Introduction: The Crisis in Ukraine Between the Law, Power, and Principle

*By Zoran Oklopcic**

Abstract

This special issue of *German Law Journal* (*GLJ*) originates from a colloquium co-sponsored by the *GLJ*, the Miller Institute for Global Challenges and the Law, and the Center for Constitutional Transitions that took place at the Berkeley School of Law in February 2015, just over a year after the revolutionary events at Maidan Square in Kiev triggered profound changes in the geopolitical map of contemporary Europe and shook the foundations of international order.

Beyond the gravity of the crisis itself, what animates the contributions in the following pages is an attendant awareness of the need to rethink the appropriateness of disciplinary responses to the conflict in Ukraine. Though the rhetoric of brazen takeovers, cynical ploys, stealing and redeeming, chronic authoritarianism and imperialism, hypocrisy, and broken promises have all contributed to a combustible political situation in and around Ukraine, a diverse sense of outrage has also been subtly, but nonetheless decisively, structured and amplified by the vocabularies of international and constitutional law, moral arguments, and their complicated interplay. Though differing in their practical ambitions, technical vocabulary, and the professional sensibilities they cultivate, the disciplines of international law, comparative constitutional law, and normative political theory, have each upheld one of the most important components of the modern social imaginary: The idea of popular sovereignty.[1]

The idea that the will of the people ought to be a decisive factor in resolving the crisis in Ukraine continues to unite most commentators, partisans, and scholars, irrespective of their otherwise profound ideological and political differences. From the perspective of overarching social imaginary, the ominous geopolitical crisis in Ukraine, while dangerous in its potential outcomes, appears as a family quarrel among the believers of the constitutional creed of western political modernity. Unlike another geopolitical crisis of our time—the attempts of ISIS to redraw the map of the Middle East—the situation in Ukraine

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[1] CHARLES TAYLOR, MODERN SOCIAL IMAGINARIES 109–43 (2004).

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is not a conflict over the *existence* of international legal order, but rather one over the *meaning* of its foundational building blocks: The internal and external self-determination of peoples, territorial integrity, and the sovereign equality of independent states.

A. Between Self-Determination and Territorial Integrity: Doctrinal Frames of International Law

The first three contributions in this volume thematize this quarrel from the perspective of public international law. Judging the legal merits of the secession of Crimea, Jure Vidmar starts from the basics, noting that international law is not necessarily hostile to all unilateral attempts to change existing territorial arrangements, even though it generally favors existing international borders.[2] The International Court of Justice (ICJ)'s Kosovo Advisory Opinion (2010) highlighted the boundaries of this agnosticism: International law abandons its neutrality towards unilateral declarations of independence (UDI) in situations where they are used to consolidate a new territorial status quo after a violation of *jus cogens*. Vidmar argues that given the Russian use of force, or threat of force, Crimea's UDI must be seen as illegal under international law.

In defending the illegality of the Crimean secession and annexation, Vidmar rejects Russian claims that Crimea's secession can be justified on the grounds of remedial self-determination. Vidmar argues that not only was there no widespread and systematic oppression of ethnic Russians in Crimea, but also that in general the right to remedial self-determination in international law remains weak. Outside the context of decolonization, recent jurisprudence, such as the *Secession Reference* of the Supreme Court of Canada, actually testifies to the hesitant approach towards external self-determination.

Brad Roth's article reaches a similar conclusion.[3] He defends the "few bright lines" that contemporary international law has drawn around the phenomenon of territorial conflict, providing a forceful defense of the territorial integrity of Ukraine by dismissing issues like Yanukovich's unconstitutional ouster and the Crimean popular referendum. The reason why the government in Kiev has a right to attempt to reinstate its sovereignty, while pro-Russian rebels do not have a right to receive external help, arises not from the conjured moral existence of the inviolate "people of Ukraine"—and the corresponding, equally conjured non-existence of the "peoples" of Lugansk and Donetsk—but simply from the macro moral imperatives and wider political purposes of international legal order. The imperative of "bounded pluralism," the respectful accommodation of political differences among polities which radically disagree about the standards of political justice, justifies *trial by ordeal*—a deliberately unequal struggle between the governmental and

[2] Jure Vidmar, *The Annexation of Crimea and the Boundaries of the Will of the People*, 16 GERMAN L.J. 365 (2015).

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

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secessionist forces—which alone, albeit with some exceptions, ought to determine the destiny of contested territory.

Anticipating challenges from other contributors, Roth argues that "the more responsive the applicable law becomes to considerations that can be branded as either so controverted as to be parochial, or so open-textured as to be indeterminate, the less that international law can serve to mobilize broad-based opposition to cross-border mischief and predation."[4] While he understands the crisis in Ukraine as a powerful testament for the need to resist intra- or inter-disciplinary "muddying [of] the waters," he nonetheless admits that past encounters between international law and the secessionist conflicts in the former Yugoslavia have contributed to the corrosion of its contemporary appeal. Although the Opinions of Badinter's Commission (1991–1992) concerning the legal aspects of the Yugoslav dissolution may have been politically justified, they were an "intellectually dishonest" and unacknowledged innovation, "neither reflective of existing legal doctrines nor generative of new ones likely to be applied going forward."[5] Likewise, the ICJ's Kosovo Advisory Opinion (2010), in its recourse to "hyper-formalism," evaded clarifying the right to self-determination in the context of territorial conflict following decolonization.

Accepting Vidmar's and Roth's legal qualifications of the conflict in Ukraine, Mikulas Fabry asks how the international community ought to react to Russia's violation of Ukraine's territorial integrity.[6] Fabry charts a middle course between two equally inadequate responses. On the one hand, he rejects the "accommodationist" claims of those who see Crimea as lost for good, arguing that the international community should reconcile itself with the Russian *fait accompli*. On the other hand, he likewise rejects "hawkish" positions and their calls for more robust counter-measures aimed at rolling back Russia's territorial gains in Ukraine. Instead, he stresses the importance of non-recognition as a widely employed countermeasure, defending it from charges of presumed ineffectiveness. Fabry argues that non-recognition of illegally acquired territories, "for all its inherent limitations, actually has a respectable history."[7]

B. Class Struggles, Professional Commitments and Wider Frames: Enlarging the Perspective of International Law

The contributions that follow complicate and challenge Vidmar's, Roth's, and, to an extent, Fabry's arguments. They do so by departing from the way academic conversations about self-determination and territorial integrity are habitually staged in collaborative

[4] *Id.* at 387.

[5] *Id.*

[6] Mikulas Fabry, *How to Uphold the Territorial Integrity of Ukraine*, 16 GERMAN L.J. 416 (2015).

[7] *Id.* at 417.

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international legal scholarship. Rather than staying in the register of doctrine—and offering *counter-doctrinal* arguments—the next three contributions upset traditional approaches by interrogating the professional commitments of international lawyers, insisting on the legal and factual hybridity of the conflict, and exposing larger ideational frames and their socio-economic underpinnings that make the conflict in Ukraine legally legible in a particular way.

In that spirit, Umut Özsu's article explicitly seeks to "destabilize the assumption that self-determination can be restricted to a 'purely legal' analysis of the sort to which many international legal scholars have conventionally confined themselves."[8] Özsu focuses on some of the causes of "discursive complexity" that many lawyers seek to reduce by resorting to doctrinal arguments. In particular, he focuses on the way lawyers' positivistic mindset leads them to "mystify and obfuscate" "concrete politico-economic pressures" that have critically contributed to the gravity of the conflict in Ukraine.[9] Rather than understanding self-determination exclusively in terms of national(istic) struggles over territorial sovereignty, Özsu suggests that "the real social power of self-determination discourse" also lies in "its ability to formalize radically different class projects."[10]

Outi Korhonen also focuses on the socioeconomic register of self-determination struggles. She complements Özsu by providing a detailed description of networks, private interests, and business conglomerates that have shaped the conflict in Ukraine, undermining the simplistic "billiard ball" account of modern statehood that contemporary international law continues to assume as one of its founding fictions.[11] For Korhonen, rather than being categorized as a simple aggression, violation of territorial sovereignty, or matter of self-determination, the conflict in Ukraine is an example not only of *hybrid warfare*, but also of *hybrid statehood*.

Hybridity presents an international lawyer, dissatisfied with the doctrinal approach to the conflict in Ukraine, with a three-fold choice: (1) one can withdraw into a morally discredited Lorimerian "relativism," embracing the factual hierarchy among sovereign states; or (2) focus on the instrumental roles played by diverse actors as they traverse the fragile and porous boundary between the public and the private sphere, or the inside and the outside of sovereign statehood; (3) in contrast to both—and rejecting Roth's warning against "muddying the waters"—Korhonen calls for a "situational critique" of the doctrinal

[8] Umut Özsu, *Ukraine, International Law and the Political Economy of Self-Determination*, 16 GERMAN L.J. 434, 434 (2015).

[9] *Id.* at 439.

[10] *Id.*

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

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project of international law, embracing the law's "softening" and increasing fuzziness. Korhonen believes that a situational critique serves an important aspirational value by "assist[ing] [in the] transition towards the ideals behind legal concepts" such as sovereign statehood. For her, such "floating legal analysis" is "[no] different from interdisciplinary and comparative legal studies that emphasize embeddedness and situatedness of objects and subjects." If international lawyers paid keen attention to the situation on the ground, they would become more attuned to the "distributional consequences" and "contingent interests" of various groups in conflict.

In the final part of this section, Boris Mamlyuk joins Özsu and Korhonen in their call to recognize the class dimension of self-determination within its richer political-economic context.[12] More specifically, he devotes attention to a wider issue of geopolitical struggle among different forms of capitalism that subtly, but decisively, frame not only the conflict in Ukraine, but also international lawyers' attempts to justify their responses to it. For Mamlyuk, the positivistic legal responses to *Cold War II* replicate Cold War legal discursive strategies and, in doing so, conceal the true nature of the conflict.[13]

Taking issue with Roth's embrace of trial-by-ordeal in the context of domestic political struggle, Mamlyuk points to the factual difference between the conflict in Ukraine and the framework Roth relies on. In Ukraine, it is not only foreign *states* providing external assistance to the Ukrainian *state* fighting secessionists. In addition, a myriad of "foreign-domestic private-public actors" continue to use their private resources to suppress the uprising as a way of consolidating economic control in Ukraine. The epistemic complexity that accompanies the identification of the fault-lines in the conflict—and justifies Roth's trial by ordeal—exemplifies a larger problem of doctrinal approaches to international law. The moral force of doctrinal syllogisms, reliant on legally relevant factual premises, is greatly reduced in conflicts—such as in Ukraine—already marred by chronic misinterpretations.

Taken together, the contributions of Vidmar, Roth, Fabry, Özsu, Korhonen, and Mamlyuk engage the conflict in Ukraine from two competing perspectives *internal* to the discipline of international law. In doing so, they help identify the costs and benefits of "doing" international law in a particular way. But international law, irrespective of its discursive dominance in debates about the conflict in Ukraine, is not the only generator of legal, political, moral, and prudential judgments that percolate in domestic and international public spheres. The next two contributions temporarily exit the field of international law and instead approach the crisis in Ukraine from the fields of comparative constitutional law and constitutional theory.

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[12] Boris Mamlyuk, *The Ukraine Crisis, Cold War II, and International Law*, 16 GERMAN L.J. 479 (2015).

[13] *See generally, id.*

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C. The Crisis in Ukraine: Between Democratic Legitimacy and Constitutional Identity

From that broad perspective, the moral pull of international law norms appears more questionable, especially given the rising prominence and proliferation of constitutional referendums being used not only to amend existing constitutions or legitimize successful revolutions, but also to establish the foundation of new states. As Stephen Tierney argues in his contribution, the proliferation of independence referendums since the early 1990s has furthered the "deep pathology of uncertainty" that surrounds the right to self-determination, contributing to the "collapsing normative authority of international law."[14] While Roth invites us to bracket international legal responses to the dissolution of Yugoslavia as problematic and dangerous, Tierney portrays the "confused, contested, and messy" responses to independence referendums as a symptom of the international order's incapacity to address the challenge such referendums pose to democratic legitimacy. [15]

The Kosovo decision led to "new gaps in an already fragmented legal regime," says Tierney, and contributed to the increased political relevance of referendums in resolving territorial disputes. Likewise, the Supreme Court of Canada's *Secession Reference* (1998) has given referendums additional *moral* dignity. While Vidmar read the *Secession Reference* with an eye to its lack of doctrinal contribution to public international law, Tierney is more interested in reconstructing its deeper moral significance. Like Oklopcic later in this volume, Tierney interprets it as requiring the organs of the Canadian constitutional order to negotiate *towards* satisfying clearly manifested secessionist desires, even if the Supreme Court itself has not explicitly recognized Quebec's right to secede.

Perfectly aware of the problems surrounding the definition of the political "self" and the identification of its "will," Tierney nonetheless tempers Roth's epistemic skepticism about the impossibility of authoritatively ascertaining the will of the people by insisting on referendums' normatively relevant "totemic resonance." Instead of calling on international law to legitimize the Crimean referendum—or to reform itself through a moral reading of the *Secession Reference*—Tierney ends his article with a more modest call, echoed by Roth: International lawyers should recognize the role played by international legal arguments in amplifying the political resonance of independence referendums in contemporary international order.

If a comparative constitutional law perspective sheds light on the predicament of contemporary international law, this still leaves the question of how a democratic constitutional order should respond to demands for secession. Should it insulate itself from secessionist challenges by entrenching an explicit commitment to its territorial integrity,

[14] Stephen Tierney, *Sovereignty and Crimea: How Referendum Democracy Complicates Constituent Power in Multinational Societies*, 16 GERMAN L.J. 523, 524 (2015).

[15] *Id.* at 527.

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putting it beyond the reach of radical political aspirations? Or, should it leave the question of secession open, or at least not expressly prohibited? While not offering an answer to these, Yaniv Roznai and Silvia Suteu's article offers a detailed map of Ukraine's constitutional amendment procedures and its territorial organization, critiquing the constitution's territorial integrity-protecting eternity clause, both from a conceptual viewpoint as well as a practical one.[16]

Roznai and Suteu recognize that eternity clauses may serve valuable, if contradictory, purposes by spurring democratic deliberation, immemorializing the most prized ideals of a particular polity, or discouraging strategic behavior of disgruntled minorities. Nonetheless, they maintain that eternity clauses are inadequate means to fend off democratic challenges posed by sub-state independence referendums. Accepting Tierney's view of sub-state constitutional referendums as democratically legitimate, Roznai and Suteu also reject standard republican arguments that territorial integrity is inextricably linked with the very idea of popular self-government.[17] In fact, they argue that there is no conceptual link between changing the territorial scope of a state and the perpetuity of its people. Even though eternity clauses often serve to protect vulnerable minorities against majoritarian abuse, that argument is especially problematic in contexts where the identification of a group as a "majority" or a "minority" is the very issue in a constitutional dispute.

Rather than attempting to reconcile eternity clauses with republican constitutional theory, Roznai and Suteu argue that the obsession with constitutional "firewalling" of territorial integrity has its roots in the domain of political symbolism, one that portrays "the people" not simply as a (necessary) fiction of modern constitutional law, but rather as a true political body. From this perspective, change in the territorial scope of a polity amounts to political self-mutilation. Finally, in addition to a lack of meaningful preservation of Ukraine's territorial integrity, the eternity clauses of its constitution may unproductively restrict legitimate peace-making settlements, thus prolonging the conflict.

D. Who Are "The People," and What Is Their Territory? The Contribution of Normative Theory

Having offered a means to understand the democratic and quasi-democratic demands of sub-state peoples for independence or territorial autonomy, neither Tierney nor Roznai and Suteu anchor their arguments in an explicitly normative understanding of self-determination, popular sovereignty, or democratic legitimacy. For a more systematic exploration of the assumptions *behind* Tierney's intuition that "direct democracy" has "moral force," or Roznai and Suteu's general openness towards territorial re-compositions,

[16] Yaniv Roznai and Silvia Suteu, *The Eternal Territory? The Crimean Crisis and Ukraine's Territorial Integrity as an Unamendable Constitutional Principle*, 16 GERMAN L.J. 542 (2015).

[17] For the most powerful contemporary argument, see PHILIP PETTIT, ON THE PEOPLE'S TERMS 302 (2012).

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we need to cross the disciplinary fence-line once again and inquire into the meaning of peoplehood and self-determination from the perspective of normative political theory—the closest disciplinary neighbor to both international and comparative constitutional law.

In the first of the two contributions that thematize the crisis in Ukraine from that perspective, Amandine Catala addresses the central normative questions: Who is "the people," and what is it morally entitled to? These questions were alluded to in both Tierney's and Roznai and Suteu's arguments but were excluded from Roth's and Vidmar's.[18] Catala's argument is two-fold: On the one hand, it positions itself within normative theories of secession and territorial rights, offering an improved version of the choice theory of secession. For her, "the people" entitled to self-determination, emerges from a "sustained relation of social and political cooperation, bringing about common social and political practices and institutions."[19] Its right to a particular segment of territory arises from "long occupancy. . . through which the group exercise[d] self-determination."[20] On the other, in judging whether the population of Crimea has been marked by a "relation of peoplehood," qualifying it as "the people" for the purposes of territorial self-determination, Catala nonetheless rejects Crimea's right to join Russia. The reason has nothing to do with the moral status of Ukraine's territorial integrity, but rather with the procedural illegitimacy of the Crimean referendum, "[T]he problem with the Crimean referendum is now where it took place," says Catala, "but how it took place."[21]

Staying within the field of normative political theory, Ayelet Banai's article argues in favor of another two-pronged theory of territorial self-determination, applicable to the conflict over the secession and the annexation of Crimea.[22] Like Oklopcic later in the volume, Banai rejects functionalist or statist justifications of territorial rights, which cannot answer which land rightfully belongs to which people. She equally rejects normative arguments in favor of a liberal-nationalist version of self-determination, while admitting that accommodating nationalist territorial demands may be justified as a matter of political prudence. Similar to Catala, Banai argues that "the people"—who bear the right to self-determination—must be a politically viable, large group "comprised of individuals that have a shared sense of affiliation to that group."[23] Those affiliations do not arise from ethnic or cultural belonging,

[18] Amandine Catala, *Secession and Annexation: The Case of Crimea*, 16 GERMAN L.J. 581 (2015).

[19] *Id.* at 596.

[20] *Id.* at 597.

[21] *Id.* at 602. For a similar argument, see Steven Wheatley, *Modelling Democratic Secession in International Law*, in NATIONALISM AND GLOBALISATION: NEW SETTINGS, NEW CHALLENGES (2015).

[22] Ayelet Banai, *Territorial Conflict and Territorial Rights: The Crimean Question Reconsidered*, 16 GERMAN L.J. 608 (2015).

[23] *Id.* at 621.

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but rather from the members' commitment to a "joint political project."[24] While Catala grounds the territorial right of a people in its long occupancy of a certain area, Banai remains suspicious of occupancy providing a useful criterion for drawing the boundaries of new self-determining units. Instead, she embraces the reasoning behind the functionalist approach to territorial rights and accepts that the regional identity of many Crimean residents, coupled with the "long and distinct legal-political history of Crimea", establishes its population as "the people" and the region as the object of its territorial right. Though she does not reject the referendum in Crimea as procedurally illegitimate like Catala, Banai accepts that the Crimean people's right to self-determination, in the form of territorial autonomy, could, in principle, be equally satisfied within either Ukraine or Russia.

Both contributions have implications for legal reform, but Banai and Catala, like Tierney, stop short of offering concrete prescriptions. Banai is pessimistic, noticing that prospects for applying her normative arguments are "not bright."[25] Catala rejects the prescriptive role of normative theory in driving international legal *reform*, even though she disagrees with Allen Buchanan's famous methodological criteria for judging the plausibility of a theoretical framework of secession.[26] While the "complex specificity" of each secessionist case argues against institutional and normative reform of international law, Catala, perhaps ironically, sees the current neutrality of international law towards secession as an *opportunity* for international actors to approach the ideals of normative theory while staying mindful of the context of each particular case.[27]

E. The Conflict in Ukraine Between Normative Reform and Conceptual Revision: Negotiating Disciplinary Fault-Lines

This brings us to the final thematic section in this special issue. In approaching the crisis in Ukraine from the perspectives of international law, constitutional law and theory, and normative political theory, all stopped short of calling for institutional reform or the radical refashioning of the vocabularies used by these disciplines. In contrast, the final set of contributions explicitly propose a bolder reform (MacLaren), the re-imagination of constitutional theory and its role in early-conflict constitution making (Oklopcic), and finally, a new theoretical defense of the role of international actors in domestic state- and constitution-making (Arato).

Agreeing with Tierney that "claims are not handled internationally according to clear rules and in a consistent fashion," Malcolm MacLaren's contribution takes up the challenge of

[24] *Id*.

[25] *Id*. at 630.

[26] Allen Buchanan, *Theories of Secession*, 26 PHIL. & PUB. AFF. 30 (1997).

[27] Catala, *supra* note 18.

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normative approaches to secessionism.[28] Unlike choice theorists of secession who often refrain from advising bold action, MacLaren makes an explicit case for re-orienting the concept of self-determination in international law towards what he calls *democratic secessionism*, which rejects reification of states and grounds their value in the interests of individuals.[29] Like Catala, he confronts Buchanan's criteria for the institutional credibility of the theoretical framework for secession. From it, MacLaren draws more radical conclusions: First, he deflates anxieties about a more relaxed approach to secession, arguing that the problems that accompany boundary drawing in ethnically-mixed areas are not as ubiquitous as they may seem at first. Like Banai, he accepts that in many cases the people may derive their boundaries from a previous political unit. Unlike Banai, however, MacLaren openly accepts the possibility of further territorial fragmentation, arguing that existing mechanisms—such as the cascading referendums in the creation of the Canton of Jura from the Canton of Berne in Switzerland in 1974—can provide satisfactory solutions to that problem. Finally, he explicitly rejects the trope of the "slippery slope" that, implicitly or explicitly, haunts both normative and doctrinal debates about secession and self-determination. Though democratic secessionism is not a "panacea," these fears should not be "pandered to," says MacLaren, who argues that most political instabilities arise from acts of secession and can be mitigated by post-secession political and economic arrangements entered into between the new and the old, rump state.

In his article, Zoran Oklopcic re-imagines constitutional solutions for the crisis in Ukraine by first tackling the disciplinary division of labor among constitutional theory, international jurisprudence, and normative political theory.[30] For him, the crisis in Ukraine is a manifestation of the paradox of constitutionalism—already noted by a number of other contributors to this volume—whereby "the people" derives its identity from the extant constitutional order, but is nonetheless imagined as a sovereign political body, authorized unconstrained by any prior legal norms. For Oklopcic, a direct critical engagement with international jurisprudence and normative theory not only holds the key for the dissolution of this paradox, but also provides the necessary building blocks through which constitutional theory can hope to offer a distinct disciplinary contribution towards resolving the crisis in Ukraine—*beyond* the vocabulary of self-determination and territorial rights offered either by normative political theory or international law.

Building on the normative value of increased aggregate satisfaction of individual constituent attachments that lies suppressed behind theories of territorial rights on the

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[28] *See* Malcolm Maclaren, *"Trust the People"? Democratic Secessionism and Contemporary Practice*, 16 GERMAN L.J. 631, 633 (2015).

[29] *See generally, id.*

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

one hand, and what is for him a credible *empirical* claim behind Roth's "bounded pluralism" on the other, Oklopcic sketches an account of early-conflict constitution making that abandons the vocabulary of peoplehood. Like Tierney, he acknowledges a deeper democratic spirit in the *Secession Reference* and, like Arato, postulates a parallel constitutional duty of Ukraine to negotiate its *federalization* in good faith. However, he also argues that the vocabulary of popular sovereignty obfuscates the inescapable role of external constituent powers in the foundation of the constitutional orders of weaker, conflict-ridden polities. He concludes by calling on constitutional theory to theorize early-conflict constitution-making process in a way that would explicitly recognize the external constitutive role of powerful states. For Oklopcic, that process, structured and mediated by the normative ideal of an aggregate increase in the satisfaction of individual constituent attachments, remains concealed within the vocabulary of a corporate people and its right to self-determination. Unlike the cascading reconfiguration of territorial boundaries, Oklopcic suggests that such an externally influenced constituent process should, in liminal cases, include the implementation of what he calls *recursive territorial pluralism*.

Finally, Andrew Arato's article confronts the historical track record of external constitutional involvement in state—and constitution—making with the normative imperatives of international legal order and recent developments in the law of self-determination.[31] While Oklopcic portrays the role of external actors as close to inevitable—and thus meriting constitutional theoretical engagement—Arato defends the "international role" in post-conflict constitution making on prudential and normative grounds. Unlike Roth, whose interpretation of the *telos* of international order prevents him from reimagining a more robust constituent role for powerful external actors, Arato embraces the qualified legitimacy of external constituent intervention, grounding it in the overarching commitments of the UN Charter to safeguard international peace and security. In doing so, the legitimate international role emerges as the reconciliation between "constitutional autochthony" and "sovereign equality."

Arato's articulation of a legitimate international role in domestic constituent processes rests on a crucial distinction between the first and second stage in a two-step constituent process. The first concerns the questions of state re-making, while the second deals with constitution-making, more narrowly understood as the creation of governing institutions within a polity whose existential parameters have been agreed upon. Although Arato does not deny the existence of a necessary overlap between the two stages, he insists that the role of external actors should in principle be restricted to the first stage, while constitution-making ought to remain the predominant domain of domestic constitutional actors.

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

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Building on his previous work on Iraq and the lessons of its constituent process, Arato's message for both external and internal constitution-makers in Ukraine is that of inclusion, participation, impartiality, and responsiveness. International constituent involvement—together with final constitutional settlement—will be more normatively and sociologically legitimate if it includes the plurality of interested parties—including the representatives of both the Ukrainian government and pro-Russian rebels—and if responds favorably to local demands for self-government. While Arato embraces the remedial account of self-determination —critiqued from radically different views by Roth, Catala, Banai, and MacLaren—which would prevent the pro-Russian rebels to secede, he, like Tierney and Oklopcic, believes that the rebels' demands to transform Ukraine into a federal-like state should be accommodated.

F. Obscurity, Paradox, Stalemate: The Crisis in Ukraine and the Future of Interdisciplinary Encounters

Who counts as "the people"? What is the meaning of its self-determination? How should we interpret the devices used to detect its will? To what extent can, and should, "the people" be shackled by the provisions of an existing constitution? The conflict in Ukraine is the most recent in a series of political conflicts with a territorial component and continues to raise endemic theoretical, doctrinal, practical, and moral questions. Instead of simply trying to answer them, however, this issue of the *GLJ* has seized an opportunity to ask whether any of these venerable disciplinary obsessions continue to matter as we think about constructive ways to respond—and perhaps even resolve—the conflict in Ukraine. Finalized at a moment when the fragile hope for a comprehensive peaceful settlement—ushered by the *Minsk II* agreement—remains alive, this issue also seeks to contribute to ongoing conversations about the salience, credibility, usefulness, perverse effects, and the internal coherence of these established disciplines.

At the same time, this volume allows space for a rarer *inter*-disciplinary encounter among neighboring disciplines that, despite sharing a mutual vocabulary of peoplehood, self-determination and sovereignty, haven't systematically reflected on the political, ethical, prudential, professional, and conceptual assumptions that have led them to—with some exceptions—vigorously police their respective disciplinary boundaries. In doing so, this special issue calls to further relax these boundaries towards the ongoing self-reflection about professional identities, political commitments, and prudential anxieties that make their concrete configuration possible.

More specifically, such future encounters would benefit from confronting the issues that resonate throughout this issue, and which will continue to demand further elaboration. For example, the question that confronts doctrinal international lawyers concerns the cost of separating doctrinal understanding of self-determination from its grassroots experience; the experience which stubbornly understands self-determination as a matter of respect for authentic political will, not simply as a placeholder for other moral or political imperatives.

The famous adage by Ivor Jennings, invoked on innumerous occasions, including in this special issue, should be understood in that light. Instead of viewing his claim that self-determination is "ridiculous because the people cannot decide until somebody decides who are the people" as a *gotcha* moment of—and for—international lawyers, we ought to view it as a symptom of enduring anxieties about the professionals' role in shaping modern political imaginary.[32] Self-determination is only ridiculous—from the legal point of view—because someone, in or out of the profession, actually continues to think that "the people" can ever be "self-determining" in a way *not* prescribed by the norms of international law. Continuing to demask this alleged ridiculousness is to admit that such views somehow still matter. In other words, apart from its role in demasking the circularity of the vocabulary of peoplehood, Jennings' ubiquitous quip should also be seen as the symptom of a profession's lingering ambivalence towards how those on the ground have come to understand what it is they are fighting for, and about what international law ought to do about it.

By the same token, critical international lawyers need to gauge whether they can move beyond the mere ethos of self-awareness in a way that would incorporate their legitimate anxieties in a more nuanced, but nonetheless general, and institutionally prescriptive fashion.[33] By offering contextual critique of doctrinal arguments and understanding self-determination as multifaceted legal concept, critical lawyers also confront enduring questions about the political and professional price of their commitment to a heightened degree of self- and other-awareness. If such legal scholarship remains similar to other forms of interdisciplinary engagement, what will continue irritating the critical project is the question of the concrete content of its contribution beyond its heightened self-awareness.

The interdisciplinary encounter hazarded in the context of the crisis in Ukraine will equally challenge dominant approaches to collective political identity in constitutional law and theory. As the contributions in this issue demonstrate, both doctrinal and critical scholars challenge constitutional theorists to better appreciate *larger constituent frames* that make the idea of "the people"—as the bearer of sovereignty and constituent power—possible in the first place. This idea is not only a centerpiece of constitutional imagination that reconciles the ideological imperative of political integration with the utopian imperative of political emancipation[34], but is also an implication of a bigger picture. It exists as a politically relevant *detail*, made possible by a larger constituent frame, which justifies not only our present-day international legal order, but which also, consequently, structures the

[32] IVOR JENNINGS, AN APPROACH TO SELF-GOVERNMENT 56 (1956).

[33] For an influential and decisive rejection of this possibility, considering it "poisoned chalice," see MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA 603 (2006).

[34] See, Martin Loughlin, *Constitutional Imagination* 78 MOD. L. REV. 1, 12 (2015).

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limits of the conceivability of sovereign peoplehood.[35] The question confronting theoretically-minded constitutional lawyers, then, is whether they can—and if they can, should they—construct their arguments in a vacuum, without gesturing towards deeper, but nonetheless concrete normative or juridical assumptions, more fully articulated by other disciplines.[36]

Finally, the crisis in Ukraine challenges normative political theory not only with obvious questions—for example, how realistic its prescriptions should be—but also by pointing to neglected registers of struggle that give new meanings to territorial conflicts. The conflict over territory—amply demonstrated in the context of Ukraine—is not just a matter of demands for national self-determination, but also a matter of geopolitical jockeying, transcontinental economic competition, and contingent insults to—not primarily national or nationalistic—political memory. To code radical political demands in terms of aspirations towards individual and collective "self-government" may not only be grossly inaccurate, but may also prevent new and productive ways of addressing the conflict.

Calls for continued conversation among disciplines that share important parts of their respective vocabularies will always be confronted with suspicions about the productivity and the costs of such engagement. However, given the plethora of answers to the central questions posed above, the price of relaxing disciplinary boundaries need not be steep, as even a cursory glance at the state of affairs in those disciplines readily confirms. In international law, the meaning of self-determination after decolonization remains marred by obscurity and fuzziness. Across the disciplinary boundary, much of constitutional law and theory simply accepts that the foundations of its discipline rest on a paradox, where a pre-political sovereign people, unshackled by prior norms, creates a constitutional order, even though its collective identity actually derives from it. In normative political theory, lively debates —some of which are showcased in this volume— have ultimately resulted in a stalemate among different theories of secession territorial rights.

Obscurity, paradox, stalemate: these three words describe how international law, constitutional law, and normative theory currently respond to the problems posed by endemic demands for self-determination and popular sovereignty in struggles over territory. Though this characterization cannot serve as an argument for *intra*-disciplinary conversations to end, it is a sufficient argument for *inter*-disciplinary conversations to continue. In the light of the monumental existential stakes that surround claims of peoplehood, such as in Ukraine, there simply is not enough useful, actionable, intra-

[35] See CHRISTIAN REUS-SMIT, THE MORAL PURPOSE OF THE STATE: CULTURE, SOCIAL IDENTITY, AND INSTITUTIONAL RATIONALITY IN INTERNATIONAL RELATIONS 6 (1999).

[36] For a rare explicit consideration of the object of constitutional theory in literature, see STEPHEN TIERNEY, CONSTITUTIONAL REFERENDUMS 2–3 (2012).

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disciplinary heritage worth protecting from the potentially corrosive effects of productive inter-disciplinary engagement.

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