# COMMENT

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

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## TABLE OF CONTENTS

| I. | INTRODUCTION | 2 |
| II. | THE CRISIS IN UKRAINE AND CRIMEA | 4 |
| III. | CONFLICTING PRINCIPLES OF SELF-DETERMINATION & TERRITORIAL INTEGRITY | 12 |
| a. | The Right of Self-Determination | 12 |
| b. | Territorial Integrity of States as a Limit on the Right of Self-Determination | 15 |
| c. | Balance Between Self-Determination & Territorial Integrity under International Conventions | 17 |
| IV. | SELF-DETERMINATION REFERENDUMS LEGITIMIZE TERRITORIAL CHANGES | 22 |
| a. | Procedural Requirements of Self-Determination Referendums | 23 |
| b. | Analysis of the Procedure of the Crimea Referendum | 25 |
| 1. | Freedom of the media & neutrality of the authorities | 27 |
| 2. | Peacefulness | 29 |
| 3. | Universal, equal, free, and secret ballot | 32 |
| 4. | International referendum observation | 34 |
| V. | POSSIBLE JUSTIFICATIONS FOR CRIMEA’S SECESSION FROM UKRAINE | 37 |
| a. | Constitutional Secession | 37 |
| b. | “Remedial” Secession | 40 |
| c. | State Disintegration | 46 |
| VI. | STABILITY REQUIRES RENEWED RESPECT FOR THE TERRITORIAL STATUS QUO | 51 |
| a. | Kosovo Advisory Opinion as legal support to Crimea | 53 |
| b. | Conclusion | 55 |

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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.¹ 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.²

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;³ 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.⁴

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. 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. 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.⁵

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.⁶ Most of the State of

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

Crimea has a population of over two million people and some two-thirds of the residents are ethnically Russian or Russian-speaking. Since the dissolution of the U.S.S.R. in 1991, Russia has continued to station its Black Sea naval forces in Crimea under an agreement with Ukraine.

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.

From 2005 to 2010, Ukraine President Victor Yushchenko was strongly in favor of Ukraine taking the financial and political steps to gain entry into the EU. Under President Yushchenko’s leadership, Ukraine strengthened its ties with Europe by securing a $16.5 billion loan from the International Monetary Fund (IMF), and by passage of a Joint Stock Company Law that was meant to encourage foreign investment.

After economic gains in the early 2000s, the 2008 world financial crisis had a crushing effect on Ukraine’s economy. As the country struggled to recover from the set-backs of the Great Recession, Ukraine has found itself in a sort of “tug-of-war” between Russia, her

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10 VSP
12 Hunt & Eisele, supra note 11, at 245.
13 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. Hunt & Eisele, supra note 11, at 245.
traditional creditor and trading ally, and the new suitor, the EU, which urges Ukraine to continue its path to join the Union.\textsuperscript{14}

In November 2013, Ukraine’s new, more Russian-leaning president, Viktor Yanukovych, announced that he was not moving forward in negotiations for Ukraine to seek admission to the EU.\textsuperscript{15} Massive public protests against Pres. Yanukovych ensued in the Ukrainian capital of Kiev.\textsuperscript{16} These “Euromaidan” protests were motivated in part by President Yanokovych’s refusal to meet EU demands that Ukraine release former Prime Minister Yulia Tymoshenko from prison.\textsuperscript{17} At one point, protesters stormed government buildings and the presidential palace.\textsuperscript{18} 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.\textsuperscript{19} On Feb. 22, 2014, the Ukrainian parliament adopted a resolution requesting President Yanokovych resign. Lawmakers elected a new President of Ukraine the following day\textsuperscript{20} while Yanokovych fled the country and sought refuge in Russia.\textsuperscript{21}

The political turmoil in Ukraine centered for months in the northwestern capital of Kiev, but with the chaotic removal of Yanokovych, the crisis spread some five-hundred miles south to Ukraine’s coastal region of Crimea.

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.\textsuperscript{22} 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.”\textsuperscript{23}

On March 6, 2014, with up to 25,000 Russian service members now deployed,\textsuperscript{24} Crimea’s local parliament voted in favor of leaving Ukraine and joining Russia.\textsuperscript{25} The assembly


\textsuperscript{17} The EU urged that Ukraine grant freedom to businesswoman and “Orange Revolution” leader Yulia Tymoshenko who had been convicted in 2011 of embezzlement and abuse of power, and sentenced to seven years in prison. Critics said Tymoshenko’s conviction was “politically-motivated.” She would later be freed from prison on Feb. 22, 2014, in the last days of the Euromaidan protests.

\textsuperscript{18} VSF


\textsuperscript{24} Putin, \textit{supra} note 8.
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.26

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?”27

Voter turnout was reported at 83.1% of all eligible voters, with 93% of ballots indicating “yes” to question number one – Crimea leaving Ukraine to join the Russian Federation.28

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.29

III. CONFLICTING PRINCIPLES OF SELF-DETERMINATION & TERRITORIAL INTEGRITY

A recurring theme as we explore 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.30

a. The Right of Self-Determination

The right of self-determination is a fundamental principle of international law.31 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.”32 The traditional concept of the right of self-determination centers on “freedom from alien subjugation, domination, and exploitation.”33

27 There was no option to maintain the status quo and Crimea’s current autonomous status within the State of Ukraine. Peters, supra note 1.
28 Peters, supra note 1.
33 Reference re Secession of Quebec, [1998] 2 S.C.R. 217, paras. 113, 114 [hereinafter Reference]. 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. Saul, supra note 4, at 613.
In 1945, the right of self-determination was proclaimed in articles 1 and 55 of the U.N. Charter. Most international law regulates the conduct of States but the right of self-determination is a general principle recognized as a right of “peoples.”

Prior to 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. Numerous U.N. resolutions invoked the right of self-determination as to colonized territories. 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.

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.

The U.N. Charter provides strong protection for territorial integrity of States. 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.”

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.

Existing States invoke territorial integrity as a supreme principle of international law. Strong protection under international law for the territorial integrity of States is part of all

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34 U.N. Charter arts. 1, 55, supra note 31; Article 1 declares that: “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.”

35 The definition of a “people” has still not been fully clarified. 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 connection; 4. political outlook; and 5. identity as a distinct people. Saul, supra note 4, at 621. 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.


38 Schwed, supra note 37, at 453.


40 U.N. Charter art. 2, para. 4.

41 U.N. Charter art. 2, para. 4, supra note 31; 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. 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/.

42 Peters, supra note 1.

43 Howse & Teitel, supra note 39, at 53.
recognized States’ struggle for stability. When the territorial integrity of a State is threatened anywhere in the world, other States “instinctively” come to its defense.  

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, and international conventions entered into by major powers, whether under the auspices of the United Nations (U.N.) or the Organization for Security & Cooperation in Europe (OSCE), each reflect this need to limit the right of self-determination.  

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.  

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."  

This declaration also contained strong protections for States’ territorial integrity. The resolution qualified the right of self-determination in paragraph six, stipulating that, “any 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.”  

Resolution 1514 effectively favored protection of territorial integrity over the right of self-determination. Delegates who voted for passage of Resolution 1514 “seemed to fear that the right of self-determination could be used as an excuse for secession.” The provision in paragraph six “ensure[d] that Resolution 1514 will not be invoked by minorities within an independent country in an attempt to legitimize a secessionist movement.”  

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. The Declaration on Friendly Relations again included strong language in defense of States’ territorial integrity:

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44 Szasz, supra note 30, at 6.  
45 Szasz, supra note 30, at 6.  
46 VSF; Quebec, 2 S.C.R. at para. 127.  
47 G.A. Res. 1514, supra note 32.  
48 The Soviet Union was the original sponsor of U.N. Res 1514, which was voted in by 89-0, with nine abstentions including States administering colonies: Belgium, France, Portugal, Spain, United Kingdom, and South Africa. Schwed, supra note 37, at 444, 451, 460.  
49 Szasz, supra note 30, at 4.  
50 G.A. Res. 1514, supra note 32, para. 6; see also Szasz, supra note 30, at 4.  
51 Szasz, supra note 30, at 4.  
52 VSF  
53 Schwed, supra note 37, at 456.  
“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. . . .”

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.

International organizations such as the Organization on Security & Co-operation in Europe (OSCE) have also urged strict observance of the principle of territorial integrity. The OSCE began during the 1970s, counting as member states leading Western and Communist bloc countries in Europe and North America. 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.

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. However, five 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. 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.

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.

The U.N. – and the League of Nations before it – has promoted plebiscites and referendums as the “democratic element of self-determination.” U.N.-sponsored self-determination referendums have aimed to identify the “free and genuine expression of the will of the peoples of the territory.”

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55 Declaration on Friendly Relations, supra note 54; see also Quebec, 2 S.C.R. at para. 128.
56 Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, Nov. 1995; see also Quebec, 2 S.C.R. at para. 120.
57 CONF. ON SEC. & CO-OP. IN EUROPE, Final Act, 14 I.L.M. 1292 (1975), arts. I-IV, VI [hereinafter Helsinki Final Act]; see also Charter of Paris, supra note 3; see also Quebec, 2 S.C.R. at, para. 129.
58 VSF
59 Helsinki Final Act, supra note 57, arts. I-IV, VIII; see also Quebec, 2 S.C.R. at, para. 121.
60 Helsinki Final Act, supra note 57, art. VIII.
61 Helsinki Final Act, supra note 57, arts. I-IV.
62 Helsinki Final Act, supra note 57, art. VI.
63 Peters, supra note 1.
64 A plebiscite generally serves as a “non-binding opinion poll,” while a publicly-approved referendum “automatically binds the government to enact the law.” Miller, supra note 36, at 626, 631.
65 G.A. Res. 1541 (1960); see also Schwed, supra note 37, at 451.
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.\textsuperscript{66}

\textit{a. Procedural Requirements of Self-Determination Referendums}

As a matter of international customary law, “a free territorial referendum is emerging as a procedural [necessity] for any territorial reapportionment.”\textsuperscript{67} However, a referendum alone is not enough for re-drawing of State borders to be found lawful under international law – the referendum must conform to recognized procedural norms.\textsuperscript{68}

One important document providing guidance on these requirements is the OSCE’s 1990 Charter of Paris\textsuperscript{69}, which identifies democratic requirements for recognition of possible new states. In addition, the Council of Europe’s Venice Commission more recently issued a Code of Good Practice on Referendums setting similar procedural requirements for referendums to be acceptable or tolerable under international law, including:

1. freedom of media and neutrality of the authorities;\textsuperscript{70}
2. peacefulness; \textsuperscript{71}
3. universal, equal, free, and secret ballot;\textsuperscript{72} and
4. international referendum observation.\textsuperscript{73}

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.\textsuperscript{74}

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 change or realignment would be justified under the European Community’s guidelines.\textsuperscript{75}

\textsuperscript{66} G.A. Res. 1514, supra note 32; see also G.A. Res. 1541, supra note 65; see also Declaration on Friendly Relations, supra note 54; see also Quebec, 2 S.C.R. at para. 126.
\textsuperscript{67} Peters, supra note 1.
\textsuperscript{68} Peters, supra note 1.
\textsuperscript{69} Charter of Paris, Annex I, arts. 7, 8, supra note 3, 30 I.L.M. at 220-22.
\textsuperscript{70} Charter of Paris, Annex I, arts. 7.7, 7.8, supra note 3, 30 I.L.M. at 221; see also Code of Good Practice, supra note 3, art. I, paras. 2.2.a, 3.1.a, art. II, para. 3.1.
\textsuperscript{71} Charter of Paris, Annex I, art. 7.7, supra note 3, 30 I.L.M. at 221.
\textsuperscript{73} Code of Good Practice, supra note 3, art. II, para. 3.2; see also Charter of Paris, Annex I, art. 8, supra note 3, 30 I.L.M. at 222 (international observation is a preference, not a requirement).
\textsuperscript{75} Peters, supra note 1.
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 then make an “immediate fusion” with the Russian Federation. 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.

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. 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. 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.

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. This includes media coverage, advertising, and the right to demonstrate in the streets. Government authorities are also to maintain a neutral position regarding a referendum campaign. The process in Crimea did not meet any of these requirements.

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 defense squads” arrested protestors who urged the public to boycott the referendum, and Crimean authorities prevented anti-referendum activists from entering Crimea. Months after the referendum, the U.N. would report that Crimean officials had made no serious attempt to look into alleged human rights abuses committed by the self-defense squads.

Speech in opposition to the referendum was also limited on Crimean television. Days before the referendum, television providers in Crimea switched several channels from Ukrainian stations – which offered a message opposed to the referendum – to Russian stations. 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.

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76 Peters, supra note 1.
78 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, http://opiniojuris.org/2014/03/14/fair-balanced-russias-legal-position-crimea/.
79 Code of Good Practice, supra note 3, art. I, para. 2.2.
80 Code of Good Practice, supra note 3, art. I, para. 2.2.
83 VSF
84 VSF
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 incidents when anti-referendum protestors were arrested.\footnote{Eur. Comm’n for Democracy Through L., Opinion no. 762/2014, March 21, 2014 [hereinafter Venice Comm’n].}

2. Peacefulness. Since the time of League of Nations-administered plebiscites in the 1920s, it has been accepted that, before a referendum on territorial realignment occurs, a region must be “pacified” or “neutralized” through withdrawal or reduction of troops from concerned States.\footnote{Peters, supra note 1.}

In the weeks before the referendum, reports identify armed troops in unmarked green uniforms patrolling outside Crimean airports and preventing international observers from entering the region\footnote{Ukraine’s interim president says government working to block Crimea referendum, FOX NEWS, Mar. 6, 2014, http://www.foxnews.com/world/2014/03/06/crimea-leader-says-11000-pro-russian-troops-in-control-region/}, and a critical factual dispute has arisen that has still not been fully resolved: Who were these “little green men”?

Proponents of Crimea’s referendum say 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.\footnote{Crimea says provocations on the rise ahead of referendum, RT, Mar. 11, 2014, http://rt.com/news/crimea-provocations-referendum-ukraine-178/}

Western critics argue 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.\footnote{VSF} The Venice Commission found “implicit threats of the use of military force emanating from the massive public presence” of military forces in Crimea.\footnote{Venice Comm’n, supra note 85.}

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\footnote{VSF}, especially when compared to the bloodshed and destruction that has gripped parts of eastern Ukraine in the months after Crimea’s referendum.\footnote{VSF}

Russian President Vladimir Putin denies that Russian troops entered the mainland of Crimea prior to the vote, and claims 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.\footnote{Partition Treaty on the Status and Conditions of the Black Sea Fleet, Rus.-Ukr., May 28, 1997; see also Putin, supra note 8.}

A Ukrainian defense minister, however, reported before the referendum that fifty Russian armored vehicles were seen traveling across Crimea, and Russian forces had taken control of bases abandoned by Ukrainian troops.\footnote{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.} Sergei Aksenov, who was appointed Crimea’s premier
on February 27, admitted that Russian troops were “protecting key sites” in Crimea to maintain public order.95

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.96

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.”97

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 international recognition.98 Proponents of the referendum say only residents with valid passports were allowed to vote,99 and point to the official turnout of over 83% of eligible voters as proof that the vote was free and fair.100 The Crimea referendum appears to have followed the secret ballot requirement and critics have not made an issue of this requirement.101

In February 2014, Crimea’s parliament originally set an autonomy referendum for May 25, almost three months ahead, but two days later moved it up to March 30.102 A few days later, the referendum was moved up an additional two weeks, and now gave the public the choice to support joining Crimea to the Russian Federation.103

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.”104 Western critics such as Professor Anne Peters say 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.105

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 three 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.

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96 Peters, supra note 1.
97 G.A. Res. 1541 (1960), supra note 65; see also Schwed, supra note 37, at 451.
100 VSF
101 VSF
103 Peters, supra note 1.
104 Venice Comm’n, supra note 85.
105 Peters, supra note 1.
4. International referendum observation. The 1990 Charter of Paris does not make international observation of elections a requirement for recognition of new States, but only a “preference” that can add more credibility to an election’s results. The Venice Commission’s 2007 Code of Good Practice, however, appears to make the presence of international observers a condition for elections to be recognized as legitimate.

The modern view is 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.”

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. The OSCE spokesperson underscored the refusal by saying the OSCE “respects the full territorial integrity and sovereignty of Ukraine.” 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.

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.’” In the end, election observers from the West did not arrive in Crimea, but observers from the former Soviet republics of Kazakhstan and Georgia were present. The procedural preference (or requirement) of international observers was not met by organizers of the referendum, although part of the blame for this is because OSCE election observers refused to be present.

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.

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.

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106 VSF
107 VSF
108 Saul, supra note 4, at 641; see also Int’l Hum. RTS. L. GRP., Guidelines for International Election Observing, prepared by Larry Garber (1984); see also Peters, supra note 1.
112 VSF
113 Quebec, 2 S.C.R. at para. 112.
a. Constitutional Secession

The international community mainly allows domestic law of the existing State to determine whether there is creation of a new State from part of its territory.\(^\text{114}\) Where unilateral secession is incompatible with a State’s Constitution, international law is likely not to recognize the unilateral declaration of independence by a minority of a State.\(^\text{115}\)

Proponents of the Crimea referendum assert that the violent actions of protestors in Kiev who ousted President Yanukovych amounted to an “anti-constitutional coup,” and ended the Kiev government’s constitutional authority.\(^\text{116}\)

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 so does not represent a constitutional secession.\(^\text{117}\)

Under the Constitution of Ukraine, the territory of Ukraine is “indivisible”\(^\text{118}\) and “[t]he territorial structure of Ukraine is based on the principles of unity and indivisibility of the State territory . . . .”\(^\text{119}\) Ukraine’s Constitution also indicates that, “[i]ssues of altering the territory of Ukraine are resolved exclusively by an All-Ukrainian referendum,” and so a referendum in the territory of Crimea would not be sufficient.\(^\text{120}\)

In addition, Article 134 of the Constitution of Ukraine states that Crimea is an “inseparable constituent part of Ukraine” and that its local government only has authority based on the limits set out in the Ukraine constitution. Therefore, the breaking away of Crimea would require an amendment to the Ukraine Constitution.\(^\text{121}\) 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.”\(^\text{122}\)

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.\(^\text{123}\)

b. “Remedial” Secession

Crimea’s referendum was unconstitutional under Ukraine’s laws, but in a 2009 written statement submitted by the United States to the International Court of Justice (ICJ), U.S. representatives wrote: “Declarations of independence may, and often do, violate domestic legislation. However, this does not make them violations of international law.”\(^\text{124}\)

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\(^{114}\) Quebec, 2 S.C.R. at para. 112.

\(^{115}\) Quebec, 2 S.C.R. at para. 112.


\(^{117}\) “The use of referendums must comply with the legal system as a whole . . . referendums cannot be held if the Constitution or a statute in conformity with the Constitution does not provide for them . . . .” Code of Good Practice, supra note 3, art. III, para. 1.

\(^{118}\) CONST. OF Ukr., supra note 7, art. 2.

\(^{119}\) CONST. OF Ukr., supra note 7, art. 132.

\(^{120}\) CONST. OF Ukr., art. 73, supra note 7.

\(^{121}\) CONST. OF Ukr., art. 134, supra note 7; see also Peters, supra note 1.

\(^{122}\) CONST. OF Ukr., art. 157, para. 1, supra note 7.

\(^{123}\) Venice Comm’n, supra note 85.

\(^{124}\) Written Statement of United States of America to the Int’l Court of Justice, Apr. 17, 2009. Prof. Anne Peters also argues that from the international law perspective, the constitutionality of Crimea’s referendum is “irrelevant,” as it
Remedial secession 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.\footnote{125}{Saul, supra note 4, at 616.}

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.\footnote{126}{Howse & Teitel, supra note 39, at 56.}

The assertion of a right to remedial secession arises in “only the most extreme of cases and, even then, under carefully defined circumstances.”\footnote{127}{Quebec, 2 S.C.R. at paras. 122, 126.} Resort to remedial secession can only be justified in the case of (1) persistent and massive human rights violations and (2) long-term denial of the right to political, cultural, and economic autonomy with the existing State.\footnote{128}{Peters, supra note 1.}

Remedial secession is limited by the modern view supporting the federalist solution to disputes between ethnic groups within a State.\footnote{129}{Quebec, 2 S.C.R. at para. 126.} Through federalism, a group’s political autonomy within an existing State satisfies the principle of self-determination.\footnote{130}{Quebec, 2 S.C.R. at para. 126.}

If a government is “open and democratic,” and respects “a people’s pursuit of its political, economic, social, and cultural development within the framework of an existing State,”\footnote{131}{Szasz, supra note 30, at 7.} then the territorial integrity of the State deserves international respect. 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.\footnote{132}{Szasz, supra note 30, at 7.}

If there is an unacceptable level of state violence directed against the people, then the state may lose the legitimacy that enables it to insist on its territorial integrity.\footnote{133}{Peters, supra note 1.} Otherwise, no unilateral remedial secession of a region is allowed, and the people must seek self-determination within the existing state government framework. For the sake of stability, the territorial integrity of the state must be upheld.\footnote{134}{Peters, supra note 1.}

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.\footnote{135}{Peters, supra note 1.} Remedial secession requires negotiations that were “seriously tried out and failed.”\footnote{136}{Peters, supra note 1.}

Some commentators consider the Kosovo secession from Yugoslavia as a valid example of remedial secession.\footnote{137}{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/;}

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the concept of remedial secession was put forward by representatives of Albania, Denmark, Estonia, Finland, Germany, Ireland, Latvia, the Netherlands, Poland, Slovenia, and Switzerland.\(^{138}\)

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. Due to “a legal vacuum which emerged as a result of the unconstitutional, violent coup d’etat carried out in Kiev by radical nationalists” and threats by these “radicals” to impose their will on Crimea, the Crimean government and people’s decision to place the territory under the protection of Russia was justified as a last resort.\(^{139}\)

None of the conditions required for remedial secession were present in Crimea.\(^{140}\) There is no evidence of use of force by the Ukrainian military against the people of Crimea.\(^{141}\) The U.N. commissioner for human rights found no widespread and systematic human rights abuses of ethnic Russians in Crimea.\(^{142}\)

There was not sufficient exhaustion of negotiations about the territorial issue with stakeholders such as the State of Ukraine. There are no reports of Crimea’s government negotiating with the government in Kiev during the weeks before the referendum.

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, and Tatars.\(^{143}\) The elected representatives of the Muslim Tatars, the indigenous inhabitants of Crimea who now number some 300,000, refused to support the Crimea referendum.\(^{144}\)

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 of notice.\(^{145}\) Crimea’s breaking away from Ukraine does not meet any of the conditions required for remedial secession.

c. State Disintegration

The concept of state disintegration justifying 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.\(^{146}\) Four of the

\(^{138}\) Written Comments, April 19, 2009; 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.” 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. United States written comments July 17, 2009; see also Saul, supra note 4, at 616-17.

\(^{139}\) Ku, supra note 78.

\(^{140}\) Peters, supra note 1.

\(^{141}\) VSF


\(^{143}\) Venice Comm’n, supra note 85.


\(^{145}\) Peters, supra note 1.

\(^{146}\) Badinter Committee, supra note 5.
republics had declared themselves independent, but against the resistance of Serbia who sought support to maintain a unified, federal Yugoslavia, and pleaded for international respect of Yugoslavia’s territorial integrity.  

At the time, examples like the negotiated break-ups of Czechoslovakia and the U.S.S.R. were countered by 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.  

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.  

Based on Badinter’s logic, if a State disintegrates, the people of a territory have a right to separate. 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. Organizers in Luhansk claimed the popular vote in favor of “self-rule” was over 79% of all cast ballots, while in Donetsk region, organizers claimed support at over 74% of those who voted.

Unlike in Crimea, Ukrainian military forces did not quietly withdraw from Donetsk or Luhansk regions following these referendums. Fighting between government troops and separatists intensified during the summer of 2014. But after Russia sent in much needed supplies to support the besieged rebels in Donetsk, the State of Ukraine was forced to sign a ceasefire agreement with rebel representatives. This agreement effectively set de facto borders around a “rebel republic” encompassing one-third of the Donetsk region.

Ukrainian forces were able to hold the Donetsk airport for most of 2014, despite its proximity to the rebel “capital” of Donetsk. 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.

On January 22, 2015, after weeks of intense shelling, Ukraine government troops abandoned the Donetsk airport and separatist forces took full control. Though the airport now lay...
completely in ruins, the retreat by Ukrainian troops sent shockwaves back to Kiev and signaled that the effort to pacify Donetsk and Luhansk was spiraling out of control.159

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.”160

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.161

Whether Ukraine is in a process of disintegration, similar to the situation that brought down the Federal Republic of Yugoslavia, 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.

VI. STABILITY REQUIRES RENEWED RESPECT FOR THE TERRITORIAL STATUS QUO

As reflected in the European Community’s Badinter Committee opinions of 1991-92, and in 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 successful in taking control on the ground.162

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.”163 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.164

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.165

160 VSF
162 Accordance With International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. (July 22) [hereinafter Kosovo Advisory Opinion], paras. 78-121; see also Badinter Committee, supra note 5; see also Howse & Teitel, supra note 39, at 59.
163 Badinter Committee, supra note 5, Opinion No. 3, at 1500.
164 Badinter Committee, supra note 5, Opinion No. 1, at 1498; see also Presidents apologise over Croatian war, BBC NEWS, http://news.bbc.co.uk/2/hi/europe/3095774.stm.
165 Kosovo Advisory Opinion, supra note 162, paras. 78-121;
Critics say the ICJ decision “sidestepped the question of whether there is a right to secede under international law.” 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. 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 State” or whether a right of remedial secession is recognized. In sum, it was “an advisory opinion that gave very little advice.”

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.

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 the country does not violate any international norms.”

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.”

Although President Putin may be exploiting points of uncertainty in present-day international law in his “rhetoric of justification” for military intervention into Crimea, his claims are more arguable because “traditional constraints in the law on the use of force and self-determination have been blurred by instances of liberal interventionism” since the 1990s.

B. **Conclusion**

An early critic of the right of self-determination wrote that “The phrase is simply loaded with dynamite. It will raise hopes which can never be realized.” Others say the right of self-determination gives rise to “chaos, insecurity and war, especially because most states have ethnic or other fault lines that make them vulnerable to the threat of self-determination.”

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166 Kosovo Advisory Opinion, supra note 162, paras. 78-121; see also Saul, supra note 4, at 615.
167 Kosovo Advisory Opinion, supra note 162, paras. 78-121; see also Saul, supra note 4, at 615.
168 Kosovo Advisory Opinion, supra note 162, para. 82.
169 Borgen, supra note 26.
170 Putin, supra note 8.
172 Putin, supra note 8.
174 Robert Lansing, THE PEACE NEGOTIATIONS, A PERSONAL NARRATIVE 97 (1921); see also Franck, supra note 31, at 53.
176 Szasz, supra note 30, at 5.
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.\(^{177}\) 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.\(^{178}\)

Commentators note a failure of the international community to clarify the scope, content, and implications of the right of self-determination.\(^{179}\) Proponents of the right of 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.\(^{180}\)

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 this “permits a broad range of plausible interpretations . . . to accommodate unforeseen circumstances.”\(^{181}\)

Multi-ethnic States do not want to clarify international norms regarding acceptable procedures or circumstances of a “legitimate” territorial realignment referendum. Such a clarification would carry with it the increased risk that more minority groups in localized areas of existing States will attempt to carry out “legally supported” pro-independence referendums and seek international recognition for their break-away territories.\(^{182}\)

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.\(^{183}\) 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.\(^{184}\)

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.

\(^{177}\) VSF
\(^{178}\) Howse & Teitel, supra note 39, at 58.
\(^{179}\) VSF
\(^{181}\) Saul, supra note 4, at 611.
\(^{182}\) Szasz, supra note 30, at 1; see also Saul, supra note 4, at 617; see also Charney, supra note 180, at 464.
\(^{183}\) Saul, supra note 4, at 619-21.
\(^{184}\) Saul, supra note 4, at 641.