

DANYLIW RESEARCH SEMINAR



Power and Ideals in Self-Determination Crises: Various Ways of Failing in Ukraine

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... for readiness to fight to prevent change is just as unmoral as readiness to fight to enforce it. To establish methods of peaceful change is therefore the fundamental problem of international morality and of international politics.

– E.H. Carr¹

The crisis in Ukraine offer us three ways – one hesitates to say models – for thinking about the relationship between power and ideals in regards to the state and what it might become. Each, in its way, is profoundly defective, each violating some essential norm or lacking some essential quality of what it means to act and to claim with legitimate authority. But while those deficiencies are in many respects obvious and flagrant, each also reflects a larger failing: of the international legal and political order, which offers no ready solutions, nor even much encouragement to creative thinking, about how crises of state formation might be resolved.

The essay considers the variety of failure in the Ukrainian crisis, and concludes by suggesting an alternative. As the participants in the Seminar are presumably quite familiar with the history of and recent events in Ukraine – much more so than am I² – I forgo the requisite potted histories to focus on those elements most closely related to this essay's subject and my field of research: state formation and self-determination in the international legal order. It is an order that, to the degree it exists, is marked, like all such orders, by both power and morality, and must express them both.

1. Russia's Illegal Intervention – Blinding Power

Russia's actions in Ukraine seem clearly to have violated international law, and this fact has made it difficult to think clearly about everything else happening in this crisis.

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1. Edward Hallett Carr, *THE TWENTY YEARS' CRISIS, 1919-1939* (Harper, 2nd ed., 1945, 1964), at 222.
 2. I approach this essay from the perspective of international law on self-determination. Only one of my published academic works – one of my first – deals directly with Ukraine. See Timothy William Waters, *Return from Exile, Return to Politics: Leadership, Political Mobilization and National Identity among the Crimean Tatars*, 44 *Ukrainian Rev.* 42 (1997).

The exercise of Russian power has effectively detached Crimea from Ukraine, reassigning the peninsula to Moscow's authority – a political reality almost universally conceded, even by actors who refuse to recognize its legality³ – and, at least so far, enabled a kind of frozen-conflict client state in the east of Ukraine.

That Russia's actions constitute a violation of international law is practically indisputable (though Russia of course disputes this) – at least, if they are not violations, it's not clear what would be.⁴ Cross-border force may only be used in very limited circumstances, and while transfer of territory between sovereigns is possible in international law, it cannot be achieved by the threat or use of force.⁵ The crypto-occupation of Crimea by 'Green Men' – let us cast niceties of proof aside and acknowledge that these were Russian military forces

3. Which is most states: Lists vary, but clearly only a small number of states other than Russia have recognized the annexation (Afghanistan, Cuba, Nicaragua, Syria and Venezuela), and many more have directly condemned it. The referendum itself has been widely condemned: In the General Assembly, a resolution criticizing the referendum (though not naming Russia specifically) passed by 100 to 11 with 58 abstentions and 24 absent. See UNGA Res. 68/262, "Territorial Integrity of Ukraine," A/68/L.39, 24 Mar. 2014, Arts. 1, 5-6 (affirming the GA's "commitment to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders[,]” rejecting the validity of the Crimean referendum and calling on states and organizations not to recognize any alteration in the status of Crimea and Sevastopol on account of the referendum). A resolution in the Security Council failed 13 to 1, Russia vetoing, with one abstention (China).
4. I develop the considerable problems with assuming Russia's actions violate international law in Timothy William Waters, "Polycentrism's Playground: Ukraine and Russia's Implausible Deniability," *Völkerrechtsblog*, 4 June 2014, <http://voelkerrechtsblog.com/2014/06/04/polycentrisms-playground-ukraine-and-russias-implausible-deniability/>. But for our present purposes, it is simplest to assume that Russia's annexation and interventions are violations. There is of course an alternative narrative, advanced in Russian circles, in which, like the old joke about the lawyer with the leaky bucket, Russia hasn't intervened at all, and besides, its intervention was fully justified.
5. The basic prohibition on use of force is UN CHARTER, Art. 2(4) ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."). There are limited recognized grounds for intervention: authorization by the Security Council, or as a consequence of self-defense. UN CHARTER, Arts. 39 & 51. In addition, there is some recognition for a principle, commonly known as the responsibility to protect, that other states might intervene militarily to prevent a state from committing certain great harms against its own population. It seems clear Russia's intervention doesn't fit these limited exceptions to the non-aggression rule.

Nothing in international law prevents transfers of territory, though there may be norms requiring consultation with the affected population. On transfers of territory and population, see Timothy William Waters, *The Blessing of Departure: Exchange of Populated Territories - The Lieberman Plan as an Abstract Exercise in Demographic Transformation*, 2 LAW & ETHICS HUM. RTS. 221 (2008), and Yuval Shany, *Redrawing Maps, Manipulating Demographics: On Exchange of Populated Territories and Self-Determination*, 2 LAW & ETHICS HUM. RTS. 286 (2008) (as well as a rebuttal by me in the same volume).

– and the interventions into eastern Ukraine strike at the twinned pillars of the postwar order: territory integrity and the prohibition of aggression.⁶

Such a flagrant display of power has fixated everyone's attention, as power tends to do. And so the responses – shoring up the government in Kiev, devising a regime of effective sanctions, extracting bodies from airliners smoking in fields – have been focused on countering Russia's power and its dreadful effects.

But in becoming the object of attention, Russia's power has distracted us from the task of asking questions about the purposes for which that power is being improperly deployed. Not entirely distracted, of course: The strategic intentions of Vladimir Putin and the Kremlin have been an object of intense interest – whether to destabilize Ukraine and keep it out of a closer embrace with the EU and NATO, to boost his domestic credentials, or other reasons. But all of these speculations are about the further effects of actions taken in eastern Ukraine and Crimea, rather than about the thing itself: the outcome directly achieved, which is the secession from Ukraine of parts of its territory and population – populations which presumably have a view about that outcome. In this respect, the obvious illegality of Russia's actions has offered an unhelpfully clear answer to a perhaps quite complicated question.

6. Some of Russia's actions in eastern Ukraine are legally complex. How much a state can support insurrectionists in another country without violating that state's sovereignty is a contested issue. But some forms of Russian aid there very likely do violate international law, and direct insertion of Russian forces or firing artillery into Ukrainian territory almost always does. On these norms more generally, see Timothy William Waters, *Plucky Little Russia: Misreading the Georgian War through the Distorting Lens of Aggression*, 49 STAN. J. INT'L L. 176 (2013)(discussing prevailing legal standards governing aggression and territorial integrity, in relation to the 2008 Russian-Georgian War – and actually finding Russia's actions then consistent with international law, a claim I do not find persuasive in Ukraine).

II. The Separatists' Precipitous Withdrawal – Idealists with Borrowed Guns?

*Crimea:*⁷ Russia's actions have shocked the world, but no one could have been surprised by the specter of Crimean secession. Given the region's demography, history, and the well-known autonomist sentiments of its population, there has long been reason to believe that the people living in Crimea might willingly join Russia, given a choice.

That willingness remains speculative. Annexation occurred with great speed: The illegal introduction of military forces, then a referendum and treaty of union, all within a matter of weeks, created circumstances in which the referendum could not a credible outcome. Even the question asked failed to offer a meaningful choice: Voters could prefer reversion to the extensive autonomy under Ukraine's 1992 or union with Russia, but not the status quo. Yet although those obvious defects invalidate the particular outcome, they do not prove the opposite: The failure of the referendum to meet any plausible standard for recognition simply leaves the question of what the Crimean people desire unanswered.

Still, the hypothetical answer is widely supposed. I know of no credible source suggesting that a majority in Crimea, had it in fact been asked its preference in a free and fair referendum, would have returned any answer other than the one it did. The referendum did not prove it, but a genuine majority of Crimea's population surely desired union with Russia.⁸

Whether that desire could or should matter – whether, say, a truly free and fair referendum yielding the same answer ought to have met with a different response – is a question we do not reach. Instead, critique centers on the invalidity of the referendum, because held under illicit Russian occupation. The question of taking seriously whatever the wishes of

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7. Sevastopol had a separate juridical status inside Ukraine, and does so now within Russia as a separate federal city, although with the rest of the peninsula it forms the Crimean Federal District. Earlier this year, Sevastopol very briefly joined in the notionally independent Republic of Crimea and entered Russia by the same Union Treaty. As the main lines of events there do not depart from the general story for Crimea, at least as they are relevant to this essay's themes, this essay does not treat Sevastopol separately.
 8. A majority is not everyone: Significant populations of Ukrainians, Tatars and some Russophones surely opposed any such change. But while particular communities strongly opposed annexation, one cannot describe any sizable area of the peninsula as a whole in which majority sentiment did not favor annexation – which would not have had they been asked in a free vote.

the Crimean population are – assuming there is any such responsibility – is obviated by the illegitimacy of the means used to demonstrate it.

Eastern Ukraine: The clear confidence with which we can speculate about the outcome of a free vote in Crimea is not available in the east. The demography of the region is simply much more complex: Although many municipalities in the eastern have even higher concentrations of Russians than in Crimea,⁹ the map is much more ragged and fractured. No sizable area can be described in which a majority was known to favor annexation before all these events without punching lots of holes in it.¹⁰ Even if we rely on the very imperfect proxy of language, we would still arrive at the conclusion that, in all probability, most people did not support secession or annexation by Russia.¹¹

In two respects, however, the region shares something in common with Crimea. First, the status referenda organized by the People’s Republics in Donetsk and Lugansk suffered from all the procedural defects of the Crimean vote – with the additional demerits that fighting, displacement of populations, and an even more notorious atmosphere of intimidation rendered the results even less useful. Instead, the violence, corruption, criminality, thuggishness and incompetence of many of the separatists has not only alienated much opinion, but further undermined the possibility of any confidence in expressions of support for their program.

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9. Many municipalities in the Donbas have very high percentages of Russians or Russophones – over 80 percent – whereas in Crimea similar percentages mostly appear in a small area in the south of the peninsula. But nearly every municipality in Crimea has a Russian majority, whereas in eastern Ukraine many do not.
 10. See, e.g., Griff Witte, “Pro-Russian separatists in eastern Ukraine were ‘nobodies’ – until now,” WASHINGTON POST, 30 April 2014 (noting that the separatists leaders were “unknown to just about everyone in Donetsk, even on the fringe that separatist politics normally inhabit” in the region, and noting “intense suspicion that the uprising roiling Ukraine’s east has little to do with genuine separatist sentiment and everything to do with meddling by this country’s eastern neighbor, Russia”).
 11. It is not at all clear that we should use language anyway: Doing so is likely to overstate pro-separatist sentiment, since in practice most self-identified ethnic Ukrainians will oppose separatism, but not most self-identified ethnic Russians will not necessarily support it. See “The majority language by city, town, and village councils: Results from the Ukrainian 2001 census,” <http://upload.wikimedia.org/wikipedia/commons/4/4f/UkraineNativeLanguagesCensus2001detailed-en.png>.

But above all, the precipitousness of the eastern referenda suggests that the separatists were not interested in seeking peaceful resolution. They had not pursued an agenda of reforms within the Ukrainian state, but had treated violence as a first, not final option. In Crimea, at least it was clear that separatism was a long-standing, simmering desire.

Second, both have relied on someone else's power to achieve an outcome they could not on their own, in ways that violate the existing order.¹² In turn, in both areas, the presence of Russian forces has in effect provided outsiders an absolute prophylactic excuse to disregard the separatists as competent claimants, an excuse not to take their aspirations seriously. We need not consider them as anything other than a regrettable fact to be dealt with – a proxy for another, illegitimate fact come from the east – because their reliance on illicit Russian power removes them from the sphere of the legitimate and the civilized.

But though gratifyingly simplifying, this is not a serious way to think about complex events, nor does it encourage us to take the separatists seriously as political actors, or anything other than wielders of illegitimate power. It focuses us on the improper modalities of their struggle, not on its purposes or ideals.

It seems ridiculous to think of Donetsk's separatists as 'idealists' – they are, so many of them, so evidently the other sort of man. But the claim they are advancing has an ideal quality, alongside its cruder aspects, because it is a claim entirely outside what we, as a global legal community, have declared possible or desirable.

III. Ukraine's Lawful Inaction – The Power Not to Give Anything

The same fixation on illegitimate Russian power that excuses us from taking the separatists seriously has also allowed their antagonist to escape close scrutiny: Perhaps the least critically examined actor in this entire episode – besides ourselves – is the Ukrainian state.

12. The separatists' own use of violence is legally much more complex. It clearly violates the Ukrainian constitutional order, to which we shall shortly turn, but in international law rebellion is mostly a political fact.

In the face of Russia's power, Ukraine has appeared as a nearly prostrate victim, and though its military performance has improved considerably, it would be no match for Russia's military if crossed the border in force. Unexamined in the blinding glare of the violence, however, is Ukraine's comprehensive failure, across nearly a quarter century, to engage with the very kinds of concerns that either provoked the present crisis or at least afforded Russia a pretext for creating a crisis. The separatists have been precipitous, but Ukraine has been the very opposite – and legally supported in its inaction.

The question of Crimea's status in Ukraine predates the collapse of the Soviet Union, became a contentious issue during that process, and has never ceased to be. The autonomy confirmed to Crimea in 1992 after Ukraine's independence was reduced by 1996.¹³ A Russian military presence on the peninsula was negotiated,¹⁴ but at no subsequent point in Ukraine's independent history has there been any serious attempt to engage with Crimea's population over the possibility of exit, or even for the restoration of its original extensive autonomy.

For the east, even less so: There, the fact of discontent with centralization of power in Kiev has been a problem of political power, manifested as an endemic split between east and west – a split repeatedly evident in electoral results, very roughly tracking ethno-linguistic differences, but clearly not reducible to that.¹⁵ Yet there have never been any serious discussions about offering far-reaching autonomy, let alone any discussion of revising the state's frontiers: No Ukrainian government has never offered any meaningful path for peaceful change to those constituencies – large or small, but surely there – who felt

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13. In January 1991, a referendum on reestablishing the Crimean Autonomous Soviet Socialist Republic was approved by 94 percent of voters on an 81 percent turnout. After independence, Ukraine reaffirmed the autonomy of Crimea, which acknowledged its status as part of Ukraine. A 1994 autonomy referendum was declared illegal and the post of president was abolished in 1995; the 1996 Ukrainian constitution retained Crimea's autonomy, but with significantly reduced powers. The events of this period are marked by considerable tension, in particular regarding the continuing role of Russia.
 14. In 1997, Russia and Ukraine signed an agreement regulating the Black Sea Fleet and the status of Russian forces on the peninsula, the terms of which were extended until 2042. Russia repudiated the treaties in 2014. *Partition Treaty on the Status and Conditions of the Black Sea Fleet (Rus.- Ukr.) signed 28 May 1997, entered into force 12 July 1999; Українська правда, "Договір Януковича і Медведєва про базування флоту до 2042 року. Текст документу," 22 April 2010.*
 15. The electoral strength of the Party of Regions has been in the eastern regions and periphery of Ukraine – the areas in which Russophones and other non-Ukrainian speakers are most heavily represented.

alienated from the Ukrainian state and desired some kind of change. The matter has been a concern for internal politics, not a question about the state.

Recent events have forced Ukraine to confront that question. Yet even in the recent crisis, changes to the state have been beyond the pale, something that might come about only through the catastrophic application of illegitimate Russian power. Thus, President Poroshenko has offered wide-ranging negotiations with the separatists, but made it clear that any discussion of Ukraine's territorial integrity is impossible,¹⁶ and that any resolution must take place within Ukraine's constitutional framework.

This is entirely understandable, given his position and constituency; equally clearly, however, it removes from the table the one thing which some number of people in the east want. And if taken seriously, these autonomy proposals prefigure the possible outcomes in ways that would practically ensure the easterners get a less than satisfactory deal – from their perspective – unless they rely on Russian power. Ukraine's constitution does not allow regional referenda¹⁷ – precisely to avoid the kinds of changes some people in Crimea and eastern Ukraine want. Nothing in Kiev's reform proposals contemplate changes to the constitution that would allow deliberation on secession.

The result is a very constricted, even distorted political space: a question compelled by Russian military power but whose possible answers are constrained by Ukraine's legal order. Any vote under Russian occupation or separatist control is illegitimate, but a vote under Ukraine's constitution is illegal. For those Ukrainian citizens who genuinely desire a change in the state, that is a choice between surrender or the gun. As long as Russia supplies enough of the latter, they don't need to contemplate the former. But that hardly

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16. See, e.g., Press Office of President, "Address by the President of Ukraine Petro Poroshenko to the Joint Session of the United States Congress," 18 Sept. 2014, <http://www.president.gov.ua/en/news/31252.html> ("I am ready to offer those who live in Donbas more rights than any part of Ukraine has ever had in the history of the nation. I am ready to discuss anything – accept [sic] one thing – Ukraine's dismemberment.") This is an official transcript; I believe the actual speech contains additional formulations on this theme. See also Sergei L. Loiko & Carol J. Williams, "Ukraine lawmakers approve EU pact, offer autonomy to rebel regions," *Los Angeles Times*, 16 September 2014, <http://www.latimes.com/world/europe/la-fg-ukraine-european-union-separatists-20140916-story.html#page=1> (noting the Rada's authorization of a three-year period of enhanced autonomy for eastern regions).
 17. See CONST. UKRAINE (2004), Art. 72 (requiring all-Ukrainian referenda to be approved by the Verkhovna Rada) and 73 (requiring that changes to the territory of Ukraine be approved exclusively in all-Ukrainian referenda).

means they will inevitably win: As we shall now consider, Ukraine has another weapon – another instrument of power and morality – at its disposal.

IV. The Other Failure: International Law and the Idol of Territorial Integrity

All the actors in this crisis have, in various ways, failed to pursue their aims by means that satisfactorily combine power with legitimacy. Russia has changed an international frontier through efficacious but illegitimate violence. The separatists have advanced their interests with borrowed power but without trying to work within the existing legal system. Long before any of this, Ukraine failed to open any constitutional pathways for change, converting its law into an absolute constraint.

But behind these particular failings is the global legal order, which has shaped the modes of acceptable action in ways that have left little scope for change other than bare power. For as it turns out, nothing in the global system requires Ukraine to do other than it has done: Nothing in international law requires a sovereign state like Ukraine to tolerate a change to its own borders. On the contrary, law guarantees its territorial integrity against almost all challenges.

This guarantee is quite extensive, allowing only the narrowest exceptions, whether for externally initiated changes, or for internal ones. A state need not accept the withdrawal of a portion of its population and territory under almost any conditions and almost entirely without regard to its own behavior or fitness: This is true even if the state is a failed one, like Somalia, an undemocratic one, like China, or a predatory one, like, say, Russia.¹⁸ The rare exceptions, such as Kosovo's unilateral secession from Serbia – itself a deeply controversial case¹⁹ – simply indicate the uniformity of this respect for territorial integrity.

18. Thus Somaliland has long been a *de facto* state but is entirely unrecognized; in China, separatism is a crime punishable by long prison sentences or death; and Russia's willingness to use extreme violence to destroy the Chechen separatist movement is well documented.

19. The principal exception is the concept of remedial secession, whereby a given population might claim a right to secede in order to protect itself from extreme violence, such as genocide, or to correct a severe systematic deprivation of its members' human rights, especially their right to participate in their own governance. The exception, along with almost all of its component claims, is quite controversial in international law; and it is clear that even its advocates contemplate an extremely high threshold to make a claim – a threshold Crimea and eastern Ukraine would not meet.

Thus it turns out that the present legal order is quite an idealized one. Russia's actions have, in that sense, made visible this imbalance in our legal values, which have tilted heavily towards an ideal of territorial integrity absolute, whether or not the power relationships in a given place make that defensible.

If that were all, we might conclude that we need to align the exercise of power more closely with our ideals – indeed, it might be thought that sanctions and military support to Ukraine are a belated effort to do precisely that. But the ideal of territorial integrity is not simply out of balance with actual power in Ukraine. It is a curiously vacant ideal, one whose lack of probative moral force should trouble us as much as its disassociation from the balance of military forces on the Eurasian steppe.

Territorial integrity is not a principle, it is a proxy: While there are clear reasons to limit *external* aggression, it makes little sense to defend the internal integrity of states that lack the very qualities that make them worth defending – states whose own populations do not desire the borders in which they live. It makes little sense to treat a given set of borders as the legally decisive unit, if that denies the real diversity, disagreement and desires of the actual existing people within.

Fixating on territorial integrity – because of Russia's intervention – makes us miss that. We have confused resistance to Russia's improper invasion with resistance to the underlying ideas and desires the invasion incidentally vindicated. This was the wrong way to hold a referendum – but that doesn't mean holding a referendum is wrong.

At present, a free vote in Crimea or eastern Ukraine is impossible – so one sensible approach might be to create conditions, over time, in which it *is* possible. This would require several things: constitutional reforms in Ukraine; international guarantees and supervision; Russian and Western acquiescence in creating a legitimate pathway to a strategic dispensation acceptable to each side, even if that leads to revision of Ukraine's borders.

There are clear power interests in a stable frontier for Ukraine – a stable limit to Russia – but it is not clear that limit must be where it now is – hardly clear, in fact, that where it *is* stable. Equally, a more sensible ideal might recommend a Ukraine whose population

consists of those people who in fact wish to live in it – a Ukraine in whatever borders its own people, living in the shaping wake of their own history, desire. And here interest and ideal might work in concert, if one considers that such a frontier might actually prove more stable.

Any such agreement would not be an expression of pure principle, but a test of power. But that is a situation we already confront, and within that context, the question is, for what purposes do we struggle? What ideals inform the exercise of power? The ones we now proclaim are curiously hollow, in a curious way are far too idealistic – insisting on territorial rigidity even when it is neither defensible nor desirable.

No less a realist than E.H. Carr made clear, in his seminal work on international relations, that any actor which fails to provide avenues for peaceful change can expect the other kind.²⁰ This truth – which for Carr was as much about morality as power, since for him, quite rightly, politics consists of both – operates just as much in a world which has supposedly prohibited war as in the more openly violent one in which Carr wrote. We should not fail to see it because of the blinding preoccupation with the Russian intervention's illegality. In the crisis in Ukraine, it might be useful to ask ourselves what ideal we are defending with our power. We call it democracy, or the stability of the international system, but it looks, too often, like territorial integrity for its own sake: the state, without regard to the wishes of those human beings living within.

20. Edward Hallett Carr, *THE TWENTY YEARS' CRISIS, 1919-1939* (Harper, 2nd ed., 1945, 1964), at 209 (“Every solution of the problem of political change, whether national or international, must be based on a compromise between morality and power.”) and 222 (“But the defence of the *status quo* is not a policy which can be lastingly successful. It will end in war as surely as rigid conservatism will end in revolution.”).