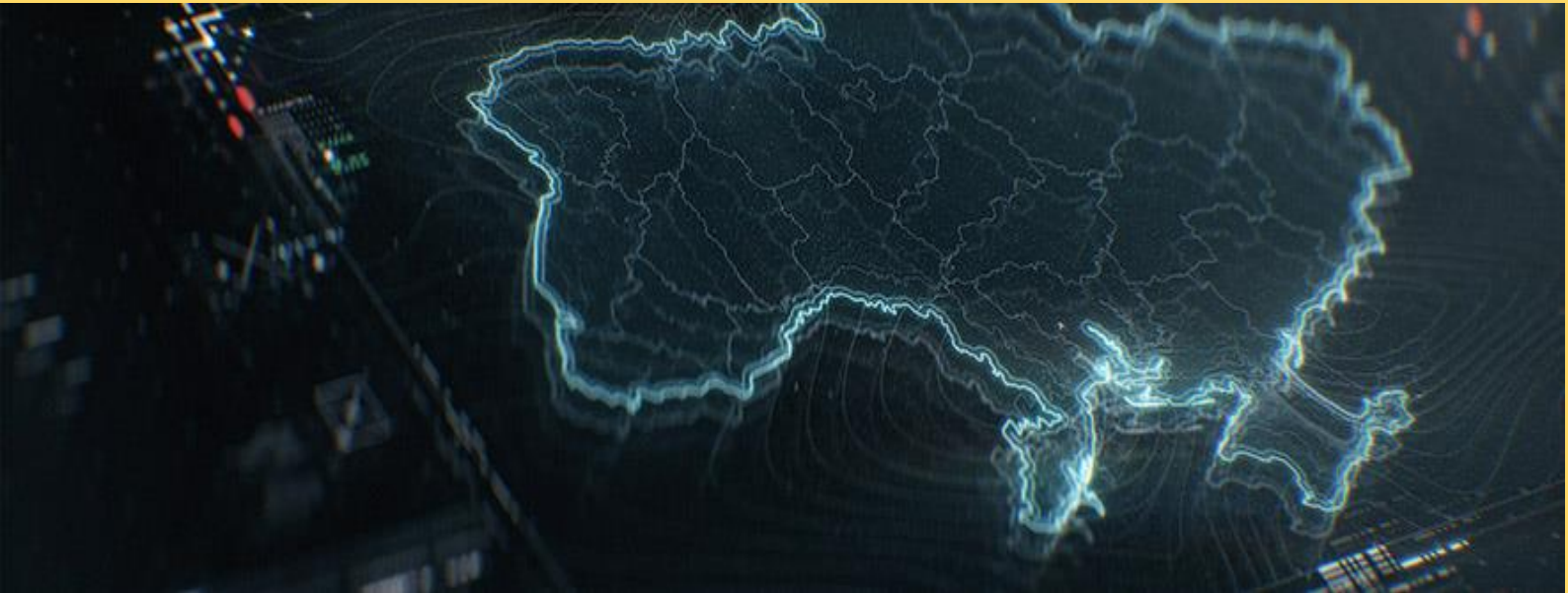




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UKRAINE SETTLEMENT PROJECT



UKRAINE SETTLEMENT OPTIONS:

Territory

By Marc Weller

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**UNIVERSITY OF
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Department of Politics and
International Studies

Harvard Negotiation Project

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UKRAINE SETTLEMENT OPTIONS PAPER: TERRITORY

Marc Weller is Professor of International Law and International Constitutional Studies in the University of Cambridge, the former Director of the Lauterpacht Centre for International Law and of the European Centre for Minority Issues, a former United Nations Senior Mediation Expert and a Barrister (Middle Temple) at Doughty Street Chambers. He served as advisor in a large number of international peace negotiations. He is the co-editor of International Law and Peace Settlements (CUP, 2021). The views expressed in this paper are his alone.

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EXECUTIVE SUMMARY

1. The territorial claims at issue in this instance can be grouped into four categories:
 - Crimea, including the city of Sevastopol;
 - The areas of Luhansk and Donetsk beyond the control of the Ukrainian authorities as of 23 February 2022;
 - The further territories of Luhansk and Donetsk that had been under the control of the Ukrainian authorities by that date;
 - Any other possible conquests, in particular in the south-east of Ukraine.
2. In principle, any forcible acquisition of Ukrainian territory by the Russian Federation is legally tainted. This includes the territories acquired in 2014, or declared supposedly independent or otherwise forcibly occupied.
3. This legal defect creates an obligation on the part of all states to refuse recognition of any territorial change brought about through the use of force.
4. The Russian Federation has announced that its demands on the status of Luhansk and Donetsk and Crimea are non-negotiable. Ukraine, on the other hand, has affirmed that it will not give up ‘an inch’ of territory.
5. To square that circle, it may be necessary to adopt a differentiated approach in relation to each of the four types of territory identified above.
6. Ukraine’s offer to defer consideration of the status of Crime for a period of perhaps 15 years is constructive and could be built on. There could be an additional pledge not to upset the *status quo*, including through the use of force, and not to question it in international fora. Instead, property rights of private persons, rights of return and human and minority rights and other practical issues could be addressed in the meantime.
7. The deferral could be augmented by an agreement on a mechanism to address the question of Crimea upon expiry of the agreed deferral period. In addition to negotiation, this could be mediation, a process of conciliation, or possibly of directed conciliation.
8. In a further step, requiring a major concession by Ukraine, the agreement could add considerations to be applied in the final settlement process, after the expiry of the deferral period. This might include a reference to an assessment of ‘the will of the people ordinarily resident in Ukraine, or resident there as of 1 February 2014, and their immediate descendants.’
9. Application of the settlement mechanism, or of some of the criteria it is to apply, could be made conditional on fulfilment by the sides of their respective commitments in relation to Crimea, or in relation to the settlement overall, during the deferral period. This would, however, require a process of independent assessment, beyond the control of the sides.
10. If an overall settlement is reached, including Crimea, other states and international institutions might pledge to remove, or not to adopt, economic measures in relation to materials, goods and services originating in Crimea during the deferral period.
11. It seems unlikely that the supposed legal identity of Luhansk and Donetsk as independent, sovereign states, removing them from the jurisdiction of Ukraine altogether, can be accepted by Ukraine or internationally. On the other hand, it seems clear that Ukraine has little interest in attempting to govern the areas beyond its control as of 23 February 2022, or to return to a Minsk II-like solution of decentralization or limited autonomy.

12. The Russian Federation may find it difficult to walk back on the formal recognition of the two entities. However, it would either need to take that step, or a solution could be found that would make such a step unnecessary or at least disguise it.
13. It is possible to consider a number of settlement models which would confirm the continued, single legal personality of Ukraine, also in relation to the two territories. However, following the Taiwan, Cyprus or Bosnia model, the legal identity of Luhansk and Donetsk as part of Ukraine could be somewhat disguised.
14. The German model is excluded. That model would accept at the international level that there exist two new states, Luhansk and Donetsk, although Ukraine could claim internally that it maintains a special, quasi-internal relationship with them, and retain an ambition of eventual unification in its constitution.
15. The Taiwan model means that all accept there is one Ukraine, but also agree that there exist two entities, Luhansk and Donetsk, of ambiguous status on its territory. Some might consider them virtual or quasi states. The Russian Federation could claim in relation to its own domestic constituents that the two territories remain states of a kind.
16. The Cyprus model means that Ukraine retains its full international legal personality and sovereignty. However, when seen from within Ukraine, there are quasi-‘states’ with ‘sovereignty’ that exercise their powers and participate in an ‘indissoluble union’ of the Ukraine. These have very wide powers of internal self-governance, but can never secede from Ukraine or join another, external state. At least notionally, it could be presented to Luhansk and Donetsk (and the Russian Federation) that they are opting into a confederal type of arrangement, or even a state union, from the starting point of their claimed statehood.
17. The Bosnia model allowed one entity to retain its state-like features, at least when seen from the inside (Republika Srpska), while ensuring that it would remain part of Bosnia and Herzegovina. Its relationship with Bosnia was akin to a confederal unit. The Republic of Serbia could maintain special relationships with that entity, although unification was precluded.
18. A similar approach as in Dayton might be possible in relation to Ukraine. However, this would imply a more definite departure from the claim to independent statehood of Luhansk and Donetsk. Still, the entities might retain the right to form special relationships with regions of the Russian Federation. Perhaps a way could be found in the agreement to require the Russian Federation merely to modify, rather than overturn, its recognition of Luhansk and Donetsk, in accordance with the terms of the agreement.
19. If a solution internal to Ukraine is to be found, it would need to involve complex power-sharing if the solution is to apply to the whole of the two Oblasts. Given the majority of non-Russian speakers, at least before the conflict, there would be a need to establish a sub-Oblast layer of governance for those municipalities where Russian-speakers are in the majority. There would also need to be a mechanism of power-sharing in relation to governance of the Oblast overall, along with human and minority rights and other provisions.
20. If the agreement addressed only the areas beyond the control of the Ukrainian authorities in Donbas as of 23 February 2022, then a simpler solution would be possible. Ukraine seems to be unenthusiastic about re-enacting or strengthening the Minsk II provisions. Rather than integrating these territories and providing for power-sharing at the central level, separation seems to be desired by both sides.

21. Accordingly, the territories could be constituted as a *sui generis* unit, or association of mainly Russian-speaking municipalities in Luhansk and Donetsk, and exercise virtually unconstrained powers of self-government or autonomy. They could form special links across the border with neighbouring regions of Russia. Ukraine itself would remain the territorial sovereign, but only exercise very limited functions in relation to these territories.
22. Another option for Luhansk and Donetsk would be to defer addressing their status. As with Crimea, there could be a standstill agreement for a number of years. In the meantime, there could be negative and positive deferral provisions, ruling out a challenge to the status quo, including through the use of force, and offering stabilizing steps. This could be augmented by a negotiation requirement at the end of that period, or some other settlement method.
23. However, it seems unlikely that provision for a referendum as an element of such an eventual settlement could be included. In the first place, this would encourage demographic manipulation during the interim period.
24. Second, if the territories covered by this arrangement are only those mainly inhabited by Russian-speakers, or those beyond the control of Ukraine as of 23 February 2022, this would be tantamount to agreeing to their independence at the conclusion of the interim period. Hence, such a solution could only be acceptable by Ukraine if it is willing to give up these territories after the deferral period, and is looking for a face-saving way of doing so. This is unlikely.
25. It is also unlikely that a full settlement can be achieved between Ukraine and the Russian Federation if the latter takes territories additional to the ones addressed above and decides to retain control over them. At present, these would be territories in the south-east of Ukraine, possibly extending as far, and perhaps even including, Odessa.
26. However, the necessary withdrawal could be sweetened with some concessions meeting key strategic concerns of the Russian Federation. These could include transit corridors linking Crimea to other territories held by the Russian Federation, guaranteed access to fresh water for Crimea, arrangements on electricity supplies, etc. Such arrangements would be adopted following the Hong Kong model. There could be a lease arrangement for an extensive number of years of strategic corridors and resource areas.

I. INTRODUCTION

A. No One Size Fits all Solution is Likely

From the perspective of international law, all actual or potential scenarios for the forcible acquisition of territory represent a serious violation of international law. This applies in equal measure to:

- Crimea including the city of Sevastopol;
- The areas of Luhansk and Donetsk not under the control of the Ukrainian government since 2014;
- The entire territory of Luhansk and Donetsk, should the Russian Federation be able to extend its control to their full Oblast boundaries;
- Any additional territory the Russian Federation might occupy.

Nevertheless, it may be unlikely that a settlement will result in the removal of Russian Federation forces from all of these areas. The settlement will likely need to apply distinct approaches in relation to each or at least to several of these categories.

B. The Issue in the Negotiations

The Russian Federation has [demanded](#) that Ukraine must acknowledge the supposed independent statehood of Luhansk and Donetsk, and the annexation of Crimea and Sevastopol by the Russian Federation. [see also John Simpson, [Ukraine Conflict: Putin Lays out his Demands in Turkish Phone Call](#), *BBC*, 17 March 2022.]

Ukraine has [offered possible concessions](#) on other key demands of the Russian Federation, such as permanent neutrality, but has steadfastly refused to consider surrendering ‘an inch’ of Ukrainian territory.

In fact, a [zone of possible agreement may exist](#) on virtually all the contentious issues between the sides. [see also [Russia Says Ukraine Willing to Meet Core Demands but Work Continues](#), *Reuters*, 30 March 2022.] However, in relation to the territorial or status claims, the conflict appears at first sight to be intractable. The options discussed below will highlight the ways found in other cases out of deadlocks of this kind.

C. Determinations by the United Nations General Assembly

Any settlement would need to address territorial issues against the background of international law. The acquisition of territory by force is entirely prohibited in international law. Moreover, under the doctrine of ‘serious violations of peremptory norms,’ third states are obliged to refrain from recognizing the forcible acquisition of territory by other states.

Agreements that offend against this mandatory principle are legally void. This limits the freedom to negotiate a peace settlement in this instance. Instead, it will be necessary to take account of the authoritative findings of the United Nations and others concerning the territories in question. In relation to Crimea, since the Security Council was unable to act due to the veto, the issue was addressed by the UN General Assembly. In Resolution 68/262 of 27 March 2014 the Assembly:

Noting that the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014 was not authorized by Ukraine,

1. *Affirms* its commitment to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders;
2. *Calls upon* all States to desist and refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine, including any attempts to modify Ukraine's borders through the threat or use of force or other unlawful means;
3. *Urges* all parties to pursue immediately the peaceful resolution of the situation with respect to Ukraine through direct political dialogue, to exercise restraint, to refrain from unilateral actions and inflammatory rhetoric that may increase tensions, and to engage fully with international mediation efforts;
- ...
5. *Underscores* that the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city of Sevastopol;
6. *Calls upon* all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status.

In relation to the armed action of the Russian Federation that commenced on 24 February 2022, the UN General Assembly adopted a resolution sponsored by no less than 93 states and receiving 141 affirmative votes, entitled Aggression against Ukraine [A/ES-11/L.1.]. The Resolution reaffirms 'that no territorial acquisition resulting from the threat or use of force shall be recognized as legal,' and:

1. *Reaffirms its commitment* to the sovereignty, independence, unity and territorial integrity of Ukraine within its internationally recognized borders, extending to its territorial waters;
2. *Deplores in the strongest terms* the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter;
- ...
5. *Deplores* the 21 February 2022 decision by the Russian Federation related to the status of certain areas of the Donetsk and Luhansk regions of Ukraine as a violation of the territorial integrity and sovereignty of Ukraine and inconsistent with the principles of the Charter;
6. *Demands* that the Russian Federation immediately and unconditionally reverse the decision related to the status of certain areas of the Donetsk and Luhansk regions of Ukraine; ...

The obligation not to recognize the fruits of a serious violation of peremptory norms is a firm part of the international order. It has been consistently restated in international standards, ever since the Nuremberg Trials. General Assembly Resolution 2625 (XXV), which is an authentic interpretation of the UN Charter, states:

No territorial acquisition resulting from the threat or use of force shall be recognized as legal.

Resolution 3314 (XXIX) on the Definition of Aggression also confirms in Article 4 (3) that 'no territorial acquisition or special advantage resulting from aggression is or shall be

recognized as lawful.’ [GA Res 3314 (XXIX)]. Similarly, the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, confirms [General Assembly Resolution 42/22, Article 10.]:

Neither acquisition of territory resulting from the threat or use of force nor any occupation of territory resulting from the threat or use of force in contravention of international law will be recognized as legal acquisition or occupation.

The UN Security Council has consistently administered this principle in practice, as was noted by the ICJ in the Kosovo Advisory Opinion. Kosovo Advisory Opinion, ICJ Reports 2010 ICJ 403, Para 81.]

... in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*).

Similarly, in the context of Israel and Palestine, the Court confirmed the positive obligation to the effect that ‘all States are under an obligation not to recognize the illegal situation’ resulting from a serious violation of a peremptory norm. [Wall, ICJ Rep 2004, p. 136, para 159.] Again, this is not a policy proposition but, as the Court noted, it is a requirement of law [para 87.]:

... the principles as to the use of force incorporated in the Charter reflect customary international law ... ; the same is true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force.

An agreement concluded in violation of the prohibition of the threat or use of force, or of the forcible acquisition of territory, is void from the beginning—it never acquires any legal force. As stated in the Vienna Convention on the Law of Treaties [Article 52.]:

A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Hence, any outcome of the present episode that results in an enforced recognition by Ukraine of territorial changes brought about forcibly would be without value. Moreover, third states would likely persist in their view that such outcomes cannot be internationally recognized.

This background restricts the room for addressing the demands of the Russian Federation in this instance. Either a territorial settlement would need to take on the appearance of having been arrived at freely, despite the present context of an armed invasion, or the requirement put forward by the Russian Federation of effecting or recognizing territorial change is excluded.

Potentially, this limitation could be overcome by a global constitutive act, accepting the outcome of the conflict and a settlement arrived at by the parties. Such an act could conceivably be furnished by a Chapter VII Resolution of the UN Security Council, although even this would be legally highly controversial. After all, it can be argued that even the UN Security Council cannot override the application of peremptory norms of international law. The very essence of such rules is that they are of such importance to the international community as a whole that they cannot ever be suspended or declared inapplicable.

Another way of addressing the issue would be a recognition of new territorial realities in a new, pan-European settlement and security order, in the mould of the Helsinki Final Act 1975.

Again, this might be considered as a regional constitutive act ratifying present realities, and offering a new beginning for international relations in Europe. However, it should be borne in mind that the Helsinki Final Act consecrated the then existing territorial arrangements as the outcome of World War II. It did not set out to overturn these, or to confirm their overturning through the use of force. Moreover, it took many years to achieve and in the end took the form of a non-binding, political commitment lacking legal force.

II. OPTIONS

There is a broad range of options addressing territorial issues of this kind. These can be divided into:

- Those that restore or retain the previously existing status of a territory;
- Those that suspend or delay addressing the status, or provide for a settlement mechanism;
- Those that disguise where sovereignty is actually located; and
- Those that accept that a change in status will occur and assist in implementing.

It will be convenient to address these in turn.

A. Internal Accommodation

Traditionally, the standard answer to attempted secession from an existing state has been to suggest an internal solution through enhanced self-government. This concession is often traded for a commitment of the entity in question to the continued territorial integrity and unity of the state.

The various forms of accommodating claims to statehood that are opposed by the central government will be reviewed in a specific options paper covering that aspect. Here it is sufficient just to introduce some key concepts.

1. *Decentralization*

In a centralized, or unitary state, most or all key decisions are taken by the central government and implemented through a cascade of national, regional and local bureaucratic institutions. The centre may also appoint senior officials, down to the regional or even local level. There is an unbroken chain of command from the centre to each locality, with intermediate bodies merely acting as implementing agents at their respective levels.

Decentralization means that the centre still takes all or most key decisions. However, the individual units of local government are given the authority to determine the specific ways in which they implement those decisions. France offers an example of a strongly centralized state that has permitted elements of decentralization generally, and more broadly in relation to special areas, such as Corsica. In view of its history and struggle for its own identity, Corsica enjoys some elements of enhanced local self-government or even autonomy.

2. *Enhanced Local Self-government*

The term ‘enhanced local self-government’ is occasionally used to disguise the sometimes highly controversial fact that autonomy has been granted to a certain region or ethnic, religious or linguistic group. This solution was adopted in the Ohrid settlement for the mainly ethnic-Albanian majority municipalities of North Macedonia. Certain units of local, or municipal government receive additional powers of localized decision-making. This may include a set of

local institutions, like an executive head and authority, a local assembly, and some local executive agencies. Under the principle of subsidiarity, those decisions that can be best taken at a level close to local populations will be assigned to local units of government.

This kind of arrangement was attempted in the Minsk II agreement. However, even the modest provisions provided for in the agreement had to be hidden in a footnote to an Article. Ukraine was unwilling to implement, considering this an imposition by force on its domestic governance arrangements.

3. *Autonomy*

Autonomy describes the permanent assignment of powers of self-government to a region. Genuine autonomy will be legally entrenched in the national constitution, or in an organic law (a higher law of constitutional standing). The range of autonomous powers may vary quite widely from case to case. They will be matched by a full range of institutions, from the executive, legislative, to the judiciary. Important executive functions may be assigned, or devolved, to regional bodies, such as policing, education policy, etc.

Traditional, long-established autonomies were sometimes used to accommodate populations affected by a change in sovereignty, subjecting significant population elements to a national government dominated by an ethnically different group. The most prominent examples of this are the Aaland Islands and South Tyrol. More recent cases include Gagauzia (Georgia), Mindanao (Philippines) or Aceh (Indonesia).

4. *Asymmetric Federalism (Federacy)*

In an asymmetric federation, the state remains essentially unitary. However, one or more regions are equipped with wide-ranging powers of self-government and associated institutions—powers denied to other parts of the country. In addition to powers of self-government, as would be typical for autonomy, some elements of federal participation in the overall state are added. This could include guaranteed representation in the national parliament and in the cabinet, perhaps a guaranteed post of vice-president, and other features.

Asymmetry can also apply within a federal system. For instance, Quebec in Canada enjoys a specific and enhanced status of self-government going beyond the powers assigned to the other federal units, as some 85 per cent of the French-speakers in Canada live in that territory.

5. *Federalism*

A federal system is composed of units of advanced self-government that are of equal standing and powers. Central powers and the powers of the federal units are clearly delineated. Moreover, the central institutions of the state offer full representation of the federal units, often including a second, upper house of parliament (senate).

Federations can be built from below, as an often notional, voluntary association of the federal units towards the common purpose of joint governance. The seeds of sovereignty, as it were, remain with the federal units. This was the nominal construction of the former Socialist Federal Republic of Yugoslavia. Residual powers then often remain with the federal units.

A second type of federal system is based on devolution, as evidenced in the UK. The overall state represented by the central federal authorities is the holder of sovereignty (as is the case now in the Russian Federation under its constitution of 1993). The federal units only enjoy the powers expressly granted to them by the centre. In this type of federation, residual powers remain with the centre, or are at times shared between the centre and the federal unit.

A recent example of federalization was the federal solution offered to the ethnic armed groups in Myanmar. According to a Nation-wide Cease-fire Agreement, the ethnic groups offered to

accept non-secession in exchange for a federal status under a new constitution. This initial agreement was translated into the Panglong II peace process which was disrupted by the recent military coup in Myanmar.

6. *Confederation*

In a confederation, semi-sovereign constituent entities come together to pool some competences in the shape of the confederal central institutions. These may be based on a more immediate form of representation of the confederal units, for instance a collective presidential council and a rotating confederal presidency. Switzerland is an often-quoted example, or the US, which started as a confederal system and gradually moved towards a more federal design.

In theory, at least, all public powers in a confederation were originally allocated to the confederal units, and only those specifically transferred to the centre can be exercised by the institutions of the overall state. All other powers remain with the confederal units.

7. *State Union*

A state union is created by two or more sovereign entities coming together to form one single legal personality in terms of international law. However, the constituent entities retain many of the attributes of sovereign self-government.

The central functions of the state union will be limited to specifically enumerated areas of competence, such as foreign policy and trade, defence, monetary policy, transport and communications, and general guidelines for economic policy. The short-lived United Arab Republic (Egypt and Syria) offers an example, along with the more recent and similarly transient Union of Serbia and Montenegro.

8. *Mixed Models*

At times, authority may be allocated according to the principle of multi-level governance. This may offer a combination of enhanced local governance in areas where a national minority constitutes a local majority, regional autonomy for larger geographic units within the state that offer unique features, other special regions (say, the capital region of the state), and finally federal-type arrangements for the state. These complex arrangements can be found in some standard constitutions, but have more recently been deployed in internal conflict settlements.

Bosnia and Herzegovina, for example, features enhanced local self-government through either mainly Muslim or ethnic Croat majority cantons, which are in turn combined in one single unit. That unit is then combined with the mainly ethnic Serb Srpska Republic by way of a confederal or union-type arrangement into one overall state with single legal personality.

Another complex arrangement was Sudan during the six-year interim period, before the referendum on self-determination for the South. Sudan was a nominal federal system. Within it, the federal units of the South had a collective identity of its own. The capital region of Khartoum has a special status, as did certain units within the supposedly federal system (Southern Kordofan, Abyei, etc).

9. *Complex Power-sharing*

Complex power-sharing adds additional elements to the mixed model. This includes enhanced provisions for minority rights and cultural autonomy for ethnic, linguistic or religious groups dispersed throughout the state territory, power-sharing arrangements within the central governing authorities and within the constituent units, and guaranteed representation of ethnic, religious or linguistic groups in the local, regional and state parliament. Again, Bosnia and Herzegovina furnishes an example.

B. Shared Sovereignty

It is possible to disguise the status of contested entities, or quasi-states in a settlement. For instance, the Turkish Republic of Northern Cyprus claims to be a sovereign and independent state. In the eyes of most other states, it is in fact a non-state, that is to say, an entity created through the unlawful use of external force. Hence, it must not be recognized as a state, and its claimed statehood cannot mature through the effective display of state authority over time.

To overcome deadlock, the UN Cyprus Settlement Plan of 24 March 2004, attempted to dilute the question of sovereignty. It provided for the establishment of one United Cyprus Republic, ‘modelled on the status and relationship of Switzerland, its federal government, and its cantons.’ [Article 2.] Specifically, this would have meant that:

- a. The United Cyprus Republic is an independent state in the form of an indissoluble partnership, with a federal government and two equal constituent states, the Greek Cypriot State and the Turkish Cypriot State. Cyprus is a member of the United Nations and has a single international legal personality and sovereignty. The United Cyprus Republic is organised under its Constitution in accordance with the basic principles of rule of law, democracy, representative republican government, political equality, bi-zonality, and the equal status of constituent states.
- b. The federal government sovereignly exercises the powers specified in the Constitution, which shall ensure that Cyprus can speak and act with one voice internationally and in the European Union, fulfil its obligations as a European Union member state, and protect its integrity, borders, resources, and ancient heritage.
- c. The constituent states are of equal status. Within the limits of the Constitution, they sovereignly exercise all powers not vested by the Constitution in the federal government, organising themselves freely under their own Constitutions ...

In other words, there would be one international legal personality for Cyprus as a whole. However, within it, there would be two ‘states’ of equal standing. These would ‘sovereignly exercise all powers not vested by the federal Constitution in the Federal government’. That is to say, the constituent entities remain the original bearers of sovereignty and they ‘sovereignly’ exercise virtually all state powers, except for a narrow band of common functions to be exercised by the institutions of the overall state.

In this case, the notion of an ‘indissoluble partnership’ rules out the possibility of ever achieving full independence for the north of Cyprus.

In this design, therefore, Northern Cyprus gives up its claim to actual, *de jure* independence—a claim unlikely to be fulfilled in international practice. Instead, it opts into the ‘indissoluble partnership’ with the South, forming the United Cyprus Republic. However, it gains acknowledgement of its *quasi*-sovereign status within those confines and retains virtually full powers of sovereign self-government. This model is therefore one that may bear consideration in the present case.

C. Assignment of Sovereignty to One Side, but Joint Decision on Territorial Change

A different outcome becomes at least possible in a further iteration of the shared sovereignty idea. This is furnished by the Northern Ireland settlement. There the self-determination unit is determined clearly—it is just one of the two contenders of either the island of Ireland as a whole, or Northern Ireland on its own.

In the 1998 Belfast or Good Friday Agreement, the parties:

ii. Recognize that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland;

iii. Acknowledge that while a substantial section of the people in Northern Ireland share the legitimate wish of a majority of the people of the island of Ireland for a united Ireland, the present wish of a majority of the people of Northern Ireland, freely exercised and legitimate, is to maintain the Union and, accordingly, that Northern Ireland's status as part of the United Kingdom reflects and relies upon that wish; and that it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people;

It should be noted that this arrangement was concluded by two existing states, not directly including the territory at issue (Northern Ireland). In this respect, the situation is similar to relations between Ukraine and the Russian Federation concerning Luhansk and Donetsk.

In the agreement, one of the most difficult issues in a settlement of this kind was clearly resolved. That is the question of what is the 'self-determination unit.' Here, clearly, it is the people of the 'island of Ireland,' i.e., the geographic unit of all of the island, rather than the present political units of the Republic of Ireland, and of the United Kingdom.

This represents a very important, if symbolic, win for the Republic of Ireland. This win is however balanced by attaching an agreed modality for implementing this right to self-determination. It can only be exercised if both parts of the Island, the people of the Republic of Ireland and the people of Northern Ireland, agree to a change in status separately. Assuming it is a given that the people of the Republic of Ireland favour union, the people of Northern Ireland can block such a move if they oppose it in a referendum. Moreover, it is clarified that this would, in fact, be the outcome at present and hence, there is no immediate need for an assessment of the will of the people.

A further variant of this option is to recognize that a unit within the state is a self-determination entity. It can hold a referendum on independence. However, implementing that referendum would depend on a decision on the part of the overall central state. This was in fact the way in which the former Soviet Union attempted to reign in the Baltic republics (and then Ukraine), as these proclaimed sovereignty within the USSR, as a first step towards reviving their independence.

According to the USSR Constitution, the Union Republics had a formal right to self-determination and secession. Of course, given the strongly centralized control exercised in Moscow, there had been no expectation that the right could ever be implemented. As the republics were attempting to do just this, the Congress of People's deputies raced to adopt a law on the implementation of the right to secession. This law would have imposed a lengthy process of consultation, and eventually the consent of all the other Union Republics, and of the Congress of People's deputies, before independence might be effected.

A more recent example may, arguably, be provided in the Bougainville settlement. There, a conditional right to self-determination is provided by Papua New Guinea for the people of Bougainville. Whether the conditions for exercising that right are met, allowing for a referendum, and whether, how and when such a result is to be implemented, might still depend on a further determination on the part of the Papua New Guinea parliament. [Kokopo Agreement, 26 January 2001.]

D. Hong Kong Solution

Under the Hong Kong Option, it is confirmed that the sovereignty of a contested territory lies with one state. However, the territory is then leased to another state for a certain number of years. At the expiry of that period, the territory reverts back to the actual sovereign.

Such a solution would not likely be contemplated for Crimea, Luhansk or Donetsk. However, it could offer a solution should the Russian Federation capture other territories which, from its perspective are of significant strategic value. This could include territories connecting it to Crimea, or providing a fresh water supply to Crimea. A transport corridor, or fresh water access, could be agreed according to a lease arrangement following the Hong Kong Model.

E. Agree to Disagree

If it seems impossible to address a claim to self-determination or statehood in the settlement, it may be possible simply to ignore the issue of status, or agree that it cannot be resolved at present.

1. *Agree to Disagree*

The sides might simply state their respective views, without any further action taken. Essentially, they agree that each side can continue holding its de-jure view of the situation.

2. *Agree to Disagree but Rule out Force*

This result may be stabilized by adding a non-use of force clause. While the sides hold divergent views *de jure*, they may agree not to upset the status quo, or the *de facto* situation. In particular, they may rule out the use of force to change the *status quo*. Instead, they may commit themselves to settle outstanding issues peacefully. This might be flanked by military disengagement, withdrawal of heavy weapons from the line of control and confidence building measures.

3. *Agree to Disagree and Renounce Hostile Action*

There may be additional steps. The sides may agree not to undertake hostile interventions aiming to undermine the de-facto administration in the territory in question. They may also renounce the use of hostile propaganda. In addition, they may also agree a moratorium on seeking international acceptance of their view on the status of the entity, or its membership in international organizations (Washington Agreement on Kosovo).

4. *Agree to Disagree, and Stabilize the Situation in the Interest of the Local Population*

Under this variant, the sides may be unable to agree on the status of the territory, but they might agree modalities of interaction in relation to the contested entity. They may conclude technical agreements of relevance to the local population (recognition of education certificates, pension payments, access to education and health services across the line of control, property right, transport and communications, sharing of recourses and energy supplies, economic relations.) The initial outcomes of the EU-led normalization dialogue on Kosovo offer an example.

F. Deferral for an Agreed Period

In addition to acknowledging that each side will retain its view on the de jure situation, while renouncing action to overturn the *status quo*, the sides may also agree, formally, to defer the issue. They may indicate that the problem may be discussed in the future, after the expiry of a certain period of time.

An initial Ukrainian proposal relating to discussions on Crimea after a period of 15 years seems to point in that direction. There does not appear to be any expectation as to a specific outcome of these discussions.

Another model is to defer the issue for a specified period, and to provide for a mode of settlement once that period has expired. This suggestion was adopted in the 1999 Rambouillet Draft Agreement for Kosovo [Chapter 8., Article 1: Amendment and Comprehensive Assessment.]:

3. Three years after entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures.

This proposed solution did not actually provide for a mechanism to effect a settlement, or even a binding settlement procedure at the end of the interim period. Rather, there would be 'an international meeting to determine a mechanism' for a settlement, i.e., a two-step modality towards a settlement.

The provision also included a conditionality, in the sense that as part of the process there would be an assessment of the implementation of the Rambouillet Agreement. Compliance by the sides, or their efforts regarding implementation, along with their proposals for additional measures to be adopted, would be taken into account. Also, the facility for introducing proposals by the Parties into the discussions seems to suggest that the outcome of the settlement process might be an extension or improvement of the Rambouillet Interim Agreement, rather than a fresh settlement.

This is however balanced by a reference to the Helsinki Final Act (code of territorial integrity of the then Yugoslavia) and the competing invocation of the 'will of the people'—a reference to a possible referendum.

Somewhat more modestly, Resolution 1244 (1999) of the UN Security Council contained an annex which referred to [S/RES/1244 (1999), 10 June 1999, Annex.]:

8. A political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the UCK. Negotiations between the parties for a settlement should not delay or disrupt the establishment of democratic self-governing institutions.

The political process that was envisaged was not specified. Neither was the timeframe for establishing that process. It appears that the end state would be not a political settlement, but rather an interim settlement. This time the balance would be between Rambouillet (which included the reference to the will of the people) and the sovereignty and territorial integrity of the Federal Republic of Yugoslavia. While the former Yugoslavia argued that it had thus been assured of an end state that would preserve Kosovo within its sovereignty, the ICJ ruled that the political process foreseen in Resolution 1244 (1999) was open as to its potential final result. It did not exclude the eventual Declaration of Independence by Kosovo.

A further variant would be to specify the mechanism for a settlement that would be applied at the expiry of the interim period. For instance, there might be provision for internationally mediated negotiations, for a conciliation procedure, etc, after an appointed interim period.

G. Interim Period plus Referendum

A much more far-reaching approach is to provide for an interim period, followed by a referendum on the status of the territory in question. This can be conditional on the fulfilment of other criteria or factors, or it can be a straightforward pledge for a referendum that will occur simply due to the expiry of the interim period.

1. External Conditionality

One variant of this approach is to make the holding of a status referendum dependent on external circumstances that may arise, possibly beyond the control of the one or other of the sides [The Law on the Special Legal Status of Gagauzia (Gagauz Yeri), Parliament of the Republic of Moldova, 23 December 1994.]:

In case of a change of the status of the Republic of Moldova as an independent state, the people of Gagauzia shall have the right of external self-determination.

It was thought possible that Moldova might divide and dissolve itself as an independent state, its component parts joining neighbouring territories. Gagauzia was assured through this provision that it would be entitled to a referendum on independence if that circumstance were to arise.

2. Internal conditionality

Internal conditionality is a solution that makes the holding of a decision on possible independence dependent on the conduct of the entity seeking the change in status.

The conditional offer of a referendum on status is provided by the Bougainville Agreement. The Kopopo Agreement of 26 January 2001 provides that Papua New Guinea will adopt constitutional amendments which will ‘guarantee’ that the referendum will be held. However, in reality, that guarantee is somewhat conditional:

... no earlier than 10 years, and, in any case, no later than 15 years after the election of the first autonomous Bougainville Government, when the conditions listed below have been met, unless the autonomous Bougainville Government decides, after consultation with the National Government and in accordance with the Bougainville Constitution, that the referendum should not be held. The conditions to be taken into account include: weapons disposal, and good governance. The actual date of the referendum will be agreed after consultations by the autonomous Bougainville Government and the National Government.

Bougainville therefore had to comply with provisions in the agreement on disarmament. Moreover, it had to demonstrate, over the interim period of 10-15 years, that it is capable of delivering ‘good governance,’ a term that could be interpreted in various ways.

It is not clear how determination of the fulfilment of these conditions is to be achieved and verified. A further conditionality in the agreement consisted of the fact that the referendum alone, if in favour of independence, would not automatically result in independence. Instead, the Bougainville parliament has to effect this result.

The referendum was held in 2019. However, Papua New Guinea insisted that it would be non-binding. As yet, it has not implemented the result, which was a majority of 98 per cent in favour of independence.

3. *Unconditional Referendum after an Interim Period*

A more straightforward example of an interim period followed by a guaranteed referendum is provided in the Machakos Protocols on South Sudan of 20 July 2002, and the Comprehensive Peace Agreement adopted three years later.

It was agreed that there would be a six-year interim period. Throughout that period, both sides would strive to implement self-government for South Sudan and equitable participation in the governance of all of Sudan. On this basis, it would be demonstrated that continued unity, according to the new complex autonomy and power-sharing arrangements, would suffice to address the concerns and interest of the people in the South. On this basis, self-determination would then be made available to the people of the South:

1.1 That the unity of the Sudan, based on the free will of its people democratic governance, accountability, equality, respect, and justice for all citizens of the Sudan is and shall be the priority of the parties and that it is possible to redress the grievances of the people of South Sudan and to meet their aspirations within such a framework.

1.2 That the people of South Sudan have the right to control and govern affairs in their region and participate equitably in the National Government.

1.3 That the people of South Sudan have the right to self-determination, inter alia, through a referendum to determine their future status.

The agreement then provides for a transition process to apply during an interim period lasting for six years. At the end of that period:

There shall be an internationally monitored referendum, organized jointly by the GOS and the SPLM/A, for the people of South Sudan to: confirm the unity of the Sudan by voting to adopt the system of government established under the Peace Agreement; or to vote for secession.

The prospect of ‘making unity attractive’ after a most violent secessionist conflict between the South and the central authorities of Sudan was not entirely notional when the agreement was concluded. The leader of the South, John Garang, had hopes of becoming the leader of all of Sudan. Hence, he was willing to accept the twin offer of Southern self-government plus involvement in the affairs of the Sudan as a whole. However, he was killed soon after the agreement had been concluded. From then on, it was clear that the South would opt for independence.

Yet, there were no firm provisions on implementing the referendum result. The African Union feared that preparatory talks between North and South on implementing independence would be seen to prejudice the referendum result. Instead, pre-referendum negotiations on how to implement possible independence were convened only belatedly, towards the end of the interim period. These negotiations were largely unfruitful. Still, the referendum was held and the result was implemented, although amidst considerable tension between North and South, and conflict also within the South.

While the referendum result in South Sudan was clearly credible, this was less the case in relation to West Irian. Like the remainder of Indonesia, the territory had been part of the Netherlands colonial empire. However, it was not decolonized along with the other territories that would form Indonesia. Under an international agreement, the territory was placed under UN administration which, in turn, handed administration over to Indonesian authorities.

The expectation established in the New York Agreement of 1962 was that the status of the territory would be finally decided in view of a plebiscite among its population. However,

instead of a plebiscite, Indonesia organized a consultation ('Act of Free Choice') among local leaders, who, when gathered together by Indonesian authorities, expressed themselves in favour of special autonomy within Indonesia. It was alleged that Indonesia stage-managed the event and pressured the hand-picked participants into accepting this result. A resistance movement formed in consequence.

Similarly unsuccessful thus far has been the attempt to arrange a referendum on integration with Morocco or independence among the people of Western Sahara. Morocco occupied the former Spanish colonial territory in 1975, before it could administer its act of self-determination. While Morocco appeared at one point to have accepted the prospect of a referendum, it has since then refused this option as far as possible independence is concerned. Instead, it has offered an autonomy settlement within Morocco.

H. Suspension of Independence Pending Preparations for Statehood

In some instances, it is clear that an entity will achieve statehood. However, activating that status is deferred, pending preparations for assuming full sovereign powers by the indigenous authorities.

Indonesia had occupied Eastern Timor in 1975, claiming the territory as part of its post-colonial inheritance. However, in international law, the territory was its own, separate self-determination unit, having been part of the Portuguese colonial empire. The remainder of what was to become Indonesia had been administered as Netherlands colonial territories.

A long-running conflict between the Indonesian authorities, and the Eastern Timorese national liberation movement, FRETELIN, ensued. Perhaps surprisingly, in 1999, Indonesia offered a referendum on self-determination, with the options of special autonomy for Eastern Timor within Indonesia or independence. The clear referendum result in favour of independence of 78.5 per cent was answered by violence and destruction administered by the withdrawing Indonesian authorities and armed forces.

A United Nations mission for Eastern Timor, partially governing the territory, was established, to allow the indigenous authorities to prepare for independence, which eventually came three years after the referendum had been held, in 2002.

A further example is provided by Namibia, which had been unlawfully occupied by South Africa, the former mandatory power. In 1989, a United Nations Transition Assistance Group of some 7,500 was deployed to the territory, as South Africa withdrew its forces. Over one year, a constituent assembly developed a new independence constitution and elections were held in accordance with that document. Namibia then achieved independence in 1990.

I. Conditional/Supervised Independence

Another example where it is clear that statehood will be the outcome is conditional or supervised independence. Under a comprehensive settlement plan provided by UN Mediator Martti Ahtisaari, it was foreseen that the UN Security Council might endorse independent statehood for Kosovo, provided Kosovo would commit to compliance with the involving conditions for its future governance provided for in the plan. Moreover, the UN Mission that had administered Kosovo since the end of the armed confrontation with the former Yugoslavia (Serbia and Montenegro) would continue to exercise some of its functions in a supervisory role, as independence was being implemented.

However, this plan was not approved by the UN Security Council. In the alternative, Kosovo unilaterally undertook to fully comply with the provisions of the Ahtisaari plan, and to

implement its principal provisions in its own independence constitution. In its Declaration of Independence, Kosovo pledged:

We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially the obligations for it under the Ahtisaari Plan. Kosovo Declaration of Independence

According to the Declaration of Independence, this undertaking is legally binding and can be invoked by all states.

J. Negative Co-existence of States in the Absence of Mutual Recognition

Coexistence relationships are different from the option of deferral. In the case of deferral of status, the question of whether an entity will be re-integrated with one of the parties to the agreement remains open—there may after all be an internal settlement. Co-existence, on the other hand, implies a relationship with an entity, or an agreement concerning an entity, that already acts like a state for all practical purposes. Reintegration is not really a realistic option, whatever the view on status of the one or other side. The modalities of interaction among the sides are, however, similar to those that might accompany deferral.

Negative co-existence means that the principal states involved do not come to an agreement on the status of an entity. However, they agree to regulate their relations as it effects that entity at least to the extent of abstaining from action directed against the entity in question.

This might consist of the transformation of a cease-fire into a renunciation of the use of force in relation to the territory under dispute and a corresponding obligation to settle disputes peacefully. Such a non-aggression pact was proposed by Kosovo in its relations with Serbia in 2021, in the context of their EU facilitated normalization negotiations.

Previously, the Trump administration achieved an agreement with the two sides, the Washington Agreement. In that agreement, Kosovo undertook to freeze its campaign to seek membership in international organizations for one year. In response, the Republic of Serbia undertook to suspend its campaign of persuading states that had recognized Kosovo to withdraw that recognition—some 15 states had done so in response of its intense lobbying effort.

Negative co-existence therefore means that the two sides agree to refrain either from the use of force against one another (negative security pledge or non-aggression pact), and/or they agree to refrain from other actions the other side sees as hostile. Beyond that, they take no steps towards mutual recognition of their mutual identity.

K. Positive Co-existence

The same applies in relation to positive co-existence. The sides do not accept their respective claims on status, although it is clear that the contested entity acts and performs like a state. However, they do agree to a variety of practical steps, mainly aiming to ease the lives of the populations in the territory under dispute. Once more, the Kosovo normalization process offers an example. Without prejudice to their respective legal positions, the parties have agreed to a whole host of practical agreements under EU mediation. These address transport and communication, economic and energy links, educational certification and a range of other problems. In other instances, attempts to achieve at least an ever-denser network of practical arrangements in relation to a territory featuring a contested status have been more hesitant

(Georgia). Indeed, even in relation to Kosovo, actual implementation of the various ‘normalization’ agreements has been quite uneven.

L. Taiwan—Co-existence in Ambiguity

When the issue of settling the status of Kosovo arose, there was considerable discussion about adopting a ‘Taiwan solution’. The trouble is that few, if anyone, agree on what the Taiwan solution means for Taiwan, and least of all for any other potential case.

With the establishment of diplomatic relations between the USA and the People’s Republic of China in 1979, the US has accepted that there is only one China, and that this one China is the PRC. Accordingly, it shifted its diplomatic representation from Taiwan, previously held to encapsulate the legal personality of ‘China,’ to the PRC.

The position of China has been that there is, indeed, only one China. Moreover, it notes that the one China is the PRC. Third, it asserts that the PRC represents all Chinese citizens. However, under the roof of the one China representing all Chinese citizens, it accepts the ‘one country, two systems model.’ This would mean that Taiwan is part of China and subject to its sovereignty and constitutional order. However, that constitutional order would guarantee a special administrative status for Taiwan, taking account of its different economic, political and social system.

In November 1992, it seemed that a formula was being agreed by the sides in an informal exchange. Supposedly it provided that:

Both sides of the Taiwan Strait agree that there is only one China. However, the two sides of the Strait have different opinions as to the meaning of 'one China.' To Peking, 'one China' means the 'People’s Republic of China (PRC),' with Taiwan to become a 'Special Administration Region' after unification. Taipei, on the other hand, considers 'one China' to mean the Republic of China (ROC), founded in 1911 and with *de jure* sovereignty over all of China. The ROC, however, currently has jurisdiction only over Taiwan, Penghu, Kinmen, and Matsu. Taiwan is part of China, and the Chinese mainland is part of China as well.

Hence, Taiwan moved from the view that it alone is China and that its authority extends to all of China to the sense that it represents the one legal personality of China, although its effective authority does not extend to the territories effectively administered by the PRC. On the other hand, whenever elections are held in Taiwan, the discussion over whether Taiwan should declare itself independent as Taiwan arises anew along with the attendant threats from the PRC against the taking of such a step.

The view of the US and her allies is deliberately obscure. There is agreement with the first two propositions, but not the third. In the Western view, there is one China, and that China is represented by the PRC. However, the authority of the government in Taipei, democratically established as it is, to govern in Taiwan, cannot be challenged. Certainly, there must not be a forcible challenge in the form of incorporation of Taiwan into the PRC.

The 1979 US Taiwan Relations Act, adopted after the shift in diplomatic relations with China from Taiwan to the PRC, seeks to ‘... make clear that the United States decision to establish diplomatic relations with the People’s Republic of China rests upon the expectation that the future of Taiwan will be determined by peaceful means.’

In the Act and related policy pronouncements, the US has committed itself to ‘make available to Taiwan such defense articles and defense services in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capability.’

Of course, if there is only one China, and Taiwan is part of it, in international law it is difficult to see why the use of force against it would amount to a violation of the prohibition of the threat or use of force in international law according to Article 2 (4). As the ICJ confirmed in the Kosovo Advisory Opinion, the prohibition operates only in relations between sovereign states. Hence, the PRC might argue that the application of its military power against Taiwan would represent merely an internal re-deployment of its own military, on its own territory. There is no violation of international law.

The USA has not made it clear what its commitment to Taiwan might consist of, beyond the supply of weapons and other equipment and services. This view has been [carried forward](#) into the present Biden administration.

In summary, the ‘Taiwan model’ seems to suggest a solution where both sides accept that territorial sovereignty of one of them also extends to the contested territory in question. Therefore, that territory is not a state of its own. However, they may not agree which one of them is the holder of all-encompassing sovereignty.

At any rate, the issue of underlying unipolar sovereignty notwithstanding, they also accept that the territory in question governs itself entirely independently, very much like a state, even if it must not proclaim itself an independent state. Moreover, the entity may seek to establish diplomatic relations with other states, as Taiwan has been doing with waning success. Any attempt to change this *modus vivendi* risks an armed confrontation. This applies to a unilateral declaration of independence by the entity, as it does to its possible forcible integration. The unspecified US pledge of support adds to the sense of uncertainty in this respect.

This policy of strategic ambiguity concerning the status of the entity in question is one that might be considered in the present instance, although the risks inherent in such an approach must be borne in mind. The principal risk is that the one or other side miscalculates the serious nature of the intent underpinning the defensive pledge. Hence, a relationship based on strategic ambiguity is inherently unstable.

M. Germany—Positive Co-existence

Another possible approach to settle sovereignty disputes is sometimes raised by Germany, based on its own experience with the Basic Treaty, or *Grundlagenvertrag*, between East and West Germany of 1972.

Before the advent of the Treaty, under the West-German Hallstain doctrine, West Germany would not maintain diplomatic relations with any state that recognized East Germany as a state. In the Basic Treaty, both Germanys agreed to develop normal, good neighbourly relations based on equal rights.

In their mutual relations, they would ‘refrain from the threat or use of force’ and reaffirmed ‘the inviolability now and in the future of the frontier existing between them and undertake fully to respect each other’s territorial integrity.’ [Article 3.] In relation to their internal affairs, they would respect each other’s sovereign jurisdiction. [Article 6.] Essentially, therefore, they recognized the exercise of sovereignty of each of the states on their respective territory.

In terms of international relations, in Article 4 of the Treaty:

The Federal Republic of Germany and the German Democratic Republic proceed on the assumption that neither of the two States can represent the other in the international sphere or act on its behalf.

Essentially, West Germany accepts that third states can recognize and have diplomatic relations with East Germany. With respect to their mutual relations, the agreement provides in Article 8 that:

The Federal Republic of Germany and the German Democratic Republic shall exchange Permanent Missions. They shall be established at the respective Government's seat. Practical questions relating to the establishment of the Missions shall be dealt with separately.

Hence, for all intents and purposes, they agreed to establish diplomatic relations. However, West Germany would retain its view that this relationship was not strictly one between two states. It was an 'inner-German' relationship and as such *sui generis*.

Moreover, West Germany added in a unilateral declaration that German unification in peace remains the aim, as provided in its constitution and notwithstanding the provisions in the treaty. However, while the Cold War lasted, this was rather a notional hope, given the requirement of consent of the sides and their commitment to the peaceful settlement of all disputes.

This agreement cleared the way to the admission of both states as full members of the United Nations. While East Germany insisted that it was engaging in diplomatic relations with West Germany in line with its unquestioned legal identity as a sovereign state, West Germany referred to its relationship with East Germany as 'inner-German' relations. It took the view that East German was now recognized as an entity exercising state authority on parts of the territory associated with the actual, underlying legal identity of a unified Germany.

Even if the rather conceptual view of West Germany about this relationship is accepted, the outcome differs from that of Taiwan. In relation to Taiwan, it was agreed that there exists one state. For most others, that one state is represented by the PRC, although another entity of less specific status also exists on the territory of the PRC.

West Germany also argued that there existed only one Germany, although this would not likely be the view of other states. With the Basic Treaty, it was agreed *de facto* and *de jure* that there exist two German states, both of which together would, in the view of West Germany, fill out the underlying legal identity of the one Germany.

III. OVERALL EVALUATION

Four types of territory may be distinguished in the present context: Crimea and Sevastopol, Luhansk and Donetsk according to the line of control of 23 February 2022, occupation of the entire territories of the two Oblasts, and finally any other territory that may also fall under the occupation of the armed forces of the Russian Federation.

Crimea conducted an independence referendum under cover of armed military intervention by the Russian Federation. For that reason alone, the referendum was tainted and invalid. The UN General Assembly has confirmed this fact and pointed to the obligation of all states not to recognize its result. Enacting the referendum through unilateral action on the part of the local authorities in Crimea by declaring independence, and granting annexation by the Russian Federation, was similarly unlawful. In international law, the acts are without effect.

The areas of Luhansk and Donetsk not under the control of the Ukrainian government as of 23 February 2022 also lack any international legal status. They were brought beyond the control of the Ukrainian government through a sizeable, although again supposedly covert, armed intervention by the armed forces of the Russian Federation. They are territories under armed

occupation. Their purported declarations of independence have been internationally rejected and their purported statehood must not be recognized by any other state. They are non-states, as has again been determined by an overwhelming majority in the UN General Assembly.

As non-states on the territory of Ukraine, Luhansk and Donetsk lack the legal capacity to invoke the right to collective self-defence. Hence, the armed invasion of Ukraine cannot be justified with reference to a request for collective action under the supposed treaties of defense and cooperation concluded between them and the Russian Federation on the eve of the invasion. Indeed, the fact that their statehood was proclaimed and recognized by the Russian Federation as an artifice in order to justify the armed invasion de-legitimizes their claim to existence in law yet further.

The International Court of Justice, in its Provisional Measures Order, has already rejected the additional argument of the Russian Federation that its invasion was justified by genocide perpetrated by Ukraine in those areas. Indeed, it ordered the Russian Federation in a legally binding way to cease the military operation. There is also no evidence that Ukraine mounted armed attacks or caused incidents against Russia itself, triggering a right to self-defence.

Any additional territorial gains that might be made by the Russian Federation would be similarly legally tainted. At present, two scenarios seem possible. First, these gains might extend towards establishing control over the entirety of the Oblasts of Luhansk and Donetsk. The purported recognition of both entities as states by the Russian Federation expressly extends to their full territory, even if, at the time, only about a third of it was under Russian Federation control.

Beyond that, the Russian Federation might seek to make and consolidate further territorial gains in the south-east of the country, connecting Crimea to the other territories it holds, and perhaps also capturing additional areas along Ukraine's southern coast.

It is clear that the status of all four types of territory in international law is that of a territory under foreign occupation. Neither the purported annexation of Crimea, nor the purported statehood of Luhansk and Donetsk have legal force in the international arena. Instead, third states are under a positive obligation not to recognize the outcome of the unlawful use of force by the Russian Federation. The same applies in relation to any other territory the Russian Federation may seek to acquire through the use of force.

This legal defect in the acquisition of territory by the Russian Federation is very difficult to overcome short of a withdrawal. A mandatory, Chapter VII resolution of the UN Security Council endorsing these acquisitions is unlikely. Even if it could be obtained, it is not clear that such a resolution could heal the legal defect in this instance. Perhaps, with the passage of a considerable period of time, the law might follow the facts. For instance, there might be a pan-European settlement recognizing a new security order, and perhaps implicitly accept the adjusted boundaries. But this seems far-fetched, or at least far off, at present.

The Russian Federation is demanding recognition of its purported annexation of Crimea and of the supposed statehood of Luhansk and Donetsk. It cannot easily depart from these demands. Recognition of the changes in the status of territories is the only possible way that the outcomes of the armed action of 2014 and of the present invasion can be 'regularized.'

However, even the acceptance by Ukraine of the purported status of these territories in a settlement under present circumstances would likely be legally irrelevant. It would clearly have been brought about by the unlawful use of force. As such, the entire settlement would be null and void from the beginning. Ukraine could always invoke this fact. The Russian Federation would not enjoy the stability it is seeking for its purported territorial acquisitions.

This background must be borne in mind when considering how the territorial dimensions of this conflict can be addressed in a settlement. Outright acceptance of the claims of the Russian Federation seems out of the question, whether for Ukraine or for its supporters, even if the Russian Federation were able to consolidate their occupation of territory, or even if it manages to subdue Ukraine entirely after all.

If, under these circumstances, any settlement is to be possible, it will be necessary to square the circle in relation to the territorial dimension. This may require differentiated treatment of the individual aspects of the Russian Federation claims, despite the fact that, legally speaking, they are all equally tainted.

A. Crimea

Starting with the annexation of Crimea, the settlement cannot simply ratify the result obtained through the use of force. However, in addition to legal considerations, there are political ones. Reversing the annexation seems hardly possible. While the referendum was tainted and has been ruled irrelevant, it seems clear that a large element of the local population would favour incorporation by Russia. Some point to the fact that the territory was simply transferred from the Russian Federation to Ukraine in 1954, without any consideration of popular will. With the emergence of the Russian Federation and Ukraine as independent states, this fact has gained an additional dimension.

Ukraine has already made the first step towards a solution when it proposed deferring the issue for a period of perhaps 15 years. During such a period of deferral, the sides would accept the *de facto* situation, while maintaining their positions *de jure*. That is to say, Ukraine would continue to regard Crimea as a special status area under its constitution, and so would the Russian Federation. However, following the model of negative co-existence, the sides would renounce the use of force to address this problem in the future and agree to settle all disputes peacefully.

The sides might also commit to positive co-existence, to address specific issues that arise from the *de facto* situation, which is likely to persist over an extensive period of deferral. These might concern the property and rights of persons displaced from Crimea, the right of voluntary returns, the property of Ukraine, guarantees of equal treatment, human and minority rights for non-Russian residents, etc. Perhaps in exchange for the withdrawal of Russian armed forces in the south-east of Ukraine, there might be arrangements for uninterrupted access to Crimea from other territories under Russian Federation control, guarantees of the provision of fresh waters and arrangements concerning the supply of electricity. This would need to be balanced by commitments relating to the environment.

The negotiations would explore whether it may be possible to go beyond deferring the status issue. Depending on concessions in other areas by the Russian Federation, Ukraine may be willing to agree to a definitive settlement mechanism that would become operational towards the termination of the period of deferral.

A third, further step would include criteria to be considered by the settlement mechanism when addressing the issue of the status of Ukraine. One may recall the balancing of the commitment to the principles of the Helsinki Final Act (territorial integrity) with the question of the assessment of the popular will in the Rambouillet draft agreement.

There might also be a ratification requirement. If popular will is not to determine the outcome of the settlement process, a plebiscite might in fact be a legal requirement if a change in the status of the territory were to occur in consequence of the settlement. Similarly, there might be provision for endorsement of an outcome agreed through the settlement mechanism by a pan-

European Conference on Security and Cooperation, and potentially also the UN Security Council.

A more straightforward deferral, leading to a definite undertaking to settle the issue through a referendum after 10-15 years could also be considered. Obviously, this would be a more significant concession on the part of Ukraine for which it would presumably wish to obtain concessions on other issues. There could also be the option of a conditional referendum after the expiry of the deferral period. Such conditions might relate to the implementation of the rights to be granted to non-Russian residents, protection of communities like the Crimean Tatars, fulfilment of pledges of cooperation by the sides in relation to Crimea, etc.

If there is to be a conditional commitment to a referendum, then the Bougainville example suggests the importance of offering an authoritative mechanism to assess performance of the sides in relation to the agreed conditionalities. There would also need to be undertakings concerning the removal of constitutional obstacles should a *de jure* acceptance of the transfer of territory be the result of the exercise.

It seems difficult to foresee avenues of settlement that move even further to the flat demand of the Russian Federation that the purported annexation must be accepted by Ukraine. Perhaps the EU and US could encourage flexibility of the Russian Federation in the search for a settlement if they consider removing sanctions targeted at products and services emanating from the occupied territory of Crimea and Sevastopol should a settlement be achieved.

B. Luhansk and Donetsk

The Russian Federation might insist on its view that Luhansk and Donetsk are sovereign and independent states. However, if it does so, it would condemn the two territories to the uncomfortable existence of non-states, living in international isolation and cut off from the massive inflow of assistance for reconstruction and development that will come to Ukraine with the end of the conflict. They would be backwaters, entirely dependent on being sustained by the Russian Federation. Of course, the Russian Federation might simply incorporate them too, by way of a further forcible annexation.

On the other hand, such an attitude would prevent a settlement, including some of the attendant benefits the Russian Federation claims to be seeking, such as permanent neutrality for Ukraine, prohibition of certain types of armaments and limitations of others, rights for Russian speakers in Ukraine, etc.

The Russian Federation would also need to consider the population balance in the two Oblasts. At least before the war, this balance was in favour of non-Russian-speaking population segments. Any settlement would need to offer a right of voluntary return to displaced persons or refugees. A deliberate policy of ethnic cleansing throughout all of Luhansk and Donetsk, also affecting the areas with a majority of non-ethnic Russian speakers, would yet further isolate Russia and turn both territories into international pariahs forevermore.

Accordingly, if the Russian Federation insists on the independence of Luhansk and Donetsk in their full Oblast boundaries, going beyond the areas that were outside the control of the Ukrainian government as of 23 February 2022, it might be left with a majority population permanently resisting Russian-dominated governance within the supposedly independent states.

Whatever the extent of territorial control it may achieve, the Russian Federation may be unlikely to offer a retreat from its recognition of the two entities.

On the other side, it seems unlikely that Ukraine could simply accept their purported independence or annexation by the Russian Federation. It might be possible simply to defer the issue, or to agree to address it at a specified later point, perhaps through an agreed mechanism. Or, to break this deadlock, it may be possible to consider in turn the German, the Taiwan, the Cyprus and the Bosnia models

In the German model, the subjects of the agreement are in fact all states, in this case Ukraine, Luhansk and Donetsk. The latter two would be entitled to engage in diplomatic relations with other states and seek membership in international organizations. However, internally, Ukraine would consider relations with the two entities as special relations that are not exactly state-to-state relations, like the ‘inner-German’ relations under the 1972 agreement. Moreover, Ukraine would assert that this agreement is underpinned by a continuous existence of the legal personality of Ukraine as one state within its full territory, including Luhansk and Donetsk.

It may be unlikely that Ukraine could accept such an outcome, which would essentially ratify the independence of the two entities. This would likely remain the case even if an agreement would add the provision that neither of the two entities could ever join the Russian Federation.

The Taiwan option might offer more room for manoeuvre. There would be one international legal personality for all of Ukraine. All, or most states, would recognize the government in Kyiv as the one and only government of Ukraine. However, Ukraine would accept that its effective authority does not extend to Luhansk and Donetsk, or perhaps more likely to the areas of Luhansk and Donetsk not under its control as of 23 February 2022. The two entities would govern themselves as *quasi* states of ambiguous status. They might maintain informal relations with other states and perhaps form a special relationship with regions across the Ukrainian border, or with the Russian Federation as such. Potentially, in this construction, the Russian Federation could maintain its agreements on friendship and defence with the two entities. It might not need formally to withdraw its recognition and could instead adjust its relations with the entities according to the settlement under a face-saving formula.

However, this too would likely be unacceptable to Ukraine. Ukraine would presumably seek a stronger confirmation of its territorial integrity and single legal personality. The Cyprus model might be more attractive from that perspective.

It would be clear that there is only one state at the international level. But when seen from within that one state, Luhansk and Donetsk might be allowed to claim that they ‘sovereignly’ exercise their very broad powers of self-government. There would be fairly minimal integration between them and the central Ukrainian government, with most competences reserved for the two entities. Moreover, they might develop special ties to the regions across the border with the Russian Federation.

In any *quasi* confederal or nominal state union model, Luhansk and Donetsk could be allowed to maintain the view that they have, from their initial position as sovereign states, voluntarily opted into association with Ukraine in accordance with the settlement.

One such model would be of a confederal-type settlement, coupled with complex power-sharing as developed in the Dayton Agreement on Bosnia. This kind of arrangement would probably apply if Luhansk and Donetsk are to be addressed within their full territorial definition as Oblasts according to the legal order of Ukraine. The two entities would be part of Ukraine, but enjoy an asymmetrical, quasi confederal status in the Ukrainian constitution that might acknowledge their special status. Extensive power-sharing provisions would apply within both entities, assuring full and equal participation of governance for all population elements in the territory. There would be extensive provision for the participation of both Oblasts in the

governance of Ukraine as a whole, along with other provisions on power-sharing and human and minority rights.

There might then be further, enhanced local self-government for the local units of government mainly inhabited by Russian-speakers in Luhansk and Donetsk. These might come together to form an association of municipalities, or region, within each of the two Oblasts, to which additional powers of autonomous government could be assigned.

In the alternative, the settlement might focus on the areas of Luhansk and Donetsk beyond the control of the Ukrainian government as of 23 February. It seems that after 8 years of persistent conflict with those territories, the Ukrainian government might not actually wish to resume full governmental authority over them, provided no loss of territorial sovereignty its involved. Even the very limited provisions for elements of enhanced local government for the mainly Russian-speaking areas of Luhansk and Donetsk in the Minsk II Agreement proved unacceptable to the Ukrainian parliament at the time.

Under this scenario, the two areas would be left to administer themselves. There would be no specific assignment of authority to them, and no provisions for an asymmetric federal-type status that would involve the entities in the overall governance of Ukraine. Ukraine would only claim very limited powers in relation to the entities. This might extend only to maintaining the external borders, a common currency, and a few other competences.

The entities would be entitled to receive economic assistance from the Russian Federation and maintain special relations with regional authorities on the Russian side of the border.

C. Additional Territorial Gains

The Russian Federation also seems to seek territorial gains outside of Donbas and Crimea, in the south-east of Ukraine. Depending on its military progress, it may seek to consolidate its hold over these areas, extending westwards along the south coast of the country as far as may be possible for the Russian Federation.

Evidently, Ukraine would resist a settlement that would ratify or confirm such conquests. If a cease-fire is achieved while these additional areas are under Russian Federation control, one might expect that hostilities will resume once Ukraine has the military capacity to do so. Given Western support, it may over time be equipped to mount a credible campaign to recapture the additional territory that was taken. The Russian Federation would, on the other hand, have to remain in constant readiness for such a more major armed campaign. Moreover, there might be continuous, lower-intensity campaigns of violence, disrupting the attempt to consolidate the armed occupation. There would also be little prospect to achieve any form of settlement—a settlement which would offer a number of elements Russia appears to seek, such as permanent neutrality for Ukraine.

This constellation may impel the Russian Federation to consider its position, even if the present conflict yields additional gains. To encourage a settlement under those circumstances, Ukraine might consider some concessions that could be offered without giving up ‘an inch’ of Ukrainian territory. In exchange for a withdrawal from areas not controlled by the Russian Federation before 23 February, Ukraine might offer guarantees for transport and communications for the Russian Federation in relation to Crimea, or perhaps a corridor for that purpose, and also arrangements concerning fresh water for Crimea. If that is not sufficient, a longer-term lease arrangement for limited areas of absolute importance to the Russian Federation might be considered, leaving Ukrainian sovereignty in relation to them intact, as provided in the Hong Kong option.

IV. CONCLUSION

Short of an overwhelming victory of the Russian Federation over the Ukraine as a whole, it is unlikely that it will be able to enforce its view of the legal status of the territories occupied in 2014, and for those additional territories it may now attempt to add. It will need to attempt to achieve this vision through a settlement. However, a settlement implies compromise.

If the Russian Federation maintains its position on the issue of territory, it is likely that Ukraine will do the same. The international legal system, international institutions and the large majority of governments, including the Western world, will support the view that no territorial change can be obtained through the use of force.

There are some means and modalities to achieve a settlement that would satisfy Russia's broader underlying interests, unless those interests are exclusively focused on the ratification of all possible territorial gains. It could of course well be that the Russian Federation only really seeks territorial expansion. In that case, its other demands, which can only be met through negotiation, like permanent neutrality for Ukraine, would be a smoke-screen.

In relation to the Crimea model, Ukraine has taken the first step by offering a deferral of the question of its status. Pending a settlement, either side can retain its view on the legal status of the territory. In the meantime, a process of normalization can set in, concerning rights of non-ethnic Russians at present or formerly in the territory and practical improvements of the situation of the local population.

For Luhansk and Donbas, it seems very difficult to avoid a walking back of the claim of the Russian Federation that both entities are in fact states. If the Russian Federation really argues that they should be states within their full boundaries according to Ukrainian internal law, it would find that these supposed states would in fact be governed by a majority of ethnic Ukrainians. It could seek to change that population balance in the forthcoming conflict even further through direct or indirect ethnic cleansing. However, this would just push the two resulting entities even further into an international pariah status.

Perhaps a Taiwan-like solution could be discussed. It would be clear that there is one Ukraine which exercises the unitary international legal personality of the country in relation to all of its territory. However, within that one country, Luhansk and Donetsk enjoy ambiguous legal status. Most states would not regard them as states, although the Russian Federation could maintain special relations with them. Moreover, there would be an assurance on the maintenance of the territorial integrity and unity of the country in future.

A further option would be the Cyprus solution. In that scenario, it is clear that there is only one international legal personality for Ukraine. The Ukraine contains Luhansk and Donetsk. As composite 'states' in the internal sense of the constitutional order of Ukraine, the 'sovereignties' exercise the competences assigned to them in the settlement. But they are not states in the sense of international law. They are part of Ukraine, in an indissoluble union, exercising very wide powers of self-administration.

This solution might flow into a complex power-sharing approach if it is to be applied to the full territories of Luhansk and Donetsk as described in the present legal order of Ukraine. Through an association of mainly Russian-speaking municipalities, a regional unit of enhanced self-administration could be created with the Oblasts. The Russian speakers would also receive assurances on participation in governance of the Oblasts as a whole, though power sharing arrangements and other tools.

If the Russian Federation is merely seeking a settlement addressing the majority-ethnic Russian parts of Luhansk and Donetsk, or those parts of the Oblasts beyond the control of the Ukrainian

government as of 23 February 2022, an odd convergence of interests between both parties may develop. Evidently, these smaller entities could not be full states. On the other hand, the interest of Ukraine in having to administer them according to an asymmetric federal or some other solution is very limited. A return to Minsk II plus seems unrealistic to many observers. Instead, ethnic separation, rather than integration within Ukraine, seems to be desired by both sides. A settlement that retains the territorial integrity of Ukraine, but permits some links between those mainly ethnic-Russian-inhabited areas might be possible, provided the rights of the non-ethnic-Russian population segment are assured.

Finally, any additional Russian Federation conquests outside of the areas discussed thus far would most likely need to be reversed. Some compensation could be offered, in the form of land corridors or other steps to link Crimea to other areas under Russian Federation control, along with guarantees on supplies of fresh water, energy, etc.