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HOW TO RESOLVE THE TERRITORIAL CONFLICTS IN UKRAINE: *UTI POSSIDETIS JURIS* AND AN INTERNATIONAL LAW-BASED PROPOSAL FOR POWER-SHARING[1]

Abstract: *In this article, I present a proposal for an international law-based formula for mediating territorial conflicts and apply it to the case of Crimea in Ukraine. Although the tragic Russian attack which commenced on 24 February 2022 has made the mediation even more difficult, once a ceasefire is achieved my formula is capable of providing legally solid compromises to the Ukrainian territorial questions that fit into the contemporary international legal framework concerning territory. Naturally, any realistic solution will require concessions on the part of all stakeholders (primarily Crimea, Ukraine, and Russia). In short, the formula offers for Ukraine the return of its territorial integrity, for Crimea internal self-determination in the form of a meaningful territorial autonomy, and for Russia a few indirect perks and guarantees, mostly related to a possible demilitarization of the Crimean Peninsula. The analysis can also be useful for Donbas, for which the formula offers recognition of some limited autonomous rights.*

Keywords: international law, Russia, Ukraine, Crimea, territorial conflicts

INTRODUCTION: THE POST-SOVIET ARCHIPELAGO OF TERRITORIAL CONFLICTS

It is nothing new that there are a lot of territorial conflicts worldwide. In the area of post-Soviet space alone, there are more-or-less seven active conflicts – in Azerbaijan

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[1] First presented in my PhD dissertation *From Kosovo to Crimea – The Legal Legacies of the Socialist Federal Dissolutions* (Unigrafia, 2020).

(Nagorno-Karabakh); Georgia (Abkhazia and South Ossetia); Moldova (Transnistria); Russia (Chechnya); and Ukraine (Crimea and the Donbas).

What might come as a surprise to many observers however is that these conflicts are the direct results of a particular international law rule – called *uti possidetis* (*juris*) – which has been used to determine the borders of most of the existing United Nations (UN) Member States. Given this pivotal role in shaping the political map of the world and its long history of application, many scholars give *uti possidetis* the prestigious label of a "doctrine".

Uti possidetis has a dual role in the post-Soviet space. Its utilization helped to make the breakup of the Union of Soviet Socialist Republics (USSR) relatively peaceful, but the price to pay was the subsequent territorial conflicts.

The main research question of this article is how an in-depth understanding of *uti possidetis* and its application in the 1990s can both explain as well as to help mediate the post-Soviet territorial conflicts in Ukraine. While the approach is mainly legal in nature, section 3 presents a proposal for a political solution to the conflicts in Ukraine.

The outline of the article is as follows: Section 1 establishes the international legal rules concerning territory, with focus on *uti possidetis* and the proposed conflict-resolution formula based on it. Section 2 summarizes the relevant history of Ukraine and Crimea. Section 3 combines the proposed formula with the facts in the case of Ukraine, and the article ends with analytical conclusions.

1. LEGAL RULES CONCERNING TERRITORY

Three main legal rules concerning territory are the right to self-determination; the territorial integrity of states; and *uti possidetis*. The first two are more commonly used, but also often in contradiction with one another. All peoples have a right to self-determination, but an external and tangible form of this self-determination (i.e. secession) is usually blocked by the host state's right to territorial integrity. All else being equal, territorial integrity takes priority and unilateral secession is prohibited.[2]

However, the dissolution of a state works according to a different legal formula. The framework changes, as there is no longer a host state whose territorial integrity is to be protected. In this case, the primary rule is the peoples' right to self-determination, and the third rule – *uti possidetis* – is used to determine the boundaries of the emerging states. Accordingly, in 1991 Ukraine had a right to become an independent state as there was no longer a need to protect the territorial integrity of the (dissolved) USSR. Crimea did not have the same right as it was formally part of Ukraine, which had a right to territorial integrity.

[2] Confirmed for example by the UNGA Resolutions 2625 (Declaration of principles of international law, 24 October 1970) and 61/295 (13 June 2007), both of which state that the right to self-determination cannot be construed as dismembering or impairing the territorial integrity of states.

1.1. *Uti Possidetis* Juris

Uti possidetis is an international legal rule derived from the ancient Roman civil law principle of *uti possidetis, ita possideatis*.[3] It is used – in absence of an agreement between the parties that settles the question otherwise – as the go-to rule to delineate emerging state borders wherever there is a case of secession or a state's dissolution. In effect, the application of *uti possidetis* creates a new, territorially sovereign state by transforming former administrative borders into international borders at the moment of independence. For example, in 1957 the United Kingdom accepted the independence of its colony British Ghana, and *uti possidetis* legally established within which borders this new state would be constituted. The colonial unit turned overnight – via universal international recognition and admission to the UN – into the Republic of Ghana within these former administrative borders and with full sovereignty over this territory.[4]

One of the main tenets of *uti possidetis* is that the emerging states must accept the pre-existing boundaries. The conceptual logic is that a change of sovereignty does not, by itself, change the status of a boundary.[5] The International Court of Justice (ICJ) has summarized this in the colonial context in the following manner:

> [b]y becoming independent, a new State acquires sovereignty with the territorial base and boundaries left to it by the colonial power. International law – and consequently the principle of *uti possidetis* – applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards. It applies to the State *as it is*, i.e., to the "photograph" of the territorial situation then existing. The principle of *uti possidetis* freezes the territorial title.[6]

This smooth transformation poses a challenge, as internal and external borders serve very different purposes under international law, and states do not normally regulate their internal borders as possible candidates for external ones.[7]

Nevertheless, *uti possidetis* has been systematically applied and endorsed by the ICJ and other legal institutions on several occasions.[8] While at first solely related to

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[3] S. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90(4) American Journal of International Law 590 (1996), p. 593; and P. Hensel, M. Allison, A. Khanani, *Territorial Integrity Treaties, Uti Possidetis, and Armed Conflict Over Territory*, paper presented at the conference "Building Synergies: Institutions and Cooperation in World Politics" (2006), p. 8.

[4] Ghana Independence Act, 5 & 6 Eliz. 2 (1957) at 1.

[5] R. McCorquodale, R. Pangalangan, *Pushing Back the Limitations of Territorial Boundaries*, 12(5) European Journal of International Law 867 (2001), p. 874.

[6] *Frontier Dispute* (*Burkina Faso v. Mali*), Judgment, ICJ Rep 1986, p. 554, para. 30.

[7] M. Shaw, *Peoples, Territorialism and Boundaries*, 8(3) European Journal of International Law 478 (1997), pp. 489-490.

[8] For authoritative statements of *uti possidetis* as a general principle, *see e.g.* ICJ, *Frontier Dispute,* para.

decolonization, its target group has been expanded greatly in the last 30 years. Thus *uti possidetis* is solidifying its status as a general principle or doctrine of international law, and constitutes the go-to rule in the cases of state dissolution.

Every practical application of *uti possidetis* has called for its adjustment to the changing paradigms of international law. Here I have identified three main cycles that have updated the doctrine into the contemporary international law system: Decolonization of Latin America (1808-1836), Decolonization of Africa (1960s), and the Socialist Federal Dissolutions (1990s). However, the last cycle has partially disrupted the doctrine's evolutionary process, which created several territorial conflicts. My proposed formula aims to correct this mistake.

1.2. (*Uti Possidetis*) *Meritus*

The main idea of the *meritus* formula is that it was the evolution of *uti possidetis* that enabled it to produce predictable and legitimate results for the parties concerned. In this way it had a decent track record of pre-empting violent conflicts over territory. Unfortunately however this did not take place in the 1990s with the dissolutions of the USSR and the Socialist Federal Republic of Yugoslavia (SFRY), as the developments concerning the right to self-determination were not taken into account. Accordingly, *uti possidetis* produced disputed results that have created endemic territorial conflicts in the successor states.

The functioning logic of *uti possidetis* is simple enough. It turns the "picture" of former administrative borders into a blueprint of the new borders of an emerging state. However, the key question is *which* administrative borders. The concept that not understood by the outside powers in the 1990s was that due to socialist ideology, the USSR and the SFRY had a unique understanding of the right to self-determination. They had created an "ethnofederal" model of different levels of autonomy given to different peoples. This was quite alien to the Western understanding of the content of self-determination.

Ethnofederalism awarded full self-determination only to the most "progressive nations", i.e. those that could be categorized as historical nations with a national culture. A lower status meant that the nation was not advanced enough for more autonomy.[9]

20; *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*Qatar v. Bahrain*), Judgment, ICJ Rep 2001, p. 40 paras. 10, 148; *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua Intervening),* Judgement, ICJ Rep 1992, p. 351, para. 386; *The Indo-Pakistan Western Boundary (Rann of Kutch) between Indian and Pakistan,* Reports of International Arbitral Awards, Vol. XVII, 19 February 1968, 1-576 at 527; and Arbitration Committee on Yugoslavia, *Opinion No. 3,* 11 January 1992, para. 2.

[9] F. Hill, *"Russia's Tinderbox": Conflict in the North Caucasus and its Implications for the Future of the Russian Federation*, Harvard University Press, New Haven: 1995, p. 2.

In the USSR, there were four levels of autonomy: the Soviet Socialist Republics (SSRs'); the Autonomous Soviet Socialist Republics (ASSRs); the Autonomous Oblasts; and the Autonomous Okrugs. The highest two levels were classified as "nations", and the lower two as "nationalities".[10] In the early 1990s, the international community chose to recognize the 15 SSRs of the USSR as independent states. Simultaneously, they left altogether twenty second-tier ASSRs to the mercy of their new parent states, without any recognized rights, although some ASSRs had more inhabitants than some SSRs. This was a clear breach of the ASSRs' self-determination rights, as provided by the USSR Constitution and the consensus in the 1990s of the content of the right. In other words, there was a lot more variance in the right of self-determination than the simple either-or formula that was used.

The concept of *meritus* – and my proposal to solve the territorial conflicts in Ukraine – consists of two components: the internal and the external legal frameworks concerning territory, and the inhabitants of the disputed area. The two components are interlinked and need to be read in harmony with each other.

The internal component is the legal status that the last applicable constitutional order provided for the territory in question. *Uti possidetis* turns the administrative borders into international ones, so the target state's constitution needs to confirm *which* borders, as not all administrative borders are transformed; but only those ones that are seen to have acquired self-determination rights. The last constitutional order is the "photograph" that the successor states inherit. The Soviet Constitution remains relevant to Ukraine insofar as it determined Ukraine's borders and included the autonomous unit (ASSR) of Crimea within those borders. Nothing in this "photograph" gave Crimea a right to secession, or Russia a right to annex it. Additionally, no matter how alien the Soviet system of ranking the progressiveness of nations was to the international community, the application of *uti possidetis* cannot question the borders drawn without compromising its function. Therefore, according to *uti possidetis* the first two tiers of the ethnofederal system were seen as administrative areas belonging to "nations" with internal self-determination rights.[11]

The external component is the content of the right to self-determination under the public international law at the moment of independence. Indeed, as legal doctrines self-determination and *uti possidetis* have a complex relationship. The former might seem obsolete as most of the borders that came out of the dissolution of the USSR were delineated based on *uti possidetis*. However, when read in conjunction

[10] G. Ubiria, *Soviet Nation-Building in Central Asia: The Making of the Kazakh and Uzbek Nations*, Routledge, London: 2016, pp. 96-97.

[11] For more on problems with internal self-determination, *see* W. Czapliński, *Self-determination – Secession – Recognition*, in: W. Czapliński, S. Dębski, R. Tarnogórski, K. Wierczyńska (eds.), *The Case of Crimea's Annexation Under International Law*, Wydawnictwo Scholar, Warszawa: 2017, p. 28.

with the first component, the right to self-determination becomes important in the case of Crimea.

As the combination of the two components, *meritus* provides us with a model that can determine the different levels of self-determination rights applicable to the different levels of borders in Crimea and Donbas.

2. THE FEDERAL HISTORY OF UKRAINE AND CRIMEA

The seeds of all the post-Soviet conflicts over territory were planted during the Soviet era. Thus it is necessary to briefly examine the history of national relations in the USSR, and why it remains relevant today.

Nationalism was always a troublesome issue for Marxism, and in 1917 the USSR became the first state that had to try to accommodate the two concepts. The solution was to create a multi-tier federal state with ethnicities, ranked into categories based on a combination of classification factors under scientific Marxism and geopolitical factors. The focus was on the highest two categories, the SSRs and the ASSRs.

The SSRs, such as Russia and Ukraine, were the most privileged entities under the ethnofederal system. The constitutive moment of the USSR was said to be the voluntary signing of the Union Treaty (1922) by the SSRs, and the illusion of their independence was maintained all throughout the Soviet era. One of the oddities of the system was that promotion and demotion were possible, and even rather frequent. This gave the peoples of the USSR a sense of *merit* being associated with the status of their national unit, and constituted a unique dynamic in the final dissolution process of the USSR.

2.1. The Rights of Different National Units

As the highest-ranking national units, the SSRs retained sovereignty over their territory and possessed an exclusive – yet in practice highly theoretical – right to free secession.[12] The number of SSRs varied and reached its peak of 16 in the 1950s. As the status was reserved only for the most progressive nations, it was possible to gain or lose this privileged position.[13] Within their borders, each SSR had autonomous institutions and a national flag. They also had a right to conduct direct foreign relations.[14]

[12] In the West, this right was often referred to as a "constitutional fiction". *See* S. Lee, *Russia and the USSR, 1855-1991*, Routledge, London: 2006, p. 36; and E. Walker, *Dissolution: Sovereignty and the Breakup of the Soviet Union*, Rowman & Littlefield, Lanham: 2003, p. 6.

[13] The SSRs which were later downgraded included the Karelo-Finnish SSR (1940-1956), and the Abkhazian SSR (1921-1924). The SSRs of Ukraine and Byelorussia were admitted to the UN as independent nations in 1945, available at: https://www.un.org/en/about-us/growth-in-un-membership (accessed 30 June 2022).

[14] C. Zürcher, *The Post-Soviet Wars*, New York University Press, New York: 2007, p. 25.

The governmental structure of the SSRs was a copy of the USSR model, with versions of a Supreme Soviet (parliament), Council of Ministers, and Supreme Court.[15] The SSRs were subjected only to the federal centre and only in areas where they had granted it exclusive jurisdiction. While their territory could not be altered without their consent, they did not have the right to ratify constitutional amendments, so in the end their powers could be altered without their consent.[16]

The second-level ASSRs were subunits located within the host SSRs. This status was given to the "national states" that usually had less inhabitants than the "sovereign states" of SSRs.[17] Nevertheless, the ASSRs possessed attributes normally attached to sovereignty,[18] such as delineated borders, individual constitutions, and national symbols, but without the rights to independent foreign relations or secession. Their governmental structure was almost an exact parallel to the SSRs, with their own Supreme Soviet and Council of Ministers.[19] However, a significant difference between the ASSRs and the SSRs was that the ASSRs were constitutionally subjects of the host SSRs, and thus entered into the structure of the USSR only through their hosts.[20] Like the SSRs, the ASSR territory could not be altered without their explicit consent.[21] The ASSRs were often promoted or demoted within this system.[22]

To summarize, both the SSRs and the ASSRs were titled "states" in the USSR Constitution, and even though the consent of the SSRs was required for territorial changes, they had several state attributes. Yet at the same time there were a few key differences, with the right to secession and the term 'sovereign' only awarded to the SSRs. The representational quotas in the federal organs also favored the SSRs. Finally, the SSRs were constituent parts of the USSR as a whole, whereas the ASSRs were integral parts of both the USSR *and their host SSR*. This was the key difference between them in 1991.

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[15] Constitution of the Union of Soviet Socialist Republics, 5 December 1936, Arts. 57, 63, and 102.

[16] N. McCabe (ed.), *Comparative Federalism in the Devolution Era*, Lexington, Lenham: 2002, p. 150.

[17] Zürcher, *supra* note 14, at 26.

[18] S. Holovaty, *Territorial Autonomy in Ukraine – The Case of Crimea*, in: European Commission of Democracy through Law, *Local Self-Government, Territorial Integrity and Protection of Minorities*, Proceedings, Lausanne 25-27 April 1996, published in *Science and Technique of Democracy*, No. 16 (Council of Europe, 1996) 135-150 at 141-142. He calls the ASSR status a "specific form of statehood", with "each nation creating an autonomous republic in the Soviet federation had the right to self-determination on the basis of national sovereignty."

[19] The 1936 Constitution of the USSR, Arts. 89 and 93.

[20] *E.g.*, B. Balayer, *The Right to Self-Determination in the South Caucasus: Nagorno Karabakh in Context*, Lexington, Lenham: 2013, p. 116; and F. Feldbrugge, G. Van Den Berg, W. Simons (eds.), *Encyclopedia of Soviet Law*, Martinus Nijhoff, The Hague: 1985, p. 73.

[21] Constitution and Fundamental Law of the Union of Soviet Socialist Republics, 7 October 1977, Art. 84.

[22] Numerous examples are listed in B. Nahaylo, V. Swoboda, *Soviet Disunion: A History of the Nationalities Problem in the USSR*, Free Press, London: 1990, p. 361; and *Goskomstat SSSR (1989), Natsionalnyi sostav naseleniya SSSR: Po dannym vsesoyuznoi perepisi naseleniya 1989*, available at: http://demoscope.ru/weekly/ssp/sng_nac_89.php?reg=1 (accessed 30 June 2022).

The above distinctions mean that, in relation to *uti possidetis*, Ukraine and Crimea were in notably different legal positions.

2.2 The Dissolution of the USSR; State Recognition and the Right to Internal Self-Determination

When the dissolution of the USSR began to seem imminent, in December 1991 the European Community (EC) issued its "Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union."[23] The Guidelines laid down the EC's formative rules for recognition of the newly-emerging states. The recognition of the SSRs was conditioned on their fulfilment of the following criteria: re-affirmation of the principle of self-determination;[24] respect for the rule of law, democracy and human rights;[25] guarantees for the rights of ethnic and national groups and minorities in accordance with the framework of the Commission on Security and Cooperation in Europe (CSCE);[26] respect for the inviolability of the *uti possidetis* borders;[27] acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation;[28] and a commitment to settle by agreement or arbitration all questions concerning state succession and regional disputes.[29] Upon fulfilling these criteria, the SSRs were recognized within their *uti possidetis* – i.e., former administrative – borders. The ASSRs were denied any kind of status recognition.

However, this choice of an all rights/no rights dichotomy between the self-determination units inevitably jeopardized the promotion of *internal self-determination*, as provided in several international conventions and instruments.[30] Most importantly, the right to self-determination had been codified since 1966 in two international Covenants,[31] making self-determination a treaty-based, general entitlement right.[32] In addition, by recognizing this right outside decolonization, many scholars

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[23] European Community, *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*, 16 December 1991, 31 I.L.M. 1486.

[24] *Ibidem*, para. 1.

[25] *Ibidem*, para. 3.

[26] *Ibidem*, para. 4.

[27] *Ibidem*, para. 5.

[28] *Ibidem*, para. 6.

[29] *Ibidem*, para. 7.

[30] *See e.g.*, Conference on Security and Co-operation in Europe, Final Act, Helsinki, 1 August 1975, Chapter VIII; *Charter of Paris for a New Europe*, 22 November 1990); and the UN General Assembly (*Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*, GA Res. 48/131, 20 December 1993, preamble).

[31] International Covenant on Civil and Political Rights, UNGA res. 2200A (XXI) and International Covenant on Economic, Social and Cultural Rights, UNGA res. 2200A (XXI), 16 December 1966.

[32] S. Oeter, *Self-Determination*, in: B. Simma (ed.), *The Charter of the United Nations: A Commentary*, Vol. 1, Oxford University Press, Oxford: 2012, p. 322; and H. Hannum, *Rethinking Self-Determination*, 34(1) Virginia Journal of International Law 1 (1993), p. 19.

claimed that the Covenants provided a legal right to internal self-determination.[33] The USSR was bound by the Covenants and had guaranteed the SSRs' and the ASSRs' right to internal self-determination in its last federal Constitution of 1977. Therefore, the ethnofederal system territorialized self-determination, awarding it to the population of a specific territory[34] It is no wonder that ASSR status under this system was so desirable.

2.3 The Federal History of Crimea

The SSR of Ukraine declared independence from the USSR in August 1991 and was universally recognized as an independent state in December of the same year. At the moment of its independence, it had within its borders the ASSR of Crimea. It also had a significant Russian-speaking minority, located mainly in Eastern Ukraine.

As a national unit, Crimea was originally declared an SSR in April 1919.[35] On 18 October 1921, it was demoted to the "Crimean ASSR of the Russian Soviet Federative Socialist Republic" (RSFSR).[36] In 1945, it was again demoted to a mere administrative region.[37] Thus over the course of 26 years Crimea had moved from 'sovereign' SSR to a non-autonomous region. On 19 February 1954, Crimea was transferred from the RSFSR to the SSR of Ukraine. The justification given was the 'integral character of the economy, the territorial proximity and the close economic ties between the Crimea Province and the Ukraine Republic', as well as the favourable stances of both the RSFSR and Ukraine.[38] Ukraine promised to rebuild Crimea and to create infrastructure.[39] On 20 January 1991, a referendum was held

[33] *E.g.*, M. Barelli, *Shaping Indigenous Self-Determination: Promising or Unsatisfactory Solutions?*, 13(4) International Community Law Review 413 (2011), p. 414; A. Rosas, *Democracy and Human Rights*, in: A. Rosas, J. Helgesen (eds.), *Human Rights in a Changing East-West Perspective*, Pinter, London: 1990, pp. 30-34; S. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90(4) American Journal of International Law 590 (1996), p. 611. According to New York City Bar, "[t]he norm of self-determination is not a general right of secession. It [...] has evolved into the concepts of 'internal self-determination,' the protection of minority rights within a state, and 'external self-determination,' secession from a state." Special Committee on European Affairs of the New York City Bar, *Executive Summary: Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova*, 14 ILSA Journal of International and Comparative Law 379 (2008), pp. 383-384.

[34] *See* Czapliński, *supra* note 11 at 26.

[35] For more on the Russian claims of its "historical rights" over Crimea, *see* T. Lundstedt, *"Peaceful and "Remedial" Annexations of Crimea*, *Russian Perspectives on International Law Symposium*, Voelkerrechtsblog, 19 January 2018, available at: https://voelkerrechtsblog.org/peaceful-and-remedial-annexations-of-crimea (accessed 30 June 2022).

[36] The 1936 Constitution of the USSR, Art. 22.

[37] N. Belitser, *The Constitutional Process in the Autonomous Republic of Crimea in the Context of Interethnic Relations and Conflict Settlement*, International Committee for Crimea, 20 February 2000, available at: https://www.iccrimea.org/scholarly/nbelitser.html (accessed 30 June 2022).

[38] Quoted in K. Calamur, *Crimea: A Gift to Ukraine Becomes a Political Flash Point*, National Public Radio, Parallels, 27 February 2014, original in *Pravda*, 27 February 1954.

[39] A. Tatarenko, *The Legal Status and Modern History of Crimean Autonomy*, Verfassungsblog, 2 April 2014.

in Crimea about returning to its ASSR status. The motion was backed by 93.26% of the electorate, with over 80% participation.[40] Ukraine re-established Crimea's ASSR status a month later.

After the August 1991 coup attempt, the USSR was in a state of paralysis, with the RSFSR not participating in any federal organs. In September, the USSR governmental system was suspended.[41] On 1 December 1991, Ukrainians overwhelming voted for independence.[42] Subsequently, on 8 December 1991 the heads of state of the RSFSR, Ukraine, and Belarus signed the Agreement Establishing the Commonwealth of Independent States (CIS). It stated that "the USSR as a subject of international law and a geopolitical reality no longer exists."[43] On 21 December 1991, eight more SSRs joined the CIS, declaring that "the USSR had ceased to exist."[44]

With the federation thus abolished, the SSRs had to make decisions on their national borders. They decided to follow the earlier decolonization examples and to retain the Soviet administrative lines according to the *uti possidetis juris* rule. Thus, the newly independent Ukraine inherited the borders of the SSR of Ukraine, including the ASSR of Crimea and the Russian-speaking areas of Donbas. However, Crimea's unique history as a federal unit complicated its relationship with Ukraine throughout the 1990s and 2000s. The main problem was that Crimea had previously been a part of Russia and had a predominantly Russian population, making the Russian Federation a stakeholder in Crimea's quest for self-determination.

From the very outset, Crimea displayed tendencies toward an enhanced autonomy or even outright independence. In February 1992 the Crimean parliament renamed the ASSR as the "Republic of Crimea", and a month later the "Republican Movement of Crimea" collected over 200,000 signatures in support for a referendum on independence.[45] The Ukrainian parliament was under pressure to grant concessions to the Crimeans, as other former ethnofederal units had already started armed uprisings (in Azerbaijan, Georgia, and Moldova). In April 1992, a Ukrainian law reinstated generous autonomy for Crimea,[46] which however granted Crimea less self-governance than the province had hoped for. On 5 May 1992, the Crime-

[40] Chronology for Crimean Russians in Ukraine, *Minorities at Risk Project* (2004), available at: https://www.refworld.org/docid/469f38ec2.html (accessed 30 June 2022).

[41] Joint Declaration of the President of the USSR and of the Leading Officials of the Union Republics, Izvestiia, 2 September 1991.

[42] 92.3% voted yes. D. Nohlen, P. Stöver (eds.), *Elections in Europe: A Data Handbook*, Nomos, Baden-Baden: 2010, p. 1985.

[43] Agreement on the Establishment of the Commonwealth of Independent States, 8 December 1991, 31 ILM 138.

[44] Alma-Ata Declaration (21 December 1991), 31 ILM 148.

[45] D. Litvinenko, *The Legal Aspects of Crimea's Independence Referendum of 2014 with the Subsequent Annexation of the Peninsula by Russia*, Master's Thesis, Harvard Extension School 2016, at 17.

[46] Law On the Status of the Autonomous Republic of Crimea, 21 April 1992.

an parliament approved a new Constitution that declared Crimea independent, pending its approval by an independence referendum. The referendum was never held, as the next day the Crimean parliament backed off and passed a constitutional amendment that stated that Crimea was a "constituent part" of Ukraine.[47]

Nevertheless, the 1992 Constitution of Crimea gave it a substantial self-governing status. The local parliament and the council of ministers were declared to possess the highest legislative and governmental power; Russian was declared the state language; and the Republic retained the right to have state symbols.[48] Just like in the late Soviet era, the Constitution proclaimed that while a part of Ukraine, Crimea "defines its relation with it on the basis of a treaty and agreements."[49]

On 19 May 1992, Crimea completely withdrew its pending independence proclamation and in July a compromise was reached: Crimea remained under Ukrainian jurisdiction, but with significant autonomy. A new law on the status of the "Autonomous Republic of Crimea" was passed, giving Crimea the right to pass laws so long as they did not contradict Ukraine's laws; to adopt a budget and have an independent tax system; and to conduct local referendums on questions under the Autonomous Republic's jurisdiction.[50]

In 1993, the Crimean parliament created an office for the President of Crimea. The first presidential elections in January 1994 were won by Yuri Meshkov, who had campaigned for Crimean secession and a union with Russia. In May 1994, the Crimean parliament adopted a law that indicated a desire for more autonomy or even outright independence, thus violating the Ukrainian Constitution and the April 1992 law on the status of Crimea.[51] International involvement followed and on 24 November 1994 the OSCE established a "Mission to Ukraine", charged with the task of supporting the work of experts on constitutional and economic matters and reporting on the Crimean situation.[52]

In March 1995 the Ukrainian parliament repealed the 1992 Crimean Constitution, abrogated all Crimean laws contradicting Ukrainian legislation, and removed the post of President of Crimea.[53] Ukraine adopted a new Constitution in 1996. It proclaimed Ukraine a unitary state with sovereignty over all its territory and the

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[47] P. Kolstø, *Russians in the Former Soviet Republics*, Indiana University Press, Bloomington: 1995, p. 194.

[48] Tatarenko, *supra* note 39.

[49] Constitution of the Republic of Crimea, 5 May 1992, Art. 9.

[50] *Autonomous Republic of Crimea*, Global Security, available at: https://www.globalsecurity.org/military/world/ukraine/arc.htm (accessed 30 June 2022).

[51] A. Bloed (ed.), *The Conference on Security and Co-Operation in Europe: Basic Documents, 1993-1995*, Martinus Nijhoff, The Hague: 1997, p. 788.

[52] The Mission was closed in 1999, available at: https://www.osce.org/mission-ukraine-1999-closed (accessed 30 June 2022).

[53] On the Autonomous Republic of Crimea, Act No. 0095, 17 March 1995.

Autonomous Republic of Crimea as an integral part of Ukraine.[54] Nevertheless, Crimea was still awarded many characteristics of a state: its representative organs were entitled to adopt a Constitution, as well as to have a local government, emblem, hymn, flag, and state language (Russian).[55] Yet at the same time these rights were substantially limited – the Crimean Constitution had to be approved by the Ukrainian parliament, and all Crimean legislation had to be in conformity with the Ukrainian Constitution and legislation.[56] The Ukrainian Constitution explicitly prohibits Crimean secession.[57]

It is noteworthy that even with these state characteristics, Crimea was and remained an autonomous unit within the territory of Ukraine. When the right to self-determination and territorial integrity are in contradiction, the latter usually prevails. Hence in the absence of Ukrainian concessions the self-determination rights of Crimeans need to be accomplished within the territorial framework of Ukraine. Crimea exists within Ukraine, as an exception to Ukrainian sovereignty. As a "non-state actor", it can nevertheless acquire an international status or role.[58]

Finally, Crimea adopted a new Constitution on 21 October 1998, concurring with the 1996 Constitution of Ukraine. According to the Constitution, Crimea exercises normative regulation over numerous areas.[59] The Crimean parliament selects the head of the Crimean government, but this is subject to a veto by the Ukrainian President.[60]

With the Crimean population being predominantly Russian,[61] the dispute between Ukraine and Crimea always had a third stakeholder. The separatist elements found support from the Russian Duma, which in 1992 had declared the 1954 transfer of Crimea to have been illegal, and in 1993 that Crimea was a part of Russia. Nevertheless, President Yeltsin did not press the issue and the dispute was seemingly settled with the 1997 Treaty of Friendship, Cooperation and Partnership between Russia and Ukraine.[62] In that Treaty Russia unambiguously recognized Ukraine's borders and sovereignty over Crimea in exchange for rights to lease the

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[54] Constitution of Ukraine, adopted on 28 June 1996, Arts. 2 and 133.

[55] *Ibidem*, Title X, Art. 134-139.

[56] *Ibidem*, Art. 135.

[57] *Ibidem*, Arts. 92(13), 92(18), and 157.

[58] J. Crawford, *The Creation of States in International Law*, Oxford University Press, Oxford: 2007, at 254.

[59] For example, in agriculture and forestry; public works, city construction and housing management; tourism; and water supply. Constitution of the Autonomous Republic of Crimea, adopted on 21 October 1998, Art. 18(2).

[60] *Ibidem*, Art. 36(1).

[61] In 2001, Russians made up 58.3% of the population of Crimea, available at: https://web.archive.org/web/20111217151026/http://2001.ukrcensus.gov.ua/eng/results/general/nationality/ (accessed 30 June 2022).

[62] Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation, 31 May 1997.

Sevastopol Naval Base until 2017.[63] After this Treaty separatist arguments were significantly curtailed in both Crimea and Russia.

The interaction between Ukraine and Crimea displays a complex ethnofederal bargaining process, and the final compromise – while containing a meaningful autonomy – was less than expected and thus contributed to separatist tendencies. Without having had its ASSR status, the Crimeans would have been simply a territorially concentrated ethnic minority. However, having held this status at the moment of the dissolution of the USSR, they expected the same rights as their counterparts in other successor states of the USSR. The power-sharing treaties that the Russian Federation had signed with its former ASSRs were a natural reference point.

The key legal point in the 1992 Crimean Constitution was that although a part of Ukraine, Crimea exercised sovereign rights over its territory, and that the bearers of this sovereignty were the people of Crimea.[64] This was a typical example of thinking along the lines of the Soviet ethnofederal framework. The ASSRs used to view their legal position as a territory entitled to "territorial sovereignty" – a substantial autonomy over their territory with strong constitutional guarantees, including a veto right over any changes. Thus, while a part of Ukraine, Crimea functioned under its own Constitution based on the sovereignty of its people, regulating its relations with Ukraine by treaties and agreements.[65]

This constitutional order was a copy of the Soviet era. It continued the asymmetric ethnofederal model and co-opted it with the new realities, such as the loss of the arbitrating federal centre, a multi-party democratic system, and a more rule of law state. However, this compromise was not to last.

The key changes made in the still valid 1998 Constitution[66] underlined Crimea's subordinate position. The Crimean Constitution had to be approved by the Ukrainian parliament;[67] the Ukrainian President had a veto right over the selection of Crimea's Prime Minister;[68] and finally and most importantly, the Constitution stated unambiguously that Crimea exercises "any and all powers as may be delegated to it by Ukrainian laws pursuant to the Constitution of Ukraine."[69] Thus, the asym-

[63] Partition Treaty on the Status and Conditions of the Black Sea Fleet, signed on 28 May 1997; Agreement between Ukraine and Russia on the Black Sea Fleet in Ukraine, signed on 21 April 2010, extended the Sevastopol lease until 2042.

[64] Constitution of Crimea (1992), Arts. 1, 2, and 7(1).

[65] *Ibidem*, Art. 9.

[66] Constitution of Crimea (1998). A new Constitution was passed in 2014, but under foreign occupation and it has not been recognized by the Ukrainian parliament. According to *ex injuria jus non oritur*, the 2014 Constitution is null and void as the international community does not recognize the Russian annexation of Crimea.

[67] *Ibidem*, Art. 135.

[68] *Ibidem*, Art. 36(1).

[69] *Ibidem*, Art. 1(1).

metric "co-sovereignty" with Ukraine was transformed into a more conventional territorial autonomy, with a delegated and limited set of powers. All that being said, Crimea continued to exercise regulation rights over many important policy areas, such as agriculture, public works, city construction, public transportation, tourism, and culture.70 Moreover, Crimea held a veto over any changes to its *uti possidetis* borders. Hence Crimea's autonomy, although curtailed, still remained not insignificant.

Donbas never had or demanded an autonomous status. The question over Crimea is a proper post-Soviet territorial dispute, whereas the Donbas separatist movement appears to be mainly orchestrated by Russia. The questions of Crimea and Donbas are thus handled separately in this article.

2.4. The Events of 2014

The roots of the 2014 first Russian invasion, as well as the ongoing full-scale war in Ukraine, go all the way back to the difficult relationship between Ukraine and Russia following the dissolution of the USSR. There have been significant problems, relating especially to the political and military alignment of Ukraine and the continuous negotiations over the Sevastopol Naval Base lease. In 2010, the lease was extended until 2042, seemingly solving the issue for a generation.

In the 2010s, a competition for the political affiliation of Ukraine developed between the EU and a Russian-led integration project called the Eurasian Economic Union (EEU). It was initially a mere customs union between Russia, Belarus, and Kazakhstan, coming into force on 1 January 2010.

However, from the very beginning Russia had more grandiose plans for the EEU. The ultimate goal was for a political union that would resemble the EU in many ways, uniting the members states' economies, legal systems, custom services, and militaries, with the intention of rivalling the other "blocks" of the EU, the USA, and China.[71] The unresolvable problem was that for the "in-between states" of Armenia, Azerbaijan, Georgia, Moldova, and Ukraine it was an either-or choice, as the EU membership or even an Association Agreement with the EU would render such a state incompatible with EEU membership.

The issue really came to fore in the late 2013. Ukraine was in the final stages of negotiating an Association Agreement with the EU, but suddenly at an EU-Ukraine summit at Vilnius Ukrainian President Yanukovych – having received an offer from Russia of economic assistance – refused to sign the agreement. A series

[70] *Ibidem*, Art. 18(2).

[71] J. Henley, *A brief primer on Vladimir Putin's Eurasian dream*, The Guardian, 18 February 2014, available at: https://www.theguardian.com/world/shortcuts/2014/feb/18/brief-primer-vladimir-putin-eurasian-union-trade (accessed 30 June 2022).

of anti-government protests followed all across Ukraine. In Kiev, the situation escalated quickly in late February 2014, culminating in President Yanukovych fleeing the country and his dismissal by the Ukrainian Parliament.

Following those events, the Russian Special Forces took over the Crimean Peninsula on 27-28 February 2014. A hastily organized and internationally condemned referendum was held on 16 March, and Crimea was incorporated two days later into the Russian Federation as a Republic. At first Russian scholars remained silent, whereas Russia's government officials were giving highly contentious international law justifications for the Russian actions.

In relation to the arguments supporting the right to self-determination of Crimea, Russia argued that Crimea was using the same general right to self-determination that Ukraine itself had used to become independent from the USSR in 1991; that the will of the Crimean people had been clearly expressed in the 16 March 2014 referendum; that there were grounds for remedial secession based on the Kosovo precedent as Russians in Crimea were under attack; and that the ICJ's Advisory Opinion on Kosovo Independence in 2010 had ruled that general international law does not prohibit a declaration of independence.

In April 2014, a series of pro-Russian protests in the Donbas area of Ukraine turned into armed conflicts between the Russia-backed rebel forces and Ukrainian authorities, producing yet another frozen conflict. Until 2022, Russia has continuously denied any direct involvement.[72]

2.5 The Right to Self-determination of Crimea and the Donbas

The Russian justifications for the annexation of Crimea are easy to refute. In what follows this article proceeds to examine what international law provides for the inhabitants of Crimean and Donbas.

First, Russia has already recognized Crimea as part of Ukraine in several international agreements. It is now trying to escape its responsibilities thereunder by claiming that due to an illegal constitutional coup Ukraine has become a new state with which Russia did not have any agreements.[73] However, international law does not give states the right to simply "un-recognize" other states in order to escape their legal obligations. Multilateral treaties involving Ukraine have remained in force all throughout the crises. These include the UN Charter; Art. 62 of the Vienna Agreement (especially banning the right to unilaterally resign from a border agreement);

[72] Protocol on the results of consultations of the Trilateral Contact Group, signed in Minsk 5 September 2014.

[73] *Address by President of the Russian Federation*, 18 March 2014, available at: http://en.kremlin.ru/events/president/news/20603 (accessed 30 June 2022).

the CSCE Final Act (1975); the CIS founding Agreement (1991); and the 1994 Budapest Memorandum. Thus, Russia's justification is not credible.

Second, Russia has claimed that the Russian population in Crimea was in danger and had to be protected with armed forces.[74] The same reasoning was used at the start of the 2022 war. Yet four independent international fact-finding missions from the OSCE, the UN, and the Council of Europe visited Crimea in the early spring of 2014 and found that there was absolutely no threat facing the Russian population in Crimea.[75] This justification was as easily refutable back then as it is in 2022.

The third justification was based on the official requests for help by President Yanukovych and the Parliament of Crimea, respectively. Under the Russian interpretation of the events of 2014, Yanukovych remained the legal President and could thus ask for help.[76] Crimea could ask for help as an independent state. Yanukovych had been removed without the constitutional threshold of 75% of parliamentarians due to the absence of many of them.[77] However, according to the Constitution only the Ukrainian parliament can ask for outside intervention, not the President. There is nothing in international law preventing a coup d'état from happening in a state – only a clear prohibition for an outside state to be involved in such a coup. Crimea remained a part of Ukraine and its autonomy did not include a right to become independent unilaterally, nor to ask for outside assistance.

The fourth justification was Russia's strongest one, i.e. that of the precedent of Kosovo independence (2008). In 1998-1999 the situation in Kosovo had developed into a threat to the civilian population, recognized by both the UN Secretary-General as well as in several Security Council resolutions. To resolve the situation, there was a highly contentious unilateral military operation to drive the Serb forces out from the province. After this had taken place, Security Council resolution 1244 established a United Nations Interim Administration Mission in Kosovo (UNMIK) to administer it until the negotiations between Kosovo and Serbia would settle the future status of the province. After eight years of failed negotiations, Kosovo declared independence unilaterally and quickly received a significant number of

[74] UN Doc SIPV. 7125, at 3-4.

[75] The Ad hoc Advisory Committee, *Report on the situation of national minorities in Ukraine,* adopted on 1 April 2014, Council of Europe Doc. para. 15; Office of the United Nations High Commissioner for Human Rights, *Report on the human rights situation in Ukraine*, 15 June 2014, available at: https://bit.ly/3axvg7W; Council of Europe Commissioner for Human Rights, *Human Rights Abuses in Crimea Need to Be Addressed*, 12 September 2014, available at: https://bit.ly/3IxwZXb; *Statement by the OSCE High Commissioner on National Minorities on her Recent Visit to Ukraine*, 4 April 2014, available at: http://www.osce.org/hcnm/117175; and Statement of 19 September 2014, http://www.osce.org/hcnm/123805 (all accessed 30 June 2022).

[76] A quote by the Russian Ambassador to the UN Vitaly Churkin on the request by President Yanukovych. Presented at the UN Security Council meeting on 3 March 2014, SIP V.7125.

[77] Constitution of Ukraine (1996), Art. 111.

international recognitions. In 2010, an ICJ Advisory Opinion held that Kosovo's declaration of independence did not violate international law.[78]

In comparison, all throughout the Ukrainian crisis Russia was heavily involved and openly used its armed forces to get the pro-Russian politicians into power.[79] These individuals then hastily organized a referendum without international observation. The President of Russia has admitted that he made the decision on the takeover of Crimea. There is no way around the fact that due to *ex injuria jus non oritur*, Russian actions make the independence of Crimea an illegal event. The same applies to the self-proclaimed "People's Republics" of Donbas.

Finally, Russia claimed that the 1954 transfer of Crimea from Russia to Ukraine had violated the Soviet Constitution.[80] However, inasmuch as Russia recognized Crimea belonging to Ukraine in several bilateral and multilateral international agreements, this argument is not legally credible.

In conclusion, while peoples have a right to self-determination, this right can usually only be realized within the confines of a state that has sovereignty over the area. An overwhelming majority of countries in the world recognize Crimea as being legally a part of Ukraine, so Ukraine is the only authority that can grant Crimea independence. If this were to take place, it would have to happen within the constitutional framework of Ukraine, which stipulates that such a move would need to be backed in referendums by the majority of voters in both Crimea as well as in Ukraine as a whole. Without such a concession, the recognition of independence and/or annexation of Crimea breaches the territorial integrity of Ukraine and is thus illegal interference into its internal affairs.

In relation to Donbas, while Ukraine did promise in the so-called Minsk II agreement in February 2015 to grant local self-governance to Donetsk and Luhansk provinces, it did so under a threat of use of force. As stated in Art. 52 of the 1969 Vienna Convention on the Law of Treaties, a treaty that is based on the threat or use of force in violation of the Charter of the UN is void. Moreover, the Minsk agreement never disputed Ukraine's territorial sovereignty over the provinces, and neither Ukraine nor Russia ever fulfilled the conditions stipulated in the agree-

[78] Unfortunately, the decision did not introduce any concrete instances or clarification on the factual content of the right to secession. N. Cwicinskaja, *The Legality and Certain Consequences of the "Accession" of Crimea to the Russian Federation*, XXXIV Polish Yearbook of International Law 61 (2014), p. 70. "The ICJ interpreted the question posed in a very narrow and formalistic way" (R. Värk, *The Advisory Opinion on Kosovo's Declaration of Independence: Hopes, Disappointments and Its Relevance to Crimea*, XXXIV Polish Yearbook of International Law 115 (2014), p. 115.

[79] Indirect aggression using the "little green men" is legally the same as using the state's official armed troops. Legal Advisory Committee, *The Opinion to the Minister of Foreign Affairs of the Republic of Poland on the Annexation of the Crimean Peninsula to the Russian Federation in Light of International Law*, XXXIV Polish Yearbook of International Law 275 (2014), p. 278.

[80] Putin's speech *(supra* note 73); and a resolution by the State Duma on 22 May 1992.

ment. After recognizing the independence of the Donetsk and Luhansk People's Republics in February 2022, President Putin stated that the Minsk agreement no longer existed.[81]

Thus, legally Crimea and Donbas continue to remain within Ukrainian territorial sovereignty. This does not mean that Crimeans and the inhabitants of Donbas are without any rights. In what follows I present a formula that demonstrates what Crimea – as a former ASSR – and the minority in Donbas would have been entitled to under international law at the time of the dissolution of USSR.

3. HOW INTERNATIONAL LAW CAN HELP TO MEDIATE THE POST-SOVIET CONFLICTS IN UKRAINE

As long as the tragic war is taking place, there can be no meaningful mediation. First there needs to be a ceasefire that holds. As I write these words the situation is ever-changing, and the future is hard to predict. At any rate, there is a need for peaceful solutions based on international law. I thus posit a proposal on how to mediate the post-Soviet conflicts in Ukraine – i.e., to settle the status of Crimea and the "People's Republics" in Donbas.

In Crimea, the question is not whether Russia or Ukraine that has full and exclusive sovereignty over Crimea. At its core, this is a Soviet dispute, so understanding the Soviet interpretation of sovereignty is key. In this framework Crimea's right to self-determination becomes an issue which needs to be taken into consideration. While this appears to complicate the matter further – bringing in a third party to compete over sovereignty – it actually clarifies the situation considerably. International law and the right to self-determination can find a solution to the Crimean question by going back to the original autonomous position of Crimea in Ukraine in early 1991, the subsequent dissolution of the USSR, and what these events meant for the autonomous status of Crimea.

A legally credible solution is to combine Crimea's autonomous status at the moment of the dissolution of the USSR with the *uti possidetis juris* rule and the rules of state succession. According to the two Vienna Conventions on the Succession of States, the term means "the replacement of one State by another in the responsibility for the international relations of territory", i.e., the transfer of rights and obligations between the former and the succeeding state.[82]

Ukraine inherited the territory of the former SSR of Ukraine and – with it – obligations towards the internal self-determination unit of the former ASSR of

[81] *Ukraine conflict: Biden sanctions Russia over 'beginning of invasion'*, BBC, 23 February 2022, available at: https://www.bbc.com/news/world-europe-60488037 (accessed 30 June 2022).

[82] Vienna Convention on Succession of States in Respect of Treaties (1978) and Vienna Convention on

Crimea. Ukraine's international recognition was conditioned on it accepting the *uti possidetis* borders, guaranteeing the rights of its national groups, and committing to settle any state succession questions by agreement or arbitration.[83]

From this equation, when adding the fact that the law of state succession is governed by the general principle of equity,[84] it follows that Crimea's right to internal self-determination was a precondition of Ukraine being recognized within its then-current legal borders that included Crimea. The following mediation proposal uses this right as a benchmark.

In Donbas, the first thing to acknowledge is that this is mostly a manufactured dispute without an ethnofederal background. The solution should begin with dismantling the illegal pseudo-state institutions set up by the separatists. The Russian-speaking areas should have enhanced local governance in those municipalities that are demographically distinct. This arrangement would provide a compromise that would be in accordance with *uti possidetis* and the previous status quo that the inhabitants of Donbas had accepted all throughout the Soviet era.

4. THE MODEL TO SOLVE THE CRIMEAN QUESTION

4.1. Territorial Autonomy

The ethnofederal model was based on and found legitimacy in providing "homelands" for the numerous peoples of the USSR.[85] Therefore, it is no coincidence that the post-Soviet conflicts revolve almost exclusively around territory and there is no credible alternative to the territorialization of autonomy.[86] Territorial autonomy is the most workable solution as it should be equally acceptable to both the conflicting parties and the international community – it is in accordance with the ethnofederal system that the parties found legitimate in their shared Soviet past, and with the territorial integrity of Ukraine that the international community places such a high value on and has insisted upon.

Succession of States in Respect of State Property, Archives and Debts (1983). Zimmerman argues that the quote constitutes the consensus on what the term 'state succession. encompasses. A. Zimmerman, *Secession and the Law of State Succession*, in: M. Kohen (ed.), *Secession: International Law Perspectives*, Cambridge University Press, Cambridge: 2006, pp. 208-209.

[83] European Community, *supra* note 23.

[84] S. Maljean-Dubois, *Le Role de l'équité dans le droit de la succession d'Etats*, in: P. Eisemann, M. Koskenniemi (eds.), *State Succession – Codification Tested Against the Facts*, Martinus Nijhoff, The Hague: 2000, p. 137.

[85] Seven out of the eight ethnofederalized SSRs have had separatist conflicts.

[86] Other alternatives include personal and cultural autonomy (M. Weller, *Introduction*, in: M. Weller, K. Nobbs (eds.), *Asymmetric Autonomy and the Settlement of Ethnic Conflicts*, University of Pennsylvania Press, Philadelphia: 2010, p. 3.

Any model to resolve the Crimean question must begin with demarcating the borders of Crimea. Art. 133 of the Constitution of Ukraine establishes the Autonomous Republic of Crimea. The 1998 Constitution of Crimea delineates the borders of this unit within the Ukrainian territorial sovereignty. According to Art. 7(1), the territory of the Autonomous Republic of Crimea is within those borders that were in existence on 20 January 1991, when its autonomous status in its current form was established. According to Art. 7(2), this territory can only be changed on the basis of a local referendum and a subsequent resolution of the Crimean parliament pursuant to the Constitution of Ukraine.[87] Hence there is no dispute over its borders.

The next step is to determine the rights involved within those borders. Crimea was a lower level ethnofederal unit with some state-like attributes, and held a veto right over any changes to its autonomy. While the rights of Crimea fall short of independence, Ukraine was only recognized independent by the international community after having pledged to respect the rights of its minorities in accordance with the commitments subscribed to in the framework of the CSCE, as well as the inviolability of all frontiers.[88]

The combination of these factors gives the Crimean territorial unit a set of rights, which I posit to be a suitable compromise by which to resolve the Crimean question. By entitling Crimea to a comprehensive yet limited territorial autonomy, the proposal does not compromise Ukrainian sovereignty over Crimea. Inasmuch as Crimea has not been internationally recognized as having become part of Russian sovereignty, there is still plenty of room to find compromises through negotiations.

Given the current impasse on the Crimean question, there is a need for a new perspective. By utilizing the *meritus* formula, my proposal establishes a framework for transforming the Soviet-era status of Crimea into the contemporary international law setting in the following four domains: *power-sharing, consociation, external guarantees*, and *special provisions*.

4.2. A Power-sharing Agreement

Power-sharing is essential for the success of any model of autonomy, but also a potential flashpoint in negotiations. Since there is no longer a federal centre to mediate the dispute, the lower-level units will aim to maximize their power within the organs of the parent state. Conversely, the parent state will aim to minimize the subunits' potential for interference so that they cannot compromise the functioning of the state. These are both equally legitimate concerns that need to be carefully balanced in any settlement.

[87] Constitution of the Autonomous Republic of Crimea (1998).

[88] European Community, *supra* note 23.

An appropriate continuation of Crimea's former autonomy does not entail a right to independent statehood, nor does it mean the confederalization or federalization of Ukraine. Since Crimea did not have a right to have independent foreign relations or a right to secession, it is within the parameters of *meritus* that it remains a part of Ukraine, with a territorial autonomy that has only a very limited external dimension.

Power-sharing needs to be accomplished by *devolution*, not decentralization. In the latter case, a unitary state gives a territorial unit a chance to exercise public power on its behalf, in a clear subordinate position. This would not work in the post-Soviet context. Instead, there should be a clear devolution of public authority, giving the autonomous region a right to exercise direct public power in its own domain.[89] This should be accommodated with the minority's own police force.[90]

Finally, a genuine autonomy arrangement should include power-sharing in the field of the judiciary. Crimea's regional courts – while being part of the unified judicial system of Ukraine – need to serve as the highest-instance court for those matters falling within the self-governance framework.[91]

So my proposal is for a power-sharing agreement between Ukraine and Crimea, which will require some re-formulation of the 1998 Constitution of the Autonomous Republic of Crimea. It is based on *uti possidetis meritus*, transforming the Soviet era autonomous agreement and its 1992 updates to accord with the present day situation:

The Crimean ASSR in Ukraine had originally been created on 12 February 1991,[92] but its status was only clarified with a new law on 30 June 1992.[93] That law gave Crimea a meaningful autonomy and the title of "Republic of Crimea." It was a functioning compromise between Ukraine's sovereignty and territorial integrity, and Crimean's right to a substantial internal self-determination in the form of strong territorial autonomy. As the codified clarification of Crimea's inherited ASSR status, it should be the basis for resolving the current Crimean question.

The main points of law involved are as follows: The Republic of Crimea is an autonomous part of Ukraine and independently resolves issues referred to its juris-

[89] Weller, *supra* note 86, p. 4.

[90] For example, in Kosovo's civil service at least 10% of the central level positions are reserved for Serbs (Law No.03/L-149 on the Civil Service, 14 June 2010, Art. 11.3).

[91] S. Wolff, *A Resolvable Frozen Conflict? Designing a Settlement for Transnistria*, ECMI Brief 26 (November 2011) p. 7. In Kosovo, 15% of Supreme Court judges must be members of minority communities.

[92] The law recognized the Crimean regional Council of People's Deputies as the highest body until the adoption of a new constitution.

[93] A law of 29 April 1992 had reproduced the ASSR model, where possible, in an independent Ukraine. However, it limited Crimean autonomy considerably and produced a backlash from the Crimean authorities. A new law was introduced in June, corresponding more with the internal right to self-determination that the Soviet ASSRs had enjoyed.

diction. Crimea can formulate its own laws and Constitution, so long as they do not contradict those of Ukraine.[94] Its territory cannot be changed or transferred to another state without the approval of both the Crimean and Ukrainian parliaments.[95] Crimea has full jurisdiction of its own affairs and it can participate "in the formation and implementation of domestic and foreign policy activities of Ukraine" on issues related to its interests.[96] According to Art. 3, Crimea's own affairs include things such as forming the electoral and judicial systems of the Republic; free ownership over the peninsula's natural resources; coordinating the economic policy of Crimea; environmental protection; the definition and implementation of policy in the field of education, culture, health care, sports, social security; as well as the protection and use of historical and cultural monuments. Crimea can develop and implement demographic policy, programs of urban planning and housing, and it has a relatively free language policy. More importantly, Crimea has an independent budgetary policy, meaning its own budget and finances. The maintenance of law and order is supervised by Crimea's own police force,[97] and it would be advisable to add symmetrical representation in the civil service, as was done in Kosovo. In foreign policy, Crimea can "independently enter into relations with other states and international organizations in the fields of economy, environmental protection, and socio-cultural sphere."[98]

Crimea has a veto over Ukrainian military affairs concerning the peninsula. Ukraine cannot – without the consent of the Crimean Parliament – station troops or military bases or conduct military exercises in Crimea.[99] Any Ukrainian military units stationed in Crimea must consist mainly of citizens residing in Crimea. The Crimean parliament needs to approve the Military Commander, the Commander of the Security Services, and the Prosecutor and Deputy Prosecutors of Crimea.[100]

The Crimean Parliament may apply to the Constitutional Court of Ukraine to declare Ukraine's laws invalid in the event they violate the powers of the Republic of Crimea.[101] Ukraine is declared to act as a guarantor of the legal status of the Republic of Crimea.[102] Finally, Art. 15 establishes that the content of the autonomy listed in the law for the Republic of Crimea may not be changed without the consent of the highest legislative body of Crimea.

[94] About the delimitation of Powers Between Public Authorities of Ukraine and the Republic of Crimea, 30 June 1992, Art. 1. The Ukrainian Parliament may also suspend normative acts of the Crimean Parliament in case of their inconsistency with the Constitution and laws of Ukraine (Art. 10).

[95] *Ibidem*, Art. 2.

[96] *Ibid*em, Art. 3.

[97] *Ibidem*.

[98] *Ibidem*, Art. 4.

[99] *Ibidem*, Arts. 5-6.

[100] *Ibidem*, Arts. 7-9.

[101] *Ibidem*, Art. 13.

[102] *Ibidem*, Art. 14.

This extensive autonomous status of Crimea was not a gift from Ukraine but a legal right of Crimeans, based on the combination of the *uti possidetis* rule and the internal form of the right to self-determination.

Any compromise solution for the Crimean question will obviously require some major concessions on the part of every stakeholder (Crimea, Ukraine, and Russia). I posit that the formula I am proposing can be the most neutral starting ground for a negotiated solution, as it is legally consistent. Ukraine maintains its territorial integrity; Crimea keeps its internal self-determination in the form of meaningful territorial autonomy; and Russia gains several perks indirectly – the rights of the Russian speakers in Crimea will be guaranteed and no matter what the Ukraine's defence policy framework in the future is, the peninsula will have a veto over any military deployments there – probably making it a demilitarised zone (apart from the Sevastopol Naval Base).

The changes that curtailed Crimean autonomy since 1995 were – in retrospect – a mistake, as they probably bred the discontent that contributed in large part to the population supporting the Russian illegal annexation in 2014. We need to find a working compromise that suits all stakeholders. I posit that the best compromise is for Ukraine, Crimea, and Russia alike to go back to the original arrangement, in the form in which it was clarified and codified in 1992, but with a few key changes.

Here I list the rest of the compromise solution, namely a consociation agreement between Crimea and Ukraine; international guarantees and dispute resolution mechanisms to be included into the compromise; and special provisions needed to get Russia to buy into the deal.

4.3. A Consociation Agreement

A functioning autonomy arrangement often requires an agreement on consociation. Not coincidentally, similar agreements are also found as a condition for meaningful minority protection in many of the EU's Accession Agreements.[103] However, when trying to find a balanced solution for the territorial conflicts involving former ASSRs, it is crucial to recognize that Ukraine was a federal component of the USSR but not a federation in itself. Consequently, *meritus* advocates for the continuation of the ethnofederal system – asymmetrical territorial autonomy – and not the federalization of Ukraine.

This is an important distinction that needs to be made. Previous mediation attempts, for example in 2003 in Moldova, have failed because they insisted on federalizing the host state. Even back in the Soviet times, the ASSRs did not have a right to independent foreign relations or veto over the host SSRs' relations. They do not need such a right now either.

[103] M. Rossi, *Ending the Impasse in Kosovo: Partition, Decentralization, or Consociationalism*, 42(5) Nationalist Papers 867 (2014), p. 872.

Thus, any mediation attempt based on *uti possidetis* should start from the premise that the former ethnofederal unit is unlikely to accept a weaker position than the internal self-governing position that corresponds with that established in the Soviet era. This should not include the right to disrupt the activities of the host state outside its territorial autonomy, but in some cases should contain a right to participate in the running of the state. This could be accomplished by establishing qualified majorities in the host state's parliament in some specific policy areas that are of importance for the subunit. The qualified majorities could be predetermined or triggered by a procedure. The aim is to limit the subunit's veto to areas that could be seen as essential to the autonomy arrangement.[104]

For example, under the current constitutional arrangement in Kosovo, a permanent Committee on the Rights and Interest of Communities guarantees the "vital interests" of communities in the legislative process within the Kosovo Assembly. Kosovo's ethnic groups are able to take part in the running of the state[105] via enhanced political representation and the entrenchment of parliamentary double-majorities in some legislative areas.[106]

Au autonomy arrangement requires determination of the appropriate level of representation for the minorities, which in turn is based on numerous factors. According to *meritus*, the guideline should be the previous level of consociation.[107] A quota to be followed is the subunit's former representation in the host state's parliament. In addition, in the more heterogeneous minority units there should be consociation agreements for the subunit's parliament as well.[108]

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[104] One example is the 2007 Kosovo Status Settlement Proposal. It envisioned a double-majority requirement for changing the Constitution and adopting laws of "vital minority interest."

[105] The UNMIK Regulation 2001/9 followed the "group-differentiated rights" model of minority protection. More in W. Benedek, *Final Status of Kosovo: The Role of Human Rights and Minority Rights*, 80(1) Chicago-Kent Law Review 215 (2005), p. 221.

[106] The representatives and all the minority representatives need to vote in favor. M. Warren, A. Zeqiri, *Decentralization or Destabilization? Striking an Ethnic Balance in the Balkans*, IPI Global Observatory, 8 July 2016. However, according to Adem Beha, while Kosovo's Constitution and subsequent legislation includes most key international legal standards on minority rights, many of them remain unimplemented in practice. A. Beha, *Minority Rights: An Opportunity for Adjustment of Ethnic Relations in Kosovo?*, 13(4) Journal on Ethnopolitics and Minority Issues in Europe 85 (2014), p. 86.

[107] The SSRs had 32 representatives in the Soviet legislative body, and the ASSRs had 11. The Constitution of the USSR (1936), Art. 35, and the Constitution of the USSR (1997), Art. 110.

[108] This is especially important in Crimea. In Kosovo, the Constitution reserves 20 of the 120 parliamentary seats to minorities and guarantees that at least one minister must be a Serb and another belongs to another minority. Moreover, the Constitution created the "Consultative Council for Communities", which serves as a channel of inter-ethnic coordination and consultation (Constitution of the Republic of Kosovo, signed on 7 April 2008, Arts. 60, 81, and 96). The Council is composed primarily of representatives of all non-Albanian communities. The OSCE monitors the Council's work (OSCE Mission in Kosovo, *Performance and Impact of the Consultative Council for Communities: 2015-2016*, 14 December 2017, pp. 4-5).

The autonomy settlement must be constitutionally entrenched and might have to be included in international agreements.[109] The key is to find a balance between stability and flexibility: the arrangement should be hard to change (to ensure stability), but flexible and dynamic rather than static. In other words, there must be clear rules on how to jointly change the rules if need be.

Consociation should be extended to judicial power-sharing, as an agreement cannot function without an impartial dispute resolution system. The representation of minorities in the judiciary will build up trust for the common cause. Therefore, the highest courts of the state should have a mandatory representation of minorities.

Thus under *meritus* Crimea should be given the same number of representatives in the Ukrainian parliament as it had under the Soviet system of consociation.

The Autonomous Republic of Crimea had the same number of confirmed seats in the Ukrainian Parliament as it did as an ASSR in the SSR Ukraine Parliament (Supreme Soviet), 12 out of 450 total (approximately 2.7%).[110] A realistic compromise should maintain this level. In the other cases of ethnofederal relations – for instance in Tajikistan – it has been proven that retaining the exact representational quota for the former autonomous unit can produce more harmonious national relations. Crimeans will likely view the continuation of the former representation quota as legitimate, increasing support for the autonomy arrangement.

4.4. International Guarantees and Mechanisms for Dispute Resolution

In addition to securing consociation in parliament – likely through a veto right in some limited policy areas – and in the judicial system, the undeniable fact is that the prolonged conflict over Crimea has built up much distrust. Thus, any credible agreement is going to need international guarantees.

These guarantees can play a decisive role, especially considering the power imbalance between Ukraine and Crimea, as well as the Soviet-era practice of using Moscow as a mediator in the case of a dispute. Building on this shared legacy is an obvious way to enhance trust between the parties, which is needed to reach and maintain a self-governance arrangement. International guarantees are also effective in committing external parties to the maintenance of the settlement. The international community can use this conflict as a means to decrease other threats to international peace and security, which all territorial conflicts contain even in their 'frozen' state.

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[109] Weller, *supra* note 86, p. 4.

[110] *Parliamentary elections not to be held at nine constituencies in Donetsk region and six constituencies in Luhansk region – CEC*, Interfax-Ukraine, 25 October 2014, available at: https://en.interfax.com.ua/news/general/230595.html (accessed 30 June 2022). For example, the quota was 3,33% for Nagorno-Karabakh in Azerbaijan's parliament and 4% for Gorno-Badakhshan in Tajikistan's parliament.

Finally, the "elephant in the room" needs to be addressed. Russia needs to be given a stakeholder position in guaranteeing Crimea's future autonomy. While this must not amount to Russia be given any veto rights over Ukraine's foreign policy, due to the pro-Russia feelings of Crimeans as well as the Soviet history of Moscow's mediation this guarantor role is an absolute necessity for the success of the settlement. This is not about rewarding Russia for its illegal aggression, but a recognition of the right to internal self-determination of Crimeans and their understandable need to have – from their point of view – a trustworthy guarantor state for the autonomy agreement. Moreover, the inclusion of Russia enables a role for the UN Security Council in the settlement (as is further discussed below).

No matter how distasteful it may be for Ukraine, Russia needs to be the guarantor of the rights of Russian speakers in Crimea, as no neutral state could credibly fulfil this guarantor's role. At the same time however, this role must be strictly limited to such issues as language rights. Russia can take an active role in protecting the agreed upon rights, for example by having a right to initiate the settlement's dispute resolution mechanism. However, it cannot be given any right to interfere with Ukraine's internal affairs or otherwise exploit this position.

There are several ways to internationally guarantee an agreement. First, a settlement can be achieved via an international peace treaty with multiple signatories, such as the one in Bosnia-Herzegovina.[111] Russia and Ukraine are not officially at war, but there needs to be an agreement to end all hostilities. Second, the settlement can be confirmed by a UN Security Council resolution, as was done in the Cambodian settlement.[112] This gives the agreement added weight and has the potential to involve the Security Council in any violations. If Russia is on board with the settlement, there will no longer be a paralyzing veto blocking this route to peace and it should be attempted. Finally, a temporary international administration of the conflict area – such as UNMIK in Kosovo – might be necessary. This administration must ensure the protection of human and minority rights, i.e., the fulfillment of the OSCE's and Council of Europe's minority protection standards. In Crimea, there needs to be a transition period, pending the details of the settlement, which includes establishment of the number of Russian troops allowed in the peninsula.

There is also a need to ensure that the autonomy agreement continues to function even when there are disputes. This should be secured primarily through consociation in the parliament and the Constitutional Court. Crimeans will probably need a guaranteed veto right over changes to its constitutional position.

In addition, a need for outside mediation in dispute resolution would be imperative. This could be accomplished by a panel of mediators, with representa-

[111] Dayton Peace Agreement Documents, initialled in Dayton on 21 November 1995.
[112] United Nations Security Council, S/RES/718, adopted on 31 October 1991.

tional quotas from both the disputing parties as well as from external countries.[113] A potential model would be the Council for Interethnic Relations introduced by Macedonia in 1991.[114] It consists of the President of the Macedonian Assembly and two members from each of the nationalities, with its main function being to consider issues of inter-ethnic relations and making proposals for their solution. The Macedonian Assembly is obliged to take into consideration the proposals of the Council and to make decisions regarding them.[115]

4.5. Special Provisions

In addition to all the above-listed requirements, a settlement based on *meritus* can include exclusion clauses, demilitarization options, international core issues, and/or referendums.

The exclusion clauses could address some potentially problematic areas between the host state and its subunits. For instance, in the case of Kosovo it was decided that in order to reassure the remaining Serb minority, the possibility of Kosovo joining Albania was banned by the UN Security Council resolution 1244. Likewise, the settlement with Gagauzia[116] and the proposals for Transnistria have contained clauses that would allow the subunit to exercise external self-determination in the event of unification of Moldova with Romania. In Crimea, such clauses could prevent Crimea from ever joining an outside state or could make some reservations if Ukraine joins the NATO or the EU.

Special provisions could also address international concerns, such as demilitarization or a non-aligned policy imposed upon the host state, as took place in Cambodia. For Crimea, this should include such external concerns as language rights. In addition, it should address the question of the Sevastopol Naval Base and the Russian Black Sea Fleet. The only realistic alternative would be to continue the Base's lease period according to the latest agreement between Russia and Ukraine, i.e., until 2042.

Finally, the settlement would need to include returning the currently occupied territories to Ukrainian control, and the free return of all internally displaced persons and refugees to their former places of residence in Crimea, under the supervision of an international peacekeeping mission.

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[113] Many international peace agreements include such provisions. *See e.g.*, Verification/Monitoring Mechanism: General Peace Agreement for Mozambique, signed 4 October 1992.

[114] Arbitration Committee on Yugoslavia, *Opinion No. 6*, 11 January 1992.

[115] Art. 78 of the Constitution of the Republic of Macedonia, quoted in: V. Neofotistos, *The Risk of War: Everyday Sociality in the Republic of Macedonia*, University of Pennsylvania Press, Philadelphia: 2012, p. 140.

[116] In 1994, the OSCE mediated a settlement between Gagauzia and Moldova.

4.6. The Model to Solve the Status of Donbas

As a baseline solution for the conflicts involving former autonomous entities, *meritus* advances an *asymmetric territorialization* that recognizes the former territorial subject as a self-governing unit. Crimea is proof that an essentially territorial conflicts can only be remedied with territorial solutions. However, for essentially non-territorial conflicts, *meritus* offers only a limited non-autonomous solution, such as the Ohrid settlement in Macedonia.[117] The level of local self-governance is based on the CSCE/OSCE framework for minority protection and the EC Guidelines.[118]

New legislation increasing the powers of elected local officials needs to be adopted, in conformity with the Ukrainian Constitution and the European Charter on Local Self-government. Enhanced competencies should relate principally to less politically sensitive areas, such as public services, urban planning, environmental protection, local economic development, culture, education, welfare, and health care. The local institutions need adequate financing to fulfil all their responsibilities.

Donbas should not get any special consociation levels in the Ukrainian parliament.

CONCLUSIONS

Admittedly it is a tall order to get Ukraine and Russia to agree on the proposals laid out in this article. It would have been difficult in 2021 and seems outright impossible today in 2022, given the horrendous, unprovoked war. Nevertheless, there needs to be concrete proposals on how to move forward. In these pages I have presented one model that would return Crimea and Donbas to Ukraine, but with concessions to Crimea and Russia. In sum, the main points are as follows:

In 1991 Ukraine inherited, through the application of *uti possidetis*, the borders of the SSR of Ukraine – including the autonomous unit of Crimea. It promised to the inhabitants of Crimea the continuation of this autonomy, and to the international community that it would respect the rights of national groups and would settle any questions concerning state succession and regional disputes by agreement or arbitration. Indeed, the recognition of Ukraine was conditioned on these criteria.

Based on Crimea's right to internal self-determination, the proposal presented in this article brings back the 1992 autonomy solution, but with a few key additions concerning dispute resolution, due to the loss of the mediating federal centre that made the arrangement work during Soviet times. In addition, unlike the 1992 solution, the solution in 2022 needs to contain a consociation agreement, to be

[117] Weller, *supra* note 86, p. 6.

[118] The 4 November 1991 Draft Convention of The Hague Peace Conference on Yugoslavia contains useful examples of minority protection.

internationally guaranteed, and to have special provisions concerning language rights and the Sevastopol Naval Base.

In exchange for its consent to the arrangement and its help in solidifying it by a UN Security Council Resolution, Russia would gain a guarantor status and the continuation of the Naval Base lease, neither of which compromise Ukrainian sovereignty. In the future, Russia could take an active role in protecting the agreed-upon rights of the Crimeans, for example by having a right to initiate the dispute resolution mechanism. However, it cannot be given any right to determine Ukraine's foreign policy or in any other way to exploit this position. To achieve this, the UN Security Council should be directly invested in maintaining the settlement.

The inhabitants of Donbas could gain a limited, local self-governance based on the CSCE/OSCE framework for minority protection and the EC Guidelines.

This proposal is non-biased, as it is based on international law. In addition, it gains further credibility from the fact that it is backed by history. Indeed, most of the things I have suggested here have worked in the past and have been found legitimate by all the parties concerned.

When the guns fall silent and the senseless war finally ends, there will be an even greater need for mediation proposals. To begin this crucial process, here I have offered one to get things started.