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International Law's Rule of Five: Russia, Ukraine, and the Dark Side of Polycentrism

TIMOTHY WILLIAM WATERS — 6 June, 2014



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In my [previous post](#), I looked at the obvious illegality of Russia's actions in Ukraine – and the problems with that obviousness in the pluralistic cacophony of international law. In this post, I look at who's to blame, and what's to be done: more work for diplomats, less for lawyers.

I. Bush's Breakfast: Sow and Reap

In domestic law, we have mechanisms for final decision. The storied US Supreme Court Justice William Brennan used to ask his clerks what the most important rule in constitutional law was; then he'd hold up five fingers. On a nine-justice court, five votes make anything possible; without them, nothing can be done. International law has its own Rule of Five: If you wield a Security Council veto, whatever you do is almost never illegal.

There is, in other words, a certain slack latitude in international law, even in our non-aggression norm – an inclarity that is, in part, a consequence of other states' actions. For it is a rule that other powers, most especially America, have taken advantage of, in ways that only reconfirmed the non-aggression norm's shaky character. Consider Secretary of State John Kerry's recent comment on the Ukrainian crisis, uttered without irony: "You just don't in the 21st century behave in 19th century fashion by invading another country on a completely trumped up pretext". But there's no need to go back two centuries, or even one: Kerry, you'll recall, voted for the Iraq war before he voted against it.

And as for that last century, it had its share of self-defined interventions, conducted with aplomb in the face of general outrage: The invasion of Grenada, for example: The UN General Assembly condemned that, 108 to 9; President Reagan said it "didn't upset my breakfast at all." Bush's breakfast – and determination – were not disturbed by claims of illegality in Iraq either. Nor has it only been Republicans: In 1999, President Clinton and much of Europe bombed Serbia without UN authorization. And just last fall, President Obama boasted, accurately enough, that America got Syria to abandon chemical weapons by threatening force – something that, under the UN Charter, is equivalent to

actually using force. (That time, of course, Russia helped broker the deal.)

Since the ink on the UN Charter started drying, the norm of non-aggression has been under serious conceptual and practical strain, which has only gotten worse, or at least more obvious, in recent decades. So while doctrinally there are good reasons to think the Kosovo intervention's legitimate illegality was no precedent for Crimea, as a matter of socio-politics it's obvious that recent actions by the West have widened the conceptual chasm in the global intervention norm.

Western complaints aren't double-standards: they are a failure to recognize that we have been resetting the standard: The doctrinal claims of R2P, the interventions in Kosovo and especially Iraq – done without Security Council approval – have made it more plausible to take unilateral aggressive action and make implausible claims with a straight face. It's the dark side of polycentrism and law-as-conversation. The Russians have noticed that it's a Rule of Five, not One, as they proved by vetoing a Security Council resolution that would have declared the Crimean referendum illegal. (Some will recall that, during the Kosovo crisis, a Russian-sponsored resolution to condemn NATO's action was defeated in the Council – which was seen by some as indirect authorization; I've not heard anyone making that argument about the failed resolution on Ukraine.) Indeed, great-power interventions – whether pretextual or simply on one's own authority – happen quite often, and the most realistic legal response is: Yes they do.

II. Five Can Play That Game. . .

Given law's indeterminacy, what's a lawyer like Obama to do? Quite understandably, the US and its European allies have recognized the liberating possibilities for policy: They've got seats on the Security Council too, and the same structures of international law's anarchic polycentrism prevent Russia from controlling the legal discourse – no decision means, equally, no decision about Western countermoves either. So there's little Russia can do to prevent what it has condemned as Cold War tactics of a "bygone era": denunciations, moves towards diplomatic isolation, and lashings of sanctions.

Little Russia could do, that is, even if those sanctions were themselves illegal. I don't think that's the case here, though that – much like Russia's invasions – is a contingent fact which shouldn't distract us from the fundamentally, irreducibly discretionary nature of the decision to apply sanctions. There are other cases – such as, say, the sanctions regime against Iran – whose legality is much more dubious, but that is no obstacle to their implementation. (In that case, their formal pedigree via the Security Council is impeccable, but the rationale is almost Crimean in its willfulness.)

All to say that Russia's implausible deniability is no obstacle to a robust Western response – but that is, and should be, little solace to those who want to see a legal regime to regulate the use of force or the more existential questions of international life. What we have is polycentric, anarchic politics, claims and counter-claims – diplomacy and conversation. If you like, you can call it law.

- *In my next post, I'll look at the problems with the Western legal and political response to the Crimean referendum and the question of eastern Ukraine's contested future: legal lessons for diplomats.*

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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