

Sovereignty and Crimea: How Referendum Democracy Complicates Constituent Power in Multinational Societies

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Abstract

This article examines the specific issue of the referendum as an instrument in the re-ordering of territory, specifically in the context of the secession of Crimea from Ukraine. The article maps how in recent decades independence referendums have proliferated and considers how the Crimean situation exposes the deep pathology of uncertainty in international law and its understanding of self-determination, exposing the referendum as a dangerous outlier. The principle of democracy, present already in the context of Kosovo's unilateral independence, and which forced the hand of Canada and the UK to accommodate secessionist aspirations, is a growing feature of international legal discourse, and one which suggests that the referendum is likely to remain a potential trump card to which nationalists will appeal to overcome both constitutional impediments and the black hole of international law in the path toward statehood.

A. Introduction

On 16 March 2014, a referendum was held in Crimea on its future status as a territory. This event was deeply controversial because it was organized against the backdrop of Russian intervention and the Ukrainian Government, which had no involvement in the process challenging its legality.¹ This article observes that the focal-point for the territorial reorganization which many ethnic Russians sought to achieve—as it has been in so many places over the past twenty five years—was an exercise in direct democracy. The Crimean process is the latest example of a trend in which the referendum has become the default device for sub-state nationalist movements wishing to appeal to their own host state and/or to the international community in pursuit of a sovereignty claim. It is frequently observed that the legal principles of territorial integrity and self-determination have been in flux since 1990 when the USSR and SFRY started to unravel.² What is less often discussed

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¹ Mark Weller, *Analysis: Why Russia's Crimea Move Fails Legal Test*, BBC NEWS (Mar. 7, 2014), <http://www.bbc.co.uk/news/world-europe-26481423> (last visited June 18, 2015).

² Zoran Oklopčic, *Which Pluralism? External Self-determination at the Intersection of National, Social and Geopolitical Emancipation*, in NATIONALISM AND GLOBALISATION (Stephen Tierney ed., forthcoming 2015).

is the crucial legitimating function performed by direct democracy in these processes, a tendency which has continued in subsequent situations where a change of status has been at stake, including Eritrea, East Timor, Montenegro and South Sudan.³

This article examines the specific issue of the referendum as an instrument in the re-ordering of territory. It begins by briefly mapping how, in recent decades, the referendum has proliferated, and how territorial and sovereignty issues have been at the heart of this proliferation (Part B). The article then considers how the Crimean situation exposes the deep pathology of uncertainty in this area, with doctrines such as self-determination and territorial integrity variously overlapping and conflicting with other areas of international law including human rights, the prohibition of the use of force, and the principle of democracy. Together this helps create a situation ripe for political manipulation (Part C). One issue which emerges in the Crimean debate—as it did in relation to the Kosovo crisis of 1998-99 and the subsequent move by states to recognize Kosovo as a State—is the relationship between legality and legitimacy. In Part D, this article considers how the referendum has assumed such importance on account of its purported capacity to fill the legitimacy gap. In this context, one must ask: what is it about the referendum as a specific type of electoral event that is so unsettling for international law? This leads to the final section which addresses other recent claims which have the referendum as a focal point, in particular the 1995 referendum in Quebec and the recent independence referendum in Scotland, each of which in effect are territorial claims directed internally to the host state as interlocutor rather than externally to the international community.⁴ These processes required the host state to reflect upon—and in turn justify—the democratic principles which underpin its own constitutional order. When there is, however, deep dissensus within the state, and claims fall back on international law, the situation in the Crimea shows an unclear and unsettled international regime, into which the referendum emerges as a dangerous, but potent, outlier. The principle of democracy, however, which forced the hand of the host state in Canada and the UK is a growing feature of international legal discourse, and one which suggests that the referendum is likely to remain a potential trump card to which nationalists will appeal to overcome both constitutional impediments and the black hole of international law in the path to statehood. It is also clear that the moral force of the referendum—even when the context within, and process by, which it is organized are both deeply suspect—can provide an unstoppable momentum towards secession in the face of the collapsing normative authority of international law.

³ See generally MATT QVORTRUP, REFERENDUMS AND ETHNIC CONFLICT (2014).

⁴ STEPHEN TIERNEY, CONSTITUTIONAL LAW AND NATIONAL PLURALISM 293–99 (2004); STEPHEN TIERNEY, DIRECT DEMOCRACY IN THE UNITED KINGDOM: REFLECTIONS FROM THE SCOTTISH INDEPENDENCE REFERENDUM (forthcoming Public Law, 2015).

B. The Proliferation of Constitutional Referendums: the Territorial Dimension

Over the past four decades the referendum has become a fixed feature of state and constitution-building across the globe. In Table 1, I offer a breakdown of how the use of referendums has grown in four main areas of constitutional practice.⁵

Table 1

4 TYPES OF REFERENDUM IN THE “NEW WAVE”	EXAMPLES
Founding of new states	<ul style="list-style-type: none"> • New states emerging from the former USSR and SFRY (1990-1992) • Eritrea (1993), East Timor (1999), Montenegro (2006), South Sudan (2011)
Creation and amendment of new constitutions	<ul style="list-style-type: none"> • Former republics of the USSR and SFRY • Iraq – ratification of the Constitution (2005) • Egypt – constitutional reforms (2011)
Sub-state autonomy	<ul style="list-style-type: none"> • Spain referendums: e.g. Basque Country (1979), Catalonia (1979), Galicia (1980) • United Kingdom referendums: Scotland (1997), Wales (1997) and (2011), Northern Ireland (1998)
European Union: treaty-making processes in respect of both integration and accession	<ul style="list-style-type: none"> • Malta; Slovenia; Hungary; Lithuania; Slovakia; Poland; Czech Republic; Estonia; Latvia (2004) • Croatia (2012)

The aspirations of sub-state peoples for constitutional change have been key to the proliferation of the referendum. It has been central to the founding of new States, and—as the referendum held in Scotland in September 2014 and the ongoing efforts by Catalan nationalists to hold a referendum on sovereignty each demonstrate—the referendum is

⁵ For further discussion see STEPHEN TIERNEY, *CONSTITUTIONAL REFERENDUMS: THE THEORY AND PRACTICE OF REPUBLICAN DELIBERATION* (2012).

now an automatic procedural move for nationalists seeking to present claims to independent statehood today. Referendums were once rarely used in the creation or amendment of constitutions, but throughout Central and Eastern Europe and more recently in Iraq and Egypt, the referendum has emerged both in the founding of new constitutions and within the text of these constitutions as part of future amendment procedures. This can also be traced to the sub-state process because many of those sub-state peoples in Central and Eastern Europe who achieved statehood by way of a referendum either had a subsequent referendum to ratify the new constitution and/or included the referendum in the new constitution as central to future processes of constitutional amendment.⁶ The referendums on accession to treaty development of the EU do not raise sub-state issues, but they do offer evidence of this general turn towards popular democracy: of the first fifteen member states, only Denmark and Ireland turned to the referendum in the accession process;⁷ of the ten joining in 2004, only Cyprus did not.⁸

It is often assumed that the referendum is of use to sub-state groups simply as a device with which to *break-up* of multinational states.⁹ But referendums are also central—as a sub-set of the second group in Table 1—in establishing complex new models of sub-state autonomy as we have seen in Spain and the UK in the late 1970s and 1990s respectively,¹⁰ and in ongoing processes of constitutional change such as the referendum on further devolution for Wales in 2011¹¹. A related example is the referendum on the draft Charlottetown Accord in 1992 in which Quebec and the rest of Canada respectively held distinct referendum processes.¹² In other words, the referendum is also central to those forms of territorial reorganization which stop short of statehood. Sub-state peoples can see the referendum as a mechanism by which their demotic specificity is recognized *within* the state; secession is not the only route to recognition, but it is a popular goal and will remain so particularly when aspirations towards greater autonomy remain frustrated.

⁶ STEPHEN TIERNEY, *THE REFERENDUM IN MULTI-LEVEL STATES: FRACTURING OR FOSTERING FEDERAL MODELS OF GOVERNMENT? The Federal Idea* (2014).

⁷ TIERNEY, *supra* note 5, at 305–12 (2012).

⁸ *Id.* at 6.

⁹ QVORTRUP, *supra* note 3, at 48.

¹⁰ TIERNEY, *supra* note 4, at 152, 285, 299–301.

¹¹ See generally R. WYN JONES & R. SCULLY, *WALES SAYS YES: WELSH DEVOLUTION AND THE 2011 WELSH REFERENDUM* (2012).

¹² TIERNEY, *supra* note 4, at 141.

C. Referendum in Crimea: The Crisis in Legality

The Crimean situation demonstrates just how confused, contested, and messy the state of international law is when territorial claims to independent statehood or irredentism arise. It is often noted that international law, although giving no right to secession except possibly in the most extreme cases of internal oppression,¹³ is in a sense neutral on the issue.¹⁴ This by definition creates a grey area. If international law is neutral, what steps can lawfully be taken either to affect or to resist secession? To add to the conceptual difficulty, attempts to secede rarely play out in practice as self-contained processes. Instead, they invariably raise ancillary legal issues. The Crimean case demonstrates how territorial questions are made more complex by the way the issue of self-determination interacts (often in fraught situations of armed conflict) not only with territorial integrity and the question of state dissolution, but also with other values and legal principles such as prohibition of the use of force, claims to democracy, “humanitarian” intervention, and the possible forfeit of a state’s entitlement to territorial integrity in light of flagrant human rights abuses. These different factors often interact in contradictory ways, and are variously prayed in aid for, or used to strengthen denials of, territorial claims.¹⁵

An example of the vagueness of the law of secession is the obscure opinion given by the ICJ in the Kosovo Advisory Opinion.¹⁶ This opinion drew a distinction between the entitlement to *declare* independence on the one hand and the right to effect it on the other hand. The Court concluded that international law does not generally prohibit unilateral declarations of independence because the principle of territorial integrity only applies in the relations between States and not in regard to internal secessionist movements.¹⁷ It does not take a great leap of imagination to see how this fine distinction drawn by the Court could serve only to further confuse what was already a highly complex and contested issue. Indeed, it can reasonably be argued that the ICJ opinion—by suggesting that agitating for independence to the point of declaring such a status—is not unlawful under international law, seems to offer a green light to secessionist movements.

However, this position is qualified. One area of focus for the Court, which it does take to be important to the context in which declarations are made, is the use of force. The Court goes on to say that unilateral declarations of independence can violate international law

¹³ Reference Re Secession of Quebec, [1998] 2 S.C.R. 217, para. 112 (Can.) [hereinafter Re Secession].

¹⁴ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, 438, para. 84 (July 22) [hereinafter Advisory Opinion].

¹⁵ Anne Peters, *Does “The West” Now Pay the Price for Kosovo*, EJIL: TALK! BLOG (Apr. 22, 2014).

¹⁶ Advisory Opinion, *supra* note 14, at 423, 438, para. 84.

¹⁷ *Id.* at 423, 425, paras. 51, 56.

where they “were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*).”¹⁸ At a theoretical level, this is not an unreasonable distinction. In the highly fraught environment of disputed territorial claims, however, where secession attempts and the use of force—the legality of which is itself often deeply contested—are so often intertwined, it should be no surprise that this aspect of the Opinion has resulted in differing interpretations by different actors.

Certainly Crimean Russians were keen to seize upon the ICJ’s statement on declarations of independence as affirmation of their right to move towards independence. On 11 March 2014, the Supreme Council of Crimea (Crimea’s Parliament) proclaimed that it was acting:

[w]ith regard to the charter of the United Nations and a whole range of other international documents and taking into consideration the confirmation of the status of Kosovo by the United Nations International Court of Justice on July 22, 2010, which says that unilateral declaration of independence by a part of the country doesn’t violate any international norms.¹⁹

On the other hand it has been forcefully argued that Crimea’s declaration of independence is illegal because it relied upon an illegal use of force. At the time of the referendum, Russian soldiers occupied the territory. As Marksén argues:

In regard to Crimea, the declaration of independence would have been impossible without Russian troops backing up the steps towards secession. Only the fact that Ukrainian forces on Crimea have been locked in their posts and that the public infrastructure has been taken over by pro-Russian forces made it possible to hold the referendum on which the declaration of independence is based. It can therefore hardly be argued that the declaration would not rely on the use of force. According to the criteria elaborated in the ICJ’s advisory opinion, if that use of force was illegal, so was the declaration of independence.²⁰

¹⁸ *Id.* at 438, para. 8.

¹⁹ Christian Marksén, *Crimea’s Declaration of Independence*, EJIL: TALK! BLOG (Mar. 18, 2014).

²⁰ *Id.*

Similarly, Milanovic draws a clear line between Crimea and Kosovo, with the use of force the critical point of distinction:

Crimea's secession is the direct result of Russia's unlawful military intervention against Ukraine, whereas Kosovo's secession was not tainted to the same extent by NATO's 1999 intervention due to the subsequent adoption of Resolution 1244, which authorized the presence of international forces in Kosovo while disabling Serbia from taking military action to suppress Kosovo's secession.²¹

But even the use of force delimitation on secession can be a difficult issue to assess in practice. In a debate about territory and sovereignty, opinions about who is actually using force unlawfully can shift rapidly depending upon conditions on the ground. If there is an armed insurrection in pursuit of secession, even one supported externally by another state, at what point do counter-measures taken by the host state themselves violate the prohibition on the use of force or international human rights norms? Also, when — if ever — does the reaction of the host state entitle an external power or powers to intervene, claiming humanitarian conditions as a pretext?

All of these questions inevitably drew the 1998–1999 international intervention in Kosovo—and Kosovo's subsequent move to independent statehood—into the Crimean debate. In Kosovo, the self-determination issue was not only murky due to its link to the path dependency of the Badinter process,²² but also precisely because of this question of “humanitarian intervention.” The author has argued elsewhere that it was the denial of a

²¹ Marko Milanovic, *Crimea, Kosovo, Hobgoblins and Hypocrisy*, EJIL: TALK! BLOG (Mar. 20, 2014). See also Peters, *supra* note 15. She distinguishes Kosovo from the Crimean situation. *Id.* She argues that the use of force/intervention in Kosovo are legally separate from Kosovo's secession while the use of force in Crimea is central to the process leading to its secession. She goes on to reject the argument that the West's conduct over Kosovo weakens criticisms of Russian action in Ukraine/Crimea. *Id.*

²² Five states emerged from the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY). On 27 April 1992 two of the six republics of the SFRY—Serbia and Montenegro—formed the Federal Republic of Yugoslavia which was considered by the EC Peace Conference Arbitration Commission to be a new state. Conference on Yugoslavia Arbitration Commission (the Badinter Commission), *Opinions on Questions Arising from the Dissolution of Yugoslavia*, (1992) Opinion No. 9. The FRY was recognized by member states of the European Community following the Dayton Agreement of 14 December 1995. The other four republics became independent states: Bosnia-Herzegovina, Croatia, Macedonia and Slovenia. In due course Montenegro would itself become independent following a referendum in 2006.

Kosovo was not eligible to apply to the Badinter Commission for recognition; and for Kosovars, conscious of the autonomy they had enjoyed under the 1974 Constitution, which in their eyes accorded Kosovo *de facto* republican status, and bearing in mind that Kosovo with a population which was approximately ninety percent ethnic Albanian was the most ethnically homogeneous autonomous unit in the Federal Republic apart from Slovenia, it seemed particularly unjust that Kosovo should be excluded from any possibility of statehood simply on account of a formal distinction in the 1974 SFRY constitution between republics and autonomous provinces.

territorial solution to the Kosovo crisis which played possibly a determinative role in sparking the intervention by Western powers with a “self-determination intervention” motivation in addition to—and perhaps even more than—a “humanitarian intervention” dynamic.²³ In any event, the culmination of the UN intervention has been a slow but inexorable road to Kosovo's statehood.

Kosovo's acquisition of statehood is the first case in which a territory of the former SFRY or USSR which was not a republic under the former constitution of either state has achieved widespread recognition as a state.²⁴ It did not fit criteria for recognition laid down by the major international powers in the wake of the “dissolution” of the state, as adjudicated by Badinter.²⁵ Inevitably, this has led to a discussion of the extent to which Kosovo acts as a precedent for the Crimean situation. In recognizing Kosovo as an independent state, a number of states argued that Kosovo was an exceptional case due to the history of conflict there, the human rights abuses which sparked the intervention that preceded its move to statehood, and even its relationship to the collapse of the SFRY. It is not surprising, however, that others are not willing to accept that the violation of Serbia's territorial integrity against its will contains no implications for any other situation. This has led other sub-state nationalists, including those in Crimea, to consider the opposition of the host state not an insurmountable barrier—in legal as well as practical terms—to statehood and to recognition. It is not convincing to compare how Kosovars were treated by the FRY in 1998 with how Crimean Russians were treated by Ukraine in the run up to the referendum in Crimea. For example, the Office of the United Nations High Commissioner for Human Rights²⁶ rejected Russian claims that there were widespread and systematic human rights violations of Ukrainians with Russian ethnicity, which justified both the Russian intervention and claims of a right to secede. The fact is, however, that the Kosovo intervention and the Kosovo opinion of the ICJ serve to muddy what were already pretty murky waters. As Marksén argues:

²³ Stephen Tierney, *The Long Intervention in Kosovo: A Self-Determination Imperative?*, in *KOSOVO AND INTERNATIONAL LAW* 249–78 (James Summers ed., 2011).

²⁴ For example, on 18 February 2008 the EU presidency announced that member states were free to decide individually whether to recognize Kosovo's independence; most have done so.

²⁵ For Kosovars, conscious of the autonomy they had enjoyed under the 1974 Constitution, which in their eyes accorded Kosovo de facto republican status, and bearing in mind that Kosovo with a population which was approximately ninety percent ethnic Albanian was the most ethnically homogeneous autonomous unit in the Federal Republic apart from Slovenia, it seemed particularly unjust that Kosovo should be excluded from any possibility of statehood simply on account of a formal distinction in the 1974 SFRY constitution between republics and autonomous provinces.

²⁶ Report on the Human Rights Situation in Ukraine, Office of the United Nations High Commissioner for Human Rights of 15 April 2014.

Since Russia is powerful enough to pursue its interests anyway, it does not need an ultimately convincing legal justification. A justification that is at least not totally absurd, but somehow arguable, is already good enough for making a case in the international political sphere. In expanding the right to self-determination in regard to Kosovo, Western states bear their share of responsibility in enabling such arguments and in undermining international law.²⁷

Since 1945, the law of self-determination has always been open to political manipulation given its importance, its close connection to principles of political legitimacy, and the area of uncertainty introduced by the UN General Assembly in relation to exceptional cases of internal oppression.²⁸ Generally, however, it was accepted that any legal right to secession which came with the right to self-determination, applied only to colonized territories and was therefore consigned to history with the virtual completion of European decolonization. The Kosovo recognition has breathed life into a dying horse and in doing so has given clever lawyers an opening to argue that, on the basis of the law's obscurity and malleability, one case is pretty much as strong as another. In this area of the law, therefore, it is not necessarily the strength of one's arguments that matter, but the opportunity to present a case—which would previously have been seen as entirely implausible—as being at least arguable: “[W]e may be wrong but there is no certainty that you are right.” As Milanovic argues, “Even if Kosovo and Crimea are legally distinguishable, they are still close enough. The West's position on Crimea is undeniably undermined by their previous stance regarding Kosovo, and they can only blame themselves for that.”²⁹

It seems that the ICJ's opinion has done more harm than good, not only in the casuistic distinction between a declaration of independence and an entitlement to independence, but also on account of what it did *not* say. It did not deal with the real issues that Serbia sought to put to it: Whether Kosovo had a right to secession, whether there is such a generalizable right under international law, or what the legal consequences of the Kosovo declaration might be.³⁰ What we are left with therefore are new gaps in an already fragmented legal regime, new ambiguities, and, most regrettably, new opportunities for opportunists to use these to bolster their political goals.

²⁷ Marksen, *supra* note 19.

²⁸ UN General Assembly Declaration 2625 which in a general commitment to the territorial integrity and political unity of sovereign and independent states hints that a state's entitlement to territorial integrity might be weakened if the state is not conducting itself, “in compliance with the principle of equal rights and self-determination of peoples,” and specifically where it is not, “possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.”

²⁹ Milanovic, *supra* note 21.

³⁰ Advisory Opinion, *supra* note 14, at 403, 423, 425, paras. 51, 56.

D. Legality and Legitimacy: The Referendum Fills the Gap?

International law does not make itself less vulnerable to intractability and incommensurability when the boundaries between legality and legitimacy are themselves obscured. In other words, not only is the law obscure, it is not even the only game in town. With the Kosovo crisis, we saw legality seep into the related but entirely open-ended notion of legitimacy which was presented as a feasible alternative to legality in justification for international action which would otherwise itself be unlawful. We see this set out starkly in relation to the “humanitarian” intervention which was described by one significant report as “illegal but legitimate.”³¹

Peters argues that one of the key distinctions between the Kosovo and Crimean cases is that that the use of force and the international intervention in Kosovo are legally separate from Kosovo's secession whereas in Ukraine and Crimea the two acts are inseparable.³² But she also concedes that if it is the case that either or both the Kosovo intervention or the Kosovo secession was illegal, and the justification for either is instead “legitimacy,” the Western powers have “a problem of credibility”:

Actors who breached the law in a previous case sound hypocritical when they point their finger to another actor's violations of the law. This is not only a matter of politics, but raises the legal problem of double standards. Applying double standards is extremely pernicious for the rule of law and fairness. One of the core elements of the rule of law is the principle that like cases must be treated alike. However, the principle of equal treatment cannot apply in the realm of unlawful behaviour, because this

³¹ THE INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, *THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED* 4 (2000). This position was also taken by a UK House of Commons Foreign Affairs Committee Report—HC Foreign Affairs Committee Fourth Report, para. 138 (May 23, 2000). For related arguments, see also, Nico Schrijver, *NATO in Kosovo: Humanitarian Intervention turns into Von Clausewitz War*, 1 INT'L L. F. 155–59 (1999). Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23–30 (1999); Abraham Sofaer, *International Law and Kosovo*, 36 STAN. J. INT'L L. 4 (2000). See also Nico Schrijver, *NATO in Kosovo: Humanitarian Intervention Turns into Von Clausewitz War*, 1 INT'L L. FORUM 155–59 (1999); Abraham Sofaer, *International Law and Kosovo*, 4 STAN. J. INT'L L. 36 (2000). Or other opinions that consider the NATO bombing of FRY to have been unlawful but which are otherwise sympathetic to NATO's motivations. See Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1–22 (1999); Michael J. Glennon, *The New Interventionism: The Search for a Just International Law*, 78 FOREIGN AFFS. 2 (1999).

³² Peters, *supra* note 15.

would condemn the supervising actors to perpetuate unlawfulness.³³

Peters defends the Kosovo intervention as 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.”³⁴

Her arguments are not unconvincing; she is also surely correct that opening up the distinction between legality and legitimacy changes the debate and offers aid to those who would present the Crimean case in a similar light. When legitimacy is introduced as a factor that can differ from—but nonetheless rival—legality as a justification for action, it should be no surprise that we find the salience of the referendum as a player in these disputes increasing. The referendum intervenes by instantiating a dramatic constituent moment, encapsulating the democratic voice of a people speaking directly and collectively; in other words, it offers one moment of apparent democratic clarity to pierce an opaque legal and political backdrop.

There are two features specific to state-forming and constitution-framing processes which—from the perspective of civic republicanism—seem to offer a strong *prima facie* defense of the deployment of direct democracy that have made the referendum so attractive to sub-state nationalists seeking to advance the constitutional position of their own national societies.³⁵ The first is that it serves to highlight the importance of the issue at stake—the people come together collectively to express their will on a major issue, at a foundational or re-foundational moment for their polity. This is a highly symbolic process which presents to the people’s host state and/or the international community a specific claim which has the ultimate democratic validation—the expressed will of the people—unmediated by politicians. This argument builds upon work within the republican revival by scholars like Bruce Ackerman who argue that constitutional politics is distinct from ordinary politics, making a compelling case for citizen engagement.³⁶ Secondly, in such decisions, the very identity of the people or the *demos* is inevitably implicated. This is because they involve constitutive constitutional issues, the most fundamental of which is the aspiration for a new state or an irredentist move to join an existing state. A

³³ *Id.*

³⁴ *Id.* But this also serves to invite questions about the motivations of the powers intervening in the Kosovo crisis. Among those skeptical of the idea that NATO and others were motivated by humanitarian concerns were: NOAM CHOMSKY, *A NEW GENERATION DRAWS THE LINE: KOSOVO, EAST TIMOR AND THE STANDARDS OF THE WEST* (2001); Robert M. Hayden, *Humanitarian Hypocrisy*, 8 *E. EUR. CONST. REV.* 91–96 (1999); CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 36 (2000).

³⁵ Stephen Tiemey, *Constitutional Referendums: A Theoretical Enquiry*, *MOD. L. REV.* 360–83 (2009).

³⁶ BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 10 (1991).

referendum not only has instrumental value in presenting a claim based upon the result of the vote, but, in bringing the people together in one direct constitutional moment, it can also help to make real the idea of a national people made manifest in the moment of collective decision-taking. In other words, a constitutional referendum takes on a symbolic representational role, encapsulating the very political selfhood of the people, while also embodying its settled will.³⁷ In turn, individuals can come reflexively to identify with one another through their shared participation in this process. In the fraught and hazy area of statehood claims, the practical force and totemic resonance of constitutional referendums combine into a forceful claim to legitimacy.

The notion of legitimacy in direct democracy, however, needs to be questioned further. Where does this stem from? It is not simply that the referendum is an exercise in democracy. The term democracy is itself vague and contested, for example between those who take respectively liberal or republican approaches, and those who favor direct as opposed to representative forms.³⁸ What is more, it has come to be validated more usually through representative than direct channels. What is particularly legitimizing about the referendum is that it is as much about the “self” as it is about the “determination” aspect of self-determination. The crucial feature of a referendum is not the decision on a particular set of constitutional aspirations, but the nature of the decision-makers. As an event, the referendum serves to mobilize a sub-state group *as a people*; the aspiration *for* self-determination and the act *of* self-determination merge into one another. In a sovereignty referendum, a sub-state people are not just claiming a right to self-determination, they are also actively self-determining in the here and now.³⁹ Further, this has the capacity to develop the identities of the citizens in the process. Not only are they the authors of a new political regime, but as such they can also undergo through this event a process of *self-authorship*, redefining themselves collectively as citizens of the new polity.

Having said all of this, however, let us not overlook that there was a whole range of process problems attached to the Crimean referendum, undermining not only claims of legality, but also those of legitimacy. In the first place, the referendum was organized against the will of the Ukrainian government. The question that was put to voters and the timing of the vote are also serious concerns. The referendum asked the people of Crimea whether they wanted to join Russia as a federal subject, or if they wanted to restore the 1992 Crimean constitution and Crimea's status as a part of Ukraine: the status quo was not

³⁷ See generally MICHEL ROSENFELD, *THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE AND COMMUNITY* (2010).

³⁸ TIERNEY, *supra* note 5, at 19–57.

³⁹ Stephen Tierney, *We the Peoples: Balancing Constituent Power and Constitutionalism in Plurinational States*, in *THE PARADOX OF CONSTITUTIONALISM* 229–46 (Martin Loughlin & Neil Walker eds., 2007).

an option.⁴⁰ Also, the final date for the referendum and the ballot choices were set only ten days before the plebiscite was held.⁴¹ Again, the turnout and result are deeply contested. The organizing authorities released their own data, but this is dismissed as fabricated by the Ukrainian government.⁴² Notably, the legality of the referendum was rejected by the United Nations. Thirteen members of the United Nations Security Council voted in favor of a resolution declaring the referendum invalid, but Russia vetoed it and China abstained.⁴³ The resolution would have reaffirmed Ukraine's "sovereignty, independence, unity and territorial integrity" and declared that the referendum "can have no validity."⁴⁴ A vote of one hundred in favor and eleven against, with fifty-eight abstentions, adopted a United Nations General Assembly resolution later, which declared the referendum invalid and affirmed Ukraine's territorial integrity.⁴⁵

But despite these factors, it is significant that it is upon the referendum that the Crimean claim to unification with Russia principally rests. Other arguments are presented. There is the claim that in historical terms the people of Crimea have a strong connection with Russia. The Crimean Oblast was a subdivision of the Russian Soviet Federative Socialist Republic until the 1954 transfer of Crimea into the Ukrainian SSR.⁴⁶ When Ukraine became independent after the dissolution of the USSR, Crimea became part of the new independent state, a process which itself followed a referendum in 1991, the legitimacy and legality of which was itself questioned by the collapsing Soviet state at the time.⁴⁷ There are also arguments that since then the autonomy of Crimea within Ukraine has been diminished.

⁴⁰ Richard Balmforth, *No Room for 'Nyet' in Ukraine's Crimea Vote to Join Russia*, REUTERS, Mar. 11, 2014, <http://www.reuters.com/article/2014/03/11/us-ukraine-crisis-referendum-idUSBREA2A1GR20140311> (last visited June 18, 2015).

⁴¹ *Crimean Parliament Votes to Join Russia, Sets Referendum Date*, NBC NEWS, Mar. 6, 2014, <http://www.nbcnews.com/storyline/ukraine-crisis/crimean-parliament-votes-join-russia-sets-referendum-date-n45686> (last visited June 18, 2015).

⁴² Sam Frizell, *Crimea Votes to Leave Ukraine for Russia*, TIME MAGAZINE, Mar. 16, 2014. See also Ian Birrell, *Crimea's Referendum Was a Sham Display of Democracy*, THE GUARDIAN, Mar. 17, 2014 (last visited June 18, 2015).

⁴³ *UN Security Council Action on Crimea Referendum Blocked*, UN NEWS CENTRE, Mar. 15, 2014, <http://www.un.org/apps/news/story.asp?NewsID=47362#.VQRJXnk8Zjo> (last visited June 18, 2015).

⁴⁴ *Id.*

⁴⁵ *Backing Ukraine's Territorial Integrity, UN Assembly Declares Crimea Referendum Invalid*, UN NEWS CENTRE, Mar. 27, 2014, <http://www.un.org/apps/news/story.asp?NewsID=47443#.VQRKTHk8Zjo> (last visited June 18, 2015).

⁴⁶ MARC WELLER & STEFAN WOOLF, *AUTONOMY, SELF-GOVERNANCE AND CONFLICT RESOLUTION: INNOVATIVE APPROACHES TO INSTITUTIONAL DESIGN IN DIVIDED SOCIETIES* 71 (2005).

⁴⁷ TIERNEY, *supra*, note 5, at 68–70.

These do not amount to arguments that justify secession, and certainly not the interference in Ukrainian affairs by Russia, but when the issue of political right is contested, the referendum can take on moral force, and can serve to unsettle constitutional systems and their self-understanding of the normative underpinnings of the state. When we look by analogy to other constitutional systems where sovereignty referendums have been a feature of political struggle, we see that the principle of democracy emerges as a potential trump card which can bring to the constitutional table a *prima facie* entitlement to secession which challenges both established interpretations of the constitution, and even the supremacy of the constitution itself.

We see this for example in the Quebec Secession Reference. Here, following Quebec's unsuccessful referendum on sovereignty in 1995, the federal government, formally the Governor in Council, asked the Court three questions:

- (1) Under the Constitution of Canada, can the National Assembly, legislature, or government of Quebec effect the secession of Quebec from Canada unilaterally?
- (2) Does international law give the National Assembly, legislature, or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature, or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
- (3) In the event of a conflict between domestic and international law on the right of the National Assembly, legislature, or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?⁴⁸

The Court took the view that international law on secession did not apply to the situation of Quebec because international law "does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their 'parent' state."⁴⁹ This rendered the third question redundant. The Court therefore focused upon the first question. In the end, this led to a subtle and complex opinion by the Court which has indirectly helped to articulate the role which a referendum on secession can play in instigating the process of constitutional amendment in Canada and on the limitations of the formal amendment process itself.

⁴⁸ Re Secession *supra* note 13, at Preamble.

⁴⁹ *Id.* at para. 111.

The way in which the Court envisaged the referendum interacting with the constitutional amendment process is intriguing. The first step the Court takes is to suggest that in the event of an unambiguous vote for secession, Quebec's partners in Confederation would have an obligation "to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed."⁵⁰ In other words, it is not simply the case that Quebec would request negotiations toward a constitutional amendment and the other provinces could simply refuse to negotiate. Instead, it seems that the negotiations must respect the will of the majority of Quebecers to secede. This does not mean that secession is a *fait accompli*, flowing simply from a Yes vote on secession. As the Court stated, "No negotiations could be effective if their ultimate outcome, secession, is cast as an absolute legal entitlement based upon an obligation to give effect to that act of secession in the Constitution."⁵¹ In contract, it could not accept that "a clear expression of self-determination by the people of Quebec would impose no obligations upon the other provinces or the federal government." The Canadian constitutional order "cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada." Doing so

[w]ould amount to the assertion that other constitutionally recognized principles necessarily trump the clearly expressed democratic will of the people of Quebec. Such a proposition fails to give sufficient weight to the underlying constitutional principles that must inform *the amendment process*, including the principles of democracy and federalism. The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec.⁵²

This Opinion does not expressly state that Quebec has the right to secede from Canada, but this is a plausible implication of what it does say. To effect secession, Quebec, or any other province, must negotiate and conclude the process by way of a constitutional

⁵⁰ *Id.* at para. 88.

⁵¹ *Id.* at para. 91.

⁵² *Id.* at para. 92 (emphasis added).

amendment, but it is a right to secede nonetheless. Quebec's partners in confederation seem to have a *legal* duty to negotiate in good faith *toward* this outcome.⁵³

There is nothing stated in the text of the Constitution Act 1982, which tells the federal government or the provinces that they have such a legal duty. Instead, this right emerges from the articulation of it by the Court. To make this move, the Court looks beyond the text of the written constitution, giving considerable importance to "unwritten" or underlying principles "animating the whole of the Constitution."⁵⁴ In the Court's view, there are four "fundamental and organizing principles of the Constitution" which are relevant to addressing the question of secession: "federalism; democracy; constitutionalism and the rule of law; and respect for minorities."⁵⁵ The Court explains, "These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other."⁵⁶ Also, "[t]hese principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based."⁵⁷ In normative terms, these principles are ascribed considerable significance. They are of interpretive value,⁵⁸ as they are in many constitutions, but beyond this, the Court had earlier found that these principles could be used to fill gaps "in the express terms of the constitutional text."⁵⁹ It is in this context that the Court makes its most startling move, declaring that these principles "are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments."⁶⁰ It is with this status in mind that we must understand the court's view that these principles must in turn "inform our overall appreciation of the constitutional rights and obligations that would come into play in the event that a clear majority of Quebecers votes on a clear question in favor of secession."⁶¹ The obligation to negotiate stems from the unwritten principles of the constitution which both fill the gaps in the constitution's text and have the power to bind governments.

⁵³ In that regard, I agree with the argument offered in Zoran Oklopcic's article in this collection. Zoran Oklopcic *The Idea of Early-Conflict Constitution-Making: The Conflict in Ukraine Beyond Territorial Rights and Constitutional Paradoxes*, 16 GERMAN LJ. 658, 681 (2015).

⁵⁴ *Re Secession*, *supra* note 13, at Preamble.

⁵⁵ *Id.* at para. 32.

⁵⁶ *Id.* at para. 49.

⁵⁷ *Id.* at para. 49.

⁵⁸ *Id.* at para. 52.

⁵⁹ *Provincial Judges Reference* [1997] 3 S.C.R. 3, para. 104 (Can.) (noting that the preamble to the constitution "invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text") (cited by *Re Secession*, *supra* note 13, at para. 53).

⁶⁰ *Re Secession*, *supra* note 13, at para. 54.

⁶¹ *Id.* at para. 2.

It seems that it is the particular symbolic resonance of the referendum as a democratic event that is crucial to a move which takes abstract constitutional principles, imbues them with legally binding force, and transubstantiates them into a concrete duty to negotiate towards the secession of part of the state. It is pertinent that the duty to negotiate exists because the “Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada.” It seems unlikely that the Court would come to this conclusion based upon, for example, a declaration by the National Assembly of Quebec of an intention on the part of the province to secede. It is the moral force of direct democracy, of the constituent power of citizens speaking directly, which has produced this result. While the Court insists that none of the four principles trumps the others, it is the principle of democracy which is used to force the hand of the other provinces. This does not entirely usurp the established pathways of constitutional amendment, but it seems to have set a substantive expectation of an outcome which in effect would require the use of the amendment process to give effect to the clearly expressed popular will of Quebecers if the other conditions it sets—absence of ambiguity “in terms of the question asked and in terms of the support it achieves”—are met.⁶²

Another recent situation is in Scotland where a referendum was held on independence, with the consent of the state. In January 2012, when the Scottish Government announced its intention to hold a referendum, the UK Government responded by arguing that the Scottish Parliament had no legal authority to do so, and it appeared for a time that this issue would end up before the United Kingdom Supreme Court. In such a scenario the UK Court would have faced some of the same issues as those confronted by the Supreme Court of Canada in 1998.⁶³ But the UK Government conceded the political principle that a referendum could be held. On 15 October 2012, a deal was reached between the two governments in what became known as the Edinburgh Agreement.⁶⁴ This provided that the UK Parliament would formally devolve to the Scottish Parliament the competence to legislate for a referendum on independence, provided that this was held before the end of

⁶² David Haljan disagrees, arguing that the duty to negotiate in good faith is simply a duty to be open-minded about the demand for secession: “A proposal for change is just that: a suggestion.” DAVID HALJAN, CONSTITUTIONALISING SECESSION 341 (2014). This is an unconvincing account which is successfully refuted by Oklopcic. See Zoran Oklopcic, *The Anxieties of Consent: Theorizing Secession Between Constitutionalism and Self-determination*, INT’L J. GRP. & MINORITY RTS. (forthcoming 2015).

⁶³ Gavin Anderson et al, *The Independence Referendum, Legality and the Contested Constitution: Widening the Debate*, UK CONSTITUTIONAL LAW ASSOCIATION BLOG (Jan. 31, 2012), <http://ukconstitutionallaw.org/2012/01/31/gavin-anderson-et-al-the-independence-referendum-legality-and-the-contested-constitution-widening-the-debate/> (last visited June 18, 2015).

⁶⁴ *Agreement between the United Kingdom Government and the Scottish Government on a Referendum on Independence for Scotland*, (Oct. 15, 2012), <http://www.scotland.gov.uk/About/Government/concordats/Referendum-on-independence> (last visited June 18, 2015).

2014.⁶⁵ This is another example of a state becoming aware that when a sub-state national group mobilizes with the aim of asserting its own constituent power, it is very hard to resist the political right of a people, long recognized as being a discrete people, to exercise its latent constituent power.

In the eyes of international law, while events surrounding referendums may raise legal problems, it is intuitively difficult to view a referendum itself as an illegal act. It has to be said that the United Nations certainly did take this view in relation to Crimea as we have seen in the overwhelming view of the United Nations Security Council and the Resolution of the General Assembly, declaring the referendum invalid and affirming Ukraine's territorial integrity.⁶⁶ Similarly, on 27 March 2014, the EU issued a statement to the UNGA to the effect that it did not recognize Russia's absorption of Crimea.⁶⁷

For others, however, it is not so simple. Jure Vidmar argues both that a "shift of territorial sovereignty" for Crimea would be illegal and that "even the declaration of independence violated international law."⁶⁸ He also takes the view, however, that the referendum in itself was not illegal.⁶⁹ He argues that—as a result of the illegalities he speaks of—there is an obligation to withhold recognition to any purported change in status and this is of course the established position of the vast majority of states including the EU.⁷⁰ But it is notable that he sees the referendum itself as a legal act. If this is the case, or even if a plausible case can be presented to this effect, it brings into play the constituent power issue which the Supreme Court of Canada and the UK Government recognized to be irrepressible in the cases of Quebec and Scotland.⁷¹ When such an electoral event takes place, mobilizing a sub-state people to vote in huge numbers for independence or for some form of territorial reorganization, the result can become, in legitimacy-based terms at least, *a fait accompli*. This was the story of the Soviet Union's own collapse, as referendums were held in

⁶⁵ *Scotland Act 1998 (Modification of Schedule 5) Order 2013*, para. 3, <http://www.legislation.gov.uk/ukSI/2013/242/made> (last visited June 18, 2015).

⁶⁶ G.A. Res. 68/262 (Mar. 27, 2014).

⁶⁷ *EU Statement—United Nations General Assembly: Territorial Integrity of Ukraine*, http://eu-un.europa.eu/articles/en/article_14799_en.htm.

⁶⁸ See also Jure Vidmar, *The Annexation of Crimea and the Boundaries of the Will of the People*, 16 GERMAN LJ. 365, 367–68, 383 (2015).

⁶⁹ Jure Vidmar, *Crimea's Referendum and Secession: Why it Resembles Northern Cyprus More than Kosovo*, EJIL TALK! BLOG (Mar. 20, 2014).

⁷⁰ *Declaration by the High Representative on Behalf of the EU on Crimea* (Mar. 16, 2015) <http://www.consilium.europa.eu/en/press/press-releases/2015/03/16-declaration-high-representative-crimea/>.

⁷¹ The UK has also recognized that Northern Ireland can secede from the UK to join the Republic of Ireland if a majority vote for this in a referendum: Northern Ireland Act 1998, s.1.

republics which were themselves of questionable legality but which by displaying massive support for independence built the political momentum to dismember the state.⁷²

E. Conclusion

This is not to say that international law should be called upon in an attempt to legitimize what is clearly an illegal act according to the constitution of Ukraine. It is simply to recognize that direct democracy is a political move which sub-state actors increasingly make on account of its power to force the hand of states to shift their approach to the constitutionality of secession. International law and international actors have played their part in giving moral force to the referendum. Badinter Commission Opinion No. 4 is the clearest example of this.⁷³ The international community allowed the deeply flawed referendum in Bosnia in 1992 to play a determining role in the recognition of Bosnia when it was barely viable as a State. The dissolution of SFRY has left the international law position on the recognition of States deeply unsettled, but one emerging trend is how influential the referendum can be, both in achieving statehood and in providing the moral force which would lead to the recognition of this statehood.

International law, which was always of little assistance in the resolution of territorial issues, has become even more confusing and contested in light of Kosovo's move to statehood and the opaque Opinion of the ICJ in response to Serbia's perfectly legitimate questions about part of its territory seceding with the tacit support and recognition of UN Member States. This also comes at a time when the right to democracy is also an increasing feature of international law.⁷⁴

The Kosovo crisis has also led to the introduction of legitimacy as an actor which now exists alongside legality as the metric of appropriate behavior. Given that the referendum was applied as a legitimizing device in the recognition of new states in Central and Eastern Europe, it should be no surprise that the referendum has risen to such prominence in the settlement of territorial disputes.

⁷² TIERNEY, *supra* note 5.

⁷³ Following a request by Bosnia-Herzegovina for recognition, the Badinter Commission found that the absence of a referendum meant that "the will of the peoples of Bosnia-Herzegovina to constitute [a republic] as a sovereign and independence State cannot be held to have been fully established." Badinter Commission, Opinion No. 4.

⁷⁴ Steven Wheatley, *Modelling Democratic Secession in International Law*, in NATIONALISM AND GLOBALISATION (Stephen Tierney ed., 2015) (forthcoming).