Policy Planning White Paper: The Legality and Impact of the Russian Referenda in the Occupied Ukrainian Territories

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Statement of Purpose

The purpose of this Policy Planning White Paper is to examine the legality and impact of the September 23-27 Russian referenda in the occupied Ukrainian territories. Specifically, the paper addresses whether the referenda provide a valid basis for Russia's intended annexation of the occupied territories.

Executive Summary

Russia is organizing referenda in four regions (or oblasts) of Ukraine – the Donetsk and Luhansk oblasts (commonly referred to together as the "Donbas Region") and the Zaporizhzhia and Kherson oblasts (hereinafter all four regions collectively referred to as the "Occupied Territories"), which are all currently under Russian military control.[1] The question being put to a vote is whether the Occupied Territories wish to join the Russian Federation and become part of its territory. Previously the Donetsk and Luhansk oblasts held referenda and declared themselves independent from Ukraine. Russia, North Korea, and Syria are the only States to recognize their claim of independence.

The purpose of the referenda is to validate Russia's annexation of the Occupied Territories, as it is assumed that immediately after the referenda, Russia would ratify the incorporation of the Occupied Territories into the Russian Federation. In turn, it is expected that Russia would then declare that any attempt by Ukraine to regain those territories would be regarded as an attack on Russian territory.

Despite the various legal rationales publicized by Russia, the referenda and any subsequent incorporation of the Occupied Territories into the Russian federation will be illegitimate and have no legal effect.

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[1] Paul Dallison, "Separatists in Ukraine's Donbas to hold votes on joining Russia," Politico, Sept. 20, 2022, *available at* https://www.politico.eu/article/separatists-in-ukraine-luhansk-region-to-hold-referendum-on-joining-russia/.

The effort by Russia to annex the Occupied Territories via referendum violates Ukraine's fundamental right to territorial integrity. The planned annexation also violates numerous Russian and international guarantees safeguarding Ukraine's territorial integrity. While there are corollary rights of self-determination and remedial secession, Russia's argument referencing Kosovo as justification and precedent do not apply to Ukraine for numerous reasons including that no systematic denial of rights existed within the Occupied Territories and Ukraine prior to Russia's invasion.

Background

Donetsk and Luhansk are oblasts within Ukraine that sit in close proximity to Russia. These oblasts have historically had strong ties to the Russian culture.[2] In 2014, conflicts arising from pro-Russia unrest materialized and separatists eventually seized control of the main government buildings and proclaimed the regions independent as the "Donetsk People's Republic" and the "Luhansk People's Republic." The current referenda attempt to provide a legal platform for Russia to establish the Donetsk People's Republic and the Luhansk People's Republic as independent States, with the intention to subsequently join Russia. In reality, they act as a legal cover for the Russian annexation of the Donbas Region from Ukraine.

Since the outset of the invasion of the Donbas Region, and all of Ukraine as of February of 2022, Russia's plan to eventually incorporate the Occupied Territories has been apparent. Russia has executed targeted efforts to erase Ukrainian culture from the Donbas Region to strengthen its claims that residents of the Donbas Region want to be a part of Russia. After the invasion, Russia appointed its own officials to administer the Occupied Territories and mandated schools to teach the Russian curriculum. As part of the plan for annexation, Russia has also encouraged local residents to apply for Russian passports in order to access national benefits.

Despite taking the official position that it is up to the residents of the Occupied Territories to decide whether they want to live in Russia or Ukraine, Russia has unfairly influenced the population and culture of the Donbas region through oppression, coercion, threats of punishment, and the lack of independent

[2] In 1994, results from a referendum, which was later annulled by Ukraine, identified that 90% of the voters recognized Russian as the official language of the Donbas Region.

observers to ensure that the referenda substantiate pro-Russia support.[3] Moreover, there is little guarantee of a free and fair election as the referenda are organized against a backdrop of military occupation, documented atrocities, and numerous displaced persons. Should the results of the upcoming referenda show pro-Russia support (as they undoubtedly will), Russia will be one step closer in their overall plan for annexation. Once annexed, it is expected that Russia will absorb the four regions as Russian territory and assert that any future Ukrainian attack to reclaim the Occupied Territories would be an attack against Russia.

Plans to hold these referenda have been announced by separatist leaders and Kremlin-backed officials in these regions. Presently, as reported through public news outlets, Russia confirmed that the new referenda are expected to take place from September 23 to 27 in the Occupied Territories.

The Crimea Prelude

The approach of managed referenda followed by attempted territorial annexation is a familiar page from the Russian playbook used to support the forcible seizure and claimed territorial integration of Crimea from Ukraine in 2014.[4]

Shortly after the seizure of portions of the Donbas Region and the entirety of the Crimean Peninsula in 2014, Russia appointed pro-Russian officials to hold municipal and regional leadership roles within the parts of Ukraine that came under the control of Russia or its allied separatist groups.

In Crimea, these separatist leaders promptly organized a referendum in 2014 to show local support for independence from Ukraine as a first step toward Russia's goal of establishing the region's desire to become part of Russia. The 2014 Crimean referendum was also designed to demonstrate that a majority of voters were in favor of seeking political independence from Ukraine and supported annexation by Russia. On March 17, 2014, Crimea declared its independence from Ukraine and was annexed by Russia four days later.

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[3] *See* Pavel Polityuk, "Ukraine says residents coerced into Russian annexation vote, West condemns 'sham'," Reuters, Sept. 23, 2022, *available at* https://www.reuters.com/world/europe/ukraine-marches-farther-into-liberated-lands-separatist-calls-urgent-referendum-2022-09-19/.

[4] Note, 2014 was not the first time Russia engaged in similar tactics. In 2006, Russia engaged in the same strategy with respect to Abkhazia and South Ossetia (so-called breakaway regions in Georgia).

The Venice Commission, organized by the Council of Europe to examine issues concerning democratic procedure and the rule of law, examined the legality of the Crimean referendum on joining Russia. In its report, the Venice Commission concluded that the referendum was illegal under Ukrainian law. According to the Venice Commission, the referendum failed to meet European standards on such plebiscites as established by its Code of Good Practice on Referenda. Among other issues, the Venice Commission noted that the referendum in Crimea was worded imprecisely, conducted in the presence of significant military presence, and given a short lead time prior to the vote. The Venice Commission also had concerns and questions about freedom of expression in Crimea during the referendum.[5]

The international community widely rejected the attempted annexation of Crimea. Only eight member States of the United Nations recognized the annexation of Crimea, while a U.N. General Assembly resolution reaffirming the territorial integrity of Ukraine and denouncing the referendum as illegitimate and having no basis to justify the annexation of Crimea was adopted 100 votes to 11, with 58 abstentions. The U.N. General Assembly continues to periodically adopt resolutions reaffirming the territorial integrity of Ukraine and its non-recognition of the Russian annexation. A number of States imposed and maintain economic sanctions tied to the illegal annexation, and Russia was even expelled from the influential G8 intergovernmental organization in protest over the illegal annexation.

Current Legal Status of Donetsk and Luhansk

A series of international agreements were ratified starting in 2014 in an attempt to end the conflict between the Ukraine and Russia and Russian-backed separatists in the Donbas Region. Extensive negotiations between Ukraine and Russia, mediated by the Organization of Security and Co-operation in Europe ("OSCE") led to the Minsk Protocol which mandated an immediate ceasefire between Russia and Ukraine. Despite this agreement, fighting in the region continued.

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[5] On "Whether the Decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum on Becoming a Constituent Territory of the Russian Federation or Restoring Crimea's 1992 Constitution is Compatible with Constitutional Principles," Opinion, EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (Mar. 21, 2014), *available at* https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)002-e.

In 2015, Ukraine, Russia, and the OSCE entered into a subsequent agreement, Minsk II, to mandate another immediate ceasefire. Unlike the Minsk Protocol, Minsk II set forth military and political measures intended to, among other things, (i) start a dialogue on interim self-governance for the two regions, (ii) provide constitutional reform in Ukraine (including decentralization), and (iii) restore full control of the State border to Ukraine. At present, these measures remain largely unimplemented, and the conflicts continue. Russia has gone so far as to unilaterally declare that the Minsk agreements "no longer exist."[6]

Indeed, the 2022 Russian invasion into Ukraine completely upended the situation in the Donbas Region. While there had been a war of attrition on the borders of the Donbas Region between the pro-Russia separatists and Ukraine in the past, the outright invasion of the Donbas Region by Russia clarified that the conflict is no longer being fought through Russia's proxies in the separatist groups. Rather, war efforts are being carried out by Russia's official military forces. Regardless of the military situation in the Donbas Region, the Donbas Region is legally a part of Ukraine under international law and the current situation on the ground does nothing to alter this legal status.

In contrast to the Donetsk and Luhansk oblasts, the territories in Zaporizhzhia and Kherson oblasts are newly occupied territories. These new territories that have now been occupied (coupled with Russian intent to occupy all of Ukraine), demonstrate Russia's resolve to continue this illegitimate, cyclical process of slowly conquering more territory through invasions and coordinated referenda.

Application of the Principles of International Law

The Principle of Territorial Integrity and Russia's Obligations to Honor the Borders of Other States

Territorial integrity—the respect for State boundaries—is a foundational principle of international law and has been a pillar of the international legal order for more than a hundred years. After World War II, the U.N. Charter of 1945 enshrined the principle of territorial integrity as a core legal rule among member States. Pursuant to Article 2, paragraph 4 of the Charter, "[a]ll Members shall refrain in their international relations from the threat or use of force against the

[6] BBC News, "Ukraine conflict: Biden sanctions Russia over 'beginning of invasion," Feb. 23, 2022, *available at* https://www.bbc.com/news/world-europe-60488037.

territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

In Resolution 2625 of 1970, the U.N. General Assembly reiterated "[t]he principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State." The International Court of Justice ("ICJ"), the U.N.'s highest judicial organ, has repeatedly recognized that the principle of territorial integrity reflects customary international law (*i.e.*, the generally accepted practice of States).

Russia has affirmed its commitment to honoring territorial integrity, both generally and more specifically in respect of Ukraine, on multiple occasions. On December 24, 1991, the U.N. Secretary General received a letter from Russian President Boris Yeltsin stating that the Soviet Union had ceased to exist. In this letter, President Yeltsin declared that Russia would continue the Soviet Union's membership in the U.N. and all of its organs and organizations and maintain full responsibility for all the rights and obligations of the Soviet Union under the U.N. Charter. Yeltsin's letter to the U.N. Secretary General implicitly acknowledged the territorial continuity and territorial integrity of Russia, Ukraine and the other States emerging from the dissolution of the former Soviet Union. Over the years, Russia has signed several agreements with Ukraine that guarantee it will honor Ukraine's territorial integrity, including:

- The Belovezh Accords. On December 8, 1991, Russia alongside Ukraine and Belarus, established the Commonwealth of Independent States pursuant to the Belovezh Accords, under which Russia agreed to "acknowledge and respect" the territorial integrity of the other Commonwealth States and the "inviolability of existing borders within the Commonwealth."

- The Budapest Memorandum. In 1994, in connection with Ukraine's commitment to eliminate all nuclear weapons from its territory, Russia, Ukraine, and the United Kingdom signed the Budapest Memorandum pursuant to which Russia reaffirmed its obligation to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine, and agreed that none of its weapons will ever be used against Ukraine except in self-defense or otherwise in accordance with the U.N. Charter.

- The Alma-Ata Protocols. On December 21, 1995, Russia, Ukraine, and nine other former Soviet republics expanded the Commonwealth of Independent States through the Alma-Ata Protocols, committing to "recognizing and respecting each other's territorial integrity and the inviolability of existing borders."

Self -Determination as an Exception to Territorial Integrity

One of the ways in which a State's territorial integrity can be altered, in limited circumstances, is through the exercise of the principle of self-determination. Despite being historically recognized as a concept essential to individual liberty, it was not until the 20th century, after the end of the First World War, for self-determination to be formally documented as a fundamental principle in the context of international relations. The doctrine is still applied very narrowly as an exception to the application of the principle of territorial integrity. This is acknowledged in certain soft law instruments, such as the Friendly Relations Declaration, the Helsinki Final Act, the Charter of Paris, and the Vienna Declaration and Programme of Action.[7] These instruments contain "safeguard clauses" that limit the right to self-determination.[8]

Modern cases of self-determination distinguish between a right to internal versus external self-determination, and these rights are not equal under customary international law. There is little debate around the right to internal self-determination, described as a group's right to preserve its cultural, religious, and political autonomy within the framework of an existing State. Examples of internal self-determination, include the right of a particular ethnic group, such as the Kikuyu people in central Kenya, the Maori people in New Zealand or the Mayan people of Mexico to preserve their culture and language, within the State.

External self-determination, the attempt of a distinct group of people within a State to secede to be free of "alien subjugation, domination and exploitation"[9] is more controversial. In the context of decolonization, customary international law

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[7] The full names for these soft law instruments are: 2625 (XXV). Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Conference on Security and Co-operation in Europe Final Act (Helsinki 1975), the Charter of Paris for a New Europe (Paris 1990), and the Vienna Declaration and Programme of Action (Vienna 1993).

[8] Simone F. van der Driest, Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law, *Neth Int Law Rev* 62, 329–363, 338 (2015) [hereinafter "van der Driest"].

[9] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* Advisory Opinion, INTERNATIONAL COURT OF JUSTICE, 22 July 2010, ¶ 82.

has recognized the effort of colonized States to seek decolonization as a form of self-determination[10] and has left the legal boundaries of external self-determination ill-defined.[11] International law generally requires external self-determination to be a last resort from extreme oppression, and nearly always requires the consent of the parent State.

The analysis of whether a group of people have a right to external self-determination begins with defining the relevant "people" which is then followed by a two-prong test. The first prong examines the extent of commonalities shared by the people (*e.g.*, racial background, ethnicity, language, religion, history, and cultural heritage) and considers whether the people have a distinct claim for territorial integrity outside of the parent State. The second prong examines the people's independent perception of themselves collectively and whether they can form a sustainable government body.[12] These prongs alone do not qualify for an unfettered right to external self-determination without the consent of the parent State. Instead, a group must not be able to obtain internal self-determination by other means, for example, a sizable, self-defined minority group of people faces a pattern of systemic discrimination or exploitation and the central government has rejected a compromise solution which effectively deprives the group of its fundamental human rights.

Outcomes from the application of this test vary, with self-government within a State at one of the spectrum and total independence from the parent State at the other end of the spectrum. The group of people asserting a claim of self-determination must demonstrate the viability and legal basis of their claim. Customary international law defers to *jus cogens* and other precedent to assess whether the claim falls within the bounds of prominent and accepted circumstances that give rise to self-determination, and if so, to what extent and how such claim should be recognized.

In most cases, a group that meets several of the criteria for self-determination can successfully seek and obtain internal self-determination. That is, they can receive redress within the State. Independence is only a remedy of last resort if no internally agreed-upon remedy can be attained, and fundamental human

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[10] Charter of the United Nations, 26 June 1945, 1 UNTS XVI; *see also* van der Driest (2015), 335.
[11] *Id.*
[12] Michael P. Scharf, *Earned Sovereignty: Judicial Underpinnings*, 31 DENV. J. INT'L L. & POL'Y 373, 379 (2003) (noting the different forms of self-determination available to a people, which include autonomy, self government, free association, and ultimately, secession).

rights have been systemically thwarted. In the application of a right to self-determination, the right is not that of an aggressor State acquiring territory of another State, but rather a right that belongs to the people seeking self-determination.

Assuming a right to self-determination is recognized, it does not necessarily follow that the right should, or must, entail external self-determination (e.g., secession). Internal self-determination through various forms of communal or regional autonomy, within the boundaries of the existing State, is the first remedy available to people seeking self-determination. Only in extreme cases would external self-determination be applicable where internal self-determination is insufficient. These extreme cases are limited to decolonization, foreign occupation or violent oppression of a defined group by the State.[13] Regarding Kosovar independence, Russia submitted a written statement to the ICJ in favor of an even narrower set of conditions in which external self-determination should be viewed as the appropriate remedy: "those conditions should be limited to truly extreme circumstances, such as an outright armed attack by the parent State, threatening the very existence of the people in question. Otherwise, all efforts should be taken in order to settle the tension between the parent State and the ethnic community concerned within the framework of the existing State."[14]

A legitimate exercise of a right to external self-determination does not sanction the forced removal of territory from one State and its appendage to a different State. While military interventions on humanitarian grounds may be initiated to support independence movements, such as the international involvement that was mobilized in Kosovo, such intervention does not warrant subsequent annexation of territory by another State.

Right of "Remedial Secession" as an Exception to Territorial Integrity

Remedial secession is a corollary to external self-determination. Remedial secession has been the subject of much debate throughout the 20th and 21st century. Because it collides with the well-established principle of territorial integrity, remedial secession in a non-colonial context was developed out of a new framework to provide for people who face *extreme* denial of internal self-

[13] *Reference re Secession of Quebec* [1998] 2 SCR 217, 287 (Supreme Court of Canada) [hereinafter "Quebec Secession (Supreme Court of Canada)"].
[14] Written Statement by the Russian Federation, Accordance with international law of the unilateral declaration of independence in respect of Kosovo, April 16, 2009, ¶ 88.

determination.[15] A remedial secession may be justified only as a "safeguard" for people who are subject to "alien subjugation, domination or exploitation outside a colonial context."[16] Attempts to establish a "qualified right" of remedial secession require evidence of oppression, and ultimate success is dependent upon (i) recognition of the State by the international community and (ii) the conduct of the parent State toward the independence-seeking entity.[17]

First, the term secession refers to the unilateral withdrawal from a parent State to create a new State. Secession is a legally neutral act that is neither accepted nor prohibited by international law.[18] The treatment of secession in prior court decisions and legislations leaves room for an interpretation that a right to self-determination beyond decolonization could lead to an exception from the practice of honoring territorial integrity but only in certain extreme last-resort circumstances. For example, the General Assembly's Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which is considered to reflect customary international law, provides:

> *Nothing in the foregoing paragraphs [concerning the right to self-determination] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.*[19]

Second, the term "remedial" in the context of secession refers to the theory that people are entitled to secede from their parent State under extraordinary

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[15] J. Vidmar, *Remedial Secession in International Law: Theory and (Lack of) Practice*, 6 ST ANTONY'S INT'L REV. 37 (2010), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2060318 [hereinafter "Vidmar, Remedial Secession"].
[16] *See* Quebec Secession (Supreme Court of Canada).
[17] Vidmar, Remedial Secession at 41.
[18] *See* James Crawford, *The Creation of States in International Law* (OUP 2006); Jure Vidmar, *Explaining the Legal Effects of Recognition*, ICLQ 61 (2012); Simone F. van den Driest, *Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law,* NETH. INT. LAW REV. 62 (2015); Quebec Secession (Supreme Court of Canada), 277-278.
[19] van der Driest, 340, *citing* Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV), UN Doc. A/RES/2625 (XXV), Annex, 24 October 1970, Principle V, ¶ 7.

circumstances when their right to internal self-determination is being denied and there are no other available remedies. Often referred to as the doctrine of last resort, remedial secession is not an absolute "right." Such a right may, according to some legal scholars, exist in circumstances where self-determination has been frustrated, human rights have been flagrantly violated, and there has been structural discrimination.[20] It requires approval, typically from the parent State, prior to implementation,[21] but if such approval is not forthcoming, may justify intervention in a State for humanitarian reasons. In the *Aaland Islands* case, the Permanent Court of International Justice held that, "the separation of a minority from the State can only be considered an altogether exceptional solution, a last resort where a State lacks either the will or the power to enact and apply just and effective guarantees."[22]

Russia's Arguments in Favor of Self-Determination and Remedial Secession in the Occupied Territories and Relevant Case Examples

Russia is invoking the principle of self-determination as an exception to territorial integrity to justify its occupation and subsequent annexation of the Occupied Territories. On several occasions, Russia has used similar justifications to bolster ethnic Russian separatist movements in neighboring States and to annex territory. In 2008, Russia used similar pretexts to justify its invasion of Georgia in support of separatists in the regions of Abkhazia and South Ossetia.[23] In 2014, Russia based its annexation of Crimea on similar principles and argued that the 2014 referendum and the subsequent annexation of Crimea was a valid exercise of the Crimean people's self-determination.

The referenda being organized in the Donbas Region is not in line with democratic standards, just as was the case with the Russian referendum in Crimea. In fact, on September 21, 2022, the Secretary General of the Council of Europe, in a statement deploring the Russian plans for a referendum in the Occupied Territories, reiterated the original findings of the Venice Commission and noted

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[20] van der Driest, 341.
[21] Vidmar, Remedial Secession at 37, 38.
[22] *The Question of the Aaland Islands: Report of the Commission of Jurists*, (1920) LEAGUE OF NATIONS OFFICIAL JOURNAL SPEC SUPP 3, 27.
[23] The 2008 Russo-Georgian War: Putin's green light, ATLANTIC COUNCIL (Aug. 7, 2021), *available at* https://www.atlanticcouncil.org/blogs/ukrainealert/the-2008-russo-georgian-war-putins-green-light/.

that "[t]hose conclusions remain valid today, with respect to all occupied territories."[24]

While ignoring more relevant and applicable precedent, Russia cites to Kosovo's independence as an example of self-determination to justify its intended annexation of the Occupied Territories in Ukraine. Arguing in favor of self-determination in Crimea, Russia has cited the ICJ's 2010 Kosovo opinion that determined that Kosovo's declaration of independence did not violate international law.[25] Attention must be called to the hypocrisy of Russia's reliance on such justifications as, back in 2008, Russia had openly supported limiting a State's right to external self-determination in opposition to Kosovar independence from Russian-allied Serbia. A cynical move on Russia's part, Russia's position adopts arguments utilized in the Kosovo proceedings by the U.S. and the U.K. that it had diametrically opposed at the time, vis-à-vis Kosovo.

In the Donbas Region, Russia is seeking to use these referenda to create a pretext of legitimacy regarding its efforts to fold the Occupied Territories into Russia, as it follows the same playbook used to annex Crimea in 2014.[26] The Russian government's claims of Ukrainian oppression of ethnic Russians in both the Donbas Region and Crimea are greatly overstated and certainly do not satisfy the high bar Russia itself views as necessary for a valid secession. It is expected that Russia will manipulate the referenda to demonstrate that, since the removal of Ukraine's pro-Russia president in 2014, the people of the Occupied Territories have faced severe political persecution prohibiting any legitimate exercise of a right to self-determination under Ukraine's current constitutional framework and requiring instead the exercise of their right to remedially secede.

The rationale set out in the Quebec, Scotland, and Kosovo contexts regarding the recognition of self-determination and its fundamental elements are further outlined and distinguished from the Russia-Ukraine context below.

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[24] *Secretary General deplores Russian plans for a referendum to annex Ukrainian territories*, COUNCIL OF EUROPE (Sept. 15, 2022), *available at* https://www.coe.int/en/web/portal/-/secretary-general-deplores-russian-plans-for-a-referendum-to-annex-ukrainian-territories.
[25] *See generally* Anton Bebler, *Crimea and the Russian-Ukraine Conflict*, 15 ROMANIAN J. INT'L L. 35, 46 (2015).
[26] Shaun Walker & Pjotr Sauer, *"A referendum is not right": occupied Kherson looks to uncertain future*, The Guardian, Aug. 15, 2022, *available at* https://www.theguardian.com/world/2022/aug/15/ukraine-kherson-region-referendum-russia.

Quebec – No Unilateral Right to Secession

The Quebec sovereignty movement occurred largely in the late 20th century and led to two failed referenda on the independence of the province. In contrast to other examples of self-determination, Quebec's sovereignty movement has largely focused on nonviolent, democratic, and legal means. In examining the relationship between the Canadian constitution and the principles of democracy and self-determination, the Supreme Court of Canada explained that while the principles of federalism and territorial integrity would prevent the unilateral secession of Quebec by referendum or through a unilateral declaration of the provincial assembly, the competing principles of democracy and self-determination under both the Canadian constitution and international law would create an obligation for the federal government of Canada to consider secession proposals from Quebec, within the parameters of the Canadian constitution.

In evaluating the questions before it, the Supreme Court of Canada emphasized that "[t]he recognized sources of international law establish that the right to self-determination of a people is ordinarily fulfilled through internal self-determination – a people's pursuit of its political economic, social and cultural development within the framework of an existing State." [27] While ultimately concluding that no such right to unilateral secession existed in Canadian law, the Court declared that the right may arise under international law in cases of (i) colonialism, (ii) "subjugation, domination or exploitation" and, possibly, (iii) where people are denied "meaningful exercise" of self-determination within the framework of their existing State."[28]

Importantly, the case of Quebec illustrates that internal self-determination can be achieved without independence. The people of the Donbas Region and the Zaporizhzhia and Kherson oblasts could similarly have obtained internal self-determination within the framework of Ukraine (and arguably may have already enjoyed such protections). Unlike the Quebec case the Occupied Territories of Ukraine faced foreign aggression by Russia and did not seek an internal, nonviolent, transparent, and democratic consultation process to seek the creation of a new State through legal means. There was no evidence of coercion or fraud in the two failed referenda in Quebec. In contrast, Russia is seeking to legitimize a forceful territorial annexation through rushed and undemocratic referenda.

[27] Quebec Secession (Supreme Court of Canada), 280-281.
[28] Quebec Secession (Supreme Court of Canada), 295-296.

Scotland – Consensual Agreement with the UK Government

Scotland similarly held a referendum on its independence in 2014.[29] The referendum followed an agreement between the Scottish and United Kingdom governments where they agreed on the terms of the referendum and granted constitutional legitimacy to the process. At the time, the Scottish government was not advocating for a unilateral act proclaiming independence, but rather asserted that a positive vote for independence would have moral and political force, giving a clear mandate to the Scottish government to negotiate the secession of Scotland through an act of the UK parliament. Importantly, almost everyone living in Scotland on the day of the referendum that was 16 or older was able to vote.[30]

Noticeably, the Occupied Territories have not followed a similar path as Scotland. At the most basic level, so much uncertainty exists around which Ukrainian citizens are available and able to exercise their right to vote. Russia has forcefully imposed referenda and has expressed no willingness to agree on a framework that would comply with Ukrainian law.

Kosovo – Legality of Declaration of Independence

The ethnic Albanians of Kosovo had a long history of systemic discrimination which rapidly escalated in the late-1990s with the dissolution of the Federal Republic of Yugoslavia. Over a period of years, compromise solutions were rejected by Serbia, including a proposal to return Kosovo to an autonomous region within Serbia. In response to atrocity crimes the international community launched a NATO led humanitarian intervention, followed by the Security Council's adoption of Resolution 1244 setting out the path for international supervision. The subsequently created U.N. Mission in Kosovo spent nearly a decade managing Kosovo's democratic development and its transition to independence.

In 2008, the Assembly of Kosovo unilaterally adopted a declaration of independence proclaiming the Republic of Kosovo to be independent from Serbia. In 2010, most of the international community, with the notable exception of Russia, accepted this declaration of independence and recognized Kosovo as a

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[29] Scottish Independence Referendum (Sept. 18, 2014), *available at* https://www.gov.uk/government/topical-events/scottish-independence-referendum/about.

[30] Laura Smith-Spark, *Scotland's vote on independence: What you need to know*, CNN, Sept. 18, 2014, *available at* https://www.cnn.com/2014/09/09/world/europe/scottish-referendum-explainer/index.html.

sovereign State.[31] Following a referral from the U.N. General Assembly, the International Court of Justice was asked to produce an advisory opinion determining—independently of the international support—whether the unilateral declaration of independence by Kosovo was in accordance with international law.[32] The ICJ addressed the question in the negative by determining that no rule of international law prohibited such a declaration of independence.[33] However, due to the nature of the question addressed to the Court, the ICJ refused to determine whether the declaration was a proper exercise of Kosovo's right to self-determination or right to "remedial secession."[34] Therefore, the legal effects of the unilateral declaration in international law remain unresolved.

Nevertheless, the case of Kosovo is inapplicable to the Ukrainian situation as the referenda come on the heels of an invasion from a neighboring country that forced more than two million people to flee the region, not a protracted conflict from within. Given the mass exodus of the local population and the death of tens of thousands of residents, the ability of any referendum to express the will of the local population in the occupied territories to exercise their right to self-determination or remedial secession is gravely impaired.[35] In contrast to the situation in Kosovo, there is not any period since Ukrainian independence from the USSR during which the Ukrainian government violently repressed ethnic Russians or Russian culture, nor any history of U.N. administration of the territory.

Conclusion

The purpose of the referenda being held in the Occupied Territories from September 23-27 is to validate Russia's annexation of the Occupied Territories. Once annexed, Russia will declare that any attempt by Ukraine to regain those territories would be regarded as an attack on Russian territory.

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[31] *See* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 ICJ REP. 403, ¶¶ 56, 79 (July 22) [hereinafter "Kosovo Advisory Opinion"]. To date, over 100 countries have recognized Kosovo, including all G-7 States and over three-quarters of European Union member States.

[32] Kosovo Advisory Opinion ¶ 1.

[33] *See* Kosovo Advisory Opinion ¶¶ 56, 79.

[34] Kosovo Advisory Opinion ¶¶ 82-83.

[35] *See* European Commission for Democracy Through Law (Venice Commission), Opinion on "Whether the Decision Taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum on Becoming a Constituent Territory of the Russian Federation or Restoring Crimea's 1992 Constitution is Compatible with Constitutional Principle," 21 March 2014, CDL-AD(2014)002, *available at* https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)002-e.

The referenda and any subsequent incorporation of the Occupied Territories into the Russian federation would be illegitimate and have no legal effect. The effort by Russia to annex the Occupied Territories via referendum violates Ukraine's fundamental right to territorial integrity. The planned annexation also violates numerous Russian and international guarantees safeguarding Ukraine's territorial integrity. A claim of remedial secession is inapplicable. While there is a recognized right of self-determination in international jurisprudence, Russia is incorrectly interpreting established international law that protects territorial integrity in order to achieve its stated political objective of absorbing territory from an independent neighboring State.

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PILPG's Policy Planning Initiative supports the development of long term, strategic policy planning that is crucial to international accountability, global conflict resolution, and the establishment of international peace. The Initiative provides timely and accurate policy planning analysis and work product on pressing and future policy conundrums by leveraging PILPG's deep network of talent within the international legal and policy communities and experience with its *pro bono* clients globally. PILPG Policy Planning focuses on advising policymakers, policy shapers, and engaged stakeholders on pressing issues within the arenas of international law, war crimes prosecution, and conflict resolution efforts. This includes identifying and addressing gaps within existing policies, anticipating key conundrums and questions that will riddle future policy decisions, applying lessons learned from comparative state practice, and proactively producing and sharing work product to inform such policies and avoid crisis decision making.