ON THE RELEVANCE OF INTERNATIONAL LAW, THEORIES OF INTERNATIONAL RELATIONS AND THE CRIMEAN CASE

by

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Abstract

The Russian Federation claims the 2014 Crimea reunification is legal. Ukraine, together with NATO countries and others, deems the annexation illegal. Both states agree on most of the facts, with a few significant exceptions, and both states argue their case in terms of international law, on which they both generally agree. Hence, what is the point of international law? Does it have a discernible and independent effect on international politics? If so, is it in principle possible to observe it?

This work attempts to be an analysis of these questions in the reunification/annexation of Crimea by Russia of 2014, to see whether an answer can in fact be given. The aim is to address the position of the Russian legal arguments within current international law, together with its implications for two of the currently most credited theories of international politics.

Preface

This thesis is the result of independent and original work by the author. No parts of it have been previously published.

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Chapter 1: Introduction

When around 500 B.C. Sparta waged war against Athens for security reasons, they were widely recognized as valid justifications for the use of force by all the concerned parties. When in 2014 Russia annexed/reunited Crimea to the Russian Federation, its justifications – which included an argument concerning vital security interests – were received with widespread condemnation. Why? Is there some development in international relations that took place recently which did not take place in the previous two thousand years?

Some argue that the game of international politics has always been played according to the same rules, with ostensible changes being only instrumental and devoid of any tangible influence. Others claim some developments have an influence on the same international politics through which they were generated in the first place. A certain understanding of international law and institutions is a development that differentiates our time from Thucydides'. The question is: do international law and international institutions have any influence on international politics?

Most international actors whose actions are politically relevant routinely make reference to international law to justify their actions. Why do they bother to advance arguments in international law? Do they expect international law to influence political developments? Why?

To be more specific: is there any evidence of international law influencing political developments? If so, how does it happen? Preliminary issues concern the existence of international law (Watts in Byers 2001: 8) and whether or not states accept or recognize it (Watts in Byers 2001: 5).

The Crimea events yet unfolding constitute a very relevant and timely case. Since all of the involved parties advanced arguments in international law, accurate references to international

law and state practice can be made. Additionally, there are arguments which seem to suggest that the case lies at the controversial "margins of international law" (Byers 2015), where new practices may first emerge. For this reason the purpose of this thesis is to discuss the Crimean case within a specified theoretical framework.

The Russian Federation claims the Crimea reunification is legal. Ukraine, together with NATO countries and others, deems the annexation illegal. Both states agree on most of the facts, with a few significant exceptions, and both states argue their case in terms of international law, on which they both generally agree . In 2015 both parties voted in support of United Nations Security Council Resolution 2202 on the territorial integrity of Ukraine. And yet, as of today, the Crimean peninsula is under Russian administration.

What is the point of international law? Is it in principle possible to show that international law has a discernible and independent effect on world affairs? Is time a factor in evaluating whether international law has had a distinct effect on political developments? Moreover, is there a specific timeframe to keep in mind when assessing potential changes in international law?

This work attempts to be an analysis of these questions in the case of the 2014 reunification/annexation of Crimea by Russia, to see whether an answer can in fact be given.

In the second chapter some general remarks concerning international relations theory will be made. Two theories will be loosely sketched, chosen for their different understanding of the role and effect of international law and institutions in international politics. The conditions for a thought experiment concerning the effects of international law will be discussed, together with a possibility of discriminating the theory in which it would be reasonable to place more confidence as a result of the experiment.

In the third chapter the legal reasoning of the parties will be presented and analyzed. The focus will be on Russian legal justifications and the relevant principles of international law. The idea is to take the Russian legal viewpoint seriously and not as mere window dressing of political decisions. This decision does not necessarily imply a bias: Russian legal arguments will be reviewed as if they were the actual legal reasons that justified in Russia's view, so to speak, its own actions. Of course, whether that is the case remains to be shown.

To do so, (§§ 3.1-3.2) some background knowledge will be briefly presented before (§ 3.3) discussing the legal reasoning of the parties with reference to the relevant international law, together with (§ 3.4) some relevant considerations.

Finally, some concluding remarks will address the position of the Russian legal arguments within current international law, together with its theoretical implications. This work intends to be a descriptive contribution to the legal debate; the question which bear keeping in mind throughout is: what is the traceable effect (susceptible of empirical verification) of international law on the political developments in Crimea from 2014? It is this broader question that is at the core of this thesis.

Chapter 2: A General Framework for International Politics

There is a debate as to whether international law has a significant effect in international politics. Those who claim that international law has an effect often refer to its normative value; those against the latter view often highlight that states' behavior takes into account international law only when it is not in contrast with their national interests. Be as it may, if international law has any effect on the developments of international politics, then it must be at least possible to envision situations in which its presence of absence would have plausibly led to different results.

2.1 Theoretical Components of Theories of International Politics

At the highest level of abstraction, there are three theoretical variables that are necessary to understand international politics: some entity/entities capable of agency, the results of the exercise of agency of such entities, and something allowing those entities to make sense of what happens in their world (i.e.: of the result of their combined agency). These variables are therefore part of every theory of international relations. Let us discuss and specify each variable in turn.

The protagonists of international politics are commonly recognized to be the states. It is so for those who agree with the principles of structural realism (Waltz 1979), but also for the main strands of institutionalism (see Brecher 2002).

According to both theories, sovereign states are not the only actors in international politics. However, if for Kenneth Waltz international institutions exist, they are a mere reflection of the underlying distribution of capabilities within the state system – they have no effect on international politics that is independent of such distribution. On the contrary, for Robert O.

Keohane the configuration of international institutions has an additional effect on international relations, which is not entirely reducible to the distribution of capabilities in the state system.

States can be considered as the most basic unitary entity of international politics. This assumption I hold so that the ensuing theory would be perfectly acceptable to a structural realist. Hence, should it be possible to show that international law has in fact a discernible effect even in a structural-realist universe (or at least in one that is not inconsistent with structural realism), then the conclusions would be significantly more cogent than otherwise. This is the reasoning behind this restrictive assumption. It also means that whatever may happen at the sub-state level is not part of the theory: the state is the basic entity of international politics and the existence of the other two variables depends directly on the existence of the first. Emphasis in the last sentence is meant to highlight the "serious problem of endogeneity embedded in institutional theory itself" (Becher 2002: 157). Roughly put: if states influence both institutions and outcomes in the state system, is it possible that institutional effects are not mere reflections of changes in the fickle power balance existing between states (Becher 2002: 177)? While it seems to be true that taking away the states means taking away the conditions of possibility of both agency and the tools for making sense of the latter, it does not necessarily follow that once in place institutions cannot have an effect of their own. The latter consideration is not immune by the methodological complication of isolating the effects of international law and institutions on the state system (Becher 2002: 157-158).

With agency here it is meant any action that could be imputed to a state, or which a state recognizes, or which other states recognize as being imputable to that state . Actions like: military invasion with the state's armed forces, imposition of a tariff, release of passports, public

statements of its accredited government officials, signing of a treaty. The idea is to refer to the behavior of states, where the term assumes most of its common sense connotations.

Finally, the third component of any theory of international relations has to regard the devices states have at their disposal, or create, to make sense of each other's behavior. So far I have used the terms 'international institution' and 'international law' without a definition. While the meaning I refer to is conveyed by the common use of the expressions, one thing is worth noticing: all international institutions are grounded on international law, although it may be the case that not all of what is commonly referred to as international law necessarily creates international institutions. Namely, while the scope and the domain of international institutions may vary greatly, it seems hard to imagine any international institution which is not the result of some international agreement. Besides, any institutional act or effect – that may not be entirely reducible to an act of states – has to be grounded in international law. Hence, by referring to international law I am referring also to international institutions (the international law which brought them to life and through which they act).

The question, within this framework, becomes: does international law (including international institutions) influence the actions of states or is it just an epiphenomenon of those actions?

2.2 Two Theories

Structural realism contends that international law is merely an effect of the way states behave, which is itself a function of the distribution of capabilities and power across the state system. Power is therefore an attribute of states. The state system is, in our framework, the sum total of every behavior of every state – i.e.: diplomatic relations, political pressures, military operations, responses by other states to previous behaviors, and so on. In this theory, which can be taken as

emblematic of a family of theories, the state system has primacy over states. International law and institutions have no role qua international law and institutions: everything they accomplish – if anything – is a result of the actions of states, as defined.

On the other hand, institutional theory claims that international law and institutions have their independent effect on the state system, concurrently or even in opposition to any other dynamics of the state system.

If what has been said so far is reasonable, then it stands to reason that it must be possible to think of a situation in which the specific effect of international law can in principle be isolated with respect to all other considerations. Of course, even in a thought experiment, it will not be possible to escape the inherent limitations of rational inquiry in the social sciences (i.e.: the fundamental problem of causal inference).

Note that the rational method of the research need not translate to the rationality of the behavior of the subjects of the research, the states (cf., among others, Watts in Byers 2001: 7).

2.3 A Thought Experiment

Ideally, we would want to have two identical worlds, identical with respect to all of the three variables mentioned: same states, same sum total of the acts of the states so far, same international law recognized by the same states. We would then introduce a disturbance of some kind in the state system and observe the reaction of the states. The disturbance has to plausibly engender different predictions as to its political developments according to the two theories. We would then do this many, many times. If the reaction is the same on average, then it would be reasonable to conclude that international law has no discernible effect on average – no measurable influence on the states' behavior, of which it is a mere manifestation. On the other

hand, any significant discrepancy in the resulting situations in the two worlds may be considered to be the direct result of the influence of international law. This, assuming noise and omitted variables had been dealt with, would settle the question.

Problem is: we currently have only one world to test the two competing theories, and no way to do without the random non-systematic variation that is to be expected even in a multiple-world scenario. Our second-best option would be to make predictions, according to the theories, about the future state of the system when a disturbance is introduced in it, and then gauge those predictions against the future state, taking into account everything that would need to be taken into account.

2.4 Why Is Crimea Relevant?

This is why the situation of Crimea is momentous: it is the disturbance. It is not that crisis have not beleaguered the state system before, they have. It is not that the interested parties rely for the first time on international law to justify strikingly different courses of actions, they have done so before. In the last sixteen years only, Kosovo and Iraq fit both descriptions. What makes the crisis momentous is that Russian actions in Crimea represent the third time in a relatively short timeframe in which actions, lacking a UN mandate, by a major world power and permanent member to the UN Security Council, are carried out notwithstanding a significant opposition (grounded in international law) by other states, with relatively limited consequences for the acting state. The point is not that this situation has never happened before. The point is precisely the opposite: this has happened before indeed. Is this trend (if it could be called such, it may be too early to say) part of a push for a change in international law? Notably at stake here are the

inviolability of territorial boundaries and the prohibition of the use of force, both issues at the core of the post-1945 state system. If so, how are we to understand Russian legal arguments?

The question now becomes: is it possible to analyze the situation and come up with some sort of prediction that, in light of future evidence, will allow us (or future researchers) to answer the question about the relevance of international law? Depending on the answer to the latter question, we may modify the degrees of confidence we place in one, or both, of the theories of international relations presented.

2.5 Assumptions

International law can be modified, interpreted differently or applied to different cases by the multitude of states. The two theories differ in the effect they impute to international law. Properly speaking, I am not referring to two theories in particular, but to two classes of theories. On the one side there are institutional theories, which attribute an effect to international law; on the other side there is structural realism, which I consider the best "realist" theory to this day, and which stands in for all those theories that attribute a very limited power to ideas. For structural realism, I refer to Waltz 1979. For institutionalism, see the overview by David Lake, Robert Keohane, Joseph Nye and Oran Young in Becher 2002 .

One property of the system of rules is that it must be consistent, at least in principle (Grant 2015: 188). By this I mean that it must be possible to show that there exists at least one interpretation of the rules that, taken together, allows the system to be consistent. If the system of rules is not consistent, then logically *ex falso quodlibet* – everything is justifiable. Considering international law as a system which develops piece by piece, where new pieces are sometimes in contradiction with the older ones, does not significantly change the picture (Grant 2015: 195): it just introduces

the dimension of time, given enough of which a new coherent way of interpreting international law as a whole will develop .

Furthermore, the existence of international law is taken for granted (in question is only its effect on political developments). Crises are therefore an intrinsic part of international politics.

In addition, international law and institutions are allowed to exercise their influence through state power. Ultimately, if it were possible to express the causal mechanism through which states, their actions and international law influence each other, there would be a crucial difference between the two theories. For a structural realist any change in the state system is the effect of some prior change in the balance of power, which is not caused (as if were) by anything else but the distribution of capabilities within the state system. Instead, for an institutionalist there would be cases in which a meaningful variation in state practice is (at least partially) due only to a prior variation in international law or institutions, which is not caused by the distribution of capabilities within the state system.

What is most interesting to focus on is: what can we observe when an event shocks the system out of balance? Will the system go back to its "original" balance? Will it move towards a new one? Can we test whether, in the process, international law (or international institutions) has an effect on political outcomes that is demonstrably distinct from the influence of the distribution of capabilities?

Chapter 3: Crimea, 2014

In this chapter I will analyze in details the legal arguments publicly presented and concerning the reunification/annexation of Crimea in 2014. The focus will be on the Russian legal viewpoint.

3.1 International Legal Background

The sovereign state of Ukraine is a member of the United Nations and has a complex domestic social and political environment, owing to which it is sometimes referred to as a "state of regions" (SASSE 2007: 1). Notwithstanding this internal complexity, from the standpoint of international law and with regard to its territoriality, since 1991 Ukraine has been a rather uncontroversial actor in international relations: its international borders have been peacefully and universally recognized. In particular, in its international relations with its most powerful neighbor, the Russian Federation, Ukraine has unambiguously, emphatically and repeatedly clarified its international borders. To refer to only a few of these legal instruments:

- Alma-Ata Declaration (1991)
- Budapest Memorandum (1994)
- Russia-Ukraine Partnership Treaty (1997)
- Treaty on the Ukrainian-Russian state border (2003)

All these treaties include provisions concerning Ukrainian state's borders.

Since the breakup of the USSR, Ukraine underwent a transition on multiple levels: regional, national, international. Although the focus here will be on the international aspect, it is worth

noting that, internally, Crimea is the only region which has been granted territorial autonomy, although the latter was arguably conceded but not elaborated (Sasse 2007: 255).

Crimea's political situation has been historically rifle with layers of complexity. Already in 1917, and then more forcefully in 1991, the same options were voiced for Crimea: independence, autonomy within Ukraine, or incorporation within Russia (Sasse 2007: 83). The issue of autonomy surfaced again just before Ukraine became independent (Sasse 2007: 129-138). Another dispute arose soon after independence in 1993 (Sasse 2007: 2) and in general the 1990s in their entirety were tumultuous times. Able political negotiations in 1990-1994 avoided the spread of violence, which was regional rather than ethnic. Eventually, in December 1998 constitutional steps for autonomy were finally formalized (Sasse 2007: 175, 219).

Given the complexity of the situation, until 2014 Crimea seemed "a conflict that did not happen" (Sasse 2007, 261), thanks to Ukraine's successful management of the international dimension of the Crimea question (Sasse 2007: 249, 253). Why did conflict not happen before 2014? Have there been any changes in international law that allowed Russia to justify the events in 2014 which were not available before?

3.2 Timeline of the Current Crisis

In November 2013 Ukrainian President Viktor Yanukovych refused to sign the EU association agreement (Marxsen 2014: 3), whose purpose was a closer cooperation between Ukraine and the EU and its member states. This action became a catalyst for popular discontent as a sizeable number of Ukrainian citizens took to the streets. In February 2014, Yanukovych fled the country (Marxsen 2014: 3) and on March 1, 2014 the Russian Parliament authorized the use of force in Ukraine. Then on March 16 a referendum took place in Crimea, followed on March 17 by a

declaration of independence by the Crimean Parliament. On March 18 Crimea and the Russian Federation signed a treaty for the accession of Crimea and Sevastopol to the Russian Federation, which was ratified on March 21.

On March 27 the United Nation General Assembly adopted resolution 68/262 which recognized the invalidity of the Crimean referendum. The resolution was supported by one hundred states and opposed by eleven, with fifty-eight states abstaining and twenty-four absent.

3.3 Russian Legal Arguments and Relevant International Law

A prominent feature of the situation is that all parties made use of international law. Yet, the use of international law per se does not give reliable indications as to its relevance in influencing political developments. Arguably, all parties agree on the validity of the international law in question. They significantly disagree over its application, which means that they also disagree to a certain extent on what the situation on the ground is.

Just a few methodological notes concerning the selection of Russian legal arguments before we analyze them separately. Only reasons that Russia has actually given will be considered, not the ones that it could have given (Jaber 2011: 941). What counts is the legal reasoning directly expressed by the states. The focus of the analysis will be on the legal reasons put forth by Russia, in order to deal with its understanding and use of international law. In addition, arguments stemming from considerations about domestic law will not be dealt with, unless they shed light on or help better define the international discourse. The rationale for the last choice is the following: if both domestic and international law influence political developments, what is the specific contribution of international law?

Although "no state espouses legal positions in a vacuum" (Grant 2015: 172), in what follows political considerations will be kept to a minimum in an attempt to isolate the discussion on international law with respect to: self-determination, intervention by invitation, humanitarian intervention and historical connections.

For each of the points mentioned, the focus will be on the Russian narrative of the reunification of Crimea with the Russian Federation and the response by other states, as expressed through legal documents. The analysis focuses on the UN era, not before (or after).

3.3.1 Self-Determination

According to Russia, Crimea achieved its reunification with Russia through a legal exercise of the collective right of self-determination. Namely: the right of self-determination granted the Crimean people the option of unilateral secession from Ukraine. A referendum was held, on the basis of this right, which resulted in the creation of a new independent sovereign state. Lastly, the Autonomous Republic of Crimea – as a sovereign state in its own right – joined the Russian Federation. As a precedent, Russian officials explicitly referred to the 1998 intervention in Kosovo by NATO .

Let us examine these three points separately, discussing the relevant international law on the right of self-determination, the validity of the referendum and the general response of other states concerning the pertinence of Kosovo as a precedent.

3.3.1.1 Right to Self-Determination

There is widespread agreement on the existence of the right of self-determination. Self-determination is referred to in both art. 1(2) and art. 55 of the United Nations Charter. While on

the one hand it is generally exercised with no infringement of territorial integrity, it clearly includes an option for independence (UNGA Resolution 2625). Self-determination is considered a human right to be exercised by "peoples".

There is less agreement on the subject of the right, the entity that can exercise it. It can be invoked by "all peoples", but there is no unique definition of what constitutes a people (Jaber 2011: 928-930).

There is also disagreement regarding the modalities by which the right can be exercised. It generally does not authorize violation of territorial integrity. The only exception to this is remedial secession, which is only a measure of the last resort, to be used when all other attempts to negotiate a settlement have failed and there have occurred ascertained human rights violations. This is all the more so given that, even in the context of decolonization when the right was first codified, unilateral declarations of independence were the exception and not the rule (Jaber 2011: 934).

3.3.1.2 Referendum and International Response

Three are the major areas of concern about the referendum of March 17, 2014: legality, modalities of execution, international response.

The referendum was illegal under Ukrainian domestic law (Grant 2015: 16-17). However, illegality under domestic law does not necessarily imply that the referendum was also illegal under international law, since international acts are regulated by international law when both secession and reunification/ annexation are concerned (Grant 2015: 16n16, 16n21, 21n47). For the same reason, domestic law in Russia is insufficient to understand the international treaty between Russia and Crimea.

Greater concern was voiced by other states about the modalities of execution of the referendum. In primis, it lacked procedural control by the UN or any third party observers (Grant 2015: 25), which would be common for acts of self-determination. A further concern was the phrasing of the referendum. The Venice Commission noted not only that it was not a yes-no question, as commonly accepted, but that it was not possible to choose an option which would have allowed for the continuation of the status quo (Marxsen 2014: 11n49). Doubts concerning the neutrality of current public authorities in Crimea, together with an ostensible presence of military force, only supported those who claim that the referendum did not comply with international standards in regard with its modalities (Marxsen 2014: 12).

Hence, the vast majority of states do not consider the referendum legal, as stated in UNGA Resolution 68/262. As far as they are concerned, Crimea is territory of Ukraine.

3.3.1.3 Previous Practice: Kosovo

In the post-colonial context the International Court of Justice has not expressed itself about the legality of secession, on which "international law is silent" (Jaber 2011: 934-935). Putting aside for the moment the unilateral declarations of independence, since 1945 there has been only one successful unilateral secession (Bangladesh), with twenty-two failed attempts (Jaber 2011: 937, 939). Even in the successful case, legally speaking, what was recognized was a fait accompli (Jaber 2011: 940). However, the case of Bangladesh has not been invoked by the Russian authorities, which referred to the case of Kosovo instead.

In the case of Kosovo, Russia noted how a negotiated solution would have been possible (Grant 2015: 180; Jaber 2011: 942), and – although Russia was a member in the negotiation process (Grant 2015: 176) – it still does not recognize Kosovo (Grant 2015: 183).

According to some international lawyers, it is important to notice that change of regional status in Kosovo was brought about by municipal law, not international law (Grant 2015: 195). If it were the case, then Kosovo could not be understood as having relied on self-determination (Jaber 2011: 941), since dissolution is different from unilateral secession (Jaber 2011: 938). Following this line of reasoning the Kosovo case would not be relevant to the discussion of the Russian point about self-determination (Grant 2015: 24). A further difference can be observed in that the intervention in Kosovo was meant to find a settlement within existing borders (first within Yugoslavia, then within Serbia and Montenegro), differently from the Crimea case (Grant 2015: 173).

On the other hand, the fact remains that Kosovo is no longer an undisputed part of Serbia, mainly due to international recognition (by the United States and the bulk of the EU member states, among others), and notwithstanding continuing opposition by Russia. Both Russia and China submitted a written statement to the International Court of Justice [ICJ] regarding the question asked to the Court by the UN General Assembly and concerning the accordance with international law of the declaration of independence of Kosovo. The main point of the Russian argument, echoed by the Chinese statement, highlights the importance of the principle of territorial integrity and the right to self-determination . While balancing one with the other , Russia argued that in the case of Kosovo the "extreme circumstances" which would allow a recognized people within a sovereign state to exercise their external right to self-determination were not present.

The Russian legal argument was not enough to prevent the political developments that followed. The objection that Kosovo should be treated as an "exceptional" case, although may be worthy of discussion as part of the subjective element of custom in international law, does little to

address the fact of what Russia can consider the objective element of state practice. Objections to this reasoning may have to be sought for somewhere else.

The legal arguments Russia put forth against the legality of the unilateral declaration of independence of Kosovo bear substantial similarity to the argument against the exercise of the right of self-determination, versus the principle of territorial integrity, by Crimea.

3.3.2 Intervention by Invitation

According to Russia, its intervention in Crimea was in compliance with a request of support by the authorities of Ukraine.

First of all, it should be considered whether there was, in fact, an intervention by Russia in Crimea. Russia maintained that the active pro-Russian forces on the ground, before Crimea joined the Russian Federation, were “self-defence units” (President Vladimir Putin, cited in Marxsen 2014: 4). As a side note, note that there were Russian forces in Crimea as part of the Black Sea Fleet Agreement between Ukraine and Russia, which allegedly had no part in the events before the unification with Russia. After the declaration of independence, Russian troops took overt action (Marxsen 2014: 3).

Although some argue that Russian armed intervention did in fact occur (Grant 2015: 44, 64-67, 73), even if it did not occur, the threat of armed intervention was present – as underscored by the Russian parliamentary decision of March 1, 2014, which authorized the use of force in Crimea. Such threat would be, in itself, a violation of art. 2(4) of the UN Charter:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Hence, the legality of the Russian military intervention rests upon whether it was a lawful response to a request of assistance by a legitimate government.

An in-depth discussion of the legality of the request would lead us astray, as it mainly concerns Ukrainian constitutional law. (It is crucial to consider what happened in February 21-22, 2014, to ascertain the legitimacy of the interim government. Marxsen 2014: 8.)

At the international level two major considerations are relevant. Firstly, after President Yanukowych fled the country, others states recognized the interim government as the legitimate government of Ukraine and dealt with it as such. Furthermore, it is remarkable that in this case intervention upon invitation resulted in territorial aggrandizement of the intervening state at the expenses of the inviting state.

3.3.2.1 Previous Practice: Afghanistan and Iraq

In the case of Afghanistan since 2001, and in the case of Iraq since 2004, the UN Security Council has clarified in its Resolutions that intervention in those areas is understood as being carried out also at the invitation of the authorities of the land.

3.3.3 Humanitarian Intervention

According to Russia, Russian involvement was spurred by humanitarian concerns in general, and regarding the safety of the Russian-speaking population in particular.

Let us examine the two claims separately.

3.3.3.1 Humanitarian Crisis

Russia claims that its intervention in Crimea was a lawful response to a humanitarian crisis on the borders of Russia. Russian intervention has been unilateral.

In the Crimean case there have been virtually no third parties that agreed on the existence of a humanitarian emergency of such magnitude that justified the intervention. The emphasis, regardless of the comment by President Putin in his March 18 speech, is not on the magnitude, but on the recognition of the existence of the crisis. Recognition of a humanitarian crisis is a political act often rife with consequences (see, for example, Lucarelli 2000), and in the case in question there was no third state or international organization that recognized the existence of a humanitarian crisis in Crimea at the time.

Furthermore, Russia did not involve any other party in its actions but acted in Crimea unilaterally.

3.3.3.2 Protection of Russian-Speaking Population

Russia also claimed that its intervention was due to existing and prolonged oppression of Russian-speaking minority in Crimea.

The claim here is that the Russian-speaking individuals in Crimea are considered as some sort of 'Russian nationals', although they are not Russian citizens. If this were the case, then Russia could claim that while protecting its 'nationals' abroad it was acting in self-defense. Beside the fact that other parties contest the assertion that the Russian-speaking minority in Crimea was or has been oppressed (Grant 2015:33), even if that were the case, some scholars notice that there would still be the need for a Security Council authorization in order to proceed with the intervention, which Russia did not seek or receive (Marxsen 2014: 7).

3.3.3.3 Previous Practice: 1971-2011

Although the right of humanitarian intervention is still an emerging norm, there have been instances in which the use of force was justified on humanitarian grounds. An example is the Operation Allied Force carried out in 1999 by NATO, or the no-fly zone imposed on Lybia in 2001.

Concerning the modalities of intervention, while Martha Finnemore and others notice that generally military intervention in case of a humanitarian crisis is multilateral (cited in Nelson 2010: 141), past state practice does not universally adapt to this claim. Consider, for example, India's military intervention in what is now Bangladesh in 1971, the Vietnamese military intervention in Cambodia in 1978-1979, the Tanzanian intervention in Uganda in those same years. Russia has been generally against the legality, under international law, of these interventions.

3.3.4 Historical Connections

Russian authorities have also made a point concerning the fact that Crimea and Sevastopol used to be part of Russia, and therefore there are historically deep connections between Crimea and Russia . While this may be true, it is not a legal argument.

Any reference made to the legality, rationale and context of the transfer of Crimea in 1954 misses the point, since it is only of domestic concern (Sasse 2007: 96-101). The same is true for the act of the Russian Parliament (in 1992) which nullified the 1954 transfer (Sasse 2007: 226). Such arguments are not pertinent from the standpoint of international law given the numerous

legal instruments that were agreed upon between Russia and Ukraine, both bilaterally and multilaterally, after 1991.

In view of what has been discussed in Part II, Russia seems to have a political argument rather than a legal one (Marxsen 2014: 17). Therefore, whatever the situation is de facto, de iure Crimea seems to be – at the moment – Ukrainian territory according to international law.

3.4 Further Considerations Pertaining to International Law

A recurring theme above is that the legal analysis of the Crimean case often happens “at the margins” (Byers 2015) of international law. In view of this, it seems relevant to ask whether the Crimean crisis is, in fact, a break with past international practice. The two issues are taken up in turn.

3.4.1 Law of the Borders and Borders of the Law

There are seven lawful ways by means of which states can acquire new territory, of which the first three have been touched upon in the previous discussion: self-determination, unification, antiquity of tenure, and then accretion, cession, partition and adjudication. The international law concerning borders and territorial issues in general is rather well developed and, perhaps more importantly, thoroughly agreed upon by the vast majority of states. In 1945 the founding members of the United Nations believed that territorial issues were at the heart of the two great wars of the past century (Grant 2015: 131). So much so, in fact, that the permanent rights of boundaries hold even in case of armed conflict (Grant 2015: 119). The ways in which territory can be acquired are all thoroughly codified. What is not admissible, and this is a cornerstone of the current international system, are forcible claims (Grant 2015: 127).

On the other hand, notwithstanding the centrality of stable state boundaries, other scholars point to the contradiction, or at least tension, that exists between territorial integrity, sovereignty and self-determination (Watts in Byers 2001: 10). To name one case: human rights and their implications seem to make the borders more porous than ever before (Grant 2015: 163; Mälksoo 2008: 226). Even without allowing for pluralism in international law, it stands to reason that there could be cases in which international law may be insufficient, if barely, to deal with them properly. The Crimean case in question may be one of those. On the one hand, the legal value of the Russian arguments has been considered weak by the vast majority of states. On the other hand, duly taking into account recent state practice may make the de facto situation in Crimea less surprising .

The main problem may not be the variation of state border per se, but the procedure by which it was carried out. It may be that the inviolability of borders, or the prohibition of the use of force, may be secondary to other considerations. However, it does not seem that Russia has shown it to be the case according to international law, and although the General Assembly has clearly stated that it is against the law-creating effect of facts (Grant 2015: 78), two questions arise: what happens now? Is there still an international interest in the issue, in the legal argument, or has practicality taken over? What are the implications?

Has Russia succeeded in Crimea? If so, does this change international law? Does Russia understand it differently? What are the implications for the value of international law tout court? These last questions are relevant regardless of whether or not Crimea is considered to be a case "at the margins", and are all the more cogent given that it may be surmised, owing to the historically deep connections between Crimea and Russia, that if a referendum had been held

with proper modalities, it may have greatly favored Crimea joining Russia rather than remaining within Ukraine.

3.4.2 Continuity or Break

The events in Crimea are considered by some scholars as constituting a break with past practice (see Grant 2015: 6). They point out to the regimes of countermeasures (Grant 2015: 99) states have put in place to show that there will be consequences to such acts. In addition, from the standpoint of international law, the vast majority of states are complying with their obligation of non-recognition of the reunification/annexation (Grant 2015: 16; Watts in Byers 2001: 9).

On the other hand, there has been consistent and remarkable unrest in what former Russian President Boris Yeltsin referred to as the Russian "near abroad", or more generally in the Commonwealth of Independent States (CIS). The situation in Georgia in 2008 could be an example, which has been considered Russia's first military offensive against a sovereign state (Allison 2009: 173), although Russia did not register it as a military intervention (Allison 2009: 174). Even in the Georgian case, Russian legal arguments had to do with self-defense , protection of nationals , even genocide . Again, there was no security council authorization (Allison 2009: 184) and the whole situation has been interpreted as a Russian challenge to customary law, at least in its near abroad and CIS states (Allison 2009: 186), regions in which Russia claims to have privileged interests (Allison 2009: 188).

More cogently, according to Russia, the peremptory norm concerning the prohibition of the use of force in inter-state relations has been violated by other states in recent times, i.e. by the United States and some of its allies in Iraq or Lybia.

Chapter 4: Final Remarks

> A declaration issued by persons within a State is a collection of words writ in water; it is the sound of one hand clapping. What matters is what is done subsequently, especially the reaction of the international community. That reaction may take time to reveal itself.
>
> CRAWFORD, Kosovo Advisory Proceedings[1]

The question now becomes: what is the value of international law, if Russia is ostensibly flaunting it without apparent significant consequences? Is the Crimean case being examined a structural break with past ways of understanding international law? Does it constitute the final evidence in support of a theory of international relations over the other? Or is it simply a change in international law, a reform?

Let us address these questions in turn, starting from the latter.

4.1 Is Russia Changing International Law?

What if Russian actions are justified – albeit according to a different understanding of international law? To be sure, as it has been noted, Russia did not annul, declare void or remove its signature from many of the legal instruments that had concluded with Ukraine or other states, which deal with territorial boundaries. In 2007, however, it did retire its signature on the Treaty on Deployment of Conventional Armed Forces in Europe (Grant 2015: 119); why did it not do so with other treaties? Maybe Russia does not consider them binding (see next paragraph) or applicable (see last paragraph), or it just understands them differently (Kennedy 1999).

[1] Cited in Grant 2015: 38.

Interpretation, in this latter case, would be the key. Hence, it seems worth asking: is Russia acting according to its own understanding of international law? Such understanding would include, as discussed above, its legal arguments understood in the light of the past practice of other states in the system. Looked at through those lenses, Russian understanding of international law may be, at least in part, motivated by other states' practice, the United States *in primis*. This conclusion runs in opposition to what is proposed in Grant 2015. Furthermore, should that be the case, is Russian behavior, together with that of other states, currently influencing the common understanding of the prohibition on the use of force and the inviolability of territorial boundaries?

Instant change in international law does not seem to be an option (cf. Watts in Byers 2001: 16). Change takes time, both to be initiated and to take root, because of the very process through which it happens (voluntary agreement of states) and the inertia of the international system. In this sense, the justifications states use, as well as those they do not use, say a lot about the horizon within which they make sense of their own actions (Nelson 2010: 130-131). It also means that there is a limit to the actions that can be made sense of within that horizon (Sasse 2007: 252; for further considerations see also Price 2008, Ferrara 2014).

If international law is the art of the plausible and politics the art of the possible (Watts in Byers 2001: 8), then international law becomes politics in the sense that it constraints, by agreed law, what political actions or developments can be explained in terms of law.

On the other hand, a structural realist may argue that the use of legal arguments may just be more refined window dressing, which would explain the variation of state justifications over time: not because of the relevance law, but because it is more expedient for states to make it look like their actions look are taken in accordance with law (Nelson 2010: 144).

Both these explanations are plausible in this context. Neither, however, addresses whether Russia is trying to change international law with its actions.

In international law sometimes the process is more important that the outcome (Sasse 2007: 8). In the Crimean case, a significant variation between the Crimean autonomous movements of the 1990s and the 2014 unrest has been external support. A remarkable concern is the process that led to Crimea currently being de facto under Russian administration, not necessarily the result per se (Sasse 2007: 33).

4.2 Is Russia Breaking with International Law?

> No state shall forcibly interfere in the constitution and government of another state. […] Such interference would be an active offence and would make the autonomy of all other states insecure.
>
> KANT [1795] 1992: 96[2]

If Russia is not trying to change the international understanding of international law, it may be acting in spite of it. In this case, its behavior could be understood as nothing short of aggression:

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations .

Namely, aggression will include “any annexation by the use of force” .

It has been noted that small states tend to use international law more often than bigger ones (Nelson 2010: 129, 142). Why would that be? Is it because they do not have enough power to

[2] By ‘constitution’ here Kant means, roughly, what we would call ‘types of regime’.

fend for themselves in a structural realist world? If that is the case, how is international law going to help them, how are they going to garner powerful supporters – on what basis?

What seems to be more interesting is the response by states to an alleged break of international law by another state. Although the ICJ has not made a pronouncement on Crimea yet, among the consequences so far:

(i) Half of the states in the world condemned in formal declarations the actions Russia took in Crimea, with less than one in every ten states expressing some form of public support.

(ii) Public condemnation in the form of statements in multilateral venues was followed up by the implementation of sanctions only on the part of relatively few states: substantial economic sanctions were imposed by the EU and its member states, while mostly token sanctions were imposed by the United States, Canada, Australia, Japan .

(iii) Sanctions were also followed up by plans of deployment of token NATO troops in Russia's neighboring states, maybe also in consideration of the fact that Russia retired its signature on the Treaty on Conventional Armed Forces in Europe.

These are the more direct consequences that are already observable. Other consequences will concern, among others: UN-sanctioned actions, implications for national security of CIS states (Sasse 2007: 222; Grant 2015: 107), implications for treaties concerning nuclear non-proliferation , the likelihood of more porous borders for everyone – including Russia (Grant 2015: 155), powerful states' "exceptionalism" (Grant 2015: 162).

Notice that the definition of aggression has been taken from a legal instrument, to which Russia is still part of. Even if a state's actions may be doing away with international law, international law may not be willing to do away that state's actions.

Hence, for the purposes of theory testing, the mere fact (if it were to be considered such) that Russia violated its international obligations does not guarantee the breakdown of the entire system of international law. It may be just another crisis (for a different view, see Grant 2015), one of the many whose settlement is one of the purposes the system of international law was created to begin with.

And yet, even if it were the case, this still does not constitute a response to the question about the intrinsic value of international law for international relations.

4.3 International Law: Does It Matter?

Chapter 2 dealt with the meta-question about the role of international law in theories of international relations. Chapter 3 dealt more directly with what international law has to say in the Crimean case. And yet, the entire discussion in Chapter 3 may be understood as having virtually no effect at all on the meta-question on the relevance of international law. To answer that, it may be useful to go back to the two theories sketched in Chapter 2.

As it should be now clear, no theory predicts that there will be no violations of international law. The relevant variation between the two theories is in the expected mechanisms of response.

According to a structural realist, a violation of international law is to be understood primarily – if not exclusively – as a violation of a balance based on the distribution of capabilities in the state system. Hence, when that happens, theory predicts that the state system will eventually find a new balance, which will mainly depend on the existing distribution of capabilities. In our case: if Russia is actually more powerful than other states thought it was, then by upsetting the balance a new balance is expected to be created in which its actual power will be taken into account (Allison 2015). In this case international law is just convenient window dressing which should

have little, if any, discernible effect on international relations since the response strategies of the other states will depend entirely on the distribution of capabilities in the state system.

According to an institutionalist, there are two additional factors that need to be taken into account: information and institutional configurations. Namely: international law is one of the elements states take into considerations before adopting their response strategy. The prohibition on the use of force is not absolute, but it is justified on the basis of international law. Succinctly put: international law has a discernible effect in international relations that is different from, although not necessarily incompatible with, other mechanisms operating in international relations.

Can the Crimea crisis be used as a test for the two competing theories? More precisely, could the response to the Crimea crisis, which is yet to unfold completely, be used as probatory evidence that would modify the degree of confidence we currently have in the two competing classes of theories , as theories of international relations capable of explaining international politics?

I argue that this is the case. Here I have presented the theories in very loose terms and only sketched the facts, given the purpose. Yet it may be possible, at least in principle, to apply Bayes rule to theories of international relations – that is: to their observable implications – in order to evaluate the relative effect of international law. I leave the task to develop more specific suggestions for a later work, since a more stringent framework will have to be specified first. Note that while all of the discussion has been written in the context of the Crimean crisis, particular names – "Russia", "Ukraine", "Crimea" – could very well be considered labels for classes of variables with relevant comparable attributes; little would change.

This works aimed to be a clarificatory contribution to the endeavor of testing theories of international relations against each other with respect to the relative relevance of international

law. Of course, this would be a relatively long-term project, given the timeframe usually associated with developments at the international level. Yet, in principle, nothing prevents us from carrying out the test(s), unless the conditions of possibility for international politics do not obtain anymore, say, because of nuclear power or environmental catastrophes (Cerutti 2007).
Note that in both cases efforts are under way to establish common international regulations; these are two more reasons that showcase the importance of figuring out what is the current actual relevance of international law.

Has Russia violated international law? According to Thomas Grant (Grant 2015) the answer seems to be unequivocally: 'yes'. The analysis carried out in this thesis seems to suggest that Grant's answer is, at a minimum, incomplete. If Russia has violated international law, it has not been the only country to do so in the last decade: Kosovo, Iraq, Libya or Afghanistan may have also been, from the Russian perspective, flagrant violation of the same law. Hence, given the significant number of high-profile violations, it seems relevant to ask questions about the potential ongoing change that may be happening in our current understanding of international law.
There is second question, connected to the previous: will Crimea become part of Russia? Or, given the situation on the ground: will Crimea go back to Ukraine? It may be too early to say, but it would seem that time could be a very influential factor. The reunification/annexation has been carried out very expeditiously. The international response has been swift in statements, but relatively slow with respect to other actions. While sanctions are generally a political instrument that requires time to be effective, the more time passes the more difficult it may become to revert the situation on the ground and not have other states simply recognize it as a *fait accompli*.

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