



KYIV-MOHYLA
LAW & POLITICS JOURNAL

KYIV-MOHYLA SCHOLARLY PEER-REVIEWED JOURNALS

The Crimea Crisis from an International Law Perspective

Author(s): Christian Marxsen

Source: Kyiv-Mohyla Law and Politics Journal 2 (2016): 13–36

Published by: National University of Kyiv-Mohyla Academy

<http://kmlpj.ukma.edu.ua/>

The Crimea Crisis from an International Law Perspective¹

Christian Marxsen

Max Planck Institute for Comparative Public Law and International Law

Abstract

In February and March 2014, Ukraine was literally overrun by a chain of events that eventually led to Crimea's incorporation into Russian territory. Crimean and Russian authorities jointly used the internal conflict in Ukraine to deprive the Ukrainian government of its control over Crimea, to hold a so-called referendum, and to declare Crimea's independence. On the day after independence was declared, Russia formally recognized Crimea as an independent state,² and the Crimean parliament requested Russia to admit Crimea to the Russian Federation.³ Soon after that, the accession treaty was signed, and, within a few more days, all Russian constitutional requirements for Crimea's accession to the Russian Federation were fulfilled.⁴ All parties to the conflict refer to international law to justify their positions. The Crimean authorities and Russia claim that Russia had a legal basis for intervening and that Crimea had the right to secede from Ukraine. Most states, however, reject these claims. Thus, three questions are presented: Was Crimea's secession lawful under international law? To what extent has Russia violated international law? And what is Crimea's status? This article addresses these questions. Part 1 briefly describes the relevant circumstances and events leading to Crimea's secession. Part 2 reviews the legal obligations between Ukraine and Russia concerning territorial integrity and the prohibition against the use and threat of force. Parts 3 and 4 discuss the legality of Russia's intervention in Crimea and the legality of Crimea's secession from Ukraine, respectively. Part 5 concludes this article by answering the questions it raises.

Key Words: use of force, self-determination, intervention by invitation, Ukraine, Crimea, Russia.

1 This contribution is the slightly revised and updated reprint of an article that was originally published in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law* 74.2 (2014): 367–91. Sources that have been published later could only occasionally be included.

2 See "Executive Order on Recognizing Republic of Crimea," President's web-site, March 17, 2014, accessed June 1, 2016, <http://en.kremlin.ru/events/president/news/20596>.

3 Luke Harding and Shaun Walker, "Crimea Applies to be Part of Russian Federation After Vote to Leave Ukraine," *The Guardian*, March 17, 2014, accessed June 1, 2016, <http://www.theguardian.com/world/2014/mar/17/ukraine-crimea-russia-referendum-complain-result>.

4 See in regard to the Russian constitutional process Otto Luchterhandt, who argues that during that process Russian constitutional law was violated (Otto Luchterhandt, "Annexion der Krim — Putin verstößt gegen russische Verfassung," *Frankfurter Allgemeine Zeitung*, April 18, 2014).



The Escalation of the Conflict in Ukraine

After the Cold War ended, Ukraine became a focus of competing geo-strategical interests, including those of the EU and Russia. Internally, too, Ukraine was torn between the European Union and Russia. Yet, over time, its orientation along this continuum between Russia and the EU has been in the EU's direction, albeit with interruptions, most notably in November 2013. More recently, this westward turn was reaffirmed by the first part of the March 2014 EU-Ukraine association agreement, which calls for closer political and economic cooperation between the EU and Ukraine. Russia, however, has strongly opposed this development and others like it, fearing the loss of its political influence in Eastern Europe. The number of non-NATO and non-EU states in Eastern Europe has declined significantly over the last two decades, and Russia does not want the remaining neutral states to also join these organizations. Moreover, Russia has had a key interest in Ukrainian territory because it relies on access to Crimea as a base for its Black Sea Fleet. Russia's bargaining power is immense: Ukraine depends on gas supplies from Russia, and Russia is an important trading partner. This enabled Russia to prevent the adoption of the EU-Ukraine association agreement that was scheduled to be signed in November 2013.

These external divisions — the EU versus Russia — have an internal corollary: while Eastern Ukraine is predominantly Russia-oriented with Russian being the native language of a good part of its population, Western Ukraine is more oriented towards the EU.

The catalyst for the current crisis between Russia and Ukraine was the internal protests that arose in November 2013 against then Ukrainian President Yanukovich and his decision to refrain from signing an association agreement with the EU. The protests soon became tumultuous, with hundreds injured and more than 100 killed. The underlying political orientation of the groups that carried the protest remains uncertain to a degree. Certain, however, is that nationalist, xenophobic, and anti-Semitic groups such as the "Right Sector" or the "Svoboda" party played a role, an especially crucial one during the violent phases of the protests.⁵ During the turmoil, representatives of EU member states expressed clear sympathies for the protesters and met with opposition leaders. What EU officials saw as mediation in the conflict was on the other side perceived, especially by Russia and Ukraine's then-government, as illegal interference in Ukraine's internal affairs. Towards the end of February 2014, Ukraine's parliament voted to remove Yanukovich from office and established an interim government.

Immediately after Yanukovich's overthrow, pro-Russian troops took control of Crimea and initiated an incremental accession of Crimea to the Russian Federation. On 1 March 2014, the Russian Federation Council authorized the use of armed forces on the territory of Ukraine.⁶ In the following weeks, Russia reinforced its troops in Crimea and assembled some of them at the Ukrainian border. After Crimea declared its independence, Russian troops acted openly in

5 "Maidan on my Mind," *The Economist*, February 15, 2014.

6 ITAR-TASS Press Report, "Putin's Letter on Use of Russian Army in Ukraine Goes to Upper House," March 1, 2014, accessed June 1, 2016, <http://tass.ru/en/russia/721586>.

Crimea, including by forcing Ukrainian military units to surrender and leave the peninsula.⁷ If and to what extent Russian troops were in Crimea before the referendum was an open question initially. Russian authorities proclaimed that the soldiers who took control of Crimea after Yanukovych's removal from office were actually independent Crimean "self-defense units."⁸ Numerous press reports, however, suggested from the beginning that these soldiers included not only local militias, but also Russian soldiers.⁹ While the Russian soldiers did not wear official emblems, they were spotted using Russian military equipment and military vehicles registered to the Russian Black Sea Fleet in Crimea.¹⁰ The direct involvement of Russian soldiers on Ukrainian territory became certain, however, when Russian President Putin openly acknowledged that "Crimean self-defense forces were of course backed by Russian servicemen."¹¹

Legal Obligations Between Russia and Ukraine

The obligations between Russia and Ukraine regarding territorial integrity and the prohibition against the use of force are contained in bi- and multilateral agreements. These two principles are clearly expressed in Article 2 (4) UN Charter,¹² and in the Helsinki Final Act.¹³ Other bi-lateral

7 David M. Herszenhorn et al., "Russian Forces Take Over One of the Last Ukrainian Bases in Crimea," *New York Times*, March 23, 2014.

8 Vladimir Putin, "Vladimir Putin Answered Journalists' Questions on the Situation in Ukraine," Kremlin Press Conference, March 4, 2014, accessed June 1, 2016, <http://en.kremlin.ru/events/president/news/20366>.

9 Anthony Faiola and Will Englund, "Ukraine Denounces 'Invasion' by Russian Forces on Eve of Crimea's Referendum," *Washington Post*, March 15, 2014; Robert Mackey, "Russia's Defense Minister Calls Evidence of Troop Presence in Crimea 'Complete Nonsense,'" *New York Times*, March 5, 2014, accessed July 1, 2016, <http://thelede.blogs.nytimes.com/2014/03/05/russias-defense-minister-calls-evidence-of-troop-presence-in-crimea-complete-nonsense/>; Andrew Higgins and Steven Lee Myers, "As Putin Orders Drills in Crimea, Protesters' Clash Shows Region's Divide," *New York Times*, February 27, 2014, accessed June 1, 2016, <http://www.nytimes.com/2014/02/27/world/europe/russia.html>.

10 Alison Smale and Steven Erlanger, "Ukraine Mobilizes Reserve Troops, Threatening War," *New York Times*, March 2, 2014, accessed June 1, 2016, <http://www.nytimes.com/2014/03/02/world/europe/ukraine.html>; Andrew Higgins, "Amid More Signs of Russian Force in Crimea, Delight Mixes With Dismay," *New York Times*, March 2, 2014, accessed June 1, 2016, <http://www.nytimes.com/2014/03/02/world/europe/tensions-rise-in-crimean-capital-as-armed-men-continue-to-take-up-posts.html>.

11 "Putin Acknowledges Russian Military Servicemen Were in Crimea," RT, April 17, 2014, published together with a video documentation of Putin's statements with simultaneous translation into English, accessed June 1, 2016, <http://www.rt.com/news/crimea-defense-russian-soldiers-108/>.

12 Article 2 (4) UN Charter states: "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."

13 Helsinki Final Act (1975), Part 1 (a) "Declaration on Principles Guiding Relations between Participating States," Principle III (Inviolability of frontiers); Principle IV (Territorial integrity of States).

agreements also are relevant. The 1994 Budapest memorandum was concluded to provide Ukraine security assurances for acceding to the Treaty on the Non-Proliferation of Nuclear Weapons as a non-nuclear-weapon state. For Ukraine's giving up Soviet nuclear weapons, the United States, the United Kingdom, and Russia committed to "respect the Independence and Sovereignty and the existing borders of Ukraine"¹⁴ and reaffirmed

their obligation to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine and that none of their weapons will ever be used against Ukraine except in self-defense or otherwise in accordance with the Charter of the United Nations.¹⁵

The three nuclear-weapon signatory states committed to seek immediate Security Council action to assist to Ukraine in case of aggression against it.¹⁶

The 1997 Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation again affirmed the inviolability of the borders between both states and provided that both parties

shall build their mutual relations on the basis of the principles of mutual respect for their sovereign equality, territorial integrity, inviolability of borders, peaceful resolution of disputes, non-use of force or the threat of force, including economic and other means of pressure, the right of peoples to freely determine their fate, non-interference in internal affairs, observance of human rights and fundamental freedoms, cooperation among states, the conscientious performance of international obligations undertaken, and other generally recognized norms of international law.¹⁷

Also relevant is the Black Sea Fleet Status of Forces Agreement (SOFA) that both Russia and Ukraine signed in 1997.¹⁸ After having agreed in 1994 to divide the Black Sea fleet (Russia getting 80% of the vessels, Ukraine the remaining 20%), Ukraine agreed in the SOFA to lease Crimean naval facilities to Russia for twenty years. This agreement was extended until 2042 in 2010 by the so-called Kharkiv Accords in return for Russia's commitment to supply Ukraine with discounted natural gas. The SOFA allows the Russian military to be in Crimea but restricts its operations and prohibits Russian troops from being generally and publicly present in Crimea.¹⁹

14 Budapest Memorandum, signed 5 December 1994, para. 1.

15 Budapest Memorandum, para. 2.

16 Budapest Memorandum, para. 4.

17 "Treaty on Friendship, Cooperation, and Partnership Between Ukraine and the Russian Federation," signed May 31, 1997, Article 3.

18 See for the development of the post-Soviet status of the Black Sea Fleet the Russian military journal: Nikolai Alexandrovich Kryukov, "Evolution of Russian-Ukrainian Relations: The Legal Status of the Black Sea Fleet," *Military Thought* 15 (2006): 120.

19 See generally "Draft Report on Aggression and the Use of Force," International Law Association, Washington Conference 2014, 14.

Russian President Putin has argued that these bi-lateral treaties are no longer binding. He contends that Ukraine's regime change was a revolution out of which a new state had emerged and with which Russia had not concluded any agreements.²⁰ This argument is obviously a political statement. It certainly has no basis in current international law.²¹ The question of state succession does not even arise in this instance because a revolutionary regime change does not constitute a discontinuity of statehood on a given territory.²²

The Russian Intervention in Crimea

Russia has justified its military intervention in Crimea on three grounds: (1) protection of nationals abroad; (2) enforcement of an alleged right to self-determination; and (3) intervention by invitation.

Protection of Nationals Abroad and of the Russian-Speaking Population

Russia has argued that its intervention was justified to protect the Russian citizens living on Ukrainian territory,²³ especially its military personnel stationed in Crimea.²⁴ This justification was given, for example, by the Russian Federation Council, which gave Putin permission to use military force on Ukrainian territory. Its chairperson, Valentina Matvienko, justified the necessity of military action by claiming that there was

a real threat to the life and security of Russian citizens living in Ukraine. There is a threat to our military in Sevastopol and the Black Sea Fleet, and I think that Russia should not be a bystander.

She stressed the importance of taking “all possible measures, to ensure the security of our citizens living in Ukraine.”²⁵

Under international law, the rescue of nationals who are in danger on the territory of another state is partly regarded as self-defense under Article 51 UN Charter or, alternatively,

²⁰ Putin, “Vladimir Putin Answered Journalists’ Questions on the Situation in Ukraine.”

²¹ The idea behind Putin’s statement is that a revolution brings into being a new state which is not bound by any treaty obligations of its predecessor. This view roots in the doctrine of so-called Soviet international law which claimed that the USSR was not bound by treaty obligations of Tsarist Russia (see Chris Osakwe, “States (International Law),” in *Encyclopedia of Soviet Law*, 2nd ed., ed. Ferdinand J. M. Feldbrugge (Dordrecht: Nijhoff, 1985), 732).

²² Andreas Zimmermann, “State Succession in Treaties,” *MPEPIL*, November 2006, para. 1.

²³ Request by Vladimir Putin to the Federation Council, UN Security Council, UN Doc. S/PV.7124, March 1, 2014, at 5.

²⁴ In the Security Council, again, the Russian representative pointed out that “the issue is one of defending our citizens and compatriots, as well as the most import[ant] human right — the right to life” (UN Doc. S/PV.7125, March 3, 2014, 3).

²⁵ Quoted in: “Putin’s Letter on Use of Russian Army in Ukraine Goes to Upper House,” ITAR-TASS Press Report, March 1, 2014, accessed June 1, 2016, <http://tass.ru/en/russia/721586>.

as an unwritten customary exemption from the prohibition against the use of force in Article 2(4) UN Charter. Addressing them in that order, the right to self-defense principally requires an ongoing *armed attack* against a state or the threat of imminent attack. While armed attacks on a state's territory or on military posts or military units abroad can justify invoking the right to self-defense, it is very much in dispute if that is also the case for armed attacks on nationals of one state who reside on the territory of another state. State practice is not uniform in that regard, but some states have referred to self-defense to justify the use of force to rescue their nationals. An argument allegedly in favor of that view postulates that a population is a constitutive element of statehood. It is therefore claimed that "an attack of sufficient violence upon a substantial number of a State's nationals"²⁶ can amount to an armed attack against the state.²⁷ Such a broad reading of the right to self-defense, however, is highly problematic.²⁸ Self-defense requires an actual threat to the existence or security of a state,²⁹ and this requires a link to the state's territory, its positions, or vessels abroad.³⁰

The rescue of nationals abroad justification relies on a narrow customary exemption from the prohibition against the use of force. State practice is admittedly not uniform and case law is ambiguous.³¹ Nevertheless, states have regarded rescue operations as justified under international law and have acted accordingly. Therefore, as A. Randelzhofer and O. Dörr have noted, this arguably created a customary international law norm:

Given the regular State practice for more than fifty years now, the positive *opinio juris* of the intervening and many third States, and a considerable reluctance on the part of other States to qualify forcible rescue operations

26 Christopher Greenwood, "Self-Defence," *MPEPIL*, April 2001, para. 24.

27 See Kristen E. Eichensehr, "Defending Nationals Abroad: Assessing the Lawfulness of Forcible Hostage Rescues," *Virginia Journal of International Law* 48 (2008): 468; see also D. W. Bowett, *Self-Defence in International Law* (Manchester: Manchester University Press, 1958), 92.

28 See also Independent International Fact-Finding Mission on the Conflict in Georgia, "Report," vol. II, September 2009, 286: "This analogy is not convincing, because putting in danger or even killing a limited number of persons is not comparable in intensity to an attack on the other state's territory. Unlike an attack on territory, attacking members of the nation is not apt to jeopardize the independence or existence of the state."

29 Albrecht Randelzhofer and Georg Nolte, "Article 51," in *The Charter of the United Nations*, vol. II, 3rd ed., ed. Bruno Simma et al. (Oxford: Oxford University Press, 2012), margin number 28.

30 Albrecht Randelzhofer and Oliver Dörr, "Article 2 (4)," in *The Charter of the United Nations*, vol. I, 3rd ed., ed. Bruno Simma et al. (Oxford: Oxford University Press, 2012), margin number 58; see in regard to military vessels the ICJ oil platform decision in which the ICJ does not exclude that even the mining of a single military vessels may trigger the right to self-defense. *Case Concerning Oil Platforms*, ICJ Reports 2003, 195.

31 See "Draft Report on Aggression and the Use of Force," International Law Association, Washington Conference 2014, 12 (with further references): "The rescue of nationals abroad has long presented a challenge to the application of the rules on use of force. It is the subject a long list of contrasting opinions, numerous cases with inconsistent state practice, and ambiguous case-law."

as unlawful, the argument can be made that a rule of customary international law is by now established allowing limited forcible action with the legitimate aim to rescue a State's own nationals.³²

In any case, such an unwritten exception to Art 2(4) of the UN Charter only offers a very narrow justification for the use of force: first, there must be evidence that the lives of a state's citizens are in danger on the territory of another state; second, the other state must be unwilling or unable to offer sufficient protection; and, acknowledging that intervention is a means of *ultima ratio*, i.e., there must be no other reliable means to rescue the nationals in danger. The cases applying this unwritten exception are therefore rather extreme. Russia carries the burden of proof and has at no point provided any concrete evidence that such violations had occurred. The aim to protect Russian citizens as expressed by the Russian Federation Council's chairperson is therefore irrelevant in terms of international law.

For the same reason, an intervention to protect the Russian minority — i.e. non-citizens, but “ethnic” Russians — in Ukraine also is not justified.³³ As a measure of the responsibility to protect, an authorization of the Security Council would be necessary.³⁴ But in the absence of any severe human rights violations against the Russian-speaking minority there is no basis for intervening for humanitarian reasons.

Enforcement of Self-Determination

Russia also has argued that the use of force was necessary to help Crimean citizens realize their alleged right to self-determination.³⁵ When Russia was still denying its military involvement in Crimea, Putin stated that “we had to help create conditions so that the residents of Crimea for the first time in history were able to peacefully express their free will regarding their own future.”³⁶ Later, after the Russian military's intervention had been confirmed, Putin again invoked the Crimean population's alleged right to self-determination: “Our task was not to

32 Randelzhofer and Dörr, “Article 2 (4),” margin number 60; but see also the opposing view taken by the Fact-Finding Commission on Georgia that interprets the legal justifications of states in a different manner by taking into account the concrete justificatory strategies: “There is probably not one single instance in state practice where a state invoked an independent, stand-alone entitlement to rescue its nationals, without relying on one of the classic grounds of justification. In state practice, none of the arguments advanced by states in order to justify military interventions in favour of their nationals has been accepted by the entire community of states. The prevailing reactions were rather reprobation, e.g. in the case of the Congo, Grenada and Panama” (Independent International Fact-Finding Mission on the Conflict in Georgia, vol. II, September 2009, 286 et seq.).

33 See e.g. Russia's claim in: UN Security Council, Annex to Letter Dated 19 March 2014 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General, UN Doc. A/68/803-S/2014/202, 20 March, 2014, at 5.

34 U. N. General Assembly, 2005 World Summit Outcome, A/RES/60/1, para 139.

35 See also the more detailed discussion of self-determination below.

36 UN Doc. A/68/803-S/2014/202, 20 March, 2014, at 5.

conduct a full-fledged military operation there, but it was to ensure people's safety and security and a comfortable environment to express their will. We did that."³⁷ Another quotation is quite telling in that regard. When a journalist asked Putin whether the Crimean scenario was out of question for repetition in Eastern Ukraine, he answered:

You know, the Crimean scenario does not reflect Russia's position; it reflects the position of the people who live in Crimea. *All our actions, including those with the use of force, were aimed not at tearing away this territory from Ukraine but at giving the people living there an opportunity to express their opinion on how they want to live their lives.*³⁸

Leaving the details of the international law on self-determination for later, even if the Crimea's population had a right to self-determination, it would not justify Russia's militarily intervention on Ukrainian territory.

Intervention upon Invitation

While Russia voiced humanitarian rhetoric as well as arguments about self-determination, its most explicit legal argument was based on the doctrine of intervention upon invitation. Russian authorities proclaimed that after Yanukovych had fled the country he issued a letter in which he invited Russia to intervene on Ukrainian territory as a countermeasure against what Russia perceived as the takeover by nationalist and anti-Semite Maidan protesters.³⁹ Russia circulated the following letter by Yanukovych as a Security Council document:

As the legally elected President of Ukraine, I hereby make the following statement.

The events on the Maidan and the illegal seizure of power in Kyiv have brought Ukraine to the brink of civil war. Chaos and anarchy reign in the country, and people's lives, safety and human rights are under threat, particularly in the south-east and in Crimea. With the influence of Western countries, open acts of terror and violence are being perpetrated and people are being persecuted on political and linguistic grounds.

I therefore appeal to the President of Russia, V. V. Putin, to use the armed forces of the Russian Federation to restore law and order, peace and stability and to protect the people of Ukraine.⁴⁰

37 Vladimir Putin, "Direct Line with Vladimir Putin," President's web-site, April 17, 2014, accessed June 1, 2016, <http://en.kremlin.ru/events/president/news/20796>.

38 President of Russia, "Interview to the Italian newspaper Il Corriere della Sera," President's web-site, June 6, 2015, accessed June 1, 2016, <http://en.kremlin.ru/events/president/news/49629>, emphasis added.

39 See UN Doc. S/PV.7124, March 1, 2014, 5.

40 UN Doc. S/2014/146, March 3, 2014.

Yanukovych has confirmed that he wrote this letter, although he has expressed regret for doing so, saying that he “was wrong” and “acted on [his] emotions.”⁴¹ Russia pointed out that Yanukovych’s removal from office was not in accordance with the Ukrainian constitution and that Yanukovych therefore was to be regarded as the legitimate president of Ukraine. As such, he was authorized to invite foreign troops to intervene.

Article 108 of the Ukrainian constitution provides that the president’s authority ends when he or she is removed from office by impeachment for treason or another crime. The impeachment procedure found in article 111 requires a majority vote of the parliament’s constitutional membership to initiate the impeachment process. Then, after an investigating commission is established and reports on its investigation, the parliament must consider the commission’s report. Two thirds of the parliament’s constitutional members must vote in favor of impeachment for the removal process to proceed. The president’s removal requires three-quarters of parliament’s constitutional membership and the Constitutional Court’s confirmation.

None of this happened for Yanukovych. He was removed by all present 328 members of parliament, but because the constitutional membership was 450 members, the required three-quarters majority was not met. Only around 73% voted to remove Yanukovych from office. His removal, therefore, violated Ukraine’s constitution. Nevertheless, Yanukovych had fled the country, and the authorities he left behind, especially the military and police, proclaimed their support for the new government. The crucial question under international law therefore is whether, though he was removed from office unconstitutionally, he still had the authority to invite Russia to intervene.

International law permits a state to invite foreign states to send troops to its territory. The “classical” understanding of this rule is that only the official government, not opposition groups, is entitled to invite foreign intervention.⁴²

Absent valid consent by the “host” state, however, a foreign military’s presence would constitute an illegal use of force.⁴³ Assessing whether consent has been given can be difficult. Disagreements about consent have focused on its formal requirements and the circumstances in which it was given. The International Law Commission has identified the commonly accepted, general requirements for a state’s consent. Under these requirements, a state’s consent must:

- 1) be valid under international law, i.e., the consent may not be based on error, fraud, corruption, or coercion;
- 2) be clearly established and expressed, not presumed;
- 3) be given prior to the otherwise wrongful act (i.e. the intervention);
- 4) be attributable to the state; and
- 5) not relate to acts whose commission would violate an obligation of states under

41 Quoted in: Associated Press Report: Caro Kriel and Vladimir Isachenkov, “AP Interview: Yanukovych Admits Mistakes on Crimea,” April 2, 2014, accessed June 1, 2016, <http://news.yahoo.com/ap-interview-yanukovych-admits-mistakes-crimea-180005849—finance.html#>.

42 See *Military and Paramilitary Activities in and Against Nicaragua*, I.C.J. Reports 1986, 14, 126.

43 ILCYB 1979, vol. II, part 2, 110; Olivier Corten, *The Law Against War — The Prohibition on the Use of Force in Contemporary International Law* (Oxford: Hart, 2010), 249.

a peremptory norm of international law, such as the consent for another state to newly establish a protectorate over its territory.⁴⁴

If the consent meets these requirements, the intervention is lawful so long as the intervening state respects the consent's scope and duration. For Yanukovich's consent, the core of the problem is the fourth requirement — was Yanukovich's consent attributable to Ukraine? *De lege lata* he was still the president, but *de facto* he lacked any control in Ukraine when he invited Russian troops to intervene. The consent must be given by the state's highest authorities,⁴⁵ and this is generally the internationally recognized government. Such clear categories blur in cases of internal conflict, civil war, and revolutionary regime change. In these circumstances, as in Ukraine, the identity of the legitimate government is often contested.⁴⁶ Different states often recognize different parties to the conflict as the state's legitimate representatives.

State practice and legal scholarship have traditionally referred to the criterion of effective control over at least parts of the state's territory and, hence, connected the legal authority to invite foreign troops to effective control of a government.⁴⁷ In recent decades, however, using the effective control criterion as the sole or primary requirement has been questioned, since governments are not only assessed by their *de facto* power, but also by their legitimacy. South Africa during apartheid, for example, was not recognized as being allowed to invite foreign states to intervene because of its internal political system.⁴⁸

State practice, on the other hand, is reluctant to rank legitimacy as the primary criterion. The cases that potentially supported an invitation by a democratically elected government without effective control involve, most importantly, ousted President Aristide's invitation for an intervention in Haiti in the 1990s, and the Economic Community of West African States' (ECOWAS) intervention in Sierra Leone.⁴⁹ In Haiti, President Aristide had fled the country after a *coup d'état*, and then, after some time, he invited the United Nations to intervene militarily.⁵⁰ Though his government had been ousted, it was internationally recognized. The Security Council, however, did not rely on Aristide's invitation to intervene, but instead acted under

44 See ILCYB 1979, Vol. II, Part Two, p. 114–15; see also ILYB 2001, vol. II, part 2, 72–74.

45 Corten, *Law Against War*, 263.

46 A recent trend in scholarship therefore argues that in case of civil war none of the fractions is entitled to invite a foreign government (See Independent International Fact-Finding Mission on the Conflict in Georgia, vol. II, September 2009, 277). However, the internal situation in Ukraine has reached the level of internal unrest, but has not amounted to civil war.

47 See “Draft Report on Aggression and the Use of Force,” International Law Association, Washington Conference 2014, 13 et seq., Georg Nolte, “Intervention by Invitation,” *MPEPIL*, 2010, para. 17.

48 Nolte, “Intervention by Invitation,” para. 17.

49 See for discussion of further cases from the cold-war era: Antonio Tanca, *Foreign Armed Intervention in Internal Conflict* (Dordrecht: Nijhoff, 1993), 22–50.

50 See for a discussion of the military intervention: David Wippmann, “Military Intervention, Regional Organizations and Host-State Consent,” *Duke Journal of Comparative & International Law* 7 (1996–1997): 217–19.

Chapter VII of the UN Charter.⁵¹ This indicates that the Security Council did not consider the invitation by a government without effective control a sufficient basis for an intervention.⁵²

Another relevant case is the use of force by ECOWAS troops in Sierra Leone in 1998. Sierra Leone's then-president Kabbah had lost all political authority and requested a military intervention by the ECOWAS. The legal basis for this intervention is contested. Some find it in Kabbah's invitation and argue that this is in line with the increasing importance of a government's legitimacy and the resulting change in the doctrine of intervention by invitation.⁵³ Others convincingly make the point that ECOWAS troops already had been legally present on Sierra Leone's territory before the invitation and acted in self-defense when they used force on Sierra Leone's territory.⁵⁴

But this is not the place to engage in more detail with the facts of these two cases. Even if these cases do not clearly support the entitlement of governments without effective control to invite foreign states, there is nevertheless an obvious tendency in state practice and scholarship to pay more attention to the legitimacy of a government. The element of effective control is predominantly still regarded as a central criterion, but determining when such effective control is lost requires an evaluation of the facts, which, in turn, grants some leeway for different views. Is, for example, a very short loss of control already enough to constitute a loss of effective control or is a specific temporal element required? How much control over a state's territory must remain to be *effective* control? The necessity for such evaluation demonstrates that the criterion of effective control is not dichotomous. Instead, it opens a grey area in which normative considerations about the legitimacy of a government are invoked. G. Nolte, for example, argues that "Governments which have been freely and fairly elected under international supervision, or which are universally recognized as having been freely and fairly elected, can arguably preserve their status for the purpose of inviting foreign troops even after having lost almost all effective control."⁵⁵ What does that all imply for Ukraine?

First, Yanukovich had fled Ukraine and had lost effective control. There was no indication that Yanukovich's ousting was only preliminary — he had lost all internal support, especially by the police and military forces. Even Putin acknowledged this when he conceded that

51 Security Council Res. S/RES/940 (1994), July 31, 1994. In a report on Haiti that is referred to by this resolution, the Secretary-General explicitly states that because of the need for coercive means, it would "be necessary for the Security Council to act under Chapter VII of the Charter in authorizing its mandate" (Report of the Secretary-General on the United Nations Mission in Haiti, U. N. Doc. S/1994/828 (1994), para. 8).

52 See Wippmann, "Military Intervention, Regional Organizations and Host-State Consent," 218–19; Corten, *The Law against War*, 285.

53 Karsten Nowrot and Emily W. Schabacker, "The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone," *American University International Law Review* 14 (1998): 401–02.

54 Marco Gestri, "ECOWAS Operations in Liberia and Sierra Leone: Amnesty for Past Unlawful Acts or Progress Toward Future Rules?" in *Redefining Sovereignty*, ed. Michael Bothe et al. (Ardsey: Nijhoff, 2005), 245; Corten, *The Law against War*, 285.

55 Nolte, "Intervention by Invitation," para. 17.

Yanukovych would not have a political future in Ukraine.⁵⁶ Based on the criterion of effective control, Yanukovych was not entitled to ask for foreign intervention.

Second, even if one refers to the criteria concerning the legitimacy of governments, there is no evidence that Yanukovych had the stronger claim than the established Maidan interim government. While he was democratically elected in 2010, a societal movement and most members of parliament spoke against his remaining in office. In cases of internal conflict, it is arguably the better justification to rely on a unanimous vote of 328 members of parliament than on the formal election results that have obviously been *de facto* annulled by a revolutionary situation. The take-over by the opposition, moreover, was not supposed to be a permanent usurpation but the installation of an interim government with elections to take place within a few months. Although the political orientation of the partly far right-winged interim-government is more than questionable, there was no practical alternative to holding timely elections and this was the direction taken by the interim government.

Third, Russia's intervention was not aimed at re-establishing Yanukovych's government and ousting the interim administration. Yanukovych had appealed to Putin "to use the armed forces of the Russian Federation to restore law and order, peace and stability and to protect the people of Ukraine."⁵⁷ Russia, by contrast, obviously pursued its own national interests. The intervention was primarily directed at preparing the secession of a part of Ukraine's territory. Therefore, Russia's actions were clearly not covered by Yanukovych's invitation.

Consequently, the presence of Russian troops in Crimea cannot be justified by reference to Yanukovych's invitation to intervene. Russia's military presence, the blocking of Ukrainian military forces and seizure of military infrastructure constitutes an unlawful use of force and a violation of Ukraine's territorial integrity.

The Legality of the Crimean Secession from Ukraine

Initially there was some uncertainty about how Crimea and Russia would design the accession of Crimea to the Russian Federation, and different routes were being explored. The relevant provisions of Russian constitutional law provide that an accession is only possible when the third state to which the territory belongs concludes a treaty with Russia.⁵⁸ A group of State Duma deputies sought to broaden the legal basis for an admission to the Russian Federation and introduced an amending law⁵⁹ that would have also allowed an admission when the third state lacked an efficient government and when a referendum had favored a territory's accession

56 Putin, "Vladimir Putin Answered Journalists' Questions on the Situation in Ukraine."

57 UN Doc. S/2014/146, March 3, 2014.

58 Russian Federal Constitutional Law No. 6-FKZ on the Procedure of Admission to the Russian Federation and the Creation of a New Subject within the Russian Federation, Arts. 4.2 and 4.4.

59 Draft Russian Federal Constitutional Law No. 462741-6 on Amending the Federal Constitutional Law of the Russian Federation on the Procedure of Admission to the Russian Federation and Creation of a New Subject Within the Russian Federation.

to Russia.⁶⁰ This route was, however, abandoned, and it was decided to design the accession based on a treaty between Russia and Crimea as an independent state. The referendum was used as a basis for declaring Crimea's independence.

Legality of the Referendum

Organizing and holding the referendum on Crimea's accession to Russia was illegal under Ukrainian constitution.⁶¹ Article 2 of the constitution establishes that "Ukraine shall be a unitary state" and states that the "territory of Ukraine within its present border is indivisible and inviolable." Crimea is covered by Chapter X of the constitution, which provides for its autonomous status. Article 134 states that Crimea is an "inseparable constituent part of Ukraine." Its autonomous status provides Crimea with certain authorities, including allowing it to hold referendums.⁶² These rights, however, are limited to local matters. The constitution makes clear that alterations to the territory of Ukraine require an all-Ukrainian referendum.⁶³

While the referendum violated Ukrainian law, it did not violate international law since it was an internal affair. There are, however, international standards concerning how states must hold referendums.⁶⁴ General principles on fair voting are expressed in Article 3 of the First Protocol to the European Convention on Human Rights⁶⁵ and in Article 25 of the International Covenant on Civil and Political Rights—treaties to which Ukraine is party. These principles are the freedom, secrecy, equality, and universality of elections. The Venice Commission has developed

60 See for a legal analysis of that draft law: Venice Commission, Opinion on "Whether Draft Federal Constitutional Law No. 462741-6 on Amending the Federal Constitutional Law of the Russian Federation on the Procedure of Admission to the Russian Federation and Creation of a New Subject Within the Russian Federation is Compatible with International Law," Opinion No. 763/2014, March 21, 2014, CDL-AD(2014)004.

61 See Venice Commission, Opinion on "Whether the Decision Taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum on Becoming a Constituent Territory of the Russian Federation or Restoring Crimea's 1992 Constitution is Compatible with Constitutional Principles," Opinion No. 762/2014, March 21, 2014, Doc. CDL-AD(2014)002.

62 Article 138 (2), Constitution of Ukraine.

63 Article 73, Constitution of Ukraine.

64 See for an in depth analysis of the Crimean referendum 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," Blog of the European Journal of International Law, April 16, 2014, accessed June 1, 2016, <http://www.ejiltalk.org/sense-and-nonsense-of-territorial-referendums-in-ukraine-and-why-the-16-march-referendum-in-crimea-does-not-justify-crimeas-alteration-of-territorial-status-under-international-law/>.

65 Article 3 of the First Protocol to the European Convention on Human Rights provides: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

a Code of Good Practice on Referendums⁶⁶ in which it provides organizational and practical rules built on these principles. Though the Code does not constitute binding international law, it nevertheless expresses international standards which, in part, form hard international law and other standards that reflect widely accepted state practices for conducting referendums.

Based on what has been reported about the Crimean referendum's circumstances, those circumstances are problematic since pro-Russian soldiers controlled Crimea and its public infrastructure. To be free, a referendum requires the absence or at least the restraint of military forces of the opposing parties⁶⁷ and the neutrality of public authorities.⁶⁸ Both elements do not seem to have been secured in Crimea.⁶⁹

Another requirement of the freedom of referendum is that the referendum's question must be clear and not misleading. The phrasing must allow for a simple yes or no answer.⁷⁰ The Crimean referendum ignored this principle as it did not ask a polar question but provided two separate alternatives, and the voters were asked to pick one:

- “1. Are you in favor of the Autonomous Republic of Crimea reuniting with Russia as a constituent part of the Russian Federation?” *or*
 “2. Are you in favor of restoring the Constitution of the Republic of Crimea of 1992 and of Crimea's status as part of Ukraine?”

To be consistent with the Venice Commission's Code of Good Practice on Referendums, the referendum could only have been held on one of these questions, which would then have been answerable with yes or no. Here, in contrast, voters were forced to choose between two courses of action without having the chance to opt for the status quo in which Crimea formed part of Ukraine under the current Ukrainian constitution. Additionally, the second question is ambiguous because there were two versions of the Crimean constitution in force in 1992. One explicitly stated that Crimea formed a constitutive part of Ukraine and one did not, and hence the definitive meaning of the second question was unclear.⁷¹

The Code of Good Practice on Referendums also contains general procedural requirements. The Code requires the existence of a referendum law that regulates the procedure of the vote,

66 Venice Commission, Code of Good Practice on Referendums, CDL-AD(2007)008rev.

67 See Anne Peters, *Das Gebietsreferendum im Völkerrecht: Seine Bedeutung im Licht der Staatenpraxis nach 1989* (Baden-Baden: Nomos, 1995), 500.

68 See Venice Commission, Code of Good Practice on Referendums, CDL-AD(2007)008rev., I.2.2 and I.3.

69 In addition to the presence of armed troops, Crimean authorities have on many occasions taken a heavily biased position towards the referendum. The Chairman of the Supreme Council of the Autonomous Republic of Crimea, Vladimir Konstantinov, for example, declared in an address to journalists that “Crimea will not return to Ukraine” (State Council of the Republic of Crimea, Press Release, Vladimir Konstantinov: “Crimea will not Return to Ukraine,” March 11, 2014).

70 See Venice Commission, Code of Good Practice on Referendums, CDL-AD(2007)008rev., I.3.

71 Paul Kolstoe, *Russians in the Former Soviet Republics* (Bloomington: Indiana University Press, 1995), 194.

and demands the presence of domestic and international observers.⁷² While international observers of largely unknown affiliation were present, a referendum law did not exist.⁷³

Thus, although holding the referendum did not violate international law, the referendum's modalities did not comply with international standards.

Legality of the Declaration of Independence

The referendum produced an overwhelming majority in favor of Crimea's accession to Russia.⁷⁴ One day after the referendum, the Supreme National Council of Crimea declared Crimea's independence and requested other states to recognize its independence. Even before that declaration, the Supreme Council of Crimea proclaimed that a declaration of independence would be taken "with regard to the charter of the United Nations and a whole range of other international documents" as well as with view to the ICJ's advisory opinion on Kosovo's declaration of independence.⁷⁵ It referred to the latter as authority that such declarations do not violate international law.⁷⁶

So what does the Kosovo opinion tell us in regard to the legality of Crimea's declaration of independence? First, the Kosovo opinion had a rather narrow scope.⁷⁷ The ICJ did not address whether and under what circumstances a right to secession might exist nor whether Kosovo had the right to secede. It explicitly excluded the consequences of the declaration and assumed that this was not covered by the General Assembly's question.⁷⁸ The court limited the scope of its opinion to the question whether the declaration as such violated international law.⁷⁹

The court held that Kosovo's unilateral declaration did not violate the norms of international law. The underlying rationale is that the principle of territorial integrity only applies in the

72 The requirement of international referendum observers is an internationally accepted practice and constitutes customary international law. See Peters, *Das Gebietsreferendum im Völkerrecht*, 501.

73 Crimean authorities invited the OSCE to send observers. The OSCE refused since the invitation would have to come from the Ukrainian government (See Reuters Press Report, RPT UPDATE1-Crimea invites OSCE observers for referendum on joining Russia, March 10, 2014, accessed June 1, 2016, <http://www.reuters.com/article/ukraine-crisis-referendum-osce-idUSL6NoM73AP20140310>).

74 The referendum was held on 16 March 2014. 1,274,096 people participated. 1,233,002 (96.77%) voted in favor of an accession to Russia (See State Council of the Republic of Crimea, Press Release, March 17, 2014).

75 Quoted in: RT-Press Report, "Crimea Parliament Declares Independence from Ukraine ahead of Referendum," RT, March 11, 2014, accessed June 1, 2016, <https://www.rt.com/news/crimea-parliament-independence-ukraine-086/>.

76 "Crimea Parliament Declares Independence from Ukraine ahead of Referendum."

77 See the critique against such narrow interpretation of the General Assembly's question as expressed in Judge Simma's concurring opinion: *Declaration of Judge Simma, I.C.J. Reports 2010*, 478 et seq.

78 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, I.C.J. Reports 2010*, 403, 423–24.

79 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 425–26.

relations between states. It does not bind actors that are themselves not sovereign states, such as internal secessionist movements.⁸⁰ However, the ICJ also acknowledges that there is relevant international practice in which states and the UN Security Council have declared such unilateral declarations of independence as invalid.⁸¹ The ICJ argues that in these cases the invalidity does not follow from the unilateral character as such, but from their close link to serious violations of international law:

the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*ius cogens*).⁸²

We may conclude from this that unilateral declarations of independence may very well violate international law. This is the case when they are connected to “egregious violations of norms of general international law,” which includes violations of the prohibition against the use of force. The reasoning is clear: when the independence is only made possible by an outside intervention we *de facto* do not face a mere internal situation in which separatists proclaim their independence. Rather, where the declaration of independence relies on the illegal use of force, it is affected by this illegality and may not be regarded as neutral anymore.

This is exactly what happened in Crimea. The referendum fundamentally relied on the illegal intervention by Russian troops who made sure that the Ukrainian government would be unable to defend its sovereignty against the separatist endeavor. Therefore, the declaration of independence cannot be regarded in isolation but needs to be assessed in context, specifically, its inherent connection to Russia’s illegal intervention. Applying the principles of the Kosovo opinion, Crimea’s declaration was illegal.

Self-Determination and Secession

The Crimean government and Russia refer to the right to self-determination of peoples as a foundation for Crimea’s secession from Ukraine.⁸³ The right to self-determination is a fundamental principle of international law and is incorporated in Article 1(2) of the UN Charter. The most authoritative interpretation of that principle is in the Friendly Relations Declaration⁸⁴ annexed to General Assembly Resolution 2625. This declaration proclaims that

80 See also: Ralph Wilde, “Kosovo (Advisory Opinion),” *MPEPIL*, May 2011, para. 7.

81 See UN Security Council, S/Res/217 (1965), para. 3 (Southern Rhodesia); S/Res/541 (1983), para. 2 (Northern Cyprus); S/Res/787 (1992), para. 3 (Bosnia and Herzegovina).

82 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, 403, 437.

83 Putin, “Vladimir Putin Answered Journalists’ Questions on the Situation in Ukraine.”

84 “Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations,” A/RES/25/2625, October 24, 1970.

all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.⁸⁵

Despite this strong formulation of the principle, it is commonly understood that the concept of self-determination may not be used to disaggregate the territory of existing nation-states. This is also clearly expressed in the Friendly Relations Declaration, which states that the principle of self-determination may not be “construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States” as long as states respect the principle of equal rights and self-determination in relation to minority groups.⁸⁶ So understood, the right to self-determination of “peoples” within an existing state guarantees certain minority rights that may amount to a right to be granted autonomy within that political entity, but it does not allow for complete political separation. Self-determination is therefore in principle limited to the realization of “internal self-determination.”

An undisputed exception has only historical relevance: the secession of states that were under colonial rule.⁸⁷ Whether there are additional circumstances under which the right to self-determination can amount to a right to secession is highly contested. According to the concept of “remedial secession,” a “people” may resort to external self-determination under extreme circumstances, especially when the state renders an internal self-determination impossible through discriminatory politics.⁸⁸ Following that understanding, the Supreme Court of Canada has identified two further constellations for external self-determination in its Quebec decision, namely “where a people is subject to alien subjugation, domination or exploitation outside a colonial context”⁸⁹ and “when a people is blocked from the meaningful exercise of its right to self-determination internally.”⁹⁰ In regard to the latter alternative, the court is, however, cautious and leaves it open whether a respective norm of international law is already established.⁹¹

85 “Declaration on Principles of International Law.”

86 “Declaration on Principles of International Law.”

87 See e.g.: Antonio Cassese, *Self-Determination — A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995), 332; Supreme Court of Canada, *Re Secession of Québec* [1998], 2 S.C.R. 217, 222.

88 Seminal in scholarship: Lee C. Buchheit, *Secession — The Legitimacy of Self-determination* (New Haven: Yale University Press, 1978), 220–23; see also Christian Tomuschat, “Secession and Self-Determination,” in *Secession — International Law Perspectives*, ed. Marcelo G. Kohen (Cambridge: Cambridge University Press, 2006), 42; Markku Suksi, “Keeping the Lid on the Secession Kettle — a Review of Legal Interpretations Concerning Claims of Self-Determination by Minority Populations,” *International Journal on Minority and Group Rights* 12 (2005): 225; David Raic, *Statehood and the Law of Self-Determination* (Boston: Nijhoff, 2002), 395.

89 See Supreme Court of Canada, *Reference Re Secession of Québec* [1998], 2 S.C.R. 217, para. 133.

90 See Supreme Court of Canada, para. 134.

91 Supreme Court of Canada, para. 154: the court holds that a right to secession exists “possibly where ‘a people’ is denied any meaningful” internal self-determination.

Under such reasoning, external self-determination is interpreted as conditional, allowing secession only as an *ultima ratio* where internal self-determination has no chance of realization.⁹² That right can be activated where a state does not enable a group with the legal status of a people to effectively realize its right to self-determination within the framework of the existing state.⁹³

The whole debate on secession has been fuelled by the (*de facto*) secession of Kosovo from Serbia, which raised the question whether the Kosovo incident can be seen as a precedent for further cases of secession.⁹⁴ States in support of Kosovo's independence have declared in unison that Kosovo was a special case that does not have any precedential value for other situations.⁹⁵ The arguments for this "unique case" perspective focus on the internal conflict in Kosovo at the end of the 1990s, with its severe violations of human rights⁹⁶ and the extended period of UN administration that preceded the declaration of independence.⁹⁷

Russia, though traditionally opposed to a right to secede, nevertheless bases its argument for Crimea's secession on the Kosovo case and tries to establish it as a relevant precedent. Having already done so with respect to Abkhazia and Ossetia,⁹⁸ it rejects the *sui generis* thesis that Western states claim applies to Kosovo. After the Crimean referendum Putin said in an address to the public:

92 Daniel Thürer and Thomas Burri, "Secession," *MPEPIL*, June 2009, para. 17.

93 Stefan Oeter, "Selbstbestimmungsrecht im Wandel," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law* 52 (1992): 755 et seq.

94 See for a discussion of the precedence character of the Kosovo case: Thomas Fleiner, "The Unilateral Secession of Kosovo as a Precedent in International Law," in *From Universalism to Community Interest*, ed. U. Fastenrath et al. (Oxford: Oxford University Press, 2011), 877 et seq.

95 See e.g. Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2007/168, para. 15; That was also proclaimed within Kosovo's declaration of independence itself which states "that Kosovo is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation" (Kosovo Declaration of Independence, February 17, 2008, accessed June 1, 2016, <http://www.assembly-kosova.org/?cid=2,128,1635>).

96 The Secretary General concluded that because of the history of internal conflict, a reintegration of Kosovo into Serbia was not an option. See Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2007/168, paras. 6–7.

97 See Council of the European Union, EU Council Conclusions on Kosovo, 2851st External Relations Council meeting, 18 February 2008: "The Council reiterates the EU's adherence to the principles of the UN Charter and the Helsinki Final Act, inter alia the principles of sovereignty and territorial integrity and all UN Security Council resolutions. It underlines its conviction that in view of the conflict of the 1990s and the extended period of international administration under SCR1244, Kosovo constitutes a *sui generis* case which does not call into question these principles and resolutions."

98 See Independent International Fact-Finding Mission on the Conflict in Georgia, Report, vol. II, September 2009, 140.

We keep hearing from the United States and Western Europe that Kosovo is some special case. What makes it so special in the eyes of our colleagues? It turns out that it is the fact that the conflict in Kosovo resulted in so many human casualties. Is this a legal argument? The ruling of the International Court says nothing about this. This is not even double standards; this is amazing, primitive, blunt cynicism. One should not try so crudely to make everything suit their interests, calling the same thing white today and black tomorrow. According to this logic, we have to make sure every conflict leads to human losses.⁹⁹

While Putin's statement could be understood as a threat, it is hopelessly under-complex and not correct in legal terms. It is obviously a political statement. Even if we take the most-far reaching suggestions for a right to a remedial secession we would not arrive at such a right in the Crimean case. As contested as these criteria may be, a right to secession would be "ultima ratio" and therefore require that there was no prospect to realize Crimea's right to self-determination within Ukraine's existing political system. This was and is certainly not the case. The Ukrainian political system very much acknowledged the special status of Crimea. One may argue about the political and organizational measures that are necessary to guarantee a sufficient degree of internal self-determination. The fact is, however, that a relatively comprehensive degree of political autonomy had already been realized under the constitution of Ukraine. Crimea had the status of an autonomous republic, and therefore the institutional arrangements for implementing internal self-determination were in place.

While Putin's statement is not sound, it nevertheless can direct our attention to the greater context of the conflict. Firstly, it demonstrates the problematic dimension of extending exemptions to established norms of international law. Norms of international law are strongest and have the utmost prospect of compliance when they are clear and do not leave much leeway for interpretation. A generous attitude towards exemptions to a norm makes it much easier for all parties to argue that a new constellation falls under such an exemption, even if that strains the scope of existing doctrine and practice. As the current case shows, Western states' strategy to extend the concept of self-determination to Kosovo is dangerous since the structure of international law provides no protection against further extensions by other states — to the contrary, it triggers desires in that regard. This strategy undermines the general strength of the norm that self-determination is principally limited to its internal dimension. The "unique case" argument is an attempt to contain the consequences of Western states' practice, though without much practical success. What will be referred to as precedent tomorrow or as evidence of a newly emerging legal rule¹⁰⁰ is not determined by the states that acted yesterday and especially not by

99 Vladimir Putin, "Address by President of the Russian Federation," President's web-site, March 18, 2014, accessed June 1, 2016, <http://en.kremlin.ru/events/president/news/20603>.

100 Interestingly, Christian Tomuschat interpreted the fact that Kosovo was under international administration already in 2006, i.e. before Kosovo's declaration of independence, "as coming within the purview of remedial secession" (Tomuschat, "Secession and Self-Determination," 42). It is evident

the meaning that those states attribute to their actions.¹⁰¹ The claim for uniqueness is a weak strategy for containment since a comparison between two situations is always possible and the result of a comparison depends on the criteria one chooses to acknowledge as relevant — and these can hardly be controlled by political declarations.¹⁰² When recognizing Kosovo, Western states pushed the limits of the concept of self-determination, and it is not surprising that other states do the same when it suits their interests.

The second issue raised is what Putin calls the “blunt, primitive cynicism” of Western states — the allegation to use double standards when evaluating Russia on the one hand, Western states’ actions on the other. Despite Putin’s polemical attitude, there is an element of truth to it.¹⁰³ Western states have sought to create an exemption to an accepted norm of international law when it seemed opportune for them and when it contradicted Russian interests in Yugoslavia generally and in Kosovo particularly. Western states have openly and strongly used the creation of an exemption to rules of international law as an instrument that was at least also beneficial for their political interests.¹⁰⁴ Russia now is denied the same right though the Crimean population’s demand to accede to Russia — as a matter of politics, not law — is not unjustified, given the apparent majority opinion there.¹⁰⁵

As has been shown above, there is certainly no right to secession in favor of Crimea. The fact, however, that Russia can invoke prior legal practice that apparently supports its claims — at least within the sketchy and instrumental language of public addresses and press releases — is partly attributable to prior politics of Western states. By further blurring the concept of self-determination Western states bear their share of responsibility for the fact that Russia can make at least a political argument for a right to self-determination of Crimea under international law, even if that argument does not hold up under a thorough legal analysis. In terms of politics, Russia, as a powerful state, does not need the best legal argument. Instead, an argument that allows Russian authorities to make a case, to present arguments for the legality by further expanding the right to self-determination, is already good enough for Putin to save his face while acting as a regional hegemonic power.

that this is even more true in view of the broad recognition of Kosovo as an independent state (as of April 2014, 108 UN member states have recognized Kosovo, see: <http://www.kosovothanksyou.com/>).

101 Although, of course, such declarations are not irrelevant. When determining the norms of customary international law such declarations are relevant for determining the *opinio juris* of states.

102 See Fleiner, “The Unilateral Secession of Kosovo as a Precedent in International Law,” 882 et seq.

103 See my further exploration of this issue in: Christian Marxsen, “International Law in Crisis — Russia’s Struggle for Recognition,” *German Yearbook of International Law*: 58 (2015): 11–48.

104 Humanitarian concerns have been invoked as the central justification for the Kosovo intervention, especially in view of the failure to prevent the genocide in Rwanda. These concerns, however, do not explain the hastily recognition of Kosovo after its declaration of independence.

105 The result of the referendum should surely not be taken as a solid basis for the evaluation of the majority opinion because the threat by present pro-Russian troops and the boycott of the referendum by parts of the population certainly have influenced the results. From the known facts, however, it is very likely that also a procedurally correct referendum would have led to a result in favor of an accession to Russia.

Conclusion: The Legal Situation after Crimea's Accession to Russia

Which norms of international law has Russia violated during the Crimea Crisis? Russia used military force to take control of the Crimean Peninsula and to prevent Ukrainian troops from intervening in the process of secession. In doing so, Russia has violated Ukraine's territorial integrity, and this violation is perpetuated by the integration of Crimea into Russia's territory. A justification for Russia's acts is missing: international law did not allow Russia to intervene to rescue Russian citizens and it did not allow Russia to intervene in Crimea upon Yanukovich's invitation. Crimea also did not become an independent state with the capacity to invite Russian troops after the referendum and could not therefore adopt an internationally binding treaty on for its accession to Russia.

What is, consequently, the current status of Crimea under international law? Crimea has at no point become an independent state: it could not secede from Ukraine since the narrow legal requirements for a right to secession were not fulfilled. Thus, from the perspective of international law, Crimea still belongs to Ukraine, whatever the *de facto* situation may look like. Because Crimea has not become a state, it could not enter into any treaty with Russia. Thus, its accession to the Russian Federation is without legal effect under international law. This view has also been supported by most states and in various international forums. General Assembly Resolution 68/262 has called upon states not to recognize any alteration to the status of the Autonomous Republic of Crimea and the city of Sevastopol and refers to the concept of obligatory non-recognition.¹⁰⁶ The Parliamentary Assembly of the Council of Europe rejected recognizing "the results of the illegal so-called referendum and subsequent annexation of Crimea into the Russian Federation" as "a grave violation of international law."¹⁰⁷ The Parliamentary Assembly of the OSCE called "on participating States to refrain from any action or dealing that might be interpreted as recognizing the unlawful annexation of the Autonomous Republic of Crimea and the city of Sevastopol."¹⁰⁸

All international law can do in view of its flagrant violation is to oblige states not to recognize the illegal changes. The doctrine of obligatory non-recognition provides that states "are under an obligation not to recognize, through individual or collective acts, the purported statehood of an effective territorial entity created in violation of one or more fundamental norms of international law."¹⁰⁹ This rationale underlies the Stimson Doctrine that was used as a justification for states not to recognize the annexation of the Baltic states by the Soviet Union.¹¹⁰ This rationale is also expressed in the International Law Commission's Article 41 of the Draft

¹⁰⁶ UN General Assembly Resolution A/68/262, March 27, 2014.

¹⁰⁷ Council of Europe, Parliamentary Assembly, Resolution 1990 (2014), April 10, 2014.

¹⁰⁸ OSCE Parliamentary Assembly, Resolution on the continuation of clear, gross and uncorrected violations of OSCE commitments and international norms by the Russian Federation, 24th annual session, July 5–9, 2015, para. 22.

¹⁰⁹ Raic, *Statehood and the Law of Self-Determination*, 107.

¹¹⁰ See Peter Van Elsuwege, "Baltic States," *MPEPIL*, March 2009, para. 20.

Articles on State Responsibility.¹¹¹ The obligation is a norm of customary international law¹¹² and aims at preventing a violation of international law from being validated by recognition.¹¹³ It contains a “minimum resistance” and “a continuous challenge to a legal wrong.”¹¹⁴ The obligation arises where a territorial entity has been created in violation of an *erga omnes* norm, especially by violating the prohibition of the use of force, by violating the right to self-determination, or by violating the prohibition of systematic racial discrimination.¹¹⁵ The process in which Crimea was integrated into the Russian Federation relied on the use of force by Russian troops and therefore gives rise to an obligation not to recognize Crimea’s accession to Russia. While this might be the law, the facts speak a different language. A reintegration of Crimea into Ukraine is distant from the political agenda of governments. They would be happy enough if the conflicts in Eastern Ukraine could be settled. It seems that the minimum resistance of non-recognition might determine the relations between Russia and almost the rest of the world for a long time.

Bibliography

- Bowett, D. W. *Self-Defence in International Law*. Manchester: Manchester University Press, 1958.
- Buchheit, Lee C. *Secession — The Legitimacy of Self-determination*. New Haven: Yale University Press, 1978.
- Cassese, Antonio. *Self-Determination — A Legal Reappraisal*. Cambridge: Cambridge University Press, 1995.
- Corten, Olivier. *The Law Against War — The Prohibition on the Use of Force in Contemporary International Law*. Oxford: Hart, 2010.
- Eichensehr, Kristen E. “Defending Nationals Abroad: Assessing the Lawfulness of Forcible Hostage Rescues.” *Virginia Journal of International Law* 48 (2008): 451–84.
- Fleiner, Thomas. “The Unilateral Secession of Kosovo as a Precedent in International Law.” In *From Universalism to Community Interest*, edited by Ulrich Fastenrath, et al., 877–94. Oxford: Oxford University Press, 2011.
- Gestri, Marco. “ECOWAS Operations in Liberia and Sierra Leone: Amnesty for Past Unlawful Acts or Progress Toward Future Rules?” In *Redefining Sovereignty*, edited by Michael Bothe, et al., 211–50. Ardsley: Nijhoff, 2005.
- Greenwood, Christopher. “Self-Defence.” *MPEPIL*, April 2001.

111 Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Article 41:
 “1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation. [...]”

112 Raic, *Statehood and the Law of Self-Determination*, 150.

113 Raic, *Statehood and the Law of Self-Determination*, 141.

114 Hersch Lauterpacht, *Recognition in International Law* (Cambridge: Cambridge University Press, 1948), 431.

115 Raic, *Statehood and the Law of Self-Determination*, 111, 141–42.

- Independent International Fact-Finding Mission on the Conflict in Georgia, "Report." Vol. II, September 2009.
- Kolstoe, Paul. *Russians in the Former Soviet Republics*. Bloomington: Indiana University Press, 1995.
- Kryukov, Nikolai Alexandrovich. "Evolution of Russian-Ukrainian Relations: The Legal Status of the Black Sea Fleet." *Military Thought* 15 (2006): 120–32.
- Lauterpacht, Hersch. *Recognition in International Law*. Cambridge: Cambridge University Press, 1948.
- Marxsen, Christian. "International Law in Crisis — Russia's Struggle for Recognition." *German Yearbook of International Law* 58 (2015): 11–48.
- Nolte, Georg. "Intervention by Invitation." *MPEPIL*, 2010.
- Nowrot, Karsten, and Emily W. Schabacker. "The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone." *American University International Law Review* 14 (1998): 321–412.
- Oeter, Stefan. "Selbstbestimmungsrecht im Wandel." *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht/Heidelberg Journal of International Law* 52 (1992): 741–80.
- Osakwe, Chris. "States (International Law)." In *Encyclopedia of Soviet Law*, 2nd ed., edited by Ferdinand J. M. Feldbrugge. Dordrecht: Nijhoff, 1985.
- Peters, Anne. *Das Gebietsreferendum im Völkerrecht: Seine Bedeutung im Licht der Staatenpraxis nach 1989*. Baden-Baden: Nomos, 1995.
- Peters, Anne. "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." April 16, 2014. Accessed June 1, 2016. <http://www.ejiltalk.org/sense-and-nonsense-of-territorial-referendums-in-ukraine-and-why-the-16-march-referendum-in-crimea-does-not-justify-crimeas-alteration-of-territorial-status-under-international-law/>.
- Raic, David. *Statehood and the Law of Self-Determination*. Boston: Nijhoff, 2002.
- Randelzhofer, Albrecht, and Georg Nolte. "Article 51." In *The Charter of the United Nations*, vol. II, 3rd ed., ed. Bruno Simma et al. Oxford: Oxford University Press, 2012.
- Randelzhofer, Albrecht, and Oliver Dörr. "Article 2 (4)." In *The Charter of the United Nations*, vol. I, 3rd ed., ed. Bruno Simma et al. Oxford: Oxford University Press, 2012.
- Suksi, Markku. "Keeping the Lid on the Secession Kettle — a Review of Legal Interpretations Concerning Claims of Self-Determination by Minority Populations." *International Journal on Minority and Group Rights* 12 (2005): 189–226.
- Tanca, Antonio. *Foreign Armed Intervention in Internal Conflict*. Dordrecht: Nijhoff, 1993.
- Thürer, Daniel, and Thomas Burri. "Secession." *MPEPIL*, June 2009.
- Tomuschat, Christian. "Secession and Self-Determination." In *Secession — International Law Perspectives*, edited by Marcelo G. Kohen, 23–45. Cambridge: Cambridge University Press, 2006.
- Wilde, Ralph. "Kosovo (Advisory Opinion)." *MPEPIL*, May 2011.
- Wippmann, David. "Military Intervention, Regional Organizations and Host-State Consent." *Duke Journal of Comparative & International Law* 7 (1996–1997): 209–39.
- Zimmermann, Andreas. "State Succession in Treaties." *MPEPIL*, November 2006.



Dr. Christian Marxsen, LL.M. (NYU) is a Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, Germany and also teaches at the Heidelberg University Law School. He has taught international law and European Union law at universities in Hamburg, Beijing, and Santiago de Chile. He holds a Ph.D. from the University of Hamburg and an LL.M. from New York University. Before joining Max Planck he worked, *inter alia*, as a legal assistant to the co-lawyers of the civil parties before the Khmer Rouge Tribunal in Phnom Penh, Cambodia, and at the International Center for Transitional Justice in New York. His current research focuses on the prohibition of the use of force in international law.