

UDC 327.8:340.131(470:477)

DOI: 10.18523/2617-2607.2019.4.73-82

Nadia Volkova

THE MINSK TRAP

MOSCOW'S PERVERSION OF THE CONFLICT ARBITRATION PROCESS IN UKRAINE

This article is a multidisciplinary analysis of the Russian Federation's exploitation of legal systems, both international and domestic, to pervert arbitration efforts in Ukraine. This short study seeks to address challenges in moving forward with future mediation efforts and asserts that the Russian Federation exploits Minsk II to contain and subdue Ukraine. Simultaneously, Russia overtly disassociates itself with its manufactured conflict in Donbas while covertly maintaining a violent stalemate in the region. It deceptively supports these arbitration efforts to satisfy international stakeholders, but has weaponized the process to achieve impunity in pursuit of greater geopolitical objectives and violations of Ukrainian sovereignty. This article offers an overview of the emerging concept of Malign Legal Operations, a notion which is colloquially known as lawfare. It highlights the Russian Federation's use of this strategy to achieve impunity within a revisionist approach to the rule of law. Furthermore, it summarizes peacebuilding efforts in the Russo-Ukrainian war from the perspective of malign legal operations and assesses Minsk II to be a trap used to reduce violence in the region on the Kremlin's terms by creating a "frozen conflict" in the likeness of South Ossetia, Abkhazia, and Transnistria. This article asserts that the Ukrainian law "On Special Self-Governance Procedure in Separate Regions of Donetsk and Luhansk Oblasts" is, de facto, the legal implementation of the Minsk Agreement without the accord being referenced by-name in the law. This fact, inter alia, serves Moscow by legally containing Ukraine and forcing a situation whereby the Kremlin's objectives are pursued by Ukraine's genuine and sincere desire to bring about peace in a conflict that was manufactured by the Russian Federation.

Keywords: Malign Legal Operations, Lawfare, Ukraine, Ukrainian Conflict, The Minsk Protocol, The Normandy Format, The Trilateral Contact Group, The Steinmeier Formula, Donbas, The Donetsk People's Republic (DPR), The Luhansk People's Republic (LPR), Conflict Mediation, Peacebuilding, Great Power Competition.

Introduction

On October 2nd, 2019, negotiations took place between Ukraine and Russia in the Belarussian capital of Minsk as a continuation of peacebuilding dialogue that began in 2014. Newly elected Ukrainian President Volodymyr Zelensky announced the revival of dialogue in an effort to improve relations with the Russian Federation (herein after referred to as Russia). More than five years of war has left eastern Ukraine ravaged with over 13,000 dead and millions displaced (RFE/RL, 2019). The result of this engagement was seemingly positive movement on the implementation of the Minsk II accords with emphasis given, *inter alia*, to re-attempting a ceasefire, a withdrawal of Russian-backed fighters from the Donbas region, and full Ukrainian control over its border with Russia. In response, Ukraine would grant special

status to the region and permit elections. All five of these efforts are part of the original thirteen measures included in the Minsk II accords, none of which have been implemented since its signing over four years ago. This particular approach is known as the "The Steinmeier Formula," and was named after the German Minister of Foreign Affairs (now President) who drafted the 3-page proposal in 2016. In light of this decision, the four member-states of the Normandy Format plan to meet in Paris to discuss these ongoing efforts. As a point of emphasis, President Zelensky announced that there would be no capitulation and that no red-lines would be crossed in the implementation of the Steinmeier Formula (Kudrytski, Verbyany, & Choursina, 2019). Many, however, are skeptical of Russia's intentions and can see no resolution that does not include concessions of Ukrainian sovereignty.

So far, every attempt to address the ongoing conflict has failed to produce meaningful results. This includes the Minsk accords signed in 2014 and 2015. This short article seeks to demonstrate that, effectively, Minsk II is a trap set by Russia to violate Ukrainian sovereignty through the creation of special-status regions in exchange for a reduction in covert aggression. Whether implemented and ratified as an international treaty under the auspices of the Vienna Convention or adopted directly into Ukrainian law, Minsk II allows the Russian Federation to;

- a. Set the terms for arbitration in Ukraine,
- b. Render Ukraine contained and strategically predictable,
- c. Satisfy the international community's desire for conflict resolution without Russia having to offer any formal commitments or concessions,
- d. Undermine Ukrainian sovereignty and freeze its Euro-NATO aspirations, and
- e. Create plausible deniability as to its involvement in the conflict, allowing it to intensify the war at any time through its supported separatists.

Significant research has been done on effective dialogue in the Ukrainian conflict and the importance of the Minsk protocol as the only existing framework within which dialogue and peacebuilding can occur. Substantial barriers to successful implementation have occurred which has made these mediation efforts nearly unachievable. This was highlighted by Dr. Andrew Foxall of the Russia Studies Centre; "Russia continues to fund, support, and arm separatists in eastern Ukraine. They, in turn, continue to dismiss, distract, and deny the work of the Organization for Security and Cooperation in Europe (OSCE), which is supposed to monitor the implementation of the agreement" (Foxall, 2015). In this sense, the Minsk Agreement can be thought of as both too important to fail and also unattainable in its current form. It is within this obscurity that Russia enjoys freedom of movement to operate with impunity. Carl Nilsson suggested this dichotomy in 2016 through a report written for the Center of Strategic and International Studies.

"A strategic pattern has emerged whereby Russia, as a perpetrator of and party to a conflict, dictates the conditions of the cease-fire, and then actively pursues the violation of the same agreement for its own political, military, and territorial gain. This serves a dual function: it undermines the international legal norm of cease-fires and provides a diplomatic "process" whereby eventually the international

community loses interest and focus in resolving the conflict, allowing the freeze to be controlled by the Kremlin" (Hvenmark Nilsson, 2016).

One need not look further than the 2008 Georgian crisis for examples of this perversion of the mediation process. Just as it continues to do with separatists in eastern Ukraine, Moscow utilized the conflict in South Ossetia and Abkhazia as a political lever to exercise control over the Georgian situation.

"Moscow used negotiations as a platform for political pressure against Georgia, maintaining a steady stream of largely unfounded accusations against Tbilisi while ignoring even the most egregious separatist violations. Moscow, on whom the separatists were existentially dependent in virtually every respect, never brought the slightest pressure to bear on them to compromise or work toward restoration of Georgia's territorial integrity. Indeed, Russian "peacekeepers" were collaborating hand-in-glove with the separatists, training, equipping and even commanding separatist forces" (Bennett, 2015).

The Kremlin's Malign Legal Operations

In 2010, Dr. Kristie Bartman published an article and subsequent book highlighting Russia's exploitation of international law to subdue adversaries and manipulate the law in pursuit of a manufactured *casus belli*. She defined the term *lawfare*, which is a portmanteau of 'Law' and 'Warfare,' as "The manipulation or exploitation of the international legal system to supplement military and political objectives legally, politically, and equally as important, through the use of propaganda" (Bartman, 2010). The term *lawfare* was first made popular by retired U.S. General Charles Dunlap in 2001. He eventually defined the term as "The strategy of using, or misusing, law as a substitute for traditional military means to achieve an operational objective" (Dunlap Jr., 2011). While his definition became widely accepted in the military community, it is Bartman's definition that best describes the manipulations and unique perversions of international law that were seen in the annexation of Crimea and invasion of eastern Ukraine. In 2018, the Council of Europe attempted to capture both this reality and the nature of hybrid threats in its draft resolution 2217;

"...the main feature of this phenomenon is "legal asymmetry", as hybrid adversaries, as a rule, deny their responsibility for hybrid operations and try to escape the legal consequences of their actions. They exploit lacunae in the law and the complexity of

legal systems, operate across legal boundaries and in under-regulated spaces, exploit legal thresholds, are prepared to commit substantial violations of the law and generate confusion and ambiguity to mask their actions” (Council of Europe, 2018).

The phrase *Malign Legal Operations* (MALOPS) shall be utilized in this article rather than *lawfare*, which is a more colloquial yet less doctrinally appropriate term. It can be said that the practitioners of MALOPS ***pursue impunity through the exploitation of legal systems by employing disinformation to shape perceptions of legitimacy, justify violations, escape legal obligations, contain adversaries, and ultimately to advantageously revise the rule of law.*** It is through this definition that the perversion of the peacebuilding process in Ukraine will be analyzed. These operations render accountability untenable through the practitioner’s disingenuous abdication of *pacta sunt servanda*, and this term serves to describe the foundation of what many describe as Russia’s “hybrid warfare” against Ukraine and the West. The legal mechanisms utilized within Russia’s MALOPS include containing adversaries with disingenuously applied legal instruments, abusing *Clausula Rebus Sic Stantibus*, spreading disinformation to shape legitimacy and control legal narratives, abusing legal lacunas and loopholes to force concessions and exhaust adversaries, and finally misapplying *Ex Factis Jus Oritur* to justify aggressive behavior or pursue false-flag *casus belli*.

Some instances of Russia’s Malign Legal Operations include the invasion and destabilization of Georgia, the invasion and passportization of eastern Ukraine, the annexation of Crimea, claims to the Lomonosov Ridge and the Arctic shelf, closures of the Kerch Strait, restrictions within the Azov Sea, the abuse of loopholes in the Montreux Convention for the combat rotation of submarines to Syria, and the abuse of exercise zones under UNCLOS to disrupt commercial shipping. These are just a few examples of how successful this asymmetric strategy can be, but these tactics are anything but new. Prior to the Russian Federation, the USSR utilized these same methods to expand territory, capture influence, and achieve geopolitical objectives against, *inter alia*, Finland, Hungary, and Afghanistan (Bartman, 2010). This behavior extends even further back, to the reign of Tsars, when Catherine II first annexed Crimea in a familiar turn of events. The Crimean Khanate received independence from the Ottoman Empire in the Treaty of Küçük Kaynarca that ended the 1768-1774 Russo-Turkish war. While the treaty forbade Russia

from positioning troops on the peninsula, Russia carefully included a loophole that declared itself the protectorate of all Orthodox Christians in the Ottoman Empire. What followed were Crimean uprisings, thanks in large part to Russian meddling, that gave Russia the false-flag *casus belli* needed to intervene in 1783 and annex Crimea in the name of peacebuilding (Corcuera, 2016).

A Brief History of Arbitration in the Russo-Ukrainian War

The Kyiv Agreement

In November of 2013, Ukrainian president Viktor Yanukovich declined to sign a long-anticipated association agreement with the European Union (EU) at the behest of the Russian Federation. Protests began in Kyiv and, a month later, Russia counter-offered Ukraine a \$15bn aid package to secure influence over its near-abroad Ukrainian neighbor (Walker, 2013). Protests intensified as a result, and the Kyiv Agreement was signed on February 21st, 2014, to calm civil unrest and stop escalating violence. This agreement was between Yanukovich and his parliamentary opposition with mediation by the EU and Russia. It called for a return to the constitution of 2004 with a re-balancing of power between the president and parliament along with presidential elections following the adoption of the new constitution. Russia, in turn, refused to sign this document due to its assessment that the Ukrainian president was giving into the demands of protestors and abdicating his power. Protests continued and intensified following the Kyiv Agreement as it was considered to be an insufficient response to many Ukrainians’ western and anticorruption aspirations. Yanukovich fled Ukraine for Russia just two days after this agreement was signed while, simultaneously, a more intense conflict was manufactured to control Moscow’s rapidly declining influence over Ukraine. As Putin himself stated; “We are forced to begin the work to bring Crimea back into Russia” (Telegraph, 2015).

The Geneva Agreement [Statement]

Within six weeks, Crimea was absorbed by Russia through a referendum that was later invalidated by the United Nations General Assembly (UNGA). Furthermore, a fifth-column uprising was incited in Ukraine’s eastern Donbas region. On April 17th, representatives of Ukraine, Russia, the EU, and the United States met to agree upon what would become the Geneva Statement. The objective was to de-escalate the growing crisis and to stipulate OSCE monitoring of the process. As a result of this

agreement, a planned strengthening of sanctions on the Russian Federation was put on hold (Borger & Luhn, 2014). Five primary measures were included in the agreement;

- (1) "All sides must refrain from any violence, intimidation or provocative actions.
- (2) All illegal armed groups must be disarmed; all illegally seized buildings must be returned to legitimate owners; all illegally occupied streets, squares and other public places in Ukrainian cities and towns must be vacated.
- (3) Amnesty will be granted to protestors and to those who have left buildings and other public places and surrendered weapons, with the exception of those found guilty of capital crimes.
- (4) The OSCE Special Monitoring Mission should play a leading role in assisting Ukrainian authorities and local communities in the immediate implementation of these de-escalation measures.
- (5) The announced constitutional process will be inclusive, transparent and accountable" (United States, European Union, Ukraine, & Russian Federation, 2014).

The Normandy Format and Trilateral Contact Group

With no discernable reduction in hostilities, the leaders of France, Germany, Ukraine, and Russia met on June 6th, 2014, on the sidelines of a ceremony commemorating the 70th anniversary of D-Day. Their objective was to address the conflict in Ukraine and to initiate a framework for mediation. As a result, the "Trilateral Contact Group" was established to facilitate dialogue between Ukraine, Russia, and the separatists with mediation provided by the OSCE. The first meeting of this group took place in Kyiv just two days later to discuss Ukrainian president Poroshenko's peace plan. These sessions continued sporadically until the Minsk Protocol was signed on 5 September by representatives of OSCE, Ukraine, Russia, and the so-called Donetsk People's Republic (DPR) and Luhansk People's Republic (LPR). The latter two organizations are not formally recognized as legitimate by the Ukrainian government. These regions are known within Ukrainian law as ORDLO, the transliteration of the Ukrainian acronym ОРДЛО, which stands for "окремі райони Донецької та Луганської областей" ("The Separate Areas of Donetsk and Luhansk Oblasts") (Law of Ukraine № 1680-VII).

Minsk I

The Minsk I protocol included twelve points ranging from a ceasefire, external monitoring, amnesty for participants in the conflict, humanitarian assistance, the withdrawal of armed groups and mercenaries, the ban of offensive operations,

a prohibition on combat aircraft, and the creation of a 30 KM buffer zone for heavy weaponry. On September 16th, just a few days after the signing of Minsk I, President Poroshenko signed document number 1690-VII, the Law of Ukraine "On Special Self-Governance Procedure in Separate Regions of Donetsk and Luhansk Oblasts." This codified many of the measures highlighted in the Minsk I agreement without specifically mentioning the accords by-name. What followed were constant violations of the ceasefire, illegal elections in DPR and LPR that violated the protocol, and a refusal by Russia to allow external observers to monitor the border. This is all while Moscow employed information operations to shape legitimacy by boasting a strict adherence to both international norms and the Minsk protocol (MacFarquhar, 2014). By 2015, the protocol had completely failed with overt offensive operations taking place by Russian-backed DPR forces and claims that no further attempts would be made to honor a ceasefire (BBC News, 2015).

Minsk II

The Minsk II protocol was subsequently agreed to on 12 February, 2015, following a Normandy Format meeting in Minsk. While present during negotiations, representatives of Russia claimed that the Russian Federation could not participate in the implementation of Minsk II because it was not a party to the conflict (Sputnik News, 2015). Minsk II included 13 measures as outlined in table 1. Not a single measure has been fully implemented in the nearly five years since the agreement was reached (Hornish, 2019). The Normandy Format met twice following the Minsk II negotiations but has not gathered since October of 2016.

The Legal Status of Arbitration Efforts in Ukraine

In order to formally accept and adopt the provisions of the Minsk accords, the parties to the conflict (Russia and Ukraine) must either implement it in good faith as-is, adopt the provisions via the passing of domestic law, or by formalizing the document under the auspices of the Vienna Convention on the Law of Treaties and ratification within state law. Despite the United Nations Security Council (UNSC) resolution 2202 that drew unilateral support and international backing for the Minsk Agreements, the resolution itself did not transform the agreement into a legally binding treaty (United Nations, 2015). Assuming that good-faith implementation is unacceptable to all parties, the only options for the recognition of Minsk are the adoption of applicable domestic law or the

Table 1. Minsk II Measures and Implementation Status

The Minsk Protocols		
Measures		Implementation
1	Bilateral Ceasefire	NO
2	Heavy Weapons Withdrawal & Buffer Zone	PARTIAL
3	OSCE Monitoring	PARTIAL
4	Local Elections under Ukrainian Law on Special Status of Conflict Region	PARTIAL
5	Amnesty for Participants	NO
6	Prisoner/Hostage Exchange	PARTIAL
7	Humanitarian Aid through International Mechanism	NO
8	Restoration of Socioeconomic Relations with Conflict Areas	PARTIAL
9	Ukrainian Control over Russian Border	NO
10	Withdrawal of Mercenaries, Armed Groups	NO
11	Constitutional Reform (Decentralization & Special Status)	PARTIAL
12	Local Elections under OSCE Standards	NO
13	Continuation of Trilateral Working Groups	PARTIAL

ratification of an international treaty via the legal formalization of the Minsk Accords. As will be seen in the following analysis, there exists no valid argument that Ukraine is currently bound by international treaty with respect to the implementation of Minsk. Furthermore, while the provisions of Minsk that could be appropriately implemented via domestic law were passed in 2014, this law will soon expire leaving Ukraine with a fresh opportunity to negotiate for a more equitable arbitration process.

Adoption through International Treaty

While they have been referred to by various international organizations such as the OSCE, UNGA, the European Parliament, and the Council of Europe, it is important to keep in mind that the Minsk Accords are *not* a binding treaty under international law. Thus, they have no *locus standi* in either domestic jurisdictions nor at the international level. The Normandy Format, the Trilateral Contact Group, and the Minsk Accords are currently diplomatic instruments. In order for a treaty to be recognized by the state of Ukraine, it needs to be signed and ratified following a special order prescribed by the Constitution of Ukraine and the "Law of Ukraine on 'Treaties'"; The Ministry of Foreign Affairs proposes the treaty to the President or Cabinet of Ministers for ratification. The President or Cabinet then considers those proposals and, pending their concurrence, the proposals are forwarded to the Parliament of Ukraine for consideration. Any treaty would also need to be considered by the Parliamentary Committee on Foreign Affairs. Also, before it can be scheduled for a vote, any discrepancies with existing domestic laws must be rectified so that the treaty may be considered by other committees. Similar procedures apply to treaty adoption in the RUSSIA whereby

any treaty must be adopted by virtue of federal law. With respect to signing an international treaty, Article 7.2 of the Vienna Convention on the Law of Treaties specifies the persons who may be considered as representatives of the State;

- (a) "Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty,
- (b) Heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited,
- (c) Representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization, or organ" (United Nations, 1969).

Furthermore, by virtue of Article 8 of the Law of Treaties; "An act relating to the conclusion of a treaty performed by a person who cannot be considered under Article 7 as authorized to represent a State for that purpose is without legal effect unless afterwards confirmed by that State" (United Nations, 1969).

The Minsk Protocols were signed by a representative of the OSCE, the Russian Ambassador to Ukraine, a former President of Ukraine serving as the Ukrainian representative, and the so-called leaders of self-proclaimed republics (LPR/DPR), which have not been legally recognized by any state. Only one of these individuals, the OSCE representative, satisfied the above excerpts from the Vienna Convention on the Law of Treaties. The separatist leaders do not fall into any category listed within Article 7.2. Furthermore, while Ukraine and Russia's representatives were appointed by their respective countries, they did not carry "full powers"

nor could they be considered representative of their states' intentions to ratify an international treaty. With respect to Article 8, no document has been confirmed by the states for the purposes of confirming the legal status of these aforementioned individuals. Finally, the Minsk Protocols have no viable enforcement mechanisms. Based on the above discussion, the Minsk Accords can be defined as a non-enforceable friendly agreement based upon the good will of the parties hitherto outlining measures aimed at ceasing hostilities in the Donbas region.

Adoption through Domestic Law

If the adoption of Minsk II via the signing and ratification of an international treaty is not preferred, then the relevant measures contained within the document can be passed directly under Ukrainian domestic law. On September 16th, 2014, President Poroshenko signed document number 1690-VII, the Law of Ukraine "On Special Self-Governance Procedure in Separate Regions of Donetsk and Luhansk Oblasts" (hereafter "the law on the special status"). Effectively, this law can be regarded as the *de facto* implementation of the Minsk agreements into Ukrainian law because provisions of the law mirror those of the Minsk agreements. Table 2 shows the ten articles of the law on the special status and their corresponding measures within the accords. Effectively, every measure of Minsk that could reasonably and appropriately be unilaterally implemented through Ukrainian law was adopted, however, there was no specific mention of the Minsk agreement in the law. Regardless, the provisions have remained unimplemented since signing and

the law was required to be renewed annually for it to stay in force. One of the conditions for permanent enforcement is the holding of elections and the establishment of relevant self-governing authorities, but that is contingent upon unrestricted OSCE monitoring and the removal of military equipment, armed opposition groups, and mercenaries in accordance with Article 10 (Law of Ukraine № 2167-VIII). The law itself expires on December 31st, 2019 in accordance with the Law of Ukraine № 2588-VIII.

Stalemate or Capitulate: The Ukrainian Dilemma

As has been discussed, Russia is pressuring Ukraine to enforce the provisions of Minsk on its terms either through the implementation of the law on the special status or by implementing its provisions (*de facto*, the Minsk provisions) by virtue of the "Steinmeier Formula." This reality constitutes an attempt by Russia to ensnare Ukraine in this "Minsk trap" by manipulating international and Ukrainian domestic law to manufacture a resolution that is favorable to Moscow and built upon its terms. This is accomplished by positioning itself as a mediator or "guarantor" (Sputnik News, 2015) rather than as a state party. It allows Russia to avoid fulfilling the same requirements as any other state party. This strategy also forces the government of Ukraine to negotiate with the self-proclaimed republics as if they were recognized state entities, which permanently shapes the legitimacy of these entities in a way that is favorable to Moscow.

Table 2. Document #1690-VII Articles and Their Corresponding Minsk II Measures

Doc #1690-VII: "On Special Self-Governance Procedure in Separate Regions of Donetsk & Luhansk Oblasts"		
Articles of Document #1690-VII (Summarized)		Corresponding Minsk Measure (Table 1)
1	Introduces law on special status for with expiration of 12/31/19	11
2	Applicability to Donetsk/Luhansk regions	11
3	Amnesty for Participants	5
4	The right to linguistic self-determination	8, 11
5	Conditions of local self-government	4, 11
6	Economic, social, and cultural self-governance	4, 11
7	Restoration of socioeconomic relations between state and conflict areas	8
8	Socioeconomic relations with cross-border entities of Russian Federation	8
9	The right to people's militias	11
10	Final provisions: OSCE monitoring of elections and disarmament, removal of armed opposition and mercenary groups, withdrawal of military equipment	1 ^{Note1} , 2 ^{Note2} , 3, 10, 12
Minsk II Measures Not Addressed in the Law: (Note: These four measures are diplomatic or bilateral in nature and not enforceable though domestic Ukrainian law)		6 (Prisoner Exchange), 7 (International Humanitarian Aid), 9 (Ukrainian Control over Russian Border), 13 (Continuation of Trilateral Working Groups)

* **Note 1:** Article 10, and in fact the entire law, supports the assumption of a complete bilateral ceasefire.

* **Note 2:** Only the withdrawal of weapons and equipment is addressed in Article 10. The buffer zone is not discussed, is not something that would be appropriately implemented via domestic law.

Disinformation surrounds the presence of Russian forces as the Kremlin has previously both denied and admitted to their existence (Oliphant, 2015). This is further obscured by the Kremlin's ruling that the deaths of Russian soldiers be labeled a state secret (Luhn, 2015). Moreover, Russia employs Private Military Contractors such as Wagner Group, RSB-Group, MAR, ATKGroup, E.N.O.T, and others to skirt international law while fully engaging in the conflict (Warsaw Institute, 2019). Not only is the ceasefire being violated constantly (OSCE SMM Ukraine, 2019b), but OSCE monitors are being denied access to territory controlled by Russian-backed separatists (OSCE SMM Ukraine, 2019a). "While Ukrainian Armed Forces are not immune to criticism for blocking SMM [Special Monitoring Mission] access, only combined Russian-separatist forces have resorted to violence to restrict the SMM's operations" (Byrnes, 2017). This aggression amount to violations of international law and OSCE norms. Additionally, the establishment of amnesty [Minsk II Measure #5] for the participants of the conflict is in itself a violation of international law as it would leave the question of a great number of war crimes perpetrated during the conflict unanswered (EuroMaidan Press, 2015). Even the delivery of humanitarian aid from Russia to the conflict region, in pursuit of Minsk II Measure #7, is a major exploitation of the agreement as these convoys are suspected of supplying separatists with arms and ammunition (EuroMaidan Press, 2018). It is unsurprising that these same methods were used to fuel the conflict in Georgia with blatant disregard to the mediation process (Hvenmark Nilsson, 2016).

The Bigger Picture

Much of the contemporary discourse surrounding the conflict in Ukraine revolves around the Minsk Accords. It is in this way that Russia is able to shape the legitimacy of the conflict as solely a Ukrainian problem. This article began its discussion of the mediation process with the EU association agreement, the Kyiv agreement, and the Geneva statement to highlight that this manufactured conflict did not appear overnight. A focus solely on the Minsk Accords only supports the Kremlin's assertions of a purely civil-war. Consideration of the larger conflict and struggle for Russian influence in its near abroad, however, re-shapes the legitimacy of the conflict so that it may be considered for what it is; *a Russo-Ukrainian war*. This can be seen in a step-by-step escalation of *Malign Legal Operations* beginning in 2013 (and arguably much earlier). The failure of traditional political influence led to the EU agreement and "Revolution of Dignity." Similarly,

the failure of a counter-offer and the Kyiv Agreement led to the covert invasion of Ukraine and the Geneva Statement. "Having 'learned' from the failure of the Kyiv Agreement, Russia at least partially hedged against a similar fate with the Geneva Statement, by bringing in the OSCE as an implementer, and this implicitly an international guarantor, of the agreement, while further working towards securing a status for representatives from Donbas and the 'region' itself" (Malyarenko & Wolff, 2018). This attempt to shape legitimacy in favor of the international recognition of Donbas peaked with the initiation of the Minsk process. The very presence of OSCE monitors and the creation of buffer zones furthered Russia's campaign of *Malign Legal Operations* by shaping the legitimacy, or the *de facto* existence, of breakaway states within Ukraine. "While Minsk II remains unimplemented, its provisions clearly signal the extent to which Russia's position had shifted within a year—from a negotiated transition of uncertain outcome to a situation in which a fundamental territorial and political re-organization of the Ukrainian state, quasi-constitutionally empowering and entrenching a strongly pro-Russian entity within Ukraine, was agreed in an ad hoc international negotiation format" (Malyarenko & Wolff, 2018). This ad hoc format was then brought before the UNSC in an attempt to capture, formalize, and legitimize the Minsk Agreements under the auspices of Public International Law. Finally, with the ultimate failure of Minsk to produce legitimized pro-Russian breakaway republics and a looming 2019 expiration date for the law on the special status, the Kremlin seeks to breathe new life into the three-year old Steinmeier Formula.

The Steinmeier Formula

The Steinmeier Formula was re-introduced into the calculus of Russo-Ukrainian conflict resolution on October 1st, 2019, when President Zelensky agreed to the terms of the three-year old proposal. This document was not written as an alternative to Minsk II, but rather as a political path to the successful implementation of the Minsk accords. Its focus was free and fair elections in Donbas and the return of state borders to Ukraine. What has not been widely reported, however, was that the adoption of this formula was a pre-condition for Russian President Putin to continue working towards conflict resolution with Ukraine or the Normandy Format (Socor, 2019). Dmitry Peskov, Putin's spokesman, confirmed this shortly after Ukraine announced its decision to proceed with the formula. "There is no doubt that this is an important

step toward implementing the earlier agreements... Hopefully, the implementation of the Minsk agreements will continue, since this is the only way to resolve the Ukrainian conflict in the country's east" (Miller, 2019). On that very same day, however, over 70 ceasefire violations were observed by the OSCE Special Monitoring Mission in eastern Ukraine (OSCE SMM Ukraine, 2019a). This double-talk amounts to Moscow's deceptive adherence to the norms of international law to contain Ukraine and control narratives surrounding the conflict's legitimacy. Simultaneously, however, Russia freely violates the agreements with plausible deniability provided in the form of a separatist movement. "Russia, as a perpetrator of and party to a conflict, dictates the conditions of the cease-fire, and then actively pursues the violation of the same agreement for its own political, military, and territorial gain" (Hvenmark Nilsson, 2016).

This being the case, one might wonder why the Kremlin would even entertain the idea of implementing Minsk II through the Steinmeier Formula if the stalemate is as advantageous as this article suggests. The reason is simple; this manufactured conflict has been costly for the Russian Federation. According to Russian officials, tens of billions of dollars were lost to sanctions by the end of 2014 alone (Kottasova, 2015). It is for this reason that Russia seeks to re-shape the conflict without losing the Ukrainian power-lever that it manufactured to modulate tensions in the region. A formal end to the fighting in favor of a more traditional form of corrupt patronage and influence over Donbas' newfound special status will achieve the same results in a more subtle and effective manner (Conley, Mina, Stefanov, & Vladimirov, 2016). In the end, what Russia seeks to gain from Ukraine's newly adopted Steinmeier Formula is a more independent Donbas region that is ripe for Russian influence and the continued undermining of Ukrainian sovereignty. One need not look further than Georgia and Transnistria to see how this strategy may play out (Bezsmertny, 2019).

Conclusion

Relations between Ukraine and Russia are experiencing a significant thaw under President Zelensky. This is evidenced by his desire for increased dialogue with Russia, the September 2019 exchange of prisoners despite an ITLOS* ruling that Russia must release Ukraine's sailors and ships (ITLOS Case #26), and the October 2019

commitment to Minsk II implementation via the Steinmeier Formula. It remains to be seen how Ukraine will implement the formula or what provisions the final signed-document contains. The only certain eventuality is that any legal mechanism, lacuna, loophole, or unexplored legal regime will be exploited by Russia to bring this violation of Ukrainian sovereignty to a pro-Kremlin conclusion. For them, victory will be to ensure that Ukraine recognizes the special status of the affected regions without any concessions or admissions of its own as to its role in the conflict.

As American political theorist E.E. Schattschneider said, "the definition of alternatives is the supreme instrument of power" (Schattschneider, 1960). For Ukraine, the alternatives are a continuation of a foreign-fueled violent stalemate in the country's east that undermines any hope for prosperity *or* the implementation of legal instruments that resolves the conflict at the expense of sovereignty and on Russia's terms. As has been proven, no equitable arbitration is possible while the Russian Federation forces its terms on the process without acknowledging its role as both an instigator and party to the conflict. Ukraine must take a strategic pause from the process and re-define the alternatives engineered by the Kremlin; namely that Minsk II can only be implemented, via any formula, once Russia acknowledges its role, returns the border to Ukraine, and allows appropriate OSCE oversight (Article 10 of the law on special status). Following this, the Minsk Agreements must be properly revisited with full and unrestricted oversight throughout implementation. One challenge will be the EU sanctions against Russia currently in place with the Minsk accords as a foundational tenant. A complete withdrawal from Minsk could undermine the continuation of these sanctions.

Any attempt to slow and re-define the negotiation process will be met by staunch resistance from both the Russian Federation and international stakeholders for whom a swift conclusion to the conflict is politically imperative. It should be remembered above all else, however, that ***Ukraine is not trapped***. As this analysis has shown, no claim that Minsk II is a legally binding agreement or international treaty under the auspices of the Vienna Convention can be seen as legitimate. Furthermore, it was stated with the acceptance of the Steinmeier Formula that Ukraine will not move forward until Russian-backed fighters are withdrawn and Ukraine regains full control over the border. This is highly unlikely to occur before December 31st, 2019. Therefore, if the law on the special status is permitted to expire as scheduled, Ukraine will find itself with a fresh start.

* International Tribunal for the Law of the Sea (ITLOS)

Unbound by previous laws or agreements, President Zelensky may at that point reinvigorate the arbitration process in a more equitable manner. In order for any mediation or dialogue on eastern Ukraine to be successful, it must be understood by peacebuilders, diplomats, and politicians that the Kremlin has no desire to mediate tensions in pursuit of a peaceful resolution, but rather in pursuit of geopolitical gain. "Russia's strategic goal is to maintain control over its Near Abroad. The methods to do so may change over time, but

the goal itself can and will not be changed" (Malyarenko & Wolff, 2018). While attempting to re-start the Minsk process is a seemingly audacious strategy, it is necessary for any genuine conclusion to the conflict within the Minsk framework. Judging by the approximately 10,000 Ukrainians that gathered to protest the adoption of the Steinmeier Formula on October 6th in Kyiv's independence square, Ukraine may once again be ready for something audacious in its pursuit of sovereignty without capitulation.

References

- Bartman, C. S. (2010). Lawfare and the Definition of Aggression: What the Soviet Union and Russian Federation Can Teach Us. *Case Western Reserve Journal of International Law*, 43(2), 423–445.
- BBC News. (2015). Ukraine rebel Zakharchenko "rejects truce talks." Retrieved from <https://www.bbc.com/news/world-europe-30949527>
- Bennett, K. (2015). The Minsk Trap. Retrieved from <http://www.europeanukraine.org/home/2015/09/the-minsk-trap/>
- Bezsmertny, R. (2019). The "Steinmeier Formula": Zelenskyy's huge mistake. Retrieved from <http://euromaidanpress.com/2019/10/03/the-steinmeier-formula-zelenskyy-s-huge-mistake/>
- Borger, J., & Luhn, A. (2014). Ukraine crisis: Geneva talks produce agreement on defusing conflict. *The Guardian*. Retrieved from <https://www.theguardian.com/world/2014/apr/17/ukraine-crisis-agreement-us-russia-eu>
- Byrnes, K. M. (2017). Ongoing Violations of International Law by the Russian Federation in Ukraine. Retrieved from <https://osce.usmission.gov/ongoing-violations-international-law-russian-federation-ukraine-2/>
- Conley, H. A., Mina, J., Stefanov, R., & Vladimirov, M. (2016). *The Kremlin Playbook*. Center For Strategic and International Studies.
- Council of Europe. (2018). Legal Challenges Related to Hybrid War and Human Rights Obligations. Retrieved from <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24762>
- Corcuera, B. (2016). Exploring History: How Catherine the Great Annexed Crimea? Retrieved December 14, 2018, from <https://exploringhist.blogspot.com/2016/01/how-catherine-great-annexed-crimea.html?m=1>
- Dunlap Jr., C. J. (2011). Lawfare Today: A perspective. *Yale Journal of International Affairs*, (Winter Issue), 146–154. Retrieved from <http://yalejournal.org/wp-content/uploads/2011/01/083111dunlap.pdf>
- EuroMaidan Press. (2015). Evidence on perpetrators of war crimes in Russia's war in Donbas to be submitted to The Hague.
- EuroMaidan Press. (2018). The hidden invasion: Russia's military convoys to Ukraine since 2014. Retrieved from <http://euromaidanpress.com/2018/11/06/the-hidden-invasion-russias-military-convoys-to-ukraine-since-2014/>
- Foxall, A. (2015). The Ceasefire Illusion: An Assessment of the Minsk II Agreement Between Ukraine and Russia, (8). Retrieved from <https://henryjacksonsociety.org/wp-content/uploads/2015/12/Minsk-II-FINAL-For-Website.pdf>
- Hornish, K. (2019). War in the Donbass: Five years on, is there any hope of a durable peace? *The Vienna Institute for International Economic Studies*. Retrieved from <https://wiiw.ac.at/war-in-the-donbass-five-years-on-is-there-any-hope-of-a-durable-peace-n-394.html>
- Hvenmark Nilsson, C. (2016). *Revisiting the Minsk II Agreement*. Retrieved from www.csis.org
- Kottasova, I. (2015). Sanctions will cost Russia more than \$100 billion. Retrieved from <https://money.cnn.com/2015/04/21/news/economy/russia-ukraine-sanctions-price/index.html>
- Kudrytski, A., Verbyany, V., & Choursina, K. (2019). Ukraine Peace Talks Get Breakthrough as Kyiv Accepts Compromise. Retrieved from <https://www.bloomberg.com/news/articles/2019-10-01/ukraine-peace-talks-get-breakthrough-as-kyiv-accepts-compromise>
- Luhn, A. (2015). Vladimir Putin declares all Russian military deaths state secrets. Retrieved from <https://www.theguardian.com/world/2015/may/28/vladimir-putin-declares-all-russian-military-deaths-state-secrets>
- MacFarquhar, N. (2014). Putin Lays Out Proposal to End Ukraine Conflict. Retrieved from <https://www.nytimes.com/2014/09/04/world/europe/ukraine-russia.html>
- Malyarenko, T., & Wolff, S. (2018). The logic of competitive influence-seeking: Russia, Ukraine, and the conflict in Donbas. *Post-Soviet Affairs*, 34(4), 191–212. DOI: <https://doi.org/10.1080/1060586X.2018.1425083>
- Miller, C. (2019). Explainer: What Is The Steinmeier Formula – And Did Zelenskiy Just Capitulate To Moscow? Retrieved October 2, 2019, from <https://www.rferl.org/a/what-is-the-steinmeier-formula-and-did-zelenskiy-just-capitulate-to-moscow-/30195593.html>
- Olyphant, R. (2015). Vladimir Putin admits: Russian troops "were in Ukraine." Retrieved from <https://www.telegraph.co.uk/news/worldnews/vladimir-putin/12054164/Vladimir-Putins-annual-press-conference-2015-live.html>
- OSCE SMM Ukraine. (2019a). *Daily Report 234/2019 (3 October)*. Retrieved from <https://www.osce.org/special-monitoring-mission-to-ukraine/434498>
- OSCE SMM Ukraine. (2019b). Trends and Observations Apr-Jun 2019. Retrieved from <https://www.osce.org/special-monitoring-mission-to-ukraine/425429>
- RFE/RL. (2019). Death Toll Up To 13,000 In Ukraine Conflict, Says UN Rights Office. Retrieved from <https://www.rferl.org/a/death-toll-up-to-13-000-in-ukraine-conflict-says-un-rights-office/29791647.html>
- Schattschneider, E. E. (1960). *The Semi-Sovereign People*. New York.
- Socor, V. (2019). Steinmeier's Formula: Its Background and Development in the Normandy and Minsk Processes. *The Jamestown Foundation Eurasia Daily Monitor*, 16(130). Retrieved from <https://jamestown.org/program/steinmeiers-formula-its-background-and-development-in-the-normandy-and-minsk-processes-part-one/>
- Sputnik News. (2015). Russia Guarantor of Ukraine Settlement, Not Party Fulfilling Deal – Kremlin. Retrieved from <https://sputniknews.com/politics/201502131018209668/>
- Telegraph. (2015). *Video: Putin reveals the moment he gave the secret order for Russia's annexation of Crimea*. The Telegraph. Retrieved from <https://www.telegraph.co.uk/news/worldnews/vladimir-putin/11458426/Putin-reveals-the-moment-he-gave-the-secret-order-for-Russias-annexation-of-Crimea.html>
- United Nations. (1969). Vienna Convention on the Law of Treaties (1969). *The United Nations Treaty Series*, 1155 (January 1980), 331. Retrieved from http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

United Nations. (2015). *Unanimously Adopting Resolution 2202 (2015), Security Council Calls on Parties to Implement Accords Aimed at Peaceful Settlement in Eastern Ukraine*. Retrieved from <https://www.un.org/press/en/2015/sc11785.doc.htm>

United States, European Union, Ukraine, & Russian Federation. (2014). *Geneva Statement on Ukraine*. Retrieved from <https://2009-2017.state.gov/r/pa/prs/ps/2014/04/224957.htm>

Walker, S. (2013). Vladimir Putin offers Ukraine financial incentives to stick with Russia. Retrieved December 11, 2018, from <https://www.theguardian.com/world/2013/dec/17/ukraine-russia-leaders-talks-kremlin-loan-deal>

Warsaw Institute. (2019). *Russian "Contractors" In the Service of the Kremlin*. Retrieved from <https://warsawinstitute.org/russian-contractors-in-the-service-of-the-kremlin/>

Волкова Н.

ПАСТКА МІНСЬКИХ ДОМОВЛЕНОСТЕЙ: ВТРУЧАННЯ МОСКВИ В ПЕРЕГОВОРНИЙ ПРОЦЕС ЩОДО ВРЕГУЛЮВАННЯ КОНФЛІКТУ В УКРАЇНІ

Ця стаття є багатодисциплінарним аналізом використання Російською Федерацією (далі – РФ) правових систем, як міжнародної, так і національної, для саботування зусиль, спрямованих на пошук правових рішень щодо конфлікту в Україні. Метою цього короткого дослідження є пошук відповідей стосовно майбутніх зусиль щодо медіації та їхнього прогресу. Зокрема, авторка стверджує, що РФ використовує Мінські угоди (далі – Мінськ II) для стримування та підкорення України. Водночас Росія відкрито дисоціюється (відмежовується) від штучно створеного та підтримуваного нею конфлікту на Донбасі, приховуючи свою участь у підігріванні конфліктного клімату в регіоні. Росія оманливо підтримує зусилля міжнародних партнерів, спрямовані на врегулювання конфлікту, перетворивши процес на зброю, щоб запобігти покаранню та досягти більш вигідних геополітичних переваг ціною українського суверенітету. У статті запропоновано огляд зародженої концепції злочинних правових операцій, поняття, відомого як «правова війна». Наголошено на тому, що РФ вдається до цієї стратегії з метою запобігання покаранню, використовуючи ревізійні підхід до верховенства права. Також підсумовано зусилля, спрямовані на досягнення миру в російсько-українській війні, з погляду злочинних правових операцій та запропоновано розглядати Мінськ II як пастку: з одного боку, відбувається зменшення жорстоких дій у регіоні на умовах Кремля, а з іншого – створюється «заморожений конфлікт» на кшталт Південної Осетії, Абхазії та Придністров'я. Авторка вважає, що Закон України «Про особливий порядок місцевого самоврядування в окремих регіонах Донецької та Луганської областей» є де-факто імплементацією Мінська II без прямого посилення на угоду. Москва робить це для того, щоб стримувати Україну в правовому полі та нав'язувати ситуацію, в якій Кремль досягає своєї мети, використовуючи щире прагнення України досягти миру у штучно створеному РФ конфлікті.

Ключові слова: руйнівні юридичні операції, правовійна, Україна, український конфлікт, Мінський протокол, Нормандський формат, Тристороння контактна група, формула Штайнмаєра, Донбас, Донецька народна республіка (ДНР), Луганська народна республіка (ЛНР), медіація конфлікту, миробудування, суперництво великих держав.

Матеріал надійшов 15.10.2019