁰ Prior to the U.N. Charter, humanitarian intervention, like the use of force generally, was legally permitted to any state.⁴⁶¹ Since the implementation of the Charter, however, it remains uncertain whether and when intervention may be justified by human rights violations.⁴⁶² What is certain: if approved by the Security Council, humanitarian intervention is legal. However, unauthorized armed intervention is presumptively illegal. Might an unauthorized humanitarian intervention be justified? Under the Charter logic, only as an act of defense of the state or its citizens or nationals.⁴⁶³ Even if legal, the use of force in humanitarian intervention is subject to the general rule that force must be necessary to prevent some greater harm and must be likely to be effective thereto.⁴⁶⁴ That is, the use of force under international law must be strictly necessary (no alternative) and proportional (limited) to the threat it is intended to neutralize.

To clarify the ambiguity regarding the legality of humanitarian intervention, I distinguish *humanitarian relief* from *humanitarian rescue* and *humanitarian intervention*.

DEPTH (Aug. 27, 2013), <http://themideastindepth.com/2013/08/27/any-u-s-attack-on-syria-will-be-illegal-under-international-law/>.

459. Nowrot & Schabacker, *supra* note 458. Although, *with* Security Council approval, an intervention to secure democratic rights may well be legal intervention in the internal affairs of another state. *See id.* at 373, 378 (explaining lawful, pro-democratic humanitarian intervention).

460. For an early effort in the U.N. era to grapple with the idea of whether and when humanitarian intervention might be lawful, see Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter*, 4 CAL. W. INT'L L.J. 203, 256–57 (1974) (noting that where intense human rights violations exist, humanitarian intervention might be lawful).

461. *Cf.* Nowrot & Schabacker, *supra* note 458, at 372–73. In discussing the uncertain legality of unilateral humanitarian intervention, Nowrot and Schabacker noted:

Even if the international community of states once accepted a customary doctrine of humanitarian intervention, it is not at all clear that the doctrine survived the United Nations Charter. Given the recent United Nations authorized humanitarian interventions in Somalia, Iraq, and the former Yugoslavia, however, it is possible to conclude that humanitarian intervention may be legally authorized by the Security Council. The legal status of unauthorized interventions, however, is tenuous.

Id. at 372.

462. U.N. Charter arts. 32, 42; HEINEGG, *supra* note 113, §§ 451, 454. *See also* Ian Hurd, *Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World*, 25 ETHICS & INT'L AFF. 293, 299, 311 (2011) (“Contemporary international law can be read as either allowing or forbidding international humanitarian intervention, and the legal uncertainty around humanitarian intervention is fundamental and irresolvable. Contradictory and plausible interpretations about the legality of any act of intervention exist simultaneously, and neither can be eliminated.”). I agree that ambiguity exists, but I regard the ambiguity as resolvable through structured coherent logic.

463. U.N. Charter art. 51.

464. HEINEGG, *supra* note 113, § 455.

1) Provision of *humanitarian relief aid*⁴⁶⁵ (*devoir d'ingèrence*)⁴⁶⁶ does not involve the use of armed force and thus does not require U.N. Security Council authorization. Therefore, the current U.S. humanitarian relief in Syria is legal under international law.

2) *Humanitarian rescue* of hostages, an actual state practice,⁴⁶⁷ whether by Russia in Tartus, Israel at Entebbe, or France at Kolwezei, is lawful under international law as a form of self-defense of the state's own citizens or nationals.

3) *Humanitarian intervention (droit d'ingèrence)* is the use of armed force to protect people⁴⁶⁸ and is distinct from humanitarian relief aid.⁴⁶⁹ Humanitarian intervention may seek merely to separate warring parties (peace-keeping) or may go further and seek to protect people, or to remove a person, persons, or even a government (peace-making).⁴⁷⁰

While some authors argue for an international duty to respect and protect human rights,⁴⁷¹ which would entail a general right to humanitarian intervention,⁴⁷² the U.N. Charter makes the rules on *jus ad bello* clear. The "responsibility to protect" doctrine, to present, is only *de lege ferenda*. "Responsibility to protect" is merely a hortatory *political claim*, not a *legal right*.⁴⁷³

465. See 10 U.S.C. § 2561(a) (2000) (stating Department of Defense humanitarian assistance funds should be used for transporting humanitarian relief or for other humanitarian purposes).

466. *Devoir et Droit d'Ingèrence*, RÉSEAU DE RECHERCHE SUR LES OPÉRATIONS DE PAIX, <http://www.operationspaix.net/41-lexique-devoir-et-droit-d-ingerence.html> (last visited Sept. 14, 2014) ("Le droit d'ingèrence est la reconnaissance du droit des États de violer la souveraineté nationale d'un autre État, en cas de violation massive des droits de la personne. Le devoir d'ingèrence, quant à lui, est conçu comme plus contraignant. Il désigne l'obligation morale faite à un État de fournir son assistance en cas d'urgence humanitaire. Ni le droit, ni le devoir d'ingèrence n'ont d'existence dans le droit humanitaire international. L'ingèrence elle-même n'est pas un concept juridique défini. Au sens commun, il signifie intervenir, sans y être invité, dans des affaires qui relèvent essentiellement de la compétence nationale d'un État.")

467. Actual state practice is one element of customary international law. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 108–09 (June 27) (noting that to form a new customary rule, there must be actual state action).

468. HEINEGG, *supra* note 113, § 451.

469. See Lois E. Fielding, *Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy*, 5 DUKE J. COMP. & INT'L L. 329, 340 (1995) (distinguishing humanitarian assistance from humanitarian intervention).

470. HEINEGG, *supra* note 113, §§ 456–57.

471. For an argument that sovereignty consists of the responsibility to protect, see *id.* § 384. I regard that as desirable but wishful thinking—*de lege ferenda*, if that.

472. See Anne-Cécile Robert, *Origines et Vicissitudes du "Droit d'Ingèrence"*, MONDE DIPLOMATIQUE (May 2011), <http://www.monde-diplomatique.fr/2011/05/ROBERT/20488>.

473. But a political right may nevertheless at times be effective. See Louis Henkin, *NATO's Kosovo Intervention: Kosovo and the Law of "Humanitarian Intervention"*, 93 AM. J. INT'L L.

Russia's argument that its interventions in Georgia and Ukraine were somehow legal is thus unfounded since the U.N. Security Council did not authorize the Russian interventions. Without the approval of the U.N. Security Council,⁴⁷⁴ humanitarian intervention, however desirable it may be to some,⁴⁷⁵ is presumptively illegal⁴⁷⁶ for otherwise there would be abuse of such right.⁴⁷⁷ For example, if the Russian logic in Crimea were the rule, China might choose to annex parts of Siberia to protect the undocumented Chinese living there, or any of the various Chinatown exclaves around the world. Likewise, France could intervene in Québec to secure Québec's liberation. The rules Russia purports to uphold are untenable because they would destabilize the entire world and are unacceptable because *every state on earth has an interest in its own territorial integrity*. Thus, Russia is and will increasingly remain isolated, particularly since China must be concerned about secessionist movements in Tibet, Taiwan, or even Hong Kong, as well as insular claims of China's neighbors to islands that it regards as Chinese territory.⁴⁷⁸ We now look briefly at the interventions in Georgia, Syria, and Ukraine to see the contours of the cold peace.

824, 825–26 (1999) (“[It is] the responsibility of the world community to address threats to international peace and security resulting from genocide and other crimes against humanity.”).

474. Russia's position, likewise, seems to be that the Security Council approval of humanitarian intervention is required if such a right exists at all. See L.N. Tarasova, *K Diskoossii o Pravomyernosti Goomanitarnoy Intyervyentzii* [To the Discussion on the Legality of Humanitarian Intervention] 9 VOPROSE TZIVILISTICHYESKOY NAOOKI I SOVRYEMYENOSTI [QUESTIONS OF SCIENCE AND MODERNITY] 99, 100 (2011) (noting that the legal status of humanitarian intervention under international law is ambiguous, but probably does not exist without U.N. Security Council approval).

475. Often, U.S. authors argue, perhaps understandably and certainly from good intentions, for a unilateral right to humanitarian intervention to prevent gross violations of basic human rights. I think those arguments are wrong as a matter of positive law and do not recognize the fact that enabling unilateral humanitarian intervention for one state enables it for all states. See Amy Eckert, *The Non-Intervention Principle and International Humanitarian Interventions*, 7 INT'L LEGAL THEORY 49, 49–50 (2001) (arguing that international law permits unilateral intervention to prevent gross violations of human rights).

476. Henkin, *supra* note 473, at 824.

477. The reason that unilateral intervention is illegal is because of the fact that otherwise spurious claims to “humanitarian” intervention would be made any time any state wished to interfere in the internal affairs of other weaker states. The Russian literature is reserved regarding the right to humanitarian intervention, and critical of its potential for abuse. As early as 1910, scholars noted the human rights atrocities committed in the name of humanitarian intervention and the problem of pretextual abuse of the idea of the right to humanitarian intervention. See generally Antoine Rougier, *La Théorie de l'Intervention d'Humanité*, 17 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 468 (1910).

478. J.M. Norton, *Why Chinese Study the Warring States Period*, THE DIPLOMAT (Dec. 12, 2013), <http://thediplomat.com/2013/12/why-chinese-study-the-warring-states-period/?allpages=yes?allpages=yes&print=yes>.

i. Georgia

Russia always asserts that all its actions are consistent with international law, even when that obviously is not the case. In Georgia, for example, Russia claims that its military intervention and creation of the barely recognized puppet states of “Abkhazia”⁴⁷⁹ and “South Ossetia”⁴⁸⁰ were perfectly legal under international law⁴⁸¹ despite the clear prohibition of the use of force under the U.N. Charter. In the 2008 Georgia war, the U.N. Security Council did not authorize the use of force. Moreover, there was no issue of self-defense of Russian territory, and while Russia could argue its defense of Russian peacekeepers was legal self-defense,⁴⁸² the formation of the puppet states of “Abkhazia” and “South Ossetia” was clearly a violation of international law as an injury to the territorial integrity of Georgia.

ii. Syria

In Syria, an ally⁴⁸³ of Russia,⁴⁸⁴ President Assad violated the international right to life⁴⁸⁵ by perpetrating mass killings⁴⁸⁶ of unarmed persons, a crime

479. Abkhazia, populated by Russian nationals, is recognized de jure only by the Russian Federation, Nicaragua, Venezuela, and Nauru, as well as by Transnistria and South Ossetia, neither of which are recognized states as their absence at the UN makes clear. *See Abkhazia Profile*, BBC NEWS (June 3, 2014, 10:50 AM), <http://www.bbc.com/news/world-europe-18175030> (noting that Russia, Nicaragua, Venezuela, and a number of small Pacific Island states would formally recognize the independence of South Ossetia and Abkhazia).

480. *South Ossetia Profile*, BBC NEWS (Oct. 17, 2013, 9:23 AM), <http://www.bbc.com/news/world-europe-18269210> (“Internationally, only Russia’s Latin-American allies Venezuela and Nicaragua have recognised South Ossetian independence, apart from a few Pacific island states.”).

481. Nicolai N. Petro, *The Legal Case for Russian Intervention in Georgia*, 32 FORDHAM INT’L L.J. 1524, 1531 (2009); Press Release, Ambassade de la Fédération de Russie au Royaume de Belgique, *The Guns of August: The Russian View on the Origins of the 2008 War in the Caucasus and on the Way Forward for the Region* (Aug. 2009) (available at http://www.belgium.mid.ru/press/247_en.html).

482. REPORT OF THE INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA 23 (2009), available at http://www.ceiig.ch/pdf/IIFFMCG_Volume_I.pdf.

483. Their alliance is exemplified by an agreement between the USSR and Syria on Soviet use of naval facilities at Latakia and Tartus in exchange for delivery of adopted air defence missiles and jet fighter planes. *See* GEORGE GINSBURGS & ROBERT M. SLUSSER, A CALENDAR OF SOVIET TREATIES 1958–1973, at 674 (1981).

484. The Russian led Eurasian Economic Community (EurAsEC) had been considering entering into a free trade agreement with Syria. *Tamozyennyi soyuz i Siriya mogoot podpisat’ dogovor o sozdanii zoni svobodnyy trgovli* [*Customs Union and Syria Could Sign a Treaty on the Establishment of Free Trade*], 100 TELEVISION RUSSIA (May 28, 2012, 8:05 AM), <http://www.tv100.ru/news/tamojenny-soyuz-i-siriya-mogut-podpisat-dogovor-o-sozdanii-zony-svobodnyy-torgovli-56782/>. However, that is probably no longer the case. Moreover, although Russia had been regularly selling arms to Syria, Russia has likely stopped this practice. *See* Valerie Cheron, *La Russie vend 36 Yak-130 à la Syrie*, RP DEFENSE (Jan. 27, 2012), <http://rpde>

against humanity.⁴⁸⁷ War crimes,⁴⁸⁸ crimes against humanity, and torture⁴⁸⁹ are non-derogable international customary laws⁴⁹⁰—*ius cogens*.⁴⁹¹ Violators of *ius cogens* are subject to universal jurisdiction.⁴⁹² Unfortunately, none of that legalizes the use of force by any state as a remedy to these grave human rights violations because of the principles of sovereign equality and its corollaries, the prohibition of intervention in purely domestic affairs of other states and the general prohibition of the use of force under international law. However, although humanitarian *intervention* in Syria or Georgia would be illegal, the U.S. humanitarian *relief* in Syria, to present, is legal.

Russia takes inconsistent positions on armed intervention in Georgia versus Syria. Although Russia somehow regards its interventions in Georgia and Crimea as legal under international law, Russia simultaneously asserts that

fense.over-blog.com/article-la-russie-vend-36-yak-130-a-la-syrie-98070122.html; *La Russie Ne Conclura Pas De Nouveaux Contrats De Vente D'armes Avec La Syrie*, AMNESTY INT'L SUISSE (July 9, 2012), <http://www.amnesty.ch/fr/pays/moyen-orient-afrique-du-nord/syrie/docs/2012/russie-stop-armes-syrie>. Putin states his strategy is to force both sides to the negotiating table. *Russland liefert Syrien keine Waffen mehr*, 20 MINUTEN (July 9, 2012, 2:38 PM), <http://www.20min.ch/ausland/news/story/26129790>.

485. *Syrian Activists Say Dozens Killed in Hama Province*, CBC NEWS (June 6, 2012, 6:36 PM), <http://www.cbc.ca/news/world/story/2012/06/06/syria-hama-violence.html> (“The reported mass killings are likely to ignite more anger nearly two weeks after the massacre of more than 100 people elsewhere in Syria as an international peace plan unravels and the country spirals toward civil war.”).

486. Sévane Garibian, *Crime Against Humanity*, ONLINE ENCYCLOPEDIA MASS VIOLENCE (June 19, 2008), <http://www.massviolence.org/Crime-against-Humanity>.

487. Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT'L L. 178, 179–80 (1946) (stating that most crimes against humanity are also war crimes and vice versa); Richard Vernon, *What is Crime Against Humanity?*, 10 J. POL. PHIL. 231, 233, 248 (2002).

488. War crimes today probably include rape, certainly because it is a systematic practice intended to degrade, subjugate, and destroy an entire people. Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 425, 428 (1993).

489. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at art. 5 (Dec. 10, 1948); Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 222; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4, *adopted and opened for signature, ratification and accession* Dec. 10, 1984, 465 U.N.T.S. 113.

490. For an overview of *ius cogens*, see Tahmina Karimova, *Derogation from Human Rights Treaties in Situations of Emergency*, RULAC, <http://www.geneva-academy.ch/RULAC/print.php?page=12> (last visited Oct. 24, 2014) (defining torture as a non-derogable right common to all treaties).

491. MATTHIAS HERDEGEN, *VÖLKERRECHT* §§ 14, 16 (7th ed. 2008) (unverified source).

492. For a theoretical overview, see David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85 (2004).

any Western intervention in Syria would be a violation of the general international law principle of non-intervention.⁴⁹³

Given the illegal annexation of Crimea by Russia, it is entirely possible that the conflict in Syria will devolve into an illegal proxy war. So far, Syria has only proven to be a very indirect proxy war, with Saudi Arabia financing rebels and Iran backing Assad.⁴⁹⁴ To present, it seems both Russia and the United States are trying to restrain their rogue suzerains, Iran and Saudi Arabia respectively. The illegal annexation of Crimea, however, may have already broken that restraint. The U.S. has expelled the Syrian Embassy from Washington after the Crimean annexation.⁴⁹⁵ Perhaps unsurprisingly to some, Israel launched the heaviest air raids on Syria in years,⁴⁹⁶ while Turkey shot down a Syrian jet fighter.⁴⁹⁷ Although *inter arma silent leges*, international legal rights and duties are still relevant to the Syrian conflict, at least for now, because the U.S. and Russia are not yet overtly committed to proxy war in Syria—or elsewhere for that matter. This is one of the reasons I refer to the currently frozen relations with Russia as “cold peace” rather than “cold war.”

iii. Ukraine

Ukraine is the most recent major conflict point between Russia and the West. In Ukraine, it was entirely evident that Russia was willing to tolerate the formation of an authoritarian dictatorship, another Belarus, as a part of its formation of a Great Russian imperium: failing to attain that, Russia annexed Crimea to guarantee control of its naval base, using the protection of Russian nationals in Crimea from non-existent discrimination and disorder as a pretext for its illegal annexation. Russia’s annexation of Crimea was simply illegal as

493. Alexei Anishchuk, *Russia Warns Against Military Intervention in Syria*, REUTERS (Aug. 26, 2013, 10:20 AM), <http://www.reuters.com/article/2013/08/26/us-syria-crisis-lavrov-intervention-idUSBRE97P0G220130826>.

494. Doyle McManus, *Syria and the Perils of Proxy War*, L.A. TIMES (Jan. 12, 2014), <http://articles.latimes.com/2014/jan/12/opinion/la-oe-mcmanus-column-proxy-war-syria-20140112>.

495. *Chairman Royce, Ranking Member Engel Support U.S. Expulsion of Syrian Diplomats*, U.S. HOUSE COMMITTEE ON FOREIGN AFF. (Mar. 18, 2014), <http://foreignaffairs.house.gov/press-release/chairman-royce-ranking-member-engel-support-us-expulsion-syrian-diplomats>; *Syrian Embassy in Washington Closed, Diplomats Expelled*, WASH. FREE BEACON (Mar. 19, 2014, 9:16 AM), <http://freebeacon.com/national-security/syrian-embassy-in-washington-closed-diplomats-expelled/>.

496. *Lebanese Media: Israeli Air Raid Hits Hezbollah 'Missile Site,' Kills Militants*, JERUSALEM POST (Feb. 25, 2014, 9:17 AM), <http://www.jpost.com/Defense/Lebanese-media-Israeli-air-raid-hits-Hezbollah-targets-342439>.

497. Sebnem Arsu, *Turkey Downs Warplane from Syria After Warning*, N.Y. TIMES, Mar. 24, 2014, at A5.

a matter of international law.⁴⁹⁸ Russia's annexation was a violation of its treaty obligation under its Treaty of Friendship to respect Ukraine's territorial integrity⁴⁹⁹ and under the *universally* recognized general principle of the territorial integrity of each State under customary international law.⁵⁰⁰ Russia's argument that the annexation was somehow an exercise of national self-determination is nonsense since there is no Crimean nation. Russian nationals living in Crimea who wished to live in Russia were in fact free to move to Russia, and were not facing discrimination or human rights abuses, contrary to the claims of the Russian federation.⁵⁰¹

Russia's comparison of its illegal annexation of Crimea to Kosovo's separation from Serbia is also wrong. Kosovo was not annexed by any state and faced actual grave human rights violations, and it was also the subject of a U.N. Resolution.⁵⁰² The so called "republic of Crimea" existed for only one day, was recognized by only one state, and was immediately annexed by that state.⁵⁰³ Russia's illegal annexation is a violation of international law and of Ukrainian national law.⁵⁰⁴ Consequently, an isolation of Russia through economic sanctions has already started.⁵⁰⁵ Hopefully this process will not end in proxy wars and state-sponsored terrorism—characteristics of the Cold War.

498. This illegality was reflected by the U.N. General Assembly Resolution condemning the annexation. Louis Charbonneau & Mirjam Donath, *U.N. General Assembly Declares Crimea Secession Vote Invalid*, REUTERS (Mar. 27, 2014, 2:43 PM), <http://www.reuters.com/article/2014/03/27/us-ukraine-crisis-un-idUSBREA2Q1GA20140327>.

499. Treaty between the Russian Federation and Ukraine on Friendship, Cooperation and Partnership, Russ.-Ukr., May 31, 1997, U.N. Doc. A/52/174.

500. U.N. Charter art. 2.

501. Amnesty International and Human Rights Watch both make clear that the human rights abuses in Crimea are against journalists and Ukrainians, not against the Russian language "minority" in Crimea. *Crimea: Attacks, 'Disappearances' by Illegal Forces Rein in Units Operating Outside Law*, HUMAN RTS. WATCH (Mar. 14, 2014), <http://www.hrw.org/news/2014/03/14/crimea-attacks-disappearances-illegal-forces>; *Made in Russia: Crimea's Grim Human Rights Predicament*, AMNESTY GLOBAL HUMAN RTS. BLOG (Mar. 22, 2014), <http://livewire.amnesty.org/2014/03/22/made-in-russia-crimeas-grim-human-rights-predicament/>.

502. Iñigo Urrutia Libarona, *Territorial Integrity and Self-Determination: The Approach of the International Court of Justice in the Advisory Opinion on Kosovo*, REVISTA D'ESTUDIS AUTONÒMICS I FEDERALS, Oct. 2012, at 107, 107–08.

503. Matt Smith & Alla Eshchenko, *Ukraine Cries 'Robbery' As Russia Annexes Crimea*, CNN (Mar. 18, 2014, 6:20 PM), <http://www.cnn.com/2014/03/18/world/europe/ukraine-crisis/>; Matt Smith & Marie-Louise Gumuchian, *Ukraine 'Will Never Accept' Crimea Annexation, President Says*, CNN (Mar. 17, 2014, 6:58 PM), <http://www.cnn.com/2014/03/17/world/europe/ukraine-crisis/>.

504. CONST. OF UKR., art. 73 (2010).

505. Marcus Walker et al., *Europe, U.S. Significantly Expand Sanctions Against Russian Economy*, WALL ST. J. (July 29, 2014, 11:15 PM), <http://online.wsj.com/articles/europe-u-s-significantly-expand-sanctions-against-russian-economy-1406666111>.

Inconsistent Russian positions on intervention in Syria versus Georgia and Ukraine and one-sided interpretations of Russia's treaty obligations toward Ukraine⁵⁰⁶ and its obligations under the WTO are examples of the double standards of which Russia so often complains.⁵⁰⁷ This exemplifies the sort of one-sided intransigence, if not hypocrisy, that the Kremlin believes best advances its interests. Given the absence of the idea of the rule of law in Russian political consciousness, this duplicity is at least comprehensible. However, lawlessness hinders economic growth in Russia and limits Russia's ability to lead its putative allies, ultimately leading to the international isolation of Russia. No honest or intelligent person would view Russia as a fantastic opportunity for investment or view its ideas about law and international relations as attractive or compelling; and, as currently configured, Russia's ideology will not attract global supporters. Putin's power base is solid, but expanding it will prove difficult, if not impossible.

CONCLUSION

Since Putin clearly casts Russia within a clash of civilizations, we can rightly ask ourselves: What exactly is this clash about?

Economically, Russia and the West are in conflict over trade ties and resources, a conflict that expresses itself through different visions of the role of individual rights, the rule of law, and democracy in the theory of law and the state.

Ideologically, the conflict between Russia and the West is between Great Russian corporatist orthodoxy with a weak rule of law and "vertical hierarchy" and the Western triumvirate of "the rule of law," "human rights," and "democracy." While Europe tries to foster the rule of law, democracy,⁵⁰⁸ and the protection of human rights,⁵⁰⁹ Russia is at best ambivalent, at worst cynical,

506. *Sanctions Against Ukraine Blackmail, Double Standards—Moscow*, ITAR-TASS (Feb. 20, 2014, 3:59 PM), <http://en.itar-tass.com/russia/720097>.

507. Alessandra Prentice, *Russia Accuses U.S. of Double Standards Over Syria*, REUTERS (Feb. 22, 2013, 5:10 PM), <http://www.reuters.com/article/2013/02/22/us-syria-crisis-russia-idUSBRE91L0BH20130222>.

508. *Freedom, Security and Justice*, EUROPEAN UNION EXTERNAL ACTION, http://www.eeas.europa.eu/russia/common_spaces/fsj_en.htm (last visited Oct. 24, 2014) ("The EU has supported the development of democracy, the protection of human rights and the development of a healthy civil society in Russia notably through the European Initiative for Democracy and Human Rights (EIDHR).").

509. *Id.* ("With democracy, respect for human rights, fundamental freedoms and the rule of law an essential element of EU-Russia relations, it is only natural that these issues are regularly discussed at all levels. In 2005 regular, six-monthly EU-Russia human rights consultations were established. They have provided for a substantial dialogue on human rights issues in Russia and the EU and on EU-Russian cooperation on human rights issues in international fora. The EU also maintains a regular dialogue with both Russian and international NGOs on human rights issues. Issues that the EU raises with Russia in the human rights consultations include: the human rights

and/or hypocritical about human rights and the rule of law. Russia misperceives itself as trapped in a zero-sum conflict of civilizations, leading to a situation that can best be characterized as a cold peace. However, differences over domestic governance questions such as corruption or gay rights are not differences that states would realistically go to war over—unlike border issues.

Thus, it is unlikely that the constant conflicts between Russia and the West will degrade into the endemic worldwide proxy wars and state-sponsored terrorism that characterized the Cold War. The conflict between Russia and the West, though increasingly zero-sum, is a relative conflict within Greco-Roman thought, not an absolute conflict between radically opposite economic systems. Unlike the Cold War, these conflicts are not expressions of antithetical ideologies, and so they will likely remain for the most part political. There may be occasional and exceptional proxy wars or even indirect state-sponsored terrorism through proxies such as Iran and Saudi Arabia. However, the occurrence of such negative-sum manifestations of these conflicts is uncertain, undesirable, and avoidable. Since these conflicts are relative and marginal, not absolute or total, this ideological clash will not result in a new (global) cold war, but likely will reflect a regional cold peace; or, perhaps, a regional cold war. The West is more likely to win these conflicts, not only due to greater material resources, but also due to a more efficient governance system that better attains desired goals.

Although Putin has elaborated a viable ideology and governance structure for maintaining personal rule within Russia, that structure cannot, as currently cast, outlive him, nor can it attract significant foreign investment, nor does it have global appeal. Thus, until Russia transforms itself into a rule of law state, we can expect continued suboptimal economic performance, lack of industrialization, and further eclipse of Russia by China—to say nothing of the inevitable chaos and instability Putin's death would cause.

situation in Chechnya and the rest of the North Caucasus, including torture and ill-treatment; freedom of expression and assembly, including freedom of the media; the situation of civil society in Russia, notably in light of the laws on NGOs and extremist activities; the functioning of the judiciary, including independence issues; the observation of human rights standards by law enforcement officials; racism and xenophobia; legislation relating to elections. For its part the Russian side raises matters of concern to it in developments inside the EU.”).

