

## REFERENDUM IN CRIMEA: DEVELOPING INTERNATIONAL LAW ON “TERRITORIAL REALIGNMENT” REFERENDUMS

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## I. INTRODUCTION

Is it in accordance with international law for a people to unilaterally “break away” territory from an existing, recognized State, and join the territory to that of a neighboring State, based solely upon a referendum where a majority of the territory’s eligible voters cast a ballot in favor of the territorial change?

The March 2014 referendum in Crimea raised this very issue. Reportedly more than 90% of voters who cast ballots favored breaking away from Ukraine and joining the Russian Federation.<sup>1</sup> The referendum has been widely criticized as an affront to Ukraine’s territorial integrity and remains unrecognized as legally effective by the vast majority of the countries of the world.<sup>2</sup>

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1. *Crimean Average Results of the Referendum*, STATE COUNCIL OF THE REP. OF CRIMEA (Mar. 16, 2014), <http://www.rada.crimea.ua/referendum/resultat> [<http://web.archive.org/web/20140317140302/http://www.rada.crimea.ua/referendum/resultaty>] [hereinafter *Crimea Referendum Results*]; see also *More Than 95% of Voters in Crimea Wanted to Return to Russia*, NTV (Mar. 17, 2014), <http://www.ntv.ru/novosti/861036/> (reporting that 95.5% of Crimean inhabitants voted in favor of Crimea’s annexation to the Russian Federation); *Official Results: 97 Percent of Crimea Voters Back Joining Russia*, CBS NEWS (Mar. 17, 2014, 10:23 AM), <http://www.cbsnews.com/news/official-results-97-of-crimea-voters-back-joining-russia/> (reporting that over 97% of those living on the Black Sea peninsula voted in favor of returning Crimea to Russia); Anne Peters, *Sense and Nonsense of Territorial Referendums in Ukraine*, EJIL: TALK! (Apr. 16, 2014), <http://www.ejiltalk.org/sense-and-nonsense-of-territorial-referendums-in-ukraine-and-why-the-16-march-referendum-in-crimea-does-not-justify-crimeas-alteration-of-territorial-status-under-international-law/> (“With a voter turnout of 83.1%, 93% answered with a ‘Yes’ . . . and thus pronounced themselves in favor of joining the Russian Federation.”).

2. G.A. Res. 68/262, ¶¶ 1-3, 7, 12 (Mar. 27, 2014) [hereinafter *Territorial Integrity of the Ukraine*]; see also *Backing Ukraine’s Territorial Integrity, U.N. Assembly Declares Crimea Referendum Invalid*, U.N. NEWS CTR. (Mar. 27, 2014), <http://www.un.org/apps/news/story.asp?NewsID=47443#>.

This paper explores whether the 2014 Crimea referendum in favor of breaking away the territory of Crimea from Ukraine, and joining it with the Russian Federation: (a) meets the *procedural requirements* established under customary international law for recognition of self-determination referendums; and (b) whether Crimea's secession from Ukraine can be justified: (1) under the laws and national constitution of Ukraine; (2) as a form of remedial secession; or (3) due to the disintegration of the State of Ukraine.

Crimea's referendum to leave Ukraine does not meet the procedural requirement of peacefulness due to the presence of Russian military forces and local self-defense squads arresting opponents of the referendum in the run-up to the vote.<sup>3</sup> The referendum to break away from Ukraine is neither constitutional, nor is there sufficient evidence of oppression of the Crimean people to support remedial secession.<sup>4</sup> However, continued conflict in Eastern Ukraine raises the question whether the Ukrainian state is disintegrating — a justification accepted in the past by the European Community to legitimize break-away republics in Yugoslavia.<sup>5</sup>

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3. See *infra* Part IV.a-b.

4. See *infra* Part V.a-b.

5. Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, July 4, 1992, 31 I.L.M. 1488, 1497 [hereinafter Badinter Committee].

## II. THE CRISIS IN UKRAINE AND CRIMEA



Crimea is a strategically-located peninsula on the Black Sea that has been part of Ukraine for decades and part of the Russian Empire for centuries before that.<sup>6</sup> Most of the State of Ukraine is divided into administrative districts called *oblasts*, but Crimea has special status as an “autonomous republic” within Ukraine, complete with its own local parliament and President.<sup>7</sup>

Crimea has a population of over two million people and some two-thirds of the residents are ethnically Russian or Russian-speaking.<sup>8</sup> Since the dissolution of the U.S.S.R. in 1991,

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6. Jamie Dettmer, *EU: Crimea Referendum Illegal*, VOICE OF AM. (Mar. 6, 2014), <http://www.voanews.com/content/eu-crimea-referendum-illegal/1865590.html> (“Crimea has been a part of Ukraine since 1954, when Soviet ruler Nikita Khrushchev formally transferred the region to Ukraine.”).

7. Конституція України (CONSTITUTION), 28 June, 1996, art. 133 (Ukr.).

8. Tom Cohen, *Legal or Not, Crimean Referendum will Shape Ukraine Crisis*, CNN (Mar. 7, 2014), <http://www.cnn.com/2014/03/07/politics/crimea-referendum-explainer/>; see

Russia has continued to station its Black Sea naval forces in Crimea under an agreement with Ukraine.<sup>9</sup>

For the past decade, there has been a surge in debate over whether Ukraine should apply for admission to the European Union (EU), especially as neighboring states such as Poland, Hungary, and Romania have applied and joined.<sup>10</sup> From 2005 to 2010, Ukraine President Viktor Yushchenko was strongly in favor of Ukraine taking the financial and political steps to gain entry into the EU.<sup>11</sup> Under President Yushchenko's leadership, Ukraine strengthened its ties with Europe by securing a \$16.5 billion loan

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also President Vladimir Putin, *Address by President of the Russian Federation* (Mar. 18, 2014), <http://eng.kremlin.ru/news/6889> ("Incidentally, the total population of the Crimean Peninsula today is 2.2 million people, of whom almost 1.5 million are Russians, 350,000 are Ukrainians who predominantly consider Russian their native language, and about 290,000-300,000 are Crimean Tatars, who, as the referendum has shown, also lean towards Russia.").

9. Agreement between Ukraine and the Russian Federation on the status and conditions of the Black Sea Fleet of the Russian Federation in Ukraine, Rus.-Ukr., May 28, 1997, VERKHOVNA RADA OF UKRAINE, [http://zakon5.rada.gov.ua/laws/show/643\\_076](http://zakon5.rada.gov.ua/laws/show/643_076); see also Kathy Lally, *Russian Forces in Ukraine: What does the Black Sea Fleet in Crimea Look Like?*, WASH. POST (Mar. 1, 2014), [https://www.washingtonpost.com/world/europe/russia-decides-to-send-troops-into-crimea-what-does-the-black-sea-fleet-look-like/2014/03/01/38cf005c-a160-11e3-b8d8-94577ff66b28\\_story.html](https://www.washingtonpost.com/world/europe/russia-decides-to-send-troops-into-crimea-what-does-the-black-sea-fleet-look-like/2014/03/01/38cf005c-a160-11e3-b8d8-94577ff66b28_story.html) ("After the dissolution of the Soviet Union in 1991, Russia and Ukraine tussled repeatedly over dividing up the Black Sea Fleet based there. Today, Russia rents its Sevastopol base from Ukraine, where it has a presence better suited to bullying small neighbors than fighting a real war . . .").

10. Taras Kuzio, *Is Ukraine Part of Europe's Future?*, 29 WASH. QTRLY. 89, 89-91 (2006); *EU Welcomes Ten New Members*, CNN (May 1, 2004), <http://www.cnn.com/2004/WORLD/europe/04/30/eu.enlargement/>; *The 2004 Enlargement: the Challenge of a 25-member EU*, EURO-LEX (Jan. 23, 2007), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:e50017;Romania+and+Bulgaria+Join+the+EU>, BBC NEWS (Jan. 1, 2007), <http://news.bbc.co.uk/2/hi/europe/6220591.stm>.

11. See Martin Hunt & Erik Eisele, *Far From Disaster: Ukraine's Energy Sector Seeks Investment And Growth*, 31 HOUS. J. INT'L L. 243, 244 (2009) (explaining that Yushchenko was swept into power under the banner of the "Orange Revolution," following bitterly contested presidential elections in 2004-05 where Yushchenko supporters alleged vote fraud in the run-off); see also *Profile: Ukraine's Ousted President Viktor Yanukovich*, BBC NEWS (Feb. 28, 2014), <http://www.bbc.com/news/world-europe-25182830> ("During his presidency . . . Yanukovich steered Ukraine towards a closer relationship with the EU. But then, days before it was due to be signed, he rejected an association agreement in November 2013 . . .").

from the International Monetary Fund (IMF),<sup>12</sup> and by passage of a Joint Stock Company Law that was meant to encourage foreign investment.<sup>13</sup>

After economic gains in the early 2000s, the 2008 world financial crisis had a crushing effect on Ukraine's economy.<sup>14</sup> As the country struggled to recover from the setbacks of the Great Recession, Ukraine has found itself in a sort of "tug of war" between Russia, her traditional creditor and trading ally, and the new suitor, the EU, which urges Ukraine to continue its path to join the Union.<sup>15</sup>

In November 2013, Ukraine's new, more Russian-leaning president, Viktor Yanukovich, announced that he was not moving forward in negotiations for Ukraine to seek admission to the EU.<sup>16</sup> Massive public protests against President Yanukovich ensued in the Ukrainian capital of Kiev.<sup>17</sup> These "Euromaidan" protests were motivated in part by President Yanukovich's refusal to meet EU demands that Ukraine release former Prime Minister Yulia Tymoshenko from prison.<sup>18</sup> At certain times,

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12. Camilla Andersen, *Helping Ukraine Avoid a Hard Landing*, IMF SURVEY MAGAZINE: COUNTRIES & REGIONS (Nov. 10, 2008), <https://www.imf.org/external/pubs/ft/survey/so/2008/car111008a.htm>.

13. Hunt & Eisele, *supra* note 11, at 245.

14. *Id.* During the 2008 financial crisis, Ukraine's government was forced to temporarily shut down the stock exchange, and value of the country's currency, the hryvna, dropped to a record low against the dollar. *Id.*; see also Luke Harding, *Ukrainian President Orders Early Election*, THE GUARDIAN (Oct. 9, 2008), <http://www.theguardian.com/world/2008/oct/09/ukraine>.

15. *Fact Sheet: EU-Ukraine Relations*, EUR. UNION EXTERNAL ACTION SERV. (Apr. 17, 2014), [http://eeas.europa.eu/statements/docs/2014/140417\\_03\\_en.pdf](http://eeas.europa.eu/statements/docs/2014/140417_03_en.pdf); see also *Ukraine Faces Critical East-West Tug of War Over EU Association Agreement*, THE GUARDIAN (UK) (Nov. 20, 2013), <http://www.theguardian.com/world/2013/nov/20/ukraine-eu-association-agreement-europe-russia> ("[The] EU deal [to] allow Ukraine free trade with Europe . . . is seen as [a] symbolic move away from former Communist masters.").

16. *Ukraine Drops EU Plans and Looks to Russia*, AL JAZEERA (Nov. 21, 2013), <http://www.aljazeera.com/news/europe/2013/11/ukraine-drops-eu-plans-looks-russia-20131121145417227621.html>.

17. *Ukraine President Yanukovich Sacks Army Chief Amid Crisis*, BBC NEWS (Feb. 19, 2014), <http://www.bbc.com/news/world-europe-26265808>.

18. Council of the European Union Press Release 17438/1/12 Rev 1, Foreign Affairs, para. 3 (Dec. 10, 2012), [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/134136.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/134136.pdf) ("The Council reiterates its strong concern regarding

protesters stormed government buildings and the presidential palace.<sup>19</sup> After three months of protest, violence between police and protestors escalated and more than 26 people were killed in the days of Feb. 18-21, 2014.<sup>20</sup> On February 22, 2014, the Ukrainian parliament adopted a resolution requesting President Yanukovich resign.<sup>21</sup> Lawmakers elected a new President of Ukraine the following day<sup>22</sup> while Yanukovich fled the country and sought refuge in Russia.<sup>23</sup>

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the politically motivated convictions of members of the former Government after trials which did not respect international standards as regards fair, transparent and independent legal process . . ."); see also Cox and Kwaśniewski: *The European Parliament Monitoring Mission to Ukraine Should Continue its Work*, EUR. UNION EXTERNAL ACTION SERV. (Oct. 16, 2013), [http://eeas.europa.eu/delegations/ukraine/press\\_corner/all\\_news/news/2013/2013\\_10\\_16\\_4\\_en.htm](http://eeas.europa.eu/delegations/ukraine/press_corner/all_news/news/2013/2013_10_16_4_en.htm) (explaining that that Cox and Kwaśniewski believe that the conditions for signature of Association Agreement were set by the Foreign Affairs Council of the EU in December 2012 and that those "conditions, especially [with regards to] Yulia Tymoshenko, still remain to be fulfilled . . ."); David M. Herszenhorn, *Fresh From Prison, a Former Prime Minister Returns to the Political Stage*, N.Y. TIMES (Feb. 23, 2014), [http://www.nytimes.com/2014/02/24/world/europe/fresh-from-prison-former-prime-minister-re-emerges-on-political-stage.html?\\_r=0](http://www.nytimes.com/2014/02/24/world/europe/fresh-from-prison-former-prime-minister-re-emerges-on-political-stage.html?_r=0) (reporting that businesswoman and "Orange Revolution" leader Yulia Tymoshenko was convicted in 2011 of embezzlement and abuse of power, and sentenced to seven years in prison). Critics said Tymoshenko's conviction was "politically-motivated." *Id.* She would later be freed from prison on Feb. 22, 2014, in the last days of the Euromaidan protests. *Id.*

19. *Ukrainian Protesters Storm Government Building in Kiev*, ABC NEWS (Jan. 24, 2014), <http://abcnews.go.com/International/video/ukrainian-protesters-storm-government-building-kiev-21658730>; see also *Ukrainian Protesters Film Inside Presidential Palace*, TELEGRAPH (UK) (Feb. 23, 2014), <http://www.telegraph.co.uk/worldnews/europe/ukraine/10656343/Ukrainian-protesters-film-inside-presidential-palace.html> (describing the actions of thousands of Ukrainians who stormed the grounds of the presidential palace and took video inside).

20. *Ukraine President Yanukovich Sacks Army Chief Amid Crisis*, BBC NEWS (Feb. 19, 2014), <http://www.bbc.com/news/world-europe-26265808> ("In apocalyptic scenes overnight on Tuesday, protesters hurled paving stones, fireworks and petrol bombs while police used water cannon and stun grenades. Both sides accused the other of using live ammunition.").

21. *Ukraine Parliament Removes President, Who Flees Kiev in 'Coup'*, REUTERS (Feb. 22, 2014), <http://www.newsweek.com/ukraine-parliament-removes-president-who-flees-kiev-coup-229909>.

22. Daniel Wisehart, *The Crisis in Ukraine and the Prohibition of the Use of Force: A Legal Basis for Russia's Intervention?*, EJIL: TALK! (Mar. 4, 2014), <http://www.ejiltalk.org/the-crisis-in-ukraine-and-the-prohibition-of-the-use-of-force-a-legal-basis-for-russias-intervention/>.

23. *Ukraine: President Viktor Yanukovich Says He was Forced to Flee Due to*

The political turmoil in Ukraine centered for months in the northwestern capital of Kiev, but with the chaotic removal of Yanukovich, the crisis spread some five-hundred miles south to Ukraine's coastal region of Crimea.<sup>24</sup>

In a February 27 special session, Crimea's parliament dismissed the local government, and called a Crimea-wide referendum to be held on May 25.<sup>25</sup> Two days later, the Council of the Russian Federation authorized the deployment of Russian armed forces into Crimea to deal with "the threat to citizens of the Russian Federation."<sup>26</sup>

On March 6, 2014, with up to 25,000 Russian service members now deployed,<sup>27</sup> Crimea's local parliament voted in favor of leaving Ukraine and joining Russia.<sup>28</sup> The assembly also asked the public to ratify the decision, and set up a Crimea-wide referendum to be held ten days later to get the public's opinion on the question.<sup>29</sup>

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*Threats; Slams 'Pro-fascist' Forces*, ABC NEWS (Austl.) (Feb. 28, 2014), <http://www.abc.net.au/news/2014-02-28/ukraine-minister-accuses-russia-of-armed-invasion/5291986>.

24. *Ukraine Crisis: Timeline*, BBC NEWS (Nov. 13, 2014), <http://www.bbc.com/news/world-middle-east-26248275>.

25. *Crimean Parliament Fires Government, Sets Autonomy Referendum*, RADIO FREE EUR. (Feb. 27, 2014), <http://www.rferl.org/content/ukraine-turchynov-appeal-calm-crimea-buildings-seized/25278931.html>.

26. *Vladimir Putin Submitted Appeal to the Federation Council*, KREMLIN (Mar 1, 2014), <http://eng.kremlin.ru/news/6751>.

27. Putin, *supra* note 8.

28. *Judgment of the Constitutional Court of Ukraine on All-Crimean Referendum*, Case No. 1-13/2014, Embassy of Ukraine in the United States of America (Mar. 15, 2015), <http://mfa.gov.ua/en/news-feeds/foreign-offices-news/19573-rishennya-konstitucijnogo-sudu-v-ukrajini-shhodo-referendumu-v-krimu> (explaining the referendum and its result); *see also Crimea Says Provocations on the Rise Ahead of Referendum*, RT (Mar. 11, 2014), <http://rt.com/news/crimea-provocations-referendum-ukraine-178/> [hereinafter *Provocations on the Rise*] (describing various instances of civil disobedience occurring in Crimea ahead of the vote, including attempts at limiting the abilities of certain people to cast a ballot).

29. *Appendix 1 to the Resolution of the Verkhovna Rada, No. 1702-6/14*, AUTONOMOUS REPUBLIC OF CRIMEA (Mar. 6, 2014), <http://www.rada.crimea.ua/textdoc/ru/6/act/1702pr.pdf> [<http://wayback.archive.org/web/20140316100339/http://www.rada.crimea.ua/textdoc/ru/6/act/1702pr.pdf>] [hereinafter *Crimea Official Ballot*]; *see also Provocations on the Rise*, *supra* note 28; *see also* Chris Borgen, *Can Crimea Secede by Referendum?*, OPINIO JURIS (Mar. 6, 2014), <http://opiniojuris.org/2014/03/06/can-crimea-secede-referendum/>.

The public that voted on March 16 in the Crimea referendum was presented by the local government with an “either/or” question: “(1) Are you in favor of Crimea joining the Russian Federation as a subject of the Russian Federation? or (2) Are you in favor of reestablishing the Republic of Crimea’s 1992 constitution and status of Crimea as a part of Ukraine?”<sup>30</sup>

Voter turnout was reported at 83.10% of all eligible voters, with 96.77% of ballots indicating “yes” to the question of Crimea leaving Ukraine to join the Russian Federation.<sup>31</sup>

Less than two weeks after the Crimea referendum was held, the U.N. General Assembly passed a resolution entitled “Territorial Integrity of Ukraine,” resolving that the referendum in Crimea had “no validity [and] cannot form the basis for any alteration of the status” of Crimea.<sup>32</sup>

### III. CONFLICTING PRINCIPLES OF SELF-DETERMINATION & TERRITORIAL INTEGRITY

A recurring theme in the exploration of this subject will be the struggle between opposing principles of law — what prominent international lawyer Paul C. Szasz characterized as the “Irresistible Force” of self-determination against the “Impregnable Fortress” of territorial integrity.<sup>33</sup>

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30. Crimea Official Ballot, *supra* note 29; *see also* *Crimea Referendum: What does the Ballot Paper Say*, BBC (Mar. 10, 2014), <http://www.bbc.com/news/world-europe-26514797> (translating the ballot for the Crimean referendum); Peters, *supra* note 1 (commenting that there was no option to maintain the status quo of Crimea’s current autonomous status within the State of Ukraine); *see also* Roland Oliphant, *Crimeans Vote Peacefully in Referendum, but have Little Choice*, TELEGRAPH (UK) (Mar. 16, 2014), <http://www.telegraph.co.uk/news/worldnews/europe/ukraine/10701676/Crimeans-vote-peacefully-in-referendum-but-have-little-choice.html> (noting there was no option for “remain as part of Ukraine as before” on the ballot for the Crimean referendum).

31. Crimea Referendum Results, *supra* note 1 (providing the official results of the referendum as 83.10% voter turnout and 96.77% in favor of reunifying Crimea with Russia).

32. Territorial Integrity of Ukraine, *supra* note 2, ¶ 2.

33. Paul C. Szasz, *The Irresistible Force of Self-Determination Meets the Impregnable Fortress of Territorial Integrity: A Cautionary Tale About Clashes in Kosovo and Elsewhere*, 28 GA. J. INT’L & COMP. L. 1, 1-2 (1999).

### A. *The Right of Self-Determination*

The right of self-determination is a fundamental principle of international law.<sup>34</sup> The U.N. has defined the right of self-determination as a right of peoples to “freely determine their political status and freely pursue their economic, social, and cultural development.”<sup>35</sup> The traditional concept of the right of self-determination centers on freedom from alien subjugation, domination, and exploitation.<sup>36</sup>

In 1945, the right of self-determination was proclaimed in articles 1 and 55 of the U.N. Charter.<sup>37</sup> Most international law regulates the conduct of states, but the right of self-determination is a general principle recognized as a right of “peoples.”<sup>38</sup> Prior to

34. U.N. Charter art. 1, ¶ 2; U.N. Charter art. 55.

35. G.A. Res. 1514 (XV), ¶ 14 (Dec. 14, 1960).

36. See Reference re Secession of Quebec, [1998] 2 S.C.R. 217, paras. 113-14 (Can.) (introducing the right of a people to self-determination); see also Matthew Saul, *The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?*, 11 HUMAN RTS. L. REV. 609, 613 (2011) (quoting the UN General Assembly’s Declaration on the Granting of Independence to Colonial Countries and Peoples 1960 which stated “alien subjugation, domination and exploitation” are contrary to the Charter of the United Nations). A few of the rights associated with a people’s right of self-determination include the right to exist as a people, the right to cultural integrity and development, the right to economic and social development, and the right to permanent sovereignty over natural resources in the people’s territory. *Id.* at 613-14 (citing the rights of a people identified by Catriona Drew, *The East Timor Story: International Law on Trial*, 12 Eur. J. Int’l L. 651, 658 (2001)).

37. U.N. Charter art. 1, ¶ 2 (“The Purposes of the United Nations are: . . . 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.”); U.N. Charter art. 55 (mentioning “the principle of equal rights and self-determination of peoples”).

38. U.N. Charter art. 1, ¶ 2; U.N. Charter art. 55; see also G.A. Res. 2200 (XXI), annex, Int’l Covenant on Civil and Political Rights, art. 1 (Dec. 16, 1966) (“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”); see also G.A. Res. 2625 (XXV), annex, ¶ 60, Declaration on Principles of Int’l Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Oct. 24, 1970) [hereinafter Declaration on Friendly Relations] (“[T]he principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations . . .”). The definition of “peoples” has still not been fully clarified despite common usage. See U.N. Charter (beginning with the words “We the *peoples* of the United Nations”) (emphasis added). UNESCO’s proposed definition of a “people” requires “a distinct people” that may possess these things in common: 1. history; 2. linguistic tradition; 3. territorial

the breakdowns of Yugoslavia and the Soviet Union, the principle of self-determination was primarily invoked by colonial peoples to gain full control of their own governments.<sup>39</sup> Numerous U.N. resolutions invoked the right of self-determination as to colonized territories.<sup>40</sup> The creation of some seventy newly independent states from former colonies during the 1945-1980 period demonstrates that most countries have respected the U.N. resolutions on self-determination.<sup>41</sup>

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connection; 4. political outlook; and 5. identity as a distinct people. Saul, *supra* note 36, at 621 (discussing the attributes that contributed to the Commission's finding that the southern Cameroonians could be accepted as a people). Others assert that a "people" does not have to be ethnically defined; a people can exercise the right of self-determination if (1) the persons live in the same territory; and (2) they are united in a political desire to form a political community within its own local territory. Peters, *supra* note 1.

39. Russell A. Miller, *Self-Determination in International Law and the Demise of Democracy*, 41 COLUM. J. TRANSNAT'L L. 601, 615 (2003).

40. See, e.g., G.A. Res. 637 (VII) A, ¶¶ 1, 6 (Dec. 16, 1952); G.A. Res. 545 (VI), ¶ 1 (Feb. 5, 1952); G.A. Res. 2145 (XXI), ¶ 12 (Oct. 27, 1966) (resolution regarding South West Africa); see also Aureliu Cristescu, *The Right of Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, U.N. Doc. E/CN.4/Sub.2/404/Rev. 1, at 18 (1981) (noting that the right of peoples to self-determination was reaffirmed at nearly every session of the General Assembly between 1961 and 1975, in resolutions concerning the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples); See, e.g., G.A. Res. 1654 (XVI), ¶¶ 1, 9 (Nov. 27, 1961), 1810 (XVII), ¶¶ 1, 9 (Dec. 17, 1962), 1956 (XVIII), ¶¶ 1, 7 (Dec. 11, 1963), 2105 (XX), ¶¶ 1, 11 (Dec. 20, 1965), 2189 (XXI), ¶¶ 1, 13 (Dec. 13, 1966), 2311 (XXII), ¶¶ 3, 9, 11 (Dec. 14, 1967), 2326 (XXII), ¶¶ 1, 14 (Dec. 16, 1967), 2426 (XXIII), ¶¶ 2, 8 (Dec. 18, 1968), 2465 (XXIII), ¶¶ 1, 14 (Dec. 20, 1968), 2548 (XXIV), ¶¶ 1, 12 (Dec. 11, 1969), 2555 (XXIV), ¶¶ 1, 10 (Dec. 12, 1969), 2621 (XXV), ¶ 4 (Oct. 12, 1970), 2704 (XXV), ¶¶ 2, 13 (Dec. 14, 1970), 2708 (XXV), ¶¶ 1, 7 (Dec. 14, 1970), 2878 (XXVI), ¶¶ 1, 9 (Dec. 20, 1971), 2908 (XXVII), ¶¶ 1, 10 (Nov. 2, 1972), 3118 (XXVIII), ¶¶ 2, 13 (Dec. 12, 1973), 3163 (XXVIII), ¶¶ 1, 11 (Dec. 14, 1973), 3300 (XXIX), ¶¶ 2, 5 (Dec. 13, 1974), 3328 (XXIX), ¶¶ 1, 11 (Dec. 16, 1974), 3421 (XXX), ¶¶ 2, 5 (Dec. 8, 1975), 3481 (XXX), ¶¶ 2, 12 (Dec. 11, 1975) and 3482 (XXX), ¶¶ 2, 7 (Dec. 11, 1975); see also Alejandro Schwed, *Territorial Claims as a Limitation to the Right of Self-Determination in the Context of the Falkland Islands Dispute*, 6 FORDHAM INT'L L.J. 443, 447 (1983) ("The right to self-determination for colonial territories is now a principle of international law. Numerous resolutions of the United Nations, as well as its Charter, have established that the right is applicable to colonized territories.").

41. Schwed, *supra* note 40, at 453-54.

*B. Territorial Integrity of States as a Limit on the Right of Self-Determination*

Self-determination is only one of many principles recognized under international law and it is limited by other principles such as respect for minority rights, democracy, the rule of law, and, perhaps most importantly, the territorial integrity of states.<sup>42</sup>

The U.N. Charter provides strong protection for the territorial integrity of states.<sup>43</sup> Article 2(4) of the U.N. Charter resolves that States “shall refrain in their international relations from any threat or use of force against the territorial integrity or political independence of any State.”<sup>44</sup>

The principle of territorial integrity serves to protect the State from outside aggression – a neighboring State that wants to annex some of a State’s territory – as well as internal disruptions – such as a people within the State’s territory who wish to break away.<sup>45</sup>

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42. See Declaration on Friendly Relations, *supra* note 38, annex, ¶ 69 (proclaiming the principle of self-determination but noting that “[n]othing in the foregoing paragraphs shall 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 conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”); see also Robert Howse & Ruti Teitel, *Humanity Bounded and Unbounded: The Regulation of External Self-Determination under International Law*, 7 N.Y.U. L. & ETHICS OF HUMAN RTS. 51, 53-54 (2013) (discussing the other inter-territorial factors that are affected by a group within a territory claiming a right to self-determination, including the interests of other groups within the territory).

43. U.N. Charter art. 2, ¶ 4.

44. *Id.*; see also Chris Borgen, *From Intervention to Recognition: Russia, Crimea, and Arguments over Recognizing Secessionist Entities*, OPINIO JURIS (Mar. 18, 2014), <http://opiniojuris.org/2014/03/18/intervention-recognition-russia-crimea-arguments-recognizing-secessionist-entities/> (To be an internationally recognized State, an entity “must have: (1) a permanent population (a people); (2) a defined territory; (3) a government; and (4) the capacity to enter relations with other States.”).

45. See Declaration on Friendly Relations, *supra* note 38, annex, ¶¶ 9-10 (“Recalling the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State, Considering it essential that all States 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”); see also Peters, *supra* note 1 (discussing the case of

Existing States invoke territorial integrity as a supreme principle of international law.<sup>46</sup> Strong protection under international law for the territorial integrity of States is part of all recognized States' struggle for stability.<sup>47</sup> When the territorial integrity of a State is threatened anywhere in the world, other recognized States generally come to its defense.<sup>48</sup>

*C. Balance Between Self-Determination & Territorial Integrity under International Conventions*

The right of self-determination has evolved within a framework of respect for the territorial integrity of States.<sup>49</sup> International conventions entered into by major powers, whether under the auspices of the United Nations<sup>50</sup> (U.N.) or the Organization for Security & Cooperation in Europe<sup>51</sup> (OSCE), each reflect this need to limit the right of self-determination.<sup>52</sup>

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Crimea where the threat to territorial integrity came both from within and from an outside neighboring state).

46. See League of Nations Covenant art. 10 ¶ 1 (A generation before the founding of the United Nations, territorial integrity was enshrined in the League of Nations Covenant, article 10: "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League."); see also Howse & Teitel, *supra* note 42, at 53 (explaining the problem of external self-determination as a "struggle between an existing state — invoking the inviolability of existing territorial boundaries as a supreme principle of international law — and a movement seeking statehood, invoking the supposed right to self-determination"); see also *Recent International Advisory Opinion*, 124 HARV. L. REV. 1098, 1098 (2011) ("That each state's territorial integrity is inviolable and that all peoples have a right to self-determination are bedrock principles of international law enshrined in the U.N. Charter.").

47. Szasz, *supra* note 33, at 5-6.

48. *Id.* at 6.

49. Malcolm N. Shaw, *Peoples, Territorialism and Boundaries*, 3 EURO. J. INT'L L. 478, 484 (1997); see also Patricia Carley, *Self-Determination: Sovereignty, Territorial Integrity, and the Right to Secession*, 7 PEACEWORKS 3, 4 (1996), <http://www.usip.org/sites/default/files/pwks7.pdf> (giving the history of the eras of development of the principle of self-determination).

50. See G.A. Res. 1514 (XV), *supra* note 35, ¶¶ 18-19; see also Declaration on Friendly Relations, *supra* note 38, annex, ¶¶ 69-70.

51. See Conference on Security and Co-Operation in Europe: Final Act, arts. I-IV, VI, Aug. 1, 1975, 14 I.L.M. 1288 [hereinafter Helsinki Final Act].

52. M. K. Nawaz, *The Meaning and Range of the Principle of Self-Determination*, 1965 DUKE L.J. 82, 94 (1965); see also Iñigo Urrutia Libarona, *Territorial Integrity and*

In 1960, the U.N. General Assembly approved Resolution 1514, one of the body's most notable declarations championing the right of self-determination for colonial peoples.<sup>53</sup> Resolution 1514 boldly proclaimed that:

all peoples have the right to self determination . . . [there should be] immediate steps . . . to transfer all powers to the peoples of [colonies], without any conditions or reservations . . . to allow them to enjoy complete independence and freedom.<sup>54</sup>

This declaration also contained strong protections for States' territorial integrity.<sup>55</sup> The resolution qualified the right of self-determination in the second to last paragraph, stipulating that, "[a]ny attempt aimed at the . . . disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."<sup>56</sup>

Resolution 1514 attempted to balance protection of territorial integrity with the principle of self-determination.<sup>57</sup> Delegates who voted for passage of Resolution 1514 may have feared that the right of self-determination could be used as an excuse for dismemberment of an existing State.<sup>58</sup> The provision in

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*Self-Determination: The Approach of the International Court of Justice in the Advisory Opinion on Kosovo*, 16 *REVISTA D'ESTUDIS AUTONÒMICS I FEDERALS* 107, 109 (2012).

53. G.A. Res. 1514 (XV), *supra* note 35, ¶ 14.

54. G.A. Res. 1514 (XV), *supra* note 35, ¶¶ 14, 17; *see also* Schwed, *supra* note 40 at 444 n.7, 451 n.41, 460. The Soviet Union was the original sponsor of U.N. Res. 1514, which was approved by an 89-0 vote, with nine abstentions including States administering colonies: Belgium, France, Portugal, Spain, United Kingdom, and South Africa. *Id.* *See also* U.N. GAOR, 15<sup>th</sup> Sess., 947<sup>th</sup> plen. mtg. ¶ 34, U.N. Doc. A/PV.947 (1960).

55. Szasz, *supra* note 33, at 4.

56. G.A. Res. 1514 (XV), *supra* note 35, ¶ 18; *see also* Szasz, *supra* note 33, at 4 (discussing the two provisions in Decolonization of Resolution of the U.N. General Assembly – paragraph 2 which proclaims “all peoples have a right to self-determination” and paragraph 6 which proclaims “any attempt aimed at the . . . disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations” – and its effect on shaping the argument between territorial integrity and self-determination).

57. *See* Szasz, *supra* note 33, at 4 (arguing the balancing act of declarations two and six of G.A. Res. 1514 (XV) slightly favors Territorial Integrity).

58. Thomas M. Franck & Paul Hoffman, *The Right of Self-Determination in Very Small Places*, 8 *N.Y.U. J. INT'L L.* 331, 369-70 (1976) (Guatemala proposed an amendment to Resolution 1514 that “[t]he principle of self-determination of peoples may in no case

paragraph eighteen made sure that Resolution 1514 could not be used as a basis by minorities in an independent state in order to bring legitimacy to a break-away movement.<sup>59</sup>

In 1970, the General Assembly again advocated for the right of self-determination in the Declaration on Friendly Relations. This resolution extended the “right of self-determination . . . without external interference” to “all peoples,” not just to inhabitants of colonies.<sup>60</sup> The Declaration on Friendly Relations again included strong language in defense of States’ territorial integrity:

Nothing . . . shall be construed as authorizing any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . . and thus possessed of a Government representing the whole people belonging to the territory without distinction. . .<sup>61</sup>

More recently, in 1995, the U.N. again recognized the right of self-determination, but without authorizing the dismemberment of States or impairment of the territorial integrity of States.<sup>62</sup>

International organizations such as the OSCE have also urged strict observance of the principle of territorial integrity.<sup>63</sup>

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impair the right of territorial integrity of any State” and Morocco feared French colonialists could use self-determination to dismember Morocco, but sponsors pointed out that paragraph 6 met these concerns).

59. G.A. Res. 1514 (XV), *supra* note 35, ¶ 18; *see also* Schwed, *supra* note 40, at 456 (using the dispute between Argentina and the United Kingdom over the Falkland Islands as a real world example of the application of G.A. Res. 1514 (XV)).

60. Declaration on Friendly Relations, *supra* note 38, annex, ¶ 60; *see also* Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 119 (quoting the Declaration on Friendly Relations); *see also* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 58 (1992) (arguing that the Declaration on Friendly Relations applies more broadly – to all peoples, not just the inhabitants of colonies).

61. Declaration on Friendly Relations, *supra* note 38, annex, ¶ 69; *see also* Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 128 (quoting the Declaration on Friendly Relations).

62. G.A. Res. 50/6, ¶ 14, Declaration on the Occasion of the Fiftieth Anniversary of the United Nations (Oct. 24, 1995); *see also* Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 120.

63. Helsinki Final Act, *supra* note 51, at 4-6.; *see Charter of Paris, supra* note 74, at 196 (“In accordance with our obligations under the Charter of the United Nations and

The OSCE began during the 1970s and included as member states leading Western and Communist bloc countries in Europe and North America.<sup>64</sup> In the OSCE's foundational 1975 covenant, the Helsinki Final Act, member states declared a respect for the right of self-determination, but tempered with proper consideration for the territorial integrity of States.<sup>65</sup>

Among the Helsinki Final Act's Ten Principles was principle VIII whereby members agreed all peoples have a right to determine their external political status without interference from outside powers.<sup>66</sup> However, other principles emphasized the need for territorial integrity: the agreement declared the "inviolability of frontiers," and that no use of force, threat of force, or military occupation used to acquire territory would be recognized as legal.<sup>67</sup> Member states also agreed that no state could provide assistance, direct or indirect, to subversives who aim to violently overthrow a member state's government.<sup>68</sup>

#### IV. SELF-DETERMINATION REFERENDUMS LEGITIMIZE TERRITORIAL CHANGES

International law is developing toward a requirement that all changes in territorial alignment be democratically justified through a direct democratic decision, such as a referendum in the territory.<sup>69</sup>

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commitments under the Helsinki Final Act, we renew our pledge to refrain from the threat or use of force against the territorial integrity or political independence of any State"); *see also* Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 129 (arguing the interpretation of "external self-determination" referenced in the Helsinki Final Act is that "no territorial or other change can be brought about by the central authorities of a State that is contrary to the will of the whole people of that State").

64. *Helsinki Accords*, ENCYC. BRITANNICA, <http://www.britannica.com/event/Helsinki-Accords>; *see also* *Who We Are: History*, ORG. FOR SEC. & CO-OP. IN EUR., <http://www.osce.org/who/87> (last visited Sept. 19, 2015) (discussing the history of OSCE and the meetings that took place leading up to the Helsinki Final Act).

65. Helsinki Final Act, *supra* note 51, at 4,5; *see also* Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 121 (quoting the Helsinki Final Act as an example of the right to self-determination's existence in other international legal documents).

66. Helsinki Final Act, *supra* note 51, art. VIII.

67. *Id.* arts. I-IV.

68. *Id.* art. VI.

69. Peters, *supra* note 1.

The U.N. – and the League of Nations before it – has promoted plebiscites and referendums as the “democratic element of self-determination.”<sup>70</sup> U.N.-sponsored self-determination referendums have aimed to recognize the “free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes.”<sup>71</sup>

There are three recognized outcomes for a people to choose in such referendums: (1) establishment of a sovereign and independent State; (2) the free association or integration with an independent State; or (3) the emergence into any other political status freely determined by the people.<sup>72</sup>

#### A. *Procedural Requirements of Self-Determination Referendums*

As a matter of international customary law, it is argued that a territorial referendum is a procedural necessity for any territorial changes.<sup>73</sup> However, a referendum alone does not make the redrawing of State borders lawful under international law – the referendum must conform to recognized procedural norms.<sup>74</sup>

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70. Miller, *supra* note 39, at 625-27, 631 (a plebiscite generally serves as a “non-binding opinion poll,” while a publicly-approved referendum “automatically binds the government to enact the law.”).

71. G.A. Res. 1541 (XV), *Principle VII* (Dec. 15, 1960); *see also* Schwed, *supra* note 40, at 451 (using the decolonization of Western Sahara as an example of the “free and genuine expression of the will of the peoples of the territory” being applied by a tribunal applying G.A. Res. 1541).

72. G.A. Res. 1541 (XV), *supra* note 71, *Principle VI* (“A Non-Self-Governing Territory can be said to have reached a full measure of self-government by: (a) Emergence as a sovereign State; (b) Free association with an independent State; or (c) Integration with an independent State.”); Declaration on Friendly Relations, *supra* note 38, annex, ¶ 66 (“The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.”); *see also* Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 126 (defining external self-determination as stated in the Declaration of Friendly Relations and contrasting it with the principle of internal self-determination).

73. Peters, *supra* note 1.

74. For procedural requirements, the author relies upon principles outlined in Conference on Security and Co-operation in Europe: Charter of Paris for a New Europe, Annex I, 1991, 30 I.L.M. 190, 220-22 [hereinafter Charter of Paris], and the Code of Good Practice on Referendums issued by the Council of Europe’s “Venice Commission.” European Commission for Democracy Through Law (Venice Commission), Code of Good

One important document providing guidance on these requirements is the OSCE's 1990 Charter of Paris, which identifies democratic requirements for recognition of possible new states.<sup>75</sup> In addition, the Council of Europe's Venice Commission more recently issued a Code of Good Practice on Referendums that sets procedural requirements that should be followed to ensure the referendum process is acceptable under international law. The procedural requirements derived from the Charter of Paris and the Code of Good Practice include:

1. freedom of media and neutrality of the authorities;<sup>76</sup>
2. peacefulness;<sup>77</sup>
3. universal, equal, free, and secret ballot;<sup>78</sup> and
4. international referendum observation.<sup>79</sup>

During the 1990s, the European Community employed the requirements in the Charter of Paris's Annex I in implementing the process for recognition of new States in the former Yugoslavia and Soviet Union.<sup>80</sup> If the four conditions identified above concerning the referendum were not met, then the right of self-determination was not exercised properly and no territorial

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Practice on Referendums, Study no. 371/2006, Mar. 16-17, 2007 [hereinafter Code of Good Practice].

75. Charter of Paris, *supra* note 74.

76. Charter of Paris, *supra* note 74, at 221; *see also* Code of Good Practice, *supra* note 74, art. I, ¶¶ 2.2.a, 3.1.a, art. II, ¶ 3.1 ("Equality of opportunity must be guaranteed for the supporters and opponents of the proposal being voted on. This entails a neutral attitude by administrative authorities, in particular with regard to: . . . coverage by the media, in particular by the publicly owned media").

77. Charter of Paris, *supra* note 74, at 221.

78. Charter of Paris, *supra* note 74, at 221; *see also* Eur. Convention on Human Rts., First Protocol, art. 3 (Mar. 20, 1952) ("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." *Id.*); *see also* G.A. Res. 2200 (XXI), *supra* note 38, art. 25.

79. Code of Good Practice, *supra* note 74, art. II, ¶ 3.2; *see also* Charter of Paris, *supra* note 74, at 222 (explaining that international observation is a preference, not a requirement).

80. European Community: Declaration on Yugoslavia and on the Guidelines on the Recognition of New States, Dec. 16, 1991, 31 I.L.M. 1485 [hereinafter EC Guidelines].

change or realignment would be justified under the European Community's guidelines.<sup>81</sup>

*B. Analysis of the Procedure of the Crimea Referendum*

Crimea's referendum is not a traditional one for independence because Crimeans voted to break off from Ukraine and immediately join the Russian Federation.<sup>82</sup> This "reunification" of Crimea with Russia has raised the suspicion, voiced by U.S. Secretary of State John Kerry, that the election was held to give a façade of democratic legitimacy to a "backdoor annexation" of the region by Russia.<sup>83</sup>

An analysis of whether the referendum in Crimea met the four necessary procedural requirements of a legitimate territorial realignment referendum is in order.

After examining the facts, we can conclude that the Crimea referendum did not follow the process required.<sup>84</sup> The Russian display of force in Crimea prior to the referendum and the Crimean government's lack of neutrality in administering the vote both cast a shadow over the legitimacy of the entire process.<sup>85</sup>

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81. See EC Guidelines, *supra* note 80, at 1487 ("[t]he commitments to these principles opens the way to recognition by the Community and its Member States and to the establishment of diplomatic relations"); see also Charter of Paris, *supra* note 74, at 220-22 (explaining the necessary rules to follow to ensure that the will of the people serves as the basis of the authority of government in the participating States).

82. See Crimea Official Ballot, *supra* note 29.

83. John Kerry, Secretary of State, Press Availability in London (Mar. 14, 2014) (transcript available at <http://www.state.gov/secretary/remarks/2014/03/223523.htm>); see also Scott Stearns, *Kerry: Crimean Referendum a "Backdoor Annexation,"* VOICE OF AMERICA (Mar. 14, 2014, 3:38 AM), <http://www.voanews.com/content/kerry-meeting-lavrov-in-another-attempt-at-calm-in-crimea/1870936.html> ("U.S. Secretary of State John Kerry says Russian acceptance of a Crimean referendum to break off from Ukraine and possibly join Russia would be an illegal 'backdoor annexation.'").

84. The author must caution that the debate between Russia and the West over the legitimacy of Crimea's referendum may be more of a disagreement over the facts than over the law, and so we must keep that in mind as we analyze the events in Crimea. See Julian Ku, *Is the Crimea Crisis a Factual or Legal Disagreement?*, OPINION JURIS (Mar. 14, 2014, 12:22 AM), <http://opiniojuris.org/2014/03/14/fair-balanced-russias-legal-position-crimea/>.

85. See Eur. Comm'n for Democracy Through L., *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, CDL-AD(2014)002, ¶ 22 (Mar. 21, 2014) [hereinafter Venice Comm'n]; see

The very short ten-day period for the public to form an opinion on the issue of secession from Ukraine made it questionable whether this vote represented the free choice of the Crimean people, or rather, whether the majority's decision was unduly influenced by the hurried nature and crisis atmosphere of the process.<sup>86</sup>

1. Freedom of the media and neutrality of the authorities

The Code of Good Practice calls for equality of opportunity for supporters and opponents of proposals to be voted upon.<sup>87</sup> This includes media coverage, advertising, and the right to demonstrate in the streets.<sup>88</sup> Government authorities are also to maintain a neutral position regarding a referendum campaign.<sup>89</sup>

The process in Crimea did not meet any of these requirements.<sup>90</sup> Those opposed to the referendum did not get equal rights to demonstrate in the streets as supporters of the vote did, and the Crimean government did not take a neutral position. Crimean "local self-defense squads" arrested protestors who urged the public to boycott the referendum, and Crimean authorities prevented anti-referendum activists from entering Crimea.<sup>91</sup> Months after the referendum, the U.N. would report

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*also* Simon Smith, *Why Should the Crimean Referendum Not Be Recognised?*, FOREIGN & COMMONWEALTH OFFICE, ¶ 7 (Mar. 17, 2014), <http://webarchive.nationalarchives.gov.uk/20141204000047/http://blogs.fco.gov.uk/simonsmith/2014/03/17/why-should-the-crimean-referendum-not-be-recognised/> ("the Crimean referendum was illegal, badly organized, unrepresentative, unfair and held under conditions of direct external military interference").

86. See Venice Comm'n, *supra* note 85, ¶ 22; Smith, *supra* note 87, ¶ 3.

87. Code of Good Practice, *supra* note 74, art. I, ¶ 2.2.

88. *Id.*

89. *Id.*

90. See Christian Marxsen, *The Crimea Crisis-An International Law Perspective*, 74/2 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Heidelberg Journal of International Law) 367, 381-82 (2014) ("...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 parties, and a neutrality of public authorities. Both elements do not seem to have been secured in Crimea.").

91. *Provocations On the Rise*, *supra* note 28; see also *Freedom of Assembly in Crimea Occupied by the Russian Federation*, CTR. FOR CIVIL LIBERTIES (UKR.) (Apr. 17, 2015), <http://www.osce.org/pc/151691?download=true> (reporting that, one week before the referendum, the "Crimean self-defense" arrested organizers of a Ukraine unity rally and police detained the organizers for 11 days).

that Crimean officials had made no serious attempt to look into alleged human rights abuses committed by the self-defense squads.<sup>92</sup>

Speech in opposition to the referendum was also limited on Crimean television; days before the referendum, Crimea's new government shut down several Ukrainian channels that offered a message opposed to the referendum.<sup>93</sup> Ukraine followed suit, banning at least four Russian channels from the airwaves in Ukraine, as Russia and Ukraine traded blame with one another over censoring free speech.<sup>94</sup>

The Venice Commission found a lack of neutrality by Crimea's local government, based on the Crimean parliament's declaration of independence on March 11, five days before the referendum, and due to the arrest of protestors at anti-referendum demonstrations.<sup>95</sup>

## 2. Peacefulness.

Since the time of League of Nations-administered plebiscites in the 1920s, it has been accepted that a region must be "pacified" or "neutralized" through withdrawal or reduction of troops from concerned States before a referendum occurs.<sup>96</sup> The neutrality of

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92. *Ukraine: UN Report Shows Rising Civilian Deaths, Ongoing Rights Abuses*, U.N. NEWS CTR. (Aug. 29, 2014), <http://www.un.org/apps/news/story.asp?NewsID=48588#VPjC077nZdg>.

93. Andrey Ostroukh, *Ukraine, Russia Intensify War of the Airwaves*, WALL ST. J. (Mar. 12, 2014, 5:50 PM), <http://blogs.wsj.com/emergingurope/2014/03/12/ukraine-russia-intensify-war-of-the-airwaves/>.

94. *Ukrainian Court Bans Russian TV Broadcast*, RT (Mar. 26, 2014), <https://www.rt.com/news/ukraine-court-bans-russian-tv-245/>.

95. See Venice Comm'n, *supra* note 85, ¶ 22 (noting the Supreme Rada's March 11 declaration of independence as a circumstance that questions the legitimacy of the March 16, 2014 referendum); see also Press Release, *Crimean Parliament Adopted a Declaration of Independence of the ARC and Sevastopol*, THE SUPREME COUNCIL OF THE AUTONOMOUS REPUBLIC OF CRIMEA (Mar. 11, 2014) [http://www.rada.crimea.ua/news/11\\_03\\_2014\\_1](http://www.rada.crimea.ua/news/11_03_2014_1) [[https://web.archive.org/web/20140313110536/http://www.rada.crimea.ua/news/11\\_03\\_2014\\_1](https://web.archive.org/web/20140313110536/http://www.rada.crimea.ua/news/11_03_2014_1)] [hereinafter *Crimea Declaration of Independence*].

96. See League of Nations Covenant art. 88, Annex. ("In Upper Silesia, an area bordering Germany and Poland, "the inhabitants will be called upon to indicate by vote whether they wish to be attached to Germany or to Poland . . . German troops [and other officials] shall evacuate the plebiscite area . . . Within the same period, the Workmen's and Soldiers' Councils which have been constituted in the area shall be dissolved . . . All military and semi-military unions formed in the said area by inhabitants of the district

the Crimea at the time of the referendum is a matter of debate. In the weeks before the referendum in Crimea, reports identified armed troops in unmarked green uniforms patrolling outside Crimean airports and preventing international observers from entering the region.<sup>97</sup> A critical factual dispute has arisen that has still not been fully resolved: Who were these “little green men”?<sup>98</sup>

Some argued these forces were Crimean while others believed they were Russian troops. Proponents of Crimea’s referendum said these troops were local self-defense squads who banded together to stabilize the security situation in Crimea in the face of the “troublemakers” who had toppled the government in Kiev.<sup>99</sup> Western critics argued that these green-uniformed patrols that emerged in Crimea in early 2014 were actually Russian troops infiltrating the region, or locals under orders from Russia.<sup>100</sup>

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shall be immediately disbanded. All members of such military organizations who are not domiciled in the said area shall be required to leave it.”); League of Nations Covenant arts. 94-95 (“In the area between the southern frontier of East Prussia . . . the inhabitants will be called upon to indicate by a vote the State to which they wish to belong . . . . The German troops and authorities will be withdrawn from the area . . . the said area will be placed under the authority of an International Commission . . .”); *see also* League of Nations Covenant art. 109 (describing similar procedures for Schleswig, an area bordering Germany and Denmark); Peters, *supra* note 1 (“First, the territory was not pacified. This is the classic requirement for unimpeded voting on territorial issues.”).

97. *See Crisis in Crimea: Enigmatic Occupiers in Camouflage*, DER SPIEGEL (Feb. 28, 2014), <http://www.spiegel.de/politik/ausland/krim-russische-truppen-am-flughafensimeforopol-a-956275.html> (“private security forces still possess full control of the airports on the Crimean peninsula . . . uniforms bear no insignia.”).

98. *See* Josh Rogin, *Exclusive: Russian ‘Blackwater’ Takes Over Ukraine Airport*, DAILY BEAST (Feb. 28, 2014, 2:23 PM), <http://www.thedailybeast.com/articles/2014/02/28/exclusive-russian-blackwater-takes-over-ukraine-airport.html> (reporting that Russian Foreign Minister Sergei Lavrov told U.S. Secretary of State John Kerry that no Russian military or marines have been deployed outside of the base of the Black Sea Fleet and postulating that the troops are security contractors); *see also* Wojciech Konończuk, *Russia’s Real Aims in Crimea*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Mar. 13, 2014), <http://carnegieendowment.org/2014/03/13/russia-s-real-aims-in-crimea> (suggesting that “Crimea was the target of a well-executed, Russian-led military operation.”).

99. *See Provocations On the Rise*, *supra* note 28 (reporting that a source in Crimean self-defense units stated that about 60 to 70 activists were planning to organize a Euro-Madian protest similar to the one held in Kiev).

100. Harriet Salem & Shaun Walker, *Russian Armoured Vehicles on the Move In Crimea*, GUARDIAN (UK) (Feb. 28, 2014, 13:48), <http://www.theguardian.com/world/2014/feb/28/gunmen-crimean-airports-ukraine>.

And there was disagreement about their impact on the peacefulness of the referendum process. The Venice Commission found “implicit threats of the use of military force emanating from the massive public presence” of military forces in Crimea.<sup>101</sup> Supporters of the referendum and reunification with Russia also assert that the process was peaceful because there was no significant violence or loss of life around the time of the referendum,<sup>102</sup> especially when compared to the bloodshed and destruction that has gripped parts of eastern Ukraine in the months after Crimea’s referendum.<sup>103</sup>

Russian President Vladimir Putin denies that Russian troops entered the mainland of Crimea prior to the vote. He claimed that Russia’s increased troop levels in Crimea – from 16,000 to 25,000 personnel – was only in areas where Russia stations its Black Sea Fleet, and in line with the troop limits under Ukraine and Russia’s agreement.<sup>104</sup>

A Ukrainian defense minister, however, reported before the referendum that fifty Russian armored vehicles were seen

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101. See Venice Comm’n, *supra* note 85, ¶ 22 (arguing that enormous presence of (para) military troops is “not conducive to democratic decision making”).

102. See Roland Oliphant, *Crimeans Vote Peacefully in Referendum, But Have Little Choice*, TELEGRAPH (UK) (Mar. 16, 2014, 9:27 PM), <http://www.telegraph.co.uk/news/worldnews/europe/ukraine/10701676/Crimeans-vote-peacefully-in-referendum-but-have-little-choice.html> (reporting that the scene at one of Simferopol’s High School polling stations was calm and well-ordered); see also Antonello Tancredi, *The Russian Annexation of the Crimea: Questions Relating to the Use of Force*, 1 QUESTIONS OF INT’L L. 5, 31 (2014), <http://www.qil-qdi.org/the-russian-annexation-of-the-crimea-questions-relating-to-the-use-of-force/> (discussing the positive relationship between intervention and human casualties).

103. See, e.g., Marie-Louise Gumuchian & Nick Paton Walsh, *Heavy Clashes Reported as Ukrainian Forces Tackle Pro-Russian Separatists*, CNN (May 6, 2014, 5:14 AM), <http://www.cnn.com/2014/05/05/world/europe/ukraine-crisis/> (reporting escalating violence in the eastern and southern regions of Crimea after President Viktor Yanukovich, a Russian supporter, had been removed from power); see also Alastair Macdonald & Yannis Behrakis, *Battle at Donetsk Airport; New Ukraine Leader Says No Talks With ‘Terrorists,’* REUTERS (May 27, 2014, 1:54 AM), <http://www.reuters.com/article/2014/05/27/us-ukraine-crisis-idUSBREA4M05420140527> (reporting military response to separatists who seized an airport in Donetsk).

104. Putin, *supra* note 8; see generally Partition Treaty on the Status and Conditions of the Black Sea Fleet, Russ.-Ukr., May 28, 1997, Ukraine Verkhovna Rada, [http://zakon4.rada.gov.ua/laws/show/643\\_076](http://zakon4.rada.gov.ua/laws/show/643_076) (treaty agreement between Russia and Ukraine).

traveling across Crimea, and Russian forces had taken control of bases abandoned by Ukrainian troops.<sup>105</sup> In televised remarks, Sergei Aksenov, who was appointed Crimea's premier on February 27, called on Russia to provide assistance in securing peace in Crimea.<sup>106</sup>

With the Russian military authorized to enter Crimea in the weeks prior to the vote, Western observers describe the Crimean referendum as being "held in front of the guns and tanks of the Russian army and of unidentified troops," and this alone gives the referendum no legal value under international law.<sup>107</sup> The show of force by Russian troops and self-defense squads stationed at strategic points likely influenced or intimidated voters who took part in Crimea's referendum, and so the vote could not reflect the "free and genuine expression of the will of the peoples of the territory."<sup>108</sup>

### 3. Universal, equal, free, and secret ballot.

The requirement that a democratic election be free, fair, and by secret ballot, is one of the oldest requirements to receive

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105. Anthony Falola & Will Englund, *Ukraine Denounces 'Invasion' by Russian Forces on Eve of Crimea's Referendum*, WASH. POST (Mar. 15, 2014), [http://www.washingtonpost.com/world/europe/tensions-mount-as-crimea-prepares-for-referendum/2014/03/15/a384c36a-ac40-11e3-a06a-e3230a43d6cb\\_story.html](http://www.washingtonpost.com/world/europe/tensions-mount-as-crimea-prepares-for-referendum/2014/03/15/a384c36a-ac40-11e3-a06a-e3230a43d6cb_story.html).

106. *Ukraine crisis: Crimea leader appeals to Putin for help*, BBC, (Mar. 1, 2014), <http://www.bbc.com/news/world-europe-26397323> (television footage of a portion of Mr. Aksenov's remarks); see also Sergei L. Loiko, *New Crimea Leaders Move up Referendum Date*, L.A. TIMES (Mar. 1, 2014), <http://articles.latimes.com/2014/mar/01/world/la-fg-wn-crimea-referendum-date-20140301> (noting that in televised remarks, Aksenov said Crimea had "established cooperation with the [Russian] Black Sea Fleet in protecting the important assets . . . [and] to protect public order."); see also Simon Shuster, *Putin's Man in Crimea Is Ukraine's Worst Nightmare*, TIME (Mar. 10, 2014), <http://time.com/19097/putin-crimea-russia-ukraine-aksyonov/> (offering background on Aksenov, the leader of Crimea's Russian Unity party).

107. Peters, *supra* note 1; see also Smith, *supra* note 87 (citing Russian military influence as a reason not to view the referendum as legitimate).

108. See G.A. Res. 1541 (XV), *supra* note 71 (Principle VII states that "[t]he associated territory should have the right to determine its internal constitution without outside interference, in accordance with due constitutional processes and the freely expressed wishes of the people"); see also Schwed, *supra* note 40, at 451 ("resolution stressed that each form of decolonization could only become effective if accomplished through 'free consultation' with the non-self-governing territory.").

international recognition.<sup>109</sup> Proponents of the referendum say only residents with valid passports were allowed to vote,<sup>110</sup> and point to the official turnout of over 83% of eligible voters as proof that the vote was free and fair.<sup>111</sup> Referendum supporters claim the vote followed the secret ballot requirement despite a report of ballot boxes in Sevastopol being transparent so that voters' choices were visible.<sup>112</sup>

In February 2014, Crimea's parliament originally set an autonomy referendum for May 25, almost three months after the announcement, but two days later moved it up to March 30.<sup>113</sup> A few days later, the referendum was moved up an additional two

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109. Eur. Convention on Human Rights, Protocol to the Convention for the Rights and Fundamental Freedoms as amended by Protocol No. 11, art. 3 (Mar. 20, 1952), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168006377c>.

110. *Provocations On the Rise*, *supra* note 28; Smith, *supra* note 87.

111. Oliver Laughland et al., *Crimea Referendum: Early Results Indicate 'Landslide' for Secession – As It Happened*, GUARDIAN (UK) (Mar. 16, 2014), <http://www.theguardian.com/world/2014/mar/16/crimea-referendum-polls-open-live>; *see also* Central Election Comm'n of Ukraine, [https://www.drv.gov.ua/portal/cm\\_core.cm\\_index?option=ext\\_num\\_voters&pdt=3](https://www.drv.gov.ua/portal/cm_core.cm_index?option=ext_num_voters&pdt=3), (as of July 31, 2015, there were 1,522,633 registered voters in the autonomous republic of Crimea and 305,210 in the city of Sevastopol, which totals to 1,827,843 voters in the Crimean peninsula. Crimea's government reported that 1,524,563 ballots were cast); *see also* *More than 95% of Voters in Crimea Wanted to Return to Russia*, *supra* note 1 (reporting that voter turnout in the Crimea referendum exceeded 81% and that more than 95% of voters were in favor of returning to Russia).

112. *Crimea Referendum Held in Line with International Standards — Observers*, ITAR-TASS (Mar. 17, 2014), <http://tass.ru/en/world/723946> (referendum proponents' view that "the voting process and vote count . . . were held in line with international electoral standards and approved regulations"); *see also* Shaun Walker & Harriet Salem, *Pro-Russian Crimeans Celebrate Landslide Vote for Return to Motherland*, GUARDIAN (UK) (Mar. 16, 2014), <http://www.theguardian.com/world/2014/mar/16/pro-russian-crimeans-celebrate-landslide-vote-union-russia-ukraine>; *see also* James Dawson, *The Crimea vote is awkward for the west – but it isn't unprecedented*, NEWSTATESMAN (Mar. 17, 2014), <http://www.newstatesman.com/world-affairs/2014/03/crimea-vote-awkward-west-it-isnt-unprecedented>.

113. *The Presidium of the Supreme Soviet of Crimea supported the initiative of the Crimean republican referendum to postpone the date of March 30, 2014*, THE STATE COUNCIL OF THE REPUBLIC OF CRIMEA (Mar. 3, 2014), [http://www.rada.crimea.ua/news/03\\_03\\_14\\_2](http://www.rada.crimea.ua/news/03_03_14_2) [[http://web.archive.org/web/20140324235823/http://www.rada.crimea.ua/news/03\\_03\\_14\\_2](http://web.archive.org/web/20140324235823/http://www.rada.crimea.ua/news/03_03_14_2)]; *see also* Loiko, *supra* note 106.

weeks, and now only gave the public the choice to support joining Crimea to the Russian Federation.<sup>114</sup>

The Venice Commission found the “excessively short” ten-day window – between March 6, when Crimea’s parliament announced the referendum, and the March 16 vote – made it difficult for “democratic deliberation and opinion forming.”<sup>115</sup> Western critics, such as Professor Anne Peters, said that due to the local Crimean government’s bias in favor of breaking away from Ukraine and the increased levels of Russian armed forces in the peninsula, the Crimea referendum was not free and fair and so cannot be grounds for a legitimate change in Crimea’s territorial status.<sup>116</sup>

Crimea was in a state of crisis, and it was no time for a rushed referendum on such an important issue. If the referendum had been held a few months after its announcement, this might have been sufficient time for the public to form an opinion on the issue of secession from Ukraine. But for the Crimean parliament to announce the referendum with only ten days’ notice made it questionable whether this vote truly represented the free, informed choice of the Crimean people.

#### 4. International referendum observation.

The 1990 Charter of Paris characterizes international observation of elections as a preferred procedure that adds credibility to an election’s results.<sup>117</sup> The Venice Commission’s 2007 Code of Good Practice, however, appears to make the presence of international observers a condition for a legitimate election.<sup>118</sup> This apparent conflict is resolved in the modern view,

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114. Jamie Dettmer, *EU: Crimea Referendum Illegal*, VOICE OF AM. (Mar. 6, 2014, 10:19 AM), <http://www.voanews.com/content/eu-crimea-referendum-illegal/1865590.html>.

115. See Venice Comm’n, *supra* note 85 (citing the extremely brief 10 day period between the decision to call the referendum and the referendum itself as a circumstance that raises questions regarding the referendum’s compliance with international standards).

116. Peters, *supra* note 1; see, e.g., Smith, *supra* note 87 (statement of British ambassador to Ukraine arguing that the Crimean referendum is illegitimate because it was improperly organized, unfair and unrepresentative, conducted with interference by the Russian military and there was a lack of public debate).

117. Charter of Paris, Annex I, arts. 8, *supra* note 74, at 222.

118. Code of Good Practice, *supra* note 74, art. II, ¶ 3.2.

as expressed by Anne Peters, that the right of self-determination is demonstrated and proven through international observers being present preceding the elections, and the presence of international observers is now an “adamant . . . legal precondition for a valid territorial referendum.”<sup>119</sup>

Crimea’s parliament invited OSCE election observers to be present during the referendum, but the OSCE declined the invitation because Crimea was not a member state, and Ukraine, an OSCE member, sent no invitation.<sup>120</sup> The OSCE spokesperson underscored the refusal by saying the OSCE respected the full territorial integrity and sovereignty of Ukraine.<sup>121</sup> At the same time, Crimea was officially inviting election observers, armed men at Crimea’s border were refusing entry to OSCE military observers, even firing warning shots to turn the observers away.<sup>122</sup>

Rustam Temirgaliyev, deputy prime minister of Crimea, clarified that Crimea’s government was “open to various international organizations, but only if they are ready to send monitors, not saboteurs, military experts and advisers. We don’t need the help of such ‘specialists.’”<sup>123</sup> In the end, a group of

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119. Peters, *supra* note 1 (stating that an “international legal precondition for a valid territorial referendum is robust international oversight” and that Crimea did not meet this precondition); see also Code of Good Practice, *supra* note 74, art. II, ¶ 3.2 (noting “Both national and international observers should be given the widest possible opportunity to participate in a referendum observation exercise.”)

120. *Crimea Invites OSCE Observers for Referendum On Joining Russia*, REUTERS (Mar. 10, 2014, 1:42 PM), <http://www.reuters.com/article/2014/03/10/ukraine-crisis-referendum-osce-idUSL6N0M73AP20140310>; see also Smith, *supra* note 87 (providing further reasons OSCE observers could not be present: “Insufficient preparatory work could be done in the timeframe available to ensure that any referendum would meet OSCE standards for democratic elections; the international community would need to be able to verify the existence of an accurate and current voter registration list; to have reassurance that only those holding Ukrainian passports were eligible to vote; and to have confidence that voters will not experience harassment or violence when attempting to vote.”).

121. *Id.*

122. *Thwarted Crimea Mission of OSCE Observers*, EURONEWS (Mar. 15, 2014, 00:21 CET), <http://www.euronews.com/2014/03/15/thwarted-crimea-mission-of-osce-observers/>.

123. *OSCE Observers Weren’t Officially Invited to Crimean Referendum - Crimean Authorities*, VOICE OF RUSSIA (Mar. 11, 2014), [http://sputniknews.com/voiceofrussia/news/2014\\_03\\_11/OSCE-observers-werent-officially-invited-to-Crimean-referendum-Crimean-authorities-5214/](http://sputniknews.com/voiceofrussia/news/2014_03_11/OSCE-observers-werent-officially-invited-to-Crimean-referendum-Crimean-authorities-5214/).

observers from more than twenty countries was present<sup>124</sup> However, because those invited to observe the referendum were “a mixture of anti-western ideologues and European far-right politicians” and not from any established non-governmental organization,<sup>125</sup> it is not clear that the procedural requirement that international observers be present was met by organizers of the referendum.

## V.        POSSIBLE JUSTIFICATIONS FOR CRIMEA’S SECESSION              FROM UKRAINE

The Supreme Court of Canada observed in its 1998 advisory opinion, *Reference re Secession of Quebec* — noted for its in-depth analysis of the question of self-determination — that there is no explicit prohibition under international law to the unilateral secession of the people of a territory.<sup>126</sup> In fact, there is present legal support for the proposition that if a people demonstrates one of these circumstances: (1) constitutional secession; (2) remedial secession; or (3) State disintegration — such a “break-away state” could receive recognition as a new member of the international community.

### A.    *Constitutional Secession*

The international community mainly allows the domestic law of the existing state to determine whether a new state is created from part of its territory.<sup>127</sup> Where unilateral secession is incompatible with a state’s constitution, international law is not likely to recognize the unilateral declaration of independence by a minority of a state.<sup>128</sup>

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124. Shaun Walker & Alec Luhn, *Crimea Goes to the Polls with Landslide Expected for Union with Russia*, *GUARDIAN* (UK) (Mar. 16, 2014), <http://www.theguardian.com/world/2014/mar/16/ukraine-crisis-crimea-referendum>.

125. *Id.*

126. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 112; Kristen Pue, *Reference re: Secession of Quebec, in Context*, *U. ALBERTA CTR. FOR CONST. STUD.* (Aug. 17, 2012) (“The Court’s decision necessitated a thorough analysis of self-determination in international law”).

127. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 112.

128. *Id.*

The relevant domestic law in the context of the Crimea referendum is the constitution of the Ukraine, and the referendum was not constitutional under that authority. Proponents of the Crimea referendum assert that the violent actions of protestors in Kiev, who ousted President Yanukovich, amounted to an “anti-constitutional coup,” and ended the Kiev government’s constitutional authority.<sup>129</sup> However, regardless of the legality of the transfer of power in Kiev on Feb. 22, 2014, the effort by Crimea to break off from Ukraine three weeks later is not legal under Ukraine’s constitution and does not represent a constitutional secession.<sup>130</sup>

Under the Constitution of Ukraine, the territory of Ukraine is “indivisible”<sup>131</sup> and “[t]he territorial structure of Ukraine is based on the principles of unity and indivisibility of the State territory . . . .”<sup>132</sup> Ukraine’s Constitution also indicates that, “[i]ssues of altering the territory of Ukraine are resolved exclusively by an All-Ukrainian referendum,” so a referendum in the territory of Crimea would not be sufficient.<sup>133</sup>

In addition, Article 134 of the Constitution of Ukraine states that Crimea is an “inseparable constituent part of Ukraine” and that its local government has authority based only on the limits set out in Ukraine’s constitution.<sup>134</sup> Therefore, the breaking away

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129. Tom Cohen, *Legal or Not, Crimean Referendum will Shape Ukraine Crisis* CNN (Mar. 7, 2014, 5:57 PM), <http://www.cnn.com/2014/03/07/politics/crimea-referendum-explainer/>; see also Nigel Morris & Kim Sengupta, *Ukraine Crisis: Russian Officials Hit with Sanctions as Kiev Warns Crimea Against Referendum*, INDEP. (Mar. 11, 2014), <http://www.independent.co.uk/news/world/europe/ukraine-crisis-russian-officials-hit-with-sanctions-as-kiev-warns-crimea-against-referendum-9183602.html> (President Yanukovich and a member of Crimea’s pro-Russian self-defense force blamed protests in Kiev for Yanukovich’s fall from power and supported Crimea’s secession by referendum).

130. See Code of Good Practice, *supra* note 74, art. III, ¶ 1 (concluding that referendums not authorized by the Constitution, such as referendums to secede, are not legal); see also Peters, *supra* note 1 (“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.”).

131. CONST. OF UKR. art. 2.

132. *Id.* art. 132.

133. *Id.* art. 73.

134. *Id.* art. 134.

of Crimea would require an amendment to the Ukrainian constitution.<sup>135</sup> However, such an amendment is foreclosed by Article 157, ¶ 1, which states: “The Constitution of Ukraine shall not be amended, if the amendments . . . are oriented toward . . . violation of the territorial indivisibility of Ukraine.”<sup>136</sup>

Thus, Crimea’s referendum to leave Ukraine is prohibited and Crimea’s local government had no authority to call such a referendum under the Constitution of Ukraine.<sup>137</sup>

### *B. Remedial Secession*

Crimea’s referendum was unconstitutional under the laws of Ukraine,<sup>138</sup> but in a 2009 written statement submitted by the United States to the International Court of Justice (ICJ), U.S. representatives wrote: “[D]eclarations of independence may — and in their nature often do — violate domestic law. However, that does not mean that there has been a violation of international law.”<sup>139</sup> Remedial secession is one process by which

135. *Id.*; see also Peters, *supra* note 1 (“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 . . .”).

136. CONST. OF UKR. art. 157, ¶ 1; see also Peters, *supra* note 1 (discussing the lack of constitutional authorization for the secession of Crimea).

137. See Code of Good Practice, *supra* note 74, art. III, ¶ 1 (requiring referendums to comply with statutory or constitutional procedure); see also CONST. OF UKR. art. 134 (prohibiting amendments to the Ukrainian Constitution that violate the territorial indivisibility of Ukraine); CONST. OF UKR. art. 157, ¶ 1 (“The Autonomous Republic of Crimea is an inseparable constituent part of Ukraine. . .”).

138. Peters, *supra* note 1 (agreeing with the Venice Commission, which concluded that the Ukrainian Constitution prohibits local referendums altering the territory of Ukraine and that the local authorities in Crimea were not authorized to call a local referendum); see also Eur. Comm’n for Democracy Through L., *Law of Ukraine on National Referendum*, art. III, ¶ 3, Study no. 705/2012, Mar. 20, 2013 (matters may be submitted to a national referendum except those expressly disallowed by the Constitution of Ukraine); see also CONST. OF UKR. arts. 134 & 157 (prohibiting referendums affecting the indivisibility of Ukraine).

139. Written Statement of the United States of America to the Int’l Court of Justice 51 (Apr. 17, 2009). Prof. Anne Peters also argues that from the international law perspective, the constitutionality of Crimea’s referendum is “irrelevant,” as it is common that a territorial referendum on independence should be unconstitutional under the law of the mother state. Peters, *supra* note 1. For example, despite the Soviet Union’s declaration that Lithuania’s February 9, 1991, referendum on independence was illegal

a state can formed by a procedure that is contrary to the legal authority of the existing state.

Remedial secessions is the legal or moral theory that oppression of an ethnic or national group within a state can eventually lead to the group's right of secession from the state, regardless of the legality of that secession<sup>140</sup> The primary argument for remedial secession is that, if a group is denied "full democratic participation based on equality of citizenship" or otherwise persecuted or oppressed based on race or ethnicity, then breaking off to form a new state may be a proper remedy – provided this is the *only means* to protect the rights of members of this group.<sup>141</sup>

The assertion of a right to remedial secession arises in "only the most extreme of cases and, even then, under carefully defined circumstances."<sup>142</sup> According to proponents, resort to remedial secession can only be justified in the case of a state's organized and deliberate denial of a People's right to political, cultural, and economic autonomy with the existing State, or serious breach of a State's obligation to refrain from forcible action depriving a People's right to self-determination.<sup>143</sup>

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and void, the European Community and other international actors welcomed the decision to hold the referendum. *Id.*

140. Saul, *supra* note 36, at 616. *Accord* Jure Vidmar, *Remedial Secession in International Law: Theory and (Lack Of) Practice*, 6 ST. ANTONY'S INT'L REV. 37, 38 n.37 (2010) ("[T]he theory of so-called remedial secession suggests that gross and systematic human rights violations can lead a state to lose a part of its territory if oppression is directed against a specific people").

141. *E.g.*, Written Statement of Ireland to the Int'l Court of Justice 8-9 (Apr. 17, 2009) (agreeing that "there is no legal right of secession where there is representative government" and stating that a government which represents the whole of its people on an equal basis is entitled to territorial integrity under international law); Written Statement of Poland to the Int'l Court of Justice 25 (Apr. 17, 2009) (stating that a remedial right to secession is based on the premise of major human rights and humanitarian law); Written Statement of the Netherlands to the Int'l Court of Justice 9 (Apr. 17, 2009) (recognizing the right to self-determination where a government denies fundamental rights and does not represent the whole people in the territory). *See also* Howse & Teitel, *supra* note 42, at 56 (supporting external self-determination where a group is denied the right to full democratic participation or otherwise subject to persecution or oppression based on race or ethnicity and other remedies are not feasible).

142. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, paras. 122, 126.

143. *See* Written Statement of the Netherlands to the Int'l Court of Justice 9 (Apr. 17, 2009) (submitting that the right to self-determination arises in the event of a

If a government respects a people's political, economic, social, and cultural development within the existing state, then the territorial integrity of the state deserves international respect.<sup>144</sup> So long as the people within the state's territory are not being oppressed, creation of a federation or some form of local autonomy is more appropriate than a territory's total separation from the state.<sup>145</sup>

If there is an unacceptable level of state violence directed against the people, the state may lose the legitimacy that enables it to insist on its territorial integrity.<sup>146</sup> Absent serious and fundamental human rights abuses by the state against a people, no unilateral remedial secession of a region is allowed, and the people must seek self-determination within the existing state

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"serious breach" of the obligation to respect and promote self-determination or the obligation to refrain from forcible acts of deprivation); *see also* Written Statement of Switzerland to the Int'l Court of Justice 17 (Apr. 15, 2009) ("a people may by way of exception exercise the right to external self-determination if the State systematically and gravely violates the right of internal self-determination on the basis of distinctive group traits, in such a manner that the group concerned can no longer be expected to remain within the State concerned"); *see also* Peters, *supra* note 1 (stating that the justification for remedial secession "can only be triggered by persistent and massive human rights violations, and by a long-lasting denial of the right to internal self-determination").

144. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 130 ("A state whose government . . . respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity."); *see also* G.A. Res. 50/6, *supra* note 62.

145. Saul, *supra* note 36, at 627.

146. Szasz, *supra* note 33, at 7.

government framework.<sup>147</sup> For the sake of stability, the territorial integrity of the state must be upheld.<sup>148</sup>

Proponents of the principle of remedial secession concede that breaking a territory away to form a new state must remain a “last resort” that is only acceptable when all other attempts to attain self-determination inside the current state have been unsuccessful, and a people has been repressed by the majority to such an extent that separation is the only feasible alternative.<sup>149</sup> Remedial secession requires negotiations that were “seriously tried out and failed.”<sup>150</sup>

Various states who submitted statements to the International Court of Justice (ICJ) during the ICJ’s consideration of the

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147. See Written Statement of the Netherlands to the Int’l Court of Justice 8-9, ¶¶ 3.6, 3.11 (Apr. 17, 2009) (“outside the context of non-self-governing territories, foreign occupation and consensual agreement – a people must, in principle, seek to exercise the right to political self-determination with respect for the principle of territorial integrity and thus exercise its right within existing international boundaries”); see also Written Statement of Poland to the Int’l Court of Justice 25-26, ¶¶ 6.5-6.7 (Apr. 17, 2009) (external self-determination such as a right to unilateral secession arises only as a last resort when a people’s ability to exercise internal self-determination is totally frustrated (citing Reference re Secession of Quebec, [1998] 2 S.C.R. 217, paras. 126-134)); see also Written Statement of Ireland to the Int’l Court of Justice 10 (Apr. 17, 2009) (stating that the right of self-determination may arise as a “last resort” in the case of “gross and fundamental human rights abuses” and “where an element of discrimination is involved”).

148. See Szasz, *supra* note 33, at 7 (suggesting that a state with an unacceptable level of violence, whether the government is the victim or perpetrator, has been destabilized to the point of losing its legitimacy and right to territorial integrity).

149. See, e.g., Written Statement of Switzerland to the Int’l Court of Justice 16-17 (Oct. 17, 2008) (sharing the view that secession is a last resort while citing Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 135); Written Statement of Ireland to the Int’l Court of Justice 9 (Apr. 17, 2009) (stating that the right of self-determination may arise as a “last resort”); see also Written Statement of the Republic of Poland to the Int’l Court of Justice 25-26 (Apr. 17, 2009) (stating that “the remedial right to secession may only come into question as a last resort” (citing Reference re Secession of Quebec, [1998] 2 S.C.R. 217, paras. 126-36)); see also Jonathan I. Charney, *Self-Determination: Chechnya, Kosovo, and East Timor*, 34 VAND. J. TRANSNAT’L L. 455, 464 (2001) (discussing the circumstances in Kosovo where “all efforts at peaceful settlement of the disputes had been exhausted”).

150. See Written Statement of Switzerland to the Int’l Court of Justice 17-18 (Apr. 15, 2009) (discussing a right to secession as a right that only exists when all other means of exercising self-determination have failed); see also Charney, *supra* note 149 (“independence was sought after all other solutions proved unavailable and armed force was used only as a last resort”); see also Peters, *supra* note 1 (also referring to remedial secession as a “last resort” where negotiations have been “seriously tried out and failed”).

validity of Kosovo's declaration of independence see the Kosovo secession from Yugoslavia as a valid example of remedial secession.<sup>151</sup> During the proceedings leading to the ICJ's *Kosovo Advisory Opinion*, the concept of remedial secession was put forward by representatives of Albania, Denmark, Estonia, Finland, Germany, Ireland, Latvia, the Netherlands, Poland, Slovenia, and Switzerland.<sup>152</sup>

In the case of Crimea, Russia's ambassador to the U.N., Vitaly Churkin, argued before the Security Council that Crimea did face an existential threat from the groups that took over the Ukraine government in February 2014.<sup>153</sup> Due to "a legal vacuum, which emerged as a result of an unconstitutional, violent coup d'état carried out in Kiev by radical nationalists" and threats by these "radicals" to impose their will on Crimea, the Crimean

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151. See, e.g., Written Statement of the Netherlands to the Int'l Court of Justice 9-12 (Apr. 17, 2009) (discussing self-determination in Kosovo); see also Written Statement of Ireland to the Int'l Court of Justice 10-12 (Apr. 17, 2009) ("the case of Kosovo represents a *sui generis* case representing an exercise of self-determination . . ."); see also Written Statement by Switzerland to the Int'l Court of Justice 21-26 (Oct. 17, 2008) (discussing the circumstances justifying self-determination in Kosovo); see also Written Statement of the Republic of Poland to the Int'l Court of Justice 26-27 (Apr. 2009) (discussing the remedial right of secession in Kosovo); see also Written Statement of Finland to the Int'l Court of Justice 5-7 (Apr. 17, 2009) (discussing the justification for Kosovo's unilateral declaration of independence). Kosovo's secession was "exceptionally justified on account of blatant human rights violations, political marginalization, persistent denial of internal self-determination of Kosovar Albanians, and as the only way out of a stalemate." Anne Peters, *Crimea: Does "The West" Now Pay the Price for Kosovo?*, EJIL: TALK! (Apr. 22, 2014), <http://www.ejiltalk.org/crimea-does-the-west-now-pay-the-price-for-kosovo/>.

152. See Saul, *supra* note 36, at 616-17 (listing Albania, Denmark, Estonia, Finland, Germany, Ireland, Latvia, the Netherlands, Poland, Slovenia, and Switzerland as states proposing the concept of remedial secession to justify Kosovo's declaration of independence). Serbia, which opposed the Albanian Kosovars' unilateral declaration of independence, noted in its response that these States provide "little to substantiate this position as a matter of international law." Written Statement of Serbia to the Int'l Court of Justice 131-32 (July 17, 2009). For its part, the United States representatives' written comments to the ICJ indicated that the U.S. would not express its views on (1) who is a "people"; (2) whether a right of "remedial secession" exists; or (3) when such a right could flow to a people. Written Comments of the United States to the Int'l Court of Justice 21 (July 17, 2009).

153. Mike Whitney, *Crimea River*, COUNTERPUNCH (Mar. 4, 2014), <http://www.counterpunch.org/2014/03/04/crimea-river/>.

government's and people's decision to place the territory under the protection of Russia was justified as a last resort.<sup>154</sup>

However, none of the special circumstances that proponents argue made Kosovo's remedial secession valid were present in Crimea.<sup>155</sup> Opponents of the referendum contend that there is no evidence of use of force by the Ukrainian military against the people of Crimea.<sup>156</sup> The U.N. Commissioner for human rights found no widespread and systematic human rights abuses of ethnic Russians in Crimea.<sup>157</sup>

Also, there was not sufficient exhaustion of negotiations about the territorial issue with stakeholders, such as the state of Ukraine.<sup>158</sup> There are no reports of Crimea's government negotiating with the government in Kiev during the weeks before the referendum.<sup>159</sup>

The Venice Commission found an "absence of negotiations" by the Crimean administration to reach a consensual solution among the three ethnic groups of Crimea – Russians, Ukrainians,

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154. *Crimea Referendum Opponents Manipulate Detached Norms of Intl Law – Churkin*, RT (Mar. 13, 2014, 10:58 PM), <https://www.rt.com/news/unsc-ukraine-meeting-crimea-694/>.

155. Peters, *supra* note 1 (noting the absence of sincere and failed negotiations, persistent and massive human rights negotiations, and long-lasting denial of internal self-determination).

156. See Catherine E. Shoichet et al., *Ukraine crisis: Russia Stands Firm Despite Rebukes, Threats of Sanctions*, CNN (Mar. 3, 2014, 10:14 PM), <http://www.cnn.com/2014/03/03/world/europe/ukraine-tensions/> (quoting Ukraine's ambassador to the U.N., "There is no evidence that the Russian ethnic population or Russian speaking population is under threat.").

157. Peters, *supra* note 156; see also Office of the United Nations High Commissioner for Human Rights, *Report on the Human Rights Situation in Ukraine 4* (April 15, 2014), <http://is.gd/1jdEcd> (reporting the High Commissioner's findings of "neither systematic nor widespread" attacks against the ethnic Russian community).

158. See Eur. Comm'n for Democracy Through L., *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 6, Mar. 21-22, 2014 [hereinafter *Opinion on Constitutionality*] (noting that negotiations were not exhausted or even attempted where "[a]ny referendum on the status of a territory should have been preceded by serious negotiations among all stakeholders" but "[s]uch negotiations did not take place.>").

159. See *id.* (discussing the lack of evidence of negotiations between Crimean authorities and Kiev).

and Tatars.<sup>160</sup> The elected representatives of the Muslim Tatars, the indigenous inhabitants of Crimea who now number some 250,000, refused to support the Crimea referendum.<sup>161</sup>

Further, Western observers also argue Crimea was already granted sufficient autonomy with its own regional government within Ukraine, and did not have a right to exercise the last resort of secession with only a few days notice.<sup>162</sup> Crimea's breaking away from Ukraine does not meet any of the conditions required for remedial secession.<sup>163</sup>

### C. *State Disintegration*

The concept of state disintegration as a justification for a territory's separation from a larger State was given support by the European Community's Badinter Committee, an arbitration commission set up in 1991 to settle disputes between the six Yugoslav republics.<sup>164</sup> Four of the republics had declared themselves independent against the resistance of Serbia, who sought support to maintain a unified, federal Yugoslavia, and

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160. *See id.* ("With respect to the referendum of 16 March 2014, the Venice Commission can only note that no negotiations aimed at a consensual solution took place before the referendum was called."); *see also* Peters, *supra* note 1 (listing "[a]bsence of negotiations" as one of the circumstances considered by the Venice Commission in its finding that the referendum was in compliance with international law).

161. Olga Rudenko, *Five Months after Russian Takeover, Crimean Tatars Unhappy with New Rulers*, KYIV POST (Aug. 7, 2014, 9:13 PM), <https://www.kyivpost.com/content/ukraine/five-months-after-russian-takeover-crimean-tatars-unhappy-with-new-rulers-359774.html>; Gabriela Baczyńska, *Crimean Tatars' want Autonomy after Russia's Seizure of Peninsula*, REUTERS (Mar. 29, 2014, 2:55 PM), <http://www.reuters.com/article/2014/03/29/us-ukraine-crisis-crimea-tatars-idUSBREA2S09320140329> ("Tatars, an indigenous population of Turkic origin, were deported from Crimea to Central Asia in 1944 . . . and began returning from exile some two decades ago").

162. *See* Peters, *supra* note 1 (noting the absence of persistent and massive human rights violations and long-lasting denial of the right to internal self-determination that could have justified remedial secession).

163. *Id.*

164. Badinter Committee, *supra* note 5, at 1488 (introductory note by Mauricio Ragazzi); *see also Id.* at 1497 (Opinion No. 1) ("[T]he Arbitration Committee is of the opinion: - that the Socialist Federal Republic of Yugoslavia is in the process of dissolution . . . [and] it is incumbent upon the Republics to settle such problems of State succession as may arise from this process . . .").

pleaded for international respect of Yugoslavia's territorial integrity.<sup>165</sup>

Badinter Committee decisions recognized breakaway States formed from parts of Yugoslavia based on the facts on the ground pointing to a breakdown of government functions, a state of war in the region, and a general "disintegration" of Yugoslavia as a federal State.<sup>166</sup> At the time, examples like the negotiated break-ups of Czechoslovakia and the U.S.S.R. stood in stark contrast to the violent break-up of Yugoslavia, where the regions of Slovenia and Croatia invoked the right of self-determination through independence referendums, and Bosnia-Herzegovina was plunged into ethnic strife.<sup>167</sup>

Based on Badinter's logic, if a State disintegrates, the people of a territory have a right to separate.<sup>168</sup> Is Ukraine in a process of disintegration on par with the political break-up of Yugoslavia two decades ago?

In the months after the poll in Crimea, pro-separatist rebels organized public referendums in two regions of eastern Ukraine, Donetsk and Luhansk.<sup>169</sup> Organizers in Luhansk claimed the popular vote in favor of "self-rule" was over 90% of all cast ballots,<sup>170</sup> while in Donetsk region, organizers claimed support at over 88% of those who voted.<sup>171</sup>

Unlike in Crimea, Ukrainian military forces did not quietly withdraw from Donetsk or Luhansk regions following these referendums.<sup>172</sup> Fighting between government troops and

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165. Badinter Committee, *supra* note 5, at 1496 (Opinion No. 1) (Slovenia, Croatia, Macedonia, Bosnia).

166. Badinter Committee, *supra* note 5, at 1497; *see also* Howse & Teitel, *supra* note 42, at 66 ("[T]he Commission interpreted the various events *engendered* by the secessionist movements, such as plebiscites in favor of independence in the republics, the breakdown in the functioning of the institutions of federal of governance in Yugoslavia, and the state of war itself, as the 'process of dissolution' of Yugoslavia as a federal state.").

167. Szasz, *supra* note 33, at 3; Saul, *supra* note 36, at 624.

168. Saul, *supra* note 36, at 623.

169. *Lugansk and Donetsk Regions Vote for Self-Determination*, RUSSIA TODAY (May 11, 2014), <http://rt.com/news/158160-lugansk-donetsk-referendum-vote/>.

170. *Id.*

171. *Id.*

172. Griff Witte & Michael Birnbaum, *Russian Troop Withdrawal Brings No Relief in Eastern Ukraine*, WASH. POST (May 30, 2014), <https://www.washingtonpost.com/world/>

separatists intensified during the summer of 2014.<sup>173</sup> But after Russia sent in much needed supplies to support the besieged rebels in Donetsk,<sup>174</sup> the State of Ukraine was forced to sign a ceasefire agreement with rebel representatives.<sup>175</sup> This agreement effectively set *de facto* borders around a “rebel republic” encompassing one-third of the Donetsk region.<sup>176</sup>

Ukrainian forces were able to hold the Donetsk airport for most of 2014, despite its proximity to the rebel “capital” of Donetsk.<sup>177</sup> The war exploded again in January 2015, and with new gains for the rebels that may point to a disintegration of Ukraine in the State’s eastern territory.<sup>178</sup>

On January 22, 2015, after weeks of intense shelling, Ukraine government troops abandoned the Donetsk airport and separatist forces took full control.<sup>179</sup> Though the airport now lay completely in ruins, the retreat by Ukrainian troops sent shockwaves back to

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uneasy-quiet-over-eastern-ukraine-after-fierce-clashes/2014/05/30/e0ff9714-e86f-4c3f-960f-1ad736f4a82a\_story.html.

173. Office of the U.N. High Comm’r for Human Rts., *Report on the Human Rights Situation in Ukraine passim* (Aug. 17, 2014).

174. *Reversal of Fortune*, ECONOMIST (Sept. 6, 2014), <http://www.economist.com/news/briefing/21615605-now-willing-use-russian-troops-more-or-less-openly-eastern-ukraine-vladimir-putin-has>.

175. Minsk Protocol, press release (in Russian). Org. for Security and Co-operation in Europe. Sept. 5, 2014, <http://www.osce.org/ru/home/123258?download=true>; see also Rick Lyman & Andrew E. Kramer, *War Is Exploding Anew in Ukraine; Rebels Vow More*, N.Y. TIMES (Jan. 23, 2015), [http://www.nytimes.com/2015/01/24/world/europe/ukraine-violence.html?\\_r=1](http://www.nytimes.com/2015/01/24/world/europe/ukraine-violence.html?_r=1) (reporting on the “shaky” nature of the ceasefire agreement).

176. See Lyman & Kramer, *supra* note 175 (“the cease-fire signed on Sept. 5 . . . had set the *de facto* borders of the rebel republic to encompass about one-third of the Donetsk region of Ukraine.”).

177. Shaun Walker & Oksana Grytsenko, *Ukraine Forces Admit Loss of Donetsk Airport to Rebels*, GUARDIAN (U.K.) (Jan. 21, 2015), <http://www.theguardian.com/world/2015/jan/21/russia-ukraine-war-fighting-east> (“Donetsk airport . . . [had] become a hugely symbolic military prize.”); Mstyslav Chernov & Peter Leonard, *11 Dead in Bus Attack in Eastern Ukraine*, ASSOC. PRESS (Jan. 13, 2015), <http://www.bostonglobe.com/news/world/2015/01/14/dead-bus-attack-that-could-doom-ukraine-shaky-truce/i7xlxv1Puagh9mfu25CyGP/story.html> (“. . . Donetsk, the city that Russian-backed separatists call their capital . . .”).

178. See Lyman & Kramer, *supra* note 175.

179. Robert Marquand, *Ukraine Rebels Take Back Donetsk Airport, as New Peace Talks Loom*, C.S. MONITOR (Jan. 22, 2015), <http://www.csmonitor.com/World/Security-Watch/terrorism-security/2015/0122/Ukraine-rebels-take-back-Donetsk-airport-as-new-peace-talks-loom-video>.

Kiev and signaled that the effort to pacify Donetsk and Luhansk was spiraling out of control.<sup>180</sup>

Aleksandr Zakharchenko, leader of the Donetsk People's Republic rebel group, told Russian news agencies that rebels planned to attack until they drove Ukrainian forces from the entire region of Donetsk, and added, "Kiev [capital of Ukraine] doesn't understand that we can attack in three directions at once."<sup>181</sup> Rebels proved Zakharchenko's point with multiple offensives in early 2015, taking more territory in the Luhansk region and driving southwest toward the port city of Mariupol.<sup>182</sup>

Whether Ukraine is in a process of disintegration, similar to the situation that brought down the Federal Republic of Yugoslavia a generation ago, remains to be seen. As the situation continues to unfold, observers will watch closely to see if the breakdown in Ukrainian authority over large swaths of territory in eastern Ukraine could eventually legitimize Crimea's withdrawal from Ukraine, not as an illegal secession, but as a justified separation from the larger, disintegrating state.<sup>183</sup>

#### VI. STABILITY REQUIRES RENEWED RESPECT FOR THE TERRITORIAL STATUS QUO

As reflected in the European Community's Badinter Committee opinions of 1991-92 and the International Court of Justice's *Kosovo Advisory Opinion*, international law has effectively rewarded breakaway States that disrupt existing national boundaries – but only if the separatist movements are

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180. *Id.*

181. Lyman & Kramer, *supra* note 175.

182. *Ukraine Forces Primed for Fresh Assaults as Separatists Mass Around Debaltseve and Mariupol*, EURONEWS (Feb. 8, 2015), <http://www.euronews.com/2015/02/08/ukraine-forces-primed-for-fresh-assaults-as-separatists-mass-around-debaltseve-/>; *Ukraine Crisis in Maps*, BBC (Feb. 18, 2015), <http://www.bbc.com/news/world-europe-27308526>.

183. See Paul Goble, *Rostov Journalist Outlines Five Scenarios for Ukraine's Disintegration*, THE INTERPRETER (July 2, 2014), <http://www.interpretermag.com/rostov-journalist-outlines-five-scenarios-for-ukraines-disintegration/> (presenting five hypothetical ways the actions of the Russian government and its agents in Eastern Ukraine might ultimately cause Ukraine disintegrate as a country as a result of).

successful in taking control on the ground.<sup>184</sup> Badinter opinions averred that “a well-established principle of international law [is that] the alteration of existing frontiers or boundaries by force is not capable of producing any legal effect.”<sup>185</sup> Yet in the same series of opinions, the committee concluded that the unified Yugoslavia “is in the process of dissolution” and opened the door to European recognition of the break-away state of Croatia, even though Croatia would gain independence by force after a multi-year interethnic conflict between Serbs and Croats where some 20,000 people were killed.<sup>186</sup> In the 2010 *Kosovo Advisory Opinion*, the ICJ’s most recent opportunity to delineate the limits of self-determination, the Court concluded that the unilateral declaration of independence by the provisional government of Kosovo in 2008 – breaking away territory from the existing State of Yugoslavia – was *not* against international law.<sup>187</sup>

Critics say the ICJ decision “sidestepped the question of whether there is a right to secede under international law.”<sup>188</sup> The Court confined its ruling to the legality of the “act of declaration” itself, and found no international prohibition on Kosovo’s announcement of independence.<sup>189</sup> The ICJ also avoided deciding the questions of whether under international law, part of the population of an existing State has a right to separate from that

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184. *Badinter Committee*, *supra* note 5; Accordance With International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22) [hereinafter *Kosovo Advisory Opinion*], ¶¶ 78-121; *see also* Howse & Teitel, *supra* note 42, at 59 (“[I]nternational law, although claiming stability of existing borders as a fundamental ordering principle, reward[s] the unilateral disruption of those very boundaries by separatist movements, where successful on the ground.”).

185. *Badinter Committee*, *supra* note 5, at 1500 (Opinion No. 3).

186. *Badinter Committee*, *supra* note 5, at 1497 (Opinion No. 1); *see also* *Presidents Apologise Over Croatian War*, BBC NEWS, <http://news.bbc.co.uk/2/hi/europe/3095774.stm> (last updated Sept. 10, 2003) (“The war left around 20,000 people dead and more than a quarter of [a] million displaced from their homes.”).

187. *Kosovo Advisory Opinion*, *supra* note 184, ¶¶ 78-121.

188. *Id.*; Saul, *supra* note 36, at 615 (“In the *Kosovo* Opinion, the Court highlighted the extensive debate about whether a right to secession . . . exists [but] . . . [t]he Court . . . felt that in the light of the question asked there was no need to attempt to resolve this debate.”).

189. *Kosovo Advisory Opinion*, *supra* note 184, ¶¶ 78-121; Saul, *supra* note 36, at 615.

State, or whether a right of remedial secession is recognized.<sup>190</sup> In sum, one commentator termed it “an advisory opinion that gave very little advice.”<sup>191</sup>

A. *Kosovo Advisory Opinion as legal support to Crimea*

Is the Crimea public poll in favor of transferring the territory of Crimea to the Russian Federation a valid exercise of self-determination by the people of Crimea? Advocates who say “yes” have pointed to the holding in the *Kosovo Advisory Opinion* as legal precedent supporting the position.<sup>192</sup>

When Crimea’s parliament passed its declaration of independence from Ukraine days before the referendum, the resolution specifically referred to the *Kosovo* decision as holding that a unilateral declaration of independence by a part of an existing State does not violate international norms.<sup>193</sup> In a speech two days after the Crimea referendum, Russian President Vladimir Putin asserted that the ICJ “agreed that the unilateral separation of Kosovo from Serbia, exactly what Crimea is doing now, was legitimate and did not require permission from the country’s central authorities.”<sup>194</sup>

President Putin may be exploiting points of uncertainty in present-day international law that were created by the same Western states that would oppose his “rhetoric of justification” for military intervention into Crimea.<sup>195</sup> His claims are arguable only

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190. *Kosovo Advisory Opinion*, *supra* note 184, ¶ 82.

191. Borgen, *supra* note 29.

192. Putin, *supra* note 8 (claiming that the legal stance the U.S. and Western Europe has adopted toward the situation in Ukraine is inconsistent with the *Kosovo* opinion); Petru Dumitriu, *The International Court of Justice’s Advisory Opinion on Kosovo: Does It Have Relevance for Crimea, Catalonia and Scotland?*, DIPLOFOUNDATION (Jun. 22, 2014), <http://www.diplomacy.edu/blog/international-court-justice%E2%80%99s-advisory-opinion-kosovo-does-it-have-relevance-crimea-catalonia> (“The Russian Federation has not stopped wondering why what was good for Kosovo is not good for Crimea.”).

193. Crimea Declaration of Independence, *supra* note 95 (declaration of independence issued “taking into account the confirmation of the UN International Court on Kosovo on 22 July 2010 the fact that the unilateral declaration of independence by part of the state does not violate any rules of international law”).

194. Putin, *supra* note 8.

195. Nico Krisch, *Crimea and the Limits of International Law*, EJIL: TALK! (Mar. 10, 2014), <http://www.ejiltalk.org/crimea-and-the-limits-of-international-law/>.

because traditional limits on the use of force and self-determination have been “blurred” by episodes of interventionism by major powers since the 1990s.<sup>196</sup> “Claims to external self-determination are stronger now than they ever once were . . . .”<sup>197</sup>

### *B. Conclusion*

An early critic of the right of self-determination wrote that “[t]he phrase is simply loaded with dynamite. It will raise hopes which can never be realized.”<sup>198</sup> Others say the right of self-determination gives rise to “chaos, insecurity and war,”<sup>199</sup> especially because “many states have ethnic or other fault lines that make them vulnerable to the threat of self-determination.”<sup>200</sup>

The principles of territorial integrity and stability are firmly established in the U.N. Charter and the OSCE’s Helsinki Final Act, two foundational documents of modern international law.<sup>201</sup> And yet, the U.N. Charter-based system of international law has endorsed self-determination of peoples, even though the goals of self-determination are at odds with respect for the territorial status quo in many cases.<sup>202</sup>

Commentators note a failure of the international community to clarify the scope, content, and implications of the right of self-determination.<sup>203</sup> Proponents of the right of

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196. *Id.*

197. *Id.*

198. ROBERT LANSING, *THE PEACE NEGOTIATIONS: A PERSONAL NARRATIVE* 97 (1921); DAVID CALLAHAN, *UNWINNABLE WARS: AMERICAN POWER AND ETHNIC CONFLICT* 24 (1st ed. 1997); Franck, *supra* note 60, at 53.

199. Franck & Hoffman, *supra* note 58, at 351; Schwed, *supra* note 40, at 467.

200. Szasz, *supra* note 33, at 5.

201. U.N. Charter art. 2, ¶ 4; Helsinki Final Act, *supra* note 51, arts. I-IV.

202. See Howse & Teitel, *supra* note 42, at 58 (referencing philosopher Leo Strauss’s suggestion that the UN’s charter-based system which requires respect for state boundaries but also endorses self-determination of peoples necessarily relies on the presumption that all present boundaries are in accordance with the self-determination of peoples. Strauss referred to this presumption as “a pious fraud of which the fraudulence is more evident than the piety.”).

203. *Recent International Advisory Opinion*, 124 HARV. L. REV. 1098, 1103, fn. 46 (2011); see also Saul, *supra* note 36, at 615, 643 (“In the *Kosovo* Opinion, the Court

self-determination advocate a clearer rule that could lead to less conflict in the future due to fewer unsupported claims and “risky provocations” by independence-minded minorities.<sup>204</sup>

The vagueness surrounding the limits of self-determination may exist for a reason. States benefit from the right of self-determination’s indeterminate status because it allows a wide range of plausible interpretations depending upon the circumstances.<sup>205</sup>

Multi-ethnic States do not want to clarify international norms regarding acceptable procedures or circumstances of a “legitimate” territorial realignment referendum.<sup>206</sup> Such a clarification would carry with it the increased risk that minority groups in localized areas of existing States would use such a clarification in international law as precedent to support pro-independence referendums and international recognition for break-away territories.<sup>207</sup>

Provided that norms on the right of self-determination remain indefinite, States may selectively apply either the principle of self-determination, or respect for the territorial status quo, depending on the context.<sup>208</sup> States can continue to provide “lip service” to the right of self-determination in other parts of the world while resisting attempts by separatist groups to realize the principle in their own territories.<sup>209</sup>

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highlighted the extensive debate about whether a right to secession . . . exists . . . . The right to self-determination is one of the most unsettled norms in international law.”).

204. Charney, *supra* note 149, at 458 (2001).

205. Saul, *supra* note 36, at 611 (“It is possible . . . that states place some value in the vagueness of the law of self-determination because it permits a broad range of plausible interpretations and is therefore able to accommodate unforeseen circumstances.”).

206. See *id.* at 642 (Speculating that the reason very few states drew attention to their views on the right to self-determination’s purported peremptory is due to “severity of the consequences that flow from the *jus cogens* concept.”).

207. Szasz, *supra* note 33, at 5-6; see also Saul, *supra* note 36, at 616-17 (noting the importance of a state’s definition of “people” when determining if a people have a right to self-determination); see also Charney, *supra* note 149, at 458 (arguing that clarifying the right to self-determination may impact how and whether both minority groups within a country and the mother country itself engage in self-determination struggles).

208. Saul, *supra* note 36, at 619-21.

209. *Id.* at 641.

If international leaders want to improve stability in the world, they should renew a commitment to formal classical rules such as respect for territorial integrity. As one step toward this goal, jurists should reverse course from decisions made by the Badinter Committee and the International Court of Justice that allowed secession of regions of Yugoslavia. Years later, the legal opinions have opened the door to specious arguments legitimizing Russia's takeover of a part of Ukraine's territory by using the Crimea referendum to give the annexation a democratic veneer.