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Polycentrism's Playground: Ukraine and Russia's Implausible Deniability

TIMOTHY WILLIAM WATERS — 4 June, 2014



In this post, the first in a series on the Ukrainian crisis, I look at the obvious illegality of Russia's actions in Ukraine – and the problems with that obviousness in the pluralistic cacophony of international law.

If Russia's invasion of Ukraine hasn't violated international law, it's hard to see what would. Which means, unfortunately, that it's hard to see what would.

I. Obvious, Illegal

After months of protests in Kiev against the pro-Moscow government's rejection of a deal with the European Union – protests which increasingly radicalized and were met with increasing violence – President Viktor Yanukovich was ousted and fled the capital and then the country. It looked, for a moment, like the end of Ukraine's crisis – but then Russia intervened militarily, first in Crimea, then in eastern Ukraine, giving support to disaffected populations of ethnic Russians, Russophones and others unhappy with the new Western-oriented regime.

The case for illegality looks clear: Despite denials from Moscow, the 'Green Men' who supposedly undertook the liberation of the Crimean peninsula looked suspiciously like Russian special forces, some of whom reportedly had been photographed in Georgia in 2008 and, more recently, in eastern Ukraine.

There are limited grounds for using force against another state, all missing here: authorization by the United Nations, self-defense, or invitation. No, no and no: Russia didn't even bother arguing the first two, and the treaties it signed for its Black Sea Fleet's bases certainly didn't allow Russian troops to roam free. The only other justification – humanitarian intervention or R2P – looks totally pretextual; there was no evidence of threats to Crimean Russians that would meet the high threshold that doctrine requires. If we have to argue about whether or not Kosovo met the standard, there is no way Crimea or even eastern Ukraine could.

For these reasons, the referendum in Crimea looked like nothing so much as cover for annexation. Indeed, from a customary international legal perspective, even Putin's initial denials that Russia troops were present actually reinforced

the legal norm against intervention, though that is cold comfort for Kiev.

Now, in eastern Ukraine, the pretexts look just as thin – claims based of the recent referendum in Donetsk and Luhansk even thinner, especially after the recent Ukrainian elections – and while there is greater violence and greater instability than there was in Crimea, it seems clear that much of it was at least initially ginned up by Russia itself, in a form of provocation that would void any claim of protective purpose.

II. *Kto kogo?* Pluralism's Playground

All this is clear – except it isn't. The pluralistic, cacophonous structure of international law means the West can *say* Russia's acts were illegal, but can't *decide* they were, and nobody else can either. The US and Europe might be right, but they can't *make* it right.

Russia's justifications are *factually* ridiculous but *theoretically* plausible. Humanitarian intervention is designed for exactly this *kind* of case, just not these facts: The fact that we can easily distinguish the Kosovo case should just remind us that it needs to be distinguished – because there is now a plausible justification for protective intervention. (Indeed, armed incursions have long been justified to protect small numbers of citizens abroad – the practice is known as the Entebbe doctrine, after an Israeli incursion into Uganda to rescue 106 hostages. In 1983, the US invaded Grenada notionally to protect a few American medical students – a considerably smaller group than Russians in Crimea.) Russia's justifications *are* dubious – in

this they resemble the Bush administration's reasons for invading Iraq: all valid in theory, just not in the actual case.

Russia even had an invitation – something Bush never got. The West rejected that invitation's validity, noting that while President Yanukovich was ousted through extra-constitutional means, he no longer held power and had fled. But loss of effective control is exactly the condition that doctrines supporting democratic and constitutional continuity seek to remedy. If you swing a dead constitution you will hit any number of countries whose elected leader was toppled – and whose successor Western states refused to recognize. The real rule is loss of control whose legitimacy we accept. Russia didn't, or at least plausibly claimed it didn't: Pretextual is not the same as illegal. (Yanukovich's usefulness to Russia was of short duration; Moscow belatedly decided to support the recent Ukrainian elections and work with the new authorities; but his presidency served Putin's purpose.)

Even the obvious falsehood that Russian troops weren't involved in the operation isn't novel. This is not the first time a major power has used such a laughably legal ruse: During the Korean War, the People's Republic of China flooded armies of its soldiers into North Korea – all of whom were, notionally, volunteers outside the state's control. Nobody believed this obvious fiction, but it did allow the Chinese to implausibly deny they were intervening, which was the point.

None of these scenarios really are comparable – the differences between the permanent 'protective' annexation of Crimea and Israel's lightning in-and-out raid on Entebbe overwhelm any thin, rhetorical analogy. Even the invasion of

Iraq looks thickly sourced in international law by comparison. Unlike its 2008 invasion of Georgia, Moscow's arguments in Ukraine don't stand up to scrutiny, or even squinting.

But implausible defiance may be enough: Facts are distracting, because the only fact that matters is not the truth about who those armed men were, but who gets to decide. It's rather like this blogpost: I could quite easily make the argument that Russia's actions are illegal, and I would be right – but I don't have the authority to make it so, and I would be wrong not to admit that. The norms at stake here are no “vaguer than typical norms of international law”, but there is no *authoritative* way to determine that Russia's actions – however insupportable – are illegal. The puerile, playground retort ‘says who’ says a great deal about international law's indeterminacy.

- In my next post, I'll continue this line of argument, asking who is to blame and (in the spirit of an earlier rejuvenator of the Moscow-based geopolitical project) what is to be done.

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