



IN-DEPTH

MAY 2022

Sovereignty's Other Half: How International Law Bears on Ukraine

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THE INSTITUTE FOR
PEACE & DIPLOMACY

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Introduction

The way in which commentators have looked upon the legal issues raised by Russia's war in Ukraine is inadequate. Western leaders have focused exclusively on Russia's violation of Ukraine's territorial integrity, both in 2014 and 2022. By territorial integrity is meant the principle that every state has a right to preserve itself in its own borders against external aggression. Undoubtedly, that is an important principle of international law. It is what makes the invasion or occupation of another state's territory a categorically unjust act. This principle alone does not fully penetrate the legal issues, however, because its standing has to be assessed alongside other important principles in international law, especially the right of revolution and the right of national self-determination.

By choosing to view the Ukraine crisis solely through the lens of territorial integrity, Western policymakers systematically overlook one critical aspect of sovereignty. The principle of territorial integrity is only the external dimension of sovereignty—the more holistic concept. It is the application of international law to the external boundaries of states. But sovereignty also has an internal dimension: the right of a people to choose the sovereign whose authority they will abide by. In constitutional democracies, in particular, sovereignty is affirmed according to the terms granted by constitutions. In a famous dictum, Supreme Court Justice George Sutherland ruled that “sovereignty is never held in suspense”—but that is exactly what happens when constitutions are overthrown.¹

This essay is an investigation of the complexities of international law surrounding the Ukraine conflict. The question has many dimensions that are not easily reconciled. To unfold its parameters re-

quires a more comprehensive account that brings both internal and external sovereignty into focus. We begin with a historical sketch or genealogy of certain key principles and then consider Ukraine in light of those precedents. Though the paper is primarily concerned with the “law,” the questions determinative of the law, I believe, are also determinative of the right ethical approach. My claim goes further: understanding the law of the matter is indispensable in formulating a prudential response—that is, one that safeguards international norms and preserves interests—to the Ukraine crisis today and similar incidents in the future. The legal framework in question is the law of nature and nations, as modified and restated by the international law of the twentieth century.

The Right of Revolution and the Question of Secession

A proper account of sovereignty must understand and reconcile it with the right of revolution, which is also elemental to international law. Every people has a right of revolution if faced with unbearable oppression. So said Thomas Jefferson in 1776. So said Abraham Lincoln in 1861. From the standpoint of the law of nature and nations, that is not a constitutional or positive right; it is a natural right. It inheres in human beings as a consequence of the natural rights they have to preserve their lives and liberties.

Jefferson and Lincoln did not see eye to eye on that question, or rather they agreed on the right of revolution but disagreed on whether the U.S. Constitution provided a right of secession. Jefferson intimated on more than one occasion that the U.S. Constitution did provide such a right, because he held that if the national government violated the compact, the states were free to be the judge of that and to take matters into their own hands. But Jefferson's view, as expressed in the Kentucky

¹ United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).



Resolutions of 1799 and in letters written in retirement, was widely reprobated at the time. Lincoln took the opposite stance, and it was his view that ultimately came to prevail. No state has a right of secession under the Constitution of the United States; each must seek redress peacefully for any grievances. Lincoln conceded that a state without a constitutional right to secede retained the natural right of revolution and could make one if it were suffering unbearable oppression, but also insisted that no such state of affairs existed in the United States, circa 1861.²

Although constitutions seldom provide a right of secession to their independent provinces, there are instances where this does occur. That was the case with the Soviet Constitution, first made in 1924, then reaffirmed on that point in 1936. In that respect, oddly enough, the Soviet Constitution made by Vladimir Lenin and Joseph Stalin was just like the European Union's. The EU also provides a right of secession and a procedure for accomplishing it, which Great Britain became the first member to exercise with its Brexit vote of 2016, finally consummated in 2020.

During the whole course of the Soviet Union's history, this right was effectively null, because the Communist Party controlled all; nevertheless, it came to matter greatly at the end when the authority of the regime had collapsed. It was one of history's grandest jokes that the most centralized state in European history should provide, in its constitution, for a right of secession, because the right was effectively nonexistent throughout, as utterly prohibited by the ironclad rule of Stalin and his successors. This large gap between theory and practice was funny enough, but the true punchline came at the end. When the Soviet Union dissolved on December 25, 1991, the hitherto meaningless

right of secession recognized in the Constitution became the legal basis on which the state dissolved into the constituent republics of which it had been formed. There were fifteen of those in 1991.

That the Soviet constitution provided a right of secession was something Putin noted in his July 2021 essay on the question. At that time, he acknowledged that Ukraine had a right to leave the Union. That is, he accepted, albeit with regret, Kyiv's resolve to be independent, while also insisting that Ukraine could not carve out of the union more territory than when it had originally joined the USSR. On this logic, Crimea, bestowed on Ukraine by Soviet premier Nikita Khrushchev in 1954, actually belonged to Russia. Moreover, while ostensibly accepting Ukraine's right of secession on legal grounds, Putin regretted its existence on the civilizational ground that Little Russians (Malorussians) were part of the same family as Great Russians (Velikorussians).³

A right of secession and a right of revolution, then, are not the same thing. But is there such a thing as a right of revolution, as John Locke and the American Founders claimed? In the history of international law, not all jurists accepted that there was. Indeed, in the seventeenth century, none believed so. Did that mean that an oppressed people was entirely without recourse? No, Dutch jurist Hugo Grotius held that outsiders might relieve such a people of the dastardly oppression under which they suffered. In this view, there was no right of revolution, but there was in some circumstances a right of external intervention.⁴

The eighteenth century ruminated on these propositions for a long time, then came to the conclu-

2 Abraham Lincoln, First Inaugural Address, March 4, 1861.

3 Vladimir Putin, "On the Historical Unity of Russians and Ukrainians," *Presidential Address*, July 12, 2021: en.kremlin.ru/events/president/news/66181.

4 Hersch Lauterpacht, "The Grotian Tradition in International Law," *British Yearbook of International Law* (1946): p.1-53.



sion that the seventeenth century had gotten it all backwards. A right of revolution did indeed exist; it was the right of external intervention that had to be rejected. This was the view of Emer de Vattel, whose *Law of Nations* (1758) had a big impact on the American Founders.⁵ The debates on this question were more complicated than this simplified rendering would suggest, as the writers on the law of nations (or “publicists”) allowed for certain exceptions to the general rules they posited. Few if any of the 17th and 18th century publicists, however, defended both internal revolution and external intervention. They were all, in principle, committed to restraint of some kind in the use of violence.⁶

It is notable that the United States today affirms both propositions, making for a situation in which revolution is encouraged by the promise of external support, as occurred in both Libya and Syria in 2011. However, this was not the traditional American view on the question, which affirmed the right of internal revolution but denied the right of external intervention. As Lincoln put it, “it is the duty of our government neither to foment, nor assist, such revolutions in other governments.”⁷

Having asserted a right of revolution, did a new state have a right to seek assistance from outsiders? According to the Americans, it did: the American revolutionaries had a perfect right to

5 Emer de Vattel. *The Law of Nations: Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*. Edited by Béla Kapossy and Richard Whatmore. Liberty Fund, [1758] 2008.

6 Richard Tuck, “Grotius, Hobbes, and Pufendorf on Humanitarian Intervention,” Stefano Recchia and Jennifer M. Welsh, eds. *Just and Unjust Military Intervention: European Thinkers from Vitoria to Mill* (Cambridge University Press, 2013), p.96-112.

7 “Resolutions on Behalf of Hungarian Freedom,” January 9, 1852, *The Collected Works of Abraham Lincoln*, Ray F. Basler, ed. (Rutgers University Press, 1953), 2:115-116. Lincoln was one of a dozen signatories to this document, but it had his characteristic language. For many citations to this effect, see John Bassett Moore, ed., *A Digest of International Law* (Government Printing Office, 1906), 7: p.2-56.

send their representatives abroad to seek recognition, loans, and supplies. They got those from France in 1778.

The American understanding of international law is crucial, because it was registered in the law of the United Nations Charter. The Charter forbids external aggression, but it does not forbid a right of revolution.⁸ Every government has a sovereign right to protect itself, by arms if necessary, if faced with armed rebellion; but every people also has a right to take up arms if it believes that it is faced with unbearable oppression from the extant authority. The law of the Charter obliges outside states to stay out of such internal struggles, though it did not prohibit aid to an existing sovereign. Although outsiders might see insurgents as belligerents once the revolutionary party established itself as a de facto government, the larger command of the law is to let that party prevail which could most command the support of the people. Whoever does prevail is entitled to recognition if it will respect its international obligations. While “the rights and attributes of sovereignty belong to it independently of all recognition ... it is only after it has been recognized that it is assured of exercising them.”⁹

The existence of a right of revolution does not mean that it should be exercised with anything other than extreme caution. Indeed, the experience of revolution shows it often produces disastrous consequences. We may say of *revolution* what Nehru said of *war*: “it does not do what you

8 International Court of Justice, Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, July 22, 2010, at www.ici-cij.org/en/case/141.

9 Moore, *Digest of International Law*, 1: 72. See also exposition of Brad R. Roth, *Sovereign Equality and Moral Disagreement: Premises of a Pluralist Legal Order* (Oxford University Press, 2011) and *ibid*, *Governmental Illegitimacy in International Law* (Oxford: Clarendon Press, 1999), 136-49, 160-71.



want to do; it does something much worse.”¹⁰ Were violent revolts easily sanctioned, governments would dissolve, and we would all be swiftly comported back to the State of Nature, as luridly described by Thomas Hobbes. That phrase signifies a condition in which there is no recognized authority for people to obey. In those circumstances, which have a tendency to make life “solitary, poor, nasty, brutish, and short,” they are forced to obey the promptings of their own naked self-interest, which consists in the preservation of their life and liberty. Living in anarchy, they need authority. In those circumstances, says international law, they get to choose the authority under which they wish to live.

The Right of National Self-Determination

That right to choose is otherwise known in international law as the right of national self-determination. When authority breaks down, the only way to resolve the question justly is to reconstruct state authority from the bottom up. This entails giving primary consideration to what the people want.

Whereas territorial integrity, the principle that forbids external aggression, is a “top-down” application of sovereignty, the right of national self-determination is a “bottom-up” application of it. Both are important principles in international law and are emphatically registered in the United Nations Charter, but, as alluded to, they are also sometimes to be found in tension or outright conflict.

While territorial integrity has long been a fundamental principle of the law of nations, the experience of the twentieth century taught that there are circumstances when it must yield to the right of national self-determination. A different way of expressing the same principle is this: in peace,

¹⁰ Nehru, February 25, 1955, Paul Seabury, ed., *Balance of Power* (San Francisco, 1965), p.173.

boundaries are more important than people; in raging conflicts between different peoples formerly grouped under the same political sovereign, when the state’s authority has broken down, people take precedence over boundaries.

Woodrow Wilson did more than any individual to impress the right of national self-determination onto the international law of the twentieth century. Before American entry into the war, in May 1916, he had stated the principles which he believed should inform peace-making. “First, that every people has a right to choose the sovereignty under which they shall live . . . Second, that the small states of the world have a right to enjoy the same respect for their sovereignty and for their territorial integrity that great and powerful nations expect and insist upon. And third, that the world has a right to be free from every disturbance of its peace that has its origin in aggression and disregard of the rights of peoples and nations.”¹¹

With the first principle — what became known as the right of national self-determination — Wilson struck a chord. “The spirit of nationalism,” one senator commented, “was never more assertive than it is now.” Wilson’s announcement of such a right “was like deep calling unto deep. The response greeting it was universal.”¹² Critics of Wilson believed that he had introduced an extremely dangerous principle into international law. His Secretary of State, Robert Lansing, for example, wrote bitterly of Wilson’s choice, predicting that it would lead to endless conflict.¹³

“Self-determination” was an inherently ambigu-

¹¹ Wilson, Address at League to Enforce Peace, May 27, 1916, Scott, *Wilson Speeches*, p.189-195.

¹² Sen. Charles Thomas of Colorado, July 29, 1919, in Jan Willem Schulte Nordholt, *Woodrow Wilson: A Life for World Peace* (University of California Press, 1991), 371.

¹³ Robert Lansing, *The Peace Negotiations: A Personal Narrative* (Houghton Mifflin, 1921).



ous concept that came to mean different things to different people. The central difficulty was identifying “the self” that would be doing the determining. Was it the nation, the state, the volk, a community of citizens? The people, one commentator noted, “cannot decide until somebody decides who the people are.” One scholar identified three separate meanings: external self-determination, or freedom from alien rule; internal self-determination, the right of a people to choose its form of government; and democracy, which embraced not only the will of the people or nation but did so in constitutional forms.¹⁴

Wilson believed in all three of these, but it is fair to say that he put external self-determination at the top. There were sharp limits in his view to what foreign nations could legitimately do by way of implanting democracy in other countries. “If they don’t want democracy,” he said of the newly independent peoples, “it’s none of my business.” At the beginning of his presidency, to be sure, those limits were not especially apparent to him, and he spoke like a kindly instructor to Latin American nations whose political institutions were not on a par with those up North. Appalled by the “government of butchers” who had in early 1913 deposed the Mexican President, Francisco Madero, he moved to depose the successor, Victoriano Huerta. But Wilson then turned away from the complexities of the Mexican scene. “If the Mexicans want to raise hell,” he remarked in 1915, “let them raise hell. We have got nothing to do with it. It is their government, it is their hell.” He applied those same ideas to the Russian Revolution: “My policy regarding Russia is very similar to my Mexican policy. I believe in letting them work out their own

14 The complicated contours of this debate are probed in Michla Pomerance, “The United States and Self-Determination: Perspectives on the Wilsonian Conception,” *The American Journal of International Law* 70 (1976): p.1-27.

salvation, even though they wallow in anarchy for a while.”¹⁵

The American government proved more interventionist toward Russia than these words would indicate, but they do bespeak a vital feature of Wilson’s international philosophy. There was no question in Wilson’s mind that democracy was the best regime, but he also believed that the primordial right to decide on the actual political system lay in each of the peoples themselves. If they wanted to appoint a dictator as their savior, it was their right to do so—even if history had shown authoritarianism to be a short-sighted and potentially dangerous choice.

In his approach to these issues — above all in his definition of nationhood — Wilson was undoubtedly purblind in certain respects. Though he was scandalized in 1919 by the spectacle of Britain and France feasting on the ruins of the Ottoman Empire, there were strict limits to his anti-imperialism. Wilson embraced the principle of national self-determination for the peoples inhabiting the European empires that fell in 1918 — German, Russian, Austro-Hungarian — but his sense of white superiority prevented sympathy with the rights of non-white peoples. Koreans, Egyptians, Haitians, Chinese, Vietnamese, Syrians, and the Indians of the Asian subcontinent had heard Wilson loud and clear. He did not hear them back.¹⁶

That Wilson entertained objectionable views on race, however, does not impair the universal validity of the principle he championed. On the contrary, it shows that the principle ought to have been affirmed by Western leaders long before it

15 For these utterances, see David C. Hendrickson, *Union, Nation, or Empire: The American Debate over International Relations* (University Press of Kansas, 2009), p.310-312.

16 Erez Manela, *The Wilsonian Moment: Self-Determination and the International Origins of Anticolonial Nationalism* (Oxford University Press, 2009).



actually was.

Wilson was entirely unprepared for the tangle of nationalities he confronted at Versailles, some of which he confessed to never having heard of. It threw up quandaries and embarrassing dilemmas because one nation's claim to self-determination inevitably clashed with other claims across a dozen different frontiers. Nor was he in a political position—with a faltering base of support in America, and faced with formidable British and French leaders whose countries had suffered far more in the war—to impose his will; compromise inevitably was the order of the day.

Even in Europe, Wilson was not quite the revolutionary devotee to self-determination that he is often portrayed as being. He saw as clearly as Lansing the potential dangers to political stability if every self-defined people should make a bolt toward independence. At the beginning of 1918, he wanted to preserve the Austro-Hungarian empire, or rather to turn it into a multi-national federal state. He did not seek that state's break-up. Nevertheless, the logic of total war, pushed most strenuously by Wilson's domestic opponents like Theodore Roosevelt, ultimately prevailed. By the time of the Armistice in November 1918, the "Poles, the Czechs, and the Jugoslavs," as Wilson put it, had raised armies, formed provisional governments, and had effective control of territory. They were embryos of new states, and based on the principle of national self-determination, they deserved recognition. There was no other basis on which to constitute the peace.

Peacemaking in 1919 and after generated tremendous obstacles to realizing the ideals of national self-determination. In the old empires, the peoples had lived in close proximity and in ways (one group dominating the city, another the hinterland) that made the application of the principle fraught and vexed. There were many different variations on

this theme, but they all pit some version of ethnic or national affinity against the claims of strategic defensibility and economic rationality. Given the previous mixture of peoples, the proliferation of numerous "minority problems" was inevitable. The League of Nations sought to handle this grim situation through a series of "minorities treaties," which failed in the 1930s. The post-1945 generation had lost confidence in these agreements and was more accepting of population transfers as a means of establishing more coherent national states.¹⁷ One great advantage of this new approach, as the proponents saw it, was to bring the principles of territorial integrity and self-determination into closer alignment.

National self-determination achieved its greatest triumph in the post-World War II period with the end of the European empires in Asia and Africa. This was not a formal aim of the UN Charter—with Britain blocking such consideration in 1944 and 1945—but it soon became the rallying cry of the United Nations. Its foremost champion was Jawaharlal Nehru, Prime Minister of India from independence in 1947 to 1964. As early as 1946, Nehru had pronounced the verdict around which he sought to marshal the world: "The whole system known as colonialism has to go."¹⁸

The UN Charter is the basis for the international law of the post-1945 period, up to and including the present. It lays out the basic norms, the interior architecture that forms the fundament of the international legal order. At its centerpiece are interlocking provisions regarding sovereignty, the sanctity of borders, non-interference, restraint in

17 Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton University Press, 2009); Jennifer Jackson Preece, *National Minorities and the European State System* (Oxford University Press, 1998).

18 Nehru in a March 1946 interview with the *New York Times*, quoted in Mazower, *No Enchanted Palace*, p.169.



the use of force, and mutual support.¹⁹

Wilson's understanding of international right, in its essentials, was incorporated into that law, which we may summarize as follows. The purpose of the international legal order is to preserve the rights of its members to their sovereignty and territorial integrity. No state may use or threaten force to challenge those rights. If they do, they should face the united opposition of the international community. By the same token, every people retains its natural right to depose oppressive governments. They should never do so lightly or for transient reasons, but the right of revolution inheres in them as a natural right. Outside powers should maintain a stand-offish attitude toward such internal conflicts. It is not their business to anoint the victor.

Two Faces of Sovereignty: Territorial Integrity and Self-Determination in Ukraine

It is my argument that the principle of national self-determination—i.e., reconstructing political authority on a bottom-up basis—is relevant to the legal and ethical issues raised by the conflict between and within Russia and Ukraine. That is, the conflict is not simply about the violation of Ukraine's territorial integrity (external sovereignty) by Russia, but also about the way in which Ukraine's internal sovereignty— or right to rule over its territory and people— got constituted and subsequently contested between the two factions. The principle of sovereignty gives to a state the right to preserve its territory intact against in-

19 The law of the charter is especially well described in Robert Jackson, *The Global Covenant: Human Conduct in the World of States* (Oxford University Press, 2000). See also Andrew Hurrell, *On Global Order: Power, Values, and the Constitution of International Society* (Oxford University Press, 2007). Jackson and Hurrell, in the custom of the English School of International Relations, call this pluralism. International lawyers call it "Charter liberalism."

ternal rebellion, but that right is qualified in two respects: the right of revolution to throw off unbearable oppression, and the obligation to obey an existing constitutional order short of that postulated condition.

The right of revolution comes with one vital proviso: everybody has it. If one group exercises it for itself, in a state that has a constitution, it yields the right to appeal to the overthrown constitution in asserting its right to rule. Why? Because the revolutionary party has just thrown the constitution into the junk heap. Under those circumstances, it can no longer fall back on the constitution's authority. The decision of one group to overthrow it has the necessary implication that others may do so as well. It is up to them, in those circumstances, to decide whose authority to obey. Under such circumstances, all individuals within that territory have "a right to choose the sovereignty under which they shall live."²⁰

The relevance of this principle to Ukraine is apparent, as that nation experienced a revolutionary or extra-constitutional seizure of power in 2014. It is doubtful, to be sure, that the 2014 Revolution of Dignity was driven by grievances that conferred a right to overthrow the existing government. Victor Yanukovich had been elected in a contest that international observers judged as reasonably fair. There was little over a year left before the next election. The rule of constitutional democracy dictates that dissatisfied people upset with the existing government should wait until the next election to register their protest. The Maidan protestors didn't want to wait, however; they wanted to get rid of Yanukovich right away, lest they be locked into the deal that the Ukrainian president had signed with Russia in late 2013. But had the popular voice as manifested in public protest won

20 Woodrow Wilson, May 27, 1916.



those subsequent elections, nothing would have prevented a new president from walking away from that deal in 2015. Yanukovich was incapable of binding his successors.²¹

In opposition to these views, it has been said that since Ukraine was a “young democracy”, the normal rules and practices of constitutional democracy could be suspended at will. The objection is devoid of merit. In fact, upholding the electoral law is indispensable in both young and old democracies. Its violation at any time from 1790 to 1860 would have produced a civil war in the United States. Its violation in contemporary America, to give a pertinent example, would pose a clear and present danger of serious civil conflict, even if the hostilities which ensued did not resemble the first civil war. Were some future despotic pretender to claim victory in the Electoral College, having violated its procedural rules, would all the states in the Union then submit to her authority? That seems inherently unlikely.

Consider January 6, 2021—the Day That Will Live in Buffoonery. The events of that day were obnoxious because the mob sought, albeit clumsily and without real purpose, to violate the electoral law—the most important requirement of constitutional democracy. The February Revolution in Ukraine, by contrast, was much more skillfully conducted than the January 6 events but still at its core remained a brazen — and far more consequential — violation of the existing electoral law.

The Washington establishment appears incapable

21 For these events of 2014, see the careful reviews in Richard Sakwa, *Frontline Ukraine: Crisis in the Borderlands* (Tauris, 2015) and Chris Kaspar de Ploeg, *Ukraine in the Crossfire* (Clarity Press, 2017). On the myths surrounding the Heavenly Hundred, supposedly massacred by Yanukovich's goons, see Ivan Katchanovski, “The ‘Snipers’ Massacre’ on the Maidan in Ukraine,” September 5, 2015, and *ibid*, “The Buried Maidan Massacre and Its Misrepresentation by the West,” *Consortium News*, April 22, 2019.

of coming to terms with these facts. We are told simultaneously that what transpired on January 6, unsuccessful and even ludicrous as it was, amounted to an *insurrection*—the worst of crimes—yet the February 2014 Ukrainian insurrection was simply how things are done in “a young democracy”.²² No, forcing a transfer of power through extra-constitutional means is an open invitation to civil war. The peaceful transfer of power through elections is the cornerstone of constitutional democracy. To transfer power any other way is to renounce constitutional democracy in principle, and substitute mobocracy in its stead. In practice, such a course sharply raises the danger of protracted civil conflict.

According to the precepts of constitutional democracy, 500,000 people in the streets of the capital city, in a nation of 45 million people, does not constitute “the nation,” because it intrinsically excludes a huge pile of voters. But let’s stipulate, for argument’s sake, that this was a choice for this group of people, fervently convinced that they represented the Ukrainian nation, to make. Outsiders, after all, should not presume a greater knowledge of what constitutes oppression than the people who live under it. If so, however, it still follows that Ukraine was thrust by that act into a revolutionary situation, a state of nature, in which everybody gets to choose the sovereignty under which they wish to live. The people in the western and central regions of Ukraine backed the new revolutionary government in Kyiv, now firmly anchored to the Western powers, whereas a decided majority of the people in Crimea and the Donbass voted for self-determination—i.e., not to be ruled by Kyiv—and sought protection from Russia in do-

22 That Ukraine was a young democracy, as opposed to a “240-year old consolidated democracy,” was the justification offered for the Maidan Revolution by Kathryn Stoner and Tom Nichols in a March 21, 2022, debate with me and Paul Robinson, at OTV’s program, *the Agenda*: <https://twitter.com/TheAgenda/status/1506057820256542723>.



ing so.²³ Did they have a right to do so? The logic of the law dictates that they did. That right had devolved on them by virtue of the previous nullification of the constitution.

The issue is illuminated by a once-famous episode in America's constitutional history, the nullification controversy of the early 1830s. John C. Calhoun of South Carolina had proposed that a state, as a party to the constitutional compact, retained within itself the right to judge the constitutionality of laws enacted by the federal government. If unconstitutional, they could be nullified by state authority. Daniel Webster's rebuttal ridiculed Calhoun's claim that a state could somehow be in the government and outside the government at the same time, that it could join in passing laws that others were to obey, and yet reject the authority of those laws as applied to itself. Unfortunately, this is exactly what the Ukrainian revolutionaries did. They defiled the constitution, then invoked its authority. On the principle set forth by Webster, they had surrendered their right to do that.²⁴

It may be said, in objection to these propositions, that the secession of Crimea and the establishment of Donetsk and Lugansk People's Republics (DPR and LPR) in 2014 were not exercises in the right of self-determination—that is, of the right of a people to choose under whose sovereignty they wish to live—because the uprising in the East was entirely orchestrated by an external power, i.e., Russia. This was a case not of self-determination, so the counter-argument goes, but of external intervention or revanchism. The decision, in effect, was made for those people by Putin, not by those people with the aid of Putin.

23 See, e.g., Soraya Sarhaddi Nelson, "Many in Eastern Ukraine Want to Join Russia," NPR, June 24, 2017.

24 Daniel Webster, "The Constitution Not a Compact," February 16, 1833, *The Papers of Daniel Webster: Speeches and Formal Writings* (University Press of New England, 1986), 1: 607.

The facts of the case do not support this interpretation. A decided majority of the people of Crimea wanted in 2014 to be a part of Russia, not Ukraine. That they accomplished it with Russian assistance is true. Also true is that the Maidan revolutionaries took power with the support of the West. Two weeks before Yanukovich fell, U.S. Assistant Secretary of State Victoria Nuland had already selected the cabinet that was to succeed him.²⁵

The Crimean referendum, to be sure, was unconstitutional under Ukraine's constitution, but the inference drawn—that the referendum was therefore illegitimate—is not correct. Under the principles stated above, it was the decision of the inhabitants of Crimea as to how they went about secession from Ukraine and accession to Russia. The critical question, therefore, is not whether the Crimean referendum was conducted in a manner satisfactory to outsiders, but whether they had a right to conduct a referendum in the first place. The revolutionary circumstances of 2014 made for much uncertainty over whether the referendum of 2014 reflected the will of the Crimean people, but a dozen subsequent public opinion polls over the following eight years show that it did. These indicate support ranging from eighty to ninety percent in favor of Crimea's secession from Ukraine and its accession to Russia.²⁶ There is every reason to believe the polling tracks with the popular will in that province.

The case of the Donbass is certainly more complicated. The people were more closely divided in that province. Public opinion polls in May 2014

25 Ukraine Crisis: Transcript of Leaked Nuland-Pyatt call," *BBC*, February 7, 2014.

26 The polling results are summarized in "2014 Crimean status referendum," Wikipedia, accessed April 13, 2022. For such sentiments in the 25 years before 2014, see Ted Galen Carpenter, "Russia-Ukraine Tensions Flared Early in the Post-Soviet Era," *The National Interest*, April 22, 2022.



showed the majority were against secession from Ukraine, but remained distrustful of the Kyiv authorities and wanted federalization. The insurgents who seized power asked in a referendum in each province: “Do you support the creation of the Donetsk People’s Republic?”, with the same question for Lugansk. Putin had asked for a postponement of the referendum, but the locals went ahead anyway. While the reported results showing overwhelming support cannot be taken at face value, the insurgency as it developed drew from the local population and was led by working class types. The leaders were successful in raising a militia and got most of their weapons from sympathetic units in the Ukrainian Army who joined their ranks. Over three-quarters of the people who died in defense of the republics were people who had been born there. Russia provided major backing to them only in late summer 2014, when they were on the verge of getting crushed by the Ukrainian counter-offensive. This left the statelets with far less territory than they had claimed in their initial pronouncements, about one-third of the Donbass province.²⁷

When the dust settled after the battles of 2014 and early 2015, a line of contact was formed. One thing was especially clear about that line: the people on either side hated each other. They each rejected the other’s proclaimed identity and allegiances. The Ukrainians wanted to defeat the Russophiles or drive them out, and the Russophiles increasingly came to want annexation by Russia. Putin, however, did not want to annex the breakaway republics in 2014 as he did Crimea. It was only in 2022, concurrent with the onset of the war, that he recognized them as independent states. Before that time, he pledged Russia to the Minsk 2 formu-

la, arranged by German and French diplomats in 2015 as a suitable compromise between, in effect, the principles of state sovereignty and self-determination. The people of the two statelets were to be re-incorporated into Ukraine—preserving that nation’s territorial integrity—but securing for them the “federal” rights of self-determination, such as the right to be taught Russian in their schools, or the right to have their own local police.

Minsk 2 was a statesmanlike formula in its attempt to reconcile these divergent principles but proved barren in practice. Unlike the minority treaties sponsored by the League of Nations, which it resembled in key respects, it was never implemented in the first place. It was rejected by both sides of the local dispute; neither would change its mind unless forced to do so by their outside protectors. Russia’s willingness to force a settlement on the DPR and LPR was never really tested, because the required steps toward “federalization” were rejected by Ukraine and also by the United States. Neither Ukraine nor the United States gave any recognition at all to the principle of self-determination as applying to Ukraine’s Russophiles. The United States accepted as axiomatic, as did the government in Kyiv, that the apparent wish of the populations of the eastern regions was irrelevant, because their secession from Ukraine was both unconstitutional and fraudulent, i.e., that the expressed views from Crimea or the Donbass were totally inauthentic and produced in effect by the Russian version of QAnon.²⁸

The former claim, as I have shown, misses the point, whereas the latter claim is contradicted by present evidence and past history. Past history shows Ukraine to be a “cleft” country, as Samuel Huntington called it in the 1990s.²⁹ Put differently,

27 Sakwa, *Frontline Ukraine*, 153-156. See also Facebook post of historian Yevgeny Norin, as translated by Russians With Attitude on March 15, 2022, at <https://web.telegram.org/z/#-1697410513>.

28 See, e.g. Adrian Karatnycky, “Ukraine Cracks Down on Its Own Pro-Russian QAnon,” *Foreign Policy*, April 1, 2021.

29 Samuel P. Huntington, *The Clash of Civilizations and the Remaking*



it is one among many “fault line states” located “in the gray zones between major culture-complexes.”³⁰ The peoples of East and West Ukraine have been divided on many questions. They are divided by historical memory, by whom they take as heroes and whom they see as villains, and a dozen other things. Polls throughout Ukraine’s history as an independent nation show this division to be real. One example: in 2010, Yankovich won 90 percent of the vote in Crimea and 10 percent of the vote in Galicia, Ukraine’s westernmost province. His opponent did the opposite. That is a much bigger gap than exists in America’s own acutely divided polity.³¹

These considerations force the conclusion that the West was wrong to see the issues of Crimea and the Donbass as being entirely a question of territorial integrity. In doing so, it ignored the right of the people, in a revolutionary situation, to give their allegiance to those who promise to best protect their rights and interests. Those wishes were reasonably clear—the people on the Russian side of the line had no desire to be ruled by Kyiv.

The West made its biggest mistake in supporting the Ukrainian Revolution of 2014. Far better it would have been to have encouraged the Ukrainian nationalists and the Russophiles to find a *modus vivendi*.³² Having helped to precipitate the civil

of *World Order*. Simon and Schuster, 1996.

30 Arta Moeini, Christopher Mott, Zachary Paikin, and David Polansky, *Middle Powers in the Multipolar World*, Institute for Peace and Diplomacy, March 2022, p.9: The authors note that in addition to Ukraine, many other countries such as Iraq, Korea, Yemen, Syria, and Karabakh also fall into this category.

31 Jack F. Matlock, Jr., “Ukraine: Tragedy of a Nation Divided,” *Krasnos Analysis Weekly Spotlight*, December 14, 2021. See also John O’Loughlin, Gwendolyn Sasse, Gerald Toal and Kristin M. Bakke, “A New Survey of the Ukraine -Russia Conflict Finds Deeply Divided Views in the Contested Donbass Region,” *Washington Post*, February 12, 2021.

32 This alternative path is well charted in many essays of Nicolai N. Petro. See especially “Will Nationalism Poison Ukraine’s New Presi-

war, it ought to have pursued a peace settlement on the basis of the principle of *uti possidetis*. That Latin phrase, meaning “as you possess,” was once a principle of peacemaking that basically corresponded in this instance to the principle of national self-determination.

Ukraine’s Face-off with the East

The course of action recommended here was vehemently rejected by Ukraine and the West in 2014. This rejection had momentous and ironic consequences.

What was the purpose of the February Revolution? It was that Ukraine should join the West (Europe) and reject the East (Russia). Yet, the practical consequence of the Revolution was to make the recovery of the lost territories in Crimea and the Donbass the overriding priority of Ukraine’s new government. In order to join Europe, in other words, Ukraine had to confront the East. This pivotal choice had three implications:

1. It effectively meant arming Ukraine for battle with the breakaway republics, rather than to focus on developing economic ties with the West.
2. It destroyed economic ties with Russia, at serious cost to Ukraine’s economic development. What ought to have been a bounty to the whole population, the valuable transit fees for Russian gas, got siphoned off by corruption. Ukraine shuttered long standing trade interdependencies. By 2021, the results of these choices were grim. GDP per capita was still less in 2021 than it had been in 2014. The Atlantic Council’s Eurasia Center, Ukraine’s best friend in the United States, painted a very

dent?” *The National Interest*, July 12, 2019; “How to Break the Cultural Deadlock in Ukraine,” *ibid*, July 21, 2021, and “A True Solution to the Tragedy of Ukraine,” *ibid*, March 21, 2022.



pessimistic portrait of the state of Ukraine's economic and political development in March 2021: "Ukraine has become the poorest country in Europe," the council noted. Foreign investment flatlined in 2020. That was partly due to the pandemic, but mostly due to the fact that "foreigners dare not invest in Ukraine because they fear their property will be stolen."³³

3. It defined Ukrainian identity in exclusivist and nationalist terms, casting Ukraine's partially Russophile heritage as an embodiment of past and current oppression. Use of the Russian language had to be discouraged because it was a reminder of this fact. Opposition media had to be shut down because they threatened to revive Russian culture.³⁴ Ukraine's strident nationalism after 2014 recalls the nationalisms of the interwar period, which boasted endlessly of the ineffable greatness of the respective peoples. During that period, all the newly independent states of Europe celebrated their people's unique heritage and distinctiveness, adding that their own very impressive contributions to world culture had been smothered by oppressive overlords. All these post-imperial nations, of course, were quite hostile to neighboring peoples. The love of one's own was bound intimately to hatred of the other.³⁵

33 Anders Åslund, Daniel Fried, Melinda Haring, John E. Herbst, William B. Taylor, and Alexander Vershbow, *Biden and Ukraine: A Strategy for the New Administration*, Atlantic Council Eurasia Center, March 2021, p.2-3.

34 For examples, see Ted Galen Carpenter, "Washington's Foreign 'Democratic' Clients Become an Embarrassment Again," *antiwar.com*, February 18, 2021. See also Council of Europe, "State Language Law of Ukraine Fails to Strike Balance Between Strengthening Ukrainian and Safeguarding Minorities' Linguistic Rights, says Venice Commission," December 6, 2019.

35 Andrew Higgins, "For Some of Ukraine's Neighbors, 'Defend Europe' Has Another Meaning," *New York Times*, January 31, 2022, cites Marek Swierczynski, a researcher in Warsaw, as remarking: "An-

The choice to recast Ukraine as an "anti-Russia" was a fateful one. It turned out to be the key element which Putin found most objectionable, constituting for him a *casus belli*. This profound arousal of nationalist sentiment in Ukraine also fundamentally contradicted what joining the West had traditionally been thought to mean. In 2002, Robert Kagan had called the European Union a Kantian paradise intended, in effect, to submerge suicidal nationalism,³⁶ whereas the 2014 Revolution strongly encouraged its revival. Indeed, when the old nationalistic spirit began to re-emerge in the 2000s in Warsaw, Budapest, and Belgrade—really, everywhere in the old Soviet Empire's sphere of influence—it was widely condemned as "undemocratic" and a deep affront to common EU values. This was not so in Ukraine's case, however. When it came to the February Revolution, the whole Western world sang in unison—Glory to Ukraine.

Kyiv's pivotal choice to confront Moscow and focus on recovering its disputed territories in the East, then, had grim implications for Ukraine's admission into the West. What the people in the Maidan wanted most of all was a closer social and economic integration with Europe. Such designs, however, were thwarted in the ensuing years through a host of obstacles reinforced by Kyiv's insistence on revising the status quo in the East. One of the major demands of the demonstrators pining for revolution in February 2014 was to rid Ukraine of pervasive corruption and oligarchic rule. Kyiv's deep resentment toward Russia, its fixation on confronting Moscow, and its anti-Russian character meant that the February Revolution would do nothing to address those problems.

ti-Ukrainian feeling is the ABC of Polish nationalism." To which one should add that D through Z is covered by another country.

36 Robert Kagan, *Of Paradise and Power: America and Europe in the New World Order* (Knopf, 2003).



Given these various dead-ends, it turned out that the only thing the United States and NATO could do to help Ukraine join the West was to build up Ukraine's military. Though the Obama Administration had helped precipitate the 2014 Revolution and then adopted principles that forbade a settlement with Russia, the president was opposed to a U.S.-led program to buttress Ukraine's armed forces. The Trump Administration, prodded by Congress, reversed this policy and began a serious effort to upgrade Ukraine's armed forces. This transpired mostly under the radar, but the results of the effort have been on display in 2022 in Ukraine's staunch defense against the Russian invasion.

Putin's War and International Law

The two foundational principles of territorial integrity and national self-determination were equally violated by the Russian invasion of Ukraine in 2022. Had Putin's invasion been confined to the Donbass, it might have retained some modicum of justice, given how the Ukrainians had put the Donbass under extensive bombardment for eight years. If the Kremlin had limited its military activity to repelling Ukrainian artillery, it might have stood as a reasonable case of self-defense. But Putin did far more. He objected to Ukraine's constitution as an "anti-Russia" and in effect sought regime change. Ukraine was to be "denazified" and "demilitarized," Moscow declared.. There is no persuasive legal basis on which Russia could claim a right to such actions. Russia's words and actions violated especially the right of all Ukrainians to national self-determination. Both these self-defined groups—nationalist Ukrainians and the Russophiles on their territory—are entitled to that.

Upon launching the 2022 war, Putin confessed to error on his part. He conceded in his war address that he ought to have done more in 2014 and after

to protect the Russophone population in Ukraine.³⁷ This he had failed to do. He accepted the territorial status quo that resulted from the initial battles. Once that had hardened into the line of control in Eastern Ukraine, however, he did not have a right to alter the territorial status quo in any substantial way, unless it be in the course of repelling an attack. There was little evidence among the Russophone population in Ukraine outside the control of the statelets that they wished for a Russian invasion to remedy their condition of oppression, such as it was. We cannot really know their state of mind, and especially so in conditions of war, because it is intrinsically dangerous for people to express their mind in a war zone, where they can get killed by partisans for saying the wrong thing.³⁸

The evidence thus far, however, casts grave doubt on the assumption that the Russophiles in Ukraine wanted a war in their backyard to deliver them from the oppression they may have felt from the Kyiv government. This sentiment is understandable. Americans routinely complain about their government, but no one wants the Mexican Army to militarily intervene on their behalf, because the remedy would be worse than the disease. That ordinary people might think this way ought to have been obvious to Putin. Apparently it was not.

It is possible, and even likely, that Russophile opinion in the Ukrainian territory outside the statelets was and is not uniform, such that a majority in Kharkiv might oppose what Russophiles in Mariupol—subject to eight years of harsh treat-

³⁷ <http://en.kremlin.ru/events/president/news/67828>

³⁸ Examples of pro-Ukrainian mayors being killed by Russia-aligned forces have been reported in the western press, but the converse is also true. See Max Blumenthal and Esha Krishnaswamy, "One Less Traitor: Zelensky Oversees Campaign of Assassination, Kidnapping and Torture of Political Opposition," *The Grayzone*, April 17, 2022. On the other hand, some of these consequences are justly attributable to the initiator of the war, as the anarchy induced by war invariably provides fertile ground for retribution of all kinds.



ment by the Azov Regiment—might welcome. Even if the Russophone population did want to be liberated, however, Russia had no right to liberate them. The only way Moscow could acquire such a right was if the people of those regions themselves rose up in the first instance, establishing themselves as a force to be reckoned with and which Kyiv had then sought to defeat with aid from its foreign patrons. The presumption in international law weighs heavily against those who begin a war for speculative reasons.

The circumstances of 2022, then, were totally different from 2014. Back in 2014, Ukraine had effectively been thrown into a state of nature. After eight years in control, the state of Ukraine had successfully re-established central authority over the large swaths of territory that remained under its domain. While a limited Russian intervention to protect the people of the Donbass, or to defend them against a Ukrainian invasion (such as the Russians allege to have been impending in February 2022) might have had some claim to legitimacy, Russia's "special operation" in 2022 did not. Though the Russian government now formally disavows "regime change" as its objective, the objectives of "denazification and demilitarization," come awfully close to that demand, as do its vague but potentially vast territorial objectives. In effect, self-determination for Ukraine's Russophiles is to be achieved at the expense of Ukraine's right to such.

Some Russian writers have compared Russia's "special military operation" in Ukraine to the North's effort to subdue the South in the American Civil War.³⁹ This analogy is not entirely without merit: in both cases, there are some respects in

39 See, e.g., "Bohemicus' on the Ukraine," *Rwasamizdat Substack*: https://rwasamizdat.substack.com/p/bohemicus-on-the-ukraine?r=e6xbi&s=w&utm_campaign=post&utm_medium=web

which the two peoples constituted a single nation, and still others in which they did not. But the time to have acted on that idea of a Greater Russia, such as Alexandr Solzhenitsyn defended in a 1990 work, was 1990 or 1991.⁴⁰ Not only did Russia recognize Ukraine's sovereignty at that time, acknowledging its right to separate statehood, but Ukraine itself gained thirty years of experience under that new dispensation. In the Ukrainian referendum of December 1, 1991, more than 90 percent of those taking part voted for independence.⁴¹

In the American case, by contrast, the Union never recognized the right of secession. Even those disapproving of the use of force in 1861, like the departing president James Buchanan, rested their position not on the right of secession, but on the inadmissibility of holding the Union together by force. The Republicans thought Buchanan's position entailed a contradiction. William Seward remarked that the president had "conclusively proved two things: '1st, that no state has the right to secede unless it wishes to; and 2nd, that it is the President's duty to enforce the laws, unless somebody opposes him.'⁴²

In the Russian case, the lapse of thirty years makes any comparison to the American case inapt. Moreover, the American Constitution did not contain a right of secession, as did the Soviet one. In the American case, such a right could only be found through "construction"—that is, by inference from a provision of the Constitution. On the legal right to repress rebellion, the North had a strong case against the South. As such, the Union had a far more persuasive case to justify its military action

40 Alexandr Solzhenitsyn, *Rebuilding Russia* (Vintage, 1991 [1990]).

41 Serhii Plokhy, *The Last Empire: The Final Days of the Soviet Union* (Basic Books, 2014), p.394.

42 Seward, New York *Evening Post*, December 6, 1860, Kenneth M. Stampp, *And the War Came: The North and the Secession Crisis, 1860-61* (University of Chicago Press, 1950), p.56.



against the Confederacy during the Civil War than Russia does today.

The felonious aspects of the Russian invasion notwithstanding, Russia's actions in Ukraine are not inherently more felonious than the 2003 Iraq War or the 1982 or 2006 Israeli wars in Lebanon, or the Saudi intervention in Yemen. As an instance of the unilateral exercise of "the responsibility to protect" (R2P), it is basically on a par with western interventions in Libya and Syria. Any case for the Russian invasion today, however, weakens the critique of these other interventions.⁴³

Nor is the Russo-Ukrainian War so terribly anomalous in a larger sense. Like many of the approximately 260 military conflicts that have occurred since 1945, this is a conflict among a people, or peoples, who have long lived in close proximity to each other. Many of these conflicts are labeled as civil wars, but the distinction between internal and external conflicts is often tenuous, as many civil conflicts are "internationalized." In the last generation, for example, every military conflict in the Muslim world (e.g., Afghanistan, Iraq, Libya, Syria, Yemen) has been heavily influenced by external parties, essentially turning them into proxy wars between regional rivals.⁴⁴

For reasons not easily understood by outsiders, neighboring peoples often fall into conflict. Proximity, in these cases, does not make the heart grow fonder; on the contrary, the peoples grow estranged and conclude, since they can't stand each other, that they would like to start killing each other. Such conflicts invariably occasion spectacular atrocities and wrongdoing, which the opposing parties come to see as emblematic of

the other. Nevertheless, it seldom happens that any one side deserves all the blame. Both parties attribute collective responsibility to the enemy people, while presenting themselves, more often than not, as great humanitarians.

Self-Determination: A Principle for Peacemaking

Realistically, the prospects for a genuine and sustainable peace treaty in the aftermath of the current war are remote. Whether Putin advances or retreats, a line of control will likely remain. Russia cannot take over all of Ukraine and is now focused on gaining territory in the East. On the other hand, Russian forces are unlikely to be fully defeated and pushed out of all of Ukraine's territory. Down the road, the parties may agree on truces and armistices, but achieving a real political settlement appears most unlikely. The differences between the two sides are way too large. The West, meanwhile, is considering war crimes charges, which if alleged against Putin and his associates are functionally equivalent to calling for "regime change" in Russia—something the Biden administration has formally disavowed. Even assuming that such charges are not pursued, would the West drop its objective of restoring Ukraine's territorial integrity on the basis of the pre-2014 boundaries? A compromise on that point is almost certainly an indispensable condition of any peace settlement, but there is no evidence that the United States would be willing to accept such a scenario, and little evidence at this point that Europe would be willing to do so either.

Even if the political conditions seem unfavorable for peace, it is important to specify what equitable terms of peacemaking would consist of, were we to take the dictates of international law and its built-in rights of equity as the basis of a fair settlement. In my view, that gives primacy to the

43 This is the vulnerability of the argument in Daniel Kovalik, "Why Russia's Intervention in Ukraine is Legal Under International Law," *rt.com*, April 23, 2022.

44 See discussion in David Armitage, *Civil Wars: A History in Ideas* (Yale University Press, 2017).



following principle: *that the least number of people be left to the jurisdiction of those they hate, or who hate them.* This is simply a different formulation of Wilson's principle of self-determination, as people would not generally choose to be part of a political association in which they were a despised minority or treated as second-class citizens.

The argument for territorial partition, on the basis of the above principle, is basically no different from the argument for divorce. It is never the best option, but it sometimes is the only option. During the long period from the founding to the Civil War, American leaders were rather obsessed with thinking this question through, and often resorted to familial metaphors in doing so. The Union was like a marriage, they said. If the parties became estranged, the logical implication was that they should split and go their separate ways. Remarkably, a large number of people, even nationalists, conceded that the union should not and probably could not be held together by force, no more than a husband or wife should block the other's departure if they had come to feel a total estrangement.⁴⁵

In the antebellum United States, however, what seemed intuitively persuasive in theory could never be reduced to practice. Dismissing the prospect of "peaceable secession" in 1850, Daniel Webster observed in Congress that "we could not sit down here today, and draw a line of separation, that would satisfy any five men in the country." That made a peaceful divorce a phantom: "your eyes and mine are destined never to see that mir-

45 The marital metaphor is explored in Paul C. Nagel, *One Nation Indivisible: The Union in American Thought, 1776-1861* (Oxford University Press, 1964), and Hendrickson, *Union, Nation, or Empire*, 212-221. On the turbulence exuded by this unhappy marriage over many decades, see also Richard Kreitner, *Break It Up: Secession, Division, and the Secret History of America's Imperfect Union*. (Little Brown, 2020) and Elizabeth R. Varon, *Disunion! The Coming of the American Civil War, 1789-1859* (University of North Carolina Press, 2010).

acle," said Webster.⁴⁶ Lincoln, in his First Inaugural, provided the clinching blow: a husband and wife can go out of the presence of each other, he said, but we can't. We're either in a federal union in which law rules or an anarchy in which force rules. The latter would be intolerable, so the former it shall be. Advocates of the North forever insisted that the purpose of the war was to establish the basis for a lasting peace.

The American Civil War perhaps shows that there is no arbiter save force between the claims of the right of a state to preserve itself and the right of a self-defined people to separate themselves in pursuit of self-determination. The enduring fame of the War for the Union is that the North adopted the liberation of the slave as a war aim, but the subsequent denouement after Reconstruction cast many African Americans in the South into a condition not far from renewed slavery. The example shows that the conflict between state preservation and self-determination is a "hard case" in and of itself, made doubly so when universal human rights (the right to be free from slavery) are thrown into the balance. In such cases, it is not obvious which principle can or should prevail in any particular circumstance. What makes the cases "hard" is that any resolution seems inevitably to require the sacrifice of an important principle or human value.

The American example and others may show that the right of national self-determination is not absolute, or can be trumped by other values, but this does not impair the intrinsic merit of that principle. What "the people" think matters, even if they may appear to some to be guilty of wrongthink. If a peace is to prove bearable, the least number of people should be subjected to rule by people they

46 Daniel Webster, March 7, 1850, Thomas Hart Benton, ed., *Abridgment of the Debates in Congress from 1789 to 1856* (New York, 1857-1861), 16: 430.



hate, or who hate them.

To be sure, one should hardly minimize the practical obstacles in the way of actualizing this principle in Eastern Ukraine. Peoples are seldom unanimous in their view of such things. The majority must therefore govern. The real question is how to define the jurisdiction within which the majority view shall prevail. Is the proper jurisdiction that of the DPR or LPR in the area of their practical control from 2014 to 2022 or the larger province of Donbass, of which the two statelets formed little more than a third? There are also practical impediments with respect to holding a referendum: with people scattered by war, who would supply the voting roll? When does the plebiscite occur—before or after a change in the military forces predominant in the territory? Who would or could ensure that the referendum is fairly conducted?

These difficulties would arise even if there were, in principle, an agreement by the parties that the principle as stated above—i.e., that the least number of people are to be ruled by those who hate them—is the correct one. And there is no such agreement. If there were, given the above obstacles, it would probably be necessary to adjudicate it through diplomatic negotiation and not referenda. In some cases, population transfer—allowing those persons interested to cross the line into the other’s territory and become a citizen therein—would surely be warranted, though it is also intrinsically desirable to avoid population displacement on a large scale. Western observers who mourn the displacement of Ukrainians by war should not also look with indifference on the fate of 6 million people in Crimea and the Donbass who don’t want to be ruled by Kyiv. One prominent U.S. columnist argues that the West should support Ukraine “with the best weaponry and training if they want to drive the Russian Army off

every inch of their territory.”⁴⁷ What happens then to the people who live there?

One reason why a political settlement—that is, a real peace treaty in which sanctions are lifted and a new status quo is created to which the parties are pledged—is so remote is that the West would reject the principle of self-determination as a basis for negotiation. Its position is that Putin cannot be permitted to gain from the use of force, that he must indeed suffer a decisive defeat. The West is as strongly committed to this position in 2022 as it was throughout the period from 2014 to 2022. It has not retreated one iota from its stance condemning the Russian annexation of Crimea. In seeing the conflict entirely in terms of Russian aggression, the West does not acknowledge that the principle of self-determination applies at all to the Russophones of Ukraine.

The West’s maximalist defense of territorial integrity in Ukraine must also be viewed against the backdrop of its own egregious violation of territorial integrity in the Global War on Terror. For all the shock that the United States has professed over the violation of Ukraine’s territorial integrity by Russia, it violated this very principle in Iraq, Libya, and Syria over two decades. The Syrian transgression is especially notable because it is still ongoing. There, the United States and the West were entirely dismissive of the manifold violations of Syria’s territorial integrity in the last decade. Even before the Syrian Revolution of 2011, Israel had annexed the Golan Heights (recognized by the Trump Administration in 2019, though by virtually no other state). After the Arab Spring, numerous powers, including the United States and Turkey, thought nothing of violating Syria’s territorial integrity. They still don’t.

⁴⁷ Thomas Friedman, “How do We Deal with a Superpower Led by a War Criminal?” *New York Times*, April 10, 2022.



Notably, too, the absolutist position the United States has taken with respect to territorial integrity in Ukraine is deeply at odds with the non-absolutist position it took toward the conflicts in Kosovo and South Sudan. Why these provinces should have a right to secession or revolution, but Crimea should have neither, has not been explained by the U.S. State Department.

In the Ukraine case, it is unreasonable to exclude self-determination as a principle of peace-making. Undoubtedly, strategic and economic factors might qualify this principle in some respects, as they did in the peace treaties after World War I, but it should remain as a fundamental criterion of an equitable peace. Self-determination is the superior principle to territorial integrity, because it accords to each people an equality of rights in regard to the most fundamental question of who should govern them.

By the same token, however, it seems virtually certain that this principle will be rejected by the West. If any settlement is deemed to “reward Putin”, or can be seen to benefit him, there will undoubtedly be stout opposition from the foreign policy establishments in the West. The proposition that the two peoples of Ukraine should enjoy equal rights is rejected out of hand by Washington and its allies. Nor is it clear that Russia now accepts it, though it once did. These attitudes stand as a formidable barrier to any peaceful settlement.

The unbridgeable chasms that exist with respect to the principles of peacemaking suggest that any diplomatic settlement is far away. This has important implications for the reasonableness and legality of the West’s response to Putin’s war.

The West’s Response in Law and Ethics

The West has so far responded to Russia’s transgression of international law in two ways. One is military aid to the Ukrainian forces; the other is a

set of draconian economic sanctions, amounting to a Total Economic War Against Russia (TEWAR).

The principles set forth here show that the United States and its allies have every right to supply arms to the Ukrainian resistance in defense of their nation. Acting on that right, however, poses a different question, as the prudence of such a choice—if it is carried far—is questionable on two grounds.

First, insofar as such supplies amount to a real intent to change decisively the outcome of the war, they approach an actual intervention. If coupled with the aim of driving Russia from the Donbass and Crimea, such efforts greatly magnify the risk of a U.S. war with Russia. That is dangerous not only for the parties involved but for the entire world. There exists neither a right nor a duty to do that; it is also inconsistent with America’s national interest and with the world’s interest. A course risking war would especially shirk the grave responsibilities which fall on the possessors of weapons of mass destruction.

A second potential liability of this strategy is that it threatens to turn Ukraine into an ungovernable and unproductive corpse. If that is the only way to get Russia out, the cost might be judged “worth it,” but it is not clear that the only way to get Putin out of most of Ukraine is by leveling those places to the ground. If Putin’s war has been received as grossly offensive to the people of Eastern Ukraine, Russia would have grave difficulty in staying there and ruling over a hostile population. The principle of peacemaking endorsed here would limit both Russian and Ukrainian objectives.

While the instinct of the national security apparatus and of public opinion in the United States has been to impose heavy costs on Putin and the Russian people, it is not an unreasonable instinct to shudder at the destruction taking place and to



doubt the long-term willingness of outside parties to rebuild Ukraine. The least destruction and loss of life, therefore, the better. That is the conclusion suggested by the humanitarian concern built into the international law of civil conflict.

This is not, however, the instinct of the Ukrainian government. The Ukrainians want to fight for their political independence and territorial integrity, and they want the West's help in doing so. On the basis of right, there can be no objection to that claim, but the immense scale of this aid raises a number of serious dangers. The U.S. unwillingness to impose any limits on Ukrainian objectives suggests a course of action greatly heightening the danger of Russian escalation.⁴⁸ The U.S. military professes not to know what happens to the stores of weapons once they cross Ukraine's border with the West. In the fog of war, it is unclear whether these shipments will aid a Ukrainian attempt to drive Russia from the Donbass and Crimea, be used to fend off further Russian aggression (towards Odessa, for instance), or end up in the hands of brigands or the adversary. The case appears to be one in which the means are driving the ends, rather than the other way around. That is true in a couple of senses. One, military shipments substitute for a clear articulation of war aims. Two, the policy suggests an intent to use the Ukrainians as a tool to hit the Russians, whereas our real obligation as outsiders is to see Ukraine as an end in itself, not as a means to our ends. It is difficult to see how Ukraine's long-term interests are

48 Secretary of State Antony Blinken said before the Senate Foreign Relations Committee on April 26 that "the United States would support the Ukrainian military in pushing Russian forces out of eastern Ukraine if that is what President Volodymyr Zelensky aims to do. If that is how they define their objectives as a sovereign, democratic, independent country, that's what we'll support." John Ismay et al., "As Diplomacy Hopes Dim, U.S. Marshals Allies to Furnish Long-Term Military Aid to Ukraine," *New York Times*, April 26, 2022.

served by turning it into Afghanistan, but perhaps the stewards of this policy know better.

Much more questionable on the ground of right are the economic sanctions the United States and the West have employed. The Western states, really a Western Union in this instance, have a right to impose burdens on themselves in seeking to harm the Russians. In effect, however, they have gone far beyond this. They have imposed a tax on the entire world. The extent of this tax is a question that will receive intensive scrutiny. It is likely that the cost will be quite large, as measured by skyrocketing and unaffordable prices for food, energy, and industrial metals, with potential for serious unemployment arising from the disruption of supply chains. Unlike normal taxes, the West doesn't collect any cash from its suborned subjects, but it does impose costs that they bear. Unlike taxes in the West, these are not progressive, but regressive. Those at the margin—one to two billion people, especially in the Global South—will be hurt the most.

The emerging line in the blame game is that these grim consequences stem from Russia's invasion of Ukraine. That is partly true, but it is also misleading. While the war has entailed serious interruptions to importers dependent on food and fertilizer exports from Russia and Ukraine, the total economic war extends the otherwise temporary shocks imposed by the war and promises to make them permanent. This is especially so insofar as the entire world is conscripted into the cause of smothering the Russian economy, on pain of suffering sanctions of their own.

There is zero evidence for the idea that the Biden Administration gave serious thought to the consequences of its economic war before launching it. The administration, supported with near unanimity by the Congress and the Blob, just assumed that the West would be strong enough to bear the costs



and to inherently prevail. Whether that assumption is correct is an important question, but it is not the only important question. The other one is whether the West has the right to impose this stagflationary tax on the rest of the world. There is no basis for thinking that it does. For thirty years, the non-Western world has rejected the legitimacy of unilateral or secondary sanctions.⁴⁹

The West professes to lead a struggling humanity to freedom, but it has lost the capacity to listen to them. It sees itself as obeying multilateral norms but has no problem legislating for seven-eighths of humanity without consulting them in the least. The worst part of it is that the injury is likely to prove ongoing and to set the world on a course toward a disruptive de-globalization, with all its wealth-destroying consequences. The only thing that could lift this gloomy prospect is a peace treaty over Ukraine. For the reasons suggested above, that seems a remote possibility. It is a tragic impasse—a situation guaranteed to produce angry resentments throughout the Global South, but one from which the West seemingly cannot retreat.

The TEWAR is the fourth time since World War II that the United States has sought to marshal the forces of the world in opposition to aggression. Korea in 1950, Vietnam in 1965, and Iraq in 1991 are the three big preceding cases. In none of the previous cases did the United States impose anything resembling the sanctions it has imposed in the latest instance. It did not seek to dictate the allowable trade of neutral states in the Third World. Indeed, the overall impact of U.S. actions, especially in Korea and Vietnam, was to provide a classic Keynesian boost to economic development in the immediate environs, as the Americans were spending money lavishly. Those expenditures in

49 On the illegality of unilateral sanctions, see Alfred de Zayas, “Unilateral Sanctions and International Law,” Geneva School of Diplomacy, June 27, 2019.

1950 gave life to Japan’s “reverse course” in 1948 and provided a spark for the Japanese “lift-off” into postwar recovery. The Four Tigers benefited due to Vietnam. This time around, the West’s zero-sum approach means no material benefits and much material harm to others. The entire U.S. effort is about threatening to exact pain on others unless they toe the line—all stick and no carrot. This is in direct contrast to China’s approach to the Global South.

To approach the Global South on this basis is the height of folly, the prelude to a loss of influence in those parts. In his *Clash of Civilizations*, Samuel Huntington wrote of how the late twentieth century “blossomed forth in the widespread and parochial conceit that the European civilization of the West is now the universal civilization of the world.”⁵⁰ That conceit is now in full flower, but the future is likely to bring a different moral reckoning.

Conclusion: Law as Practical Reason

This essay has argued that the architecture of reasoning embedded in classic international law helps us navigate the great conflict over Ukraine, which now threatens to engulf the world. There are two faces to sovereignty in law, not just one. While the West has focused solely on territorial integrity, the conflict in Ukraine can neither be properly understood nor peacefully resolved without careful attention to self-determination.

In the ongoing crisis, neither the United States nor Russia survives unwounded in their encounter with international law. Each state has pursued policies in Ukraine that violated the law. The United States was most guilty in the first instance—especially in scandalously supporting an extra-constitutional revolution in Ukraine in

50 Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon and Schuster, 1996), p.55.



2014, and then in not acknowledging as a basis for peace discussions that both Crimea and the Donbass should have a say in their own fate. Russia's 2022 invasion fares no better under the eye of the law. It violates Ukraine's right to national self-determination.

With two wrongs in the balance, I have set forth as a fundamental prerequisite of peace-making a version of the self-determination principle—*that the least number of people be subject to rule by people they hate, or who hate them*. That principle should also constitute a limit on the military objectives the United States and the West seeks in Ukraine. It is both dangerous and unjust to make the restoration of Ukraine's territorial integrity—the repossession of Crimea and the Donbass—the principal war aim of the United States, and it is entirely foolish to put this choice entirely in the hands of the Ukrainians, as Secretary of State Antony Blinken has vowed. If there is to be any settlement at all, then the respective rights of the two peoples who inhabit that territory, now more estranged than ever, need to be the basis for that settlement. “One side takes all” cannot be the basis of a peace treaty. It is rather the recipe for a war between nuclear powers.

In appealing to International Law, I might be charged with appeal to a phantom, for there is in the public mind no fixed idea of what International Law signifies or demands. It has shape-shifted in the unipolar era in dramatic ways. I mean by it the law of the United Nations Charter, or what is called pluralism or Charter liberalism. In the thirty years that followed the end of the Cold War, that older view was displaced by a new set of ostensibly legal standards that have served to justify a wide range of U.S. interventions (invariably requiring a violation of the territorial integrity of other states). The United States appealed to International Law throughout these interventions, and indeed Inter-

national Law came to be viewed in many quarters as a warrant for intervention. This great paradigm shift, however, also constituted a great inversion, for the older law was, at its core, a barrier to intervention. In that law, states were to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State.”⁵¹

These new interventionist doctrines, based on rules made up in the West, never actually displaced the United Nations Charter as a law for planet earth; they were more pretend law than real law, but who could tell? The public and the foreign policy establishments in the West, not having studied the matter, had no way of determining what was real and what was fake by way of an appeal to international law.⁵²

The older law, the one that constitutes a barrier to intervention, is the law on which we need to focus. It is the law of the UN Charter, the distant heir to the law of nature and nations. It is the law that accords equal rights to all peoples of the earth. This law offers a route to practical wisdom, that is, a way of both protecting interests and respecting norms. Political leaders who flout the law, to be sure, always do so in the belief that they are getting away with something, when they are usually getting themselves into far deeper trouble, mistaking the true interests of their state.

There are many instances of such practicality in the history we have reviewed. Respect for the advantages of neutrality as keeping Ukraine from danger is one such idea. Respect for constitutionalism, as forbidding support for internal revolution, is another. Respect for the principle of self-determination when people descend into an-

51 Article 2 (4) of the United Nations Charter.

52 A reliable primer is Rajan Menon, *The Conceit of Humanitarian Intervention* (Oxford University Press, 2016).



archy or war is a third. Respect for the principle that, in a world of many nations, one nation cannot pretend to be the ultimate umpire or arbiter of it all, rounds out these legal and ethical verities. Some may dismiss them as reveries; in fact, they are intensely practical.

The United States disliked the lessons taught by the older law and charted another path in violation of them. The more prudent course would have been to submit to their basic wisdom. This would have spared the world a lot of trouble.

About the Author

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Cover: Presidential Office of Ukraine

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