

# The Return of *Novorossiya*: Why Russia's Intervention in Ukraine Exposes the Weakness of International Law

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## I. INTRODUCTION

The end of the Cold War unleashed optimism that a new relationship between the West and Russia could be grounded in mutual adherence to international norms and institutions.<sup>1</sup> Although Russia's emergence from its Soviet mold was hobbled by economic turmoil and political corruption,<sup>2</sup> its attempt to instigate democratic and legal reforms<sup>3</sup> and later enter the WTO<sup>4</sup> suggested that the geopolitical divide between the West and Russia had been supplanted by Russia's desire to integrate itself into the global economy.<sup>5</sup> However, the events of 2014 and 2015 in Ukraine have dashed the West's hopes about Russia's

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1. See Charles William Maynes, *Squandering Triumph: The West Botched the Post-Cold War World*, FOREIGN AFF., Jan.–Feb. 1999, at 15, available at <http://www.foreignaffairs.com/articles/54616/charles-william-maynes/squandering-triumph-the-west-botched-the-post-cold-war-world>.

2. See generally Alexander Domrin, *Corruption in the Name of "Democracy": The USA and Russia in the 1990s*, 18 MICH. ST. J. INT'L L. 117 (2009).

3. See Whitney Cale, *Through the Russian Looking Glass: The Development of a Russian Rule of Law and Democracy*, 7 LOY. U. CHI. INT'L L. REV. 93, 108–10 (2010); Sarah E. Cox, Note, *Reverse Revolution: Russia's Constitutional Crisis*, 22 PAC. RIM L. & POL'Y J. 179, 181 (2013).

4. See National Security Project, *A Bull in Bear's Clothing: Russia, WTO, and Jackson-Vanik* 33 (Bipartisan Pol'y Ctr., Task Force Paper, 2012), available at <http://bipartisanpolicy.org/wp-content/uploads/sites/default/files/Russia%20Staff%20Paper.pdf>.

5. See TOM BJORKMAN, *RUSSIA'S ROAD TO DEEPER DEMOCRACY* 103 (2003).

transformation into a norms-respecting power.<sup>6</sup> Russia's annexation of Crimea<sup>7</sup> and subsequent occupation-in-all-but-name of eastern Ukraine<sup>8</sup> have not only raised the likelihood of a new protracted geopolitical standoff, but also denigrated international legal norms designed to provide consultative processes for the diffusion of interstate tensions.<sup>9</sup>

The crisis in eastern Ukraine began when former President Viktor Yanukovich declined to sign an association agreement with the European Union ("EU") that would have paved the way for Ukraine's admission into that transnational polity.<sup>10</sup> Widespread popular anger over Yanukovich's action resulted in the eruption of protests in Kiev that eventually led to his ouster and to a period of protracted internal turmoil.<sup>11</sup> Yanukovich's successors pledged to renew efforts to integrate Ukraine into the EU.<sup>12</sup> In response, Russia annexed Crimea and began supporting an armed rebellion in the eastern part of Ukraine in order to keep the country entrenched in Russia's orbit.<sup>13</sup> Russian President Vladimir Putin's use of the Tsarist

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6. See generally John Mearsheimer, *Why the Ukraine Crisis is the West's Fault: The Liberal Delusions that Provoked Putin*, FOREIGN AFF., Sept.–Oct. 2014, at 77, available at <http://www.foreignaffairs.com/articles/141769/john-j-mearsheimer/why-the-ukraine-crisis-is-the-west-s-fault>.

7. See Steven Pifer, *Will the Russian Military Move Beyond Crimea?*, 2PARAGRAPH (March 4, 2014), <http://2paragraphs.com/2014/03/will-the-russian-military-move-beyond-crimea/>.

8. See Andrew E. Kramer & Michael R. Gordon, *Ukraine Reports Invasion on a New Front*, N.Y. TIMES, Aug. 28, 2014, at A1, available at [http://www.nytimes.com/2014/08/28/world/europe/ukraine-russia-novoazovsk-crimea.html?\\_r=0](http://www.nytimes.com/2014/08/28/world/europe/ukraine-russia-novoazovsk-crimea.html?_r=0).

9. See Himanil Raina, *Legal Questions of Russia's Intervention in Ukraine* (ISSSP Reflecons, No. 14, 2014), available at <http://isspp.in/russian-intervention-in-crimea-geopolitical-consequences-legal-perspectives/>.

10. See David Herszenhorn, *Facing Russian Threat, Ukraine Halts Plans for Deals with E.U.*, N.Y. TIMES, Nov. 22, 2013, at A6, available at <http://www.nytimes.com/2013/11/22/world/europe/ukraine-refuses-to-free-ex-leader-raising-concerns-over-eu-talks.html?pagewanted=all>.

11. See Nadia Diuk, *Euromaidan: Ukraine's Self-Organizing Revolution*, WORLD AFF., Mar.–Apr. 2014, at 9, available at <http://www.worldaffairsjournal.org/article/euromaidan-ukraine%E2%80%99s-self-organizing-revolution>.

12. Department of Information and Communication of the Secretariat of the CMU, *Arseniy Yatsenyuk: Agreement with EU is Intended to Upgrade Ukraine's Economy*, UKRAINIAN GOV'T PORTAL (June 25, 2014, 2:01 PM), [http://www.kmu.gov.ua/control/en/publish/article?art\\_id=247415048&cat\\_id=244314975](http://www.kmu.gov.ua/control/en/publish/article?art_id=247415048&cat_id=244314975).

13. See Uri Friedman, *Putin's Playbook: The Strategy Behind Russia's Takeover of Crimea*, ATLANTIC (Mar. 2, 2014, 10:32 AM), <http://www.theatlantic.com/international/archive/2014/03/putins-playbook->

term *Novorossiya* (“New Russia”)<sup>14</sup> in reference to historically Russian territories in eastern Ukraine raised fears that his ambitions might extend to other Eastern European states with Russian-speaking populations.<sup>15</sup> Although tensions have since cooled and both sides have pledged to pursue efforts to diffuse the conflict, questions remain about the sustainability of the ceasefire and what the long-term implications of Russia’s intervention in Ukraine on International Law will be.

This note will argue that Russia’s annexation of Crimea and subsequent intervention in eastern Ukraine are evidence that international norms do not effectively constrain the behavior of states when violating those norms serves their perceived interests. The recent events in Ukraine suggest that states tend to pursue their geopolitical interests regardless of the constraints theoretically imposed on them by International Law. Part I will sketch a historical overview of the conflict between Ukraine and Russia with a particular focus on the aims and interests Russia regards as central to its security vis-à-vis Ukraine. Part II will provide an overview of the International Law norms implicated by Russia’s intervention in Ukraine. Part III will outline a realistic critique of the ability of International Law to constrain interstate aggression.

## II. A BRIEF HISTORY OF RUSSIA AND UKRAINE

The underlying roots of the present conflict extend far back into the history of both Russia and Ukraine and involve overlapping notions of national identity. Modern-day Ukraine is split between identities that clash at all levels of society.<sup>16</sup> Its eastern half is Russian-speaking, Orthodox, and – arguably, until recently – sees Ukraine as a natural part of Russia’s

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the-strategy-behind-russias-takeover-of-crimea/284154/.

14. See *President of Russia Vladimir Putin Addressed Novorossiya Militia*, RUSSIAN PRESIDENTIAL EXECUTIVE OFFICE (Aug. 29, 2014, 1:10 AM), <http://eng.kremlin.ru/news/22863>.

15. See Roger McDermott, *Putin’s War for Novorossiya*, JAMESTOWN FOUNDATION (Sept. 2, 2014, 4:35 PM), [http://www.jamestown.org/single/?tx\\_ttnews%5Btt\\_news%5D=42772&tx\\_tnews%5BbackPid%5D=381&cHash=7eafd3375c32b123bddc142df678c21d#.VC7k5NTF-cw](http://www.jamestown.org/single/?tx_ttnews%5Btt_news%5D=42772&tx_tnews%5BbackPid%5D=381&cHash=7eafd3375c32b123bddc142df678c21d#.VC7k5NTF-cw).

16. See Orlando Figes, *Is There One Ukraine?*, FOREIGN AFF. (Dec. 16, 2013), <http://www.foreignaffairs.com/articles/140560/orlando-figes/is-there-one-ukraine>.

orbit.<sup>17</sup> Its western half is Ukrainian-speaking, Catholic, and aspires to integrate into Europe.<sup>18</sup> This division reflects Ukraine's difficult journey to independence and its historically evolving geographic boundaries.<sup>19</sup>

Russia, on the other hand, has long challenged the West with its multisided identity. Geographically straddling both Europe and Asia, Russia's history has been shaped by its mystical Orthodox faith,<sup>20</sup> the vastness of its borders (together with a chronic fear about maintaining their security and integrity),<sup>21</sup> and the "messianic" mission thought by many Russians during both the Tsarist and Soviet periods to animate their foreign policy.<sup>22</sup> To understand Russia's deep interest in Ukraine's place in Europe vis-à-vis Russia, it is first necessary to consider their deeply interwoven history.

#### A. THE ORIGINS AND EVOLUTION OF UKRAINIAN IDENTITY AND INDEPENDENCE

Separated from the Soviet Union in 1991, Ukraine's history as an independent State has been relatively short.<sup>23</sup> Prior to its 72-year membership in the Soviet Union, the territory now comprising Ukraine shifted between a long succession of polities, including the Russian Empire and, earlier, the Polish-Lithuanian Commonwealth.<sup>24</sup> Together with

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17. See generally MIKHAIL A. MOLCHANOV, *POLITICAL CULTURE AND NATIONAL IDENTITY IN RUSSIAN-UKRAINIAN RELATIONS* (2002).

18. *Id.*

19. Eve Conant, *How History, Geography Help Explain Ukraine's Political Crisis*, NAT'L GEOGRAPHIC (Jan. 29, 2014), <http://news.nationalgeographic.com/news/2014/01/140129-protests-ukraine-russia-geography-history/>.

20. See Robert 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, 368 (2011).

21. See ROBERT KAPLAN, *THE REVENGE OF GEOGRAPHY: WHAT THE MAP TELLS US ABOUT COMING CONFLICTS AND THE BATTLE AGAINST FATE* 159 (2012).

22. See HENRY KISSINGER, *WORLD ORDER* 57 (2014).

23. See Philip Chase, *Conflict in the Crimea: An Examination of Ethnic Conflict Under the Contemporary Model of Sovereignty*, 34 COLUM. J. TRANSNAT'L L. 219, 222 (1996).

24. See Zenon E. Kohut, *The Question of Russo-Ukrainian Unity and Ukrainian Distinctiveness in Early Modern Ukrainian Thought and Culture* 17 (Kennan Institute, Occasional Papers Series #280, 2001), available at <http://www.wilsoncenter.org/sites/default/files/ACF2C9.pdf>.

Russians and Belarusians, Ukrainians trace their historical lineage to the Kievan Rus, a loose federation of East Slavic tribes in Europe from the 9<sup>th</sup> to the mid-13<sup>th</sup> century.<sup>25</sup> The origins of modern Ukrainian nationalism can be traced to the 17<sup>th</sup> century Ruthenian uprising against the Polish-Lithuanian Commonwealth after which Bohdan Khmelnytsky established the short-lived Cossack Hetmanate.<sup>26</sup> The Russian Empire eventually absorbed most of that polity, but Khmelnytsky's achievement of independence from Poland cemented his stature as a major nationalist hero in Ukraine's collective memory.<sup>27</sup>

Modern Ukraine emerged from the ashes of the Russian Revolution of 1917, an event that galvanized Ukraine's national movement and led to the formation of several Ukrainian polities in formerly Russian and Austro-Hungarian lands from 1917 until 1920.<sup>28</sup> Under the Peace of Riga at the conclusion of the Polish-Soviet War, western Ukraine was incorporated into Poland, which in turn recognized the Ukrainian Soviet Socialist Republic in March 1919.<sup>29</sup> Three years later, it became a founding member republic of the Soviet Union.<sup>30</sup>

Although it endured enormous trauma during the height of Stalinist terror in the 1930s<sup>31</sup> and the ensuing Second World War,<sup>32</sup> Ukraine was a key industrial and agricultural powerhouse in the Soviet Union.<sup>33</sup> Soviet authorities in the post-Stalin era intermittently allowed waves of "Ukrainization" which, among other policies, restored the Ukrainian language

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25. See JOHN CHANNON & ROBERT HUDSON, *PENGUIN HISTORICAL ATLAS OF RUSSIA* 16 (1995).

26. See PAUL ROBERT MAGOCSI, *A HISTORY OF UKRAINE* 231 (1996).

27. See Andreas Kappeler, *From an Ethnonational to a Multiethnic to a Transnational Ukrainian History*, in *A LABORATORY OF TRANSNATIONAL HISTORY: UKRAINE AND RECENT UKRAINIAN HAGIOGRAPHY* 52–53 (Georgiy Kasianov & Philipp Terr eds., 2009).

28. REX A. WADE, *THE RUSSIAN REVOLUTION, 1917*, at 155 (2005).

29. See KRYSZYNA MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* 419–20 (2d ed. 1968).

30. See CHANNON & HUDSON, *supra* note 25, at 526.

31. See generally SERHY YEKELCHYK, *STALIN'S EMPIRE OF MEMORY: RUSSIAN-UKRAINIAN RELATIONS IN THE SOVIET HISTORICAL IMAGINATION* (2004).

32. See Bohdan Krawchenko, *Soviet Ukraine Under Nazi Occupation, 1941-4*, in *UKRAINE IN WORLD WAR II: HISTORY AND ITS AFTERMATH* 15 (Yury Boshyk ed., 1986).

33. See MARTIN MCCAULEY, *THE RISE AND FALL OF THE SOVIET UNION* 145 (2013).

to a place of prominence in Ukrainian national life.<sup>34</sup> Following the collapse of the Soviet Union in December 1991, Ukraine commenced the formidable task of building up institutions of a newly independent State that had not yet truly stood on its own feet in modern times.<sup>35</sup> With extensive documentation of deeply rooted corruption and a stagnant economy, the country's journey to modernity has still not been completed.<sup>36</sup>

## B. UKRAINE IN THE RUSSIAN WORLDVIEW

"Everything about Russia – its absolutism, its size, its globe-spanning ambitions and insecurities – stood as an implicit challenge to the traditional European concept of international order built on equilibrium and restraint."<sup>37</sup>

As noted earlier, both Russia and Ukraine trace their historical roots to the Kievan Rus.<sup>38</sup> The importance of Kiev in Russia's own historical narrative puts that city, presently situated in the geographic heart of modern Ukraine, firmly within Russians' conception of their patrimony.<sup>39</sup>

However, shared historic roots do not alone explain why Russia persistently regards Ukraine's integration into the West as a major strategic problem.<sup>40</sup> A more comprehensive understanding of this attitude stems from basic geopolitical calculations of security and power. Ever since the end of the Cold War, one of Russia's principle strategic fears has been the encroachment of the North Atlantic Treaty Organization ("NATO") into its traditional sphere of influence.<sup>41</sup> Given the

34. See *Ukrainization*, INTERNET ENCYCLOPEDIA OF UKRAINE, <http://www.encyclopediaofukraine.com/display.asp?linkpath=pages%5CU%5CK%5CUkrainization.htm>.

35. See SARAH WHITMORE, *STATE-BUILDING IN UKRAINE: THE UKRAINIAN PARLIAMENT, 1990-2003*, at 1 (2004).

36. See generally Tom Keatinge, *Ukraine's Own Worst Enemy*, FOREIGN AFF. (July 31, 2014), <http://www.foreignaffairs.com/articles/141695/tom-keatinge/ukraines-own-worst-enemy>.

37. See KISSINGER, *supra* note 22, at 50.

38. See CHANNON & HUDSON, *supra* note 25.

39. *Id.* at 51.

40. See Jamila Trindle, *The West's Tricky Economic War with Russia*, FOREIGN POLY (Sept. 3, 2014), [http://www.foreignpolicy.com/articles/2014/09/03/ukraine\\_sanctions\\_europe\\_russia\\_economic\\_war\\_nato\\_ceasefire](http://www.foreignpolicy.com/articles/2014/09/03/ukraine_sanctions_europe_russia_economic_war_nato_ceasefire).

41. See Mearsheimer, *supra* note 6, at 78, 82.

longstanding importance of Ukraine's geographic position between Russia and the West – an importance that has been evident in key moments in Russia's recent military history<sup>42</sup> – Russia's chief strategic concern is that Ukraine's admission into NATO would fatally expose its western flank during a military conflict, giving NATO-allied states an upper hand.<sup>43</sup>

NATO was founded in 1949 as a collective defense system to deter Soviet aggression against Western Europe by placing Western Europe under America's nuclear umbrella.<sup>44</sup> As the Cold War drew to a close, however, the Soviet Union expressed a desire that NATO continue to exist in Europe under the aegis of American power to keep newly reunified Germany peaceful.<sup>45</sup> This desire was concurrently paired with strong opposition to any enlargement of NATO, with Soviet leaders warning repeatedly that they would not tolerate NATO operating at the Soviet Union's vulnerable western borders.<sup>46</sup> Ignoring the warnings of post-Soviet Russian leaders<sup>47</sup> and American diplomats<sup>48</sup> who foresaw the potential for a later standoff over the matter, the first enlargement of NATO in 1999 added Poland, the Czech Republic, and Hungary, followed by a second expansion in 2004 that added Bulgaria, Estonia, Latvia,

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42. *The Geopolitics of Russia: Permanent Struggle*, STRATFOR GLOBAL INTELLIGENCE (Apr. 15, 2012, 1:47 PM), <http://www.stratfor.com/analysis/geopolitics-russia-permanent-struggle#axzz3Oj6m0a00> (enter email address to get the full article).

43. See Mearsheimer, *supra* note 6, at 82.

44. See Michael Gallagher, *Declaring Victory and Getting Out [of Europe]: Why the North Atlantic Treaty Organization Should Disband*, 25 HOUS. J. INT'L L. 341, 344 (2003). In a memorable formulation, Lord Ismay, one of NATO's first Secretaries-General, said that the alliance's purpose was "to keep the Americans in, the Russians out, and the Germans down." See W.R. SMYSNER, *FROM YALTA TO BERLIN: THE COLD WAR STRUGGLE OVER GERMANY* 135 (2000).

45. See Mearsheimer, *supra* note 6, at 78.

46. See Stephan Blank, *Russian Policy on NATO Expansion in the Baltics*, WILSON CTR. (Jan. 27, 1998), <http://www.wilsoncenter.org/publication/151-russian-policy-nato-expansion-the-baltics>.

47. See Roger Cohen, *Yeltsin Opposes Expansion of NATO in Eastern Europe*, N.Y. TIMES (Oct. 2, 1993), available at <http://www.nytimes.com/1993/10/02/world/yeltsin-opposes-expansion-of-nato-in-eastern-europe.html>.

48. See STROBE TALBOTT, *THE RUSSIA HAND: A MEMOIR OF PRESIDENTIAL DIPLOMACY* 220 (2002) (recounting that toward the end of his life, George Kennan, the architect of the United States' policy of containment toward the Soviet Union in the late 1940s, warned that NATO expansion was a "strategic blunder of potentially epic proportions").

Lithuania, Romania, Slovakia, and Slovenia.<sup>49</sup>

Ever since the first round of NATO enlargement, U.S. foreign policy and NATO activity have intensified Russians' fears about the alliance. For Russians, one of the most serious demonstrations of NATO's potential threat to Russia was the 1995 bombing campaign against Bosnian Serbs in the broader context of the Bosnian War.<sup>50</sup> Russian President Boris Yeltsin warned that "[t]his [was] the first sign of what could happen when NATO comes right up to the Russian Federation's borders . . . The flame of war could burst across the whole of Europe."<sup>51</sup> Another major flare up occurred during the Russian occupation of Georgia in 2008. At a NATO summit that year, U.S. President George W. Bush promised that Georgia and Ukraine would one day enter NATO. Russian President Vladimir Putin responded by warning that "[t]he appearance of a powerful military bloc on our borders will be taken by Russia as a direct threat to the security of our country."<sup>52</sup> Some observers theorized that one of the purposes of Russia's ground invasion of Georgia in 2008 was to destabilize the country, thereby making it ineligible for NATO membership.<sup>53</sup>

Although the association agreement spurned by Yanukovych in 2013 was aimed at integrating Ukraine into the EU and not NATO, Russia perceived the prospect of Ukraine's integration into the EU to be a stepping-stone to eventual entry into NATO.<sup>54</sup> For Russian officials who have accused proponents of EU expansion of attempting to establish a "sphere of influence" in Eastern Europe,<sup>55</sup> the one implies the

49. See Gallagher, *supra* note 44, at 351.

50. See Mearsheimer, *supra* note 6, at 78.

51. Boris Yeltsin, *Yeltsin Sees War Threat in NATO Enlargement*, JAMESTOWN FOUNDATION (Sept. 8, 1995, 3:00 AM), [http://www.jamestown.org/single/?tx\\_ttnews%5Btt\\_news%5D=10206&tx\\_tnews%5BbackPid%5D=209&no\\_cache=1#.VDBAQTF-cw](http://www.jamestown.org/single/?tx_ttnews%5Btt_news%5D=10206&tx_tnews%5BbackPid%5D=209&no_cache=1#.VDBAQTF-cw).

52. Sebastian Alison & James G. Neuger, *Russia Says NATO Expansion is Direct Threat to Russia*, BLOOMBERG NEWS (Apr. 4, 2008, 11:25 AM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aq34xuTFCvx0>.

53. See JIM NICHOL, CONG. RESEARCH SERV., RL 34618, *RUSSIA-GEORGIA CONFLICT IN AUGUST 2008: CONTEXT AND IMPLICATIONS FOR U.S. INTERESTS* 11 (2009), available at <http://fas.org/sgp/crs/row/RL34618.pdf> ("Georgia also appeared even less eligible by some NATO members for a Membership Action Plan (MAP), usually considered as a prelude to membership, because of the destruction of some of its military capabilities and the heightened insecurity of its borders.").

54. See Mearsheimer, *supra* note 6, at 79.

55. See Valentina Pop, *EU Expanding Its 'Sphere of Influence,' Russia Says*, EUOBSERVER (Mar. 21, 2009, 4:17 PM),



other.

Russia's fear of NATO expansion is grounded on its historic experience with land-based invasion.<sup>56</sup> With no natural borders except for the Arctic and Pacific Oceans, there has been "a deep-seated and long-standing [belief] among Russia's rulers that [ . . . ] the best way to deal with [the threat of invasion is] to expand Russia's borders."<sup>57</sup> Indeed, Russia has experienced invasion five times over the last two centuries from its western flank.<sup>58</sup> Napoleon's armies entered Moscow in 1812; France and the United Kingdom attacked Crimea in 1854; Germany invaded during World War I.<sup>59</sup> In 1921, Poland briefly occupied and defeated the newly established Soviet Union during the Polish-Soviet War.<sup>60</sup> Finally, the Soviet Union lost millions of its citizens under ferocious German assault from 1941 to 1945, making the Soviet theater in World War II one of the bloodiest in recorded history.<sup>61</sup> With the exception of the 1854 Anglo-French incursion into Crimea, all these invasions came across land.<sup>62</sup>

With this understanding of the historic ties between Ukraine and Russia, as well as Russia's particular fear of NATO enlargement, it is now necessary to consider the International Law implications of Russia's recent actions in Ukraine. Specifically, the next section will look at which universal norms have allegedly been violated by Russia's annexation of Crimea and subsequent involvement in the eastern part of Ukraine. The section will further consider why the lens of realism explains Russia's willingness to violate internationally accepted norms in the pursuit of its strategic interests.

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<http://euobserver.com/foreign/27827>.

56. See GEOFFREY HOSKING, *RUSSIA: PEOPLE AND EMPIRE* 41 (1998) ("At all times the survival of the empire and the maintenance of its territorial integrity were the paramount priorities for Russia's rulers, before which national, religious, economic and other priorities invariably yielded.")

57. See JOHN MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* 190 (2003).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 127.

### III. THE LEGAL IMPLICATIONS OF RUSSIA'S INTERVENTION IN UKRAINE: ARE THEY EVEN PRACTICALLY SIGNIFICANT?

During the protracted crisis in eastern Ukraine, many parties have appealed to International Law to justify their positions before the international community. For instance, Ukrainian authorities have pointed to widely held norms enshrining State sovereignty to assail Russia's annexation of Crimea and material support of rebels in its eastern territories. Russia, on the other hand, has justified its annexation of Crimea by reference to Crimeans' alleged right to exercise self-determination by voting to join Russia. Although a portion of this discussion will note the unwillingness of the international community to recognize Russia's annexation of Crimea, it is not enough merely to recognize the dominant Western consensus that Russia has violated International Law. It is also necessary to consider the implications of such conflicting appeals to International Law and what they say about the ability of International Law to constrain the behavior of states in the regulation of interstate aggression.

#### A. RUSSIA'S APPEAL TO THE PROTECTION OF OPPRESSED MINORITIES AND CRIMEANS' RIGHT TO SELF- DETERMINATION AS THE LEGAL BASIS OF ITS UKRAINE POLICY

##### 1. Yanukovych's Appeal for Russian Intervention

Russia has justified its incursion into Crimea partially by pointing to ousted President Yanukovych's appeal to Russia for the "use the armed forces of the Russian Federation to establish legitimacy, peace, law and order, stability and defend the people of Ukraine."<sup>63</sup> The legal implications of a legitimate request for foreign intervention are considerable because International Law permits invited armed interventions only when made by legitimate authorities in pursuit of legitimate ends.<sup>64</sup> One difficulty with Russia's argument, however, is that

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63. *Yanukovich Sent Letter to Putin Asking for Russian Military Presence in Ukraine*, RT (Mar. 4, 2014, 4:20 AM), <http://rt.com/news/churkin-unscurussia-ukraine-683/>.

64. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 181 (June 27); Rep. of the Int'l Law Comm'n, Draft

it is not clear whether Yanukovych was vested with proper authority when he made this appeal since he had at that time been removed from office and fled the country.<sup>65</sup>

There are two perspectives on the legitimacy of authority when requesting foreign intervention.<sup>66</sup> The first is the “effective control theory”, which states that only a government that exercises *de facto* control over a State’s territory is authorized to speak on behalf of that State. If, during a rebellion or other episode of internal domestic strife, a government is stripped of effective control over its territory, it cannot request foreign military intervention.<sup>67</sup> When Yanukovych fled Ukraine, the country was already split between Ukrainian nationalists (particularly the so-called Maidan demonstrators in Kiev) demanding his resignation, and anti-Maidan demonstrators in the Russian-speaking southern and eastern parts of the country who supported him.<sup>68</sup> Because neither side effectively controlled or represented the entire country, neither side had the authority to invite foreign intervention.

The second theory is the Russian-favored “popular sovereignty theory,” which states that the loss of effective control over territory does not strip a government of its legitimacy.<sup>69</sup> Following this line of reasoning, Russia has repeatedly characterized Yanukovych’s ouster as an unconstitutional coup,<sup>70</sup> which if true would comport with

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Articles on the Responsibility of States for Internationally Wrongful Acts, With Commentary, 53rd Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10; GAOR 56th Sess., Supp. No. 10 (2001), at 72 (art. 20).

65. See Chris Borgen, *Who Speaks for Ukraine?*, OPINIO JURIS (Mar. 3, 2014, 8:23 PM), <http://opiniojuris.org/2014/03/03/who-speaks-for-ukraine/>.

66. See Grigory Vaypan, *(Un)Invited Guests: The Validity of Russia’s Argument on Intervention by Invitation*, CAMBRIDGE J. INT’L & COMP. L. (Mar. 5, 2014), <http://cjicl.org.uk/2014/03/05/uninvited-guests-validity-russias-argument-intervention-invitation/>.

67. See Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT’L L. 189 (1985).

68. See Yuras Karamanau, *Ukraine: Rival Groups Protest in Divided Crimea*, USA TODAY (Feb. 26, 2014, 7:23 AM), <http://www.usatoday.com/story/news/world/2014/02/26/ukraine-protests/5829289/>.

69. See Varun Baliga, *Blind Spot in the Use of Force Framework – Notes on Crimea*, NALSAR INT’L L. BLOG (Oct. 11, 2014), <https://nalsariblog.wordpress.com/2014/10/11/blind-spot-in-the-use-of-force-framework-notes-on-crimea/>.

70. See Viktor Yanukovych Was Ousted by an Unconstitutional Coup, Said Vladimir Putin. *The EU and US Disagree.*, WORLD POL. J. (Mar. 4, 2014),

recent UN General Assembly Resolutions applying the popular sovereignty theory to cases of military *coups d'état*.<sup>71</sup> If, however, Yanukovich's ouster was constitutionally legitimate and the result of a loss of popular support, then Russia could not use his previous legitimacy to legally justify his request for intervention.<sup>72</sup>

To further justify its assertion that Yanukovich acted under constitutional authority, Russia also argued that the Ukrainian parliament's vote on February 22, 2014 to remove Yanukovich from power contradicted Article 111 of the Ukraine constitution. Article 111 states that parliament can remove the president only "if he commits treason or some other crime."<sup>73</sup> To establish treason or the commission of a crime, the constitution calls for a review by the Constitutional Court and also a three-fourths majority vote by parliament, which would necessitate a quorum of 338 lawmakers, 10 more than the tally that ultimately voted for Yanukovich's removal.<sup>74</sup> The failure to observe these prescribed procedures suggests that Yanukovich was not legitimately deprived of power.

Today, however, the majority of the world recognizes the current President, Petro Poroshenko and his government, as the legitimate governors of Ukraine. Putin and Poroshenko have formally met on several occasions, suggesting that regardless of Russia's views on the procedures by which Yanukovich was removed from office, Russia effectively recognizes the current Ukrainian administration.<sup>75</sup>

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<http://worldpoliticsjournal.com/blog/2014/03/viktor-yanukovich-was-ousted-by-an-unconstitutional-coup-said-vladimir-putin-the-eu-and-us-disagree/>.

71. See e.g., G.A. Res. 301, U.N. GAOR, 63rd Sess., Supp. No. 21, U.N. Doc. A/63/L.74 (June 30, 2009) (discussing a *coup d'état* in Honduras); G.A. Res. 7, U.N. GAOR, 46th Sess., Supp. No. 31, U.N. Doc. A/RES/46/7 (Oct. 11, 1991) (discussing a *coup d'état* in Haiti).

72. See Institut de Droit International, *Present Problems of the Use of Force in International Law, Sub-Group C – Military Assistance on Request*, at art. 3(1) (Sept. 8, 2011), available at [http://www.idi-iil.org/idiE/resolutionsE/2011\\_rhodes\\_10\\_C\\_en.pdf](http://www.idi-iil.org/idiE/resolutionsE/2011_rhodes_10_C_en.pdf) ("Military assistance is prohibited . . . in particular when its object is to support an established government against its own population.").

73. See Daisy Sindelar, *Was Yanukovich's Ouster Constitutional?*, RADIO FREE EUROPE RADIO LIBERTY (Feb. 23, 2014), <http://www.rferl.org/content/was-yanukovichs-ouster-constitutional/25274346.html>.

74. *Id.*

75. See, e.g., *Cold Self-Interest*, ECONOMIST (Oct. 31, 2014, 11:28 AM), <http://www.economist.com/blogs/easternapproaches/2014/10/ukraine-russia-gas-deal> (noting that in October 2014, Russia and Ukraine signed a deal to

## 2. Russia's "Responsibility to Protect" Threatened Russian Populations in Ukraine

Russia has further justified its intervention in Ukraine by claiming a right to protect Russian minorities in Crimea and Ukraine's eastern territories who are threatened by militias, the Ukrainian military, and general political and social upheaval. While not explicitly referencing the so-called "responsibility to protect" principle (or "R2P") to justify its intervention on humanitarian grounds, the rhetoric of Russian leaders seems to mirror it. The Speaker of the Russian Duma related that Putin has been authorized to "use all available means to protect the people of Crimea from tyranny and violence," while Foreign Minister Sergei Lavrov pronounced that "we are talking here about protection of our citizens and compatriots, about protection of the most fundamental of the human rights."<sup>76</sup>

R2P is an evolving legal concept that emerged in the post-Cold War era as a response to a number of international humanitarian crises.<sup>77</sup> Under R2P, the international community is thought to have a responsibility to actively prevent war crimes, crimes against humanity, ethnic cleansing, and genocide through military intervention if an offending State is unable or unwilling to stop atrocities.<sup>78</sup> Russia has ironically often opposed American humanitarian interventions and challenged their legality under International Law, claiming that they violate the principle of State sovereignty and are cynical pretexts for advancing America's geostrategic interests.<sup>79</sup> However, Russia notably referenced R2P to partially justify its 2008 invasion of South Ossetia in Georgia.<sup>80</sup>

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resume shipments of natural gas to Ukraine in time for winter).

76. Mark Kersten, *Does Russia Have a 'Responsibility to Protect' Ukraine? Don't Buy It*, THE GLOBE & MAIL (Mar. 4, 2014, 12:59 PM), <http://www.theglobeandmail.com/globe-debate/does-russia-have-a-responsibility-to-protect-ukraine-dont-buy-it/article17271450/>.

77. See generally Halil Rahman Basaran, *Identifying the Responsibility to Protect*, 38 FLETCHER F. WORLD AFF. 195 (2014).

78. *Id.*

79. *Non-Interference on the Line*, ECONOMIST (Mar. 15, 2014), <http://www.economist.com/news/china/21599035-crisis-ukraine-uncovers-hole-heart-chinese-foreign-policy-non-interference>.

80. See Gareth Evans, *Russia, Georgia, and the Responsibility to Protect*, 1

During that conflict, Foreign Minister Lavrov expounded at some length on Russia's legal and moral obligation to protect threatened Russians in the northwestern parts of Georgia:

[U]nder the Constitution [the President] is obliged to protect the life and dignity of Russian citizens, especially when they find themselves in the armed conflict. And today he reiterated that the peace enforcement operation enforcing peace on one of the parties which violated its own obligations would continue until we achieve the results. According to our Constitution there is also responsibility to protect – the term which is very widely used in the UN when people see some trouble in Africa or in any remote part of other regions . . . This is the area where Russian citizens live. So the Constitution of the Russian Federation, the laws of the Russian Federation make it absolutely unavoidable to us to exercise responsibility to protect.<sup>81</sup>

As with the 2008 conflict in Georgia, however, Russia and Ukraine vehemently disputed the existence and scope of human rights violations that would legally sanction foreign humanitarian intervention. The Ukrainian Association of International Law, for instance, totally rejected the Russian position:

[... ] no duly authorized national, foreign or international institution has declared any violation of human rights on the territory of Ukraine, or specifically in the Autonomous Republic of Crimea, which would have required the intervention of any subject of international law or the international community.<sup>82</sup>

The Russian Foreign Ministry, on the other hand, has published a comprehensive White Book chronicling what it concluded are extensive human rights violations in Ukraine.<sup>83</sup>

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AMSTERDAM L.F., no. 2, 2009, at 25, 25, available at <http://amsterdamlawforum.org/article/view/58/86>.

81. *Id.*

82. *An Appeal from the Ukrainian Association of International Law*, EUROMAIDAN PRESS (Mar. 3, 2014), <http://euromaidanpress.com/2014/03/03/an-appeal-from-the-ukrainian-association-of-international-law/>.

83. See *Russian Foreign Ministry Presents White Book on Human Rights*

Putin recently highlighted these violations in pointed comments about the situation in Ukraine:

In the southeast of [Ukraine], people are killed, there is a real humanitarian disaster going on, tens of thousands of refugees are forced to seek shelter, including in Russia. Journalists die performing their professional duties. In violation of all international norms and conventions, diplomats are attacked, as was in the case of the attack on the Russian Embassy in Kiev and the Consulate General in Odessa.<sup>84</sup>

At first glance, these starkly contrasting assessments of the humanitarian situation in Ukraine might reflect a mere difference of opinions, but in practice they readily highlight the difficulty of defining and applying international norms to concrete situations when adversarial geopolitical interests are at stake.<sup>85</sup>

There are also conflicting views on the legality of humanitarian intervention itself.<sup>86</sup> Although there appears to be consensus that humanitarian intervention is “legal” when sanctioned by the U.N. Security Council, there is not widespread agreement among states on intervention in the absence of U.N. Security Council authorization. Historically, this disagreement has been most pronounced between democratic powers and developing states. “Large numbers of post-colonial states, particularly in Africa and Asia, have opposed, and continue to oppose, the principle of humanitarian intervention. Many such states see themselves as vulnerable to foreign intervention, and are understandably sensitive about threats to their sovereignty. In some cases other and less creditable considerations are involved: many an oppressive regime would like to stop the emergence of a new norm that

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*Abuses in Ukraine*, TASS (May 5, 2014, 1:34 PM), <http://itar-tass.com/en/russia/730463>.

84. *USA Pushed Ukrainians to Split, Putin Says*, PRAVDA.RU (June 27, 2014), [http://english.pravda.ru/news/russia/27-06-2014/127911-ukrainians\\_usa\\_putin-0/#.VFKYrWTF8i4](http://english.pravda.ru/news/russia/27-06-2014/127911-ukrainians_usa_putin-0/#.VFKYrWTF8i4).

85. See, e.g., Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in WALTER CARLSNAES ET AL., *THE HANDBOOK OF INTERNATIONAL RELATIONS* 538, 538 (2002) (“Disagreement over the effect of international commitments and the causes of compliance with them is equally persistent.”).

86. See Sean Murphy, *Criminalizing Humanitarian Intervention*, 41 *CASE W. RES. J. INT’L L.* 341, 344–52 (2009).

could upset the monopoly of power within the State.”<sup>87</sup> Thus the inconsistent practice of states as well as ongoing dispute about the ultimate legality of intervention on humanitarian grounds has complicated the legal paradigm of Russia’s intervention in Ukraine.

Russia’s insistence that it has a responsibility to protect threatened ethnic Russians in Ukraine’s eastern territories and Crimea may at first glance appear to be nothing more than a cynical manipulation of a still-evolving international norm to pursue broader strategic objectives under the guise of legality. However, it also reveals a fundamental weakness inherent in attempting to institutionalize international norms: there is no overarching authority responsible for the development or enforcement of International Law.<sup>88</sup> Concepts such as R2P are therefore subject to cynical manipulation by any State regardless of that State’s conformity with the perceptions and assumptions of other members of the international community.

### 3. Did Crimea Have a Right to Secede from Ukraine?

Crimea has been an object of conquest since the classical era.<sup>89</sup> Ancient Greeks, ancient Romans, the Byzantine Empire, and the Ottoman Empire inhabited its southern portion, while numerous peoples, including the Golden Horde, inhabited its interior.<sup>90</sup> Crimea was absorbed into the Russian Empire in the late 18<sup>th</sup> century and remained a Russian territory until 1954 when Soviet leader Nikita Khrushchev transferred it to the Ukrainian Soviet Socialist Republic as a gift from the Russian people.<sup>91</sup> Recent data shows that “more than 76% of the population of Crimea sees Russian as its native language and 93% of the children are educated in Russian-language schools.”

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87. See Adam Roberts, *The United Nations and Humanitarian Intervention*, in HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS 88 (Jennifer M. Walsh ed., 2004).

88. See Ruti Teitel, *A Cornerstone of International Law—and An Obstacle to Protecting Citizens*, LEGAL AFF., Sept./Oct. 2002, [http://www.legalaffairs.org/issues/September-October-2002/feature\\_teitel\\_sepoct2002.msp](http://www.legalaffairs.org/issues/September-October-2002/feature_teitel_sepoct2002.msp).

89. See, e.g., Todd B. Krause & Jonathan Slocum, *Gothic Wanderings*, 401-418, LINGUISTIC RES. CTR., U. TEX. AUSTIN, COLL. LIBERAL ARTS, <http://www.utexas.edu/cola/centers/lrc/eieol/gotol-10-R.html>.

90. *Crimea*, ENCYCLOPEDIA BRITANNICA (Mar. 20, 2014), <http://www.britannica.com/EBchecked/topic/143010/Crimea/314881/History>.

91. *Id.*



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These historical details are relevant to a thorough understanding of why Russia annexed Crimea in 2014. Russia has attempted to ground its annexation in legal norms by pointing to the right of Crimeans to exercise self-determination and secede from Ukraine, which they purported to do in a disputed referendum on March 16, 2014. The official final vote, with an alleged turnout of over 80%, counted 96.77% of Crimeans and 95.60% of Sevastopol residents voting to join Russia.<sup>93</sup> Ukraine vehemently disputes the legality (as well as the procedural integrity)<sup>94</sup> of the vote and denies that it was a legitimate exercise of self-determination.

Self-determination is deeply embedded in the UN Charter.<sup>95</sup> One of the proclaimed purposes of the UN's existence was to elevate self-determination as a fundamental political and moral value, thereby linking it to the goal of promoting constructive and peaceful relations among states in the aftermath of World War II.<sup>96</sup> Additionally, Article I of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights states that “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>97</sup> Finally, the United Nations Declaration of Human Rights Article 15 declares that all people have a right to a nationality and that no one can be deprived of a nationality or denied the right to change their nationality.<sup>98</sup>

92. Aneta Pavlenko, *Russian in Post-Soviet*, 32 *RUSS. LINGUISTICS* 59, 61 (2008), [available at](http://astro.temple.edu/~apavlenk/pdf/Russian_Linguistics_2008.pdf) [http://astro.temple.edu/~apavlenk/pdf/Russian\\_Linguistics\\_2008.pdf](http://astro.temple.edu/~apavlenk/pdf/Russian_Linguistics_2008.pdf) at

93. *Crimea Declares Independence, Seeks UN Recognition*, RT (Mar. 17, 2014, 1:06 PM), <http://www.rt.com/news/crimea-referendum-results-official-250/>.

94. *Ukraine Crisis: 'Illegal' Crimean Referendum Condemned*, BBC (Mar. 6, 2014, 6:58 PM), <http://www.bbc.com/news/world-europe-26475508>.

95. *Self Determination (International Law)*, LEGAL INFO. INST., [http://www.law.cornell.edu/wex/self\\_determination\\_international\\_law](http://www.law.cornell.edu/wex/self_determination_international_law).

96. STEFAN OETER, *Self-Determination*, in 1 *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 313, 319 (3rd ed. 2012), [available at](http://opil.ouplaw.com/view/10.1093/law/9780199639762.001.0001/law-9780199639762-part-14#law-9780199639762-div3-36) <http://opil.ouplaw.com/view/10.1093/law/9780199639762.001.0001/law-9780199639762-part-14#law-9780199639762-div3-36>.

97. G.A. Res. 2200 (XXI) A, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966), at 49 (art. 1), [available at](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2200(XXI)) [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/2200\(XXI\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2200(XXI)).

98. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III)(Dec. 10, 1948), at 74 (art. 15).

Self-determination is thus one of the few rights that are presently thought to be *peremptory* in nature – i.e., a principle universally accepted by the international community from which there can be no derogation.<sup>99</sup>

There are two problems with the current concept of self-determination that are starkly illuminated by Russia's annexation of Crimea on the supposed grounds of Crimeans' right to self-determination. The first is that International Law has not defined clearly what a "people" is, thus casting doubt on whether this right can apply to residents of Crimea.<sup>100</sup> The second is that the concept of self-determination, particularly when construed as an argument for secession, contradicts another fundamental international norm: the right of a State to preserve its territorial integrity.<sup>101</sup>

There is no recognized right to secede under International Law.<sup>102</sup> Neither the UN Charter nor any major international covenant confers an unfettered right of secession to any State's inhabitants.<sup>103</sup> Judicial opinions about referenda debates have been inconclusive. For example, when it was asked to analyze Kosovo's declaration of independence from Serbia in 2008, the International Court of Justice ruled that Kosovo's secession did not strictly violate International Law because general International Law does not contain a prohibition on declarations of independence, but it also did not positively affirm its legality.<sup>104</sup> Looking broadly at the practice of States,

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99. See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 75 (2004).

100. See generally Vita Gudeleviciute, *Does the Principle of Self-Determination Prevail over the Principle of Territorial Integrity?*, INT'L J. BALTIC L., Apr. 2005, available at <http://www.tamilnet.com/img/publish/2009/10/Gudeleviciute.pdf>.

101. Patricia Carley, *Self-Determination: Sovereignty, Territorial Integrity, and the Right to Secession* 9 (U.S. Inst. Peace, Peacework No. 7, 1996), available at <http://www.usip.org/sites/default/files/pwks7.pdf>.

102. Chris Borgen, *Can Crimea Secede by Referendum?*, OPINIO JURIS (Mar. 6, 2014, 3:27 PM), <http://opiniojuris.org/2014/03/06/can-crimea-secede-referendum/>.

103. Roya M. Hanna, *Right to Self-Determination in In Re Secession of Quebec*, 23 MD. J. INT'L L. 213, 230 (1999).

104. See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo: Summary of the Advisory Opinion*, I.C.J. (July 22, 2010), <http://www.icj-cij.org/docket/files/141/16010.pdf>; Heiko Krueger, *Was Kosovo's Split-Off Legitimate? Background, Meaning and Implications of the ICJ's Advisory Opinion*, 4 CAUCASIAN REV. INT'L AFF. 293, 294 (2010) ("Does that mean that the ICJ recognized the legality of Kosovo's

the international community tends not to sanction independence referenda that are conducted in contravention to a State's internal laws. Since 1945, the United Nations has not recognized a single State created by unilateral secession "against the declared wishes of the government of the predecessor State."<sup>105</sup> It is more often the case that unilateral attempts at secession fail even when there is *de facto* independence,<sup>106</sup> and so there is very limited historical practice to justify codifying secession as a right.

[T]here have been hundreds of peacefully resolved self-determination claims over the past decades, and the accumulating body of law and precedent they have created has set a fairly high, if uncodified, threshold for establishing the legitimacy of secessionist claims: A group of people in a defined territory must have distinctive identity and a history of persecution at the hands of an unresponsive state that has made it impossible for them to effectively exercise the right to internal self-determination.<sup>107</sup>

Ukraine has repeatedly emphasized that it did not grant Crimea a right to conduct an independence referendum and that the vote violated Ukraine's constitution. Moreover, in spite of Russia's insistence that Crimean residents were denied the right to order their local affairs by the government in Kiev, Crimea's constitutional status within Ukraine arguably already was a solution to their autonomy-related grievances:

Between 1991 and 1998, Crimea's leaders laboriously negotiated the status of their relationship with Ukraine, resulting in the creation of an "Autonomous Republic of Crimea," whose rights were spelled out in

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independence? No. Unlike many press reports suggest, the ICJ explicitly made clear that it did not handle the question of the legal consequences of the declaration of independence. But this would have been the crucial question. Without an answer to that question, the ICJ could not clear up Kosovo's legal status.").

105. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 390 (2nd ed. 2007).

106. *Id.*

107. Brad Simpson, *Self-Determination in the Age of Putin*, FOREIGN POL'Y (Mar. 21, 2014), [http://www.foreignpolicy.com/articles/2014/03/21/self\\_determination\\_in\\_the\\_age\\_of\\_putin\\_crimea\\_referendum](http://www.foreignpolicy.com/articles/2014/03/21/self_determination_in_the_age_of_putin_crimea_referendum).

both the Ukrainian and Crimean constitutions. It was a textbook example of the peaceful resolution of a claim to self-determination – which just a few decades earlier might have resulted in violent conflict, and a sobering counterpoint to the bloody disintegration of the former Yugoslavia.<sup>108</sup>

Russia has conversely hailed the Crimean independence vote as an exercise in self-determination and argued that the international practice of States, particularly in the fairly recent case of Kosovo, legally sanctions the result. Many international scholars and observers nevertheless reject Russia's comparison of Crimea to Kosovo. Kosovo voted to secede from Serbia in 2008 following years of brutal repression by the Yugoslav army, which led to NATO's bombing campaign in 1999. According to Neil Melvin of the Stockholm International Peace Institute, "[t]here was extensive and systematic discrimination and violation of human rights in Kosovo. This created the main legal basis for an international intervention and the declaration of independence. However, with Crimea, there really is no humanitarian crisis despite the claims advanced by Russia."<sup>109</sup> Also, unlike the case of Kosovo, the international community's recognition of Crimea's referendum has been very limited. Only 14 UN member States have recognized it. In contrast, as of August 2014, 108 UN member States have recognized Kosovo's declaration of independence from Serbia.<sup>110</sup>

Thus Russia's annexation of Crimea on the questionable grounds of Crimean self-determination – much like Russia's self-identified humanitarian responsibility to protect oppressed minorities in Crimea and the eastern territories of Ukraine – is likely nothing but a cynical cover for the pursuit of strategic interests in the region. The challenging interplay between State sovereignty and self-determination – both recognized as fundamental norms in the international system – has arguably created a situation in which Russia has been able to exploit unclear international legal norms to achieve broader

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108. *Id.*

109. *Experts: Crimea Isn't Comparable to Kosovo*, ANADOLU AGENCY (Mar. 17, 2014, 6:16 PM), <http://www.aa.com.tr/en/politics/302263--experts-crimea-isnt-comparable-to-kosovo>.

110. Solomon Islands Recognize Kosovo's Independence, KOSOVAR MINISTRY OF INDEPENDENCE, accessed March 8, 2015, *available at* <http://www.mfa-ks.net/?page=2,4,2415&offset=1> (noting that Solomon brought the number of States recognizing Kosovo to 108).

geopolitical objectives.

## B. UKRAINE'S APPEAL TO STATE SOVEREIGNTY AS A LEGAL DEFENSE AGAINST RUSSIA'S INTERVENTION

In addition to rejecting Russia's asserted responsibility to protect threatened Russians, as well as Crimeans' right to unilateral secession, Ukraine has staunchly opposed Russia's intervention within its territory by appealing to another foundational international norm: State sovereignty and the impermissibility of intervening in the internal affairs of other States. Ukraine argues that Russia has violated Ukrainian sovereignty by annexing a portion of its territory and also by offering financial and logistical assistance to rebels in the eastern part of the country. Russia's response (which, again, has been accused of being nothing more than cynical manipulation by some observers)<sup>111</sup> is an elaboration of its asserted responsibility to protect threatened populations in Ukraine: The once absolute concept of State sovereignty has necessarily evolved to permit interventions on humanitarian grounds, which if true, could shield Russia from accusations that it has impermissibly violated the sovereignty of Ukraine.

### 1. The Principle of State Sovereignty

There is arguably no more important norm underpinning modern international relations than the concept of State sovereignty.<sup>112</sup> The reason for this goes to the very foundation of international relations:

[Sovereignty] defines nationhood. It underlies international law's requirement of state consent to treaties and customary international law. And it explains why nations respect territorial borders, confer and deny recognition, and honor diplomatic immunity. In these and many other contexts, national sovereignty is among the most robust of international legal

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111. Interfax-Ukraine, *Putin: West's position on Crimea cynical*, KYIV POST (Mar. 18, 2014, 5:32 PM), <http://www.kyivpost.com/content/ukraine/putin-west-position-on-crimea-cynical-339860.html>.

112. Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1843 (2009).

principles, exercising a powerful influence on national behaviors.<sup>113</sup>

The modern concept of State sovereignty is commonly thought to have originated with the Peace of Westphalia, an historical event which arguably marked the birth of the modern State.<sup>114</sup> Sovereignty assigns States three crucial characteristics: (1) jurisdiction over their own territories and permanent populations; (2) the duty not to intervene in the exclusive jurisdiction of other States; and (3) the dependence of obligations which emerge from the sources of International Law.<sup>115</sup> The Peace of Westphalia, which describes several peace treaties signed between May and October 1648 ending the Thirty Years' War (1618-1648) in the Holy Roman Empire and the Eighty Years' War (1568-1648) between Spain and the Dutch Republic, molded a new international political order based upon the concept of co-existing sovereign States.<sup>116</sup> Under this order, interstate aggression would be moderated by a balance of power in which States endeavor to ensure that no actor within the international system wields an excessive measure of power that could upset the equilibrium.<sup>117</sup> The Westphalian order introduced "prejudice" against interference in other States' internal affairs.<sup>118</sup>

The concept of State sovereignty thus became a crucial new instrument to regulate interstate aggression. Specific efforts to preserve the balance of power envisaged by Westphalia included the European concert of powers against Napoleon, as well as the Treaty of Vienna following the Napoleonic Wars

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113. See Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STAN. L. REV. 959, 959 (2000).

114. See PETER H. WILSON, *EUROPE'S TRAGEDY: A HISTORY OF THE THIRTY YEARS WAR* 754 (2009) ("The [dominant] interpretation of Westphalia regards it as the birth of the modern international order based on sovereign states interacting (formally) as equals within a common secularized legal framework, regardless of size, power or internal configuration.").

115. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 15 (1st ed. 1966).

116. Jeffrey D. Martino, *At the Edge of the State: Indigeneous Peoples and Self-Determination*, 4 N.Y. CITY L. REV. 103, 104 (2001).

117. See KISSINGER, *supra* note 22, at 2 ("The Westphalian peace reflected a practical accommodation to reality, not a unique moral insight. It relied on a system of independent states refraining from interference in each other's domestic affairs and checking each other's ambitions through a general equilibrium of power.").

118. *Id.*

that cemented Westphalian notions of balance and sovereignty for nearly a century before the outbreak of World War I.<sup>119</sup> To this day, despite numerous global wars and political upheavals that have radically changed (and increased) the body of States operating within the international system, State sovereignty remains a foundational norm.<sup>120</sup> Even Article 2 of the relatively recent United Nations Charter proclaims that the organization “is based on the principle of the sovereign equality of all its Members,”<sup>121</sup> that “[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state,”<sup>122</sup> and that “[n]othing contained in the . . . Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.”<sup>123</sup>

Despite these strong historical underpinnings, some scholars and observers think that the concept of State sovereignty has been steadily eroding.<sup>124</sup> Following World War I, a number of treaties and institutions challenged the absolutism of State sovereignty by recognizing a need to protect vulnerable populations threatened by, for instance, humanitarian disaster.<sup>125</sup> Although the end of World War II paved the way to a protracted Great Power standoff between the United States and the Soviet Union during which Westphalian concepts of State sovereignty and balance of power were central to international affairs, the proliferation of numerous human rights treaties<sup>126</sup> elevated rights-based norms

119. *Id.* at 29.

120. See MICHAEL STRUETT, *THE POLITICS OF CONSTRUCTING THE INTERNATIONAL CRIMINAL COURT: NGOS, DISCOURSE, AND AGENCY* 168 (2008).

121. U.N. Charter art. 2, para. 1.

122. *Id.* at para. 4.

123. *Id.* at para. 7.

124. See William Magnuson, *The Responsibility to Protect and the Decline of Sovereignty: Free Speech Protection Under International Law*, 43 *VAND. J. TRANS. L.* 255, 257 (2010).

125. See David Wippman, *The Evolution and Implementation of Minority Rights*, 66 *FORDHAM L. REV.* 597, 599–600 (1997) (noting that following World War I concerns about the rights of minority groups “dominated the international legal agenda”).

126. See, e.g., International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966); Universal Declaration of Human Rights, *supra* note 98.

to new heights of legal expression.<sup>127</sup> A long succession of thinkers, including some as early as Prussian philosopher Immanuel Kant, have envisioned the establishment of a community of nations to regulate competitive interstate relations by subordinating sovereignty to law.<sup>128</sup> For much of history, however, the political and military realities of international relations made this goal unattainable.<sup>129</sup> Following the collapse of the Soviet Union, however, a new approach to international order seemed to emerge. A series of humanitarian interventions in conflict areas such as Kosovo and Somalia –unthinkable during the Cold War<sup>130</sup> – challenged the absolutism of State sovereignty by crystalizing a new legal paradigm of intervention in the internal affairs of other States to prevent genocide and other serious human rights violations.<sup>131</sup>

The recent evolution of State sovereignty thus offers both challenges and opportunities for proponents of heightened international intervention in humanitarian crises. On one hand, mobilizing States to intervene in humanitarian crises is more possible now than ever before, not only because the geopolitical restraints of the Cold War have evaporated, but also because there has been a concerted popular and legal push to sanction such interventions. On the other hand, the non-absolute nature of State sovereignty potentially exposes weaker States to the cynical exploitation of this principle. While historically a backer of strong State sovereignty, Russia now

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127. See BROWNLIE, *supra* note 115.

128. See, e.g., Immanuel Kant, *Perpetual Peace: A Philosophical Sketch* (1795), available at <https://www.mtholyoke.edu/acad/intrel/kant/kant1.htm>.

129. See Francis Fukuyama, *The End of History*, NAT'L INT., Summer 1989 ("The twentieth century saw the developed world descend into a paroxysm of ideological violence, as liberalism contended first with the remnants of absolutism, then bolshevism and fascism, and finally an updated Marxism that threatened to lead to the ultimate apocalypse of nuclear war."), available at <http://www.wesjones.com/eoh.htm>.

130. See IAN JOHNSTONE, THE POWER OF DELIBERATION: INTERNATIONAL LAW, POLITICS AND ORGANIZATIONS 59 (2011) ("The five permanent members of the [Security Council] have been dealing with each other on an almost daily basis for the last 20 years, in effect, debating the shape of the post-Cold War world in the context of particular crises and on occasion thematic issues (such as the protection of civilians in armed conflict). From northern Iraq, through Bosnia, Somalia, Haiti, Rwanda, Sierra Leone, Kosovo, East Timor, the Democratic Republic of the Congo, Liberia, Sudan and Afghanistan, collectively they have found a way of authorizing – or endorsing after the fact – operations that could have been unthinkable during the Cold War.").

131. See *supra* pp. 113–16 (discussion on Responsibility to Protect).



argues that it has a legal obligation to protect threatened Russians in Ukraine partly on the basis of weakened norms governing State sovereignty.

## 2. Russia Has Likely Violated Ukraine's Sovereignty by Supporting Pro-Russian Separatists

Russia steadfastly and consistently denies that it has violated Ukraine's sovereignty.<sup>132</sup> In public comments on the ongoing crisis, Russian leaders have taken care to emphasize that their conduct has been grounded in respect for Ukraine's sovereignty and the right of its democratically-elected leaders to conduct Ukraine's foreign policy without external interference, including signing an association agreement with the EU.<sup>133</sup> With regard to Crimea, Putin rejects rhetoric suggesting that Russia "annexed" the peninsula by pointing out that Russian troops were already deployed on a Russian military base in Crimea regulated by a treaty between the two countries. Furthermore, Putin argues that International Law demands respect for Crimeans' right to self-determination under the UN Charter, a right which he claims a majority of Crimeans exercised during the peninsula's referendum to make clear their desire to join Russia.<sup>134</sup>

The difficulties with Russia's arguments about Crimeans' right to secession have already been discussed. With regard to accusations that Russia has stationed troops in the eastern part of Ukraine and provided financial and logistic support to pro-Russian rebels, Russia has arguably been even less successful in warding off Western accusations of violating Ukrainian sovereignty. In a June 2014 interview, Putin insisted that "there are no armed forces, no Russian 'instructors' in southeastern Ukraine, and there never were any."<sup>135</sup> However, for months NATO, American, and other

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132. Reuters & The Associated Press, *Russia Denies Reports That It Invaded Ukraine*, HAARETZ (Aug. 28, 2014, 7:55 PM), <http://www.haaretz.com/news/world/1.612981>.

133. *Lavrov: Russia won't sanction if Kiev Signs EU Deal*, RT (Jun. 10, 2014, 12:20 PM), <http://rt.com/news/165080-lavrov-ukraine-association-eu/>.

134. *Putin Says Crimea Referendum No Breach of International Law*, HERALD (Harare) (Mar. 16, 2014), <http://www.herald.co.zw/putin-says-crimea-referendum-no-breach-of-international-law/>.

135. *Russia Never Annexed Crimea, No plans to intervene in Ukraine, It's a Western delusion - Putin*, VOICE OF RUSSIA (June 5, 2014, 11:01 AM), [http://voiceofrussia.com/news/2014\\_06\\_05/Russia-never-annexed-Crimea-no-](http://voiceofrussia.com/news/2014_06_05/Russia-never-annexed-Crimea-no-)

countries' intelligence communities, as well as a wide array of private observers, have provided extensive evidence of Russian troops and equipment operating in eastern Ukraine.<sup>136</sup> This evidence includes video documentation of Russian troop movement, photographs, testimony of Russian soldiers,<sup>137</sup> local eyewitness accounts,<sup>138</sup> and satellite imagery.<sup>139</sup> Despite ongoing vehement Russian denials, the evidence collectively suggests that Russia has indeed supported pro-Russian separatists. Moreover, at one point approximately 20,000 Russian troops were amassed on Russia's border with Ukraine.<sup>140</sup>

There are numerous theories about why Russia has been providing extensive support to separatist rebels in Ukraine. For a period of time, there was fear that Russia intended to annex eastern portions of Ukraine.<sup>141</sup> Another theory held that Russia hoped to carve a land route from Russia to the newly annexed Crimean peninsula.<sup>142</sup> Finally, other observers have suggested that Russia has no specific intention to annex any more Ukrainian territory, but by supporting rebels and fomenting an ongoing military and humanitarian crisis in the eastern part of the country, will be able to keep Ukraine enmeshed in a "frozen conflict" that will prevent the country's admission into either the EU or NATO.<sup>143</sup>

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plans-to-intervene-Ukraine-its-Western-delusion-Putin-5970/.

136. See, e.g., *Moscow Slams NATO's Accusations of Invasion in Ukraine as Groundless*, RT (Nov. 12, 2014, 5:12 PM), <http://rt.com/news/204895-russia-ukraine-military-nato/>.

137. Alexander Prohanov, *Who Are you, "Shooter?"*, ZAVTRA (Nov. 20, 2014) <http://zavtra.ru/content/view/kto-tyi-strelok/> (interviewing soldiers about their experiences).

138. *Ukraine: Mounting Evidence of War Crimes and Russian Involvement*, AMNESTY INT'L (Sept. 7, 2014), <http://www.amnesty.org/en/news/ukraine-mounting-evidence-war-crimes-and-russian-involvement-2014-09-05>.

139. *Id.*

140. Cassandra Vinograd, *NATO Says Russia has 20,000 Troops on Ukraine's Border*, NBC NEWS (Aug. 6, 2014, 6:01 AM), <http://www.nbcnews.com/storyline/ukraine-crisis/nato-says-russia-has-20-000-troops-ukraines-border-n173781>.

141. Carol Williams, *As Pro-Russia Revolt Founders in Ukraine, Invasion Fears Rise*, L.A. TIMES (Aug. 6, 2014, 4:30 PM), <http://www.latimes.com/world/europe/la-fg-ukraine-russia-invasion-fears-20140806-story.html>.

142. Benny Avni, *All Is Not Well on Ukraine's Eastern Front*, NEWSWEEK (Nov. 17, 2014, 3:14 PM), <http://www.newsweek.com/all-not-well-ukraines-eastern-front-284894>.

143. Svante E. Cornell, *Crimea and the Lessons of Frozen Conflicts*, AM. INT. (Mar. 20, 2014), <http://www.the-american-interest.com/2014/03/20/crimea-and-the-lessons-of-frozen-conflicts/> ("Putin's message to all these countries—

The glaring disconnect between extensive evidence chronicling Russian intervention in eastern Ukraine and the rhetoric employed by Russian leaders to deny this intervention suggests that, despite its repeated appeals to International Law norms throughout the crisis, Russia knows that its material support of pro-Russian separatists cannot be reconciled with International Law norms. Accordingly, a policy of absolute denial is the only feasible approach that Russia can take to maintain face and to operate with a degree of operational flexibility. At this stage, then, it is necessary to consider why Russia would continue to take steps that are so at odds with International Law norms while simultaneously pledging respect for those same norms.

### C. REALISM'S EMPHASIS ON THE RELATIONSHIP BETWEEN POWER AND SECURITY EXPLAINS WHY INTERNATIONAL LAW WILL NOT CONSTRAIN RUSSIA

There is no consensus among scholars of international relations or practitioners of statecraft about the utility or value of International Law as an instrument of regulating interstate relations.<sup>144</sup> Proponents of realism in particular tend to dismiss outright any significant role International law might play in affecting the behavior of States in the international system.<sup>145</sup> This section will consider the theoretical assumptions of realism, the views of some realist scholars on International Law, and why these views explain, with considerable success, why Russia has been willing to violate International Law norms to pursue its interests in Ukraine.

#### 1. Realist Assumptions about the Anarchical Nature of the International System and the Role of International Law

Although there are several strands of realist thought, all

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and now to Ukraine—is the same: If they go West, Russia will dismember them and prevent them from regaining their sovereignty.”).

144. See, e.g., David Fidler, *War, Law & Liberal Thought: The Use of Force in the Reagan Years*, 11 ARIZ. J. INT'L & COMP. L. 45, 75 (1994) (discussing contrasting perspectives among international relations scholars on the utility of international law).

145. See *id.* at 72–73. See also Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 206 (1993).

realists agree that there is an inseparable link between security and power.<sup>146</sup> Classical realism, whose origins extend as far back as the Greek historian Thucydides' famed account of the Second Peloponnesian War, emphasizes humans' unalterable lust for power as the eternal root of military conflict.<sup>147</sup> In more modern times, Hans Morgenthau brought classical realism into the twentieth century by incorporating pessimistic assumptions about human psychology into his analysis of contemporary international relations.<sup>148</sup>

Structural realism is a more recent variation of this theoretical perspective. In his 1979 seminal work "Theory of International Politics," Kenneth Waltz deemphasizes the psychological roots of interstate competition and instead elevates the significance of the anarchical structure of the international system.<sup>149</sup> In an anarchical international system, no centralized power exercises domination over individual States.<sup>150</sup> Every State must pursue its survival by means of *self-help*, because those that fail to do so will expose themselves to mortal danger.<sup>151</sup> On this point, however, there is disagreement with yet another strand of realism. Offensive realism, developed by John Mearsheimer, disagrees with structural realists about the reasons *why* States pursue power.<sup>152</sup> Whereas structural realists believe that the pursuit of hegemony in an anarchical system is a misguided and dangerous goal, offensive realists believe that States will inevitably attempt to gain as much power as they possibly can because only by attaining a position of hegemony – or something close to it – can a State ensure its security and survival.<sup>153</sup>

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146. See Jonathan D. Greenberg, *Does Power Trump Law?*, 55 STAN. L. REV. 1789, 1793 (2003).

147. See *id.* at 1793–96.

148. See *id.*

149. See generally KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979).

150. *Id.*

151. John J. Mearsheimer, *Structural Realism*, in *INTERNATIONAL RELATIONS THEORIES: DISCIPLINE AND DIVERSITY* 71, 74 (Tim Dunne, Milja Kurki, & Steve Smith eds., 2006), available at <http://mearsheimer.uchicago.edu/pdfs/StructuralRealism.pdf> ("Fearful of other states, and knowing that they operate in a self-help world, states quickly realize that the best way to survive is to be especially powerful. The reasoning here is straightforward: the more powerful a state is relative to its competitors, the less likely it is that it will be attacked.").

152. See generally *id.*

153. *Id.* at 72.

Realism is predicated on at least five assumptions about the international system that explain in part why States engage in conflict with each other.<sup>154</sup> The first, according to Mearsheimer, is that “great powers” are the principal actors in world politics.<sup>155</sup> The second is that all states possess some offensive military capability by which they can inflict harm to others.<sup>156</sup> The third is that States are perpetually uncertain about the intentions of other States, i.e., they cannot know which States intend to use force to alter the balance of power in the international system and which States don’t want to change it.<sup>157</sup> The fourth is that the main goal of States is to survive by preserving their territorial integrity and operating without external interference.<sup>158</sup> The final assumption is that States are rational actors that devise and execute strategies in the pursuit of policies that will ensure their survival.<sup>159</sup> When these assumptions interact with one another and are assessed against the backdrop of history, they possess a great deal of explanatory power with regard to the competitive nature of international relations.

Realists also emphasize that the basic unit of currency in the international system is power.<sup>160</sup> Because of the chronic uncertainty about other States’ long-term intentions as well as the inability to appeal to higher powers for help in the event of attack, States tend to seek to accumulate power both as a deterrent to attack and as a means of fighting off attacks in progress.<sup>161</sup> Power, in more subtle ways, may shape global events and form alliances, which affect a State’s security vis-à-vis others. But the unregulated exercise of raw power stands in opposition to recent attempts to establish legal norms regulating international conflict and the use of force. The question now is what role International Law plays in a world characterized by the realist assumptions noted here.

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154. *Id.* at 73.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 74.

159. *Id.*

160. See generally David Baldwin, *Power and International Relations*, in HANDBOOK OF INTERNATIONAL RELATIONS 273, 273–75 (Walter Carlsnes, Thomas Risse & Beth A. Simmons eds., 2013).

161. See Peter Toft, *John J. Mearsheimer: An Offensive Realist Between Geopolitics and Power*, 8 J. INT’L REL. & DEV. 381, 383 (2005), available at <http://www.palgrave-journals.com/jird/journal/v8/n4/full/1800065a.html>.

According to virtually all strands of realism, International Law plays no significant role in alleviating the basic structural conditions that infuse conflict and the lust for power into the international system.<sup>162</sup> To the extent that the rhetoric of International Law permeates public discourse and consumes the attention of States, realism contends that International Law is a cynical tool by which States pursue their own interests. In other words, if a State concludes that complying with a provision of International Law – or insisting that other States comply with International Law – is consistent with its individual interests, then it will claim to be bound by International Law and act accordingly. However, if a State concludes that disregarding a provision of International Law is a means by which it can achieve security vis-à-vis other States, then it will freely do so.

Liberalism is an international relations theory that emphasizes institutions and domestic and transnational civil society as key variables in shaping international behavior.<sup>163</sup> One of liberalism's aims is the establishment of "a body of rules regulating transnational society that will foster the creation of transnational patterns of interest likely to shape State action."<sup>164</sup> Its proponents reject realism's bleak assessment of International Law by pointing to the myriad of organizations, treaties, and tribunals to which States voluntarily submit themselves.<sup>165</sup> In the age-old debate about the utility of International Law, liberals find persuasive value in the many instances of States altering their behavior and internal policies, or relinquishing part of their sovereignty, under the framework of norms, treaties, and international institutions.<sup>166</sup> Realists respond to this by raising examples of States that fail to comply with international norms, withdraw from treaties when

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162. See, e.g., Harold Hongju Koh, *Why Do Nations Obey International Law*, 106 YALE L.J. 2599, 2616 (1997) ("International relations scholars, suffused with realism, treated international law as naive and virtually beneath discussion.").

163. See Burley, *supra* note 145, at 228.

164. *Id.* at 232.

165. See generally John Mearsheimer, *The False Promise of International Institutions*, INT'L SECURITY, Winter 1994–95, at 5, 15–26, available at <http://mearsheimer.uchicago.edu/pdfs/A0021.pdf>. See also Burley, *supra* note 145, at 207 ("Liberals focus not on state-to-state interactions, at least not in the first instance, but on an analytically prior set of relationships among states and domestic and transnational civil society.").

166. See Mearsheimer, *supra* note 165, at 18 (discussing how contracting and creating rules may affect a State's behavior).

convenient, disregard UN Security Council resolutions, and engage in activities banned by multilateral treaties.<sup>167</sup> Despite optimism that the post-Cold War period would lead to greater enthusiasm for international norms and institutions, realists conclude that States are selective in applying norms that suit their interests.<sup>168</sup> If one adopts the foundational assumptions of realism, this conclusion is inescapable: there is no higher power that can compel a State chronically uncertain about its security to comply with a norm that is widely thought to carry the force of law. So if a State concludes that following a particular norm would expose it to exploitation by other States or minimize its existing power, then it has every incentive to disregard that norm.

## 2. International Law Has Failed to Constrain Russian Incursions Against Ukraine's Sovereignty

Even if one extends to Russia the widest possible benefit of the doubt about its claims and defenses in the context of the crisis in Ukraine, it is astonishingly difficult to reconcile all of its actions in Ukraine with International Law. Moreover, if Western critics' bleak assessments about Russia's behavior are accurate, then Russia has indeed violated International Law. While this is disturbing to International Law scholars and activists who envision legal norms as the means by which States should achieve sustained cooperation with each other in an increasingly interconnected world, this is not surprising at all if one considers Russia's geopolitical position vis-à-vis NATO and understands what the loss of influence over Ukraine would mean for Russia's conception of its own security. In other words, realism explains and has virtually predicted the crisis in Ukraine.

As discussed, Russia views Ukraine as an integral component of its patrimony, a vital geographic buffer zone between its vast territory and the menacing threat of the West, and a manifestation of its power and influence in what Russia refers to as "the Near Abroad."<sup>169</sup> The collapse of the Soviet

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167. See *id.* at 33 (providing a number of historical examples in which States' actions were not in compliance with international norms).

168. See generally *id.*

169. Robert Kagan, *New Europe, Old Russia*, WASH. POST (Feb. 6, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/05/AR2008020502879.html>.

Union in 1991 greatly weakened Russian power not only by diminishing Russia's territorial landmass, its ability to project power abroad, and its total national wealth and population, but also by pitting itself against the "victorious" NATO alliance.<sup>170</sup> The enduring threat of nuclear war continues to make it virtually inconceivable that the West would ever directly attack Russia, but NATO expansion has instilled in Russia a fear that the US-led security alliance will take advantage of its relative strength by constraining, intimidating, or bullying Russia.<sup>171</sup> The NATO bombing of Belgrade in 1999 confirmed Russia's worst fears that NATO would pursue regional objectives that are at odds with Russian interests.<sup>172</sup>

Russia's post-1990 efforts to integrate itself into international institutions, adopt and apply the rhetoric of legal norms, and commit itself to constructive cooperation with the West comport entirely with realism's maxim that States ultimately pursue ends that align with their interests.<sup>173</sup> For instance, after enduring considerable economic degradation in the 1990s, Russia began to take steps to enter the WTO as a way of penetrating new global markets, importing competitive technologies, and stimulating its weak domestic economy.<sup>174</sup> Fast-forwarding to a very different situation in 2015, Russia has not been dissuaded from intervening in Ukraine by the threat and subsequent imposition of Western economic sanctions.<sup>175</sup> At first glance, this appears to undermine Russia's long-held goal of modernizing and growing its moribund economy. It strongly suggests, however, that retaining influence over Ukraine occupies a place of prominence in

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170. See Coit D. Blacker, *The Collapse of Soviet Power in Europe*, 70 FOREIGN AFF., no. 1, 1991 at 88, 98, available at <http://www.foreignaffairs.com/articles/46275/coit-d-blacker/the-collapse-of-soviet-power-in-europe>.

171. See, e.g., Alexei K. Pushkov, *Don't Isolate Us: A Russian View of NATO Expansion*, NAT'L INT., Spring 1997, at 58, 58–62.

172. See JOSEPH LAURENCE BLACK, *RUSSIA FACES NATO EXPANSION: BEARING GIFTS OR BEARING ARMS?* 110–15 (2000).

173. See generally Hubert Zimmerman, *Realist Power Europe? The EU in the Negotiations about China's and Russia's WTO Accession*, 45 J. COMMON MARKET STUD. 813 (2007).

174. See *id.* at 825–27.

175. See David R. Cameron, *Sanctions Will Not Deter Russia, Concerned about Its Security Interests in Ukraine*, YALEGLOBAL ONLINE (May 1, 2014), <http://yaleglobal.yale.edu/content/sanctions-will-not-deter-russia-concerned-about-its-security-interests-ukraine>.



Russia's conception of its security to such an extent that it is willing to damage its relationship with the West, suffer economic harm, and violate a myriad of legal norms.

Although Western leaders reacted to Russia's intervention in Ukraine with outward bafflement,<sup>176</sup> Putin has long been open about the underlying rationale of his policy and why Russia came to perceive internal political developments in Ukraine as a threat to Russia's interests. When asked to comment in an interview about some Ukrainians' desire to enter NATO, Putin responded: "This is what worries us, because if Ukraine joins . . . NATO, NATO's infrastructure will move directly towards the Russian border, which cannot leave us indifferent."<sup>177</sup> While discussing his repeated attempts to diffuse the situation in Ukraine through diplomatic channels, Putin also made clear his view regarding the relationship between the prospect of Ukraine's theoretical eventual admission into NATO and Russia's annexation of Crimea:

In response to our attempts to hold . . . dialogue . . . [,][the West] supported the anti-constitutional state coup in Ukraine, and following that we could not be sure that Ukraine would not become part of the North Atlantic military bloc. In that situation, we could not allow a historical part of the Russian territory with a predominantly ethnic Russian population to be incorporated into an international military alliance, especially because Crimeans wanted to be part of Russia. I am sorry, but we couldn't act differently.<sup>178</sup>

Although Russia has engaged in smokescreen tactics to conceal the full extent of its engagement with Ukraine's pro-Russian separatists,<sup>179</sup> it has made no attempt to downplay or hide its overriding strategic objectives in Ukraine. Ever since the collapse of the Soviet Union, Russia has consistently viewed NATO as a strategic threat. Furthermore, Russia does not trust American and Western overtures about promoting democratization in Ukraine, instead viewing Western policy in Ukraine as a cynical ploy to extend American power

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176. Alexander Kudasheff, *Opinion: The West baffled*, DEUTSCHE WELLE (Aug. 29, 2014), <http://www.dw.de/opinion-the-west-baffled/a-17889604>.

177. VOICE OF RUSSIA, *supra* note 135.

178. *Id.*

179. *See, e.g.,* RT, *supra* note 136.

eastward.<sup>180</sup> With this understanding of Russia's perception of NATO's motivations, realism has not only had great explanatory power in the context of the ongoing crisis; it may also have had predictive power. As noted in the prior section, George Kennan – the architect of the United States' original policy of containment toward the Soviet Union in the late 1940s – warned that NATO expansion was a “strategic blunder of potentially epic proportions” that could one day lead to needless confrontation with Russia.<sup>181</sup> Other realist scholars warned that failing to respect Russia's core interests – that is, its basic need for a buffer between its territorial landmass and the Western alliance foremost among them – would be the root of future tension between Russia and the West.<sup>182</sup>

#### IV. CONCLUSION

The ongoing crisis in Ukraine has exposed the weakness of International Law as a tool of managing international relations. Despite great optimism that the end of the Cold War laid the groundwork for an international system based on respect for legal norms and institutions, the evidence of Russia's intervention in Ukraine shows that the basic assumptions of realism remain valid. These assumptions hold that States are chronically concerned about their security in an anarchical system in which no higher power can compel States to pursue particular courses of action – and that this causes States to be suspicious of others and to seek power above all else. In such a world, there arguably is no room for law – not, at least, as a genuinely influential variable affecting international relations.

In the case of Ukraine, Russia has extensively used rhetoric about International Law to justify its actions in front of the global community. However, even while granting the widest possible benefit of the doubt to Russia's arguments, it is difficult to conclude that Russia has not violated a series of international norms by annexing Crimea and supporting a separatist movement in eastern Ukraine. With a more thorough understanding of the security concerns at the root of

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180. See Mearsheimer, *supra* note 6, at 77.

181. TALBOTT, *supra* note 48, at 220.

182. See Eugene Rumer, *NATO Expansion: Strategic Genius or Historic Mistake?*, NAT'L INT. (Aug. 21, 2014), <http://nationalinterest.org/feature/nato-expansion-strategic-genius-or-historic-mistake-11114>.

Russia's policy on Ukraine, as well as the arguably faulty Western policy of expanding NATO eastward, the conclusion that International Law failed to constrain Russian behavior seems inescapable. Furthermore, understanding *why* States willingly violate legal norms to pursue their interests is possible only within a realist conception of the international system: there is no room for law and norms where States perceive their only means of self-preservation to be the pursuit of power.