

The Ukraine Crisis, Cold War II, and International Law

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A. Introduction

The Ukraine crisis has, yet again, called into question the coherence and stability of international law both as a language for mediating particular types of international disputes—such as conflicts between the so-called Great Powers¹—and as a set of institutions capable of serving as *fora* for the resolution of these disputes. Given the scale and intensity of the ongoing war in Ukraine and the magnitude of its regional and global repercussions, a number of policymakers and historians have already made compelling arguments for why the conflict may be the most significant threat to global order since the end of the Cold War—perhaps even since the Cuban Missile Crisis.² While policymakers in the U.S. and Russia have cautioned against drawing Cold War parallels,³ numerous analysts

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¹ GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER* (2004).

² Juliane von Mittelstaedt & Erich Follath, *Interview with Henry Kissinger: 'Do We Achieve World Order Through Chaos or Insight?'*, DER SPIEGEL INTERNATIONAL (Nov. 13, 2014), <http://www.spiegel.de/international/world/interview-with-henry-kissinger-on-state-of-global-politics-a-1002073.html>; STEPHEN F. COHEN, *SOVIET FATES AND LOST ALTERNATIVES: FROM STALINISM TO THE NEW COLD WAR* (2012); Jessica McKenzie, *The Most Dangerous Time in Russian-US Relations Since the Cuban Missile Crisis*, THE NATION (Dec. 5, 2014), <http://www.thenation.com/blog/192073/most-dangerous-time-russian-us-relations-cuban-missile-crisis>.

³See NATO, *NATO-RUSSIA RELATIONS: THE FACTS*, (Feb. 5, 2015), http://www.nato.int/cps/en/natolive/topics_111767.htm#cl1 (debunking “myth” of NATO trapped in a “Cold War mentality”); see also INTERNATIONAL SECURITY ADVISORY BOARD, *REPORT ON U.S.-RUSSIA RELATIONS* (Dec. 9, 2014), stating:

The term ‘new Cold War’ is neither accurate nor helpful. The immediate issues are regional, not global, and—except among some extreme nationalists in Europe—the ideological content of the Putin vision has not inspired adherents outside Russia. But if there is no new Cold War, at a minimum there is now a significant adversarial component to our relationship from the Russian standpoint.

<http://www.state.gov/t/avc/isab/234902.html>; see also U.S. State Department Daily Press Briefing, (Mar. 13, 2015), <http://translations.state.gov/st/english/texttrans/2015/03/20150316314034.html#axzz3UsXW78hL>; see also Интервью Владимира Путина радио «Европа-1» и телеканалу TF1, KREMLIN.RU (June 4, 2014), <http://www.kremlin.ru/transcripts/45832>.

in both countries have proclaimed the start of a new Cold War in light of the rapid deterioration in relations between Moscow and Washington.⁴ Beyond bilateral U.S.–Russia relations, and in the words of Dmitri Trenin, director of the Carnegie Moscow Center, Cold War Two (hereinafter “CWII”) has “effectively put an end to the interregnum of [post-Cold War] partnership and cooperation between *the West* and Russia.”⁵ While sharing the view that a new Cold War has erupted, this article suggests that its causes are far deeper and its likely battlegrounds are far wider than mere antagonism between the United States and Russia over the fate of Ukraine. To the extent that CWII has begun, it may mark a return to interbloc rivalry, East versus West, or even Great Game geopolitics. To complement these frames, the present conflict may also be understood by viewing it through the prism of political economy, particularly the study of “new-statism,” or the new developmental state within the broader context of the development of global capitalism.⁶ Thinking of CWII this way allows one to ask whether CWII is actually a war between Western liberal capitalism and various systems of state capitalism, of which Russia’s is but one. To be even more precise, one can also ask whether the conflict is better thought of as a contest between different state capitalisms for control over key trade or transit routes, production locales, and markets. Tribes, states, and empires have always waged mortal combat over these material matters. CWII—whether it has started or soon will—will likely rest on similar considerations. And yet, despite the seriousness of the threat, there has been remarkably little academic discussion, and much less public debate, regarding the configuration of global power flows that has contributed to this crisis or the role, and limitations of law in structuring our political imaginations in response to these challenges.⁷ This Article is an attempt to call attention to several serious aspects of the Ukraine crisis which have hitherto been underanalyzed, namely the role of information warfare in exacerbating its magnitude.

⁴ Michael McFaul, *Confronting Putin’s Russia*, N.Y. TIMES (Mar. 23, 2014,); Moscow State University, *Холодная война XXI века, Конференция 23 апреля 2014 года в Московском Государственном Университете*, YOUTUBE (Apr. 23, 2014), <https://www.youtube.com/watch?v=v6Vs74j4kpQ> (recording of high-level university-wide conference at Russia’s leading university on the topic of Cold War II).

⁵ Dmitri Trenin, *Welcome to Cold War II*, FOREIGN POLICY, (Mar. 4, 2014), http://www.foreignpolicy.com/articles/2014/03/04/welcome_to_cold_war_ii (emphasis added).

⁶ See, e.g., DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2005); Nicola Phillips, *Globalization and Development*, in *GLOBAL POLITICAL ECONOMY* 416 (John Ravenhill ed., 2d ed., 2008); see also MARK RUPERT & M. SCOTT SOLOMON, *GLOBALIZATION AND INTERNATIONAL POLITICAL ECONOMY: THE POLITICS OF ALTERNATIVE FUTURES* (2006).

⁷ *Is International Law Effective? The Case of Russia and the Ukraine*, *American Society of International Law Annual Meeting* (Apr. 9, 2014), http://publicinternationallawandpolicygroup.org/wp-content/uploads/2014/04/Event-Review_Is-International-Law-Effective.pdf (abbreviated summary of proceedings); Katrina vanden Heuvel & Stephen F. Cohen, *Cold War Against Russia Without Debate*, THE NATION (May 1, 2014), <http://www.thenation.com/article/179579/cold-war-against-russia-without-debate>; US-Russia Forum, YOUTUBE (June 16, 2014), <https://www.youtube.com/watch?v=p8IH50BR0EQ>.

B. The Ukraine Crisis and International Law

The “Ukraine crisis” as used here refers to the ongoing geopolitical contest over the fate of Ukraine, the breadbasket of Europe and the point of origin of Russian civilization.⁸ The term explicitly captures events giving rise to the Euromaidan protests in late November 2013, and includes: The subsequent overthrow of democratically-elected Ukrainian president Viktor Yanukovich on 22 February 2014; the emergence of a nationalist post-overthrow government;⁹ the eruption of federalist/separatist “anti-Maidan” protests in Crimea and throughout Ukraine—primarily, but not exclusively—¹⁰ in the Donbas region; the subsequent referendums on independence held in Crimea¹¹ and Luhansk/Donetsk regions; the absorption of Crimea into the Russian Federation;¹² the eruption of armed conflict in Eastern Ukraine;¹³ and countermeasures taken by the U.S., EU, and NATO against Russia for its actions in Crimea and its support of alleged separatists in Eastern Ukraine.¹⁴

⁸ See Umut Özsu, *Ukraine, International Law, and the Political Economy of Self-Determination*, 16 GERMAN L.J. 434, 438–39 (2015) (defining the “Ukraine crisis” as the “culmination of a broad trend over the past two decades to move away from the U.N. Charter’s prioritization of territorial sovereignty and toward what many regard as a new species of liberal interventionism”).

⁹ Lucan Way, *Civil Society and Democratization*, 25 J. DEMOCRACY 35 (2014); Anton Shekhovtsov & Andreas Umland, *Ukraine’s Radical Right*, 25 J. DEMOCRACY 59 (2014), <http://www.journalofdemocracy.org/sites/default/files/Ukraine-25-3.pdf>.

¹⁰ Kristian Vigenin, *We Insist on a Thorough Investigation of the Events in Odessa*, BULGARIAN MINISTRY OF FOREIGN AFFAIRS (May 3, 2014), <http://www.mfa.bg/bg/events/6/1/2845/index.html> (demanding an investigation into May 2, 2014 Odessa Trade Unions House fire, which killed more than 40 anti-Maidan protesters who were trapped inside while the building was set alight) (in Bulgarian).

¹¹ *NATO says Crimea Referendum Would Break International Law*, REUTERS (Mar. 14, 2014), <http://www.reuters.com/article/2014/03/14/us-ukraine-crisis-nato-idUSBREA2D1NI20140314>.

¹² *Address by President of the Russian Federation*, PRESIDENT OF RUSSIA (Mar. 18, 2014), <http://eng.kremlin.ru/news/6889> (calling on the Duma to accept Crimea and Sevastopol as two new subjects of the Russian Federation).

¹³ Paul Stronski, *Broken Ukraine: The Mess Isn’t All Russia’s Fault*, FOREIGN AFFAIRS (Mar. 17, 2015), <https://www.foreignaffairs.com/articles/eastern-europe-caucasus/2015-03-17/broken-ukraine>.

¹⁴ Andrew Monaghan, *The Ukraine Crisis and NATO-Russia Relations*, NATO REVIEW MAGAZINE (2014), <http://www.nato.int/docu/review/2014/Russia-Ukraine-Nato-crisis/Ukraine-crisis-NATO-Russia-relations/EN/index.htm> (stating that

Various security aspects of the crisis—such as the infiltration of Crimea, and Russian military exercises and a build up on Ukraine’s border—have unsettled Eastern European members of the Alliance and created a debate in the West about the strength of NATO’s Article Five commitment to defend its members. This has resulted both in enhanced reassurance efforts and the preparation of a Readiness Action Plan. This plan envisages enhancing intelligence and

I. Roots of the Ukraine Crisis

Like any geopolitical phenomenon, the Ukraine crisis has multiple roots. First, at the most superficial level the timing of the crisis suggests that Russia's decision to grant asylum to Edward Snowden—the engineer of the single most disruptive and consequential intelligence leak in history—was certainly one major cause in the rift between the U.S./U.K. and Russia.¹⁵ Russia's involvement in the Snowden affair was one immediate catalyst in the breakdown of U.S.-Russia and NATO-Russia relations¹⁶ in the latter half of 2013, which were otherwise faithful to the underlying “reset” ethic promulgated by the Obama Administration and the administration of then-president Dmitry Medvedev.¹⁷ In a similar correlative vein, roots of the Ukraine crisis may lie within Russian support for the Assad regime in Syria, thereby stifling eleventh-hour efforts by the U.S. to intervene in early September 2013,¹⁸ or within ongoing Russian support for a comprehensive nuclear deal with Iran, which some influential U.S. foreign policy leaders actively oppose.¹⁹

Second, the breakdown in Russian-Ukrainian relations can be traced to centuries-long cultural, intellectual, and political rivalry—or at least anxiety—between Kiev and Moscow

awareness capabilities, more high intensity military exercises, prepositioning equipment and supplies further east and improving the capacity of the NATO Rapid Reaction Force).

¹⁵ GLENN GREENWALD, NO PLACE TO HIDE (2014); Tom Whitehead, *GCHQ's Internet Surveillance with US Ruled Unlawful*, THE TELEGRAPH (Feb. 5, 2015), <http://www.telegraph.co.uk/news/uknews/law-and-order/11394860/GCHQs-mass-Internet-surveillance-ruled-unlawful.html>.

¹⁶ See McKenzie, *supra* note 2.

¹⁷ Office of the Press Secretary, *U.S.-Russia Relations: “Reset” Fact Sheet*, (June 24, 2010), available at <https://www.whitehouse.gov/the-press-office/us-russia-relations-reset-fact-sheet>. For a provocative perspective on Russia's ability and willingness to abide by the “Western” language of international law, see, e.g., Anna Dolidze, *The Non-Native Speakers of International Law: the Case of Russia*, 15 BALTIC Y.B. INT'L L. (forthcoming 2015).

¹⁸ Barack Obama, *Remarks in Address to the Nation on Syria*, WHITEHOUSE.GOV (Sept. 10, 2013), (transcript available at <https://www.whitehouse.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria>):

The U.S. has] determined that it is in the national security interests of the United States to respond to the Assad regime's use of chemical weapons through a targeted military strike. The purpose of this strike would be to deter Assad from using chemical weapons, to degrade his regime's ability to use them, and to make clear to the world that we will not tolerate their use.

¹⁹ See Robert Mackey, *Republicans' Iran Letter Ignites Fierce ‘#47Traitors’ Debate Online*, NY TIMES (Mar. 11, 2015), www.nytimes.com/2015/03/12/world/middleeast/republicans-iran-letter-ignites-fierce-47traitors-debate-online.html?_r=0.

for ascendancy vis-à-vis one another and, more broadly, across the Slavic world.²⁰ In the words of one of contemporary Ukraine's leading sociologists, Evgenii Golovakha, Ukrainian–Russian relations have always been characterized by an “older brother, younger brother” rivalry, with Russians as “younger brothers” trapped in an expansive mindset that is built on a self-consciously messianic—Moscow as the Third Rome²¹—civilizing mission.²² By contrast, Kievan Rus and the hundreds of medieval principalities that interlaced the territory that is now contemporary Ukraine, had always been more multicultural and more welcoming of foreign influences.²³ This nearly millennial tension and genuine fraternal bond between Ukraine and Russia—as well as their people—informed every geopolitical realignment involving one or the other state or territory.²⁴ Ukraine had always occupied a preferred place in the Russian political imagination, from Russian Imperial history through the Soviet and post-Soviet periods, as the point of origin of Russian language, Russian Orthodoxy, and Russian statehood.²⁵ Beyond adding necessary historical or cultural context, the symbiotic and mutually constitutive Ukrainian–Russian relationship features prominently as a cause in the internally conflicting rationales for the Ukraine crisis, both within Ukraine and Russia.²⁶ To paraphrase Churchill, if Russia is a “riddle wrapped in a

²⁰ Evgenii Golovakha, *Russia Has Lost the War*, YOUTUBE (Mar. 16, 2015), <https://www.youtube.com/watch?v=Ljb2ZKsoaXo>.

²¹ *Id.*; Alar Laats, *The Concept of the Third Rome and Its Political Implications*, in RELIGION AND POLITICS IN MULTICULTURAL EUROPE: PERSPECTIVES AND CHALLENGES 102 (Alar Kilp & Andres Saumets eds., 2009) (tracing the doctrinal origins of Moscow as the Third Rome and arguing that the universalizing concept still sub-consciously animates Russian political discourse).

²² See Golovakha, *supra* note 20. For several leading accounts of the way in which international law furthers a Eurocentric civilizing mission, see ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* (2005); see also MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960* (2002).

²³ Ukraine's culture of hospitality is legendary. In the political sphere, this includes, but of course is not limited to, the appointment of Scandinavian rulers—the Varangians—to rule Kievan Rus, just as Ukrainians have welcomed foreign-born cabinet ministers in the post-Yanukovich era. PAUL R. MAGOCSI, *A HISTORY OF UKRAINE: THE LAND AND ITS PEOPLES* 65–70 (2010); *Ukraine's New US-Born Finance Chief Enduring Baptism by Fire*, N.Y. TIMES (Mar. 1, 2015); *Ukraine Goes Abroad for Government Ministers*, THE WALL ST. J. (Dec. 2, 2014).

²⁴ The very etymology of the name “Ukraine,” it should be remembered, hearkens back to the Old Slavic (and contemporary Russian and Ukrainian) word *krai*, which means “border”—which, when combined with the prepositional *u-*, translates to “borderland.” ETYMOLOGICAL DICTIONARY OF THE UKRAINIAN LANGUAGE, VOL. 7 (O.S. Melnychuk, ed., 1983). The space that Ukraine bordered, of course, and in relation to which it has always been defined, was none other than Moscovite Rus, that is, the place we know as contemporary Russia.

²⁵ VLADIMIR VASILEVICH SHCHERBITSII, *SOVIET UKRAINE* (1985); ROMAN SOLCHANYK, *UKRAINE AND RUSSIA: THE POST-SOVIET TRANSITION* (2001); Dmitri Titoff, *Is Russia's Perceived Insecurity a Sufficient Explanation for War?*, SILK ROAD REPORTERS (Mar. 15, 2015), <http://www.silkroadreporters.com/2015/03/15/is-russias-perceived-insecurity-a-sufficient-explanation-for-war/>.

²⁶ See, e.g., William E. Butler, *Russia and the WTO System: Law, Regionalism, and Politics*, 44 U. MEM. L. REV. 599, 616 (2013) (“Whether the vision of a CIS common law comes to pass or not, the symbiotic role of the Russian legal system cannot fail to impress. Russian law and Russian legal concepts serve as the principal model for legal

mystery inside an enigma,” then *Ukrussia* (a deliberately awkward politically-ambivalent term to describe the geographic, social, and political space between Poland and Alaska)—with its high rates of intermarriage, shared political history, and absence of distinct markers²⁷—is Churchill’s riddle metaphor squared, due to the obviously conflicting inferiority/superiority tropes in Ukrainian political discourse vis-à-vis Russia, Russia’s superiority/fraternity complex vis-à-vis Ukraine, and contemporaneous, almost instinctive, affection and distrust from both sides towards the other (not to mention *Ukrussia*’s perennial anxiety with the “West”). Many Russians and significant segments of Ukrainian society believe that Russia and Ukraine quite literally represent one and the same people, one nation,²⁸ and thus one supra-state civilizational space. This belief is a core empirical basis for many of Russia’s international legal arguments in regards to the Ukraine crisis.

A third potential cause of the present crisis—and one that features prominently in elite Russian foreign policy and international legal arguments—is that the Ukraine crisis is chiefly the product of a U.S.-backed coup.²⁹ Because any inquiry into the factual basis for this assertion would necessarily require access to sources that ordinarily are not accessible, international lawyers can and should inquire hypothetically into the legal effect, if any, of the forced removal of Yanukovich upon Russia’s subsequent actions in Ukraine. Brad Roth’s contribution to this publication takes this issue up directly, but only in the context of the legitimacy of the ouster of Yanukovich (intervention by invitation) and broader arguments

development within the CIS.”); see also Laure Delcour & Kataryna Wolczuk, *Eurasian Economic Integration: Implications for the EU Eastern Policy*, in *EURASIAN ECONOMIC INTEGRATION: LAW, POLICY AND POLITICS* 179, 197 (Rilka Dragneva & Kataryna Wolczuk eds., 2013) (describing Russian efforts to incentivize Ukrainian participation in the Eurasian Customs Union, including long history of gas disputes between Ukraine and Russia), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2430216.

²⁷ See BOHDAN HARASYMIW, *POST-COMMUNIST UKRAINE* 206 (2002) (discussing lack of differentiating markers between “Ukrainians” and “Russians”). The term “Ukrussia” is one of my choosing precisely to collapse this national distinction as a heuristic to facilitate describing particular aspects of the Ukraine crisis which do not depend on nationality.

²⁸ Here, “nation” is used in the narrow Slavic sense of the word “*natsia*,” as *ethnos*. This is the same ethnic sense of the word in which the modern Wilsonian right of “nations” to self-determination was formulated. Vladimir Putin, *Concert Dedicated to the Reunification of Crimea and Sevastopol with Russia*, PRESIDENT OF RUSSIA (Mar. 18, 2015), available at <http://www.kremlin.ru/news/47878> (“In Russia, we have always thought that Russians and Ukrainians are one people. I think so now as well. Of course, extreme nationalism is always harmful and dangerous.”).

²⁹ Vitaly Churkin, Russian Ambassador to the United Nations, *Address to the United Nations Security Council 7253rd Meeting* (Aug. 28, 2014), <http://webtv.un.org/watch/ukraine-security-council-7253rd-meeting/3754452835001>; S. E. Naryshkin, *The Coup D’etat in Kiev in February 2014 and International Law*, 2 *EURASIAN L. J.* 8 (2015), http://www.eurasialaw.ru/index.php?option=com_content&view=article&id=7140:-2014-&catid=477:-2-81-2015&Itemid=796 (interview with Naryshkin Sergey Yevgenyevich, Chairman of the State Duma of the Federal Assembly of the Russian Federation) (In Russian).

surrounding self-determination for Crimea and LNR/DNR.³⁰ And as Roth's example suggests, one need not be an "apologist for Russia" to seriously consider these questions, no matter how contested the underlying facts may be.³¹ That Russia has chosen to explicitly portray the Ukraine crisis as a U.S.-instigated coup logically implies that all of the international legal arguments raised in this volume regarding the impermissibility of Russia's actions in Ukraine are reversed by Russia to reflect impermissible U.S. intervention in Ukraine, including the dispatch of military advisors by the U.S. and U.K. to support Ukrainian military restructuring.³²

Fourth, as Umut Özsü and Outi Korhonen argue, the Ukraine crisis cannot be understood without analyzing purely domestic socioeconomic conditions and the debate over regional trade integration within the context of both the Eastern Partnership Programme of Europe and the Eurasian Customs Union.³³ Although the crisis is now typically attributed by expert circles to the latter dynamic as a rejection of Russian regional hegemonic influence, the former (domestic economic conditions) actually accounted for a greater share of the mass mobilization of discontented Maidan protesters.³⁴ Although bound up with romantic rhetoric regarding European aspirations and rule of law, the narrow issue that triggered mass mobilization on the Maidan in late November 2013 was pronounced dissatisfaction with the economic policies of the Yanukovich regime and ultimately concerned bread-and-butter economic welfare issues for the overwhelming majority of Ukrainian citizens.³⁵ Of course, the demands of Euromaidan protesters were not articulated in strictly socio-economic terms. To the extent that utterances from the main stage on Kiev's Maidan Square could be said to represent the will of the polity, they coalesced around the following particularized excesses: (1) nepotism and cronyism within the governing regime (anti-corruption); (2) suppression of fundamental human rights, particularly civil and political rights (e.g., violation of the right to assemble, and passage of strict controls on

³⁰ Brad Roth, *The Virtues of Bright Lines: Self-Determination, Secession, and External Intervention*, 16 GERMAN L.J. 384, 388 (2015).

³¹ *Id.* at 415; Jens David Ohlin, *infra* note 74 (discussing competing empirical theories for the shooting down of Malaysian Airlines flight MH17 and discussing international legal consequences of alleged Russian support for separatists).

³² See Naryshkin, *supra* note 29 ("I will leave the terminological games on their [Western] consciences, but will emphasize that facilitating an armed coup from abroad—in legal terms is called intervention into domestic affairs of Ukraine."). On 20 March 2015, the United States announced that approximately 300 U.S. paratroopers will begin training Ukrainian National Guard units in Western Ukraine. Earlier in March 2015, the U.K. also announced that it would send additional non-lethal support in the form of advisory and training teams.

³³ See Özsü, *supra* note 8.

³⁴ *Russian Bailout Masks Ukraine's Economic Mess*, BBC News (Dec. 18, 2013), <http://www.bbc.com/news/business-25430980>.

³⁵ *Id.*; see also *NATO Says Crimea Referendum Would Break International Law*, *supra* note 11.

political speech); (3) particular grievances regarding treatment of political prisoners, and other specific violations of rights (excesses of the state security police service, the Berkut); and (4) Russia's perceived encroachment into Ukraine's sovereign will for the purpose of enticing Ukraine towards further integration with Russia.

Each of these grievances—and the list could be expanded in manifold ways—reflected broader anxiety amongst the people of Ukraine that the post-socialist transition had failed them in fundamental ways by depriving them of welfare, security, and the promise of a prosperous future.³⁶

That Ukrainian protesters—and the post-Yanukovich Ukrainian government—chose to highlight the economic failures of the post-Soviet transition by articulating their demands in the vocabulary of nationalist politics—in opposition to perceived Russian threats, or in opposition to the divisive or ineffective politics of fifth-column *moskali* within Ukraine³⁷—in the vocabulary of human rights, or in the jargon of law and development—good governance, legislative/institutional reform, anti-corruption, rule of law promotion, judicial independence, etc.—is not incidental. These argumentative tropes operate on a distinct conception of international law and global governance that gives preference to particular international legal actors over domestic legal actors, and, furthermore, over more inchoate socio-political forms—such as class.³⁸ Thus, nationalism gives preference to the nation-

³⁶ John D. Haskell & Boris N. Mamlyuk, *Capitalism, Communism . . . and Colonialism? Revisiting "Transitology" as the Ideology of Informal Empire*, 9 GLOBAL JURIST (2009), <http://ssrn.com/abstract=1679246>.

³⁷ In Ukrainian, *moskali* is a derogatory plural term to refer to ethnic Russians, Russian nationals, or Russian-allied Ukrainians, and is typically used to refer to chauvinistic or strong-arm conduct by Russians against Ukrainian interests, irrespective of context (art/culture, military, economic, etc.). Of many Russian equivalents to refer to Ukrainians, a term with similar derogatory meaning to *moskali* is *ukrop*, or baby dill spice. These linguistic nuances are significant because some of the rhetoric emanating from Maidan and its partisans has had eerie parallels to infamous utterances in the Rwanda genocide (Hutus referring to Tutsis as cockroaches and calling for their extermination). See *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, (Sept. 2, 1998); *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, ICTR-99-52-A, (Nov. 28 2007). Further, in the 2 May 2014 Odessa Trade Unions House fire reports showed that far-Right groups were chanting "burn kolorados" which is a double entendre reference to: (1) the orange and black colors of the Ribbon of St. George, a ribbon print that is used to widely commemorate Soviet victory in WWII and which serves as an identifying marker for pan-Soviet-space solidarity; (2) the typical summer Eastern European farm practice of manually gathering Colorado potato beetles (*Leptinotarsa decemlineata*) off potato plants to burn them in large farm fires. Furthermore, in the context of the Ukraine crisis, the 'fifth-column' internal threat may refer to, *inter alia*, the assertion that Ukrainian intelligence and state police services were penetrated and compromised by Russian intelligence, which was alleged to exert control over Ukrainian foreign affairs. See Denis Trifonov, *Russian Intelligence Presence in the CIS*, THE CENTRAL ASIA-CAUCASUS ANALYST (Dec. 17, 2003), <http://www.cacianalyst.org/publications/analytical-articles/item/8615-analytical-articles-caci-analyst-2003-12-17-art-8615.html>. Therefore, to fully defend sovereignty and actualize self-determination against Russia, one of the first acts of the post-Yanukovich government was "lustration" across all organs of public administration to remove perceived channels of Russian influence. Council of Europe Venice Commission: *some provisions of Ukrainian lustration law should be revised*, INTERFAX-UKRAINE (Dec. 12, 2014), <http://en.interfax.com.ua/news/general/239646.html>.

³⁸ See Özsu, *supra* note 8.

state as a legal actor on the international plane; human rights gives preference to the individual vis-à-vis an offending state and gives the individual international legal personality; developmentalist discourse gives preference to particular institutional actors, such as the IFIs, with technocratic expertise to solve seemingly complex and intractable problems.³⁹ In this way, long before the Crimean conflict and violence in the Donbas, the articulation of Maidan claims in distinct international legal forms—such as Ukraine’s right of self-determination in making its “European choice” free from Russian pressure⁴⁰ and the political violence against Maidan protesters as gross violations of human rights that delegitimize the otherwise democratically-elected and universally-recognized Yanukovich government⁴¹—seemingly creates the conditions and the necessity for an international legal intervention to rectify the underlying problems. In other words, the articulation of various economic and political claims in narrow international legal terms suddenly removes an otherwise purely domestic matter into the realm of international law, provided various international legal actors are prepared to entertain those claims or honor those interests.

³⁹ Alvaro Santos, *The World Bank’s Use of the “Rule of Law” Promise*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 275, 284 (David M. Trubek & Alvaro Santos eds., 2006) available at <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1915&context=facpub>; *Ukraine’s Bail Out*, *THE ECONOMIST* (Mar. 14, 2015), <http://www.economist.com/news/europe/21646214-loan-provides-sticking-plaster-stricken-war-weary-economy-when-relief-looks-barely-enough>.

⁴⁰ See Özsu, *supra* note 8, at 444 (explaining that in the context of the Ukraine crisis, self-determination “is to be understood primarily as the ability of the ‘Ukrainian people’ to ‘choose’ European integration over Russian hegemony, and only secondarily as the ability of the ‘peoples’ of Donetsk and Luhansk to conduct elections with an eye to autonomy or independence.”).

⁴¹ See Roth, *supra* note 30.

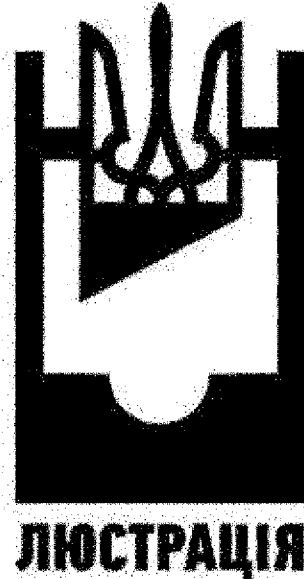


Illustration 1. Logo of the Ukrainian Lustration Committee⁴²

These arguments are not unique to Ukraine.⁴³ Similar argumentative rationales have been deployed against authoritarian or undemocratic regimes to support subsequent arguments for intervention—as witnessed in Libya, Syria, Egypt, Iran, and Venezuela—or are deployed towards particular emancipatory ends.⁴⁴ Often, the universalizing/particularizing—globalizing/Balkanizing—arguments appear side by side, reinforcing one another.⁴⁵ Matters that are traditionally within the sole purview of domestic law acquire international

⁴² As of 22 March 2015, 399 former government officials have been added to the Ukrainian Ministry of Justice lustration list. See UKRAINIAN MINISTRY OF JUSTICE, LUSTRATION COMMITTEE, *Unified Governmental Registry of Those Falling Within Ukrainian Law "On Cleansing [Lustration] of Government,"* available at <http://lustration.minjust.gov.ua/register> (In Russian). Ukraine's law on lustration has been deemed overbroad and lacking in procedural due process by the Venice Commission, and is currently undergoing review. See UKRAINE MINISTRY OF JUSTICE, LUSTRATION COMMITTEE, *Візит Венеціанської Комісії до України: Обговорення Проекту Змін До Закону України "Про Очищення Влади,"* (Feb. 17, 2015), available at <http://lustration.minjust.gov.ua/article/read/53> [In Russian].

⁴³ Before actions in Crimea and Donbas, similar international legal arguments were deployed against Russia in connection with the highly-publicized Khodorkovsky affair (Russia violating liberal internationalist principles regarding the inviolability of private property) or in connection with its notorious anti-gay-propaganda law. Stanley Reed, *Yukos Shareholders Awarded About \$50 Billion in Court Ruling*, N.Y. TIMES (July 28, 2014), http://www.nytimes.com/2014/07/29/business/international/yukos-shareholders-awarded-about-50-billion-in-court-ruling.html?_r=0.

⁴⁴ See, e.g., LYNN SAVERY, *ENCENDERING THE STATE: THE INTERNATIONAL DIFFUSION OF WOMEN'S HUMAN RIGHTS* (2007).

⁴⁵ MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (2006).

significance as a result of complex institutional efforts by actors who obviously have a normative stake in piercing the sovereignty veil of the state at issue.⁴⁶ But the moment they pierce the veil, these same actors have a clear interest in defining the degree of permeability that they will permit in the new jurisdictional membrane of that state. Often, the only way to identify these actors and to understand the legal mechanisms pursuant to which they operate is to go beyond conventional threshold questions of statehood or governmental legitimacy.

II. Ukraine Crisis Under International Law

Thus far, it should be clear that the Ukraine crisis triggers numerous issues that call into question the effectiveness and coherence of the international legal order. The exceptional positivist analyses on the intersection of territorial integrity and self-determination in this volume attest to the broad range of arguments available within that discourse, which, even though it explicitly sets itself in opposition to politics, nonetheless acknowledges the moral stakes in each of these deliberations.⁴⁷ Thus, rather than attempt to assess the various disputed rationales for Russia's actions in Ukraine from one's own default positivism—such as the application of Badinter or Kosovo precedents to Russia's tortured history with doctrinal innovations in the field of self-determination⁴⁸—it may be more useful to consider how this crisis is viewed in broader international-legal-political terms by four key actors: U.S., EU, Russia, and China. These views are crucial to understanding how international legal strategies are being currently developed and deployed to restructure the global order:⁴⁹

U.S.: Russia's actions violate settled norms of non-interference in the sovereignty of another state; Russia is returning to 19th century international rules in a 21st world; Russia is an aggressor guilty of the supreme crime, starting a war of conquest;⁵⁰ Russia is a reawakened empire;⁵¹ "Fuck the EU!";⁵² because of

⁴⁶ See Roth, *supra* note 30, at 400–03 (describing the tensions within international law's conception of the *domaine réservé* and, more generally, critiquing the Badinter practice of muddying doctrinal bright lines between, for example, constitutional and international law, with moral and political considerations).

⁴⁷ See Jure Vidmar, *The Annexation of Crimea and the Boundaries of the Will of the People*, 16 GERMAN L.J. 365 (2015); see also Roth, *supra* note 30; BRAD ROTH, SOVEREIGN EQUALITY AND MORAL DISAGREEMENT (2011).

⁴⁸ Bill Bowring, *Positivism Versus Self-Determination: the Contradictions of Soviet International Law*, in INTERNATIONAL LAW ON THE LEFT: RE-EXAMINING MARXIST LEGACIES, 133 (2008); Boris N. Mamlyuk, *Russian International Law and Indeterminacy: Cold War and Post-Soviet Dynamics*, in THE LEGAL DIMENSION IN COLD WAR INTERACTIONS: SOME NOTES FROM THE FIELD, 81, 84–87 (Tatiana Borisova & William Simons, eds., 2012).

⁴⁹ Vladimir S. Kotlyar, *International Law and Contemporary Strategic Conceptions of the USA and NATO*, DIPLOMATIC ACADEMY, MINISTRY OF FOREIGN RELATIONS OF RUSSIAN FEDERATION (2007), <http://www.dipacademy.ru/> (unpublished habilitation thesis) (In Russian).

⁵⁰ Kerry's interview with NBC News on Ukraine, Middle East, U.S. DEPT. OF STATE, (Mar. 2, 2014) available at <http://translations.state.gov/st/english/texttrans/2014/03/20140302295198.html#ixzz3V3HK4Gir> ("This is an act

Russia's invasion, U.S., U.K. and EU have a strategic, but also possibly legal (Budapest Memorandum⁵³), obligation to provide financial and military assistance to the post-Yanukovich government; broad sectoral and targeted financial sanctions are an effective punitive and remedial mechanism under international law for dealing with 'outlaw' states.⁵⁴

EU: See above, minus the obvious. Russia must be sanctioned for invading Ukraine; the sanctions must not be so significant that they harm domestic economic actors in the sanctioning state; Ukraine crisis shows the need for a stronger collective security mechanism (reexamination of NATO, Article 5,⁵⁵ and doctrinal disputes regarding conditions triggering defense obligations in asymmetrical or hybrid war⁵⁶ settings [cyberwar; support for proxy intra-state secessionist movements; etc.]); implementation of Minsk 2 agreement is an

of aggression that is completely trumped up in terms of its pretext. It's really 19th century behavior in the 21st century ...").

⁵¹ Boris N. Mamlyuk, *Intervention and Colonialism as Responses to Alleged Fascism*, OPINIO JURIS BLOG (Mar. 17, 2014), <http://opiniojuris.org/2014/03/17/ukraine-insta-symposium-intervention-colonialism-responses-alleged-fascism/>.

⁵² This refers to a notorious incident in which an intercepted recording of a telephone call between Victoria Nuland (United States Assistant Secretary of State for European and Eurasian Affairs) and Geoffrey Pyatt (Ambassador of the United States to Ukraine) was leaked to news outlets. In the telephone call, where Nuland discusses her preferences for various high-level government positions in the immediate post-Yanukovich period, Nuland is overheard stating: "Fuck the EU..." The statement was not denied by the U.S. State Department, which referred to the interception and leak of the call as a new low in Russian tradecraft. For context on the EU's anxiety regarding U.S. politics vis-à-vis Ukraine and EU; See, e.g., Michael Bolle & Oliver Fläschner, *The European Union: Stability Despite Challenges*, 4 *BALTIC J. EUR. STUD.* 20 (2014).

⁵³ The Budapest Memorandum was a four-party 1994 agreement between UK, US, Russia and Ukraine, pursuant to which Ukraine agreed to transfer its nuclear weapons (deployed and stockpiled) to Russia, in exchange for guarantees respecting the territorial integrity of Ukraine. The status of the Memorandum under international law is unclear, although signatory states could make a very compelling argument that it is legally binding as a treaty. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, *Merits*, 2001 I.C.J. 40.

⁵⁴ See SIMPSON, *supra* note 1. On 28 July 2014, the U.S. government accused Russia of testing land-based cruised missiles in violation of the Intermediate Range Nuclear Forces Treaty (1987); *US Says Russia Breached Nuclear Treaty*, THE GUARDIAN (July 28, 2014), <http://www.theguardian.com/world/2014/jul/29/us-says-russia-breached-nuclear-treaty>.

⁵⁵ North Atlantic Treaty Art. 5, Apr. 4, 1949, 34 U.N.T.S. 243; Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 *EUR. J. INT'L L.* 1 (1999).

⁵⁶ For an overview of Russia's conception of hybrid war, see Outi Korhonen, *Deconstructing the Conflict in Ukraine: The Relevance of International Law to Hybrid States and Wars*, 16 *GERMAN L.J.* 452 (2015); see also Sascha-Dominik Bachmann & Håkan Gunneriusson, *Hybrid Wars: 21st Century's New Threats to Global Peace and Security*, 43 *S. AFR. J. MIL. STUD.* 77 (2014), available at: http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2506063.

important stress-test for the effectiveness of EU good offices; NATO expansion; regional trade integration is a zero-sum game and is closely bound up with security considerations.⁵⁷

Russia: Russia generally maintains a hyper-formalist, positivist approach to international law, including arguing against evolving customary doctrines of humanitarian intervention/R2P, expansive legal justifications for international war on terrorism, and preemptive self-defense;⁵⁸ international law arises as a result of concordance of wills (Tunkin);⁵⁹ in light of multipolarity, states are entitled to competing international legal positions;⁶⁰ Russia has privileged international legal positions in its near-abroad as a result of its unique status as “continuator” to the Soviet Union and as a result of various regional integration agreements;⁶¹ regional integration should not be a zero-sum game and Ukraine should be permitted to join both the EU and the Eurasian Customs Union; U.S. is responsible for Ukraine crisis at every stage;⁶² ‘Western’ arguments regarding Crimea are hypocritical, as the ‘West’ unrepentantly intervenes and violates sovereignty (*tu quoque*); Crimea has special historical significance for Russia (supposed place of baptism of Vladimir who brought Christianity to Kievan Rus; Sevastopol as formally-designated ‘Hero City’ following WWII; etc.), and was unlawfully transferred to the Ukrainian S.S.R. by Khrushchev, which corroborate Russia’s claim for historical reunification (German reunification as precedent) (historical argument);⁶³ Russia is supporting Crimean internal and external self-determination claim because of the threat from Ukrainian ultra-nationalists, whom Russia brands fascists or neo-Nazis (political/historical argument); Russia’s actions in Crimea were supported by

⁵⁷ George Christa, *European Union Security Logics to the East: The European Neighbourhood Policy and the Eastern Partnership*, 19 EUR. SEC. 413 (2010).

⁵⁸ See Kotlyar, *supra* note 49.

⁵⁹ G.V. IGNATENKO & O.I. TIUNOV, *INTERNATIONAL LAW: A TEXTBOOK FOR HIGHER EDUCATION INSTITUTIONS* 18, 96–99 (4th ed. 2005) (In Russian).

⁶⁰ *Id.* at 9; LAURI MÄLKSOO, *RUSSIAN APPROACHES TO INTERNATIONAL LAW* 109 (2015) (describing Tunkin’s and other Soviet/post-Soviet Russian theorists rejection of Western blueprints for a “world state”).

⁶¹ See IGNATENKO, *supra* note 59, at 11. The issue of whether Russia is a state successor or occupies a *sui generis* place as a ‘continuator’ of the Soviet Union is an incredibly complex and consequential matter under international law. See JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 427 (8th ed. 2012) (discussing Russia’s status as “continuator” of the Soviet Union in diplomatic practice, and particularly at the United Nations). I am grateful to William Butler for noting this crucial point.

⁶² Lavrov: *US Escalated Ukraine Crisis at Every Stage, Blamed Russia*, RT (Feb. 7, 2015), <http://rt.com/news/230219-lavrov-munich-speech-ukraine/>.

⁶³ Anton Moiseienko, *What Do Russian Lawyers Say About Crimea?*, OPINIO JURIS BLOG (Sept. 24, 2014), <http://opiniojuris.org/2014/09/24/guest-post-russian-lawyers-say-crimea/>.

doctrine of intervention by invitation (positivist/formalist argument);⁶⁴ Russia has a duty to protect not just nationals abroad, but also ‘compatriots’ abroad (positivist/customary arguments); Russia needs to develop new doctrines of ‘humanitarian operations/interventions in self-defense’;⁶⁵ NATO expansion is offensive action against Russia.

China: Supports strict conceptions of sovereignty; voting pattern (abstention) on UNGA Resolution 68/262 (on territorial integrity of Ukraine) reflects China’s state practice of ambivalent and pragmatic engagement with international legal institutions;⁶⁶ China acknowledges *fait accompli* of Crimea and its special significance for Russia;⁶⁷ (China within BRICs: use temporary window of neutrality to consolidate and expand own influence on the international legal and political arena).⁶⁸

From this—as well as from the expert analysis by the contributors in this volume—several broader observations may be made. First, as Mikulas Fabry notes, one way of thinking about this crisis is to acknowledge—echoing William Burke-White—that Crimea is Russia’s, and to study the precedential effect of Crimea on Russia’s continuing efforts in East Ukraine, and the effect of the Crimean affair on the coherence of the international legal order.⁶⁹ Second, we can imagine that “the territorial fruits of Russia’s intervention in Ukraine can be reversed,”⁷⁰ and to escape the dangers of extreme pluralism—or even

⁶⁴ Mikulas Fabry, *How to Uphold the Territorial Integrity of Ukraine*, 16 GERMAN L.J. 416 (2015). For further reading on the arguments advanced by Russia, see the collections of essays in the *Opinio Juris* Ukraine Insta-Symposium (www.opiniojuris.org) and Oxford Public International Law Debate Map. *Debate Map: Ukraine Use of Force*, OXFORD UNI. PRESS (Aug. 3, 2014), <http://opil.ouplaw.com/page/ukraine-use-of-force-debate-map>; see also Boris N. Mamlyuk, *Intervention and Colonialism as Responses to Alleged Fascism*, OPINIO JURIS BLOC (Mar. 17 2014), <http://opiniojuris.org/2014/03/17/ukraine-insta-symposium-intervention-colonialism-responses-alleged-fascism/>; Boris N. Mamlyuk, *Russia May Invoke Force Majeure Clause of New START in Response to Possible US Sanctions*, CAMBRIDGE J. INT’L L & COMP. L. BLOG (Mar. 9, 2014), <http://cjlcl.org.uk/2014/03/09/russia-may-invoke-force-majeure-clause-new-start-response-possible-us-sanctions/>; See Özsu, *supra* note 8.

⁶⁵ Vladimir Putin, President, Russian Federation, *Address to Russian Ambassadors and Permanent Representatives* (July 1, 2014), available at https://www.youtube.com/watch?v=uzSZWz_CXT8&feature=youtu.be&t=3m30s (in Russian).

⁶⁶ G.A. Res. 68/262, U.N. Doc. A/RES/68/262 (Mar. 27, 2014); See Roth, *supra* note 30, at 387 (noting the voting pattern at the UN General Assembly showed 100 votes affirming territorial integrity of Ukraine, eleven against, and expressing disappointment that fifty-eight members abstained, and twenty-four were absent from the vote).

⁶⁷ *Chinese Premier Won’t Say If Crimea’s Annexation Was Illegal*, RADIO FREE EUROPE/RADIO LIBERTY (Mar. 15, 2015), <http://www.rferl.org/content/china-statement-crimea-annexation-anniversary/26901691.html>.

⁶⁸ Asian Infrastructure Investment Bank (AIIB), www.aiibank.org; New Development Bank (formerly BRICS Development Bank), available at: <http://ndbbrics.org/>.

⁶⁹ See Fabry, *supra* note 64.

⁷⁰ *Id.*

nihilism—and to avoid collapsing law into politics, we can develop positivist arguments to exemplify how Russia's actions violate settled principles of international law. This type of analysis will not by itself return Crimea to Russia given the limits of international law's remedial mechanisms,⁷¹ but clear expressions of outrage at Russia's illegal conduct become policy-relevant in subsequent deliberations, such as ongoing legal and policy debates over whether to provide lethal aid to Ukraine or to extend multilateral sanctions against Russia.

The problem with channeling our default positivism to issues of territorial integrity (TI), non-intervention (NI), or self-determination (SD), is that these debates often omit far more important issues, both broader and narrower, of international law. In other words, this framing is simultaneously over-inclusive/over-determined, and under-inclusive/under-determined.⁷² Analyses focused on TI, NI, and SD (or non-international armed conflict/international armed conflict) elide several broader issues, as examined below.

III. Lawfare, Disinformation & International Law

Positivist accounts fail to acknowledge the role of information warfare or propaganda in fracturing and reconstructing the international legal order and the way in which the information war has emerged as a new form of lawfare. Positivist international legal analyses of an ongoing security challenge—like positivistic social science, usually, though not necessarily⁷³—rely on empirical data, such as polling results, quantitative reports regarding troop presence, movements, and capacity, as well as ancillary factual circumstances that serve to define the moral terms of our engagement with a given actor on the international plane.⁷⁴ There is zero doubt that Russia has deployed significant

⁷¹ See generally REMEDIES IN INTERNATIONAL LAW: THE INSTITUTIONAL DILEMMA (Malcolm Evans, ed., 1998); see also CHRISTINE D. GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW (2002).

⁷² MARTTI KOSKENNIEMI, *supra* note 45, at 591–97; MARTTI KOSKENNIEMI, THE POLITICS OF INTERNATIONAL LAW 339–42 (2011).

⁷³ For a classic treatment of the fact/law distinction, and an analysis of fact-becoming-law processes, see HANS Kelsen, A GENERAL THEORY OF LAW AND STATE (Anders Wedberg trans., 2009).

⁷⁴ Victoria Nuland, *TransAtlantic Security Challenges: Central and Eastern Europe* (Apr. 10, 2014), <http://www.foreign.senate.gov/download/nuland-testimony-4-10-14>; Nick Cumming-Bruce, *U.N. Cites Abuses in Crimea Before Russia Annexation Vote*, N.Y. TIMES (Apr. 15, 2014), <http://www.nytimes.com/2014/04/16/world/europe/un-cites-abuses-in-crimea.html> (reporting on statement of then-United Nations' High Commissioner for Human Rights, Navi Pillay, that

[f]acts on the ground need to be established to help reduce the risk of radically different narratives being exploited for political ends [...] People need a reliable point of view to counter what has been widespread misinformation and also speech that aims to incite hatred on national, religious or racial grounds . . .

resources in shaping the factual narrative surrounding the Ukraine crisis and is deploying a highly-choreographed propaganda/disinformation machine aimed at three distinct audiences: (1) Purely domestic; (2) the Russian-speaking near-abroad; and (3) foreign audiences.⁷⁵ But it is also important to understand that other states have explicitly responded in kind, casting a partisan light on even factual or journalistic reports, not to mention expert opinions, surrounding the Ukraine crisis.⁷⁶ In such an atmosphere, international lawyers can base their legal analyses on their own intuitions regarding the

One of the most tragic, but by no means unique, instances of the politicization of fact-gathering processes in the Ukraine crisis has been the controversy regarding the downing of MH17 on 17 July 2014. See Excerpt of Address of Vitaly Churkin, Russia's Ambassador to the United Nations' 7221th meeting (July 21, 2014), *available at* <https://www.youtube.com/watch?v=qhU4vjUL4Q> (calling for impartial and independent international investigation into the MH17 incident through the framework of ICAO); Jens David Ohlin, *Control Matters: Ukraine & Russia and the Downing of Flight 17*, OPINIO JURIS BLOG (July 23, 2014), <http://opiniojuris.org/2014/07/23/control-matters-ukraine-russia-downing-flight-17/> (considering state responsibility arguments for holding Russia culpable/liable for downing of MH17 while acknowledging several conflicting empirical accounts regarding the shootdown).

⁷⁵ David M. Herszenhorn, *Russia Is Quick to Bend Truth About Ukraine*, N.Y. TIMES (Apr. 15, 2014), <http://www.nytimes.com/2014/04/16/world/europe/russia-is-quick-to-bend-truth-about-ukraine.html>; *Russia Warns of Ukraine Gas Cuts; Nuland Touts "Truth-Telling Campaign,"* DEMOCRACY NOW (Apr. 11, 2014), <http://www.democracynow.org/2014/4/11/headlines> (describing testimony of Assistant Secretary of State for European and Eurasian Affairs Victoria Nuland before the U.S. Senate Foreign Relations Committee). The way in which Russia is typically said to exert control over information is through state control over means of mass communication, including the English-language outlet, RT. But the Kremlin has also operationalized seemingly apolitical administrative agencies, such as Rossotrudnichestvo (Federal Agency for the Commonwealth of Independent States, Compatriots Living Abroad and International Humanitarian Cooperation, a federal agency with oversight over Russia's near-abroad), to shape the factual narrative over the Ukraine crisis, specifically to counter what Russia perceives as an information war against it. See, e.g., Rossotrudnichestvo, *Information War Against Russia* (translation of an article from *El Nuevo Diario*) (Mar. 18, 2015), <http://rs.gov.ru/press/news/8091> (In Russian).

⁷⁶ On 2 December 2014, for instance, Ukraine established a Ministry of Information Policy, whose stated goal is to counter Russian propaganda in Ukraine. SUPREME COUNCIL OF UKRAINE, *Міністр інформаційної політики України*, (Dec. 2, 2014), http://www.kmu.gov.ua/control/uk/publish/article?art_id=247789675&cat_id=247077361; *RWB Opposes Creation of Information Ministry*, REPORTERS WITHOUT BORDERS (Dec. 2, 2014), <http://en.rsf.org/ukraine-rwb-opposes-creation-of-02-12-2014,47325.html>; *State's Nuland at House Hearing on Situation in Ukraine*, U.S. DEPART. OF STATE (Mar. 4, 2015), <http://translations.state.gov/st/english/texttrans/2015/03/20150304313897.html#ixzz3V482DdQ1> (Statement of Assistant Secretary of State for European and Eurasian Affairs:

And on Russia's propaganda, we're working with the Broadcasting Board of Governors to ramp up efforts to counter lies with truth. This year, the BBG is committing \$23.2 million to Russian-language programming, a 49 percent increase over FY14, and is requesting an additional \$15.4 million for FY16. We are also requesting more than \$20 million in foreign assistance and public diplomacy funds to counter Russian propaganda through training for Russian-speaking journalists; support for civil society watchdogs and independent media; exchange programs for students and entrepreneurs; and access to fact-based news on the air, on front pages and online.

on-the-ground reality—such as Roth’s assessment of the “general plausibility to the claim that some substantial majority [in Crimea] favored the region’s transfer to Russian control”—⁷⁷ or the lawyers can agitate for bolder steps, such as the recognition of the limitations of international legal institutions’ fact-finding capacity, and, specifically in Ukraine, an honest observation that OSCE monitoring functions have been impinged,⁷⁸ leading to a distorted and incomplete picture of the battlefield.

There are countless other illustrations of the way that disinformation distorts our international law analysis. One of the clearest examples emanates from the august halls of the United Nations Security Council, in the way that basic translation tasks and results have arguably become politicized and distorted. For instance, in a widely reported 28 August 2014 direct admission of the presence of so-called Russian volunteers in Eastern Ukraine, Russia’s Ambassador to the United Nations, Vitaly Churkin, made the following statement:

⁷⁷ See Roth, *supra* note 30, at 390.

⁷⁸ Mstyslav Chernov & Peter Leonard, *Ukraine’s Cease-Fire Deal Hurt by Deception*, CTV NEWS (Mar. 21, 2015), <http://www.ctvnews.ca/mobile/world/ukraine-s-cease-fire-deal-hurt-by-deception-1.2290795> (“Evidence is emerging, however, that the warring sides are leading [OSCE] monitors on a time-wasting game of hide-and-seek.”).

<p>Всем известно, что на востоке Украины есть российские добровольцы. Этого никто и не скрывает.</p>	<p>Everyone knows that there are Russian volunteers in eastern parts of the Ukraine; no one is hiding that.</p>	<p>There are Russian volunteers in Eastern Parts of Ukraine. No one is hiding that. No one is hiding that.</p>	<p>Everyone knows that there are Russian volunteers in eastern Ukraine; no one conceals the fact.</p>	<p>Everyone knows that there are Russian volunteers in eastern Ukraine. Nobody is hiding this.</p>
<p>Хотелось бы, чтобы аналогичную транспарентность проявили и некоторые другие страны.</p>	<p>We would like to see similar transparence shown by other countries.</p>	<p>We would like to see similar transparence shown by other countries.</p>	<p>One could wish that there could be similar transparency in certain other countries.</p>	<p>It would be desirable if certain other states showed analogous transparency.</p>
<p>Пусть наши американские коллеги расскажут, чем занимаются в здании Совета обороны и безопасности Украины десятки американских советников. Пусть расскажут, сколько американских наемников из так называемых охранных предприятий воюют в тысячах километрах от своих берегов.</p>	<p>For example, maybe our American colleagues can tell us about what the tens of American advisors who in the building of the Ukrainian Security Council are doing. Or how many so-called Ukrainian mercenaries from so-called military enterprises are waging</p>	<p>For example, maybe our American colleagues can tell us about what the tens of American advisers and the building of the cream security consular are doing – of the Ukrainian consular are doing them and the mercenaries are waging war thousands of kilometers</p>	<p>Let us hear what our American colleagues have to say about what dozens of American advisers are doing in the Ukrainian Defence Council building, or how many American mercenaries from so-called private military contractors are fighting</p>	<p>Let our American colleagues explain what tens of American advisors are doing in the building of the Ukrainian Ministry of Defense and State Security. Let them explain how many Americans are fighting in so-called private military firms thousands of kilometers</p>

	<i>war</i> thousands of kilometers away from their land?	<i>away from</i> <i>their land.</i>	thousands of kilometers from their shores.	away from their shores.
Откуда у украинских силовики появились новейшие американские системы вооружения? ⁷⁹	<i>Where did the Ukrainian security forces get the latest weapons?</i> ⁸⁰	<i>Where did the security forces get their latest weapons?</i> ⁸¹	How come <i>American weapons systems</i> have shown up in the Ukrainian armed forces? ⁸²	How come the newest American weapons systems have ended up in Ukrainian hands? ⁸³

Illustration 2: Table of Translations of Address by Vitaly Churkin, Aug. 28, 2014

The point here is not to give empirical credence to Ambassador Churkin's assertions but to emphasize that errors such as these—whether made unintentionally, mid-sentence, by the UN Verbatim Reporting Service, or by a rogue translator—on arguably *the* most consequential issue in the Ukraine crisis—who *exactly* is conducting military operations on the territory of Ukraine?—call into question our discipline's most foundational methodological premises, for example, that even if we know that states will have conflicting policy positions in time of conflict, we can at least obtain an uncompromised expression of a given state's position by accessing UN records.⁸⁴ Further, given the on-demand expectations of contemporary politics, the speed with which a mistranslation or factual error can enter and influence policy deliberations or legal analyses is typically

⁷⁹ Transcript of original Russian speech spoken into the record. Vitaly Churkin, Russian Ambassador to the United Nations, Address to the United Nations, at the United Nations Security Council 7253rd Meeting (Aug. 28, 2014), available at <http://webtv.un.org/watch/ukraine-security-council-7253rd-meeting/3754452835001>; U.N. S.C. Provisional Rep. S/PV.7253 (Aug. 28, 2014), [hereinafter Provisional Report] available at <http://daccess-dds-ny.un.org/doc/UNDOC/PRO/N14/519/51/PDF/N1451951.pdf?OpenElement> (emphasis added).

⁸⁰ See *id.*

⁸¹ C-Span automated transcription of UN Verbatim Reporting Service Russian-English translator. U.N. Security Council Meeting on Ukraine-Russia Conflict, (C-Span broadcast Aug. 28, 2014), <http://www.c-span.org/video/?321183-2/un-security-council-meeting-ukraine> (emphasis added).

⁸² See Provisional Report, *supra* note 79.

⁸³ Author's translation.

⁸⁴ Official Document System of the United Nations, available at <http://documents.un.org>; The United Nations Live & On-demand, available at <http://webtv.un.org>.

instantaneous.⁸⁵ Against the broader context for what arguably precipitated the crisis—the implications of the Snowden disclosures on U.S.–EU relations and Anglo-American versus global relations (e.g., Five Eyes spying on allied and adversary heads of state and UN officers; state-sponsored espionage for private commercial gain;⁸⁶ global cyber disinformation campaigns)—the fact that the domain of information has emerged as a central battlefield in the new Cold War should cause pause in the minds of those who rely on empirical data points to draw normative conclusions.⁸⁷

International law does not have a toolkit for identifying—let alone remedying—these types of problems. The conventional guarantees States had to assure that *that state's* version of events remains uncompromised—such as diplomatic immunity, burden of proof in international legal proceedings, state participation in multilateral monitoring missions—seem stressed. Recalling the major translation mistake above, it would seem that if anyone stood to benefit from documenting and exposing the way that Russian delegates' positions

⁸⁵ Robert Mackey, *Senator inhofe Shows Fake Photos of Ukraine War*, (C-Span broadcast Feb. 13, 2015), <http://www.c-span.org/video/?c4528166/senator-inhofe-shows-fake-photos-ukraine-war>; Robert Mackey, *Sifting Ukrainian Fact from Ukrainian Fiction*, N.Y. TIMES (Feb. 13, 2015), <http://www.nytimes.com/2015/02/14/world/europe/sifting-ukrainian-fact-from-ukrainian-fiction.html>.

⁸⁶ Jack Goldsmith, *The Precise (and Narrow) Limits On U.S. Economic Espionage*, LAWFARE BLOG (Mar. 23 2015), <http://www.lawfareblog.com/2015/03/the-precise-and-narrow-limits-on-u-s-economic-espionage/>; Paul Walden, *The Economic Blowback from NSA Spying Begins*, WASH. POST (Mar. 21, 2014), <http://www.washingtonpost.com/blogs/plum-line/wp/2014/03/21/the-economic-blowback-from-nsa-spying-begins/>.

⁸⁷ *Ukraine's New Bail-out: The Austerity to Come*, THE ECONOMIST (Feb. 12, 2015), <http://www.economist.com/blogs/freexchange/2015/02/ukraines-new-bail-out-0> (stating:

This morning the International Monetary Fund (IMF) announced that it would probably grant Ukraine a new bail-out. How big is it? Some have reported a \$17.5 billion bail-out; others a \$40 billion figure. In fact, the 'new' bail-out is only worth around \$5 billion. That is because the IMF already pledged \$17 billion back in April, of which only \$5 billion has been actually disbursed. In other words, the fund is making good old promises, rather than offering any new cash. Christine Lagarde, the head of the IMF, hopes that by the time other Western donors pile in, Ukraine will get about \$40 billion-worth of cash. That is very optimistic. If the IMF disburses all the money it has promised, it will disburse about \$18 billion over the next four years. America and the European Union have, vaguely, promised about \$2 billion each. That together leaves us a long, long way short of \$40 billion. Tim Ash, of Standard Bank, is blunt: 'This is NOT a significantly increased IMF programme, and Ms Lagarde should not try and sell it as such.'

(emphasis in original); *Merkel's Remark On 'Criminal' Annexation Omitted In Russian Translation*, RADIO FREE EUROPE/RADIO LIBERTY (May 12, 2015), <http://www.rferl.org/content/russia-merkel-putin-translation-criminal-word-omitted/27011285.html>.

are mistranslated and misinterpreted, it would be none other than Russia, a permanent member of the UN Security Council. Yet the fact that this, and doubtless other, factual infelicities are allowed to stand begs far deeper questions regarding a given state's fidelity to: (1) its own factual narrative and stated policy preferences; (2) truth as a moral virtue; and, of course, (3) international law as a medium for reconciling the preceding considerations with the competing interests of other states on the international plane. Beyond epistemic or axiological concerns, international law also seems remarkably ill-equipped to tackle four related problems that arise from the weaponization of information. First, international law does not understand how to study lawfare or other clandestine legal orders,⁸⁸ nor has it fully grasped its complicity in these projects. How does one study clandestine legal orders—for example, surveillance, drones, torture, lawfare—to assess legitimacy when the very object of one's study is: (1) By definition, hidden; (2) fiercely vindictive; (3) likely to become more hidden in future affairs once uncloaked? Second, despite a rigorous turn to institutions in fields like economics and law and development, contemporary international law seems incapable of analytically capturing, let alone speaking to, the dynamic institutional patterns of global information production and transfer.⁸⁹ International law supposes that civil society monitors the space between the prohibition of incitement to violence and human rights guarantees of free speech, but the recent loss of faith in the neutrality of particular civil society organizations—e.g., Human Rights Watch—or diffused interest-shaping processes like “spotlight effects” and “compliance pulls”⁹⁰ must entail a comprehensive study into the way these sets of actors and processes may be operationalized as weapons of lawfare. Third, if one way of controlling an information battlespace is by delegitimizing and discrediting particular actors within that space, international lawyers must heed the ways in which international legal argument is used to accomplish this task. Lastly, given how routine translation may become an instrumentality of lawfare, international law should take scrupulous methodological care in approaching plural discourses, especially in moments of extraordinary tension.⁹¹

⁸⁸ DARIUS REJALI, *TORTURE AND DEMOCRACY* 411–12 (2007) (tracing the evolution of global torture regimes across centuries to observe a shift away from overt scarring to stealth or clean torture that leaves no marks, and hence, gives the torturer plausible factual deniability, which, in turn, absolves torturers from legal liability) (“Public monitoring, then, is still the critical variable that makes elites behave as they do.”).

⁸⁹ Arthur Larson, *The Present Status of Propaganda in International Law*, 31 *LAW & CONTEMP. PROBS.* 439 (1966). (explaining that the issue of disinformation is not a new one for international law) (“The exponential rate at which information technology has transformed over the past fifty years militates in favor of revisiting previous attempts to monitor, if not regulate, propaganda, with a view towards developing new paradigms of thinking about information flows and controls in the [twenty-first] century.”).

⁹⁰ Harold Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2634, 2651–55 (1997) (describing Israel's decision to obey the Oslo accords, in part, because “the relative openness of Israel's liberal democratic society created multiple channels to spur it forward: through public opinion, the news media, and other mechanisms of public accountability faced daily by Netanyahu and his party”).

⁹¹ See Dolidze, *supra* note 17.

IV. Unstable Domestic/International Binary

Analyses that begin and end with conventional threshold statehood questions—TI, SD, NI, etc.—also typically overlook the important fact that the previously rigid line between external and internal attributes of self-determination has been blurred conceptually, doctrinally, and in the field⁹² to the point where, for certain states, talking about formalist attributes of statehood without foregrounding that discussion with concrete politico-economic analyses becomes impossible. Outi Korhonen's mapping of the various institutional, economic, and social forces within Ukraine that have contributed to the crisis, and that are redefining Ukraine's legal and constitutional order is highly instructive here.⁹³ Gazing within the state apparatus and within the opaque world of an influential post-Soviet commercial entity shows that domestic and global actors work in predictable ways such as sweeping legislative reforms and the availability of financing conditioned on structural adjustment and austerity policies, and also in unconventional manners—for example, the over \$1 billion litigation in the High Court of Justice in London between two rival economic-political clans in Ukraine over control of key economic assets.⁹⁴ The key insight of Korhonen's analysis is that all of these legal strategies and conflicts operate simultaneously on both domestic and international planes.⁹⁵ In other words, a seemingly pedestrian contract dispute currently being litigated in London between several Ukrainian oligarchs may be more dispositive on the issue of Ukraine's future than positivist accounts on the doctrine of non-intervention.⁹⁶ It is crucial to understand the process by which international law aids in concealing these domestic, private law disputes from the gaze of

⁹² David Kennedy, *The Mystery of Global Governance*, 34 OHIO N.U. L. REV. 827 (2008); William E. Butler, *Russia and the WTO System: Law, Regionalism, and Politics*, 44 U. MEM. L. REV. 599, 616 (2013).

⁹³ Outi Korhonen, *Deconstructing the Conflict in Ukraine: The Relevance on International Law to Hybrid States and Wars*, 16 GERMAN L.J. 452 (2015).

⁹⁴ Leonid Bershidsky, *Ukraine's Oligarchs Are at War (Again)*, BLOOMBERGVIEW (Mar. 20, 2015), <http://www.bloombergview.com/articles/2015-03-20/ukraine-s-oligarchs-are-at-war-again>; Richard Balmfarth, *Ukrainian Oligarch Under Fire After Night Raid on State Oil Firm*, REUTERS (Mar. 20, 2015), <http://www.reuters.com/article/2015/03/20/us-ukraine-crisis-kolomoisky-idUSKBN0MG2A320150320>. The conflict in issue in Kiev is an attempt by Igor Kolomoisky—an oligarch who was appointed by the post-Yanukovich government as governor of Dnipropetrovsk—to maintain control over a major energy pipeline operating company, which had recently been seized by representatives of the Poroshenko government.

⁹⁵ Korhonen, *supra* note 93. For broader discussion regarding the need for an empirically-grounded understanding of the way that business clans play a constitutive role in various legal structures, see TEEMU RUSKOLA, *LEGAL ORIENTALISM: CHINA, THE UNITED STATES, AND MODERN LAW* Ch. 3 (2013); see also ANNELISE RILES, *COLLATERAL KNOWLEDGE: LEGAL REASONING IN THE GLOBAL FINANCIAL MARKETS* (2011) (analyzing the various ways that private governance regimes relating to collateral in financial transactions have emerged as a “quiet nexus of tremendous political and economic *legitimacy*—within the market, the government, and the wider political sphere”).

⁹⁶ James Marson & Nick Shchetko, *Ukraine President Ousts Fellow Tycoon as Regional Leader*, WALL. ST. J. (Mar. 25), <http://www.wsj.com/articles/ukraine-ousts-regional-leader-kolomoisky-1427265254>.

statehood inquiries. On one level, international law's insistence on the normative supremacy of formal legal norms and processes over other levers of influence indicates that concerns regarding witness tampering, murder, forced disappearance, corruption, political pressure, destruction of evidence, and so forth in *Pinchuk v. Bogolyubov/Kolomoisky*,⁹⁷ for example, may be compartmentalized by certain actors through claim construction into private law causes of action or, worse still, into far more narrow evidentiary or discovery disputes.⁹⁸ Therefore, they may appear formally irrelevant to the question of the legitimacy of the appointment of someone like Kolomoisky as governor of a contested region in eastern Ukraine, and to the question of legality surrounding the actions of Kolomoisky's private military organization under either Ukrainian or international law.⁹⁹ Even if the issues fall within the ambit of human rights law, the lack of robust human rights prosecution mechanisms or political will in these contexts assures the effective decoupling of so-called public and private disputes. Queries into informal governance regimes that constrain these political choices in the Ukraine crisis would certainly facilitate a more workable power sharing agreement. Yet few such analyses are apparent.

Moreover, an understanding of the interrelationship between these types of disputes in the Ukraine crisis—problematizing the distinction between traditionally public and private international law, and international/municipal law¹⁰⁰—may actually shed more light on how international law structures our range of prescriptive options in a crisis like that in contemporary Ukraine. Specifically, the conservative and status quo-perpetuating legal presumption favoring the rights of an ostensibly united population, or at least a population that has expressed its sovereign will through some sort of democratic or majoritarian

⁹⁷ *Pinchuk v. Bogolyubov*, (unreported) EWHC (Comm) QB. (breach of contract claim by one Ukrainian billionaire against two rival Ukrainian billionaires arising out of privatization of a large energy company and pipelines) (Eng.).

⁹⁸ Jim Armitage, 'Evidence Destroyed' in War of the Tycoons, THE INDEPENDENT (Apr. 18, 2014), <http://www.independent.co.uk/news/business/news/evidence-destroyed-in-war-of-the-tycoons-9268761.html>.

⁹⁹ Cathrin Kahlweit, *Der Oligarch zeigt Kiew die Muskeln [Oligarch Shows Kiev His Muscles]*, SÜDDEUTSCHE ZEITUNG (Mar. 25, 2015), <http://www.sueddeutsche.de/politik/ukraine-der-oligarch-zeigt-kiew-die-muskeln-1.2409673> ("What looks like the end of the internal war for dominance in the energy sector, in fact, may result in a real war for control of those regions in eastern Ukraine, which have not yet been controlled by the pro-Russian separatists.") (German); Konrad Schuller, *Der gestürzte Oligarch und der Rechte Sektor [The Fallen Oligarch and Right Sector]*, FRANKFURTER ALLGEMEINE ZEITUNG (Mar. 26, 2015), http://www.faz.net/aktuell/politik/ausland/europa/ihor-kolomojskijs-entmachtung-inszenierte-abschiedszeremonie-13505871.html?printPagedArticle=true#pageIndex_2 (describing the creation of military command structures by Kolomoisky that essentially consolidate *de facto* joint staff control over the various volunteer units within Ukraine and reporting that this informal association of battalion leaders is without legal basis and was created on the grounds that it was the only way the alleged weaknesses of the official army leadership could be compensated) (in German).

¹⁰⁰ Dan Danielsen, *How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance*, 46 HARV. INT'L L. J. 411 (2005), available at http://www.harvardilj.org/wp-content/uploads/2011/03/HILJ_46-2_Danielsen.pdf.

choice—a presumption inherent in the doctrines of territorial integrity and democratic governance—firstly foregrounds the legal rights of a unitary state vis-à-vis competing claims to internal self-determination.¹⁰¹ Similarly, it also gives preference to these so-called first order questions over inquiries into the legitimacy of the governmental actors said to represent the will of the nation by, among other things, relying on a normative political theory that reifies the will of a particular group of predetermined people typically identified with that state.¹⁰² Both the doctrine of trial by ordeal and international law's permissive stance on external assistance to local forces crushing separatist uprisings lose much of their moral force when one considers that it is not merely foreign *states* who are actually providing external assistance to *states* trying to “crush internal efforts at territorial fragmentation,” but that various foreign-domestic and private-public actors are using private means to suppress the uprising as a way of consolidating economic control over key industries, often in a way that is ambivalent to the actual political contours of the subsequent settlement.^{103 104} Kolomoisky, in short, may not care whether his private army controls industrial infrastructure in a frozen conflict zone, a nominally independent statelet, a unitary Ukraine, or in an LNR/DNR annexed by Russia. International law, if it persists in claiming moral high ground, should care.

V. Positivist Statehood v. Regional/Global Governance

Third, the emphasis on positivist accounts of inter-state relations—such as those between Russia and Ukraine—obscures the far more important role of international law in facilitating the reorganization of global economic power along new regional or global lines. We can illustrate this by reference to the earlier observation regarding the way that international law is premised on the creation of various globalized and universalist regimes—for example, UN, WTO, etc.—but simultaneously reifies the idea of a hermetic nation-state. In the Ukraine crisis, this has meant the use of international legal argument

¹⁰¹ Roth, *supra* note 30 (stating:

Such a ‘trial by ordeal’ doctrine is not as completely bereft of moral logic as it may initially appear. External assistance to separatist forces has been a notorious means of both great power predation and regional mischief. Moreover, however arbitrary state boundaries may be, settled bases for re-configuration tend to be elusive.[.]

¹⁰² Zoran Oklopčić, *The Idea of Early-Conflict Constitution-Making: The Conflict in Ukraine Beyond Territorial Rights and Constitutional Paradoxes*, 16 GERMAN L.J. 658, 661 (2015) (“Irrespective of its frequent association with radical nationalism, the vocabulary of a nation’s territorial rights is one of the dominant ways to justify the legitimacy of territorial sovereignty in normative political theory.”).

¹⁰³ Roth, *supra* note 30, at 412 (“States were licensed to crush internal efforts at territorial fragmentation; only when they proved confessedly unwilling or decisively unable to do so did they lose their legal claim to territorial integrity.”).

¹⁰⁴ Pinchuk, (unreported) (Eng.), at paras. 1–2.

by domestic politicians when justifying requests for debt forgiveness or appeals for developmental aid to the EU and/or U.S. Contemporaneously, an inverted form of this argument is raised to completely foreclose the possibility of intervention or development assistance to another actor with clearly identified policy interests in the state at issue. Viewing post-Cold War (1989–2013) color revolutions/interventions collectively, it seems that the *modus operandi* of collective security after the demise of the U.S.S.R. has been characterized by a pragmatic and genuine concern with coalition building,¹⁰⁵ tactical alliances even with declared adversaries—such as the U.S. campaign alongside Syria and Iran against ISIS—and instrumentalist willingness to partner with ostensible Great Power rivals—for example, Russian participation in post-2003 Iraq oil-sector reconstruction;¹⁰⁶ Russian acquiescence in America’s use of the Transit Center at Manas, Kyrgyzstan, in support of war effort in Afghanistan. Notwithstanding the bellicose bluster of George W. Bush’s statement “You’re either with us, or against us[,]”¹⁰⁷ U.S. and EU member states’ policy practice in the post-Cold War/pre-Ukraine crisis moment seemed to reflect a pragmatic ‘big-tent’ approach to international politics. Even states that opposed particular interventions were afforded operational space and limited freedom of action within the state on the receiving end of intervention so long as they brought capacity to contribute in some meaningful way.¹⁰⁸

The Ukraine crisis is different. It seems to signal an end to post-Cold War pragmatism—at least on the plane of inter-Great Power relations—and, at least superficially, appears to usher in a return to something akin to economic bloc politics, with the bifurcated international legal plane that implies. Recalling the trade partnership negotiations between Ukraine and EU, and the separate negotiations between Ukraine and Russia in 2013, one of the Russian proposals urged Ukrainian accession in *both* the EU and the Russian-led Eurasian Customs Union. From a geopolitical standpoint, this would have been a net win for Europe, Ukraine, and Russia. The EU would have obtained the security, technical standardization, and structural adjustment guarantees it sought. Russia would have expanded its already significant bilateral trade with and investment in Ukraine, and it would have had firmer legal guarantees of Ukraine’s status as a transit state for Russian energy flows to Europe, such as the enforcement of performance obligations under various

¹⁰⁵ Martti Koskeniemi, *The Place of Law in Collective Security*, 17 MICH. J. INT’L L. 455 (1995–1996), available at <http://heinonline.org/HOL/LandingPage?handle=hein.journals/mjil17&div=20&id=&page=>.

¹⁰⁶ *Russia’s Second Largest Oil Producer Enters First Week of Operations in Iraq*, ALBAWABA (Mar. 30, 2014), <http://www.albawaba.com/business/lukoil-iraq-565042>.

¹⁰⁷ George W. Bush, Pres. of the US, *Address to a Joint Session of Congress and the American People* (Sept. 20, 2001), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>.

¹⁰⁸ The most recent example of this could be China’s recent announcement to begin air strikes or otherwise contributing to the anti-ISIS effort in Iraq, given that Iraq has recently overtaken Russia in volume of oil sold to China, second only to Angola.

public/private agreements with Ukraine and Ukrainian firms.¹⁰⁹ Ukraine, for its part, could have bargained for substantial financial assistance from both Russia and the EU, helping to resolve its chronic fiscal problems in a meaningful and sustainable way. On a doctrinal level, there are no formal barriers to this type of arrangement. In fact, state practice demonstrates the remarkable adaptability of international legal forms to precisely these types of regional trade arrangements; the EU's Eastern Partnership Program itself is a prime example, as are the on-going negotiations concerning the Trans-Pacific Partnership (TPP) and the Transatlantic Free Trade Area.¹¹⁰ The point here is not to evaluate the normative merits of a given policy proposal but to highlight the remarkably capacious nature of the spaghetti bowl of multilateral (GATT, TRIPS) and regional trade agreements and to explore how actors use international legal arguments to give preference to particular forms over others. The intense pressure applied upon Ukraine to make its European choice suggests that new forms of economic lawfare have emerged that clearly promote particular types of liberalization discourses over other such discourses.¹¹¹ This, too, should be significant for international lawyers for it seems to complicate the original liberal state thesis on which much of contemporary normative international legal theory is grounded.¹¹²

Despite the compatibility of a EU–Ukraine–Russia arrangement with existing international legal practice and the broadly adopted policy of trade liberalization—in which Russia would effectively have had to harmonize its trade/investment/governance policies with the EU—Ukraine's fateful decision to reject Russia's proposal evinces the latest, and most significant, step in the restructuring in the global political economy and in international law. First, it conclusively ended Ukraine's *ad hoc* status as a more or less neutral transit state that could exact concessions from actors on both ends of the transit corridor and effectively ended Ukraine's buffer state security status. Second, as an ally with both the U.S. and the EU, post-Yanukovich Ukraine seems to have effectively moved from a Eurasian leaning trade configuration to a European oriented security configuration. By itself, there is nothing remarkable about this switch under international law, given that any sovereign and independent nation is presumed to have complete freedom of action in making these

¹⁰⁹ William Kratzke & Dmitri Titoff, *Russia and the WTO: Realpolitik by the Rules of Free Trade*, 44 MEM. L. REV. 633 (2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2461777.

¹¹⁰ See, e.g., Peter Van Elsuwege, *EU-Belarus Relations: Coping With the Reality of the Eurasian Economic Union*, in THE EUROPEAN UNION AND REPUBLIC OF BELARUS: GETTING CLOSER FOR BETTER FUTURE 256 (2014) (discussing place of Belarus in EU's Eastern Partnership Program, and prospect of concluding new bilateral association agreements, including provisions on the establishment of Deep and Comprehensive Free Trade Areas (DCFTAs), but noting that future of EU-Belarus integration hinges on issues of political compatibility).

¹¹¹ See generally EURASIAN ECONOMIC INTEGRATION: LAW, POLICY AND POLITICS 179, 197 (Rilka Dragneva & Kataryna Walczuk eds., 2013).

¹¹² See Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1993); Jose Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory*, 12 EUR. J. INT'L L. 183 (2001).

types of choices, so long as they do not violate *jus cogens* norms or preexisting treaty commitments. Charter statehood remains foundational doctrinally, but it may be that outside of the very narrow context of Great Power sovereignty, statehood arguments retain purchase only insofar as they background a state's choice to choose one or another regional trade/security configuration.

VI. Positivism Ignores Temporality & Processes of Legal Change

Lastly, the remarkable aspect of Ukraine's about-face on the issue of participation in the Eurasian Customs Union was the speed and ease with which the shift from a concrete Russian trade deal to an inchoate European roadmap was effectuated in Ukraine, and the deployment of international legal argument to marshal public support and throttle opposition to this realignment. One possible explanation for why the radical reversal of policy was accepted by Ukrainians so soon after the ouster of Yanukovich was that the process of delegitimizing Russia as an international legal actor, and the Eurasian Customs Union as a restoration of Soviet empire,¹¹³ had started long before the annexation of Crimea, before the ouster of Yanukovich, and before Maidan.¹¹⁴ The parallels in legal arguments deployed against the regimes of both Yanukovich and Putin—suppression of dissent as human rights violations and rampant corruption as contrary to international governance norms—served to further delegitimize both associatively.¹¹⁵ Understanding how these arguments are deployed by particular actors such as the EU can explain at least one vector in the possible future tactical use of lawfare.¹¹⁶ When an otherwise stable

¹¹³ Anders Åslund, *Sergey Glazyev and the Revival of Soviet Economics*, 29 POST-SOVIET AFF. 375 (2013), available at <http://www.tandfonline.com/doi/abs/10.1080/1060586X.2013.809199>.

¹¹⁴ As Gerry Simpson writes, our conceptions of the international legal order have always had inclusive (pluralist) and exclusive (anti-pluralist) streams, often, again, simultaneously. Simpson, *supra* note 1. States, in turn, may choose to isolate or 'outlaw' themselves (early Soviet autarky) or they may be isolated by the international community because of the *ultra vires* nature of their creation (Iran, North Korea, etc.) or behavior—namely, Soviet Union as an outlaw state in the eyes of the West based on perceptions of aggression (Hungary, Czechoslovakia, Afghanistan), and anti-liberalism. A state may also declare itself to be an outlaw, or an anti-law state, as the early Soviet experience with international law makes clear. Simpson, *supra* note 1, at 261 (Nazis viewed the USSR as an anti-state). But as Simpson, Roth, and many others note, the move away from universalism/homogeneity towards a greater acceptance of pluralism typically occurs when an actor (such as the Soviet state vis-à-vis the League) shows itself capable of maintaining a baseline level of effective control over a territory, or otherwise signals legitimacy. *Id.*; Roth, *supra* note 30, at 412 n. 99 ("Successful revolution sooner or later begets its own legality.") (quoting STANLEY A. DE SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW (1977)); BRAD ROTH, GOVERNMENTAL ILLEGITIMACY AND INTERNATIONAL LAW 136–50 (1999).

¹¹⁵ Adam Taylor, *Russia on Iraq: 'We Told You So,'* WASH. POST (June 12, 2014), <http://www.washingtonpost.com/blogs/worldviews/wp/2014/06/12/russia-on-iraq-we-told-you-so/> ("[I]t's tempting to look at Russia's positions [against intervention] on various conflicts and wonder whether there was something to it. . . . Critics might also point out that in Iraq, Libya and Syria, Putin has been unusually vocal in his support of strongman leaders — like supports like, you could say.").

¹¹⁶ See, e.g., Rob Knox, *Strategy and Tactics*, 21 FINNISH Y.B. INT'L L. 193 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1921759.

domestic socio-political-legal order collapses in the face of populist opposition, it may be that the collapse is the product of years of more subtle deligitimization by various international legal actors. Gradual, nearly imperceptible deligitimization sets the stage for opportunistic usurpations of power when historical circumstances combine to make likelihood of success high, and—more importantly—they precondition perceptions of legitimacy and any subsequent acts of recognition by explicitly defining the new government in oppositional and relational terms to the old. Thus, even if the new government is corrupt in absolute terms, it is seen as inherently more responsive, reformable, and legitimate because it came to power with the sanction of the international community. International law's under-theorized and inherently indeterminate notions of temporality then step in to further legitimize the new government and delegitimize the new opposition simply because "transition will take time," trapping the society in a perpetual transition towards viable hoped-for security arrangements and age-old goals of good government.^{117 118 119}

The same process repeats domestically. International law conditions political consciousness, defines national political vectors, and provides legal justification for, say, punitive actions against the opposition, which are otherwise strictly impermissible under domestic law,¹²⁰ or even international legal civil and political rights guarantees, which are subordinated to core statehood concerns in an imagined normative hierarchy.¹²¹ Thus, of the many remarkable paradoxes of the Maidan revolution, one of the first legislative acts of the post-Yanukovich era was to disband the democratically elected Communist Party block—a party holding 32 of the 445 seats in parliament—an issue which a year later

¹¹⁷ U.N. Secretary-General, *Island of Palmas Case (Netherlands, USA)*, 2 U.N. Rep. Int'l Arb. Awards 829. (Apr. 4, 1928); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, 16; see also JUUS STONE, *SOCIAL DIMENSIONS OF LAW AND JUSTICE* 494 (Stanford Univ. Press 1966) ("In the nature of things those who wielded the transitional state power [in Soviet society] would fix the time-table for this metamorphosis [from bourgeois legality to communism].").

¹¹⁸ Oklopčić, *supra* note 102 (describing disintegration of socialist Yugoslavia from 1991 to Kosovo in 2008 as territorial fragmentation on "time-release").

¹¹⁹ John D. Haskell, *Will the Real Transitory Stand Up?*, 15 *BALTIC YEARBOOK OF INT'L L.* (2015); *Haskell & Mamlyuk, supra* note 36 (discussing different conceptions of temporality in context of post-socialist transition debates between shock therapists and gradualists).

¹²⁰ Roth, *supra* note 30.

¹²¹ European Convention of Human Rights arts. 10 (freedom of expression), 11 (freedom of association), 14 (discrimination), Dec. 20, 1971, 14 CETS 194; BERNADETTE RAINEY ET AL., JACOBS, WHITE AND OVEY: *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 476 (2014); David Harris et al., *Law of the European Convention on Human Rights, in UNITED COMMUNIST PARTY OF TURKEY* (2014) (explaining that the European Court of Human Rights held that Article 11 of the European Convention on Human Rights extends to political parties, and not merely trade-union-type associations). *United Communist Party of Turkey and Others v. Turkey*, App. No. 133/1996/752/951 (Jan. 30, 1998), [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58128#{"itemid":\["001-58128"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58128#{).

remains frozen in litigation.¹²² Second, in terms of international law's influence on socialization and norm diffusion, sociologists have long documented that "in the Russian mentality the West continues to exist as an ideal."¹²³ As a result, assertions of rogue behavior by the "Western ideal" which Russians seek to emulate may undermine their faith in their rulers' ability to bring them closer to that ideal, or paradoxically, it may cause irrational feelings of moral indignation and superiority.¹²⁴ In Russia, the result of what General Philip M. Breedlove, the Supreme NATO Commander in Europe, called "the most amazing information war blitzkrieg in history," approval ratings for the ruling regime have climbed to nearly all-time highs,¹²⁵ adding to a feedback loop of increased nationalism and resignation to perennial outlaw status in international law. In Ukraine, similar external legitimacy critiques contributed to significant mobilization against the Yanukovich regime, but, irrespective of the political fate of the ruler (which hinges on far more than popular sentiment), the effect of international legal scrutiny in both instances was the consolidation of popular grievances and aspirations into largely nationalistic sentiments and political programs. International law lacks mechanisms for restraining the worst excesses of nationalism in the wake of regime changes even as it implicitly or explicitly endorses nationalist conceptions of statehood in legitimating post-'regime change' governments. Lastly, international legal arguments are translated into domestic practice even in their most controversial and unsettled forms,¹²⁶ such as the dubious, and largely unexamined, use of anti-terrorism doctrine by the post-Yanukovich government to legally classify its military operations in the Donbas.

¹²² Emile Schepers, *Judge Withdraws from Ukraine Communist Trial Because Cops Raided His Office*, PEOPLE'S WORLD (Feb. 23, 2015), <http://peoplesworld.org/judge-withdraws-from-ukraine-communist-trial-because-cops-raided-his-office/>. The Communist Party opposed armed action against Donbas and presumably would have opposed IMF bailouts because austerity measures would disproportionately impact its core constituents.

¹²³ Lev Gudkov, *Россия переживает рецидив тоталитаризма* [Russia is Living Through Recidivism of Totalitarianism], НОВОЕ ВРЕМЯ (Dec. 16, 2014), <http://nv.ua/opinion/Gudkov/rossiya-perezhivaet-recidiv-totalitarizma--25255.html>. In Russian Lev Gudkov is the head of Russia's Levada Center, one of the most credible polling organizations in contemporary Russia.

¹²⁴ Dolidze, *supra* note 17; Malksoo, *infra* note 151; Titoff, *infra* note 125 (stating that:

Psychological compensation is achieved in two ways. The media make Russia appear nobler (great power, rich culture etc.) and the media expose flaws and decadence in Western societies. Gudkov points to the apparent irrationality of the public reaction that approaches fatalism. He observes that the Russians are deeply pessimistic about their personal future. By endorsing the Kremlin's political course, they derive satisfaction by associating with their country's perceived great power behavior.).

¹²⁵ Dmitri Titoff, *Is Russia's Perceived Insecurity a Sufficient Explanation for War?*, SILK ROAD REPORTERS (Mar. 15, 2015), <http://www.silkroadreporters.com/2015/03/15/is-russias-perceived-insecurity-a-sufficient-explanation-for-war/>.

¹²⁶ Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT'L & COMP. L.Q. 57 (2011).

VII. Positivism as Mute When/Where Most Needed

The above is not to say that positivist analysis should be abandoned altogether in favor of broader sociological or theoretical inquiries into the ideological/constitutive functions of international law. In fact, the normative takeaway should be quite the opposite.¹²⁷ Just as framing the international legal arguments in terms of TI, NI, and SD—or NIAC/IAC—fails to capture broader dynamics of global governance, it also is under-inclusive of the much more significant issues that fall squarely within the ambit of public international law. This includes pressing material issues, such as: (1) Treaty regimes governing cross-border travel between Ukraine and Russia for residents of the breakaway republics, and Ukrainian-Russian migration treaties and state practice in the context of various earlier regional integration agreements—an issue that affects more than 5 million Ukrainian citizens and is only partially covered by the Minsk agreements; (2) observance of law of armed conflict in the ongoing combat operations and application of evolving norms concerning the use of private military contractors to all sides in the conflict; (3) precedential effect from alleged U.S., EU, or Russian intervention to prevent formation of a regional trade agreement;¹²⁸ (4) nature, function, and limits on the use of emerging global anti-terrorism doctrines in purely domestic settings; (5) the emerging right to intervene—in non-territorial (namely, cyber) settings—to protect strategic economic interests; etc. These international legal issues affect millions of victims of the Ukraine crisis—both inside and out of Ukraine—and the precedential effect of these vectors of this crisis is likely to be large.

C. Cold War II and International Law

Having broadened the aperture to recall how international law facilitates the piercing of sovereigntist veils in various contexts—international law furthering globalization in the fields of trade liberalization, human rights, delegitimization of domestic government actors, etc.—we also observe the remarkably fluid way in which international legal arguments are deployed to ‘Balkanize’ particular spaces or ‘Iranize’ particular actors. We know how international law’s sovereigntist conceptions of statehood can be used against perceived outlaws in the international community—for example, international law may

¹²⁷ *Introduction: The Future of International Legal Positivism*, in *INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD* 1–12 (Jean d’Aspremont & Jörg Kammerhofer eds., 2014) (exploring range of competing international legal positivisms, and proposing shared embrace of the need for theoretical refinement, within permissible disciplinary bounds).

¹²⁸ To dampen populist Ukrainian hopes for European integration, Russia could sustain a “frozen conflict” in Luhansk/Donetsk, modeled on Transdniestria. Similarly, a frozen conflict could be advantageous to certain Western powers or Ukraine, as it may act as an obstacle to any future prospective integration with Russia or a Russian-dominated Eurasian Economic Union.

promote Balkanization through rigid applications of the right to TI, NI, and SD.¹²⁹ But broadening the aperture still further, we can observe how the Ukraine crisis represents a departure from earlier conceptions of post-WWII and post-Cold War liberal internationalism, which generally encouraged broad-based political participation by states in matters of shared importance—from non-proliferation to counter-terrorism all the way to participation in various post-conflict reconstruction settings.¹³⁰ Following realist conceptions of international law, this distinguishing feature may be understood as simply the age-old realignment of political blocs within the family of nations. But the Ukraine crisis also arguably signals the start of a new type of conflict in international law, which we can unpack as a series of myths and reflections.

1. Myth of CWII as Interbloc Rivalry

Seen through Russian eyes, the Ukraine crisis may be said to represent an attempt by Western states to weaken Russia's international legal position and, hence, weaken its standing in global affairs. Consequently, weakening Russia sends a strong signal to other potential adversaries—China, or the BRICs—that post-Cold War international law remains at its core, a Euro-American political project,¹³¹ and that attempts to disrupt or challenge this foundational premise will be met with fierce resistance. In this way, the new cold war can be said to fall along a familiar geopolitical axis: Interbloc rivalry between groupings of North Atlantic liberal states—with security alliances neatly corresponding to trade pacts; and various groupings of illiberal states—with Sino-Russian trade/security alliances.¹³² Between the two extremes, there is the potential of a non-aligned movement, but at its core, a Cold War posture necessarily implies a two-bloc rivalry. Therefore, even attempts by the EU to open a discursive space for responses to the Ukraine crisis that fall short of arming Ukraine are met as something like outlaw behavior in its own right. “Fuck the EU . . .” suddenly shifts from a crude expression of contempt for European sensibilities, to being a concise and literal reminder to Western European powers that it was the U.S. that served

¹²⁹ Roth, *supra* note 30, at 384. (“By sweepingly prohibiting inter-state exertions of coercion and force (while licensing such exertions within state boundaries), the international legal order has effectively privileged sovereignty arrangements that frustrate these [intra-state] communities’ demands for self-governance.”).

¹³⁰ DAVID KENNEDY, *OF WAR AND LAW* 41 (2006). In contrast to realists, liberal internationalists generally see international relations in positive-sum, versus zero-sum terms. See NOAH FELDMAN, *COOL WAR: THE FUTURE OF GLOBAL COMPETITION* 171–172 (2013); cf. ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 98–105 (1984).

¹³¹ R. P. Anand, *Equality of States in an Unequal World: A Historical Perspective*, in *Sovereign Equality of States*, 197 *RECUEIL DES COURS* 52 (1986); Diane A. Desierto, *Postcolonial International Law Discourses on Regional Developments in South and Southeast Asia*, 36 *INT’L J. L. INF.* 387, 387 (2013).

¹³² Cf. Brian Carlson, *Russia-China Gas Deal a Sign of Russian Weakness, Not New Alliance*, FOREIGN POLICY INST., JOHNS HOPKINS UNIV., SCH. OF ADVANCED INT’L STUDIES (June 4, 2014), available at <http://www.fpi.sais-jhu.edu/#!/RussiaChina-Gas-Deal-a-Sign-of-Russian-Weakness-Not-New-Alliance/c1qvb/54c690900cf2ad5dc6e2cd8b>.

as a guarantor of European peace, reconstruction, and prosperity throughout the Cold War and post-Cold War period.¹³³ As mentioned earlier, however, the danger of the myth of Cold War II as new bloc politics (U.S.-UK; EU; BRICs) is that this framing typically foregrounds inchoate regional or even ‘civilizational’ political forces while marginalizing far more concrete political economic forces and actors.

II. Myth of “Cold War II” as Cold War I

The Ukraine crisis and Cold War II can also be viewed as a continuation of the twentieth century’s Cold War.¹³⁴ This argument is raised in Anglophone and Russian foreign policy circles, typically by reference to surface parallels between the Anglo-American/Western European versus Russian/Sino-Russian conflict of yore, and its present day incarnations. For an international lawyer, the problem with this view is self-evident given that international law has remarkably little positive law to “apply” to a conflict conceived in these terms. On the one hand, international law’s engagement with the Cold War can be said to have been episodic. In fact, the marginalization of international law from actual loci of power—manifest in the Cold War stalemate postures within the UN Security Council¹³⁵—was one of the defining features of the Cold War. On the other hand, as we have seen from the conceptualization of CWII as a legal institution and as opening new potentialities in the use of *lawfare*, CWI can also be revisited as a legal institution—constitutive of international law in the 20th century and constraining our imaginations to that present day. This is arguably true for every field of international law, from the Western-Soviet debates over the doctrines of sources, to self-determination and intervention. In this way, international law was not just a central battlefield in the Cold War; the Cold War was international law.

A broad claim like the one above is naturally subject to the caveat that Cold War historians often disagree on whether a definitive account of the Cold War is possible, or even advisable.¹³⁶ But most historians acknowledge that a defining feature undergirding this conflict was the notion that the Cold War was above all a *war of ideas* to ascertain which

¹³³ See George Friedman, *Europe: Destined for Conflict?*, CHICAGO COUNCIL ON GLOBAL AFFAIRS (Feb. 4, 2015) <http://www.thechicagocouncil.org/event/europe-destined-conflict> (lecture by founder of private intelligence firm, Stratfor, regarding U.S. foreign policy positions vis-à-vis the EU and individual European states).

¹³⁴ See STEPHEN F. COHEN, *SOVIET FATES AND LOST ALTERNATIVES: FROM STALINISM TO THE NEW COLD WAR* (2011).

¹³⁵ Boris N. Mamlyuk, *Uniting for Peace in the Second Cold War: A Response to Larry Johnson*, AM. SOC. INT’L J. (July 21 2014), available at <http://www.asil.org/blogs/uniting-%E2%80%9Cpeace%E2%80%9D-second-cold-war-response-larry-johnson>.

¹³⁶ Odd A. Westad, *The Cold War and the International History of the Twentieth Century*, in *CAMBRIDGE HISTORY OF THE COLD WAR*, at 2 (Melvyn P. Leffler & Odd A. Westad eds., 2010).

economic model—liberal capitalism or socialism—was more resilient.¹³⁷ It is important to emphasize that while particular models of social or political organization were important components of the ideological standoff, they were not essential, or dispositive, factors in the East-West standoff.

If we choose to define CWII in aforementioned binary terms like US-Russia, liberal-illiberal, democratic-undemocratic, or even liberal capitalist-state capitalist—then based on the above—it would be a mistake to view the present conflict as a continuation of CWI.¹³⁸ This is because despite claims to the contrary, there is no foundational ideological difference between the principal combatants in this conflict. Even the most vocal and articulate proponents of a contemporary Russian ideational divergence with the West take pains to identify the precise contours of the supposed ideological difference.¹³⁹ In the words of Timothy Snyder, for instance:

The Eurasian Union is the enemy of the European Union, not just in strategy but in ideology. The European Union is based on a historical lesson: that the wars of the twentieth century were based on false and dangerous ideas, National Socialism and Stalinism, which must be rejected and indeed overcome in a system guaranteeing free markets, free movement of people, and the welfare state. Eurasianism, by contrast, is presented by its advocates as the opposite of liberal democracy.¹⁴⁰

Snyder goes on to trace the ideology of the Eurasian Union to Alexander Dugin, the controversial Russian political theorist/mystic—a contemporary Rasputin—who claims that Russia should restore its traditional primacy in Eurasian affairs under the broad banner of Russian Orthodoxy and conservative Christian social values.¹⁴¹ Snyder continues:

The fundamental political logic of the European Union is that there's a positive relationship between civil

¹³⁷ See Vladimir O. Pechatnov, *Soviet-American Relations Through The Cold War*, in OXFORD HANDBOOK OF THE COLD WAR 107, 109 (Richard Immerman & Petra Goedde eds., 2013) (describing competing Cold War strategies as resting on the ultimate objective of a complete military or economic defeat of the other).

¹³⁸ See Boris N. Mamlyuk, *Cold War Protagonists*, in 'THE BEST IN THE WEST': EDUCATOR, JURIST, ARBITRATOR: LIBER AMICORUM IN HONOUR OF PROFESSOR WILLIAM BUTLER 54 (2014).

¹³⁹ Åslund, *supra* note 113.

¹⁴⁰ Timothy Snyder, *Fascism, Russia, and Ukraine*, in N.Y. REV. OF BOOKS (2014).

¹⁴¹ *Id.*

society, sovereignty and integration. Civil society helps sovereignty, integration helps sovereignty. Where a sovereign state is weak, civil society can help. European integration can also help. The Russian proposition is to take away integration and to take away civil society, and leave sovereignty all by itself. That's a different political theory This is not the version of Europe we have come to know.¹⁴²

These types of arguments are serious attempts to identify and describe ideological rifts, but polemical assertions of difference are not compelling without empirical support.¹⁴³ It is to be expected that any state power aspiring to a measure of sovereignty would define itself in opposition to perceived U.S. hegemony, given how politically effective that argument is vis-à-vis domestic and global constituencies in the contemporary moment. In what Alexander Cooley has described as normative jujitsu:

Russia has been at the forefront of publicly flagging the West's own normative and legal inconsistencies. The meme of US hypocrisy and accusations that Washington routinely practices of double standards has gained traction, especially in the wake of US government complicity in torture or violations of civil liberties. Stripped of its allegedly universal and consistent values framework, liberal order is nothing but raw geopolitics.¹⁴⁴

Second, the authorities frequently invoked in support of the claim that Russia aspires to rebuild a "civilizational space" or particular sphere of influence are far more nuanced than frequently acknowledged by particular Anglophone analysts,¹⁴⁵ or *Russian* advocates of this

¹⁴² Paula Chertok, *Timothy Snyder: Ukraine is But One Aspect of a Much Larger Strategy that Threatens European Order*, EUROMAIDAN PRESS (Mar. 18, 2015), available at <http://euromaidanpress.com/2015/03/18/timothy-snyder-ukraine-is-but-one-aspect-of-a-much-larger-strategy-that-threatens-european-order/>.

¹⁴³ See, e.g., Andrei Tsygankov, *Vladimir Putin's Last Stand: The Sources of Russia's Ukraine Policy*, 31 POST-SOVIET AFF. 279, 294–95 (2015), available at <http://www.tandfonline.com/doi/pdf/10.1080/1060586X.2015.1005903> ("The problem with the imperialist argument is that it overstates Putin's ideological commitment and willingness to go as far as Russian nationalists would want him to go.").

¹⁴⁴ Alexander Cooley, *Ukraine's Insta-Symposium Russia's Rule-breaking as Power Politics*, OPINIO JURIS, <http://opiniojuris.org/2014/03/07/russias-rule-breaking-power-politics/#sthash.HnjG3RTR.dpuf>.

¹⁴⁵ See, e.g., Paul Grenier, *Distorting Putin's Favorite Philosophers*, CONSORTIUM NEWS (Mar. 27, 2015), available at <https://consortiumnews.com/2015/03/27/distorting-putins-favorite-philosophers/>.

thesis.¹⁴⁶ Third, although purportedly “illiberal” in political form, Russia has arguably completed its ‘liberal’ turn in terms of privatization, liberal commercial law reform, and accession to the multilateral liberal trade regime.¹⁴⁷ Russia, as Vladimir Putin remarks in various economic and legal forums, is more than “open for business,”¹⁴⁸ suggesting that Russia aggressively protects foreign investor rights.¹⁴⁹ Or, as an experienced Kremlinologist, Scott Horton, notes:

It’s also important to note—and I think this is something very few outside observers do understand—that within the Russian political and intellectual world, Putin and [Dmitry A.] Medvedev belong to the liberal tradition. Their stronger, potential opposition are more reactionary, more conservative, more authoritarian than they are. That will probably come as a surprise to most people on the outside, but that’s true.¹⁵⁰

Lastly, an imagined civilizational conflict between Russia and the U.S. is also a non-starter, given that both states are multicultural, largely Christian, and trace their ontological roots to the same fountainhead: European Enlightenment thinking.¹⁵¹

More generally, regardless of the moniker ascribed to one state or another in terms of its faithfulness to some broadly-defined creed—liberal, neoliberal, illiberal, developmentalist, “new-statist,” and so forth—globalization has resulted in unprecedented harmonization, standardization, and convergence in actual economic practice:

¹⁴⁶ *Id.*; Alexander Lukin, *What the Kremlin Is Thinking: Putin’s Vision for Eurasia*, FOREIGN AFFAIRS (July/Aug. 2014), <https://www.foreignaffairs.com/articles/russia-fsu/2014-06-16/what-kremlin-thinking>.

¹⁴⁷ Russia was recognized as a “market economy” by the EU on 29 May 2002. The United States recognized Russia as a “market economy” on 7 June 2002. See Russian Democracy Act of 2002, H.R. 2121 (2002), available at <https://www.govtrack.us/congress/bills/107/hr2121/text>; See *EU Announces Formal Recognition of Russia as “Market Economy” in Major Milestone on Road to WTO Membership*, EUROPEAN COMMISSION (May 29, 2012), available at europa.eu/rapid/press-release_IP-02-775_en.pdf; W.E. BUTLER, RUSSIAN FOREIGN RELATIONS AND INVESTMENT LAW (2006).

¹⁴⁸ See generally, St. Petersburg International Economic Forum, <http://www.forumspb.com/>.

¹⁴⁹ WILLIAM E. BUTLER, *supra* note 147; WILLIAM E. BUTLER, FOREIGN INVESTMENT LAW IN THE COMMONWEALTH OF INDEPENDENT STATES (2002); cf. Stanley Reed, *Yukos Shareholders Awarded About \$50 Billion in Court Ruling*, N.Y. TIMES (July 28, 2014), http://www.nytimes.com/2014/07/29/business/international/yukos-shareholders-awarded-about-50-billion-in-court-ruling.html?_r=0.

¹⁵⁰ Interview by Myron A. Farber, *The Rule of Law Oral History Project 8: The Reminiscences of Scott Horton* (Nov. 21, 2012).

¹⁵¹ Cf. Lauri Malksoo, *The History of International Legal Theory in Russia: A Civilizational Dialogue with Europe*, 19 EUR. J. INT’L L. 211 (2008).

Behind these major shifts in social policy lie important structural changes in the nature of governance. Given the neoliberal suspicion of democracy, a way has to be found to integrate state decision-making into the dynamics of capital accumulation and the networks of class power that are in the process of restoration, or, as in China and Russia, in formation. Neoliberalization has entailed, for example, increasing reliance on public-private partnerships (this was one of the strong ideas pushed by Margaret Thatcher as she set up 'quasi-governmental institutions' such as urban development corporations to pursue economic development). Businesses and corporations not only collaborate intimately with state actors but even acquire a strong role in writing legislation, determining public policies, and setting regulatory frameworks (which are mainly advantageous to themselves). Patterns of negotiation arise that incorporate business and sometimes professional interests into governance through close and sometimes secretive consultation The shift from government (state power on its own) to governance (a broader configuration of state and key elements in civil society) has therefore been marked under neoliberalism. In this respect the practices of the neoliberal and developmental state broadly converge.¹⁵²

Therefore, an argument that premises the start of a second cold war on a supposed liberal/illiberal divide may actually conceal the true source, and likely direction, of the conflict by, yet again, reifying the state—even a self-professed deviant from abstract liberal values—as the fundamental unit of analysis in subsequent inquiries into the nature of the conflict. This applies particularly when the argument fails to include more rigorous empirical studies showing Russia's or another state's divergence from contemporary neoliberal economic best practices. Unlike in CWI, when nearly total economic embargoes were the primary mechanism by which battle lines were drawn, globalization has assured that national boundaries can no longer serve as rigid lines of demarcation in the new conflict.¹⁵³ In addition to its many observed harmonizing effects, globalization has also

¹⁵² DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM, 76–77 (2005) (citations omitted).

¹⁵³ See, *supra* note 147 (discussing financial cross-ownership between global firms and actors as an attribute of globalization).

brought heterogeneity in modes of socio-economic organization within and between states to the point where ascribing an ideological bent to a state becomes an essentializing act useful only as a descriptive heuristic. For these reasons, a “CWII as CWI” argument resting on an imagined ideological confrontation between an illiberal Russia and a liberal “West” remains a one-dimensional realist view of CWII.¹⁵⁴ Several alternative ways of thinking about CWII may be more useful.

III. Myth of “Cold War II” as a Legal Institution or as Lawfare?

This last myth needs to be considered given the prominence now attached to the concept of lawfare in some circles, but it is far harder to grasp with rigor than even the aforementioned conceptually slippery ways of conceiving of the Ukraine crisis under international law. To start, one can suppose that any war—“hot” or Cold—has a legal form, and can be thought of as a legal phenomenon, or even a legal institution with a particular set of practices, professional ethics, and formal/informal dispute resolution mechanisms.¹⁵⁵ International lawyers are keenly aware that norms are often ignored by actors, but the assertion of legal supremacy over more immediate prudential considerations in a conflict is typically said to provide various channeling, progressive development, spotlight, or broadly educational functions with the hope that it leads to greater compliance—if not now—then over a prolonged period of non-compliance.¹⁵⁶ Deploying legal arguments against transgressors, even when they are met with contempt or counterclaims, also serves to register moral disapproval.¹⁵⁷

¹⁵⁴ See *Korhonen*, *supra* note 93 (“These suggestions disregard law’s endemic symbiosis with power structures and come up with old catch-all explanations that . . . the more void of meaning [they are] the more ubiquitous they become, for example ‘the new cold war.’”); see also *Feldman*, *supra* note 130.

¹⁵⁵ See *D’ASPREMONT*, *supra* note 127.

¹⁵⁶ Stephen Holmes & Ivan Krastev, *Ukraine Is Not the New Yugoslavia, It’s Worse*, *MOSCOW TIMES* (Mar. 26, 2015), <http://www.themoscowtimes.com/opinion/article/ukraine-is-not-the-new-yugoslavia-it-s-worse/518089.html> (stating that

The West’s motivations in Ukraine, too, seem more pedagogical than strategic: to show Putin that changing borders by force is unacceptable in Europe today. The hope is that economic sanctions, together with Russian casualties on the ground, will force Russia humbly to accept its post-Cold War status as a third-rate power, while sending the additional message that any effort to revise the U.S.-led world order is doomed to fail — with serious economic costs.[].]

¹⁵⁷ Roth, *supra* note 30, at 394 (discussing the “intellectually dishonesty” of the Badinter Commission and ICJ’s Kosovo decision in redefining existing doctrine to accommodate prevailing moral reaction to Serb nationalism and ethnic violence in the region following the dissolution of Yugoslavia).

Phrased differently, even where a warring party or combatant acts “outside” the legal framework, or “violates international law,” law nonetheless remains constitutive of the way power is exercised, even if the exercise of said power is said to be unlawful.¹⁵⁸ In this view, the abstentions of China, India, Brazil, and others on the UN vote concerning the territorial integrity of Ukraine are just as important and legally significant—in that they forewarn of competing voting blocs in opposition to future “Western”—EU, U.K., U.S.—interests—as the predictable *post hoc* vote concerning Russian aggression to the issue of Ukraine’s territorial integrity. The rhetoric of legality, or claims of illegality, often constitute effective tactical options in their own right—a reality captured in the controversy over the very term *lawfare*.¹⁵⁹ A compelling argument that a nation is violating international law can mobilize the “international community,” and perhaps more importantly, galvanize the constituencies within the member states comprising the international community.¹⁶⁰ Moving beyond Ukraine, several examples help to illustrate this point: (1) The use of chemical weapons in Syria against civilian populations is so universally deplorable—and so contrary to settled international legal norms—that ‘humanitarian intervention’ is not just necessary, but is arguably mandated by the doctrine of *responsibility-to-protect* (R2P);¹⁶¹ (2) The Islamic Republic of Iran’s very existence—including its original ‘unlawful’ founding; theocratic form of government; state sponsorship of terrorist organizations; incursion into Iraq under the pretext of combatting ISIS; nuclear aspirations—violates international law and must be punished by effective targeted financial sanctions, trade embargos, or precise armed strikes,¹⁶² with broad-based support from the international community; (3) China’s South China Sea claims violate international maritime law and must be counterbalanced by collective diplomatic and economic pressure, and if necessary, military action.

While they assert the centrality of law in each of these examples, international lawyers are innately mindful of the limitations of legal argumentation in actually providing a roadmap for the resolution of the policy dispute at issue. The traditional place of the international legal practitioner in these security matters was to provide principled legal arguments in

¹⁵⁸ SIMPSON, *supra* note 1; Roth, *supra* note 30 (describing Russia’s practice of still upholding a norm even as it violates it).

¹⁵⁹ Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT’L AFF. 146 (2008).

¹⁶⁰ David Rivkin, Lee Casey, *Lawfare*, WALL ST. J. (Feb. 23, 2007), <http://www.wsj.com/news/articles/SB117220137149816987> (“The term ‘lawfare’ describes the growing use of international law claims, usually factually or legally meritless, as a tool of war. The goal is to gain a moral advantage over your enemy in the court of world opinion, and potentially a legal advantage in national and international tribunals.”).

¹⁶¹ Spencer Zifcak, *The Responsibility to Protect After Libya and Syria*, 13 MELBOURNE J. INT’L L. 59 (2012), available at <https://www.law.unimelb.edu.au/files/dmfile/downloadaddad11.pdf>.

¹⁶² John Bolton, *To Stop Iran’s Bomb, Bomb Iran*, N.Y. TIMES (Mar. 26, 2015), http://www.nytimes.com/2015/03/26/opinion/to-stop-irans-bomb-bomb-iran.html?_r=0.

support of 'their' government's position.¹⁶³ As with domestic lawyering, the only real limitation on the international lawyer's ability to make good faith arguments in support of—or against—a given position is one's set of personal and professional ethical commitments.¹⁶⁴ When the lawyer's ethical commitments come up against the government client's choice to act against the lawyer's counsel, we are reminded that the practitioner can always step aside or, at most, may choose to actively critique a government's position.¹⁶⁵

Next, it is important to explicitly lay bare several implications inherent in the fact that international law is no longer merely the language of diplomatic relations or a set of processes for the resolution of particular narrow disputes between nominally equal sovereigns.¹⁶⁶ As all lawyers understand, legal arguments can be deployed for various tactical purposes in a conflict, whether to bolster negotiating leverage, to discredit an opponent, or perhaps to sow the conditions for a future—far more consequential—conflict. And while the instrumentalist use of international legal processes is not a new phenomenon, contemporary international legal practice has broadened the scope and reach of international law far beyond its traditional province of governing inter-state relations or serving as a Trojan horse for the insertion of particular legal codes past sovereignty firewalls.¹⁶⁷ Today, international law is part of the everyday vernacular of politically conscious classes in Tahrir or Maidan, and it is increasingly part of the lexicon of mass populations affected by human rights abuses, environmental catastrophes, and mass internal displacement. The popularization of international law as a frame of reference for popular discourse on global governance matters has meant that international legal arguments can now be deployed for highly effective politicization uses against domestic and global audiences—not merely for the articulation of narrowly-constructed claims and not merely by state actors. Thus, beyond the conflation of international and domestic policy matters into a type of legal discourse where decoupling the two becomes conceptually impossible—for instance, the need to sustain large domestic fiscal deficits to sustain foreign military and aid spending—the popularization of international law furthers the realization of something like the long-imagined normative supremacy of the international over the domestic, in several subtle ways.

¹⁶³ See, for example, Martti Koskenniemi, *The Place of Law in Collective Security*, 17 MICH. J. INT'L L. 455 (1995); DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2005).

¹⁶⁴ John D. Haskell, *Taking Risks Ethically*, 22 FLORIDA J. INT'L L. 285 (2010).

¹⁶⁵ For an analogous expression of political will in the academic context, see Matthew Craven et al., *We Are Teachers of International Law*, 17 LEIDEN J. INT'L L. 363 (2004).

¹⁶⁶ Chris Borgen, *The Crimea, Compliance, and the Constraint of International Law*, OPINIO JURIS (Mar. 3, 2014), available at <http://opiniojuris.org/2014/03/03/crimea-compliance-constraint-international-law/>.

¹⁶⁷ YVES DEZALAY, BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* (2002); UGO MATTEI & LAURA NADER, *PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL* (2008).

First, in the narrowest monist sense, the popularization of international law can beget louder calls for adherence to settled international norms from a greater numbers of political constituents. Second, by transposing international legal arguments into domestic political arenas,¹⁶⁸ domestic political actors can take advantage of popular sentiment to register gains vis-à-vis other domestic political actors—for example, U.S. Republican legislative efforts to apply pressure upon an ostensibly “weak” Democratic President on the issue of, say, providing lethal aid to Ukraine. Third, within the American political context, the promotion of international law and international legality coincides with visions of American primacy in global affairs—typically in terms that span the political spectrum.¹⁶⁹ Lastly, just as the Cold War offered the necessary pretext for continuation of massive wartime defense spending—so vital to the expanding military industrial complex in the United States and elsewhere¹⁷⁰—the popularization of international humanitarianism, liberal internationalism, and *hegemonic exceptionalism*,¹⁷¹ may serve the policy of galvanizing popular support for military expenditures to attain military primacy. Military primacy, in turn, is translated through international legal forms into normative supremacy on the hegemon’s terms. Lawfare, in other words, can be deployed both domestically and globally and its first order targets may actually be domestic and foreign polities, rather than rogue or outlaw states.¹⁷²

Moreover, as Julian Ku points out, the recent suggestion that the United States should use *lawfare* against Russia—championed by the same individuals who helped to popularize the term and decried its use against the U.S.—is unlikely to be effective for two reasons.¹⁷³

¹⁶⁸ See, e.g., Russian Aggression Prevention Act of 2014, S.2277 (2014), available at <https://www.congress.gov/bill/113th-congress/senate-bill/2277>.

¹⁶⁹ Contrast Robert Kagan, *Superpowers Don’t Get to Retire*, BROOKINGS (May 26, 2014), <http://www.brookings.edu/research/opinions/2014/05/26-superpowers-dont-retire-kagan>, with Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L. 503 (1995); Anne-Marie Slaughter, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907 (1992).

¹⁷⁰ THE ECONOMIC IMPACT OF THE COLD WAR: SOURCES AND READINGS (James L. Clayton ed., 1970) (regarding expansion of U.S. defense sector following WWII); CHRISTOPHER SIMPSON, BLOWBACK: AMERICA’S RECRUITMENT OF NAZIS AND ITS DESTRUCTIVE IMPACT ON OUR DOMESTIC AND FOREIGN POLICY 56–65 (1988) (discussing U.S. government recruitment of former Nazi military, intelligence, and scientific cadres to support the case of continued Soviet threat, in part, to sustain and expand congressional budget appropriations for U.S. defense spending).

¹⁷¹ Kagan, *supra* note 169.

¹⁷² Alexander Lebedev & Vladislav Inozemtsev, *The West is Wrong to Write Off Ukraine’s Debts*, THE GUARDIAN (Apr. 13, 2015), <http://www.theguardian.com/world/2015/apr/13/ukraine-debts-lebedev-corruption> (“Between 2010 and 2014, Ukraine was something unknown in modern history—a private state. . . . The sometimes private state should be countered with private international justice—and only this will ensure that the corruption of the past will not be repeated.”).

¹⁷³ Julian Ku, *Should the U.S. Use “Lawfare” Against Russia?*, OPINIO JURIS (Apr. 9, 2014), <http://opiniojuris.org/2014/04/09/u-s-use-lawfare-russia/#sthash.ZfUcmf8T.dpuf>. The original *Wall Street Journal*

First, lawfare is particularly effective when conducted in U.S. domestic venues, where procedural rules allow for broad discovery and protracted litigation, and there are presumably limited ways to bring Russian actors to court in the U.S. Second, Ku argues that lawfare tactics distract policymakers from achieving more important strategic objectives, such as increasing sanctions and increasing military aid. But as Scott Horton points out, there is another, more fundamental, problem with lawfare, and particularly lawfare against Russia:

One thing that I think has also not been tracked very much is that there is a direct parallel between [Russian politically-motivated extraterritorial assassinations] and American ideas about targeted killing; *that is, that the Russians, at the highest level, within the FSB [Federal Security Service] and military intelligence—they track extremely closely how the United States rationalizes its own drone program, its own targeted-killing program—the legal and policy rationale. I have actually seen documents that have come from the FSB, classified documents that were made available by a defector I interviewed, in which they talk about this. They talk about how, when these killings are carried out, they are to be justified with exactly the same rationales used by the United States.* The targets will be characterized as terrorists, or people who are consorting with terrorists, giving them material aid and so forth. There will be statements that there was no ability to deal with them through police means; that they constituted some immediate threat. *So all the same language that the United States uses, they use as a rationale.*¹⁷⁴

Lawfare claims, in other words, inspire echo chamber lawfare counterclaims—the end result of which can either be victory by one of the combatants, or the wholesale propagation of legal nihilism, with all the unsavory consequences that entails. Lawfare

piece by Rivkin and Casey claimed that lawfare was damaging the U.S. by trapping it in litigation and restricting its freedom of action in critical respects. The authors argued that Al-Qaida, for instance, was instructing its fighters to claim that they were tortured so as to attain sympathy from domestic and global polities. The subsequent piece by Rivkin and Casey seems to endorse lawfare tactics against Russia by encouraging the “U.S. and its allies [to] challenge the legality of Russia’s actions in every conceivable legal venue, whether domestic or international.” David Rivkin & Lee Casey, *The Outlaw Vladimir Putin*, WALL ST. J. (Apr. 8, 2008), <http://www.wsj.com/news/articles/SB10001424052702304640104579485331656203834>.

¹⁷⁴ Horton, *supra* note 150, at 11 (emphasis added).

against lawfare, of course, equals warfare.¹⁷⁵ Rather than broadly defining CWII as the competing use of international legal mechanisms to articulate/advance differing ideological positions, a lawfare conception of CWII opens two distinct vectors amenable to rigorous empirical or theoretical study: (1) micro—an existential battle between various actors for unquestioned primacy in the production and control of international legal discourse; (2) macro—CWII as being about the way in which a universalist legal order can effectively withstand pluralist security challenges.

D. Conclusions: International Lawyers in the Ukraine Crisis and/or CWII

As I have written elsewhere,¹⁷⁶ and as should be clear from this article, the Ukraine crisis may be symptomatic of a new Cold War—with its attendant global, domestic, and institutional/academic politics.¹⁷⁷

I have been observing the Ukraine crisis closely, and have written several essays that suggest avenues for research that try to capture particular doctrinal nuances—drawing from primarily Anglophone and Russian legal sources. Yet I have also watched in dismay as the intensifying domestic debate over the Ukraine crisis has seen the eruption of bellicose rhetoric from some quarters. This includes outright *ad hominem* attacks purporting to impugn the allegiances of individuals deemed, in Brad Roth's phrase, "apologists for Russia" or, worse yet, "apologists for Putin."¹⁷⁸ In Russia, the vilifying rhetoric has even made use of the term "fifth columnists," with its terrifying evocation of treasonous collaboration with the enemy. Mindful of the uneasy Cold War history of McCarthyism in the U.S. and silencing of dissent in the U.S.S.R. and post-Soviet states—I have watched with alarm how the dispassionate analysts on both sides who have urged for reason, compromise, and rigorous analysis have been attacked as dovish, naïve, or worse, as intellectual saboteurs secretly working against the interests of "their state."¹⁷⁹ The lesson

¹⁷⁵ CHINA MIÉVILLE, *BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW* (2005) ("Between equal rights, force prevails.").

¹⁷⁶ Mamlyuk, *supra* note 138.

¹⁷⁷ As a scholar focused on Russian approaches to international law and global governance, I have done research in Moscow's Institute of State and Law under the auspices of the U.S. Fulbright program, and my work generally tries to understand Soviet and Russian legal theory against broader historical and economic currents. I have been following developments in the post-Soviet space since my days in law school and travel to the region to conduct research, gather materials, and meet with scholars in effort to understand the social and legal contours of the respective societies.

¹⁷⁸ Isaac Chotiner, *Meet Vladimir Putin's American Apologist*, NEW REPUBLIC (Mar. 2, 2014), <http://www.newrepublic.com/article/116820/vladimir-putin-defended-american-leftist>.

¹⁷⁹ Steve Gutterman, *Russian Professor Under Pressure over Nazi Comparison on Ukraine*, MOSCOW TIMES (Mar. 4, 2014), available at <http://www.reuters.com/article/2014/03/04/us-ukraine-crisis-russia-professor-idUSBREA2315X20140304>; Stephen F. Cohen, *Cold War Book Reviewing?*, N.Y. TIMES (June 4, 1995), <http://www.nytimes.com/1995/06/04/books/l-cold-war-book-reviewing-087505.html> (describing how U.S. Cold

of one of the leading American comparativists and path blazing scholars of Soviet law—John N. Hazard (1909–1995), a lifelong Columbia Law School professor who had earlier served his country in WWII as a *Soviet-law expert*,¹⁸⁰ but who was later investigated—and cleared—by the House Un-American Activities Committee and was subsequently denied entry visas to the Soviet Union—serves as a sobering reminder that Cold War politics are ruthless politics.¹⁸¹

Given that my scholarly focus inevitably touches on various critical or heterodox schools of legal thought—as *any* study of Soviet or post-Soviet law would—I am in a double bind, given the potential for blowback, mischaracterization, and impugned ill-motive inherent in what are, in fact, *utterly conventional American legal realist* suggestions that strictly positivist accounts fail to capture the actual driving forces of legal change. My decision to enter this conversation is driven by the academic ethos of intellectual honesty and a search for truth, a value of no national—let alone solely Ukrainian, Russian or American—provenance. Moreover, the fact that I see such a disclaimer as necessary is itself testament to the chilling effect this polarized political discourse has had, and may yet have, on scholarship. The specific normative/political commitment that animates these pages is a desire to further our understanding of global governance in institutional spaces that permit and encourage these types of inquiries, rather than stifling them with unprincipled assertions of national partisanship. My hope is that readers take it upon themselves to engage with the ideas presented here without essentializing the round pegs of the suggested avenues for research into the narrow square holes of nationalist politics.

As this Article proceeds to print, the Ukraine crisis shows no signs of abetting internally or in terms of the broader global restructuring along the lines suggested above—increasing use of disinformation, lawfare, realignment in global trade law, and even law and development architecture. The United States and European Union have taken punitive measures against Russia through three formal channels: (1) Unilateral and multilateral military aid commitments to Ukraine;¹⁸² (2) targeted financial sanctions against individuals and firms connected to Russia’s ruling elite;¹⁸³ and (3) broader sectoral sanctions and other

War-era academic and journalistic communities “imputed bad and even un-American thinking to scholars who dared rethink prevailing explanations of Soviet history”); Robert Ivie, *Cold War Dissent Revisited*, 17 RHETORIC & PUB. AFF. 163 (2014).

¹⁸⁰ JOHN N. HAZARD, RECOLLECTIONS OF A PIONEERING SOVETOLOGIST (2d ed. 1987).

¹⁸¹ Boris N. Mamlyuk & Ugo Mattei, *Comparative International Law*, 36 BROOK. J. INT’L L. 385, 408 (2011).

¹⁸² On May 1, 2014, Senator Bob Corker (R-TN) introduced the 2014 Russian Aggression Prevention Act, which would authorize, *inter alia*, up to \$100 million in direct military aid for Ukraine. See *supra* note 168. Since then, the U.S. and other NATO states have announced various other military aid commitments to Ukraine.

¹⁸³ U.S. Department of the Treasury: Resource Center, *Ukraine-Related Sanctions*, available at <http://www.treasury.gov/resource-center/sanctions/programs/pages/ukraine.aspx>

unarticulated countermeasures in response to the incipient trade war between the United States and Russia.¹⁸⁴ Russia has responded in kind, with broad import bans on foodstuffs and other categories of goods from the United States and European Union. There is little indication that a political solution to the conflict is forthcoming.

For internationalists or comparativists whose work does not center on the region, this crisis is significant for several additional reasons. It serves as a vivid contemporary case study on indeterminacy, showing the fluid nature of international and domestic legal argument, especially in relation to similar challenges elsewhere—such as humanitarian aid for Yazidis in Iraq versus humanitarian aid for Gaza versus humanitarian aid for Donetsk, and so forth. Second, the crisis highlights the failures of our best current collective security mechanisms and emphasizes the need for an urgent reexamination of collective security objectives and institutions. Third, the magnitude of the potential crisis opens the door for a consideration of heterodox empirical and theoretical accounts of law and war, bracketed in the broader context of global relations of production and power. An understanding of natural gas “politics”—the maze of contracts that assures the delivery of Russian gas to European markets—may explain the situation in Ukraine and EU-US-Russian relations far better than orthodox narratives of “illiberal” Russia struggling in a “liberal” world.

Lastly, this article has tried to suggest several alternative avenues of research pursuant to which we can uncover how legal formalism—or a particular style of international legal positivism—may conceal the actual driving forces of a complex conflict like the one in Ukraine. Mindful of the rapidly evolving nature of the conflict, this article closes on the same questions that started it. Explicitly highlighting, then bracketing out, the uncertainty surrounding concrete empirical claims, how is the Ukraine crisis transforming two of international law’s deepest anxieties: (1) The (in)effectiveness of positivist international law as a discursive trope when discussing ‘great power’ relations; and (2) the insistence on pronouncements of international legality when conducting foreign affairs in light of the relative ineffectiveness of international legal institutions to mediate those affairs?

¹⁸⁴ For instance, on August 7, 2014, Russia placed a one-year embargo on food imports from the United States, European Union, Australia, Canada and Norway. Roberto Ferdman, *Russia’s Ban on American Food Imports is Going to Hit the U.S. Poultry, Pork and Nut Industries the Hardest*, WASH. POST (Aug. 7, 2014), <http://www.washingtonpost.com/blogs/workblog/wp/2014/08/07/russias-ban-on-american-food-imports-is-going-to-hit-the-u-s-poultry-pork-and-nut-industries-the-hardest/>.