



UKRAINIAN AMERICAN BAR ASSOCIATION

Асоціація Українських Правників Америки

March 16, 2014

STATEMENT

Crimean Referendum to Join Russia Violates Ukraine's Constitution, Domestic Laws, and General Principles of International Law

The Crimean referendum to join Russia on March 16 is illegal and threatens Ukrainian sovereignty, territorial integrity, national and world peace, and international order and security. It is against the Constitution of Ukraine, its laws, generally accepted norms and principles of international law, and every conceivable principle of democracy. Countless international organizations and most countries around the world have already stated that under no circumstances is the Crimean Referendum legitimate; therefore, its results will not be accepted and recognized by the international community.

First, it is plainly obvious that a Crimean-only referendum regarding its status is in direct violation of the Constitution of Ukraine. Article 2 of the Constitution (both 1996 and 2004 versions) clearly states that Ukraine is a unitary state and that its territory within its present borders shall be indivisible and inviolable. Ukraine is comprised of 25 administrative regions (including the Autonomous Republic of Crimea), plus the capital of Kyiv and the city of Sevastopol. Crimea is an integral constituent part of Ukraine (Article 134). The territorial structure of Ukraine is based on the principles of unity and integrity of the State territory (Article 134). The Constitution of Ukraine cannot be amended if the amendment is aimed at the liquidation of the independence or violation of the territorial integrity of Ukraine (Article 157). Article 73 of the Constitution clearly prescribes that any alterations to the territory of Ukraine shall be approved exclusively by an all-Ukrainian referendum. Article 72 provides an imperative procedure for the all-Ukrainian referendum that must be strictly observed.

The Crimean referendum also contradicts the Constitution of the Autonomous Republic of Crimea. Paragraph 2 of part 2 of its Article 7 unequivocally states that any referendum to change the territorial boundaries of Crimea must be conducted in accordance with the Constitution of Ukraine. Further, the opening paragraph of the Crimean Constitution makes a general declaration that the Autonomous Republic of Crimea is an integral part of Ukraine and shall govern itself within the boundaries set by the Ukrainian Constitution. Drawing on this principle, paragraph 2 of Article 2 of the Crimean Constitution states that the Constitution of Ukraine preempts any conflicting law passed by the Autonomous Republic of Crimea.

According to paragraphs 13 and 20 of Article 92 of the Constitution of Ukraine, the questions of territorial integrity and the conduct of referenda are to be regulated exclusively by the laws of Ukraine adopted by the Verkhovna Rada (Ukrainian parliament). There is presently no law in

Ukraine that regulates regional (local) referenda. Thus, the mere fact the Crimean parliament decided to hold a local referendum without an existing procedure defined by the law is, on its face, unlawful and violates human and citizen rights. Article 57 of the Constitution of Ukraine states that everyone has the right to know his or her rights and duties. Furthermore, laws and other regulatory legal acts defining the rights and duties of citizens are invalid, unless the population has been notified in compliance with the procedure established by law. Because the law on local referendum does not exist, the rights and duties of citizens are not defined and, evidently, no one knows the extent of such rights and duties.

Even from a practical point of view, the referendum cannot pass the test of legitimacy. The referendum was organized in 10 days by a self-appointed Crimean leader who represents the Russian Unity Party, which received less than 4% of support in last election. There is no expert analysis of the wording of the questions included on the referendum ballot, the procedure for running the vote is more than questionable, and the international experts and observers have not been allowed into the region. Moreover, the “voting” will be held in an environment where armed soldiers, with no insignia but widely considered to be Russian, are overseeing the event. It is hard to imagine that the free expression of the voters’ will, required by part 2 of Article 71 of the Constitution of Ukraine, can be guaranteed under these circumstances. The voters, if they do vote, will be doing so under duress.

Various ethnic and religious minority groups in Ukraine, including the Crimean Tatars and the Jews, as well as Ukraine’s civic sector have all expressed their desire to preserve status quo and stay with Ukraine and not to be forced to flee their homes and leave their lives behind. Notably, the Majlis of the Crimean Tatar People has asked the Crimean residents to boycott the sham referendum. Crimea’s indigenous population of about 300,000 Crimean Tatars, who suffered persecution and killings under the Soviet regime and Stalin, spent decades to return to their homeland, yet are facing grave danger again. It needs to be noted that the wording of the referendum ballot does not even allow for preservation of the status quo. This clearly violates citizens’ rights and restricts basic freedoms, in contradiction of the Constitution of Ukraine.

The referendum in Crimea has also been universally condemned as unconstitutional and illegal by the Ukrainian government institutions, as well as by representatives of Ukraine’s ethnic and religious minorities and the civic sector. On March 7, the interim President of Ukraine Oleksandr Turchynov suspended the Crimean parliament’s resolution authorizing the March 16 referendum. On March 11, the Verkhovna Rada issued a statement demanding the Crimean parliament to immediately revise its decision in compliance with the Constitution and the laws of Ukraine. Ukraine’s Minister of Justice Pavlo Petrenko, Ombudsman Valeriya Lutkovska, and Chair of the Council of Judges Vasyl Onopenko have come out with similar statements. On March 14, the Constitutional Court of Ukraine ruled that the Crimean referendum is unconstitutional and ordered the peninsula’s authorities to immediately cease any preparatory actions in this regard. Furthermore, on March 15, the Council of Europe’s Venice Commission for Democracy through Law issued an opinion holding the referendum illegitimate, as the possibility of such a vote is not provided for by either the Ukrainian or the Crimean Constitution and the procedure and circumstances under which it is being conducted are contrary to all democratic principles.¹

¹ Unfortunately, full text of the Opinion will not be published until March 21-22.

The legality of the referendum in Crimea similarly does not pass muster under the general principles of international law. On one hand, both the Charter of the United Nations (UN Charter) and the International Covenant on Civil and Political Rights (ICCPR) recognize that “[a]ll peoples have the right to self-determination.” On the other hand, under Article 2(4) of the UN Charter and the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (1970), “Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state...” The Helsinki Final Act of the Conference on Security and Cooperation in Europe (1975) reiterates this principle and continues, in its Chapter 1, that, while the national borders can be changed, this must occur “in accordance with international law, by peaceful means and by agreement.” Most recently, on September 19, 2012, world leaders and civil society representatives adopted the Declaration on the Rule of Law at the National and International Levels, reaffirming their commitment to upholding the sovereign equality of all States, respecting their territorial integrity and political independence, refraining from the threat or use of force in a manner inconsistent with the UN Charter, and upholding the peaceful resolution of disputes in conformity with the principles of justice and international law.

The international legal framework recognizes the need to carefully balance two competing principles – the right to self-determination and the territorial integrity of the state. In this context, the accepted position under international law and established practice gives clear preference for maintaining the status quo with respect to recognized territorial borders of the states. The 1993 Vienna Declaration of the UN World Conference on Human Rights states that the right to self-determination “shall not 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...” In other words, in the event of a conflict between the people’s right to self-determination and the principle of territorial integrity of the state, the latter usually prevails.

International law does not recognize the right to secession as a preferred manifestation of the right to self-determination. In fact, it has been said that such a narrow interpretation of the right to self-determination threatens territorial integrity and can only lead to greater problems than solutions. Instead, the right to self-determination should be interpreted broadly, including through such forms as right to cultural independence, religious freedom, use of own language, and enhanced autonomy, all exercised within the confines of existing national borders and falling short of secession. Every effort should be made to preserve territorial integrity and political unity of the states.

This preference for territorial integrity over separatism does not mean that the international legal framework does not recognize the right to secession in certain, limited conditions. However, this right to remedial secession may only be triggered under the most extreme circumstances, typically involving situations of widespread, continuous pattern of gross human rights violations (such as crimes against humanity or genocide) against a vulnerable group. The exercise of the right to self-determination through secession is viewed as a last resort, through the prism of the duty of international community to protect against gross abuses of human rights. Moreover, even in such instances, the international practice does not recognize the right of a people to unilateral

secession from a recognized state. Instead, any settlement of domestic conflict that deviates from the territorial status quo must necessarily rely on an internationally sanctioned negotiation process among all interested parties and, to the extent possible, the consent of disputing parties.²

It appears that no one but Russia believes that the situation in Crimea presents any of the extreme circumstances that could justify the argument for the exercise of the right self-determination by means of remedial secession. In fact, it should be stressed that no evidence exists whatsoever that Ukraine's interim government threatens the population of Crimea in any way. Specifically, the Russian population in Crimea has not been subject to violations of their human rights or oppression in the exercise of their cultural, religious, or linguistic rights, and so cannot be seen as a vulnerable group in this context. Moreover, the new Ukrainian authorities have signaled their willingness to negotiate the granting of expanded autonomy to the Crimean citizens, most recently during the speech by Prime Minister Arseniy Yatsenyuk before the UN Security Council on March 13. Additionally, the Crimean Tatars, which represent the indigenous population of Crimea, have consistently expressed their support for preservation of territorial integrity and sovereignty of the independent Ukraine. Russian and other ethnic populations present in Crimea are fully able to exercise their rights within the established territorial boundaries of Ukraine, and therefore are not entitled to separate from Ukraine in a unilateral manner. It is for this very reason that the referendum in Crimea does not enjoy the support of international community, having been condemned by the UN Security Council,³ Council of Europe, OSCE, EU, NATO, the United States, and most other countries around the world. The Crimean referendum is seen as disruptive of the established international order, the preservation of which is one of the key objectives of international security systems.

Russia and separatist groups in Crimea have recently invoked Kosovo in support of their position for the right to self-determination through secession. It must be noted, however, there are fundamental differences between the situation of ethnic Albanians in Kosovo under the former Yugoslavian rule and that of ethnic Russians in Crimea under the Ukrainian government. Kosovo's remedial secession was a result of a clear and documented pattern of mass atrocities perpetrated against its predominantly ethnic Albanian population. The referendum concerning Kosovo's political status was explicitly required by the 1999 UN Security Council Resolution 1244, and as such was an internationally sanctioned and accepted process. Between 1999 and Kosovo's referendum in 2008, the territory was administered as a UN protectorate, which allowed to engage in extensive international negotiations and a mediation process overseen by an international Contact Group.

² In this regard, a 1998 advisory opinion of the Supreme Court of Canada, *Reference re Secession of Quebec*, offers instrumental guidance with respect to the present situation in Crimea. In it, the Court held that Quebec's proposed referendum on separation from Canada was unconstitutional under Canada's Constitution. Instead, any proposed secession would require a nationwide referendum and, if approved by such referendum, be followed by intensive negotiations to define the terms under which Quebec would gain independence from Canada. The Court also reaffirmed the fact that international law does not entitle constituent parts of a sovereign state to secede unilaterally from the parent state, as long as the people are able to meaningfully exercise their right to self-determination within an existing nation state.

³ On March 15, the UN Security Council would have issued a formal resolution strongly condemning the Crimean referendum as illegal, but for Russia's veto over the proposed document. The other 13 members of the Council voted in favor of the resolution, with China abstaining.

Russia has explicitly rejected such an approach with respect to settlement of the status of Crimea. It refused to participate in a proposed Contact Group, and continues to rely on its surrogates in Crimea to physically intimidate and prevent access to the peninsula by the UN and the OSCE monitors. The hypocrisy of Russia's reference to Kosovo is even more astonishing, given the fact that Russia has not recognized Kosovo's independence. In fact, in its written statement to the International Court of Justice submitted as part of a proceeding to issue an advisory opinion on the status of Kosovo, Russia argued that unilateral secession as a manifestation of the right to self-determination should apply "only in extreme circumstances, when the people concerned is continuously subjected to most severe forms of oppression that endangers [their] very existence..." and that "the situation [in Kosovo] does not even begin to come close to the 'extreme circumstances' under which the right to secession may be invoked."

In light of the above analysis, any referendum in Crimea would have no legal effect under either Ukrainian or international law. Given the lack of adequate preparation and the intimidating presence of Russian troops, it would also be a deeply flawed process, which would have no moral effect. The annexation of Crimea could have grave implications for the international legal order that protects the unity and sovereignty of all states. The referendum outcome, despite being illegal and illegitimate under both national and international rules and principles in the first place, is almost certain to push Crimea into the unresolved status. For all of the reasons stated above, Ukraine and all civilized nations will definitely not recognize the referendum. Russia, however, will keep referring to its fraudulent results. For years to come, Russia can use this uncertainty around the peninsula as a certain degree of leverage in the game which the people of Ukraine have never intended to be a part of. Everything they wanted was to eliminate the vestiges of their totalitarian Soviet past and the corrupt and bloody dictatorship of Yanukovich, in order to build a strong and democratic European state. Given the strong commitment to advancing the rule of law both at the national and international levels, it is critical on this truly historic occasion for all political forces in Ukraine to respect national laws, and for all members of the international community to respect international law and justice. Most notably, it bears reminding that, under the 1994 Budapest Memorandum on Security Assurances, the United States, Great Britain, and Russia have all undertaken a commitment to provide guarantees against threats or use of force against the territorial integrity or political independence of Ukraine, in exchange for Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons and giving up the world's third largest nuclear arsenal. Ukraine has complied with its end of this agreement, and the time has now come for its other signatories to adhere to their obligations.

March 16, 2014

Statement prepared by the Constitutional Law Committee
Judge Bohdan A. Futey, Chairman