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Letting Go of Territorial Integrity: Getting Realism and Ideals Right on Ukraine

TIMOTHY WILLIAM WATERS — 16 June, 2014



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In my previous two posts ([here](#) and [here](#)), I looked at the problems of declaring Russia's actions in Ukraine illegal – the dark side of law's polycentrism. In this post, I consider the defective legal policy driving the Western response to Russia's intervention in Ukraine – the West's failed fixation on territorial integrity – and consider a better response to Ukraine's contested future: the return of a repressed idealism.

Western responses to Russia's intervention in Ukraine look like an exercise in realism. Constrained by imperial overstretch and economic entanglement with Russian fossil fuel, the US and Europe know they are unable and unwilling to force a newly assertive Russia to withdraw militarily from the Crimea. So instead they are fighting a preemptive battle: In all the diplomacy – a NATO summit, talks in Geneva – there has been almost no talk of returning Crimea, and all the pressure of sanctions is aimed at forestalling further Russian incursions into the mixed areas of eastern Ukraine.

But the realism is grudging. Western policy is equally marked and driven by a curious – and curiously misplaced – idealism: a fetishism of territorial integrity, which defeats our own interests and denies a different idealism that once motivated our law and policy.

I. No Questions Please

Russia's actions have shocked the world, but no one could have been shocked by the specter of Crimean secession. Given the region's demography, history, and the autonomist sentiments of its population, there has long been every reason to expect that, given a choice, Crimeans might willingly join Russia. Of course, the recent referendum didn't offer them a real choice: It allowed voters to opt for radical autonomy or Russia, but not the status quo – all under the coercive presence of Russian occupation. There almost certainly was and is a genuine majority for independence, but it was impossible to know.

Real choice was never on Moscow's agenda – the referendum was a triumphant confirmation, not a decision. But the US and Europe were no more interested in a genuine

vote than Moscow was: The Obama administration ruled out recognizing the referendum *before* the Russians had a chance to rig the vote. Although conceding secessionist sentiment there was genuine, Western policymakers left no space for a Crimean referendum on *any* terms, and has taken the same line in eastern Ukraine.

II. Surrender or the Gun

The reason, of course, is opposition to Russia's improper military incursion. America and Europe have many geo-strategic interests in the crisis – energy security; protection of the global economy; a stable relationship with Russia; and absorption of Ukraine into the Western orbit – but one involves a principle of the global legal order: reaffirming the shaken consensus that borders may only be changed by peaceful means.

Yet to vindicate this consensus, the US and its European allies have chosen to stand their ground on a strangely hollow principle: The Obama administration's first response to the crisis was to declare its support Ukraine's territorial integrity, and it has continued on that path. On Crimea, it has sunk into a tactical silence, but defense of territorial integrity continues to drive Western rhetoric and policy for the rest of Ukraine, determining the schedule of threats and sanctions.

Western diplomats have advised the new Kiev government to appease its Russian minority – but by internal means only. This can project an aura of unreality, as with the American proposal, early in the crisis, to send monitors to Crimea to protect the rights of *Russians*, when of course it's all the *non-Russians* there who need protecting. But such logic

arises out of seeing Ukraine as the necessary territorial frame: secession is unthinkable, while Russia's proposals to federalize Ukraine – assumed to be a way station to secession – are met with instant, oppositional skepticism: the false urgency of 'no.'

Ukraine's government and the newly elected president, Poroshenko, with the full support of their Western allies, insist solutions must be found within Ukraine's existing constitutional framework, but the constitution prohibits regional referenda precisely to avoid the kinds of changes most Crimeans and some eastern Ukrainians so clearly want. And although the new government has proposed dialogue with the separatists, there's no evidence it is considering changes to the constitution that would allow deliberation on secession – changes that would be even less likely if Kiev's military effort succeed in its double task of suppressing the separatists while avoiding Russian intervention.

The result is a set of empty boxes, a choice less real than the Crimean referendum: A vote under Russian occupation or separatist militant pressure would be illegitimate, but under restored Ukrainian sovereignty a vote would be illegal. For those Ukrainians who genuinely desire a new regime, that is a policy of surrender or the gun. And as long as Russia supplies the latter, they don't need to contemplate the former. So much for realism.

III. Proxies for Principles

Opposing Russia's intervention has thus also meant opposing the secessionist desires of many Ukrainians. But surely this is the right thing to do? At first glance, it might appear that territorial integrity is simply the mirror of non-aggression,

the perfect expression of the very principle we want to reaffirm. And self-determination law is a right of ‘peoples,’ which in contemporary international law means the whole population of a state, not just some splintered fraction of it.

But territorial integrity is not a principle, it is a proxy: It makes no sense to defend the territorial integrity of states that lack the very qualities that make them worth defending – states whose own populations do not respect or desire the borders in which they live. It makes no sense to treat a population as a people just because it happens to be confined in a set of borders if that denies the real diversity, disagreement and desires of the actual existing people within that state.

Affirming the norm that borders must not be changed by force doesn’t mean just preventing invasions; it means providing pathways for peaceful change. That requires engagement with the causes (or pretexts) driving separatism and invasion. This is the logic that has driven the R2P movement’s turn to pre-conflict assistance, but that logic needs to go further: It also means supporting changes to borders not only in response to great persecution, but when that is some human community’s democratic desire.

But fixating on territorial integrity – and on Russia’s improper intervention – makes us miss that opportunity and imperative. John Kerry’s predecessor as Secretary of State, Hillary Clinton, recently made a stir when she compared Putin to Hitler. There’s something to it, because – much like the Munich Compromise over Sudetenland in 1938 – Crimea’s secession may actually be a good idea regrettably executed: an idea whose evident moral value we can’t see because its chief supporter is behaving so badly.

We have confused resistance to Russia's improper invasion with resistance to the underlying idea the invasion incidentally vindicated. This was the wrong way to hold a referendum – but that doesn't mean holding a referendum is wrong. Means and ends: The principle we ought to be defending is the inviolability of states from *outside* intervention, except in limited circumstances that Russia clearly hasn't met. But we should not be defending states against their *own people's* wishes – whether the whole population, or some discrete part that wants to go another way.

IV. Rediscovering Wilson

Today, a free vote in Crimea or eastern Ukraine is impossible – so we should create conditions in which a free vote is possible. The US and Europe should press Ukraine to adopt a constitution that reaffirms its sovereignty *and* provides for internationally supervised plebiscites in Crimea and the east, say in six months; then support the process and promise to respect any free and fair outcome. They should condemn Russia's aggression *and* cooperate with Russia in creating a legitimate pathway to achieve its strategic aspirations in ways the international system allows, even if that leads to revision of Ukraine's borders.

As the price of cooperation, the West should insist on specific protections for Crimea's Tatars, who suffered unspeakably under Soviet rule and fear a return to Moscow's control, as well as ethnic Ukrainians, and demand guarantees that in eastern Ukraine – where genuine secessionist sentiment is much more complex – Russia will respect its people's, or peoples', wishes.

We should demand that of Russia – and ourselves. The West’s interests and its ideals, properly considered, are not in conflict here: Our real *interest* is in a Ukraine secure and sovereign, with borders that are sensible, defensible and respected; our real *ideal* is a Ukraine in whatever borders its people, living in the shaping wake of their own history, desire. After all, that desire is our own – a thoroughly American idea which forged modern Europe: It is Woodrow Wilson’s self-determination. In the days and months ahead, we should ask ourselves why, instead of that democratic, liberating principle, it is its opposite – territorial integrity for its own sake – that we have chosen to defend.

The author, a professor of law at Indiana University, Associate Director of its Center for Constitutional Democracy, and member of its Russian and East European Institute, was a 2012-13 Alexander von Humboldt Experienced Research Fellow in residence at the Max Planck Institute for Comparative Public Law and International Law. He is most recently editor of The Milošević Trial – An Autopsy (Oxford University Press 2013), and is writing a book on secession and self-determination.

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2 Comments



THEODOR SCHILLING

17 June, 2014 at 16:58 – Reply

I sympathise with Waters' critique of *uti possidetis* which too often has lead to arbitrary results. However, the remedy that he proposes might be worse than the ill it is intended to heal. *Uti possidetis* does not prevent peoples from consensually separating: the divorce of the Czech Republic and Slovakia is a case in point. But this is not what Waters proposes, nor is his proposal restricted to what has been dubbed remedial secession. Rather, he proposes "supporting changes to borders ... when that is some human community's democratic desire". "[W]e should not be defending States against their own people's wishes – whether the whole population, or some discreet part that wants to go another way."

This strikes me as rather facile. It does not contemplate that the wishes of the whole population and of any discreet part of it might be irreconcilable although Waters clearly prefers, at least for Ukraine, the wishes of the "discreet part". It does not address the wishes of possible discreet minorities within those "discreet parts" – may they claim a sub-secession? Neither does it address the all-decisive question of the delimitation of

the “discreet parts” – “Crimea and the east” is not particularly specific. Most certainly, the question “whatever borders [Ukraine’s] people ... desire“ will not get the same answer from every person interviewed. Equally certainly, whatever those borders will be, they will not be defensible, neither in the West nor, more practically important, in the East; this is a question of geography.

Finally, Woodrow Wilson. Whether self-determination is “a thoroughly American idea” may be doubted by anybody contemplating the American civil war. That that idea forged modern Europe is also doubtful. Its application after WWI was tinged with a heavy dose of the much older idea of *vae victis*, and thus laid the groundwork for WWII. Modern Europe was rather forged in Yalta and Potsdam, and self-determination did not play any role at that stage. In the end, John Rawls (*The Law of Peoples*, 1999, at 39) has said it all: “It does not follow from the fact that boundaries are historically arbitrary that their role in the Law of Peoples cannot be justified. On the contrary, to fix on their arbitrariness is to fix on the wrong thing. In the absence of a world-state, there must be boundaries of some kind, which when viewed in isolation will seem arbitrary, and depend to some degree on historical circumstances.”



TIMOTHY WATERS

3 July, 2014 at 06:59 – Reply

A Reply to Prof. Schilling

‘Facile’ is an easy epithet. Posts are brief by nature, with important issues inevitably left in the ether. Prof. Schilling’s questions are excellent, and a moment’s reflection would suggest they have answers.

First, his critiques:

1. Any question about Ukraine's borders "will not get the same answer from every person interviewed." True, in every election. (Scotland's upcoming referendum is by majority vote.)
2. The post-World War I settlement was marked by *vae victis* – and by self-determination. One cannot look at a map of Mitteleuropa today and fail to see the effects of both. (But consider my post revised to 'forged in significant part,' with my thanks.)
3. True, self-determination is not an exclusively American idea. But Wilson's model is no less American because the Civil War preceded it. To paraphrase a thoroughly American poet, my country contains multitudes.
4. Some borders are more easily defended; events show Ukraine's eastern frontier is not one of them. What makes a border defensible is not geography but the neighbors.
5. Lastly, Rawls has certainly not said it all, or much of relevance here, since I nowhere suggest historical borders cannot be justified. But they need to be, and no sensible system this side of Panglossia supposes the ones we have are the best of all possible. One thing Rawls says is true: In the absence of a world state, there must be borders – so it is of the highest importance to make good ones.

Now, to answer Prof. Schilling's questions:

- A referendum will never achieve total unanimity
- and does not need to. (My model requires a supermajority, to assure secession is truly the dominant sentiment.)
- Territory is never specific – and therefore

requires some mechanism to delimit it. (My model proposes internationalized plebiscites. Such things were done after WWI.)

– New minorities might sub-secede – so we need contingent voting zones, as on the German-Polish and Austrian-Yugoslav borders. (I propose minimum populations for all seceding groups.)

– Remedial secession fails to address many cases and creates perverse incentives for groups to demonstrate a sufficient level of suffering. (My model proposes a right to negotiate secession.)

My proposal is complicated – like the world we live in. The current rule exhibits a curious indifference to change or desire. Its rigidity makes it easy to predict – Thomas Franck called it an idiot rule – though I don't see that as a virtue.

Finally, the medium: The short form requires a reader to read for what it is. I doubt blogs are the right forum for developing scholarship; I feel even more dubious about comments. So – having in mind G.B. Shaw's comment about writing that fills much needed gaps – I bring this one to a close.

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