

## **THE 2014 REFERENDUM IN CRIMEA**

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### **Outline**

- The “referendum” in Crimea held on 16 March 2014 fulfilled the criteria of neither legality nor legitimacy.
- The “referendum” was conducted in breach of Ukraine’s domestic, bilateral (Ukraine-Russia) and international legal frameworks.
- The procedure for the preparation and conduct of the “referendum” on the day, including its international observation, was entirely inadequate.
- The “referendum” cannot be considered as a legitimate expression of popular will due to the violation of the criteria of free and fair voting and due to the actual number of voters and their choices being unknown.
- The “referendum” creates a precedent of illegal irredentism in interstate politics and a violation of international law.

This note provides an analysis of the legality and legitimacy of the so-called referendum on the status of Crimea held on 16 March 2014. It is argued that the “referendum” fulfilled neither criteria and hence cannot be considered either as legally valid or legitimately representative of public opinion. In conclusion the following points are made: first, a standpoint in both the Russian and Western mass-media of interpreting the “referendum” as a proxy for an opinion poll is misguided. Second, the “referendum” undermines political stability in Ukraine and beyond as it sets a precedent for illegal irredentism portrayed as democratic process.

### Background and legal framework

Crimea is an autonomous republic situated in the south of Ukraine. Geographically a peninsula, it was acquired by the Russian Empire from the decaying Ottoman Empire in 1783 (Taagepera 2014) and in 1922 it was incorporated into the Soviet Union. In 1954, on the basis of the Soviet Constitution of 1936 (Article 18), through a decision of the Presidium of the Central Committee of the Communist Party of the Soviet Union of 25 January 1954, given effect by a resolution of the Soviet Supreme Council of 19 February, the then Crimean Oblast' was transferred from the then Russian Federative to the then Ukrainian Soviet Socialist Republic, of which Ukraine is a direct successor.<sup>1</sup>

Following the collapse of the Soviet Union and the declaration of independence by Ukraine on 24 August 1991, Crimea became the Autonomous Republic of Crimea within a unitary Ukrainian state. Crimea further demanded and, following a tense stand-off with Kyiv between January 1994<sup>2</sup>-1995 under the presidency of Leonid Kuchma and with the involvement of OSCE (Stern and Druckman 2006), finally received the status of an autonomous region fixed in the Constitution of 28 June 1996. This autonomy implies its own constitution, parliament and government. However, these institutions remain subordinate to the Constitution, Parliament and President of Ukraine (according to the Articles 85(28), 85(37) and 106(16) of the Constitution of Ukraine). The Crimean Tatars, indigenous people of Crimea, are represented by their own highest representative body, the *Qurultai*, and its executive body, the *Mejlis*.

As a result of the Russian Empire's and the Soviet Union's nationalities policies, Crimea has a complex demographic history. In the aftermath of these policies, including the long-term genocide of Crimean Tatars culminating in their large-scale deportation to Central Asia in May 1944 (Moser 2014), Crimean Tatars

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<sup>1</sup> This fact is often represented as a decision by an allegedly "drunken Khrushchev" based on his nationalist sentiments (Lewycka 2014). This is incorrect as the rationale behind that decision was complex: it included territorial continuity, infrastructural and overall economic integration, and the need to consolidate Soviet power after the annexation of Western Ukraine (Kramer 2014). Also, the Crimean Oblast' was transferred to the Ukrainian Soviet Socialist Republic following a transfer in 1924 of some of that republic's south-eastern territories to the Russian Soviet Federative Socialist Republic (Bayley et al. 2012, p. 654).

<sup>2</sup> When the nationalist-minded Russian Yuri Meshkov was elected president and demanded independence, he ran into a political standoff with the Presidium of the Crimean Supreme Council by September 1994 on the basis of violating both Crimea's and Ukraine's legislation.

(recently estimated at 12% of the peninsula's population) became the third largest nationality after Russians (recently estimated at 58.3%) and Ukrainians (recently estimated at 24.3%); and 6% of population is comprised of other nationalities: Belarusians, Tatars, Armenians, Jews, Poles, Moldovans, Azeris and others, according to the national census of population of 2001.<sup>3</sup>

Despite the historic and demographic complexities of Crimea and the turbulent political scene of the rest of Ukraine, Crimea's institutional framework functioned until 23 February 2014. On that day, after the flight of President Viktor Yanukovich and the change of government following the three-month long *Maidan* protests, troops without insignia occupied administrative buildings in Crimea, blocked Ukrainian military bases there and on 6 March 2014 the Crimean Parliament made a decree "About the conduct of an all-Crimean referendum" on 16 March 2014.<sup>4</sup> A consideration is now made of the legal grounds for such a referendum to take place: domestic, bilateral (i.e. between Ukraine and Russia) and international.

The domestic legal framework was based on the Constitution of Ukraine. An alteration to the territory of Ukraine may only be decided exclusively by a national referendum, initiated for this purpose by the Parliament of Ukraine, *Verkhovna Rada*, according to the Constitution (Article 73) and to the Law of Ukraine "On the national referendum" of 2013 (Articles 3(2), 14). In the same law the procedure for organizing such a referendum is outlined, which, among other things, provides for a period of 50 days for its preparation (Article 27).<sup>5</sup>

On this basis alone, the decision by the Crimean Supreme Council to hold a referendum was legally null and void. Furthermore, it violated international legal frameworks: both bilateral, between Ukraine and Russia, and international. Crimea can only organize local referenda (Article 138 of the Constitution of Ukraine). Therefore, the "referendum" of 16 March 2014 was unconstitutional.

According to legal experts' estimates, Russia's recognition of Ukraine's borders inherited from the Soviet Union, including Crimea, was clear and unambiguous. It was secured in such bilateral treaties as the Belovezhskaya Pushcha Accords of 8 December 1991 on the dissolution of the Soviet Union, the Alma Aty Declaration of 21 December 1991 on the establishment of the Commonwealth of

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<sup>3</sup> About the number and composition population of Ukraine by data All-Ukrainian population census' 2001 data.

<sup>4</sup> Postanovlenie VR ARK "O provedenii obshchekrymskogo referendum," March 6, 2014.

<sup>5</sup> Zakon Ukrayiny "Pro vseukrayiny'kyi referendum," November 6, 2012.

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Independent States, and the Treaty on friendship, cooperation and partnership between the Russian Federation and Ukraine of 31 May 1997 (Weller 2014).

The international legal framework of interstate relations covers:

- (1) prohibition of the use of force against the sovereignty, territorial integrity or political independence of any state, based on which the use of foreign armed forces on the territory of a state is defined as amounting to aggression regardless of a declaration of war and the type of presence (invasion, attack, occupation, annexation, blockade, contravention of the agreement governing foreign troops' presence or sending irregulars), according to the United Nations (UN) General Assembly Resolution of 1974 (Article 3);
- (2) sovereign equality, refraining from the threat or use of force, inviolability of frontiers, territorial integrity of states, peaceful settlement of disputes, and non-intervention in internal affairs, according to "Helsinki Final Act OSCE" of 1 August 1975;
- (3) specifically for Ukraine, security guarantees on the political independence, sovereignty and territorial integrity of the country within its existing borders in exchange for nuclear weapons' disarmament according to the Budapest Memorandum of 5 December 1994, signed by Ukraine, the Russian Federation, the United Kingdom and the United States, and by France and China in individual statements, following Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons.<sup>6</sup> Those guarantees were reaffirmed by the United States and Russia in the Joint Declaration of 2009 (Burlyuk 2014).

## Campaign

From a sociological point of view, there was no history of significant support for independence of Crimea or for joining the Russian Federation among public opinion in Crimea (Bohm 2014). An evaluation of preferences of Crimea's Russian population as largely moderate and more likely to support the *status quo* than secession was predominant in diplomatic as well as in academic circles (Aronov 2014; Burlyuk 2014).<sup>7</sup>

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<sup>6</sup> Following the dissolution of the Soviet Union, Ukraine inherited the world's third largest stockpile of nuclear weapons.

<sup>7</sup> Differing opinions were present as well. As summarized by the political analyst Oleksandr Sushko shortly before the "referendum," "There is turbulence and there are differences between the regions but not to that extent. In sociological terms, there are absolutely no grounds for a split... The only region where the idea of secession is more

In fact, the public opinion polls on the status of Crimea since Ukraine's independence referendum in 1991 have demonstrated a fairly consistent pattern: the majority – up to 60% – supported the *status quo* autonomy within a unitary state, some 25% favored secession or joining Russia, and a remaining minority of about 15% preferred other options, including decentralization and further autonomy.

**Table 1: Public opinion polls on the status of Crimea since 1991**

Year	Question	Responses
1991	“Do you support the Act of Declaration of Independence of Ukraine?”	54.19% - “yes” <sup>8</sup>
2009	“Do you want Crimea to leave Ukraine and join Russia?”	32.3% - “yes”
2011	“Do you want Crimea to leave Ukraine and join Russia?”	24.4% - “yes”
2011	“Do you perceive Ukraine as your motherland?”	71.3% - “yes” (out of those 66.8% Russians), 18.6% - “no” (22.2% Russians) <sup>9</sup>
October 2011	“In your opinion, what should the status of Crimea be?”	49% - “autonomy in Ukraine (as today)”; 33% - “Crimea should be separated and given to Russia”
May 2013	“In your opinion, what should the status of Crimea be?”	53% - “autonomy in Ukraine (as today)”; 23% - “Crimea should be separated and given to Russia” <sup>10</sup>

As Table 1 illustrates, roughly the same percentage of voters in Crimea, with a slight increase over time, kept supporting the idea of one country within its

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or less popular is Crimea, because it's the only region where ethnic Russians are in the majority” (Rettman 2014).

<sup>8</sup> Register of results of all-Ukraine referendum, December 1, 1991.

<sup>9</sup> Mironova 2014.

<sup>10</sup> The International Republican Institute, Baltic Surveys Ltd./The Gallup Organization, Rating Group Ukraine, 2013.

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borders.<sup>11</sup> The inevitable question that arises is that how does this tally with the “official” results of the “referendum” where 97% of voters apparently supported joining Russia. In this respect, two aspects are key: first the preparation and second the conduct of the “referendum.” The first aspect, as outlined in the five points below, concerns the procedural issues of the preparation of the “referendum.”

First, it was initiated by the Crimean Parliament on 6 March 2014, i.e. ten days in advance of the “referendum” itself and was followed by the “adoption” on 11 March 2014 of the declaration of independence of the Autonomous Republic of Crimea and the city of Sevastopol by the Crimean Supreme Council and Sevastopol City Council, respectively.

There is no evidence that the majority of MPs supported irredentism or secession. According to the then vice prime-minister of the Crimean Government, Rustam Temirgaliev, who was deputy of the “Regions of Crimea” faction, there was no discussion on issues of separatism and secession during the faction’s meetings in late February 2014. The thrust of the debates was the increase of economic autonomy within the limits of Ukraine’s constitutional reform.<sup>12</sup> Sergei Aksenov, a leader of the nationalist party ‘Russian Unity’ with three seats out of 100 in the Crimean Parliament, supported the irredentist option; he was installed as a prime-minister the day after a de-facto military take-over on 27 February 2014 (Ackerman and Bartkowski 2014, Bohm 2014).

Despite a lack of a popular demand, the Crimean Parliament voted for a referendum about the status of autonomy to be held on 16 March 2014 (Vlasova 2014a). The TV interview of a former self-proclaimed “separatist leader” Igor Girkin (nicknamed “Strelkov”) in which he describes bringing deputies to the vote at gunpoint<sup>13</sup> sheds light on the procedural validity of the vote and of its re

Since the Parliament and the Crimean Supreme Council do not have powers to declare independence, these decisions had no more legal force in 2014 than they had twenty years earlier, in 1994. Respectively, they were declared

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<sup>11</sup> It is important to note that the post-“referendum” public opinion polls’ results were seriously distorted due to a number of methodological errors, as a recently conducted poll by GfK Ukraine demonstrates, and should not be considered as representative; instead, alternative methods of polling under occupation should be applied (Fedets’ 2015).

<sup>12</sup> V Krymu viddilennia ne obhovoriuvaly, ale hochut’ rozshyrennia, February 21, 2014.

<sup>13</sup> Informatsiino-analitychna programa “Vysnovky,” January 31, 2015.

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unconstitutional by the Decision of the Constitutional Court of Ukraine of 14 March 2014.<sup>14</sup>

Second, the “referendum” was prepared in ten days between 6 and 16 March, after the finalized date for voting was changed twice: originally scheduled for 25 May, it was brought forward first to 30 March and then to 16 March (Smith 2014). This is an inadequate amount of time by any standards, not least under the above-mentioned domestic Ukrainian legislation on the national referendum.

Third, the “referendum” was prepared and conducted with the open presence of foreign, albeit unmarked, troops on the territory of Crimea. That presence was explained by the new “authorities” as local “self-defense” units (Bohm 2014; Vorobiov 2014), leaving questions open about the origin of their military ammunition including weapons and vehicles, and justified in a number of ways. Arguments that troops were “invited” in by either President Viktor Yanukovich, who had recently fled, or by the Crimean new “authorities,” were made by the Russian foreign minister Sergei Lavrov and other senior officials (Weller 2014). In this regard, it is important to specify that, according to the Constitution of Ukraine, only the Parliament of Ukraine has the right to approve foreign troops’ presence in Ukraine (Article 85(9)), which it did not do in this case (Power 2014). From a legal point of view, Russia’s augmentation of its forces in Crimea, which accompanied the appearance of unmarked troops, amounted to an armed intervention and aggression, according to the UN definition of 1974 (Tancredi 2014). That made it impossible to conduct a referendum in a lawful and legitimate way.

Turning to another broadly used line of argumentation about the need to “protect” the Russian and Russian-speaking population in Crimea after the change of government in Kyiv, there are clear guidelines in the Council of Europe’s Framework Convention for the Protection of National Minorities of February 1995. The protection of national minorities is the responsibility of the host state and only where there is evidence of systemic and grave violation of their rights does the international community have the right to intervene on a mandate from the UN, according to its Charter of 26 February 1945. In Crimea, as in the rest of Ukraine, there was no documented evidence of even a single case of such a violation, apart from those “reported” by the Russian mass-media, usually based on “witnesses’ testimony” (Baer 2014; Bohm 2014; Burluk

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<sup>14</sup> Decision of the Constitutional Court of Ukraine about conformity with the Decree of the Supreme Council of the Autonomous Republic of Crimea “About the conduct of the all-Crimean referendum,” March 14, 2014.

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2014; Moser 2014; Power 2014).<sup>15</sup> This aspect rendered the situation in Crimea completely at odds with that of Kosovo which became a frequent but inadequate comparison (Bellinger 2014; Weller 2014). Importantly, the OSCE High Commissioner on National Minorities Astrid Thors' visit to Crimea, which went largely unnoticed due to the tensions running high at the time, resulted in her concern being expressed at the risk of violent conflict and its consequences to "all communities, particularly the Ukrainian and Crimean Tatar groups", and "no evidence of violations or threats to the rights of Russian speakers."<sup>16</sup> Similarly, local protests against Russian military intervention and "protection" held throughout Crimea in early March 2014 went largely unnoticed (Ackerman and Bartkowski 2014), as did intimidating potential pro-Ukrainian voters up to preventing them from voting (Smith 2014). As the US Ambassador and US permanent representative to the UN Samantha Power put it, "military action cannot be justified on the basis of threats that haven't been made and aren't being carried out" (March 6, 2014).

Fourth, the questions on the ballot paper read: 1. "Are you in favor of the reunification of Crimea with Russia as part of the Russian Federation?" or 2. "Are you in favor of restoring the 1992 Constitution and the status of Crimea as part of Ukraine?" However, the Constitution of 1992 declared independence from both Russia and Ukraine, of which voters were not informed (Smith 2014), and was overruled by a later Constitution of 1995. Therefore, the formulation of the questions on the ballot paper did not include either a status quo option or an option for more autonomy within Ukraine (Smith 2014). It effectively presented a choice between irredentism and secession, respectively (Wilfore 2014). Above all, it violated the territorial integrity of Ukraine (Ackerman and Bartkowski 2014).

The fifth and final point regards preparation being marked by the Crimean new

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<sup>15</sup> On the contrary, the statistics on the languages used in the 589 Crimean schools prior to the "referendum" is revealing: 56% i.e. 330 of the Crimean schools were taught exclusively in Russian; 3% i.e. 15 schools were taught in Crimean Tatar; and 1% i.e. 7 schools were taught exclusively in Ukrainian. Schools within the latter two groups have, in a number of cases, been closed down since the annexation of Crimea. Incidentally, 40% i.e. 237 of Crimean schools were bi- or trilingual (Lassowsky and Dalphond 2014).

<sup>16</sup> Developing situation in Crimea alarming, says OSCE High Commissioner on National Minorities, March 6, 2014.



“authorities” and the Russian media leading one-sided pro-Russian propaganda while blocking Ukrainian TV channels in Crimea (Smith 2014). Both activities were in breach of the provision on providing balanced and objective information.<sup>17</sup>

All the above points were in breach of those parts of Ukraine’s legislation as outlined above as well as being contrary to the “Code of Good Practices on Referendums” established by the Council of Europe’s Venice Commission on Democracy through Law; both Russia and Ukraine are member states of the Council of Europe (Wilfore 2014). Moreover, that commission’s experts submitted conclusions that the “referendum” would be illegal (Vlasova 2014). In short, these procedural violations are sufficient to nullify the validity of the “referendum” as a means of popular expression.

## Results

The second aspect was the actual conduct of the “referendum” on 16 March 2014, presented below. The “official” results announced by Russia were of an 83% turnout and a 96.77% support for the “joining Russia” option.<sup>18</sup> This was presented as the expression of the will of 82% of Crimea’s population. The “expression of popular will” was used by the Russian Federation as a pretext to *de facto* annex Crimea by means of a “treaty” with new Crimean “government” of 18 March 2014 (Kramer 2014).<sup>19</sup>

**Table 2. Results of Crimea’s status referendum in 2014**

Date of referendum:	16 March 2014
Electorate:	1,844,589
Referendum questions:	1. “Are you in favor of the reunification of Crimea with Russia as part of the Russian Federation?” 2. “Are you in favor of restoring the 1992 Constitution and the status of Crimea as part of Ukraine?”
Total votes cast:	1,274,096 (100%)
Total valid votes:	1,264,999 (99.29%)
Valid votes in favor:	1,233,002 (96.77%)
Valid votes against:	31,997 (2.51%)

<sup>17</sup> Open declaration of “Citizen Observer,” March 18, 2014. “Civil Observer” is Russia-based citizens’ led observation community founded in 2011.

<sup>18</sup> Crimea votes to join the Russian Federation: 96.77% say YES, March 17, 2014.

<sup>19</sup> Dogovor mezhdru Rossiiskoi Federatsiei i Respublikoi Krym o prinyatii v Rossiiskuyu Federatsiyu Respubliki Krym i obrazovanii v sostave Rossiiskoi Federatsii novykh sub’ektov.

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Apart from the lack of a legal basis for conducting the “referendum” and the procedural violations of its preparation as outlined above, the procedure for holding it did not conform to any standards. Procedural violations permeated the composition of voters’ lists, the process of the actual voting and the observation of the vote. Among the principal problems were:

First, lists of voters were unofficial because the Central Electoral Commission of Ukraine blocked access to the database of the State registry of voters for Autonomous Republic of Crimea and Sevastopol (Decision of 4 March 2014)<sup>20</sup> hence the new “authorities” compiled and produced voters’ lists there.<sup>21</sup> Along with incomplete lists, there were cases of voting by the citizens of the Russian Federation<sup>22</sup> and of multiple voting, e.g. in Sevastopol 124% of residents would have had to vote to achieve the “official result” (Ackerman and Bartkowski 2014).

Second, the electoral commissions’ composition was not transparent (Smith 2014) and they were not accessible to journalists.<sup>23</sup> Third, as a result of the legal problems mentioned above, neither the OSCE nor other international organizations sent their observers. In fact, the OSCE observers had been prevented from entering Crimea by Russian paramilitary groups a week prior to the “referendum” (Vorobiov 2014). The observers present were overwhelmingly from Russia, in particular, the so-called CIS-EMO (Commonwealth of the Independent States – Election Monitoring Organization),<sup>24</sup> and European far-right parties and organizations (Fox 2014, Shekhovtsov 2014). Therefore the “observation” was not independent and accountable to any international organizations. This is crucial because international observation is an important element to allow international recognition of the validity of free and fair expression of popular will.

Fourth, the calculation and publication of results cast a serious doubt over their validity. An inadequate organization, as outlined above, implied a lack of clarity on how many people the Crimean new “authorities” say voted. In particular, two

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<sup>20</sup> Postanova Tsentral’noyi Vyborchoyi Komisiyi Ukrayiny Nr 35, March 6, 2014.

<sup>21</sup> Grigorii Ioffe: Blokirovanie dostupa k reestrtru izbiratelei ARK ne povliyaet na provedenie referendum, March 7, 2014.

<sup>22</sup> Open declaration of “Citizen Observer,” March 18, 2014.

<sup>23</sup> Ibid.

<sup>24</sup> Self-defined as “an international non-governmental organization, the main declared aim of each is to assist maintaining and developing the institution of elections and civil control in states with developing systems of democracy,” founded in Russia in 2003.

pieces of evidence undermine the “officially” published results. First was the declaration of the former head of *Mejlis* Mustafa Dzhemilev. Quoting leaked sources in the Russian Federal Security Service, he said that the actual turnout was 34.2%.<sup>25</sup> Second was the leak from the president of Russia’s Council on Civil Society and Human Rights. That leak in a report on the “referendum” in Crimea, which was posted briefly on that council’s website, stated that turnout was approximately 40%, out of which 55% voted to join Russia – i.e. 22.5% of Crimea’s eligible voting population (Gregory 2014), and “even these numbers may be inflated since voters were casting ballots under the barrel of a gun” (Kochis 2014).

These pieces of information are important enough to challenge an interpretation of the Crimean “referendum” as illegal but still legitimate or at least as being a representative expression of popular will<sup>26</sup> (Moser 2014; Wilfore 2014; Benardo 2014). Also, they align with the results of opinion polls presented above much better than the “official” results (Kochis 2014). On the basis of an analysis of those polls in 2013-2014, Snyder (2014) arrives at a conclusion similar to that of Ackerman and Bartkowski (2014): “For the supposed referendum result in both the percentage of the winning vote and total turn-out to have been accurate, all ethnic Russians would have had to vote in favor of question #1, plus virtually the entire Ukrainian minority in Crimea... Crimean support for joining Russia... would have been highly implausible to have exceeded 50%.” This is particularly the case considering that the “referendum” was widely boycotted by most of Crimean Tatars and pro-Ukraine voters (Ackerman and Bartkowski 2014; Peters 2014; Smith 2014).

In light of all the problems in respect of initiating, organizing and conducting the “referendum” presented and analyzed above, its “results” were not recognized by the EU leaders and the G7 countries as legal and legitimate (Fox 2014). The “referendum” was confirmed by the UN Security Council on 15 March 2014 as being invalid and, as such, not forming the basis for altering the status of Crimea. That resolution was vetoed by Russia and was not adopted; the following resolution of UN General Assembly condemning the unlawful annexation was passed on 27 March 2014 but it did not have binding effect (Bellinger 2014). In Samantha Power’s words of 19 March 2014, “Now, the referendum has taken place, but the national and international legal status of Crimea has not changed.

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<sup>25</sup> Dzhemilevu “slii” dannye FSB ob istinnyh itogah referendumu, March 25, 2014.

<sup>26</sup> For instance, as in the editorial “Post-Crimea Relations with the West,” published on 18 March 2014 in *The New York Times* (Ackerman and Bartkowski 2014).

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A thief can steal property, but that does not confer the right of ownership on the thief.”<sup>27</sup>

### Conclusions

Not only did the “referendum” not meet the legal criteria of a national referendum, it did not meet the procedural requirements either. On that basis, it was neither legally valid nor legitimately representative, contrary to a standpoint of treating its “results” as a proxy of an opinion poll. There are sound analytical and empirical grounds to believe that should the same “referendum” have taken place under conditions of free and fair expression of popular will, with four options offered (independence, annexation by Russia, enhanced autonomy within Ukraine or the *status quo*), the end result would in all likelihood have been different, most probably with support for the *status quo* (Ackerman and Bartkowski 2014). Therefore, the term “unlawful annexation,” which is now predominantly used in the international documents and the mass-media (Peters 2014), is both in form and content much closer to what took place in Crimea in March 2014 rather than a “referendum.” The upshot is that the “referendum” undermines the political stability in Ukraine and potentially in Russia itself and beyond as it sets a precedent for illegal irredentism portrayed as democratic process.

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<sup>27</sup> United States Rejects Russia’s Military Intervention and Land Grab in Crimea, March 19, 2014.

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