Deconstructing the Conflict in Ukraine: The Relevance of International Law to Hybrid States and Wars

By Outi Korhonen[*]

A. Introduction

In Ukraine, spheres of political, military, and economic control are contested, non-transparent, and shifting. As the Ukrainian government lost control over the rebellious Eastern oblasts (regions) of the country, Russia denies its authority over various pro-Russian separatists and vigorously rejects any responsibility for the abuses by the unidentified "green men," both before and after the annexation of Crimea. Even during the decades before this conflict, the rule of law in Ukraine was "thin" at best. Meaningful political control was sporadic and dispersed, often wielded by the mix of public, private, and other shady actors occupying the grey area between a functional and a dysfunctional state. If state actors never effectively took control over the events at the state-level during peaceful times, it is not surprising that it is more difficult once a "hot" conflict breaks out. It is not unreasonable to assume that Minsk agreements—signed in an effort to stop the hemorrhaging of the conflict—will not hold if the signatories do not effectively control the diverse public and private actors who possess the actual capacity to influence the dynamic on the ground. Before rendering any kind of juridical judgment, the complicated political and socioeconomic configuration of the conflict in Ukraine forces us to first confront a factual puzzle: Who and what influence the current situation? Which concrete actors really drive the conflict and what interests animate them?

With this in mind, this Article examines the twin phenomena of the hybridization of war and the hybridization of states, and what they mean for international law's relevance in the conflict in Ukraine. With an eye on this ineluctable hybridity, this Article asks how international lawyers should respond to the challenges posed by the blurring of fundamental legal categories in the conflict in Ukraine—such as public/private, state/individual, war/peace, aggression/defense, and the attendant difficulties of identifying legitimate agents of political control.

Unlike most current approaches to the crisis in Ukraine within international law, this Article's method of inquiry recognizes the embeddedness of legal subjects and actors in the social register of political struggle. Rather than accepting that international law's relevance hinges on its ability to satisfy "journalistic" knowledge-interests by offering to gently civilize

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political conflicts on the one hand—climaxing on the attributions of blame and punishment or, on the other hand, on its impotence to deliver either—this Article suggests that the inquiry start from a description of conflicted subjects, their stakes in the conflict, and the underlying ideological and structural frames that inform them[1] with an aim to unearth the potential and the limitations of international law in responding to the experience of a diverse set of relevant political and socioeconomic actors. In doing so, it joins the calls for methodological renewal in international and comparative laws that have emphasized embeddedness, embodiment, and rich contexts and challenged traditional assumptions of realism and objectivism. As a classic feminist text puts it:

> [S]ituated knowledges require that the object of knowledge be pictured as an actor and agent, not as a screen a ground or a resource, never finally as a slave to the master that closes of the dialectic in his unique agency and authorship of "objective" knowledge . . . . Indeed, coming to terms with the agency of the "objects" studied is the only way to avoid gross error and false knowledges of many kinds . . . .[2]

Rather than a doctrinal exegesis, one should approach international legal analysis through the lens of situational critique: A form of interdisciplinary and comparative legal studies that emphasizes embeddedness and situatedness of their objects and subjects.

B. Crisis in Ukraine and International Reactions

The build-up to the crisis in Ukraine was not as quick and spectacular as the international reactions may have suggested. Its origins are deeper and more diverse. On the one hand, the dire socioeconomic situation and the disappointment with the results of transition contributed to the political fragility of social peace. Before the uprising, for example, the basic socioeconomic indicators put Ukraine within the last quartile among the countries of the world in terms of alcoholism, drug abuse, orphans, HIV infection rates, corruption, respect for basic freedoms, alienation, and general hopelessness.[3] On the other hand, the complex constellation of external and internal political and economic rivalries and

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[1] *See generally*, Umut Özsu, *Ukraine, International Law, and the Political Economy of Self-Determination*, 16 GERMAN L.J. 434 (2015) (examining these in an exemplary manner). I thank Anne Orford for the methodological discussion that made this explicit in Turku April 27, 2015. See also Anne Orford, In Praise of Description, 25 LEIDEN J. INT'L L. 609–25 (2012).

[2] Donna Haraway, *Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective*, 14 FEMINIST STUDS. 575, 592–93 (1988).

[3] *See, e.g.*, KARINA KOROSTELINA, CONSTRUCTING THE NARRATIVES OF IDENTITY AND POWER, SELF-IMAGINATION IN A YOUNG UKRAINIAN NATION 81 (2013).

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affiliations that provided a modicum of stability in the country before the conflict was tenuous and fragile. Even before the conflict, the public and the private, the state, the regions, and the businesses—as well as informal actors of various sizes—have fiercely struggled for control over people, territory, infrastructure, and other resources.

Beyond concrete Russian actions, one could also view the escalation into internal and inter-state war as the overt manifestation of a more enduring political predicament. To not dwell on a legalistic assessment of the situation that does little to stop fighting and killing—that is, restating the rule that the use of force is illegal—we must dive into the situational conditions of the subjects between whom the conflict-driving problems exist.

I. Doctrinal Responses

The overwhelming majority of first-hand broadcasted reactions by international lawyers to the Ukrainian crisis condemned the secession and the annexation of Crimea as a form of Russian aggression, illegal both under the Ukrainian constitution as well as under international law.[4] Irrespective of this dominant narrative, some reactions compared the annexation of Crimea to Northern Cyprus, Aaland Islands, and—most notably—to Kosovo's recent unilateral declaration of independence. In that later regard, some international lawyers feared that Kosovo set a precedent for a secessionist slippery slope, while others used doctrinal, political, and historical arguments to distinguish the case of Crimea from the similar previous cases of unilateral secession.[5] Within the debates in international law, the Russian claims of remedial self-determination have generally been rejected. Despite Russian claims, almost all lawyers agree that there had been no systematic violent attacks on ethnic Russians before the invasion.[6] Establishing direct Russian control over the rebels in the East has been more difficult. Although the general outcry at the downing of the Malaysian Airlines flight MH17 spurred many accusations of terrorism and the Russia's sponsorship of it, there was no straightforward way to determine effective or sufficient control—the knowledge of purpose—to use the attack against civilians. As Barry Kellman argued:

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[4] *See* OXFORD PUB. INT'L L., Debate Map: Ukraine Use of Force (2014), http://opil.ouplaw.com/page/ukraine-use-of-force-debate-map (last visited Aug. 3, 2014).

[5] *See* Steven Tierney, *Sovereignty and Crimea: How Referendum Democracy Complicates Constituent Power in Multinational Societies*, 16 GERMAN L.J. 523, 527–28, 536 (2015).

[6] *See* OSCE (HCNM), HUMAN RIGHTS ASSESSMENT MISSION IN UKRAINE 9 (May 12, 2014), http://www.osce.org/odihr/118476?download=true ("No increase in the manifestation of intolerance or escalation of violence against the Russian-speaking population was observed in the [visited] regions . . . ."); *see also* Brad R. Roth, *The Virtues of Bright Lines: Self-Determination, Secession, and External Intervention*, 16 GERMAN L.J. 384 (2015).

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> Under international criminal law, to prosecute the missile providers would require a finding of aiding and abetting—the missile providers would have had to have appreciated that their actions meaningfully contributed to the crime's commission. Yet, to hold a missile provider responsible for international crimes committed with its weapons would be virtually unprecedented.[7]

These quick snapshots demonstrate the modus operandi of mainstream international legal analysis in the context of an acute unfolding crisis. First, these snapshots identify what the rules are, who obeys and who violates them, and what are the available sanctions. Second, they seek to apply rules and doctrines to the publicized events taking subjects, their constitutions, borders, and other characteristics, as unexamined givens.

When international actors disregard rules, and when international legal sanctions do not produce desired effects, international lawyers face the charge of their irrelevance. International law is damasked as a mushy field for formalistic nerds who are out of touch with the real world of machoistic power politics.[8] At that point, the media, other disciplines, and some lawyers themselves, repeat the old Austinian charge: International law is not really law.[9] And to a certain extent, there is some truth to that charge. An analysis without questioning whether actors and events correspond in any proximity to the assumptions embedded in the traditional doctrinal definitions—of states, belligerents, and internal conflicts—produces responses that are mostly too general and abstract to make a difference, or command compliance, in a "hot" crisis.[10] The modest doctrinal response to such Austinian anxieties is well known: Even violators grant that they are not acting in a rule-free space. The modest defense of international law's relevance consists in pointing that even Russian authorities, like those of other superpowers, tend to invoke international

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[7] *See* Barry Kellman, *MH17 and the Missile Threat to Aviation*, 18 ASIL INSIGHTS (2014), http://www.asil.org/insights/volume/18/issue/19/mh17-and-missile-threat-aviation (last visited June 15, 2015) (stating that the make/country of origin of the arms is not sufficient to prove state responsibility in the circumstances of the international arms trade and smuggling today).

[8] *See* Eric Posner, *Russia's Military Intervention in Ukraine: International Law Implications*, http://ericposner.com/russias-military-intervention-in-ukraine-international-law-implications/ (last visited Jan. 15, 2015) (associating irrelevance based on enforcement deficit critique on international law in Ukraine crisis).

[9] Austin has been discussed by many as the progenitor of the idea that without efficient enforcement a system cannot be properly called legal. According to the command theory of law, international law could not be regarded as law at all. Austin was criticized by H.L.A. Hart, who also had reservations about the legal quality of international law. *See, e.g.*, Mehrdad Payandeh, The Concept of International Law in the Jurisprudence of H.L.A. Hart, 21 EUR. J. INT'L L. 967 § B (2010).

[10] *See* Boris M. Mamlyuk, *The Ukraine Crisis, Cold War II, and International Law*, 16 GERMAN L.J. 479, 515 (2015) (unraveling the concept of Cold War and what its meaning structures entail in a precise and highly insightful discussion).

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legal rules—right of self-determination, right to offer humanitarian relief, intervention by invitation or consent, pre-emptive self-defense—as proof that international law continues to matter in the conflict in Ukraine.[11]

II. Relevance Beyond Apology

Should international lawyers satisfy themselves with this explanation? Ukraine and Crimea are perhaps the only glaring examples of many other conflicts, frozen and active, where doctrinal legal analysis has contributed little in achieving a fair and lasting political settlement. To say that vigorous denunciations of contemporary violations of the norms of international law may rule buttresses compliance with the central tenets of international legal order in the long run is a poor consolation to the present-day victims of the conflict. Instead of focusing its gaze exclusively on the long run, international legal analysis should devote its energy towards facilitating peaceful political settlements, here and now. From this perspective, it is unhelpful to assume that conflicting parties are "bad men" who simply lack political will to comply with the norms of international law, or are otherwise acting in bad faith. Such everyday "evilization" is an unproductive start for conflict resolution.

In order to obtain a more accurate map of the conflict useful in the pursuit of its resolution, international lawyers need to rely on an updated understanding of the use of force and its concrete users. Instead of doctrinal interpretations of international law, they should look more closely at the conditions within which the subjects, actors, and their actions are embedded and examine how the war itself is constructed as a legal concept and how is it legally managed.[12] Thus, the relevance of law for the conflict in Ukraine should not be seen as exclusively, or even dominantly, dependent on the concrete intensity of the conflict, but rather on the fit of the analytical tools, instruments, and proposals that are used to resolve political conflict.[13] It may be that the situation is not aggravated by the "bad men" but rather, the bad fit of our conceptual tools with the corresponding situation makes law seem irrelevant. Before international law can aspire to speak constructively to the conflict in question, we must first uncover relevant details and outline relevant ideational structures that subtly or not so subtly frame the conflict, starting with the way in which law frames our understanding of war.

C. Hybrid War and Law

[11] *See* OXFORD PUB. INT'L L., supra note 4 (stating defenses of international law's significance).

[12] *See* DAVID KENNEDY, OF WAR AND LAW (2006) (noting that David Kennedy has thus been right to characterize modern war as lawfare).

[13] *See* Mamlyuk, supra note 10 (demonstrating that one needs an analytical description on a larger scale, probing the deeper layers of the conflict, and, in more detail).

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The way we imagine war is simplistic and thus problematic. We often imagine traditional wars as conflicts of armies dressed in colorful uniforms clashing on open plains and new wars as asymmetric battles in real and cyber jungles, waged by camouflaged soldiers, undercover agents, and urban guerilla. Although trends have changed, the history of war is far from a linear progression from the first to the second image.[14] Whatever its history, contemporary news-threshold hostilities increasingly relate to state failure, enduring large-scale social injustice, complex humanitarian emergencies, organized crime, social/economic/natural disasters, vestiges of neo-colonialism, or competition over valued natural resources.[15]

What in part obfuscates such finer-grained picture of war is the law itself. As David Kennedy rightly observed, an "increasing continuity between war and peace, [is simultaneously accompanied by a] continued rhetorical assertion of their distinctiveness."[16] For Kennedy, "Warfare has become a modern legal institution . . . . Law has built practical as well as the rhetorical bridges between war and peace, and is the stuff of their connection and differentiation."[17] Even when legalization of warfare has turned war-making into another bureaucratic effort, placing it on the same continuum with peace, the legal doctrine has continued to assume their radical distinctiveness.[18] Being cognizant of this structuring role of law should empower us to see more clearly its essential hybridity most clearly on display in the conflict in Ukraine.

Roughly a year before the crisis in Ukraine became news, recently appointed Chief of General Staff of the Armed Forces of the Russia Valery Gerasimov spoke and wrote on the conflicts in the Middle East, identifying them as exemplars of contemporary hybrid warfare: One in which the distinctions between war and peace, combatants and non-combatants, and aggression and defense blur, and territorial fronts give way to economic, industrial, technological, trade, media, energy supply, cyber-spatial, and other overt and covert means of hostile engagement.[19] In contemporary hybrid wars, political, economic, informational, humanitarian, and other non-military measures blend into, precede, or substitute traditional uses of force. They may be indistinguishable from hyper-competition, large-scale

[14] MARY KALDOR, NEW AND OLD WARS: ORGANIZED VIOLENCE IN GLOBAL ERA (1999).

[15] OUTI KORHONEN & JUTTA GRAS, INTERNATIONAL GOVERNANCE IN POST-CONFLICT SITUATIONS (2001).

[16] KENNEDY, *supra* note 12, at 5.

[17] *Id.*

[18] *Id.*

[19] VPK NEWS NO. 8, Feb. 5, 2013, http://vpk-news.ru/sites/default/files/pdf/VPK_08_476.pdf (last visited June 15, 2015); Sam Jones, Ukraine: Russia's New Art of War, FINANCIAL TIMES, Aug. 28, 2014, http://www.ft.com/intl/cms/s/2/ea5e82fa-2e0c-11e4-b760-00144feabdc0.html#axzz3QDUHEgwh (last visited June 15, 2015).

cyber-espionage, and underhand encouragement and control of interstate shadow economy. In a formulation that comes not from Russia, but from the West,

> hybrid wars blend the lethality of state conflict with the fanatical and protracted fervor of irregular warfare. In such conflicts, future adversaries (states, state-sponsored groups, or self-funded actors) will exploit access to modern military capabilities, including encrypted command systems, man-portable air-to-surface missiles, and other modern lethal systems, as well as promote protracted insurgencies that employ ambushes, improvised explosive devices (IEDs), and coercive assassinations. This could include states blending high-tech capabilities such as antisatellite weapons with terrorism and cyber warfare directed against financial targets.[20]

The reason why hybridity of conflict remains only partially recognized—mostly by the professionals and the specialists—should not be attributed only to the way in which law, as Kennedy rightly stresses, structures the binary between war and peace. Beyond the structuring role of law, there is our political imaginary that still, in large part, sees states as Waltzian "billiard balls"[21] whose inner workings remain obfuscated by thick and impenetrable shells. To embrace the fact of hybridity, and set the stage for a more productive engagement of international law, we need to admit that states' domestic governance, political independence, and their entire constitutional order may in fact be shallow and formal, sitting on top of other, more robust layers of sociopolitical and socioeconomic control, organization, and distribution.[22] It follows that state actors may wage hybrid wars for years underneath a porous and fragile—rather than a hard—surface of a sovereign state. Despite the fantasies of doctrinal approaches to international law that

[20] Frank Hoffman, *Hybrid Warfare and Challenges*, 52 JOINT FORCE Q., 34, 37 (2009). Western military strategists had also discussed new wars, asymmetry, compound strategies, and hybrid wars, particularly in reference to the Middle East.

[21] The billiard-ball-theory of states as units is associated with the neo-Realism of Kenneth Waltz, in particular, in KENNETH WALTZ, THEORY OF INTERNATIONAL POLITICS 99 (1979); although the structural causes of conflict in the international system are part of Waltz's theory, the analysis here opposes the neo-realist take and posits that states should be understood as non-unitary actors with diffused rather than tightly shut borders and cultural spaces.

[22] In the Western media, the hybridity was suppressed by making ominous references to the Franco-British appeasement policies and the traumas of the 1930s. Owen Wilson, David Cameron Warns of "Appeasing Putin Like Hitler," GUARDIAN, http://www.theguardian.com/politics/2014/sep/02/david-cameron-warns-appeasing-putin-ukraine-hitler (last visited Jan. 28, 2015) (criticizing the cynicisms of the comparison and refers to reports of off-record discussions both between EU Commission President Barroso and President Putin, and those among the Western leaders in the Nato summit in September 2014).

conjure states as billiard balls and impenetrable spaces, overwhelming evidence points to the contrary: States are artificial constructs, not billiard-ball-like or human-like. Rather than seeing them "as units," international lawyers should accept their polymorphous, porous, and non-Unitarian nature, and instead of approaching them generically, accept the diversity of ways in which they organize and manage social, political, and economic power.[23]

Hybrid wars exploit the incommensurability and polymorphism that the international—legal—system partially suppresses under the rubric of sovereign statehood and partially allows by carving out limited legal spaces for non-governmental organizations, multinational corporations, and individuals. Hybrid wars adjust their methods given this morphology of legal space and according to their concrete objectives. Instead of focusing exclusively on achieving military victory, they seek to gain control and subjugate the enemy through political, economic, informational, humanitarian, and other measures.

In that regard, Gerasimov's doctrine emphasizes the significance of new information and communication technologies (ICT). While modern ICT does away with the spatial, temporal, and information gaps between the forces on the field, military command and state administration—not to mention organs of military allies or alliances— it also does away with the distinctions between strategic, operational, and tactical levels and between offensive and defensive operations.[24] Furthermore, in an asymmetric war, special operations, extending over to the recruitment of opposition groups within the adversary's political space, radically downplay the idea of war as the clash of armies that can be clearly distinguished by nationality, ethnicity, origin, or at least military uniform. It further destroys the idea of physical frontlines and, instead, extends hostilities to geographic and non-geographic theaters ever less distinguishable from civilian spaces.[25]

To insist on the hybridity of warfare is also to recognize that individuals within the institutional actors also play different roles, wear different hats, have conflicting affiliations, loyalties, motivations, identity traits, and genuine links, even if they act in the name of juridical persons "approved" by international law. This insight is by no means new; famous Clausewitzian ideas have long posited the artificial boundary between political, military,

[23] *See, e.g.*, Georg Sørensen, States Are Not "Like Units": Types of State and Forms of Anarchy in the Present International System, 6 J. POL. PHIL. 79, 79–81 (1998).

[24] *Id.*; *see also*, Hoffman, *supra* note 20, at 37.

[25] *Id.* Still, hybrid wars are not reducible to anarchy. While methods of such wars constantly transform through the reciprocal exploitation and fueling of the development of cutting edge technologies for war, Gerasimov traced the hybrid war mindset back to U.S. tactics in Desert Storm but also to partisans in World War II, and Soviet methods in Northern Caucasus and Afghanistan; whereas, Hoffman made comparisons even with certain battles in the American Civil War.

and other modes of struggle as a matter of strategic concern.[26] For our purposes, it is more important to insist on the contextual nature and fluidity of hybrid warfare[27] and which makes conventional doctrinal conclusions difficult for epistemic, interpretive, and political reasons. The above-referenced discussion presents three concrete difficulties.

The first difficulty concerns increasingly blurred distinctions. Contemporary, public international law in general, and humanitarian law in particular, rely on our ability to distinguish public from private, state officials from non-state actors, combatants from civilians, and military from non-military engagement.[28] The traditional doctrinal approach experiences difficulty drawing bright lines in the context of a hybrid war that thrives precisely on blurring such distinctions.

The second difficulty concerns recognizing compliance. The emergence of positive rules always lags behind the development of the new methods of warfare, which by necessity engender new patterns of behavior, and in turn give rise to the questions of what constitutes compliance with international law in particular cases. When actors, theatres, methods, and modes of warfare rapidly change, judging compliance requires a level of expertise that cannot be acquired quickly or practiced without extensive training or without the knowledge of the contextual background. Certain incidents in the Russo-Ukrainian relations over the past decade, such as cyber attacks, espionage, hostile corporate takeovers, or wintertime gas-cuts, can be interpreted either as systematic acts of hybrid war or as merely unsavory, but nonetheless legal, incidents in the interaction among sovereign states. Different interpretations place them under different legal regimes and render different outcomes when it comes to judging compliance with international law.

Finally, the doctrinal project in international law cannot productively approach hybrid wars because it has no means to account for, both historically as contemporaneously, global and local asymmetries of political and economic power. As products of Western political history, international law of war and humanitarian law are rightly seen as privileging customs, industries, levels of development, resources, and social concerns of those who have historically promulgated them, rather than the international community as a whole. The panoramic view of international legal order discloses a systemic asymmetry between the "haves" and the "have-nots," not only in the socioeconomic sphere but also in the arena of armed conflict.

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[26] *See, e.g.*, COLIN GRAY, STRATEGY AND HISTORY, ESSAYS ON THEORY AND PRACTICE 185 (2006) (citing Clausewitz and Bull) ("War, its threat and actuality, is an instrument of policy.").

[27] *Contrast* Andreas Paulus & Mindia Vashakmadze, *Asymmetrical War and the Notion of Armed Conflict—A Tentative Conceptualization*, 91 REV. RED CROSS 95 (2009), *with* DAVID KILCULLEN, OUT OF THE MOUNTAINS: THE COMING AGE OF THE URBAN GUERRILLA (2013), *and* Saskia Sassen, *When the City Itself Becomes a Technology of War*, 27 THEORY, CULTURE & SOC'Y 33 (2010).

[28] Paulus & Vashakmadze, *supra* note 27, at 99–100.

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Insurgent, guerilla, and revolutionary struggles are the ground-level manifestations of asymmetrical conflict between asymmetrical entities. In fact, one may say that "irregular" or "dirty warfare" are other derogatory terms used by the "haves" to delegitimize the justice struggles of the "have-nots."[29] Rendering these asymmetries illegible from the perspective of international law is of course possible and may indeed serve important valuable aspirations, as the article of Brad Roth in this issue forcefully argues.[30] But our decision concerning whether to subscribe to making global power differentials irrelevant for the project of international law must be predicated, as Zoran Oklopcic argued in his piece, on—among other things—an independent judgment about whether international legal order really contributes to such goals.[31]

D. Hybridized Subject(s): The Case of Ukraine

The previous discussion demonstrates that the phenomenon of hybridity cannot be constrained only to the phenomenon of war. If war strategies are hybrid, so are the actors who support them and are affected by them. The picture of the state that emerged from the discussion of hybrid warfare is a far cry from a billiard-ball-like "national unit," and instead resembles the amorphous field of volatile political and socioeconomic competition between more salient, and ultimately decisive, competing actors.[32]

The fluidity of the structure of the Ukrainian state and political economy defies the identification of the absolute character of its dividing lines, whether public or private, national or international. Sometimes national borders serve to protect the essential interests of powerful actors. Sometimes powerful actors do better for themselves by acting through their multinational networks, at times making use of formal law and informal rules, sometimes making use of formal law, and sometimes informal rules. Within such a fluid system, actors engage in internal and international competition and "diplomacy"—or haggling—that may be compared with that of medieval city-states.

Even prior to the outbreak of the conflict, the reality of political life in Ukraine complicated and undermined the fantasies of a liberal democratic and Unitarian state as an ultimate

[29] For example, the actions of Palestinian suicide bombers are often juxtaposed to the vast technological superiority of the Israeli army; the conflicting units are different and, therefore, the tactics are also available.

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

[31] *See* Zoran Oklopcic, *The Idea of Early-Conflict Constitution-Making: The Conflict in Ukraine Beyond Territorial Rights and Constitutional Paradoxes*, 16 GERMAN L.J. 658, 670 (2015).

[32] From that perspective, nations indeed present themselves as "imagined communities." BENEDICT ANDERSON, IMAGINED COMMUNITIES; REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1982).

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destination of global historical necessity. For astute sociological and anthropological observers of the region, such description is hardly surprising. It is worth quoting extensively from Janine Wedel's penetrating analysis, which already in 2001 pre-figured important dimensions of the conflict:

> Under post-socialist transformations, much political-economic influence . . . accrued to those who skillfully blend, equivocate, mediate, and otherwise work the spheres of state and private, bureaucracy and market, and legal and illegal . . . . Political-economic influence [became] precisely . . . the "control of the interface between public and private". . . . [M]any outcomes, such as the distribution and ownership of resources, [were] shaped by struggles [to steer] at the state-private nexus. [As a consequence] informal groups and networks operate in the multiple domains of politics, economics, and law. [T]he state-private distinction [is] fluid, subdivided, overlapping, or otherwise obscure. [Also] spheres within and around the state are flexible and fluid. They are situationally and even fleetingly activated, deactivated, and otherwise molded by actors operating under various configurations of state and private rubrics who employ state-ness and private-ness strategically to achieve individual, group, and even official goals. Structure is malleable.[33]

Equally, as Viatcheslav Avioutskii argued:

> Ukrainian administrative system is strongly intertwined with the private sector. Most business groups succeeded in "privatizing" strategic administrative posts or bodies. They influence state policy-making through legislative bodies [such as] [Rada, regional and municipal councils]. The line dividing private business and state affairs has become unclear and floating. . . . [T]he state has been privatized.[34]

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[33] Janine Wedel, *Corruption and Organized Crime in Post-Communist States: New Ways of Manifesting Old Patterns*, 7 TRENDS IN ORGANIZED CRIME 3, 4–5, 18 (2001).

[34] Viatcheslav Avioutskii, *The Consolidation of Ukrainian Business Clans*, 1 REVUE INTERNATIONALE ECONOMIQUE 119, 141 (2011).

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While the international legal subjectivity of a state does not vanish, its public sphere is half-privatized, in turn, privatizing the central markers of its sovereignty: Domestic policing and international war-making. "Privatization" or state-capture, however, does not have to mean an extinguishment of public action; it can be understood as one of the alternating strategies chosen by powerful actors within an existing state. Equally, those who have "captured" the state may exploit different power strategies in external relations that depend on the internal constellation of power, rather than on their formal status—party, IGO, coalition.[35]

In addition to being a soft, non-unitary, privatized or captured state, Ukraine has been described as a "clan" and a fragmented state. The Ukrainian state is fragmented into regions which, through their differing histories, have given rise to political-economic-cultural "clans," defined as much through blood lines, but more so through original cultural-historical affiliations within relatively circumscribed localities. Clans have been loosely identified to one of the provinces of present day Ukraine—from Lvivian Ukrainians with historical ties to the Austro-Hungarian Empire and the Polish-Lithuanian Kingdom, the Crimeans with their peculiar mix of Byzantine, Khazar, Tatar, Ottoman, and Russian imperial heritage, to Kievan Ukrainians tracing their progeny to the Medieval city state of Kievan Rus, which is equally important to the nationalistic narrative of Russia.

In highlighting the role of "clans," however, we should not over-emphasize it. The conflict in Ukraine is not primarily ethnic, any more than in the Balkans or the Middle East.[36] Ukrainian internal divisions cannot be reduced to local affiliations, political ideologies, or ultimately economic interests. The conflict in Ukraine is not an incarnation of another "oil war."[37] Because the concept of "clan" implies ethnicity, a more precise and inclusive analytical lens would be the term of an "interest grouping." Therefore, present day linguistic and religious lines alone would support such clan-divisions only tentatively.

The formation of political affiliations of ethnic groups in Ukraine has been intertwined with the competing imperial expansion over the course of centuries, which were frequently accompanied by brutal population transfers and deportations among the domicile populations. Historically, the most momentous amongst them were Catherine the Great's transfers of Russians, Bulgarians, Armenians, and Germans to the Black Sea ports and the Soviet deportations of the Tatars from Crimea and the Cossacks of Western and Central Ukraine during Stalin's reign, thus destroying the possibility of most clans to claim

[35] Martti Koskenniemi, *International Law: Between Fragmentation and Constitutionalism*, pt. 10 (2006), http://www.helsinki.fi/eci/Publications/Koskenniemi/MCanberra-06c.pdf.

[36] *See generally*, OUTI KORHONEN & JUTTA GRAS, INTERNATIONAL GOVERNANCE IN POST-CONFLICT SITUATIONS (2001).

[37] See MARY KALDOR, TERRY LYNN KARL & YAHIA SAID, OIL WARS (2007) (describing a theory of coincidence of a new war in the so-called petro-states, including Russia).

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uninterrupted dominion in the history of any particular region. Among other oblasts, the Autonomous Republic of Crimea, annexed to Ukraine by Khruschev in 1954, had a special status—the city of Sevastopol also had its own status provision in the 1996 Constitution.[38]

The dissolution of the Soviet Union also brought about further changes in the intra-clan dynamic. The breakup of the Soviet Union spurred "dynamic competition among regional clans and crystallized ... [into] a 'totalitarian clan' system, in which . . . 'power belongs to several clans, which can alternate at power by nominating their totalitarian dictator.' "[39] After the dissolution of the Soviet Union, "clans" have evolved from their previous historical forms, becoming increasingly complex actors and contributing to the formation of Ukraine as system as an "oligarchic democracy."[40] In the post-Soviet space, those oligarchic groupings include dynasties, blocs, cliques, financial industrial groups (FIGs), and the more or less organized adherents of meta-political ideologies (Ukrainian Orangists versus the Blues). According to Oleksandr Turchynov, Ukrainian interest groupings can be further divided into "central administrative-economic groups, regional administrative-economic groups or foreign administrative-economic groups . . . [some being] connected to the criminal world" in a variety of more and less overt and covert ways.[41]

The complex constellation of cooperation and conflict among these groups undermines the schematic picture of the conflict in Ukraine as a simple two-sided conflict between Russia and Ukraine and their political and economic satellites. Rather than a national or international "us" versus "them" situation, there is a multitude of divisions and interests in the conflict(s) and it is utterly misleading to portray it as a soccer match. The complex political picture may be both the reason for, as well as the outcome of, the hybrid war strategies, currently in play.[42]

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[38] The territorial structure of Ukraine as prescribed in the Constitution of 1996 was influenced by the peculiarities of history and the constant contestation by Russia over Crimea and Sevastopol. Thus, article 133 provided that Ukraine is composed of 25 oblasts (provinces), one Autonomous Republic (Crimea), and two cities with special status (Sevastopol and Kiev). Despite Khrushchev's grant of Crimea to Ukraine, during Soviet times and beyond, Crimea and Sevastopol were also mentioned in the various Constitutions of the Soviet Union and, later, the Russian Federation.

[39] Wedel, *supra* note 33, at 33.

[40] Ironically, its clan structure made it appear more pluralist than, for example, Russia and Belarus. *See* SLAWOMIR MATUSZAK, THE OLIGARCHIC DEMOCRACY: THE INFLUENCE OF BUSINESS GROUPS ON UKRAINIAN POLITICS 74, 78 (2012).

[41] Wedel, *supra* note 33, at 33 (referring to Oleksandr Turchynov (1996)). On the exploits of the criminal networks, see references also in Helene Lavoix, *Ukraine Crisis: State of Play—The Oligarchs*, THE RED (TEAM) ANALYSIS SOCIETY (June 13, 2014), https://www.redanalysis.org/2014/06/13/ukraine-state-play-oligarchs/ (last visited Jan. 31, 2015). *See also* MATUSZAK, *supra* note 40.

[42] See the arrow-pierced images of Ukraine business and political relations in, for example, Lavoix, *supra* note 41, and Avioutskii, *supra* note 34, at 119–41.

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To illustrate it, one may look at the Ukrainian interests groupings more closely, which wield exceptional economic and political power, and where the six largest among them make up "almost 18% of the Ukrainian GDP."[43] More specifically, commentators identify three to seven highly powerful groupings in Ukraine, among which the most regionally embedded and also most influential ones are two of the richest groupings in the provinces of Dniepropetrovsk and Donetsk.[44]

While the central Dniepropetrovsk oblast (province) is the main seat of interest groupings whose rivalry has resulted in various splits and mergers both within the region and outside of it, the Eastern "Donetsk oblast is dominated mainly by one political force (Party of Regions) and by one business group (SCM)."[45] System Capital Management (SCM) is also one of the most exclusively owned groups, belonging to the Ukrainian billionaire, Rinat Akhmetov, whose net worth before the conflict was estimated between ten to twenty-five billion U.S. dollars.[46] While seen as deeply Donetskian, the "SCM group operates in 14 Ukrainian regions and 6 other countries [namely] [the] U.S., Russia, Italy, Bulgaria, Switzerland [and] Great Britain."[47]

Notwithstanding nominal ventures in Russia, the complicated relations in the post-Soviet space led SCM to the early choice to guard against co-operation because of the many potential conflicts and the fear of the comparative advantage of the Russian business.[48] SCM built its economic and financial clout, like that of many other groups, on the capture of strategically high-valued former state assets (e.g. steel industry) after the breakup of the Soviet Union. While SCM's core business is steel-making (from mining to industrial products), it also owns some 200 companies including banks, sea-port operations, energy plants, media, mobile networks, real estate, agriculture, transportation, and pharmaceutical industry.[49] During Yanukovic's presidency, the SCM-led interest grouping was the most quickly expanding one and in the war its infrastructure is among the worst hit.

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[43] Avioutskii, *supra* note 34, at 120–21, 140–41.

[44] Caveat: By taking these two oblasts (provinces/regions) and their groupings as examples I risk implying that they are the decisive forces of the conflict. Such implication is not intended. On the contrary, the choosing of these examples is not based on any sociological or political evidence of their superior significance vis-á-vis the various other regions and influence groupings around Ukraine.

[45] Avioutskii, *supra* note 34.

[46] *Id.* at 125–29; see also Lavoix, *supra* note 41.

[47] Lavoix, *supra* note 41.

[48] Avioutskii, *supra* note 34, at 118–19.

[49] *See* SYSTEM CAPITAL MANAGEMENT, http://www.scmholding.com/en/business/list/ (last visited June 1, 2015).

Unlike other groupings, however, SCM has been overtly and directly involved in politics through its own party, the Party of Regions (PR). [50] As the largest Ukrainian economic actor, SCM also controlled "[t]hrough informal networking and minority shareholdings . . . , most middle-sized assets situated in the oblast."[51] It was the largest employer in Donetsk oblast and the sole employer in many cities, having on its payroll some 200,000 employees. SCM's influence depended not only on its monopoly, but also on its economic success, which it then used as a sociopolitical leverage. This economic success enabled it to pay higher than the Ukrainian average salaries to its employees and finance a variety of communal, housing, and other beneficial projects.[52]

In addition to SCM, Donetsk oblast is the seat of a number of autonomous businesses some of which can be characterized as "travelling companions" of the SCM-led grouping and others as dissidents wielding their support to Orange forces and political parties. The most notable opposition to the SCM-led grouping in the region identified itself with the ISD group (Industrial Union of Donbass), which was sold to Russian parties, later renationalized and taken over by SCM in the 2000s. Outside the SCM's clout, there are also oligarchs such as Yuriy Boyko, at one time the Minister of Fuel and Energy in Yanukovych's cabinet (2002–2004) (estimated net worth 2.6 billion U.S.D.), and Serhiy Taruta, the founder of ICM (2.6 billion U.S.D.), the initial war-time governor of Donetsk and recently replaced by President Poroshenko.[53]According to Avioutskii, "[i]n comparison to the Dniepropetrovsk clans and other minor regional groups, the influence of the Donetsk businessmen is better structured and constant . . . [deriving] not only [from] a very high concentration of industrial and mining assets in this oblast, but also [from] a peculiar organization of their 'channel for influence.' "[54] In contrast to the more common mode of wielding political influence through the funding of various parties and candidates, the SCM leaders are formally engaged in politics through the Party of Regions. In many ways, the PR has acquired the characteristics of a "business project" and played a major role in changing Ukrainian politics in two ways: First, it has weaned power away from the regional political clans in the Western and central Ukraine, and second, it has helped to shift even more power towards the business

[50] *Id.* at 126–29.

[51] *Id.*

[52] Press Release, System Capital Management, SCM's Profit-Maker (Oct. 28, 2011) (on file with the author). According to SCM it pays twice as high salaries as other companies. *See id.*, Interview with CEO Oleg Popov, http://www.scmholding.com/en/media-centre/coverage/view/300/ (last visited Jan. 31, 2015).

[53] *See* Avioutskii, *supra* note 34, at 127–29.

[54] *Id.* at 139.

community,[55] turning it, as Matuszak describes, into a "platform" from which industrial oligarchs strike deals.[56]

Central Dniepropetrovsk oblast and its politicians are far better known in the West than the Eastern ones because of their role both during the Soviet times and immediately thereafter. The so-called Kuchma clan, Brezhnev's Dniepropetrovsk clan, and Khrushschev's circle all gained influence through controlling major assets in the military-industrial complex,[57] the model which the SCM also followed in the east. The Dniepropetrovsk elite's historical importance has spurned fierce rivalries. When Leonid Kuchma, a former communist party chief, was elected president of Ukraine in 1994—an office that he held until 2005—there was a major breakup in the elite into "several competing and hostile groups seeking to control resources through the privatization process and the control of trade flows."[58] These include the PrivatBank grouping associated with tycoons Igor Kolomoisky (USD 5bn) and Gennady Bogolyubov (USD 4,7bn) and the Interpipe grouping with Viktor Pinchuk (USD 6bn) at its helm. Both groupings own and control major industries in banking, mining, gas, media, and transportation industries.[59]

Martial ties fortify the public private nexus, both in the east and the west of the country When Pinchuk married Kuchma's daughter Olena in 2002, the Interpipe grouping consolidated its support behind Kuchma's party, enabling it to exploit the support of Kuchma-appointed civil servants in its attacks on Privat. On the other hand, Privat grouping mainly supported the Lazarenko-Tymoshenko group and eventually started attacking Kuchma and his prime minister, later President Victor Yanukovich, for corruption and killings of journalists leading to the Orange Revolution in 2005. During Yulia Tymoshenko's tenure as the prime minister, Privat grouping managed to push back the expansion of the Donetsk-based groupings as well as gain more influence over Western Ukraine,[60] including eventually over highly strategic and controversial energy project that reversed the course of the oil-pipe Odessa-Brody, which supplies Azeri oil to European countries.[61]

Unlike SCM, the Dniepropetrovsk groupings have not shunned deals with Russia and have sold major steel assets to Russian-multinational industrial giants, such as Evraz (seated in

[55] *Id*. at 138–39.

[56] MATUSZAK, *supra* note 40, at 57.

[57] *Id*. at 16.

[58] Avioutskii, *supra* note 34, at 119–41.

[59] MATUSZAK, *supra* note 40, at 16.

[60] *Id*. at 19–20.

[61] *Id*. at 21–22.

London),[62] although coercion is often alleged in these deals.[63] The multidimensionality of affiliations and the ability of the grouping leaders to align with seemingly contradictory positions are perhaps best illustrated by Pinchuk himself. Despite his close ties to the Kuchma/Yanukovich reign, he also operated within the Western financial, business and political elite and has taken "a very pro-active role in building close ties with the West and the EU . . . lobbying . . . to oppose Russia."[64] Also, despite Kuchma's closeness to Yanukovich, the former now serves as the representative of the incumbent, President Petro Poroshenko, in the Minsk peace process.[65]

Needless to say, the relationships between two oblasts and among various interest groupings have continued to change over time. While interest groups regarded President Yanukovich as pro-Russian, he was also supported by Rinat Akhmetov, who, in contrast, emerged as hostile towards the Russian influence over SCM's business interests and has in the meantime come out as critical of the attempts to undermine Ukraine's territorial integrity.[66] It is also telling how the most pro-Russian minded oligarch, Dmitry Firtash—the greatest rival of Yulia Tymoshenko and a force behind her demise and later imprisonment in 2011—acted as the broker of the deal that put current President Poroshenko into office. Firtash has also been closely tied with the PR—for example, SCM/Akhmetov—even though he comes from a different region and grouping (RosUkrEnergo and group DF).[67]

The landscape that emerges from the rivalries and affiliations among different public-private groupings is not only extremely complex but also situationally changing. Oftentimes actors such as SCM/Akhmetov play all sides,[68] which is not surprising when the fault-lines in the conflict are unclear, contingent, and changing themselves. Sometimes rivalries and affiliations span over a number of issues but they may also shift on a case-by-case basis.[69] Equally, even if two or more interest groupings support the same outcome—say, closer ties with the EU—they may go about achieving it in very different ways, because of their

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[62] *See* EVRAZ: MAKING THE WORLD STRONGER, http://www.evraz.com (last visited June 11, 2015).

[63] MATUSZAK, *supra* note 40.

[64] Lavoix, *supra* note 41.

[65] *See* Roman Olearchyk, *Battle Rages in East Ukraine as Peace Talks Stall*, FINANCIAL TIMES, Jan. 31, 2015, http://www.ft.com/intl/cms/s/0/966d0adc-a967-11e4-a28e-00144feab7de.html#axzz3QWt0dpZw (last visited Feb. 1, 2015).

[66] *See* Lavoix, *supra* note 41.

[67] *Id.*; *see also* paragraphs on DF group and RosUkrEnergo, the Russian-Ukrainian joint venture in natural gas.

[68] J.Y. Donetsk & T.J. Enakievo, *Rinat Akhmetov's Choice*, ECONOMIST, (May 20, 2014), http://www.economist.com/blogs/easternapproaches/2014/05/ukraine.

[69] MATUSZAK, *supra* note 40, at 30, 53, 78.

internal rivalries, mutual interdependencies, and the channels of influence available to them. While, for example, the PR is allied with President Poroshenko's party, United Ukraine, supports ties with the EU and the NATO, albeit with firm ties to and peaceful relations with Russia; also, there are other oligarchs who believe that closer ties to the West can only be achieved through war with Russia. For example, Privat grouping and Kolomoisky fund volunteer battalions and have put bounties up to one million USD "to capture Russian weapons and terrorists (and) . . . . pro-separatist leader(s)."[70] According to estimates, while the official Ukrainian army was stripped of resources until the Western aid started to flow in, some fifty volunteer battalions of various ideological stripes, often funded by the oligarchs, made up the backbone of Ukrainian defenses.[71]

E. Three Approaches to the Consequences of Hybridization of Wars and Subjects of International Law

The outcome of the doctrinal analysis does not change depending on whether the target state's statehood is fragile or soft, whether its border controls are symbolic or non-existent, or whether its official institutions are functioning or not. Nor does doctrinal judgment depend on whether a country's official economy represents only a fraction of the de facto economic exchange, the majority of which occurs under the radar among various shady national and external private actors. But how productive is that stance? What are the costs of upholding the legalistic binary between war and peace, and neglecting the attendant epistemic, interpretive, and political difficulties that plague it? Even if an external threat or attack is illegal, stating, condemning, or even sanctioning such illegality mostly falls short of helping to resolve a conflict, let alone stop the cycle of injustices and violence.

Especially in non-unitary states, the legalistic discourse of international law, as Andrew Arato argued in this volume, may indeed remain irrelevant for the resolution of the conflict.[72] The factually non-unitary state structure of Ukraine, corrupted and stripped of public assets, prevents it from acting efficiently and decisively. When we hear President Poroshenko, an oligarch himself, a minister, or a regional governor speak on international relations, do we hear the voice of SCM, Interpipe, Privat or other groupings, or the voice of the Ukrainian people? Depending on their contingent political and private interests, these actors control the "activation and deactivation" of the state.[73] Through the exploitation of the fragile and porous public/private divide, these actors defend the myriad of their

[70] Lavoix, *supra* note 41.

[71] Chris Dunnet, *Ukraine's 'Battalions' Army, Explained*, HROMADSKE INT'L, (Sept. 17, 2014), https://medium.com/@Hromadske/ukraines-shadow-army-b04d7a683493 (last visited June. 15, 2015).

[72] Andrew Arato, *International Role in State-Making in Ukraine: The Promise of a Two-State Constituent Process*, 16 GERMAN L.J. 691 (2015).

[73] Wedel, *supra* note 33, at 18.

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interests, primarily interested in gaining situational advantage against each other at a particular point in time, even if the external Russian threat might have altered that dynamic. To understand decision-making in such contexts one has to "foreground the background of the public spectacle" of government, not only during the war but also in peacetime, even in notional democracies.[74] But what implications does such foregrounding have for the future of international legal analysis in contexts such as the crisis in Ukraine? In the next section I explore three possible approaches beyond the doctrinal analysis and analyze their implications.

I. Relativist Approach

In a system of subjects that differ as much as contemporary states do, one could argue that we need to embrace legal relativism instead of universalism. The factual differences—between the "haves" and "have-nots," powerful and powerless, countries in good legal standing and "outlaw" states, politically stable and "failing" states—would seem to counsel for their differential juridical treatment as well.[75] One variant of such approach is, now infamous, project by James Lorimer, who distinguished between absolute and relative equality, giving more powerful, civilized states more rights within international order.[76] As an explanatory lens, Lorimer's approach towards partial recognition of states seems to better capture the political dynamic in and around Ukraine than any other lens available from within the discipline of international law.

First, it draws attention to the endemic dynamic between powerful and less powerful sovereigns in the context of the struggles over the sovereignty of Crimea, which did not abruptly surface only in 2014, after the Maidan Revolution. Already in 1996, Yuri Shcherbak, the ambassador of Ukraine to the United States, decried the "serious aggravation of the situation around Sevastopol" arising from the resolutions of the Russian authorities that Sevastopol had federal status within Russia.[77] Invoking

> [U]niversally recognized principles and norms of international law, in particular Paragraph 4 of Article 2 of the United Nations Charter, as well as resolutions of the OSCE . . . and provisions of the Treaty between Ukraine and Russia of November 19, 1990 . . . and [ ] U.N.

[74] DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM 349 (2005).

[75] *Cf.* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2004).

[76] 1 JAMES LORIMER, THE INSTITUTES OF THE LAW OF NATIONS: A TREATISE OF THE JURAL RELATIONS OF SEPARATE POLITICAL COMMUNITIES 103 (1883).

[77] THE UKRAINIAN WEEKLY, Dec. 22, 1996, No. 51, Vol. LXIV http://www.ukrweekly.com/old/archive/1996/519604.shtml (last visited Jan. 15, 2015).

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> Security Council . . . special statement on this matter on July 20, 1993[,] [78]

the Ambassador appealed "to the world community—to the U.N., the OSCE, the Council of Europe, the Black Sea Cooperation Council, leaders of friendly countries, including the U.S.A.—to take all measures in order to convince Russia that the path of territorial claims is counterproductive."[79] According to the Ambassador the "Sevastopol campaign [began by] influential political leaders and parties of Russia" not, however, including the President Yeltsin. The campaigners' view was that

> to not claim Sevastopol as Russian territory . . . would demonstrate . . . inability to defend its national interests, and therefore to tackle the task of contemporary Russian nation-building; If Russia should renounce Sevastopol as a Russian city, a precedent of resolving territorial disputes in a manner inconsistent with legal procedures would be created. It would lead to the development of centrifugal tendencies in Russia which may cause dissolution of the nation . . . . Keeping Sevastopol within Russia would significantly improve its geopolitical situation and would provide for the stabilization of the internal situation in Russia; From the point of view of national and cultural traditions in Russia, Sevastopol is one of the strategic elements of Russian national consciousness. The loss of Sevastopol would not only damage patriotic feelings of the Russian people but would complicate the process of searching for a new national identity, which is very important now in connection with the rebirth of Russian statehood.[80]

As imperialistic as many Russian claims over sovereignty of Crimea may seem, these claims have also over time also incorporated the ideals of the rule of law, the responsibility to protect public order, human rights, and the right to self-determination, and the genuine historical links. Such claims have Lorimerian resonances. There may be special circumstances, according to the nineteenth century British jurist, when states either need to be built or where they fail their populations, where recognition can be rightfully revoked, triggering the right to protection.[81]

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[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] JAMES LORIMER, THE INSTITUTES OF THE LAW OF NATIONS: A TREATISE OF THE JURAL RELATIONS OF SEPARATE POLITICAL COMMUNITIES 27–28 (1884).

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There is another sense in which the Ukraine situation rings traditional relativist bells. In the Lorimerian relativist terms, international law is a project of progress. Recognizing the legitimacy of territorial acquisitions, aimed to reconcile factual, social, and industrial "aggression" with the juridical status quo, Lorimer's relativist position would allow for an earlier recognition of the existence of (hybrid) war between polities than is the case under contemporary international legal regime. If international law is the project of progress, and if that progress is linked to "fruitful [commercial] enterprises," the idea of progress would likewise justify industrial and economic invasions—either on behalf of either the EU or Russia—together with the hybrid forms of warfare used to accomplish it.[82]

Regardless of its explanatory power, most international lawyers would rightly denounce such relativist approaches to the Ukrainian crisis as racist, imperialist, regressive, "real-political," and outdated. It is, however, intriguing to question why the structure of international law allows for a lingering presence of Lorimer's arguments well after their heyday.[83] Part of the answer surely lies in what Antony Anghie called "the dynamic of difference" present behind both the naturalizing moves of international law in the context of past colonial encounters as well as in the context of Russia's aspirations in Ukraine today.[84] While contemporary approaches to power differentials in international law shun the hierarchical accounts of "the dynamic of difference," their embrace of sovereign equality ends up reifying statehood, obfuscating incommensurability, pluralism, and multi-polarity (fragmentation) both within and without sovereign state, thus setting the stage for factually similar Lorimerian political outcomes.

II. Instrumental State Approach

If one were to resist the dynamic of hierarchical difference and refuse to analyze Ukraine's troubles through the optics of governance or state failure, one might, following Matuszak, see the pluralism of the oligarchic competitive systems as a sociopolitical phenomenon, hardly uncommon under the circumstances of contemporary economic globalization. As we have seen earlier, in Ukraine, the interest groupings have public and private arms activated and deactivated at will. They have their overt agents or covert "sleepers" in public offices and within their businesses rivals' groupings. In furthering their interests, they rely on non-transparent intermediaries from both sides of the public/private divide within and without Ukraine. Some of them command armed battalions, some have hotlines to foreign peers

[82] *Id.* at 28.

[83] For a cautious defense of transformative occupations and/or humanitarian interventions in failed states, (i.e. relativization of the non-intervention and non-interference rules) see Adam Roberts, Transformative Military Occupation: Applying the Laws of War and Human Rights, 100 AM. J. INT'L L. 580 (2006).

[84] ANGHIE, *supra* note 75.

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and dignitaries, while others are connected to international crime syndicates. Their conflict and cooperation within the political, military, and economic arenas of Ukrainian hybrid state illustrate that our imaginary of unitary statehood—featuring a straightforward chain of command under the rule of law—is profoundly misconceived.[85] In fact, as Dan Danielsen argued, corporations will often

> supply rules where none exist. Sometimes they shape the rule scheme through direct political or economic pressure on regulators. Sometimes they shape it by evading the rule scheme and doing business elsewhere. Sometimes, to satisfy other business purposes, they adopt more stringent practices than the applicable rules require. Sometimes they act on their own to get a market edge or exploit an opportunity. Sometimes they act in groups to create a harmonized regulatory environment or to prevent regulation. . . . [Thus] corporate actors are engaged in governance.[86]

The softer the state, the further the balance tips in favor of private power. From this emerges what has been called a semi/privatized and fluid state, with globalization making its jurisdictional borders ever more diffuse. Internal and extraterritorial hybrid orderings may produce inconsistent and even contradictory state actions depending on who controls the site from which they emanate, within or across jurisdictions. Public governance may fade while the control of business interest may dominate. In the extreme, inconsistencies, corruptible decision-making, and the lack of transparency are not remedied by appeals to the law (e.g. who is the legal representative, what is the law of the land, whose jurisdiction/control is effective here) since powerful interests groupings are able to act in hybrid ways in activating the law, even being the law and the enforcement when needed. The oligarch can speak as President, as a CEO, as a shareholder, as a rich citizen, as Governor, as a charity leader, as the head of local assembly, or as an NGO; he can be on the FBI's most-wanted list and be the peace mediator building humanitarian corridors in the conflict zone.[87] He can act in public, or private, in or in both roles and his personal advantage can be translated into state interest the more quickly and easily the softer and more fluid the hybrid state becomes.

From this perspective, it becomes obvious that public international legal analysis that strives to be concretely useful in a particular conflict—beyond the generation of moral

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[85] KENNEDY, *supra* note 74.

[86] Dan Danielsen, *How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance*, 42 HARV. INT'L L. J. 411, 412 (2005).

[87] Lavoix, *supra* note 41.

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outrage and the attribution of moral blame—must be performed in tandem with the analysis of the roles played by various private and public actors.

III. Situational Critique Approaches

One can see the emphasis on the twin hybridization—of war and of its subjects—as the capitulation before the softening of international law, its axiomatic divisions, and fundamental principles. In his influential work on the subject, Martti Koskenniemi has criticized such softening tendencies as the reduction of international law to international relations or, worse yet, the imposition of a managerialist mindset that would reduce international law to rules of thumb, replacing it with a combination of expert rule and perpetual negotiations based on equity.[88] The worries about law's softening, however, need to be put in perspective given the aspirational quality, floating pragmatism, and critical cosmopolitanism inherent in the situational critique.

First, notwithstanding its formal flaws or corrosive effect on disciplinary identity, softened international law would not need to revoke or downgrade the statehood of a soft state, like Ukraine—as the relativist approach suggested—since it would allow the concept of state to be a project towards hard statehood. In fact, the fuzziness of international law's conceptual apparatus might assist in approaching the ideal behind the legal concept, political autonomy, and self-determination.[89] In keeping an eye on the constant evolution of states' actual powers and its governing capacity vis-à-vis other entities, international lawyers would keep the ideal of political autonomy and self-determination more vivid and meaningful in comparison with the doctrinal approaches to international law.

Second, he situational critique does not simply consist in the apology for international law's softness or the hybridity of its central categories, however. Rather, it engages in, what we might call, floating legal analysis. Similarly to the floating of national currencies, depending on a situation, an international lawyer may need to allow his legal evaluation to "float." In the same way in which globalization made the gold standard for national currencies impossible to sustain, floating legal analysis challenges the doctrinal "gold standard," defending "fixed" legal judgments only within a circumscribed spatiotemporal "band," allowing them to fluctuate as complex situations on the ground evolve.[90]

Applied to the Ukraine crisis, working for peace requires the solving of numerous legal and policy disputes and paying attention to the distributional consequences across the

[88] Koskenniemi, *supra* note 35, pts. 5, 16.

[89] OUTI KORHONEN, INTERNATIONAL LAW SITUATED: THE LAWYER'S STANCE TOWARDS CULTURE, HISTORY AND COMMUNITY (2000).

[90] In that regard, floating analysis echoes Kennedy's call for combining the principled commitment and the participation in the process of governance with pragmatism about consequences. See KENNEDY, *supra* note 74, at 327–58.

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society—without ignoring the contingent interest of the groupings on each side and/or across the regional and interstate borders or not across the borders. For instance, the EU and the US might be better advised to lift aggressor-sanctions on Russia if it turns out that they predominantly affect most disempowered social groups, without meaningfully affecting the war-hawkish power centers. By the same token, the West might also consider arms—export bans to certain interest groupings in Ukraine even though, doctrinally, the state of Ukraine is not the aggressor and must be collectively aided in its self-defense. Instead of one grand solution based on doctrinally-enabled binaries between aggressor/defender, guilt/sanction, lawbreaker/victim, states need several consecutive decisions to tackle the conflict drivers. Several consecutive decisions are needed to tackle the conflict drivers—each decision changing the situational conditions and, thus, altering the bases of the next.

A situated international legal approach may thus utilize different tools from different, even contradictory, legal regimes in order to deconstruct fixed legal positions that ignore the instability of the factual positions to which they are applied. Although Koskenniemi asserted that "no lawyer will refuse to find States as States"[91]—in the deconstructive sense proposed above—he seems to have embraced a kind of situational approach in his sympathetic portrayal of the European critical cosmopolitanism (i.e. in Kant's international lawyer):

> Kant sees the [legal] judgment as the original product of the decision-maker, and thus attributable to that person. Against managerialism as ideology, law is enlightenment as responsibility. This would not be fidelity to any particular meaning of a text or practice. Nor to a systemic effort to reach some objective, purpose, or value. Instead, it would have to be law as a mindset within which the law-applier will have to be about the way the law-applier approaches the task of judging within the narrow space between fixed textual understandings . . . on the one hand, and predetermined functional objectives . . . on the other, without endorsing the proposition that the decisions emerge from a "legal nothing" . . . .[92]

Equally, Koskenniemi rightly maintains that

[91] Koskenniemi, *supra* note 35, pt. 18.

[92] *Id.*, pt. 26.

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> [t]here is no innocent standpoint, no meeting of horizons at some moment of brilliant hermeneutic reflection. Some will continue to win, others to lose. Losing consciousness of this is perhaps the worst possible contribution a lawyer can make . . . . [T]o expand toward universality, one must penetrate deeper into subjectivity.[93]

It seems logical that in addition to the self-critique—the penetration into the judgment-maker's subjectivity—one would also need to apply the spirit of that critique on to other subjects (legal actors, states, private parties) that are the object of a particular judgment in a particular situation if for no other reason than not to objectify, or "other," them into a subordinate position with an epistemic hierarchy.[94] By recognizing inherent critical cosmopolitanism as the larger frame of inextricably partial perspectives of international lawyers, and by extending the standards of this interpretive charity on to the hybrid subjects involved in hybrid conflicts, the situational critique aspires to, what Kennedy aptly called, "grace in governance."[95]

F. Conclusion

Even without a sociological, anthropological, historical, or comparative legal analysis, the blunt standardized indicators of democracy, transparency, or investor security have long shown that the situation in Ukraine was similar to North Korea and getting worse since the financial crisis and Yanukovich's presidency.[96] Security and stability were weak, with various internal interests groupings competing against each other over Ukraine's economic resources while at the same time defending against the economic–industrial competition between Russia and the EU. They frustrated and circumvented the promises made by the state of Ukraine for opening its markets in return for oil, gas, or both (Russia) and export opportunities (EU). Interested in monopolizing entire economic sectors and supply chains, the one common fear of the interest groupings was to fend off transparency and free competition, both from within and from without Ukraine. The hyper-competition in which they were engaged entailed constant hostile takeover risk, political coercion through supply cuts or market access, raiding practices, and violent crime. For them, every change—be it new presidential election and renegotiation of his constitutional powers or an international treaty (for example, economic association or customs union)—risked huge financial losses,

[93] *Id.*, pt. 29.

[94] Such logic can, of course, be criticized as the re-introduction of the hermeneutic Horizontenverschmelzung ideal.

[95] KENNEDY, *supra* note 74, at xxvi.

[96] MATUSZAK, *supra* note 40, at 59.

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the confiscation or nationalization of assets, criminal prosecution domestically or abroad, cancellations of exclusive licenses to operate in one or more economic fields, collection of fantastic back taxes, or a sudden influx of more competitive foreign products.[97] The lack of property protection and investor security, the ability to buy verdicts, the corruption of state institutions—including the security and the regular police—meant the same insecurity for internal interest groupings as for outside business and investment. In addition to the global financial crisis and the percolating effects of the Orange revolution—the so-called "revolt of the millionaires against the billionaires"[98]—with the middle class and mid-size enterprises practically missing from the scene, the Yanukovych's presidency was characterized by his desire to grow his own business clan known as "The Family."[99] Within this scheme, prominent members of the security apparatus were engaged in smuggling, and oligarchs regarded the affairs of the state as a zero-sum game. In the end, Yanukovych's balancing efforts were failing. He upset many interest groupings and his imprisonment of Tymoshenko dealt a strong blow to his relationship with the West; all the while, he was attempting to reduce his personal dependence on the most important political party in Ukraine (PR) that had backed his ascent.

With the internal stress level rising, it was imprudent to increase conflicted external pressures on the state.[100] In terms of Gerasimov's description of hybrid war, both internal and external versions of it were already underway when the EU seemed to gain against Russia in 2013. As industrial and economic hyper-competition is part of hybrid war tactics, the signing of the EU Association Agreement could be construed as an act of hybrid war on behalf of some circles in Russia as well as those Ukrainian interest groupings that stood to lose the most from a more open competition with the businesses from the EU. It was clear that the Russian interest groupings that had so far been much more prominent in the Ukrainian market than their EU peers—in the sectors that fluctuated between partial opening and protectionism—would see it as a hostile act both by Ukraine and by the EU. Consequently, it was highly probable that Russia may retaliate. The precarious balance within and without Ukrainian state borders had been upset and a major destabilization followed. Its logic was evident. It is highly probable that it was only the tip of the iceberg because the majority of the interests in Ukraine, yet also in Russia and the post-Soviet space more widely, hides in the shadows of the grey economy and non-transparent power structures.[101]

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[97] *Id.* at 15, 23–24, 43.

[98] *Id.* at 19.

[99] Interestingly, the Family is the relatively belated start to build a new oligarchic clan with a model that is actually based on blood relations in addition to the reliance of security police links.

[100] *See* Introduction to RICHARD SAKWA, FRONTLINE UKRAINE: CRISIS IN THE BORDERLANDS (2015).

[101] Wedel, *supra* note 33.

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The question for international law, or more accurately, for international lawyers, is how to support peace efforts in such a situation. The dominant mode of legal analysis set the stage for—if not explicitly requested—economic and military muscling, both local and international stolen public assets investigations (locally and internationally), the ballooning of budget deficit, further energy instability for Ukraine, Europe, and beyond, and hurting economic sanctions between the EU, United States, and Russia, and between Russia and Ukraine. The framing of the conflict through doctrinal binaries that suppress the factual hybridity of the conflict hurts diplomatic efforts, disrupts the necessary co-operation between the West and Russia vis-à-vis Syria, ISIS, Iran, Afghanistan and Libya, and leads to further destabilization. As in other contentious crises over the last several decades, international norms affirming territorial integrity, political independence, sovereign equality, self-determination of peoples, and the prohibition of the threat or use of force can work a shield against political reality. This reality contributes to the illusions of a stabilizing statehood and adequate governance where in fact there is none, preventing us from timely identifying quickly deteriorating political situations.

As argued in this article, a promising way out of this predicament for international lawyers is to assert the politics of law—both against doctrinal approaches as well as Lorimerian geopolitics—in the "spirit," or with the "grace" of, situational critique. As Donna Haraway rightly put it, "[C]oming to terms with the agency of the objects studied, is the only way to avoid gross error and false knowledges of many kinds. . . ."[102] To be persuasive to those who struggle on the ground and to productively address underlying conflict drivers, one therefore needs to unpack the actions and subjects that international law has traditionally pre-packed for the purposes of doctrinal legal analysis. For the international lawyer, this also means conceiving new options and making choices as situations develop, rather than participating in the freezing of narratives, the reification of political and economic subjects, and, ultimately, the conflicts that arise amongst them. In critiquing the prevailing mode of international legal analysis in the context of the crisis in Ukraine, this Article embraced the "ongoing urgency of the question: 'what is the social significance of your science?' " together with the corresponding "impossibility of answering that question once and for all."[103] While accepting this impossibility, the situational critique defended in this Article also entails the acceptance of responsibility to offer renewed answers to this question in actual crises that summon the attention of international law and provoke it to respond constructively.

[102] Haraway, *supra* note 2, at 593.

[103] Anne Orford, *Scientific Reason and the Discipline of International Law*, 25 EUR. J. INT'L L. 369, 385 (2014).

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