

The Crimea Crisis

An International Law Perspective

*Christian Marxsen**

Abstract	367
I. The Escalation of the Conflict in Ukraine	368
II. Legal Obligations between Russia and Ukraine	370
III. The Russian Intervention in Crimea	372
1. Protection of Nationals Abroad and of the Russian-speaking Population	372
2. Intervention upon Invitation	374
IV. The Legality of the Crimean Secession from Ukraine	380
1. Legality of the Referendum	380
2. Legality of the Declaration of Independence	383
3. Self-Determination and Secession	384
V. Conclusion: The Legal Situation after Crimea's Accession to Russia	389

Abstract

In February and March 2014 Ukraine was literally overrun by a chain of events that eventually led to an incorporation of Crimea into Russian territory. A joint endeavor by Crimean and Russian authorities used the internal conflict in Ukraine to deprive the Ukrainian government of its control over Crimea, to hold a referendum, and to declare the independence of Crimea. Already on the day after the declaration of independence Russia formally recognized Crimea as an independent state,¹ and the Crimean parliament requested Crimea to be admitted to Russia.² Soon after that, the accession treaty was signed and within only a few more days all Russian constitutional requirements for an accession of Crimea to Russia were fulfilled.³

* Dr. iur., LL.M. (NYU), Senior Research Fellow, Max Planck Institute for Comparative Public Law and International Law, Heidelberg.

¹ See Executive Order on recognising Republic of Crimea, 17.3.2014, <eng.kremlin.ru>.

² *L. Harding/S. Walker*, Crimea Applies to be Part of Russian Federation after Vote to Leave Ukraine, *The Guardian* (online ed.), 17.3.2014.

³ See in regard to the Russian constitutional process *O. Luchterhandt*, who argues that during that process Russian constitutional law was violated (*O. Luchterhandt*, Annexion der Krim – Putin verstößt gegen russische Verfassung, *Frankfurter Allgemeine Zeitung*, 18.4.2014).

All parties to the conflict refer to international law to justify their positions. The Crimean authorities and Russia claim a legal basis for a Russian intervention in Crimea and a right to secession while the majority of states rejects that claim. How, after all, do the actions towards Crimea's secession have to be qualified under international law? To which extent has Russia violated international law and what is the current status of Crimea?

In order to address these questions, this paper starts with a brief introduction into the background of the current escalation (I.) and then reviews the legal obligations between Ukraine and Russia regarding their territorial integrity and the prohibition of the use and threat of force (II.). Third, it discusses the legality of the Russian intervention in Crimea (III.), and, fourth, the Crimean secession from Ukraine (IV.). Answers to the questions raised will then be provided in the Conclusion (V.).

I. The Escalation of the Conflict in Ukraine

After the end of the cold war, Ukraine has become a focus of geo-strategical interests. Ukraine is torn between the European Union on the one hand, Russia on the other. For the EU, Ukraine is a potential candidate for future accession. The first part of the association agreement that was signed in March 2014 directs the EU and Ukraine towards closer political and economic cooperation. Russia, on the other hand, opposes that development sharply and fears for 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 strictly defies that the remaining neutral states become part of these organizations as well. Moreover, Russia has a key interest in Ukrainian territory, since it relies on access to Crimea as basis for its Black Sea Fleet. Russia's bargaining power is by all that immense: Ukraine depends on gas supplies from Russia and is, in addition to that, an important trading partner. This role has enabled Russia to prevent the adoption of the EU-Ukraine association agreement that was, for a first time, scheduled to be signed in November 2013.

These external divisions find an internal corollary in a division of Ukraine's population: while Eastern Ukraine is predominantly Russia-oriented with Russian being the native language of a good part of the population, the population of the Western part is more oriented towards the European Union.

The catalyst for the current crisis between Russia and Ukraine was the internal protests that arose in November 2013 against President *Yanu-*

kowych and his decision to refrain from signing the association agreement with the EU. The protests soon developed into a turmoil during which hundreds were injured and more than 100 people killed. The underlying political orientation of the groups that carried the protest remains uncertain to a degree. Certain is, however, 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.⁴ 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 an illegal interference into Ukrainian internal affairs. Towards the end of February 2014, the 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 process of accession of Crimea to Russia. On 1.3.2014, the Russian Council authorized the use of armed forces on the territory of Ukraine.⁵ In the following weeks Russian troops in Crimea were reinforced and also gathered at the Ukrainian border. After Crimea’s declaration of independence Russian troops openly took action in Crimea and, for example, forced Ukrainian military units to surrender and leave the peninsula.⁶ If and to which extent, however, Russian troops were already present before the referendum, remains contested. Russian authorities keep proclaiming that the soldiers who took control of Crimea after *Yanukovich*’s removal from office were actually independent Crimean “self-defense units”.⁷ Numerous press reports, however, suggest that these soldiers were not only local militias, but in fact also Russian soldiers.⁸ While they did not wear official emblems, they have been spotted using professional Russian military equipment and military vehicles regis-

⁴ Maidan on my mind, *The Economist*, 15.2.2014.

⁵ ITAR-TASS Press Report, Putin’s Letter on Use of Russian Army in Ukraine Goes to Upper House, 1.3.2014 <en.itar-tass.com>.

⁶ *D. M. Herszenhorn* et al., Russian Forces Take Over One of the Last Ukrainian Bases in Crimea, *New York Times*, 23.3.2014.

⁷ *V. Putin*, Vladimir Putin Answered Journalists’ Questions on the Situation in Ukraine, Kremlin Press Conference, 4.3.2014, transcript accessible at <www.kremlin.ru>.

⁸ *A. Faiola/W. Englund*, Ukraine Denounces “invasion” by Russian Forces on Eve of Crimea’s Referendum, *Washington Post* (online ed.), 15.3.2014; *R. Mackey*, Russia’s Defense Minister Calls Evidence of Troop Presence in Crimea “Complete Nonsense”, *New York Times* (online ed.), 5.3.2014; *A. Higgins/S. L. Myers*, As Putin Orders Drills in Crimea, Protesters’ Clash Shows Region’s Divide, *New York Times*, 27.2.2014.

tered for the Russian Black Sea Fleet in Crimea.⁹ The evidence therefore strongly suggests that Russian troops played an important role in taking over the infrastructure in Crimea and in blocking Ukrainian military units. Without an independent investigation, however, it remains factually uncertain at which point in time exactly troops under Russian command took control of Crimea for the first time.

II. Legal Obligations between Russia and Ukraine

The obligations between Russia and Ukraine with regard to territorial integrity and the prohibition of the use of force are contained in a number of bi- and multilateral agreements. These two principles are clearly expressed in Article 2 (4) UN Charter,¹⁰ and in the Helsinki Final Act.¹¹ In addition to that, a number of bi-lateral agreements contain relevant provisions. 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 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”¹² 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”.¹³

The three signing nuclear-weapon states committed to seek immediate Security Council action to provide assistance to Ukraine in case of an aggression against Ukraine.¹⁴

⁹ A. Smale/S. Erlanger, Ukraine Mobilizes Reserve Troops, Threatening War, New York Times, 2.3.2014; A. Higgins, Amid More Signs of Russian Force in Crimea, Delight Mixes With Dismay, New York Times, 2.3.2014; Associated Press, Gunmen Surround Ukrainian Military Base in Crimea, 2.3.2014.

¹⁰ 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.”

¹¹ 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).

¹² Budapest Memorandum, signed 5.12.1994, para. 1.

¹³ Budapest Memorandum (note 12), para 2.

¹⁴ Budapest Memorandum (note 12), para 4.

The 1997 Treaty on Friendship, Cooperation, and Partnership between Ukraine and Russia 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”.¹⁵

Another relevant treaty for the legal obligations between Russia and Ukraine is the Black Sea Fleet Status of Forces Agreement (SOFA) that both states settled upon in 1997.¹⁶ After agreeing to divide the Black Sea fleet in 1994 (Russia getting 80 % of the vessels, Ukraine the remaining 20 %), Ukraine consented to lease Crimean naval facilities to Russia for twenty years. This agreement has been prolonged until 2042 in 2010 by the so-called Kharkiv Accords, in which Russia has committed to supply Ukraine with discounted natural gas in return. The Black Sea Fleet SOFA allows Russian military to be present in Crimea, but restricts operations to a confined agreed-upon scale and does not allow a general public presence of Russian troops in Crimea.¹⁷

Putin has made the argument that these bi-lateral treaties are no longer binding. He considered the regime change a revolution out of which a new state had emerged and with which Russia had not concluded any agreements.¹⁸ This argument is obviously a political statement. It has no basis in the current doctrine of international law.¹⁹ The question of state succession does not even arise in regard to Ukraine because a revolutionary regime

¹⁵ Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation, signed 31.5.1997, Article 3.

¹⁶ See for the development of the post-Soviet status of the Black Sea Fleet the Russian military journal: *N. A. Kryukov*, Evolution of Russian-Ukrainian Relations: The Legal Status of the Black Sea Fleet, in: *Military Thought* 15 (2006), 120.

¹⁷ See generally International Law Association, Draft Report on Aggression and the Use of Force, Washington Conference 2014, 14.

¹⁸ *V. Putin* (note 7).

¹⁹ The idea behind *Putin's* statement is that at 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 the so-called Soviet international law which claimed that the USSR was not bound by treaty obligations of Tsarist Russia (see *C. Osakwe*, States (International Law), in: *F. J. M. Feldbrugge* et al., *Encyclopedia of Soviet Law*, 2nd ed. 1985, 732).

change does not constitute a discontinuity of statehood on a given territory.²⁰

III. The Russian Intervention in Crimea

Russia has referred to several legal arguments to justify a military intervention in Crimea. Russia especially claims the legality of its actions under two concepts of international law: the protection of nationals abroad (1.) and intervention upon invitation (2.).

1. Protection of Nationals Abroad and of the Russian-speaking Population

One argument has been that an intervention would be justified in order to protect the Russian minority that lives on Ukrainian territory. This justification was, for example, given by the Russian Council which gave *Putin* the permission to use military force on Ukrainian territory. Its chairperson *Valentina Matviyenko* justified the necessity of military action under reference to “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”.²¹

In terms of international law, the rescue of nationals that are in danger on the territory of another state is partly regarded as self-defense under Article 51 UN Charta (1.) or, alternatively, as an unwritten customary exemption of the prohibition of the use of force as provided by Article 2 (4) UN Charta (2.).

1. 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 enable 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

²⁰ A. Zimmermann, State Succession in Treaties, MPEPIL (online ed.), November 2006, para. 1.

²¹ Quoted after: ITAR-TASS Press Report (note 5).

self-defense as a justification for the use of force to rescue their nationals. An argument allegedly in favor of that view is 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”²² can amount to an armed attack against the state.²³ Such a wide reading of the right to self-defense is, however, highly problematic.²⁴ Self-defense requires that there is an actual threat to the existence or security of a state²⁵ and this requires a link to the state’s territory, its positions, or vessels abroad.²⁶

2. The second possible justification for the rescue of nationals abroad relies on a narrow customary exemption of the prohibition of the use of force. State practice is admittedly not uniform and case law is ambiguous.²⁷ Nevertheless, states have regarded rescue operations as justified under international law and acted accordingly. With *A. Randelzhofer* and *O. Dörr* it can therefore be argued that this has created a norm of customary international law: “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 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 [...]”²⁸

²² C. Greenwood, Self-Defence, MPEPIL (online ed.), April 2001, para. 24.

²³ See K. E. Eichensehr, Defending Nationals Abroad: Assessing the Lawfulness of Forcible Hostage Rescues, Va. J. Int’l L. 48 (2008), 468; see also D. W. Bowett, Self-Defence in International Law, 1958, 92.

²⁴ 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.”

²⁵ A. Randelzhofer/G. Nolte, Article 51, in: B. Simma et al., The Charter of the United Nations, 3rd ed., Vol. II, 2012, margin number 28.

²⁶ A. Randelzhofer/O. Dörr, Article 2 (4), in: B. Simma et al., The Charter of the United Nations, 3rd ed., Vol. I, 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 vessel may trigger the right to self-defense. *Case Concerning Oil Platforms*, ICJ Reports 2003, 195.

²⁷ See International Law Association (note 17), 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.”

²⁸ A. Randelzhofer/O. Dörr (note 26), 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

Such an unwritten exception of Art 2 (4) of the UN Charter does in any case only offer a very narrow justification for the use of force: first, there must be evidence that the life of a state's citizens is in danger on the territory of another state; second, the other state must be unwilling or unable to offer sufficient protection; and generally, intervention is a means of *ultima ratio*, i.e. there must be no other reliable means to rescue the person in danger. The cases covered are therefore rather extreme. Russia carries the burden of proof and has at no point provided any concrete evidence that such violations have actually taken place. The aim to protect Russian citizens as expressed by the Russian 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 is also not justified. As a measure of the responsibility to protect, an authorization of the Security Council would be necessary²⁹ but in the absence of any severe human rights violations against the Russian speaking minority there is no room for an intervention for humanitarian reasons anyway.

2. Intervention upon Invitation

The strongest argument in favor of Russia as well as the most substantial legal issue is brought up by the concept of intervention upon invitation. The Russian authorities proclaimed that after *Yanukovych* had fled the country he had issued a letter in which he invited Russia to intervene on Ukraine territory as a countermeasure against what Russia perceives as the takeover by nationalist and anti-Semite Maidan protesters.³⁰ *Yanukovych* has confirmed that he invited Russian troops, although he has expressed regret for that and said that he “was wrong” in doing so and “acted on [his] emotions”.³¹ Russia pointed out that *Yanukovych*'s removal from office was not in accordance with the Ukrainian constitutional provisions and that *Yanu-*

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.).

²⁹ U.N. General Assembly, 2005 World Summit Outcome A/RES/60/1 of 16.9.2005, para. 139.

³⁰ See *V. Putin* (note 7).

³¹ Quoted after an Associated Press report: *C. Kriel/V. Isachenkov*, AP Interview: Yanukovych Admits Mistakes on Crimea, 2.4.014, available at: <hosted.ap.org>.

kovych therefore was to be regarded as the legitimate President of Ukraine who is in the position to invite foreign troops to intervene.

Before turning to the legal requirements of a valid intervention upon invitation it is useful to take a brief look at the legal situation under Ukraine's constitution that has arisen after the removal of *Yanukovych* from office.

Article 108 of the Ukrainian constitution provides that the president's authority ends in case of removal from office by the procedure of impeachment against treason or another crime committed by the President. The impeachment procedure is further spelled out in Article 111 and *inter alia* requires: first, that the majority of the constitutional membership of parliament initiates the impeachment procedure; second, that an investigating commission is established; third, that the parliament considers the results of the investigation; fourth, that two thirds of the majority of the constitutional members vote on ground of evidence to bring up charges against the President; and lastly, the decision of removal needs to be taken by three quarters of the constitutional membership upon confirmation by Ukraine's Constitutional Court.

In fact, none of this has happened regarding *Yanukovych*. His removal was decided by all present 328 members of parliament, but as the constitutional membership counts 450 members, the required majority of three quarters was not met. Only around 73 % have voted to remove *Yanukovych* from office. His removal has therefore been in violation of Ukraine's constitution. Nevertheless, *Yanukovych* fled the country and did not retain a power position, since the administration, especially military and police forces proclaimed to support the new government. Because he was – from the perspective of Ukrainian constitutional law – still in office, the crucial question is whether he was entitled under international law to invite Russia to intervene.

As a general rule of international law, a state can invite foreign states to send troops to its territory. The “classical” understanding is that only the official governments, but not opposition groups are entitled to such invitations.³²

The consent expressed in the invitation excludes the wrongfulness of a military presence that would otherwise constitute an illegal use of force.³³ Legally difficult is the question when such consent shall be considered valid. The debate has concentrated on formal requirements in regard to the ex-

³² See *Military and Paramilitary Activities In and Against Nicaragua*, ICJ Reports 1986, 126.

³³ ILCYB 1979, Vol. II, Part Two, 110; O. Corten, *The Law Against War – The Prohibition on the Use of Force in Contemporary International Law*, 2010, 249.

pression of consent, but also on substantive requirements in relation to the inviting government. General requirements for the validity of a state's consent that may be regarded as commonly accepted have been elaborated by the International Law Commission in its commentary on the draft articles on state responsibility. In the commentary to Article 29,³⁴ the ILC has pointed out that a state's consent

1. has to be valid in international law, i.e. the consent may not be based on error, fraud, corruption, or coercion;
2. needs to be clearly established and really expressed, which excludes a merely presumed consent;
3. must be given prior to the otherwise wrongful act (i.e. the intervention);
4. must be attributable to the state;
5. and is void if it relates to acts whose commission would violate an obligation of states under a peremptory norm of international law, such as the consent for another state to newly establish a protectorate over its territory.³⁵

The legal consequence of a consent that fulfills these criteria is that the principal wrongfulness of an intervention is excluded as long as the intervening state respects the scope and duration set by the consenting state.

In regard to the consent expressed by *Yanukovych*, the requirements 1. to 3. cannot be further explored, since details on the letter of consent as well as on the circumstances under which it has been expressed have not been made accessible to the public. The core of the problem is criterion 4., namely if *Yanukovych's* consent is attributable to Ukraine. *De lege lata* he was still the president, *de facto* he lacked any control in Ukraine when he invited Russian troops to intervene.

³⁴ Article 29 of the draft articles reads:

1. The consent validly given by a State to the commission by another State of a specified act not in conformity with an obligation of the latter State towards the former State precludes the wrongfulness of the act in relation to that State to the extent that the act remains within the limits of that consent.

2. Paragraph 1 does not apply if the obligation arises out of a peremptory norm of general international law. For the purposes of the present draft articles, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. (ILCYB 1979, Vol. II, Part Two, 109).

³⁵ See ILCYB 1979, Vol. II, Part Two, p. 114-15.

Principally, the consent needs to be expressed by the state's highest authorities³⁶ and this is generally the internationally recognized government. Such clear categories blur in case of internal conflict, civil war, and revolutionary regime change. As in Ukraine, it is then often contested who shall be considered to be the legitimate government.³⁷ Different states often recognize different parties to the conflict as a 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 a minimum of effectiveness of a government.³⁸ Over the last decades the effective control criterion as the sole or primary requirement has been put into question, since governments are not only assessed by their *de facto* power anymore, but also by their legitimacy. South-Africa during apartheid, for example, was not considered to be allowed to invite foreign states to intervene because of its internal political system.³⁹

State practice is, on the other hand, reluctant to generalize the legitimacy as the primary criterion. The cases that are being discussed as potentially supporting an invitation by a democratically elected government without effective control are, most importantly, ousted President *Aristide's* invitation to intervene in Haiti in the 1990s, and the Economic Community of West African States' (ECOWAS) intervention in Sierra Leone.⁴⁰ In Haiti, President *Aristide* had fled the country after a coup d'état and then, after some time, invited the United Nations to intervene militarily.⁴¹ Though his government had been ousted, it was internationally recognized. The Security Council, however, did not rely on *Aristide's* invitation to intervene, but acted under Chapter VII of the UN Charter.⁴² This indicates that the Secu-

³⁶ O. Corten (note 33), 263.

³⁷ 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.

³⁸ See International Law Association (note 17), 13 et seq., G. Nolte, Intervention by Invitation, MPEPIL (online ed.), 2010, para. 17.

³⁹ G. Nolte (note 38).

⁴⁰ See for discussion of further cases from the cold-war era: A. Tanca, Foreign Armed Intervention in Internal Conflict, 1993, 22 et seq.

⁴¹ See for a discussion of the military intervention: D. Wippmann, Military Intervention, Regional Organizations and Host-State Consent, in: Duke J. Comp. & Int'l L 7 (1996-1997), 217 et seq.

⁴² Security Council, S/RES/940 (1994) of 31.7.1994. 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 her

rity Council did not consider the invitation by a government without effective control a sufficient basis for an intervention.⁴³

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 ECOWAS. The legal basis for this intervention is contested. Some find it in *Kabbah*'s invitation and argue that this is in line with an increasing importance of a government's legitimacy and a change in the doctrine of intervention by invitation.⁴⁴ Others convincingly make the point that ECOWAS troops had been legally present on Sierra Leone's territory already before the invitation and acted in self-defense when using force on Sierra Leone's territory.⁴⁵

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 assumption of an 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 and opens a certain leeway. 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 has to remain in order to ascertain *effective* control? The necessity for such evaluation demonstrates that the criterion of effective control is not dichotomous, but opens a grey area in which normative considerations in regard to 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."⁴⁶ What does that all imply for Ukraine?

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.

⁴³ See *D. Wippmann* (note 41), 218 et seq.; *O. Corten* (note 33), 285.

⁴⁴ *K. Nowrot/E. Schabacker*, The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone, *Am. U. Int'l. L. Rev.* 14 (1998), 401 et seq.

⁴⁵ *M. Gestri*, ECOWAS Operations in Liberia and Sierra Leone: Amnesty for Past Unlawful Acts or Progress Toward Future Rules?, in: *M. Bothe et al. (eds.), Redefining Sovereignty*, 2005, 245; *O. Corten* (note 33), 285.

⁴⁶ *G. Nolte* (note 38), para. 17.

First, *Yanukovych* had fled Ukraine and had lost effective control. There was no indication that the ousting of *Yanukovych* was only preliminary, as he had lost all internal support, especially by police and military forces. Even *Putin* acknowledged this when he conceded that *Yanukovych* would not have a political future in Ukraine.⁴⁷ Based on the criterion of effective control, *Yanukovych* was not entitled to ask for foreign intervention.

Second, even if one refers to criteria related to 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 also the majority of the members of parliament spoke out against him remaining in office. In case 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 was, moreover, 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 is no practical alternative to holding timely elections and this is the direction taken by the interim government.

Third, Russia's intervention has not even aimed at the reestablishment of *Yanukovych's* government and at ousting the interim administration. It obviously pursued national interests that are independent from that. Russia's intervention was primarily directed at preparing the secession of a part of the state's territory. Even without knowledge of the content of *Yanukovych's* invitation it is hardly imaginable that the disaggregation of Ukraine's territory would have been covered by his invitation and, even if, the respective invitation would constitute treason and would arguably therefore be illegal anyway.

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.

⁴⁷ V. *Putin* (note 7).

IV. 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 Russia and different routes were being explored. The 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.⁴⁸ A group of deputies of the State Duma aimed to broaden the legal basis for an admission to Russia and introduced an amendment law⁴⁹ which would have allowed an admission also where an efficient government of the third state was absent and where a referendum had voted in favor of accession to Russia.⁵⁰ 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 a declaration of independence of Crimea.

1. Legality of the Referendum

Organizing and holding the referendum on Crimea's accession to Russia was illegal under the Ukrainian constitution.⁵¹ Article 2 of the constitution establishes that "Ukraine shall be a unitary state" and that the "territory of Ukraine within its present border is indivisible and inviolable". This is confirmed in regard to Crimea by Chapter X of the constitution, which provides for the autonomous status of Crimea. Article 134 sets forth that Crimea is an "inseparable constituent part of Ukraine". The autonomous status provides Crimea with a certain set of authorities and allows, *inter alia*, to hold referendums.⁵² These rights are, however, limited to local matters. The

⁴⁸ 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, Articles 4.2 and 4.4.

⁴⁹ Draft Law 462741-6.

⁵⁰ 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, 21.3.2014, CDL-AD(2014)004.

⁵¹ 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, 21.3.2014, Doc. CDL-AD(2014)002.

⁵² Article 138 (2), Constitution of Ukraine.

constitution makes clear that alterations to the territory of Ukraine require an all-Ukrainian referendum.⁵³

While holding the referendum as such violated Ukrainian law, it did not constitute a violation of international law since it is an internal affair. There are, however, international standards in regard to how states have to hold referendums.⁵⁴ General principles on fair voting are expressed in Article 3 of the First Protocol to the European Convention on Human Rights⁵⁵ 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 a Code of Good Practice on Referendums⁵⁶ in which it provides organizational and practical rules that substantiate these principles. Though this code does not as such constitute binding international law, it nevertheless expresses international standards which in part form hard international law, and others in which a widely accepted practice of states with regard to referendums is reflected.

Based on the limited factual evaluation of the situation during the referendum that is possible, especially the freedom of the referendum did not seem to be guaranteed, since pro-Russian soldiers had taken control of Crimea and controlled the public infrastructure. This is problematic, because the freedom of a referendum requires the absence or at least restraint of military forces of the opposing parties⁵⁷ and a neutrality of public authorities.⁵⁸ Both elements do not seem to have been secured in Crimea.⁵⁹

Another requirement of the freedom of election is that the question of the referendum is clear and not misleading. The phrasing must allow a sim-

⁵³ Article 73, Constitution of Ukraine.

⁵⁴ See for an in depth analysis of the Crimean referendum *A. Peters, Sense and Nonsense of Territorial Referendums in Ukraine, and Why the 16 March Referendum in Crimea Does Not Justify Crimea's Alteration of Territorial Status under International Law*, 16.4.2014, <www.ejiltalk.org>.

⁵⁵ Article 3 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."

⁵⁶ Venice Commission, Code of Good Practice on Referendums, CDL-AD(2007)008rev.

⁵⁷ See *A. Peters, Das Gebietsreferendum im Völkerrecht: Seine Bedeutung im Licht der Staatenpraxis nach 1989, 1995*, 500.

⁵⁸ See Venice Commission (note 56), I.2.2 and I.3.

⁵⁹ 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, *V. Konstantinov*, for example, declared in an address to journalists that "Crimea will not return in the Ukraine" (State Council of the Republic of Crimea, Press Release, *Vladimir Konstantinov: "Crimea Will Not Return In the Ukraine"*, 11.3.2014, <www.rada.crimea.ua>).

ple yes or no answer.⁶⁰ The Crimean referendum ignored this principle as it did not ask a polar question but provided two separate alternatives of which 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?”

According to the Venice Commission’s Code of Good Practice the referendum could only have been held on one of the 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 alternative 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, one did not,⁶¹ and hence the definitive meaning of the second alternative remains unclear.

Ultimately, the Code of Good Practice on Referendums also provides for a number of general procedural requirements. The code requires the existence of a referendum law that regulates the procedure of the vote, and demands the presence of domestic and international observers.⁶² While international observers of largely unknown affiliation were present,⁶³ a referendum law did not exist.

In conclusion it can be said that holding the referendum as such did not violate international law, but that it did not comply with international standards in regard to its modalities.

⁶⁰ See Venice Commission (note 56), I.3.

⁶¹ *P. Kolstoe*, *Russians in the Former Soviet Republics*, 1995, 194.

⁶² The requirement of international referendum observers is an internationally accepted practice and constitutes customary international law. See *A. Peters* (note 57), 501.

⁶³ 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 UPDATE 1-Crimea Invites OSCE Observers for Referendum on Joining Russia, 10.3.2014, <www.reuters.com>).

2. Legality of the Declaration of Independence

The referendum produced an overwhelming majority in favor of an accession to Russia.⁶⁴ Already one day after the referendum, the Supreme National Council of Crimea declared the independence of Crimea and requested the recognition of its independence by other states. Already 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.⁶⁵ The latter is referred to as an authority that such declarations do not violate international law.⁶⁶

So what does the Kosovo opinion tell us in regard to the legality of Crimea’s declaration of independence? First, it is crucial to recall that the Kosovo opinion only had a rather narrow scope.⁶⁷ The ICJ neither addressed the general question if and under which circumstances a right to secession might emerge nor if such a right existed in regard to Kosovo. It explicitly excluded the consequences of the declaration and assumed that this was not covered by the General Assembly’s question.⁶⁸ The court limited the scope of its opinion to the question whether the declaration as such violated international law.⁶⁹

Regarding Kosovo’s unilateral declaration of independence the court then, indeed, holds that the declaration did not violate norms of international law. The underlying rationale is that the principle of territorial integrity only applies in the relations between states. It does not bind actors that are themselves not sovereign states, such as internal secessionist move-

⁶⁴ The referendum was held on 16.3.2014. 1.274.096 people participated. 1.233.002 (96,77 %) voted in favour of an accession to Russia. (See State Council of the Republic of Crimea, Press Release, 17.3.2014, <www.rada.crimea.ua>). On all Crimean referendum on 16.3.2014 for the reunification of the Crimea with Russia on the rights of the subject of the Russian Federation voted 96,77 % of Crimean citizens.

⁶⁵ Quoted after RT-Press Report, Crimea Parliament Declares Independence from Ukraine Ahead of Referendum, 11.3.2014, <www.rt.com>.

⁶⁶ RT-Press Report, Crimea Parliament ... (note 65).

⁶⁷ 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*, ICJ Reports, 478 et seq.

⁶⁸ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ Reports, 423 et seq.

⁶⁹ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ Reports, 425 et seq.

ments.⁷⁰ 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.⁷¹ 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*)”.⁷²

The question here therefore remains a factual one. The evidence, as stated above, suggests that the referendum process was backed up by Russian troops in Crimea and relied on the use of force.⁷³ Press reports indicate that these troops were vital for disempowering the Ukrainian military units in Crimea by locking them in their posts, and for taking over the Ukraine-run Crimean public infrastructure. Supposed that is the case, the referendum fundamentally relied on the illegal intervention by Russia. In any case, it at least relied on Russia’s threat to use force, most remarkably expressed in the Russian Federation Council’s authorization to use military force on Ukrainian territory. Therefore, the declaration of independence cannot be regarded in isolation of that illegality. Applying the principles of the Kosovo opinion then, in fact, leads to an illegality of the Crimean declaration of independence.

3. Self-Determination and Secession

The Crimean government as well as Russia refer to the right to self-determination of peoples as a foundation for Crimea’s secession from Ukraine.⁷⁴ The right to self-determination is a fundamental principle of in-

⁷⁰ See also *R. Wilde*, Kosovo (Advisory Opinion), MPEPIL (online ed.), May 2011, para. 7.

⁷¹ See UN Security Council, S/RES/217 (1965) of 20.11.1965, para. 3 (*Southern Rhodesia*); S/RES/541 (1983) of 18.11.1983, para. 2 (*Northern Cyprus*); S/RES/787 (1992) of 16.11.1992, para. 3 (*Bosnia and Herzegovina*).

⁷² *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ Reports, 437.

⁷³ See e.g. *D. M. Herszenhorn*, Crimea Votes to Secede From Ukraine as Russian Troops Keep Watch, New York Times, 17.3.2014.

⁷⁴ *V. Putin* (note 7).

ternational law and is incorporated in Article 1 (2) UN Charter. The most authoritative interpretation of that principle has been given in the Friendly Relations Declaration,⁷⁵ annexed to General Assembly Resolution 2625. This declaration proclaims that “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”.⁷⁶

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.⁷⁷ Understood like that, 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 does not allow for complete political separation. Self-determination is therefore in principle limited to the realization of “internal self-determination”.

An undisputed exception to that is only of historical relevance: the secession of states that were under colonial rule.⁷⁸ 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.⁷⁹ Following that understanding, the Supreme Court of Canada has identified two further

⁷⁵ Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, A/RES/25/2625 of 24.10.1970.

⁷⁶ Declaration on Principles ... (note 75).

⁷⁷ Declaration on Principles ... (note 75), e contrario.

⁷⁸ See e.g. A. Cassese, *Self-Determination – A Legal Reappraisal*, 1995, 332; Supreme Court of Canada, *Re Secession of Québec* (1998), 2 S.C.R. 217, 222.

⁷⁹ Seminal in scholarship: L. C. Buchheit, *Secession – The Legitimacy of Self-determination*, 1978, 220 et seq.; See also C. Tomuschat, *Secession and Self-Determination*, in: M. G. Kohen, *Secession – International Law Perspectives*, 2006, 42; M. 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), 189, 225; D. Raic, *Statehood and the Law of Self-Determination*, 2002, 395.

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”⁸⁰ and “when a people is blocked from the meaningful exercise of its right to self-determination internally”.⁸¹ 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.⁸²

Under such reasoning, external self-determination is interpreted as conditional,⁸³ allowing secession only as an *ultima ratio* where internal self-determination has no chance of realization. That right can get 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.⁸⁴

The whole debate on secession has been fueled by the (*de facto*) secession of Kosovo from Serbia which has raised the question whether the Kosovo incident can be seen as a precedent for further cases of secession.⁸⁵ 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.⁸⁶ The arguments for this “unique case” assumption are the internal conflict in Kosovo at the end of the 1990s with its severe violations of human rights⁸⁷ and the extended period of UN administration that preceded the declaration of independence.⁸⁸

⁸⁰ See Supreme Court of Canada (note 78), para. 133.

⁸¹ See Supreme Court of Canada (note 78), para. 134.

⁸² See Supreme Court of Canada (note 78), para. 154: the court holds that a right to secession exists “possibly where ‘a people’ is denied any meaningful” internal self-determination.

⁸³ *D. Thürer/T. Burri*, Secession, MPEPIL (online ed.), June 2009, para. 17.

⁸⁴ *S. Oeter*, Selbstbestimmungsrecht im Wandel, *ZaöRV* 52 (1992), 741, 755 et seq.

⁸⁵ See for a discussion of the precedence character of the Kosovo case: *T. Fleiner*, The Unilateral Secession of Kosovo as a Precedent in International Law, in: U. Fastenrath et al., *From Universalism to Community Interest*, 2011, 877 et seq.

⁸⁶ See e.g. Letter dated 26.3.2007 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, 17.2.2008, <www.mfa-ks.net>).

⁸⁷ 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 26.3.2007 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2007/168, para. 6-7.

⁸⁸ See Council of the European Union, EU Council Conclusions on Kosovo, 2851st External Relations Council meeting, 18.2.2008: “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 ad-

Russia, though traditionally opposing a right to secession, nevertheless bases its argument for secession on the Kosovo case and tries to establish it as a relevant precedent. It had already done so in regard to Abkhazia and Ossetia⁸⁹ and now again rejects the *sui generis* thesis that Western states proclaim with a view to Kosovo. After the Crimean referendum *Putin* said in an address to the public:

“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.”⁹⁰

While one might consider if *Putin's* statement is to be understood as a threat, it is in any case 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 remedial secession we would not arrive at such a right in the Crimean case. As contested as these criteria may be in detail, a right to secession would be “*ultima ratio*” and therefore requires that there was no prospect to realize Crimea’s right to self-determination within the existing political system of Ukraine. 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. 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 so that the institutional arrangements for implementing internal self-determination were in place.

While *Putin's* statement is not sound as such 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

ministration under SCR 1244, Kosovo constitutes a *sui generis* case which does not call into question these principles and resolutions.”

⁸⁹ See Independent International Fact-Finding Mission on the Conflict in Georgia, Report, Vol. II, September 2009, 140.

⁹⁰ V. *Putin*, Address by the President of the Russian Federation, 18.3.2014, transcript accessible at <www.kremlin.ru>.

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 in regard to Kosovo is dangerous, since the structure of international law provides no protection against further extensions by other states, but by contrast only triggers desires in that regard. It 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 – without much practical success though. What will be referred to as precedence tomorrow or as evidence of a newly emerging legal rule⁹¹ is not determined by the states that acted yesterday and especially not by the meaning that those states attribute to their actions.⁹² 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.⁹³ 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. Western states have pushed towards creating an exemption to an accepted norm of international law when it seemed opportune for them and when it contradicted Russian interests, in regard to Yugoslavia in general and to Kosovo in particular. Western states have quite 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.⁹⁴ Russia now is denied the same

⁹¹ Interestingly, *C. 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" (note 79), 42. It is evident 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>>).

⁹² 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.

⁹³ See *T. Fleiner* (note 85), 882 et seq.

⁹⁴ Humanitarian concerns have been invoked as the central justification for the Kosovo intervention, especially in view of the failure to prevent the genocide in Ruanda. These con-

right though the Crimean population's demand to accede to Russia is – as a matter of politics not law – not unjustified, given the apparent majority opinion there.⁹⁵

One can say that there is 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 a thorough legal analysis. In terms of politics, Russia as a powerful state is not in need of the ultimately striking legal argument – one which 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 hegemonial power.

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

Which norms of international law has Russia after all violated during the Crimea Crisis? Russia used military force to take control of the peninsula and to force Ukrainian troops not to intervene in the process of secession. When exactly Russia intervened in Crimea remains contested. It might have already happened – as many press reports indicate – shortly after *Yanukovich's* removal from office through the presence of troops that acted under control of Russia. In any case Russia has used the threat of force, clearly expressed in the Russian Council's authorization to use military force on Ukrainian territory. After the referendum Russian troops took openly control of Crimea, seized Ukrainian military equipment, and forced Ukrainian troops to surrender. In doing so, Russia has violated Ukraine's territorial integrity and this situation is perpetuated by the integration of Crimea into

cerns, however, do not explain the hastily recognition of Kosovo after its declaration of independence.

⁹⁵ 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 favour of an accession to Russia.

ZaöRV 74 (2014)

Russia's territory. A justification for Russia's acts is not given: international law did not allow Russia to intervene in order to rescue Russian citizens and it did neither allow an intervention in Crimea upon *Yanukovich's* invitation. Crimea has also not become an independent state with the capacity to invite Russian troops after the referendum and could therefore also not adopt an internationally binding treaty on the 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. As Crimea has not become a state, it could consequently not enter into any treaty relations with Russia so that its accession to Russia is without legal effect under international law. This view has been expressed by the UN General Assembly: General Assembly Resolution A/RES/68/262 of 27.3.2014 has called upon states not to recognize any alteration to the status of the Autonomous Republic of Crimea and the city of Sevastopol and herewith refers to the concept of obligatory non-recognition.⁹⁶ 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".⁹⁷ 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.⁹⁸ This rationale is also expressed in the International Law Commission's Article 41 of the Draft Articles on State Responsibility.⁹⁹ The obligation is a norm of customary international law¹⁰⁰ and aims at preventing that a violation of international law becomes validated by means of recognition.¹⁰¹ It contains a "minimum resistance" and "a continuous challenge to a legal wrong".¹⁰² The obligation arises where a territorial entity has been created in violation

⁹⁶ UN General Assembly Resolution A/RES/68/262 of 27.3.2014.

⁹⁷ *D. Raic* (note 79), 107.

⁹⁸ See *P. V. Elsuwege*, *Baltic States*, MPEPIL (online ed.), March 2009, para. 20.

⁹⁹ 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. (...)"

¹⁰⁰ *D. Raic* (note 79), 150.

¹⁰¹ *D. Raic* (note 79), 141.

¹⁰² *H. Lauterpacht*, *Recognition in International Law*, 1948, 431.

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.¹⁰³ The process in which Crimea was integrated into Russia relied on the use of force by Russian troops and therefore gives rise to an obligation not to recognize Crimea's accession to Russia. Resolution A/RES/68/262 of 27.3.2014 was adopted with 100 votes, 58 abstentions, and 11 No-votes.¹⁰⁴ Only a small number of states has recognized Crimea's accession to Russia while the majority of states opposes Crimea's integration into Russia.¹⁰⁵ Nevertheless, even if more international sanctions were imposed on Russia, a reintegration of Crimea into Ukraine is currently more than unlikely. It seems after all that the minimum resistance of non-recognition might determine the relations between Russia and almost the rest of the world for a not so minimal period of time.

¹⁰³ D. Raic (note 79), 111, 141 et seq.

¹⁰⁴ A Security Council resolution of similar content was not adopted. China abstained, but Russia raised a veto to the resolution. See UN Security Council, Draft Resolution, UN Doc. S/2014/189 of 15.3.2014.

¹⁰⁵ See also Parliamentary Assembly of the Council of Europe, Recent Developments in Ukraine: Threats to the Functioning of Democratic Institutions, Resolution 1988 (2014).

