

Bernadette Sangmeister

THE (IN-) EFFECTIVENESS OF INTERNATIONAL LAW

**A CRITICAL ANALYSIS OF THE RATIONAL CHOICE
THEORY IN THE LIGHT OF THE UKRAINIAN CRISIS 2014**

Research Paper

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Abstract

The aim of this research paper is to explore the role and content of the rational choice theory in international law and to critically analyse this theory in the light of the current Ukrainian crisis: Does the Ukrainian crisis 2014 prove rational choice theorists right? Can Russia's military intervention in Crimea and the annexation of this region be seen as the failure of the UN Charter and therefore, as an evidence for the ineffectiveness of international law? Is international law effective at all?

It will be argued that the rational choice theory cannot be seen as proven right in the light of the Ukrainian crisis 2014: Although, with regard to Russia's unlawful military intervention in Crimea, the current crisis might at first glance be considered as validating the rational choice theory and the general ineffectiveness of international law, there is as well some evidence to be found in the actions and reactions of Russia and other nation-states and institutions from which one can deduce that international law does influence states' behaviours, that states are not merely acting out of self-interest but also out of international legal obligations and that thus the current crisis may rather serve as an example of the (overall) effectiveness of international law.

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I Introduction

1. Russia's military intervention in Ukraine violates international law.
2. No one is going to do anything about it.¹

These statements by Eric Posner, made in the wake of the Russian military intervention in Ukraine in late February 2014, illustrate the sceptical view of rational choice theorists on the effectiveness of international law. According to rational choice scholars, international law has a minor influence on the behaviour of states, for it is only complied with when states have a rational self-interest in following international legal norms.²

The current debate about the validity and legality of certain states' or institutions' actions in the Ukrainian crisis with regard to international law reminds the world of the problematic special nature of international law as a body of law aiming at governing international relations between sovereign states (and other non-state subjects such as international organisations) but not providing for coercive enforcement mechanisms.³ In contrast to national legal systems, the international legal system lacks institutions: there is no formal legislative body, no executive police force and no judicial body with general compulsory jurisdiction.⁴

Thus, when a state does not comply with international law, only the following three (non-coercive) enforcement mechanisms can be considered: firstly, the action taken by the malefactor might be judicially scrutinised through ad hoc tribunals, the International Court of Justice (ICJ) or the European Court of Human Rights (ECtHR);⁵ secondly, if having adopted an authorizing resolution, the UN Security Council might take an "enforcement action" against the misbehaving state, which may consist of a military, an economic or another diplomatic, political or social measure; thirdly, other states might take actions on a bi- or multilateral level and deprive the malefactor of certain rights and privileges, affecting the state directly, e.g. through expulsion or suspension of the state itself from inter-governmental organisations, or affecting the state indirectly, e.g. through asset freezes for certain individuals or companies of the state in question.⁶

If the misbehaving state is a "powerful" one, which is economically and militarily relatively independent from other states, the efficiency of the aforementioned enforcement mechanisms might be called into question. This problem is increased if the misbehaving state is additionally one of the five permanent members of the UN Security Council,⁷ who have a right to veto any resolution by the UN Security Council.

¹ Eric Posner "Russia's Military Intervention in Ukraine: International Law Implications" (1 March 2014) Eric Posner <www.ericposner.com>.

² See e.g. Jack Goldsmith and Eric Posner *The Limits of International Law* (Oxford University Press, New York, 2005) at 225.

³ See Martin Dixon *Textbook on International Law* (7th ed, Oxford University Press, Oxford, 2013) at 3 and 6.

⁴ At 14.

⁵ Note that the ad hoc tribunals and the ICC prosecute individuals (political leaders) and not states.

⁶ See Dixon, above n 3, at 4 et seqq.

⁷ The Security Council's five permanent members are China, France, Russia, the UK and the US.

This lack of coercive enforcement mechanisms, the lack of certainty with regard to certain rules of international law and the fact that violations of international law have taken place throughout history have contributed to a sceptical attitude to the effectiveness of international law.⁸

Considering the weaknesses of international law one can legitimately ask the question if the rational choice theory can be proven true.

This research paper aims at explaining and critiquing the rational choice theory in international law (part II) before evaluating the validity of this theory in the current Ukrainian crisis (parts III and IV): Does the Ukrainian crisis 2014 prove rational choice theorists right? Can Russia's military intervention in Crimea and the annexation of Crimea by Russia be seen as "the failure of the [UN] Charter"⁹ and therefore, as an evidence for the ineffectiveness of international law?

II Rational Choice Theory in International Law – The Approach of Goldsmith and Posner

As mentioned above, one characteristic of international law - in contrast to national law - is that it has practically no coercive enforcement mechanisms. Recent historical events, like the military intervention of NATO in Kosovo in 1999 or that of the US, the UK and their allies in Iraq in 2003, where international law was violated, have triggered increasing conceptual and empirical studies about the effectiveness of international law. The main focus of these studies has been on the compliance of states with international law.

The rational choice theory, which stems from the field of international relations and focuses on the positive analysis of the existing international law system in order to theorize it by applying economic methods, can be conceived as one of the compliance-focused theories having gained prominence since 2000.¹⁰

A Theory and Assumptions

Eric Goldsmith and Eric Posner, two American experts in international law, were the first scholars to apply economic analysis to international law while attempting to conceptualize the rational choice theory extensively for international law scholarship in their book *The Limits of International Law*¹¹ in 2005. Goldsmith and Posner's approach uses game theoretical models in terms of states' interactions as a basis for their argumentation and explicitly draws on rational choice methodology, assuming that "states act rationally to maximize their interests" and that their preferences in terms of outcomes are "consistent, complete and transitive".¹²

⁸ See Dixon, above n 3, at 15 et seq.

⁹ Julian Ku "Russia Reminds the World (and International Lawyers) of the Limits of International Law" (2 March 2014) *Opinio Juris* <www.opiniojuris.org>.

¹⁰ See Robert Howse and Ruti Teitel "Beyond Compliance: Rethinking Why International Law Really Matters" (2010) 1 *Global Policy* 127 at 128.

¹¹ Goldsmith and Posner, above n 2.

¹² At 7.

The main thesis of their rational choice theory in international law is that states are ultimately driven by rational self-interest and not by any international legal or moral obligations.¹³ By stating that “international law does not pull states toward compliance contrary to their interests, and [that] the possibilities for what international law can achieve are limited”¹⁴ Posner and Goldsmith claim that there is no independent effect of international law and a state’s conduct. Accordingly, they argue that compliance with international law only takes place if there is a (long- or short-term) self-interest of the state in following international law.¹⁵

The best explanation for when and why states comply with international law is not that states have internalized international law, or have a habit of complying with it, or are drawn by its moral pull, but simply that states act out of self-interest.

It must be noted that this theory is based on the assumption that there is no primary self-interest of states in complying with international law.¹⁶ Even though Goldsmith and Posner emphasise that their approach must be distinguished from the realists’ approach in that the content of a state’s interest is not limited to security and wealth (and can vary by context),¹⁷ the two rational choice theorists explicitly exclude the compliance with international law as a preference from the state’s interest calculation.¹⁸ They dismiss this preference for the following two reasons: Firstly, on the grounds of assuming that states are ultimately rather driven by other interests, such as security or economic growth, which are considered to be of a higher rank; secondly, for the methodological reason of being “unenlightening to explain international law compliance in terms of a preference for complying with international law”.¹⁹

Another important aspect of their rational choice theory is the idea that international law is a mere product of states’ conducts, an instrument for promoting national policy or rather an endogenous outgrowth of national state interests.²⁰ Due to this approach, international law is considered as a delicate matter likely to change according to the will of the respective states. With regard to customary international law, for instance, the two authors challenge the traditional view on customary international law as a reflection of universal behavioural regularities but argue that customary international law is rather a reflection of either coincidence of interest or bilateral cooperation, coordination or coercion.²¹

Similarly, Goldsmith and Posner claim that international treaties can be said to be a reflection of one of these four states’ interactions. However, with regard to treaties, the proponents of the rational choice theory also argue that – in contrast to customary international law – these instruments are more likely to foster cooperation and coordination among states. Nevertheless,

¹³ At 10 et seqq.

¹⁴ At 13.

¹⁵ At 225.

¹⁶ At 7.

¹⁷ At 6.

¹⁸ At 7.

¹⁹ At 9 et seq.

²⁰ At 13.

²¹ Ibid.

it must be noted that according to them, the effects of what international treaties can achieve are again limited.²²

In short, on this account, international law can only be seen as effective in cases where it is in the states' self-interest to comply with international law.²³ Goldsmith and Posner even claim that "powerful states may do better by violating international law when doing so shows that they will retaliate against threats to national security".²⁴

B Critiquing this Approach

There are three major concerns about Goldsmith and Posner's rational choice theory, which will be discussed in the following:

Firstly, a concern can be raised against Goldsmith and Posner's hypothesis that international law is a mere reflection of states' interactions with no universal regularities. Drawing on art 38 of the Statute of the International Court of Justice, which provides a (partial) list of sources of international law, one can say that it is nowadays acknowledged in international law that there are not only positivist laws, derived from political authority and obligations and thus likely to change, but that there are also universal values, serving as the basis for laws among nations, such as human rights, which are not subject to change.²⁵ Therefore, the stance taken by Goldsmith and Posner has to be seen critically, but since this concern is not decisive for answering the question about the validity of the rational choice theory with regard to the effectiveness of international law, this critical point will not be further discussed in this paper.

Secondly, it might be questioned in how far states can really be said to act always rationally. Cognitive psychologists point out that states are acting through political leaders, thus human beings, who may well make cognitive errors.²⁶ This criticism implies that economic analysis and game theories cannot have a prominent place in the analysis of the effectiveness of international law. Even Goldsmith and Posner themselves admit that the rational choice of states is a simplifying assumption, which does not claim to be accurate in every situation.²⁷ Thus, for lack of a more adequate working assumption, the rational choice theory might have a valid position in the analysis of international law if one does not focus on the literal meaning of *rationality*, but rather on the assumption of states acting out of self-interest, which Goldsmith and Posner do.

²² See at 225.

²³ Ibid.

²⁴ At 103.

²⁵ See Statute of the International Court of Justice, art 38 (1): "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply ... (c) the general principles of law recognised by civilised nations". The Statute is an integral part of the Charter of the United Nations (UN Charter) according to Chapter XIV of the UN Charter.

²⁶ Rose McDermott *Risk-Taking in International Politics: Prospect Theory in American Foreign Policy* (University of Michigan Press, Ann Arbor, 1998) at 173 et seq.

²⁷ See Goldsmith and Posner, above n 2, at 8.

Thirdly, another concern can be expressed with regard to the scope of the self-interest of a state as introduced by Goldsmith and Posner. From a constructivist perspective, according to which states have no fixed preferences but interests of states are rather influenced by ideas, culture, norms and law,²⁸ the assumption of Goldsmith and Posner that states' interests are an "unexplained given" and not influenced by international law,²⁹ might be seen critically. Furthermore, it might be questioned why an intrinsic interest in complying with international law is completely excluded as a preference of states in the rational choice theory. Even though it might be true that sometimes, a self-interest of a state, such as an interest in economic wealth, might prevail over the obedience to international law, it might also be true that at other times, the state has a self-interest in complying with international law that prevails over other national interests. Are Goldsmith and Posner right in claiming that there is no normative pull that drives states to legality according to the principle of *pacta sunt servanda*?

Critics of the rational choice theory, such as Thomas Franck, claim that international law does have an influence on a state's behaviour.³⁰ They consider lawfulness to be an endogenous preference of political leaders.³¹ The fact that - from time to time - states fail to comply with the norms of international law,³² seems to support Posner's and Goldsmith's view that there is no such normative pull.³³ However, even such violation of international law does not necessarily mean that the states are not highly influenced by international law in terms of their actions.³⁴ Some scholars maintain that international law has demonstrably altered "the focus and agenda of states and non-state actors in dealing with conflict and post-conflict transitions".³⁵

The degree of the normative compliance pull might, however, vary. According to Franck, it is dependent on what he calls the degree of "legitimacy" of the rule of (international) law. International law rules which come into existence through a transparent, fair and inclusive process are highly legitimate and can strengthen this normative compliance pull.³⁶ Franck's main focus within the legitimacy is on the determinacy of the rule, which makes the rule transparent by generating an ascertainable understanding of what the rule permits and prohibits.³⁷ Hence, hereafter, the failure to comply with international law might be due to a

²⁸ See e.g. Alexander Wendt *Social Theory of International Politics* (Cambridge University Press, Cambridge, 1999) at 120 et seqq.

²⁹ Goldsmith and Posner, above n 2, at 9.

³⁰ Thomas Franck "The Power of Legitimacy and the Legitimacy of Power: International Law in Age of Power Disequilibrium" (2006) 100 AJOL 88 at 91 et seq.; see also Howse and Teitel, above n 10, at 132.

³¹ See e.g. Ryan Goodman and Derek Jinks *Socializing States: Promoting Human Rights through International Law* (Oxford University Press, New York, 2013).

³² Franck notes in this context that noncompliance of states is "very much the exception", contrary to the common perception, see Franck, above n 30, at 92.

³³ See Goldsmith and Posner, above n 2, at 15.

³⁴ Franck, above n 30, at 91 et seq.; Howse and Teitel, above n 10, at 132.

³⁵ Howse and Teitel, above n 10, at 134.

³⁶ Thomas Franck *The Power of Legitimacy Among Nations* (Oxford University Press, New York, Oxford, 1990) at 24 et seqq.

³⁷ See Franck, above n 30, at 94. See also Jutta Brunée and Stephen Toope *Legitimacy and Legality in International Law* (Cambridge University Press, Cambridge, 2010) at 350 et seq., who articulate a theory of

lack of clarity of the relevant norm, which, however, does not generally undermine the ability of international rules to create a normative pull. Franck points out in this context that an indicator of the (international) law's legitimacy is that "those who violate its strictures invariably claim not to be doing so", by "distorting the law's meaning, or by lying about the facts of their violation".³⁸

In this context, it is noteworthy that even other rational choice theorists, such as Andrew Guzman, have criticised Goldsmith and Posner's sceptical approach when it comes to the significance of multilateral agreements in international law.³⁹ Goldsmith and Posner say that they are "sceptical that genuine multinational collective action problems can be solved by treaty, especially when a large number of states are involved."⁴⁰ According to them, treaty obligations are only complied with when states fear retaliation from other states, a failure of coordination or reputational loss.⁴¹ The fear of reputational loss is not conceived of as a major factor by the two scholars.⁴² Guzman criticises this radical approach as understating "the potential role of reciprocity and retaliation" and ignoring the fact that reputational sanctions are "an alternative compliance-promoting mechanism in multilateral agreements".⁴³ Thus, even for rational choice scholars, Goldsmith and Posner's approach seems quite radical.⁴⁴ A clear distinction between their approach and that of the realists, who claim that international law does not matter at all, since states compete in an anarchical international system, to which international law is epiphenomenal,⁴⁵ cannot be drawn.

To conclude, especially the last concern raised with regard to the scope of states' interest and the role of international law for states' behaviours casts some doubt on the main thesis of the rational choice theory that international law can only be seen as effective in cases where it is in the states' rational self-interest to comply with international law.

international legal obligations, according to which shared understandings and clear legal norms are crucial for states' adherence to international law.

³⁸ Franck, above n 30, at 95 et seq. Compare with Howse and Teitel, above n 10, at 134, who argue that political leaders invest in rhetoric in order to justify their actions not only to other states but also to their own citizens, wherefore Goldsmith and Posner's point that self-interest of states were exogenous to the preferences of citizens could hardly be upheld.

³⁹ Andrew Guzman *How International Law Works: A Rational Choice Theory* (Oxford University Press, New York, 2008) at 63 et seqq; see also Joel Trachtman *The Economic Structure of International Law* (Harvard University Press, Cambridge, 2008) at 113 et seq. for the influence of customary international law on states' actions.

⁴⁰ Goldsmith and Posner, above n 2, at 87.

⁴¹ At 90.

⁴² See at 90 et seq.

⁴³ See Guzman, above n 39, at 64.

⁴⁴ See Goldsmith and Posner, above n 2, at 17, who admit that they are "more sceptical about the role of international law in advancing international cooperation than ... most rational choice-minded lawyers".

⁴⁵ See e.g. John Mearsheimer "The False Promise of International Institutions" (1994) 19 *International Security* 5 at 11 et seqq.

III Factual Background of the Ukrainian Crisis

Before the rational choice theory can be evaluated in the light of the Ukrainian crisis, the key events of the on-going Ukrainian Crisis from November 2013 to June 2014 will be presented in the following.⁴⁶

A November 2013 - March 2014: From an Internal to an International Conflict

The current Ukrainian crisis was triggered by the decision of the (ousted) Ukrainian president Viktor Yanukovych to suspend preparations for an Association Agreement and a Free Trade Agreement of Ukraine with the European Union on 21 November 2013 in order to strengthen Ukraine's ties with Russia.⁴⁷ In the aftermath of that decision, mass protests on Kiev's streets began, known as the "Euromaidan"⁴⁸ movement, demanding for a closer European integration of Ukraine.⁴⁹

Before, Ukraine, with its economy in dire straits, had had two options to stay afloat, accepting loan offers from either the West or Russia: the western offer included the possibility of entering the EU in the future whereas the Russian offer included the possibility of forming part of Vladimir Putin's visionary Eurasian (Economic) Union, i.e. a customs union with Russia, Kazakhstan and Belarus.⁵⁰ Yanukovych, who belongs to the Party of Regions, which ideologically aims at defending and upholding the rights of ethnic Russians and Russian speakers in Ukraine, chose the latter option in the end.⁵¹

The "Euromaidan" protests led to street fights between pro-EU Ukrainians and special police units, the worst day of violence being the 20 February 2014, which resulted in the death of at least 88 people within 48 hours. On 22 February 2014, Ukraine's president Yanukovych fled Ukraine and the Parliament voted for removing Yanukovych from power and announced new elections for 25 May 2014.⁵² Olexander Turchynov was appointed as interim president and a new government under the leadership of Arseniy Yatsenuk was formed by the former opposition.⁵³

⁴⁶ This paper considers events up to 19 June 2014.

⁴⁷ "The Ukrainian Crisis" *Economic & Political Weekly* (online ed, Mumbai, 15 March 2014).

⁴⁸ The term "Euromaidan" originates from a Twitter hashtag and is a composition of the two words "Euro", which stands for Europe, and "maidan", which refers to the "Maidan Nezalezhnosti" (= Independence square) in Kiev, where the main protests have taken place, see Jim Heintz "Ukraine's Euromaidan: What's in a name?" *Kyiv Post* / Associated Press (online ed, Kiev, 2 December 2013).

⁴⁹ Above n 47.

⁵⁰ Anuradha Chenoy "Ukraine's Conflict and Resolution" *Economic & Political Weekly* (online ed, Mumbai, 22 March 2014). Note that the latter offer was made by Russia in December 2013.

⁵¹ Ibid.

⁵² Note that the legality of these actions is contested for not having taken place in accordance with the impeachment process stipulated in the Ukrainian constitution and Yanukovych still claiming to be the legitimate president of Ukraine.

⁵³ See "Ukraine crisis timeline" (7 June 2014) BBC News <www.bbc.com>

Many ethnic Russians and Russian-speaking Ukrainian nationals in the east and south of Ukraine who had supported Yanukovich protested against the new interim government, seeing interim prime minister Yatsenuk as representing only “the Ukrainian-speaking western-oriented mass”, which they believed to constitute a threat to them,⁵⁴ and accusing the interim government of having a “worrying relationship” with the “far-right openly neo-Nazi groups”.⁵⁵

The crisis in Crimea unfolded in the aftermath of the Ukrainian Parliament’s decision on 23 February 2014 to adopt a bill repealing an act from 2012⁵⁶ which gave minority languages such as Russian the status of official “regional languages”. Even though the acting president Turchynov vetoed that bill in the following, this could not calm down the emotions. On 26 February 2014, pro-Russian protesters clashed with supporters of the “Euromaidan” movement and Crimean Tatars in Crimea.⁵⁷ The “pro-Russian” sentiment in Crimea can be explained by the fact that nowadays the majority of the Crimean population are ethnic Russians,⁵⁸ a factor which is due to the circumstance that Russia has been the dominant power in that region over the last two centuries.⁵⁹

The Ukrainian crisis became an international conflict in late February 2014, with pro-Russian forces gradually taking control of Crimea. After Russian troops had seized the government buildings in Crimea on 27 February, the US warned Russia not to intervene militarily in Ukraine. Russia claimed to protect its fleet position in line with the Black Sea Fleet Agreement.⁶⁰

Subsequently on the same day, the Crimean parliament decided to hold a referendum on the status of Crimea and to replace its prime minister with the pro-Russian Sergej Aksjonov. At the request of the latter and the ousted Ukrainian president Yanukovich, the Russian Parliament approved Putin’s suggestion of using military power in Ukraine on 1 March in order to protect Russian citizens in eastern Ukraine. Just one day later, hundreds of Russian troops headed to the Crimean peninsula and took it over without firing any shots. Russia’s actions were condemned by many states and institutions including NATO, the US and the EU, and Russia was threatened with sanctions.⁶¹

After a majority of the votes in the Crimean referendum had been in favour of Crimea joining the Russian Federation and after the Crimean Parliament had officially declared Crimea

⁵⁴ Chenoy, above n 50.

⁵⁵ Boris Mamlyuk “Ukraine Insta-Symposium: Intervention and Colonialism as Responses to Alleged Fascism” (17 March 2014) *Opinio Juris* <www.opiniojuris.org>.

⁵⁶ On the Principles of the State Language Policy Act 2012 (Ukraine).

⁵⁷ See “Timeline: Ukraine’s political crisis” *Aljazeera* (15 May 2014) <www.aljazeera.com>.

⁵⁸ Crimea has undergone ethnical changes in modern history from the Crimean Tatars forming the majority of the Crimean population in 1783 to the present situation of having ethnic Russians as the majority of the population (58%), followed by Ukrainians (24%), Tatars (12%) and others (6%) according to the 2001 census.

⁵⁹ “Why Crimea is so dangerous” *BBC News* (11 March 2014) <www.bbc.com>.

⁶⁰ See above n 57.

⁶¹ *Ibid.*

independent from Ukraine, the Russian leader and the new Crimean leader signed a treaty declaring Crimea an independent, federal state of the Russian Federation on 18 March.⁶²

Ukraine and a lot of western countries consider the referendum illegal, having taken place under the omnipresence of Russian troops and without the participation of the Crimean Tatars. On March 27, the UN General Assembly passed a non-binding resolution, declaring the Crimean referendum invalid.⁶³ With an absolute majority of UN member states in favour of this resolution, the predominant view of these nation-states is that Ukraine continues its sovereignty over Crimea. Thus, the current legal status of Crimea is unclear.

In the aftermath of Crimea's annexation, both economic and symbolic sanctions have been imposed against Russia by the international community, such as travel bans and asset freezes for individuals and the exclusion of Russia from the G8.⁶⁴ On March 31, Putin ordered a "partial withdrawal" of Russian troops from the Ukrainian border.⁶⁵

B April 2014 – June 2014: Further "Pro-Russian Unrest" in Eastern Ukraine

The annexation of Crimea by Russia has caused further unrest in the (south-) eastern parts of Ukraine, where ethnic Russians and Russian-speakers are highly represented.⁶⁶ Since 6 April 2014, a development labelled as "pro-Russian unrest" has taken place in the regions of Donetsk, Luhansk, Kharkiv and Odessa.⁶⁷ In contrast to the unrest in Crimea, in these "pro-Russian unrest" in the east of Ukraine, no "regular" Russian soldier has been "visible".⁶⁸ Since the beginning of that unrest the West has accused Russia of supplying the pro-Russian separatists with weapons.⁶⁹

From the beginning of April 2014 on, pro-Russian separatists stormed official (government) buildings in the aforementioned (south-) eastern regions of Ukraine, occupied them and demanded greater autonomy, independence and / or referendums on secession for their regions.⁷⁰ Acting president Tymoshenko's response to these occupations was a launch of several "anti-terror operations" against these pro-Russian separatists, which, then, caused further violence in the respective regions.⁷¹

⁶² Ibid.

⁶³ *Territorial integrity of Ukraine* GA Res 68/262, A/Res 68/262 (2014).

⁶⁴ See above n 57.

⁶⁵ See above n 53.

⁶⁶ According to the census from 2001, unlike in the rest of the country, the ethnic Russian population is significant in the east and south of Ukraine, varying from over 10% to 40%.

⁶⁷ See e.g. Tamila Vashalomidze "Timeline: Ukraine's pro-Russian unrest" (16 June 2014) Aljazeera <www.aljazeera.com>.

⁶⁸ See Andrew Kramer "Russians Find Few Barriers to Joining Ukraine Battle" (9 June 2014) The New York Times (online ed, New York, 9 June 2014).

⁶⁹ See "Dozens dead as rebels down Ukraine army plane" (14 June 2014) Aljazeera <www.aljazeera.com>.

⁷⁰ See above n 57.

⁷¹ See Vashalomidze, above n 67.

In order to “deescalate” the Ukrainian crisis, Ukraine, Russia, the US and the EU met in Geneva and declared in their joint Geneva Statement of 17 April generally that “all sides must refrain from any violence, intimidation or provocative actions” and concretely that “all illegal armed groups must be disarmed and all illegally seized buildings must be returned to legitimate owners”, while amnesty would be granted to all the protestors who were not guilty of capital crimes.⁷² Furthermore, the four parties agreed on the Organization for Security and Co-operation in Europe (OSCE) as the monitoring body for the de-escalation measures and committed the US, the EU and Russia to support this mission.⁷³

The implementation of the “de-escalation plan”, however, has been difficult since pro-Russian separatists continued occupying government buildings, which caused more fighting between the separatists and Ukrainian government troops and led to hundreds of dead people on both sides.⁷⁴ Russia condemned the violent actions of the Ukrainian government against pro-Russian separatists in late April and called the Geneva peace plan “dead”. Around the same time, the Russian army started new military exercises at its border with Ukraine. The US and the EU imposed new sanctions on Russia and warned Russia not to prevent the planned presidential elections in Ukraine.⁷⁵ At the beginning of May, the OSCE proposed a roadmap for the implementation of the Geneva Statement to all four parties,⁷⁶ which included national dialogue roundtables led by the Ukrainian government⁷⁷ and provided for holding free and fair presidential elections in Ukraine.⁷⁸

After referendums in the regions of Donetsk and Luhansk had been held on 11 May with the majority of votes in favour of declaring these regions independent from Ukraine, pro-Russian separatists declared these regions independent and asked to join the Russian Federation. The Ukrainian government and the West considered these referendums illegal.⁷⁹ So far, none of these regions have been annexed by the Russian Federation as planned by the separatists. On 7 May, before the referendums were held, Russia’s president Putin had called on pro-Russian separatists to postpone the referendums in these regions in order to encourage a dialogue in Ukraine.⁸⁰ On the same day, Putin had also declared that the upcoming presidential elections in Ukraine were a step “into the right direction”.⁸¹

⁷² Joint Statement: Geneva Statement on Ukraine (17 April 2014), available at <www.eeas.europa.eu/statements/docs/2014/140417_01_en.pdf>, at 1.

⁷³ At 1 et seq.

⁷⁴ See Vasholomidze, above n 67.

⁷⁵ See above n 57.

⁷⁶ “OSCE Response to the Crisis in Ukraine” (29 May 2014) OSCE <www.osce.org> at 1.

⁷⁷ Three of these national dialogue roundtables have already taken place in Ukraine in May 2014, however, every time, without participation of Russian separatists.

⁷⁸ See “Swiss Chairperson-in-Office receives positive responses to OSCE Roadmap, says implementation is well underway” (12 May 2014) OSCE <www.osce.org>.

⁷⁹ See above n 53.

⁸⁰ Ibid.

⁸¹ Ibid.

On 25 May, the presidential elections were held in Ukraine and resulted in Petro Poroshenko being the new president of Ukraine.⁸² Since Poroshenko is unaffiliated to any political party, but has political experience as a former minister under both Yushchenko⁸³ and Yanukovich, he is considered to be a “pragmatic politician who sees Ukraine’s future in Europe but hopes to mend relations with Russia”.⁸⁴ His inauguration on 7 June was attended by more than 50 foreign delegations, inter alia from the US, the EU, Russia⁸⁵, Belarus and China.⁸⁶ In his inauguration speech, Poroshenko demanded a quick end of the crisis and peace for Ukraine. He expressed his will to “preserve and strengthen Ukraine’s unity”,⁸⁷ to sign the economic Association Agreement with the EU, which would mean “the first step” to realise his vision for Ukraine joining the EU in the future, and his will not to give up on Crimea, for “Crimea is and will be Ukrainian”.⁸⁸

One of Poroshenko’s first actions as the new Ukrainian president was the presentation of a peace plan, which envisaged the recognition of the Ukrainian presidential elections by Russia, the cease-fire by the pro- Russian separatists and the establishment of a “humanitarian corridor for civilians who are not involved in the conflict”.⁸⁹ After talks between Ukraine and Russia had been mediated by the OSCE, the new Ukrainian president seemed to have reached a “mutual understanding” between the two states on 9 June concerning the ending of violence in the east of Ukraine.⁹⁰ In this context it must be noted that Putin had already announced on 19 May 2014 that he had ordered Russian troops back from near the eastern border of Ukraine.⁹¹

IV The Ukrainian Crisis – Evidence for the Validity of the Rational Choice Theory?

In this part, it will be examined if the Ukrainian crisis 2014 can serve as evidence for the validity of the rational choice theory, according to which international law can be seen as effective only in cases where it is in the states’ self-interest to comply with international law.

⁸² Note that the election took place with most polling stations closed in the east of the country, see above n 53.

⁸³ Note that he also was one of the main financial supporters of both the Orange Revolution and the Euromaidan protests.

⁸⁴ See “Profile: Ukraine ‘Chocolate King’ President Poroshenko” (25 May 2014) BBC News <www.bbc.com>.

⁸⁵ Note that Russia’s president Putin had not been invited, see “Putin Not Invited to Poroshenko’s Inauguration as Ukraine President, Peskov Says” (29 May 2014) The Moscow Times (online ed, Moscow, 29 May 2014). Instead, the Ambassador for Russia to Ukraine, Mikhail Zurabov, was present at the inauguration ceremony.

⁸⁶ See “Ukraine: International Recognition for President Poroshenko” (7 June 2014) Euronews <www.euronews.com>.

⁸⁷ Note that in this context he guaranteed the unhindered development of Russian and other minority languages in Ukraine, but aimed at establishing Ukrainian as the only official state language within Ukraine.

⁸⁸ See “Excerpts from Poroshenko’s Speech” (7 June 2014) BBC News Europe <www.bbc.com>.

⁸⁹ See “Poroshenko doesn’t rule out roundtable in Donetsk involving parties to conflict” (12 June 2014) interfax-Ukraine <www.en.interfax.com.ua>.

⁹⁰ See Timothy Heritage “Ukraine sees ‘understanding’ with Russia on peace moves” (9 June 2014) Reuters <www.reuters.com>.

⁹¹ See above n 53.

The analysis follows a two step-approach: firstly, Russia's actions in Crimea will be assessed legally and secondly, the results will be used for an evaluation of the rational choice theory in the Ukrainian crisis.

A Legal Assessment of Russia's Intervention in Crimea

The preliminary question is if Russia violated international law with its military intervention in Crimea with regard to the use of force. The prohibition of the threat or use of force is one of the cornerstones of the contemporary international legal system, laid down in art 2 (4) of the UN Charter.⁹² This article reflects the principle of the inviolability of a state's sovereignty, which is why the Charter explicitly just provides for derogations from this principle in the following two cases: as an act of self-defence pursuant to art 51 UN Charter or with the authorisation of the Security Council under Chapter VII of the UN Charter.⁹³

Art 2 (4) of the UN Charter prohibits all member states from engaging in any "threat or use of force against the territorial integrity or political independence of any state".⁹⁴ Even though it might be arguable in how far Russia as a member state of the UN Charter "used" force by merely sending troops to the Crimean region without them shooting, this action could at least be considered as a "threat" of force against the territorial integrity of Ukraine.⁹⁵ In this context, it must be noted that the Russian Parliament explicitly granted Putin the permission to use armed force in Ukraine.⁹⁶

President Putin himself denied having militarily intervened in Crimea and claimed to have acted "in line with an international agreement" by referring to the Black Sea Fleet Agreement between Ukraine and Russia.⁹⁷ However, the Black Sea Fleet Agreement, which allows some Russian military to be lawfully in Crimea, does not cover the major increase of Russian troops and their movements to other than the agreed bases without the consent of the Ukrainian government.⁹⁸

Russia's actions could nonetheless be justified by one of the exceptions to the prohibition of force laid down in art 2 (4) UN Charter. Even though none of the written exceptions provided by the Charter can be invoked here, the following unwritten exceptions have to be considered:

⁹² Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds) *The Charter of the United Nations: A Commentary* (3rd ed, Oxford University Press, Oxford, 2012) vol 1 at [1] of art 2 (4).

⁹³ See at [44-51] of art. 2 (4). Note that there is a third written exception concerning measures against former enemy states according to art 107 of the UN Charter, which, however, is said to have become obsolete or rather void.

⁹⁴ Charter of the United Nations, article 2 (4).

⁹⁵ Contrast Vladimir Putin, president of Russia (speech to the State Duma deputies, Federation Council members, heads of Russian regions and civil society representatives, Moscow, 18 March 2014), <www.eng.kremlin.ru/transcripts/6889>: "I cannot recall a single case in [the] history of intervention without a single shot being fired and with no human casualties."

⁹⁶ See above n 57.

⁹⁷ See Putin, above n 95.

⁹⁸ See Simon Chesterman "Crimean War 2.0: Ukraine and International Law" (14 March 2014) Social Science Research Network <www.papers.ssrn.com>.

- a “humanitarian intervention” / “responsibility to protect” (R2P) intervention to protect ethnic Russians / Russian nationals abroad in the territory of another country from crimes against humanity and
- an “intervention by invitation”.

Regardless of the highly disputed character of these unwritten exceptions, it must be noted that none of these two exceptions were given in this case:

Firstly, the circumstances justifying a humanitarian intervention or a “R2P” to protect ethnic Russians or Russian nationals respectively was not given as – until the military intervention of Russia in Crimea - there was neither an escalation of violence against Russian minorities nor a situation in which the human rights of the Russian minority in Ukraine were at stake after the new Ukrainian government had taken over:⁹⁹ even though it can be argued that there had been a promotion of a nationalistic agenda against Russian minorities such as the attempt to abolish Russian as a (local) minority language in Ukraine, it must be noted that this bill was finally vetoed by the new acting president Turchynov in order to accommodate the interests of all ethnic groups and minorities.¹⁰⁰

Secondly, an “intervention upon invitation” cannot serve as a justification for Russia’s intervention either. An “intervention upon invitation” can only be a justification in exceptional circumstances, requiring “no uncertainty” in terms of the “actual presentation of such a request by a duly constituted government”.¹⁰¹ The request to intervene made by the Prime Minister of Crimea can only be qualified as a non-sufficient local one, for Crimea was part of Ukraine at that time. The other request made by the ousted president Yanukovich – regardless of the question if his removal was valid under Ukrainian constitutional law – simply *de facto* lacked certainty concerning himself as the head of state representing the Ukrainian government.¹⁰²

For these reasons, to conclude, Russia’s military intervention in Crimea constituted a violation of art 2 (4) of the UN Charter, thus, a violation of international law.

⁹⁹ See *Report on the Human Rights Situation in Ukraine* Office of the High Commissioner for Human Rights (15 April 2014), available at <www.ohchr.org> at 3 et seq. ; see also Mark Kersten “Does Russia have a ‘responsibility to protect’ Ukraine? Don’t buy it” *The Globe and Mail* (online ed, Toronto, 4 March 2014).

¹⁰⁰ See “Ukraine’s parliament-appointed acting president says language law to stay effective” (1 March 2014) ITAR-TASS Russia News Agency <www.en.itar-tass.com>.

¹⁰¹ See *Report of the Special Committee on the Problem of Hungary* GA XI Supplement 18 A/3592 (1957) at [266].

¹⁰² See Daniel Wisheart “The Crisis in Ukraine and the Prohibition of the Use of Force: A Legal Basis for Russia’s Intervention?” (4 March 2014) EJIL:Talk! <www.ejiltalk.org>, who argues that Yanukovich lacked “effective control” of the situation in Ukraine. See also Grigory Vaypan “(Un)Invited Guests: The Validity of Russia’s Argument on Intervention by Invitation” (5 March 2014) *Cambridge Journal of International and Comparative Law* <www.cjicl.org.uk> , who argues that under both the effective control theory as well as the popular sovereignty theory the validity of the “intervention by invitation” argument brought up by Russia is highly doubtful.

Furthermore, a second violation of international law by Russia might be seen in its action of annexing Crimea, if one qualifies this action as a “seizure of territory under the threat of force”.¹⁰³ The predominant view in international legal scholarship is that the Crimean declaration of independence, which might have justified Crimea’s right to secession under international law, was coming about as a result of an “unfree” referendum under the modalities of international law standards due to Russia’s unlawful use of force and is thus invalid, since the use of force is seen as a factor precluding a nation from declaring independence.¹⁰⁴ However, since this line of argumentation is not uncontested as the factual situation under which the referendum took place is not entirely clear,¹⁰⁵ and more importantly, since the legal evaluation of Russia’s annexation is not decisive for the purpose of this paper, the annexation of Crimea will not be legally assessed any further.

B Validity of the Rational Choice Theory in the Ukrainian Crisis

The question arises if the fact that Russia violated international law with regard to its intervention in Crimea (and its annexation) can prove the rational choice theory right, according to which states are ultimately driven by self-interest and not by international legal obligations.

1 Pros: Russia’s Violating International Law out of Self-Interest

At first glance, Russia’s actions in Crimea seem to prove this theory right. The ultimate drive for Russia’s military intervention in Crimea (and its annexation) might be seen in Russia’s self-interest in ensuring its economic growth and the establishment of the Eurasian Union as a counterpart to the European Union and the USA.¹⁰⁶ In his speech from 18 March 2014, Putin emphasised that Russia had “its own national interests” and accused the West of having interfered with the development of the Eurasian integration process of Russia and Ukraine since 2004.¹⁰⁷ The UN Charter and other international legal instruments could obviously not compel Russia to comply with international law, being contrary to Russia’s economic self-interest.

¹⁰³ See Anne Peters “Sense and Nonsense of Territorial Referendums in Ukraine, and Why the 16 March Referendum in Crimea Does Not Justify Crimea’s Alteration of Territorial Status under International Law” (16 April 2014) EJIL:Talk! <www.ejiltalk.org>.

¹⁰⁴ See Gregory Fox “The Russia-Crimea Treaty” (20 March 2014) EJIL:Talk! <www.ejiltalk.org>, who makes reference to the ICJ’s Advisory Opinion on Kosovo of 22 July 2010; see also Peters, above n 103; Lauri Mälksoo “Crimea and (the Lack of) Continuity in Russian Approaches to International Law” (28 March 2014) EJIL:Talk! <www.ejiltalk.org>. Note that the validity of the Crimean referendum is also highly contested under national constitutional law.

¹⁰⁵ See e.g. the points made by Russia, justifying its action by pointing to Crimea’s right to (external) self-determination and making also reference to the ICJ’s advisory opinion on Kosovo, which would hence be necessary to analyse in further detail, see Putin, above n 95.

¹⁰⁶ Russia, Belarus and Kazakhstan signed a treaty on 29 May for the establishment of the Eurasian Economic Union in 2015, which, however, at the moment cannot be seen a counterweight to the EU or the US but rather as a “diplomatic triumph” see “Introducing the Eurasian Economic Union: Where Three is a Crowd” *The Economist* (online ed, London, 30 May 2014).

¹⁰⁷ Putin, above n 95.

This fact can also serve as an example of the point made by Goldsmith and Posner that the protection of peace in general is problematic to achieve through multilateral international agreements,¹⁰⁸ such as the UN Charter. With regard to the actions of Russia in the current crisis Posner argues that “international legal norms outstripped the interest of countries, and so there was no incentive to uphold them”.¹⁰⁹

Thus, if one bears in mind Russia’s international law violation out of national self-interest in the current Ukrainian crisis, one might argue that the rational choice theory of Goldsmith and Posner is proven right.¹¹⁰

2 *Cons: States’ Actions after Russia’s Violation Indicating the Influence of International Law*

No system of law, however, achieves perfect compliance. Does the non-compliance of Russia in the Ukrainian crisis 2014 with its actions in Crimea prove the point of Posner and Goldsmith that international law is ineffective in the case of a state’s self-interest that does not coincide with the obedience to international law?

As mentioned above, critics of the rational choice theory claim that international law *does* have an influence on a state’s behaviour.¹¹¹ This influence of international law on states’ behaviours can be said to be reflected in the current Ukrainian crisis in the reactions of various states and institutions of the international community to Russia’s international law violation in Crimea, the impact of these reactions on Russia’s behaviour, and in the interaction of Russia and the West in the “pro-Russian unrest” in Eastern Ukraine.

(a) *Measures Taken by the West and the UN against Russia*

After the violations of Russia in Crimea had taken place, various states and institutions of the international community, such as the US, the EU and NATO (= the West), publicly criticised that Russia had violated international law and that this behaviour would not be accepted. Furthermore, several sanctions were imposed on Russia as a means of putting pressure on Russia to show obedience to international rules: Whereas the EU and the US imposed travel bans and asset freezes on Russian individuals, seven members of the G8 suspended Russia as a member from the G8.¹¹²

Besides, with a majority of 100 Yes to 10 No votes, the UN General Assembly adopted a resolution declaring the Crimean referendum invalid and calling on states and other

¹⁰⁸ See Goldsmith and Posner, above n 2, at 87.

¹⁰⁹ Eric Posner “Putin’s Triumph in Crimea: Implications for International Law” (2 June 2014) <www.ericposner.com>.

¹¹⁰ See e.g. Posner, above n 1; Ku, above n 9.

¹¹¹ See e.g. Franck, above n 30, at 91 et seq.; Howse and Teitel, above n 10, at 132.

¹¹² See part III A.

international institutions not to recognize any change in the status of Crimea.¹¹³ Note in this context that before the referendum in Crimea took place, there had even been an attempt on the level of the UN Security Council to pass a resolution aiming at declaring that a Crimean referendum could have “no validity”, for the adoption of which 13 out of 15 members voted and which was only blocked by Russia, using its veto right in the Security Council.¹¹⁴ Regardless of Russia’s (foreseeable) veto at this point, this overwhelming result of the votes shows the great criticism of Russia’s actions by the most powerful states of the UN.¹¹⁵

Last but not least, it is noteworthy to mention in this context that the ECtHR had granted Ukraine an interim measure against Russia on 13 March to “refrain from measures which might threaten the life and health of the civilian population on the territory of Ukraine” under the European Convention on Human Rights,¹¹⁶ a factor, which might be seen as “proof of a growing ‘juridification’ of international relations”¹¹⁷ or the will of states to recur to judicial enforcement mechanisms available at the international level.

(b) Russia’s Reaction to these Measures

Russia reacted to the measures of the West and the UN by subsequently showing more obedience to international law: Even though some scholars argue that the sanctions imposed by the West on Russia were trivial”,¹¹⁸ it cannot be denied that after the measures had been taken by the actors of the international community, Putin ordered his troops not to start firing in Crimea, (partly) withdrew troops from the Ukrainian borders¹¹⁹ and did not intervene in other parts of Ukraine.¹²⁰

Furthermore, Russian representatives used international law rhetoric to justify the Russian actions in Ukraine, which becomes clear in president Putin’s speech to the Duma after the annexation of Crimea on 18 March.¹²¹

¹¹³ For UN GA resolution, see above n 63. Full voting summary: Yes: 100, No: 11, Abstentions: 58, Not Voting 24, Total Voting Membership: 193, see <www.unbisnet.un.org>.

¹¹⁴ See “UN Security Council Action on Crimea Referendum Blocked” (15 March 2014) UN <www.un.org>. Note that China abstained from the vote.

¹¹⁵ See Ryan Goodman “How ‘Overwhelming’ was the UN General Assembly vote on Crimea?” (24 April 2014) Just Security <www.justsecurity.org>, who describes the UN Security Council vote on Crimea (in contrast to the UN General Assembly Vote) as “clearly overwhelming”.

¹¹⁶ See ECtHR “Interim measure granted in inter-State case brought by Ukraine against Russia” (press release, 13 March 2014), available at <www.echr.coe.int>.

¹¹⁷ Martin Breuer “Der EGMR, Zerrieben im Konflikt Russland-Ukraine?” (18 March 2014) Verfassungsblog on Matters Constitutional <www.verfassungsblog.de> (translation: “Is the ECtHR Pulverised in the Conflict between Russia and Ukraine?”).

¹¹⁸ Posner, above n 109. See further on the point that economic sanctions are ineffective against a large country like Russia Eric Posner “What to Do About Crimea? Nothing. Why all our responses in Crimea are wrongheaded and doomed to fail” (March 27 2014) Slate Magazine <www.slate.com>.

¹¹⁹ See part III A.

¹²⁰ See Nico Krisch “Crimea and the Limits of International Law” (10 March 2014) EJIL:Talk! <www.ejiltalk.org>, who argues that this latter point might be seen as the strongest evidence of the impact of international law.

¹²¹ See above n 95.

They [the West] say we are violating norms of international law. Firstly, it's a good thing that they at least remember that there exists such a thing as international law – better late than never. Secondly, and most importantly – what are we violating? True, the President of the Russian Federation received permission from the Upper House of Parliament to use the Armed Forces in Ukraine. However, strictly speaking, nobody has acted on this permission yet. Russia's Armed Forces never entered Crimea; they were there already in line with an international agreement. ...

They [the United States and Western Europe] keep talking of some Russian intervention in Crimea, some sort of aggression. This is strange to hear. I cannot recall a single case in history of an intervention without a single shot being fired and with no human casualties.

In this speech, Putin also referred directly to the UN Charter, namely to the right of nations to self-determination, and indirectly to the internationally accepted principle of humanitarian intervention by saying that Russia's task was to protect Russian "compatriots", the "millions of Russians and Russian-speaking people" in Ukraine.¹²²

All these references to international law principles were designed to justify Russia's actions, and underline Putin's general awareness of the high importance of international law in states' interactions. Some scholars maintain that international law might even be said to have "forced" Russia into this kind of justificatory rhetoric.¹²³ In line with critics of the rational choice theory, such as Thomas Franck, it can therefore be argued that the use of this form of rhetoric should not be underestimated and that it implies that Russia basically accepts the legitimacy of international law norms, namely the principles and rules established by the UN Charter in this case.

However, Russia's president Putin also "managed to exploit certain points of uncertainty in international law" in his speech by referring (indirectly) to the principle of humanitarian intervention.¹²⁴ As mentioned above, this principle is an unwritten and highly contested exception to the prohibition of the use of force enshrined in art 2 (4) of the UN Charter, which – nonetheless- has been more or less accepted by UN member states in the past as a justification for a military intervention. This proves the point made by Franck that international agreements, such as the UN Charter, are at risk of losing their legitimacy or rather their determinacy if rules, such as the prohibition of the use of force, have become vague due to the states' practice of intervening militarily on the grounds of unwritten (and unclear) exceptions.¹²⁵

¹²² Ibid.

¹²³ See e.g. Krisch, above n 120; Chris Borgen "The Crimea, Compliance, and the Constraint of International Law" (3 March 2014) *Opinio Juris* <www.opiniojuris.com>.

¹²⁴ Krisch, above n 120.

¹²⁵ On the particular point of the determinacy of the UN Charter see Franck, above n 30, at 95 et seqq.

(c) *Interaction of Russia and the West Concerning the “Pro-Russian Unrest”*

The development of the interactions between the West and Russia concerning the “pro-Russian unrest” in Eastern Ukraine also indicates the influence of international law on states’ behaviours and shows the ultimate common will of all parties to resolve the Ukrainian crisis by using means of international law.

Even though it is not clear in how far Russia can be blamed for having supplied pro-Russian separatists with weapons or not having done enough to sufficiently control the Russian-Ukrainian border,¹²⁶ the will of Russia, Ukraine, the US and the EU to resolve this crisis in accordance with international law was most obvious in their joint Geneva statement of 17 April, where all parties called for a peaceful end of the Ukrainian crisis by paying attention to both the interests of the Ukrainian government and those of the separatists. Furthermore, the bilateral “agreement” between Ukraine and Russia in the form of a mutual understanding to implement Poroshenko’s peace plan points into this direction.

Generally speaking, the implementation of this peace plan has been difficult not only due to the actions of pro-Russian separatists but also due to the vagueness of the peace plan, not providing for any concrete measures or enforcement mechanisms. When the Ukrainian government continued launching anti-terrorist attacks against the separatists, Russia even called the Geneva peace plan dead.¹²⁷ However, both the western countries and the OSCE contributed to the revival of the peace plan: the West by imposing sanctions on Russia, and the OSCE by presenting a concrete roadmap for the implementation of the Geneva peace plan to all four parties. After the OSCE had presented its roadmap Putin called on separatists to postpone their referendums even though - in contrast to the previous situation in Crimea - in the eastern part of Ukraine, the life of ethnic Russians and Russian speakers could be seen at stake in the wake of the launch of the counter-terrorism actions led by the Ukrainian government. Furthermore, Putin withdrew some of the troops from the Ukrainian border, did not interfere with the presidential elections in Ukraine and until at present, has neither militarily intervened in eastern Ukraine nor annexed the regions that demanded integration into the Russian Federation.¹²⁸

As a matter of fact, Russia is “embedded in international institutions”, such as the UN¹²⁹ and the OSCE, which aim at implementing expectations set by international law, such as the UN

¹²⁶ On 14 June, pro-Russian separatists fired a “large-calibre machine gun” at an Ukrainian air force near Luhansk, which resulted in the death of 49 people. Ukraine and the West accused Russia of supplying separatists with “weapons, supplies and fighters”, see Vashalomidze, above n 67.

¹²⁷ See part III B.

¹²⁸ Ibid.

¹²⁹ Note that Ukraine has also requested UN peacekeepers. Some argue that this request does not require an authorization by the UN Security Council, see Ryan Goodman “José Alvarez: Ukraine’s Request for UN Peacekeepers Does Not Require Security Council (Russian) Approval” (16 April 2014) Just Security <www.justsecurity.org>.

Charter or joint statements reached between contracting parties.¹³⁰ In the current crisis, it seems that the OSCE has fulfilled this role of exerting its influence on its member states, in particular on Russia and Ukraine.

V Conclusion

To conclude, Goldsmith and Posner's rational choice theory cannot be seen as proven right in the light of the Ukrainian crisis 2014: Although the current crisis might at first glance be considered as validating the rational choice theory and the general ineffectiveness of international law with regard to Russia's unlawful military intervention in Crimea, there is as well some evidence to be found in the actions and reactions of Russia and other nation-states and institutions, from which one can deduce that international law *does* influence states' behaviours, that states are not merely acting out of self-interest but also out of international legal obligations and that thus the current crisis may rather serve as an example of the (overall) effectiveness of international law.

Breaches of international law do not mean that international law is irrelevant or ineffective. As can be seen in this crisis, effectiveness means more than compliance. By contrast, the normative power of international legal obligations to influence states' behaviours, which can be measured by observing the follow-up interactions between the malefactor and the other states and international organisations, has to be taken into account as well.

The current Ukrainian crisis has shown that a strong influence of international law can be said to be reflected in the following:

- in the states' (immediate) reactions to violations of international law, such as publicly accusing the malefactor of having breached international law and imposing (economic or symbolic) sanctions on this state,
- in the malefactor's reactions to these measures, such as subsequently showing more obedience to international law rules and using international law rhetoric to justify the violation of these rules and
- in the follow-up interactions of the malefactor and the other states and international organisations, which underline a common will to resolve the crisis caused or aggravated by the malefactor's international law violation.

Finally, two remarks will be made in response to the introductory statements made by the rational choice theorist Posner:

His first statement, according to which Russia's intervention in Crimea violated international law has been proven right. This underlines the problem that international law is not capable of

¹³⁰ Borgen, above n 123.

erasing military facts.¹³¹ Therefore, the rational choice theory has its legitimate place in international law theory as it is capable of explaining problems that can occur on the international level due to strong national self-interests.

Posner's second statement expressing that no one was going to do anything about the Russian violation of international law has been proven wrong. Mechanisms available at the international level have been used by other states and international institutions in order to fulfil expectations of international law. Thus, contrary to the rational choice theorists' thesis, international law does have a significant impact on states' actions, sometimes "in ways that are not immediately obvious".¹³²

¹³¹ Ibid.

¹³² Ibid.

BIBLIOGRAPHY

PRIMARY SOURCES

A United Nations Materials

Charter of the United Nations.

Report of the Special Committee on the Problem of Hungary GA XI Supplement 18 A/3592 (1957).

Report on the Human Rights Situation in Ukraine Office of the High Commissioner for Human Rights (15 April 2014).

Territorial integrity of Ukraine GA Res 68/262, A/Res 68/262 (2014).

B Legislation

On the Principles of the State Language Policy Act 2012 (Ukraine).

C Statements and Speeches of State and EU Representatives

Joint Statement: Geneva Statement on Ukraine, EU-US-Ukraine-Russian Federation (17 April 2014).

Vladimir Putin, president of Russia (speech to the State Duma deputies, Federation Council members, heads of Russian regions and civil society representatives, Moscow, 18 March 2014).

SECONDARY SOURCES

A Texts

Jutta Brunée and Stephen Toope *Legitimacy and Legality in International Law* (Cambridge University Press, Cambridge, 2010).

Thomas Franck *The Power of Legitimacy Among Nations* (Oxford University Press, New York, Oxford, 1990).

Ryan Goodman and Derek Jinks *Socializing States: Promoting Human Rights through International Law* (Oxford University Press, New York, 2013).

Jack Goldsmith and Eric Posner *The Limits of International Law* (Oxford University Press, New York, 2005).

Andrew Guzner *How International Law Works: A Rational Choice Theory* (Oxford University Press, New York, 2008).

Rose McDermott *Risk-Taking in International Politics: Prospect Theory in American Foreign Policy* (University of Michigan Press, Ann Arbor, 1998).

Bruno Simma, Daniel-Erasmus Khan, Georg Nolte and Andreas Paulus (eds) *The Charter of the United Nation: A Commentary* (3rd ed, Oxford University Press, Oxford, 2012).

Joel Trachtman *The Economic Structure of International Law* (Harvard University Press, Cambridge, 2008).

Alexander Wendt *Social Theory of International Politics* (Cambridge University Press, Cambridge, 1999).

B *Journal Articles*

Thomas Franck “The Power of Legitimacy and the Legitimacy of Power: International Law in Age of Power Disequilibrium” (2006) 100 AJOL 88.

Robert Howse and Ruti Teitel “Beyond Compliance: Rethinking Why International Law Really Matters” (2010) 1 Global Policy 127.

John Mearsheimer “The False Promise of International Institutions” (1994) 19 International Security 5.

C *Newspaper Articles*

“Introducing the Eurasian Economic Union: Where Three is a Crowd” *The Economist* (online ed, London, 30 May 2014).

“Putin Not Invited to Poroshenko’s Inauguration as Ukraine President, Peskov Says” *The Moscow Times* (online ed, Moscow, 29 May 2014).

“The Ukrainian Crisis” *Economic & Political Weekly* (online ed, Mumbai, 15 March 2014).

Anuradha Chenoy “Ukraine’s Conflict and Resolution” *Economic & Political Weekly* (online ed, Mumbai, 22 March 2014).

Jim Heintz “Ukraine’s Euromaidan: What’s in a name?” *Kyiv Post / Associated Press* (online ed, Kiev, 2 December 2013).

Mark Kersten “Does Russia have a ‘responsibility to protect’ Ukraine? Don’t buy it” *The Globe and Mail* (online ed, Toronto, 4 March 2014).

Andrew Kramer “Russians Find Few Barriers to Joining Ukraine Battle” *The New York Times* (online ed, New York, 9 June 2014).

D Press Releases

European Court of Human Rights “Interim measure granted in inter-State case brought by Ukraine against Russia” (press release, 13 March 2014).

E Internet Materials

1 From International Organisations

“OSCE Response to the Crisis in Ukraine” (29 May 2014) OSCE <www.osce.org>.

“UN Security Council Action on Crimea Referendum Blocked” (15 March 2014) UN <www.un.org>.

“Swiss Chairperson-in-Office receives positive responses to OSCE Roadmap, says implementation is well underway” (12 May 2014) OSCE <www.osce.org>.

2 From Legal Scholars

Chris Borgen “The Crimea, Compliance, and the Constraint of International Law” (3 March 2014) *Opinio Juris* <www.opiniojuris.com>.

Martin Breuer “Der EGMR, Zerrieben im Konflikt Russland-Ukraine?” (18 March 2014) *Verfassungsblog on Matters Constitutional* <www.verfassungsblog.de>.

Simon Chesterman “Crimean War 2.0: Ukraine and International Law” (14 March 2014) *Social Science Research Network* <www.papers.ssrn.com>.

Gregory Fox “The Russia-Crimea Treaty” (20 March 2014) *EJIL:Talk!* <www.ejiltalk.org>.

Ryan Goodman “How ‘Overwhelming’ was the UN General Assembly vote on Crimea?” (24 April 2014) *Just Security* <www.justsecurity.org>.

Ryan Goodman “José Alvarez: Ukraine’s Request for UN Peacekeepers Does Not Require Security Council (Russian) Approval” (16 April 2014) *Just Security* <www.justsecurity.org>.

Nico Krisch “Crimea and the Limits of International Law” (10 March 2014) *EJIL:Talk!* <www.ejiltalk.org>.

Julian Ku “Russia Reminds the World (and International Lawyers) of the Limits of International Law” (2 March 2014) *Opinio Juris* <www.opiniojuris.org>.

Lauri Mälksoo “Crimea and (the Lack of) Continuity in Russian Approaches to International Law” (28 March 2014) *EJIL:Talk!* <www.ejiltalk.org>.

Boris Mamlyuk “Ukraine Insta-Symposium: Intervention and Colonialism as Responses to Alleged Fascism” (17 March 2014) *Opinio Juris* <www.opiniojuris.org>.

Anne Peters “Sense and Nonsense of Territorial Referendums in Ukraine, and Why the 16 March Referendum in Crimea Does Not Justify Crimea’s Alteration of Territorial Status under International Law” (16 April 2014) EJIL:Talk! <www.ejiltalk.org>.

Eric Posner “Putin’s Triumph in Crimea: Implications for International Law” (2 June 2014) <www.ericposner.com>.

Eric Posner “Russia’s Military Intervention in Ukraine: International Law Implications” (1 March 2014) <www.ericposner.com>.

Eric Posner “What to Do About Crimea? Nothing. Why all our responses in Crimea are wrongheaded and doomed to fail” (27 March 2014) Slate Magazine <www.slate.com>.

Grigory Vaypan “(Un)Invited Guests: The Validity of Russia’s Argument on Intervention by Invitation” (5 March 2014) Cambridge Journal of International and Comparative Law <www.cjicl.org.uk>.

Daniel Wisheart “The Crisis in Ukraine and the Prohibition of the Use of Force: A Legal Basis for Russia’s Intervention?” (4 March 2014) EJIL:Talk! <www.ejiltalk.org>.

3 *From News Agencies*

“Dozens dead as rebels down Ukraine army plane” (14 June 2014) Aljazeera <www.aljazeera.com>.

“Excerpts from Poroshenko’s Speech” (7 June 2014) BBC News <www.bbc.com>.

“Poroshenko doesn’t rule out roundtable in Donetsk involving parties to conflict” (12 June 2014) interfax-Ukraine <www.en.interfax.com.ua>.

“Profile: Ukraine ‘Chocolate King’ President Poroshenko” (25 May 2014) BBC News <www.bbc.com>.

“Timeline: Ukraine’s political crisis” (15 May 2014) Aljazeera <www.aljazeera.com>.

“Ukraine crisis timeline” (7 June 2014) BBC News <www.bbc.com>.

“Ukraine: International Recognition for President Poroshenko” (7 June 2014) Euronews <www.euronews.com>.

“Ukraine’s parliament-appointed acting president says language law to stay effective” (1 March 2014) ITAR-TASS Russia News Agency <www.en.itar-tass.com>.

“Why Crimea is so dangerous” BBC News (11 March 2014) <www.bbc.com>.

Timothy Heritage “Ukraine sees ‘understanding’ with Russia on peace moves” (9 June 2014) Reuters <www.reuters.com>.

Tamila Vashalomidze “Timeline: Ukraine’s pro-Russian unrest” (16 June 2014) Aljazeera
<www.aljazeera.com>.