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Whose International Law?

Legal Clashes in the Ukraine Crisis

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Abstract

This paper examines the role of international law in the Ukrainian crisis. It demonstrates that the United States and the European Union, which have led global opposition to Russia's involvement in Ukraine, have held uniform views on major international legal issues raised by that involvement. This unified stance suggests that the transatlantic zone is where shared basic values and principles of a global order do not exist only as a matter of abstract rhetorical agreement but also get translated into concrete policies and are applied to concrete cases. These policies must be acknowledged and probed no less than the fractiousness that is more typically the focus of commentaries on EU common foreign and security policy and transatlantic relations.

Introduction

This paper examines the role of international law in the Ukrainian crisis. It demonstrates that the United States (US) and the European Union (EU), which have led global opposition to Russia's involvement in Ukraine, have held uniform views on major international legal issues raised by that involvement, including those related to Russia's military intervention, the Crimean referendum, and the absorption of Crimea into the Russian Federation. This uniformity is notable for at least three reasons. First, the post-Cold War years had seen multiple disagreements both among the member states of the EU and between EU member states and the US over the interpretation of legal norms in high-profile cases involving the actual or potential use of military force. Second, Russia consciously drew upon some of those contested cases, especially the Kosovo intervention (1999) and recognition (2008), to construct a plausibly-sounding legal case for its actions in Ukraine. Third, intra-EU and transatlantic opinions on how best to react to those actions quickly diverged and these differences were being actively encouraged from Moscow. Yet neither the past rifts over cases such as Kosovo, nor the initial differences over the scope and severity of possible responses to Russia, nor Russia's attempts to exploit both, have proven to be an obstacle to the emergence of a unified transatlantic[1] legal view of the crisis in Ukraine. Crucially, this unified view developed in close coordination rather than fortuitously. There can be little doubt that, in terms of the triangular diplomacy framework presented by the editors of this volume, US and EU leaders sought the strongest common position in order to cast the Russian legal argumentation into as unconvincing light before the global diplomatic audience as possible.

It would be premature to draw sweeping conclusions from this single case, however significant it may be not just in the regional but also global context. One cannot, for example,

[1] It should be noted that while the focus of this volume is on the US and EU, the transatlantic alliance also includes Canada and Turkey. Both have been part of the consensus on Ukraine.

presume that the firm collective position on Ukraine has signaled a more harmonious era in EU common foreign and security policy or transatlantic relations. Yet what is already clear is that the EU and EU-US concord is not an isolated event. It is more than, say, a reaction to the threat to the eastern flank of the EU and the North Atlantic Treaty Organization (NATO). The shared EU and US stance, particularly in regards to Russia's claim of a right to forcibly protect Russian "compatriots" abroad and its forcible incorporation of Crimea, actually fit a long-standing policy pattern. Since 1945 the US and the member states of the EU and its institutional predecessors have consistently opposed both the idea of a unilateral right to use interstate force on behalf of one's ethnic kin and the incidents of forcible territorial aggrandizement. The former is at odds with what have been generally recognized as legally permissible grounds for the use of force (Dinstein 2005), while the latter have violated of the norm of territorial integrity which protects states against involuntary loss of territory to other states (Zacher 2001).

This history indicates that, despite all their disagreements in various recent and not-so-recent cases, when fundamental norms of international conduct are deemed to have been infringed in particular cases the US and the EU members are capable of achieving durable consensus and the EU can attain high internal coherence as a foreign policy actor. More broadly, it suggests that the transatlantic zone is where shared basic values and principles of a global order do not exist only as a matter of abstract rhetorical agreement but also get translated into concrete policies and are applied to concrete cases. These policies must be acknowledged and probed no less than the fractiousness that is more typically the focus of commentaries on EU common foreign and security policy and transatlantic relations.

The role of international law

Most international analyses of the Ukrainian crisis have focused on geostrategic, military and economic issues. Given that the crisis involved a great, nuclear-armed power and a major energy supplier carrying out the first forcible incorporation of a territory across interstate boundaries in Europe since 1945, this is understandable. However, what has not been necessarily widely appreciated is that all these issues have a distinct legal dimension. This should not be surprising. States almost invariably seek to justify their foreign policies within the framework of international norms, and in particular international legal norms.[2] As a purely empirical matter, then, states believe in both the existence of the prevailing norms to which they can appeal and the importance of convincing other states that they act within them and avoiding a reputation as a reprobate actor. Indeed, they frequently exert more painstaking efforts when making a case for policies they suspect will be controversial or know will entail antagonism or coercion.

Given that international norms are normally general, justifications of an action typically assert either that (1) there is a compatibility with a previous construction and relevant precedents of a norm, or (2) that there are compelling reasons for an innovative interpretation based on the new, unique or unusual circumstances of the case and/or other pertinent moral and legal considerations. While an individual state always justifies its actions by claiming adherence to existing international norms, the authoritative judgment whether this is so cannot be simply its alone. Other states governed by the norms have to accept these explanations. In an anarchic states system lacking a court with compulsory jurisdiction or any other universally binding interpreter of conflicting claims, it is they who, in most instances, serve as a kind of collective judge and jury.

[2] Norms are understood here as prescriptive statements delineating proper conduct. They encompass legal rules, shared moral and diplomatic principles and standards, rules of etiquette, and tacit rules of the game. The principal focus of this paper is on norms with legal status on the respect for which states tend to put the highest premium.

This is true whether the case concerns the defense of a single act within a norm, the claim of a single exception to a norm, or the formation of a new, more general interpretation of a norm which also pertains to comparable acts.

Regardless of its power, interests or motivations, if a government cannot provide satisfactory explanations of its actions to other states, then it can expect to face negative consequences internationally. The precise character of these consequences depends on various factors, including the type and severity of the deemed transgression. But it is essential to understand that whatever negative diplomatic, economic or military consequences follow a particular foreign policy move, these arise only after external actors have been able to identify a specific norm transgression and to justify their response by reference to that transgression. International norms, and above all international law, thus serve as a cognitive, communicative and argumentative device through which states understand, explain, shape, demand, support or oppose individual governmental actions. If attempts to grasp conflicts without a full consideration of the moral and legal framework in which they are played out are bound to be, on the whole, incomplete, this need is even greater when the pertinent norms are universally heralded as central components of the contemporary international order yet remain contested, as they have been in the case of Russia's engagements in Ukraine. An additional need for analysis stems from the importance of the principal actor in the Ukrainian crisis. As Roy Allison (2014: 1256) writes, "…Russia is a major power, with a permanent seat at the UN Security Council, which aspires to shape and constrain interpretations of law and international norms in the wider community of states as well as its own neighborhood. This legal contest has potentially serious implications for the international system."

Legal arguments and counter-arguments in the Ukrainian crisis

Legal clashes between the US and the EU, on the one hand, and Russia, on the other hand, over Russia's engagements in Ukraine went hand-in-hand with disputes over facts on the ground, although the latter are less pronounced today than they were at the time of their occurrence in 2014. Following a highly contested change of government in Kiev on 22 February, Russia's military forces, not wearing insignia but later acknowledged publicly by President Putin on several occasions, deployed to take control over military, governmental, communication and transportation installations throughout the Crimean peninsula. This action, which began on 27 February, was denounced by the new authorities in Kiev as an "illegal entry"[3] and an "unauthorized act of aggression."[4] With Russian troops surrounding the autonomous parliament and other key public buildings, the Crimean autonomous government came under control of politicians of a pro-Russian party who hastily organized a declaration of Crimean independence from Ukraine and unification with Russia on 11 March[5] and a referendum to approve the move on 16 March. On 17 March, following the 96.8% approval of the unilateral secession, the "Republic of Crimea"[6] was recognized by Russia as an independent state.[7] Having accepted the petition for accession to the Russian Federation, the Russian government then, equally swiftly, signed an

[3] See Statement of Ukraine, UN Doc. S/PV.7124, 1 March 2014.
[4] See Statement of Ukraine, UN Doc. S/PV.7125, 3 March 2014. There had been Russian military forces in Crimea – at the sprawling naval base in Sevastopol – on the basis of a Russo-Ukrainian bilateral treaty, but these could not be deployed elsewhere on Ukrainian territory without prior consent of the Kiev government. No such consent was ever sought before 27 February and the military operation, in any case, involved thousands of additional troops flown in from Russian territory.
[5] Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol, Supreme Council of Crimea, 11 March 2014.
[6] This entity was proclaimed in the 11 March declaration as consisting of the Autonomous Republic of Crimea and the city of Sevastopol, which had a separate status in Ukraine.
[7] See Executive Order on Recognizing Republic of Crimea, President of Russia, 17 March 2014.

"interstate treaty" with the "Republic of Crimea" to that effect on 18 March.[8] The upper chamber of the Russian legislature ratified the treaty on 21 March, thus completing the merger in domestic law.

Russian Arguments

Russia presented an array of arguments to justify its actions. It defended its involvement in Crimea (and later in eastern Ukraine) by the need to protect human rights of Russian citizens and "compatriots"[9] in the wake of what it considered an anti-constitutional seizure of power by anti-Russian groups in Kiev, alluding to the right to protect a state's nationals abroad and invoking the 1983 US military intervention in Grenada.[10] It claimed to have received invitations to intervene by President Yanukovich, whom it continued to recognize as the legal head of state and whose letter it produced at the United Nations Security Council (UNSC),[11] and by the newly installed Crimean leadership.[12] Once it effectively displaced Ukrainian authority on the peninsula, Russia supported the idea of Crimean independence as a justifiable, albeit "extraordinary," response to the "legal vacuum" created by the "violent coup" in Kiev[13] and then declared the March 16 referendum and the request for accession to Russia to be a valid exercise of the right to self-determination in international law.[14] In support of its embrace of Crimea's unilateral secession, Russia in addition invoked: (1) the precedent of US-led recognition of Kosovo's unilateral

[8] Agreement between the Russian Federation and the Republic of Crimea on the Accession of the Republic of Crimea to the Russian Federation and on Forming New Constituent Entities within the Russian Federation, 18 March 2014.
[9] The groups and their exact constituents were blurred in Russian pronouncements. What was clear, however, was that Russia was claiming not only the right to protect its citizens, but also any ethnic Russians or Russian speakers who were not its citizens.
[10] See Statements of the Russian Federation, UN Doc. S/PV.7125, 3 March 2014.
[11] Statement by the President of Ukraine, annexed to UN Doc. S/2014/146, 3 March 2014.
[12] See Statement of the Russian Federation, UN Doc. S/PV.7124, 1 March 2014.
[13] See Statement of the Russian Federation, UN Doc. S/PV.7134, 13 March 2014.
[14] See Address by President of the Russian Federation, annexed to UN Doc. A/68/803-S/2014/202, 18 March 2014.

secession - just as it had done when it recognized Abkhazia and South Ossetia in 2008 - and (2) the *Kosovo* (2010) advisory opinion of the International Court of Justice which concluded that unilateral declarations of independence do not, as such, violate international law.[15]

US/EU Counter-Arguments and their Aftermath

Despite Russia's elaborate rationales, no state openly endorsed its military intervention and only a small handful of countries publicly accepted the March 16 referendum as a valid exercise of the right to self-determination (Afghanistan, Armenia, Kazakhstan, Kyrgyzstan, Nicaragua, North Korea) or endorsed Crimea's inclusion into Russia (Afghanistan, Nicaragua, North Korea, Syria, Venezuela). Most official reactions to Russia's use of force, the Crimean referendum and Crimea's absorption into Russia were markedly negative. The US and EU members, together with Canada, Australia, New Zealand and Japan, were the most vocal critics of Russia and they presented, both individually and in multilateral bodies such as the United Nations (UN), NATO, the Organization for Security and Cooperation in Europe (OSCE), the Group of Seven (G7), the Council of Europe (CE) and the Visegrad Group, a cohesive and coordinated voice in contesting Russia's legal and factual assertions.

The US and EU countries denied, along with other external actors, including UN and OSCE human rights representatives on the ground,[16] that there was, anywhere in Ukraine, any systematic or widespread persecution of Russian speakers; as such, the protection and welfare of this group, consisting overwhelmingly of Ukrainian citizens, was the responsibility of the Ukrainian, not Russian, state. They pointed that the only body constitutionally authorized to invite foreign troops

[15] See Statement by the Russian Ministry of Foreign Affairs Regarding the Adoption of the Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol, 11 March 2014.
[16] See Statement by Ivan Šimonović, Assistant Secretary-General for Human Rights, UN Doc. S/PV.7144, 19 March 2014.

onto Ukrainian territory was the country's parliament, and not its president or autonomous authorities,[17] regardless of who the legal and legitimate president or autonomous authorities were.[18] Because none of the invoked or implied grounds – the protection of nationals abroad as part of the right to self-defense, humanitarian intervention, intervention by invitation – was justifiable, Russia's use of force was an "aggression."[19] They construed the referendum in, and the transfer of, Crimea to have been the result of this invalid external military force[20] rather than genuine internal self-determination by the people of the peninsula, as Russia claimed.[21] They considered the transfer to be, in fact if not in formal designation, an "annexation"[22] and, as such, a grave violation of the norm of territorial integrity. Ever since Russia assumed actual control of it they have regarded Crimea as having the status of a territory under illegal "occupation."[23]

The US and the EU member states led the global legal and institutional opposition to Russia's actions in Ukraine by jointly sponsoring a UNSC draft resolution reaffirming Ukraine's internationally recognized boundaries.[24] Following the sole negative vote by Russia -- which constituted a veto -- they moved the draft to the UN General Assembly (UNGA), which adopted

[17] See Statement of the United States of America, UN Doc. S/PV.7125, 3 March 2014.
[18] Both were disputed. Russia's claim that the transitional government in Kiev was illegal and illegitimate internationally because it came to power by a forcible, US- and EU- sponsored overthrow of a democratically-elected government found practically no support abroad, even as a small group of states denounced the US in the UNGA for interfering in the Ukrainian domestic affairs prior to 22 February. Almost all governments and international organizations took as legitimate the transitional government which took effective control of Ukraine on 22 February. At the same time, Russia was virtually alone in its stance that the new rulers in Simferopol were the legitimate government of the autonomous entity – for the majority of UN members they would not have assumed power had Russia's armed forces not seized control of the peninsula first.
[19] Statement of the United States of America, UN Doc. S/PV.7125, 3 March 2014 and Conclusions on Ukraine, Council of the European Union, 3 March 2014.
[20] See Statement of G7 Leaders on Ukraine, 12 March 2014 and Council Conclusions on Ukraine, Council of the European Union, 20 March 2014.
[21] See Statement by the Russian Ministry of Foreign Affairs Regarding Accusations of Russia's Violation of Its Obligations under the Budapest Memorandum of 5 December 1994, 1 April 2014.
[22] See Statement of the United States of America, UN Doc. S/PV.7138, 15 March 2014; Council Conclusions on Ukraine, Council of the European Union, 17 March 2014; and Statements of Australia, France, Jordan, Lithuania, the Republic of Korea and the United Kingdom, UN Doc. S/PV.7144, 19 March 2014.
[23] Statement of France, UN Doc. S/PV. 7125, 3 March 2014.
[24] UN Doc. S/2014/189, 15 March 2014.

an almost identical text. The preamble of Resolution 68/262 titled "Territorial Integrity of Ukraine"[25] recalled Art. 2 of the UN Charter, which obligates the UN member states to refrain from threatening or using force against the territorial integrity and political independence of any state and to settle any dispute peacefully; UNGA Resolution 2625 (XXV), which stipulates that the territory of a state shall not be the object of forcible acquisition by another state; the Helsinki Final Act (1975), which obligates signatories to respect the borders of other states in Europe; and the Budapest Memorandum (1994), the Treaty of Friendship, Cooperation and Partnership between Russia and Ukraine (1997), and the Alma-Ata Declaration (1991), in which Russia formally acknowledged the former Soviet boundaries of Ukraine, with Crimea included. In the operative section the resolution affirmed the internationally recognized boundaries of Ukraine (Para. 1); declared the March 16 referendum to have no validity and to constitute no basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol (Para. 5); and called upon all states, international organizations and specialized agencies not to recognize any such alteration and to refrain from any action or dealing that might be interpreted as recognizing any such altered status (Para. 6).

Resolution 68/262 was adopted by 100 votes to 11, with 58 abstentions. However, these numbers does not fully capture the extent of agreement with the principles in the US- and EU member states- authored text. During the UNGA discussion on the resolution's draft[26] several delegations - Argentina, Botswana, Ecuador, Jamaica, Saint Vincent and the Grenadines, and Uruguay - explicitly endorsed the resolution's key stipulations but chose abstention for other reasons. Indeed, Argentina, along with fellow abstainer Rwanda, voted for the UNSC draft resolution twelve days earlier. Additionally, China and Algeria abstained, but voiced their general

[25] UN Doc. A/68/262, 27 March 2014.
[26] UN Doc. A/68/PV.80, 27 March 2014.

support for the territorial integrity of Ukraine.[27] In any case, with the sole exception of North Korea, no statement made in the UNGA session on Resolution 68/262 openly supported Russian actions or their justifications.

Strong public rebukes of illegal conduct and widespread support for non-recognition of Crimea's altered status have not led the Russian leadership to retreat from Crimea. In fact, in short order it opted for active backing of pro-Russian separatists in eastern Ukraine's Donetsk and Luhansk regions of Donbass, all the while continuing to insist - as it had done with respect to Crimea only to later admit otherwise - that it had no direct or indirect military involvement in those areas. However, the shared legal position spearheaded by synchronized US and EU efforts has created a long-term diplomatic scheme which defines the dominant international view of Russia's actions in Ukraine and frames policy options -- those pertaining to the conflict as well as its settlement -- for all parties. Among the options facilitated by the determination that Russia committed major violations of international law have been multiple common responses by individual states and international organizations. Without that determination there would not be a policy of non-recognition of Crimea's altered status, an evolving regime of diplomatic and economic countermeasures against Russia - not just by the US or Europeans but also Canada, Australia, New Zealand and Japan – NATO's decision to reevaluate its strategic relations with Russia and to strengthen the defenses of its easternmost members, or the pledges of diplomatic, economic and military assistance to Ukraine.

There is, of course, no guarantee that any of these - or any new future policies - will achieve their desired purpose. There are simply no surefire methods - and that also includes more hawkish and costly methods than applied so far - to induce Russia to alter its conduct in Ukraine (Fabry

[27] China also did so on several occasions in UNSC debates. See Chinese statements in UN Doc. S/PV.7138, 15 March 2014 and UN Doc. S/PV. 7144, 19 March 2014.

2015). Even if large-scale and damaging to the target country, economic sanctions do not have an encouraging track record as an instrument of direct policy change. As for military options, any potential plans have to contend with Russia's considerable tactical advantages in adjoining Donbass and its extension of nuclear defense coverage over Crimea. But it is already significant that Russia has remained internationally isolated in its exploits in, and positions on, Ukraine. Even Belarus and Kazakhstan, two of its closest allies in post-Soviet space and fellow founding members of the newly-founded Eurasian Economic Union, began to distance themselves politically from Moscow. The Belarusian president, who initially appeared to support Russia and whose government voted against UNGA Resolution 68/262, later voiced disapproval of the Russian takeover of Crimea. In January 2015 the parliament of Belarus approved legislation proclaiming that hostile acts by foreign forces, whether wearing the proper uniforms and insignia, would be considered an invasion (Grant 2015: 7).

More broadly and perhaps most significantly so far, widespread international opposition has prevented Russia from consolidating its claim of territorial title to Crimea. Akin to title to property in domestic society, title to territory in international society denotes not actual possession but a socially validated right to possess.[28] If the objective is permanent, stable and secure possession internationally, *de facto* possession is necessarily deficient; rightful possession hinges on external legitimacy in the form of recognition. There have been a number of instances since the end of World War II where non-recognition of an illegal territorial situation eventually led to its reversal on the ground. Not all reversals required additional external countermeasures beyond non-recognition and some were brought about internally. The end of

[28] During the UNSC debate following Russia's incorporation of Crimea, Samantha Power, the US ambassador to the UN, captured the idea thus: "The national and international legal status of Crimea has not changed. A thief can steal property, but that does not confer the right of ownership on the thief." See UN Doc. S/PV.7144, 19 March 2014.

East Timor as a part of Indonesia and the Baltic republics as parts of the Soviet Union came as the result of a domestically produced regime change to which the international opprobrium generated by non-recognition nevertheless helped contribute.

Broader contours of legal contestation in the Ukrainian crisis

That the US and EU ever achieved a united front on key international legal issues associated with Ukraine, which helped shape global opposition to the Russian exploits there is noteworthy for several reasons. For one, there is a long list of disagreements both among EU members and between EU members and the US over the interpretation of legal norms in high-profile cases involving the actual or potential use of force. The US rebuffed the British and French grounds for attacking Egypt in 1956, France called the US intervention in Vietnam "illegal" in 1965, and a number of the member states of the European Community voted for the UNGA resolution deploring the 1983 US military intervention in Grenada -- which, as seen, Russia invoked in the UNSC as a seeming precedent for itself in Ukraine -- as a "flagrant violation of international law."[29] After the end of the Cold War, there were intra-European and transatlantic disputes over the admissibility of recognition of Croatia, Macedonia and, most recently, Palestine. Divisions also plagued several aspects of nuclear non-proliferation talks with Iran, especially the question whether the Non-Proliferation Treaty (1968) granted Iran an automatic right to enrich nuclear material, and of the treatment of detainees in the war on terror, including the legality of the US policy of enhanced interrogation, secret US internment facilities abroad (so-called "black sites"), and detention practices at the Guantanamo Bay military prison. There was a very public, highly charged transatlantic and intra-EU split between what Donald Rumsfeld, US Secretary of Defense

[29] UN Doc. A/RES/38/7, 2 November 1983.

at that time, called “old” and “new” Europe over the legality of the 2003 decision to attack Iraq without an explicit UNSC authorization. The EU failed to come up with a common decision on both the NATO intervention in 1999 and Kosovo’s unilateral independence and recognition in 2008. The former was undertaken without any UNSC authorization and the latter against the will of Serbia, the territorial integrity of which was expressly affirmed by UNSC Resolution 1244 (1999) establishing interim UN administration of the territory in the wake of the NATO intervention. Five EU member states, in fact, vocally opposed the latter.[30] In the *Kosovo* proceedings before the International Court of Justice in 2009-2010 four of them, Spain, Cyprus, Slovakia and Romania, denied the lawfulness of Kosovo’s unilateral independence, which pitted them directly against the US, Britain, France and a number of other EU member legal delegations who argued the exact opposite.

Russian Strategy of Legal Argumentation

Russia, aware of the divisions generated by Kosovo and other cases, deliberately drew upon them to construct its legal case in Ukraine. This was part of a larger Russian strategy to divide its opponents. Even before the total scale and brazenness of the Russian involvement in Ukraine became fully apparent, transatlantic and intra-EU differences had emerged over the proper scale and intensity of possible countermeasures against Russia. Some countries were at least partly concerned by the weight of their economic relations with Russia, while others were driven primarily by apprehensions about what Russia might do next unless it is firmly resisted.

[30] Whatever the merit of their arguments, the EU as a whole had previously opposed unilateral solutions in regards to Kosovo and called for a UNSC endorsement of the final decision on the status of Kosovo (Berg and Molder 2014: 479-480).

The objective of citing past contested cases, as of the overall legal case as such, appeared to be negative rather than positive. Instead of seeking to convert others to the merit of an openly pursued cause, the Russian government put forward claims that "were probably not made in the expectation that they would convince most states of the legality of Russian actions, but to create sufficient uncertainty in the international community at large, especially among EU states, to limit punitive western responses, as well as perhaps gather support among certain traditionally friendly CIS [Commonwealth of Independent States] states (Allison 2014: 1259)." As Christopher Borgen (2015: 255) remarks, "At times the use of legal language is an attempt to give other states a credible excuse not to act, not to enforce legal norms when an argument can be made either that there was no violation or that the situation is too complex to warrant precipitous action." The appeal to past cases was meant to invoke the logic of precedent: If the US and select European countries could, on their own accord and against significant opposition, launch the humanitarian intervention in Yugoslavia and the invasion of Iraq, and then engineer recognition of Kosovo's unilateral secession, even if qualifying it as "unique" and "special" setting no precedent for other situations, then how could Russia not have the same unilateral right to launch its own humanitarian enterprises and to endorse unilateral secessions it considers special?[31]

Weaknesses in Russian Legal Argumentation

None of these appeals proved successful at weakening international opposition. This was partly because of Russia's own past positions. Whatever the rationales behind the controversial US and European military operations in Kosovo or Iraq, the original Russian reactions to them did not suggest that Russia considered the cases to have modified the content of the relevant legal rules on

[31] See, in particular, Address by President of the Russian Federation, annexed to UN Doc. A/68/803-S/2014/202, 18 March 2014.

the use of force. The official Russian statements condemned Kosovo and Iraq – just as Grenada before – as illegal, without any added qualification. What is more, in the years that followed Russia time and again criticized any non-consensual use of military force beyond the UN Charter, which allows it only in self-defense or following UNSC authorization. For example, the Concept of the Foreign Policy of the Russian Federation, approved by President Putin as late as 2013, denounced coercive measures undertaken outside of the framework of the UNSC, including any unilateral humanitarian interventions, and rejected any arbitrary or politically motivated interpretations of international legal norms and principles such as the non-use of force or threat of force, peaceful settlement of international disputes, respect for sovereignty and territorial integrity of states, and the right of peoples to self-determination.[32] A particular case can establish a credible precedent for subsequent comparable cases only when this option is admitted, or at least not opposed, at the time the case is legally argued. It certainly cannot be established years later out of what one had persistently regarded as illegality.[33] To reject an action straightforwardly as illegal is to preclude, not to invite, its future acceptance.[34]

[32] See Concept of the Foreign Policy of the Russian Federation, 12 February 2013, especially Paras. 15 and 31(b).
[33] A past case conjured up by Russia provides an excellent illustration of this point. In the UNSC debate on 13 March 2014 (UN Doc. S/PV.7134), its UN ambassador referred to the case of Mayotte, an island affirmed by the UNGA to be part of the Comoros in 1975, but where France, as the withdrawing colonial power, nevertheless organized a referendum in 1976 in which the residents voted to remain part of France. The suggestion appeared to be that if Russia is accused of being responsible for a dubious referendum, there is a prior validating example of France organizing one. However, in 1976 the Soviet Union rejected the French referendum as illegal. The French ambassador exposed the faulty logic of invoking the Mayotte referendum to legitimize the Crimean one in a subsequent UNSC meeting (UN Doc. S/PV.7138, 15 March 2014): "They are trying so hard to use all available means in Moscow that they do not want to see that in the [Mayotte] example, Russia having taken the opposite position from the one that is taking today, that shaky comparison - even if one accepts it - proves that Russia was wrong in 1976 or it is wrong now, in 2014. It must choose."
[34] To give a pertinent example, while in the past a number of states invoked a right to military intervention to protect their nationals residing abroad, this assertion always met with considerable opposition when the military operation entailed more than the extraction of nationals under immediate threat (as it did, for instance, in Grenada in 1983). Consequently, no such right beyond this very narrow exception can be said to exist in international law (Dinstein 2005: 231-234).

Only in its vociferous rejection of an independent Kosovo without Serbia's consent was there ever any indication that Russia may consider the case a precedent for other cases (Fabry 2012: 667-668). However, precedents, just like international norms themselves, are a social phenomenon; they take hold not by individual proclamation but by collective acknowledgment. When Russia invoked the Kosovo example from February 2008 to validate its recognition of South Ossetia and Abkhazia in August 2008, only four UN members were persuaded to follow the move. With the exception of Venezuela and Nicaragua, no country that opposed the unilateral secession of Kosovo endorsed the unilateral secessions of South Ossetia and Abkhazia. The five EU dissenters belonged fully to this camp. For these EU members, as well as for nearly all other countries opposing or not backing Kosovo's independence, legally dubious recognition in one case did not constitute a license for extending legally dubious recognition in other cases. All the EU member states, along with the US, condemned recognition of the two breakaway Georgian territories.

It should be added that to the extent that Russia made principled arguments on secession and statehood in the wake of Kosovo, South Ossetia and Abkhazia, its subsequent actions in Ukraine were at odds with them. During the *Kosovo* proceedings before the International Court of Justice in 2009-2010, Russia - presumably seeking to reinforce its case for recognition of the two Georgian territories - argued that sub-state groups cannot break away unilaterally from their parent states by invoking the right to self-determination except in the conditions justifying remedial secession. According to its written submission to the court, these conditions should be "limited to truly extreme circumstances, such as an outright armed attack by the parent state, threatening the very existence of people in question. Otherwise all efforts should be taken in order to settle the tension between the parent state and the ethnic community concerned within the

framework of the existence state."[35] Even with its many outlandish factual assertions regarding the events in Ukraine after the fall of President Yanukovich, Russia did not go as far as to allege that the Kiev government engaged in "an outright armed attack" in Crimea "threatening the very existence of [its] people." Thus by Russia's own publicly articulated standards, the conditions for a permissible unilateral secession of Crimea were not met.[36]

This analysis makes clear that Russia had already applied Crimea-like arguments to its actions in Georgia. Already then, there was virtually no international support for territorial changes that followed Russia's use of force, even though the Georgian situation actually contained ambiguities working in Russia's favor. Since Georgia was generally seen, including by an EU fact-finding mission, to have initiated armed hostilities, hitting in the process the Russian troops in South Ossetia, the Russian claim of self-defense was not groundless;[37] the Russian troops in South Ossetia and Abkhazia had been deployed as part of internationally-legitimized peacekeeping mandates; and South Ossetia and Abkhazia had been sites of long-standing secessionist conflicts

[35] Written Statement of the Russian Federation of 17 April 2009, Para. 88. Russia originally used this "human rights" language to describe Georgia's actions against South Ossetia and Abkhazia when it recognized the two territories in 2008. It should be pointed out that this claim is far broader than anything made in the supposed Kosovo precedent. According to the US-led coalition that spearheaded recognition of Kosovo, the human rights abuses by the parent state were, along with the particular context of the disintegration of Yugoslavia and extended UN administration, what made Kosovo's unilateral secession unique and what justified recognition only in that case. In contrast, Russia came to embrace remedial secession as such: the notion, purportedly supported by a passage in UNGA Resolution 2625 (1970), that the right to self-determination permits, as a remedy of last resort, unilateral secession of a sub-state entity when its parent state engages in extreme oppression of that entity. The right to remedial secession had not been previously invoked by Russia or any other country in explicit terms when recognizing a new state.

[36] It is also important to note that the ICJ never concluded in the *Kosovo* case that unilateral secession is legal, as claimed in the Crimean declaration of independence or President Putin's address of 18 March 2014. The court only ruled that unilateral declarations of independence, as public acts, do not as such contravene international law. Incidentally, the court explicitly denied their legality when "connected with the unlawful use of force or other egregious violations of norms of general international law." See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, Para. 81. It is precisely the unlawful use of force that Russia has been widely deemed to have engaged in Ukraine.

[37] Russia's military action against Georgia was justified primarily as self-defense but also partially as a humanitarian mission to protect Russian citizens and other civilians suffering "genocide" in South Ossetia. While the US and EU rejected that anything approaching genocide took place there, it did not deny that Russia could use force as a response to an armed attack on its soldiers. It only condemned that response as highly disproportionate.

preceding even the independent Georgian state, which never managed to establish effective control over them. No such ambiguities existed in Crimea or Donbass prior to the Russian involvement in late February 2014: There had been no internationalized disputes, breakaway *de facto* states or even genuine indigenous secessionist movements in the two regions, and Russian citizens or interests, including the naval base in Sevastopol, had never been physically threatened, much less harmed, from within their territory.

EU-US unity in the Ukrainian crisis in historical perspective

If the outside world had been largely unconvinced by Russia's legal rhetoric in Georgia, then it had no real basis to be convinced by its Ukrainian variant. Still, it is important to be aware that the internal cohesiveness of the EU and the transatlantic accord on key legal questions in the Ukrainian case are part of a broader historical pattern. They are not simply a realist reaction to Russia's threat to the eastern boundaries of the EU and NATO. That threat cannot, of course, be denied: perhaps most importantly, the three Baltic republics, all of which contain ethnic Russian minorities, are directly imperiled by Russia's assertion of a virtually untrammeled right to protect its "compatriots" abroad. However, in light of the historical experience with Germany's abuses of its neighbors with ethnic German populations prior to World War II, the US and Europe, along with the rest of the world, have since 1945 consistently resisted the idea that a state can unilaterally employ military force to safeguard its ethnic kin on foreign soil. While there had been no clear case challenging this consensus, the various European minority protection treaties and institutional mechanisms under the CE or OSCE are premised on the renunciation of the idea. No less importantly, since the end of World War II the US and the member states of the EU and its institutional precursors have consistently opposed boundary modifications brought about by

interstate force.[38] This was not so only when such changes were undertaken by adversaries, as when Iraq invaded and annexed Kuwaiti (1990) or when the Federal Republic of Yugoslavia was sanctioned for seeking to dismember Bosnia and Herzegovina by supporting the Bosnian Serb separatist insurgency (1992-1995). The US and European countries also opposed such changes when these were carried out by friendly countries, including formal and informal allies: Indonesia's annexation of East Timor (1975), Israeli annexation of East Jerusalem (1980) and the Golan Heights (1981), Argentine's 'recovery' of the Falkland Islands (1982), the declaration of Northern Cyprus independence (1983) following Turkey's invasion and occupation of a part of the Republic of Cyprus, and Morocco's annexation of Western Sahara (1976) and seizure of the Parsley Island (2002). In one instance, that of Israel in 1967, most states in the transatlantic alliance actually accepted Israel's military action and occupation that preceded the territorial alteration as warranted, and in another, that of Northern Cyprus, they were ambivalent about Turkey's initial use of force. But in all these cases the US and European countries unanimously rejected the validity of forcible territorial change. What is more, they followed that rejection by various diplomatic, economic and military efforts to overturn it, upholding the policy of non-recognition whenever the efforts did not lead to the reversal on the ground.[39]

Given this past, the US-EU legal unity on Crimea and eastern Ukraine is not all that striking. Indeed, it would have been disconcerting if any country in the transatlantic alliance considered Russia's use of force in Ukraine to be anything but wholly indefensible and the purported independent republics being declared on its territory to be anything but manifest

[38] One important case, that of non-recognition of the Soviet conquest of the Baltic republics, actually precedes 1945.
[39] One exception to this - a narrow exception specific to the process of decolonization - was India's forcible absorption of Goa (1961). While the US and European countries condemned India's use of force against Portugal, they eventually acquiesced to its fruits. But the decolonization consensus envisioned the transfer of tiny colonial enclaves abutting newly independent countries to those countries and Portugal was seen as defying the general international agreement that it does not have valid title to Goa.

products of that force, irrespective of any genuine anti-Kiev grievances or pro-Moscow sentiments that might have existed within them. All of this suggests that, despite all their legal disagreements in different cases, the US and the EU members are able to agree on the first-order norms of international conduct when these are challenged in specific instances. Despite various concealments and spins about human rights and self-determination of Russian nationals, minority and speakers, Russia's *de facto* annexation of Crimea and its central role in fomenting and sustaining the subsequent armed separatist insurrection in Donbass, constitute such a challenge. The prohibitions of unilateral interstate force on behalf of ethnic kin and of forcible territorial acquisition between states are universally acknowledged as fundamental pillars of post-1945 international law. As demonstrated by references in the preamble of UNGA Resolution A/68/262, they are captured in multiple global and regional documents, including legally binding treaties; in fact, until recently Russia (and before it the Soviet Union) had been their resolute proponent.

That the US and the EU repudiated Russia's actions in Ukraine should ultimately be no surprise. Even the most trenchant critics of transatlantic relations and the role of Europe in world politics such as Robert Kagan (2003: 41-42) acknowledge that the US and EU share the same basic values and vision of a global order. Those basic values are undoubtedly incompatible with Russia's conduct in Ukraine. International liberal thought has disparaged territorial conquest since John Locke in the late 17th century. International relations practice witnessed unsuccessful attempts by constitutional states in the Americas to outlaw it in the Western Hemisphere in the late 19th century and worldwide in the early 20th century. Its international legal prohibition was globally codified in the League of Nations Covenant following World War I, but that prohibition was challenged at enormous costs in the 1930s and early 1940s. In the aftermath of World War II, after a renewed commitment among the great powers, the number of attempts at forcible

territorial aggrandizement was dramatically reduced and none resulted in a recognized change of territorial title. The opposition to the use of force on behalf of ethnic kin does not have as long a history, but is not less decisive. The US and the EU would go against a great deal of historical grain if it would suddenly tolerate in Ukraine what it did not tolerate in other cases.

The fact that the US and EU, together with other liberal democracies, share the same basic values and vision of a global order does not preclude them from having occasional disagreements over international legal interpretation. This is not necessarily because of opposing interests. Individual norms are typically worded broadly and their relationship to other norms is rarely well-defined. Their general character and fuzzy boundaries make their precise content often unclear or indeterminate in particular instances: They have to be interpreted by the agents invoking them. The normative and factual complexity of many actual situations in world politics allows for disparate interpretations that can be motivated as much by different good-faith assessments of those situations as by conflicting interests embroiled in them. It is, therefore, unlikely that legal disagreements will cease to occur in the transatlantic alliance. But it is equally important to appreciate that the alliance is capable of robust and lasting agreement and that the US and the EU are adept at synchronizing their diplomatic efforts in the service of that agreement. In Ukraine, the coordinated US-EU diplomacy has prevented the Russian assertions with respect to the right of protecting "compatriots," the right of peoples to self-determination, and state recognition from taking hold as valid global precedents and thus from modifying the content of relevant international legal norms. Perhaps most significantly, the US- and EU-led policy of non-recognition has denied Russia the legitimization of its claimed title to Crimea and, in so doing, reinforced rather than weakened the norm of territorial integrity banning forcible territorial revisionism in interstate relations.

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