Ukraine, International Law, and the Political Economy of Self-Determination

By Umut Özsu[*]

Abstract

This article attempts to destabilize the assumption that self-determination can be restricted to a "purely legal" analysis of the sort to which most international legal scholars have conventionally confined themselves. It does so by focusing upon the conditions under which the legal rhetoric of collective self-determination came to be mobilized during the course of Russia's incursion into and subsequent annexation of Crimea in early 2014, as well as its ongoing deployment in the context of Russia's political, military, and financial support for self-declared "people's republics" in Donetsk and Luhansk. After briefly examining legal arguments in support of and in opposition to Russia's actions, the article argues that the Ukraine crisis problematizes the traditional reluctance of international lawyers to engage with the complex, and often counterintuitive, articulations of self-determination offered by participants in armed conflict. Recourse to self-determination cannot be understood without appreciating the concrete politico-economic pressures in response to which states are created and recreated. The alternately "lofty" and "cynical" formulations of self-determination that have characterized the ongoing struggle in and over Ukraine can only be understood in light of protracted competition between rival class projects that generate significantly different visions of world order. This compels us to confront the class dimensions of the concept of collective self-determination rather than continuing to conceive it as a purely national, or ethno-national, project of recognition or emancipation.

A. Introduction

Many scholars consider international law to be at least partly agnostic with respect to the complex processes whereby states are formed, transformed, and dissolved. Frequently characterized as "factual" or "political," many such processes have classically been

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understood to exist outside the scope of international legal doctrine *sensu stricto*, this being regarded first and foremost as a class of rules and principles that govern the conduct of formally constituted and recognized states and other international persons. As a result, international law tends to offer comparatively little guidance in situations of civil strife or even outright civil war in which rival groups engage in a struggle for control over state institutions and governmental legitimacy, particularly when such struggle is accompanied by serious and sustained secessionist claims. Rather than prescribing or proscribing a particular outcome, international law—as conventionally understood—counsels caution and restraint, encouraging the extension of de jure recognition only after a given entity is deemed to have satisfied the conditions of statehood articulated most famously, though not without controversy, in the 1933 Montevideo Convention: A defined territory, a permanent population, a government, and the capacity to enter into relations with other states.[1] Whatever informal relations may be established for pragmatic or prudential reasons with this or that participant in the conflict, it is only with the fulfillment of these criteria by one or another participant that a state has traditionally been thought to be constituted and to warrant formal recognition as such. Hence the crucial importance of what has conventionally been dubbed the doctrine of "effective control": until such time as a party to the conflict has demonstrated through internal processes its actual authority over the relevant territory, population, and governmental institutions, it cannot be said to wield the kind of power requisite for recognition as the government of a state.[2]

Not surprisingly, the idea of self-determination has always generated considerable difficulties in this regard. On the one hand, in order to have any meaning at all, the concept of self-determination must apply, indirectly if not necessarily directly, to the processes whereby states are made, remade, and unmade. On the other hand, such application must be strictly regulated, the alternative generally being cast as a conceptually murky and normatively unsustainable extension of the concept of self-determination to all manner of disparate and structurally unrelated grievances and aspirations. In the absence of such strict regulation, typified by the 1970 Friendly Relations Declaration's so-called "safeguard clause,"[3] the UN Charter's prioritization of territorial sovereignty—its oft-derided "state-

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[1] Convention on Rights and Duties of States Adopted by the Seventh International Conference of American States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19.

[2] For a thorough discussion, *see* DAVID RAIČ, STATEHOOD AND THE LAW OF SELF-DETERMINATION 49–88 (2002). For an attempt to rethink the idea of "effective control" in light of recent developments in Africa and Latin America, *see* Brad R. Roth, *Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine*, 11 MELB. J. INT'L L. 393 (2010). *See also* BRAD R. ROTH, SOVEREIGN EQUALITY AND MORAL DISAGREEMENT: PREMISES OF A PLURALIST INTERNATIONAL LEGAL ORDER 169–220 (2011).

[3] The Declaration states:

> Nothing in the foregoing paragraphs [about the principle of equal rights and self-determination of peoples] shall be construed as authorizing or encouraging any action which would dismember or

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centrism"—would be undermined, perhaps fatally. Consequently, since the end of the Cold War, most international lawyers have tended to cast self-determination primarily as a thin right to recognition within an existing state ("internal self-determination"), and only secondarily and derivatively as an extraordinary right of remedial secession or outright independence ("external self-determination").[4] During much of the Cold War, many states—particularly those identifying as socialist or non-aligned—regarded decolonization through the exercise of the right to external self-determination as the core of self-determination more generally. Today, external self-determination is typically understood to be of a highly exceptional character, limited on most accounts to non-self-governing territories and "peoples subject to alien subjugation, domination, and exploitation."[5]

> impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.

Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, principle 5, G.A. Res. 2625 (XXV), U.N. Doc. A/RES/25/2625 (XXV) (Oct. 24, 1970). Note that this "safeguard clause" was reaffirmed in the 1993 Vienna Declaration and Programme of Action. *See* UN World Conference on Human Rights, Vienna Declaration and Programme of Action, 32 I.L.M. 1661, 1665 (June 25, 1993). This is arguably the most famous such clause, but it is by no means exceptional. On the contrary, as James Summers has noted, "[t]he normal response in international instruments has been for an article on self-determination to be accompanied with provisions on the territorial integrity of states." JAMES SUMMERS, PEOPLES AND INTERNATIONAL LAW: HOW NATIONALISM AND SELF-DETERMINATION SHAPE A CONTEMPORARY LAW OF NATIONS 332 (2007).

[4] The Supreme Court of Canada's observations in its influential *Quebec Secession Reference* advisory opinion provide a tidy illustration:

> The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through *internal* self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to *external* self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances.

See Reference re Secession of Quebec, [1998] 2 S.C.R. 217, 282, para. 126 (Can.). This claim is sometimes framed as one relating to the current (but not necessarily future) state of the relevant law. *See, e.g.*, SIMONE F. VAN DEN DRIEST, REMEDIAL SECESSION: A RIGHT TO EXTERNAL SELF-DETERMINATION AS A REMEDY TO SERIOUS INJUSTICES? 310–11 (2013) ("*At present*, the right to self-determination does not allow for unilateral secession, but rather focuses on its internal dimension and is limited by the traditional core principles of international law, such as sovereignty and territorial integrity of the State.") (emphasis added).

[5] The International Court of Justice has made this point on a number of occasions, most recently in its advisory opinions on Israel's construction of the West Bank security wall and Kosovo's unilateral declaration of independence. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,

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Obscured by this standard and rather opaque characterization is the complex role played by the rhetoric of self-determination in the messy, multifaceted processes whereby states are rent asunder or cobbled together with a view to generating new distributions of sovereign authority, particularly outside the context of decolonization foregrounded in the General Assembly resolutions that were adopted during the height of the idea's resonance in Asia and Africa.[6] To grapple with self-determination's shifting and multifarious articulations in the hands of different claimants to state power would, it is often thought, stretch the concept too far, extending it to phenomena to which even enthusiastic advocates have traditionally been reluctant to deem it applicable.

This reluctance to confront the discursive complexity of self-determination has many causes—and even more consequences. However, a significant portion of it stems from the default positivism in which so much international legal doctrine continues to be rooted. After all, if the task of "legal science"—as conceived by most classical legal positivists—is to explain the operation of an integrated order of valid legal rules, then understanding the forces and relations behind the emergence, transformation, and disintegration of such a system is an endeavor that generally falls beyond the ambit of the jurist's vocation and expertise. For those who espouse such a view, the attempt to shed light upon the normative architecture of an established legal order is to be strictly distinguished from the attempt to elucidate the powers and dynamics through which it first arises: the former is a properly juridical exercise, part and parcel of rule-based, value-neutral, thoroughly objective legal analysis, while the latter is an activity best left to historians, sociologists, political theorists, and others. Thus, for Hans Kelsen, "juristic theory," a specifically normative mode of jurisprudence that examines legal order as a "system of valid norms," is to be distinguished sharply from the "sociological or realistic theory of law," according to which investigation of recurring patterns of behavior can yield insight into the rules that structure everyday life.[7] Similarly, for H. L. A. Hart, legal theory must necessarily adopt the "internal point of view," examining the nature of legal obligation so as to illuminate the binding force of legal rules, rather than the "external point of view," confined as it is to tracking empirically verifiable regularities concerning the social efficacy of such rules.[8]

Advisory Opinion, 2004 I.C.J. 136, 171-72, para. 88 (July 9); Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, 436, para. 79 (July 22).

[6] *See* G.A. Res. 1514 (XV), U.N. Doc. A/RES/1514 (XV) (Dec. 14, 1960); *see also* G.A. Res. 1541 (XV), U.N. Doc. A/RES/1541 (XV) (Dec. 15, 1960). For recent reconsideration of the context, *see* SUNDHYA PAHUJA, DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH, AND THE POLITICS OF UNIVERSALITY 80–86 (2011). *See also* MATTHEW CRAVEN, THE DECOLONIZATION OF INTERNATIONAL LAW: STATE SUCCESSION AND THE LAW OF TREATIES (2007).

[7] HANS KELSEN, GENERAL THEORY OF LAW AND STATE 162 (Anders Wedberg trans., 1945).

[8] H. L. A. HART, THE CONCEPT OF LAW 89–90 (2d ed. 1994).

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Such views have long exerted influence over international legal scholarship on questions of self-determination. In his monumental study of statehood, James Crawford, for instance, argued that while unilateral secession has traditionally not "involve[d] the exercise of any right conferred by international law," such law has been "prepared to acknowledge political realities once the independence of a seceding entity was firmly established and in relation to the territory effectively controlled by it."[9] In other words, international law has little to say about the nebulous, multifactorial processes through which new polities are formed, particularly outside the colonial context. But this new state of affairs—or set of "political realities"—may attract de jure recognition once the formal criteria of statehood are deemed to have been satisfied.[10] On a rote positivist account, rendering self-determination in broad enough terms to capture the different ways in which it is invoked under conditions of anarchy or civil war would expose the concept to a variety of "political" and "economic" concerns that have precious little to do with the character of law and legal reasoning. The ongoing influence of traditional legal positivism is a significant reason for this, though not, of course, the only such reason.[11]

This article attempts to destabilize the assumption that self-determination can be restricted to a "purely legal" analysis of the sort to which many international legal scholars have conventionally confined themselves. It does so by focusing upon the conditions under which the legal rhetoric of self-determination came to be mobilized during the course of Russia's incursion into and subsequent annexation of Crimea in early 2014, as well as its ongoing deployment in the context of Russia's political, military, and financial support for self-declared "people's republics" in Donetsk and Luhansk. After briefly examining the legal arguments that have been floated in support of and opposition to Russia's actions, I argue that the Ukraine crisis—the culmination of a broad trend over the past two decades to move away from the UN Charter's prioritization of territorial sovereignty and toward what

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[9] JAMES R. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 388–89 (2d ed. 2006).

[10] It bears noting that Crawford maintains this positivist stance despite his otherwise highly nuanced treatment of self-determination. *See* James Crawford, *The Right of Self-Determination in International Law: Its Development and Future*, *in* PEOPLES' RIGHTS 7, 38 (Philip Alston ed., 2001) ("The problem with self-determination, outside the colonial context, is this: while authoritative sources speak to its existence, it is an intensely contested concept in relation to virtually every case where it is invoked").

[11] Hence, I do not mean to suggest that *all* international lawyers with an interest in issues of self-determination warrant characterization as legal positivists, and that such characterization would explain their generally tepid engagement with the concept. My claim is simply that such positivism tends to inform the way in which international lawyers typically frame the concept's content and scope of application. For notable examples of non-positivistic international legal scholars who grapple with self-determination's complex articulations, *see* KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW (2002); Martti Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, 43 INT'L & COMP. L.Q. 241 (1994); Nathaniel Berman, *Sovereignty in Abeyance: Self-Determination and International Law*, 7 WISC. INT'L L. J. 51 (1988); Gerry Simpson, *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age*, 32 STAN. J. INT'L L. 255 (1996). I differ from these and other scholars in my explicit concern for questions of political economy.

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many regard as a new species of liberal interventionism[12]—problematizes the traditional reluctance of international lawyers to engage with the different ways in which self-determination is imagined in actual practice. Central to their self-identification as jurists with a particular set of concerns and competencies, this reluctance has prevented most international lawyers from taking seriously the complex, often counterintuitive articulations of self-determination that are offered by participants in armed conflict, with the predictable result that the real social power of self-determination discourse—its ability to formalize radically different class projects—is thereby mystified and obfuscated. Recourse to self-determination cannot, I argue, be understood without appreciating the concrete politico-economic pressures in response to which states are created and recreated. The alternately "lofty" and "cynical" formulations of self-determination that have characterized the ongoing struggle in and over Ukraine can only be understood in light of protracted competition between rival class projects that generate significantly different visions of world order. This compels us to confront the class dimensions of the concept of self-determination—long recognized by Marxist historians and sociologists, and also signalled to some degree (in the form of the idea of "economic self-determination") by socialist and non-aligned international lawyers during the Cold War[13]—rather than

[12] Classic studies of this development (and of its various ramifications) include Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AMER. J. INT'L L. 46 (1992); BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW (1999); DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad R. Roth eds., 2000). For recent reconsideration, *see, e.g.*, STEVEN WHEATLEY, THE DEMOCRATIC LEGITIMACY OF INTERNATIONAL LAW (2010); Jean d'Aspremont, *1989–2010: The Rise and Fall of Democratic Governance in International Law*, *in* SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW: VOLUME 3, at 61 (James Crawford & Sarah Nouwen eds., 2012); Susan Marks, *What Has Become of the Emerging Right to Democratic Governance?*, 22 EUR. J. INT'L L. 507 (2011); RUSSELL BUCHAN, INTERNATIONAL LAW AND THE CONSTRUCTION OF THE LIBERAL PEACE (2013). Nico Krisch has raised this point explicitly in the context of recent developments in Ukraine. *See* Nico Krisch, *Crimea and the Limits of International Law*, EJIL TALK! (Mar. 10, 2014), http://www.ejiltalk.org/crimea-and-the-limits-of-international-law/ (arguing that:

> [t]he more formal classical rules [on the use of force and self-determination] have come under pressure by arguments from democracy (recognizing the continued relevance of a democratic government in exile), from rights (of individuals threatened by a crisis, calling for protection and intervention) and from liberal conceptions of political choice (the right to secede as an exercise of self-determination)).

[13] For what arguably remains the sharpest Marxist historical examination of self-determination claims, *see* E. J. HOBSBAWM, NATIONS AND NATIONALISM SINCE 1870: PROGRAMME, MYTH, REALITY (2nd ed. 1992). For discussion of "economic self-determination" (including ideas about sovereignty over and free utilization of natural resources) in the context of the International Covenant on Economic, Social, and Cultural Rights, *see* BEN SAUL, DAVID KINLEY & JACQUELINE MOWBRAY, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES, AND MATERIALS 12–132 (2014). For broader discussion of self-determination's relation to the principle of permanent sovereignty over natural resources, *see* NICO SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES 49–70 (1997).

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continuing to conceive it solely as a national (or ethno-national) project of recognition or emancipation.[14]

B. Aggression and Intervention

Self-determination claims are rarely advanced in a vacuum. In nearly all cases, they are bundled up with a large number of different assertions and assumptions about the nature and authority of international law. The Ukraine conflict has been no exception in this regard. In addition to a variety of specific claims about the content and scope of application of self-determination, the conflict has also produced a variety of broad legal arguments. While most such arguments relate to self-determination only indirectly, they establish much of the conceptual framework for claims oriented specifically towards self-determination.

Considered from the standpoint of established United Nations law, the legal consequences of Russia's ongoing violation of Ukraine's sovereignty, particularly in Crimea,[15] have widely been regarded as fairly straightforward. First and foremost, Russia's unilateral military intervention into and eventual annexation of Crimea has typically and justifiably been understood to constitute an act of aggression. As such, it has been condemned as a flagrant violation of the prohibition on non-defensive use of force, enshrined in classical form in Articles 2(4) and 51 of the UN Charter.[16] Those who defend Russia's invasion of Crimea sometimes attempt to develop arguments on the basis of the Article 51 exception for individual or collective self-defense. The obvious and insurmountable difficulty with these arguments is that it is impossible to adduce credible evidence that Russia was subject to an armed attack prior to its invasion of Crimea. Similarly, while intervention to protect nationals abroad has sometimes been entertained as a basis for a more expansive and charitable reading of Article 51, and while the upper house of the Federal Assembly of Russia appeared to rely upon this approach when it authorized the use of force in Ukraine

[14] Although it goes without saying that such nationalism frequently lies at the root of many self-determination claims.

[15] For the purposes of this article, I include the city of Sevastopol in my discussion of Crimea. Officially a "city with special status," and therefore distinct from Crimea under Ukrainian constitutional and administrative law, Sevastopol hosts Russia's Black Sea Fleet and has traditionally been accorded great material and symbolic importance by many Russians, not least because of its crucial role on the eastern front during the Second World War.

[16] As is well-known, Article 2(4) prohibits the threat or use of force against any state's territorial integrity and political independence, while Article 51 allows for an important exception to this prohibition in cases of individual or collective self-defense on the part of UN member states: If any such state is subject to armed attack, it may exercise its right of self-defense even before the Security Council, acting under Chapter VII of the Charter, has taken actions to maintain international peace and security. Charter of the United Nations with the Statute of the International Court of Justice Annexed Thereto arts. 2(4), 51 1 U.N.T.S. XVI (June 26, 1945).

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on 1 March 2014,[17] it has not always been easy to find concrete evidence that Russian nationals in Ukraine have been subject to systemic and pervasive attacks of the kind required to trigger the application of any such rule.[18]

Russia and its supporters have also advanced, or at least suggested, a number of supplementary arguments. Some, for instance, have argued that Russia has been engaged in an act of humanitarian intervention. Others contend, somewhat more plausibly, that Russia was "invited" to intervene, either by Viktor Yanukovych, ousted as Ukraine's president in February 2014, or Sergey Aksyonov, "elected" Crimea's prime minister through forcible means later the same month.[19] Neither of these two ancillary arguments is persuasive.

For one thing, despite pervasive claims to the contrary since the end of the Cold War—particularly since the "illegal but legitimate" NATO bombing campaign during the Kosovo War[20]—there is no legal basis for undertaking humanitarian intervention without express authorization from the Security Council, however "legitimate" or even necessary the relevant use of force may appear to be. Even on a charitable account of the relevant doctrine, the legality of unilateral humanitarian intervention—and of the "responsibility to protect," which is widely touted as a more palatable successor to such intervention—is extremely tenuous. No multilateral treaty governing humanitarian intervention or the "responsibility to protect" is currently available, and neither finds significant support in customary international law, the requisite combination of *opinio juris* and established

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[17] *Putin's Letter on Use of Russian Army in Ukraine Goes to Upper House*, TASS RUSSIAN NEWS AGENCY (Mar. 1, 2014), http://itar-tass.com/en/russia/721586; *Russian Parliament Approves Troop Deployment in Ukraine*, BBC NEWS (Mar. 1, 2014), http://www.bbc.com/news/world-europe-26400035.

[18] *See, e.g.*, UN Office of the High Commissioner for Human Rights, Ukraine: Misinformation, Propaganda and Incitement to Hatred Need to be Urgently Countered—UN Human Rights Report (Apr. 15, 2014), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14511&LangID=E (stating that "while there were some attacks against the ethnic Russian community, these were neither systematic nor widespread"). *But see* Stephen F. Cohen, *The Silence of American Hawks About Kiev's Atrocities*, THE NATION (June 30, 2014), http://www.thenation.com/article/180466/silence-american-hawks-about-kievs-atrocities. As Boris Mamlyuk notes in his contribution to this issue, Russian officials and legal advisors currently appear to be attempting to develop new doctrinal tools to protect nationals and "compatriots" abroad. *See* Boris N. Mamlyuk, *The Ukraine Crisis, Cold War II, and International Law*, 16 GERMAN L.J. 479 (2015).

[19] Significantly, Vitaly Churkin, Russia's permanent representative to the UN, appeared to make both claims before the Security Council in early March 2014. *See* S.C. 7124th mtg., U.N. Doc. S/PV.7124 (Mar. 1, 2014); S.C. 7125th mtg.; U.N. Doc. S/PV.7125 (Mar. 3, 2014).

[20] *See* the Independent International Commission on Kosovo's influential *ex post facto* assessment of the intervention: INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 163–98 (2000).

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patterns of state practice being lacking.[21] To put the matter simply, neither Russia nor any other state is capable of intervening in Ukraine absent Security Council authorization, at least not without falling foul of the post-1945 framework for the use of force.

For another thing, a state can justify its intervention on the basis of an invitation if and only if relevant governmental authorities in the state that is subject to intervention are responsible for issuing the invitation. By the third week of March 2014, when Moscow signed and ratified a treaty formalizing Crimea's immediate admission to the Russian Federation,[22] Yanukovych no longer wielded authority over government institutions in Kiev: the Ukrainian parliament had voted to remove him from office on 22 February, and he appears to have abandoned the city, eventually to find refuge in Moscow, on the preceding day. Thus, if the standard of "effective control," though offensive in its deference to "might makes right," remains key to assessing the validity of an invitation to intervene under conditions of secessionist armed conflict, as most international lawyers continue to believe,[23] Ukraine cannot be said to have requested or provided its consent to any intervention on the part of Russia.[24] Naturally, this is even more pertinent in the case

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[21] The notion of a "responsibility to protect" was first articulated in the final report of an international commission sponsored by the Canadian federal government. *See* INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (2001). The notion has received only limited support thus far, and even then only through non-binding resolutions and related statements. *See* G.A. Res. 60/1, paras. 138–39, U.N. Doc. A/RES/60/1 (Oct. 24, 2005); S.C. Res. 1674, para. 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006); UN Secretary-General Ban Ki-moon, *Address at Event on "Responsible Sovereignty: International Cooperation for a Changed World"* (July 15, 2008), http://www.un.org/sg/selected-speeches/statement_full.asp?statID=1631.

[22] The legal status of the agreement has been questioned widely, with some going so far as to regard it as void *ab initio* on the grounds that it violates a *jus cogens* norm of territorial integrity. *See, e.g.*, Gregory H. Fox, *The Russia-Crimea Treaty*, OPINIO JURIS (Mar. 20, 2014), http://opiniojuris.org/2014/03/20/guest-post-russia-crimea-treaty/.

[23] *See, e.g.*, ROTH, *supra* note 12, at 185–88; David Wippman, *Pro-Democratic Intervention by Invitation*, *in* Fox & Roth, *supra* note 12, at 293, 297–99; Georg Nolte, *Secession and External Intervention*, *in* SECESSION: INTERNATIONAL LAW PERSPECTIVES 65, 79–80 (Marcelo G. Kohen ed., 2006); OLIVIER CORTEN, THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW 277-87 (2010). *Cf.* Crawford, *supra* note 10, at 40–47; CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 99 (3d ed. 2008). For exaggerated criticisms that elide the continued centrality of the UN Charter's prioritization of territorial sovereignty, *see* Christopher J. Le Mon, *Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested*, 35 N.Y.U. J. INT'L L. & POL. 741, 743, 745 (2003) (arguing, *inter alia*, that "effective control" is a "dated principle" that "does not permit extensive flexibility"); Gregory H. Fox, *Intervention by Invitation*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 816, 835 (Marc Weller ed., 2015) (insisting, rather exaggeratedly, that the UN is "increasingly unlikely to prefer effective control to democratic legitimacy").

[24] This was precisely one of the points that Ukraine made before the Security Council. *See Letter Dated 4 March 2014 from the Permanent Representative of Ukraine to the United Nations Addressed to the President of the Security Council*, U.N. Doc. S/2014/152 (Mar. 4, 2014), http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2014/152.

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of Crimea, since Aksyonov, acting in his capacity as the head of a constituent part of Ukraine, has never been empowered to issue a sufficiently authoritative invitation.[25]

C. Class and Competition: Self-Determination's Multiple Imaginaries

These legal arguments are vitally important. Were it not for the fact that Russia and fellow "BRIC" state China are permanent members of the Security Council, with the power to veto prospective resolutions, that body would almost certainly have denounced Russia's actions in Ukraine as illegal. That said, what is nearly always elided in discussions about the ongoing conflict in Ukraine are the different conceptions of self-determination that have been deployed by the various concerned parties. Indeed, if it is accurate to speak of a "crisis" here,[26] it is to no small extent because recent developments in Ukraine have laid bare a much deeper fracture in the international law of self-determination and the broader understanding of international legal order instituted in 1945. In essence, the struggle in and over Ukraine is a powerful and far-reaching illustration of the fact that self-determination does not find expression in a single determinate logic, and that it has always served as a means of articulating and mobilizing enthusiasm for competing politico-economic projects, often with radically incommensurable assumptions, objectives, and implications.

For the Western-supported government of Ukrainian President Petro Poroshenko and Prime Minister Arseniy Yatsenyuk, Russia is a fundamentally neo-imperial entity, determined to leverage its pivotal role in the global oil and gas trade into a program of territorial expansion and increased geopolitical influence, not least by reinforcing corrupt and despotic administrations of the sort typified by Yanukovych's various caretaker governments. The unstable coalition currently in control of Kiev counts in its ranks a large number of neo-liberals and Ukrainian ultra-nationalists, many of whom have consistently opposed the kind of "Eurasianism" and revived pan-Slavism that remains commonplace among Russian foreign policy circles.[27] Bankrolling much of their platform is a group of

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[25] *See* Military and Paramilitary Activities in and Against Nicaragua (Merits) (Nicaragua v. U.S.A.), 1986 I.C.J. 14, 126, para. 246 (June 27) ("[I]t is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition.").

[26] The question of whether Ukraine is a "crisis" is a very real one, as there is much to be said for the view that international responses to developments in Ukraine have *confirmed*—not *undermined*—the conventional prohibitions against unilateral military intervention and non-defensive use of force. Nevertheless, the fact that Crimea has effectively been integrated into Russia and that much of Ukraine has been transformed into the site of a Cold War-style proxy war testifies to the scale of its geopolitical repercussions and the scope of its precedential implications.

[27] For the rise of the right in post-Yanukovych Ukraine, *see "Ukraine's European Discourse Does Not Correspond to Reality": Interview with Volodymyr Ishchenko*, EURASIANET (Apr. 26, 2015), http://eurasianet.es/2015/04/ukraines-european-identity-does-not-correspond-to-reality/ (last visited May 1, 2015); *The Far Right Are Still the Most*

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rival, but structurally linked, "business clans" with strong roots in Kiev and key western cities such as Lviv. These economic-administrative interests groups have long played a significant role in defining Ukraine's political economy, governance structure, and domestic and foreign policies, often, though certainly not always, by way of opposition to similar "clans" in Crimea and the heavily industrialized Donbass, Kharkiv, and Dnipropetrovsk regions.[28] Committed to consolidating and amplifying the "spirit of Maidan" so as to accede to the European Union and deepen its already considerable engagement with the World Trade Organization and international financial institutions, the oligarchic bourgeoisie of western and central Ukraine frequently juxtaposes its "European" aspirations with Russia's "Asiatic" credentials, typified by the newly established Eurasian Economic Union.[29] From this perspective, the real self-determination claim at issue in the ongoing crisis is that of the "Ukrainian people," not that of the various "pro-Russian" groups within Ukraine. That is to say, self-determination is to be understood as the foundation of independent statehood, not as a constant threat to territorial integrity and *uti possidetis juris* in the post-Soviet space. More precisely, it is to be understood primarily as the ability of the "Ukrainian people" to "choose" European integration over Russian hegemony, and only secondarily as the ability of the "peoples" of Donetsk and Luhansk to conduct elections with an eye to autonomy or independence.[30] The UN model of national statehood—central to the "embedded liberalism" that lay at the heart of the post-1945 project of reconstituting international order through a new set of legal and financial

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Visible Political Forces, CTR. SOC. & LABOR RESEARCH (Dec. 9, 2014), http://cslr.org.ua/en/the-far-right-are-still-the-most-visible-political-forces/. The chief exponent of Russian "Eurasianism" is the Moscow-based neo-fascist Alexander Dugin. For a taste of his work, *see* ALEXANDER DUGIN, EURASIAN MISSION: AN INTRODUCTION TO NEO-EURASIANISM (2014). For one account of the role of "Eurasianism" in the crisis, *see* Timothy Snyder, *Fascism, Russia, and Ukraine*, N.Y. REV. BOOKS (Mar. 20, 2014), http://www.nybooks.com/articles/archives/2014/mar/20/fascism-russia-and-ukraine/.

[28] For the emergence and consolidation of regional "business clans," *see* RICHARD SAKWA, FRONTLINE UKRAINE: CRISIS IN THE BORDERLANDS 60-67 (2015); *cf.* Sławomir Matuszak, *The Oligarchic Democracy: The Influence of Business Groups on Ukrainian Politics*, 42 OŚRODEK STUDIÓW WSCHODNICH STUD. (Sept. 2012), http://www.osw.waw.pl/en/publikacje/osw-studies/2012-10-16/oligarchic-democracy-influence-business-groups-ukrainian-politics.

[29] Yatsenyuk himself is given to stressing Ukraine's "European future," and to speaking of "the European project of Ukraine." *See, e.g.*, US Department of State, Press Conference of Prime Minister Arseniy Yatsenyuk and Secretary of State John Kerry, Kiev, Ukraine (Feb. 5, 2015), http://www.state.gov/secretary/remarks/2015/02/237212.htm; Arseniy Yatsenyuk in interview with Matthias Schepp & Christoph Schult, *Ukrainian Prime Minister: Putin "Needs New Annexations,"* DER SPIEGEL ONLINE (Dec. 20, 2014), http://www.spiegel.de/international/europe/spiegel-interview-with-ukrainian-prime-minister-arseniy-yatsenyuk-a-1009711.html.

[30] Note, though, that the latter point receives consideration in the language of the second Minsk Protocol, drafted and signed in early February 2015. For an English translation of the text, *see Minsk Agreement on Ukraine Crisis: Text in Full*, THE TELEGRAPH (London) (Feb. 12, 2015), http://www.telegraph.co.uk/news/worldnews/europe/ukraine/11408266/Minsk-agreement-on-Ukraine-crisis-text-in-full.html. The first Minsk Protocol, signed in September 2014, had failed to put an end to hostilities.

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institutions—can be safeguarded only through fidelity to the general norm of territorial integrity and consistent respect for the "will of the people," inasmuch as this is demonstrated by a functional liberal democracy that is at least nominally dedicated to free, fair, and regular elections. There is an important internal dimension to this vision of self-determination, at least of the somewhat thin variety that famously found expression in Article 1 of the two 1966 human rights covenants.[31]

For a Russia that finds itself increasingly driven by predatory monopoly capitalism and a neo-tsarist consolidation of executive authority after a prolonged period of privatization and deregulation,[32] the administration that has managed to install itself in Kiev is little more than an unelected and essentially illegitimate regime, thoroughly incapable of representing the interests of Ukraine's sizeable population of ethnic Russians and Russian nationals. Its commitment to European integration and desire to reduce its dependence upon Russian oil and gas is threatening not simply on its own terms, particularly as Ukraine is often hailed as the world's "most significant hydrocarbon transit country,"[33] but also insofar as it testifies to a bolder, more fundamental attempt to repudiate what many Russians regard as the country's historical antipathy toward Western liberalism.[34] By effectively spurning the multibillion-dollar "action plan" treaty that Yanukovych had signed with Putin in December 2013 and opting instead for an association agreement with the European Union and a series of large loans from the International Monetary Fund,[35] the

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[31] International Covenant on Economic, Social, and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171. For commentary, *see* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 47–62, 65–66 (1995).

[32] On the political economy of post-Soviet Russia, *see* BORIS KAGARLITSKY, EMPIRE OF THE PERIPHERY: RUSSIA AND THE WORLD SYSTEM 304–22 (Renfrey Clarke trans., 2008); THE POLITICAL ECONOMY OF RUSSIA (Neil Robinson ed., 2013); PEKKA SUTELA, THE POLITICAL ECONOMY OF PUTIN'S RUSSIA (2012). *See also* Gleb Pavlovsky, *Putin's World Outlook—Interview by Tom Parfitt*, 88 NEW LEFT REV. 55 (2014).

[33] INTERNATIONAL ENERGY AGENCY, UKRAINE ENERGY POLICY REVIEW 2006, at 204 (2006), *quoted in* MARGARITA M. BALMACEDA, THE POLITICS OF ENERGY DEPENDENCY: UKRAINE, BELARUS, AND LITHUANIA BETWEEN DOMESTIC OLIGARCHS AND RUSSIAN PRESSURE, 1992–2012, at 94 (2013).

[34] *See, e.g.*, Vladislav Tolstykh, *Reunification of Crimea with Russia: A Russian Perspective*, 13 CHIN. J. INT'L L. 879, 885–86 (2014) (arguing that Crimea was returned to its "natural state" through incorporation into Russia, and that Ukraine "will not become a part of Europe or the Western world," because "for this it would have to completely give up its language, religion, history and genetic memory").

[35] For the "action plan," *see Russia Makes $15 Billion, Gas Discount Commitments to Ukraine*, DEUTSCHE WELLE (Dec. 17, 2013), http://www.dw.de/russia-makes-15-billion-gas-discount-commitments-to-ukraine/a-17303930. For the IMF's own account of its loans to Ukraine, *see Interview with Reza Moghadam: Ukraine Unveils Reform Program with IMF Support*, IMF SURVEY (Apr. 30, 2014), https://www.imf.org/external/pubs/ft/survey/so/2014/new043014a.htm; *Interview with Poul Thomsen: Stabilizing Ukraine's Economy*, IMF SURVEY (Sept. 2, 2014), https://www.imf.org/external/pubs/ft/survey/so/2014/car090214a.htm. The precise size of these loans has been

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Kiev administration has demonstrated in Moscow's eyes its unwillingness to respect the rights of ethnic Russians and Russian nationals, many of whom see themselves as politically and economically marginalized. Though Russia had vigorously sought to contain external self-determination during the course of its struggle in the 1990s against secessionist movements in Chechnya and Tatarstan, and though it had made a point of imposing highly stringent conditions on the application of any right of remedial secession in its official statement regarding the Kosovo advisory proceedings,[36] it has now thrown its weight behind secession as a justifiable response to Kiev's allegedly systematic, but unproven, persecution of all those "loyal to" Russia. Comparisons with Kosovo have proven to be especially useful here: in addition to suggesting that Crimean authorities invoked the right to self-determination in much the same way that Ukrainian officials had during the dissolution of the Soviet Union, Putin has accused the West of hypocrisy on matters of secession, sidestepping the Kremlin's own position on Kosovo in order to highlight the fact that the United States had itself been of the view that international law does not expressly prohibit unilateral declarations of independence.[37] If unlawful, and often covert, use of force has proven necessary to protect Russian interests, so be it. Self-determination, on this account, is to be understood as a "BRIC" state's potentially unlimited right to protect its nationals and "ethnic kin" abroad.

The precise status of self-determination for those in Crimea and the Donbass who have supported incorporation into Russia or some form of outright independence is far from clear. Nevertheless, certain tendencies are visible. For Crimeans who have expressed enthusiasm for Russia's annexation of a territory that had been an autonomous region of Ukraine since 1991, self-determination seems to be at least as much a vehicle for attracting much-needed Russian investment—Moscow has pledged no less than $12 billion over the

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the subject of some skepticism. *See, e.g.*, *Ukraine's New Bail-Out: The Austerity to Come*, THE ECONOMIST (Feb. 12, 2015), http://www.economist.com/blogs/freeexchange/2015/02/ukraines-new-bail-out-0.

[36] The conditions under which any such right might be triggered "should be limited to truly extreme circumstances, such as an outright armed attack by the parent State, threatening the very existence of the people in question." Written Statement by the Russian Federation (Apr. 16, 2009), 31–32, para. 88, I.C.J. Advisory Proceedings: Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, http://www.icj-cij.org/docket/index.php?p1=3&p2=4&case=141&code=kos&p3=1.

[37] Vladimir Putin, *Address by President of the Russian Federation*, PRESIDENT OF RUSSIA (Mar. 18, 2014), http://eng.kremlin.ru/news/6889. For the American position during the Kosovo proceedings on the question of whether international law regulates declarations of independence, *see* Written Statement of the United States of America (Apr. 17, 2009), 50–52, I.C.J. Advisory Proceedings: Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, http://www.icj-cij.org/docket/index.php?p1=3&p2=4&case=141&code=kos&p3=1. For some of the general implications of Putin's arguments, *see also* LAURI MÄLKSOO, RUSSIAN APPROACHES TO INTERNATIONAL LAW 2–3, 180–84 (2015).

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next five years[38]—as it is a rectification of a Khrushchev-era "administrative error."[39] Similarly, when viewed from the resource-rich and industrially productive Donbass, suspicious of anti-Russian policies and mindful of its sharp economic decline in the years immediately following the Soviet Union's collapse,[40] self-determination is a means of achieving not simply political autonomy but a rapid and sustained rise in the standard of living, mainly by reorienting the regional economy toward a new Russian "empire" that is able and willing to provide financial support and a steady supply of cheap natural gas.[41] This has engendered numerous efforts to legitimize the state-building endeavor currently underway in what many have once again come to term "New Russia" (*Novorossiya*), a deeply unstable territory crisscrossed by all manner of mercenaries and private armies, working alternately for and against this or that rentier-turned-capitalist in a complex assemblage of politically powerful holding companies.[42] A hastily organized plebiscite was held in Crimea in March 2014, with an overwhelming majority of voters supporting union with Russia.[43] This, in turn, served as a model for similar referendums in Donetsk and

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[38] Anna Andrianova, *Crimea Ignores Economic Pain to Embrace Putin in New Russia Era*, BLOOMBERG BUSINESS (Dec. 14, 2014), http://www.bloomberg.com/news/articles/2014-12-14/crimea-ignores-economic-pain-to-embrace-putin-in-new-russia-era.

[39] In 1954, no more than a decade after Stalin had ordered the deportation and massacre of large numbers of Tatars and other non-Russian inhabitants of Crimea, Soviet authorities transferred responsibility for administering the peninsula from the Russian Soviet Federative Socialist Republic to the Ukrainian Soviet Socialist Republic. This put a nominal end to the authority that Russia had wielded over Crimea more or less continually since the late eighteenth century, when it had conquered a Muslim Tatar state affiliated with the Ottoman Empire. For details, *see* YAROSLAV BILINSKY, THE SECOND SOVIET REPUBLIC: THE UKRAINE AFTER WORLD WAR II 18–19 (1964).

[40] For discussion of support throughout the Donbass—the "Ukrainian Ruhr"—for Yanukovych and the Party of Regions, an explicitly russophone party that has now effectively been dissolved, *see* Ararat L. Osipian & Alexandr L. Osipian, *Why Donbass Votes for Yanukovych: Confronting the Ukrainian Orange Revolution*, 14 DEMOKRATIZATSIYA 495 (2006). On the Donbass' economic decline in the early 1990s, *see* Hiroaki Kuromiya, *The Donbas—The Last Frontier of Europe?*, *in* EUROPE'S LAST FRONTIER?: BELARUS, MOLDOVA, AND UKRAINE BETWEEN RUSSIA AND THE EUROPEAN UNION 97, 103–05 (Oliver Schmidtke & Serhy Yekelchyk eds., 2008). For useful discussion of the history and politics of Ukraine's various regions, *see also* MIKHAIL A. MOLCHANOV, POLITICAL CULTURE AND NATIONAL IDENTITY IN RUSSIAN-UKRAINIAN RELATIONS 239–43 (2002).

[41] *"We Want to Join a Russian Empire": Discussion with the Leader of the Donetsk People's Republic*, CENTER ON GLOBAL INTERESTS (July 8, 2014), http://www.globalinterests.org/2014/07/08/we-want-to-join-a-russian-empire-discussion-with-the-leader-of-the-donetsk-peoples-republic/. *See also* Thomas Grove & Gabriela Baczynska, *East Ukraine Separatists Hold Vote To Gain Legitimacy, Promise Normalcy*, REUTERS (Oct. 30, 2014), http://www.reuters.com/article/2014/10/30/us-ukraine-crisis-east-idUSKBN0IJ22G20141030.

[42] For a nuanced treatment of the pro-Russian tendencies of eastern Ukrainian "business clans," *see* Kuromiya, *supra* note 40, at 105–07. *See also* Andrew Wilson & Clelia Rontoyanni, *Security or Prosperity? Belarusian and Ukrainian Choices*, *in* SWORDS AND SUSTENANCE: THE ECONOMICS OF SECURITY IN BELARUS AND UKRAINE 23, 39–40 (Robert Legvold & Celeste A. Wallander eds., 2004).

[43] The haste with which the Crimean referendum took place is one of the grounds upon which many have compared it unfavorably with superficially similar referendums in Scotland and Catalonia. *See* Brad Simpson, *Self-*

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Luhansk in May 2014, where a significant majority in each oblast affirmed declarations of independence. Representatives of the self-proclaimed republics of Donetsk and Luhansk have since underscored the significance of these referendums, arguing that they are representative of "popular will" and holding elections on their basis in November 2014.[44] Indeed, a top official from the "Donetsk People's Republic" recently went so far as to propose a conference of unrecognized states that would eventually culminate in a "League of New States," promising to issue quasi-formal invitations to Basque, Flemish, Texan, and Venetian nationalists as part of a vague appeal to (certain) peoples seeking self-determination.[45] Even more so than in the cases of "frozen conflicts" like those in Abkhazia, Transnistria, South Ossetia, and Nagorno Karabakh, not to mention the Turkish Republic of Northern Cyprus and a host of other states that enjoy little or no international recognition, self-determination in Donetsk and Luhansk would appear to be a product of politico-economic opportunism no less than ethno-nationalist agitation.[46]

At its core, the Ukraine crisis—likened by one lawyer to the nineteenth-century "Scramble for Africa"[47]—has put on display a set of rival modes of conceiving self-determination, each buttressed by distinct class interests: Kiev's insistence on a classical, Charter-based account of territorial integrity and independence, expressed in a vision of national self-determination that prioritizes a bourgeoisie's right to "choose" Europe over Russia; Moscow's drive to leverage itself into greater geopolitical power through strategic manipulation of "ethnic kin" and foreign nationals, not to mention hydrocarbon resources,

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Determination in the Age of Putin, FOREIGN POLICY (Mar. 21, 2014), http://foreignpolicy.com/2014/03/21/self-determination-in-the-age-of-putin/.

[44] *Donetsk, Luhansk Leaders Hold On To Positions of Self-Determination*, TASS RUSSIAN NEWS AGENCY (Sept. 9, 2014), http://tass.ru/en/world/748746.

[45] Glenn Kates, *Ukraine Separatists Plan "Summit of Unrecognized States,"* RADIO FREE EUROPE (Jan. 29, 2015), http://www.rferl.org/content/ukraine-separatists-summit-unrecognized-states/26820366.html. Unsurprisingly, Kosovars were among the numerous groups *not* to be mentioned.

[46] For a comparison of the Abkhazian and South Ossetian cases with that of Kosovo, partly with a view to undermining widespread claims that they are of an essentially *sui generis* character, *see* Rein Müllerson, *Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia*, 8 CHIN. J. INT'L L. 2, 3–4, 24 (2009). *See also* Antonello Tancredi, *Neither Authorized nor Prohibited? Secession and International Law After Kosovo, South Ossetia and Abkhazia*, 18 ITAL. Y.B. INT'L L. 37 (2008); Cedric Ryngaert & Sven Sobrie, *Recognition of States: International Law or* Realpolitik*? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia*, 24 LEIDEN J. INT'L L. 467 (2011); KOSOVO: A PRECEDENT? —THE ADVISORY OPINION AND IMPLICATIONS FOR STATEHOOD, SELF-DETERMINATION AND MINORITY RIGHTS (James Summers ed., 2011); SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW (Christian Walter, Antje von Ungern-Sternberg & Kavus Abushov eds., 2014). For the view that Turkey's invasion of Cyprus in 1974 is an illuminating analogue to Russia's recent actions in Crimea, see further Jure Vidmar, *The Annexation of Crimea and the Boundaries of the Will of the People*, 16 GERMAN L.J. 365 (2015).

[47] Rein Müllerson, *Ukraine: Victim of Geopolitics*, 13 CHIN. J. INT'L L. 133, 138 (2014).

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tethering self-determination to a program of irredentist expansion in the process; and a variety of sub-state actors in Crimea and the Donbass, marshaling analogous "Kosovo-style" arguments for secession against the background of what they frequently regard as a second Cold War. It may be tempting to suggest that one or more of these positions follow from a fundamental failure to understand the "nature" or "essence" of self-determination, or perhaps even of international law generally.[48] This, however, would be to misunderstand self-determination, which does not admit of authoritative, genuinely definitive interpretations, such that a given argument about self-determination could be said to fall afoul of the settled rule. Thus, if the conflict in Ukraine has put on offer a variety of competing approaches to self-determination, this has only affirmed the plasticity of a concept that has always owed much of its popularity to its responsiveness to varying politico-economic projects.[49]

D. Conclusion

Self-determination has long been the object of theoretical critique, even outright dismissal. Some have suggested that the notion of self-determination—which has many of its modern philosophical origins in Kant's conception of the free and self-conscious individual[50]—has played no more than a secondary role in managing decolonization and resolving ensuing or related conflicts: it is only "once the basic decision for political reorganization or redistribution of power has been made," Prakash Sinha wrote in 1973, that "the principle of self-determination is invoked to attain the result in a desirable fashion."[51] But perhaps the most fashionable criticism is the oft-repeated claim that the very idea of collective self-determination is circular and self-contradictory. On the one hand, self-determination is frequently characterized as a right or principle that is capable

[48] *See, e.g.*, Anna Dolidze, *How Well Does Russia Speak the Language of International Law?*, OPEN DEMOCRACY (Feb. 6, 2015), https://www.opendemocracy.net/od-russia/anna-dolidze/how-well-does-russia-speak-language-of-international-law; Anna Dolidze, *The Non-Native Speakers of International Law: The Case of Russia*, 15 BALT. Y.B. INT'L L. (forthcoming 2015), *available at*: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2523633 (last visited May 1, 2015).

[49] I have focused on two states (Ukraine and Russia) and one set of sub-state actors (Crimea and the self-proclaimed "people's republics" of Donetsk and Luhansk). I have done so on account of the fact that these actors have been most directly involved in the conflict in Ukraine. It goes without saying, though, that the analysis can be extended to include a variety of other actors, not least the United States and European Union.

[50] Eric D. Weitz, *Self-Determination: How a German Enlightenment Idea Became the Slogan of National Liberation and a Human Right*, 120 AMER. HIST. REV. 462, 469 (2015). Note, though, that there is currently no genuinely persuasive genealogy of the concept of collective self-determination. Indeed, attempts to trace the concept's pedigree have tended to be rather sketchy to date. For a telling example from a doyen of international legal studies, *see* Ian Brownlie, *An Essay in the History of the Principle of Self-Determination*, *in* GROTIAN SOCIETY PAPERS 1968: STUDIES IN THE HISTORY OF THE LAW OF NATIONS 90 (C. H. Alexandrowicz ed., 1970).

[51] S. Prakash Sinha, *Is Self-Determination Passé?*, 12 COLUM. J. TRANSNAT'L L. 260, 271 (1973).

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of being asserted and exercised only by a minimally cohesive and clearly identifiable "people." On the other hand, scholars often point out, it is only through the assertion and exercise of this right or principle that a determinate "people" is generally understood to come into being. As a result, the concept of collective self-determination would seem to presuppose the existence of the very "people" its operationalization is meant to call forth. How, after all, is one to develop a coherent account of self-determination when the operation of any such right or principle would seem to presume the very "people" it is intended to make possible in the first place?[52]

Inasmuch as one can speak of solutions to quandaries of this kind, they must always come in sociological form. From a strictly logical standpoint, it is difficult, if not altogether impossible, to defend self-determination without at the very least making a serious effort to defuse or minimize such circularities. Considered from a broadly social perspective, though, the matter lends itself to ready explanation. Ultimately, like most other concepts of international law, self-determination is a site of contestation, a discursive device that serves as something of a placeholder for competing, even incommensurable, visions of world order. What is more, insofar as such visions of world order are anchored in and articulated by different class interests, the concept of self-determination is also a site of class struggle. While the conceptual difficulties inherent in the idea of self-determination have understandably attracted considerable attention for some time, its *actual* operation—the way in which it mediates different class-based accounts of nationhood, statehood, and international order—is nearly always sidelined. This is not, of course, entirely surprising, given the default positivism of so many international lawyers, but it certainly does result in an impoverished understanding of self-determination's resonance.

It was in the hands of Lenin that self-determination came to be invested with the status of a revolutionary call to arms—a force for mobilizing anti-colonialist and anti-imperialist sentiment on a truly global scale.[53] And it was the Soviet Union that reinforced and

[52] For classic discussion of this quandary, *see* IVOR JENNINGS, THE APPROACH TO SELF-GOVERNMENT 56 (1956) (arguing that the notion of self-determination, or "let the people decide," is "ridiculous because the people cannot decide until somebody decides who are the people"). I do not address here any number of other criticisms that have been levelled against the concept of self-determination, particularly the notion of "peoplehood" upon which it is premised. For strong discussion of the difficulty of defining "peoples" from an especially pertinent but generally neglected perspective, *see* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 100–03 (2d ed. 2004). *Cf.* LUIS RODRÍGUEZ-PIÑERO, INDIGENOUS PEOPLES, POSTCOLONIALISM, AND INTERNATIONAL LAW: THE ILO REGIME (1919–1989) (2005); GLEN SEAN COULTHARD, RED SKIN, WHITE MASKS: REJECTING THE COLONIAL POLITICS OF RECOGNITION (2014). For more general discussion of the theoretical paradoxes of self-determination in constitutional and international theory, see Zoran Oklopcic, *The Idea of Early-Conflict Constitution-Making: the Conflict in Ukraine Beyond Territorial Rights and Constitutional Paradoxes*, 16 German L.J. 658 (2015).

[53] Wilson began to lean upon a weak form of self-determination only after it became clear that subject nationalities were interpreting demands for representative government in stronger terms than had initially been assumed. *See* Cassese, *supra* note 31, at 14–23; *cf.* THOMAS D. MUSGRAVE, SELF-DETERMINATION AND NATIONAL MINORITIES 23–24 (1997). For a broader reconstruction of the rivalry, *see* ARNO J. MAYER, WILSON VS. LENIN: POLITICAL ORIGINS OF THE NEW DIPLOMACY, 1917–1918 (1964).

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radicalized the demands of an already ambitious Third World during the Cold War, helping to articulate a strong right of external self-determination in the context of national liberation movements.[54] Indeed, for both the socialist bloc and the non-aligned world, collective self-determination—understood in the sense of economic sovereignty as well as that of political independence—was decolonization's most dominant point of legal reference, far more influential and authoritative than individualistic human rights was deemed to be.[55] It is not a little ironic, then, that the new, post-Soviet Russia, supported by its allies and proxies in Ukraine, would now make a point of positioning itself as a champion of self-determination, though in this case by framing the concept in a reactionary, unabashedly neo-imperial register. If nothing else, this conceptual mutation should remind us of the elasticity of self-determination, its ability to relay and formalize, often through a kind of "translation," a variety of disparate grievances and aspirations. A predominantly positivistic international law that refuses to grapple with such elasticity—and the differential class relations it reflects and sustains—blinds itself to the *real effectiveness* of self-determination, fetishizing it as part of an exercise in conceptual analysis instead of understanding its material weight and influence.

[54] *See* Cassese, *supra* note 31, at 44–45. *See also* JOHN QUIGLEY, SOVIET LEGAL INNOVATION AND THE LAW OF THE WESTERN WORLD 133–71 (2007); Bill Bowring, *Positivism versus Self-Determination: The Contradictions of Soviet International Law*, *in* INTERNATIONAL LAW ON THE LEFT: RE-EXAMINING MARXIST LEGACIES 133 (Susan Marks ed., 2008); SCOTT NEWTON, LAW AND THE MAKING OF THE SOVIET WORLD: THE RED DEMIURGE 216–40 (2015).

[55] For a strong articulation of this view, *see* SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 84–119 (2009).

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