

## The Crimean Vote of March 2014 as an Abuse of the Institution of the Territorial Referendum

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### A. Introduction

Torsten Stein reviewed my doctoral dissertation on territorial referendums in the German Yearbook of International Law.<sup>1</sup> For me as a young academic this was of course exciting, and I was very happy for his generous assessment. As a sign of gratitude, and to celebrate Torsten Stein's birthday, I return to my first academic topic, hoping it will once again capture the interest of the addressee of this *Festschrift*.

This contribution examines the international legal relevance of the recent Crimean referendum, starting from the premise that, as a matter of international customary law, and as a matter of legal consistency and fairness, a free territorial referendum is emerging as a procedural *conditio sine qua non* for any territorial re-apportionment. It concludes that the referendum was not free and fair, and could not form a basis for the alteration of Crimea's territorial status.

### B. The referendum of 16 March 2014

On 16 March 2014, the population of Crimea had overwhelmingly voted in favour of joining the Russian Federation. The population was asked to choose between the following alternative: "1) Are you in favour of Crimea joining the Russian Federation as a subject of the Russian Federation?" or "2) Are you in favour of re-establishing the 1992 constitution of the Republic of Crimea and Crimea's status as a part of Ukraine?" The maintenance of the territorial and status quo was not given as an option in that referendum, and no international observers were present.

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1 Stein, GYIL 1996, pp. 616 et seq.

The official results claim that with a voter turnout of 83.1 %, 93 % answered with a “Yes” to the first question, and thus pronounced themselves in favour of joining the Russian Federation. In contrast, one member of the Russian Council of human rights, Jewgenij Bobrow, and two other human rights experts wrote the following: “The referendum: According to the opinion of basically all experts and citizens asked: The vast majority of the inhabitants of Sevastopol have voted in the referendum in favour of the union with Russia (the turnout was 50 to 80%); in Crimea, 50 to 60% have, according to various sources, voted in favour of the union with Russia with a turnout of 30 to 50%”.<sup>2</sup> If this observation were true, then only 15 to 30% of those eligible to vote did vote in favour of joining Russia.

The spokespersons of the Crimean Tatars declared that their ethnic group had boycotted the referendum of 16 March, and announced that they sought to hold a referendum on their “political autonomy” within Crimea. Tatars currently form about 10 percent of the Crimean population. Probably hundreds of thousands of Tatars were killed, starved, and were deported from the 1920s to the 1940s under Soviet policy. On 11 May 2014, separatists in the Eastern Ukrainian region of Donesk held a referendum on independence which was so obviously marred<sup>3</sup> that it was not recognised by any outside actor.

The 16 March referendum, and further territorial referendums in Ukraine (held or projected), place in the limelight the problématique of this legal institution.<sup>4</sup> Are not the outcomes of referendums in ethnically mixed units most often ethnically pre-determined? And does not the resort to a referen-

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2 Jewgenij Bobrow, member of the Russian Human Rights Council, and others, „Problems of the inhabitants of Crimea“, overview of 4 May 2014, [http://www.president-sovet.ru/structure/gruppa\\_po\\_migratsionnoy\\_politike/materialy/problemy\\_zhiteley\\_kryma.php](http://www.president-sovet.ru/structure/gruppa_po_migratsionnoy_politike/materialy/problemy_zhiteley_kryma.php). „Референдум: По мнению практически всех опрошенных специалистов и граждан: – подавляющее большинство жителей Севастополя проголосовали на референдуме за присоединение к России (явка 50-80 %), в Крыму по разным данным за присоединение к России проголосовали 50-60 % избирателей при общей явке в 30-50 %“ (translation by Tigran Beknazar). This overview is no official document of the Human Rights Council, and the authors only reproduce the estimates and considerations of their interlocutors without evaluating their objectivity and precision.

3 Election booths were not spread over the entire region, but only existed in the areas (mainly some cities) under separatist control; the ballot sheets were not secured and could easily be copied; there were no safeguards against double-voting; non-residents were reported to have voted.

4 Peters, *Das Gebietsreferendum im Völkerrecht*, 1995.

dum lead to ever smaller subgroups which again seek to detach themselves from a larger one? After all, the Ukrainian people, including the Crimean population, had some 20 years ago voted in favour of independence from the Soviet Union.<sup>5</sup> That Ukrainian referendum of 1 December 1991 had been at the time widely appreciated as having rung the “death knell”<sup>6</sup> for the dissolution of the USSR one week later, when the Agreement Establishing the Commonwealth of Independent States of Minsk of 8 December 1991 declared that the Soviet Union “as a subject of international law and a geopolitical reality is ceasing its existence.”<sup>7</sup> But even before that date, and later, Crimean politicians had several times (in 1991, 1992, 1994, and so on) planned and sometimes held “polls” on a special status of Crimea.<sup>8</sup>

*C. Possible qualifications of the change of Crimea’s territorial status*

In the case of Crimea, the territory broke away only to unite itself one split second later with the neighbouring state Russia. Such a transfer could be qualified, in traditional terms of territorial realignment, depending on what viewpoint one takes and what the technical details of the operation were, as a *secession* (maybe such as the secession of Eritrea from Ethiopia in 1991), but here with a subsequent *fusion* of two states (such as the fusion of Northern and Southern Yemen to form a United Yemen in 1991); as an *integration* of one entity into a neighbouring state (just like the German Democratic Republic integrating into the Federal Republic of Germany in 1990); as a *cession* of territory from Ukraine to Russia (such as the cession of Louisiana to the USA by France in 1803 or the cession of Alaska to the USA by Russia in 1867); as a *dereliction* of Crimea by Ukraine; or finally as an *annexation* (such as the annexation of the Baltic states by the Soviet Union in 1990, or of East Timor by Indonesia in 1975).

What happened with Crimea is probably best qualified as a seizure of territory under threat of force, i.e. as an unlawful annexation. Were it to be

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5 *Peters*, Das Völkerrecht der Gebietsreferenden – das Beispiel der Ukraine 1991-2014, Osteuropa 2014, forthcoming.

6 *Rourke/Hiskes/Zirkzadeh*, Direct Democracy and International Politics: Deciding International Issues through Referendums, 1992, p. 37.

7 Preamble of the Agreement Establishing the Commonwealth of Independent States of Minsk (8 December 1991), repr. in ILM 1992, p. 143, concluded between Belarus, the Russian Soviet Federative Socialist Republic (RSFSR), and Ukraine.

8 *Peters* (fn. 5).

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understood as a secession with an ensuing immediate fusion with Russia, the very strict preconditions for the exceptional *ex post*-toleration or acceptance of a secession would have had to be met, which was not the case (see on this below).

However we qualify this alteration of territorial status, it cannot be justified by the Crimean referendum of 2014, which did not satisfy international legal standards. Importantly, holding a free and fair referendum is only a necessary, but not a sufficient condition for a territorial realignment to be accepted as lawful by international law. The operation could therefore not constitute a legal basis for the new territorial status quo. On a side note, the Donetsk referendum in Eastern Ukraine even less fulfilled international standards.<sup>9</sup>

*D. Exercise of self-determination by Crimeans?*

*I. The population of Crimea might qualify as a people in the sense of international law*

The international right to self-determination is only given to groups qualifying as a people. The right to decide is not incumbent on other groups (for example cultural minorities who do not form a people in the sense of international law). However, what is a people (and what is “only” a minority) is unclear.

The collective holder of the right to self-determination need not be ethnically defined. The multi-ethnic composition of the Crimean population, its close cultural ties both to the Ukrainian people on the one hand, and to the Russian people on the other, does not rule out to qualify the Crimeans as a separate “people” in the sense of the international right to self-determination. The definition of a “people” in Art. 1 is notoriously vague.<sup>10</sup> Also, resort to self-determination always bears the danger of hypostasizing a fictitious (possibly ethnically determined) entity as a final authority which risks to undermine personal freedom and human rights. This can be avoided if the “people” (and concomitantly those entitled to vote in a territorial referendum) are understood in the French tradition (corresponding to the practice

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<sup>9</sup> See above fn 3 .

<sup>10</sup> See on the holder of the right to self-determination *Stein/v. Buttlar*, *Völkerrecht*, 13<sup>th</sup> ed. 2012, paras. 670-71.

of decolonisation): The “people” are those who decide to share a political destiny, and those are the ones potentially affected by political decisions taken by the politico-territorial authority they live under. This concept of “people” or “nation” in the French tradition is in fact lived by many multi-ethnic and multi-lingual peoples in the world, for example the Swiss, the Nigerians, or the Chinese. The entire process of decolonisation, which was legally based on the principle of colonial self-determination, always took populations (independently of their ethnic composition) as the bearer or subject of the collective right.

To conclude, it is sufficient, and in normative terms preferable, to ascribe the collective right to a group of persons who live on a given territory and who are united by their political aspiration to form a political community with its own territorial basis. But how to identify those? A self-enrolment of any person claiming to belong to the group of interested persons would violate the international requirement of an “appropriate connection” between person and state.<sup>11</sup> Therefore, some objective connection to the territory which is at stake must exist. The most reasonable (clear and operational) link is the residence in the territory. In practice this has been in fact the decisive criterion for granting the right to vote on a territory (e.g. in all decolonisation referendums, and in Eastern Europe post 1989) – see in detail below section F.IV.

## *II. Towards an individualistic conception of self-determination*

The lacking clarity of the international rules on the holder of the right to self-determination is related to the fact that the self-determination “units” (groups of people) which should then be entitled to take a majority decision about their political destiny cannot be delineated in a reasonable manner. Most individuals belong to overlapping communities (defined by language, religion, ethnicity, political preference, and so on). Humans do not ascribe the same importance to these (and other) affiliations, and their related sense of collective identity may also change. In Socialist Yugoslavia, many people

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<sup>11</sup> See, e.g., Article 11 of the ILC Draft Articles on State Succession and Its Impact on the Nationality of Natural and Legal Persons, ILC YB 1999, vol. I(2), p. 21. The commentary makes clear that “appropriate connection” is looser than a “genuine link”. *Ibid.*, p. 34. See also ICSID Tribunal, *Micula et al. v. Romania*, Case No. ARB/05/20 (24 September 2008), ILM 2009, p. 48, para. 99.

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apparently did not care or even know whether they were Bosnians or Croats and so on. Depending on which “objective” criterion you rely on, the resulting collective defined by that criterion will look differently. That is one reason why I espouse an individualistic and democratic view of the right to self-determination: The right to (co-)decide about one’s political destiny should in the end be traced back to individuals, and related to *their* rights. The vote on the territory need not (and should not) be viewed as a decision of “a” people as the morally relevant actor. Granted, the right to self-determination is conceptualised as a collective right in the Human Rights Covenants. Still, in moral terms, collective rights are best understood (only) as an acknowledgement of the fact that humans (must) live in a social community to flourish and be able to enjoy their rights. It is for this reason that the reference to the group makes sense – not because of any free-standing moral worth of that group. Put differently, any “collective right” is supportive of and ultimately derivative of the individual group members’ interests, needs, and rights.

The problem with the individualistic view is that it seems to require that a genuine realisation of the right to self-determination must allow smaller and smaller sub-units to take an independent decision on their territory. In fact, this occurred in Ukraine: ranging from an Ukrainian over a Crimean to a possible Tatar decision.

But would not the ultimate consequence then be that every single human being would have to be allowed to decide freely on his or her nationality (and his or her affiliation to a political community going with it)? No. Such an extension would prevent the existence of functioning political communities and would ultimately not serve the social needs of humans. It would also be incompatible with the current international law framework which presupposes the existence of states as political entities constituted by groups of persons and a territory. To conclude, while the individualistic view of self-determination does not offer any shield against further political and territorial fragmentation, its moral value – namely to underscore the imperative to respect individual freedom within groups – is not contradicted by the (theoretical) possibility to push it ad absurdum.

### *III. Further procedural and substantive requirements for secession*

Further procedural requirements for the exercise of the collective right to self-determination, besides the (direct-) democratic quality of the exercise,

exist. Even proponents of a principle of remedial secession (as the extreme outcome of an exercise of self-determination) accept that such an action must in any case remain a means of last resort which may come into play only when other strategies to realise internal self-determination within a given state, without disrupting territorial integrity, have failed. In other words, negotiations about the territorial issue with all stakeholders, in order to find a consensual solution, must have been exhausted. Furthermore, the process must be peaceful.

Besides, a number of material requirements exist in order to render a secession acceptable or tolerable under international law. Resort to this *ultima ratio* can only be triggered by persistent and massive human rights violations, and by a long-lasting denial of the right to *internal* self-determination which could be realised by establishing mechanisms of political autonomy within one state.<sup>12</sup> All these conditions were absent in Crimea.

If the procedural and material pre-requisites needed to render a secession tolerable are missing, the principle of territorial integrity and stability – which is presumed to serve best the interests of humans – prevails over the aspiration to self-determination in form of independent statehood. In contrast to the ICJ's view in the *Kosovo Advisory Opinion*,<sup>13</sup> the principle of territorial integrity is best understood to protect states also against disruptions from inside the state, and this understanding also informs state practice.<sup>14</sup> In any case, the principle of territorial integrity was applicable to the status change of Crimea, because the threat to territorial integrity emanated (also) from a neighbouring state, and not only from the inside.

If these material (and overlapping) three procedural conditions (democratic procedure, peacefulness, exhaustion of negotiations on internal political autonomy) are not fulfilled, then the right to self-determination has not been exercised properly and for that reason cannot justify – under international law – a territorial alteration.

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12 *Stein/v. Buttlar* (fn. 10 ), para. 685.

13 ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion of 22 July 2010, ICJ Reports 2010, p. 403, para. 80.

14 See in this sense also *Stein/v. Buttlar* (fn. 10 ), para. 681.

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*E. The unconstitutionality of the 16 March referendum under Ukrainian law*

The referendum of 16 March 2014 was unconstitutional under Ukrainian law.<sup>15</sup> Its legal basis was a resolution adopted by the Supreme Rada (Council) of the Autonomous Republic of Crimea “On the all-Crimean referendum” on 6 March 2014. That resolution had been passed on the basis of Articles 18.1.7 and 26.2.3 of the Constitution of the Autonomous Republic of Crimea. (Article 18.1.7 provides that among the powers of the Autonomous Republic of Crimea is “calling and holding of republican (local) referendums upon matters coming under the terms of reference of the Autonomous Republic of Crimea”. According to Article 26.2.3, “passing of a resolution upon holding of a republican (local) referendum” belongs to the powers of the Supreme Rada). These provisions are based on Article 138.2 of the Constitution of Ukraine according to which the “organising and conducting local referendums is within the competence of the Autonomous Republic of Crimea”.

The Venice Commission determined that the 16 March referendum was not allowed by the Ukrainian Constitution which enjoys supremacy over the Constitution of Crimea as an Autonomous Republic, based on the following analysis:<sup>16</sup> first of all, Ukraine is a unitary state. According to Article 132 of the Constitution of Ukraine, “the territorial structure of Ukraine is based on the principles of unity and indivisibility of the state territory, [...]” Under Article 134 of the Constitution, “the Autonomous Republic of Crimea is an inseparable constituent part of Ukraine and decides on the issues ascribed to its competence within the limits of authority determined by the Constitution of Ukraine”. The Autonomous Republic of Crimea therefore enjoys autonomy only to the extent that powers were transferred to it by the Constitution of Ukraine. Article 135 of the Constitution of Ukraine holds that “regulatory legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea and decisions of the Council of Ministers of the Autonomous Republic of

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15 This was the assessment of the Ukrainian Constitutional Court, judgment of 14 March 2014, (No. 2-rp/2014; engl. translation of the full text on the web site of the Ukrainian embassy in Austria, see <http://austria.mfa.gov.ua/de/press-center/news/19880-rishennya-konstitucijnogo-sudu-ukrajini>, last accessed on 25 June 2014.

16 Venice Commission, Opinion no. 762/2014 of 21 March 2014 (Doc. CDL-AD(2014)002), “Whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organize a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea’s 1992 constitution is compatible with constitutional principles”.



Crimea shall not contradict the Constitution and laws of Ukraine [...]” Since Article 134 of the Constitution of Ukraine defines Crimea as an inseparable constituent part of Ukraine, the secession of Crimea would require amending the Constitution of Ukraine. Such a constitutional amendment is, however, prohibited by Article 157.1 of the Constitution of Ukraine which contains a kind of freezing clause. The Venice Commission – in my opinion correctly – concluded that “the Ukrainian Constitution prohibits any local referendum which would alter the territory of Ukraine and that the decision to call a local referendum in Crimea is not covered by the authority devolved to the authorities of the Autonomous Republic of Crimea”.<sup>17</sup>

However, from an international law perspective, the constitutional admissibility or inadmissibility of the referendum is irrelevant. Therefore, any potential international legal value of the Ukrainian referendum of 16 March 2014 is not tainted by its unconstitutionality. It is actually typical that territorial referendums conducted in the exercise of the right to self-determination are unconstitutional under the law of the mother state. For example, prior to the Lithuanian referendum of 9th February 1991, then president of the Soviet Union, Gorbachev, had declared these referendums illegal and their result void. Nevertheless, the European Community and numerous other international actors welcomed the decision to hold referendums on Baltic independence (i.e. their restoration of statehood).<sup>18</sup>

*F. Free and fair territorial referendums are the proper procedure for exercising the right to self-determination*

Contemporary international law moves in the direction of requiring that all territorial realignments be democratically justified, and preferably through

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<sup>17</sup> *Ibid.*, para. 15.

<sup>18</sup> See for example EC, “Statement concerning the Baltic referenda”: “The European Community and its Member States underline the significance of the popular consultations held in Lithuania, Latvia and Estonia which reaffirmed their legitimate aspirations. They note with satisfaction that the consultations have taken place in peace and without interference or violence. These results cannot be ignored.” in: European Political Cooperation Documentation Bulletin Vol. 7 (Luxembourg 1991), Doc. No. 91/071, 4 March 1991, Brussels, Luxembourg, p. 137.

a direct democratic decision, i.e. by a territorial referendum.<sup>19</sup> This has been most conspicuously implied by Opinion No 4 of the Badinter Commission on Bosnia-Herzegovina which asked for a referendum as a pre-condition for the recognition of a new state by the European Community.<sup>20</sup>

*I. The democratic component of the right to self-determination*

The international legal obligation to conduct a territorial referendum flows from the principle of self-determination of peoples. That principle, especially in its Wilsonian inception,<sup>21</sup> is historically rooted in the principle of popular sovereignty and has a democratic component, even if it does not outrightly amount to a right to democratic government. It is generally acknowledged that the right to self-determination should be exercised democratically.<sup>22</sup>

Besides this democratic element, the international right to self-determination has an (ethno-) nationalist component. It is this nationalist facet of

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19 See for scholarly statements assuming that territorial realignments require the consent of the affected population: *Stein/v. Buttlar* (fn. 10 ), para. 559 (with regard to the *cession* of territory). See in this sense also *Wolfrum*, in: Dahm/Delbrück/Wolfrum (eds.), *Völkerrecht*, Vol. I/1, 2<sup>nd</sup> ed. 1989, p. 376 (on cessions); *Peters* (fn. 4), p. 470; *Ratner*, *Am. J.Int'l L.* 1990, p. 590 (622-23); *Tancredi*, in: Kohen (ed.), *Secession – International Law Perspectives*, 2006, pp. 171 (190-91); *Saxer*, *Die Internationale Steuerung der Selbstbestimmung und der Staatsentstehung*, 2010, p. 777.

20 Repr. in ILM 1992, pp. 1501-1503. See *Cassese*, *Self-Determination of Peoples: A Legal Reappraisal*, 1995, p. 272: “The Committee thus elevated the referendum to the status of a basic requirement for the legitimization of secession.”

21 Woodrow Wilson, Address of the President of the United States, delivered to the Senate of the United States, 22 January 1917, p. 6 “And there is a deeper thing involved than even equality of right among organized nations. No peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed, and that no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property.” (Woodrow Wilson Library, <http://www.woodrowwilson.org>, last accessed on 25 June 2014) See also *ibid.*, Address to the US American Congress of 8 June 1918, point 5: “A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined.”

22 See for example the written statement of Switzerland in the Kosovo Advisory Opinion Proceeding, 17 October 2008, paras. 69-80.

self-determination which motivated the post-1989 Eastern- and Central-European referendums,<sup>23</sup> but which was at the time probably underestimated by Western states demanding and welcoming the referendums.

Based on these two partly conflicting traditions, a free and fair referendum is (potentially) one procedural exigency for the exercise of the right to self-determination. A territorial referendum is admissible and has even emerged as the standard procedure to exercise the right to self-determination. Moreover, contemporary international customary law seems to mandate that the collective right to self-determination (notably when it seeks the extreme result of secession) should be exercised through elections or through a territorial referendum.

## *II. State practice*

The state practice founding this principle started with the plebiscites after World War I, the decolonisation referendums of the 1950s and 1960s, and has been much intensified by the numerous referendums during the dissolution of the Soviet Union<sup>24</sup> and Yugoslavia after 1990.<sup>25</sup> Since then, probably all territorial changes and re-drawings of boundaries were preceded by (and justified by) referendums, or at least by democratic elections in which the territorial issue was the main or only agenda item. Examples for such indirect democratic justifications were the re-unification of Germany in 1990, and the secession of Kosovo from Serbia in 2008.

It is doubtful whether the formal type of territorial change, notably the distinction between the consensual and non-consensual change of status, matters. Traditionally, the controversy on a possible requirement of a referendum only related to territorial changes consented by the involved governments. Put differently, the controversy was only about the question whether a given executive consent needed to be supported by an additional popular consent. This structure of the debate had to do with the fact that referendums

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23 See notably *Miller*, Colum. J. Transnat'l L. 2002-2003, pp. 601-648.

24 Ten of the 15 Soviet Republics organized referendums on independence, either still within the Soviet Union (Estonia, Latvia, Lithuania, Georgia, Armenia, Turkmenistan and Ukraine) or after its formal dissolution (Uzbekistan, Azerbaidjan, Moldavia).

25 Between 1990 and 1992, all Yugoslav republics, except Serbia, organized independence referendums. Montenegro split off from Serbia, accompanied by a referendum on independence in 2006.

after 1914 only related to *cessions*, i.e. to transfers of territory on the basis of international treaties between the concerned states. The second type were decolonisation referendums on the legal basis of the colonial right to self-determination, where the release into independence in the end also happened with the consent of the then-colonial powers (not against their will). Only after 1989, referendums accompanied the dismembration of a state (the Soviet Union, which disappeared as a subject of international law), or successive secessions (the case of Yugoslavia). Secession is normally defined as the breakaway of a territory without the consent or even against the will of the “mother state”.

But – importantly – the formal distinction between consented and non-consensual has been eroded in practice, because the breakup of a state, or the breakaway of a part of its territory normally is a protracted process during which the political attitudes of the actors, including that of the central government, change. For example, the Soviet Republics initially declared their independence against the will of the central government, but in the end that government agreed. The same is true for all cases of decolonisation, likewise for the splitting off of South Sudan from Sudan in 2011, and even in Yugoslavia.

As mentioned, the academic debate on a possible “popular consent-requirement” for territorial realignments initially focused only on the cession of territory by means of an international treaty, in line with the older state practice.<sup>26</sup> However, it seems fair to say that once we accept a requirement of a democratic justification, this rule must extend to all types of territorial changes, especially against the background that a neat categorisation is not possible in practice.

As far as Kosovo and Germany are considered, the “democratic justification” of the status change laid in the elections to parliaments (or representative bodies) in which the territorial status change was the most important agenda item.<sup>27</sup> Notably the Kosovar declaration of independence of 17 February 2008 claimed: “We, the democratically elected leaders of our people, declare Kosovo to be an independent and sovereign state. This declaration reflects *the will of our people* [...]”. The Security Council resolution

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26 See the references above in fn. 19 .

27 See for Germany the decision of the GDR-*Volkskammer* on accession to the Federal Republic of Germany of 23 August 1990. Bundesarchiv, BArch DA 1/4042, [https://www.bundesarchiv.de/oeffentlichkeitsarbeit/bilder\\_dokumente/01525/index-16.html](https://www.bundesarchiv.de/oeffentlichkeitsarbeit/bilder_dokumente/01525/index-16.html), last accessed on 25 June 2014.

1244 which is still in force refers to the Rambouillet Accords which in turn prescribe that a definite solution for Kosovo should be found “on the basis of the will of the people”.<sup>28</sup> So the declaration of independence was ultimately based on the elections of 17 November 2007 which had been qualified by the UN Secretary General as “in compliance with international and European standards”.<sup>29</sup> In scholarship, the secession of Kosovo has been qualified as illegal precisely because of the lack of a referendum,<sup>30</sup> a view which again highlights the importance ascribed to referendums as a procedure for legitimizing territorial change.

It is unclear whether the dissolution of Czechoslovakia in 1993 occurred against the will of the majority of the people. According to polls, the majority did not want to split up, and also did want a referendum on this question. On the other hand, the population had previously elected uncompromising political parties and no grass root opposition or popular protest formed against the dissolution plans. The dissolution of the state has therefore occasionally been qualified as a breach of international law on account of the lack of a proper procedure for ascertaining the will of the concerned populations and due to an ensuing violation of the principle of self-determination.<sup>31</sup>

### *III. Procedures for the expression of the will of the people*

The intention of the group to form a “people”, who will then constitute the “personal” element of a new state (consisting in a people, a territory, and a government) must be expressed in a “free” way (cf. common Art. 1 of the

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28 Resolution 1244, para. 11 lit. e): “taking full account... of the Rambouillet accords [...]”. The quoted passage on “will of the people” can be found in Art. I sec. 3 of chapter 8 of the Rambouillet Accords.

29 Report of the Secretary General to the Security Council on the United Nations Interim Administration Mission in Kosovo, 3 January 2008, UN Doc. S/2007/768, para. 3: “The elections were organized under UNMIK’s authority by Kosovo’s Central Election Commission, in close cooperation with the Organization for Security and Cooperation in Europe (OSCE). [...] The elections took place without incident following a generally fair and calm campaign period, and were confirmed by the Council of Europe to have been in compliance with international and European standards.”.

30 *Fleiner*, in: Fastenrath/Geiger/Kahn/Paulus/v. Schorlemer/Vedder (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma*, 2011, pp. 877 (890-91 and 893-94).

31 *Hertig*, *Die Auflösung der Tschechoslowakei. Analyse einer friedlichen Staatsteilung*, 2001, pp. 347-370.

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UN Human Rights Covenants of 1966), and this is where the procedural standards kick in. The self-constitution of the population of Crimea might have occurred over some time, manifest in various political moves, even before the 2014 referendum. But for that (assumed) political actor and potential holder of the collective right to self-determination to lawfully exercise an extreme form of this right (namely to secede and join another state), specific *procedural* and *material* conditions must be fulfilled.

Already in the context of decolonisation, the UN General Assembly had established specific procedural rules for the (arguably unusual case of) “free association” of a non-self-governing territory with an independent state and for its “integration with an independent state”. The “free association”, according to the General Assembly, “should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes.” The “integration should be the result of the freely expressed wishes of the territory’s peoples acting with full knowledge of the change of their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes”.<sup>32</sup> The integration of Crimea into the Russian Federation of course occurred outside the context of decolonisation, but the rules on democratic vote, established by the UN, are transferrable to this situation, following their purpose.

#### *IV. The identification of the eligible voters*

**Residence as the standard practice:** The most difficult question of territorial referendums is to determine who is entitled to vote. As stated above, some objective connection to the territory which is at stake must exist. In practice, residence in the territory has been the decisive criterion for granting the right to vote on a territory. Tying the right to vote to residence is consistent from the perspective of the main objective of a territorial referendum which is to grant potentially affected persons a say about the political future of a territory. The persons potentially affected are notably the future inhab-

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32 UN GA Res. 1541 of 15 December 1960: “Principles which should guide Member States in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter”, Principles VI, VIIa), and IX b). (This resolution was adopted one day after the Decolonization Resolution).

itants of the territory. Because the future residence is uncertain, current residence or habitual stay must be used as a proxy. Affectedness of the residents and inhabitants is basically independent of nationality (citizenship), because due to a state's territorial jurisdiction, the (new) state's laws will regulate the lives of its inhabitants.

In all Eastern European referendums after 1989, the residents of the territory were given the right to vote. The residency-principle had also been observed in the plebiscites in the aftermath of the First World War and in the decolonisation referendums under the auspices of the United Nations. Only in some historic instances this had been complemented by a principle of ethnicity.

**The delineation of the territory:** Once we accept the residency-principle, the question of the identification of the voters will be transferred to the problem of the delimitation of the territory. The drawing of the boundary of the territory put to vote will frequently play a decisive part for the outcome of the referendum. In an ideal world, the territory itself and its borders would have to be defined by the population itself. One could devise a procedure which would have to be set in motion by a proposition on a territory which would have to find support by specific number of inhabitants, and then could be adjusted in a bottom-up fashion. Such a complicated procedure for first delineating the territory on a county-by-county basis was indeed used in the course of the creation of a new canton Jura in Switzerland.<sup>33</sup> But no other historic referendum followed such a procedure.

In contrast, extant administrative boundaries were used for defining the territory whose affiliation (e.g. independence) was then put to vote. Here lies the proper function of the principle of *uti possidetis*: to constitute a starting point of a democratic process. Overall, the problem of the definition of the territory should not be overstated. It is a common phenomenon in all democratic elections that their results are influenced by the territorial delineations of the electoral districts. The practice of manipulating these in order to achieve specific outcomes, "gerry-mandering", is well-known and does not call into question the practice of elections as such.

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33 *Häfelin/Haller*, Schweizerisches Bundesstaatsrecht, 2001, paras. 1004-1007. Newer editions of the textbook do not explain the procedure in detail.

**Involvement of the neighbouring populations:** An important question is whether the population of the neighbouring territories should not have a vote, too. In the case of the Crimea, this would notably be the remaining population of Ukraine. Other Ukrainians are obviously also affected by the territorial realignment. On the basis of this consideration, in the case of the formation of the Swiss canton Jura, the neighbouring populations, and the entire Swiss people, had indeed been asked to vote, too.

The criteria of (potential) affectedness by the territorial order does not offer any secure grounds for excluding voters because “affectedness” is a matter of degree, and not clear-cut. In an interdependent world, ultimately not only all the inhabitants of a state and of the neighbouring states, but many other persons may be affected by the creation of a new state (or by the incorporation of a territory into the big neighbour state), even personally, for example in economic terms.

Therefore, the determination about who is affected by a territorial alteration so intensely that this warrants granting him or her a say on that operation is to some extent haphazardous. Against the background of a graduation of affectedness, reserving the right to vote to residents does not seem arbitrary. The residents will in any case suffer more intense consequences than anybody else, and the criterion of residence has the great advantage of being relatively clear and precise. This consideration supports the usefulness of the residency-principle which has, as already mentioned, in fact become the standard practice on territorial referendums.

**Irrelevance of historical ties:** Once affectedness is acknowledged to be the rationale of granting a vote in a territorial referendum, then the historical relation between a group and a territory should, strictly speaking, play no role. From that perspective, it is irrelevant that Crimea was given as a “gift” to Ukraine by Chruschtshev in 1954, although the peninsula had strong cultural and political ties with Russia. It is, regarded in that light, likewise irrelevant that the current population of Crimea is the result of illegal or a least illegitimate transfers of populations, notably the expulsion of the Tatars in the first half of the 20<sup>th</sup> century. The justification for not focusing on these factors for delineating the circle of voters is that, generally speaking, it is very hard to decide whether a population lives “rightfully” on a given territory. One only has to inquire further into the past to realise that basically all current settlements have at some point in time been realised through conquest, expulsions, etc.



**Consideration of artificial population transfers:** The neglect of historical events must not go too far. Is it legitimate to allow those persons to vote who have been specifically settled on a given territory by a colonial or quasi-colonial power? Inversely one must ask whether those who originated in the territory but had to flee from oppression should be entitled to vote. These questions have been most relevant in the former Soviet Union and also for Crimea. The current composition of the population of Crimea is the result of specifically targeted settlement of Russians on the peninsula and of deportations and mass killing of other ethnic groups, notably Tatars.

The answer must start from the insight that all persons who settle freshly in a territory will also be affected by its future political organisation and should therefore be allowed to vote. But an exception must be made for persons who have been specifically transported, by an interested government, into the territory with a view to influencing the result of a concretely projected referendum. Targeted settlement in order to manipulate a vote can be neutralised by requiring a period of residency in the territory before the date of the referendum. The period of continuous residence required will depend on local history. In the Eastern European referendums after 1989, that period had varied between six months and 24 months. The Venice Commission found six months to be good practice.<sup>34</sup> In contrast, a 24-month residency requirement set up before the 2006 Montenegrin referendum has been criticised as excessively long by the Venice Commission.

Looking at the “outbound” side of the voters, we should again distinguish between normal migration movements and forced transfers. On the one hand, no binding international standard that expatriates should have the right to vote has emerged.<sup>35</sup> Granting a right to vote to those persons involves a risk of double voting, or – inversely – the risk of being disenfranchised in their state of residence. On the other hand, specifically expelled persons should be granted a right to vote. Otherwise, denying the right to vote to expelled persons might actually encourage those in power to expel persons in order to get rid of voters.

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34 Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report – Adopted by the Venice Commission at its 51st and 52nd sessions (5-6 June and 18-19 October 2002), p. 5, part I.1.1.c (CDL-AD(2002)023-e).

35 Venice Commission, Opinion on the Compatibility of the Existing Legislation in Montenegro concerning the Organization of Referendums with Applicable International Standards (CDL-AD(2005)041), 19 December 2005, para. 53.

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With a view to the classic problem of population transfers for the purpose of manipulation of the results of a territorial referendum, an international rule has emerged in the context of plebiscites and referendums taking note of mass expulsions and deportations. People who have been expelled or fled have often been allowed to vote as so-called outvoters. Such outvoters must be admitted to vote if they left the territory due to verifiable events, for example disregard of minority protection rules. The problem has also been addressed by defining a threshold date. With regard to persons who left the territory after that threshold date, a legal presumption can be established that they did so on account of overall repression by the government, which means that they should be granted the right to vote.

Once outvoters are admitted for participation, the ensuing question is whether these have to travel into the territory for being allowed to vote, or whether they can also vote by distance at their place of residence. The latter was for example the case in the independence referendum on Eritrea in 1993.

#### *G. The modalities of territorial referendums*

##### *I. International standards on conducting referendums*

International law does not only ask for a democratic decision-making process on territorial questions, and to that extent demands a referendum (or elections), but also sets up the rules on the modalities of conducting such referendums. If these are not observed, if a referendum is not free and fair under international standards, it cannot constitute a basis in international law for the sought territorial change.

The procedures and modalities of a referendum are very important, because it depends on them whether the idea of a free and fair territorial referendum is operational in real life. Only an operational rule of international law is credible and can deploy normative force. In fact, during the 20<sup>th</sup> century, and most of all in the extensive referendum practice after 1989, some international standards, rules and principles on how a territorial referendum must be conducted have emerged or are in the course of formation. Additionally, post-1989 international law, notably in Europe, has shaped stan-

dards on other kinds of referendums (not specific territorial ones), as a form of exercising direct democracy.<sup>36</sup>

Not all of these modalities of a referendum derive from binding international standards. Some (only) constitute “best practices”.<sup>37</sup> Although existing international standards on territorial referendums are “open-textured”,<sup>38</sup> based on the varied practice of many countries, and leaving leeway to their judgment and traditions, some core principles can be said to form part and parcel of international customary law.

Importantly, the legal status of requirements on the modalities of territorial referendums are independent of the question whether a customary law requirement to hold a referendum (or to legitimise a territorial change in an indirectly democratic fashion) already exists (as I assume) as a matter of hard international law. Should this not be the case, a conditional scheme applies: even if there were no international law obligation to organise a referendum, international law could still regulate its modalities in a compulsory fashion. The “if ... then”-scheme is well established in international law. For example, there is no right of option (i.e. the right to choose one’s nationality in the event of a realignment of territory) under contemporary customary law.<sup>39</sup> However, if an option is granted either by treaty or by domestic law, time limits for the exercise of this right must be reasonable. The same “if ... then”-scheme applies with regard to the admission of the entry of aliens to the territory of a state,<sup>40</sup> and in the area of social rights.<sup>41</sup> To conclude: *If* a state decides to hold a referendum, *then* it must satisfy international standards. And when these standards are not respected, a territorial referendum cannot serve as a legal basis for a territorial change.

The most important and arguably hard international legal standards concern, first, peacefulness; second, universal, equal, free and secret suffrage;

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36 See Council of Europe, Parliamentary Assembly Recommendation 1704 (2005), “Referendums: towards good practices in Europe”, 29 April 2005; Venice Commission, Code of Good Practice on Referendums (CDL-AD(2007)008rev), 20 January 2009 which contains “Guidelines on the Holding of Referendums”.

37 Venice Commission, Opinion on the Compatibility of the Existing Legislation in Montenegro concerning the Organization of Referendums with Applicable International Standards (CDL-AD(2005)041), 19 December 2005, para. 11.

38 *Ibid.*, para. 64.

39 *Ronen*, Option of Nationality, MPEPIL, online edition, 2009, para. 12.

40 ECtHR, *Abdulaziz, Cabales and Balkandali v. UK*, appl. no. 9214/80 et al., paras. 70 et seq.

41 ECtHR, *Stec v. UK*, appl. no. 65731/01 and 65900/01, para. 53.

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third, the framework conditions of freedom of media and neutrality of the authorities; and finally an international referendum observation.

## *II. Violation of these standards in Crimea*

None of these four sets of international legal standards has been respected in the Crimean 2014 referendum.

**First, the territory was not pacified.** This is the classic requirement for unimpeded voting on territorial issues. In the historical plebiscites on cession, which developed with regard to the re-drawing of boundaries among neighbouring states in the aftermath of wars, the pacification was realised by the “neutralisation” of the territory through the withdrawal or reduction of the troops of both concerned states. Pacification may also require the imposition of a ceasefire.

This basic rule of pacification and neutralisation is of paramount importance for the assessment of the 2014 referendum in Crimea. It was held in front of the guns and tanks of the Russian army and of unidentified troops. For this reason alone, the referendum cannot deploy a legal value under international law. It cannot be said that, against the background of the history of Crimea, even in the absence of Russian and unknown troops, a majority of the voters would in any case have voted in favour of joining Russia, even if the exact rate of approval might have been lower. Such an argument is unacceptable, because the prohibition of conducting a referendum in a non-pacified territory, under threat of force, is exactly a procedural and formal device to forestall speculations about an ostensible real will of the concerned population. What happened in Crimea corresponds to what the academic authority on territorial plebiscites, political scientist Sarah Wambaugh, wrote: “a plebiscite not effectively neutralised is a crime against the inhabitants of the area”.<sup>42</sup>

**Universal, equal, free and secret suffrage:** These are the internationally recognised fundamental principles of electoral law as expressed in article 25 CCPR and article 3 of the First Protocol to the ECHR. The democratic com-

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42 *Wambaugh*, Plebiscites Since the World War: Vol. I, Washington Carnegie Endowment of Peace 1933, p. 507.

ponent of the right to self-determination requires that these principles be observed in exercising the right to self-determination. In order to guarantee the universal and unfalsified vote, all voters must be orderly registered. Concerning the element of “universal” suffrage, difficult questions arise with regard to the delimitation of the voters. For example, as already stated, transferred, dispelled and displaced former inhabitants of the territory should be in principle allowed to vote, too (see above section F.IV).

**Framework conditions:** In order to realise the basic principles of democratic suffrage, a number of typical practical measures need to be taken. In order to allow for a free vote (which includes the freedom of voters to form an opinion and their freedom to express their wishes), freedom of expression and of the press, free campaigning, including freedom of assembly, freedom of association for political purposes, and free movement must be guaranteed. The administrative authorities must espouse a neutral attitude, in particular with regard to the referendum campaign, coverage by the media, public funding, and the right to demonstrate.

In its Opinion on the territorial referendum in Montenegro which bolstered the separation from the Union of Serbia and Montenegro, the Venice Commission summarised these framework conditions as follows: “the authorities must provide objective information; the public media have to be neutral, in particular in news coverage; the authorities must not influence the outcome of the vote by excessive, one-sided campaigning; the use of public funds by the authorities for campaigning purposes must be restricted”.<sup>43</sup>

**Notably the lack of international observation:** The adamant international legal precondition for a valid territorial referendum is robust international oversight, ideally encompassing a transfer of authority over all matters connected with the referendum to an international institution. At the very least, international observers and facilitating personnel must be deployed. The basic rule of international oversight already formed in the context of the plebiscites organised by the League of Nations and the United Nations. These referendums had been prepared and organised, or were observed by international institutions.

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43 Venice Commission, Opinion on the Compatibility of the Existing Legislation in Montenegro concerning the Organization of Referendums with Applicable International Standards (CDL-AD(2005)041) of 19 December 2005, para. 12.

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The Venice Commission's Guidelines on the Holding of Referendums spell out the requirement of international observation as following: "b. Observation must not be confined to election day itself, but must include the referendum campaign and, where appropriate, the voter registration period and the signature collection period. It must make it possible to determine whether irregularities occurred before, during or after the vote. It must always be possible during vote counting. c. Observers should be able to go everywhere where operations connected with the referendum are taking place (for example, vote counting and verification). The places where observers are not entitled to be present should be clearly specified by law, with the reasons for their being banned".<sup>44</sup>

The rationale of international observation is obvious: Even if representatives of international organisations are merely passive observers, their reports will decide about the value which is ascribed to the referendum by the international community. Their presence is a guarantee both for the organisers and for the voters that the international standards on procedures, organisation, and side conditions of territorial referendums, are complied with.

Historical experience shows that international observation of territorial referendums is feasible. Organisations involved in the organisation and/or observation of territorial referendums have so far been notably the United Nations, the European Union, the Organisation of African Unity, and the CSCE/OSCE.

In State practice, only those territorial referendums which were conducted under international observation have been subsequently recognised by other states. A counterexample is the referendum in the Bosnian Krajina of the Serbian population of Bosnia-Herzegovina of 10 November 1991, which was not internationally monitored. The Arbitral Commission established by the European Community was "of the opinion that the will of the people of Bosnia-Herzegovina to establish a SRH [a Serbian Republic of Bosnia-Herzegovina] as a sovereign and independent state cannot be held to have been fully established".<sup>45</sup> In the case of Ukraine, OSCE referendum ob-

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44 CDL-AD(2007)008rev of 20 January 2009) point 3.2. of the Guidelines., p. 11.

45 Opinion No. 4 of the Badinter Commission, paras. 3-4, repr. in ILM 1992, p. 1488 et seq., (1503).

servers were not present,<sup>46</sup> and therefore a fundamental condition for the international legal relevance of the territorial referendum was lacking.

The Venice Commission had issued an opinion before the 2014 referendum was held, and therein qualified the imminent referendum as problematic from the perspective of “European constitutional principles” (in the sense of a European Common law). The Venice Commission also stated (before the referendum) that “a number of circumstances make it questionable whether the referendum of 16 March 2014 could be held in compliance with international standards”.<sup>47</sup> These circumstances were the following:

- (1) Lacking legal clarity: The legal rules according to which the referendum was carried out were unclear, because Ukraine did not have a law regulating local referendums.
- (2) Absence of peacefulness and impediment to a free formation of the voters’ will due to at least implicit threats of the use of military force emanating from the massive public presence.
- (3) Concerns with regard to the respect for the freedom of expression in Crimea.
- (4) Difficulty for democratic deliberation and opinion forming due to the excessively short period of only ten days between the decision to call the referendum and the referendum itself.
- (5) Lack of neutrality of the Crimean authorities due to the declaration of Crimean independence of 11 March 2014 by the Supreme Rada of Crimea.
- (6) Absence of negotiations about a consensual solution among all stakeholders, especially with participation of all ethnic groups of Crimea (Russian, Ukrainians, Tatars and others).

These observations are pertinent. Overall, because of the disrespect for the existing international rules on territorial referendums, the 2014 referendum

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46 The OSCE had refused to observe the referendum: “The Chair also ruled out the possibility of an OSCE observation of the planned referendum of 16 March as the basic criteria for a decision in a constitutional framework was not met. Furthermore, an invitation by the participating State concerned would be a precondition to any observation activity in this regard.” (Press release by the OSCE of 11 March 2014, <http://www.osce.org/cio/116313>, last accessed on 25 June 2014.).

47 Venice Commission, Opinion no. 762/2014 of 21 March 2014 (Doc. CDL-AD(2014)002), paras. 21-22.

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in Crimea could not justify the breakaway of Crimea and its joining with Russia under international law.

#### *H. International reactions to the referendum*

The unequivocal international reactions to the Crimean referendum confirm this assessment. The UN General Assembly passed a resolution entitled “Territorial Integrity of Ukraine”<sup>48</sup> which “underscores that the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol”.<sup>49</sup> States participating in the General Assembly plenary debate<sup>50</sup> pronounced themselves explicitly in this sense, too (for example Ecuador). Other actors held that the referendum was illegal without specifying whether under Ukrainian constitutional law, under international law, or both (Georgia, Iceland), or that it was illegal under Ukrainian constitutional law (the EU<sup>51</sup> and the Venice Commission<sup>52</sup>); or that the referendum was in violation of international law (Moldova and Turkey<sup>53</sup>). Only one state in the General Assembly debate opined that the referendum was legal, and this was North Korea.

One day before the referendum, a Security Council Draft Resolution was tabled by 42 states.<sup>54</sup> The text was “noting with concern the intention to hold a territorial referendum on the status of Crimea on 16 March 2014” (preamble), and “declares that this referendum cannot have any validity, and cannot form the basis of any alteration of the status of Crimea, and calls upon all States, international organisations and specialised agencies not to recognise

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48 UN GA Res. A/68/L39 of 27 March 2014.

49 *Ibid.*, para. 5, emphasis added.

50 Debate in the GA, 27 March 2014, morning.

51 Debate in the GA, 27 March 2014, morning.

52 Venice Commission, Opinion No. 762/2014, 21 March 2014 (Doc CDL-AD(2014)002) on “whether the decision taken by the supreme council of the autonomous republic of Crimea in Ukraine to organize a referendum on becoming a constituent territory of the Russian federation or restoring Crimea’s 1992 constitution is compatible with constitutional principles”.

53 Debate in the GA, 27 March 2014, morning.

54 UN Doc. 189/2014 of 15 March 2014.



any alteration of the status of Crimea on the basis of this referendum [...]”.<sup>55</sup> That resolution was vetoed by Russia, with China abstaining.

Other regional organisations and groups of states likewise found the international legal irrelevance of the referendum and refused to recognise it. The Parliamentary Assembly of the Council of Europe stated that the result of this referendum has “no legal effect”;<sup>56</sup> and the G 7 leaders<sup>57</sup> and the representatives of the EU<sup>58</sup> pronounced themselves in this sense, too.

These condemnations stand in stark contrast to the international reactions to the previous Ukrainian referendum of 1 December 1991. That vote had been explicitly and officially welcomed, *inter alia* by the then EC and its member states,<sup>59</sup> by the United States,<sup>60</sup> and by NATO.<sup>61</sup> Comparing these reactions reveals that territorial referendums are deemed to be a crucial factor

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<sup>55</sup> *Ibid.*, para. 5.

<sup>56</sup> Council of Europe, PA, Res. 1988 (2014), 9 April 2014: “16. The so-called referendum that was organised in Crimea on 16 March 2014 was unconstitutional both under the Crimean and Ukrainian Constitutions. In addition, its reported turnout and results are implausible. The outcome of this referendum and the illegal annexation of Crimea by the Russian Federation therefore have no legal effect and are not recognised by the Council of Europe. The Assembly reaffirms its strong support for the independence, sovereignty and territorial integrity of Ukraine. [...]”.

<sup>57</sup> G-7 Leaders Statement, 12 March 2014: „Any such referendum would have no legal effect. Given the lack of adequate preparation and the intimidating presence of Russian troops, it would also be a deeply flawed process which would have no moral force. For all these reasons, we would not recognize the outcome.”.

<sup>58</sup> Joint statement by President of the European Council Herman Van Rompuy and President of the European Commission José Manuel Barroso on Crimea, 16 March 2014: “[T]he European Union considers the holding of the referendum on the future status of the territory Ukraine as contrary to the Ukrainian Constitution and international law. The referendum is illegal and illegitimate and its outcome will not be recognized.”.

<sup>59</sup> “The European Community and its Member States have taken note of the referendum in Ukraine in which a clear majority expressed itself in favour of independence. They welcome the democratic manner in which the Ukrainian people declared their wish for their republic to attain full sovereignty.” (Statement by an EPC Ministerial Meeting concerning Ukraine”, Doc. No. 91/427, Brussels and The Hague, publ. in: European Political Cooperation Documentation Bulletin 1991, vol. 7, p. 719).

<sup>60</sup> “The United States welcomes this expression of democracy which is a tribute to the spirit of the Ukrainian people [...]” (US Department of State, “Ukrainians Vote for Independence”, US Department of State Dispatch, Vol. 2, No. 49, 9 December 1991).

<sup>61</sup> “The Western Allies obviously respect the *decisions of free elections, expression of a people’s aspirations*”. (Atlantic News No. 3375 of 4 December 1991, pp. 3-4, emphasis added).

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for legalizing territorial alterations, but only if they are conducted properly.

### *I. Conclusion*

The Crimean referendum of 16 March 2014 could not justify the Crimean secession and the territory's integration into Russia. Neither the procedural nor the material conditions for the secession of Crimea (and the immediately ensuing union with Russia) have been met in this spring.

The modalities and side conditions of that referendum were not in conformity with the European and international standards on that matter. In addition, the substantive conditions for a remedial secession have not been met either. The referendum of 11 May 2014 in the Donetsk region did not satisfy these conditions either. Both the 16 March vote and other referendums abuse the legal institution of the territorial referendum. The alteration of the territorial status of Crimea remains illegal under international law, and third states are obliged not to recognise it.<sup>62</sup>

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62 According to the ICJ, the obligation of non-recognition of illegal situations relates to the violation of „important“ international norms, and is not limited to the breach of *jus cogens* or *erga omnes* norms. (ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, para. 159). See also Art. 41 of the Articles on state responsibility (UN Doc. A/56/589 and Corr.1) 56/83) on the obligation not to recognize “serious breaches” of a “peremptory norm of general international law”. See also *Milano*, The non-recognition of Russia's annexation of Crimea: three different legal approaches and one unanswered question, *Questions of International Law 2014*, pp. 35-55.