Faculty of Law
University of Helsinki

FROM KOSOVO TO CRIMEA

The Legal Legacies of the Socialist Federal Dissolutions

Tero Lundstedt

ACADEMIC DISSERTATION

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In Helsinki, June 2020

Tero Tapani Lundstedt

Abstract

This thesis is focused on the socialist federal dissolutions of the Union of Soviet Socialist Republics (USSR) and the Socialist Federal Republic of Yugoslavia (SFRY) in the early 1990s, and on a legal rule related to state succession, *uti possidetis* (*juris*). Briefly, *uti possidetis* transforms former internal administrative borders into international borders at the moment of state dissolution, with all the legal ramifications this status change entails. The thesis reconstructs from the events an evolutionary process that led the international community to choose a specific version of *uti possidetis* regarding the socialist federal dissolutions. After demonstrating the mistakes made in this process, the thesis provides a proposal for an updated version of *uti possidetis* that can rebalance the legal principles of self-determination and territorial integrity in future state dissolution cases.

Part I poses the research question of *what are the legal legacies of the socialist federal dissolutions for international law in general and the post-federal successor states in particular?* It claims that by a virtue of being a general legal principle, *uti possidetis* has to evolve alongside the shifting paradigm of the international legal order. After accounting for the evolution of *uti possidetis* with its application in the decolonization cases since the 1800s, the thesis concludes that this vital process was disrupted in the early 1990s. The chosen mode of application failed to take into account two legally crucial factors: the evolution of the right to self-determination and the unique socialist federal model. As *uti possidetis* was not updated to factor in these changed circumstances, it was misapplied, causing national fragmentation in the successor states. This has directly contributed to territorial conflicts, out of which Kosovo and Crimea are the most prominent.

Part II introduces the two components of a proposed *uti possidetis* update. Chapter 3 exhibits the internal component, the last applicable legal order of the dissolving state. Chapter 4 presents the external component, the international legal rules regarding the dissolution. The combination of the two at the moment of dissolution generates an update of *uti possidetis*, titled '*uti possidetis meritus*'. It calls for expanded recognition of internal borders and draws legitimacy from its compatibility with the existing *uti possidetis* framework.

Part III presents the legal aftermath of the socialist federal dissolutions and proposes the *meritus* formula as a remedy. Chapter 5 gives a comprehensive review of how the right to self-determination was realized in the socialist federal dissolutions and how this caused territorial conflicts. Chapter 6 concludes the argument by exhibiting two potential forms of application for *meritus*: it can be used to help settle already existing conflicts, as well as to minimize territorial fragmentation in the future state dissolution or independence cases.

In sum, the vital evolution of *uti possidetis* was disrupted in its transformation into a non-colonial context. The legal legacies of the socialist federal dissolutions are the distortion of *uti possidetis* and the lack of balance between self-determination and territorial integrity in the successor states. *Meritus* aims to remedy both.

Contents

PART I: *UTI POSSIDETIS JURIS*

1. Introduction

This dissertation is focused on a particular set of events - the socialist federal dissolutions of the Union of Soviet Socialist Republics (USSR) and the Socialist Federal Republic of Yugoslavia (SFRY) in the early 1990s - and on a particular legal rule, *uti possidetis* (*juris*). Briefly, *uti possidetis* (in English 'as you possess, so you may possess') is an international law principle that transforms former internal administrative borders into international borders, with all the legal ramifications this status change entails.[1] The dissertation reconstructs from the events an evolutionary process that led the international community to choose a particular version of *uti possidetis* regarding these dissolutions. It demonstrates the mistakes made in this process that ended up producing fragile successor states. Consequently, I provide a proposal for an updated version of the rule - *uti possidetis meritus* - that can be used to rebalance the legal principles of the right to self-determination and territorial integrity in the cases of state dissolution.

1.1 Research Question

The research question that I am posing is *what are the legal legacies of the socialist federal dissolutions for international law in general and the post-federal successor states in particular?*

In order to answer this question, I first address a series of sub-questions, the main of which are:

1) What mistakes were made with the application of *uti possidetis* in the socialist federal dissolutions?
2) What would be a more orthodox application of *uti possidetis*?

[1] For articles and other scholarly publications of the *uti possidetis* doctrine, in general or in a decolonization context, see, *inter alia*, J. Crawford, 'State Practice and International Law in Relation to Secession' 69(1) *British Yearbook of International Law* (1998) 85-117; R. McCorquodale and R. Pangalangan, 'Pushing Back the Limitations of Territorial Boundaries' 12(5) *European Journal of International Law* (2001) 867-888; E. Hasani, '*Uti Possidetis Juris*: From Rome to Kosovo' 27(2) *Fletcher Forum of World Affairs* (2003) 85-94 (<*http://hdl.handle.net/10427/76986*>. References to online sources are accurate as on 9 June 2020); P. Hensel, M. Allison and A. Khanani, 'Territorial Integrity Treaties, *Uti Possidetis*, and Armed Conflict Over Territory', paper in the conference 'Building Synergies: Institutions and Cooperation in World Politics' (2006) 1-41; F. Jankov and V. Ćorić, *The Legality of* Uti Possidetis *in the Definition of Kosovo's Legal Status*, Conference Paper, 2nd European Society of International Law, 2007); and P. Muwanguzi, *Reconciling Uti Possidetis and Self Determination: The Concept of Interstate Boundary Disputes* (Social Science Research Network, 2007). For research more concentrated on the dissolution of the USSR and the SFRY and the role *uti possidetis* played there, see, *inter alia*, D. Türk, 'Recognition of States: A Comment' 4(1) *European Journal of International Law* (1993) 182-185; R. Rich, 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union' 4(1) *European Journal of International Law* (1993) 36-65; R. Hayden, *Blueprints for a House Divided: The Constitutional Logic of the Yugoslav Conflicts* (University of Michigan Press, 1999); E. Milano, 'Security Council Action in the Balkans: Reviewing the Legality of Kosovo's Territorial Status' 14(5) *European Journal of International Law* (2003) 999-1022; P. Korchnak, *The Collapse of Federations: Elite Political Mobilization in the Dissolutions of Yugoslavia and Czechoslovakia* (VDM Verlag, 2008); and L. Anderson, 'Ethnofederalism: The Worst Form of Institutional Arrangement…?' 39(1) *International Security* (2014) 165-204. While these lists are far from all-inclusive, I conclude that the research on *uti possidetis* has been undertaken only on a limited scale, especially in light of the latest major transformation of the doctrine in relation to the socialist federal dissolutions of the 1990s.

3) In conclusion, what are the legal legacies of the socialist federal dissolutions?

My methodological perspective is threefold. After this introductory Chapter, I demonstrate the evolutionary nature of *uti possidetis* (Chapter 2). I then present the two components that together constitute my *uti possidetis meritus* proposal, the internal (Chapter 3), and external (Chapter 4) legal frameworks at the moment of the dissolution or independence. The next two Chapters focus on the legal legacies of the socialist federal dissolutions. Chapter 5 analyzes the realization of the right to self-determination in the state dissolution context and analyzes the various statuses that the minorities ignored by the application of *uti possidetis* have been offered in the successor states. Chapter 6 then introduces my proposal for (*uti possidetis*) *meritus*, which has two potential uses. First, it can help to mediate the current post-Soviet and post-Yugoslav ethnic conflicts - i.e., the legal legacies of the socialist federal dissolutions. Second, it can be used in future cases of state dissolution or independence to achieve solutions that respect both territorial integrity of states and the right to self-determination of peoples and, thus, to promote peaceful solutions to overlapping claims on territory.

1.2 *Uti Possidetis Juris* and Its Evolutionary Cycles

To clarify my arguments and the proposal for *meritus*, I first introduce the *uti possidetis juris* doctrine and its evolutionary logic. I then delineate the parameters that make the third cycle of this evolution stand out - the socialist ethnofederalist model and the right to internal self-determination.

The *uti possidetis* doctrine is based on a Roman civil law principle, according to which, when there was a completing claim on a property, an official edict would grant provisional possession of the property in question during litigation to the person who already was physically possessing it. When the doctrine was transformed into the international law sphere in the early 1800s, it acquired the status of a general principle that transfers sovereignty over a particular territory. However, as an international legal principle, every practical application of *uti possidetis* has called for its adjustment to the changing paradigms of international law. I have identified four distinct cycles that have contributed to the evolution of the doctrine. These are Decolonization of Latin America (1808-1836), Decolonization of Africa (1960s), the Socialist Federal Dissolutions (1990s), and the Independence of Kosovo (2008). Each cycle has in its turn updated the doctrine into contemporary international law

system. My argument is that this necessary evolutionary process was partially disrupted in the third cycle, amounting to misapplication of the rule and subsequent territorial conflicts.[2]

The first international legal application of *uti possidetis* took place with the decolonization of Latin America in the early 1800s. According to this international adaptation, the old administrative borders established by the former sovereign - Spain and Portugal - became international borders at the moment of independence. For instance, a former Spanish administrative unit of the Viceroyalty of the Rio de la Plata was transformed into a state of Argentina, corresponding to the territory of the former unit. Here, the *uti possidetis juris* variant of the doctrine won over *uti possidetis de facto*, and thus only the former legal administrative borders were taken into account, not the actual (*de facto*) possession of a territory.[3] Since that time, the doctrine has further evolved alongside the changing paradigms of international law with every application cycle. One thing remains constant: *uti possidetis* is only a subsidiary rule to be used in case there is not a peaceful agreement on borders. The doctrine is not indispensable in a sense that it can be ignored if all the stakeholders agree. That being said, the doctrine's history demonstrates that there rarely is an agreement, and *uti possidetis* becomes, time and time again, the default position.

By the time of the second cycle in the 1960s, international law had developed to prohibit the use of force. *Uti possidetis* was used to 'internationalize' and thus provide international law protection to new African borders. Additionally, unlike in Latin America, there were several types of colonial borders in Africa, both between the colonizers and within their colonial territories. The complexity of borders required a choice of which ones to internationalize. The new leaders of now independent African states eventually chose to honor *all* former colonial borders, despite their arbitrariness and non-correspondence with the ethnic or cultural divisions of the continent.

The third cycle in the 1990s was a watershed moment for *uti possidetis*, with two distinct modes of application. In the USSR, the Soviet Socialist Republics that constituted the federation agreed upon

[2] There are dissenting views that deny the cyclical role of the socialist federal dissolutions altogether (for example, M. Johanson, *Self-Determination and Borders: The Obligation to Show Consideration for the Interests of Others* (Åbo, 2004); S. Lalonde, *Determining Boundaries in a Conflicted World: The Role of* Uti Possidetis (Montreal, 2003); and J. Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart Publishing, 2013)). According to these views, *uti possidetis* remains a decolonization rule - therewith rendering it obsolete in contemporary international law - and the dissolution of the SFRY was a series of illegal secessions. However, in my opinion, the role of *uti possidetis* as a general principle of international law is established outside decolonization context (For instance, see the cases by the International Court of Justice in the *Frontier Dispute* case *(Burk. Faso v. Mali)*, Judgment, I.C.J Reports (1986) 554, para. 20; and *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment, I.C.J Reports (2001) 40, paras. 10, 148). From this, I deduce that the application of *uti possidetis* has to take into account other general principles of international law and that this did not take place in the third cycle.

[3] Brazil tried in vain to argue for *uti possidetis de facto* in relation to its borders with the neighboring states.

the dissolution and the application of *uti possidetis*, thus producing 15 independent states. In contrast, Serbia and Montenegro were unwilling to allow secessions from the SFRY and disputed the dissolution of the federation altogether. Moreover, once they were finally ready to accept dissolution, they still would not accept *uti possidetis*. The European Community (EC) chose to intervene in an attempt to prevent a civil war and insisted over the federal authorities that the SFRY was dissolving and that *uti possidetis* could be used to draw the boundaries of the emerging states.

On 16 December 1991, the EC published the *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*.[4] The Guidelines made the EC recognition contingent upon criteria and promised to award recognition to any of the six Yugoslav Republics that fulfilled it. The list was in effect a codification of international law principles as they stood in the early 1990s. Two new developments were especially notable in contrast to the second cycle of the 1960s. First, the principle of self-determination had been codified into international covenants with a new division into internal and external self-determination variants. Second, a completely new human rights paradigm had emerged.[5] Correspondingly, the Guidelines criteria included the re-affirmation of the principle of self-determination, respect for the rule of law, democracy and human rights, guarantees for the rights of ethnic groups and minorities, and the inviolability of the *uti possidetis* borders.[6]

The Yugoslav Republics were asked to send applications for recognition to an *ad hoc* judicial body, Arbitration Commission of the Peace Conference on Yugoslavia, which then made recommendations for the EC. In essence, the Arbitration Commission acted as a kind of an *uti possidetis* court, evaluating how the applicants fared in relation to the Guidelines principles. I conclude that through the Guidelines and the work of the Arbitration Commission, the human rights paradigm was successfully incorporated into *uti possidetis*. Yet, the division of self-determination was bypassed with lasting negative consequences for both the doctrine and the successor states. This was due to the failure to understand the relation between the ethnofederal model and self-determination.

The distortions in the third cycle produced fragmented successor states prone to territorial challenges. The first reckoning came in 2008 with the proclaimed independence of Kosovo. This fourth cycle

[4] *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*, European Community, 16 December 1991, 31 ILM 1486.
[5] The codification of human rights had started to emerge after the Second World War, starting with the 1945 UN Charter and the 1948 Human Rights Declaration. Between 1948 and 1991, at least seven major international conventions were prohibiting various human rights violations. G. Stokes, 'Independence and the Fate of Minorities, 1991-1992' in C. Ingrao and T. Emmert (Eds), *Confronting the Yugoslav Controversies: A Scholars' Initiative* (Purdue, 2013) 82-113 at 99.
[6] *Guidelines* (n 4) paras. 1 and 3-5.

differs fundamentally from the third, as Kosovo had not been a Yugoslav Republic but an autonomous province within one, namely Serbia. Nevertheless, due to numerous factors, many states decided to recognize Kosovo independent within its *uti possidetis* borders. In this profound transformation, *uti possidetis* was not applied universally: over 40% of the countries in the world have not thus far recognized Kosovo.[7] In addition, the justifications for recognition have been rather peculiar. The recognizers have been insisting on linking the independence and the dissolution of the SFRY, but in the absence of legal reasoning, it remains unclear why this should be the case. I claim that this is a byproduct of trying to fix the misapplication of the third cycle without admitting the mistakes made.

1.3 The Two Components of the Third Cycle: Ethnofederalism and Internal Self-Determination

As I claim that the misapplication of *uti possidetis* in the third cycle produced the fourth cycle and the continuing fragmentation in the successor states of the USSR and the SFRY, let me now account for the two factors that caused it: ethnofederalism and the right to internal self-determination.

According to the Marxist-Leninist ideology, the socialist states consisting of several ethnic groups had to make sure that the right to self-determination was respected through the creation of territorial autonomies. This was a compromise between the need to demonstrate progressiveness of the socialist national policy in the area of national self-determination without allowing the peoples of the former Russian Empire to secede, and the need to build a functioning central-planned economy based on territorial units. Under this ideological framework called 'ethnofederalism', the peoples of the USSR and the SFRY were given a piece of territory and were put into a hierarchy based on their progression level towards socialism. The right to self-determination was based on this status, and an upgrade was possible through merit. In the USSR, the most progressive nations were awarded the title Soviet Socialist Republics (SSRs), followed by the Autonomous Soviet Socialist Republics (ASSRs).[8] In the SFRY, the SSRs were called the Socialist Republics (SRs), and the ASSRs the Socialist Autonomous Provinces (SAPs). The SSRs and the ASSRs - and their Yugoslav counterparts - were constitutionally guaranteed to have elements of statehood and an ensemble of national symbols.

[7] According to the Ministry of Foreign Affairs of Kosovo, by 9 June 2020, 114 UN member states have recognized Kosovo. <*http://www.mfa-ks.net/en/politika/483/njohjet-ndrkombtare-t-republiks-s-kosovs/483*>.

[8] The ethnofederal system consisted of altogether four levels. Below the ARRSs, there were the Autonomous Oblasts and the Autonomous Okrugs, respectively. However, since the SFRY did not have units that were similar to the lower two levels, for clarity's sake I will look into the other units in Chapter 3.

Meanwhile, in the public international law framework, self-determination had been codified into two significant international covenants on 16 December 1966: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (the Covenants). During the drafting stage, the Western powers were focusing on the guarantees for the fundamental rights and freedoms of individuals. In contrast, the USSR - supported by the developing countries - advocated for the need to enshrine the right of peoples to self-determination to the Covenants.[9] The USSR view won support and, in the end, both the Covenants have an identical Article 1, stating that '[a]ll peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.[10] The Covenants made self-determination a treaty-based, general entitlement right.[11] In addition, by recognizing self-determination outside decolonization, the Covenants demonstrated that the principle can be applied both internally and externally, and many consider them to provide a legal right to *internal* self-determination.[12] The SFRY and the USSR were bound by the Covenants and, accordingly, had guaranteed the right to internal self-rule to their subjects in their last federal Constitutions of 1974 and 1977 that remained in force at the moment of their dissolutions.

When the socialist federations started dissolving in 1991, the then European Community, in the absence of any realistic alternatives, decided to insist upon the application of *uti possidetis*. However, a major mistake was made when only the highest level - the SSRs of the USSR and the SRs of Yugoslavia - were taken into account and the second-level units - ASSRs and SAPs - were invariably denied any kind of status recognition. This relentless categorization and all rights/no rights dichotomy between the self-determination units inevitably jeopardized the promotion of internal self-

[9] A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1995) at 47.
[10] *International Covenant on Civil and Political Rights*, UNGA res. 2200A (XXI), and *International Covenant on Economic, Social and Cultural Rights*, UNGA res. 2200A (XXI), both adopted by the General Assembly on 16 December 1966. Both Covenants entered into force in 1976 and have more than 160 signatory states.
[11] S. Oeter, 'Self-Determination' in B. Simma (Ed), *The Charter of the United Nations: A Commentary, Volume 1* (3rd Ed., Oxford University Press, 2012) 313-334 at 322; H. Hannum, 'Rethinking Self-Determination' 34(1) *Virginia Journal of International Law* (1993) 1-69 at 19.
[12] E.g., Barelli, 'Shaping Indigenous Self-Determination: Promising or Unsatisfactory Solutions?' 13(4) *International Community Law Review* (2011) 413-436 at 414; A. Rosas, 'Democracy and Human Rights' in A. Rosas and J. Helgesen (Ed), *Human Rights in a Changing East-West Perspective* (Pinter, 1990) 30-34; S. Ratner, 'Drawing a Better Line: *Uti Possidetis* and the Borders of New States' 90(4) *American Journal of International Law* (1996) 590-624 at 611; and Cassese (n 9) 48-52. According to New York City Bar, '[t]he norm of self-determination is not a general right of secession. It is the right of a people to decide on their culture, language, and government. It has evolved into the concepts of "internal self-determination," the protection of minority rights within a state, and "external self-determination," secession from a state'. Special Committee on European Affairs of the New York City Bar, 'Executive Summary: Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova' 14 *ILSA Journal of International and Comparative Law* 449 (2008) 379-390 at 383-84.

determination, as provided in several international conventions and instruments.[13] Predictably, following their independence, most of the former first-level units that had second-level units within their territories abolished these autonomies, creating separatist movements out of the disillusioned minorities. Since the Guidelines made recognition of the successor states contingent upon, *inter alia*, respecting the guarantees for the rights of national groups and minorities, I claim that the greatest failure was not to recognize the minority regimes already in place. I further claim that the ASSRs and the SAPs, as constituent units of the federations, possessed a right to internal self-determination independently from their host state and these legitimate expectations should have been recognized. For Kosovo, the right to independent self-government was guaranteed in the Constitutions of the SFRY, the Socialist Republic of Serbia and the Socialist Autonomous Province of Kosovo (all 1974). For the ASSRs, this was guaranteed in the 1977 USSR Constitution, the individual ASSR Constitutions, and the early 1990s Soviet Constitutional amendments. These autonomic statuses were seen as an integral component, even a condition, of the second-level unit being a part of the first-level unit. Ignoring this was a grave breach of the right to self-determination, and disrupted the evolution of the *uti possidetis* doctrine, undermining its legitimacy in the process.[14]

1.4 Previous Research on *Uti Possidetis* and the Socialist Federal Dissolutions

Given the pivotal role that *uti possidetis* has played in the creation of the majority of the United Nations (UN) member states, it has not been studied with the corresponding intensity. Notably, the impact of the socialist federal dissolutions to *uti possidetis*' evolution has received scarce attention, with the notable exceptions (in chronological order) of Pellet,[15] Craven,[16] Shaw,[17] Ratner,[18] Bartos,[19]

[13] For instance by the Conference on Security and Co-Operation in Europe's *Final Act*, Helsinki, 1 August 1975, Chapter VIII; and *Charter of Paris for a New Europe*, 22 November 1990); and by the UN General Assembly (*Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*, GA Res. 48/131, 20 December 1993, preamble).
[14] I am using the definition of 'legitimacy' by Thomas Franck, according to which legitimacy is 'a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process'. T. Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, 1990) at 24.
[15] A. Pellet, 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples' 3(1) *European Journal of International Law* (1992) 178-185.
[16] M. Craven, 'The European Community Arbitration Commission on Yugoslavia' 66(1) *British Yearbook of International Law* (1995) 333-413.
[17] M. Shaw, 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today' 67(1) *The British Yearbook of International Law* (1996) 75-154; and M. Shaw, 'Peoples, Territorialism and Boundaries' 8(3) *European Journal of International Law* (1997) 478-507.
[18] Ratner (n 12).
[19] T. Bartos, '*Uti Possidetis*, Quo Vadis?' 18 *Australian Yearbook of International Law* 37 (1997) 37-96.

Radan,[20] Lalonde,[21] Johanson,[22] Vidmar,[23] Mirzayev,[24] Peters,[25] and Sarvarian.[26] Next, I summarize these authors' views on *uti possidetis* in relation to the socialist federal dissolutions.

Pellet and Craven see the establishment of the Arbitration Commission of the Peace Conference on Yugoslavia as an essential organ to award legitimacy to the *uti possidetis* borders. Pellet concludes that such an international instrument can also be useful in solving future ethno-territorial conflicts. Craven argues that in the absence of effective control, *uti possidetis* was used to give the emerging states both their shape as well as an international personality as states.[27] Shaw is firmly of the opinion that *uti possidetis* is a general principle, basing his analysis on the International Court of Justice's (ICJ) *Territorial Dispute* case and the state practice from the early 1990s onwards.[28] To him, *uti possidetis* is both factual and legal concept that remains a framework rule. Regardless, the borders it creates can be changed, either by an agreement of the parties in question or by a coordinated collective policy of recognition in the interest of international peace and security.[29]

Ratner and Lalonde deliver a very critical take on the application of *uti possidetis* outside decolonization context. Ratner nevertheless insists that it is, despite its misgivings, a customary norm.[30] In his conclusion, he proposes a new version of *uti possidetis* that goes back to the original Roman doctrine and awards only a provisional title of territory, which will remain until the parties accept the costs and benefits of those borders or new ones after negotiating.[31] This is significant, as proposals for reforming or re-interpreting the *uti possidetis* doctrine are otherwise almost nonexistent.[32] Lalonde draws a different conclusion and argues that *uti possidetis* never had such a

[20] P. Radan, 'Post-Secession International Borders: A Critical Analysis of the Badinter Arbitration Commission' 24(1) *Melbourne University Law Review* (2000) 50-76.
[21] Lalonde (n 2).
[22] Johanson (n 2).
[23] Vidmar (n 2).
[24] F. Mirzayev, Uti Possidetis *v Self-Determination: The Lessons of the Post-Soviet Practice* (Leicester, 2014).
[25] A. Peters, 'The Principle of *Uti Possidetis Juris*: How Relevant is it for Issues of Secession' in C. Walter, A. von Ungern-Sternberg and K. Abushov (Ed), *Self-Determination and Secession in International Law* (Oxford University Press, 2014) 95-137.
[26] A. Sarvarian, '*Uti Possidetis Iuris* in the Twenty-First Century: Consensual or Customary?' 22(4) *International Journal of Minority and Group Rights* (2015) 511-532.
[27] Craven (n 16) 390.
[28] Shaw (n 17, 'The Heritage') 497-499.
[29] Shaw (n 17, 'Peoples') 154.
[30] Ratner (n 12) 598.
[31] *Ibid*. at 617-618.
[32] Silverburg has suggested that the Palestinian question could be answered by a slightly tempered version of *uti possidetis*. S. Silverburg, '*Uti Possidetis* and a Pax Palestiniana: A Proposal' 16 *Duquesne Law Review* (1977–1978) 757-780 at 778-779. His proposal, however, tried to settle only the dispute over territory in Palestine, and not to provide a new formulation of *uti possidetis* for any future territorial disputes. In addition, Bartos presents his own proposal for a norm that would be used in dissolution cases instead of *uti possidetis*, which he terms a 'norm of collective intervention'. Bartos (n 19) 84-85.

binding status as was awarded to it in Yugoslavia and that the version applied in that context was an entirely new version, which cannot draw legitimacy from its colonial precedents.

Equally critical, both Bartos and Radan argue that the application of *uti possidetis* in the 1990s was not the same as the old decolonization rule. In Radan's analysis, this *uti possidetis* application - which he terms 'Badinter Borders Principle' - was a political choice and ended up breaching the right to self-determination. He concludes that internationally supervised plebiscites in contested areas would have yielded better and more legally sound results.[33] Bartos also determines a new rule emerging from the dissolutions, but he observes that this new rule can jeopardize the promotion of internal self-determination.[34] He argues that the application of *uti possidetis* outside decolonization context can have many negative consequences, concluding that it should not be applied in the future.[35]

Johanson is perhaps the greatest critic of *uti possidetis*, denying its applicability even in the decolonization context due to the lack of *usus* and *opinio juris*.[36] Both Vidmar and Sarvarian conclude that *uti possidetis* is not - at least automatically - applicable outside decolonization context.[37] Vidmar finds it still desirable, as it creates an emerging practice of the creation of democratic political systems along with the creation of new states. Sarvarian rejects the notion of forcing successor states to accept *uti possidetis*, viewing it as just one of the possible methods of territorial limitation that may be adopted by the common consent of the parties.

Peters and Mirzayev are the only ones addressing the correlation of *uti possidetis* and self-determination in the post-Soviet area. Peters addresses what she terms the 'CIS *problématique*' of the post-Soviet secessionist entities through *uti possidetis*, concluding that they cannot lawfully rely on the doctrine for their quest for independence. Mirzayev concurs, concluding that when the principles of *uti possidetis* and external self-determination conflict, *uti possidetis* prevails and protects the territorial integrity of the successor states.

A comprehensive legal analysis of the evolution of *uti possidetis* up to and beyond the socialist federal dissolutions has not been made,[38] and this is one of my major contributions to the research field. Moreover, the previous research seems to take for granted the borders chosen in the socialist federal

[33] Radan (n 20) 76.
[34] Bartos (n 19) 85-86.
[35] *Ibid.* at 95-96.
[36] Johanson (n 2) 123-124.
[37] Vidmar (n 2) 9-10, Sarvarian (n 26) 531-532.
[38] Only Ratner gives a complete chronological timeline on the evolution of *uti possidetis*, and his analysis concludes that its application in the socialist federal dissolutions was a mistake to begin with and, subsequently, he does not draw any conclusions from those cases.

dissolutions, whereas my research contests this very notion. After analyzing these dissolutions, I then move to my second, even more indispensable component of this dissertation: a proposal for the reformulated and updated version of *uti possidetis,* in accordance with its evolutionary logic.

1.5 The Argument

My argument consists of several sub-claims, each elaborated in turn in different Chapters. My first claim is that by a virtue of being a general principle of international law,[39] *uti possidetis* has to evolve alongside the shifting paradigm of the international legal order. However, this natural and necessary evolution process was disrupted in the third cycle. The disruption was an unintentional byproduct of the doctrine's *raison d'etre* - to advance the peaceful resolution of territorial disputes by upholding a version of a status quo. This noble aim was not achieved, since the application failed to take into account the combination of two legally crucial factors: the evolution of the principle of people's right to self-determination and the ethnofederal model in place in the socialist federations at the moment of the dissolutions. Thus, *uti possidetis* was not updated to account for the changed circumstances of a non-decolonization context, and was subsequently misapplied.

My second claim is that this misapplication has caused national anti-cohesion and fragmentation in many of the successor states. In 2008, this led to the fourth cycle: the proclaimed independence of Kosovo, followed by puzzled reactions by the international community. The reactions have varied between a rather absurd '*sui generis*' (i.e., one of a kind) argumentation to justify recognition and a Russian policy of utilizing the Kosovo 'precedent' to further Moscow's political goals in the post-Soviet space. I further claim that the independence of Kosovo is indeed a 'precedent' in the sense that

[39] For the authoritative statements of qualifying *uti possidetis* as a general principle, see the ICJ's *Frontier Dispute* (n 2) para. 20; *Qatar v. Bahrain* (n 2) paras. 10, 148; *The Indo-Pakistan Western Boundary (Rann of Kutch) between Indian and Pakistan*, Reports of International Arbitral Awards, Vol. XVII, 19 February 1968, 1-576 at 527; *Dubai-Sharjah Border Arbitration*, Court of Arbitration, 19 October 1981, in E. Lauterpacht and C. Greenwood (Ed), *International Law Reports Vol. 91* (Cambridge University Press, 1993) 549-680 at 579; *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua Intervening)*, Judgement, I.C.J Reports 351 (1992), para. 386L; Arbitration Committee on Yugoslavia, *Opinion No. 3*, 11 January 1992, para. 2. For additional supporting scholarly views, see, among others, G. Naldi, 'The Peaceful Settlement of Disputes in Africa and its Relevance to the Palestinian/Israeli Peace Process' X *Palestinian Yearbook of International Law* (Kluwer, 1998/1999) 27-42 at 39; Shaw (n 17, 'Peoples') 503; J. Scott, 'The Swiss Decision in the Boundary Dispute between Colombia and Venezuela' 16(3) *American Journal of International Law* (1992) 428-431 at 428-429; and the Counter Memorial of Yemen ('in the dismemberment of an empire like the Ottoman Empire, there is a presumption, both legal and political in character, that the boundaries of the independent states which replace the Empire will correspond to the boundaries of the administrative units of which the dismembered Empire was constituted'). Permanent Court of Arbitration, *Eritrea - Yemen Arbitration (First Stage: Territorial Sovereignty and Scope of the Dispute)*. ILM, Vol. 40, No. 4, 2001, pp. 900-982.
There are also dissenting opinions. For instance, concentrating on the African context, see D. Ahmed, *Boundaries and Secession in Africa and International Law: Challenging* Uti Possidetis (Cambridge University Press, 2015) at 32-35; and, in general, S. Torres Bernández, 'The "*Uti Possidetis Juris* Principle" in Historical Perspective' in K. Ginther (Ed), *Völkerrect zwischen normativem Anspruch und politischer Realität: Festschrift für Karl Zemanek zum 65. Geburtstag* (Duncker & Humblot, 1994) 417-438 at 435.

it has solidified the 'frozen' state of several post-Soviet territorial conflicts.[40] I posit that the international community did a twofold mistake with *uti possidetis*. The first was to misapply it in the early 1990s, but at least consistently. The second mistake was made by 114 UN member states[41] from early 2008 onwards, where they breached the flawed logic of the third cycle by recognizing the independence of one of the mistreated minorities and calling that case unique. Some have joined Russia in claiming that this has created a legal precedent for all the post-soviet territorial disputes, and especially the separatist leaders have been eagerly invoking this argument.

Therewith, the main argument that I present in this dissertation is the following: the vital evolution of *uti possidetis* was disrupted in its transformation into a non-colonial context, generating a series of territorial conflicts in the affected areas. The main legal legacy of the socialist federal dissolutions is twofold. In relation to international law in general, these events led to the distortion of the *uti possidetis* doctrine. In relation to the successor states in particular, the failure to update *uti possidetis* in the socialist federal dissolutions have led to a lack of balance between the peoples' right to self-determination and the territorial integrity of states. Therewith, the doctrine's distorted application has transformed it into having a potential to generate rather than to prevent territorial disputes. The seemingly perpetual conflicts plaguing the successor states of the SFRY and the USSR - Kosovo, Abkhazia and Crimea being the most proverbial - are all symptoms of this legacy.

1.6 The Proposal for *Uti Possidetis Meritus*

After having explained the causes of the misapplication of *uti possidetis* in the socialist federal dissolutions, the main goal of this dissertation is to re-interpret the doctrine to be applicable in other cases and to factor in the changes that have taken place in international law since its last successful application in the 1960s. Hence, I now present a proposal for an updated version of *uti possidetis* in consistence with its evolutionary logic.

Both internal and external borders are created in a particular political context. While the SFRY was throughout its existence an undemocratic state, its creation on a federal basis in 1946 was a result

[40] Many scholars have insisted on the precedential value of the independence of Kosovo. For example, Chris Borgen has argued that, since those states recognizing Kosovo's independence refused to argue that Kosovo is owed sovereignty as a legal right, they had no choice but to resort to the *sui generis* argumentation. This, in turn, has led to a situation where, 'while there is not (as of yet) a Kosovo "precedent" in international law, there is now, based on the reactions of the TMR (Transnistrian Moldovan Republic) and other secessionist entities, as well as Russia, a Kosovo *argument* in international diplomacy'. C. Borgen, 'Imagining Sovereignty, Managing Secession: The Legal Geography of Eurasia's "Frozen Conflicts"' 9 *Oregon Review of International Law* (2007) 477-535 at 524-525.
[41] N 7.

from considerable internal national negotiations. Some scholars have argued that the logic of keeping certain borders without the political context can and should be called into question.[42] Yet, *uti possidetis* does not work that way. The doctrine cannot question the *juris* situation without a causal sequence that might prove disastrous for the international peace and security. Thus, the last federal constitutions need to be the starting point on any legal analysis in relation to *uti possidetis*. According to these constitutions, some of the SSRs' and the SRs' borders were delineated, even conditioned, on them having highly autonomous self-determination units within those borders.[43]

There are two distinct types of intra-state borders: federal and internal. Federal borders are less susceptible to change because they are a result of negotiations, whereas internal borders are more often based on unitary decisions.[44] If there are no exceptional grounds for rebutting a presumption that the entities entered their close relationship for historical reasons, this presumption and the continuation of internal self-determination will prevail. In addition, in both variants of the right to self-determination, scholars and states tend to view this not as a single-use, but rather a continuing right.[45] Johanson, in her well-defined analysis, has separated the purpose, functionality, and the effects of borders, which in turn reveals the desired and the actual effects of a border. The desired effect explains why the internal border was constructed, what effects it was supposed to have, and the consequences of internationalizing it.[46] In other words, the political context has to be addressed.

Notably, the application of *uti possidetis* in the socialist federal dissolutions failed to address these issues. For example, in the case of Serbia, its external borders were internationalized and its internal

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[42] For instance, Johanson argues that the internal borders of the SFRY should have been modified after the dissolution, since they were created only to make the federation possible as a state. Once this goal became obsolete, there was no reason to maintain them (Johanson (n 2) 244). However, I claim that it is impossible to define the original reasoning behind certain borders. In order for *uti possidetis* to function, the borders need to be assumed to 'reflect the wishes of the people and, thus, satisfy self-determination'. J. Summers, *The Idea of the People: The Right of Self-Determination, Nationalism and the Legitimacy of International Law* (PhD Thesis, University of Helsinki, 2004) at 149.

[43] See, e.g., B. Rrecaj, 'A Contemporary Interpretation of the Principles of Sovereignty, Territorial Integrity and Self-Determination, and the Kosovo Conundrum' in J. Summers (Ed), *Kosovo: A Precedent? The Declaration of Independence, the Advisory Opinion and implications for Statehood, Self-Determination and Minority Rights* (Martinus Nijhoff Publishers, 2011) 109-142 at 115 ('Kosovo was a *de facto* republic lacking formal arrangements'); R. Petersen, *Western Intervention in the Balkans: The Strategic Use of Emotion in Conflict* (Cambridge University Press, 2011) at 114 ('the 1974 constitution gave the Kosovo Autonomous Region *de facto* powers of a full-fledged republic'); and M. Pavlović, 'Yugoslavia - The Constitution of 1974 and Some Political Results', *Transconflict,* 19 April 2013 *<http://www.transconflict.com/2013/04/yugoslavia-the-constitution-of-1974-and-some-political-results-19/.>* at 55-56 ('In effect, the federal constitution of 1974 gave Kosovo *de facto* republican status, but not *de jure* status').

[44] J. Presscot, *Boundaries and Frontiers* (London, 1978) at 167.

[45] According to UNESCO, self-determination 'is not confined to a right to be enjoyed by formerly colonized peoples. It is not a right to be enjoyed once only and thereafter to be forever lost'. *UN Doc. E/CN.4/Sub.2/1992/6*, para. 3(d). The representative of Jordan echoed this in a report to the UN Human Rights Committee, stating that 'the principle of self-determination is a continuous process and does not end with the declaration of independence'. Jordan, CCPR Report, *UN Doc. CCPR/C/1/Add.55* (1981) at 2. See also O. Kimnich, 'The Issue of a Right of Secession' in C. Tomuschat (Ed), *Modern Law of Self-Determination* (Kluwer, 1993) 83-98 at 90.

[46] Johanson (n 2) 196-197. In order to understand the desired effects of the Kosovo-Serbia internal SFRY border, the political context needs to be addressed. See subchapter 4.2.5.

divisions (i.e., political context) were completely ignored.[47] Those applying *uti possidetis* were not prepared for the multidimensional borders of the socialist federations. While the internationalized borders were chosen in the same seemingly impartial manner as in the case of decolonization, this time around there were numerous lower-level subunits with extensive legal guarantees. It would have been essential to respect the existing autonomous arrangements. The history of those successor states that decided to reject their ethnofederal legacy speaks volumes for the need to update *uti possidetis*.[48]

The proposed updated version of *uti possidetis* takes into account new developments in international law, especially the codification of internal self-determination in international Conventions. In addition, it considers the transnational context and takes into account the actual political situation on the ground at the moment of independence. In other words, I propose a more in-depth understanding of the nature of borders and the regimes around and the purposes of those borders. I call this proposal *uti possidetis meritus*, that can be roughly translated 'as you have earned, so you may possess'. It is a formula for *expanded recognition of internal borders in accordance with the internal and external self-determination dichotomy*. It draws legitimation from its conformity with the existing *uti possidetis* framework.[49] According to the ICJ in the *Frontier Dispute* case, *uti possidetis* 'applies to the State *as it is*, i.e., to the "photograph" of the territorial situation then existing. The principle of *uti possidetis* freezes the territorial title; it stops the clock, but does not put back the hands'.[50]

While this is an entertaining metaphor, *uti possidetis*, in its current form, is not simply a 'photograph' of the territorial situation then existing. It is rather a sketch, or a photograph after some photoshopping has taken place. *Uti possidetis* affirms the borders *after* there has been a critical choice of which borders to include in the picture. The closer you zoom into the original picture, the more dividing

[47] Some authors have argued that The Hague Peace Conference should have put pressure to negotiate on borders. For example, see B. Crawford, 'Explaining Defection from International Cooperation: Germany's Unilateral Recognition of Croatia' 48(4) *World Politics* (1996) 482-521 at 495; V. Jovanovic, 'The Status of the Federal Republic of Yugoslavia in the United Nations' 21(5) *Fordham International Law Journal* (1997) 1719-1736 at 1724; D. Gibbs, *First Do No Harm: Humanitarian Intervention and the Destruction of Yugoslavia* (Vanderbilt, 2009) at 11, 77; and E. Hasani, *Self-Determination, Territorial Integrity and International Stability: The Case of Yugoslavia* (Bilkent University, 2001) at 216-217. However, 'natural borders' are almost nonexistent in the world, and the federal internal borders at least tend to result from negotiations and to be more acceptable ones (e.g., Presscot (n 44) 167). In the SFRY, there had been negotiations that had produced the internal borders that were in place in the early 1990s - including those of Serbia.

[48] See Chapter 5.

[49] Many scholars have called for reformation of the *uti possidetis* doctrine after the third cycle of the socialist federal dissolutions. For instance, Klabbers and Lefeber have argued that the collision between self-determination and *uti possidetis* should be resolved either by using *uti possidetis* with justice and equity considerations, or by using self-determination with considerations of stability mitigating its effects (J. Klabbers and R. Lefeber, 'Africa: Lost Between Self-Determination and *Uti Possidetis*' in C. Brölmann (Ed) *Peoples and Minorities in International Law* (Martinus Nijhoff Publishers, 1993) 37-76 at 76). Allen and Castellino have emphasized the need for modern international law to reassess the relationship between the rights to self-determination and its 'attendant doctrine' *uti possidetis* in order to develop a more equitable approach to the resolution of such territorial disputes (S. Allen and J. Castellino, 'Reinforcing Territorial Regimes: *Uti Possidetis* and the Right to Self-Determination in Modern International Law' 48 *Amicus Curiae*, July/August (2003) 20-25 at 24). The *uti possidetis meritus* formula is premeditated to address these issues.

[50] *Frontier Dispute* (n 2) para. 30.

administrative lines appear. A value choice takes place, after which the chosen borders are highlighted and the rest are photoshopped out of the picture. Before the third cycle, this value choice was made by the emerging states in question. In the early 1990s, the SSRs of the USSR were likewise able to agree on the utilization of *uti possidetis*, albeit over the heads of the lower-level units. However, the dissolution of the SFRY was the first time that an outside requisite made *uti possidetis* applicable. While the EC did not command the states of the SFRY to dissolve according to the administrative lines, it had a major lever to use, the issue of recognition. Based on the constitutive theory of recognition, the EC simply informed the states of the SFRY that if fulfilling the criteria, they would be recognized within their former administrative borders. The Draft Convention of 4 November 1991 had tried to highlight *all* the internal borders, but eventually the EC highlighted only the internal borders between the SRs and photoshopped out the internal borders of the SAP of Kosovo.

After the socialist federal dissolutions, it became apparent that the contemporary understanding of self-determination and the ideologically determined level-structure of self-determination in these federations would be breached by this kind of cognizant elimination of the lower-level internal self-determination rights in place. For example, on top of individual minority rights, the USSR had four levels of self-determination units with varying degrees of self-rule. As the ICJ elaborated in 2005:

> 'the *uti possidetis juris* principle requires not only that reliance be placed on existing legal titles, but also that account be taken of the manner in which those titles were interpreted and applied by the competent public authorities of the colonial Power'.[51]

Disregarding the colonial reference as the case was about an old colonial border, the key statement here is the about how 'titles were interpreted and applied by the competent public authorities'. It is impossible to deny that the modern understanding of 'territorial title' has developed into a more complex set of manifestations.[52] In sum, in the early 1990s, both the international legal framework and the potential target group of *uti possidetis* were fundamentally different from the previous cycles.

The *uti possidetis meritus* formula is based on the premise that *uti possidetis* is a general principle of international law that needs to be interpreted alongside the other international law principles. Thus, *uti possidetis* has to continue to evolve at the same phase with the principle of self-determination, or it will conflict with it and lose its ability to promote the peaceful settlement of territorial disputes.[53]

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[51] *Frontier Dispute (Benin/Niger)*, Judgement, I.C.J Reports (2005) 148, para. 140.
[52] Indeed, this is apparent with the definition of the right to self-determination in the 1966 Covenants (n 10).
[53] According to Koskenniemi, '[t]he apparent validity of the conflicting principles of *uti possidetis* and national self-determination has long been an international lawyer's favorite paradox.' M. Koskenniemi, 'Report of the Director of Studies of the English-Speaking

Accordingly, *uti possidetis meritus* bases recognition in acknowledgement of the political divisions in place at the moment of the dissolution. It is a formula for a comprehensive interpretation of the 'photograph' of the frozen 'territorial title' as portrayed by the ICJ in 1986.

The uncompromising attitude in the application of *uti possidetis*, combined with the justified and legitimate expectations of the lower-level subunits, has led to several territorial conflicts and foreign interventions since 1991.[54] In 1995, the Dayton Accords - the peace treaty that ended the Bosnian War - simultaneously broke the earlier *uti possidetis* logic and neglected to address the status of Kosovo, making the situation worse. As an afterthought, there was a final but ultimately unsuccessful international attempt to force the FRY to re-establish Kosovo's autonomy in 1999.[55] The consequent military intervention serves as a demonstration of the failure of the chosen version of *uti possidetis* to advance the peaceful resolution of territorial disputes.

By its very definition, *uti possidetis* is often challenged by minorities. Without any generally accepted solution to the clash between the external right to self-determination and territorial integrity of a state, *uti possidetis* has to address the grievances of these minorities. Since the FRY chose the road of complete denial of minority rights, its clashes with the EC Guidelines and later with the separatist Kosovo Liberation Army became unavoidable. Therefore, I claim that the independence of Kosovo was a direct byproduct of the chosen version of *uti possidetis*. The Peace Conference on Yugoslavia tried to readjust the doctrine into the new international legal system, but ultimately failed in relation to Kosovo. If the current version of *uti possidetis* is reapplied, it has enormous potential to fail again.

Hence, there is an urgent need to renew the doctrine. *Meritus* seeks to prevent any further disintegration in times of territorial changes. In this sense, it shares the paramount goal of *uti possidetis*, which has previously demonstrated an ability to learn from the past and to transform along with the changing international legal context. This has to happen again in order for it to remain relevant in the future. Finally, I want to emphasize that I am not simply arguing with the benefit of hindsight that the continuation of the second-level units' autonomies would have produced more

Section of the Center' in P. Eisemann and M. Koskenniemi, *State Succession: Codification Tested against the Facts* (The Hague, 2000) 65-132 at 102.

[54] While this introduction has been mostly discussing Kosovo, in the former USSR there were numerous armed conflicts between the newly independent successor states and their formerly autonomous minorities. I focus on these issues in Chapter 3.

[55] *The Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo*, S/1999/648, would have restored Kosovo's autonomy with international guarantees. However, its framework was hopelessly late, as by 1999 the FRY political leadership was unable to compromise, and the Albanian leadership was refusing to settle for anything less than full independence.

desirable results. I argue that according to the evolutionary logic of *uti possidetis*, my interpretation of *uti possidetis meritus* would have been more in accordance with international law.

1.7 The Structure of the Dissertation

Chapter 2, *The Evolutionary Cycles of Uti Possidetis Juris,* presents the original version of *uti possidetis* and demonstrates its evolutionary logic through the main evolution cycles. After dissecting the complex relationship between *uti possidetis* and the right to self-determination, Chapter concludes that *uti possidetis* was the right doctrine, but the wrong version, in the socialist federal dissolutions.

Part II, *The Two Components of Uti Possidetis Meritus,* introduces the internal and external components of the *meritus* proposal. Chapter 3, *The Internal Component: Socialist Ethnofederalism,* exhibits the first component - the last applicable internal legal order of the dissolving state. It analyzes in detail the concepts of nationality, nationalism and self-determination in the Marxist-Leninist doctrine, including the ethnofederal concept that was supposed to provide an answer for the 'national question'.[56] It explains the four-tier ethnofederal structure, how the 'progressiveness' of a people was designated and how this contributed to their legitimate expectations (*meritus*) prior to the dissolution.

Chapter 4, *The External Component: The Evolution of the Right to Self-Determination,* presents the second component - the international legal framework at the moment of the federal dissolutions. It accounts for the evolution of the right to self-determination since the 1960s second cycle of *uti possidetis*. It then disentangles the double mistake made by the international community by first excluding the second-level ethnofederal entities altogether, and then recognizing one of them independent and calling it 'unique'. This has hastened the fragmentation of those successor states that had inherited the socialist 'solution', and distorted the contemporary right to self-determination.

Part III, *The Legal Legacies of the Socialist Federal Dissolutions*, concludes the dissertation by enumerating the legal aftermath of the 1990s federal dissolutions and by proposing the *meritus* formula as a remedy to the endemic separatism of the post-Soviet space. Chapter 5, *The Right to Self-Determination in a State Dissolution Context,* combines the evidence gathered in the other Chapters. It gives a comprehensive review of how the right to self-determination was realized in the socialist federal dissolutions, how the successor states confronted their former autonomous subjects, and why the subsequent international mediation efforts have failed to settle the overlapping territorial claims.

[56] This essential question had to be answered since the original theory had a significant ideological problem with nationalism and its self-proclaimed progressiveness could not allow exercising Great Power chauvinism against minorities. See n 179.

Chapter 6, *The Theory of Orderly State Dissolution: Uti Possidetis Meritus,* concludes the argument by exhibiting two potential forms of application for my proposal. First, *meritus* can be used to gain insights into the parties' demands and thus to help settle already existing conflicts in the post-Soviet and post-Yugoslav spaces. Second, as a general principle, it can be used to minimize territorial fragmentation and subsequent conflicts in the future state dissolution or independence cases.

Finally, Chapter 7, *Conclusions: Salvaging Uti Possidetis Juris,* rounds up the dissertation by summarizing the findings of the other Chapters and by presenting my final conclusions.

2. The Evolutionary Cycles of *Uti Possidetis Juris*

This Chapter presents the evolution of international law doctrine of *uti possidetis*, with its two variants, *uti possidetis juris* and *uti possidetis de facto*. I focus predominantly on the former variant, as the doctrine's evolutionary nature has made the latter obsolete. From a legal point of view, my main interest is on the doctrinal and hierarchical relations of *uti possidetis* with the principles of self-determination of peoples and territorial integrity of states.

Uti possidetis is a constantly evolving international legal doctrine. I have identified four distinct cycles of this evolution, with each cycle developing the doctrine by either changing its substance or enlarging its target group. These are Decolonization of Spanish America (1808-1836); Decolonization of Africa and South Asia (the 1960s); Socialist Federal Dissolutions (the 1990s); and the Independence of Kosovo (2008).[57] Originally a Roman private law doctrine, *uti possidetis* was transferred to the international law sphere in the early 1800s. Since then, *uti possidetis* has been increasingly conflicting with other legal principles, especially self-determination of peoples. This is not surprising, as it is a byproduct of *uti possidetis*' historical evolution - its main goal has always been to avoid violence at any cost, with the demands of self-determination given only secondary importance. While the ambiguous legal position of *uti possidetis* seems to suggest that it could only be used as a default rule when there are no other competing rules in place, in practice - as demonstrated by the second and third cycles - it seems to overrule any competing norms.

While the doctrine is often applied with some unease, and its track record shows mixed results and dissatisfaction with the borders that it has created, it is nevertheless periodically utilized due to the lack of credible alternatives. Notably, with *uti possidetis*' main existential reason being to resolve territorial conflicts peacefully, it suffered a major defeat when applied outside decolonization context in the early 1990s Yugoslavia and violence broke out.[58]

In this Chapter, I first give a limited summary of the origins and the first two historical evolutionary cycles of the legal doctrine of *uti possidetis*. I then assess the its difficult and often contradictory relationship with the international law principles of self-determination of peoples and territorial

[57] This is by no means a conclusive list of the application cycles of *uti possidetis*, but I have chosen these instances as they have transformed the doctrine in meaningful ways. Other application rounds include the creation of multiple states with the breakup of the Federal Republic of Central America (1841), in the aftermath of the end of the First World War (1917-1923), and the gradual decolonization of the Middle East before and after the Second World War. However, in these instances, there were other legal factors at play (such as defeat in a major war), and no references to *uti possidetis* as a legitimating factor were made.

[58] The application of *uti possidetis* outside decolonization context has been legally disputed by a significant amount of scholars. For example, see Ratner (n 12); Radan (n 20) 50-76; Jankov and Ćorić (n 1); Lalonde (n 2); and Hasani (n 1).

integrity of states - both undisputedly established by the 1960s - by placing them into an international legal hierarchy. Finally, after analyzing the latest two cycles outside the decolonization context, I present my conclusions of the evolution of the *uti possidetis* doctrine.

2.1 Original and Modern Versions of *Uti Possidetis Juris*

The *uti possidetis* doctrine is derived from the ancient Roman civil law principle of *uti possidetis, ita possideatis*.[59] According to its original form, when there was a dispute between two claims on property, an official edict would grant *provisional* possession of the property in question during the litigation to one of the parties unless the other party had obtained it by violence or in a form revocable.[60] When the doctrine was transferred to the international law sphere, the original clause that excluded even provisional possession if it was accomplished by the use or force was reversed. This was understandable, given that the use of unlimited military force was considered a legitimate tool of coercion between states under international law of that time.[61]

The modern, international version of *uti possidetis* creates a new, territorially sovereign state by transforming previous administrative borders into international borders at the moment of independence. For example, in 1957, the United Kingdom accepted the independence of its colony, British Ghana. The doctrine of *uti possidetis* then legally established within which borders new state would be constituted. The mere administrative unit of British Ghana turned overnight - with the aid of universal international recognition and the admission to the UN - into the Republic of Ghana within these former administrative borders and with full sovereignty over this territory.[62] Correspondingly, *uti possidetis* insists that states emerging from colonial administrative control must accept the pre-

[59] Ratner (n 12) 593; Hensel et al. (n 1) 8.
[60] The Roman Praetor was applying a legal formula of '*[u]ti eas aedes, quibus de agitur, nec vi nec clam nec precario alter ab altero possidetis, quominus ita possideatis, vim fieri veto*' ('As you possess the house in question, the one not having obtained by force, clandestinely, or by permission from the other, I forbid force to be used to the end that you may not continue to possess it'). Peters (n 25) 97. See also Ratner (n 12) 592-593.
[61] See, *inter alia*, L. Oppenheim and H. Lauterpacht (Ed), *International Law: A Treatise* (7th Ed., London, Longman 1952) 598-599; and T. Baty, 'Can an Anarchy be a State?' 28(3) *American Journal of International Law* (1934) 444-455 at 444, 446, 454.
[62] *Ghana Independence Act*, 5 & 6 Eliz. 2 (1957) at 1. There were, however, several notable inconsistencies with the application of *uti possidetis* in Africa, and Ghana is an interesting example of this. While Republic of Ghana did succeed into the territory of the British Ghana, it also received and annexed the former administrative unit of British Togoland in the process, after the former had held a plebiscite on the question of union. This could be seen as a violation of the *uti possidetis* doctrine, since the people of Togoland were not given a chance to vote for independence, but rather to join either Ghana or French Togo. *Report by His Majesty's Government in the United Kingdom to the General Assembly of the United Nations on the Administration of Togoland under United Kingdom Trusteeship, for the Years 1949-1955*, His Majesty's Stationery Office, London, 1950-1956.

existing colonial boundaries. The conceptual logic is that a change of sovereignty by itself does not change the status of a boundary.[63] The ICJ has clarified the doctrine in the following manner:

> 'By becoming independent, a new State acquires sovereignty with the territorial base and boundaries left to it by the colonial power. International law - and consequently the principle of *uti possidetis* - applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards. It applies to the State *as it is*, i.e., to the "photograph" of the territorial situation then existing. The principle of *uti possidetis* freezes the territorial title; it stops the clock, but does not put back the hands'.[64]

This transformation poses a challenge, as internal and external borders tend to serve very different purposes, and states do not regulate their internal borders as possible candidates for external ones.[65] Yet, despite these apparent shortcomings *uti possidetis* has been systematically applied and strongly endorsed by the ICJ on several occasions. It has evolved from the decolonization context of the first two cycles to the dissolution of federations in the early 1990s.[66] During these evolutionary cycles, the potential target group of *uti possidetis* has been expanded, and it is solidifying its status as a general principle of international law and the doctrine of choice in the cases of state dissolution.[67]

Notwithstanding, the constant evolution has come with a price of unpredictability. *Uti possidetis* appears to have potential for both over and under inclusiveness, i.e. it might include future cases we would not want it to include and exclude cases that we would want it to include.[68] While this is a common problem in international law, it is a particularly delicate matter with *uti possidetis*, since the rules of territory and sovereignty are essential in an international system of equal sovereign states. Primarily for this reason, there have been no universal codification attempts of *uti possidetis*, and it remains a somewhat vague rule without incontrovertible source. While the ICJ has attempted at times to remove this ambiguity by clarifying the doctrine's content and place in the international legal hierarchy, it has done so very carefully, realizing the potential risks involved. One thing does not seem to change - *uti possidetis* is needed, time and time again, to delineate borders when there are unexpected changes in the political map of the world. It then requires an expansive legal interpretation

[63] McCorquodale and Pangalangan (n 1) 874.
[64] *Frontier Dispute* (n 2) para. 30.
[65] Malcolm Shaw has described the difference thus: 'Internal or admin borders are established by domestic law for a variety of purely domestic purposes, and they may alter widely over time. While internal boundaries fix permanent lines and have important consequences concerning international responsibility and jurisdiction, internal boundaries possess none of these characteristics'. Shaw (n 17, 'The Heritage') 489-490.
[66] It can be argued that the doctrine has evolved even beyond the dissolution of a federation context in the case of Kosovo and Serbia.
[67] N 39.
[68] About the commonality of this problem in international law, see M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005) at 591-592.

from the previous cases to be justified in a new situation. Thus, the doctrine's content is only defined through these problematic situations where it needs to be applied.

2.2 The First Cycle: Decolonization of Spanish America

The first application of *uti possidetis* took place in the context of the dissolution of the Spanish Empire. After the Napoleonic invasion and especially due to the abdication of Ferdinand VII of Spain in 1808, the local *criollo* leaders of the American colonies demanded self-government. They legitimized their actions through traditional law and the sovereignty of the people in the absence of a legitimate king.[69] This so-called *retroversion of the sovereignty to the people* was a precursor of the notion of popular sovereignty in Spanish America.[70] It was premised on the basis that the colonies were a personal possession of the King, not of Spain. Hence, when the legitimate ruler was illegally removed, the principle insisted that the sovereignty would return to the people, who had a right to accept or to reject the authority of the new ruler in Madrid.[71] Spain was unwilling to accept this retroversion, insisting on its legitimate colonial rights and a long period of wars and instability followed, with the complete decolonization of Spanish America legally finished only in 1836.[72]

From 1826 to 1884, there were altogether three inter-state conferences on the subject of creating a continent-wide Latin American Confederation.[73] In the end, all the plans ended up being rejected by the revolutionary leaders due to the lack of communications, political experience, and common traditions between the newly independent states.[74] Thus, with the colonies having achieved de facto independence but having rejected the plans for confederation, there was a pressing need to delineate

[69] The legal foundations of these claims were derived from the old 'Seven-Part Code' of traditional Spanish law, compiled during the reign of Alfonso X of Castile (1252-1284). The original text has been codified and compiled in Spanish, for instance, in *Las Siete Partidas del Rey Don Alfonso X, El Sabio*, 1, (Impr. Real, 1807).

[70] The doctrine of popular sovereignty submits that the authority - or legitimacy - of the government is created and sustained by the consent of its people, who are the true source of political power. The origins of the doctrine is with the social contract philosophers, Hobbes, Locke and Rousseau. Anne Peters well summarizes the modern version of popular sovereignty: 'the standard view is now that the internal sovereignty of a government depends on its legitimacy and that its legitimacy is the basis of its sovereignty'. A. Peters, 'Humanity as the A and Ω of *Sovereignty*' 20(3) *European Journal of International Law* (2009) 513-544 at 517.

[71] N. Goldman, *Nuevas perspectivas en la Historia de la Revolución de Mayo* (Universidad de Buenos Aires, 1998). For the critical view on immovability of sovereignty see P. Gratton, 'A "Retro-version" of Power: Agamben via Foucault on Sovereignty' 9(3) *Critical Review of International Social and Political Philosophy* (2006) 445-459.

[72] The Spanish Empire collapsed in 1820 when a great internal upheaval in Madrid forced the returned King Ferdinand VII to restore the 1812 Constitution. The new liberal government in Spain - rather naively - assumed that the Latin American insurgents were fighting for a liberal cause and that there could be reconciliation based on the 1812 Constitution. However, the colonial leaders rejected any notions of the return to the Spanish rule. Finally, in 1836 Spain renounced its sovereignty over all of continental America. Even though it took Spain much longer to recognize them independent, from 1836 onwards there were no competing claims on sovereignty over their territories. M. Costeloe, *Response to Revolution: Imperial Spain and the Spanish American Revolutions, 1810-1840* (Cambridge University Press, 2009) at 165-171.

[73] The conferences were held in 1826, 1847-1848, and 1884.

[74] A. Alvarez, 'Latin America and International Law' 3(2) *American Journal of International Law* (1909) 269-310 at 278-281, 288.

the new territorial units. Eventually, all the Latin American colonies apart from the Portuguese colony of Brazil[75] chose to utilize the altered version of the Roman doctrine of *uti possidetis, ita possideatis*. However, this took place with a considerable delay, as the majority of the colonies affirmed the application of *uti possidetis* only in 1848, thereby giving a retroactive effect to the 1810 administrative borders.[76] Notably, the decision for the first international application of *uti possidetis* was made by the local peoples, and there was no outside pressure to adopt these particular borders. The doctrine was understandably desirable from the colonies' point of view. First, it ensured that there would be no area of *terra nullius*, which would be inviting any re-colonization by Spain or other European powers. Second, the acceptance of Spanish administrative borders would ensure that the independent colonies would not start fighting each other for the location of these borders. Finally, *uti possidetis* provided the new states with a *territorial legitimization*, enabling them to proclaim judicially acceptable nature of the state's territorial definition, both internally and externally.[77]

Additionally, there was a conflict of the two versions of *uti possidetis*. The previous legal practice was that a secessionist attempt was condemned or recognized, pending on whether an entity enjoyed effective control over the territory.[78] Some scholars and revolutionary *criollos* continued to advance this idea of *uti possidetis de facto*, arguing that the borders between American states should be drawn according to the effective possession at the time of independence. Comparably, *uti possidetis juris* held that only the Spanish legal documents could determine the location of borders. In the end, *juris* became the dominant variant and was used, for example, in 1933 by the Permanent Court of International Justice to settle a border dispute between Honduras and Guatemala.[79]

Most of the Latin American states proceeded to codify *uti possidetis* into their constitutions and international treaties.[80] From the doctrinal point of view, this was a significant definition of policy

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[75] P. La Pradelle, *La Frontiére: Etude de Droit International* (Paris, 1928) at 79-83.
The Portuguese colony of Brazil was administrated as one colonial unit. After Napoleon was defeated in 1815, King John VI of Portugal raised de jure status of Brazil to an equal and integral part of a 'United Kingdom of Portugal, Brazil and the Algarves' (*Reino Unido de Portugal, Brasil e Algarves,* Law issued by the Prince Regent on 16 December 1815). However, in 1820 a Constitutionalist Revolution erupted in Portugal. A new constituent assembly demanded a gradual undermining of the Brazilian sovereignty, igniting an armed uprising for independence. After years of fighting, King accepted the independence of Brazil in *Treaty of Rio de Janeiro*, 29 August 1825. The separatist leaders wanted to keep the previous administrative unit intact and, since there were no competing claims, with the Treaty of 1825, the sovereignty over the whole Brazil was transferred to the newly proclaimed Empire of Brazil.
[76] This was done in the *Treaty of Confederation* (Peru, Bolivia, Chile, Ecuador, and New Granada), 8 February 1848.
[77] Shaw (n 17, 'The Heritage') 97.
[78] Johanson (n 2) 106.
[79] *Honduras Borders Case (Guatemala v. Honduras)*, PCIJ Series A, No. 2 (1933) 1309, at 1323.
[80] For example, see *Constitución Política de la República de Ecuador*, 23 September 1830, Art. 4; *Constitución de la República de Honduras*, 8 February 1848, Art. IV; *Constitución de Venezuela de 1830*, 1 January 1830, Art. V; *Definitive Treaty of Peace and Friendship* (Bolivia and Peru), 8 November 1831, Art. XVI; *Treaty of Peace, Friendship, and Alliance* (Equator and Peru), 25 January 1860; *Treaty of Peace* (Colombia and Peru), 22 September 1829, Art. V; *Treaty between Colombia and Venezuela for Submitting to*

relating to the acceptance of the *uti possidetis* borders. The close to uniform acceptance of the doctrine in Latin America gives a strong presumption that there was emerging at least a local customary international law rule. For example, the Swiss Federal Council summarized the doctrine in their 1922 arbitral award between Colombia and Venezuela as 'the basis of South American public law'.[81]

Concerning other legal principles, it should be noted that at the time of Spanish American decolonization, the principle of self-determination of peoples that could have conflicted with *uti possidetis* had not yet emerged. That being said, *uti possidetis* did collide with the notion of territorial integrity of the Spanish Empire. This was explained away with the previously mentioned retroversion of sovereignty. The colonial leaders saw the legal status of the colonies to be fundamentally tied to the figure of the legitimate King - the ultimate possessor of the colonies - and not the country of Spain *per se*. When the King was overthrown, the colonies decided not to submit under the authority of Madrid but saw the sovereignty over the territory having returned to its inhabitants. Therewith, territorial integrity was not breached. After their hard-fought independence had been achieved, the new states could and subsequently did claim themselves an uncontested right to territorial integrity, and this was accordingly recognized by the European great powers and the United States (US).

The first cycle of *uti possidetis* altered the original Roman law doctrine in several ways. First, it was applied as a result of the use of force, something that the original version had unambiguously rejected. This version of the doctrine would not be applied later since by the time of the second cycle, there was an imperative against the use of force in international relations. Secondly, the *uti possidetis juris* - instead the original Roman *uti possidetis de facto* - variant took undisputed primacy. As the actual control over territory was in constant transition, the local leadership chose to honor the old Spanish administrative (*juris*) borders, instead of what they might have actually been territorially possessing at the moment of independence (*de facto*). Finally, the status of this possession of territorial

Arbitration the Question of the Boundary between the Two Republics, 14 September 1881; *Semi-Official Conference of the Representatives of the Argentine Republic, Bolivia, Colombia, Dominican Republic, Equator, Mexico, Peru, Salvador, and Venezuela,* 14 August 1883; *Dispute between Argentina and Chile concerning the Beagle Channel*, 18 February 1977, Reports of Internal Arbitral Awards Vol. XXI, pp. 53-264 at 57; *Colombia-Venezuela Boundary Case* (1922), Reports of International Arbitral Awards, Vol. I (UN Sales 1948), at 223; and the *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906*, 1960 I.C.J Reports 57, at 30. For instance, Malcolm Shaw has been referring to the Latin American practice with codifying *uti possidetis* as 'unequivocally supportive'. Shaw (n 17, 'Peoples') 99.

[81] 'When the Spanish colonies of Central and South America proclaimed their independence in the second decade of the nineteenth century, they adopted a principle of constitutional and international law to which they gave the name of *uti possidetis juris* of 1810. The principle laid down the rule that the boundaries of the newly established republics would be the frontiers of the Spanish provinces, which they were succeeding. This general principle offered the advantage of establishing the general rule that in law no territory of old Spanish America was without an owner. [...]. The principle also had the advantage; it was hoped, of doing away with boundary disputes between the new states'. Swiss Arbitration Award, '*The Decision of the Swiss Federal Court'*, signed at Bern, Switzerland, on 24 March 1922, by the President and Chancellor of the Swiss Confederation, 428-429.

sovereignty was changed from the provisional one into a permanent one. The modern public international law version and a potential customary precedent of *uti possidetis* had emerged.

2.3 The Second Cycle: Decolonization of Africa and South-Asia

After 150 years had passed since the first cycle, *uti possidetis* was reapplied in the African and Asian decolonization context in the 1960s, in a very different international legal era. The subsequent evolution of the doctrine is derived from two main differences: the changes in other international law principles (such as the prohibition of the use of force), and in the legal framework from the state succession of only one sovereign (Spain) to several sovereigns (European colonial powers of the United Kingdom, France, Belgium, Italy, Portugal, and Spain).

Since there had not been any codification of the doctrine in international treaties outside Latin America, in order for *uti possidetis* to be legally applicable, there was a need for evidence of it being accepted as a customary international law rule or a general principle. The Statute of the ICJ describes customary international law as 'a general practice accepted as law'.[82] It is generally agreed that the existence of a customary international legal norm requires the presence of two elements, state practice (*usus*) and a belief that such practice is required, prohibited or allowed, as a matter of law (*opinio juris sive necessitatis*).[83] However, since *uti possidetis* had been reapplied very scarcely and without explicit references to it,[84] there was no evidence of *usus* or *opinio juris*. A choice had to be made between a wholesale redrawing of the African borders in an attempt to rectify the past injustices and an agreement to use colonial borders and *uti possidetis*.

Decolonization movement drew legitimacy from the right to self-determination of peoples, which had been proclaimed first as a political principle in 1917. In 1945, this principle had been incorporated into Articles 2(1) and 55 of the UN Charter, but was considered too vague to provide a clear legal entitlement.[85] However, decolonization had a definite momentum, and subsequent developments

[82] *The Statute of the International Court of Justice*, Art. 38 (I) (b), 26 June 1945.
[83] L. Doswald-Beck, 'Assessment of Customary International Law: Introduction', *International Committee of the Red Cross* (2005) 1-9 at 1. While these two constituent elements have been accepted uniformly by scholars, there remains different emphasizes on the relation between the two. For instance, professor Bin Cheng holds that the state practice being significant only as evidence of *opinio juris*, which is the crucial element in forming customary international rule. B. Cheng, 'Custom: The Future of General State Practice in a Divided World' in R. McDonald and D. Johnston (Eds), *The Structure & Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (Martinus Nijhoff Publishers, 1983) 513-532 at 515.
[84] N 57.
[85] I analyze the right to self-determination in much more detail in Chapter 4.
Self-determination has never evolved from the vagueness relating to its exact legal content. According to Jan Klabbers, the 'very norm of self-determination used to be (and still is) rather indeterminate, too indeterminate perhaps for uncontroversial judicial application'. J. Klabbers, 'The Right to be Taken Seriously: Self-Determination in International Law' 28(1) *Human Rights Quarterly* (2006) 186-

made self-determination as a right in customary and treaty law. The 1960 *Declaration on the Granting of Independence to Colonial Countries and Peoples*[86] (1960 Declaration) made the decolonization process simply irreversible. According to Article 2,'[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'. It laid the legal foundation for the decolonization policy of the UN. In 1966, two crucial UN covenants established in their first articles the right to self-determination as a treaty right.[87] In 1970, a *Friendly Relations Declaration* reaffirmed the right to self-determination and added that '[e]very State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter'.[88] Finally, there have since been several authoritative elaborations in the auspices of the UN on the content of self-determination.[89]

After the 1960 Declaration, most of the colonial empires in Africa dissolved rapidly. Since the colonialists had, in effect, no choice but to grant independence to all their subjugated peoples, they had to choose their future borders.[90] At first, it seemed that the colonial powers would ally with the so-called Pan-Africanists and redraw the borders. In 1958, the All-African People's Conference (AAPC) was held in Accra, the capital of then already independent Ghana. Delegates consisted of activists from the African states still under colonial rule, and of governmental bodies of already independent African states. The AAPC passed the resolution denouncing colonial boundaries as

206 at 189. For a comprehensive analysis of the divide that transforms the political idea into an international legal right of self-determination, see Cassese (n 9). For more on the object of internal self-determination, see W. Twining, *Issues of Self-Determination* (Aberdeen University Press, 1991). For the legitimization of international law through self-determination and nationalism, see Summers (n 42).

[86] *Declaration on the Granting of Independence to Colonial Countries and Peoples*, UNGA res. 1541 (XV), adopted by the General Assembly on 14 December 1960. The resolution went much further than a standard UN General Assembly declaration would have. There was, for instance, the establishment of a Special Committee, which was a United Nations entity devoted exclusively to the issue of decolonization and monitoring the implementation of the resolution 1514.

[87] N 10.

[88] The Principle of Equal Rights and Self-Determination of Peoples in *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, UNGA res. 2625 (XXV), 24 October 1970.

[89] In 1984, the Human Rights Committee's 'General Comment' on Article 1 of the Covenant on Civil and Political Rights reaffirmed that peoples have the right to self-determination without clarifying who the people entitled to this right are. *CCPR General Comment No. 12: Article 1 (Right to Self-determination) The Right to Self-determination of Peoples*, Office of the High Commissioner for Human Rights, adopted on 13 March 1984. In 1996, the UN Committee on the Elimination of Racial Discrimination (CERD), overseeing the *International Convention on the Elimination of All Forms of Racial Discrimination* (UNGA res. 2106 (XX), 21 December 1965) gave its 'General Recommendation' on the right to self-determination. It recalled that self-determination had both internal and external aspects and emphasized that none of its actions should be construed as being inconsistent with the principles of territorial integrity and national unity. *General Recommendation 21, The Right to Self-Determination*, Committee on the Elimination of Racial Discrimination (Forty-eight session, 1996), U.N Doc. A/51/18, annex VIII at 125 (1996).

[90] The only legal restraint was the principle of *nemo dat quod non habet*, according to which the metropolitan state can only transfer to the successor state the territorial extent of its competence. D. O'Connell, *State Succession in Municipal Law and International* Law, *vol. 2* (Cambridge University Press, 1967) at 273.

artificial and called for their abolition or adjustment according to the true wishes of the people.[91] Nevertheless, the majority of the indigenous elites opted for maintaining extant lines as the most feasible method for a swift end to colonialism,[92] and the withdrawing colonialists allied with them.

The apparent reasoning behind the retention of colonial borders was to use the legal precedent of *uti possidetis* to legitimize the new international borders in Africa. Therewith, the agreement was made to re-introduce *uti possidetis* and claim that it was already a universal customary rule. This uniformity gave *uti possidetis* universal applicability, making it legally so effectual that indeed it can be argued to have become an international customary rule.[93] The ICJ has later enhanced this legal status in the cases concerning Latin American and African borders.[94]

The doctrine was more clearly focused on the second cycle. Most of the colonial borders were clearly demarcated and, unlike in Latin America, most of the legal sovereigns accepted decolonization.[95] The political leaders of the independent African states made a collective attempt to legitimize the *uti possidetis* borders in the auspices of the newly established Organization of African Unity (OAU). As a remarkable gesture - and mimicking the Latin American tendency to ratify the *uti possidetis* borders via international treaties - the 1963 Charter of the OAU enshrined the sanctity of the inherited colonial borders among its core principles.[96] One year later, the OAU delegates met in Cairo and issued a collective declaration, pledging to 'respect the frontiers existing on their achievement of independence' while admitting that the borders in question 'constitute a grave and permanent factor

[91] Accoundted for in A. Cukwurah, 'The Organisation of African Unity and African Territorial and Boundary Problems: 1963-1973' 1(1) *Nigerian Journal of International Studies* (1975) 56-81. Peter Radan has additionally been gathering other dissenting statements by African leaders of the time, such as Tanzania's President Nyerere, in Radan (n 20) 69-70.
[92] C. Legum, *Pan-Africanism: A Short Political Guide* (Praeger, 1962) at 228, 231.
[93] Malcolm Shaw argues that *uti possidetis* is a customary rule and will override the right to self-determination in a conflict situation, Shaw (n 17, 'Peoples') 152. Most of the scholars arguing for the customary rule position of *uti possidetis* are deriving this from the ICJ's *Frontier Dispute* (n 2) para. 21. For example, Brian Sumner argues that the Court may have tacitly elevated the status of *uti possidetis* to that of customary international law, even though it has never acknowledged as much. B. Sumner, 'Territorial Disputes at the International Court of Justice' 53(6) *Duke Law Journal* (2004) 1779-1812 at 1809. See also M. Wesley, '*Uti Possidetis*: The Procrustean Bed of International Law?', Paper presented at the ILA Conference of 21st Century Borders, 13 June 2014, at 2. He argues that very few international scholars argue against *uti possidetis* having attained the position of customary international law.
[94] N 39.
[95] In the Spanish and Portuguese colonies and in French Algeria there was a considerable delay and even tragic violent repressions.
[96] *Charter of the Organization of African Unity*, 25 May 1963, Art. III.3.

of dissension'.[97] While many scholars have pointed out the obvious paradox displayed in the Cairo Declaration,[98] the African borders remain virtually unaltered to this day.[99]

The application of *uti possidetis* and the Cairo Declaration have been criticized. According to Sumner, the ideological argumentations against colonial borders as inappropriate delimiters of territory 'is essentially the antithesis of a *uti possidetis* claim'.[100] Touval considers the African borders to be in contradiction to otherwise prevailing notion on the aim of building nation-states.[101] Ravenhill points out the difficulties in Africa to build state-institutes in their ethnically, socially, and historically fragmented territories.[102] Likewise, in his well-defined analysis on the national (dis)cohesion of the African countries, Okafor points the blame to the inherited borders.[103] Davidson has argued that the European states left the new African states not only with artificial borders but with an artificial understanding of a nation-state. He concludes that there is a need in Africa to re-invent the state that is appropriate for a post-imperialist future.[104] Notwithstanding, the chosen African boundaries are not without proponents. For instance, Herbst sees them as a rational response to otherwise unmanageable political terrain. He argues that the sacrosanctity of African borders has enforced the principle of territorial integrity and thus affected positively to the development of international law.[105]

The application of *uti possidetis* produced better results in the decolonization of Asia, where there had been a significant amount of preservation of the earlier state traditions during the colonial times.[106] Thus, the new Asian states inherited the borders of units with long, pre-colonial state traditions, which eventually amounted to a full restoration of the pre-colonial forms of the state organization. Consequently, *uti possidetis* borders were met with wider acceptance than in Africa.[107] A major exception was that of the partition of India and Pakistan, where a 'Two-Nation Theory'

[97] *Resolution on Border Disputes* ('the Cairo Declaration'), 10 September 1964, AGH/RES.16(I).
[98] See, *inter alia*, Sumner (n 93) 1809; Ratner (n 12) 599-600; J. Herbst, 'The Creation and Maintenance of National Boundaries in Africa' 43(4) *International Organization* (1989) 673-692 at 673.
[99] Outside the decolonization context, there have been only two universally recognized border changes in the form of creation of new states: in Eritrea (1993) and South Sudan (2011). The independence of Namibia (1990) was considered as an instance of delayed decolonization. Additionally, there are numerous territorial disputes, 'failed states' and unrecognized entities all over Africa.
[100] Quoted in Sumner (n 93) 1792. He cites A. Burghardt, 'The Bases of Territorial Claims' 63(2) *Geographical Review* (1973) 225-245 at 239-240.
[101] S. Touval, 'Treaties, Borders, and the Partition of Africa' 7(2) *Journal of African History* (1966) 279-293.
[102] J. Ravenhill, 'Redrawing the Map of Africa', in D. Rothchild and N. Chazan (Eds), *The Precarious Balance: State and Society in Africa* (Westview Press, 1988) 280-289 at 282-283.
[103] O. Okafor, *Re-Defining Legitimate Statehood: International Law and State Fragmentation in Africa* (Martinus Nijhoff Publishers, 2000) at 33-36.
[104] B. Davidson, *The Black Man's Burden: Africa and the Curse of the Nation-State* (Oxford University Press, 1992) at 321.
[105] Herbst (n 98) 673-674 and 692.
[106] For example, J. Gerring, D. Ziblatt, J. Van Gorp, and J. Arévalo, 'An Institutional Theory of Direct and Indirect Rule' 63(3) *World Politics* (2011) 377-433 at 389-392; and M. Stuart-Fox, *A History of Laos* (Cambridge University Press, 1997) at 30.
[107] R. Solomon, 'Boundary Concepts and Practices in Southeast Asia' (Advanced Research Project Agency, 1969) 1-59 at 27-30.

produced a political movement that aspired for two separate nations from the former administrative unit of British India.[108] Subsequent developments led to the establishment of separate Dominion of India and Dominion of Pakistan, which then became independent inheriting these borders.[109]

As mentioned earlier, from a doctrinal point of view, there were two main differences between the first and second cycles of *uti possidetis*. First, the use of force among states had been prohibited in 1928 with the ratification of the Kellogg-Briand Pact.[110] A universal prohibition was ratified into Article 2(4) of the UN Charter, which all new member states have to adhere to. Additionally, the London Agreement and Charter of 8 August 1945,[111] and subsequent affirmation by the UN General Assembly of that Charter must be assumed, according to Ian Brownlie, to have had the effect of underscoring the essential illegality of the use of force as a policy instrument.[112] Therewith, at the time of decolonization, there was a general ban on the use of force between states, which led *uti possidetis* to be chosen in order to exclude any revisionist use of force. By internationalizing the former administrative borders, the doctrine made these new borders protected by international law and the prohibition of the use of force.[113] This logic was repeated in the third cycle.

Second, due to the nature of the borders in Africa, *uti possidetis* had to take into account both internal and external lines drawn by the colonizers. For instance, in Western Africa, there were recognized international borders between the British, French, Spanish, and Portuguese colonial possessions, as well as various types of administrative borders within each of these colonial areas. The choice of which borders to turn into international ones was left for the colonizer in question, which resulted in Africa having more international borders than any other continent.[114] However, there did not emerge any single method of how to determine which borders to use, making the application of *uti possidetis*

[108] The separation was manifested less on linguistic or ethnic and more on religious basis. Y. Kahn, *The Great Partition: The Making of India and Pakistan* (Yale University Press, 2007) at 18-19.
[109] There has been a significant amount of resentment, ethnic deportations, and violence related to the rejection of the borders. Among these incidents, there have been several wars over the control of Kashmir and, in the 1970s, a Pakistani Civil War and intervention by India led to independence of East Pakistan as Bangladesh.
[110] *General Treaty for Renunciation of War as an Instrument of National Policy* (Kellogg-Briand Pact), 27 August 1928, League of Nations, Treaty Series, Vol. 94, p. 57, Art. I. The treaty became effective on 24 July 1929 between the original signatory states of Australia, Belgium, Canada, Czechoslovakia, France, Germany, British India, the Irish Free State, Italy, Japan, New Zealand, Poland, South Africa, the United Kingdom and the US.
[111] *The Charter of the International Military Tribunal - Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945.
[112] I. Brownlie, *International Law and the Use of Force by States* (Oxford University Press, 1963) at 116.
[113] Craven has argued that, unlike in most situations where a unit has attained statehood based on either effective control or self-determination, the interpretation by the Badinter Commission gave Yugoslav republics prima facie statehood irrespective of the effectiveness. He concludes that *uti possidetis* was used not only to give entities their shape but also to give them international personality as states. Craven (n 16) 389-390.
[114] Ratner (n 12) 596.

inconsistent.[115] In the first cycle, the divisions within the Spanish colonial empire had been mainly political, not cultural. In the second cycle, the divisions were cultural rather than political. Nevertheless, only the latter was taken into account when delineating the borders.

In sum, in the second cycle, *uti possidetis* was utilized for its perceived ability to prevent violence. This peace-project nature of the doctrine, aimed to be accomplished by the preservation of the status quo, is the main reason for it being reapplied in the early 1990s. The undesirable byproduct of this noble aim is that it fails to recognize the amount of resentment that the new international borders can create. While the *uti possidetis* borders were not without critics in Africa, there was a majority view - displayed, for instance, under the auspices of OAU - that any alternative to these borders would cause more fragmentation. Therefore, the right to self-determination belonged to territorial units rather than peoples, and the indigenous elites accepted this. This is the major difference to the third cycle, especially in Yugoslavia where the federal authorities contested the right to self-determination of territorial units and, thus, the peace-project failed.[116]

Next, before continuing to the third cycle, I need to analyze the relation between *uti possidetis* and the general international law principles, most importantly, that of self-determination. The application of the doctrine in Africa and South-Asia did not happen in breach of territorial integrity of states since colonization had acquired an illegal character, and there was almost a universal acceptance of decolonization by the previous sovereigns.[117] However, *uti possidetis* did conflict with the right to self-determination. In the end, new borders are only as consistent with the right to self-determination as the internal laws of the previous sovereign were.[118] These laws do not necessarily include recognizing different peoples or drawing borders according to their wishes.

2.4 The Legal Categorization of the Right to Self-Determination and *Uti Possidetis*

The people's right to self-determination took a notorious 'false start' at the end of the First World War, being applied only in Europe and lacking at the time any concrete legal base or a precise

[115] To name but a few, the German colonies of Togo and German Kamerun were divided between the colonies of the United Kingdom and France, becoming later independent as parts of Ghana, Nigeria, and French Cameroons, respectively. British and Italian Somalia became independent as one state and an Island of Kuria Muria in British Yemen became part of independent Oman (Jankov and Ćorić (n 1) 9-10). Also, in the French Indochina, Vietnam had been subdivided administratively into Tonkin (north), Annam (center), and Cochinchina (south), but became later independent as two states in 1954 and was finally unified as a single Vietnamese state in 1975.
[116] Allen and Castellino have argued that with respect to the doctrine's prime aim, the preservation of order, *uti possidetis* has begun to falter. Allen and Castellino (n 49) 22.
[117] Of the exceptions, see n 95.
[118] The 'territorial title' that the ICJ referred to as being frozen at the moment of independence meant essentially the domestic law of the state in question. Accounted for in Shaw (n 17, 'Peoples') 559.

formula.[119] The principle had two great - albeit politically opposite - ideologues: Woodrow Wilson and Vladimir Lenin.[120] Both leaders insisted on people's right to determine their political future. Yet, the reality was more restrictive. Wilson's version of the right was applicable only to the independence of the subjugated peoples under the fallen monarchies of Germany and Austro-Hungary.[121] Lenin's version applied only within the USSR, and even there for most of the Soviet period, the alleged right to self-determination, including the right to secession, would exist only in theory, not in practice.

In 1920, the League of Nations appointed a body of Commission of Rapporteurs to solve a dispute between Finland and Sweden over the Åland Islands. In their report, the Commission represented a thorough assessment of self-determination. According to the rapporteurs' categorization:

> 'The principle is not, properly speaking, a rule of international law and the League of Nations has not entered it in its Covenant […]. It is a principle of justice and of liberty, expressed by a vague and general formula which has given rise to most varied interpretations and differences of opinion'.[122]

In 1945, the principle of self-determination was institutionalized in the UN Charter.[123] However, the confusion about its meaning persisted throughout and after the drafting process.[124]

The status of self-determination was enhanced when the 1966 Covenants on Civil and Political Rights[125] and on Economic, Social and Cultural Rights[126] made it a qualified legal right beyond decolonization context. Both Covenants have an identical Article 1(1) specifying that:

> 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.

In 1970, the *Friendly Relations Declaration* added that '[e]very State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights

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[119] This false start is accounted for, *inter alia*, in J. Duursma, *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood* (Cambridge University Press, 1996) at 7-27. Cassese (n 9) 11-33) concludes that Enlightenment and the 19th century were the most important roots for the principle of self-determination.
There are some unavoidable overlaps in narrative with this subchapter and the subchapter 4.1.

[120] For more on how Lenin's proclamation of the right to self-determination made Wilson respond directly with his Fourteen Points, see J. Breuilly, 'Nationalism, National Self-Determination, and International Relations' in J. Baylis, S. Smith and P. Owens, *The Globalization of World Politics: An Introduction to International Relations* (Oxford University Press, 2017) 435-449 at 443.

[121] Wilson's Secretary of State Robert Lansing was very skeptical of the notion of self-determination, which he described as 'simply loaded with dynamite', adding that '[w]ithout a definite unit which is practical, application of this principle is dangerous to peace and stability'. Quoted in K. Meyer, 'Editorial Notebook; Woodrow Wilson's Dynamite', *The New York Times Archives*, 14 August 1991.

[122] *Report of the Commission of Rapporteurs* (Beyens, Calonder, Elkins), League of Nations Docs. B7.21/68/106/VII (1921) at 22-23.

[123] *Charter of the United Nations*, 26 June 1945, Art. 1(2).

[124] According to Quane, the divergence of the opinions over the content of self-determination, which existed between the future Security Council permanent member States, was not resolved during the drafting of the Charter. H. Quane, 'The United Nations and the Evolving Right to Self-Determination' 47(3) *The International and Comparative Law Quarterly* (1998) 537-572 at 561.

[125] *International Covenant on Civil and Political Rights* (n 10).

[126] *International Covenant on Economic, Social and Cultural Rights* (n 10).

and self-determination of their right to self-determination and freedom and independence'.[127] The general view is that self-determination has emerged as an operative legal right.[128] Nonetheless, as pointed out by several scholars, despite these credentials, the principle remains problematic as an international law norm for its vagueness.[129] In the 1970 Declaration, 'self-determination has been equated to self-government rather than independent statehood', apart from the exceptional cases of colonies and non-self-governing territories.[130] Some have argued that it should not be seen as a single principle at all, but for instance, as explained by Buchanan, 'a placeholder for a range of possible principles specifying various forms and degrees of independence'.[131] As noted by Malcolm Shaw, '[s]elf-determination is always constrained by virtue of its cautious definition in international law. Apart from isolated examples of special circumstances, and with the aim of preservation of peace, there have been no recognition of secession from post-independence units'.[132]

From a standpoint of the law-making process, the categorization of *uti possidetis* has equally divided the scholarly opinion. There is no univocal academic ground on whether it is a general principle, a general or local custom, or a judicial decision,[133] although the case for the general principle has been the strongest in the academic circles.[134] Jankov and Ćorić see *uti possidetis* as a mere judicial decision that should always give away when it is conflicting with the *jus cogens* norm of self-determination.[135] Ratner has argued that *uti possidetis* could be either seen as a local custom in Latin America and

[127] *Friendly Relations Declaration* (n 88) para. 1.
[128] See, e.g., *Western Sahara, Advisory Opinion, I.C.J Reports* (1975) p. 12 at 120-121; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), *Advisory Opinion,* I.C.J. Reports (1971) p. 16 at 73-75; and I. Brownlie, *Principles of Public International Law* (4th ed, 1990) at 595-598.
[129] The lack of concrete legal content has been downgrading the principle of self-determination almost since it first appeared. See, among others, T. Grant, 'Extending Decolonization: How the United Nations Might Have Addressed *Kosovo'* 28(1) *Georgia Journal of International and Comparative Law* (1999) 9-54 at 11; Cassese (n 9) 159-162; H. Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (University of Pennsylvania Press, 1990) at 27; and Hannum (n 11) 2.
[130] M. Nikouei and M. Zamani, 'The Secession of Crimea: Where Does International Law Stand?' 85(1) *Nordic Journal of International Law* (2016) 37-64 at 49.
[131] A. Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Westview Press, 1991) at 50. For a more philosophical approach to self-determination, see T. Kapitan, 'Self-Determination and International Order' 89(2) *The Monist* (2006) 356-370 at 356-360.
[132] Shaw (n 17, 'Peoples') 152.
[133] In 1977, Secretary-General of Organization of African Unity stated that '*uti possidetis* does not constitute a sacrosanct principle, but may instead be overruled or revised, especially in the light of the right to self-determination'. Quoted in J. Klabbers and R. Lefeber, 'Lost Between Self-Determination and *Uti Possedetis*' in C. Brölmann, R. Lefeber, M. Zieck, (Eds), *Peoples and Minorities in International Law* (American Society of International Law, 1993) 34-63 at 63. On the other hand, Malcolm Shaw has been making a strong case, especially after the Badinter Opinions, for *uti possidetis* to be a general principle of international law. He insisted that 'the acceptance of colonial borders by the Organization of African Unity neither created a new rule, nor extended a local customary rule to Africa. Rather, it constituted recognition and confirmation of an existing principle'. Shaw (n 17, 'Peoples') 494.
[134] N 39.
[135] Jankov and Ćorić (n 1) 24-25.

Africa or as a general customary rule connected to the process of decolonization.[136] Finally, according to Shaw, the application of *uti possidetis* will 'not be overridden by the norm of self-determination'.[137]

The ICJ has endorsed *uti possidetis* on several occasions. In the 1992 *Case Concerning Land, Island and Maritime Frontier Dispute* (*El Salvador v. Honduras, Nicaragua Intervening)*, the dispute was over a boundary between El Salvador and Honduras. The Court defined *uti possidetis* to be 'concerned as much with the title to territory as with the location of boundaries', that the 'key aspect of the principle is the denial of the possibility of *terra nullius*' and that '*uti possidetis* is essentially a retrospective principle, investing as international boundaries administrative limits intended originally for quite different purposes'.[138] Additionally, the Court re-affirmed the principle's pivotal role in territorial disputes, when it stated that '[t]he award's view of the *uti possidetis juris* position prevails and cannot now be questioned juridically, even it could be questioned historically'.[139]

More information can be acquired from the 1986 *Case Concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)*, which entails the greatest endorsement of *uti possidetis* by an international legal organ. The dispute was instigated by Mali, which - despite having endorsed the *uti possidetis* borders in the Cairo Declaration - had questioned its boundary with Burkina Faso. The parties chose to submit the case to the ICJ, and the Court analyzed their border in detail. Paragraph 19 of the judgement deals exclusively of the intangibility of the inherited borders:

> 'In the preamble to their Special Agreement, the Parties stated that the settlement of the dispute should be "based in particular on respect for the principle of the intangibility of frontiers inherited from colonization", which recalls the principle expressly stated in resolution AGH/Res. 16 (I) adopted in Cairo in July 1964 at the first summit conference following the creation of the Organization of African Unity, whereby all member States "solemnly […] pledge themselves to respect the frontiers existing on their achievement of national independence."'[140]

Paragraphs 20-26 focus solely on *uti possidetis*:

> 'Chamber cannot disregard the principle of *uti possidetis juris,* the application of which gives rise to this respect for intangibility of frontiers. It emphasizes the general scope of the principle in matters of decolonization and its exceptional importance for the African continent [...]. Although this principle was invoked for the first time in Spanish America, it is not a rule pertaining solely to one specific system of international law. It is a principle of general scope, logically connected with the phenomenon of the obtaining of independence, wherever it occurs […].

[136] Ratner (n 12) 599.
[137] Shaw (n 17, 'Peoples') 152.
[138] *Land, Island and Maritime Frontier Dispute* (n 39) para. 43.
[139] *Ibid.* para. 67.
[140] *Frontier Dispute* (n 2) para. 19.

> The principle of *uti possidetis juris* accords pre-eminence to legal title over effective possession as a basis of sovereignty. Its primary aim is to secure respect for the territorial boundaries which existed at the time when independence was achieved […].
>
> This principle of *uti possidetis* appears to conflict outright with the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course […]. If the principle of *uti possidetis* has kept its place among the most important legal principles, this is by a deliberate choice on the part of African States'.[141]

There are several important observations to be made from this lengthy quote. The ICJ gives us a somewhat puzzling definition of *uti possidetis*, in the first paragraph referring to its general scope in matters of *decolonization*, while in the second insisting that it is a principle of general scope, logically connected with the obtainment of independence *wherever it occurs*. In 1991, the decision to apply *uti possidetis* to a non-colonial situation of the third cycle was based on this equivocal formulation.

In the third quoted paragraph, the ICJ confirms the pre-eminence of *uti possidetis juris* over *uti possidetis de facto*.[142] In the fourth paragraph, it affirms that the principle conflicts with the right to self-determination, but chooses the 'wisest course' of ignoring this. It also states *uti possidetis* to be among the most important legal principles since the African states chose to apply it so uniformly.

Finally, excluding the possibility of using consideration of equity in establishing the boundaries, the Court made the following statement, which legally enhances the doctrine significantly:

> 'The Chamber would however stress more generally that to resort to the concept of equity in order to modify an established frontier would be quite unjustified […]. These frontiers, however unsatisfactory they may be, possess the authority of the *uti possidetis* and are thus fully in conformity with contemporary international law'.[143]

Thus, it would seem that the judicial decisions of the ICJ could be read to either support *uti possidetis* as a customary rule tied directly to decolonization context,[144] or as a general customary rule or principle, related to obtaining independence wherever it occurs.[145] As I mentioned before, scholarly

[141] *Ibid.* paras. 20-26.
[142] The Permanent Court of International Justice had already favored *uti possidetis juris* in its 1933 judgment in *Honduras Borders Case* (n 79).
[143] *Frontier Dispute* (n 2) para. 149.
[144] The scholars considering *uti possidetis* as being tied to the decolonization context include, *inter alia*, Ratner (n 12) who argues that the doctrine should not be applied unquestioningly in cases of the breakup of established states. Lalonde has suggested that the recent calls to extend and apply *uti possidetis* in non-colonial situations are based upon its purported success in the past in resolving conflicts over boundaries, which, she argues, is not that impressive. Lalonde (n 2) at 230. See also Radan (n 20) 50-76.
[145] This view was endorsed for example by Malcolm Shaw, Thomas Grant, Rein Müllerson (R. Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' 42(3) *The International and Comparative Law Quarterly* (1993) 473-494 at 486), Enver Hasani (n 1) and the Badinter Commission (*Opinion No. 3* (n 39)).

opinion is divided over the legal categorization of *uti possidetis*. However, a majority is leaning towards acknowledging *uti possidetis* as a general principle. For example, Shaw has argued that '[t]here was no need for Chamber in *Territorial Dispute* case to do more than to note that *uti possidetis juris* was applicable between the parties based on its inclusion in the compromise. Chamber chose to underline the fact that it applies to all decolonization situation and even beyond, in all situations where there was a movement from one sovereign authority to another - such statement by the court outside the strict *ratio decidenci* of a decision can constitute authoritative statements of the law'.[146]

In the *Beagle Channel* case, the Court of Arbitration summarized *uti possidetis* having two main aspects. First, there was a presumption that all territory in South America is deemed to have been part of one of the former administrative divisions of Spanish colonial rule (vice-royalties, captaincies-general, etc.),[147] leaving no area *terra nullius*. Second, the title to any given locality is deemed to automatically rest in whatever state took over the administrative area in which it was situated.[148]

Before moving forward to the third cycle, I need to establish a legal hierarchy between the right to self-determination and *uti possidetis*. Some scholars have argued that self-determination has the status of a *jus cogens* norm.[149] These norms are the most fundamental international law principles that cannot be violated by any state through treaties, or local or even general customary rules.[150] According to the Vienna Convention of the Law of Treaties:

> 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm

[146] Shaw (n 17, 'Peoples') 497.
[147] As Anne Peters has pointed out, there were quite diverse types of territorial entities in Latin America: '*uti possidetis juris* was not only applied to the boundaries between *vice-rouyautés* (vice-Kingdoms), but was likewise applied to administrative subdivisions (called *audiencia* or *intendencia*) within a single vice-kingdom […]. *Uti possidetis* was applied to the different types of boundaries without regard for the difference in status'. Peters (n 25) 122.
[148] *Dispute between Argentina and Chile concerning the Beagle Channel* (n 80) para. 10.
[149] For instance, Mullerson has argued that self-determination is a fundamental principle, which informs the development of other aspects of international law. R. Mullerson, *Ordering Anarchy: International Law in International Society* (Martinus Nijhoff Publishers, 2000) at 166. McCorquodale has suggested that subsequent articulations of the right to self-determination in international instruments, such as the *Declaration on Principles of International Law* (1970, n 88), and the *African Charter of Human and Peoples' Rights* (27 June 1981 (Banjul), OAU Doc. CAB/LEG/67/3), have clarified the content of Article 1 of the 1966 Covenants, thereby giving the right to self-determination a fundamental place in international legal hierarchy. R. McCorquodale, 'Self-Determination: A Human Rights Approach' 43(1) *International and Comparative Law Quarterly* (1994) 857-885 at 858-859. Saul has argued that the fact that there are 167 states parties to the International Covenant on Civil and Political Rights reduces the need to question the fundamental customary legal base of the principle. M. Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' 11(4) *Human Rights Law Review* (2011) 609-644 at 625. See also Jankov and Ćorić (n 1) 15.
[150] *Prosecutor v. Anto Furundzija* (Trial Judgement), International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, IT-95-17/1-T, 10 December 1998.

> from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[151]

In my opinion, the cases before the ICJ seem to be awarding self-determination a bit more limited status. Most scholars have taken the view that while the right to self-determination is without a doubt an international law principle - and a very fundamental one at that - it nevertheless will give away to the more straightforward principle of *uti possidetis*.[152] This conclusion does not signal the weakness of the right to self-determination but that it lacks a clear legal content when compared to *uti possidetis*. The ICJ is likewise giving a cautious support *uti possidetis* over self-determination in the *Frontier Dispute* case, in the paragraphs cited previously. It appears that *uti possidetis* is, at minimum, an international law principle that is able to overrule self-determination in a conflict situation.[153]

All that being said, two crucial things need to be kept in mind as we proceed towards the re-emergence of *uti possidetis* in the third cycle with the federal state break-up. First, the colonial territories have an undisputed special legal status, confirmed by the UN Charter[154] and the 1960 Declaration.[155] After those instruments, colonization had accumulated a controversial character of being not in accordance with international law, and decolonization was a legal response to this development.[156] The socialist federations that dissolved in the early 1990s - the USSR and the Socialist Federal Republic of Yugoslavia (SFRY) - were not illegal as colonial empires or as states *per se*.[157] This fact plays a role when the SFRY challenges the dissolution narrative. Moreover, as *uti possidetis* had previously been

[151] *Vienna Convention on the Law of Treaties*, Art. 64, 23 May 1969, United Nations Treaty Series, vol. 1155, 331.
[152] E.g., Shaw (n 17, 'Peoples') 152. I concur that the two principles are in the same level in legal hierarchy, and that in a situation of a conflict between them, *uti possidetis* is the stronger for it is much more concrete. Patrick Muwanguzi, after comparing the legal statuses of *uti possidetis* and self-determination, concludes that although self-determination is a universal right, it is restricted to a specific category of persons and usually is overridden. Muwanguzi (n 1) 1.
[153] After the third cycle, it could be even seen as a local customary rule with a massive geographical scope that does not require decolonization context to be applicable.
[154] *Charter of the United Nations* (n 123), Chapter XI, Arts. 73-74.
[155] *Declaration on the Granting of Independence to Colonial Countries and Peoples* (n 86).
[156] Many scholars see the end of colonization being achieved through colonies exercising their right to self-determination. Yet, there are dissenting views on this. For instance, Koskenniemi sees the attempt to explain decolonization in terms of a right to self-determination skeptically: it 'may not have been necessary to achieve what had already been decreed by politics - namely the entry into statehood of some hundred former colonial territories'. M. Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' 43(2) *International and Comparative Law Quarterly* (1994) 241-269 at 249.
While views have been expressed that the USSR was indeed a colonial empire (see*, inter alia*, W. Kolarz, *Russia and her Colonies* (New York, 1952)), most scholars refer to the UN approved 'salt-water thesis', according to which one criterion of a colony is that there is salt water separating it from its colonial master. Only such territories have been recognized as having the right to self-determination since their separatism does not disrupt the territorial integrity of existing nation-states. In the UNGA resolution 637, the principle of self-determination was affirmed for the peoples of non-self-governing territories, as identified by the UN. *Declaration of the Right of Peoples and Nations to Self-Determination*, UNGA res. 637 (VII) (1952).
[157] Therewith, a legal problem manifested itself when the SFRY refused to go down peacefully, claiming the peoples of Yugoslavia had used their right to self-determination when forming the federal state. For example, Hondius has argued that even if the right to self-determination still existed, it did not rest with the republics because they were not parties to, but rather results of, the union of the peoples. F. Hondius, *The Yugoslav Community of Nations* (Mouton, 1968) at 250.

applied only in the decolonization context, there had to be a legally comparable situation in the federal dissolutions. The proposed legal formula presented in the next subchapter - 'process of dissolution' - achieved placing the SFRY into the legal framework of colonization.[158] While this caused some controversy, the underlying logic lies within the doctrine's fundamental aim as a peace project. As stated by the ICJ in paragraph 26 of the *Frontier Dispute* case, '*uti possidetis* appears to conflict outright with the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course'. While not resorting to the same line of argument in letter, it seems that the 'process of dissolution' formula follows it in spirit, thereby valuing the maintenance of the territorial status quo within the dissolving SFRY as the wisest course.[159]

Second, in the previous cycles, there had been no dispute on former administrative borders becoming international borders, but over where these borders were. In the third cycle, it was the other way around: the location of the previous administrative borders was clear, but in many cases, the dispute was over whether these should become international borders. Additionally, there were different hierarchical levels of federal subunits, and it was not at all self-evident which of these borders should be internationalized and what would be the legal status of the rest of the borders.

Two exceptional and peaceful cases from the early 1990s need to be singled out. In 1990, the two German States unified by leaving the old German Democratic Republic's administrative divisions intact.[160] This unification, while peaceful and based on agreement, involved four other state parties.[161] In 1993, the federal state of Czechoslovakia dissolved into its two constituent parts - the Czech Republic and Slovakia - after a mutual agreement.

[158] According to most of the scholars dealing with *uti possidetis*, its appliance in the context of federal dissolutions, while legally arguably artificial, was the right choice. For instance, according to Shaw, any attempt to reconfigure the SFRY internal borders at the time of dissolution would have most likely produced even worse outcomes. 'The absence of *uti possidetis* presumption would in place as the guiding principle only effective control as the principal criterion for the creation of international boundaries would be to invite the use of force as the inexorably first step'. Shaw (n 17, 'Peoples') 502.
[159] Vidmar has argued that the Badinter Commission artificially stretched the judgement in *Frontier Dispute*, as 'an attempt at peace activism'. Vidmar (n 2) 207. Shaw has argued that this stretching of the judgement actually took place already within the *Frontier Dispute* case, where the ICJ said much more about *uti possidetis* as it needed to.
[160] *Treaty on the Final Settlement with Respect to Germany* ('*Two Plus Four Agreement*'), 12 September 1990, Moscow, Art. 23; and T. Stammen, 'Federalism in Germany' in P. Wagstaff (Ed), *Regionalism in the European Union* (Intellect Ltd, 1999) 98-118 at 98-99.
[161] The other four were the original occupier powers of France, the United Kingdom, the USSR, and the US. For more, see R. Piotrowicz and S. Blay, *The Unification of Germany in International and Domestic Law* (Amsterdam, 1997) at 99-100.

2.5 The Third Cycle: The Socialist Federal Dissolutions

Having presented the *uti possidetis* doctrine and its primacy in a conflict situation over self-determination, I proceed to the third cycle and the main legal issues of this dissertation. In essence, this subchapter outlines the most radical transformation of *uti possidetis* and demonstrates some of its tragic consequences. According to some scholars,[162] the applicability of *uti possidetis* outside decolonization context was legally questionable. However, I am of the opinion that by 1991 *uti possidetis* had a status of a general principle of international law and there were no credible alternatives available.[163] Some dissenting scholars have insisted that a more self-determination friendly set of borders could have been produced - perhaps through referendums - and blame the premature recognition decisions by the EC of blocking this alternative.[164] Still, the majority of scholars support the application of *uti possidetis*, and the state practice demonstrates that *opinio juris* was also clearly in favor of its appliance in the socialist federal dissolutions of the 1990s.

That being said, it would have been paramount to take into account the developments in international law since the second cycle and the non-colonial context of the socialist federal dissolutions. While the EC recognition framework and the international mediation efforts attempted this restructuring, some key elements, including the socialist federal model, were not understood. Thus, I argue, *uti possidetis* was misapplied. The legal repercussions of this still haunt the international community.

2.5.1 The Socialist Ethnofederal Model

Already during the Russian Civil War (1917-1922), the Bolsheviks[165] had proclaimed equality and sovereignty of all the peoples in Russia, including the right to self-determination and free development of national minorities and ethnic groups.[166] Despite the reality of ultra-centralized control from Moscow, the 1922 Union Treaty proclaimed the USSR as a federal state of sovereign nations.[167] The fiction of voluntariness of their unification was maintained in all the Soviet

[162] For instance, according to Ratner (n 12); Lalonde (n 2); and Bartos (n 19).
[163] According to Shaw, both *Territorial Dispute* and the Badinter Commission affirmations of the applicability of *uti possidetis* 'are authoritative, particularly bearing in mind that there was no prior rule of international law precluding the application of the *uti possidetis* principle to post-colonial situations. In addition, the subsequent practice has been fully in conformity with the principle, while contradictory claims have met with international opposition'. Shaw (n 17, 'Peoples') 503.
[164] For instance, see Crawford (n 47) 495. Jonathan Widell has concluded that in the Yugoslavian context, one might argue that *uti possidetis* is nothing but a way to bestow legitimacy to what would otherwise be nothing but a case of premature recognition. J. Widell, 'The Breakup of Yugoslavia and Premature State Recognition', *Serbianna* 22 October 2004 at 1-3.
[165] At this point their name was officially 'All-Russian Communist Party'.
[166] *Declaration of the Rights of the Peoples of Russia*, adopted by the Council of People's Commissars of the Russian Socialist Federative Soviet Republic on 15 November 1917.
[167] *Treaty on the Creation of the Union of Soviet Socialist Republics* (*Договор об образовании СССР*), adopted by the 'First Congress of the Soviets of the Union of Soviet Socialist Republics', Moscow, 30 December 1922. Treaty legalized the voluntary union of the

constitutions. Indeed, the Union Treaty was used throughout the Soviet history as a constituent basic norm,[168] providing legitimacy to the USSR and to the ruling Party. The voluntariness aspect was essential: under Marxist-Leninist ideological variant, any coerced domination of distant peoples by Moscow would have been otherwise unjustifiable.[169] In January 1924, the right to self-determination was accompanied by the right to secession in the first Constitution of the USSR, with Article 4 stating that '[e]ach one of the member Republics retains the right to freely withdraw from the Union'.

According to the Soviet dogma, the Bolsheviks were creating the world's first dictatorship of the proletariat that all the other countries would soon follow according to the materialist conception of history.[170] Their unwavering belief on the inevitable triumph of socialism cannot be overemphasized. Most of their policy goals were dependent on a dialectic materialist vision of a world progressing towards a preordained path to the eventual victory of socialism. This would take place despite any action or inaction by the leaders of the countries in the world. A single individual, even in a commanding position, could only hasten or retard the natural flow of history in a minuscule scale.[171] This was equally applicable in the area of self-determination of peoples. The national differences and antagonisms were a result of a capitalist distortion, inevitably destined to disappear with the final worldwide victory of socialism. Therefore, the Bolshevik project to legislate and control the national relations within the USSR was meant to be merely a temporary solution to guarantee the survival of the revolutionary regime, while the 'socialist spark' would set the advanced capitalist states of Europe on fire.[172] Nonetheless, since this vision was combined with the Marxist-Leninist ideological understanding of self-determination, the union of these progressive nations had to be 'voluntary'.

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original four constituent components of the Federation; Russian Soviet Federative Socialist Republic, Ukrainian Soviet Socialist Republic, Byelorussian Soviet Socialist Republic, and Transcaucasian Soviet Federative Socialist Republic.

[168] The concept of 'basic norm' is based on a need to find a point of origin of all law, from which any laws and the constitution gain their legitimacy More in-depth take on the basic norm concept can be found on with the *Grundnorm* analysis in H. Kelsen, *General Theory of Law and State* (Harvard University Press, 1949).

[169] The first leader of the USSR, Vladimir Lenin, deciphered this need in December 1919 in an official letter: 'We want a voluntary union of nations - a union which precludes any coercion of one nation by another - a union founded on complete confidence, on a clear recognition of brotherly unity, on absolutely voluntary consent'. V. Lenin, 'Letter to the Workers and Peasants of the Ukraine: Apropos of the Victories over Denikin', in V. Lenin (Ed), *Collected Works*, *Vol. 30* (Progress Publishers, 1965) 291-297 at 291.

[170] E.g., K. Shimp, 'The Validity of Karl Marx's Theory of Historical Materialism', *Major Themes in Economics* (Spring 2009) 35-56.

[171] 'Men make their own history, but they do not make it as they please; they do not make it under self-selected circumstances, but under circumstances existing already, given and transmitted from the past'. K. Marx, 'The Eighteenth Brumaire of Louis Bonaparte' 1 *Die Revolution* (1852) 3-139 at 9.

[172] Accounted for in detail in R. Donaldson, J. Nogee and V. Nadkarni, *The Foreign Policy of Russia: Changing Systems, Enduring Interests* (Sharpe, 2014) at 40. In the 1930s, the national project became stationary with the 'Socialism in One Country' policy. The original theory held by Lenin and Leon Trotsky before the October Revolution of 1917 was that an isolated revolution, especially in backward Russia, would have no chance of survival without the revolution spreading to the advanced states of Germany, France, and England. However, as Lenin saw the 'spark' of the revolution dying out, he changed his stance and proclaimed that socialism could be built in Russia alone, but it would remain incomplete until the worldwide revolution. After Lenin's death in 1924, Trotsky and Josif Stalin fought for the leadership position. Trotsky advocated the concept of 'permanent revolution' and claimed that the restoration of

In essence, the concept of a federation was used as 'the post-revolutionary cure to the pre-revolutionary tactical doctrine of self-determination'.[173] In order for the Soviet government to demonstrate the progressive national policies of socialism, it created an ethnicity-based constitutional system called 'ethnofederalism'.[174] It was a very particular political federation model, where federal subunits reflected ethnic groups' territorial distribution, but with a socialist twist that put subunits in a hierarchical order based on an alleged 'progressive level' of their development toward socialism.[175]

There were four levels of self-determination statuses. The highest level consisted of the allegedly 'independent' nations of fifteen Soviet Socialist Republics (SSRs), which were constitutionally considered sovereign and provided with the right to secession.[176] The second-level consisted of sub-state entities called the Autonomous Soviet Socialist Republics (ASSRs), located within the borders of the SSRs. While they lacked the constitutional right to secede, the ASSRs had a relatively strong autonomy.[177] The third level units were awarded the status of Autonomous Oblasts (AOs), which entailed a strictly limited autonomy within the host SSR without any relevant sovereign rights. The last level units were the Autonomous Okrugs located within an AO, with only minor cultural rights. This system was a combination of official ideology and tactical concession to the reality of numerous different peoples within the Russian domain. The simulation of the voluntariness of their union had to be maintained to provide internal and external acceptance and legitimacy to the new revolutionary state.[178] However, while much of the content of national self-determination was a simulation, it should be noted that most of the ethnofederal units were acknowledged and created for the first time in history by the Soviet leadership, reflecting the revolutionary radicalism of the regime.

The first Yugoslav state, the Kingdom of Yugoslavia (1918-1941), was dominated by the Serbs. When the communists emerged victorious in 1945, the right to self-determination was proclaimed to

capitalism was inevitable without the worldwide revolution. Stalin, who won the leadership position and, thus, the argument, advocated the concept of 'socialism in one country' where Russia would build a socialist economy that would be so advanced that the rest of the world would want to emulate it. One could argue that history eventually proved Trotsky right - or at least Stalin wrong. For more on the topic, see E. Van Ree, 'Socialism in One Country: A Reassessment' 50(2) *Studies in East European Thought* (1998) 77-117.

[173] Hasani (n 1) 59.

[174] See, *inter alia*, Anderson (n 1) 165; C. Zürcher, *The Post-Soviet Wars* (New York University Press, 2007) at 23-32; and M. Beissinger, 'Nationalism and the Collapse of Soviet Communism' 18(3) *Contemporary European History* (2009) 331-347 at 334.

[175] See n 629.

[176] While the secession right was guaranteed in every constitution, it was meant to be read through the ideological lenses of the government. According to the official ideology, the nations had achieved a higher form of self-determination under socialism. According to the Soviet representative of Human Rights Committee in 1978, it is 'inconceivable that a republic would want to secede, since there [is] a solid and unshakable bond uniting all the peoples and nations of the State'. U.N. Doc. CCPT/C/SR.108-09 (1978).

[177] The 1990 constitutional amendments gave the ASSRs a close-to-equal legal status with the SSRs. See subchapter 3.7.4.

[178] Zürcher (n 174) 22-27. The difference to the tsarist times was astonishing. The Russian Empire had been ruled as a monoculture Russian state, with a few recognized minorities and even fewer minority rights. After the establishment of the Bolshevik rule, all of this changed. For example, in the 1926 census, there were listed 176 recognized nationalities in the USSR.

all the peoples of Yugoslavia. In order to copy the proper 'socialist solution' to the so-called national question,[179] the federal state model of Yugoslavia was based on the 1936 USSR Constitution and thus the SFRY became the second ethnofederal socialist state. Its six Socialist Republics (SRs) were made equivalent to the SSRs, and two Socialist Autonomous Provinces (SAPs) were made equivalent to the ASSRs. Therewith, the SFRY built the same constitutional time bombs and faced the same pattern of dissolution than the USSR when the legitimacy of the federal state was called into question.[180]

2.5.2 The Breakdown of the Socialist Federal Systems

Since the state demise of the socialist federations has been accounted for rigorously elsewhere,[181] and they are elaborated in more detail in Chapters 3 and 4, I give here only a brief overview of the events focusing on the application of *uti possidetis*.[182]

[179] The original Marxist doctrine, while being somewhat abstract on the matter, was suggesting that states would wither away in a not-too-distant future. Therefore, contemporary nationalism was a problem that needed to be solved. In the USSR, Lenin was already in 1920 acquiescing that the national and state differences will continue to exist for a 'very, very long time, even after the dictatorship of the proletariat has been established on a world scale' (V. Lenin, '"Left Wing" Communism, an Infantile Disorder' in V. Lenin (Ed), *Collected Works, Vol. 31* 17-118 at 107). Stalin continued on the same path, summarizing his view in the speech in 1929; 'It would be a mistake to think that the first stage of the period of the world dictatorship of the proletariat will mark the beginning of the dying away of nations and national languages, the beginning of the formation of one common language. On the contrary, the first stage, during which national oppression will be completely abolished, will be a stage marked by the growth and flourishing of the formerly oppressed nations and national languages, the consolidation of equality among nations, the elimination of mutual national distrust, and the establishment and strengthening of international ties among nations' (J. Stalin, 'The National Question and Leninism - Reply to Comrades Meshkov, Kovalchuk, and Others', speech on 18 March 1929). Therewith, under his rule, there was at first an actual strengthening of different national cultures, only to be replaced by severe oppression and 'russification' in the 1930s when the leadership started to see the strength of different national groups as a threat to the domination by Moscow.

[180] Several scholars have written about the ethnofederal model sowing the seeds for the later implosion of the USSR along the ethnic lines. See, for instance, R. Müllerson, *International Law and Politics: Developments in Eastern Europe and the CIS* (Routledge, 1994) at 76; and R. Nalbandov, *Not by Bread Alone: Russian Foreign Policy under Putin* (Potomac, 2016) at 266. In addition, on 21 January 2016, at the meeting of the Presidential Council for Science and Education, President Putin blamed Lenin and the Bolsheviks for the fall of the Soviet Union, by stating that '[t]here were many such ideas as providing regions with autonomy, and so on. They planted an atomic bomb under the building that is called Russia which later exploded'.

[181] See, *inter alia*, V. Zubok, *A Failed Empire: The Soviet Union in the Cold War from Stalin to Gorbachev* (University of North Carolina Press, 2007). He claims that the most decisive factor to the collapse of the Union in 1991 was an imperial overreach. Alternatively, Plokhy advances the position that the key to the breakup of the Soviet state was the 1991 inability of the Russian and Ukrainian republics to settle on the continued existence of a unified state. S. Plokhy, *The Last Empire: The Final Days of the Soviet Union* (Basic Books, 2014). Kisak argues that the biggest single contributor to the collapse was Reagan's Strategic Defense Initiative and the subsequent military overstretch of the USSR. P. Kisak, *The End of the Soviet Union* (Amazon Digital Services, 2015). A very comprehensive overview is given by Robert Strayer, listing, *inter alia*, great power conflict, imperial decline, revolution, ethnic conflict, economic development, totalitarian ideology, and transition to democracy among the sources of the Soviet collapse. R. Strayer, *Why Did the Soviet Union Collapse? Understanding Historic Change* (Routledge, 1998).

On the Yugoslavian side, the supply is equally encompassing. To name but a few, Finlan points out in his book *The Collapse of Yugoslavia 1991-1999* (Osprey Publishing Ltd, 2004) the long process that it took for the federation to fall, including the late epilogue in Kosovo 1998-1999, which - arguably - still continues today. While many people point the blame to collapse of Yugoslavia to the 1980s failure of the planned economy, Brian Hall takes another explanatory route in his book *The Impossible Country: A Journey through the Last Days of Yugoslavia* (Penguin Books, 1994). He claims that Yugoslavia, as a unified country, should never have been and was always doomed to a grand failure, whether it was socialist or not. Peter Korchnak has argued, in his intriguing comparisons between the SFRY and Czechoslovakian cases that the dissolutions were unintended side products of an attempt to modernize state socialism, which then led the ethnic elites to mobilize in order to gain more resources from the center. Korchnak (n 1).

[182] There are some unavoidable overlaps in narrative with this subchapter and the subchapter 4.3.

In the late 1980s, reforming attempts of the failing command-economy structure led to an economic collapse, delegitimizing both the ruling Party and the federal system. As dissent began to build up, ethnofederal entities started to claim their constitutional rights. The USSR collapsed faster and mostly without violence because the *primus inter pares* nation - Russian Soviet Federative Socialist Republic (RSFSR) with over half the total Soviet population[183] - chose not to preserve the Union. With the withdrawal of the RSFSR, there was no longer a self-sustaining center, and the USSR ceased to exist overnight on 26 December 1991.[184] However, despite all the similarities, the SFRY dissolution took a different path for two reasons. First, Yugoslavia did not have a dominating nation in the same sense as the RSFSR had been in the USSR.[185] Second, the leadership in the SR of Serbia chose to disregard the other SRs' constitutional right of secession by calling in the army to preserve the Union by force.

In the USSR, the final dissolution began with all the SSRs and many of the lower-level units proclaiming themselves 'sovereign' in 1988-1991.[186] The Soviet leadership could not challenge these proclamations, as they had basis on the 1977 Constitution and were essential to the 'normative mythology of Soviet federalism'.[187] The USSR President Mikhail Gorbachev attempted to re-legitimize the USSR with a New Union Treaty, but his decision to rebalance the federal system by promoting the ASSRs to a close-to-equal position with the SSRs escalated the national tensions.[188] Dissent on his rule among the Party elite built up, and in August 1991 they attempted a coup. While it failed, the coup attempt destroyed the credibility of Gorbachev's visions for the federation and of him as a leader. At this point, the USSR as a unitary state was doomed.

In the SFRY, there was likewise an attempt to renew the federation. After the death of President Tito in May 1980, the SFRY had been ruled by a collective presidency of the six SRs and two SAPs, called Presidium. It had a rotating one-year chairmanship for each federal unit.[189] During the turbulent

[183] In 1990, 50, 78% of the Soviet population of 293 million were Russians. Central Intelligence Agency, 'Soviet Union - People', *The World Factbook 1991*.
[184] I have chosen to use this date as the final 'end of the USSR' because of the symbolism of the resignation of the last leader Mikhail Gorbachev, the Supreme Soviet dissolving itself, and the ceremonial lowering of the Soviet flag and raising of the Russian flag in the Kremlin. However, one may also argue that the USSR dissolved already on 8 December, which was the official line the CIS states took in their foundational documents. See subchapter 3.8 and n 216.
[185] The Russian Federation comprised of 76% or the territory and 51% of the population of the former USSR. In contrast, Serbia made up only 40% of the territory and 45% of the population (including Kosovo Albanians) of the SFRY in 1991. Craven (n 16) 370.
[186] More on this 'parade of sovereignties', see subchapter 3.7.3.
[187] E. Walker, *Dissolution: Sovereignty and the Breakup of the Soviet Union* (Berkeley, 2003) at 60. As Hale has demonstrated, the SSRs with the most robust set of the sociopolitical institutions that cultivated ethnic identity and facilitated national mobilization were best equipped to make separatist demands. H. Hale, 'The Parade of Sovereignties: Testing Theories of Secession in the Soviet Setting' 30 *British Journal of Political Science* (Cambridge University Press, 2000) 31-56 at 45.
[188] The ASSRs received most of the rights previously invested solely to the SSRs A. Marshall, *The Caucasus under Soviet Rule* (Routledge, 2010) at 294. For more on the early 1990s Soviet legislation, see subchapter 3.7.4.
[189] *Constitution of the Socialist Federal Republic of Yugoslavia*, Art. 313. Promulgated on 21 February 1974.

1980s, two visions of the future of the SFRY were competing in Presidium. Serbia's vision was to re-centralize the SFRY by taking control over the collective presidency,[190] while Slovenia and Croatia advocated for a loose confederal Yugoslavia with an undisputed right to secession for the SRs.[191] The rift became permanent in January 1990, when the ruling Party broke down into eight factions.[192] In May 1991, Serbia blocked the installation of the Croatian candidate for the rotating presidency, which led to the dissolution of the Presidium.[193] With all the main federal organs in disarray, Slovenia and Croatia decided to abandon the Yugoslav project and to declare independence unilaterally.[194]

The implosions of the socialist federations and the subsequent recognition requests by the subunits of the USSR and the SFRY caught the international community off guard. The US and the USSR gave the EC the lead to settle the situation, and thus the SSRs and SRs addressed their recognition requests to the EC from the summer of 1991 onwards.[195] The task to establish a common position was formidable, given that the legal terrain of these dissolutions was equivocal and controversial. This was especially true in the SFRY, where the state organs refused to dissolve and threatened that any unilateral declaration of independence would be considered an illegal secession attempt. Thus, within the recognized borders of the SFRY, there were several competing claims on sovereignty over a particular territory. For instance, when the SR of Bosnia-Herzegovina declared independence, challenging this was the official SFRY claim of sovereignty over the area, as well as an unofficial attempt by the SRs of Croatia and Serbia to divide Bosnia-Herzegovina between themselves.[196]

In essence, the EC had to reconcile two fundamental but contradictory international law principles of territorial integrity and the right to self-determination. The position of international law in relation to

[190] This was achieved by replacing the leadership of the SR of Montenegro in January 1989 and by revoking the autonomies of the two SAPs in March 1989. This gave Serbia four votes out of eight in Presidium. See subchapter 4.2.7.
[191] Accounted for in Hayden (n 1) 53-54.
[192] Accounted for in detail in D. Pauković, 'Last Congress of the League of Communists of Yugoslavia: Causes, Consequences and Course of Dissolution' 1(1) *Contemporary Issues* (2008) 21-33. The League of Communists was the only allowed political party according to the Preamble VIII of the 1974 Constitution of the SFRY.
[193] D. Busky: *Communism in History and Theory: The European Experience* (Praeger Publishers, 2002) at 36. After this event, Croatian, Slovenian, Bosnian, and Macedonian delegates started boycotting the sessions of Presidium. Serbian and Montenegrin delegates continued to attend the sessions until 1992.
[194] The EC was officially called the European Economic Community until the Maastricht Treaty of 1992.
[195] In the case of the Baltic States, the EC welcomed the restoration of their independence on 27 August 1991, after Moscow had implied their acceptance. The USSR officially recognized the Baltic independence on 6 September 1991 and the Conference for Security and Co-Operation in Europe admitted the Baltic States as new members on 10 September 1991. I. Ziemele, *State Continuity and Nationality: The Baltic States and Russia* (Martinus Nijhoff Publishers, 2005).
[196] Croatian and Serbian presidents, Franjo Tuđman and Slobodan Milošević met on 25 March 1991 at the Karađorđevo hunting ground in Northwest Serbia. This meeting did not produce any official record of the signed agreement, but it was widely believed that the two Presidents agreed on the partition of Bosnia-Herzegovina upon the breakup of Yugoslavia. This alleged agreement became known as the Karađorđevo agreement. J. Sadkovich, *Tuđman - Prva politička biografija* (Zagreb, 2010) at 393; and L. Danforth, 'Nationalism in Eastern Europe: Nations, States, and Minorities' 19(2) *Cultural Survival* (1995) 1.

this conflict of norms is that it does not grant sub-state entities a general right to secede, but neither does it prohibit secession.[197] A growing number of scholars argue for a 'remedial right' to secession,[198] but there is no univocal state practice to support this.[199] Thus, although the SSR and the SRs had a constitutionally guaranteed right to secede,[200] in general the internal law of a state is not a matter of international law.[201] The EC did not feel competent to interpret the federal constitutions and remained indecisive over its recognition policy. Nevertheless, there was an urgent need to react, especially concerning the SFRY where violence seemed imminent.

2.5.3 The Socialist Federal Dissolutions and *Uti Possidetis Juris*

The original EC position was to support the territorial integrity of Yugoslavia.[202] After Croatia and Slovenia declared independence on 25 June 1991,[203] the EC mediated a three-month moratorium on these declarations in order to ease tensions. Notwithstanding, a civil war broke out soon after. The

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[197] For instance, see T. Franck, 'Opinion Directed at Question 2 of the Reference' in A. Bayefsky (Ed), *Self-Determination in International Law: Quebec and Lessons Learned* (Kluwer Law International, 2000) 75-84 at 83.

[198] Conditions for this 'remedial right' vary considerably. The first to introduce the concept was Lee Buchheit in 1978 (L. Buchheit, *Secession: The Legitimacy of Self-Determination* (Yale University Press, 1978) at 220-223. In 1991, Professor Allen Buchanan continued to develop the concept by outlining the limited right to secession under certain circumstances, mostly related to oppression by people of ethnic or racial groups, and especially those previously conquered by other peoples (Buchanan (n 131)). Other notable supporters of the right are, among others, David Gordon (D. Gordon (Ed), *Secession, State and Liberty* (Transaction Publishers, 2002)); Anthony Birch (A. Birch, 'Another Liberal Theory of Secession' 32(4) *Political Studies* (1984) 596-602); Jane Jacobs (J. Jacobs, *The Question of Separatism: Quebec and the Struggle over Sovereignty* (Baraka Books, 1980)); and Robert McGee (R. McGee, 'A Third Liberal Theory of Secession' 14(1) *Liverpool Law Review* (1992) 45-66. Opponents of this alleged right include Jure Vidmar (J. Vidmar, 'Remedial Secession in International Law: Theory and (Lack of) Practice' 6(1*) St Anthony's International Review* (2010) 37-56); Katherine Del Mar (K. Del Mar, 'The Myth of Remedial Secession' in D. French (Ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press, 2013) 79-108); and Alexandros Ntovas (A. Ntovas, 'The Paradox of Kosovo's Parallel Legal Orders in the Reasoning of the Court's Advisory Opinion' in *ibid*. at 139-164).

[199] Vidmar (n 198) 37.

[200] The 1974 SFRY Constitution (n 189) sets out in Basic Principle I: 'The nations of Yugoslavia proceedings from the right of every nation to self-determination, including the right to secession'.
The 1977 USSR Constitution (*Constitution and Fundamental Law of the Union of Soviet Socialist Republics*, 7 October 1977) sets out in Art. 72: 'Each Union Republic shall retain the right freely to secede from the USSR'.
The problem was that the Constitutions did not provide any specific formula for such a right. When the center was challenged with the secession claims, Gorbachev chose to introduce a new 'law of secession' to provide this formula (in reality, to postpone the independence enough to introduce the new Union Treaty. See J. Treiman, 'The Soviet Secession Law is a Sham' 36(3) *Lithuanian Quarterly Journal of Arts and Sciences* (1990) at 1-2). Conversely, the authorities in the SFRY chose to deny this right categorically.

[201] Indeed, in international law, the principle of non-intervention includes 'the prohibition of the threat or use of force against the territorial integrity or political independence of any state'. UN Charter, Art. 2(4). The principle of non-intervention also prohibits a State of intervening in a dictatorial way in the internal affairs of other States. The ICJ has referred to 'the element of coercion, which defines, and indeed forms the very essence of, prohibited intervention'. *Case Concerning the Military and Paramilitary activities in and Against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment, I.C.J Reports (1986), p. 14, para. 205. As Oppenheim puts it, 'the interference must be forcible or dictatorial, or otherwise coercive, in effect depriving the state intervened against of control over the matter in question. Interference pure and simple is not intervention' (L. Oppenheim and H. Lauterpacht (Ed), *International Law: A Treatise* (9th Ed., London, Longman 1992) at 432. Whether there is an exception to the principle of non-intervention in the case of assistance to peoples seeking to exercise the right of self-determination remains controversial. M. Jamnejad and M. Wood, 'The Principle of Non-Intervention' 22(2) *Leiden Journal of International Law* (2009) 345-381. In the end, the EC chose to interpret this as a case of state dissolution and not of a secession, thus invoking *uti possidetis* and making the domestic law of the SFRY and the USSR a matter of international law.

[202] G. Ahrens, *Diplomacy on the Edge: Containment of Ethnic Conflict and the Minorities Working Group of the Conferences on Yugoslavia* (Woodrow Wilson Center Press, 2007) at 42.

[203] *Slovenian Declaration of Independence*, 25 June 1991. *<http://www.slovenija2001.gov.si/10years/path/documents/declaration/>*. *Croatian Declaration of Independence*, 25 June 1991. *<http://narodne-novine.nn.hr/clanci/sluzbeni/1991_06_31_875.html>*.

EC then arranged a Peace Conference on Yugoslavia, which convened from 7 September 1991 onwards. The Conference produced a series of Draft Conventions calling for the right to secession for the SRs and the right to autonomy for the SAPs. The Conventions were signed by all the SRs apart from Serbia.[204] On 5 November 1991, the Conference was called off due to Serbian non-cooperation. Thus, as the EC had failed to reach a political solution, they decided to have a legal solution instead by delegating the issue to an independent arbitration commission.

Arbitration Commission of the Peace Conference on Yugoslavia (also known as and hereinafter, the Badinter Commission)[205] was established by the initiative of the Council of Ministers of the EC on 27 August 1991 to provide legal advice over the questions of recognition. The mandate of the Commission was somewhat vague; while its rulings were envisaged to be binding decisions, they would have to be requested by the not specified 'valid Yugoslavian authorities'. In reality, the representatives of the EC were making requests for the most critical questions.[206] In the series of 15 opinions, the Badinter Commission gave its interpretation on the applicability of *uti possidetis* and recommendations on the recognition of individual SRs. The main issue relating to *uti possidetis* was that while the principle of territorial integrity did not protect the colonial possessions of the European states (due to the illegitimacy of colonialism in the 1960s context) in the second cycle, it did protect the territorial integrity of the SFRY in the early 1990s. Nevertheless, according to the Commission's legal interpretation, *uti possidetis* was applicable in Yugoslavia based on the 1986 *Frontier Dispute* case, where the ICJ delineated that the doctrine is a 'principle of general scope, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs'.[207]

[204] For the details, see subchapter 4.3.2. During the Conference, there was constant lobbying in the EC by Germany, Italy, and Denmark of recognizing Croatia and Slovenia, but the strong opposition of France, the United Kingdom, and the Netherlands balanced this out. A number of scholars have criticized the indecisiveness of the leaders of the EC. For instance, Lucarelli gives a chilling judgment, particularly to France, the United Kingdom, and Germany in the two most crucial moments of the dissolution of Yugoslavia: the diplomatic recognition of Slovenia and Croatia, and the debate over a possible military intervention. S. Lucarelli, *Europe and the Breakup of Yugoslavia: A Political Failure in Search of a Scholarly Explanation* (Martinus Nijhoff Publishers, 2000).

[205] The five-member Commission consisted of Presidents of the constitutional courts from the EC member states. The members were Roman Herzog, President of the Federal Constitutional Court of Germany, Aldo Corasaniti, President of the Constitutional Court of Italy, Francisco Tomás y Valiente, President of the Constitutional Tribunal of Spain and Irene Petry, President of the Belgian Court of Arbitration. Robert Badinter, President of the Constitutional Council of France, chaired the Commission. Radan (n 20) 50-76.

[206] Pellet (n 15) 178.

[207] '*Uti possidetis*, though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle, as stated by the International Court of Justice in the case between Burkina Faso and Mali […]. Nevertheless the principle is not a special rule which pertains to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles'. *Opinion No. 3* (n 39) 1500. The Badinter Commission has been criticized, as some scholars such as Bartos (n 19) and Lalonde (n 2) argue that the previous sentence by the ICJ that states that *uti possidetis* 'is a firmly established principle of international law where decolonization is concerned' limits its applicability to decolonization context.

This interpretation had a potential to be a perilous legal precedent, breaking any state in the world 'wherever separatism occurs'. Therefore, the Commission had to make this a unique case. It considered the conditions that are normally used to define a state - a people with a territory, subject to an organized political authority - and then summarized the situation in the SFRY in late 1991. With three SRs having declared their independencies, [208] the federal organs no longer meeting 'the criteria of participation and representativeness inherent in a federal state',[209] and an armed conflict taking place between the federal units, the Commission opined that this was not merely a secessionist conflict but a case of a federal dissolution.[210] Thus, they determined in Opinion No. 1 that the SFRY was in the 'process of dissolution'.[211]

It cannot be over-emphasized that the independences of the SRs were recognized internationally *in the context of dissolution* of Yugoslavia in order not to establish a precedent, for remedial or any other kind, for *unilateral secession*. International law and, especially, *opinio juris*, seems unable to tackle the questions of secession, which cannot be either approved or prohibited. Therefore, the Badinter Commission chose a formulation that underlines the uniqueness of the case.[212] Opinion No. 1 crossed the legal gap between a unitary federal state and a dissolving colonial empire, thus making *uti possidetis* applicable seemingly without the risk of creating a precedent of legal state destruction.

Opinion No. 1 has been criticized.[213] For example, James Crawford has pointed out that the Commission chose to proceed on the basis that the process of dissolution 'was a matter of fact, and

[208] The SRs of Slovenia, Croatia, and Macedonia had declared themselves independent after having support for this confirmed in referendums, while the SR of Bosnia-Herzegovina had declared itself sovereign. Moreover, Bosnia-Herzegovina had scheduled an independence referendum for February 1992, as requested by the EC before it would proceed with its recognition. *The Referendum on Independence in Bosnia-Herzegovina: February 29-March 1, 1992,* Report Prepared by the Staff of the Commission on Security and Cooperation of Europe, 1-21 at 2.

[209] Quote of Opinion 1 in Craven (n 16) 367. Craven adds that while representativeness of a government may influence the credibility of its claim to wield effective authority over a portion of its territory when facing a secession, the general distinguishing of a state based on this cannot be accepted. However, he continues that the test should be different between federations and unitary states since federations have been thought to be characterized by a constitutionally guaranteed division of power between central and regional government in which both forms of government exercise simultaneously independent and direct control over the population. *Ibid.*

[210] Arbitration Committee on Yugoslavia, *Opinion No. 1*, 29 November 1991, 31 ILM 1494 at 1495-1496.

[211] *Ibid*. at 1494.

[212] This is a reoccurring theme in the cases of unilateral secession. Correspondingly, see subchapter 2.6 on the independence of Kosovo.

[213] Critical stances on the 'biased' or 'tendentious' interpretation of the events by the Badinter Commission have been taken by, for example, E. Yalınkılıçlı, 'The Dissolution of Former Yugoslavia' *Academic Perspective* 13 September 2014; E. Pond, *Endgame in the Balkans: Regime Change, European Style* (Brookings Institution Press, 2006); D. Marolov, 'The Policy of the USA and EU Towards the Disintegration of Yugoslavia' 1(2) *IJSST* (2012) 1-16; and, most fiercely, P. Radan, *The Break-Up of Yugoslavia and International Law* (Routledge, 2002) where the author was questioning all four claims that the Commission was utilizing to justify its stance on a dissolution taking place in the SFRY. More favoring stance has been taking by, *inter alia*, Sonja Biserko, the president of the Helsinki Committee for Human Rights in Serbia in her Keynote speech, Third Annual Humanity in Action International Conference in Sarajevo, 28 June 2012; and Vigan Qorrolli in his book on the dissolution process, V. Qorolli, *The Dissolution Process and the Recognition of New States: Beyond ex-Yugoslav Context: Kosovo's Statehood under International Law* (Lambert Academic Publishing, 2010).

that the emergence to independence of the constituent republics was a consequence of that fact'.[214] The situation could equally have been interpreted the other way around. Nevertheless, by late 1991 the situation on the ground was indeed very precarious - the SFRY was no longer functioning and there was an ongoing ethnic conflict in which the Yugoslav leadership appeared complicit.[215]

Following Opinion No. 1 and the unofficial dissolution of the USSR,[216] the EC issued the 'Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union' on 16 December 1991.[217] The Guidelines presumed the dissolutions already taking place and laid down formative rules for the recognition of the newly emerging states. After mentioning 'the principles of the Helsinki Act and the Charter of Paris, in particular the principle of the self-determination' the Guidelines conditioned the recognition of the SSRs and the SRs on their fulfillment of the following criteria: re-affirmation of the principle of self-determination;[218] respect for the rule of law, democracy and human rights;[219] guarantees for the rights of ethnic and national groups and minorities in accordance with the framework of the Conference on Security and Cooperation in Europe (CSCE);[220] respect for the inviolability of the *uti possidetis* borders;[221] acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation;[222] and a commitment to settle by agreement or arbitration all questions concerning state succession and regional disputes.[223]

In addition, the EC took into account the different circumstances of the SFRY and the USSR. For the SFRY, the EC issued a 'Declaration on Yugoslavia' on 16 December 1991. It conditioned the recognition of the SRs on them accepting the conditions of the Guidelines and those laid down in the Draft Conventions - especially considering human rights and the rights of national or ethnic groups - and supporting the continuation of The Hague Peace Conference on Yugoslavia.[224] The SRs were advised to send their recognition applications to the Badinter Commission that would evaluate their cases based on the criteria of the Guidelines and the Declaration on Yugoslavia. For the USSR, the

[214] J. Crawford, *The Creation of States in International Law (2nd edn,* Oxford University Press, 2006) at 401.
[215] *Ibid*. at 401.
[216] On 8 December 1991, the leaders of Russian, Ukrainian and Belarussian SSRs met in a Białowieża Forest in Belarus to sign an agreement where they established the Commonwealth of Independent States to replace the USSR. *Agreement on the Establishment of the Commonwealth of Independent States* (*Belavezha Accords)*, 8 December 1991, 31 ILM 138.
[217] *Guidelines* (n 4).
[218] *Ibid.* para. 1.
[219] *Ibid.* para. 3.
[220] *Ibid.* para. 4.
[221] *Ibid.* para. 5.
[222] *Ibid.* para. 6.
[223] *Ibid.* para. 7. This means that via an agreement between all the stakeholders there can be a deviation of the *uti possidetis* borders. They can likewise be changed later via mutual agreement.
[224] *Declaration on Yugoslavia*, European Community, 16 December 1991, 31 ILM 1485.

EC issued a Statement, which gave the SSRs notably less strict conditions to receive recognition. As their dissolution was seen to be taking place in a peaceful and consensual manner, they were only asked to fulfil the requirements listed in the Guidelines and to adhere shortly to the Nuclear Non-Proliferation Treaty.[225] Thus, in the third cycle, there were different rules to recognition, based on whether the dissolution was consensual (USSR) or not (SFRY).

The SRs of Slovenia, Croatia, Macedonia, and Bosnia-Herzegovina send their applications to the Badinter Commission,[226] whereas Serbia and Montenegro refused to apply for recognition, proclaiming instead that they continue the existence of the SFRY under the name of the Federal Republic of Yugoslavia (FRY).[227] In contrast, the former SSRs of the USSR agreed upon the dissolution and the application of *uti possidetis*, similarly than in the second cycle decolonization.[228] In the auspices of the newly established Commonwealth of Independent States (CIS), they decided

[225] The European Community, Statement on 31 December 1991: 'The Community and its Member States Welcome the assurance received from Armenia, Azerbaijan, Belarus, Kazakhstan, Moldova, Turkmenistan, Ukraine and Uzbekistan that they are prepared to fulfil the requirements contained in the "Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union". Consequently, they are ready to proceed with the recognition of these Republics. They reiterate their readiness also to recognize Kyrgyzstan and Tadzhikistan once similar assurances have been received. Recognition shall not be taken to imply acceptance by the EC and its Member States of the position of any of the republics concerning territory which is the subjects of a dispute between two or more Republics. Recognition will furthermore be extended on the understanding that all Republics participating with Russia in the CIS on whose territory nuclear weapons are stationed, will adhere shortly to the Nuclear Non-Proliferation Treaty as non-nuclear weapon states'. Quoted in I. Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (Martinus Nijhoff Publishers, 1998) at 57-58. Moreover, in the Agreement on joint measures in relation to nuclear weapons (signed along with the Alma-Ata Declaration on 21 December 1991, n 230) it was proclaimed that there would be a united command and control over the nuclear weapons and strategic forces that were deployed in 1991 not only in Russia but also in Belarus, Kazakhstan, and Ukraine. Under the agreement, the nuclear weapons from these states were to be transferred to Russia as the legal successor of the USSR by 1 July 1992. Due to political and technical circumstances, the weapons were either destroyed or were only transported to Russia by 1996. Y. Nikitina, 'Security Cooperation in the Post-Soviet Area within the Collective Security Treaty Organization', *ISPI Analysis* No. 152 (2013) at 2.
The Russian Federation was not listed, as the CIS had jointly decided that Russia would legally continue the State existence of the USSR. Thus, Russia did not seek and did not receive any recognition by the international community.

[226] For Bosnia-Herzegovina, the Commission decided that the independence should not be recognized, because unlike the other Republics, Bosnia-Herzegovina has not yet held a referendum on independence. Therefore, 'the will of the peoples of Bosnia-Herzegovina to constitute the SRBH as a sovereign and independent State cannot be held to have been successfully established'. Arbitration Committee on Yugoslavia, *Opinion No. 4*, 11 January 1992, 31 ILM 1501, para. 4.
For Croatia, the Commission decided that independence should not be recognized because the new Croatian Constitution did not incorporate the protections for minorities required by the EC. Arbitration Committee on Yugoslavia, *Opinion No. 5*, 11 January 1992, 31 ILM 1503.
For Macedonia, the Commission recommended the recognition. However, the EC did not recognize Macedonia because of the strong Greek opposition. Arbitration Committee on Yugoslavia, *Opinion No. 6*, 11 January 1992, 31 ILM 1507.
For Slovenia, the Commission recommended the recognition. Arbitration Committee on Yugoslavia, *Opinion No. 7*, 11 January 1992, 31 ILM 1512.

[227] The remaining republics of Serbia and Montenegro had agreed on changing the name to Federal Republic of Yugoslavia from early 1992 onwards. In the Constitution of the FRY, it was maintained that this was a legal continuity of the SFRY, but excluding any territorial claims on the four seceding republics. *UN Doc A/46/915*, 7 May 1992.

[228] Only the Baltic States refused to accept the dissolution and *uti possidetis* in relation to their situation, as they held the opinion that they had nothing to do with the dissolution of the USSR, which they had never legally been a part of. However, below the SSR level there was considerable dissent by many of the ASSRs and the AOs against *uti possidetis*, and this would become a major factor to the internal cohesion of the successor states. See more in Chapter 3.

that Russia would continue the legal existence of the USSR,[229] and that all their border adjustments would be settled by *uti possidetis*, if not agreed otherwise by the parties in question.[230]

By early 1992, Belgrade was finally willing to accept the dissolution of the SFRY,[231] but not based on the internal borders that would leave an unacceptable number of Serbs out of the FRY.[232] The applicable SFRY Constitution was ambiguous as it stated that 'the nations' (ethnic designation) had a right to self-determination and secession, not the SRs.[233] Yet, according to the Yugoslavian Constitutional Court, the rights of self-determination and secession belonged to 'the peoples of Yugoslavia and their socialist republics'.[234]

According to the Badinter Commission's interpretation of the 1974 SFRY Constitution, only the SRs - not the SAPs or national minorities without territorial units - were entitled to the right to self-determination, including secession based on their former administrative borders. The Badinter Commission reasoned that the *uti possidetis* 'principle applies all the more readily to the Republics since the second and fourth paragraphs of Article 5 of the Constitution of the SFRY stipulated that the Republics' territories and boundaries could not be altered without their consent'.[235] This was a problematic interpretation, given that this same right was afforded to the SAPs.[236]

The dissolution of the SFRY stands out as a case where the conflict between the peoples' right to self-determination and *uti possidetis* was at its most visible form.[237] The SFRY had been built upon

[229] *Decision by the Council of Heads of State of the Commonwealth of Independent States*, ILM 31 (1992), para. 1. On 24 December 1991, the President of Russia addressed a letter to the UN Secretary-General, stating that Russia would continue the membership of the USSR in the UN. *Letter of the President of the Russian Federation to the UN Secretary-General*, ILM 31 (1992) 138.
[230] In the auspices of the CIS, the inviolability of their former internal borders has been affirmed in several treaties: *Agreement on the Establishment of the Commonwealth of Independent States* (n 216) Art. 5; *Alma-Ata Declaration* (21 December 1991), 31 ILM 148, Preamble and Art. 1; *Charter Establishing the Commonwealth of Independent States* (22 January 1993), 34 ILM 128, Art. 3; and *Declaration on Respect of Sovereignty, Territorial Integrity and Inviolability of Boundaries of Member States,* Bulletin of International Agreements No. 7, Moscow 1994, 9-10.
[231] Already on 15 March 1991, speaking on Serbian State Television, President of Serbia and a de facto acting President of the SFRY, Slobodan Milošević, had declared that 'Yugoslavia does not exist anymore'. J. Carter, I. Vamik and D. Volkan (Ed), *Regional and Ethnic Conflicts: Perspectives from the Front Lines* (Routledge, 2009) at 246.
[232] According to the Serb estimates, today, up to four million Serbs are living outside Serbia. *Balkans Daily*, 25 January 2013. In comparison, in the Republic of Serbia, there are, according to the 2014 estimate, 7, 2 million people, out of which 83% are Serbs.
[233] The 1974 SFRY Constitution (n 189), Preamble 1; J. Headley, 'The Way Opened, the Way Blocked: Assessing the Contrasting Fates of Chechnya and Kosovo' in A. Pavković and P. Radan (Ed), *On the Way to Statehood: Secession and Globalization* (Ashgate, 2008) 85-100 at 86.
[234] Quoted in P. Radan, 'The Legal Regulation of Secession: Lessons from Yugoslavia and Canada' in M. Jovanović and K. Henrard, *Sovereignty and Diversity* (Utrecht, 2008) 133-155 at 137.
[235] *Opinion No. 3* (n 39) para. 2.
[236] The 1974 SFRY Constitution (n 189), Art. 5, states this as such: 'The territory of the Socialist Federal Republic of Yugoslavia is a single unified whole and consists of the territories of the Socialist Republics. The territory of a Republic may not be altered without the consent of that Republic, and the territory of an Autonomous Province - without the consent of that Autonomous Province'.
[237] The fact that external actors insisted on the dissolution taking place against the wishes of about 43,5% of Yugoslavs is a somewhat puzzling fact in the light of self-determination. According to the 1991 census, Serbia's population was 40,9% and Montenegro's 2,6%

a compromise that had been ungenerous to the Serbs, who had been in effect 'weakened' by the internal borders of the SFRY.[238] The Serbs outside Serbia were not granted autonomy, and Serbia's possession of the two SAPs of Kosovo and Vojvodina was conditioned on them being autonomous, making Serbia a federation within a federation.[239] The lines drawn by the socialist government at the time involved a great deal of pragmatism for the future functioning of the federal structures. These choices need to be valued in the context of the Marxist perception of nationalism, the aim of which was only to settle national contentions within a state, never to create separate nation-states.[240] According to the rationale of the SFRY Constitutions, the nations of Yugoslavia had the right to self-determination, but they had opted for a common federal state.[241] Whatever internal territorial adjustments had taken place since were only manifestations of the joint exercising of sovereignty within the federation. Notwithstanding, according to the internal logic of *uti possidetis* the motivations behind borders do not matter - and, indeed, cannot be questioned - as long as they had been delineated under the applicable constitutional order of the state.[242]

There are several important observations to be made of the peaceful dissolving of the USSR and the violent implosion of the SFRY. First, it cannot be over-emphasized that these were cases of *dissolution*. Even though republics had a constitutional right to secede, this was often referred to as 'constitutional fiction',[243] and no republic was recognized by exercising this alleged right. According to the Badinter Commission and the agreements reached by the Soviet successor states under the auspices of the CIS, there were *no secessions* from the socialist federations. Instead, there were two federal state dissolutions, which in effect broke them into their constitutive parts according to the

of the SFRY total. Yet, one should keep in mind that Serbia without the SAPs was limited to 24% and that many Serbs lived in Bosnia-Herzegovina, Macedonia, and Croatia.

[238] In all the Yugoslavian constitutions (1946, 1953, 1963, and 1974), Serbia was the only SR that had its territorial sovereignty compromised by autonomous units, which were gaining more and more legal rights every passing Constitution. Yet, while the Serbs were the largest national group outside their 'own' Republic, they did not subsequently receive autonomous units in other SRs.

[239] This was especially true after the 1974 constitution. H. Haug, *Creating a Socialist Yugoslavia: Tito, Communist Leadership and the National Question* (I.B Tauris, 2012) at 108-109.

[240] *Ibid*. at 113.

[241] *Constitution of the Federative People's Republic of Yugoslavia*, 31 January 1946, Art. 1.

[242] The Serbs objected to the application of *uti possidetis* as it gave the other SRs no incentives to negotiate on borders before their independencies. Albanians were another ethnic group that felt it was not getting a fair deal in the dissolution. Although Kosovo was a constituent part of the SFRY according to the 1974 Constitution and its population was 90% Albanian, it had to remain within Serbia. The 1974 SFRY Constitution (n 189) Arts. 5, 291-292, 321, 375 and 398. While the international community ignored its independence aspirations, Kosovars organized a referendum on 22 September 1991, which affirmed the 'Republic of Kosova' to be a 'sovereign and independent state' by 99, 98% of the votes in favor, with a turnout of 87%. Ten percent Serb minority boycotted the referendum, which Yugoslavian authorities declared null and void. Direct Democracy, *<http://www.sudd.ch/event.php?lang=en&id=ks011991>*.

[243] For more about the constitutional fiction of secession in the SFRY, see, *inter alia*, S. Ramet and L. Adamović (Ed), *Beyond Yugoslavia: Politics, Economics and Culture in a Shattered Community* (Westview Press, 1995); and R. Geuss, *History and Illusion in Politics* (Cambridge University Press, 2001) at 105-106. About constitutional fiction in another context, see D. Haljan, *Constitutionalizing Secession* (Hart Publishing, 2014) at 336.

previous administrative borders. Hence, there was no state to secede from, only a state succession. Subsequently, there was no legal precedent for unilateral secession.[244]

Second, when the borders of the new entities had to be delineated, there were no credible alternatives to *uti possidetis*. The logic behind 'internationalizing' the SFRY internal borders was that the successor states would then be protected by international law, for instance, by the UN Charter Article 2(4).[245] However, while the *uti possidetis* borders were clearly established internally, they were often too controversial to be a blueprint for the dissolution, leading to territorial conflicts.[246] Therewith, the internal borders chosen by *uti possidetis* can be called into question. Even as the Guidelines insist on respecting all frontiers,[247] the EC ignored the second-level units of the socialist federations, and the rest of the international community followed suit. Eventually, all the SSRs and the SRs were admitted to the UN as member states.[248] In contrast, to this day, not a single former second-level territorial unit of either the USSR or the SFRY has been admitted, despite some of them having limited or even substantial international recognition.[249]

Finally, *uti possidetis*, by virtue of being a general principle, needs to evolve alongside other trends of international law. In the third cycle, there were again new conditions to be taken into account in its application. These conditions were derived from the new human rights paradigm on international law, and many of these were outlined by the EC in late 1991 in the Guidelines, the Declaration on

[244] Johanson has criticized the Badinter Commission Opinions heavily, claiming that they managed - while officially insisting on the prohibition of changing status quo by force - to protect armed secessionist attempts within the SFRY. Johanson (n 2) 105-106.
[245] There was also an attempt to make the successor states UN member states as swiftly as possible. Croatia, Slovenia and - most controversially - Bosnia-Herzegovina became members of the UN already in 1992. For instance, Robert Hayden has argued that the independence and recognition of Bosnia-Herzegovina was an example of negative sovereignty. According to him, it was recognized, not by Badinter criteria of a united population with organized political authority, but rather to deny large parts of the population to reject that authority. The only way to have a Bosnian state was to ignore a large part of the consent of those to be governed, creating minorities out of previously sovereign peoples. Hayden (n 1) 111-122.
[246] In Croatia, Serbs proclaimed a Republic of Serbian Krajina (Република Српска Крајина, Krajina is 'frontier' in Serbo-Croatian), existing from 1991 to 1995 without international recognition. In Bosnia-Herzegovina there were a Croatian Republic of Herzeg-Bosnia (*Hrvatska Republika Herceg-Bosna*) that existed in 1991-1994, Autonomous Province of Western Bosnia (*Autonomna Pokrajina Zapadna Bosna*) existing in 1993-1995 and Serbian Republika Srpska (*Република Српска*), existing from 1992 to 1995 as an unrecognized breakaway state and from 1995 onwards as a constituent component of the Federation of Bosnia and Herzegovina. The SAP of Kosovo declared independence first time around in 1991.
[247] 'respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement'. *Guidelines* (n 4) para. 5.
[248] Serbia was finally admitted to the UN by the General Assembly resolution *A/RES/55/12* on 1 November 2000, under the name Federal Republic of Yugoslavia, after almost a decade of attempts to be seen as a legal continuator of the SFRY. Russia was the sole exception that did not apply for the membership, but instead was seen to be legal continuator of the USSR membership.
[249] The former SAP of Kosovo has received 114 recognitions worldwide (n 7). The former ASSRs of the USSR have been less successful. Chechnya received one international recognition in the 1990s, and Abkhazia and South Ossetia have received five since 2008. If the votes against the UN General Assembly Resolution 68/262 (*UN Doc. A/RES/68/262*, 27 March 2014) can be seen as legal support and recognition of Crimean independence and its subsequent joining of the Russian Federation, then Crimea has 11 recognitions. However, I think this would be an apparent over-interpretation of the voting decision as no country apart from Russia has officially recognized these events.

Yugoslavia, The Hague Peace Conference's 4 November 1991 Draft Convention, and the Statement on the USSR.[250] The US fully endorsed the EC recognition policy, with minor changes in the formulation of the conditions.[251] Eckert has concluded that the international community chose to value the new conditions - protection of human rights, observance of democratic governance and promotion of international peace and security - over the traditional Montevideo criteria, producing new states with noble ideals but without the capacity to fulfill their commitments.[252]

In conclusion, there was a tragic flaw with the third cycle application of *uti possidetis*. The doctrine had previously adapted into the new legal terrain, but this time around the new dimensions of self-determination were ignored.[253] Even though the Badinter Commission advised the EC not to recognize any SR that did not fulfil all the criteria, the EC chose a dichotomy of two unequal units. Eventually, all the SRs were recognized independent and the SAPs were recognized to have no rights whatsoever. Lacking any international support, the SAPs had their autonomies abolished in the 1992 FRY Constitution.[254] A similar dynamic took place in the USSR context between the former SSRs and their ASSRs. Notably, the only major difference of the legal statuses of the first and second-level subunits was the former's alleged right to secession. As there were no secessions,[255] the application of *uti possidetis* should have also taken into account the lower-level units.

I argue that while the black-or-white categorization of the rights of the first and second-level subunits by the EC might have been justifiable in the earlier cycles, this was a grand distortion of the modern right to internal self-determination in the early 1990s. Certainly, the legal nature and content of self-determination had evolved into a more complex set of manifestations than merely the 'either-or' dichotomy that the EC chose to apply. Additionally, I argue that in order for *uti possidetis* to be applicable in the future, there has to be a new understanding of the following elements: the relevant

[250] For example, in the Guidelines (n 4) the EC demanded that in order to gain recognition, the SSRs had to '[r]espect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights' and the '[g]uarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE'.
[251] The four principles guiding the US recognition policy were stated as: 1) the US would accept any outcome chosen peacefully, democratically, and through negotiation; 2) the US would not recognize changes in internal or external borders achieved though force, intimidation, or threats; 3) the republics must be committed to resolving disputes through peaceful negotiation; and 4) the republics must be committed to respecting the human rights of all citizens, including the members of all ethnic groups. Cited in M. Halperin, D. Scheffer and P. Small, *Self-Determination in the New World Order* (Washington, 1992) at 36-37.
[252] A. Eckert, 'Constructing States: The Role of the International Community in the Creation of New States' 12 *Journal of Public and International Affairs* (2002) 19-39 at 19.
[253] Especially its division into internal and external self-determination variants since 1966. See subchapter 4.1.3.
[254] Additionally, while Serbia under Milošević was indeed oppressing the Albanians in Kosovo, the Serbs in Croatia would have nevertheless deserved a strong and constitutionally guaranteed set of minority rights.
[255] When the SRs put this 'right' to the test, it was denied by the SFRY authorities and was not applied. In the USSR, no SSR had time to try to use the lengthy Soviet Secession Law formula before the USSR dissolved in December 1991.

territorial boundaries that should be respected,[256] and the content of 'territorial title' that *uti possidetis* freezes.[257] The international community should not have recognized Kosovo's independence in the early 1990s, but it should have used *uti possidetis* to 'internationalize' Kosovo's borders.[258]

Under the socialist federations, the ethnofederal subunits had possessed constitutional guarantees of their rights and many vestiges of a national state, such as own constitutions, legislatures, national flags, well-delineated borders, and substantial representative rights within the federal organs. After the dissolution, none of these rights were guaranteed, and most of the autonomies were abolished soon thereafter. After a 'peaceful' dissolution of the USSR, civil wars or ethnic clashes erupted in many of the successor states, most notably in Georgia,[259] Azerbaijan,[260] Moldova,[261] and Russia.[262] In the FRY, the EC imposed decision that left Kosovo within the borders of Serbia without any guarantees over its status led to the Kosovo uprising (1998-1999)[263] and to the controversial NATO intervention (1999).[264] Thus, I conclude that the chosen version of *uti possidetis* in the third cycle produced the very armed conflicts over territory that it was aiming to preempt.

[256] *Frontier Dispute* (n 2) para. 22-23.
[257] *Ibid.* at para. 30.
[258] Under this formula, the international recognition of the FRY could have been conditioned on respecting the internationally guaranteed autonomous borders of Kosovo, based primarily on the 4 November 1991 Draft Convention of The Hague Peace Conference on Yugoslavia. See more in subchapter 4.3.2.
[259] From the independence of Georgia on 22 December 1991 onwards there were inter-ethnic conflicts in South Ossetia (1991-1992) and Abkhazia (1992-1993). These conflicts were ignited by the decision of the first democratically elected President of Georgia, Zviad Gamsakhurdia, to abolish the autonomous statuses of these sub-entities of Georgia, as a response to Ossetian and Abkhazian demands for a recognition of their statuses in independent Georgia. See subchapter 5.4.3.
[260] The final collapse of the USSR in the form of nationalist separatist tendencies started from the Armenian enclave of Nagorno-Karabakh in the SSR of Azerbaijan, which demanded to be transferred to the SSR of Armenia. After the independence of Azerbaijan (18 October 1991) there was a secession attempt - backed by neighboring independent Armenia - by Nagorno-Karabakh and a civil war lasting until the ceasefire in May of 1994. See subchapter 5.4.1.
[261] After the Moldovan independence (27 August 1991) the former Moldavian ASSR declared independence as Transnistria, leading into an armed conflict from 2 March to 21 July 1992. The Transnistrian case differs from the other ASSRs, as the Moldavian ASSR had not legally existed since 1940. Since it is within the rights of the previous sovereign to alter the internal boundaries according to its constitutional system, Transnistria is legally in a different position than the ASSRs that existed in 1991. See subchapter 5.4.2.
[262] On 26 November 1990, during the 'parade of sovereignties', the Chechen-Ingush ASSR declared 'State Sovereignty of the Chechen-Ingush Republic'. On 1 November 1991, an independent Chechen Republic was declared, leading into first and second Chechen wars.
[263] Accounted for, *inter alia*, in Z. Irwin, 'The Uprising and NATO's Intervention, 1998-1999' in S. Ramet, A. Simkus and O. Listhaug (Eds), *Civic and Uncivic Values in Kosovo: History, Politics, and Value Transformation* (Central European University Press, 2015) at 93-118.
[264] The NATO intervention is a very controversial and much-debated event in the international law and political science scholarly circles. For the legality, or illegality, of the NATO intervention, see, for example, B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects' 10(4) *European Journal of International Law* (1999) 1-22; C. Greenwood, 'International Law and the NATO Intervention in Kosovo' 49(4) *The International and Comparative Law Quarterly* (2000) 926-934; M. Koskenniemi, 'The Lady Doth Protest Too Much: Kosovo, and the Turn to Ethics in International Law' 65(2) *The Modern Law Review* (2002) 159-175; and L. Henkin, 'Kosovo and the Law of "Humanitarian Intervention"' 93(4) *The American Journal of International Law* (1999) 824-828.

2.6 The Fourth Cycle: A 'Non-Precedent'

After the 1999 NATO intervention, the Security Council resolution 1244 established the UNMIK (United Nations Mission in Kosovo) to provide the former SAP with an interim administration until there would be a final political settlement over the province's legal status.[265] The resolution 1244 maintained the third cycle *uti possidetis* stance and insisted upon respecting the territorial integrity of the FRY. While this seemingly excluded Kosovo's independence, the resolution nevertheless established a 'political process' that was supposed to produce an equally acceptable compromise. After a full eight years under UNMIK and a series of failed negotiation attempts, Kosovo unilaterally proclaimed independence from Serbia on 17 February 2008.[266] This declaration was made by the members of the Kosovo parliament under the 'Provisional Institutions of the Self-Government' (PISG), introducing themselves in this role as 'we, the democratically elected leaders of our people'.[267] The declaration was controversial, not least because of the 'Common Document' agreed upon on 5 November 2001 by the FRY and the PISG stipulated that the latter would not have an authority to take any steps towards resolving Kosovo's final status.[268] The decision on whether or not to recognize this independence - a major aberration of the third cycle *uti possidetis* borders - has divided the international community ever since.[269]

After the third cycle, *uti possidetis* can be seen applicable in federal dissolutions. The problem is that the third cycle had deprived the second-level subunits of their right to self-determination, resulting in territorial conflicts. This is not the first clash of legal principles where the maintenance of peace, stability, and territorial integrity are valued over a right to self-determination.[270] However, the logic of the third cycle was destroyed with the independence of Kosovo. After the Kosovo war of 1998-1999, it had become incomprehensible that the Albanians could continue to live under the Serb rule.[271]

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[265] *S/RES/1244*, 10 June 1999.
[266] *Declaration of Independence of the Republic of Kosovo*, 17 February 2008.
[267] *<http://news.bbc.co.uk/2/hi/europe/7249677.stm>*.
[268] I. King and W. Mason, *Peace at Any Price: How the World Failed Kosovo* (Cornell, 2006) at 122.
[269] Despite its efforts and a significant amount of international recognition (the amount of which is in constant flux due to Serbian attempts to 'buy off' Kosovo recognitions *<https://www.euractiv.com/section/enlargement/news/15-countries-and-counting-revoke-recognition-of-kosovo-serbia-says/>*), Kosovo has not yet been accepted to the UN as a member state. Commenting on this, Kosovo's deputy minister of foreign affairs, Petrit Selimi, was quoted saying that '[n]ational identities these days, they're not so much based on memberships to these old-world organizations like the UN and Council of Europe. Those still matter, no dispute about that. But if you don't have a team in Champions League in football; if your country is not on Facebook; if you don't have a song in the Eurovision song contest, then are you a real country?'. *<http://www.mfa-ks.net/sr/politika_single/3247>*.
[270] E.g., the second cycle of *uti possidetis*.
[271] The denial of this possibility was affirmed by the Special Envoy of the Secretary-General, the former President of Finland Martti Ahtisaari, in his report to the Secretary-General after a prolonged series of negotiations between the parties. The Special Envoy gave his proposal on 26 March 2007, suggesting that the only plausible outcome would be a UN supervised independence, with the Serb

Yet, as any attempt to correct this situation would invite similar claims by the former ASSRs, there was no alternative to finding a legal justification for independence that would be limited to Kosovo.

As the FRY was a federal state, theoretically another round of dissolution remained a possibility.[272] However, another forced state dismemberment on the Serbs would entail severe legal and political consequences. Moreover, in June 2006 the Yugoslav project was terminated with the independence of Montenegro. As Serbia was no longer a federation or in a federation,[273] the decisions made by the EC in 1991-1992 came back with a vengeance. There was no formula to recognize Kosovo independent, but its return under Serbia control was not an alternative. In the end, the countries that recognized Kosovo chose again to take a road less travelled and came up with yet another *sui generis* (i.e., one of a kind) concept, not unlike the 'process of dissolution' in 1991.[274] The legal argument was that the case of Kosovo was so *unique* that its particular circumstances - the dissolution of the SFRY, the atrocities committed by the FRY regime and the extensive international involvement - can never be repeated anywhere. Hence, Kosovo cannot be seen as a precedent for any future secessions.

Naturally, Kosovo is a *sui generis* case, in the same sense than the decision to apply *uti possidetis* outside decolonization context via the 'process of dissolution' formula was a *sui generis* case. Each new cycle of *uti possidetis* entails a unique transformation of the doctrine. The first cycle introduced it into the international legal sphere of sovereignty over territory. The second cycle transformed *uti possidetis* into a situation of several sovereigns and several external and international borders in the context of African decolonization. The third cycle made it applicable outside decolonization context, both by agreement (within the CIS) and by outside requisite (the Badinter Commission). In the latter case, the dissolution itself was taken *as a fact*, and this fact initiated a process comparable to decolonization, thus making *uti possidetis* applicable. Finally, the disputed independence of Kosovo can be legally categorized either as a fourth cycle of transformation of *uti possidetis* or as a breach of

minority rights secured by a new Kosovo Constitution. *Comprehensive Proposal for Kosovo Status Settlement, Report of the Special Envoy of the Secretary-General on Kosovo's Future Status*, 26 March 2007.

[272] *Opinion No. 1* (n 210).

[273] After the Kosovo War (1999), Serbia had restored the autonomies of Vojvodina and Kosovo in the 2002 Constitution of the Union State of Serbia and Montenegro (adopted on 27 January 2003), and in the 2006 Constitution of Republic of Serbia (adopted on 30 September 2006). However, the autonomies have not been as substantial or as guaranteed as in the SFRY era. According to the European Commission for Democracy Through Law (Venice Commission), '[w]ith respect to substantial autonomy, an examination of the Constitution, and more specifically of Part VII, makes it clear that this substantial autonomy of Kosovo is not at all guaranteed at the constitutional level, as the Constitution delegates almost every important aspect of this autonomy to the legislature'. European Commission for Democracy Through Law, *Opinion on the Constitution of Serbia*, adopted by the Commission at its 70th plenary session (Venice, 17-18 March 2007), para. 7.

[274] Already prior to Kosovo's declaration of independence, the UN Secretary-General Ban Ki-Moon was anticipating this formula when he said in an interview that 'each situation need to be examined based on its unique circumstances' and that Kosovo was a 'highly distinctive situation' because of the intervention of the international community. He, however, emphasized that decision of recognition is left to the UN member states. <*https://web.archive.org/web/20080314204124/http://www.interfax.com/17/373003/Interview.aspx*>.

the earlier logic and as an endorsement of a legal right to remedial secession, which opens up other legal questions outside the scope of this dissertation.

I claim that the legal concept of *sui generis* that the recognizers of Kosovo are advancing is an empty shell. In essence, the argument insists that while there is *usus* (state practice) of recognizing Kosovo outside the Badinter Commission framework, there is no *opinio juris* (a belief that such practice is allowed in any other situation). The logic of the argument seems to be that since there is no combination of *usus* and *opinio juris*, there is no customary law and no dangerous precedent created. Nevertheless, you cannot have it both ways. If there is no *opinio juris*, then the independence of Kosovo cannot be in accordance with international law. If it was in accordance with international law - namely due to the dissolution of the SFRY, the atrocities committed, and the international involvement - then there is *opinio juris*, and there *is* a precedent. Without clear reasoning why Kosovo is not a precedent, the *sui generis* concept sounds merely as an unconvincing apology.[275]

I argue for a middle ground between precedent and exception - that *sui generisness* should be endorsed by its legal connection to the *uti possidetis* federal dissolution. Marc Weller, who has been very much involved in both the Kosovo status process as well as theorizing about the concept of 'remedial secession',[276] has argued that in order to explain Kosovo's independence, it might be tempting to 'rediscover' Kosovo's status under the SFRY.[277] After all, the only major difference between the supposedly '*sui generis*' Kosovo and the 'non-*sui generis*' Croatia was constitutionally the latter's right to secession, which was never applied. Thus, in my opinion the legal debate on the independence of Kosovo should be linked with the 1991 dissolution of the SFRY and the misapplication of *uti possidetis.* Only after this linkage has been understood, the post-Soviet territorial conflicts can be seen in a different light.

If we dissect the legal argumentation supporting the 'uniqueness' of Kosovo, a pattern emerges. In 1999, the US Secretary of State Madeleine Albright commented on the NATO intervention: 'Some

[275] As Morag Goodwin has pointed out, the main problem with the *sui generis* concept is that those advancing it are doing 'so little to hide their political preferences'. M. Goodwin, 'From Province to Protectorate to State: Sovereignty Lost, Sovereignty Gained?' in J. Summers, *Kosovo: A Precedent? The Declaration of Independence, the Advisory Opinion and implications for Statehood, Self-Determination and Minority Rights* (Martinus Nijhoff Publishers, 2011) 87-108 at 108.
[276] This dissertation will not focus on the concept of remedial secession in any detail. For more on remedial secession, see, inter alia, A. Buchanan, 'Theories of Secession' 26(1) *Philosophy and Public Affairs* (1997) 31-61; T. Simon, 'Remedial Secession: What the Law Should Have Done, from Katanga to Kosovo' 40(105) *Georgia Journal of International and Comparative Law* (2011) 105-173; Vidmar (n 198); and C. Mueller, 'Secession and Self-Determination - Remedial Right Only Theory Scrutinised' 7 *POLIS Journal* (2012) 283-321.
[277] M. Weller, *Contested Statehood: Kosovo's Struggle for Independence* (Oxford University Press, 2009) at 272.

hope, and others fear, that Kosovo will be a precedent for similar interventions around the globe. I would caution against any such sweeping conclusions. Every circumstance is unique'.[278] In 2007, the Comprehensive Proposal by the Special Envoy of the Secretary-General stated in its conclusion:

> 'Kosovo is a unique case that demands a unique solution. It does not create a precedent for other unresolved conflicts. In unanimously adopting resolution 1244 (1999), the Security Council responded to Milošević's actions in Kosovo by denying Serbia a role in its governance, placing Kosovo under temporary United Nations administration and envisaging a political process designed to determine Kosovo's future. The combination of these factors makes Kosovo's circumstances extraordinary'.[279]

In June 2007, 10 former foreign ministers of Western states published a plea in the New York Times under the title 'Kosovo Must Be Independent', insisting that 'Kosovo is a unique situation that has required a creative solution. It should not create a precedent for other unresolved conflicts'.[280]

However, the separatists in the former ASSRs and Russia were interpreting the possibility of Kosovo independence as a precedent. President Putin commented in the summer of 2006 that '[w]hen we hear that one approach is possible in one place (but) is unacceptable in another, it is difficult to understand and is even more difficult to explain to people'.[281] Encouraged by this statement, the ASSR separatist representatives of Abkhazia,[282] South Ossetia,[283] and high Russian officials continued to warn about the Kosovo precedent before and after the independence declaration.[284]

On 18 February 2008, the US Secretary of State Condoleezza Rice justified recognition based on the 'unusual combination of factors found in the Kosovo situation - including the context of Yugoslavia's breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended

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[278] M. Albright, Speech at the Council for Foreign Relations. Quoted in T. Onea, *US Foreign Policy in the Post-Cold War Era: Restraint versus Assertiveness from George H.W. Bush to Barack Obama* (Palgrave Macmillan, 2013) at 86.
[279] *Comprehensive Proposal for Kosovo Status Settlement* (n 271) para. 15.
[280] *<https://www.b92.net/eng/news/politics.php?yyyy=2007&mm=06&dd=16&nav_id=41838>*. The former foreign ministers of the US, Canada, Sweden, Australia, Germany, Poland, Denmark, Luxemburg, the Netherlands, and France signed the plea.
[281] 'Putin urges uniform regional-conflict approaches', *Sputnik*, 2 June 2006. He also said, concerning Abkhazia and South Ossetia, that 'Russia has never raised the issue of annexing any territories outside its current borders. We have no plans of the kind'.
[282] 'President of Abkhazia: Solution to Kosovo will be a World Precedent', *Tanjug* (Moscow), 28 March 2007. Reference in A. Trbovich, *A Legal Geography of Yugoslavia's Disintegration* (Oxford University Press, 2008) at 417.
[283] President of South Ossetia hailed Putin's 'new approach' as a break with the old double standards in ignoring the universally accepted right of peoples to self-determination. *<http://www.rferl.org/a/1065315.html>*. In addition, in March 2007, Deputy Foreign Minister of Azerbaijan, Araz Azimov, held an address in the European Parliament to point out differences between Kosovo and the Azerbaijani-Armenian conflict over the former Autonomous Region of Nagorno-Karabakh. *<http://www.rferl.org/a/1075387.html>*.
[284] In 2008, First Deputy Prime Minister Sergey Ivanov commented at the Munich Security Conference that '[i]f it comes to a unilateral recognition of Kosovo, that would be a precedent'. *<http://uk.reuters.com/article/uk-russia-kosovo-idUKL1034558020080210>*. In March 2008, the Chairman of the Committee of the Post-Soviet Affairs Alexey Ostrovsky stated: 'We must review our foreign policy in response to new challenges such as the unilateral declaration of independence by Kosovo' *<https://www.ft.com/content/397057f2-f3ad-11dc-b6bc-0000779fd2ac?mhq5j=e2>*. Later he added that the Western states 'have opened a Pandora's Box. The world community should understand that from now on the resolution of conflicts in the ex-Soviet area cannot be seen in any other context from that of Kosovo'. *<https://web.archive.org/web/20080902083212/http://www.javno.com/en/world/clanak.php?id=131742>*.

period of UN administration - are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as precedent for any other situation in the world today'.[285]

On 18 February 2008, British Ambassador to the UN said that '[t]he unique circumstances of the violent break-up of former Yugoslavia had made it a *sui generis* case, which created no precedent, as all EU member states today agreed',[286] and the Prime Minister of the United Kingdom commented that '[f]irstly, I want to close the chapter that has followed the break-up of Yugoslavia. Kosovo has been and is the last unresolved status issue'.[287]

The pattern is that the recognizing states were using the *sui generis* concept in an attempt to appease in advance the countries with potential separatist issues, such as Russia and China. Nevertheless, neither accepted the *sui generis* formulation. For instance, President Putin insisted on January 2008 that 'any resolution on Kosovo will set a precedent in international practice'.[288] Moreover, all the explanations justify Kosovo's independence in the context of the break-up of the SFRY. This is legally significant - those who recognize Kosovo are unwilling to endorse any legal right to secession and depend on the fact of dissolution. Yet, as affirmed by the Badinter Commission, only the SRs had the right to become independent from the SFRY via *uti possidetis*.[289] Being bypassed and ignored in the federal dissolution does not make Kosovo unique, as there remains several former ASSRs in the post-Soviet space with equally legitimate demands.

Serbia was willing to put the *sui generis* argumentation to the test. In October of 2008, backed by Russia, it managed to persuade the UN General Assembly to adopt a resolution 63/3,[290] which requested an Advisory Opinion from the ICJ. The question agreed upon was: 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?'.[291] The 2010 Advisory Opinion could have given an authoritative answer to the question of the final sovereignty over Kosovo. However, the Court chose to pursue a loophole in the phrasing of the question. As noted by Richard Falk, the ICJ gave a 'non-answer that

[285] C. Rice, 'U.S Recognizes Kosovo as Independent State', U.S Department of State, 18 February 2008. *<http://2001-2009.state.gov/secretary/rm/2008/02/100973.htm>*.
[286] Security Council emergency session following Kosovo's Declaration of Independence (SC/9252), 18 February 2008.
[287] *<http://kosova.org/post/England-recognizes-Kosovo-as-am-independent-state>*.
[288] *<http://news.bbc.co.uk/2/hi/europe/7193225.stm>*. Quite in contrary to the hopes by the EU and the US, Kremlin has repeatedly affirmed that the Kosovo precedent can now be used to solve separatist issues in the post-Soviet area.
[289] Arbitration Committee on Yugoslavia*, Opinion No. 2*, January 11 1992, 31 ILM 1497.
[290] *Request for an Advisory Opinion of the International Court of Justice on Whether the Unilateral Declaration of Independence of Kosovo in in Accordance with International Law*, A/RES/63/3 (8 October 2008).
[291] *Introductory Note from the UN Secretary-General to the International Court of Justice* (8 October 2008) at 1.

combined legal positivism with political realism'.[292] In essence, the Court avoided the controversial issues such as the right to secession - remedial or otherwise - and the legality of international recognition of such a secession. Serbia's formulation of the question asked whether the *act of declaration* was in accordance of international law. The Court chose to answer this question, albeit in reverse - it analyzed whether there is anything in general international law or a *lex specialis* that would make the act of a declaration illegal. In the Court's general conclusion:

> 'The adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework […]. Consequently, the adoption of that declaration did not violate any applicable rule of international law'.[293]

Majority of scholars found the Opinion disappointing,[294] and many sided with the dissenting Judge Keith, who argued that the Court should have used its discretion to refuse the requested Advisory Opinion when the problem seemed too political, rather than compromising the integrity of the ICJ's legal reasoning and judicial character.[295] The Opinion gave no obvious addition to the debates over Kosovo being either a *sui generis* exception or a universal precedent.[296] There have even been attempts to qualify the 2010 Advisory Opinion as a non-precedent.[297]

As a conclusion on the independence of Kosovo, I argue that this should be seen as the fourth cycle of the evolution of *uti possidetis*. It can be seen either as a belated state succession of a lower-level

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[292] R. Falk, 'The Kosovo Advisory Opinion: Conflict Resolution and Precedent' 105(1) *The American Journal of International Law* (2011) 50-60 at 54.

[293] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, I.C.J. Reports (2010), para. 122.

[294] For example, see P. Hilpold, 'The International Court of Justice's Advisory Opinion on Kosovo: Perspectives of a Delicate Question' (14) *Austrian Review of International and European Law* (2009) 259-310; M. Mammadov, '"Traditional Gap" in the ICJ's Advisory Opinion on Kosovo' 4(4) *Caucasian Review of International Affairs* (2010) 313-324; and D. Efevwerhan, *Secession and the Lessons from Kosovo: New Dimensions in the Law of Secession* (Lambert Academic Publishing, 2012).

[295] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Separate Opinion of Judge Keith, para. 1; and Separate Opinion of Judge Cançado Trindade, para. 26. The Court voted on the question of whether to exercise the right to discretion and chose to give the Advisory Opinion by the vote of 9 to 5. See, *inter alia*, Ntovas (n 198) 164; M. Milanovic, 'Kosovo Advisory Opinion Preview' *EJIL: Talk!* 14 July 2010; D. Jacobs, 'The Kosovo Advisory Opinion: A Voyage by the ICJ into the Twilight Zone of International Law' *The Hague Justice Portal*, 12 October 2010; and E. De Brabandere, 'The Kosovo Advisory Proceedings and the Court's Advisory Jurisdiction as a Method of Dispute Settlement', *The Hague Justice Portal*, 27 September 2010.

[296] While some claim a precedential character, the Court limited the scope of its decision. *Kosovo Advisory Opinion* (n 290) para. 56. For many sides of the debate, see e.g., S. Tierney, 'The Long Intervention in Kosovo: A Self-Determination Imperative?' 249-278 and S. Trifunovska, 'The Impact of the "Kosovo Precedent" on Self-Determination Struggles' 375-394, both in J. Summers (Ed), *Kosovo: A Precedent?* (Brill, 2011). A view of Kosovo as a precedent in J. Ker-Lindsay, 'Preventing the Emergence of Self-Determination as a Norm of Secession: An Assessment of the Kosovo "Unique Case" Argument' 65(5) *Europe-Asia Studies* (2013) 837-856.

[297] For instance, the German Foreign Minister Guido Westerwelle stated on 26 July 2010 during a visit to Cyprus: 'It's a unique decision in a unique situation with a unique historical background […]. It is not a decision for other countries or other regions in the world'. The quotation from A. Peters, 'Has the Advisory Opinion's Finding that Kosovo's Declaration of Independence was not Contrary to International Law Set an Unfortunate Precedent?' in M. Milanovic and M. Wood (Eds), *The Law and Politics of the Kosovo Advisory Opinion* (Oxford University Press, 2015) 291-313 at 295. She adds that, for instance, Russia has been insisting that both the independence of Kosovo as well as the ICJ Advisory Opinion on that independence are precedents.

ethnofederal unit that had a de facto republican status,[298] or a major *uti possidetis* transformation that now has the potential to dissolve nation-states that have created distinct autonomous territories for minorities. In the first case, legally speaking, Kosovo should be seen as a de facto republic that has become independent retroactively from the SFRY. Only in the second case, this would have happened from Serbia. In any event, I claim that the misapplication of *uti possidetis* in the third cycle was the catalyst that led to Kosovo's unilateral declaration of independence 16 years later. In sum, despite their promises to the contrary,[299] the international community had failed to endorse the legitimate aspirations of the Kosovars in the third cycle. After this failure, the *sui generis* argumentation makes sense. The events of 1998-1999 had made it impossible to return to the earlier autonomous status, which Kosovo should have been awarded already in the early 1990s.

In accordance with *uti possidetis*' evolutionary logic, the third and fourth cycles have added a set of requirements. In the third cycle, a recognized entity needed to have a certain status under the dissolving federation, and had to announce its will to constitute a state and to agree on a series of criteria.[300] The fourth cycle introduced additional preconditions in the Proposal by the Special Envoy of the Secretary-General.[301]

2.7 Conclusion: An Indeterminate Rule

In the previous pages, I have introduced the evolutionary nature of *uti possidetis*, as well as its four distinct cycles of transformation. What emerges is an unpredictable yet indispensable international legal rule of last resort, which has been used to create approximately half of the UN member states of today.[302] Moreover, I substantiated how the essential evolutionary process of *uti possidetis* was breached in the third cycle. This breach has already enhanced the fragmentation processes taking place in the post-Soviet areas and produced the highly controversial independence of Kosovo. The full content of this impact remains to be seen.

[298] According to the 1974 Constitution, the Kosovo Assembly was the highest authority of the province, with the power to change the constitution of the SAP of Kosovo, and a veto over changes to the federal constitution or to the constitution of Serbia. Moreover, it controlled the executive council and other administrative bodies of the province. In many ways, from 1974 onward, Kosovo had almost all the prerogatives of other federal units. Pavlović (n 43). See more on subchapter 4.2.5.
[299] For instance, see *The Conference for Peace in Yugoslavia*, Joint Statement, 7 September 1991, where the EC state promised to 'reestablish peace for all in Yugoslavia and to achieve lasting solutions which respect all legitimate concerns and legitimate aspirations'.
[300] These included, *inter alia*, the respect for the rule of law, democracy, and human right, and constitutional guarantees for the rights of ethnic and national groups and minorities in accordance with the framework of the CSCE. *Guidelines* (n 4) paras 2-3.
[301] The criteria were especially directed on the minority protection over the Serbian population, and the most essential part of the 'supervised independence' was that the UN would be guaranteeing the minority protection for a period after the independence. *Comprehensive Proposal for Kosovo Status Settlement* (n 271) paras. 11-14.
[302] In the first three *uti possidetis* cycles that I have accounted for, there have been created 12 South American states in the first cycle, 62 African and Asian countries in the second cycle, and 23 European and Asian states in the third cycle.

The main reason for *uti possidetis*' ambiguity is that there has been no universal codification of its content or target group. In most cases, it has easily been agreed upon by the parties after the fact of decolonization or dissolution. These newly independent states then codified the doctrine within the legal instruments between themselves. However, questions over territory are so essential that states who have not yet been affected by the doctrine do not like to commit to rule that might compromise their territorial sovereignty. All that being said, the combination of state practice and the ICJ case law has been building up the momentum for *uti possidetis* to be seen as a universal custom. States might find themselves bound by it even against their wishes, as Belgrade found out in 1991-1992.

The combination of the lack of codification and the doctrine's content being defined only through the controversial situations of its application is problematic. As the famous legal maxim goes, 'hard cases make bad law'.[303] Especially after the third cycle, the rule produced can only be described as equivocal. Its indeterminate structure has evolved over time into ambivalence over its appliance, in a manner of a Jack-in-the-box analogy where a legal rule might appear unexpectedly to be applicable to a given situation.[304] This is not ideal, given the central importance of questions over territory.

To conclude, as a general principle, *uti possidetis* must evolve alongside general international law. Otherwise, it will be either doomed to irrelevance or - even worse - lose its ability to prevent armed conflict over territory. As this evolution took place only partially in the third cycle, the inner logic of the doctrine was broken, alongside its validity to solve territorial disputes peacefully. Therewith, in the following Chapters, I explicate in detail what went wrong in the third cycle. In Chapter 3, I account for the *internal legal context* at the moment of the dissolution, i.e., the socialist ethnofederal model. In Chapter 4, I construe the external component, the *international legal framework* at the moment of the socialist federal dissolutions. Together, these two components give us access to the actual content of *uti possidetis* in the early 1990s, which I have named (*uti possidetis*) *meritus*. Chapters 5 and 6 conclude the dissertation by analyzing how the successor states of the USSR and the SFRY chose to confront their national minorities, and introducing the *meritus* formula that can be used to settle the already existing territorial disputes and to preempt new ones from occurring in the cases of independence or state dissolution.

[303] Original quote from the US Supreme Court Justice Oliver Wendell Holmes, Jr., in 1904 with the case Northern Securities Co. v. United States. M. Davis and A. Stark (Eds), *Conflict of Interest in the Professions* (Oxford University Press, 2001) at 41-42.
[304] This analogy has been used by Thomas Wilhelmsson to describe the conflict between national legislation of an EU member state and the European Community Law. In Wilhelmsson's analogy, the ambivalence is over the matter when a given rule is applied. See T. Wilhelmsson, 'Jack-in-the-Box Theory of European Community Law' in L. Krämer, H. Micklitz, and K. Tonner (Ed), *Law and Diffuse Interests in the European Legal Order* (Nomos Verlagsgesellschaft, Baden-Baden, 1997) 177-194.

PART II: THE TWO COMPONENTS OF *UTI POSSIDETIS MERITUS*

3. The Internal Component: Socialist Ethnofederalism

In this Part, I present to the two components that constitute my proposal for *uti possidetis meritus*: *internal* and *international legal contexts* at the moment of the dissolution. This Chapter exhibits the internal legal framework, which is the *lex specialis* of the socialist federal dissolutions - i.e., the socialist ethnofederal model. The following Chapter establishes the external component as the *lex generalis* - i.e., the international legal framework, especially the right to self-determination. While both components are equally applicable in the SFRY setting, for clarity's sake, Chapter 3 focuses mainly on the USSR example, whereas Chapter 4 addresses the SFRY.

Briefly, ethnofederalism was the official socialist national policy. It assigned the recognized peoples of the socialist federations a demarcated national territory and divided them into a hierarchy based on the progression level towards socialism. The right to self-determination was based on this status, and an upgrade was possible through merit. In this Chapter, I first account for the ideological origins of the ethnofederal system, previously unknown in the history of federalism and in contradiction with the original Marxist ideology. I then proceed to introduce the four levels of ethnofederal structure, with the focus on the two most high-ranking units: the SSRs and the ASSRs. In relation to the *uti possidetis meritus* formula, I establish the legitimate expectations (*meritus*) of the ethnofederal units in relation to the right to sovereignty and self-determination according to the applicable legal rules.

3.1 The Ideological Foundations of Ethnofederalism: Historical Materialism and the 'National Question'

3.1.1 The Philosophical Origins of Historical Materialism

Karl Marx's theory on 'historical materialism' is based on Georg Hegel's concept of history occurring through a dialectic of opposing forces.[305] Hegel's dialectic, in turn, is based on a classical notion of dialectics presented by Plato in his Socratic dialogues. According to this original version, a philosophical argument was presented as a back-and-forth debate between individuals on opposing sides of a given altercation. The debaters would arrive at the truth after disclosing and overcoming the contradictions in the argument of their opponent.

[305] R. Palmer and J. Colton, *A History of the Modern World* (6th Ed., New York, 1983) at 498-499. Originally presented in G. Hegel, *Die Phenomenologie des Geistes* (Bamberg und Würzburg, 1807). The term comes from the Greek word 'dialego', to discourse or debate.

Hegel's version is also relying on a contradictory process between opposing sides. Instead of Plato's opposing individuals, however, Hegel's opposing sides were usually concepts. Additionally, his philosophy contains a factor of determinism. As he defined his dialectics:

> 'all change comes through the clash of antagonistic elements. All history, and indeed all reality, is a process of development through time, a single and meaningful unfolding of events, necessary, logical and deterministic; that every event happens in due sequence for good and sufficient reason, not by chance; and that history could not and cannot happen any differently from the way it has happened and is still happening today'.[306]

While Plato and Hegel had different frameworks for their dialectics, in both forms the dialectical method produced more and more sophisticated results. The Hegelian form consisted of three dialectical stages of development: a thesis, an antithesis contradicting or negating the thesis, and the tension between the two being resolved by a synthesis.[307] The word 'negate' can be misleading as the elements of the thesis and antithesis are preserved within the synthesis.

Marx adopted the framework of Hegel's dialectical method while criticizing it as too ideal:

> 'My dialectical method is not only different from the Hegelian, but is its direct opposite. […] the ideal is nothing else than the material world reflected by the human mind, and translated into forms of thought […]. The mystification which dialectic suffers in Hegel's hands, by no means prevents him from being the first to present its general form of working in a comprehensive and conscious manner'.[308]

Through the work of Marx, Friedrich Engels, and Vladimir Lenin, this version of dialectic became a school of thought known as historical materialism.[309] This theory emphasizes the primacy of the material way of life and social praxis over all forms of social consciousness. It was portrayed as a scientific way to explain the events in the past, form a thorough progressive story from those events and, most importantly, to predict the future based on this story.[310]

For the socialist theoreticians, the central contradiction to be resolved through dialectics was the class struggle, because of its central role in the social and political lives of societies. Another recurring theme is the constant progressive change of the material world. According to Engels:

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[306] Quoted in Palmer and Colton (n 305) 493.
[307] Hegel actually never coined these terms, but instead ascribed terminology to Immanuel Kant. Hegel (n 305) Preface.
[308] K. Marx, *Capital: A Critique of Political Economy - The Process of Capitalist Production* (Cosimo, 2007) at 25. Originally in K. Marx, *Das Kapital, Vol. 1* (Hamburg, 1873), Afterword to the Second German Edition.
[309] A term 'dialectic materialism' has been used interchangeably, for example by a Russian Marxist theoretician Georgi Plekhanov.
[310] For more on Marx's historical determinism, see A. Bauer and V. Eichhorn, 'Historical Materialism and Social Prediction' 8(3) *Soviet Studies in Philosophy* (1969) 235-251.

> 'For dialectical philosophy nothing is final, absolute, sacred. It reveals the transitory character of everything and in everything: nothing can endure before it, except the uninterrupted process of becoming and of passing away, of endless ascendancy from the lower to the higher'.[311]

3.1.2 The Materialist Conception of History

Once Marx had prepared his theoretical framework, he proceeded to explain the history of the world through the dialectic method. According to him, all societies have always been dominated by the economy. All the other aspects of society, such as property relations, social classes, culture, legal system, and the state itself, are developed in response to the economic forces and are used to prevent people from seeing their material conditions clearly. His central focus was on the ownership of 'means of production' - things that are necessary to produce material goods, such as land, natural resources, technology - and the social relationships people enter into in order to acquire and use these means. This combination produces the *mode of production*, which is the determinant for any given historical era. Societies progress through historical stages of modes of production, which there are altogether five: primitive communal, slave labor, feudal, capitalist, and socialist.[312] Marx concluded that most of Europe had progressed from feudalism to capitalism. In capitalist societies, the dominant mean of production is capital, the wealth required to invest in economic development. This tends to make everything in modern societies a commodity, whose value comes from being bought or sold. According to the dialectic method, the advanced states of Europe had reached this level of development through the predicted progression: first, there was the thesis (feudalism), which brought on reaction (capitalism) as an antithesis, whereas the final negation of the negation, the synthesis, would be the most progressive mode of production, i.e., socialism.

Marx used the term 'revolution' extensively in its expanded meaning, describing a rapid change in crucial points of history. He considered capitalism the most progressive mode of production the world had seen, as it can generate tremendous growth through capitalist's ability and incentive to reinvest profits into new technologies. This makes the capitalist class the most revolutionary in history.

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[311] Quoted in V. Lenin, *On the Question of Dialectics: A Collection* (1915), reproduced in V. Lenin, *Collected Works, Vol. 38* (Progress Publishers, 1980) 357-361. Lenin himself defined the term 'development' in a similar manner: 'A development that repeats, as it were, stages that have already been passed, but repeats them in a different way, on a higher basis […] a connection that provides a uniform, and universal process of motion, one that follows definite laws - these are some of the features of dialectics as a doctrine of development that is richer than the conventional one'. In 1907, he defined development as 'the "struggle" of opposites'. V. Lenin, *Collected Works, Vol. 13, June 1907 - April 1908* (Progress Publishers, 1978) at 301.

[312] J. Stalin, 'Main types of Relations of Production' in J. Stalin, *Dialectical and Historical Materialism* (Moscow, 1938). Leninist ideology would add one more subtype of the relation of production, imperialism. This was the 'highest form of capitalism', a natural result of the capital exceeding the boundaries of national states. V. Lenin, *Collected Works, Vol. 19* (Progress Publishers, 1942) at 47.

However, means of production change more rapidly than the relations of production, and this causes a mismatch between base and superstructure,[313] which generates social conflict. The history of means of production is both the substructure and the prime mover of history. Thus, political and legal institutions correspond to the economic interests of the ruling class in a given era.[314] The role of law and the legal system are mere superstructures serving the material needs of the economically dominant class, and 'the rule of law' is nothing more than an ideological mechanism to justify their ownership of the means of production.[315] Marx saw nothing intrinsically good in the existence of the law, which would be abolished alongside the class conflict, with the final advent of communism.[316]

Marx further believed that capitalism was inevitably prone to periodic crisis. This was due to his uncompromising stance on the source of profits being solely the surplus value appropriated from labor.[317] In his view, the long term tendency for the rate of profit to fall will lead to the intensification of exploitation and the heightening of the class conflict.[318] Therefore, as the capitalists would invest more in new technologies and less in labor, they would cause the workers to lack capital of which to consume, resulting in recession or depression, where the price of labor would fall even further.

This cycle between growth and collapse would become ever more severe. Marx concluded that the long-term consequence of this development would be an increasing impoverishment of the majority of the working people, the proletariat. He predicted that the process would inevitably lead to a situation where the proletariat would seize the means of production, making them, in essence, the next revolutionary class, those who progress history instead of being a victim of it.[319] The new era that this would bring about would encourage social relations that benefit everyone equally, while not being prone to crises. However, Marx also predicted that capitalists would never accept this

[313] As defined by Michael Lewers, 'Marx defines the base as the social relations between men which create and produce materials that are eventually put up for exchange. From the base comes a superstructure in which laws, politics, religion and literature legitimize the power of the social classes that are formed in the base. So, for Marx, art and literature are a superstructure of society'. M. Lewers, 'Base and Superstructure', *Methods of Literary and Cultural Studies*, 6 April 2015.
[314] K. Marx, *A Contribution to the Critique of Political Economy* (Chicago, 1904) at Preface II.
[315] A. Zimmerman, 'Marxism, Communism and Law: How Marxism Led to Lawlessness and Genocide in the Former Soviet Union' 2(1) *The Western Australian Jurist* (2011) 1-60 at 17. He adds that already Plato had portrayed in *Republic* that 'each form of government enacts the laws with a view to its advantage' and that legislation is 'for their - the rulers - advantage'. *Ibid*.
[316] As phrased by Hans Kelsen, the 'anti-normative approach to social phenomena is an essential element of the Marxian theory in general and of the Marxian theory of law in particular'. H. Kelsen, *The Communist Theory of Law* (London, 1955) at 36.
[317] Marx's opponents and proponents have criticized this view. See, for example, J. Robinson, *Economic Philosophy* (Penguin Books, 1962); and P. Pilkington, 'Marx, Hegel, The Labour Theory of Value and Human Desire', *Fixing the Economists*, 13 August 2013.
[318] A. Gamble, D. Marsh and T. Tant (Eds), *Marxism and Social Science* (Macmillan, 1999) at 177.
[319] Stalin was a firm believer of inevitability proclaimed by the historical materialism. 'If development proceeds by way of the disclosure of internal contradictions, by way of collisions between opposite forces on the basis of these contradictions and so as to overcome these contradictions, then it is clear that the class struggle of the proletariat is a quite natural and inevitable phenomenon'. Stalin, 'Contradictions Inherent in Nature' in Stalin (n 312).

revolutionary step, so negotiating with them would be useless.[320] Instead, a revolution like the French Revolution of 1789 was needed to overthrow the established mode of production. Subsequently, a proletarian dictatorship would have to be established to maintain this new socialist system.[321]

3.1.3 Inevitability of Progress

Unlike Hegel, who was more ambiguous on the subject,[322] Marx and Lenin believed that history was predetermined,[323] and that people can affect its flow only on a limited scale. Thesis-antithesis-synthesis was the inescapable cyclical life of progress, and socialism was a historical inevitability given that the working class had every incentive to bring about the new revolutionary era.[324] This was simple logic: their position would worsen until they would rise and bring about the change.

According to the theory, the proletarian revolution would take place first in the most advanced capitalist countries, with the most impoverished working class. Following, the sparkle of a revolution would rapidly spread among the industrialized states until the whole world had progressed to the next mode of production. The October Revolution of 1917 was actually in contradiction with the theory, as Russia had not yet fully advanced from feudalist to capitalist mode of production. According to historical materialism, each revolution happens only when and where appropriate conditions are met.

Nevertheless, while Russia was not ready for a revolution in theory, by late 1917 it certainly was ready in practice. The communist agitation had established a firm ground and the ruling class was bound to the highly unpopular figure of the Tsar. Most significantly, the Provisional Government,[325] which had taken over after the fall of the imperial regime, was closing in on a total collapse due to the strains of the First World War. Moreover, communists were well organized in the Bolshevik

[320] This view was repeated throughout the writings of Marx and Engels, for instance, in 'Chapter IV. Position of the Communists in Relation to the Various Existing Opposition Parties' in K. Marx and F. Engels, *The Communist Manifesto* (London, 1848) and '10. The Necessity, Preconditions and Consequences of the Abolition of Private Property' in K. Marx and F. Engels, *The German Ideology* (written originally in 1846, published in Moscow, 1932).

[321] Originally presented in K. Marx, 'The Class Struggles in France 1848-1850' (1850), republished in K. Marx and F. Engels, *Selected Works, Vol. 1* (Progress Publishers, 1969) 186-299.

[322] Hegel's work is usually interpreted as deterministic, but his equivocalness on the matter has led many scholars to contest this view. See, inter alia, E. Cafagna, 'Hegel and Determinism' 11(3) *Giornale critic della filosofia italiana* (2015) 588-609.

[323] E.g., 'each of the three great periods of world history has brought Marxism new confirmation and new triumphs. But a still greater triumph awaits Marxism, as the doctrine of the proletariat, in the coming period of history'. V. Lenin, 'The Historical Destiny of the Doctrine of Karl Marx' in V. Lenin, *Collected Works, Vol. 18* (4th Ed., Progress Publishers 1975) 582-585 at 585.

[324] 'What the bourgeoisie therefore produces, above all, are its grave-diggers. Its fall and the victory of the proletariat are equally inevitable'. 'Chapter I. Bourgeois and Proletarians' in Marx and Engels, *The Communist Manifesto* (1848).

[325] The Russian Provisional Government was formed by the Provisional Committee of the State Duma and held power in Russia between March and October 1917. The story of the Provisional Government is very well documented, for example, in R. Browder and A. Kerensky, *The Russian Provisional Government, 1917: Documents* (Stanford, 1961).

Party.[326] As one Bolshevik would later recall, in 1917, they had 'found power lying in the streets and simply picked it up'.[327] The Bolshevik decision to take power in Russia caused critique in some Marxist circles. For instance, Karl Kautsky, the leader of a highly influential Social Democratic Party of Germany, criticized the Bolsheviks for taking power too early and initiating revolutionary changes for which there was no economic rationale in Russia.[328]

Lenin was well aware that the October Revolution was not 'supposed' to have happened and would not survive alone. Indeed, only six months previously he had proclaimed in his 'April Thesis' that their upcoming revolution would not be an isolated event, but an example that would catch on the war-weary states of Europe,[329] Germany in particular. For example, in Political Report of the Central Committee in 1918, Lenin warned '[a]t all events, under all conceivable circumstances, if the German revolution does not come, we are doomed'.[330] Theoretically, this view was based on the writings of Engels, who had proclaimed the revolution impossible in one country alone.[331]

Until his death in 1924, Lenin kept on hoping in vain for a German revolution. Yet, he had to reconcile the establishment of the proletarian dictatorship in Russia with the fact that theory had failed to live up to the expectations. Therewith, the Bolsheviks started advancing an idea of 'defending the revolution' from the capitalist state's attempts to undermine the superiority of socialism. Lenin's successor, Stalin, made this policy permanent with a slogan 'Socialism in one country', promising that the USSR would build a society so advanced that the rest of the world would have no choice but to imitate it and to embrace socialism. In 1938, Stalin divided the question of socialism in one country

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[326] The Bolshevik faction split from the Russian Social Democratic Labour Party in the 2nd Party Congress in 1903 (R. Suny, *The Soviet Experiment: Russia, the USSR, and the Successor States* (Oxford University Press, 1998) at 57). This was mainly due to the issue of party discipline, with the Bolsheviks advocating 'virtually a military discipline'. R. Pipes, *The Formation of the Soviet Union: Communism and Nationalism 1917-1923* (Harvard, 1964) at 244. The Party functioned under a series of different names. In 1918-1925, it was called the 'Russian Communist Party (Bolsheviks)'. In 1925, the Party was re-named 'All-Union Communist Party (Bolsheviks)' and finally as the 'Communist Party of the Soviet Union' in 1952, the title of which it would retain until it was banned on 29 August 1991.

[327] This quote is attributed to many sources, including Lenin and Leon Trotsky, who cite each other. Quoted in Z. Çelik, D. Favro and R. Ingersol (Eds), *Streets: Critical Perspectives on Public Spaces* (Berkeley, 1994) at 67; and *<http://encyclopedia.1914-1918-online.net/article/revolutions_russian_empire>*.

[328] K. Kautsky, *Social Democracy versus Communism* (Rand, 1946), 'Chapter 4. Lenin and the Russian Revolution'.

[329] V. Lenin, 'The Tasks of the Proletariat in the Present Revolution' (7 April 1917) in V. Lenin, *Collected Works, Vol. 24* (Progress Publishers, Moscow, 1964) 19-26.

[330] Extraordinary Seventh Congress of the Russian Communist Party, 7 March 1918.

[331] 'By creating the world market, big industry has already brought all the peoples of the Earth, and especially the civilized peoples, into such close relation with one another that none is independent of what happens to the others. Further, it has coordinated the social development of the civilized countries to such an extent that, in all of them, bourgeoisie and proletariat have become the decisive classes and the struggle between them the great struggle of the day. It follows that the communist revolution will not merely be a national phenomenon but must take place simultaneously in all civilized countries […]. It will have a powerful impact on the other countries of the world, and will radically alter the course of development which they have followed up to now, while greatly stepping up its pace. It is a universal revolution and will, accordingly, have a universal range'. Principle 19 in F. Engels, *Principles of Communism* (1847), published in F. Engels, *Selected Works, Vol. 1* (Moscow, 1969) 81-97.

into internal relations within the USSR and the external relations with the world. In the former case, Stalin held that they have everything necessary to construct socialism alone. However, when asked about whether the victory of socialism was 'final', i.e. is there a possibility of capitalism being restored in Russia, Stalin replied that the final victory was possible only on an international scale.[332]

3.1.4 Nationalism under Historical Materialism

Nationalism was always a troublesome phenomenon for historical materialism and Marx was very inconsistent with the topic. While he insisted the whole concept being merely an element of class warfare that bourgeois use against the proletariat to make them unaware of their social conditions,[333] he was the first person to use the phrase 'self-determination of nations'.[334]

Notwithstanding, since nationalism remained a political force until the final victory of socialism was achieved, Marxist political parties had to try to accommodate it with their ideology. The first direct treatment of nationalism as an important policy issue in its own right took place in a Congress held by the Second International in 1896.[335] An ideological schism developed, as the majority of the participants affirmed that all nations have a right to self-determination, yet their centralist bias[336] forced them to advocate keeping the existing multinational Empires intact.[337] Eventually, the majority view emerged, according to which the supremacy of the proletariat would render states and nationalism obsolete. Therefore, in a short term, it was advisable to ensure the survival of the

[332] J. Stalin, 'On the Final Victory of Socialism in the U.S.S.R.' in J. Stalin, *Collected Works, Vol. 14* (Red Star, 1978) at 315-325.
[333] Marx called nationalism 'illusory communal interest' that was a by-product of capitalism suffusing nations into larger 'national' units. R. Tucker, *Stalin as Revolutionary, 1879-1929: A Study in History and Personality* (New York, 1973) at 123-125. Many later theoreticians, such as Antonio Gramsci, have been criticized heavily on their failure address nationalism as a phenomenon in a comprehensive manner. One often-quoted critique is by Tom Nairn who argues that the theory of nationalism represents 'Marxism's great historical failure'. He concludes that nationalism is inescapable and the failure to address it was inevitable, resulting from the 'instant formula utopias of proletarian internationalism'. T. Nairn, 'The Modern Janus' 94(1) *New Left Review* (1975) 3-29 at 29.
[334] The phrase appeared first in the International Workingmen's Association's 'Proclamation of the Polish Question' (1865). Marx had a major role in the Association, especially in the international issues. Walker Connor has observed the irony of the right to self-determination being proclaimed by the history's most famous internationalist. W. Connor, *The National Question in Marxist-Leninist Theory and Strategy (*Princeton, 1983) at 11. More on Marx's role in the Association, see A. Gouldner, 'Marx's Last Battle: Bakuni and the First International' 11(6) *Theory and Society* (1982) 853-884.
[335] Also known as the Socialist International, was an organization of socialist and labor parties between the years 1889-1916. It was formed to succeed the First International (International Workingmen's Association) that had been dissolved in 1876.
[336] According to Marx, legal relationships in a communist state would be of purely administrative nature. 'Law' was to be merely regulations or operating procedures for bureaucratizing the ideology. A unitary centralized government would be the most efficient with this. R. Plawker, 'The Soviet Contradiction: Socialist Federalism and the Freedom of Secession' 10(1) *Wisconsin International Law Journal* (1991-1992) 169-183 at 171-172. Lenin also thought that larger units were preferable. In 1920, he asserted that the Party should 'create as large states as possible' (V. Lenin, *Collected Works, Vol. 31, April - December 1920* (Progress Publishers, 1966) at 167-168) and that the Bolsheviks 'do not favor the existence of small states' (V. Lenin, *Collected Works, Vol. 32, December 1920 - August 1921* (Progress Publishers, 1973) at 342). As another prominent Marxist ideologue Karl Kautsky put it in 1892, the socialist society was 'nothing more than a single gigantic industrial concern'. K. Kautsky, *The Class Struggle* (New York, 1971) at 138.
[337] The opposing faction led by Rosa Luxemburg argued for the dismantling of Empires such as Austro-Hungary and Russia. R. Luxemburg, 'The National Question: 1. The Right of Nations to Self-Determination', *Przeglad Socialdemokratyczny,* 1908-1909. Luxemburg also held the view that under capitalism the right to self-determination cannot exists, while in socialism it is not necessary.

dictatorship of the proletariat in bigger units. The First Congress of the Russian Socialist Democratic Labor Party, held in Minsk 1898, proclaimed in a resolution 'the right of nations to self-determination' in this context. The reality was that no Russian political party was willing to dismantle the Tsarist Empire, which was a guarantee of the Great Power status in international politics.[338] In fact, in their inconsistent treatment of the national question, both Marx and Engels had been advancing the continuation of Russian imperialism as serving a progressive purpose.[339] They held the view that Russians had progressed to a more-or-less capitalist mode of production, unlike some of the more backward nations of the Empire who still lived in feudalism.[340]

In addition to lacking developed capitalism, Russia was a particularly troublesome target for a potential revolution from the national perspective since it was comprised of over 100 different nationalities. However, Lenin recognized this problem early on and used it to advance his cause. In November 1917, he became the first major political leader in the world to proclaim the right of self-determination of peoples,[341] two months before the famous Fourteen Points of Woodrow Wilson.[342] The issue of the national question[343] in multiethnic Empires had preoccupied Lenin for quite some time. He had ordered Stalin to write a comprehensive article on the question, titled 'Marxism and the National Question'. The article considers different ways to solve the national question, rejects the so-called Austro-Marxists' version of 'cultural-national autonomy'[344] and proposes regional autonomy in its place.[345] In addition, the article provides the characteristic features of a nation: 'A nation is a historically constituted, stable community of people, formed on the basis of a common language,

[338] R. Lukic and A. Lynch, *Europe from the Balkans to the Urals: The Disintegration of Yugoslavia and the Soviet Union* (2nd Ed., Oxford University Press, 1999) at 43.
[339] M. Molnar, *Marx et Engels et la politique internationale* (Paris, 1975), quoted in *ibid.* at 43.
[340] Marx's championing of the right to self-determination for Poland and its secession from Russia should be seen in this context: he viewed the Polish nation as more progressive than Russia, which would only retard its progression until independence was achieved.
[341] N 166. In the declaration, the Bolshevik government recognized the equality and sovereignty of all peoples of Russia, granting them the right to free self-determination up to and including secession, freedom of religion, and the free development of national minorities on the territory of Russia. Lenin had committed himself already in 1914 to the right to national self-determination. V. Lenin, 'The Right of Nations to Self-Determination', *Prosceshcheniye* 4-6, April-June 1914.
[342] On 8 January 1918, President Wilson proposed a 14-point program for world peace that later formed the basis for peace negotiations after the surrender of Germany. While the points dealt with the topic, the term 'self-determination' was not yet used on this occasion.
[343] See n 179.
[344] Austro-Marxists were a Marxist faction in the Dual-Monarchy of Austro-Hungary. They were mostly German-speaking Austrians and were more preoccupied with the national question than the other Marxists since Austro-Hungary was extremely heterogenic in its ethnic composition. The most prominent were Otto Bauer and Karl Renner, who were the first Marxist to renounce the orthodoxy of nationalism as an ephemeral phenomenon. According to their policy, cultural values were neutral, devoid of class content, and could be preserved with the future socialist order. Their autonomy-model would not be regional but based on people, who would enjoy cultural rights wherever they lived. The idea of cultural autonomy appealed to the Jewish Socialist Party in Russia since they lacked a territorial area with a Jewish majority. M. Löwy, 'Marxists and the National Question' 1(96) *New Left Review* (1976) 81-100 at 92-94.
[345] J. Stalin, 'Marxism and National Question' 3-5 *Prosveshcheniye* 1913. This formed the base for the ethnofederal model that the Bolsheviks established in the 1924 Constitution of the USSR (n 390). The article made Stalin the Party's specialist in nationality affairs, and he was later assigned to be the Commissar of Nationalities in the first Bolshevik government.

territory, economic life, and psychological make-up manifested in a common culture'.[346] Finally, the article confirms that nationalism is a part of the social superstructure of the capitalist era of history, to be replaced by internationalist consciousness free of national elements under socialism.[347]

Lenin saw no realistic alternative to national self-determination since nations existed objectively.[348] However, he accepted Marx's notion that nationalism was bound to be dissolved alongside class struggle. It seemed pointless to construct federalism in the USSR as national differences were about to be eradicated. Marx had spoken explicitly against any federal arrangements, insisting that the interests of the proletariat could best be served through a unitary government structure.[349] Therewith, before 1917, Lenin adamantly opposed federalism, fearing its potential for abetting nationalism.[350]

Lenin's mind changed with a surge of separatism all over the Russian Empire after the revolution. He thought it paramount to keep Russia intact, as the Bolsheviks would need the grandest possible unit to serve as a spark of revolution to more advanced Western Europe. He concluded that the only way to save the Empire was by proclaiming the right to self-determination up to secession, a temporary concession in exchange for political support for the regime. Lenin argued that if Bolsheviks were to give the right to secession for the nations of Russia, most of them would not use it.[351] If they were to deny the nations this right, they would fight for it.[352] He calculated that any seceding nations would

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[346] *Ibid*. at 2. In the SFRY the official nationalist ideologue was Edvard Kardelj, who in his 1939 book *The Development of the Slovene National Question*, defined a nation in very similar terms than Stalin in 1913. According to Kardelj, a 'nation is […] a specific people's community arising on the basis of the social division of labour in the era of capitalism on a compact national territory within the framework of a common language and close ethnic and cultural relationship in general'. E. Kardelj, *Razvoj slovenskega narodnega vprašanja* (3rd Ed., Belgrad, 1988). However, in the second edition (1957), he changed the definition to 'a product of the socio-economic relations of the epoch of capitalism which is a product of the social division of labour'. In other words, since the division of labour still exists under socialism, so does the nation. D. Djokić, *Yugoslavism: Histories of a Failed Idea, 1918-1992* (London, 2003) at 168.

[347] Stalin (n 345) 6.

[348] 'If we were to declare that we do not recognize Finnish nation, but only the toiling masses, that would be sheer banality. We cannot refuse to recognize what actually exists; it will itself compel us to recognize it'. V. Lenin, *On the Program of the Party* (1915), reproduced in 10(7) *The New International* (1944) 199-202.
For more on the objectivity of a state recognition see Koskenniemi (n 68) at 272-282. He concludes that the question of whether or not an entity is a state cannot be merely a matter of the entity's self-definition and, therefore, criteria such as the one in the Montevideo Convention is needed. However, this is problematic, since the recognizing states decide the application of statehood criteria always after a *subjective* assessment. Thus, Lenin cannot refuse to recognize what *subjectively* exists, but this does not compel others to recognize since nothing has been proven to exist *objectively*. In any case, the Bolsheviks were in a privileged position to argue for the objective existence of nations within their political realm, since recognition by the previous sovereign is often a guarantee of universal recognition for the new state.

[349] Marx also attacked the liberal notions of Montesquieu and Rousseau, both of whom though federated systems to be more democratic than unitary states. G. Gleason, *Federalism and Nationalism: The Struggle for Republican Rights in the USSR* (1990) at 24, 129.

[350] E.g., in 1913 he insisted that 'Marxists will never, under any circumstances, advocate either the federal principle of decentralization' (V. Lenin, 'Critical Remarks on the National Question' 10-12 *Prosveshcheniye* (1913) 20-45 at 45), and 'class loyalty is eternal, while ethnic loyalty is transitory' (Quoted in J. Hazard, *The Soviet Legal System: The Law in the 1980's* (New York, 1984) at 27).

[351] 'Separation is altogether not our scheme. We do not predict separation at all'. V. Lenin, *Collected Works, Vol. 18, April 1912 - March 1913* (Progress Publishers, 1963) at 90.

[352] Gleason (n 349) 30.

be drawn back to Russia by their progressive policies, economic necessity, and a need for military protection. He was also willing to sacrifice parts of the Empire for the sake of the socialist system.[353]

3.2 The Early Years of the Bolshevik Rule

3.2.1 The First Stage: 'War Communism', 1917-1921

On 25 October 1917,[354] the Bolshevik Party was able to overthrow the Russian Provisional Government, which had held the ultimate power in the Russian Empire since the fall of the Czar earlier that year. While the revolution itself was relatively peaceful, a Civil War started immediately, vindicating Marx's prediction that the bourgeois class would never accept the overthrow of capitalism. Following Marx's theory on the need for the dictatorship of the proletariat, Lenin proclaimed the Bolsheviks as the 'Vanguard of the Proletariat', banning all other political parties.[355] Yet, as Marx's further predictions of the worldwide revolution failed, the need to defend the revolution was expanded to include external threats. The Bolsheviks viewed all the other governments of the world as enemies of their revolution. As they had expressed as their aim to help to overthrow all the other governments, the reciprocal foreign hostility was to be expected.

The Bolshevik fears appeared proven correct when several capitalist states made interventions against them in the Civil War.[356] Notwithstanding, the Leninist national policy claimed its greatest victory as the Bolsheviks' proclamation of the right to self-determination enabled them to gather considerable support from the non-Russians.[357] This gave them legitimacy while discrediting the reactionary

[353] J. Hazard, *The Soviet System of Government* (Cambridge University Press, 1957) at 84. According to Connor, Leninist policy was a 'formula for performing the task of harnessing the powerful forces of nationalism to the revolution and then vanquishing them thereafter'. Connor (n 334) 36-37. The fact that Russia had no traditional colonies in the 'salt-water' sense (see n 156 and 546) contributed to Lenin's calculations.

[354] The date is according to the Old-Style Julian calendar used in Russia at the time; in the Gregorian calendar the date is 7 November 1917. The Bolsheviks changed the calendar in Russia to the New Style on 24 January 1918.

[355] V. Lenin, *What Is To Be Done? Burning Question of Our Movement* (Stuttgart, 1902) at 1.C. This took place in the years 1917-1921. Finally, in 1921, the ban on political opposition reached the Party itself, as the 10th Party Congress of the Russian Communist Party (Bolsheviks) legislated a 'ban on factions' to eliminate any factionalism and dissidence within the Party. D. Lorimer, *The Collapse of Communism in the USSR: Its Causes and Significance* (Australia, 1997) at 18-19. Ban on factions was a logical extension of the 'democratic centralism' concept adopted already in the 6th Party Congress of the Russian Social-Democratic Labour Party Congress, July 26 - August 3, 1917. See more on 'democratic centralism' in the subchapter 3.4.

[356] The Civil War started after the provisional government was overthrown in the October Revolution. A loose alliance of forces known as the White Army started insurgencies all over the Empire and were supported, in varying degrees, by the United Kingdom, Japan, France, and the US. See E. Mawdsley, *The Russian Civil War* (New York, 2007) at 45-55.

[357] According to the only census carried out in the Russian Empire (1897), the Russians were a minority. The census determined only native tongue, not ethnicity *per se*, and accounted for 55,6 million Russian speakers in a total population of 125,6 million.

nationalist policies of their opponents. By 1921, the Bolsheviks had won. The following period of War Communism introduced the most radical changes to everyday life in Russia.[358]

The Bolsheviks aimed to exterminate all vestiges of the old order and to concentrate all power to the Party. The abolished institutions included the legal and commercial systems, as well as most of the governmental organizations. All industry was nationalized, the property was communalized, and ration cards replaced money. The economic aim was to control all national production and all distribution of goods to the population, thereby introducing a socialist non-profit operation to replace the capitalist market mechanisms. The War Communism experiment failed for several reasons. Most importantly, the dictatorship of the proletariat was only supposed to defend the revolution for a short while before the world-wide revolution. When this did not take place, the isolated national economy of Russia, strained further by the Civil War, started to collapse under an economic blockade.[359]

Nevertheless, some Bolsheviks argued that War Communism also failed in the ideological sphere. Both Marx and Lenin had insisted before the revolution that the transition to communism should be gradual, and the 'rush to communism' in 1918 violated the principles they had set down.[360] Speaking of War Communism, Lenin admitted in October 1921:

> 'brief experience convinced us that that line was wrong, that it ran counter to what we had previously written about the transition from capitalism to socialism, namely, that it would be impossible to bypass the period of socialist accounting and control in approaching even the lower stage of communism. […] our theoretical literature has been definitely stressing the necessity for a prolonged, complex transition through socialist accounting and control from capitalist society (and the less developed it is the longer the transition will take) to even one of the approaches to communist society'.[361]

3.2.2 Reconsolidation of the Bolshevik Rule

By the early 1920s, the Bolshevik government had won the Civil War and proceeded to reconquer some parts of the Empire that had unilaterally declared their independencies. To Lenin's surprise, the revolutionary socialist leaders in Georgia, Armenia, and Azerbaijan took up arms against the Red

[358] As Lenin explained in a pamphlet, '[i]t was the war and the ruin that forced us into War Communism […]. Under this peculiar War Communism we actually took from the peasant all his surpluses - and sometimes even a part of his necessaries - to meet the requirements of the army and sustain the workers'. V. Lenin, 'The Tax in Kind: The Significance of the New Policy and Its Conditions' (1921) in V. Lenin, *Collected Works, Vol. 32* (Progress Publishers, 1965) 329-365.
[359] The Allied blockade of Soviet Russia was put in place on 11 November 1918, the same day than the Armistice with Germany. It was lifted on 16 January 1920. However, the Soviet continued to perceive that the Allies were attempting to create a unified capitalist front against them. This was broken by the Soviet diplomatic victory in their relations with Germany, finalized in the Treaty of Rapallo in 1922. X. Eudin and H. Fisher, *Soviet Russia and the West 1920-1927: A Documentary Survey* (Stanford, 1957) at 203, 411.
[360] G. Rozman, *The Chinese Debate about Soviet Socialism, 1978-1985* (Princeton, 1987) at 156-157.
[361] V. Lenin, 'The New Economic Policy and the Tasks of the Political Education Departments' in V. Lenin, *Collected Works, Vol. 33* (Progress Publishers, 1965) 69-79 at 62-63.

Army.[362] He observed that these leaders did not fight against the revolutionary policies of the Bolsheviks, but against the continuing domination by Moscow.

As a result, Lenin produced a major ideological contribution to the issue of self-determination.[363] He concluded that even though nationalism was a capitalist distortion, it would remain a social fact even under socialism and could not be ideologically neglected. As a result, it would have to be confined via self-determination of peoples. Moreover, there existed two different forms of nationalism: that of oppressed nations (such as that of Georgians, considered good and legitimate) and that of oppressor nations (such as Russian chauvinism, which could not be justified under socialism).[364] Without the latter, there would be no need for that of the former, and the world would advance towards the ultimate withering away of a state that Engels had predicted.[365] Subsequently, the Party started contemplating different state structures to overcome the national distrust of the formerly oppressed nations.[366]

3.2.3 The Second Stage: New Economic Policy and the Idea of a Federation

The second attempt to establish a communist order in Russia had its origins in the realization that it was to remain alone in a world of hostile capitalist powers.[367] In order for it to survive, there would need to be a competitive economy and support for the socialist order by the non-Russians. The

[362] Georgia was independent from 26 May 1918 to 25 February 1921, Armenia from 28 May 1918 to 2 December 1920, and Azerbaijan from 28 May 1918 to 28 April 1920.

[363] V. Lenin, 'Memorandum on the National Question' written in December 1922, published in *Sotsialisticheskii vestnik*, December 1923, 13-15.

[364] 'It is necessary to distinguish between the nationalism of the oppressing nations and the nationalism of the oppressed nation, the nationalism of a great nation and the nationalism of a small nation. In regard to the second nationalism we, the nationalism of a great nation, almost always prove in historical practice guilty of an endless amount of coercion and, even more than that, unnoticed to ourselves commit an endless amount of coercions and insults. [...]. For this reason, the internationalism of the oppressing side, or the so-called great nation […] must consist not only of the observance of the formal equality of nations, but also of that inequality which removes on the part of the oppressing, great nation that inequality which accumulates in actual life.' V. Lenin, 'Memorandum on the National Question' written in December 30-31, 1922, 13-15. Originally published in *Sotsialisticheskii vestnik*, December 1923.
Indeed, Russians were seen in these early stages of the socialist project as having no national rights, since they had misused their dominant role in the past. The Party was especially hostile towards the backward elements of the Russian culture, such as the Orthodox Church. Y. Slezkine, 'The USSR as a Communal Apartment, or How a Socialist State Promoted Ethnic Particularism' 53(2) *Slavic Review* (1994) 414-452 at 434.

[365] 'The Interference of the state power in social relations becomes superfluous in one sphere after another, and then ceases of itself. The government of persons is replaced by the administration of things and the direction of the processes of production. The state is not "abolished", it withers away'. F. Engels, *Anti-Duhring (Herrn Eugen Dühring's Umwälzung des Sozialismus*, 1878) at III.2.

[366] A prominent Bolshevik figure of national policy, Semen Dimanshtein, illustrated this in 1919: 'We are going to help you develop your own language and culture, because in this way you will join the universal culture, revolution and communism sooner'. S. Dimanshtein, 'Narodnyi komissariat po delam natsional´nostei' 41(49) *Zhizn' natsional'nostei,* 26 October 1919. Stalin later explained this phenomenon thus: 'We are undertaking the maximum development of national culture, so that it will exhaust itself completely and thereby create the base for the organization of international socialist culture'. Quoted in T. Martin, *The Affirmative Action Empire: Nations and Nationalism in the Soviet Union, 1923-1939* (Cornell, 2001) at 5.

[367] G. Gill, *Symbols and Legitimacy in Soviet Politics* (Cambridge University Press, 2011) at 37.

economic downfall was curtailed with the introduction of the New Economic Policy (NEP), and the peripheries were won over by the socialist ethnofederal model of territorial autonomy.[368]

According to the NEP, the peasants were allowed to sell the surpluses left after taxes under a market mechanism,[369] small private enterprises were allowed, and the ration card system was abolished.[370] Lenin was contemplating even more significant changes of policy, advocating a 'state capitalist' model under which 'the state performs the role of the capitalist employer, exploiting the workers in the interest of the state'.[371] Under socialism, there would be no exploitation of workers, but to achieve this level of progress, Russia would need to enhance its industrial base and productivity through capitalism. Influential Bolsheviks such as Bukharin and Trotsky regarded the NEP as a dangerous deviation from Marxism and opposed it vehemently. However, Lenin was able to curtail the opposition by highlighting the temporariness of the policy and, finally, by threatening to resign.[372]

3.2.4 The 'Assimilationists' versus the 'Autonomists'

While the NEP was grudgingly accepted as a temporary policy, the subject of federalism caused a major ideological split within the Party in the early 1920s. The opposing sides were the 'assimilationists' led by Stalin and the 'autonomists' led by Lenin.[373] While Lenin remained the nominal leader of the Party, he was losing this status due to his ailing condition.[374] The difference of opinion had to do with the future of the proclaimed Soviet Socialist Republics (SSRs) and the Autonomous Soviet Socialist Republics (ASSRs), and their relationship with the RSFSR.[375]

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[368] I. Sukhov, 'Russian Federalism and Evolution of Self-Determination' 5(3) *Russia in Global Affairs* (2007) 46-61 at 47. Significantly, certain national rights were based on the 'progressiveness' of a given ethnicity. See more on subchapter 3.3.

[369] The NEP was successful in saving the Soviet economy from a complete breakdown. Nevertheless, just as self-determination, it was seen as a temporary concession that would become obsolete with socialism. When Stalin took over after Lenin, he terminated the NEP. H. Glaza, 'Lenin's New Economic Policy: What It Was and How It Changed the Soviet Union' 1(11) *Inquiries Journal* (2009). *<http://www.inquiriesjournal.com/articles/59/lenins-new-economic-policy-what-it-was-and-how-it-changed-the-soviet-union>*.

[370] B. Gorshkov, *Peasants in Russia from Serfdom to Stalin: Accommodation, Survival, Resistance* (Bloomsbury Academic, 2018) at 187.

[371] A. Pannekoek, 'State Capitalism and Dictatorship' 3(1) *International Council Correspondence* (1937) 8-16 at 8. For the original writings on state capitalism, see V. Lenin, '"Left Wing" Childishness' 88-90 *Pravda* (1918) in V. Lenin, *Collected Works, Vol. 27* (Progress Publishers, 1972) 323-334. The USSR used the state capitalist system for most of the Soviet period, without officially adopting the term.

[372] W. Laqueur, *Soviet Realities: Culture and Politics from Stalin to Gorbachev* (Transaction Publishers, 1990) at 160.

[373] T. Rakowska-Harmstone, 'The Dialectics of Nationalism in the USSR' *Problems of Communism*, May 1974, 1-22 at 1.

[374] A series of strokes in 1922-1924 took away Lenin's ability to lead the Party, and 12 December 1922 was his last day in his office in the Kremlin. Y. Felshtinsky, *Lenin and His Comrades: The Bolsheviks Take Over Russia 1917-1924* (New York, 2010) at 218-219. Moreover, Lenin never held an unchallenged dictatorial position within the Party, such as his successor Stalin would.

[375] The SSRs were proclaimed mostly after the victory of the Bolshevik side in their Civil Wars during 1918-1919, for example, in Lithuania (16 December 1918), in Byelorussia (1 January 1919), and in Ukraine (19 March 1918). The ASSRs were, likewise, proclaimed as the Red Army reconsolidated the authority of Moscow in outer peripheries of the Empire, for instance, in Turkestan (30 April 1918), in Crimea (18 October 1921), and in Karelia (27 June 1923). After the October Revolution, the state lacked an official name for over three months, then was named the Soviet Russian Republic, on 25 January 1918, in the 3rd All-Russian Congress of Soviets, and, finally, renamed Russian Socialist Federative Soviet Republic in the Constitution promulgated on 10 July 1918.

The assimilationists insisted that the SSRs should be made autonomous areas of the RSFSR, and the elaborate system of treaties with them, created in 1918-1921, should be abolished. Stalin prepared a draft, called 'Project of a Resolution Concerning the Relations between the RSFSR and the Independent Republics', where he argued that the distinction between the ASSRs and the SSRs should be terminated, with all the SSRs being transformed into the ASSRs of the RSFSR.[376] In contrast, the autonomists favored the Leninist model of different levels of autonomy given to nations and nationalities of the USSR, including the notion that the SSRs would remain sovereign in the USSR.[377]

In the end, due to the personal authority of Lenin and the clear rejection of Stalin's draft by the Georgian, Byelorussian and Ukrainian SSRs, the autonomists were victorious. Lenin defended his stance with references to Engels, who was less hostile to federalism than Marx.[378] In addition, he insisted that the continuing commitment to self-determination had to be demonstrated by a voluntary treaty of Union, with a constitutionally guaranteed right of secession. As described by Lenin in 1919:

> 'We want a voluntary union of nations - a union which precludes any coercion of one nation by another - a union founded on complete confidence, on a clear recognition of brotherly unity, on absolutely voluntary consent […]. We are striving towards the complete abolition of frontiers'.[379]

The NEP and socialist ethnofederalism are quintessentially linked: both were major deviations from the original ideological tenets but were seen as necessary temporary evils. Ethnofederalism had two additional objectives: to demonstrate the progressiveness of socialist national policies in eradicating Russian chauvinism, while simultaneously keeping the USSR political unit intact.[380]

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[376] This draft was only partly published at the beginning of de-Stalinization in 1956. However, Richard Pipes has reconstructed the draft from the correspondence between Lenin and Stalin in 1922. Pipes (n 326) 270-271.

[377] Lenin consistently highlighted the transitory nature of federalism. 'Federalism is a transitional form of government enroute to the unity of the laborers of all nations'. V. Lenin, *Collected Works, Vol. 41, 1896 - October 1917* (Progress Publishers, 1969) at 164.

[378] He also referred often to the American and Swiss federal experiences, which had evolved from a confederation to a federation to centralized unity According to Lenin, a federation was 'the surest step to the most solid unification of the different nationalities or Russia into a single, democratic, centralized Soviet state'. Quoted in J. Stalin, *Sochineniia, Vol. 4* (Moscow, 1954) at 66. However, the American and Swiss models for a federal structure are different in many aspects. As explained by Lukic and Lynch, there are two possible features that well-functioning federation needs: either 'the capacity to create a nation (the US federal model) or the capacity to guarantee the peaceable coexistence of the diverse ethnic and linguistic groups that are constituent parts of the federation (the Swiss federal model'. They conclude that the USSR was unable to create a Soviet nation or a state structure that could provide a convincing degree of national equality among the constituent national groups of the federation. Lukic and Lynch (n 338) 8-9.

[379] 'Letter to the Workers and Peasants of Ukraine', 28 December 1919, in V. Lenin, *Collected Works*, *Vol. 30, September 1919 - April 1920* (Progress Publishers, 1965) at 293.

[380] The RSFSR Constitution was drafted in 1918, but was done in haste, did not include federalist provisions and was preoccupied with denying political power from the regime's enemies. *Constitution of the Russian Socialist Federative Soviet Republic*, 10 July 1918.

3.3 The Establishment of the Union of Soviet Socialist Republics

This subchapter accounts for the entrenchment of ethnofederalism in the Union Treaty (1922) and the first Constitution of the USSR (1924). Throughout the Soviet era, ethnofederalism remained a deviation from Marxism, to which the whole concept of a 'socialist state' was an oxymoron. However, the Leninist system was successful in retaining the multinational state inherited from Imperial Russia in an era of nation-states without seeming to re-establish imperialism.[381]

3.3.1 The Dual Structure of the Soviets and the Government

In the Bolshevik political theory, all supreme legislative authority belonged to the Soviets (*council* or *committee*). Initially, Russian workers had been largely organized, but under the state-sponsored trade unions. In the wake of the 1905 Russian Revolution, the first Soviets were proclaimed, representing a break with the government's oversight. The Soviets were autonomous movements organized all over the industrial centers of Russia, usually at the factory level.[382]

While the government forcibly closed down the Soviets in late 1905, they were resurrected during the 1917 Revolutions. The Bolsheviks were able to pressure out the more moderate factions and began radicalizing the Soviets with the slogan 'All power to the Soviets'.[383] As the supreme constitutional power base, the Soviets delegated their representatives to the All-Russian Congress of Soviets, which then appointed the Central Executive Committee, acting as a kind of a parliament. The real executive power lay in the Council of People's Commissars, the de facto government of the RSFSR, appointed by the Central Executive Committee.

3.3.2 The 1922 Union Treaty

In November 1918, the RSFSR government established the Council of Workers' and Peasants' Defense[384] as a supreme administering body for the combined Civil War effort of the RSFSR, Latvia, Lithuania, Byelorussia, and Ukraine. It was the first organ with authority outside the RSFSR. In 1919,

[381] Additionally, the Bolsheviks had been strongly affected by the simultaneous collapse of the Austro-Hungarian, Ottoman, and Tsarist Empires. As put by Martin, 'Lenin and Stalin understood very well the danger of being labelled an empire in the age of nationalism'. Martin (n 366) 19. As nationalism was conceived as a capitalist distortion, the ethnofederal model was to be transitory and the USSR itself a negation of all the previous states that had existed. For the dialectic method, see subchapter 3.1.2.
[382] A. Nin, 'The Soviets: Their Origin, Development and Function', originally published in *Cuademos de Cultura* (Valencia, 1932). <*https://libcom.org/library/soviets-their-origin-development-functions-andreu-nin*>. The most important was the Petrograd Soviet.
[383] V. Lenin, 'Declaration of Rights of the Working and Exploited People' in V. Lenin, *Collected Works, Vol. 26* (Progress Publishers, 1972) 423-425. This was also made explicit by a declaration in January 1918: 'Russia is hereby proclaimed a Republic of Soviets of Workers', Soldiers' and Peasants' Deputies. All power, centrally and locally, is vested in these Soviets'.
[384] In Russian *Sovet Rabochei i Krest'ianskoi Oborony*, established on 30 November 1918.

the RSFSR governmental degree deprived the other states of the Council of much of their powers without consent.[385] The basis for the USSR was laid on an unequal footing from the beginning.[386]

The federal structure introduced in the 1922 *Treaty on the Creation of the Union of Soviet Socialist Republics*[387] (the Treaty) would be the framework and Grundnorm of the Union all throughout the Soviet era. It was included into all subsequent constitutions as an annex. The original Republics of the Union were the RSFSR, the Ukrainian SSR, the Byelorussian SSR, and the Transcaucasian Socialist Federative Soviet Republic.[388] The Treaty determined the main principles of consolidation to be equal rights and voluntariness of the Union, the right of free withdrawal from the Union, and the right for new member states to join the Union.[389]

3.3.3 The 1924 Constitution of the Union of Soviet Socialist Republics

The 1924 Constitution contained a commitment to expand the USSR gradually by admitting new, ideologically liberated republics until the long-awaited 'withering away' would happen when the whole world had joined the USSR, which would then terminate itself as useless.

> 'access to the Union is open to all Republics already existing as well as those that may be born in the future. […] it will serve as a bulwark against the capitalist world and mark a new decisive step towards the union of workers of all countries in one world-wide Socialist Soviet Republic'.[390]

The Constitution was less centralized than the subsequent ones, with Article 1 listing the exclusive powers given to the Union. Article 3 proceeded to affirm the sovereignty still residing with the member Republics.[391] Article 15 listed the three original levels of the ethnofederal structure: four SSRs,[392] the ASSRs of the RSFSR and Georgia, and the AOs in the Transcaucasia.

The treaty also established federal governing organs. The supreme legislative organs were the Congress of Soviets of the Union (Congress) and the Central Executive Committee (CEC). Congress

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[385] All-Russian Central Executive Committee, 'On the Unification of the Soviet Republics of Russia, the Ukraine, Latvia, Lithuania and Belorussia for the Struggle against World Imperialism', 1 June 1919.
[386] The domination by the RSFSR was criticized in the Soviet circles in the early stages. For instance, Christian Rakovsky, Chairman of the Council of People's Commissars of the Ukrainian SSR, cited several instances where the RSFSR was issuing laws and degrees for the other SSRs even before the Union had been ratified. Quoted in Pipes (n 326) 292.
[387] *Treaty on the Creation of the Union of Soviet Socialist Republics* (n 167).
[388] The Transcaucasian Socialist Federative Soviet Republic was formed from the republics of Azerbaijan, Armenia, and Georgia in 1922. The previously mentioned Latvia and Lithuania were not able to join the Union at this point.
[389] *<http://www.prlib.ru/en-us/history/Pages/Item.aspx?itemid=371>*.
[390] *Constitution of the Union of Soviet Socialist Republics*, Part 1 Declaration, 31 January 1924. Lenin had a major influence on the constitutional ethnofederal model. However, the following Constitution of 1936 cancelled most of the theoretical decentralization.
[391] *Ibid.* Art. 3, 'The sovereignty of the member Republics is limited only in the matters indicated in the present Constitution, as coming within the competence of the Union. Outside of those limits, each member Republic exerts its public powers independently'.
[392] Part II of the Constitution, inexplicably, nevertheless mentions that the Socialist Soviet Republic of Transcaucasia includes 'the Socialist Soviet Republic of Azerbaijan, the Socialist Soviet Republic of Georgia and the Socialist Soviet Republic of Armenia'.

was meant to be the highest organ, with exclusive responsibilities including amending the Constitution, accepting new republics into the USSR, and electing the CEC and the Council of People's Commissariats (the government of the USSR, hereinafter Sovnarkom). However, in practice it was a propaganda device with declining importance,[393] and the 1936 Constitution disbanded it.

The main parliamentary body was the CEC, composed of the Federal Soviet and the Soviet of Nationalities.[394] The Federal Soviet's 371 members were elected among the representatives of the SSRs in proportion to the population, and they represented the interests of all Soviet people. The Soviet of the Nationalities was the organ that gave a voice to the different nationalities of the Union. It was composed of five representatives from each SSR and one representative from each ASSR and AO.[395] The CEC had the exclusive authority for publishing codes, decrees, and acts that were presented to it by its Presidium or by Sovnarkom.[396]

The ultimate power belonged to the 21 members in the CEC Presidium, elected in a joint session of the Federal Soviet and the Soviet of Nationalities. Between the sessions of the CEC, Presidium was 'the supreme organ of legislative, executive, and administrative power of the USSR'.[397]

3.4 The Organizational Structure of the Communist Party of the Soviet Union

The Communist Party of the Soviet Union (the CPSU) was a monolithic political organization that dominated all aspects of the political, economic, social, and cultural life of the USSR. Its basic units, the local Party organizations, were a feature in all bodies of importance, including factories, bureaucracies, schools, and collective farms. While the Constitution contained several decentralizing articles, the CPSU's monopoly on power made a major part of this decentralization irrelevant.[398] Indeed, the Constitution and other legal documents that supposedly regulated the governing of the Union were, in reality, subordinate to the policies of the CPSU leadership. Moreover, even though

[393] L. Schapiro, *The Origin of the Communist Autocracy: Political Opposition in the Soviet State; First Phase, 1917-1922* (2nd Edition, Harvard University Press, 1977) at 66.
[394] The 1924 Constitution of the USSR (n 390) Art. 13.
[395] *Ibid.* Art. 15.
[396] *Ibid.* Art. 17. According to Art. 37, the ministers were called People's Commissars.
[397] *Ibid.* Art. 29.
[398] As Richard Pipes put it, '[t]he evolution of Soviet federalism, therefore, cannot be studies merely from the point of view of the changing relations between the central and provincial institutions of the state; it must be approached, first of all, from the point of view of the relations between the central and provincial institutions of the Communist Party'. Pipes (n 326) 244.

the Soviet government and the CPSU were separate bodies, almost all high government officials were members of the CPSU - not surprisingly, as it was the only allowed political party in the country.[399]

The official supreme body in the CPSU was the Party Congress, where thousands of delegates met around once every five years. The Congress nominally elected the 300 members of the Central Committee, which performed the Party work in between congresses. The Central Committee elected the members of various party committees, with the Politburo and the Secretariat being the centers of ultimate power. The Politburo, with about 24 full members, was the supreme policy-making body in domestic and foreign policy. It was equivalent to the Presidium of the CEC in the federal structure. The Secretariat's area of responsibility was the administrative work of the Party apparatus.

In relation to the CPSU, by delegating rights to the territorial units, ethnofederalism was viewed with suspicion.[400] In response, Lenin added two principles in order to avoid localism that might constrain building socialism: the CPSU would function under the organizational principle of 'democratic centralism', and would be unified throughout the Union, organized for the interest of the proletariat and irrespective of national background.[401]

Lenin first formulated democratic centralism in his 1902 article 'What is to be Done?',[402] and finalized in a 1906 article 'Freedom to Criticise and Unity of Action'.[403] According to the principle, a CPSU body should have a debate when forming the Party line on a given subject behind the closed doors. Once there had been a vote and the decision had been made, there had to be a strict Party

[399] The CPSU was not mentioned in the 1918 RSFSR or the 1924 USSR Constitutions, but Art. 1.7 of the 1918 Constitution banned any opposition from holding governmental office. In 1936, the CPSU was made the only allowed political Party. *Constitution of the Union of Soviet Socialist Republics*, 5 December 1936, Art. 126. It retained this role in Art. 6 of the 1977 Constitution. At its height in the early 1980s, the CPSU had some 19 million members. G. Smith, *Soviet Politics: Struggling With Change* (St. Martin's Press, 1991) at 125.

[400] Leninist principles on ethnofederalism included four progressive demands: the right to self-determination and free secession from the Union; the right for the national groups to form their own 'independent' governments; full legal, political, and economic equality of all nations; and the equality of languages within the Union.

[401] The Eight Party Conference (March 1919) adopted the following resolution: 'At the present time, Ukraine, Latvia, Lithuania and Belorussia exist as separate Soviet Republics [...]. But this does not mean that the Russian Communist Party should in turn be organized as a federation of independent Communist Parties […]. It is necessary to maintain the existence of one centralized Communist Party with the Central Committee which directs all Party activities in all parts of the RSFSR. All the decision of the Russian Communist Party and of its leading institutions are unconditionally binding on all sections of the Party independently of their national compositions. The central committees of the Ukrainian, Latvian and Lithuanian Communist enjoy the right of the Party regional committees and are entirely subordinated to the Central Committee of the Russian Communist Party'. Quoted in W. Kulski, *Peaceful Coexistence: An Analysis of Soviet Foreign Policy* (Chicago, 1959) at 397. See also Gleason (n 349) 30-31.

[402] Lenin (n 354).

[403] V. Lenin, 'Freedom to Criticise and Unity of Action' 22 *Volna* 1906 in V. Lenin, *Collected Works, Vol. 10* (Progress Publishers, 1965) at 442-443. A similar organizational principle had been part of the First International Working Men's Association's *General Rules of the International Working Men's Association*, October 1864.

discipline and unquestioning subordination to the majority view. Any Party decision would be obligatory for the lower bodies, enabling the Party to appear uniform.[404]

In all his apparent defense of the rights of the non-Russian minorities, Lenin consistently subordinated the nationality issues to the class struggle, insisting that the Party had to represent only the class interest. An obvious contradiction manifested itself when democratic centralism clashed with the constitutional powers of the republics. Combined with the fact that the republican and the Party leaders were the same (mostly Russian) people, the ethnofederal structure lost a lot of its content.[405] Thus, the fundamental incompatibility of the division of powers in federalism and centralization inherent with communism weakened the otherwise decentralized federal structure.[406]

In conclusion, the Soviets were the basis of any political power in the USSR. However, the supreme legislative and executive organs of the Union, as well as the local Soviets who elected them, were subjected to de facto control of the CPSU. Therewith, the ultimate political power in the USSR was invested in the CPSU Central Committee and the Politburo. This explains the Bolshevik willingness to concede to federalism, otherwise in contradiction with their Marxist philosophy.

3.5 The Soviet Ethnofederal Structure: An Asymmetrical Federation

The USSR was a unique type of federation with three defining characteristics. First, peoples of the federation were proclaimed to continue to enjoy their right to self-determination, which materialized in an asymmetric model that gave them a different set of rights. The most privileged SSRs retained their sovereignty in the federation. Second, the Constitution guaranteed a set of rights for the subunits, with the SSRs enjoying an unconditional right to secession.[407] Finally, the continuing validity of the Union Treaty and the voluntary basis of the Union remained essential to Soviet constitutional theory.

The ethnofederal system was made permanent in the 1924 Constitution, which ranked all the recognized nations and nationalities of each region into a hierarchy of either SSR, ASSR, or AO. In each, the 'titular' nationality had the right to self-determination and a set of self-governing

[404] *Definition from the 1961 Party Rules*, adopted by the Twenty-Second Congress of the CPSU, 17-31 October 1961.
[405] Friedrich has called the USSR and the SFRY 'façade federations' due to democratic centralism and the domination by the unified Party undoing any real federal relations. C. Friedrich, *Man and His Government: An Empirical Theory of Politics* (New York, 1963).
[406] According to Richard Pipes, this 'lent the evolution of the Soviet state a peculiar character'. Pipes (n 326) 246.
[407] In the Part 1: Declaration of the 1924 Constitution 'the right to freely withdraw from the Union is assured to each Republic', in Art. 17 in the 1936 Constitution (n 399) and Art. 72 of the 1977 Constitution '[t]o every Union Republic is reserved the right freely to secede from the USSR'. However, the apparent shortcoming of this generous right was the lack of any procedural means of realizing it. For more on the right of secession in the Soviet context, see Buchanan (n 131) 127-147. According to the Comparative Constitutions Project, among 184 countries, 11 specify some rights of secession, 26 preclude secession, and 147 do not directly discuss the matter.

institutions.[408] The 1936 Constitution increased the number of autonomous units and added a fourth ethnofederal level, the Autonomous Okrugs (AOks).[409] In 1991, the USSR was composed of fifteen SSRs, twenty ASSRs, eight AOs, and ten AOks.[410]

The Soviet era presided over a number of intra-republican territorial transfers, the most famous being Crimea in 1954.[411] Other notable changes include the transfers of the Taranrog and Shakhty Okrugs from the Ukrainian SSR to the RSFSR in 1924,[412] reciprocal transfers between the RSFSR and Tuvan AO in 1944, and two major transfers from the Kazakhstan SSR to the Uzbekistan SSR.[413] Overall, the SSR borders were changed over 200 times, and the lower level borders even more often.[414]

The ranking of an ethnofederal unit was based on the combination of classification under scientific Marxism and geopolitical factors. Marxism awarded national rights only to the progressive nations - i.e., those that had advanced to the capitalist mode of production and could be seen as historical nations with national culture. A lower status meant that the nation had not advanced past feudalism or had not attained a sufficient level of national culture.[415] In general, the progressive SSRs and ASSRs were classified as 'nations' and the lower units as 'nationalities'.[416]

The geopolitical factor was that while most of the nationalities classified as ASSRs did not have a history as a political unit, the original SSRs had been recognized independent by the Western states.[417]

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[408] For example, in 1925, the Northwest corner of the Georgian SSR was awarded to Abkhazians under the title 'the ASSR of Abkhazia'.
[409] Curiously, when Stalin became the undisputed ruler of the USSR in the late 1920s, he expanded the ethnofederal system, which he had previously advocated against.
[410] The 1977 Constitution of the USSR (n 200) Arts. 71, 85, 87, and 88.
[411] Crimea had been an ASSR in the RSFSR from 1921-1942, after which it lost the ASSR status and autonomy. In 1954, it was transferred to the Ukrainian SSR. In early 1991, Crimea regained the ASSR status, title of which it possessed up until the dissolution.
[412] E. Krinko and M. Medvedev, '"To Elect a Parity Commission": Documents about the Transfer of Taganrog and Shakhty Districts to the RSFSR in 1924-1925' 10(4) *Russkii Arkhiv* (2015) 288-295.
[413] The transfers took place in 1956 and 1963, including 170 000 hectares and 959 000 hectares of land, respectively. The main motive of these transfers was centralizing of agricultural administration in the area. E. Allworth, *Central Asia, 130 Years of Russian Dominance: A Historical Overview* (Duke, 1995) at 296. Joshua Castellino has noted the problematic nature of applying *uti possidetis* to the borders without taking into account these transfers. J. Castellino, *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial National Identity* (Martinus Nijhoff Publishers, 2000) at 119. However, the temporal scope of application of uti *possidetis* is the internal administrative borders at the moment of independence. For example, in *Guinea-Bissau v. Senegal arbitration*, the Tribunal did not accept the argument for returning to prior borders before colonial transfers, proclaiming that there is no 'special condition of antecedence' relating to the changing of borders prior independence. *Guinea-Bissau v. Senegal Arbitral Award of 31 July 1989*, Judgement, I.C.J Reports (1991) 53.
[414] P. Goble, 'Territorial Swap between Two Russian Oblasts Could Become Model for Redrawing Borders Elsewhere, Geographer Says', *Window on Eurasia*, 27 January 2020.
[415] F. Hill, *"Russia's Tinderbox": Conflict in the North Caucasus and its Implications for the Future of the Russian Federation* (Harvard, 1995) at 2.
[416] The Soviet constitutional theory was not altogether consistent with the 'nations' and 'nationalities' terminology. It was also common to refer to the first two levels as 'states' and the lower two levels as 'ethnoterritorial self-administrative units' within their host SSR. G. Ubiria, *Soviet Nation-Building in Central Asia: The Making of the Kazakh and Uzbek Nations* (Routledge, 2016) at 96-97.
[417] For instance, Ukraine had participated in the Brest-Litovsk peace negotiations and Armenia, Azerbaijan, and Georgia had maintained diplomatic missions abroad with both de facto and de jure recognition by the most important Western states. Pipes (n 326) 250.

The CSPU felt necessary to create the impression that the SSRs retained their independence, hence the voluntary Union Treaty. This resulted in a stark distinction in the Soviet political theory and constitutional law between the non-Russian areas inland and the borderlands.

When the 1936 Constitution was being drafted, Stalin made a lengthy rebuttal on each of the proposed amendments.[418] One proposal was to add a new article to legislate that when reaching a proper level of economic and cultural development, the ASSR could be promoted to the status of a SSR. Stalin re-affirmed the possibility for promotion but insisted on three additional criteria. First, Stalin confirmed the already established practice that the ASSR in question had to have a border with a foreign country, in order to make the right to secession theoretically possible.[419] Second, the titular nation of the ASSR had to form a majority within that republic. Finally, to be able to protect its independence it had to have a population of over a million.[420]

All of the ethnofederal units had representation at the federal level. The 1936 Constitution changed the name of CEC to the Supreme Soviet of the USSR. Like its predecessor, it was the highest legislative federal organ with two chambers, the Soviet of the Union and the Soviet of Nationalities. The Supreme Soviet was elected from the ethnofederal units proportionately to their population, representing the needs of the USSR as a whole. The Soviet of Nationalities existed to guarantee political participation of the nations and nationalities. Its representational structure was changed twice, portraying the changes in the political power of the national units. The 1936 Constitution was a victory for the ASSRs, and a subsequent loss for the lower units, as the representation was set to be 25 deputies from each SSR, 11 from each ASSR, five from each AO and one from each AOks.[421] The 1977 Constitution raised the SSR deputies to 32.[422]

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[418] J. Stalin, 'On the Draft Constitution of the USSR', Report Delivered at the Extraordinary Eight Congress of the Soviets of the USSR, 25 November 1936 in J. Stalin, *Problems of Leninism* (Peking, 1979) 795-834.

[419] Not coincidentally, all the SSRs had borders with foreign countries, while the only ASSR with such a border was the Karelian ASSR, a former SSR. According to Ronald Helin, the downgrading of the Karelian ASSR resulted from the improvement of relations between the USSR and Finland. Thus, the USSR made a decision to make Finland a model of its good intensions toward neutral countries in 1955. R. Helin, *Economic-Geographic Reorientation in Western Finnish Karelia: A Result of the Finno-Soviet Boundary Demarcations of 1940 and 1944* (Washington, D.C, 1961) at 101. In addition, two ASSRs were bordering Mongolia, Buryat ASSR and Tuvan ASSR, but Mongolia was throughout the Soviet-era a virtual puppet state of the USSR, not a foreign country *per se*.

[420] Stalin (n 418) 826. While the criteria was never officially codified, it became the norm, although sometimes applied arbitrarily. E.g., the Karelo-Finnish SSR was breaching the third criterion with a population of only half a million, while Kazakhs, Kirghiz, and Karelians were all breaching the second criterion with less than 50% of the population being members of the titular nation. Ubiria (n 415) 96; and B. Nahaylo and V. Swoboda, *Soviet Disunion: A History of the Nationalities Problem in the USSR* (London, 1990) at 361.

[421] The 1936 Constitution of the USSR (n 399) Art. 35.

[422] The 1977 Constitution of the USSR (n 200) Art. 110.

3.5.1 The Soviet Socialist Republics

The SSRs were the main units that constituted the USSR, retaining sovereignty over their territory and possessing the exclusive right to free secession.[423] Their number varied between the original four and the peak of 16 in the 1950s. This status was reserved only to the most progressive nations,[424] and it was possible to gain or lose this privileged position.[425] The SSRs had their borders, governments, legislatures, constitutions, judiciaries, national flags, armed troops, and the right to have direct foreign relations.[426] The governmental structure of the SSRs was a miniature of the USSR model, with their Supreme Soviet, Council of Ministers, and Supreme Court.[427] The SSRs were subjected only to the federal center and only in areas where they had granted it exclusive jurisdiction. However, while their territory could not be altered without their consent, they did not have the right to ratify constitutional amendments, so their powers could be altered without consent.[428]

3.5.2 The Autonomous Soviet Socialist Republics

The ASSRs were subunits located within their host SSRs.[429] This status was awarded to the 'national states' that were numerically smaller than the 'sovereign states' of the SSRs.[430] Notwithstanding, the ASSRs possessed attributes usually attached to sovereignty. For example, a 1996 study by the European Commission of Democracy through Law called the ASSR status a 'specific form of statehood', adding that 'each nation creating an autonomous republic in the Soviet federation had the right to self-determination on the basis of national sovereignty'.[431] Just as their more progressive

[423] In the Western scholarly circles, this right was often referred to as a simulation or 'constitutional fiction'. For instance, see R. Sharlet, 'Constitutional Law and Politics in Russia: Surviving the First Decade' 11(1) *Demokratizatsiya, The Journal of Post-Soviet Democratization* (2003) 122-128 at 123; S. Lee, *Russia and the USSR, 1855-1991* (Routledge, 2006) at 36; and Walker (n 187) 6.

[424] See, *inter alia*, J. Larrain, 'Classical Political Economists and Marx on Colonialism and "Backward" Nations' in B. Jessop and R. Wheatley, *Karl Marx's Social and Political Thought: Critical Assessments of Leading Political Philosophers, Second Series* (Routledge, 1999) 164-195 at 174-175.

[425] The later downgraded SSRs were the Karelo-Finnish SSR (1940-1956, the status changed to the ASSR), the Bukharan People's Soviet Republic (1922-1925, divided between the Uzbek SSR and the Turkmen SSR), and the SSR of Abkhazia (1921-1924, the status changed to the ASSR). Abkhazia had a unique history within the Soviet political theory, as it was the only 'contractual republic' of the USSR, in a state union with the Georgian SSR, as well as part of the Transcaucasian SFSR in 1921-1924.
The most privileged SSRs of Ukraine and Byelorussia were admitted - under the Soviet constitutional theory rather curiously - to the UN as independent nations in 1945. The USSR first attempted to secure the UN membership for all the SSRs, but after a political compromise acquiesced for three seats.

[426] Zürcher (n 174) 25.

[427] The 1936 Constitution of the USSR (n 399) Arts. 57, 63, and 102.

[428] N. McCabe, *Comparative Federalism in the Devolution Era* (Lexington, 2002) at 150. Like many of the scholars studying Soviet constitutional law, he concludes that the constitutional provisions in the Soviet context usually did not describe nor determined political practice and that they included provisions that undermined any apparent concessions to federalism.

[429] Except for the Nakhichevan ASSR, which was part of the Azerbaijan SSR but located within the Armenian SSR.

[430] Zürcher (n 174) 26.

[431] S. Holovaty, 'Territorial Autonomy in Ukraine - The Case of Crimea' in European Commission of Democracy through Law, *Local Self-Government, Territorial Integrity and Protection of Minorities*, Proceedings, Lausanne 25-27 April 1996, published in *Science and Technique of Democracy*, No. 16 (Council of Europe, 1996) 135-150 at 141-142. See also G. Lapidus, 'Ethnonationalism and Political Stability in the USSR', *Final Report to National Council for Soviet and East European* Research (University of California, 1984) at 12; and Hill (n 415) 2. According to Stowe-Thurston, the ASSRs had a stronger claim to self-determination than the lower

counterparts, they received delineated borders, individual constitutions and national symbols, but without the rights to independent foreign relations or secession. Their governmental structure was almost an exact parallel to the SSRs, with the ASSR Supreme Soviet and the Council of Ministers.[432] However, as a significant differentiation from the SSRs, until the early 1990s, the ASSRs were constitutionally subjects of the host SSR, unlike the SSRs who were subjects of the USSR. Thus, the ASSR enters the structure of the USSR as autonomous parts of the host SSRs.[433] Like the SSRs and unlike the lower-level units, the ASSR territory could not be altered without consent.[434]

The cultural rights of the ASSRs were more restricted than the SSRs. As a rule, education was only available in Russian. Nonetheless, they had their political cadres, and as an informal rule, members of the titular nation were favored to cadre positions and university places.[435]

As any ethnofederal status, the ASSR's could be promoted or demoted within the system. Examples of this include *Volga German* (1918-1941 an ASSR of the RSFSR, autonomy abolished);[436] *Chechnya* (1922-1936 an AO of the RSFSR, 1936-1944 an ASSR, 1944-1957 autonomy abolished, 1959-1991 an ASSR); *Karbardino* (1921-1936 an AO of the RSFSR, 1936-1991 an ASSR); *North Ossetia* (1924-1936 an AO of the RSFSR, 1936-1991 an ASSR); *Kalmyk* (1920-1935 an AO of the RSFSR, 1935-1943 an ASSR, 1943-1957 autonomy abolished, 1957-1958 a return to an AO and 1958-1991 to an ASSR); *Karakalpak* (1925-1932 an AO of the RSFSR, 1932-1936 an ASSR, 1936-1991 an ASSR of the Uzbek SSR); and *Tuva* (1921-1944 an 'independent' satellite state, 1944-1961 an AO of the RSFSR, 1961-1991 an ASSR).[437]

To summarize, the SSRs and the ASSRs possessed many similarities in their legal rights. They were titled 'states' in the Constitution, their consent was required for territorial changes, and they enjoyed a number of state attributes. Yet, they also had a few key differences, with the right to secession and

units that were typically ethnically Russian. A. Stowe-Thurston, 'A State of the Union: Federation and Autonomy in Tatarstan', *Russian Studies Honors Projects*, Paper (2016) at 38.

[432] The 1936 Constitution of the USSR (n 399) Arts. 89 and 93.

[433] E.g., B. Balayer, *The Right to Self-Determination in the South Caucasus: Nagorno Karabakh in Context* (Lexington, 2013) at 116; and F. Feldbrugge, G. Van Den Berg and W. Simons (Eds), *Encyclopedia of Soviet Law* (Martinus Nijhoff Publishers, 2nd Edition 1985) at 73.

[434] The 1977 Constitution of the USSR (n 200) Art. 84.

[435] 'This positive discrimination adhered to the Soviet drive for the incorporation of national elites'. Zürcher (n 174) 26.

[436] Nahaylo and Swoboda (n 420) 361.

[437] *Goskomstat SSSR (1989), Natsionalnyi sostav naseleniya SSSR: Po dannym vsesoyuznoi perepisi naseleniya 1989. <http://demoscope.ru/weekly/ssp/sng_nac_89.php?reg=1>.*

the term 'sovereign' only awarded to the SSRs. The representational quotas in the federal organs also favored the SSRs. Thus, in relation to *uti possidetis*, these units were in a different position.[438]

3.5.3 The Autonomous Oblasts and the Autonomous Okrugs

The status of an AO was awarded to small ethnic groups in a compact area of settlement. Their autonomous rights did not include sovereign attributes, such as constitutions or national symbols, and resembled more of a limited form of autonomy. The AOs were subjects of the host SSR, and their territory could be changed without their consent. Again, promotion within the system was possible.[439]

The last ethnofederal level was AOks. They were under their host AOs jurisdiction and had only a limited set of cultural rights. They did not receive promotions in the Soviet era.[440]

Finally, there were around seven million people without a unit in the ethnofederal structure.[441] Usually, this discrimination was justified since these national groups had a national state outside the USSR, for example, Germans,[442] Poles, Koreans, Bulgarians, and Greeks.[443]

3.6 The Changing Tides of the Soviet National Policy: *Korenizatsiia*, *Sblizhenie,* and *Sliyanie*

In the first years of the ethnofederal system, Soviet national policy discouraged even voluntary assimilation to the Russian culture and national self-consciousness was correspondingly promoted. All official recognized minorities were encouraged politically and financially to establish their national schools, producing in time indigenous national elites. The USSR assisted in creating a written language for those official ethnic groups that had been lacking one.[444] Local languages were then taught at schools and universities, as well as used in local administration.[445]

[438] Although this line became blurred with the Constitutional amendments of the 1990s. See subchapter 3.7.4.
[439] For example, Yakut, Chuvash, Udmurt, and Mari AOs (all established in 1920) became ASSRs in 1922, 1925, 1934, and 1936, respectively. For a complete list of the promotions and demotions within the Soviet ethnofederal structure, see J. Olson (Ed), *An Ethnohistorical Dictionary of the Russian and Soviet Empires* (Greenwood, 1994) at 777-780.
[440] Outside the autonomous ethnofederal system, the 1936 Constitution also added to the Soviet administrative structure Oblasts (basic administrative units of the SSRs), and Krais, (territories of strategic importance) without any autonomous rights.
[441] Gleason (n 349) 12.
[442] Numbering around two million. Nahaylo and Swoboda (n 420) 361.
[443] The Yugoslavian nationality policy, likewise, used the outside national state of nationality of the SFRY as the basis for discriminatory representation in the governmental structure. See Chapter 4.1.3.
[444] Slezkine (n 364) 421-423.
[445] This sometimes provoked a long adaptation process of a previously Russianized population. *Ibid*. at 102-103.

The promoted national policy of *korenizatsiia* - 'indigenization' - aimed to make the Soviet rule appear more 'indigenous' to non-Russians.[446] Each ethnofederal unit received an official culture and folklore, with the aim to 'drain nationality of its content while legitimizing it as a form'.[447] In order to demonstrate progression under historical materialism, socialist themes were promoted in the events chosen to be included in their official national histories.[448]

A system of personal nationality complemented ethnofederalism. Similarly to the ethnofederal units, the citizens of the USSR were categorized into an exhaustive set of over a hundred national groups. The personal nationality had significant effects, as it was a key element of an individual's legal status, registered in internal passports, transmitted by descent and recorded in most official transactions.[449]

Korenizatsiia ended abruptly in the late 1930s, as Stalin began to see periphery nationalism as a threat. Russian nationalism, previously been condemned as oppressive, was rehabilitated, and the national culture in the USSR was proclaimed to be 'national in content, socialist in form'.[450] In 1938, the Russian language became compulsory in all schools and many institutions established during the *korenizatsiia* era were dismantled.[451]

The next change of policy took place when Nikita Khrushchev had consolidated his power after the death of Stalin. The 20th Party Congress (1956) again recognized the existence of national differences in the USSR. In the 22nd Party Congress (1961) Khrushchev presented two new national concepts: *sblizhenie* (сближение, 'coming together') and *sliyanie* (слияние, 'merging') of nations. He was basing his concepts on the early Leninist national policy, where it was presupposed that the march towards socialism would make nations to disregard their differences and to work together (*sblizhenie*), while at the same time creating a common, internationalist culture through merging (*sliyanie*). As he summarized in his report on the Party Programme (1961):

> 'Under socialism, two interconnected, progressive tendencies operate on the national question. In the first place, each nation is undergoing a tempestuous all-round development and the rights of the union and

[446] Ronald Suny has argued that the early USSR of the 1920s became the 'incubator of new nations'. R. Suny, *The Revenge of the Past: Nationalism, Revolution and the Collapse of the Soviet Union* (Stanford University Press, 1993) at 87.
[447] R. Brubaker, 'Nationhood and the National Question in the Soviet Union and Post-Soviet Eurasia: An Institutionalist Account' 23 *Theory and Society* (1994) 47-78 at 51.
[448] According to Brubaker, the USSR failed to create any sense of national belonging for the state as a whole. 'No other state has gone so far in sponsoring, codifying, institutionalizing, even (in some cases) inventing nationhood and nationality in the sub-state level, while at the same time doing nothing to institutionalize them on the level of the state as a whole'. R. Brubaker, *Nationalism Reframed: Nationhood and the National Question in the New Europe* (Cambridge University Press, 1996) at 29.
[449] Brubaker (n 447) 53.
[450] Stalin (n 418) 805.
[451] R. Zia-Ebrahimi, 'Empire, Nationalities and the Collapse of the Soviet Union', *Vestnik, the Journal of Russian and Asian Studies*, 8 May 2007.

> autonomous republics are expanding. In the second place, under the banner of proletarian internationalism the socialist nations are drawing ever closer together'.[452]

While Khrushchev retained Russian as the language of Union-wide communication, he abolished other Russification measures, shifted some economic-administrative competencies to the republics, and installed many non-Russians to important offices in central and local governments.[453] Regardless, in 1964 many of these measures were again reversed by his successor Leonid Brezhnev. The last USSR Constitution was approved in 1977 amidst debate over whether Lenin had wanted the ethnofederal structure to be a temporary solution to the national question. On 4 October 1977, Brezhnev gave a report to the Supreme Soviet on the proposed amendments to the Draft Constitution. He concluded that proposals had been advanced to introduce a reference to a single Soviet Nation, to liquidate the sovereignty of the SSRs and the ASSRs, and to abolish the Soviet of Nationalities. Nevertheless, these proposals were resisted as premature.[454]

During the tenure of his successor Yuri Andropov, the USSR finally conceded that national identity would outlive class identity even under socialism.[455] Stressing the continuing Soviet confusion over the subject, in 1982, Andropov called for a 'well thought of, scientifically substantiated nationalities policy', acknowledging to a lack of one.[456] The Party kept on trying, in vain, to square the vicious circle of advancing national cultures while assuring their conformity.

3.7 The Disintegration of the Ethnofederal Structure

The collapse of the USSR has produced numerous scholarly accounts on its underlying grounds.[457] While a contributing factor, nationalism should not be blamed for the dissolution. Indeed, the ethnofederal model had sustained centralized control from Moscow for 70 years. However, with the

[452] Quoted in G. Hodnett, 'The Debate over Soviet Federalism' 18(4*) Soviet Studies* (1967) 458-481.
[453] In 1956, a Regional Economic Council was created in order to decentralize economic management. *Ibid.* at 458.
[454] *Izvestiia*, 5 October 1977. The Constitution ended up curtailing the rights of the lower-level units by giving the SSRs additional seven representatives in the Soviet of Nationalities. However, the Constitution used the term 'socialist federalism' for the first time.
[455] Lapidus (n 431) III. This was highly problematic due to a simultaneous ideological crisis over the underperformance of socialism.
[456] Interview in *Pravda*, 22 December 1982 at 1-2. Under Andropov, the goal of creating a Soviet Nation was abandoned. The same year, his future successor Konstantin Chernenko admitted that there was 'the problem of the relationship between the two leading trends in the development of nations under socialism: their all sided development and flowering on the one hand and their steady rapprochement on the other'. *Pravda*, December 1982 at 10, quoted in Lapidus (n 431) 6.
[457] For different viewpoints, see, R. Strayer, 'Decolonization, Democratization, and Communist Reform: The Soviet Collapse in Comparative Perspective' 12(2) *Journal of World History* (2001) 375-406 (arguing the dissolution as principally a belated decolonization of an Empire); V. Vujačić, *Nationalism, Myth, and the State in Russia and Serbia: Antecedents of the Dissolution of the Soviet Union and Yugoslavia* (Cambridge University Press, 2015) at 10-38 (arguing that it was due to the non-Russian elites losing allegiance to the federation after economic setbacks); and D. Marples, 'Revisiting the Collapse of the USSR' 53(2/4) *Canadian Slavonic Papers* (2011) 461-473 (arguing that it resulted from a series of economic failures with simultaneous de-legitimization of Marxism-Leninism).

ideological bankruptcy of socialism - the *raison d'etre* of the Union - the ethnofederal units provided a suitable template for the peaceful dissolving of the federation that had become obsolete.

The USSR had always predicted the ultimate withering away of a state and saw no danger in equipping the ethnofederal units with prerequisites of statehood or proclaiming their sovereign status. In addition and equally importantly, the system had created indigenous national elites in the SSRs and the ASSRs. By providing them with administrative and political institutions embodied in their 'national homelands', ethnofederalism had created national figures with a political history of favoring their 'own' units to the extent that the centrally planned economy allowed.[458] While all this was harmless under the tight grip of the CPSU, the combination of the struggle over fewer resources and the loosening of the Party control led to the local national leaders to change their rhetoric, first to promoting national rights, followed by the calls for independence.

Finally, the role of the last leader Mikhail Gorbachev cannot be underestimated. While he inherited a federal project undergoing a systemic crisis, his radical policies did shape at the very least the way and the timing of the dissolution of the USSR.[459]

3.7.1 The 'Pre-Crisis' Situation

The era of Soviet stagnation came to an end with the accession of Gorbachev in March 1985. Just as his two predecessors in 1982-1985, the new General Secretary of the CPSU was confronted with massive structural problems with the Soviet economy. However, unlike his predecessors, he was ready to acknowledge the situation and to act accordingly. In relation to the nationality issues, a January 1987 Plenum of the Central Committee of the CPSU recognized the flaws in the official ethnic policies and initiated the groundwork for the future changes.[460] In the subsequent Plenum in

[458] Vujačić (n 457) 12.

[459] There is no scholarly consensus on whether Gorbachev caused the collapse of the USSR or whether he merely postponed the inevitable with his attempt to save the Union. For more on this debate see, inter alia, C. Martinez, 'Cases of the Collapse of the U.S.S.R under Mikhail Gorbachev' *Academia,* 10 September 2014, who blames Gorbachev's policies as the main reason for the collapse of the USSR; and H. Mullock, 'The Collapse of the Soviet Union: Major Reasons and Implications', *Research-Methodology*, 30 May 2016 *<http://research-methodology.net/the-collapse-of-the-soviet-union-major-reasons-and-implications/>,* who gives a more favorable view on Gorbachev and his role in the dissolution.

[460] This led to a series of changes in the nationality policy. New analytical units on the nationalities issues were established in the USSR Academy of Sciences and to the SSR academies. In August 1988, a special unit on nationality policy was established within the CPSU Central Committee, which culminated in its *Draft Nationalities Policy of the Party under Present Conditions* a year later. A. Osipov, 'The Background of the Soviet Union's Involvement in the Establishment of the European Minority Regime in the Late 1980s' 15(2) *Journal on Ethnopolitics and Minority Issues in Europe* (2016) 59-77 at 65.

June 1987, Gorbachev confronted the Party leadership over the economic problems, insisting that the USSR was in a 'pre-crisis situation',[461] which had to be addressed:

> 'At some stage - this became particularly clear in the latter half of the seventies - something happened […]. The country began to lose momentum. Economic failures became more frequent. Difficulties began to accumulate and deteriorate, and unresolved problems to multiply. Elements of what we call stagnation and other phenomena alien to socialism began to appear in the life of society'.[462]

Gorbachev's approach to these issues had two inherent flaws. First, the Soviet economy was even worse off than he was conceding.[463] Second, he thought socialism as an intrinsically non-flawed system that only needed an adjustment by 'turning to Lenin', whom he cited often.[464]

Nevertheless, Gorbachev introduced a series of radical measures to Soviet politics. He made some astonishing successes in foreign policy, including a significant lowering of tensions of the Cold War rivalry and a series of arms-reduction negotiations and treaties.[465] Having inherited a situation of encirclement by hostile powers,[466] Gorbachev was able to improve relations with all the neighbors of the USSR.[467] In the domestic front, Gorbachev had to balance carefully between the conservative Party hardliners and the liberal reformers. Additionally, he was the first Soviet leader since Lenin to acknowledge the grievances of the non-Russian peoples. The national policy had remained since Stalin's formulation in its base assumptions the same: a nation in the USSR was a group of individuals with cohesiveness among language, culture, and ethnicity, residing in a particular area. Ethnofederalism then addressed the right to self-determination via more-or-less sovereign administrative units, named after the titular nation. However, there was one restriction: only the toilers of a nation, not its bourgeois, could enjoy self-determination.[468] Thus, the secession right became obsolete, as only bourgeois would want to secede, and they did not have a right to self-

[461] M. McCauley (Ed), *Gorbachev and Perestroika* (Palgrave Macmillan, 1990) at 106-107.
[462] M. Gorbachev, *Perestroika: New Thinking for Our Country and the World* (Harper & Row, 1987) at 18-19.
[463] Gorbachev admitted later that due to his hesitation, he dismissed his economic advisors' proposals and missed the most favorable window of opportunity in 1987-1988. J. Prados, *How the Cold War Ended: Debating and Doing History* (Washington, 2011) at 112.
[464] *Ibid*. at 25-26. In relation to the sovereign status of the SSRs in the USSR, Gorbachev said that '[f]irst of all, it should be stressed that the Party will work consistently to implement the Leninist nationalities policy, including the basic principle of the right of nations to self-determination'. Quoted in Walker (n 187) 72. Graber, Burns and Siracuse have argued that Gorbachev could never cope with his internal conflict between the need for profound transformation and his own system-supportive tendencies. N. Grabner, R. Burns and J. Siracuse, *Reagan, Bush, Gorbachev: Revisiting the End of the Cold War* (Praeger, 2008) at 125.
[465] The most important treaties were the *Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles*, signed 8 December 1987, and the *Strategic Arms Reduction Treaty*, signed 31 July 1991.
[466] R. Sakwa, *Gorbachev and His Reforms, 1985-1990* (New York, 1990) at 315.
[467] This came with the price of losing the Soviet satellites and, ultimately, his power base in the CPSU. However, Zubok has argued that the most important aspect of Gorbachev's learning process was his growing realization early on that the USSR was inferior to the West both militarily and economically. V. Zubok, 'Why Did the Cold War End in 1989? Explanations of "The Turn"' in O. Westad (Ed), *Reviewing the Cold War* (London, 2000) 343-368 at 355.
[468] Vujačić (n 457) 10.

determination.[469] This all changed under Gorbachev, who wanted to reaffirm the voluntary basis of the Union with a new Treaty, after rejuvenating the Soviet economy and ideology.

3.7.2 *Perestroika*, *Glasnost*, and the Effects to the Soviet National Policy

Perestroika (перестро́йка, 'restructuring') was Gorbachev's most ambitious goal, amounting to nothing less than reforming the entire political and economic system of the USSR. While it introduced a series of market-like reforms, the aim was not to end the central-planned economy but to make it more efficient. *Perestroika* did not directly address nationality issues, but it led to another, equally radical shift of policy via *Glasnost* (гла́сность, 'openness'). It aimed to increase transparency in governance and accomplished first a decrease in censorship, followed by freedom of speech.[470]

Glasnost had a major impact on the national policy. As Gorbachev needed a new power base for his reforms, he started promoting the democratization of the Soviet political culture. After gathering support in the 19th Party Conference of the CPSU in 1988,[471] he made the Supreme Soviet approve constitutional amendments establishing a new legislative parliament, the Congress of People's Deputies (CPD).[472] Significantly, for the first time in Soviet history, the elections for CPD were multi-candidate.[473] As a result, opposition candidates gathered some 300 out of 2250 seats in the CPD and demanded the repeal of Article 6 of the Constitution that ensured the CPSU's political monopoly.

Gorbachev persuaded the Supreme Soviet to repeal Article 6 just prior to the March 1990 local elections of the SSRs and the ASSRs. This produced another failure, as the CPSU lost the elections in the Baltic States, Moldova, Armenia, and Georgia, and faced a powerful nationalist opposition in the rest of the SSRs. Significantly, due to the *glasnost* reforms of free speech, open discussion over the nationality issues was made possible. The elected national representatives started to publicize the grievances of their legal position in the USSR.[474]

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[469] Additionally, this justified the banning of all the other political parties than CPSU throughout the USSR.

[470] In retrospect, one could summarize that perestroika was a failure while glasnost was a success, based on the original goals. See more in S. Fish, 'The Hazards of Half-Measures: Perestroika and the Failure of Post-Soviet Democratization' 13(2) *Demokratizatsiya, The Journal of Post-Soviet Democratization* (2005) 241-253.

[471] The Party Conference was a huge gathering on the CPSU members that had not taken place since 1941.

[472] The SSRs also established their individual CPDs to replace the Supreme Soviets, as well as a position of a President of the SSR. On 27 October 1989, an amendment to the RSFSR Constitution allowed the ASSRs to establish their CPDs, with Dagestan being the only one to use this right. The amendment also established a Committee for Constitutional Supervision.

[473] However, the elections were still not multi-party, as the CPSU retained its constitutional position as the only allowed political party. Additionally, one-third of the seats were reserved for the CPSU. The first opposition bloc was formed in the summer of 1989 from the liberal and nationalist members of the opposition in the CPD, led by Boris Yeltsin.

[474] Most vocal being the Lithuanian SSR that had declared independence on 11 March 1990 and the Georgian SSR that had declared the treaty by which it became part of the USSR null and void. D. Barry et al, *Perestroika at the Crossroads* (Sharpe, 1991) at 235.

The years 1988-1990 brought on a further deterioration of the economy and national unity. The most serious signs of this were the armed clashes between the Armenian and the Azerbaijan SSRs and the Baltic States' intensifying demands for independence. In 1989, the Central Committee of the CPSU adopted a *Draft Nationalities Policy of the Party under Present Conditions*, admitting that:

> 'the nationalities question in the Soviet Union has become extremely acute recently. The Party recognizes that a solution to the problems that have arisen in this connection is of enormous importance for the fate of restructuring and the future of our country'.[475]

The Draft blamed the contemporary problems in the USSR on 'deformations' in national policy after Lenin and described the sovereignty of the republics as 'largely formal'.[476] However, Gorbachev aimed to change this with a renewed Leninist federation that would limit the federal government's powers to foreign and defense policies and to 'general tasks' in economic policy.[477] In a speech a few months later, he concluded that 'up to now our state existed as a centralized and unitary state and none of us has yet the experience of living in a federation', that the political and economic realities in the USSR 'violate the constitutional provisions of the Soviet federation both in letter and spirit' so that 'the very idea of federation has been seriously compromised'.[478]

Gorbachev's attempts to grant the subunits the powers that the Marxist-Leninist ideology had been promising was a precarious issue. Socialist ethnofederalism had always been a balancing act between granting the ethnofederal units cultural autonomy, defined territory and symbols of statehood, while insisting on the supremacy of the central state and Party in order to sustain the central-planned economy.[479] While Gorbachev's reforms tried to reconfirm a voluntary Union between sovereign states, his policies were eroding the supremacy of both the state and the Party.

3.7.3 The Parade of Sovereignties

On 12 June 1990, the process that was later termed the 'parade of sovereignties' started with the *Declaration of State Sovereignty of the RSFSR*.[480] It proclaimed the RSFSR as a sovereign state of which's laws would take priority over the USSR laws (Article 5.2), and which would significantly

[475] *Draft Nationalities Policy of the Party under Present Conditions* (CPSU Platform), adopted by the CPSU CC Plenum, 20 September 1989, reprinted in *Pravda*, 24 September 1989, 1-2.
[476] *Ibid.* at 1-2.
[477] Walker (n 187) 71.
[478] M. Gorbachev, 'The Fate of *Perestroyka* Is in the Unity of the Party', CPSU Central Committee Plenum, 25 December 1989.
[479] As concluded by Ross, 'paradoxically, the very policies which the communists had used to placate nationalism ended up giving it succour'. C. Ross, *Federalism and Democratization in Russia* (Manchester, 2002) at 17.
[480] Adopted by the First Congress of People's Deputies of the RSFSR, by the majority of 907-13 (nine abstentions). Some SSRs had already proclaimed their sovereignty, but the RSFSR was the first SSR with ASSRs to do this, opening up questions about their legal status.

expand the rights of its ASSRs and AOs (Article 9). The previously cautious regional elites were encouraged by this example, with altogether 26 ASSRs and AOs all over the USSR declaring state sovereignty within a year.[481] They were particularly bold in the RSFSR where President Boris Yeltsin had encouraged the autonomous units to '[t]ake as much independence as you can hold on to',[482] and where the ASSRs had gained other additional rights. Most of the ASSRs' and the AOs' sovereignty declarations proclaimed a unilateral status upgrade to a SSR, alongside the supremacy of their laws.[483]

A key difference between the sovereignty declarations of the SSRs and those of the lower-level units was that for the SSRs, these were a precursor of the independence declarations. In contrast, only one lower ethnofederal unit - Chechnya - declared independence in the Soviet era. This disparity in aims needs to be kept in mind. The SSRs had a different legal position not limited to their constitutional right to secession: they were nominally incorporated into USSR via the Union Treaty.[484] Most of the ASSRs and all of the lower-level units had been established by unilateral administrative decisions and were artificial creations of Moscow.[485] That being said, the titular nationalities in the ASSRs were not artificial creations. They had been locally governing 'their' republics, in their national languages, under their institutions established by their Constitutions. While they were not ready to declare independence, they felt entitled to an upgrade in their status with genuine constitutional guarantees.

The declarations of sovereignty and supremacy of the SSRs' and the ASSRs' laws over the USSR legislation amplified the 'war of laws' that had been ongoing since the late 1980s. It was a symptom of the fundamental ambiguities in the Soviet federalism and the 1977 USSR Constitution. The Soviet doctrine on federal jurisdiction upheld an idea of the 'unity of a state power', which stipulated that a will of a Soviet organ should not be questioned by another organ.[486] As with most of the USSR's problems, this constitutional ambiguity did not matter as long as the CPSU held the undisputed

[481] Twenty-four of these declarations happened within the RSFSR and two within the Georgian SSR. J. Kahn, 'The Parade of Sovereignties: Establishing the Vocabulary of the New Russian Federalism' 16(1) *Post-Soviet Affairs* (2000) 58-89 at 60.
[482] Quoted in J. Kahn, *Federalism, Democratization, and the Rule of Law in Russia* (Oxford University Press, 2002) at 95. The leaders of the ASSRs were worried about what might happen to their legal position if the RSFSR became independent. For instance, a drafter of the Bashkortostan's declaration, professor Venir Samigullin, was quoted saying that it 'was not clear if Russia left the Union what would be the fate of the ASSRs - if Russia declared independence, then what to do?''. Kahn (n 481) 61.
[483] Yet, unlike the SSRs', their declarations were not usually backed up by popular approval via referendum. Eight of the fifteen SSRs held referendums on independence and two for state sovereignty, all of which affirmed the approval of a great majority of the voters. In the ASSRs, only Ingushetiya, Tatarstan, and Bashkortostan held referendums, in 1991, 1992, and 1993, respectively.
[484] Moreover, the SSRs possessed many rights that the ASSRs did not, such as the right to enter into relations with foreign states, to conclude treaties and conduct economic relations with them, and to participate in international organizations. Walker (n 187) 91.
[485] There were exceptions, such as the Abkhazian ASSR (see n 1085).
[486] The USSR also lacked a Constitutional Court. See more, M. Hartwig, 'The Institutionalization of the Rule of Law: The Establishment of Constitutional Courts in the Eastern European Countries' 7(3) *American University International Law Review* (1992) 449-470 at 452-453.

ultimate power, but the system broke down with the erosion of the Party. The SSRs had been passing jurisdiction that was often abrogated by Moscow as unconstitutional. The SSRs sometimes rejected Moscow's rulings and laws over the issue, claiming that it was not of all-Union importance.[487] Therewith, the same matter could be legislated by two authorities simultaneously, in unison or contradiction with one another. In 1990, the ASSRs started to imitate this practice. The 1990s reforms were responses to this unsustainable situation.

3.7.4 The 1990 Reforms of the Federal System

The year 1990 was a watershed moment for the ethnofederal system as a series of constitutional amendments and laws which, when combined with the new parliamentary power of the CPD and the downfall of the CPSU, finally brought elements of genuine federalism to the USSR.[488]

The reforms began on 3 April 1990 with the Secession Law,[489] which made fundamental changes to the foundations of the USSR. First, the Law defined the legal formula by which the SSRs could realize their right to 'free' secession, provided by Article 72 of the 1977 Constitution.[490] Second, it significantly raised the ASSRs' autonomy in many areas up to a virtual equivalence with that of the SSRs. Most significantly, in case their host SSR would choose to secede, the ASSRs were given a right to decide after a referendum whether to leave the Union with their host SSR or to remain an autonomous part of the USSR, with which it would then re-negotiate on its self-governing status.

The Secession Law was accompanied by an amendment (2 April 1990) of the previous Law on 'anti-Soviet propaganda' by making peaceful campaigning for the dissolution of the USSR permissible. Many SSRs, particularly the Baltic States, started to capitalize on this immediately.

The privatization of the economy and deepening federalization meant competition for resources. The economic relations between the USSR, the SSRs and the ASSRs were reformulated with a Law on

[487] The same situation was happening in the SFRY as well. For more on the war of laws in Yugoslavia, see R. Hayden, 'Constitutional Events in Yugoslavia, 1988-90: From Federation to Confederation and Paralysis?', *Final Report to National Council for Soviet and East European Research* (University of Pittsburgh, July 1990). However, the major difference between the two cases was the fact that in the USSR setting, the center could, up until 1990-1991, force its will on SSRs. In the SFRY, the country resembled more a confederation with a feeble central authority that was unable to force its SRs to comply.

[488] F. Feldbrugge, *Russian Law: The End of the Soviet System and the Role of Law* (Martinus Nijhoff Publishers, 1993) at 126.
As summarized by Alexander Osipov, the Party and governmental documents, legislative acts, and the statements of the high officials allow deconstructing the conceptual underpinnings of the renewed policy. In his view, the new conception of self-determination in the USSR in these years led to an asymmetrical federation where status was negotiable rather than imposed. Osipov (n 460) 65-66.

[489] *Law on the Procedure for Resolving Questions Connected with a Union Republic's Secession from the USSR*, 3 April 1990.

[490] The Secession Law received critique in both within the USSR (in the Baltic States) and outside since it bestowed most of the secession decision making power to the central government, and not to the SSR who is supposed to have a guaranteed, unqualified right to secede from the Union. See Treiman (n 200).

10 April 1990,[491] followed by individual economic treaties between them. In addition, most of the SSRs established direct trade ties with foreign countries.[492] According to the head of the Supreme Soviet commission that prepared the law, Nikolai Pivovarov, the recognition of the rights of the SSRs and ASSRs was the most important constitutional change of this law.[493]

The Language Law[494] retained Russian as the official language of the USSR, but gave SSRs right to choose their state languages.

The Free National Development Law[495] further added genuine federalism to the USSR by assigning most legislative and executive powers to the SSRs and the ASSRs.

The most ambitious Law on the federal reform was a major constitutional amendment on 26 April 1990, called 'On the Division of Powers between the USSR and the Subjects of the Federation'. The introductory decree stated that the Law was to be considered as the basis of the elaboration of the New Union Treaty.[496] The groundbreaking change was that the terms 'ASSR' and 'SSR' disappeared, and they both were titled *subjects of the federation*, subordinated directly to the USSR government and thus becoming direct subjects of the USSR.[497] James Hughes and Gwendolyn Sasse have argued that this law radically altered the federal arrangement in a sense that prior to the law, the SSRs were seen technically 'sovereign' whereas after the law was passed, this distinction was eradicated as both were now subjects of the federation.[498] While the ASSRs remained a part of their host SSRs, this was now based on free self-determination of peoples. They possessed all state power on their ASSR territory, apart from powers expressly transferred to the USSR or the host SSR.[499] Soviet scholars

[491] *Law on the Principles of Economic Relations between the USSR, the Union and Autonomous Republics*, 10 April 1990.
[492] R. Kaufman and J. Hardt (Eds), *The Former Soviet Union in Transition* (Sharpe, 1993) at 142.
[493] Interview in *Pravda*, 13 November 1989. Quoted in S. White, G. Gill and D. Slider (Eds), *The Politics of Transition: Shaping a Post-Soviet Future* (Cambridge University Press, 1993) at 247.
[494] *Law on the Languages of the Peoples of the USSR*, 24 April 1990.
[495] *Law on the Free National Development of Citizens of the USSR Who Reside Outside Their Own National-Territorial Formations or Who Do Not Possess Such Formations on the Territory of the USSR*, 26 April 1990.
[496] *Izvestiia*, 3 May 1990.
[497] *Law on the Division of Powers between the Union of Soviet Socialist Republics and the Subjects of the Federation*, 26 April 1990, Section 1(3).
[498] J. Hughes and G. Sasse, 'Comparing Regional and Ethnic Conflicts in Post-Soviet Transition States' in J. Hughes and G. Sasse (Eds), *Ethnicity and Territory in the Former Soviet Union: Regions in Conflict* (Routledge, 2002) 1-35 at 19. In addition, Feldbrugge has noted that the law left the status of the two lower units, the AOs and the AOks, vague. Feldbrugge (n 488) 129.
[499] 'The autonomous republics are Soviet socialist states that are members of the USSR federation. Autonomous republics and autonomous formations are a part of union republics on the basis of the free self-determination of peoples, and they possess all state power on their territory, except for the powers they have transferred to the jurisdiction of the USSR and union republics'. *Law On the Division* (n 497) Section 1(3). 'O razgranichenii polnomochii mezhdu Soyuzom SSR i sub'ektami federatsii' in *Vedemosti s'ezda narodnykh deputatov SSSR I Verkhovnogo Soveta SSSR*, 19, 9 May 1990 at 430. Translated by John Dunlop in J. Dunlop, *Russia Confronts Chechnya: Roots of a Separatist Conflict* (Cambridge University Press, 1998) at 91. Zverev has highlighted that the equality of the ASSRs with the SSRs was stressed, barring those rights they had voluntarily assigned to the latter. A. Zverev, 'The Value of the

were puzzled by this development. For instance, professor Zheleznyov, a key drafter of the Tatarstan ASSR's sovereignty declaration, commented that this was 'juridical nonsense because one republic, one state, cannot at the same time be subject of two federations'.[500] However, they were ignoring events in the USSR half a century earlier: the SSRs of Abkhazia, Armenia, Azerbaijan, and Georgia had held the same status in 1922-1936, as constitutive parts of both the USSR and the Transcaucasian Socialist Federative Soviet Republic.[501] The asymmetrical socialist understanding of different levels of sovereignty, inherent with the ethnofederal model, was making this development possible.

The 26 April Law equalized the rights of the SSRs and the ASSRs by introducing a concept that the relations between them are determined by the treaties and conventions they conclude within the Soviet legal framework.[502] As Sakwa has noted, after the Law, the ASSRs could negotiate on equal terms with their host SSRs.[503] Indeed, the higher status of the ASSRs in comparison to the lower units was pointed out in several articles.[504] Finally, the Law offered a new distribution of jurisdiction between the USSR and the SSRs, superseding Chapters 8-11 of the 1977 Constitution. The exclusive powers of the USSR were restricted, and jurisdiction in several areas was passed to the SSRs.

Meanwhile, Gorbachev had pushed through a series of amendments enlarging the powers of the President of the USSR - position created for him in March 1990 - over the reforms taking place. The Presidents of the ASSRs were now also included in the Council of the Federation. This institution was established in 1990 and included the President of the USSR and the leaders of the fifteen SSRs.[505] The most important task of the Council was drafting the New Union Treaty, with the turmoil all over the USSR adding a sense of urgency.[506]

3.7.5 New Union Treaty and the Referendum on the Future of the USSR (1991)

Gorbachev proposed his New Union Treaty project to the Party in the 28th Congress of the CPSU in July 1990. This historical Congress approved the project, supported his other reforms so far, and re-

Tatarstan Experience for Georgia and Abkhazia' in B. Coppieters, D. Darchiashvili and N. Akaba (Eds), *Federal Practice: Exploring Alternatives for Georgia and Abkhazia* (Bruessels, 2000) 91-110 at 96.

[500] Quoted in Kahn (n 481) 77. Hough has questioned this Soviet contradiction that partially deprived the SSRs of their sovereignty while giving it to the ASSRs. J. Hough, *Democratization and Revolution in the USSR, 1985-1991* (Brookings, 1997) at 386.

[501] See, for instance, G. Law, *Administrative Subdivisions of Countries: A Comprehensive World Reference, 1900 through 1998* (Library of Congress, 1999) at 313. In addition, in the SFRY context, the Socialist Autonomous Province of Kosovo had held the same dual status as a constitutive unit of both the SFRY and Serbia, since the 1974 Yugoslav Constitution.

[502] *Law On the Division* (n 497), Section 1(4).

[503] R. Sakwa, *Russian Politics and Society* (Routledge, 1993) at 215.

[504] Feldbrugge (n 488) 130.

[505] The President of Lithuania boycotted all the sessions. In March 1990, a constitutional amendment gave the ASSRs' Presidents and the leaders of the AOs and AOks equal rights in the Council than those of the SSRs. G. Hahn, *Russian Revolution from Above 1985-2000. Reform, Transaction and Revolution in the Fall of the Soviet Communist Regime* (Transaction Publishers, 2002) at 277-278.

[506] By late 1990, at least the Baltic Republics were already considered lost, and the Caucasus was in disarray. *Ibid*. at 131.

elected him as the General Secretary. These were the last major decisions made by the CPSU, as this was the last Party Congress before the dissolution of the Party a year later.

The negotiations over the New Union Treaty, known as the Novo-Ogarevo Process, took place mostly between the SSRs and the ASSRs in the Council of the Federation. The first draft was made public in November 1990. It contained drastic changes, such as renaming the country the Union of Soviet *Sovereign* Republics, abolishing the CPD, and awarding most powers to the Council of the Federation. The aim was to turn the USSR into a confederation. Finally, the draft put the ASSRs on a par with SSRs, describing both as republics and as sovereign states.[507]

Based on the feedback, a drafting committee started reworking the Treaty on 1 January 1991. However, just as many had feared, six SSRs (the Baltic States, Moldova, Georgia, and Armenia) refused to participate in the drafting, started to boycott all federal institutions, and were preparing for independence. Gorbachev continued to push for a '9+1 agreement' with the remaining SSRs and the USSR. A third draft was approved by the Soviet of the Union on 6 March 1991 but was rejected in the individual Supreme Soviets of the SSRs.

Adamantly, Gorbachev sought an alternative source of political support. On 17 March, a hastily organized popular referendum was held in nine of the SSRs,[508] producing a 76% support for the continuation of the USSR, including a majority in all of them.[509] This success enabled Gorbachev to persuade nine of the SSR Presidents to continue to work for a mutually acceptable Treaty.[510] Finally, the New Union Treaty was completed and was to be signed on 20 August 1991.[511] It proclaimed to be based on the right of nations to self-determination and that all the SSRs and ASSRs possess and retain their sovereignty in the Union of Soviet Sovereign Republics.[512]

[507] Quoted in Minority Rights Group International, *World Directory of Minorities and Indigenous Peoples - Russian Federation*, November 2014, *<http://www.refworld.org/docid/4954ce18c.html>*.
[508] *Referendum on the Preservation of the Union of Soviet Socialist Republics*. The posed question was: 'Do you consider necessary the preservation of the Union of Soviet Socialist Republics as a renewed federation of equal sovereign republics in which the rights and freedom of an individual of any nationality will be fully guaranteed?'.
[509] The results varied between 70,2% in the Ukrainian SSR to 97,9% in the Turkmen SSR. Only one ASSR, Abkhazia, organized referendum (Georgian SSR was among the boycotting republics), with 52,3% in favor. *<http://i.imgur.com/xXS4jN0.jpg>*.
[510] *Novo-Ogaryovo Agreement*, signed on 23 April 1991.
[511] Even the order of the signatures had been agreed. More on the Novo-Ogarevo process, see S. Cohen, *Soviet Fates and Lost Alternatives: From Stalinism to the New Cold War* (Colombia, 2011) at 85-111.
[512] *Treaty on the Union of Sovereign States*, 15 August 1991, Part 1. Basic Principles.

However, the Party hardliners, always suspicious of Gorbachev, saw the Treaty as the end of the USSR.[513] After a crisis meeting, a delegation of representatives from the Party, the Red Army, industry, and the government met Gorbachev at his vacation residence in Crimea.[514] When they failed to persuade the President not to sign the Union Treaty, they put him under house arrest and attempted a *coup d'état* under a collective name of the *State Committee on the State of Emergency* on 19 August 1991.[515] The Committee's Resolution No. 1 proclaimed that, for the purpose of protecting the independence and territorial integrity of the country, the USSR law 'On the Legal Conditions Applying in a State of Emergency' becomes immediately binding all over the Union (Article 1); all the structures of power and administration in defiance of the USSR laws and Constitution are to be immediately disbanded and all their laws and decisions considered invalid (Articles 2 and 3); and that all activities of political parties and public organizations are suspended (Article 4).[516] As a response, a massive protest against the coup began at the streets of Moscow led by the RSFSR President Yeltsin. When the Army refused to get involved, the coup unraveled. Among its victims were the CPSU, which Yeltsin banned in the RSFSR by a presidential decree; and Gorbachev, who had no more legitimacy to pursue the Union Treaty or to lead the country.

3.8 The Dissolution of the Union of Soviet Socialist Republics

After the coup attempt, the USSR remained in a state of paralysis, with the RSFSR refusing to participate in any federal organs. On 2 September 1991, the governmental system of the USSR was suspended.[517] Still attempting to save the Union, on 25 November 1991, Gorbachev presented a final draft of the New Union Treaty to the SSRs. It portrayed a loose confederation, the Union of Sovereign States, and gained some support. However, Yeltsin concluded that any Treaty without Ukraine was useless and wanted to wait until Ukraine had held its referendum of independence. The Ukrainian

[513] When Prime Minister Valentin Pavlov received the text of the Treaty on 15 August, he was alarmed and told the cabinet that there would be a power vacuum if it was signed. C. Hille, *State Building and Conflict Resolution in the Caucasus* (Brill, 2010) at 208.
[514] There are two different narratives of this meeting: Gorbachev claims that the delegation demanded that he resign, while the delegation members claim that the demand was for the President to return to Moscow, to refuse to sign the treaty, and to declare a state of emergency. <*http://www.bbc.co.uk/history/worldwars/coldwar/soviet_stand_01.shtml*>.
[515] The Committee (*Государственный комитет по чрезвычайному положению*) consisted of eight high-ranking Soviet officials, including Vice President Yanayev, Prime Minister Pavlov, Interior Minister Pugo, Defense Minister Yazov and Chairman of the KGB Kryuchkov. The coup is well documented, for example, in Congressional Research Service, *Soviet Coup Attempt: Background and Implications* (Library of Congress, 1991); and M. Sixsmith, *Moscow Coup: The Death of the Soviet System* (Simon & Schuster, 1991).
[516] Quoted in R. Sakwa, *The Rise and Fall of the Soviet Union: 1917-1991* (Routledge, 1999) at 462. According to Sakwa, the 'putschists' hoped to neutralize the opposition by a raft of populist measures, but in vain. Sakwa concludes that the Committee did not understand the profoundness of transformation of the Soviet society under perestroika. *Ibid*. at 462.
[517] *Joint Declaration of the President of the USSR and of the Leading Officials of the Union Republics*, Izvestiia, 2 September 1991.

vote on 1 December 1991 was overwhelmingly for the independence,[518] and the Treaty became infeasible.

On 8 December 1991, the heads of state of the RSFSR, Ukraine, and Belarus met in Minsk and signed an 'Agreement Establishing the Commonwealth of Independent States' (CIS). This document stated that, since the Novo-Ogarevo Process had become deadlocked and several republics had de facto withdrawn from the USSR, 'the USSR as a subject of international law and a geopolitical reality no longer exists'.[519] On 21 December 1991, eight more heads of state joined the CIS,[520] declaring that 'with the establishment of the Commonwealth of Independent States, the USSR ceased to exist'.[521]

Gorbachev's signature is missing from the CIS establishment documents that terminated the socialist federal experiment. The center had become so discredited and obsolete that the SSRs did not feel this necessary. Therewith, being the General Secretary of a banned Party and the President of a federation that had lost all its subunits, he announced his resignation on 26 December 1991:

> 'Dear compatriots, fellow citizens, as a result of the newly formed situation, creation of the Commonwealth of Independent States, I cease my activities in the post of the USSR president […]. I have firmly stood for independence, self-rule of nations, for the sovereignty of the republics, but at the same time for preservation of the union state, the unity of the country'.[522]

3.9 Conclusion: Dissolution and *Uti Possidetis Meritus*

In the auspices of the CIS, the successor states of the USSR agreed that Russia would continue the legal existence of the USSR,[523] and declared that all their border adjustments would be settled by *uti possidetis*, if not agreed otherwise by the parties in question.[524] Similarly to the 1960s decolonization, the utilization of *uti possidetis* was agreed upon in a mutual agreement by the states emerging from the former Empire. Therewith, the SSRs became sovereign states and their internal borders international borders, as they were recognized independent by the international community and became member states of the UN. As the dissolution was seen to be taking place in a peaceful and

[518] D. Nohlen and P. Stöver (Eds), *Elections in Europe: A Data Handbook* (Nomos, 2010) at 1985. The Ukrainian parliament had already declared independence on 24 August following the *coup d'etat*. In the referendum, the question posed was: 'Do you support the Act of Declaration of Independence of Ukraine?'. 92,3% voted affirmative.
[519] *Agreement on the Establishment of the Commonwealth of Independent States* (n 216).
[520] The Baltic States did not participate, for they had been recognized independent by the USSR already on 6 September 1991, while Georgia was under severe internal unrest culminating in the civil war.
[521] *Alma-Ata Declaration* (n 230).
[522] Resignation speech, quoted in C. Chatterjee, L. Kirschenbaum and D. Field, *Russia's Long Twentieth Century: Voices, Memories, Contested Perspectives* (Routledge, 2016) at 230. On the same day, the Supreme Soviet formally dissolved itself and the USSR.
[523] N 229.
[524] N 230.

consensual manner, the SSRs were only asked to fulfil the requirements listed in the Guidelines and to adhere shortly to the Nuclear Non-Proliferation Treaty as non-nuclear weapon states.[525]

This peaceful dissolution process hid the fact that 20 former ASSRs had lost the constitutional guarantees for their autonomies, and that some of them refused to accept the new rule of the now-independent SSRs as legitimate, eroding the internal cohesion of the successor states. Under the ethnofederalist system, these recognized nationalities had been given a meaningful self-governance within a demarcated territory assigned to their titular nationality. Moreover, the 1990-1991 amendments had taught the ASSRs to emphasize the constitutive forms of their autonomic institutions. In the Soviet era, they could always ask Moscow to mediate if there was a conflict with their host SSR. When the SSRs were recognized territorially fully sovereign, many of them felt no need to respect the former autonomy agreements. While they confronted their ASSRs in different ways,[526] many of them chose a revocation (e.g., Georgia with Abkhazia) or a substantial diminishing of their autonomies.[527] This often led to protracted conflicts.

Therefore, I wish to challenge the narrative of the peaceful dissolution of the USSR. I argue that *uti possidetis* was misapplied in 1991, both on the grounds of Soviet Law and of public international law. First, national law and international law work in general work in different spheres,[528] and the internal legislation of a country will typically not have international legal ramifications.[529] That being said, one major exception of this rule is the *uti possidetis* doctrine, which selects the units of its application based on the constitutional order of the dissolving international legal entity. In effect, it freezes the constitutional (*juris*) situation at the moment of independence. Thus, I claim that the application of *uti possidetis* in the dissolution has to be based on the legal framework of the USSR in December 1991: the 1977 USSR Constitution with its amendments and the individual SSR constitutions. As the international community recognized the former SSRs based on these legal instruments, it is puzzling

[525] N 225. The Russian Federation was not required this, as the successor states of the USSR had jointly decided that it would legally continue the State existence of the USSR. Thus, Russia was a unique case that did not seek or receive any international recognition.
[526] See subchapter 5.2-5.4.
[527] For instance, one of the first legislative initiatives of the newly independent Republic of Georgia was to abolish the autonomies of the former ASSR of Abkhazia and the AO of South Ossetia. In the SFRY context, the same took place in Serbia in relation to Kosovo.
[528] As phrased by Oppenheim, '[i]n consequence of its internal independence and territorial supremacy, a state can adopt any constitution it likes, arrange its administration in any way it thinks fit, enact such laws as it pleases, organise its forces on land and sea, build and pull down fortresses, adopt any commercial policy it likes and so on'. L. Oppenheim, *International Law: A Treatise. Vol. 1. Peace* (London, 1905) at 255-256.
[529] A good example of this is the Soviet attempt to gain seats for all its SSRs in the UN (n 425). However, the international legal position of these states could not be altered just by Soviet legislation, and they remained, in the eyes of the rest of the world, dependent subunits of the USSR. The United Kingdom was amenable to this Soviet request because it wanted the then-dominion of India to be admitted as well. J. Nichol, *Diplomacy in the Former Soviet Republics* (Praeger, 1995) at 13.

that they ignored the rights and even the existence of the lower level ethnofederal units as stipulated in the very same instruments.

Second, by a virtue of being a general principle of international law,[530] *uti possidetis* has to evolve alongside the shifting paradigm of the international legal order. As I accounted for in Chapter 2, in the first two cycles *uti possidetis* was applied in accordance with other international legal principles. There were indisputable attempts, primarily by the EC, to again update *uti possidetis* in the contemporary international legal framework in place in the early 1990s. State recognition remains a powerful weapon in international relations, and the EC used this bargaining position when forming its collective recognition policy. It informed the former SSRs that they would be recognized 'subject to the normal standards of international practice and the political realities in each case' within their former borders if fulfilling the following criteria:

> 'Respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights
>
> Guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE
>
> Respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement
>
> Acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability
>
> Commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes'. [531]

This was a major break from the standard Montevideo Convention state recognition criteria.[532] Yet, the EC's application failed to take into account two crucial factors. In relation to the internal law of the USSR - internationalized by *uti possidetis* - the EC did not understand ethnofederalism and the status of the ASSRs in it. This was especially problematic, since the constitutional amendments of

[530] For the authoritative statements of qualifying *uti possidetis* as a general principle of international law, see ICJ's *Frontier Dispute* (n 2) para. 20; *Qatar v. Bahrain* (n 2) paras. 10, 148; *Indo-Pakistan Western* (n 39) 527; *Dubai-Sharjah Border Arbitration* (n 39) 579; *Land, Island and Maritime Frontier Dispute* (n 39) para. 386L; *Opinion No. 3* (n 39) para. 2. For additional supporting scholarly views, see, among others, Naldi (n 39) 39; Shaw (n 17, 'Peoples') 503; and Scott (n 39) 428-429. There are also dissenting opinions. On the African context, see Ahmed (n 39) 32–35; and, in general, see Torres Bernández in Ginther (n 39) 435.
[531] *Guidelines* (n 4).
[532] *Montevideo Convention on the Rights and Duties of States*, signed in Montevideo, 26 December 1933. Entered into force on 26 December 1934. Art. 1 defines a state as a person of international law possessing the following qualifications: 'a permanent population; a defined territory; government; and capacity to enter into relations with other states'.

1990-1991 had considerably enhanced the ASSR's legal position.[533] Moreover, the decision to deny the ASSR's rights is illogical concerning the EC Declaration's paragraphs 2 and 3, which stipulate the need to guarantee the rights of national groups and the respect of inviolability of borders.[534]

To summarize, at the moment of the dissolution of the USSR, the ASSRs' representational rights had been upgraded to be in most part equal to the SSRs;[535] they were direct subjects of the USSR as well as their host SSR;[536] their territory could not be altered without their consent;[537] and while they lacked the right to secede, they did possess the right to decide whether they wanted to remain a part of the USSR or the host SSR that was seceding.[538] In other words, their legal status was, in many ways, comparable to that of the SSRs.[539]

All that being said, I need to highlight two crucial legal distinctions between the first and second-level subunits. First, as recognized by the EC in both the USSR and the SFRY, only the highest ethnofederal level possessed the right to secede from the federation. However, this right was never exercised. The USSR had a legal formula for secession, but there was no time to utilize it before the USSR ceased to exist. The SFRY guaranteed the right to secede, but no formula for it, and the 1974

[533] *Law on the Procedure for Resolving Questions Connected with a Union Republic's Secession from the USSR* (n 489); *Law on the Principles of Economic Relations between the USSR, the Union and Autonomous Republics*, 10 April 1990; *Law on the Free National Development of Citizens of the USSR Who Reside Outside Their Own National-Territorial Formations or Who Do Not Possess Such Formations on the Territory of the USSR*, 26 April 1990; and, finally, *Law on the Division of Powers* (n 497).

[534] In Chapter 4, I analyze the rights of the national groups in more detail, especially under the framework of the CSCE. Concerning the inviolability of borders, this Chapter aims to elucidate the legal status that the ASSRs possessed at the moment of the dissolution. This helps to explain the following distortions and conflicts that have taken place since the dissolutions. See subchapter 5.1.

[535] See subchapter 3.7.4.

[536] *Law on the Free National Development of Citizens of the USSR Who Reside Outside Their Own National-Territorial Formations or Who Do Not Possess Such Formations on the Territory of the USSR*, 26 April 1990, Art. 1. Hughes has argued that the combination of the Secession Law (3 April 1990), *Law on Economic Principles* (10 April 1990), and *Law on the Division of Powers* (n 497) together eradicated the core features of the constitutional distinction between the SSRs and the ASSRs. J. Hughes, *Chechnya: From Nationalism to Jihad* (University of Pennsylvania, 2007) at 16. Tishkov has argued that the Law of 26 April 1990 gave SSRs and ASSRs an equal status as subjects of the federation. V. Tishkov, 'Dynamics of a Society at War: Ethnographical Aspects' in R. Sakwa (Ed), *Chechnya: From Past to Future* (Anthem, 2005) 157-180 at 271. Bowring concurs, noting that the 1990 laws raised the ASSRs to a significant extent to the level of subjects of the USSR, equal to the SSRs in their interconnections with the USSR. B. Bowring, 'The Russian Constitutional System: Complexity and Asymmetry' in M. Weller and K. Nobbs (Eds), *Asymmetric Autonomy and the Settlement of Ethnic Conflicts* (Pennsylvania, 2010) 48-74 at 54.

[537] The 1977 Constitution of the USSR (n 200) Art. 84.

[538] *Law on the Procedure for Resolving Questions Connected with a Union Republic's Secession from the USSR* (n 489) Art. 3. 'In accordance with universally recognized principles and norms of international law and international obligations of USSR the seceding republic is to guarantee all civil, political, social, economic, cultural and other rights and freedoms of citizens of the USSR which remain on its territory without any acts of discrimination based on race, skin color, sex, language, religion, political or other beliefs, ethnic or social origin, welfare, place or time of birth'. *Ibid.* Art. 16.

[539] In a remarkably comparable situation in the context of the SFRY, an independent Arbitration Committee tried to establish a clear distinction between the Socialist Republics and the Socialist Autonomous Provinces in the application of *uti possidetis.* The Committee concluded that '[t]he principle applies all the more readily to the Republics since the second and fourth paragraph of Art. 5 of the Constitution of the SFRY stipulated that the Republics' territories and boundaries could not be altered without their consent'. *Opinion No. 3* (n 39) para. 2. Since the Commission based many of its Opinions on the above-quoted Guidelines (n 4), I argue that the successor-states of the USSR should have been obliged to have gone through the same process to gain recognition. The later distortions could have been avoided by recognizing the rights of the ASSRs, whose territory, likewise, could not be altered without their consent. For more on the SFRY case, see subchapter 4.3.

constitution was inconsistent on the matter.[540] Thus, in the end, *no state seceded* from the USSR or the SFRY. Instead, there were federal-state dissolutions, an application *uti possidetis*, and subsequent state successions. Now, since the successor states were formed on the basis of *uti possidetis*, the right to the secession of the SSRs has no legal relevance, and it becomes even harder to argue that the ASSRs had no rights in the state dissolution.

Second, there did exist a highly important legal difference between the SSRs and the ASSRs outside the secession framework that is essential to the application of *uti possidetis*: the ASSRs were direct subjects of *both* the federation, as well as their host SSR. Thus, I argue that in contrast to the SSRs, the ASSRs did not have a right to independence in the early 1990s. Notwithstanding, they had a special legal status that should have been recognized.[541]

In conclusion, the international recognition decisions in the early 1990s resulted in a distortion of the contemporary *uti possidetis* doctrine. In the previous Chapter, I explained why its application has to take into account the last constitutional order of the target state, as well as any changes in the general international law principles. While this Chapter focused on ethnofederalism as the last constitutional order, the following Chapter establishes the general international law principles applicable to a state dissolution. The combination of these factors can then be used to upgrade *uti possidetis* into the contemporary international legal setting and to ensure peaceful changes of sovereignty over territory in the future. If the international community continues with the obsolete version used in the socialist federal dissolutions, it is likely heading towards another regrettable failure.

[540] This enabled the Serbian SR to deny this right from the other SRs, leading eventually into the 'process of dissolution', as recognized by the Badinter Commission. *Opinion No. 1* (n 210).
[541] For my proposal for an adapted version of *uti possidetis juris* that takes into account the lower level internal borders, see Chapter 6. According to this version, the legitimate expectations (*meritus*) of the ASSRs under both internal and international law are taken into account. Consequently, the recognition of the SSRs would have been conditioned upon respecting these expectations.

4. The External Component: The Evolution of the Right to Self-Determination

The previous Chapter introduced the first component of (*uti possidetis*) *meritus*, the *internal legal framework* at the moment of state dissolution. The internal component is *lex specialis* and changes with the target state, as *uti possidetis* takes the borders of reference from the last applicable internal legal order of the state in question. As I am using the dissolutions of the USSR and the SFRY as examples for *meritus*, the previous chapter introduced their internal legal framework, namely the *socialist ethnofederal model*.

Consequently, next I progress to the second - external - component of *meritus*: the *international legal framework* at the moment of the dissolutions of the USSR and the SFRY in 1991. The external component is *lex generalis* and thus is applicable in the same manner in all cases where *uti possidetis* is utilized. Additionally, it is in constant flux, evolving alongside other developments of international law. The focus in this chapter is on the evolution of international legal principles, most importantly of the right to self-determination and its division into internal and external self-determination variants.

By using the SFRY as an example, I establish the background of the legitimate expectation (*meritus*) of a former autonomous unit to self-rule in the form of a constitutionally guaranteed autonomy. This expectation was due to both internal (the last applicable legal order) and external (the right to self-determination as interpreted by the intervening parties) legal frameworks as they stood at the moment of the SFRY's dissolution. I first go through the evolution of the right to self-determination in the UN era, followed by a brief history of self-determination in the Yugoslav context. Finally, I move to the synthesis of these two aspects - the content of the right to self-determination and the constitutional position of Kosovo - as they were at the time of the external intervention in the summer of 1991.

4.1 Self-Determination in the United Nations Era

4.1.1 Self-Determination as a Principle, 1945-1966

Following a 'false start' after the First World War,[542] the principle of self-determination gained real significance after the establishment of the UN. Unlike the League of Nations,[543] the UN codified self-

[542] See subchapter 2.4.
[543] The Commission of Rapporteurs analyzed self-determination in the early 1920s thus: 'The principle is not, properly speaking, a rule of international law and the League of Nations has not entered it in its Covenant […]. It is a principle of justice and of liberty, expressed by a vague and general formula which has given rise to most varied interpretations and differences of opinion'. *Report of the Commission of Rapporteurs* (n 122) 22-23.

determination into its Charter, according to which one of its purposes is to 'develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'.[544] However, self-determination remained a vague principle without clear legal ramifications.

This ambiguity changed when decolonization began to have political momentum in the UN. As the USSR had an exceptional attitude towards self-determination due to its history,[545] it became the leading proponent of decolonization. As the USSR had 'solved' its national question with ethnofederal model, it felt it was entitled to promote self-determination as a *legal right* that was only applicable to other states.[546] Indeed, the USSR was consistently involved in drafting international treaties and conventions referring to self-determination,[547] and it was enshrined in Article 1(2) of the Charter by a supplement proposed by the Soviet delegation.[548]

Another major status-upgrade came with the 1960 UN General Assembly's *Declaration on the Granting of Independence to Colonial Countries and Peoples* that equated the *right* to self-determination to complete independence in the colonial context.[549] Although not legally binding, it went much further in its legal implications than a normal General Assembly Declaration, establishing a Special Committee devoted exclusively on decolonization and monitoring the implementation of the 1960 Declaration. The Soviet role was again decisive, as its delegation submitted the original draft of the Declaration.[550] The USSR continued its quest for codifying the right to self-determination into a binding international agreement and found natural allies for this cause from the newly-independent African and South-Asian states.

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[544] *Charter of the United Nations* (n 123), Chapter 1, Art. 1(2).
[545] See subchapters 3.1.4, 3.3, and 3.5.
[546] Additionally, the USSR's reasoning was due to the fact that unlike the Western bloc, the socialist bloc did not have colonies - at least in the salt-water sense - and could thus weaken the West by promoting decolonization. More on the salt-water thesis on colonialism (with particular focus on indigenous peoples in Australia and Irish in Northern Ireland), in A. Maguire, 'Contemporary Anti-Colonial Self-Determination Claims and the Decolonization of International Law' 22(1) *Griffith Law Review* (2013) 238-268. Moreover, self-determination was seen as a useful instrument to consolidate Russian territorial acquisitions. Numerous examples of these are summarized in M. Beissinger, 'Self-Determination as a Technology of Imperialism: The Soviet and Russian Experiences' 14(5) *Ethnopolitics* (2015) 479-487 at 481-482.
[547] According to a highly distinguished Soviet scholar Grigory Tunkin: 'Having placed the right of nations to self-determination at the base of its policy on the nationality question, the Soviet government pressed for the recognition of the principle of self-determination of nations as a principle of international law'. G. Tunkin, *Theory of International Law* (Translated by W. Butler, London, 1974) at 61.
[548] *Ibid*. at 62.
[549] N 86 Arts. 2, 4, and 6.
[550] This is well documented by Bowring, who calls this instance a 'truly climatic moment in the development of contemporary international law'. B. Bowring, 'Positivism versus Self-Determination: the Contradictions of Soviet International Law' in S. Marks (Ed), *International Law on the Left: Revisiting Marxist Legacies* (Cambridge University Press, 2008) 133-168 at 160.

4.1.2 Self-Determination as a Right, 1966-1991

The momentum continued, as self-determination was made a *qualified legal right beyond decolonization context* by the 1966 Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, both containing identical Article 1(1): 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.[551] Article 1(3) gives a more specific depiction by stating that the signatories 'shall promote the realization of the right to self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations'. The preparatory work was guided by the UN General Assembly, which called on the UN Commission on Human Rights to 'study ways and means which would ensure the right of peoples and nations to self-determination and to prepare recommendations for consideration by the General Assembly at its next session'.[552] In addition, the resolution recognized the right of peoples and nations to self-determination as a 'fundamental human right',[553] and portrayed it as being 'the first human right without which other political, civil, economic, social and cultural rights would be meaningless'.[554]

The Covenants have been seen as prominent developments of international law on self-determination in several aspects.[555] For one, they make self-determination a treaty based right and a general entitlement not limited to decolonization, which is its specific emanation.[556] Many believe the Covenants to be signaling a notion that national unity is not an automatic *fait accompli*, but has to be earned by the government of a state.[557] Additionally, a territorial element in the construction of self-determination can be derived from the state practice.[558] According to Higgins, self-determination

[551] N 10. Art. 1(1) was identical to Art. 2 of the 1960 Declaration. The SFRY ratified both Covenants on 2 June 1971 and the USSR in 1973. *<https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en#1>.*

[552] Hannum (n 129) 19, citing the *Draft International Covenant on Human Rights and Measures of Implementation: Future Work of the Commission on Human Rights*, GA Res. 421D A/1775, 1 December 1950. See also n 89.

[553] *Ibid.* at 20.

[554] J. Castellino and J. Gilbert, 'Self-Determination, Indigenous Peoples and Minorities' 3 *Macquarie Law Journal* (2003) 155-178 at 161. Furthermore, according to Karakostanouglou, the preparatory work seemed to provide a right to secede under two conditions: 'if a) multiethnic state that is comprised of ethnic groups similar in size, but not in case of groups forming the populations majority and another the populations minority (case of ethnic minorities) b) when ethnic group has been recognized as a political entity in the constitution'. Quoted in V. Karakostanoglou, 'The Right to Self-Determination and the Case of Yugoslavia' 32 *Balkan Studies* (1991) 335-362 at 345, citing A. Μπρεδήμα, "Αυτοδιάθεση λαών και απόσχιση κράτους στα πλαίσια των Ηνωμένων Εθνών" (Self-Determination of Peoples and Secession of States within the Framework of the U.N.), in Διεθνές Δίκαιο και Διεθνής Πολιτική (12 *International Law and International Politics* (1987)) 105-147 at 121.

[555] For instance, Shaw has called the Covenants as 'an authoritative interpretation of the UN Charter's Human Rights provisions'. M. Shaw, *International Law* (6th Ed., Cambridge University Press, 2008) at 308-311.

[556] Oeter (n 11) 322. According to Hannum, the 'relative straightforward language' of Art. 1, in addition to its reference to 'all' peoples and the fact that 'is found on a human rights treaties intended to have universal applicability suggest a scope beyond that of decolonization'. Hannum (n 129) 19.

[557] D. Wippman (Ed), *International Law and Ethnic Conflict* (Cornell, 1998) at 121. Ratner reaches the same conclusion (n 12) 611.

[558] S. Oeter, 'The Kosovo Case - An Unfortunate Precedent' 75(1) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2015) 51-74 at 60; and U. Saxer, *Die Internationale Steuerung der Selbstbestimmund und der Staatsentstehung* (Heidelberg, 2010) at

refers to the right of the majority within a generally accepted political unit to the exercise of power.[559] Franck has supplemented this by claiming that self-determination is linked with historically pre-constituted political entities with a specific territory. Therefore, 'people' is not merely a group of persons, but the historically constituted people of a particular territorial entity.[560] The linkage between territory and people is essential in order not to invite a series of never-ending minority secessions. This affiliation became fundamental in the socialist federal context in the early 1990s. Finally, the 1966 Covenants also made a clear distinction between peoples, to whom Article 1 is applicable, and persons belonging to minorities, whose legal rights are guaranteed under Article 27.[561]

In 1970, a UN Friendly Relations Declaration clarified the content of self-determination by stating that '[b]y virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter'.[562] It also made a principled presumption in favor of territorial integrity:

> 'Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'.[563]

324-326. Some states have claimed that territorial autonomy (such as the Soviet ethnofederal model) assures that self-determination is accomplished in a single-party state. *USSR 1984 CCPR/C/SR/565*, para. 2.

[559] R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (London, 1963) at 104.

[560] T. Franck, 'Clan and Superclan: Loyality, Identity and the Community in Law and Practice' 90(3*) American Journal of International Law* (1996) 359-383. He has also defined self-determination as a 'right of a people organized in an established territory to determine its collective political destiny in a democratic fashion and is, therefore, at the core of the democratic entitlement'. T. Franck, 'The Emerging Right to Democratic Governance' 86(1) *American Journal of International Law* (1992) 46-91 at 52.

[561] According to Art. 27, '[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'. Since the mid-1990s, the rights of the minorities are also guaranteed by the *Framework Convention for the Protection of National Minorities* (FCPNM), adopted on 10 November 1994 by the Committee of Ministers of the Council of Europe. The next breakthrough in minority affairs took place at the CSCE Copenhagen Summit of June 1990. The summit formulated seven key principles that later became the fundamentals of the European minority regimes embedded in further OSCE, as well as Council of Europe instruments including the legally binding FCPNM and the *European Charter for Regional or Minority Languages*. Osipov (n 460) 69.

[562] *Friendly Relations Declaration* (n 88) Art. 1. The SFRY supported the declaration.

[563] *Ibid*. Malcolm Shaw has pointed out that the very instruments of the United Nations that proclaim the foundations of the principle of self-determination, the UN Charter, the 1960 Declaration, and the 1970 Declaration also clearly prohibit partial or total disruption of national unity and territorial integrity of states. He also adds general reaffirming of territorial integrity of states in the UN Security Council resolutions S/5002 (1961), 716 (1991), 822 (1993), 852 (1993), 876 (1993), 884 (1993) and 896 (1994). Shaw (n 17, 'Heritage') 482. Notwithstanding, the 1970 Declaration can alternatively be read the other way around, and there are views that territorial integrity is only protected if the government of a state presents the whole of its people without discrimination. See, *inter alia*, F. Kirgis, 'The Degrees of Self-Determination in the United Nations Era' 88(2) *American Journal of International Law* (1994) 304-310 at 306; and *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Written Statement of Switzerland (2009), paras. 62-63.

The 1970 Declaration is believed by many legal commentators to reflect customary international law and 'remains the most authoritative statement on the meaning of self-determination'.[564] It affirms that territorial integrity protects federations just as it does unitary states. Indeed, there is a legal assumption that in federations, self-determination is bound-up in the constructs of the federation or autonomy.[565] Any other interpretation would make states reluctant to bestow an autonomous status to a subunit since such administrative subdivisions could potentially be 'upgraded' to the status of international boundaries.[566] Equally, states with federal arrangements could be destabilized by their internal boundaries, which would provide potential secessionists a clear blueprint to fracture a state.[567]

In 1974, self-determination was included in the 'Definition of Aggression' resolution by the UN General Assembly, which stated that it was the 'duty of states not to use armed force to deprive peoples of their right to self-determination, freedom and independence, or to disrupt territorial integrity' and that '[n]othing in this definition […] could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter'.[568]

In 1975, the Helsinki Final Act identified most fully the content of self-determination at a regional level,[569] by extending its normative content to all nations and peoples.[570] In this declaration, the participating states promised to 'respect the equal rights of peoples and their right to self-determination' in conformity with the UN Charter and relevant norms of international law and affirmed that 'all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status'.[571] Although the Helsinki Final Act was not legally a treaty, it was a political agreement with lasting consequences.[572]

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[564] H. Hannum, 'Legal Aspects of Self-Determination', *Encyclopedia Princetoniensis: The Princeton Encyclopedia of Self-Determination*. *<https://pesd.princeton.edu/?q=node/254>*.
[565] Oeter (n 11) 327.
[566] M. Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia' 86(3) *American Journal of International Law* (1992) 569-607 at 606.
[567] Bartos (n 19) 86.
[568] *Definition of Aggression*, GA Res. 3314 (XXIX), 14 December 1974, preamble and Art. 7.
[569] As described by Kuznetsov, '[a]fter the decline of colonial empires, the issue of self-determination of peoples in the sense of the formation of autonomous States was basically resolved […]. Now the provisions of this principle are basically applicable to the peoples of existing sovereign States'. V.I Kuznetsov and G.V. Ivanenko, 'Principles of International Law' in V.I Kuznetsov and B.R. Tuzmukhamedov, *International Law - A Russian Introduction* (Trans. and Ed. by W. Butler, Eleven Publishing, 2009) 129-162 at 149.
[570] The Act proclaims: 'By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development'. *Final Act* (n 13) 1. (a) VIII.
[571] *Ibid.* chapter VIII. The SFRY was among the signatories.
[572] Particularly utilized by human rights groups of the Eastern Bloc. *<http://www.humanrights.ch/en/standards/europe/osce/helsinki/>*.

In 1984, the Human Rights Committee's 'General Comment' on Article 1 of the Covenant on Civil and Political Rights reaffirmed the right to self-determination - without clarifying who are the people entitled to this right. Moreover, it affirmed that the state parties have a specific obligation not only in relation to their peoples but vis-à-vis all peoples who have been deprived of this right.[573] Finally, the CSCE summit in 1990 produced a Charter of Paris, in which the participatory states re-affirmed people's right to self-determination in a similar wording than in the Helsinki Final Act.[574]

The right to self-determination has been reaffirmed several times since the socialist federal dissolutions. For example, in 1993 the UN World Conference on Human Rights issued a 'Vienna Declaration and Programme for Action', with paragraph 2 repeating the 1966 Covenants definition of self-determination and adding that the 'World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights'.[575] In the same year, a UN Declaration recognized 'the right of peoples to take legitimate action in accordance with the Charter of United Nations to realize their inalienable right to self-determination'.[576] Notwithstanding, it added that this right 'shall not be construed by disrupting territorial integrity of sovereign states', in the same formulation as in the 1970 Friendly Relations Declaration.

To conclude, by the time of the socialist federal dissolutions in late 1991, the right to self-determination had gained an undisputable position under international law with the ICJ referring to it as an operative legal right on several occasions.[577] However, it remains a problematic legal norm for its vagueness.[578] The actual content of self-determination, as well as its relationship with territorial integrity, remains somewhat unclear. For example, outside decolonization, the 1970 Declaration seems to equate self-determination to self-government rather than independent statehood.[579]

[573] *CCPR General Comment No. 12* (n 89). Regrettably, the Human Rights Committee has not clarified the content further since 1984.
[574] *Charter of Paris for a New Europe* (n 13) 5. The SFRY was among the signatories.
[575] *Vienna Declaration and Programme of Action*, United Nations Human Rights Office of the High Commissioner, adopted by the World Conference on Human Rights in Vienna on 25 June 1993. The Declaration had originally 171 state parties out of the 179 UN member states of that time, including all the EU countries. The FRY signed the declaration later, as it was not represented at the UN in 1993. In addition, referring to the 1966 International Covenants, the Badinter Commission has affirmed that the right to self-determination serves to safeguard human rights. *Opinion No. 2* (n 289) para. 3.
[576] *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, UN Doc. A/RES/50/6, 40th plenary meeting, 24 October 1995 at para. 1.
[577] See, e.g., *Western Sahara* (n 128) 120-121; and *South West Africa* (n 128) 73-75.
[578] See Cassese (n 9) 159-162; H. Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Pennsylvania, 1990) at 27; and Hannum (n 129) 2.
[579] Nikouei and Zamani (n 130) 49.

4.1.3 Internal and External Self-Determination

In addition to affirming it as a legal right, when the 1966 Covenants recognized self-determination outside decolonization, they seem to unequivocally demonstrate that it can be applied both internally and externally. Decolonization - and the cases where peoples were seen to be under another form of foreign domination - was a clear example of the external form of self-determination. While all peoples have the right to self-determination, the right to the territorial integrity of the existing states usually restrains it. However, in the decolonization context the territorial integrity did not prohibit the independence of the African states since the 1960 Declaration had made colonization illegal and had thus left no room for any counterarguments for the territorial integrity of the colonizing states.[580]

Yet, self-determination continues to have a pivotal role outside decolonization. In these cases, the contradiction with territorial integrity remains. Therewith, in order not to deprive peoples of their right to self-determination, many scholars assert that the Covenants provide a right to internal self-determination, which conveniently does not have to mean the dismemberment of state's territory. For example, Rosas concludes that both the wording of self-determination in the Covenants and subsequent state practice seems to be pointing in favor of the right to internal self-determination and the *travaux preparatoires* do not refute such a claim.[581] According to Hannum, the right to popular participation, as expressed in Article 21 of the Universal Declaration of Human Rights (1946) and Article 25 of the 1966 International Covenant on Civil and Political Rights, should be interpreted as internal aspects of self-determination.[582] Thornberry argues that the internal aspect of self-determination is represented in the 1970 Friendly Relations Declaration and by its indeterminate connection with human rights.[583] Thürer claims that the modern view of self-determination recognizes a 'federalist option' of allowing a certain level of cultural or political autonomy as a means of satisfying this right.[584] Finally, Borgen defines the mainstream view of the right to internal self-determination as meaning a right to choose a political system and pursuit of economic, social, and cultural development in the auspices of an existing state.[585] In sum, the general view on the content

[580] *Declaration on the Granting of Independence to Colonial Countries and Peoples* (n 86).
[581] A. Rosas, 'Internal Self-Determination' in Tomuschat (n 45) 246.
[582] Hannum (n 577) 113.
[583] P. Thornberry, 'The Democratic or Internal Aspect of Self-Determination with some Remarks on Federalism' in Tomuschat (n 45) 120.
[584] D. Thürer, 'Self-Determination, 1998 Addendum' in R. Bernhardt (Ed), 4 *Encyclopedia of Public International* Law (North-Holland, 2000) 364-373 at 373.
[585] C. Borgen, 'Public International Law and the Conflict over Transnistria' in M. Akgün (Ed), *Managing Intractable Conflicts: Lessons from Moldova and Cyprus* (Istanbul, 2013) 83-108 at 89.
For other proponents of the right to internal self-determination, see Shaw (n 555) 289-293; L. Medina, 'An Unsatisfactory Case of Self-Determination: Resolving Puerto Rico's Status' 33(3) *Fordham International Law Journal* (2009) 1048-1100 at 1061-1062; C.

of the right to internal self-determination appears to amount to a right to territorial self-governance with clear legal limits in the host state's constitutional order, and usually not including a right to external self-determination in the form of secession.

The African Commission of Human and People's Rights reaffirmed in 1995 the view that while the right to self-determination could be exercised in various forms, it has to be in compliance with other fundamental principles of international law, such as the principles of sovereignty and territorial integrity. The Commission saw no sufficient legal ground in favor of external self-determination for the people of Katanga, but affirmed that the province of Katanga 'was obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire'.[586] In other words, with the right to self-determination being restricted by territorial integrity, the Commission held that the Katangese people had a right to internal self-determination within Zaire.

The Committee on the Elimination of Racial Discrimination (CERD) that gives expert interpretations of human rights provisions in international treaties[587] has stated that Article 1 of the 1966 Covenants needs to be subdivided into the internal and the external aspects of the right.[588] According to the CERD, the right to internal self-determination means that the 'governments are to represent the whole population, without distinction as to race, colour, descent or national or ethnic origin. The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community'.[589]

Chinkin, 'Expert Opinion by Christine Chinkin Accompanying the Ad-Hoc Committee of Canadian Women on the Constitution's Reply Factum' in A. Bayefsy (Ed), *Self-Determination in International Law: Quebec and Lessons Learned* (Brill, 2000) 231-240 at 236; A. Eide, 'In Search of Constructive Alternatives to Secession' in Tomuschat (n 45) 139-176; J. Crawford, 'Democracy and International Law' 64(1) *British Yearbook of International Law* (1993) 113-133 at 115-117; M. Sterio, *The Right to Self-Determination under International Law: 'Selfistans', Secession, and the Rule of the Great Powers* (Routledge, 2013) at 18-22; M. Seymour, 'Secession as a Remedial Right' 50(4) *Inquiry* (2007) 395-423 at 398; Cassese (n 9) 48-52 and 59-62; Barelli (n 12) 414; Rosas in Rosas and Helgesen (n 12) 30-34; and Ratner (n 12) 611.

[586] *Katangese People's Congress v. Zaire*, Merits, Communication No 75/92, Eight Activity Report 1994-1995 (ACHPR 1995), quoted in M. Evans and R. Murray (Ed), *Documents of the African Commission of Human and People's Rights: The System of Practice, 1986-2000* (Oxford University Press, 2001) at 232.

[587] Including the UN General Assembly's *International Convention on the Elimination of All Forms of Racial Discrimination* (n 89) 195.

[588] *UN Doc. CERD/48/Misc.7/Rev.3* (Forty-eight Session, 1996), Arts. 2-4. In addition, CERD drew extra attention to the General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, which has an extensive list of the rights that the states need to award to minorities. It also contains the 'basic saving clause' in Art. 8, stating that '[n]othing in the present declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of states'. *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res. 47/135, 18 December 1992.

[589] *Committee on the Elimination of Racial Discrimination, General Recommendation No. 21: The Right to self-determination*, Office of the United Nations High Commissioner for Human Rights, Forty-eight session, 23 August 1996.

The International Conference of Experts has defined internal self-determination to mean '[p]articipatory democracy: the right to decide the form of government and the identity of rulers by the whole population of a state and the right of a population group within the state to participate in decision making at the state level. Internal self-determination can also mean the right to exercise cultural, linguistic, religious or (territorial) political autonomy within the boundaries of the existing state'.[590] Under another definition, self-determination 'is not a general right of secession. It is the right of a people to decide on their culture, language, and government. It has evolved into the concepts of "internal self-determination", the protection of minority rights within a state, and "external self-determination", secession from a state. While self-determination is an internationally recognized principle, secession is considered a domestic issue that each state must assess itself'.[591] Finally, as summarized by the Independent International Fact-Finding Mission on the Conflict in Georgia, 'outside the colonial context, self-determination is basically limited to internal self-determination. A right to self-determination in form of secession is not accepted in state practice'.[592]

4.1.4 The Coincidental Evolution of *Uti Possidetis* and the Right to Self-Determination

For *uti possidetis*, there were two relevant developments in international in 1966-1991: the *principle* of self-determination had been codified as a legal *right* in the 1966 Covenants with a more clarified content, and a completely new human rights paradigm had emerged.[593] I claim that while the international community did successfully incorporate the latter,[594] the former was partially bypassed with lasting negative consequences for both the affected successor states and *uti possidetis*.

In the second cycle in the early 1960s, *uti possidetis* had to accommodate only a *principle* of self-determination. As the 1960 declaration had made colonialism illegal, the former colonial powers'

[590] *Report of the International Conference of Experts*, organized by the United Nations' Educational, Scientific and Cultural Organization (UNESCO), 21-27 November 1998, Barcelona.
[591] Special Committee on European Affairs of the New York City Bar (n 12) 383-384. The Committee also concluded that international law could provide a means to clarify the strengths and weaknesses of the parties' positions and, perhaps, to provide a framework for fruitful settlement discussions that realpolitik has been unable to deliver.
[592] Independent International Fact-Finding Mission on the Conflict in Georgia, *Report Volume II* (September 2009) at 141.
[593] A clear account on the emergence of the first human rights systems, first in Europe, and then in the auspices of the UN since the 1960s, see D. Shelton, 'An Introduction to the History of International Human Rights Law', *GW Law Faculty Publications & Other Works*, Paper 1052 (2007), 1-30 at 13-24. Additionally, the UN Chronicle has divided the international human rights law into three generations (the first generation is 'liberty', civil and political rights, the second generation is 'equality', socio-economic rights and the third generation is 'solidarity', collective rights such as right to self-determination), and highlights the importance of the ratification of the 1966 Covenants in this process. <*https://unchronicle.un.org/article/international-human-rights-law-short-history*>.
[594] For instance, the EC *Guidelines* (n 4) demanded that the emerging successor states fulfill a set of criteria based on the human rights paradigm. In order to get a recognition from the EC, new states had to, *inter alia*, respect for the provisions of the Charter of the United Nations, the *Helsinki Final Act* and the *Charter of Paris for a New Europe* (n 13), especially with regard to the rule of law, democracy and human rights; and guarantee the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of CSCE.

territorial integrity was not respected, and they had to renounce these territories in favor of self-determination.[595] The ICJ has argued that *uti possidetis* is, in fact, an extension of the right of self-determination, for example in the *Frontier Dispute* case (1986): '[t]he essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African states judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples'.[596]

The changes in the content and scope of the right to self-determination since the second cycle are apparent. International Covenants, the UN General Assembly resolutions, state practice,[597] and scholarly writings all confirm that there exists a legal right to self-determination, which has external and internal aspects. Yet, while numerous scholars corroborate the existence of the right to internal self-determination, they have significant issues trying to establish and agree on what such a right entails - a problem not uncommon with self-determination in general.[598] As summarized by Michla Pomerance, the UN declarations are a conflicting package of principles, 'presented without any indication of how a desirable balance might be struck between them'.[599]

Thus, having established the evolution of self-determination from a principle to a qualified legal right with the division to internal and external self-determination aspects, in order to accommodate this division to the Yugoslav context, I account for the history of self-determination in the SFRY.

[595] The decision on which borders to 'internationalize' was eventually left to the new African leaders. They, in turn, decided that self-determination of the African peoples would be best guaranteed by applying *uti possidetis* to all the former colonial borders, despite their arbitrariness. As self-determination was merely a vague principle, this was seen sufficient to guarantee self-determination in Africa, and there have been very few changes in the decolonization borders since. Only major changes have been the independence of Eritrea (1991) and of South Sudan (2011). Still, *uti possidetis* borders in Africa have been criticized heavily. Davidson goes even further in his book, making an intriguing comparison between the crisis of a nation-state in Africa and the socialist federal dissolutions in Europe. According to him, in both cases, the main issue is about the imposed political institutions and the predatory leadership that governs them. See more in Davidson (n 104).

[596] *Frontier Dispute* (n 2) para. 25.

[597] For State practice, see, inter alia, *Oral statement by the Federal Republic of Germany*, the International Court of Justice Verbatim Record, 2 December 2009 at para. 39.

[598] Castellino and Gilbert have argued that, indeed, international law should concentrate its attention in the right to self-determination to its internal variant since it can be considered a compromise between minorities and sovereign states (n 554) 175. In addition, the internal variant is in accordance with the current emphasis on the territorial integrity of states. Therewith, internal self-determination requires an increase in scholarly attention, if not only for its numerous alternatives, in stark contrast with the more axiomatic route of decolonization or secession. However, this 'compromise' has its complexities, as, according to Castellino and Gilbert, minorities tend to view the right to internal self-determination in the same light as the UN mandate or trusteeship system, i.e., as a provisional measure towards achieving full political independence and statehood (*Ibid.* at 175).

[599] M. Pomerance, *Law of Self-Determination in Law and Practice: The New Doctrine in the United Nations* (Springer, 1982) at 46.

4.2 Self-Determination and the National Question in the Yugoslav Context

4.2.1 The Origins of the National Question in the Kingdom of Yugoslavia

Yugoslavia was one of the several manifestations of the 'first-round' of self-determination, which was only applicable to the vanquished Central Powers of the First World War.[600] The state was proclaimed as the Kingdom of Serbs, Croats and Slovenes on 1 December 1918. It united the former Kingdoms of Serbia and Montenegro with previous Austro-Hungarian holdings of Slovenia, Croatia, and Bosnia-Herzegovina as a presentation of 'Yugoslavism', a shared South Slav identity. Despite proclamations of unity, the Kingdom was administrative chaos: in 1918, it had 'six custom's areas, six legal jurisdictions, five currencies, five railway networks, and three different banking systems'.[601]

This first Yugoslav project was from the outset dominated by Serbia.[602] For example, the Kingdom was ruled by the Serbian royal House of Karađorđević and its capital was the Serbian capital of Belgrade. Thus, despite proclamations of being a manifestations of self-determination, the Kingdom was constantly weakened by the lack of unity between its peoples. The debates over centralization and the ethnic relations dominated the political discourse.[603] In sum, the Croats favored a federal structure that would ensure the respect of their culture, while the Serbs favored a centralized state.[604]

In 1921, Yugoslavia's first Constitution was promulgated. It created a unitary state, abolishing all the pre-Yugoslavian regions and introducing 33 districts (*oblast*) as the primary administrative units of the country.[605] Croat discontent rose throughout the 1920s and culminated with the leading Croatian opposition party declaring on 1 August 1928 that '[w]e do not want to destroy the state, we are not going outside of the state's borders, but within the borders of this state the Croat must be the only master on Croatian territory'.[606] King Alexander responded on 3 October 1929 by disbanding the

[600] Other manifestations included the formation of Czechoslovakia out of the Austro-Hungarian lands of Bohemia, Moravia, Czech Silesia, Slovakia, and Sub Carpathian Ruthenia; the formation of dependent Mandate Territories out of the former Ottoman lands; the independences of several previously Russian territories including Finland and the Baltic States; and the formation of the USSR with (theoretically) high levels of territorial autonomy granted to the peoples of Russia based on the right to self-determination.
[601] L. Benson, *Yugoslavia: A Concise History* (Palgrave Macmillan, 2004) at 51.
[602] Mostly due to the having fought on the victorious allied side in the First World War and having suffered horrendous casualties.
[603] Especially between the Serbs and the Croats. The difference between the language of the Serbs and the Croats is a contentious issue that has been politicized by both sides. For example, their languages have been described as 'closely related and mutually intelligible as British English and American English'. R. Hayden, 'Serbian and Croatian Nationalism and the Wars in Yugoslavia' 19(2) *Cultural Survival Quarterly Magazine*, June 1995. <*https://www.culturalsurvival.org/publications/cultural-survival-quarterly/serbian-and-croatian-nationalism-and-wars-yugoslavia*>. More pronounced differences arise from the fact that most of the Croats are Roman Catholics while the Serbs are Orthodox Christians, and that the Croats use Latin alphabet while the Serbs use Cyrillic alphabet.
[604] Radan (n 213) 138. 'Serb politicians rejected federalism on largely practical grounds. Because the Serbs were the most territorially dispersed of Yugoslavia's constituent nations, it would have been impossible to create a Serb federal unit'. *Ibid*. at 139.
[605] Constitution of the Kingdom of Serbs, Croats and Slovenes, promulgated on 28 June 1921. Art. 95 established the unit of *oblast* and a ministerial degree on 28 April 1922 then divided the country into 33 *oblasts*.
[606] M. Biondich, *Stjepan Radić, the Croat Peasant Party, and the Politics of Mass Mobilization, 1904-1928* (Toronto, 2000) at 241.

parliament, introducing a dictatorship, and changing the administrative structure from 33 oblasts to nine provinces (*banovinas*) that were named after rivers and were drafted to deliberately cut across traditional regions.[607] The aim was to suppress nationalism while building national unity, and the state was symbolically renamed the Kingdom of Yugoslavia.[608] After all of the nationalist parties were banned,[609] a part of the Croat opposition was radicalized. The former Croatian Deputy Ante Pavelić left for exile to start a revolutionary *Ustaša* organization aiming to bring down the Kingdom of Yugoslavia and achieving independence for Croatia.

The Croats continued to oppose the dictatorship and to call for a solution to the 'Croatian question' by ending the Serb hegemony. In 1934, an assassin working in cooperation with *Ustaša* assassinated King Alexander. The Prince Regent Paul saw the Serb-Croat conflict as the main threat to Yugoslavia and was pressured from abroad to resolve these internal problems.[610] After several years of negotiations, the Serbs and the Croats finally reached an agreement - *Sporazum* - on 26 August 1939. According to Jović*, Sporazum* was the first step towards the federalization of Yugoslavia, which could solve the national question.[611] It created an autonomous *Banovina* of Croatia, encompassing the areas of Croatia, Slavonia, Dalmatia, Herzegovina and parts of Bosnia. Croatia gained substantial autonomy, as only foreign policy, transportation, and other 'Pan-Kingdom areas of administration' were left for Yugoslavia.[612] This angered both the Serb minority in the new *Banovina* and *Ustaša*, who wanted full independence for an even larger area. In addition, ethnic relations between remained tense, as other nationalities envied the preferential treatment of the Croats.[613]

The Kingdom of Yugoslavia was de facto put to an end in April 1941, when the Axis Powers conquered the country. However, Yugoslavia had already been failing as a unitary state. It had been unable to find an answer to the national question of how to keep Yugoslavia united without Serb hegemony and how to persuade the Croats as the second largest ethnic group to remain in the state. While *Sporazum* had offered a type of a solution, it had not satisfied all the Croats and had alienated

[607] R. Donia and J. Fine, *Bosnia and Hercegovina: A Tradition Betrayed* (Colombia, 1994) at 129.
[608] Serbo-Croatian word *Jugoslavija* means the 'Land of the Southern Slavs'. According to Art. 3 of the 1921 Constitution, the Serbs, Croats, and Slovenes were three tribes of one unified Yugoslav nation, with the official language being 'Serbo-Croato-Slovenian'.
[609] Radan (n 213) 141.
[610] Especially by the United Kingdom and France, who wanted Yugoslavia to resolve its internal problems in order for it to be able to stand up to Nazi Germany. *Ibid*. at 141.
[611] D. Jović, '(Dis)integrating Yugoslavia: King Alexander and Interwar Yugoslavism' in D. Djokić (ed), *Yugoslavism: Histories of a Failed Idea, 1918-1992* (London, 2003) 136-156 at 155.
[612] *Banovina* of Croatia encompassed 30 percent of the area of the whole Kingdom. A. Bellamy, *The Formation of Croatian National Identity: A Centuries-Old Dream?* (Manchester, 2003) at 50-51.
[613] Accounted for in S. Ramet, *The Three Yugoslavias: State-Building and Legimitation, 1918-2005* (Woodrow Wilson Center Press, 2006) at 108.

other nationalities, including the Serbs living in the *Banovina* of Croatia. However, the underground Communist Party was determined to solve the question with the Soviet ethnofederal model.

4.2.2 The Socialist Solution: Ethnofederalism and 'Brotherhood and Unity'

The Communist Party of Yugoslavia (the Party) was founded in 1919 but was soon banned by the authorities. The Party's national policy was based on the Marxist-Leninist version of the right to self-determination, which perceived nationalism as something that can divert the masses from economics and class struggle.[614] By 'solving' the national question, the Party could lead the masses back to their economic interests. In the conferences of 1924 and 1926, the Party proclaimed that the right to self-determination including secession belongs to all nations and nationalities of Yugoslavia, and that the Yugoslav state should be dissolved as an 'imperialist creation'.[615] Nevertheless, in the mid-1930s, the Party started advocating for the preservation of Yugoslavia in a federal form.[616]

After the Axis invasion, the Party announced the 'People's Liberation War' against the occupiers. Out of the two liberation movements,[617] the communists proclaimed to have the solution to the national question and could thus unite the Yugoslav peoples in a common struggle.[618] Under an organization called Anti-Fascist Council for the National Liberation of Yugoslavia (*Antifašističko Veće Narodnog Oslobođenja Jugoslavije*, AVNOJ), the Party gathered together several armed groupings to conduct a unified armed resistance campaign against the occupying forces and to work as a kind of revolutionary parliament to re-organize the state in a federal form.[619] On 26 November 1942 in Bihać, AVNOJ's first session adopted a principle of a federal state to solve the national conflicts that had plagued Yugoslavia. On 29-30 November 1943 in Jajce, AVNOJ's second session proclaimed itself the 'supreme legislative and executive body of Yugoslavia', promoted Macedonians among the recognized peoples and pledged that the state was to be re-established 'on a democratic federative principle as a state of equal peoples'.[620] This was the first instance where a principle called

[614] See subchapter 3.1.4.
[615] E. Redžić, *Bosnia and Hercegovina in the Second World War* (London, 2005) at 209-210.
[616] This was due to the Comintern having started to advocate the preservation of larger political units to counterbalance fascism. G. Ognjenović and J. Jozelic (Eds), *Titoism, Self-Determination, Nationalism, Cultural Memory: Volume Two, Tito's Yugoslavia, Stories Untold* (Palgrave Macmillan, 2016) at 77.
[617] The other resistance movement was the monarchist, mostly Serb Chetniks organization that fought the Axis forces and Titoist Partisans in 1941-1945. The Chetnik movement remained loyal to the Kingdom of Yugoslavia's government in exile but was abandoned by the Allies when the Partisans' victory started to seem inevitable in the late stages of the Second World War in Europe. More on Chetniks see, for example, Ramet (n 613) 113-162.
[618] There is a parallel here to the Russian Civil War, where the Bolsheviks were able to gain support among the various peoples of Russia by proclaiming their right to self-determination. See subchapter 3.2.1.
[619] This first AVNOJ was an assembly of 54 representatives from different sections of the country and was dominated by the Party. G. Harmon, *War in the Former Yugoslavia: Ethnic Conflict or Power Politics?,* A Senior Honors Thesis, Boston College 2007 at 107.
[620] Quoted in Radan (n 213) 145.

'brotherhood and unity' (*bratstvo i jedinstvo*) was announced to solve the national question in Yugoslavia.[621] The aim was to make the Yugoslav peoples recognize that their disunity was insane and had led to genocides during the Second World War.[622] Therefore, the national question could be solved with a federation of equal Yugoslav peoples. After the victory of the communist forces, the third AVNOJ was held on 7-9 August 1945 in Belgrade. It convened a Constituent Assembly to prepare a new Constitution for the renamed state, the Federative People's Republic of Yugoslavia.

The first federal Constitution of Yugoslavia was promulgated on 31 January 1946. It was largely based on the 1936 Soviet Constitution, most importantly on the principles of ethnofederal divisions and democratic centralism.[623] The new state held the same area as the Kingdom of Yugoslavia,[624] but now followed the Soviet example of fulfilling the right to self-determination of its various peoples through territorial autonomies. Thus, Yugoslavia was divided between six nominally equal Republics of Serbia, Croatia, Slovenia, Montenegro, Macedonia, and Bosnia-Herzegovina, with Serbia having two provinces with special autonomous status, Kosovo and Vojvodina.[625] The Republic's borders had been determined at the AVNOJ meeting on 24 February 1945, and they coincided mostly with the nationalist claims of each of the peoples of Yugoslavia.[626] They became sacrosanct with Article 12 of the Constitution, stating they could be altered only with the consent of the Republic in question.

Just as with their counterparts in the USSR, ethnofederalism was a way for the Yugoslav leaders to reconcile nationalist aspirations with an extremely centralized state structure needed for a functioning central-planned economy. Especially the nationalist aspirations of the Serbs remained an issue. While the other peoples had more-or-less compact areas of settlement, the most numerous Serbs were scattered all around Yugoslavia. Eventually, the Serbs accepted their Republic being smaller than it was due, but only as long as they remained in one centralized state. While the Party thought that ethnofederalism had solved the national question, repeated re-drafting of the Constitution

[621] Brotherhood and Unity resembled the official national ideology in the USSR, termed 'friendship of peoples' (*druzhba narodov*).
[622] V. Perica, *Balkan Idols: Religion and Nationalism in Yugoslav States* (Oxford University Press, 2002) at 100. The reference is to the notorious massacres of the Serbs by the Croat *Ustaša* organization in 1941-1945. More on this dark episode of Yugoslavian history see, for example, A. Korb, 'Genocide in Times of Civil War: Popular Attitudes Towards Ustaša Mass Violence, Croatia 1941-1945' in F. Bajohr and A. Löw (Eds), *The Holocaust and European Societies: Social Processes and Social Dynamics* (Palgrave, 2016) 127-145.
[623] See subchapter 3.4.
[624] With small additions acquired from Italy in Istria and Dalmatia.
[625] *Constitution of the Federative People's Republic of Yugoslavia* (n 241), Art. 2: 'The Federative People's Republic of Yugoslavia is composed of the People's Republic of Serbia, the People's Republic of Croatia, the People's Republic of Slovenia, the People's Republic of Bosnia and Herzegovina, the People's Republic of Macedonia and the People's Republic of Montenegro. The People's Republic of Serbia includes the autonomous province of Vojvodina and the autonomous Kosovo-Metohijan region'. In effect, Serbia had a similar position than the RSFSR had in the USSR, being both the core state of federation and a 'federation within a federation'.
[626] Radan (n 213) 149-150.

demonstrates that it had only changed the question's content.[627] The Yugoslavian national question was a political struggle between the Serb aims to centralize the state with only *administrative divisions* and the other people's attempts to maximize their autonomy in a confederal state. The Party leadership tried to balance these differences, with President Tito stating in May 1945 that:

> 'If Bosnia and Herzegovina is equal, if everyone has their federal unit, then we did not divide Serbia, but have created happy Serbs in Bosnia, and just the same with Croats and Moslems. It is just an administrative division. I do not want in Yugoslavia borders that will separate, I have said it already a hundred times that I want borders which will connect our peoples'.[628]

Following the Soviet model,[629] the eight major national groups in Yugoslavia were put into a hierarchy, allegedly based on their progression level towards socialism, and were assigned a rank and a territory. The USSR model had four levels of rank, with the highest two being the Soviet Socialist Republics (SSRs), and the Autonomous Soviet Socialist Republics (ASSRs). Yugoslavia, with a significantly smaller number of inhabitants and peoples, transplanted only the highest two into its Constitution: the six Yugoslav 'nations' (*narodi*) were called Socialist Republics (SRs) and were legally equivalent to the SSRs, whereas the two 'nationalities' (*narodnosti*) were called Socialist Autonomous Provinces (SAPs) and were legally equivalent to ASSRs.[630] The Constitution reserved

[627] The alleged solution to the national question only postponed the demands of the various peoples to self-determination. Moreover, as the Party's solution to the national question was copied from the USSR, it is not surprising that the socialist federations would face the same fragmentation at the same time in the early 1990s.

[628] J. Tito, a speech at the founding congress of the Communist Party of Serbia, 8 May 1945. This reflected the Soviet formulation of the subject. For instance, in 1920, the then Commissar of Nationalities Joseph Stalin stated that '[a]utonomy means not separation but union between the self-governing [...] peoples and the peoples of Russia'. J. Stalin, speech at the Congress of the Peoples of the Terek Region, 17 November 1920.

[629] Which, in turn, was based on the socialist nationality theories of Friedrich Engels. F. Engels, 'To the Editor of the Commonwealth (The Commonwealth No. 160, 1866)' in K. Marx and F. Engels, *Collected Works, Vol. 20* (Moscow, 1985) 155-158 at 157. It seemed, although the original theoreticians did not spell it out clearly, that the progressive level of society would be the most important determining factor with the nations-nationalities distinction. This view was apparent with the Soviet distinction.

[630] The USSR and the SFRY designation of which peoples were awarded the highest status were decided on a different basis. In the USSR, this was done by a combination of the peoples' 'progressive level' towards socialism and geopolitical location. See Chapter 3. I am using the term 'Socialist Autonomous Province' that was used in the last 1974 Constitution of the SFRY throughout this Chapter when referring to the two autonomous provinces, but their titles changed several times during the SFRY era. Kosovo was titled 'Autonomous Region of Kosovo and Metohija' from 1945 to 1963, 'Autonomous Province of Kosovo and Metohija' from 1963 to 1968 and 'Socialist Autonomous Province of Kosovo' from 1968 onwards. Vojvodina was titled 'Autonomous Province of Vojvodina' from 1945 to 1963 and 'Socialist Autonomous Province of Vojvodina' from 1963 onwards.
While the SAP of Vojvodina had the same status as Kosovo at the time of the dissolution of the SFRY, this dissertation does not focus on this unit, since it has a Serb majority, has been satisfied with its role as a part of Serbia and has not demonstrated any separatist claims since the dissolution took place. Moreover, Vojvodina's autonomy in Serbia was restored in 2002.

the right to secession to the SRs,[631] but without giving any legal formula on how to accomplish this.[632] In addition, many articles in the Constitution seemed to contradict the existence of such a right.[633]

The terms 'nations' and 'nationalities' had special connotations in the socialist national policy, as the theory saw nationalism as a passing and mostly negative phenomenon. The issue was even more delicate in Yugoslavia due to the experiences of the Kingdom of Yugoslavia. Thus, it was essential that no national group felt like a minority under Serb hegemony. The issue with the six nations of Yugoslavia was solved by making them 'in principle equal, so that the Serbs, constituting between 35 and 40 percent of the country's population, were considered formally equal with the Montenegrins, at less than 3 percent'.[634] The discrimination and less autonomous rights awarded to the two other ethnic groups, 'nationalities', was justified by reference that SAPs had 'homelands' outside the borders of Yugoslavia.[635] Therewith, the Hungarians in Vojvodina and the Albanians in Kosovo were not given an SR status, because of the existence of Hungary and Albania, respectively.[636]

4.2.3 The 1950s: 'Yugoslavism' and the Integration of the World

While President Tito had proclaimed in 1948 that ethnofederal model had resolved the problem of nationalities in Yugoslavia,[637] the need to adjust the constitutional arrangement resurfaced about once a decade. Moreover, the subsequent constitutional changes were not minor adjustments but reflected fundamental internal structural changes.[638] Soon after the 1946 Constitution was promulgated, there occurred a severe Soviet-Yugoslav split in relations, which had significant ramifications to the Yugoslavian politics in general and to the nationality policies in particular.

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[631] 'The Federative People's Republic of Yugoslavia is a federal people's state, republican in form, a community of peoples equal in rights who, on the basis of the right to self-determination, including the right of separation, have expressed their will to live together in a federative state'. The 1946 Constitution (n 241), Art. 1(1).

[632] A prominent member of the Party and later the President of the Federal Assembly Moša Pijade commented in 1950 that 'our Constitution contains no clauses which would give the republics the right of secession in the same sense as expressed by Art. 17 of the Constitution of the USSR […]. Inasfar as the Constitution has mentioned the right to secession, it is only in connection with the origin of the F.N.R.J and not in order to ensure that our republics still have today the right of separation'. Quoted in B. Bagwell, 'Yugoslavian Constitutional Questions: Self-Determination and Secession of Member Republics' 21 *Georgian Journal of International and Comparative Law* (1991) 489-523 at 509.

[633] For example, Art. 3(12) of the 1946 Constitution, which stated that the 'People's Assembly of the Federative People's Republic of Yugoslavia determines the boundaries between the people's republics'. N 241.

[634] Stokes (n 5) 83.

[635] See subchapter 4.2.2.

[636] Yet, even according to this ideological logic, there is no reason why the Albanians in Macedonia did not receive autonomy. The status of the SAPs changed in due time with their alleged 'progression' towards socialism. This was apparent by the 1974 Constitution giving Kosovo, along with almost all the right vested to the Republics, a new title of '*Socialist* Autonomous Province of Kosovo'.

[637] J. Tito, 'Concerning the National Question and Social Patriotism', speech at Slovene Academy of Arts and Sciences, 26 November 1948.

[638] Pavković and Radan (n 233) 135-136.

As the Party[639] was no longer bound by the Soviet dogma, it was able to assert its contribution to the socialist national theory. The 1950s was a period of promoting the idea of 'Yugoslavism', according to which the national differences would rapidly vanish and give away to a more internationalist viewpoint. This was reflected in a set of extensive constitutional amendments called *Fundamental Constitutional Law*, on 13 January 1953. The changes included introducing a new revolutionary socialist model termed 'workers self-management' that gave workers control over some large key-sector enterprises.[640] In relation to the nationalities, the Party started to implement its equally revolutionary policy of actively withering away of the state by decentralization. The state power was steadily devolved from the federal level to the republic level and from the municipalities to the workers' enterprises. The increase in the status of the SRs and the SAPs was evident in the establishment of a Federal People's Assembly with two houses: a Federal Chamber representing the regions and Chamber of Producers representing the workers' self-management units.[641] However, despite the changes, Yugoslavia remained a very centralized state, as the calls for Yugoslavism countered any claims for enhancing the SRs rights further. As an important writer and later President of the Federal Republic of Yugoslavia, Dobrica Ćosić, wrote in 1961:

> 'We pronounce ourselves for Yugoslavism […] as a free process by which nations and people grow together and unify socialistically, Yugoslavism - as a part of a historically inevitable process of the integration of the world and the appearance of socialist civilization on this planet'.[642]

4.2.4 The 1960s: De-Centralization

In 1963, a new Constitution was introduced. It renamed the country the Socialist Federal Republic of Yugoslavia,[643] made 'Brotherhood and Unity' one of the guiding principles of the federation,[644] furthered decentralization by delegating more powers to the SRs and the SAPs,[645] and strengthened the workers' self-management.[646] In the national policy sphere, the 1963 Constitution described Yugoslavia as a 'community of nations', rejecting the 'Yugoslavism' of the previous decade. Since

[639] Renamed in 1952 as the League of Communists of Yugoslavia (*Savez komunista Jugoslavije*).
[640] *The Constitutional Law on the Basics of the Political and Social Organization of the Federative People's Republic of Yugoslavia and of Federal Organs of Authority*, promulgated on 13 January 1953, Art. IV, Section 15.
[641] *Idib*., Art. 2.1.2.1.
[642] Quoted in N. Miller, *The Nonconformists: Culture, Politics, and Nationalism in a Serbian Intellectual Circle, 1944-1991* (Central European University Press, 2007), 'Chapter 3 Ćosić: Engagement and Disillusionment' 83-118. Original in D. Ćosić, 'O savremenom nesavremenom nacionalizmu', *Sabrana Dela Vol 8* (1961), 17-46. A similar idea of all the countries uniting into one super-state was illustrated in the 1936 Constitution of the USSR (n 399), which stated in its declaratory first part that it was the first step towards 'the union of workers of all countries in one world-wide Socialist Soviet Republic'. For more, see subchapter 3.3.3.
[643] *Constitution of the Socialist Federal Republic of Yugoslavia*, promulgated on 7 April 1963, Art. 1.
[644] *Ibid.* Introductory Part, Basic Principles I and VI.
[645] *Ibid.* Arts. 190, 191, and 192.
[646] *Ibid.* Introductory Part, Basic Principle II, and Art. 9.

1946, the official theory maintained that by uniting into a Federation, the peoples of Yugoslavia had 'used' their right to self-determination, thereby consummating the right to secession.[647] The 1963 Constitution changed this view drastically, making the possibility of secession conceivable.

Nevertheless, the 1963 Constitution failed to solve national grievances within the federation. In 1964, the Eight Party Congress started a fundamental overhaul of the nationality policies of the SFRY by re-opening the national issue, including economic inequalities.[648] The Party decided to push for more economic decentralization as the process of the central state 'withering away' had to be continued.[649] In addition and ideologically significantly, Lenin's theory that nations would disappear with the disappearance of the class society was officially rejected.[650] This meant that the national question would not go away and that the state would have to address it.

In 1966, Tito admitted that the national question had been solved only in principle and that 'material and political content needed to be added'.[651] According to the Archives of Yugoslavia, the 1964 Congress started 'the process of alteration relations between the federal state and republics, resulting in a fundamental transformation of the federation. Yugoslavia was built as a "federation of balance" […]. Republican elites started thinking about Yugoslavia as a "transitional" creation. Administrative boundaries among republics (formerly described as "veins in marble") became the boundaries of autonomous states'.[652]

When combined with the increasing regional imbalances with wealth, the 'community of nations' approach led to the SR and SAP elites being increasingly orientated towards 'their' national unit. As Tomić put it, '[w]hat apparently seemed a good compromise in dealing with the different national interests in Yugoslavia set the legal or formal basis for the later dissolution of the state. The increasing

[647] Bagwell (n 632) 509-510.
[648] The SFRY was throughout its history unable to significantly change the socio-economic situation of the country's geography: those SRs that had been under the Austro-Hungary - Slovenia and Croatia - were profoundly more industrialized, both in 1918 and in 1991, than the rest. In contrast, Kosovo kept on falling more behind the SRs throughout the existence of the SFRY. See, for example, K. Kawczynska, 'Disintegration of the Socialist Federal Republic of Yugoslavia' 2 *Przegląd Zachodni* (2013) 169-189 at 169-173.
[649] V. Poposvki, 'Yugoslavia: Politics, Federation, Nation' in G. Smith (Ed), *Federalism: The Multiethnic Challenge* (Routledge, 1995) 180-207 at 189.
[650] V. Pešić, 'The War for Ethnic States' in N. Popov (Ed), *The Road to War in Serbia: Trauma and Catharsis* (English ed., CEU Press, 2000) 9-49 at 20.
[651] Quoted in N. Kressel, *Mass Hate: The Global Rise of Genocide and Terror* (Springer, 1996) at 25.
[652] Archives of Yugoslavia, 'Amendments to the 1963 SFRY Constitution'. *<http://www.arhivyu.gov.rs/active/en/home/glavna_navigacija/leksikon_jugoslavije/konstitutivni_akti_jugoslavije/amandmani_na_ustav_iz_1963.html>*.

federalization of the country strengthened the republics (and autonomous provinces) and, to a certain degree, influenced the population's exclusive orientation to its "own" republic'.[653]

At the end of the 1960s, after decades of regular constitutional changes, the Party started to implement the decisions of the 1964 Party Congress to solve the national question conclusively. On 18 April 1967, the first series of amendments decentralized the federation by delegating more power to the Council of Nationalities. In August 1967, the SFRY ratified the 1966 Covenants that internationally codified self-determination as a legal right. On 26 December 1969, the status of SAPs was expanded as they could now implement their 'sovereign rights' in their territories, and they were made 'essentially equal' to Serbia.[654] Finally, on 30 June 1971, there was the last major set of amendments, mostly concerning the self-management system. These amendments contained some significant steps towards decentralizing the SFRY and paved the way for the last 1974 Constitution.

4.2.5 The 1974 Constitution: An Asymmetrical Federation or a Confederation?

The 1974 Constitution was drafted by a Constitutional Commission comprised of both constitutional experts and politicians and with a close-to-equal representation of the SRs and the SAPs than in the previous constitutional drafting processes.[655] In his report of the upcoming Constitution to the Chamber of Nationalities on 22 January 1974, the President of the Federal Assembly and the Chairman of the Commission Mijalko Todorović linked the success of the socialist self-management system to the state of relations among different nationalities in the SFRY.[656] This echoed Tito's proclamation that political content needed to be added to the national relations, and the 1974 Constitution was meant to achieve just that. The basic concept remained the same: the state and its laws were withering away, and the Constitution would only legislate a transitionary period.[657] Notwithstanding, *nations* were not withering away, so there was a need to continue to legislate their reciprocal relations and power-sharing. Moreover, the SFRY was now part of several international

[653] D. Tomić, 'From "Yugoslavism" to (Post-) Yugoslav Nationalisms: Understanding Yugoslav Identities' in R. Vogt, W. Cristaudo and A. Leutzsch (Eds), *European National Identities: Elements, Transitions, Conflicts* (Routledge, 2014) 271-292 at 276.
[654] Archives of Yugoslavia, 'Amendments to the 1963 SFRY Constitution'.
[655] M. Accetto, 'On Law and Politics in the Federal Balance: Lessons from Yugoslavia' 32(2) *Review of Central and East European Law* (2007) 191-231 at 202.
[656] 'The close dialectical interconnection of the solution of the relations and status of the working class in associated labor and in the system of political relations and of the self-management solution of relation among the nationalities has been confirmed'. M. Todorović, *Report on the Final Draft of the SFRY Constitution*, President of the Federal Assembly and Chairman of the Joint Constitutional Commission of all the Chambers of the Federal Assembly, made at the session of the Chamber of Nationalities on 22 January 1974.
[657] Bagwell (n 632) 498.

instruments that were calling for actual measures to support the right to self-determination. The 1974 Constitution was a great leap forward in this regard. Indeed, Basic Principle I stated that:

> 'The nations of Yugoslavia, proceeding from the right of every nation to self-determination, including the right to secession […] have together with the nationalities with which they live, united in a federal republic of free and equal nations and nationalities […]. The working people and the nations and nationalities shall exercise their sovereign rights in the Socialist Republics, and in the Socialist Autonomous Provinces in conformity with their constitutional rights'. [658]

The process of delegating power from the federal government to the member-republics (and, to a lesser extent, from the republic governments to the people themselves) was brought to an entirely new level. Indeed, the SFRY after 1974 could be described either as a weak asymmetrical federation or as a strong asymmetrical confederation. One traditional description of the difference between a federation and a confederation is that in a federation, the governing body can enact binding laws to all its members.[659] The SFRY could indeed enact binding legislation, but the Constitution added a confederal element by introducing the principle of 'consensus in decision-making', which amounted to giving the SRs and even the SAPs a virtual veto right to all federal legislation.[660] Rycerska has argued that this resulted in the federal authorities not being sovereign in respect to its constitutive parts and citizens, making it impossible to call the state a federation.[661]

The changes relating to self-determination since 1963 included the SFRY signing the 1966 Covenants and voting in favor of the 1970 Friendly Relations Declaration, both of which affected the self-determination provisions of the 1974 Constitution.[662] According to the 1974 Constitution's Basic Principles VII, in order for the SFRY to fulfill the principles of the UN Charter it will strive 'for the right of nations to self-determination and national independence', 'for respect for the rights of national

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[658] The 1974 SFRY Constitution (n 189), Basic Principles I.
[659] G. Ahrne and N. Brunsson, *Meta-Organizations* (Edward Elgar, 2008) at 13.
[660] Archives of Yugoslavia, 'The Constitution of the Socialist Federative Republic of Yugoslavia, February 21, 1974'.
The 1974 SFRY Constitution (n 189) Art. 294 states that '[i]f a bill, draft regulation or draft enactment or any other issue concerning the general interests of a Republic or Autonomous Province, or the equality of the nations and nationalities is on the agenda of the Federal Chamber, and if so requested by the majority of delegates from one Republic or Autonomous Province, resort shall be made to a special procedure to consider and adopt such a bill, draft enactment or issue'. The special procedure would then require that all SRs and SAPs reach a common position, or the bill would be rejected.
[661] Quoted in Kawczynska (n 648) 172, original in I. Rycerska, *Rozpad Jugosławii. Przyczyny i przebieg* (Kielce, 2003) at 14.
[662] The SFRY signed international Covenant on Economic, Social and Cultural Rights on 8 August 1967 and ratified it on 2 June 1971. Art. 1(3) of the Covenant states that the state parties 'shall promote the realization of the right to self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations'.
Friendly Relations Declaration (n 88) states that '[e]very State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence' and '[b]y virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter. Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter'.

minorities' and 'for international support for peoples waging a just struggle for their national independence and liberation from imperialism, colonialism and all other forms of national oppression and subjugation'. As the SFRY had promised to advance the cause of self-determination abroad, it was intrinsically guaranteed for all the peoples of Yugoslavia on several clauses of the Constitution.

The 1974 Constitution made the SAPs constituent units of the SFRY, with their legal position no longer exclusively a matter of the Serbian Constitution. The SAPs could forge direct links with federal authorities bypassing the Serbian authorities, which gave them a '*de facto* republican status'.[663] They gained a right to have their Constitution, assemblies, and executive councils, with 'no vertical superiority or subordination' between their organs and those of the SR Serbia.[664] For example, the Kosovo Assembly was the highest authority in the Kosovo SAP, with the power to change the SAP Constitution and veto changes to the Constitutions of the SFRY or Serbia that would have affected its legal position. In addition, the Kosovo Assembly had the power to issue laws and budgets and to appoint and recall presidents, judges, and high officials in the province. Finally, the SAPs gained the same right to territory as the SRs, which could no longer be altered without their consent.[665]

To summarize, while the Constitution retained some asymmetry between the SRs and SAPs, the line was blurred considerably with references to the SAPs 'sovereign rights'[666] and equal ability to introduce bills for all-Union laws.[667] Their representative ratio also improved in the main legislative body, with the Federal Chamber having 30 representatives from each SR and 20 from each SAP.[668] The Constitutional Court of the SFRY had two judges from each SR and one from each SAP. Finally, in the highest authority - the SFRY Presidium - the SRs and the SAPs both had one representative.

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[663] According to Pavlović in M. Pavlović, 'Kosovo under Autonomy, 1974-1990' in C. Ingrao and T. Emmert, *Confronting the Yugoslav Controversies: A Scholars' Initiative* (Purdue, 2013) 48-80 at 16.

[664] Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Governments of Kosovo (Request for an Advisory Opinion), *Written Comments of the Republic of Slovenia on Other Written Statements*, 17 July 2009 at 30.

[665] The 1974 SFRY Constitution (n 189) Art. 5. As summarized in the Written Comments of Slovenia, '[a]t the federal level, autonomous provinces were equal to republics also with regard to decision making powers on the following main issues: Republics and autonomous provinces took decisions on amendments to the SFRY Constitution on an equal footing (Arts. 398-402 of the SFRY Constitution), meaning the consent of autonomous provinces was required for the adoption of an amendment to the SFRY Constitution; Federal bodies decided on laws and other issues stipulated by the Constitution (Arts. 398-402 of the SFRY Constitution and amendment No. 40) on the basis of the agreement of republic and provincial assemblies; The Federation concluded certain treaties in agreement with the competent republic or provincial bodies (Art. 271 of the SFRY Constitution); Republics and autonomous provinces cooperated with foreign bodies, organisations and international organisations (amendment No. 36 to the SFRY Constitution); Republics and autonomous provinces could request a special decision-making procedure in the Federal Chamber of the SFRY Assembly (Art. 294 of the SFRY Constitution)'. *Written Comments of Slovenia* (n 664) 10.

[666] *Ibid.* Art. 4.

[667] *Ibid.* Art. 293.

[668] The secondary body (Chamber of Republics and Provinces) had 12 from each SR and eight from each SAP. *Ibid*. Arts. 291 and 292.

Many scholars have pointed out that many articles of the 1974 Constitution treat the SAPs in practice as equal to the SRs.[669] Confusingly, the SRs were described as 'states based on the sovereignty of the people' whereas the SAPs were described as 'autonomous socialist self-managing communities based on the power of and self-management by the working class'.[670] Thus, seemingly the powers that the Constitution invested upon them had a different basis: for the SRs, it was the 'sovereignty of the people',[671] which was not mentioned in Article 4 that concerns the 'autonomous socialist self-managing communities' of the SAPs.[672] That being said, Article 4 continued to state that the nations and nationalities of Kosovo realize their 'sovereign rights' in the province. A leading Yugoslav constitutional lawyer Dr. Jovan Mirić argued that the Constitution contained confederal elements and that 'under Article 4 of the SFRY Constitution, the socialist autonomous province is not only autonomous, but even sovereign: it is the locus of the exercise of the sovereign rights of the working people and citizens and of the nationalities and ethnic minorities'.[673]

The 1974 Constitution of Serbian SR reaffirmed the equality of the nations and nationalities in Serbia:

> 'In the Socialist Republic of Serbia the nations and nationalities shall be equal. Every nationality shall be guaranteed the freedom to use its language and alphabet, develop its culture and establish organizations, and enjoy other constitutional rights in the exercise of its right to express its nationality and culture'.[674]

The 1974 Constitution of the SAP of Kosovo stated that:

> 'The Socialist Autonomous province of Kosovo […] proceeding from the freely expressed will of the population - the nations and nationalities of Kosovo and the freely expressed will of the people of Serbia, has associated itself with the Socialist Republic of Serbia *within the framework of the SFRY*'.[675]

The conditionality of the association of Kosovo with Serbia only within the federal framework was an early indication of the troubles ahead if the existence of the SFRY was called into question.

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[669] For instance, Arts. 1 and 3. See, for example, Pavlović (n 663) 65; and S. Woehrel, 'Kosovo: Historical Background to the Current Conflict', *CRS Report for Congress*, 3 June 1999, at 4.
[670] *Ibid.* Arts. 3 and 4.
[671] The 1974 SFRY Constitution (n 189), Art. 3.
[672] *Ibid.* Art. 4.
[673] Quoted in *East Europe Report: Political, Sociological and Military Affairs*, Foreign Broadcast Information Service, 20 December 1984 at 97.
[674] *Constitution of the Socialist Republic of Serbia*, promulgated on 25 February 1974, Art. 145.
[675] *Constitution of the Socialist Autonomous Province of Kosovo* (1974), Art. 1, *Official Gazette of the Autonomous Province of Kosovo*, No. 4/1974, italics mine. In addition, the Constitution of the SAP Kosovo does refer to the 'sovereign rights' of the nations and nationalities of Kosovo, in Basic Principles I(3) and Art. 2.

4.2.6 The 1974 Constitution and *Uti Possidetis Juris*

Being the last federal Constitution, the 1974 Constitution was paramount in establishing the rights of the ethnofederal units at the moment of the dissolution of the SFRY.[676] There is a general view among states that the constitutional arrangements 'reflect the wishes of the people and thus satisfy self-determination'.[677] This is due to the fundamental principle of sovereignty of states - the freedom to choose their political, social, economic, and cultural system.[678] Consequently, I start with the premise that the 1974 Constitution was the legal basis for any arguments on national rights since it reflected both the self-determination of peoples in the SFRY, as well as the international obligations of the SFRY. While international law and internal law work on different levels, when *uti possidetis* is being applied, international law has to rely on the constitution of the previous sovereign to establish borders. When the SFRY dissolved, the successor states were recognized according to their former administrative borders designated to them by this Constitution. Therewith, it is essential to understand what the last applicable Constitution had awarded for Kosovo.

According to the Marxist-Leninist doctrine, the distinction between nations and nationalities is a result from their differing level of progression. Significantly, the 1974 SFRY Constitution gave Kosovo a clear promotion by simultaneously increasing its autonomous rights and awarding it the prefix 'socialist', making the province officially the *Socialist* Autonomous Province of Kosovo. This was an explicit recognition of Kosovo's progression towards socialism under the SFRY.

While the SFRY distinction between nations and nationalities seems artificial and subjective, the utilization of *uti possidetis* has to be based on the legislative acts of the previous sovereign, and its constitutional matters are within the internal competence of the state. Thus, *uti possidetis* grants international legal effects to the state's internal legislation without questioning its content. This content provided a legal distinction between the nations (SRs) and the nationalities (SAPs). However, the factual content of this distinction was vague and mostly limited to the SRs having slightly elevated

[676] There were no major changes to this Constitution, but two rounds of amendments occurred. First took place on 3 July 1981, which regulated the self-management system and the term-limits to the SFRY presidency (as the President-for-life Tito had died a year previously). The second round took place on 25 November 1988, where some free-market reforms took place, and the federation gained a few additional legislative rights, but the veto right was preserved. Archives of Yugoslavia, 'The Constitution of the Socialist Federative Republic of Yugoslavia, February 21, 1974'.
<http://www.arhivyu.gov.rs/active/en/home/glavna_navigacija/leksikon_jugoslavije/konstitutivni_akti_jugoslavije/amandmani_na_ustav_iz_1974.html>.

[677] J. Summers, *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations* (Martinus Nijhoff Publishers, 2007) 187.

[678] T. Franck, R. Higgins, A. Pellet, M. Shaw and C. Tomuschat, *The Territorial Integrity of Quebec in the Event of the Attainment of Sovereignty* (Québec's Ministère des relations internationales, 1992) at 2.3.

representation in the federal bodies and a theoretical right to secession.[679] Otherwise, in most cases, the SAPs were both treated and designated as being equal with the SRs.

The ethnofederal system used in the USSR and the SFRY had produced a unique understanding of sovereignty and self-determination based on merit and possibilities of upgrading or downgrading one's status. Throughout the years, Kosovo had fought a long campaign to obtain the SR status. The SAP's hoped were partially fulfilled with the 1974 Constitution. Nevertheless, the system needed the guarantees of the federal center and proved to be only as everlasting as the central government. The ethnofederal model collapsed conjointly with the governing institutions of the SFRY.

The 1974 Constitution, in essence, froze the constitutional situation in place until the dissolution of the SFRY in 1991-1992. As all the SRs and the SAPs had the right to veto any constitutional changes, Serbia was unable to make constitutional alterations to the SAPs' autonomy in the SFRY Constitution. While it made changes to its SR Constitution and abolished the autonomies of the two SAPs, these were unconstitutional acts without legal relevance to the application of *uti possidetis juris*.[680] Thus, in late 1991 Kosovo's legal position was still regulated by the 1974 SFRY Constitution, which confirmed its substantial internal self-rule and equality with the 'nations' of Yugoslavia.[681]

4.2.7 The Endgame of Yugoslavia: Disintegration of the Federal and Party Structures, 1987-1990

While the 1974 Constitution eased the tensions between the nations and nationalities, the confederating tendencies had an unintended consequence of pushing the national elites of the SRs and the SAPs to defend the rights of 'their' units against the other constituent elements and the federal center. The economic differences between the units were becoming more and more pronounced.[682] In 1978, the aging President-for-life Tito lamented the lack of national unity in the SFRY and in the Party: 'There is no Yugoslavia… There is no party any more'.[683] After his death in 1980, the SFRY

[679] This was due to the SAPs already having 'homelands' outside the SFRY. See subchapter 4.2.2.
[680] This is due to *uti possidetis* freezing the legal boundaries at the moment of the dissolution. As Serbia's constitutional changes were not in accordance with the SFRY constitutional system, they were not legal acts and do not produce legal ramifications for the application of *uti possidetis*. See subchapter 4.4.
[681] The 1974 SFRY Constitution (n 189) Preamble I, and Arts. 1 and 4.
[682] Slovenia, Croatia, and the SAP of Vojvodina were growing strongly and converging towards the Western European levels, whereas Bosnia-Herzegovina and Kosovo performed poorly. L. Kukić, 'Regional Development Under Socialism: Evidence From Yugoslavia', 267 *Economic History Working Papers* (London School of Economics, 2017) at 7.
[683] J. Ridley, *Tito, A Biography* (London, 1994) at 409.

Presidium started a system of a rotating one-year term presidency among the eight SR and SAP representatives. Without a strong leader, real power in the SFRY shifted to the ethnofederal level.[684]

In March 1981, massive demonstrations demanding a SR status and economic equality took place in Kosovo. The SFRY leadership decided to blame the regional leaders for not being strict enough against nationalism.[685] However, they were in denial about the real problems facing Kosovo, namely rising poverty, unemployment, and worsening relations between the Albanians and the Serbs.[686] Simultaneously, the economic situation was deteriorating across the federation, with personal incomes declining and governmental debt from International Monetary Fund rising drastically.[687] Anna Orford has described in her work how the international financial institutions, in effect, restructured Yugoslavia by imposing cuts in wages and services in exchange for loans.[688] This put the national relations under severe strain as the wealthier Slovenia and Croatia were becoming increasingly unwilling to pay donations for the less developed parts of the federation.[689] Pressures for democratization grew, and some politicians were gathering public support with nationalist rhetoric.[690] In the late 1980s, nationalist parties had been formed in all the SRs and the SAPs.

The final breakup of the SFRY began in Serbia. First, in late 1987 a strife developed within the Serbian Communist Party between those who advocated Yugoslavia's restructuring under Serb dominance and those who clung to the Titoist concept of a multinational SFRY.[691] The former policy line, championed by the Serbian Party leader Slobodan Milošević, won the vote, and the advocates of the latter line were forced to resign.[692] Following, in the summer of 1988, Milošević launched an 'Anti-Bureaucratic Revolution', a wave of popular mobilization that rallied the Serbs around him as a national leader. The aim was to take over the SFRY by replacing important federal officials -

[684] A. Wachtel and C. Bennett, 'The Dissolution of Yugoslavia' in C. Ingrao and T. Emmert, *Confronting the Yugoslav Controversies: A Scholars' Initiative* (Purdue, 2013) 13-47 at 28.
[685] Pavlović (n 663) 60.
[686] For example, between 1970 and 1982, the Albanian unemployment rate rose from 76% to 77,6 %, whereas the Serb equivalent fell from 17,6% to 15,1%. *Ibid*. at 54.
[687] M. Boduszynski, *Regime Change in the Yugoslav Successor States: Divergent Paths toward a New Europe* (John Hopkins University Press, 2010) at 64-65.
[688] She argues that the 'programme of economic liberalisation and restructuring of the state implemented by the international financial institutions of the World Bank and the IMF during the 1970s, 1980s and indeed the 1990s contributed to the conditions' which fueled ethnic tensions in the SFRY. A. Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press, 2003) at 89.
[689] M. Franek, 'Description of the Most Important Wars, which Took Place on Balkan Territory' 2(1) *Challenges of the Future* (2017) 27-43 at 33.
[690] Wachtel and Bennett (n 684) 28.
[691] *Ibid*. at 29.
[692] Most influential of them was the President of Serbian SR, Ivan Stambolić, who resigned in December 1987 and was replaced by one of Milošević's allies and, in May 1989, by Milošević himself.

'bureaucrats' - with Milošević' supporters. The main targets were the leaders of the SR of Montenegro and the SAPs of Kosovo and Vojvodina. The SFRY federal government proved to be unable to respond to such an intense assault on its authority, and the Party decided to sacrifice the SAPs.[693] In the absence of support from the federal authorities, after a series of mass demonstrations, a great number of high SFRY officials left office.[694] The government of Vojvodina resigned in October 1988, followed by the governments of Kosovo (November 1988) and of Montenegro (January 1989). This gave Milošević control over four out of eight votes in the SFRY Presidium and an opportunity to start pushing for the recentralization of the SFRY.

In November 1988, the last major federal legal act of the SFRY took place as a set of constitutional amendments were promulgated. In the lack of any consensus on the future relationship between the federal units, the amendments dealt mostly with limited free-market reforms. While virtually all representatives agreed that a new constitution would be needed,[695] they had quite contrary positions over the content of the new constitutional arrangement. The rhetoric against 'Serb domination' was hardening among the Slovenian and Croatian leaderships who advocated a very loose confederation and who had started even to contemplate secession from the SFRY.[696] Milošević, by now an unchallenged leader of Serbia, stated that such secessions would be impossible until border changes were negotiated so that the Serb-populated areas could remain within the SFRY.[697]

In this atmosphere of distrust, all the SRs and the SAPs were supposed to make amendments to their Constitutions to reflect the 1988 SFRY constitutional amendments. Some SRs chose to use this opportunity to push through their agendas. Slovenian and Croatian amendments added articles on their 'self-determination', 'sovereignty' and the 'right to secession'.[698] Slovenia was justifying these additions due to the right to self-determination as provided in the 1966 Covenants which the SFRY had signed and Article 210 of the 1974 Constitution which states that 'international treaties which

[693] Wachtel and Bennett (n 684) 31.
[694] N. Vladisavljević, 'Introduction: The Significance of the Antibureaucratic Revolution' in N. Vladisavljević, *Serbia's Antibureaucratic Revolution: Milošević, the Fall of Communism and Nationalist Mobilization* (Palgrave, 2008) 1-24 at 1.
[695] R. Hayden, 'The Beginning of the End of Federal Yugoslavia: The Slovenian Amendment Crisis of 1989', *The Carl Beck Papers in Russian & East European Studies*, No. 1001 (1992) at 6.
[696] In addition, as a response to Milošević taking over the Kosovo government, Slovenia withdrew its police contingent from the Province. Wachtel and Bennett (n 684) 33.
[697] A. Kuperman, 'Transnational Causes of Genocide, or How the West Exacerbates Ethnic Conflict' in R. Thomas (Ed), *Yugoslavia Unraveled: Sovereignty, Self-Determination, Intervention* (Lexington, 2003) 55-86 at 61.
[698] For example, Amendment 8a of the Constitution of the Slovenian SR stipulated that 'all organizations and movements may freely participate in political life, provided they support […] the sovereignty of the Slovenian nation and the people of Slovenia'. Among the amendments were also a declaration of 'complete and unalienable right' to 'self-determination, including the right to secession'. S. Woodward, *Balkan Tragedy: Chaos and Dissolution after the Cold War* (Brookings, 1995) at 110.

have been promulgated shall be directly applied by courts of law', thus becoming legally binding internally without a need to have a separate federal law on the matter.[699] Serbian amendments started the process of abolishing the autonomies of the SAPs in the SR level, for example, by taking away their veto right over changes in the Serbian SR Constitution and giving the Serbian Constitutional Court vertical superiority over the Kosovo Constitutional Court.[700] The Kosovo Assembly was forced to give its consent to the changes during a proclaimed state of emergency, and due to a boycott without legally required two-thirds of a majority. When the Kosovo Assembly further protested the amendments, Serbia dissolved it all together and assumed its functions.[701] The process for dismantling the autonomous structures of Kosovo was continued with series of measures and laws in the summer of 1990: Albanian language broadcasting on TV and radio was suspended,[702] and teaching in Albanian was banned.[703] Finally, the process reached a conclusion on 28 September 1990 with a new Serbian SR Constitution which, in effect, terminated what remained of the autonomy of the SAPs.[704]

The unconstitutional nature of the Serb actions cannot be overstated, as this is a critical element in the application of *uti possidetis*. The abolishment of Kosovo's autonomy was contrary to the 1974 SFRY Constitution,[705] violated several individual federal laws,[706] and the principle of *vacatio legis*.[707] The assumption of the Kosovo Assembly's functions had no basis in the 1974 SFRY Constitution as the Kosovo Assembly was not in any kind of a subordinate position to the Serbian Assembly. Thus, the abolishment process of Kosovo's autonomy should be seen as illegal and invalid in its entirety,

[699] Hayden (n 487) 15-16.
[700] There were four critical amendments. Amendment 29 made certain provisions of the SAPs' Constitutions not applicable if the assembly of the SAP did not harmonize such provisions within one year. Amendment 33 considerably weakened the status of the SAPs in relation to passing laws relating to legislation applicable thought out the SR Serbia. Amendment 44 stipulated that the Serbian Constitutional Court could begin to decide on certain matters without the Kosovo Constitutional Court having yet concluded its proceedings on the matter. Amendment 47 abolished Art. 427 of the Constitution of Serbia, which stated that Serbia decided on its constitutional amendments based on an agreement with the SAP assemblies, which now could only give 'opinions'. However, the SAPs retained a right to give their consent to amendments of the SFRY Constitution, which the Serbian amendments were breaking.
[701] D. Janjic, A. Lalaj and B. Pula, 'Kosovo under the Milošević Regime' in C. Ingrao and T. Emmert, *Confronting the Yugoslav Controversies: A Scholars' Initiative* (Purdue, 2013) 273-301 at 279.
[702] A. March and R. Sil, 'The "Republic of Kosova" (1989-1998) and the Resolution of Ethno-Separatist Conflict: Rethinking "Sovereignty" in the Post-Cold War Era', *CIAO Working Papers* (Pennsylvania, 1999) at 5.
[703] M. Sommers and P. Buckland, *Parallel Worlds: Rebuilding the Education System in Kosovo* (International Institute for Educational Planning, 2004) at 41.
[704] March and Sil (n 702) 5.
[705] The 1974 SFRY Constitution (n 189) Arts 2 and 5.
[706] For example, *Law on the Foundations of State Administration and Federal Executive Council, Law on General Administrative Procedure*, and *Law on Administrative Disputes*. Summarized in *Written Comments of Slovenia* (n 664) 20.
[707] The principle of *vacatio legis* requires that a certain time limit must elapse from the date of the promulgation of the law until its entry into force. For example, three legal acts by Serbia were adopted, published, and entered into force on 26 June 1990. *Ibid*. at 23.

and will not affect the utilization of *uti possidetis*, which is based on the *last legal order* at the moment of the dissolution.[708]

The escalation continued, with the members of the dissolved Kosovo Assembly issuing a Declaration of Independence on 2 July 1990. Technically, the declaration was not of independence from the SFRY but from Serbia, and it demanded that Kosovo be recognized as one of the SRs of the restructured SFRY.[709] The politicians in Kosovo were split between 'legalists' and 'anti-legalists'. Both groups advocated for independence and self-determination for Kosovo. However, the former sought this on the basis of autonomy as portrayed in the 1974 Constitution. In contrast, the latter claimed this approach would only result in Kosovo remaining under a new Yugoslavia or Serbia and, thus, advocated for unilateral radical action.[710]

As the federal center remained passive, the Constitutional Court tried to intervene against obvious distortions of the 1974 Constitution.[711] It concluded that all the SRs except Montenegro had violated the Constitution with their 1988-1989 amendments.[712] While the Court could only give its 'opinion' on the matter, it activated the SFRY Federal Assembly. On 27 March 1990, the Assembly passed a resolution that unequivocally demanded that the SRs change their Constitutions accordingly within three months.[713] None of them did, as the SFRY was becoming increasingly paralyzed.

The 14th Party Congress of the League of Communists of Yugoslavia was held in Belgrade from 20 to 22 January 1990. It convened under a growing crisis that was putting the very survival of the federation at stake. On the third day and before the Congress had reached any substantial decisions, the Slovenian delegation called for democratic reforms, including multi-party elections, appealed for a peaceful resolution of the unrest in Kosovo, and proposed reforming the Party as an association of

[708] I.e., the last legal order of the dissolved federal entity, not the legal order of the subordinate SR of Serbia.
[709] Tierney (n 296) 269.
[710] S. Maliqi, 'Why the Peaceful Resistance Movement in Kosovo Failed' in R. Hudson and G. Bowman (Eds), *After Yugoslavia: Identities and Politics within the Successor States* (Palgrave, 2012) 43-76 at 55-56.
In 1993, a somewhat similar situation developed in the former SR of Bosnia-Herzegovina. An area in the North-West of the country led by Fikret Abdić proclaimed the establishment of the Autonomous Province of Western Bosnia on 27 September 1993. It did not seek secession, but recognition as a separate administrative unit within Bosnia-Herzegovina. However, on 26 July 1995 the leaders of the Autonomous Province transformed the autonomy movements into a push for secession by proclaiming independence. The Autonomous Province was put to an end after a successful military operation by the army of Bosnia-Herzegovina on 7 August 1995.
[711] Unlike in the Soviet system, in the SFRY, the decisions of the SRs could be challenged by the Constitutional Court.
[712] With other SRs, the violations were mainly technical, but with Slovenia, the Court held that the references to the unilateral right to secession were unconstitutional. Interestingly, while the Court did criticize Serbia on many grounds, it did not hold the abolishment of the SAPs autonomies to be unconstitutional.
[713] Trbovich (n 282) 177.

fully autonomous political parties.[714] Milošević and his allies blocked all these proposals. The Slovenian delegation walked out, followed by the Croatian delegation. The Chair of the meeting called for an adjournment for the following day, but the Congress was never recalled. With this failure, all illusions about the Party's unity or ability to overcome the crisis were dispelled.[715] All the subsequent initiatives to create a new, all-Yugoslav political Party failed and the League of Communists disintegrated into eight factions, renamed as social democrat or socialist parties.

While the disintegration of the Party precluded federal elections, the first free elections of the SFRY era were held on the ethnofederal level. In the atmosphere of ethnic tensions, nationalist parties or coalitions won in each SR and SAP, enhancing the SFRY fragmentation.[716] On 23 December 1990, Slovenia held a referendum with overwhelming support for independence.[717] Soon afterwards, Serbia, Slovenia, and Croatia promulgated new SR Constitutions, with Slovenia and Croatia giving themselves a unilateral right to secede if the SFRY could not be restructured on a confederal basis.[718]

The only common nominator remaining for the SRs and SAPs was the collective presidency. On 21 December 1990, the SFRY Presidium conceded that nations in the SFRY are sovereign and have a right to self-determination and secession.[719] Nevertheless, it held the view that secession could not be a unilateral act as that ignores other nations' interests and that Slovenia and Croatia should negotiate with the other SRs on the future of the SFRY.[720] However, in May 1991, Serbia blocked the installation of the Croatian candidate for the rotating presidency, which led to the dissolution of Presidium.[721] With Serbia now in de facto control of all the remaining federal organs, Slovenia and

[714] L. Centrih, 'The Road to Collapse: The Demise of the League of Communists of Yugoslavia', *Research Paper Series of Rosa Luxemburg Stiftung Southeast Europe No 2* (2014) at 4.
[715] Accounted for in detail in Pauković (n 192) 21-33.
[716] According to Hayden, these elections 'set the stage for the civil war that broke out in summer and fall 1991'. R. Hayden, 'Constitutional Nationalism in the Formerly Yugoslav Republics' 51(4) *Slavic Review* (1992) 654-673 at 654.
[717] With 93,2% turnout, independence was supported by 88,2% of the voters. D. Jović, 'The Slovenian-Croatian Confederal Proposal: A Tactical Move or an Ultimate Solution?' in L. Cohen and J. Dragović-Soso (Eds), *State Collapse in South-Eastern Europe: New Perspectives on Yugoslavia's Disintegration* (Purdue, 2008) 249-280 at 274.
[718] *Constitution of the Republic of Croatia*, adopted on 24 December 1990, Art. 135; *Constitution of the Republic of Slovenia*, adopted on 23 December 1990, Amendment 99.
[719] R. Iglar, 'The Constitutional Crisis in Yugoslavia and the International Law of Self-Determination: Slovenia's and Croatia's Right to Secede' 15(1) *Boston College International and Comparative Law Review* (1992) 213-239 at 219.
[720] To this end, the SFRY Presidium had presented the SFRY Federal Assembly a document entitled 'Concept for the Constitutional Structure of Yugoslavia on Federal Basis', to be used as a draft for future constitutional reform. The document did concede the right to secession in accordance with procedures to be set out in the federal Constitution. I. Primoratz and A. Pavković (Eds), *Identity, Self-Determination and Secession* (Ashgate, 2006) at 159.
[721] Busky (n 193) 36.
Already in March 1991, Milošević had declared that 'Yugoslavia does not exist anymore'. Carter et al. (n 231) 246.

Croatia decided to stop interacting with the SFRY institutions and pursue their independencies unilaterally, despite Milošević' threats of use of force.

4.3 External Intervention: The EC Declarations, The Hague Peace Conference, and the Badinter Commission Opinions

4.3.1 The Right to Self-Determination as Portrayed by the EC in 1991

In the summer of 1991, Prime Minister of the SFRY Ante Marković admitted that the SFRY would be unable to solve its internal conflicts alone and pleaded for proposals for a peaceful solution from the EC and other international organizations.[722] After receiving support from the US and the USSR, the EC took a leading role in the mediation efforts.[723] However, the EC member states had difficulties in formulating a comprehensive stance towards the SRs' right to self-determination and the SFRY's right to territorial integrity. Already on 19 December 1990, the EC foreign ministers had taken notice on the situation in the SFRY and had demanded respect for human rights, democratic principles, territorial integrity of Yugoslavia, and the interests of the republics.[724] On 13 March 1991, the European Parliament declared in a resolution that 'the constituent republics and autonomous provinces of Yugoslavia must have the right freely to determine their own future in a peaceful and democratic manner and on the basis of recognized international and internal borders'.[725] Yet, on their 9 April 1991 meeting, the EC was demanding the preservation of territorial integrity of the SFRY.[726] The Organization for Security and Co-operation in Europe (OSCE) likewise promoted the territorial integrity of Yugoslavia at a ministerial meeting on 19-20 June.[727]

The EC's wariness towards recognizing unilateral secessions is understandable.[728] Secession remains a very disorganized and disputed area of international law because it entails two contradictory but fundamental principles of territorial integrity and the right to self-determination. Currently, international law does not grant sub-state entities a general right to secede, but neither does it prohibit secession.[729] Some scholars argue that the 'right' to territorial integrity, in fact, only protects

[722] Bagwell (n 632) 494.
[723] See subchapter 2.5.2.
[724] *Ministerial Meeting Between the European Community, Its Member States and the Courtiers of the European Free Trade Association*, Brussels, 19 December 1990.
[725] European Parliament, 'Resolution on Yugoslavia', 13 March 1991.
[726] The PM of Luxemburg even declared that the SFRY could hope for Associate Membership in the EC. M. Klemenčič, 'The International Community and the FRY/Belligerents' in C. Ingrao and T. Emmert, *Confronting the Yugoslav Controversies: A Scholars' Initiative* (Purdue, 2013) 152-199 at 159.
[727] Notwithstanding, the foreign ministers of Germany, the US, the USSR, and the SFRY declared that it was up to the nations of Yugoslavia to decide their futures. *Ibid*. at 160.
[728] See n 204.
[729] For instance, see Franck (n 197) 83.

international (external) borders of the state, and the matter of secession is purely an internal affair.[730] A growing number argues for a 'remedial right' to secession in the cases where there are extreme persecutions of a minority in a state,[731] but the state practice does not support the right to remedial secession and states are wary of endorsing such a general legal right.[732] Additionally, although the 1974 Constitution did contain a constitutionally guaranteed right to secession for the SRs,[733] the EC did not feel competent to interpret the SFRY Constitution.[734] Notwithstanding, by the summer of 1991, there was an urgent need for a reaction as violence seemed imminent.

After supporting referendums, Croatia and Slovenia declared independence unilaterally on 25 June 1991.[735] At first, the EC and the OSCE chose to deny recognition because of the fear of a Yugoslav civil war.[736] Instead, the foreign ministers of the EC troika were sent to act as mediators. This produced Brioni Agreement on 7 July 1991, which called for a three-month moratorium on the

[730] For example, see G. Abi-Saab, 'Conclusion' in M. Kohen (Ed) *Secession: International Law Perspectives* (Cambridge University Press, 2006) 470-476 at 473. On the other hand, James Crawford insists that territorial integrity prohibits secession because it dismembers state. J. Crawford, 'State Practice and International Law in Relation to Unilateral Secession' in A. Bayefsky (Ed), *Self-Determination in International Law: Quebec and Lessons Learned*, (Brill, 2000) 31-62 at 60.
[731] For the conditions for this 'remedial right' see n 198.
[732] Vidmar (n 198) 37.
[733] The last SFRY Constitution of 1974 sets out in Basic Principle I: 'The nations of Yugoslavia proceedings from the right of every nation to self-determination, including the right to secession'.
The last Soviet Constitution of 1977 sets out in Art. 72; 'Each Union Republic shall retain the right freely to secede from the USSR'.
The problem with both these constitutional rights was that the Constitutions did not provide any formula for it. When the center was challenged with the secession claims, the authorities in the SFRY chose to categorically deny this right. In contrast, the Soviet President Gorbachev chose to introduce a new 'law of secession' to provide this formula (in reality meant to postpone the independences enough for him to introduce the New Union Treaty. See, for example, Treiman (n 200) 1-2).
[734] Indeed, the international legal principle of non-intervention includes 'the prohibition of the threat or use of force against the territorial integrity or political independence of any state' (UN Charter, Art. 2(4)). In addition, the principle of non-intervention signifies that a State should not otherwise intervene in a dictatorial way in the internal affairs of other States. The ICJ has referred to 'the element of coercion, which defines, and indeed forms the very essence of, prohibited intervention'. *Nicaragua v. United States of America* (n 201) para. 205. As Oppenheim puts it, 'the interference must be forcible or dictatorial, or otherwise coercive, in effect depriving the state intervened against of control over the matter in question. Interference pure and simple is not intervention' (Oppenheim and Lauterpacht (n 201) 432. Whether there is an exception to the principle of non-intervention in the case of assistance to peoples seeking to exercise the right of self-determination remains controversial. Jamnejad and Wood (n 201) 345-381.
[735] The Slovenian referendum on 23 December 1990 gave a result of 88,5% of all electors (94,8% of those participating) voting for independence (*Statistični letopis 2011,* (Statistical Yearbook 2011, Statistical Office of the Republic of Slovenia), p. 108). The Croatian referendum on 2 May 1991 had 93,24% of the participants voting for independence. Then on 19 May 1991, there was a referendum on the structure of the Yugoslav federation. The phrasing was unambiguous and did not explicitly inquire on whether one was in favor of secession. The question posed was: 'Are You in favor of Croatia to be able to enter into an alliance of sovereign states with other republics (in accordance with the proposal of the republics of Croatia and Slovenia for solving the state crisis in the SFRY)?'. This time 94,17% of the voters voted 'yes'. However, the participation was only 78,69% as most of the Croatian Serbs were boycotting the vote. N 203.
[736] Ahrens (n 202) 42.

independencies.[737] Despite these efforts, the civil war broke out soon after.[738] Next, at the meeting held in Brussels on 27 August 1991, the EC decided to convene a peace conference in The Hague.[739]

4.3.2 The Hague Peace Conference on Yugoslavia

The Hague Peace Conference on Yugoslavia (also known as International Conference for Peace in Yugoslavia, hereinafter the Conference) was convening from 7 September to 5 November 1991 and gathered the representatives of all the SRs and the head of the SFRY Presidium Stipe Mesić.[740] In the Conference, Mesić affirmed that all Yugoslav regions had the right to self-determination, including the right to secession.[741] However, Chairman Lord Carrington insisted that the international community should not recognize any state independent until a mutually acceptable solution had been found. In addition, the USSR President Gorbachev showed his political support to the Conference by inviting Serbian President Milošević and Croatian President Tuđman to Moscow, where he tried to reason with them to renounce the use of force. Moreover, Gorbachev said that he believed that the war between Serbia and Croatia 'mirrored the horrors' that were possible in the USSR.[742] Milošević and Tuđman then promised to work with the Conference to end the fighting.

In the opening ceremony, the participants of the Conference issued a joint statement declaring as their mission 'to reestablish peace for all in Yugoslavia and to achieve lasting solutions which respect all legitimate concerns and legitimate aspirations'.[743] On 6 October, the EC issued a declaration stating that '[t]he right to self-determination of all peoples of Yugoslavia cannot be exercised in isolation from the interests and rights of ethnic minorities within the individual Republics'.[744] On 18 October 1991, the Conference produced a Draft Convention that proposed independence for all the SRs wishing for it within their internal borders, with comprehensive guarantees for safeguarding human

[737] The so-called Brioni Agreement or Brioni Declaration was a document signed by the representatives of Slovenia, Croatia and the SFRY under the initiative of the EC in 7 July 1991. Agreement, by insisting on the three-month moratorium of independence, sought to create an environment in which further negotiations of the future of the federation could take place. It failed and ended up isolating the SFRY Prime Minister Marković in his efforts to preserve the SFRY, while in effect stopping any form of federal influence over Slovenia. *<http://www.ucdp.uu.se/gpdatabase/peace/Yug%2019910712.pdf>*.

[738] First, a war between Slovenia and the SFRY lasted from 27 June to 6 July 1991, followed by the Croatian War lasting until 12 November 1995. For a good overview of the SFRY dissolution wars, see C. Baker, *The Yugoslav Wars of the 1990s* (Palgrave, 2015).

[739] Based on the proposals of Germany, France, and the Netherlands. D. Rupel, 'Managing Yugoslav Crises: Conference on Yugoslavia in The Hague (1991) and the Challenges of Multilateral Diplomacy' 21(3) *Acta Histriae* (2013) 329-360 at 336.

[740] While the Kosovo delegation was not officially invited, it was allowed to follow the proceedings transmitted to a separate room reserved for them. H. Krieger, *The Kosovo Conflict and International Law: An Analytical Documentation 1974-1999* (Cambridge University Press, 2001) at 115.

[741] Quoted in P. Montgomery, 'Yugoslavs Joust at Peace Meeting', *The New York Times*, 8 September 1991. Italics mine.

[742] J. Gow, *Triumph of the Lack of Will: International Diplomacy and the Yugoslav War* (London, 1997) at 193. He believes that the meeting was actually less about Yugoslavia and more for Gorbachev's purposes of persuading the SSRs of the USSR to sign the New Union Treaty and avoid the fate of the SFRY.

[743] *Joint Statement* (n 299).

[744] European Community, *Declaration on the Situation in Yugoslavia*, Haarzuilens, 6 October 1991.

rights of ethnic and national groups that would become minorities.[745] Thus, the SFRY would recognize the independencies of the SRs wanting to secede in exchange for minority right guarantees. The Draft was signed by all the SRs but Serbia.[746]

After the failure of the Draft Convention, the Conference shifted its focus on establishing conditions for recognizing unilateral independencies from the SFRY. These conditions mostly concerned about human rights and the rights of national and ethnic groups.[747] The next two Drafts tried to re-establish the SAPs autonomy by demanding that the 'republics shall apply fully and in good faith the provisions existing prior to 1990 for autonomous provinces'.[748] The Conference also established a 'Special Group' focusing on Kosovo, but which reached no tangible results.[749]

On 28 October, the EC issued a Declaration where they noted the uncompromising attitude of Serbia and affirmed that the SFRY situation can only be solved through the principles in the Draft Conventions and that the principles of no unilateral change of borders and protection of human and minority rights are 'universal, objective standards, which leave no room for compromise'. Finally, they stated that if Serbia would continue its non-cooperative stance, the EC 'will proceed with the cooperative republics to obtain a political solution, in the perspective of recognition of the independence of those republics wishing it'.[750]

On 4 November 1991, the last Draft Convention was published. It reaffirmed the applicability of the 1966 Covenants, the Helsinki Final Act (1975), the Charter of Paris (1990), and the minority rights as enshrined in, inter alia, the Convention of the Elimination of Racial Discrimination and the CSCE meeting of experts in Geneva.[751] Moreover, it guaranteed for any group 'forming a substantial percentage of the population in the Republic' a 'general right of participation in public affairs, *including participation in the government of the Republics* concerning their affairs'.[752] Finally, it demanded a special status of autonomy for special minority areas - such as Kosovo - under which

[745] The so-called 'Carrington Peace Plan', an excerpt from M. Gilbert, *European Integration: A Concise History* (Rowman & Littlefield, 2012) at 162.
[746] Trbovich (n 282) 247.
[747] N 224.
[748] *Treaty Provisions for the Convention*, 23 October 1991, Art. 2.C.6; and *Treaty Provisions for the Convention*, 1 November 1991, Art. 2.C.6.
[749] Krieger (n 740) 115.
[750] European Community*, Declaration on the Situation in Yugoslavia*, 28 October 1991. As the EC had shifted its focus on the conditions of recognizing unilateral independence of the SRs from the SFRY, the reference here was that there could be no unilateral changes to the SR borders, which were still considered sacrosanct. As the SFRY was a dissolving entity, its sovereignty was broken, and it no longer enjoyed the right to territorial integrity.
[751] *Treaty Provisions for the Convention*, 4 November 1991, Arts. 2.A and 2.B.2.
[752] *Ibid.* Art. 2.B.3. Italics in the original.

they were to have their national emblems, legislative bodies, regional police forces, and judiciaries, accompanied with a demilitarized status.[753] Moreover, the provisions for autonomy would be subjected to international monitoring.[754] After Serbia rejected the Draft, the Conference was brought to an end in its last plenary session on 5 November 1991.[755]

In the end, as the Conference was unable to reach a compromise solution and the EC member states were divided over the recognition policy, they decided to delegate the issue to the independent arbitration commission, and an arbitration procedure was established to accomplish legal settlement for the SFRY crisis.[756] This procedure gained a form of an Arbitration Commission of the Peace Conference on Yugoslavia (the Badinter Commission) to act as a legal advisor for the EC.[757]

4.3.3 The Badinter Commission Opinions

As the Badinter Commission was meant to offer *a federal solution* to the impasse, the arbitrators appointed by the EC were not international but constitutional lawyers.[758] However, after the political situation further deteriorated, the Badinter Commission became under significant pressure to establish rules according to which *unilateral independencies* could be legitimately recognized.[759] As the SFRY was increasingly seen as a dissolving entity, the main question was who had the right to self-determination in Yugoslavia. The SRs of Slovenia and Croatia were advocating for this 'unqualified' right belonging to all the SRs. Serbia and Montenegro - claiming to speak on behalf of the SFRY - claimed that the right belonged to the six 'nations' of Yugoslavia and that the internal administrative borders did not correspond with the location of peoples. Kosovo argued that the 1974 Constitution guaranteed the right to self-determination for the SRs and the SAPs alike.

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[753] The Draft Convention of 4 November 1991 states that such a status would be provided for areas that are 'listed in Annex A', but in reality, the Conference was never able to produce Annexes for the Draft Convention as it was called off in the following day. However, the Badinter Commission was insisting on the applicability of the 4 November Draft Convention in its Opinions 4, 5, 6 and 7 in relation to minorities in all the other SRs, so I feel confident to conclude that already well-delineated Kosovo would have been one of the 'special areas' that the Draft Convention was referring to.

[754] *Ibid.* Art. 2.C.5.

[755] The Conference would continue in August 1992 under a meaningful title of 'International Conference on the Former Yugoslavia'. While none of the Draft Conventions was signed by all the SRs, in the EC's 'Declaration on Yugoslavia' (n 224) on 16 December 1991 'all Yugoslav Republics' were invited to state, by a deadline, whether they wished to be recognized, and whether they accept the commitments from the Guidelines and the provisions laid down in the Draft Conventions prepared by the Conference.

[756] Conference on Yugoslavia Arbitration Commission, *Opinions on Questions Arising from the Dissolution of Yugoslavia*, 31 ILM (1992) 1488-1526 at 1488.

[757] Established by the *Extraordinary Meeting of the Foreign Ministers* (Brussels, 27 August 1991).

[758] M. Fitzmaurice, 'Badinter Commission (for the Former Yugoslavia)' in R. Wolfrum, *Max Planck Encyclopedia of Public International Law, Vol. 1* (Oxford University Press, 2012) 775-785 at para. 9.

[759] Germany was particularly eager to recognize Slovenia and Croatia, displaying this already in July 1991. S. Lucarelli, 'Germany's Recognition of Slovenia and Croatia: An Institutionalist Perspective' 32(2) *The International Spectator* (1997) 65-91 at 66.

This confusion was due to the fact that while the 1974 SFRY Constitution had decentralized the federation by bestowing significant rights to the SRs and the SAPs, it had justified this with references to 'national' rights and equality.[760] Unlike the USSR Constitution that was very explicit on the SSRs having a right to secession, the SFRY Constitution stated that 'the nations' (ethnic designation) had a right to self-determination and secession, not the SRs.[761] According to the Yugoslavian Constitutional Court, the rights of self-determination and secession belonged to 'the peoples of Yugoslavia and their socialist republics'.[762] Radan has argued that this notion cannot be justified, as the 1974 Constitution can only be read as to mean that the SRs were the result of the peoples' exercise of the right to self-determination and that '[a]s such the republics could not have the rights of self-determination or secession, that right being vested exclusively in Yugoslavia's peoples'.[763] The Yugoslavian Constitutional Court had confirmed this on 19 February 1991 with the *Kosovo Declaration Case*, stating that 'only peoples of Yugoslavia' had the right of self-determination.[764]

In late November 1991, the Badinter Commission gave its Opinion No. 1. After considering the traditional statehood conditions,[765] the Commission made a summary of the situation of the SFRY at the end of 1991. Slovenia, Croatia, and Macedonia had had referendums with overwhelming support for independence and declared their independence accordingly, while the parliament of Bosnia-Herzegovina had adopted a sovereignty resolution. The main federal organs were no longer meeting the criteria of participation and representativeness inherent in a federal state.[766] Finally, the federal authorities were powerless to enforce the ceasefire agreements in the armed conflicts between the SRs.[767] Based on these findings, the Commission opined that the SFRY was in a 'process of dissolution', rather than in a secessionist conflict.[768]

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[760] A. Budding, 'Nation/People/Republic: Self-Determination in Socialist Yugoslavia' in L. Cohen and J. Dragović-Soso (Eds), *State Collapse in South-Eastern Europe: New Perspectives on Yugoslavia's Disintegration* (Purdue, 2008) 91-130 at 103.
[761] The 1974 SFRY Constitution (n 189), preamble 1; Headley (n 233) 86.
[762] Quoted Radan (n 234) 137.
[763] *Ibid*. at 138.
[764] *Ibid*.
[765] The Badinter Commission was listing the criteria from the Montevideo Convention: a community, consisting of a territory and a population, subject to an organized political authority characterized by sovereignty.
[766] Craven has argued that while the representativeness of a government may influence the credibility of its claim to effective authority over territory when facing a secession, the distinguishing of a state based on this cannot be accepted. However, he continues that the test should be different between federations and unitary states since federations have been thought to be characterized by a constitutionally guaranteed division of power between central and regional government in which both forms of government exercise simultaneously independent and direct control over the population. Craven (n 16) 367.
[767] In 1991, two conflicts had erupted in the SFRY: between Slovenia and Serbia (SFRY) and between Croatia and Serbia (SFRY).
[768] *Opinion No. 1* (n 210). The Opinion has received critique. For instance, Kreca has argued that the 'process of dissolution' had no basis in the SFRY Constitution (M. Kreca, *The Badinter Arbitration Commission: A Critical Commentary* (Belgrade, 1993) at 12–14). It is also questionable interpretation according to the comparative theory and practice of federalism (I. Bernier, *International Legal*

As the EC was confirmed that the SFRY was not going to survive as a state, it issued two declarations on 16 December 1991: 'Declaration on Yugoslavia' and the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' (the Guidelines). These are the most important documents that delineate the subsequent EC recognition practice, later to be adopted universally.[769] While the Guidelines were similarly applicable to the USSR, the Declaration on Yugoslavia and the Draft Conventions of The Hague Peace Conference were applicable only to the SFRY.[770]

The Guidelines continue the evolution of the *uti possidetis* doctrine by reforming it to take into account the developments that had taken place in international law since the 1960s. Under the Guidelines, the EC required any SR or SSR asking for recognition to respect the provisions of the UN Charter, the Final Act of Helsinki and the Charter of Paris; to guarantee the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE; to respect the inviolability of all frontiers which can only be changed by peaceful means and by common agreement; to accept all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability; and to settle by agreement or arbitration any questions concerning State succession and regional disputes.[771]

According to the Declaration on Yugoslavia, which was only applicable to the SRs:

> 'The Community and its Member States agree to recognize the independence of all the Yugoslav Republics fulfilling all the conditions set out below. The implementation of this decision will take place on 15 January 1992.
>
> They are therefore inviting all Yugoslav Republics to state by 23 December whether:
>
> – they wish to be recognized as independent States
>
> – they accept the commitments contained in the above-mentioned Guidelines

Aspects of Federalism (London, 1973) at 26). Radan has argued that the closer look to the Opinions No. 3 and No. 11 imply secession, not dissolution, taking place. Radan (n 20) 51.

[769] Timeline of the recognitions of Slovenia and Croatia was as follows: The Badinter Commission Opinion No 1, declaring the SFRY being 'in the process of dissolution', was published on 29 November 1991; Germany recognized Croatia and Slovenia on 23 December 1991; the EC recognized the countries on 15 January 1992, although this had been decided already on a meeting on 17 December 1991; in the days following the official EC recognition Canada, Australia and Argentina recognized the countries; finally, within a few months the countries were recognized by the US, Russia, China, Japan and India, and were admitted to the UN on 23 May 1992. See more on the politics of these decisions on Crawford (n 47) 482-521. She is very critical towards the German policy and only slightly less critical towards the EC policy in general. For much more favoring view of the EC goals (but not of the implementation of these goals) see Eckert (n 252) 19-39. Finally, for a good overview of the events from the international relations perspective, especially focusing on the Common Foreign and Security Policy of the European Union, as well as the UNSC debates, see Lucarelli (n 204).

[770] The EC issued an official statement on 31 December 1991 which, in turn, was applicable only to the USSR (n 225).

[771] *Guidelines* (n 4).

> – they accept the provisions laid down in the draft Convention - especially those in Chapter II on human rights and rights of national or ethnic groups - under consideration by the Conference on Yugoslavia
>
> – they continue to support the efforts of the Secretary General and the Security Council of the United Nations, and the continuation of the Conference on Yugoslavia'.[772]

While Serbia refused to sign the last Draft Convention on 4 November, the 'process of dissolution' derived from Opinion No. 1 began to produce legal ramifications, transforming the SFRY internal borders and internal legislation to a matter of international law. On 11 January 1992, the Badinter Commission gave its Opinions No. 2-7. Opinions No. 2 and No. 3 stipulated that *uti possidetis* was applicable in the context of the breakup of the SFRY. The Commission based this view in the *Frontier Dispute* case, where the ICJ defined *uti possidetis* as a 'principle of general scope, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs'.[773] The application of *uti possidetis* removed the possibility of independence for the Serbian areas in Croatia and Bosnia-Herzegovina since the Serb minorities there were not constituent units of the SFRY. Opinion No. 3 stated that '[e]xcept where otherwise agreed, the former boundaries become frontiers protected by international law' and that *uti possidetis* 'applies all the more readily to the Republics since the second and fourth paragraphs of Article 5 of the Constitution of the SFRY stipulated that the Republics' territories and boundaries could not be altered without their consent'.[774]

With the Badinter Commission having affirmed the applicability of *uti possidetis*, Opinions No. 4-7 then addressed the recognition of Bosnia-Herzegovina,[775] Croatia,[776] Macedonia,[777] and Slovenia,[778] based on their fulfilment of the conditions of the Guidelines and the Declaration on Yugoslavia. Opinion No. 2 referred expressly to the 4 November 1991 Draft Convention:

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[772] N 224. According to Cassese, Declaration on Yugoslavia is profoundly innovative for making recognition contingent on 'democratic rule, that is, internal self-determination'. Thus, the 'close link existing between external and internal self-determination' was affirmed by the EC. Cassese (n 9) 268.

[773] '*Uti possidetis*, though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle, as stated by the International Court of Justice in the case between Burkina Faso and Mali […]. Nevertheless the principle is not a special rule which pertains to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles'. *Opinion No. 3* (n 39) 1500.

[774] *Ibid*. This sentence is somewhat puzzling given that the SAPs had the very same right than the SRs to veto any changes to their boundaries. On the contrary, to paraphrase Opinion No. 3, I argue that the right to internal self-determination works all the more readily for the former SAPs because of the applicable *lex specialis* - ethnofederalism - as portrayed in the SFRY Constitution.

[775] *Opinion No. 4* (n 226). The Commission decided against recognition at this point, since the will to constitute an independent state had not been affirmed via referendum.

[776] *Opinion No. 5* (n 226). The Commission decided against the recognition at this point because the new Croatian Constitution did not provide for the minority guarantees demanded by the EC.

[777] *Opinion No. 6* (n 226). The Commission decided in favor of the recognition.

[778] *Opinion No. 7* (n 226). The Commission decided in favor of the recognition.

> 'Where there are one or more groups within a State constituting one or more ethnic, religious or language communities, they have the right to recognition of their identity under international law. As the Commission emphasized in its Opinion No 1 […] the - now peremptory - norms of international law require a States to ensure respect for the rights of minorities. This requirement applies to all the Republics vis-à-vis the minorities on their territory. The Serbian population in Bosnia-Herzegovina and Croatia must therefore be afforded every right accorded to minorities under international conventions as well as national and international guarantees consistent with the principles of international law and the provisions of Chapter II of the draft Convention of 4 November 1991'.[779]

This Opinion has a great significance in relation to the SAPs since it contained a certain, undisputable set of rights to those nationalities that lacked the SR status. The Badinter Commission is calling minority rights 'peremptory norms of international law' that apply to all the SRs.[780] This annuls any arguments for Serbia being a 'persistent objector'[781] of the Badinter Commission Opinions. Even more significantly, Opinion No. 2 is referring to the provisions of Chapter II of the Draft Convention of 4 November 1991, which demanded a special status of autonomy for Kosovo. Moreover, Opinions No. 4-7 demanded that the SRs fulfill the commitments of the 4 November Draft Convention. Thus, I conclude that this is where the misapplication of *uti possidetis* takes place. Under both the internal and external legal frameworks - the 1974 SFRY Constitution and public international law of the early 1990s - the Badinter Commission made the right choice of insisting the guarantees for the rights of minorities and the continuation of Kosovo's autonomy. However, the EC and the international community failed to execute this decision in regard to the SR of Serbia, even though they did succeed to do this in relation to all the other SRs. In retrospect, this made the Kosovo uprising almost inevitable. I claim that the recognition of Kosovo's independence and the '*sui generis*' argumentation[782] are derived from this collective mistake of the early 1990s.

All the relevant international instruments that the Badinter Commission was referring to - the Helsinki Final Act, the Charter of Paris, and the EC Guidelines - demanded the inviolability of *all frontiers*. The Conference put forward several Draft Conventions, all aiming to uphold Kosovo's autonomy and

[779] *Opinion No. 2* (n 289) Art. 1.
[780] Despite the extensive usage of the term, international law does not have any authoritative definition of a minority. One of the more famous definitions has been made by the UN Special Rapporteur Capotorti, according to which minority is a 'group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members - being nationals of the state - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, religion or language'. F. Capotorti, 'Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities', *UN Doc. E/CN.4/Sub.2/384/Rev.1* (1977).
[781] As summarized by James Green, 'if a state persistently and consistently objects to a newly emerging norm of customary international law during the period of the "formation" of that norm (*i.e.* prior to its crystallization as a binding rule of customary international law), then the objecting state is exempt from the customary norm in question once it has crystallized and for so long as the objection is maintained'. J. Green, *Persistent Objector Rule in International Law* (Oxford University Press, 2016) at 1. However, peremptory norms of international law are exempt from the persistent objector rule, as they bind states even without their prior consent.
[782] See subchapter 2.6.

its internal frontiers. Their opening ceremony spoke of respecting all legitimate concerns and legitimate aspirations. So why was Kosovo's status bypassed in the end?

The most crucial Opinion in relation to the status of Kosovo was Opinion No. 5, in which the Badinter Commission considered whether Croatia had fulfilled the conditions in the Guidelines and whether it had fulfilled all the provisions of the Draft Convention on 4 November 1991.[783] The Badinter Commission concluded that Croatia had incorporated some of the provisions of the Draft Convention insufficiently to its new constitution, and had failed especially concerning Chapter II, Article 2.C, which demands a special status of autonomy in the Croatian case for the Serb minority. I conclude that if Serbia had applied the Badinter Commission for recognition, this would have been conditioned, incontrovertibly, on the re-establishment of Kosovo's autonomy. It would have been imperative for the EC to stand firm on this policy.

Serbia was indeed in a dire need for recognition. The rump-SFRY consisting of Serbia, Montenegro, and the SAPs of Kosovo and Vojvodina was renamed in a new 1992 Constitution as the 'Federal Republic of Yugoslavia (FRY). The Constitution finalized Milošević' campaign of abolishing the internal provinces of Serbia.[784] Afterwards, the FRY refused resolutely to apply for recognition from the Badinter Commission. As Opinion No. 8 had ruled that 'the process of dissolution of the SFRY, referred to in Opinion No. 1 of 29 November 1991, is now complete and that the SFRY no longer exists',[785] the question arose which state, if any, would legally continue the existence of the SFRY as Russia had done in the USSR. On 27 June 1992, the EC had declared that it would not recognize FRY as the successor state of the SFRY until 'qualified international institutions' would do so.[786] A week later, the Badinter Commission Opinion No. 9 stated that no successor state could continue the membership of the SFRY in international organizations, including in the UN.[787] Finally, Opinion No. 10 stated that the FRY 'is a new state which cannot be considered the sole successor to the SFRY; its recognition by the Member States of the European Community would be *subject to its compliance*

[783] *Opinion No. 5* (n 226).
[784] *Constitution of the Federal Republic of Yugoslavia*, 27 April 1992. The constitution had no mention of the previous autonomous provinces, creating a unitary state apart from the dividing internal border of Serbia and Montenegro.
[785] Arbitration Committee on Yugoslavia, *Opinion No. 8*, 4 July 1992, 31 ILM 1521.
[786] *The European Community Declaration on Former Yugoslavia*, 27 June 1992.
[787] Arbitration Committee on Yugoslavia, *Opinion No. 9*, 4 July 1992, 31 ILM 1523.

with the conditions laid down by general international law for such an act and the joint statement and Guidelines of 16 December 1991'.[788]

Yet, Kosovo's legitimate aspirations were dealt a series of blows during the next four years. Serbia continued to live in a legal fantasy as a continuation of the SFRY, although the UN Security Council resolutions 757 and 777 had explicitly reaffirmed the international rejection of the continuation of the SFRY.[789] On 21 November 1995, the Yugoslav Wars were seemingly put to an end with the Dayton Peace Agreement (also known as and hereinafter, the Dayton Accords)[790] that ended the Bosnian War between the Bosniaks and the Croats on one side and a self-proclaimed Serb-entity called 'Republika Srpska', supported militarily by Serbia, on the other.[791] While the end of the war was certainly a warmly welcomed event, the Dayton Accords contained two inherent distortions. First, throughout the Badinter Commission Opinions, there had been very few legal constants, but one had been the retention of the former SR borders via *uti possidetis*. This had to be devised by the *ad hoc* territorial modifications in the Dayton Accords that brought upon a de facto re-partition of the state.[792] Therewith, the international community breached their recent application of *uti possidetis* by forcing Bosnia-Herzegovina to accept a major reconfiguration of the state's internal borders, in order to satisfy the self-determination demands of the Serb minority.[793]

Second and even more seriously, while the Dayton Accords did breach the earlier application of *uti possidetis*, it still neglected to address the status of Kosovo in any manner. According to Peter Russell, while there were several reasons to exclude Kosovo from the Dayton Accords, the 'lack of knowledge

[788] Arbitration Committee on Yugoslavia, *Opinion No. 10*, 4 July 1992, 31 ILM 1525. Italics mine.
According to Trifunovska, the failure of The Hague Peace Conference and the subsequent Peace Conference in Brussels failed because of the Serb dissatisfaction caused especially by the Badinter Commission Opinions No. 1 ('process of dissolution'), as well as 9 and 10 (refusing to accept the FRY as the continuation of the SFRY). S. Trifunovska (Ed), *Yugoslavia through Documents: From Its Creation to Its Dissolution* (Martinus Nijhoff Publishers, 1994) at 378.
[789] *SC Res. 757*, 30 May 1992, noted that 'the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations has not been generally accepted. SC Res. 777, 16 September 1992 added that the 'Security Council considers that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore recommends to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply of membership in the United Nations and that it shall not participate in the work of the General Assembly'. The FRY was finally admitted to the UN as a new member on 1 November 2000 by the General Assembly, following the recommendation by the Security Council (SC Res. 1326, 31 October 2000).
[790] *General Framework Agreement for Peace in Bosnia and Herzegovina*, formally signed on 14 December 1995. While the wars between former SRs were put to an end with this agreement, it led to the armed uprising by the Kosovo Liberation Army in 1996-1998.
[791] For an overview with special attention to the internal and international politics, see S. Burg and P. Shoup, *The War in Bosnia-Herzegovina: Ethnic Conflict and International Intervention* (M.E. Sharpe, 1999). For the Republika Srpska, see subchapter 5.5.3.
[792] Bartos (n 19) 77.
[793] *General Framework Agreement* (n 790) Art. 3. The Serbs of Bosnia-Herzegovina had no territorial autonomy in the SFRY.

or concern about the state of affairs in Kosovo' were not among them.[794] The Dayton Accords would have been an excellent opportunity to pressure the Serb leadership to reinstall the autonomy of Kosovo, as should have been the case considering the EC Guidelines, The Hague Peace Conference Draft Conventions and the Badinter Commission Opinions. However, as the Dayton Accords disregarded the issue, the last remaining leverage that the international community had over the FRY leadership was the issue of recognition.

In the FRY era, the status of Kosovo was unquestionably not in conformity with the criteria spelled out by the Badinter Commission and the EC. Accordingly, the EC member states and the rest of the international community held out their recognition of the FRY, and the EC gave several statements declaring their unwavering support for Kosovo's legitimate right to self-governance. On 15 June 1992, the EC declared that 'frontiers can only be changed by peaceful means and (the EC states) remind the inhabitants of Kosovo that their *legitimate quest for autonomy* should be dealt with in the framework of the Peace Conference'.[795] In February 1994, the European Union[796] (EU) endorsed a proposal for the re-establishment of Kosovo's autonomy in its European Action Program for Yugoslavia.[797] All that being said, on 9 April 1996 the EU member states collectively recognized the FRY,[798] thereby effectively giving up the demands for the status of Kosovo in the process.[799] It should be noted that the recognition decision was made a month after the CERD's 'General Recommendation 21', which reaffirmed the division of the right to self-determination to internal and external aspect.[800]

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[794] P. Russell, 'The Exclusion of Kosovo from the Dayton Negotiations' 11(4) *Journal of Genocide Research* (2009) 487-511 at 487. According to Russell, the exclusion 'was the result of a deliberate decision on the part of Richard Holbrooke and his team that the severity of the Bosnian war justified focusing on it to the point, if necessary, of excluding any other issue'. Thus Kosovo was bypassed, 'despite both longstanding fears that the violence in Bosnia might spread and knowledge about the conditions in Kosovo. The one man whose cooperation was deemed to be absolutely essential, Slobodan Milosevic, was adamantly opposed to any discussion of Kosovo at Dayton'. He concludes that 'the decision was not cost-free, and the level of violence in Kosovo increased radically in the post-Dayton period in consequence. Rugova's policy of peaceful resistance was completely undermined, replaced by the violent struggle of the Kosovo Liberation Army and the corresponding increase in brutality and violence from the Serbian military'. *Ibid*. at 504-505.

[795] The EC Press Statement, Luxembourg, 15 June 1992, italics mine. Quoted in Tierney (n 296) 266. Tierney continues that '[a]s a consequence, Kosovo had a right only of internal self-determination', and the Peace Conference did not consider its right to external self-determination. *Ibid*.

[796] The European Community was renamed by the 'Treaty on European Union', signed in Maastricht on 7 February 1992.

[797] 'A broad autonomy in Kosovo also has to be re-established within the framework of the current borders […] an international presence (for example, ECMM) appears necessary in order to monitor the respect for the rights of ethnic groups and minorities'. *Action Plan of the European Union for the Former Yugoslavia November 1993-February 1994*, C1 London II. According to the Independent International Commission on Kosovo, leading politicians, including David Owen, continued to insist on the integrity of Yugoslavia. The Independent International Commission on Kosovo, *The Kosovo Report* (Oxford University Press, 2000) at 58.

[798] *European Union Bulletin*, No. 4 (1996) at 1.4.7.

[799] *Ibid*. While the EC recognized the FRY unconditionally, the Presidency did state that '[h]ereinafter the development of good relations with the Federal Republic of Yugoslavia and of its position within the international community will depend on a constructive approach by the FRY to […] the full respect for […] minority rights'. Document 4b/78, *Declaration by the Presidency on Behalf of the European Union on Recognition by EU Member States of the Federal Republic of Yugoslavia*, Brussels 9 April 1996.

[800] The Committee inspects the implementation of the Convention on the Elimination of All Forms of Racial Discrimination (n 89), of which all the EU member states were state parties to.

In addition, the EU recognition stance was inconsistent with its earlier position, according to which both Croatia and Bosnia-Herzegovina had been demanded to grant internal self-determination for their minorities that had not been former constitutional units of the SFRY. Indeed, in the Bosnian case, the previously unknown entity of Republika Srpska had achieved a status of a constitutional unit with a veto right in the Bosnia-Herzegovina federation by *invoking the use of force*. The disappointment caused by the exclusion drove a group of Kosovars to pursue self-determination in similar extra-legal means, in a form of armed uprising by the Kosovo Liberation Army,[801] not unlike the separatists in several of the former ASSRs of the USSR since 1991.[802]

4.4 Conclusion: Dissolution and the Badinter Commission Opinions

Examining the previous application cycles of *uti possidetis*, the Badinter Commission chose to use the doctrine to establish the borders of the successor states of the SFRY and to give them legitimacy.[803] Moreover, it chose to contribute to the evolution of *uti possidetis* by adding new criteria to be fulfilled in order for a state to be awarded recognition.[804] These included a mostly overlapping combination of new trends in international law and the criteria provided by the EC in the Guidelines, the Declaration on Yugoslavia, and The Hague Peace Conference's 4 November 1991 Draft Convention. This contribution was in complete conformity with the earlier evolutionary logic of *uti possidetis*. The doctrine needs to be updated in order for it to function. Thus, when compared to the earlier cycles of *uti possidetis*, the evolutionary process seems to continue and carry the doctrine into the 1990s setting. In my opinion, the decisions to apply *uti possidetis* and to upgrade it on the basis of the changes since the second cycle - including, in addition to the above mentioned EC instruments, the 1966 Covenants, the 1975 Helsinki Final Act and the 1990 Charter of Paris - were legitimate.

Notwithstanding, I argue that the EC - and, by extension, the international community that imitated the EC in the recognitions - did not follow through with the Badinter Commission Opinions and with their own logic in two ways. First, the EC did not advance *uti possidetis* to take into account the second-level internal borders and thus addressed internal self-determination in an inconsistent

[801] Accounted for, *inter alia*, in K. Hudson, *Justice, Intervention, and International Relations: Re-Assessing Just War Theory in 21st Century* (Routledge, 2009) at 136; and in A. Hehir (Ed), *Kosovo, Intervention and Statebuilding: The International Community and the Transition to Independence* (Routledge, 2010) at 6.
[802] See n 249.
[803] The Badinter Commissions influence cannot be overstated. As noted by Vidmar, although its opinions were 'not legally binding, they were generally followed by the entire international community'. Vidmar (n 198) 46.
[804] Shaw argues that the authoritativeness of the Badinter Opinions (in particular the decision to apply *uti possidetis* outside decolonization framework) is proven by the subsequent international practice, which has been fully in conformity with the Opinions and the EC Guidelines criteria. In contrast, any contradictory claims have met with international opposition. Shaw (n 17) 503-504.

manner.[805] The systematic ignorance of the rights of the SAPs was in contradiction with several Badinter Commission Opinions. Opinion No. 2 stated that '[w]here there are one or more groups within a state constituting one or more ethnic, religious or language communities, they have the right to recognition of their identity under international law […]. This requirement applies to all the Republics vis-à-vis the minorities on their territory'.[806] Opinions No. 4-7 subsequently demanded that all the SRs fulfill the requirement of Opinion No. 2, with direct references to the autonomous arrangements in the 4 November 1991 Draft Convention. Finally, Opinion No. 10 conditioned the recognition of the FRY with the fulfilment of the demands of the Declaration on Yugoslavia, the 4 November Draft Convention, and the Guidelines.

In effect, the EC recognized internal self-determination to be the right for ethnic groups but incoherently did not provide this for the established, constituent self-determination units.[807] The second-level ethnofederal units became victims of this failure.[808] Moreover, the EC reasonably attempted to have as little fragmentation of the SFRY as possible, and the SRs seemed like a logical instrument to draw the line on minority secessions. I agree with this decision to the extent of limiting *secessions*. However, the subsequent relentless categorization and all rights-no rights dichotomy between the SRs and the SAPs inevitably jeopardizes the promotion of internal self-determination, as provided in several international conventions and instruments that the EC and the Badinter Commission were systematically referring to.[809] Another reaffirmation came in autumn 1992, when the International Human Rights Committee that monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR) requested urgent special reports on specific issues under the ICCPR from Bosnia-Herzegovina, Croatia and the FRY. The Committee noted that 'all the

[805] For more on the different forms of internal self-determination and why the right to self-determination should not be equated with a right to independent statehood, see J. Anaya, 'The Capacity of International Law to Advance Ethnic or Nationality Rights Claims' 75(4) *Iowa Law Review* (1990) 837-844 at 842-843. For more on how internal self-determination is principally designed to forestall a more aggressive assertion of the right (on the road to its ultimate culmination in secession) see J. Oloka-Onyango, 'Heretical Reflections on the Right to Self-Determination: Prospects and Problems for a Democratic Global Future in the New Millennium' 15(1) *American University International Law Review* (1999) 151-208 at 168. Finally, for a good overview of the right to self-determination according to the demands based on international human rights law, see McCorquodale (n 149) 857-885. He concludes that while the right to self-determination is a human right, it is not an absolute human right and should be handled with this restriction kept in mind.
[806] *Opinion No. 2* (n 289) Art. 1.
[807] According to the Dutch government (holding then the EC Presidency): 'It considers it especially important that selective application of principles be avoided. The principle of self-determination e.g., cannot exclusively apply to the existing republics while being deemed inapplicable to national minorities within those republics'. Quoted in D. Owen (Ed), *Bosnia-Herzegovina: The Vance/Owen Peace Plan* (Liverpool, 2013) at 28. The Dutch government also asserted that it was difficult to imagine that the SFRY could peacefully dissolve into its six independent republics with their borders intact and suggested a redrawing of the borders.
[808] While this Chapter focuses on the SFRY, the Guidelines were also applicable to the successor states of the USSR. See Chapter 3.
[809] For instance, the previously mentioned *Helsinki Final Act* (n 13) Chapter VIII; the *Charter of Paris for a New Europe* (n 13); and *Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections* (n 13), preamble. According to Allen and Castellino, one of the main problems with *uti possidetis* as a legal rule is that it seems to critically alter the right to self-determination as it stands in modern international law (Allen and Castellino (n 49) 22).

peoples within the territory of the former Yugoslavia are entitled to the guarantees of the Covenant'. The states in question then acquiesced in being bound by Yugoslavia's obligations under the ICCPR.[810] Nevertheless, the fact remains that in the end, all the SRs received recognition of their independent statehood by fulfilling the Guidelines criteria (and in the case of the FRY, eventually without fulfilling it), whereas the SAPs could not get any status recognition under any criteria.

While I do not agree with the form of internal self-determination that the EC chose to use - bypassing the rights of the second-level units and the interpretations of the Badinter Commission on this regard - I want to point out that even disregarding this fact, the logic does not hold. If the EC insists that Kosovars are not in a special position, they at least should have been awarded the same constitutional guarantees than their Serb counterparts in Bosnia-Herzegovina and, to a lesser extent, in Croatia. Previously a constituent autonomous unit of the SFRY did not even receive the *same rights* as other ethnic groups without any prior status.[811] For example, in the Annex 4 of the Dayton Accords (the current Constitution of Bosnia-Herzegovina), the Bosnian Serbs received a status that is comparable to the Kosovo's autonomy in the 1974 SFRY Constitution, especially on their ability to participate within the political organs of the federation and to use a veto right in constitutional matters.[812] Yet, the fact remains that this status upgrade was accomplished by the use of force and was built upon no previous legal basis, whereas the international community chose to ignore Kosovo's *peaceful* demands until their armed uprising in 1998.

Uti possidetis needs to protect minority rights consistently and thus should take into account internal self-determination instruments already in place. Otherwise, the peace project nature of *uti possidetis* fails, and it ends up producing more territorial instability and ethnic violence as the Yugoslav Wars illustrate. The tragedy of the EC's practice towards the constituent units of the former SFRY is that it consistently demanded the protection and even autonomy for minorities in every other case except in Kosovo, which was one of the two recognized minorities with autonomy in one of the SRs.

I claim that as a constituent unit of the SFRY, Kosovo possessed a right to internal self-determination independently from the host SR of Serbia. While there is no authoritative definition on the content of

[810] Müllerson (n 145) 492.
[811] Indeed, if anything, the Serb minority seemed to be somehow *sui generis* after the dissolution. See subchapter 2.6 on the issue of the *sui generis* formulation with regards to Kosovo independence.
[812] For example, Republika Srpska was guaranteed one-third of the seats in both the upper and lower chambers of the Parliamentary Assembly, in the House of Peoples (Art. IV.9), and the House of Representatives (Art. IV.10). The veto right was affirmed in Art. V.7. *General Framework Agreement for Peace in Bosnia and Herzegovina* (n 790), *Annex 4: Constitution of Bosnia-Herzegovina*.

the right to internal self-determination in practical terms - apart from it being separate from the external self-determination, i.e., secession - in the cases of the SAPs, this is easier to establish. The SRs, as the constituent *nations* of the SFRY, possessed a general, external right to self-determination that they continued to enjoy as a part of the federation. After the dissolution, this amounted to the right to have an independent state or to join another state.[813] The constituent autonomous units as *nationalities* of the SFRY did not have a right to external self-determination as their peoples had already established nation-states outside the SFRY. That being said, under the last legal order of the dissolving SFRY, the nationalities possessed a right to *internal* self-determination, an autonomous status to self-govern their given territory, and to participate politically in the organs of both the host SR and the federation.

As accounted previously, *uti possidetis* turns the former administrative borders to international borders at the moment of the dissolution or independence. However, in the third cycle, there was also the recognized right to internal self-determination. The application of *uti possidetis* in the early 1990s should have recognized both variants of the right. The SRs borders were internationalized accordingly, but their internal administrative borders - delineating the autonomous areas of the SAPs - should have been recognized as well. According to the last legal order as enshrined in the 1974 Constitution, the SAPs were not in a subordinate position vis-à-vis Serbia. Therefore, Serbia never fully possessed these units in the federal times, and ignoring this is a factual distortion of the *uti possidetis* doctrine. If a former SR wanted to retain the entire territorial extent it had during the federal times - and only obtained during the federal times[814] - this should have been made contingent upon respecting the inherited autonomous statuses of the SAPs. On the contrary, the version of *uti possidetis* used made the previously guaranteed constitutional statuses dependent on the goodwill of the successor state - indeed an implausible scenario in Serbia led by Slobodan Milošević.[815]

[813] Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia chose the first option, whereas Serbia and Montenegro decided to integrate into a new joint state, the FRY. According to the Friendly Relations Declaration: 'The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people'. *Friendly Relations Declaration* (n 88).

[814] Before the SFRY, Kosovo only became a part of Serbia in 1912. Noel Malcolm has argued that the incorporation of Kosovo at this point was done outside the operating 1903 Constitution of Serbia, which states in Art. 4 that no changes to the frontiers of Serbia can be valid unless the Grand National Assembly has agreed on it. N. Malcolm, *Kosovo: A Short History* (New York, 1999) at 264. After 1912, Kosovo remained a part of Serbia only for six years, out of which Serbia was occupied most of the time by the Central Powers in the First World War. When the Kingdom of Yugoslavia was proclaimed in 1918, Kosovo became a part of Yugoslavia, not Serbia. Only in 1945 the Federal Yugoslavia degreed Kosovo to be a part of Serbia, but with autonomous status. At the same time, Serbia and Montenegro gained substantial area as they divided the Sandžak region between themselves. Finally, in 1974, Kosovo was made a part of Yugoslavia while remaining a part of - but not subordinated to - the SR of Serbia.

[815] Serbia argued that Kosovo had more arguments for independence in 1999 when human rights violations were taking place, but had no right to independence in 2008, as Serbia had been a functioning democracy since the fall of Milošević in 2000. Thus, the safeguards

Kosovo's right to internal self-determination in the early 1990s was independent of Serbia since its autonomy under the 1974 Constitution was not given by Serbia but by the SFRY. Moreover, it was seen as an integral component, even a condition of Kosovo being a part of Serbia. Self-determination insists on a link with pre-determined political entities, and the SAP of Kosovo was a constituent - and arguably sovereign[816] - socio-political unit with a clearly defined territory. Therewith, I conclude that the people of Kosovo[817] had a legal entitlement to self-rule, in their constitutionally designated area, when the dissolution took place. Germany supported this view in its Oral Statement in the ICJ's Kosovo hearings in 2009, which called this the democratic right to internal self-determination that was taken away by the unilateral abolishment by Serbia from 1989 onwards.[818] According to many Yugoslav lawyers, under the 1974 Constitution, Kosovo was a SR in all but name.[819] It had all the functions of a republic and held a veto right at the federal level. It had a Constitution, a parliament that was the highest authority in the province, as well as judicial and educational systems.[820] Finally, Kosovo was in effective control over its area through its police force.[821]

While Serbia had unconstitutionally abolished Kosovo's autonomy on its Constitution - i.e., on the SR level[822] - the act has no legal relevance as we look at the state succession from the SFRY. *Uti possidetis juris* concentrates on the applicable legal (*juris*) situation at the moment of independence,

for the Kosovo autonomy could have been restored (Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, *Written Statement of the Republic of Serbia*, 15 April 2009 at 237). However, at that point, many facts on the ground had changed, making the process in my opinion irreversible: Kosovo had been excluded from the Dayton Accords, the Kosovo War, and external intervention had taken place, and the interim administration by the UN had been governing Kosovo since 1999. See subchapter 2.6.

[816] N 675.

[817] 'The people of Kosovo' has been recognized several times, for instance by the Security Council resolution (SC Res. 1244, 10 June 1999, art. 10); the Independent International Commission on Kosovo (n 797) 286-287; UN Secretary-General (UNIS/SG/2763, 15 January 2001); and the last SFRY Constitution (n 189), Art. 4.

[818] *Oral statement by the Federal Republic of Germany* (n 597) para. 39.

[819] For example, according to Vojin Dimitrijević, there was a general Yugoslavian view that the provinces were republics in all but name, and the only reason they were not awarded this was the alleged political unreliability of the Albanian population, that the Yugoslav authorities did not want to invest even a theoretical right to secession. V. Dimitrijević, 'The 1974 Constitution and Constitutional Process as a Factor in the Collapse of Yugoslavia' in P. Akhavan and R. Howse (Ed), *Yugoslavia, the Former and Future: Reflections by Scholars from the Region* (Brookings, 1995) 45-74 at 59. Timothy Waters sees this minor distinction became the lynchpin with the recognition decisions. Based on the constitution, Badinter could have chosen either nations, nationalities or the provinces and made a disputable decision to choose only nations. T. Waters, 'Indeterminate Claims: New Challenges to Self-Determination Doctrine in Yugoslavia' 20(2) *The SAIS Review of International Affairs* (2000) 111-144 at 124-125. Finally, the leading Yugoslav constitutional lawyer of the time Mirić held the opinion that after the 1974 Constitution, 'the socialist autonomous province is not only autonomous, but even sovereign'. Quoted in *East Europe Report* (n 673) 97.

[820] Pavlović (n 663) 57.

[821] *The Prosecutor v. S. Milošević, M. Milutinović, N. Sainović, D. Ojdanic & V. Stojiljković*, The International Criminal Tribunal for the Former Yugoslavia, Case No IT-99-37 (1999), Art. 3; D. Phillips, *Liberating Kosovo: Coercive Diplomacy and U.S Intervention* (Belfer Center for Science and International Affairs, 2012) at 7; P. Williams, 'Earned Sovereignty: The Road to Resolving the Conflict of Kosovo's Final Status' 31(3) *Denver Journal of International Law and Policy* (2003) 387-426 at 395.

[822] Accounted for, *inter alia*, in Krieger (n 740) 522.

and the unconstitutional abolition is thus null and void.[823] The abolishment of the SAP autonomy was a territorial modification of the SFRY territory, which was not left for the discretion of the SRs but needed the federal government's constitutional ratification. While internal changes do not require outside recognition, *uti possidetis* can only work through the applicable legal framework of the target state. Otherwise, Serbia could have proclaimed in its SR Constitution that the Serb areas of Bosnia-Herzegovina belonged to the SR of Serbia as well. As stated by the ICJ in the *Frontier Dispute* case, '[t]he principle of *uti possidetis juris* accords pre-eminence to legal title over effective possession as a basis of sovereignty'.[824] Already in the first cycle, the states in question had agreed that their new borders should be based on *uti possidetis juris*, not *uti possidetis de facto*. By abolishing Kosovo's autonomy illegally, Serbia was, in essence, arguing *uti possidetis de facto* as *fait accompli*. However, de facto variant has never been internationally accepted, and it is equally inapplicable in this case.[825]

In addition to it not being in accordance with the SFRY legislation and constitutional order, the denial of the continuation of Kosovo's autonomy was a breach of the understanding and the scope of the contemporary doctrine of self-determination. This flaw disrupted the evolution of *uti possidetis*, undermining its legitimacy in the process. While contemporary international law does not provide for a legal right to autonomy, it does provide for guarantees for a group that has enjoyed such a right - taking back the autonomous status unilaterally is a clear breach of self-determination.[826] As the

[823] Alan Pellet has argued that the 1990s dissolutions precedents have demonstrated that *uti possidetis* would be applicable in the case of Quebec and that the Canadian Constitution (Canadian Constitution Act, 1982) would protect the current borders of Quebec until the moment of (possible) independence. Franck et al. (n 678) 2.1 and 2.5-2.7.
The other side of this is that any lawful changing of borders just prior to the moment of independence will provide a legal effect when applying *uti possidetis*. For instance, in the *Guinea-Bissau v. Senegal* arbitration, Guinea-Bissau argued that *uti possidetis* should only apply to treaties 'concluded a long way back', so that any treaties concluded by the colonial power 'once the process of liberation had begun' would be null and void if they breached the essential elements of the right of peoples to self-determination. However, the Tribunal did not accept this, proclaiming that there is no 'special condition of antecedence' relating to the changing of borders prior independence. *Guinea-Bissau v. Senegal Arbitral Award* (n 412) 53. In addition, the same view was confirmed by the Badinter Commission (n 207) and by Franck et al. (n 678) 2.3.
[824] *Frontier Dispute* (n 2) para. 23.
[825] As affirmed by the Permanent Court of International Justice in *Honduras Borders Case* (n 79) 1322; and by the ICJ in the *Frontier Dispute* (n 2) para. 23.
[826] See, *inter alia*, A. Buchanan, 'A Principled International Legal Response to Demands for Self-Determination' in Primoratz and Pavković (n 720) 141. He argues that the international legal order should support a right to intrastate autonomy for groups that have been granted such an autonomy previously, and that violation of such an autonomy needs to be regarded as a violation of international law. I would add that Buchanan is only addressing the question according to general public international law - in the case of Kosovo, there were special issues such as the international obligations of the SFRY. Babbit has concluded that if a group is denied language rights, non-discrimination, political inclusion, or economic opportunities, the risk of an armed confrontation is already high. If the group had, in earlier stages, an autonomy that has not been honored, the confrontation becomes all the more likely (E. Babbitt, 'Negotiating Self-Determination: Is It a Viable Alternative to Violence?' in H. Hannum and E. Babbitt, *Negotiating Self-Determination* (Lexington, 2006) 159-166 at 159-160. In the context of the autonomous arrangements in China, Friberg has concluded that the autonomous entities need to give their consent to the changes in the autonomous status. E. Friberg, '"Masters of Their Homelands": Revisiting the Regional Ethnic Autonomy System in China in Light of Local Institutional Developments' in M. Weller and S. Wolff, *Autonomy, Self-Governance and Conflict Resolution: Innovative Approaches to Institutional Design in Divided Societies* (Routledge, 2005) 205-229 at 220. Kaikobad has argued that when establishing the gravity of a breach of self-determination with the revoking of autonomy one needs to separate between a negotiated autonomous status, where there might be some international institutional

Commission of Jurists affirmed in their 1920 report, self-determination does not give a positive right to secession, which is an internal matter of a state. However, in some cases, such as the post-First World War transformations, self-determination was no longer just an internal matter, and the right to self-determination for the new states in Europe could not be questioned.[827] The same applies to the situation in the 1990s, where the abolition of Kosovo's autonomy was not just an internal matter of Serbia but was fundamentally linked to the preservation of international peace.

On the other hand, it is my opinion that Kosovo did not have a right to external self-determination in the early 1990s as the SRs did. The difference is somewhat small but decisive. Outside decolonization context, the right to self-determination does not have state practice or *opinio juris* on amounting to a legal right to secession, because it is always connected to, and restrained by, the principle of territorial integrity.[828] This rule did not bind the SRs of the SFRY, because the SFRY dissolved and - similarly to decolonization - there is no more state whose territorial integrity to uphold. Notwithstanding, it does bind Kosovo since Serbia continues to exist as one of the SFRY successor states with its inherited *uti possidetis* borders.[829] In a conflicting situation, without exceptional circumstances, territorial integrity seems to prevail over the external right to self-determination.[830] This is the view

involvement (such as Eritrea and Hong Kong), and situations where autonomy is a concession or a gift. K. Kaikobad, 'Autonomy, Kashmir and International Law' in R. Hofmann and U. Caruso (Ed), *Minority Rights in South Asia* (Peter Lang, 2011) 114-145 at 144. Finally, Oeter has argued that '[i]f the state completely blocks any "internal self-determination", erodes existing arrangements of autonomy and subsequently takes recourse to brutal forms of violent oppression, ending in gross and consistent patterns of crimes against humanity, forms of "ethnic cleansing", perhaps even genocide, a "right to secession" as an emergency tool seems to be arguable'. Oeter (n 558) 62. See also GA Res. 47/135 (n 588), Arts. 1 and 2; and the *CSCE Copenhagen Document on the Human Dimension*, 29 June 1990, Arts. 4, 5(2), 5(3), 5(7), 5(20), 6, 30, 31, 33 and, especially, 35, which states that '[t]he participating States will respect the right of persons belonging to national minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities. The participating States note the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic, and religious identity of certain national minorities by establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances minorities'.

[827] *Report of the International Commission of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Åland Islands Question*, 3 October 1920 at 4.

[828] In fact, in the UN era and prior to the socialist federal dissolutions of the 1990s, there was only one successful secession in the case of Bangladesh. According to Heraclides, Bangladesh secession fits very well with the very essence of the principle of the right to self-determination. It is a right of majorities, and the people of Bangladesh, while oppressed, were the majority of the state of Pakistan. A. Heraclides, *The Self-Determination of Minorities in International Politics* (Routledge, 1991) at 24.

[829] This is why Kosovo's independence in February 2008 is indeed unique, as there was Serbia whose territorial integrity to uphold.

[830] On the exceptional circumstances, see *Reference re Secession of Quebec*, (1998) 2 SCR 217. The Canadian Supreme Court took its stance on the 'exceptional circumstances' from the 'saving clause' of the 1970 *Friendly Relations Declaration* (n 88). For instance, Marc Weller and Marko Milanović have been supporters for this reading of the 'saving clause' (see M. Weller, 'The Sound of Silence: Making Sense of the Supposed Gas in the Kosovo Opinion' in M. Milanović and M. Wood, *The Law and Politics of the Kosovo Advisory Opinion* (Oxford University Press, 2015) 187-218 at 201-203. Apart from these exceptional circumstances, the Supreme Court of Canada maintained that international law expects the right to self-determination to be exercised within the framework of existing sovereign states and consistently with the maintenance of territorial integrity of those states. James Crawford argues that the right to self-determination could be allowed in cases of extreme misgovernance, in situations of '*carance de souverainete'*. Crawford (n 214) 126-127. Lauri Hannikainen argues that the right to secession is only applicable for colonial peoples and peoples under alien domination. For others, autonomy can be a lawful choice for self-determination. L. Hannikainen, 'Self-Determination and Autonomy in International Law' in M. Suksi, *Autonomy: Applications and Implications* (Martinus Nijhoff Publishers, 1998) 79-96 at 84.

of the majority of scholars in relation to the so-called 'saving clause' of the 1970 *Friendly Relations Declaration*.[831] Yet, within the confinements of territorial integrity, there is still the 'default rule' of internal self-determination,[832] which can be accomplished in several ways.[833]

As international law acknowledges state sovereignty, if a state has not assumed any specific international obligations to consent to autonomous arrangements, it is up to that state to decide on its internal affairs, including whether or not to grant autonomy.[834] That being said, in the early 1990s, there existed external factors that did legally bound Serbia to uphold Kosovo's autonomy. First, Serbia was given its SR borders by the SFRY at the same time when Kosovo was given autonomy within those borders. The conceptual logic of *uti possidetis* is that a change of sovereignty by itself does not change the status of a boundary.[835] Serbia cannot have it both ways. Since it wanted to maintain its SR area, including the SAP of Kosovo, it should have then inherited the autonomous status that the SFRY had instilled upon Kosovo, in accordance with its international legal obligations.[836] Second, the SFRY was bound to several international treaties that provided the right to self-determination and that were legally binding in the federation according to Article 210 of the 1974 SFRY Constitution.[837] Third, in the autumn of 1992, Serbia had officially acquiesced in being bound by the 1966 Covenants and had affirmed that 'all peoples in the territory of the former Yugoslavia are entitled to the guarantees of the Covenants'.[838] Finally, Serbia was bound to respect the right to self-determination and self-government of Kosovo according to the EC Guidelines, the

[831] 'Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color'. GA Res. 2625 (n 88), 'The principle of equal rights and self-determination of peoples'.
[832] *Reference re Secession of Quebec* (n 830) Art. 126; C. Borgen, 'Kosovo's Declaration: Analyzing the Legal Issues of Secession and Recognition', *Opinio Juris,* 20 February 2008; Borgen (n 40) 483; and D. Saad, 'Crimea Secession: A Legal Standpoint', *The Cord*, 19 March 2014.
[833] Klabbers and Lefeber have argued that people would not be entitled to external self-determination by means of secession if it can enforce its right to internal self-determination. However, while a part of internal self-determination can be achieved through individual human rights instruments without collective rights, the authors demonstrate that the 'surplus value' of these collective rights is a people's freedom to determine its internal political status. For the very least, all peoples should be entitled to participate in the decision-making process of the state, in particular with the constitution. This right could be implemented in various ways, for instance, through federalism, special constitutional rights, or democratic governance. Klabbers and Lefeber in Brölmann (n 49) 43-44, 49. Kosovo used to enjoy constitutionally guaranteed rights, including a veto right over the Serbian constitution, numerical participation rights in the SFRY and the Serbian SR parliaments, and a membership in the rotating presidency of the SFRY. By removing all these rights in 1989, the Serbian actions can only be classified as a grave denial of the right to internal self-determination of the Kosovo people.
[834] Hannikainen (n 830) 87.
[835] *Temple of Preah Vihear (Cambodia v. Thail.)*, I.C.J. Reports (1962) 6, quoted in McCorquodale and Pangalangan (n 1) 874.
[836] The obligations deriving from, *inter alia*, the 1966 Covenants (n 10), the 1970 *Friendly Relations Declaration* (n 88), the *Helsinki Final Act* (n 13), the 1990 *Paris Charter for New Europe* (n 13), the 1990 *CSCE Copenhagen Document on the Human Dimension* (n 826); and the GA Res. 47/135 (n 588).
[837] N 189.
[838] Quoted in Müllerson (n 145) 492.

Declaration on Yugoslavia, the Badinter Commission Opinions No. 2, 5, and 8-10, as well as the 4 November 1991 Draft Convention. Therefore, I conclude that according to the evolutionary logic of *uti possidetis*, the border between Kosovo and Serbia should have been 'internationalized' in the form of internationally guaranteed autonomy based on the above-mentioned instruments.

If applied in 1991, *meritus* would have awarded Kosovo the continuation of its substantial autonomy via the leverage over the recognition of the FRY. The Hague Peace Conference did attempt to do this on several occasions with the Draft Conventions, and the Badinter Commission subsequently conditioned the recognition of the former SRs to accepting the last Draft Convention of 4 November 1991. However, unlike the *meritus* formula, they did not portray this as a legal right of Kosovars derived from *uti possidetis juris*, but rather as a political compromise Serbia should agree upon.[839] As merely a political compromise, it was forgotten in 1996 when the EC and the international community recognized the FRY. At this instance, if the EC had maintained a strict line towards the FRY, the evolution of *uti possidetis* would have been completed. While the Badinter Commission Opinions by themselves do not and cannot create international law, I claim that since the rest of the international community waited for the EC recognition decisions and then followed suit with these decisions, this uniform display of state practice arguably began a process of creating customary law - or, rather, a customary update of an old international law rule.

After the 'process of dissolution' had started in late 1991, consistent and clearly legally justified demands would have produced the continuation of Kosovo's autonomy with international guarantees, like those portrayed in the Draft Convention of 4 November 1991.[840] Furthermore, if clearly justified on the basis of *uti possidetis* and made applicable to all the SAPs and the ASSRs, the concurring successor states would likely have avoided territorial conflicts with their subunits.[841] Finally, I want to emphasize that this interpretation would have been more in accordance with international law.

[839] Often in ethnic conflicts, the intervening parties suggest territorial autonomy or its enhancement as the solution to the conflict. This is usually not seen to be based on any prior legal right to autonomy but to political compromise to stop the conflict. For example, the conflict between Indonesia and the Free Aceh Movement was settled by granting the Aceh region substantial autonomy in *Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement*, 15 August 2005.
[840] Would the peaceful coexistence have lasted under the Milošević regime is debatable and beyond the scope of this dissertation. The key in such arrangements is to have as extensive monitoring system as possible, preferably with UN participation.
[841] The former ASSRs that have declared independence since 1991 include Crimea, Abkhazia, Transnistria, Tatarstan, and Chechnya. In addition, former lower-level units of South Ossetia and Nagorno-Karabakh have declared independence.

PART III: THE LEGAL LEGACIES OF THE SOCIALIST FEDERAL DISSOLUTIONS

5. The Right to Self-Determination in a State Dissolution Context

This is the third and final Part of the dissertation. In the first Part, I have analyzed the essence and the evolution of the *uti possidetis* doctrine. In the second Part, I introduced the two components that make up my proposal for *uti possidetis meritus* - internal and external legal framework at the moment of state dissolution. In addition, I provided an overview of the ethnofederal history of my two main dissolution cases, the USSR and the SFRY.

In this Part, I finish the dissertation by providing the way forward from the impasse that the misapplication of *uti possidetis* in the early 1990s has led to.[842] First, I demonstrate through case studies how the right to self-determination was implemented in the late 20th Century state dissolution context and account for the numerous legal symptoms that have emerged in the successor states of the USSR and the SFRY. The results are rather striking and substantiate my original argument - that the insufficient understanding of ethnofederalism distorted the application of *uti possidetis*. Indeed, out of the eight successor states of the USSR and the SFRY federalized in the socialist era, seven have experienced separatism of their former ethnofederal units.[843] Moreover, out of these cases, those three states that more or less followed the same guidelines as my *uti possidetis meritus* - which I present in detail in the following Chapter - are doing manifestly better in their national relations than those states that followed the official *uti possidetis* application model.[844]

In sum, those states that accepted that their sovereignty over the ethnofederal units was qualified and that the autonomous arrangements needed to be continued were able to solve the challenges to their territorial integrity peacefully. Those states that took the recognition of their independence as a clean slate and abolished the autonomies they regarded as externally imposed during the federal era have faced a series of unilateral independence declarations, armed clashes, and 'frozen conflicts'.[845]

I begin this analysis by examining the cases of those successor states that retained aspects of the ethnofederal system - the Russian Federation, Uzbekistan, Tajikistan, and Ukraine. Following, I proceed to the cases of those states that chose to consider their recognition of independence as a

[842] For more on the misapplication of *uti possidetis*, see subchapter 4.4.
[843] In contrast, none of the non-federalized successor states have experienced separatism.
[844] See subchapter 5.3.
[845] A frozen conflict is a legal situation in international relations where there exists only a ceasefire, not any formal peace treaty or a power-sharing agreement between the parties. In the post-Soviet context, the conflict has often resulted from an armed uprising of a former autonomous unit that had lost this status after the dissolution. While the separatists were able to secure the retreat of the host state's army from their territory, they have remained unrecognized and unable to reach an agreement on autonomy.

chance to abolish their internal autonomies and reassert full authority over their subunits, which then led to tragic consequences - Azerbaijan, Moldova, Georgia, and Serbia. Finally, I disentangle the two cases outside the ethnofederal framework - Bosnia-Herzegovina and Macedonia.

The main point to realize is that the international community failed to sufficiently guarantee the right to self-determination to all the stakeholders of the dissolving socialist federations. According to the version of *uti possidetis* used by the recognizing states in the early 1990s, the successor states had only limited obligations towards their autonomous subunits, whose right to self-determination was eventually based solely on the goodwill of the host state. Subsequently, the actual implementation of this right was manifested in very different fashions. This, in turn, has complicated the international mediation efforts, which I go through in the last section of this Chapter.

5.1 Introduction: Three Versions of Self-Determination in the Post-Dissolution Framework

Due to the recognition policies chosen by the EC and the wider international community that linked the recognition of the USSR and the SFRY successor states to the internal administrative borders, two legal issues emerged in the early 1990s: the interpretation over the *ethnofederal systems* in place in these federations, and the subsequent interpretation of the applicable legal rule, *uti possidetis*.

As previously accounted, ethnofederalism was a set of ethnicity-based territorial autonomies, derived from the proclaimed progressiveness of national policies under socialism.[846] In this particular political federation the state consisted of a certain number of first-level ethnic subunits, which were in turn further subdivided - *ethnofederalized* - to better reflect ethnic groups' territorial distribution. For ideological reasons, the different ethnicities were put into a hierarchical order based on an alleged 'progressive level' of their development toward socialism.[847] The two highest units of the USSR were the SSRs, followed by the ASSRs.[848] In the SFRY, these units were called the Socialist Republics (SRs) and the Socialist Autonomous Provinces (SAPs), respectively. During the socialist era, the USSR ethnofederalized seven of its 15 SSRs,[849] and the SFRY one of its six SRs, Serbia.[850]

[846] See, *inter alia* Zürcher (n 174) 23-32; and Beissinger (n 174) 334.
[847] See subchapter 3.5.
[848] For example, the SSR of Georgia was ethnofederalized in 1921 to contain two ASSRs of Abkhazia and Ajara and an AO of South Ossetia. See subchapter 5.4.3.
[849] Azerbaijan, Georgia, Moldova, Russia, Tajikistan, Uzbekistan, and Ukraine.
[850] Moreover, the SR of Bosnia-Herzegovina was made a homeland to three different ethnicities - Bosniaks, Croats, and Serbs. This had fragmenting consequences when the SFRY dissolved in 1991-1992.

As explicated earlier, *uti possidetis* is an international law principle according to which the former administrative borders of a unit become international borders at the moment of independence.[851] Before the socialist federal dissolutions, it had been utilized only in a decolonization context in the early 1800s and in the 1950s-1960s.[852] While *uti possidetis* has received judicial recognition as a general principle of international law, it is essential to note that it does not merely freeze the borders in place. As noted by Ian Brownlie, according to *uti possidetis* 'the change of sovereignty does not *as such* change the status of a boundary, and thus pre-existing disputes will subsist as an aspect of the principle of continuity'.[853] Thus, in the next Chapter, I advance the *uti possidetis meritus* argument to take into account not only the highest level, but the lower-level administrative borders as well.

While the successor states have differed politically since their independencies, the challenge of nationalism and the national question - who has the right to self-determination and how it is implemented within a state - continues to affect their national development. Yet, despite these similarities, the state succession was interpreted differently in legal terms in the USSR and the SFRY contexts. Indeed, when addressing the legal legacies of the dissolutions of the USSR and the SFRY, one observes three separate trajectories in the international recognition policy: the Russian Federation, other former SSRs, and the former SRs of the SFRY. This is due to there being a couple of significant differences between the two federal dissolutions. First, the USSR dissolution was consensual at the highest ethnofederal level - all the SSRs endorsed the view that Russia would continue the legal existence of the USSR,[854] and formally declared that their borders would be settled by *uti possidetis* if not agreed otherwise by the parties in question.[855] Second, there was a great fear that the dissolution of the USSR would not be peaceful. As the US Secretary of State James Baker put it in December 1991, if the dissolution was not organized peacefully, the USSR could become a 'Yugoslavia with nuclear weapons thrown in'.[856] Added to the fact that this dissolution was consensual, outside states demanded a lot less from the SSRs to be recognized independent.[857] Third,

[851] For a good overview of *uti possidetis*, see Shaw (n 17, 'Peoples') 75-154.
[852] In both cases, the successor states of the colonial empires agreed to apply *uti possidetis* and to honour the former administrative borders. Most Latin American States agreed to apply *uti possidetis* in the Treaty of Confederation (n 76), the African states in the 1963 *Charter of the Organization of African Unity* (n 96), art III.3, and reaffirmed in *Resolution on Border Disputes* (n 97). For more on *uti possidetis*, see subchapter 2.1.
[853] Brownlie (n 225) 58. Italics in the original.
[854] *Decision by the Council of Heads of State* (n 229), para. 1.
[855] In the auspices of the CIS, the inviolability of their former internal borders has been affirmed in several treaties: *Agreement on the Establishment of the Commonwealth of Independent States* (n 216) Art. 5; *Alma-Ata Declaration* (n 230). Preamble and Art. 1; *Charter Establishing the Commonwealth of Independent States* (n 230) Art. 3; and *Declaration on Respect of Sovereignty, Territorial Integrity and Inviolability of Boundaries* (n 230) 9-10.
[856] 'Soviet Union As We've Known It Is Gone, Baker Says', *Washington Post*, 9 December 1991.
[857] See subchapter 3.8.

as Russia continued the legal existence of the USSR, its recognition was not contingent on any criteria. Therefore, the application of *uti possidetis* in 1991-1992 takes place in three different legal frameworks: the continuation state, the SSRs, and the SRs.[858]

For the continuation state,[859] things were rather straightforward as all the other SSRs supported Russia's claim to continue the existence of the USSR. On 12 December 1991, Russian President Yeltsin addressed a letter to the UN Secretary-General stating that Russia would continue the membership of the USSR in the UN.[860] In exchange, Russia affirmed the USSR's treaty obligations and accepted responsibility for most of its foreign debt. While the EC's Statement on the USSR mentioned the Soviet Union, nothing was demanded of Russia for its legal continuation state status. Thus, Russia did not seek and did not receive recognition for its independence by the international community.[861]

The recognition of the SSRs within their *uti possidetis* borders was contingent upon fulfilling the requirements of the EC Guidelines.[862] These included the respect for provisions of the UN Charter, the Helsinki Final Act (1975) and the Charter of Paris (1990),[863] especially with regard to the rule of law, democracy, and human rights; guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE; inviolability of all frontiers which can only be changed by peaceful means and by common agreement;

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[858] This interpretation is dubious in the *uti possidetis* framework. I claim that while it is plausible to treat Russia differently due to the continuation state status, according to *uti possidetis*' evolutionary logic, there are no legal grounds to separate the SSRs and the SRs, apart from the 'political realities' mentioned in the *Guidelines* (n 4).

[859] As pointed out by Müllerson, the 'state succession is a very special part of international law' that can govern succession only as a set of generally recognized norms of customary international law. The conventions on state succession would not be obligatory for new states. In the case of Russia continuing the legal existence of the USSR, he comments 'even deep social changes are irrelevant in determining whether or not a State continues to exist'. He concludes that due to Russian retaining most of the USSR territory - which, in turn, had inherited the legal personality of the Russian Empire in 1917 in state practice - and all the other former Soviet Republics agreeing with the continuation, Russia should be seen as the legal continuation state of the USSR. Müllerson (n 145) 474 and 476. I would add that all the constituent Republics - SSRs - representing the late USSR that commented on the issue supported Russia's continuation state status, which was subsequently widely recognized in state practice. Therewith, I concur with Müllerson.
For a critical take on the 'continuation state' proposal, see O. Zadorozhnii, *International Law in the Relations of Ukraine and the Russian Federation* (Kyiv, 2016) at 112-113.

[860] *Letter of the President of the Russian Federation to the UN Secretary-General* (n 229). Similarly, in the late 1940s, after considerable debate, the UN concluded that India could continue British India's legal personality, including its UN membership. Pakistan on the other hand was required to apply for membership as a new state.
According to Michael Scharf, the international community has considered six factors when determining whether a potential successor has inherited the legal personality of the dissolving entity. The successor has to have a substantial majority of the former state's territory, population, resources, and armed forces, as well as the control over most central government institutions and has to have entered into an agreement on the continuation of legal personality with the other components of the former State. M. Scharf, 'Musical Chairs: The Dissolution of States and Membership in the United Nations' 28(1) *Cornell International Law Journal* (1995) 29-69 at 67.

[861] Although many countries did re-establish diplomatic relations with the Russian Federation, such as the US (on 31 December 1991) and the People's Republic of China (on 27 December 1991).

[862] *Guidelines* (n 4). For more, see subchapter 4.3.

[863] The *Helsinki Final Act* and the *Charter of Paris for a New Europe* (n 13) form the legal basis for inter-state relations in Europe, reaffirming the legal principles of state sovereignty, territorial integrity, and peaceful settlement of disputes and inviolability of borders.

commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning state succession and regional disputes;[864] and commitment to adhere to the Nuclear Non-Proliferation Treaty as non-nuclear weapon states.[865]

The most comprehensive and relevant of these commitments to the application of *uti possidetis* were the inviolability of borders and the CSCE framework for the rights of national groups and minorities. This framework was updated in the early 1990s, with the most important documents being the Copenhagen Document on the Human Dimension of the CSCE in June 1990,[866] and the Report of the CSCE Meeting of Experts on National Minorities in July 1991.[867] While there is no precise, binding definition, within the CSCE framework, the term 'national minority' usually means a population that is a numerical minority within a state but might share the same ethnicity as the population constituting a majority in another state.[868] The rights enshrined in the CSCE instruments include the right to effective participation in public affairs,[869] and to maintain and develop their culture in every aspect without any attempts to assimilation.[870] They obliged the successor states to take the necessary measures to protect the separate identity of national minorities, taking into account their historical and territorial circumstances.[871] Finally, the CSCE's 1991 Report noted that '[i]ssues concerning national minorities, as well as compliance with international obligations and commitments concerning the rights of persons belonging to them, are matters of *legitimate international concern* and consequently do not constitute exclusively an internal affair of the respective State'.[872]

Finally, the SRs of the SFRY were given the strictest criteria. In addition to the above-listed conditions of the EC Guidelines, their recognition was further contingent by the EC Declaration of Yugoslavia.[873] It demanded that the SRs wishing to be recognized had to apply by a deadline to a special Arbitration Commission and accept the provisions laid down in the Draft Convention -

[864] *Guidelines* (n 4).
[865] N 225. This condition was due to the USSR's nuclear weapons being located in the RSFSR, Ukraine, Belarus, and Kazakhstan.
[866] *Document on the Human Dimension* (n 826). According to Chandra, the 1990 Document 'is still regarded as the basic OSCE standard-setting instrument concerning minority rights'. R. Chandra (Ed), *Minority: Social and Political Conflict, Volume-1: Racial and Ethnic Minorities* (Isha Books, 2004) at 278.
[867] *Report of the CSCE Meeting of Experts on National Minorities*, Geneva, 19 July 1991. While the CSCE instruments are only politically binding, the successor states were also bound by similar provisions adopted by the UN and the Council of Europe. Moreover, while the CSCE instruments do not contain complaint mechanisms (Chandra (n 866) 178) the commitments were made legally binding by the EC Guidelines.
[868] Chandra (n 866) 282.
[869] This included the right to participate 'in decision-making or consultative bodies' that 'constitutes an important element of effective participation in public affairs'. *Report of the CSCE Meeting of Experts on National Minorities* (n 867) Chapter III.
[870] *Ibid.*
[871] *Ibid.* Chapter IV.
[872] *Ibid.* Chapter II. Italics mine.
[873] N 224.

especially those related to human rights and rights of national or ethnic groups - under consideration by the Conference on Yugoslavia.[874] Furthermore, they had to support the continuation of the Conference and the efforts of the UN Secretary-General and the Security Council.

Eventually, all the SSRs and the SRs were recognized independent after fulfilling the criteria applicable to their case. Concurrently, the dissolutions completely disregarded the lower-level units. In both the USSR and the SFRY, the ruling Party had thought it had solved the national question via ethnofederalism. However, this solution only worked in a multinational federation with a one-party authoritarian system. Thus, the legal legacy that the socialist federations bequeathed to their successor states was the *ethnofederalization* of national question. In 1991-1992, those SSRs and SRs that had been ethnofederalized during the socialist era inherited both the *uti possidetis* borders and the socialist solution, which was hard to reconcile with their newly founded and unqualified independence.

Therewith, the ethnic disputes in the successor states of the USSR and the SFRY were affected by both external and internal policies. The external policy was imposed upon them by the international community, which coordinated its recognition policy based on a set of criteria. The internal policy was the way in which the successor states decided to reconcile their ethnofederal history to the external policy, and it determined the outcome of a given ethnic conflict. Next, I locate the ethnofederalized SSRs and SRs into a chart with three possibilities for them to adopt for their internal policy: retention, rejection, or distortion of their ethnofederal legacy. The main conclusion is that all but one of the ethnofederalized successor states that chose to retain meaningful parts of the ethnofederal arrangement were spared of armed separatism. In contrast, none of those that chose to reject their ethnofederal legacy could avoid ethnic conflicts with their former subunits.

[874] The Hague Peace Conference convened from 7 September to 5 November 1991 and gathered the representatives of all the SRs and the EC member states. See more on subchapter 4.3.2.

Table 1: The External and Internal Policies of the Successor States of the Socialist Federations

External Policy / Internal Policy	1st Version of Self-Determination The Continuation State	2nd Version of Self-Determination Soviet Socialist Republics	3rd Version of Self-Determination Yugoslav Republics
	Statement on the USSR	Statement on the USSR + Guidelines	Declaration on Yugoslavia + Guidelines
Ethnofederalism Retained	The Russian Federation	Uzbekistan Tajikistan Ukraine	
Ethnofederalism Rejected		Azerbaijan Moldova Georgia	
Ethnofederalism Distorted			Serbia Bosnia-Herzegovina Macedonia

My claim is that *uti possidetis* was applied in an inadequate manner by the outside states in relation to the ethnofederalized SSRs and SR. None of them were seen to have any legal obligations towards their subunits *per se*, although they were seen to have obligations in relation to their minorities in general. The problem was that the former ethnofederal subunits were left in the no-man's land between peoplehood and minority status. This is a crucial distinction: for example, the UN Human Rights Committee has determined that there is no right to self-determination for minorities, only for peoples, and that the ICCPR Article 1 is applicable to peoples and Article 27 for minorities.[875] As minorities lack any explicit right to autonomy, some scholars have advanced that this right could be deduced from the right to effective participation in public life, which is manifested in several minority

[875] UN Human Rights Committee, 'CCPR General Comment No. 23' Art. 27 (Rights of Minorities), 8 April 1994. However, confusingly the Badinter Commission stated in Opinion No. 2 that the Serbs in Bosnia-Herzegovina would have rights under Art. 1.

documents before and after the socialist federal dissolutions.[876] Nevertheless, there was no explicit right to autonomy for a minority in 1991.

The socialist ethnofederal system used unusual terminology, e.g., terming the ASSRs and the SAPs 'nationalities'. The status of a 'nationality' was less than peoplehood - which amounted to the right to external self-determination when the federations dissolved in the early 1990s - but more than just a status of a minority or and ethnic group, who did not receive any self-governing territorial rights. For example, in the SFRY setting, Albanians in Kosovo received the 'nationality' status, whereas the Albanians in Macedonia did not receive the same 'constituent' element of the state, territorial rights, or indeed any collective rights as a group.[877] Moreover, the subunits thought of national rights according to the ethnofederal logic, and many of them attempted to unilaterally promote themselves to the higher level of self-determination just prior to the dissolutions of the socialist federations.[878]

Thus, the international recognition policy produced various different solutions on how to address their former autonomous units and minorities, producing equally various results. Eventually, the international community did successfully ensure the rights of minorities but failed to do this in relation to the internal self-determination rights of the lower-level territorial autonomies. Paradoxically, the rights of minorities were, in some cases, strengthened by the dissolution, while the rights of the recognized national groups with territorial autonomy were curtailed or outright ignored.

To conclude, the response of the newly-independent state authorities to their ethnofederal legacy and the automatic challenge that this posed to their central authority would chart their future course as nations for years to come. Eventually, all the ethnofederalized former SSRs and the SR experienced calls for the continuation of autonomy or outright separatist movements of varying intensity. The ones that chose to negotiate and to continue the autonomous status of the subunits were able to secure a peaceful balance between the right to internal self-determination and territorial integrity. The ones who chose to revoke previous autonomies were succumbed to separatist violence and lost the ensuing

[876] Such as the 1990 Copenhagen Document (n 826), *Report of the CSCE Meeting of Experts on National Minorities* (n 867), *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, UNGA 47/135 (n 588), and *Framework Convention for the Protection of National Minorities* (n 561). In 2010, the Independent Expert on minority issues stated in her report to the Human Rights Council that public participation 'entails participation in governmental bodies, the judiciary and other agencies of the criminal justice system, decentralized and local forms of government, consultation mechanisms, as well as through cultural or territorial autonomy arrangements' (A/HRC/13/23, para. 32). In the ethnofederal context, 'effective participation' manifested differently, as the lover level subunits were used to substantial representational quotas, often complimented with veto right.
[877] M. Koinova, 'Why Do Ethnonational Conflicts Reach Different Degrees of Violence? Insights from Kosovo, Macedonia, and Bulgaria during the 1990s' 15(1) *Nationalism and Ethnic Politics* (2009) 84-108 at 92-93.
[878] For example, Kosovo declared itself as an SR on 2 July 1990 and Transnistria as a SSR on 2 September 1990.

conflicts because of foreign intervention.[879] However, these cases did not end favourably for the separatists either, as they have been stuck with their unrecognized status and remain heavily dependent on the patron state. Thus, in relation to the right to self-determination, the version of *uti possidetis* that was applied in the socialist federal dissolutions ended up achieving the worst of all possible scenarios, with negative effects on most of the successor states affected by ethnofederalism and on most of the minorities alike.[880]

This Chapter progresses in the following manner: I first account for how the ethnofederalized successor states responded to the grievances of their subunits in all the three relevant trajectories - the continuation state, the SSRs, and the SRs - creating in the process three versions of self-determination in the post-Soviet and post-Yugoslav spaces. I then analyze how they legally performed in relation to the version of self-determination that was required of them and how the former subunits viewed this relationship. Finally, I present my conclusions on the right to self-determination and the application of *uti possidetis* in the socialist federal dissolutions.

5.2 The Continuation State: The Russian Federation

5.2.1 Russia and the First Version of the Right to Self-Determination

When listing the legal legacies of the socialist federal dissolutions, the Russian Federation is a natural place to start as it was the most ethnofederalized unit at the moment of the dissolution of the USSR. However, it is also a strange case for the application of *uti possidetis*, as it was only applicable to Russia to a more limited extent - while *uti possidetis* determined the other SSRs' borders with Russia, it was not otherwise applicable to Russia as it did not need outside recognitions. Therefore, the Russian decision to retain the Soviet ethnofederal system, as well as its subsequent dissolving in the 2000s, do not stem from a clear international legal obligation.[881] This makes the Russian version of self-determination manifestly different from the other ethnofederalized SSRs.

That being said, the Russian conception of the right to self-determination remains highly relevant for several reasons. First, as I accounted for in subchapter 4.1, the USSR and Russia have significantly contributed to the evolution of the right to self-determination since the concept's very inception in

[879] By Russia in the cases of Georgia and Moldova, and by Armenia in Azerbaijan.
[880] A case could be made that an established territorial autonomy should be guaranteed under international law. However, my argument is that in the case of federal state dissolution and the application of *uti possidetis*, the right to internal self-determination is already guaranteed under international law (see Chapter 6).
[881] The Russian Federation was, naturally, bound by the treaty obligations of the USSR in relation to minority protection, but it did not have an obligation to continue its territorial autonomies as I claim the other federalized SSRs had.

1917, and Russian interpretations have thus an enhanced weight in the international community. Second, Russian views on self-determination resonate directly beyond its borders, and it has, on several occasions promoted its federal structure as a model for internal self-determination in the post-Soviet space.[882] Third, as a constitutionally multinational federal state, it is especially important for Russia to find a consistent balance between the right to self-determination and the territorial integrity of states. Fourth, as the official continuation state of the USSR, Russia has a unique attitude to its Soviet past that the other former SSRs do not share. This has greatly affected Russian stance towards ethnofederalism, and its international law doctrine on self-determination remains heavily influenced by its Soviet legacy. Finally, Russia has a negotiation history with ethnofederal relations,[883] which surely affected its decision to pursue this path again in the 1990s.

5.2.2 Russian National Question

Russia was ethnofederalized in the early 1920s when the lands formerly under Russian imperial rule gained autonomy as SSRs and received demarcated borders that became their internationally recognized borders in 1991. The ethnofederalization process continued, and eventually, the Russian Soviet Federative Socialist Republic (RSFSR) consisted of 20 ASSRs and one Autonomous Oblast (AO) at the moment of the dissolution of the USSR.[884] Just like all the other ethnofederalized SSRs, these internal divisions were imposed upon Russia by the federal center. However, unlike the others, Russia accepted the ethnofederal model as a legitimate way to handle the national question. Whereas most of the former SSRs with ASSRs and AOs discredited the Soviet past, Russia embraced and retained the Soviet ethnofederal system.[885] This decision may have well saved the country from disintegration during the chaotic 1990s,[886] and has dramatically affected the Russian understanding of the notions of internal and external self-determination. The restoration of ethnofederalism was

[882] Apparent for instance in the Russian federalization suggestion for Moldova in the form of the 'Kozak Memorandum' in 2003 (n 1267), the Russian Written Statement in the Kosovo hearings at the International Court of Justice in 2009 (*Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for advisory opinion)*, Written Statement by the Russian Federation, 16 April 2009), and in the federalization plans for Ukraine in the form of the Minsk Agreements in 2014-2015 (n 1297-1298).

[883] First, in 1922 the USSR was established by a Union Treaty of allegedly equal negotiation partners of Armenia, Azerbaijan, Georgia, Moldova, Russia and Ukraine (*Treaty of the Creation of the Union of Soviet Socialist Republics*, n 167). In 1991, President Gorbachev tried to re-legitimize and save the USSR by a renewed Union Treaty, which proclaimed the right of nations to self-determination and that all the SSRs and the ASSRs possess and retain their sovereignty in the Union of Soviet Sovereign Republics. *Treaty on the Union of Sovereign States* (n 512) Part 1. Basic Principles.

[884] All the ASSRs apart from the Bashkir ASSR (founded by agreement between the RSFSR and local elites) were creations of Moscow. P. Roeder, *Where Nation-States Come From: Institutional Change in the Age of Nationalism* (Princeton, 2007) at 57.

[885] This is understandable, as the last Soviet census of 1989 identified 101 ethnic groups within Russia, with 39 groups numbering more than 100 000.

[886] See more in H. Hale, 'The Makeup and Breakup of Ethnofederal States: Why Russia Survives Where the USSR Fell' 3(1) *Perspectives on Politics* (2005) 55-70.

done in phases: in 1990-1992 by making amendments to the 1978 RSFSR Constitution, in March 1992 by the signing of the Federal Treaty, followed by the new Russian Constitution in December 1993, and by a long process of drafting individual power-sharing treaties with the federal units in 1992-1998.

5.2.3 The Final Ethnofederal Developments of the Soviet Era, 1990-1991

From spring 1990 onwards, the USSR President Gorbachev pushed through a series of constitutional changes for a complete overhaul of the federal system in preparation for his grand project, New Union Treaty.[887] These ground-breaking changes promoted the ASSRs close-to-equals with the SSRs in the Soviet constitutional system.[888] At this point, the RSFSR President Yeltsin decided to use the ASSRs as a political weapon against the federal center and Gorbachev. By allowing the subunits to demand even more autonomy within the RSFSR, Yeltsin initiated a process known as the 'parade of sovereignties' where all the SSRs and many of the ASSRs declared themselves to be sovereign.[889] An important distinction to make here is that in Russia all the ASSRs apart from Chechnya and Tatarstan proclaimed sovereignty within the framework of the RSFSR. In contrast, most of the SSRs were aiming for independence from the USSR.

After a Union-wide referendum had affirmed the will of the Soviet people to preserve the USSR,[890] Gorbachev proceeded to negotiate the New Union Treaty with the SSRs and the ASSRs. However, Yeltsin was making preparations for Russian independence via changes to the 1978 RSFSR Constitution. In May 1991, a constitutional amendment upgraded the ASSRs into the 'Republics' of the RSFSR.[891] In July 1991, four of the five titular ethnic AOs of RSFSR - Adygea, Altai, Khakassia, and Karachay-Cherkessia - were upgraded into Republics as well, while the lowest level ethnic units were upgraded to an equal status with ethnic Russian regional units.[892]

In August 1991, the New Union Treaty process collapsed after a coup attempt by the Communist Party hardliners, which resulted in Yeltsin becoming a de facto ruler of the USSR. After meeting with

[887] See subchapter 3.7.5.
[888] Four momentous laws were passed in April 1990 (n 533).
[889] In August 1991, Yeltsin encouraged the Russian ASSRs to 'take as much independence as you can hold on to' (n 482). Consequently, 16 of the RSFSR's 20 ASSRs and some of the AOs of the USSR to proclaim their sovereignty in a short time.
[890] *Referendum on the Preservation of the Union of Soviet Socialist Republics*, held on 17 March 1991. 'Yes' vote won by 77,85%, with over 80% turnout.
[891] *On Amendments and Additions to the Constitution (Basic Law) of the Russian Soviet Federative Socialist Republic*, 24 May 1991.
[892] *On Amendments and Amendments to the Constitution (Basic Law) of the Russian Soviet Federative Socialist Republic in Connection with the Transformation of Autonomous Regions into Soviet Socialist Republics within the Russian Soviet Federative Socialist Republic*, 3 July 1991. See more on J. Hughes, 'Managing Secession Potential in the Russian Federation' in J. Hughes and G. Sasse (Eds), *Ethnicity and Territory in the Former Soviet Union: Regions in Conflict* (Routledge, 2014) 36-68 at 47.

the leaders of Ukraine and Belarus in December 1991, Yeltsin proclaimed that the USSR 'no longer exists'.[893] Gorbachev resigned on 25 December, and the next day, the Supreme Soviet formally dissolved itself and the USSR. Although all the constituent 15 SSRs achieved external self-determination via internationally-recognized independence, for the ethnofederalized ones, the negotiations over the right to self-determination were just beginning.

Before and after the dissolution, the RSFSR parliament produced draft constitutions to settle the national question of independent Russia - whether to retain the federal system and in what form. The first draft prepared by the Rumiantsev Constitutional Commission proposed to abolish the ethnofederal framework by erasing the distinction between Republics (former ASSRs and AOs) and the lower ethnic Russian administrative units and creating about 50 new *zemli* (lands) with equal status and without ethnic labels.[894] The proposal echoed the Soviet schism over the subject in the early 1920s.[895] Notwithstanding, this was perhaps an unrealistic suggestion given the constitutional changes made in 1990-1991. After the Republics vigorously protested the draft, Yeltsin, parliament, and the governments of the Republics and the lower units started to negotiate on the continuation of the asymmetric ethnofederal structure.

5.2.4 The 1992 Federal Treaty

The 1992 Federal Treaty[896] was signed between the Russian government and 18 of the 20 Republics of the RSFSR,[897] with the main objective to prevent the disintegration of the newly independent Russian Federation. In effect, the Treaty cemented the federal asymmetry and secured the loyalty of the Republics by providing them with extensive autonomy. It used the Soviet terminology when proclaiming the Republics to be 'sovereign republics within the Russian Federation'. The Republics had the right to their own constitutions, wide autonomy over their internal budgets and foreign trade, and the right to use their natural resources and land.[898]

A month after the signing of the Federal Treaty, a constitutional amendment made the Treaty a part of the applicable 1978 RSFSR Constitution and declared federalism as one of the 'unshakable

[893] *Agreement on the Establishment of the Commonwealth of Independent States* (n 216). On 21 December, eight more heads of state joined the CIS (*Alma-Ata Declaration* (n 230)).
[894] Hughes (n 892) at 46.
[895] See subchapter 3.2.4.
[896] *Treaty of Federation*, signed in Moscow on 31 March 1992.
[897] The two Republics not signing were Tatarstan and Chechnya. The Treaty consisted of three separate treaties, one with Republics, one with ethnic Russian administrative units, and one with the lower-level ethnic AOs and AOks. Hughes (n 892) 47.
[898] As summarized by Hughes, the 'republics were now treated as empowered autonomous units within the federation, while the regions were effectively dealt with as administrative units under the vertical power of a unitary state'. *Ibid*.

foundations of the constitutional system'.[899] However, national tensions continued, and law on 3 July 1992 froze the existing internal borders of the RSFSR and demanded that any outstanding territorial disputes within the Federation had to be solved by 1 July 1995.[900]

5.2.5 The 1993 Constitution of the Russian Federation

After Yeltsin's draft Constitution for the Russian Federation was approved in a national referendum, it became effective in December 1993.[901] The Constitution took back some of the powers of the Republics from the Federal Treaty by endorsing partially the Rumiantsev draft's suggestions on the equalization of the status of the subunits. The Federal Treaty's provisions were contained in Article 11, but only up to the extent that they conform to the other parts of the Constitution. The references to the Republic's 'sovereignty' were omitted, and all subunits were given equal status as 'subjects of the federation'.[902] Finally, Article 3 stated that the Russian Federation rests on the sovereignty of the whole people of Russia (*rossiiane*), not on the sovereignty of separate Russian (*russkii*) peoples.[903]

The Constitution reproduced the Soviet asymmetrical federal system. There were three ethnofederal units - 20 Republics (former ASSRs and AOs), one remaining AO, and 10 AOks[904] - and three predominantly Russian administrative units - krais (territories), oblasts (areas), and federal cities.[905] Yet, the new Constitution failed to solve the inherent inconsistency with the equality of the federal units. Every federal subject was given a right to have its head, parliament and the constitutional court, and all the subjects had equal rights in relations with federal government bodies and two delegates each in the Federation Council, the upper house of the Federal Assembly. However, the actual asymmetry between the Republics and the rest of the subjects was visible in several articles. For example, the Republics have a right to have their state language (Article 68) and their constitution, while the other subjects may have only a charter (Article 5).

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[899] *On Amendments and Additions to the Constitution (Basic Law) of the Russian Soviet Federative Socialist Republic*, 21 April 1992, Art. 1.
[900] Feldbrugge (n 488) 188.
[901] *Referendum on the Draft Constitution of the Russian Federation*, 12 December 1993. The draft was approved by 58,43% of the vote, with 54,4% turnout. Seven Republics returned majority votes against the Constitution, and Tatarstan boycotted the referendum.
[902] *Ibid.* Arts. 5 and 65. The same levelling to 'subjects of the federation' took place in the late USSR between the SSRs and the ASSRs according to *Law on the Division of Powers* (n 497) Section 1(3).
[903] 'The multinational people of the Russian Federation shall be the vehicle of sovereignty and the only source of power in the Russian Federation'. *Ibid.* Art. 3.
[904] Six of these have been abolished since 2005. The four remaining AOks are Chukotka, Khanty-Mansi, Nenets, and Yamalo-Nenets.
[905] 1993 Constitution, Art. 65(1). In sum, Republics, AOs, and AOks are determined and named primarily on the basis of the minority populations concentrated in the region. In contrast, oblasts and krais are generic administrative divisions and have no particular basis for their formation. Krais usually contain an autonomous oblast or okrug.

Some of Yeltsin's aides were jubilant about the 1993 Constitution having solved the national question. For instance, soon after the Constitution's adoption, Yeltsin's nationalities adviser Emil Paen proclaimed that '[f]ederalism [is] no longer an issue' in Russia.[906] Nevertheless, Yeltsin was aware that the balance between the Republic's 'sovereignty' and the Federation's territorial integrity had not been found. While Article 72 broadly delimited powers in favour of the federal government, Article 11 stated that the division of powers between the center and the subjects may be regulated by 'treaties', without giving mechanism for this treaty-making. The Republics were most keen federal subjects to signing these treaties. As commented by the Bashkorstan President Rakhimov in 1994:

> 'I feel that if we actually want to have a truly federative state, Russia must sign bilateral treaties with all the republics forming the Federation […]. There are those among us who want to make the republics, oblasts and krais completely equal political. That cannot be allowed […]. In Sverdlovsk oblast, for example, the nationality question does not arise'.[907]

5.2.6 The Power-Sharing Treaties

To summarize, after having given the Republics extensive autonomous rights during the late Soviet era and in the 1992 Federal Treaty, and then scaling these rights back somewhat in the 1993 Constitution, Russia planned to balance the situation with individual treaties with the subunits, taking into account the unique circumstances of each case. Thus, from 1994 to 1998, Russia proceeded to write a series of more detailed and individually designed power-sharing treaties with the Republics and the lower-level units. The historical parallels to this were the negotiations over the Union Treaty (1922) and the New Union Treaty (1991) between the federal center and the subunits.

In general, the power-sharing treaties reproduced the 1993 Constitution's Article 72 formulation that limited the Republics' autonomy. However, some Republics were given better treaties than others. Tatarstan was conceded the most extensive autonomy, with its power-sharing treaty establishing a co-sovereignty with Russia.[908] The first sections declared Tatarstan a 'State' that is 'united with the Russian Federation', on the basis of the Russian and Tatarstan Constitutions and the Treaty. The Constitution of Tatarstan (November 1992) declared its laws to be 'supreme' (Article 59), proclaimed it to be 'a sovereign state, a subject of international law associated to the Russian Federation' (Article

[906] Quoted in R. Ahdied, *Russia's Constitutional Revolution: Legal Consciousness and the Transition to Democracy 1985-1996* (Penn, 2010) at 133.
[907] Quoted in S. Solnick, 'Will Russia Survive? Center and Periphery in the Russian Federation' in B. Rubin and J. Snyder (Eds), *Post-Soviet Political Order: Conflict and State Building* (Routledge, 2005) 54-74 at 66.
[908] Tatarstan is one of the most populous Republics in Russia and has a long and complicated history of national relations with Moscow, including several secessionist attempts and uprising, as well as at times preferential treatment. For example, during the Soviet-era, Tatars were one of the chosen few nationalities that could continue their studies in their language after primary school.

61), and reserved the right to conduct independent foreign relations, to hold exclusive ownership of natural resources and to restrict military service of its citizens to its territorial jurisdiction.[909]

These constitutional provisions were in flagrant disagreement with the 1993 Constitution and challenging to reconcile with the sovereignty of the Russian Federation over its whole territory. After Tatarstan, treaties became less generous, although the economic leverage of Bashkortostan and Yakutia meant they could also extract considerable powers.[910]

A presidential decree on 12 March 1996 established a standardized format and a specific vocabulary for the future power-sharing treaties. Interestingly, it was only in April 1997 that the Russian Duma legitimized the process of signing the power-sharing treaties.[911]

5.2.7 The Chechnya Debacle

While the power-sharing treaties were successful in keeping Russia intact, a major mistake was made in relation to the former Chechen-Ingush ASSR.[912] Chechnya was the only ASSR that had declared outright independence from Russia (on 2 November 1991) and refused to sign the 1992 Federal Treaty. The Ingush minority feared Chechnyan secession and declared independence *within* the RSFSR as the Republic of Ingushetia on 4 June 1991. This was codified into the RSFSR Constitution in December 1992.[913]

Yeltsin's refusal to recognize a former ASSR independent is understandable. Russia had another 19 of these units, and it could have ignited a chain reaction leading to the fragmentation of the Federation. However, his failure to negotiate with Chechen leadership led to the First Chechen War (December 1994 to August 1996), after which Russia had to sign a ceasefire.[914] The unilaterally declared and unrecognized 'Chechen Republic of Ichkeria'[915] suffered from economic chaos, instability, and

[909] Quoted in Hughes (n 892) 52.
[910] The Bashkortostan treaty describes it as 'a sovereign state within the Russian Federation' (Art. 1) and accords its Constitution an 'equal status' with the Russian Constitution in the regulation of joint relations (Art. 2). Furthermore, Bashkorstan was the only Republic in addition to Tatarstan to gain a right to establish a national bank. The Yakutia treaty describes it as a state 'conforming to the Constitution of the Russian Federation and the Constitution of the Republic of Sakha (Yakutia) within the Russian Federation'. *Ibid*.
[911] *Federal Law on the Principle and Order of the Delimitation of Jurisdiction and Powers between the Organs of State power of the Russian Federation and the Organs of State Power of the Subjects of the Russian Federation*, 25 April 1997.
[912] Two ASSRs in the RSFSR that had two nations (Chechen-Inhush and Kabardino-Balkar) and the Dagestan ASSR had nine nations.
[913] *On Amendments to Article 71 of the Constitution (Basic Law) of the Russian Federation*, 10 December 1992.
[914] It is telling of the scope of the Chechen 'independence' aspirations that the Chechen separatists under Johar Dudaev continued to insist right up to his death in 1995 that Chechnya would be happy to remain a member of the redesigned USSR but not of Russia. R. Sakwa and A. Pavković, 'Secession as a Way of Dissolving Federations: The USSR and Yugoslavia' in P. Radan and A. Pavković (Eds), *The Ashgate Research Companion to Secession* (2016) 147-170 at 151.
[915] Throughout its existence, it was recognized only by the Taliban rogue government of Afghanistan, which the Chechen President Maskhadov rejected as he considered Taliban illegitimate. A. Kullberg, 'The Background of Chechen Independence Movement III: The Secular Independence Movement', *The Eurasian Politician*, 1 October 2003.

Islamist extremism throughout the 1990s. Finally, in August 1999, an Islamist insurgency movement from Chechnya infiltrated on the Russian side of the border in the Republic of Dagestan, igniting the Second Chechen War. After the capital Grozny was captured in February 2000, the Chechen regime fell apart, although a low-level insurgency movement continued. In 2003, a referendum approved a new Constitution that reintegrated Chechnya to the Russian Federation with limited autonomy.[916] As attested in the encompassing amount of cases against Russia in the European Court of Human Rights, Chechnya remains in a way a frozen conflict.[917]

5.2.8 Dismantling Russian Federalism

By the summer of 1998, 46 of the 89 subjects of the federation had concluded power-sharing treaties. However, only the treaties with key Republics - Tatarstan, Bashkortostan, and Yakutia - actually provided for a significant devolution of powers. The future president Vladimir Putin got his first experiences dealing with the Republics in July 1996, as he was recruited by the Head of the Presidential Administration Anatoly Chubais to run the Control Division that handled relations with the regions and the Republics. From the center's perspective, the most important issue settled by the power-sharing treaties was the supremacy of federal law over regional law.[918] The main task of the Control Division was to ensure compliance with the vertical command line from the Presidential Administration. In 1997, it was reported that many regional laws conflicted with federal laws and the Constitution, a phenomenon that Chubais termed 'legal separatism'.[919] In January 1999, Prime Minister Primakov called for the reforming of the federal system and the bilateral treaties.[920]

As summarized by Lynch, the Russian Federation that Putin took over as a President in 1999 'resembled at best a confederation rather than a unitary state or even a federation'.[921] However, this began to change from the summer of 1999 onwards. In June, Duma passed a law stipulating that all

[916] *Constitution of the Chechen Republic*, adopted on 27 March 2003.
[917] After Russia ratified the European Convention of Human Rights in 1998, it has been heavily involved in numerous cases, many of which are related to the situation in Chechnya. For example, in 2019, the Court dealt with 9238 applications concerning Russia, of which 8793 were declared inadmissible or struck out. It delivered 198 judgments (concerning 445 applications), 186 of which found at least one violation of the European Convention on Human Rights. Quoted in European Court of Human Rights, *Press Country Profile - Russia*, updated February 2020.
[918] According to Art. 76 of the Constitution, '1. On issues under the jurisdiction of the Russian Federation, federal constitutional laws and federal laws shall be adopted. These shall have direct force on the entire territory of the Russian Federation. 2. On issues under the joint jurisdiction of the Russian Federation and the constituent entities of the Russian Federation, in addition to federal laws, laws, and other normative legal acts of constituent entities of the Russian Federation shall be issued, which are adopted in accordance with those federal laws. 3. Federal laws may not conflict with federal constitutional laws'.
[919] T. Frommeyer, 'Power Sharing Treaties in Russia's Federal System' 21(1) *Loyola of Los Angeles International and Comparative Law Review* (1999) 1-53 at 48.
[920] M. Chuman, 'The Rise and Fall of Power-Sharing Treaties Between Center and Regions in Post-Soviet Russia' 19(2) *Demokratizatsiye* (2011) 133-150 at 134.
[921] A. Lynch, 'What Russia Will Be?' Eurasian Futures, *The American Interest*, 25 October 2018.

the power-sharing treaties must be revised to comply with the Constitution by 2002. In May 2000, a territorial-administrative reconfiguration divided the subjects into seven new federal districts, each headed by a presidential plenipotentiary representative. In June 2000, a landmark case on the status of the power-sharing treaties in the Russian Constitutional Court struck down Bashkortostan's electoral law, establishing an important de jure precedent that the Republic Constitutions must comply with the federal Constitution.[922]

In the summer of 2001, a commission headed by Dmitri Kozak began to formulate a basic framework for relationships between federal, regional, and municipal governments, to centralize control. After the commission's report on 20 May 2002, Putin adopted its findings as the basic policy for the division of power between the center and the regions.[923] With the pressure from the Duma's legislation, the Constitutional Court's decision and President's new policy line, the power-sharing treaties began to unravel one by one.[924] From July 2001 to May 2003, 34 regions abolished their treaties. Some regions tried to resist,[925] but the federal government kept the pressure on. In July 2003, a new federal law came into effect, stipulating that bilateral treaties should be revised under a new procedure or be abolished.[926] Only Tatarstan and Bashkortostan continued renewal negotiations. By July 2005, all bilateral treaties became invalid, but Tatarstan was able to set forth a new treaty in 2007.[927] Moreover, in relation to the lower-level units, since 2005, six out of the ten AOks have been abolished.[928]

5.2.9 Conclusions

Due to the continuation state status, under *uti possidetis* Russia had no special obligations towards its numerous ethnofederal subunits. Nevertheless, it chose continuity in its approach to the national question and transplanted the Soviet ethnofederal model into the 1993 Constitution. The Russian leaders felt that the national question had again been solved with the federal right to internal self-determination. From the outset, however, this right was restricted. While the 1992 Federal Treaty

[922] *Decision 92-O*, Russian Constitutional Court, 27 June 2000.
[923] Chuman (n 920) 144-145.
[924] The dismantling of the Russian federal system did not take place at the constitutional level - the power-sharing system was treaty-based and largely outside the constitutional framework, so it could be reversed by simply abolishing the treaties.
[925] The Republics of Tatarstan, Bashkortostan and Yakutia, the Oblasts of Chubash, Sverdlovsk, and Irkutsk, Krasnoyarsk Krai and Moscow City objected.
[926] *On Amendments and Supplements to the Federal Law about General Principles for the Organization of Legislative and Executive Power Organs*, 4 July 2003. The law was based on the basic concept of the Kozak commission.
[927] The Treaty had to be renewed every five years. It was in 2012, but not in 2017. This will reduce Tatarstan's administrative autonomy to the same level as the other Republics. For example, Tatarstan will lose its Presidential institution by 2020. See more in <*https://www.europeanforum.net/headlines/russia-revoking-tatarstan-s-autonomy*>.
[928] These were Agin-Buryat, Evenk, Komi-Permyak, Koryak, Taymyr, and Ust-Orda Buryat AOks. They were demoted either as Okrugs or Districts without autonomic rights.

cemented the ethnofederal model, provided the subunits with encompassing autonomy, and proclaimed the ASSRs 'sovereign republics', the 1993 Constitution reversed these gains by curtailing the autonomies and replacing the term 'sovereign' by 'subjects of the federation'.[929] Moreover, unlike in the Soviet constitutional theory, the Constitution's declaration of the right to self-determination to all peoples of Russia did not entail a right to secession. In the 1990s, the Russian Constitutional Court re-affirmed the interpretation that territorial integrity overrules a right to secession in the Russian Federation in *Tatarstan* (1992) and *Chechnya* (1995) cases.[930] The Court reasoned that according to the Russian Constitution and international law doctrine, the whole people of a state alone had the full right to self-determination. A minority inhabiting a province was not seen as a 'people' with the right to have a state of their own but, at most, a right to *internal self-determination* within the Russian Federation. Finally, the developments in the last 20 years have both curtailed the number of the autonomous units, and the rights vested upon these units.

Thus, I conclude that Russian autonomous subjects did experience a reduction of their rights after the dissolution. Unlike the USSR, which was a treaty federation with a constitutional right to secession, Russia is a constitutional federation where the constituent parts are considered to be part of a pre-existing political entity and have no constitutional right to secede.[931] Yet, according to *uti possidetis*, the requirements for the recognition of Russia's bid to continue the existence of the USSR were very limited - to honor the borders of the other SSRs and to uphold the USSR's legal obligations including minority protection.[932] The Russian Federation has upheld these obligations and remains one of the more successful former SSRs in relation to its answer to the inherited national question - apart from the violent conflict with Chechnya that casts a shadow over Russian federalism.

Next, I analyze the lower-level subunits' right to self-determination in the context of the other ethnofederalized former SSRs and the SRs. The comparison between the SSRs is especially fruitful as their state structures were, in most cases, identical from 1924 to early 1990. However, after the

[929] The same categorization concerning the ASSRs, took place in the 1990s when they became the 'subjects' of the USSR as well as part of their host SSR. See subchapter 3.7.4.
[930] J. Summers, 'Russia and Competing Spheres of Influence: The Case of Georgia, Abkhazia and South Ossetia' in M. Happold (Ed), *International Law in a Multipolar World* (Routledge, 2011) 91-113 at 109.
[931] Sakwa and Pavković (n 914) 154.
[932] In addition, in 1992, the Russian Federation joined the UN Declaration 47/135 (n 588), where it reaffirmed the rights of its ethnical minorities to cultural autonomy. In 1998, it signed a mostly analogous Council of Europe's *Framework Convention for the Protection of National Minorities* (n 561). According to the Convention, the signatories pledge to respect the rights of national minorities, to undertake to combat discrimination, to promote equality, to preserve and develop the culture and identity of national minorities, to guarantee certain freedoms in relation to access to the media, minority languages and education and to encourage the participation of national minorities in public life. Art. 25 of the Convention binds the member states to submit a report to the Council containing 'full information on the legislative and other measures taken to give effect to the principles set out in this framework Convention'.

momentous decisions by the Soviet leadership to allow free national elections in the SSRs in 1990 and to expand their internal autonomy considerably, the local elites began to redesign these institutions, including the relations between their ASSR or AO subunits. I begin with the former SSRs that retained the ethnofederal system, followed by those that outright rejected it.

5.3 Ethnofederalism Retained: Uzbekistan, Tajikistan, and Ukraine

In addition to the special case of the Russian Federation, three former ethnofederalized SSRs chose a de facto retention of many aspects of the ethnofederal agreement, which in turn made their national relations a lot less confrontational than in the other SSRs with inherited subunits. As former SSRs, the *second version* of the right to self-determination in the post-dissolution framework is applicable. Apart from Russia, the recognition of the SSRs was contingent upon fulfilling the criteria of the EC Guidelines and the Statement on the USSR. The criteria included respecting the rule of law, democracy and human rights as stipulated in the UN Charter and the CSCE framework, guaranteeing the rights of national groups and minorities under the CSCE commitments, inviolability of the *uti possidetis* borders apart from common agreement, and commitment to arbitrate any regional or state succession disputes and to adhere to the Nuclear Non-Proliferation Treaty.[933] Therewith, the decisions of Uzbekistan, Tajikistan, and Ukraine to retain the rights of their ethnofederal units need to be analyzed according to these criteria.

5.3.1 Uzbekistan and Karakalpakstan

Uzbekistan inherited one ASSR, Karakalpakstan. The area had a complex ethnofederal history: it was first created in 1925 as an AO within the Kazakh ASSR and transferred to the RSFSR in 1930. In 1932, it was promoted to an ASSR. In 1936, it was transferred in this capacity to the SSR of Uzbekistan. During the rest of the Soviet era, Karakalpakstan enjoyed a constitutionally guaranteed meaningful autonomy as an ASSR within Uzbekistan.[934] In April 1990, the autonomy of the ASSRs was promoted to a virtual equivalence with the SSRs in many areas. For example, they gained the right to secede with its host SSR or to remain an autonomous part of the USSR, with which it would then re-negotiate on its self-governing status.[935] In addition, the term ASSR was abolished, and these units became direct subjects of the USSR. They remained a part of their host SSRs, but now based on free self-determination of peoples. Moreover, the ASSRs were now said to possess all state power

[933] N 4 and n 225.
[934] *Constitution of the Soviet Socialist Republic of Uzbekistan*, adopted on 19 April 1978, Part VI.
[935] *Law on the Procedure for Resolving Questions Connected with a Union Republic's Secession* (n 489).

on their territory apart from powers expressly transferred to the USSR or to the host SSR.[936] Finally, the law introduced a concept of contractual relations between the SSRs and the ASSRs, stating that the relations between them are to be determined by the treaties and conventions they conclude within the Soviet legal framework.[937] This was the legal position of Karakalpakstan at the moment of the dissolution of the USSR and the application of *uti possidetis* in December 1991.[938]

After functioning at the interim period under its SSR Constitution, Uzbekistan promulgated a new Constitution on 8 December 1992. It reproduced the ethnofederal status of Karakalpakstan with a comparable level of self-governance. The former ASSR was called sovereign and titled the 'Republic of Karakalpakstan'.[939] It received a right to have a Constitution,[940] its territory could not be altered without its consent, and the Republic 'shall be independent in determining its administrative and territorial structure'.[941] Karakalpakstan has extensive autonomy in creating its local institutions,[942] and its relations with Uzbekistan 'shall be regulated by treaties and agreements' concluded between the two and any disputes 'shall be settled by the way of reconciliation'.[943] Finally, reminiscent from the Soviet federal theory, Karakalpakstan has the right to secede on the basis of the referendum, although Uzbekistan's veto right substantially qualifies this.[944] All that being said, the reality of an authoritarian regime in Uzbekistan can, at times, have unexpected consequences for the functioning of the constitutional order in the country. Unlike in the Soviet-era, Karakalpakstan can no longer appeal to the federal authorities for the actions of Uzbekistan.

To conclude, just like in the late Soviet era, Karakalpakstan retaines the right to be called sovereign Republic, although the 1992 Constitution does not mention the right to self-determination. Karakalpakstan continues to have its Constitution, and any decisions concerning territorial alterations or Karakalpakstan's rights are made via concurrent decision making, giving both Uzbekistan and Karakalpakstan mutual right to veto over changes. Finally, Karakalpakstan's relations with

[936] *Law on the Division of Powers* (n 497), Section 1(3). It left the status of AOs and the AOks vague. See Feldbrugge (n 488) 129.
[937] *Ibid.* Section 1(4). As Sakwa has noted, the ASSRs could now negotiate on equal terms with their host SSRs. Sakwa (n 503) 215.
[938] While Uzbekistan had already declared independence in August 1991, it was recognized independent only after the dissolution of the USSR. The EC recognized it on 16 January 1992. While the US recognized the country already on 25 December 1991, Washington stipulated that the establishment of diplomatic ties would depend on meeting its conditions on human rights and democracy, which was finally achieved on 15 March 1992. Uzbekistan became a UN member state on 2 March 1992.
[939] *Constitution of the Republic of Uzbekistan*, adopted on 8 December 1992, Art. 70.
[940] *Ibid.* Art. 71.
[941] *Ibid.* Art. 73.
[942] *Ibid.* Arts. 93, 107, and 109. However, this can be somewhat limited with Art. 71 stating that the 'Constitution of the Republic of Karakalpakstan must be in accordance with the Constitution of the Republic of Uzbekistan'.
[943] *Ibid.* Art. 75.
[944] *Ibid.* Arts. 74 and 78.

Uzbekistan are regulated by treaties between the two. I conclude that Uzbekistan passed the second-level requirements that the international community insisted upon for the SSRs, namely those listed in the EC Guidelines and the Statement on the USSR. Therewith, in terms of *uti possidetis*, the international recognition of Uzbekistan in 1992 was not premature.

5.3.2 Tajikistan and Gorno-Badakhshan

Tajikistan inherited one AO, Gorno-Badakhshan. The AO was first created in 1925 and in 1929 it was transferred to the newly-formed SSR of Tajikistan. Gorno-Badakhshan remained an AO throughout the Soviet era and even received additional territory in 1955.[945] After the failed Soviet coup, Tajikistan declared independence in September 1991. However, a Civil War broke out between different clans almost instantly.[946] Until 1994, Tajikistan operated under its 1978 SSR Constitution, which guaranteed the AO limited autonomy without any sovereign attributes.[947] While the ASSRs were titled 'states' and direct subjects to the USSR, the AOs were 'a part of union republics on the basis of the free self-determination of peoples'. Nevertheless, just like the ASSRs, they 'possess the entirety of state power on their territory, except for the powers that they transfer to the jurisdiction of the USSR and union republics'.[948] Moreover, the relations between the ASSRs and the AOs 'are defined by treaties and agreements that are concluded within the framework of the USSR constitution, the constitutions of the union republics and autonomous republics, and this law'.[949] This was the legal status of Gorno-Badakhshan at the moment of the dissolution of the USSR (December 1991).[950]

Gorno-Badakhshan declared its independence at the start of the Tajik Civil War in May 1992, but later backed down and chose to negotiate with the central authorities. After the fighting had ceased, Tajikistan adopted a new Constitution on 6 November 1994, which has been amended twice since.[951] Under Chapter 7 of the Constitution, Gorno-Badakhshan retains the AO title. It is described as integral part of Tajikistan and while notably not sovereign, its territory cannot be changed without its consent.[952] The AO has its parliament which has a right of 'legislative initiative'.[953] However, as

[945] The Gharm Oblast was dissolved and divided between the AO and Tajikistan by a Soviet government decision.
[946] For more on this catastrophic war and the power-sharing agreements on the eventual peace treaty (1997) see D. Lynch, 'The Tajik Civil War and Peace Process' 4(4) *Civil Wars* (2001) 49-72.
[947] See subchapter 3.5.3.
[948] *Ibid.* quoted in Walker (n 187) 91.
[949] *Ibid.*
[950] Tajikistan had declared independence in September 1991. It was recognized independent by the EC on 16 January 1992 and by the US already on 25 December 1991. It became a UN member state on 2 March 1992.
[951] *Constitution of Tajikistan*, adopted on 6 November 1994, amended after referendums on 26 September 1999 and on 22 June 2003.
[952] *Ibid.* Art. 81. The AOs possessed the same veto right over their territory in the USSR Constitution.
[953] *Ibid.* Arts. 60 and 82.

pointed out by Roeder, this right can be rescinded by a constitutional amendment over which the AO has no veto.[954] Moreover, according to the Constitution, the local AO authorities are directly accountable to the President of Tajikistan,[955] and Gorno-Badakhshan has no right to secession from Tajikistan. However, one needs to keep in mind that even during the Soviet times, Gorno-Badakhshan was the lower-level AO, and it is within the ethnofederal logic that its rights are more limited to its ASSR counterparts, such as Karakalpakstan. In addition, Tajikistan is - together with Russia - the only former SSR that has maintained a second legislative chamber for regional representation,[956] reminiscent of the Soviet of Nationalities of the USSR.

Tajikistan chose to retain many of the more meaningful parts of the Soviet ethnofederal arrangement in its relations with its inherited national question and Gorno-Badakhshan continues to enjoy many autonomous rights, including its parliament and regional representation in Tajikistan's parliament.[957] Thus, I conclude that Tajikistan likewise passes the second-level requirements as portrayed in the EC Guidelines and the Statement on the USSR, and its international recognition in January 1992 was not premature. The relationship between the AO and the central government has remained sometimes confrontational since the 1994 Constitution, yet so far the subsequent constitutional amendments have enhanced the AO's rights.[958]

5.3.3 Ukraine and Crimea

Ukraine inherited one ASSR, Crimea. It was a different from the other ASSRs in many aspects, contributing to Crimea's complicated relationship with Ukraine throughout the 1990s and 2000s. First, Crimea was made an ASSR only in February 1991, and this decision was not imposed by the USSR but initiated by Ukraine. Second, just like Karakalpakstan, Crimea had previously been a part of other SSR than Ukraine.[959] Third, Crimea had a predominantly Russian population, making the Russian Federation a stakeholder in the former ASSR's quest for self-determination.[960]

[954] Roeder (n 884) 65.
[955] *Constitution of Tajikistan* (n 951) Arts. 78 and 80.
[956] The Parliament of Tajikistan was made bicameral after a constitutional amendment on 26 September 1999.
[957] In addition, according to Art. 53, one of the assistants to the Chair of Parliament must be a people's deputy from Gorno-Badakhshan.
[958] N 951.
[959] While rare, there are other examples of this under the ethnofederal system. For instance, Gorno-Badakhshan was at first part of Turkestan ASSR, until transferred to the SSR of Tajikistan in 1929. Moldavian ASSR existed from 1924 to 1940 within the SSR of Ukraine, until it was disbanded and divided between Ukraine and Moldova in August 1940. Abkhazian SSR and Karelo-Finnish SSR were demoted from the 'independent' SSR status to becoming parts of Georgia and RSFSR as ASSRs in 1931 and 1956, respectively.
[960] The same kind of dynamic happened between Armenia and Azerbaijan in relation to Nagorno-Karabakh. See subchapter 5.4.1.

Crimea was originally created as a national unit in April 1919 when the Bolshevik government declared it as a SSR.[961] The peninsula was occupied during the Russian Civil War by the White Army. On 18 October 1921, the Crimean territorial unit was re-established as the 'Crimean ASSR of the RSFSR',[962] which was downgraded to an administrative Region without autonomy on 30 June 1945.[963] In this capacity, it was transferred from the RSFSR to the SSR of Ukraine on 19 February 1954. The reasoning given to this transfer was the 'integral character of the economy, the territorial proximity and the close economic ties between Crimea Province and the Ukraine Republic', as well as the favouring stances of the RSFSR's and Ukraine's Presidiums.[964] Moreover, the transfer was conditioned on Ukraine rebuilding the Region from its SSR budget, creating infrastructure including water and energy supply, and setting up recreational areas on the Western coast of the peninsula.[965]

On 20 January 1991, a referendum was held in Crimea, with a posed question of 'Are you in favor of the restoration of the Crimean ASSR as a subject of the USSR and as a party to the Union Treaty?'. The motion was backed by 93,26% of the electorate, with over 80% participation.[966] The ASSR status for Crimea was re-established on 12 February 1991. Notably, this decision was made not by Moscow but by Ukraine - it had declared its sovereignty and its laws' precedence over the laws of the USSR already on 16 July 1990.[967] Subsequently, at the moment of the dissolution of the USSR, Crimea had acquired all the rights of an ASSR.[968]

As the host SSR, Ukraine inherited the ASSR of Crimea according to *uti possidetis*. However, from the very outset, Crimea displayed tendencies for more enhanced autonomy or even outright independence. On 26 February 1992, the Crimean parliament renamed the ASSR as the 'Republic of Crimea', and in March, the 'Republican Movement of Crimea' collected over 200 000 signatures in support for an independence referendum.[969] There was a great pressure on the Ukrainian parliament

[961] For more about Crimean history prior to 1945 (in Finnish), see T. Lundstedt and L. Hannikainen, 'Ajavatko Venäjän perustelut Krimin valtaukselle sen kansainvälisoikeudellisen doktriinin umpikujaan?' 45(4) *Oikeus* (2016) 445-465 at 445-446; and for the Russian claims of its 'historical rights' over the province see T. Lundstedt, '"Peaceful and "Remedial" Annexations of Crimea', *Russian Perspectives on International Law Symposium, Voelkerrechtsblog,* 19 January 2018. *<https://voelkerrechtsblog.org/peaceful-and-remedial-annexations-of-crimea/>*.
[962] Renamed simply Crimean ASSR in the 1936 Constitution of the USSR (n 399) Art. 22.
[963] D. Heaney (ed), *The Territories of the Russian Federation 2016* (Routledge, 2016) at 313.
[964] Quoted in K. Calamur, 'Crimea: A Gift to Ukraine Becomes A Policial Flash Point', *National Public Radio, Parallels*, 27 February 2014, original in *Pravda*, 27 February 1954.
[965] A. Tatarenko, 'The Legal Status and Modern History of Crimean Autonomy', *Verfassungsblog*, 2 April 2014.
[966] 'Chronology for Crimean Russians in Ukraine', *Minorities at Risk Project* (2004).
[967] *Declaration of State Sovereignty of Ukraine*, passed by the parliament of the Ukrainian SSR, 16 July 1990.
[968] The international community ignored Ukraine's original independence declaration in August 1991. However, the recognition by the RSFSR on 2 December was followed by the US on 25 December and by the EC member states by 31 December 1991.
[969] D. Litvinenko, 'The Legal Aspects of Crimea's Independence Referendum of 2014 With the Subsequent Annexation of the Peninsula by Russia', *Master's Thesis*, Harvard Extension School 2016 at 17.

to give concessions to Crimeans, as many of the former ethnofederal units had started armed uprisings in Azerbaijan,[970] Georgia,[971] and Moldova.[972] Thus, in April, a Ukrainian law reinstated generous autonomy for Crimea,[973] although this still amounted to less self-governance than the province had hoped for. Subsequently, on 5 May 1992, the Crimean parliament approved a new Constitution that declared Crimea independent, pending on its approval by an independence referendum to be held on 2 August 1992. This referendum was never held, as the next day, the Crimean parliament backed off and passed a constitutional amendment that stated that Crimea was a 'constituent part' of Ukraine.[974]

Nevertheless, the 1992 Constitution of Crimea gave it a very substantial self-governing status. For example, the local parliament and the council of ministers were stated to possess the highest legislative and governmental power, Russian was declared the state language and the Republic retained the right to have its state symbols.[975] Additionally, just like in the late Soviet era, the Constitution proclaimed that while Crimea was a part of the state of Ukraine, it 'defines its relation with it on the basis of a treaty and agreements'.[976]

On 19 May, Crimea annulled its proclamation of independence, and after a set of prolonged negotiations, in July 1992 Ukraine and Crimea agreed on a compromise: Crimea would remain under Ukrainian jurisdiction, but with significant cultural and economic autonomy. Following, a new Ukrainian law on the status of the 'Autonomous Republic of Crimea' was adopted.[977] It gave Crimea right to pass its laws as long as they did not contradict Ukraine's laws, to adopt a budget and impose its tax system, to have its policies in environmental regulation, social protection, and culture, and to conduct local referendums on questions under the Autonomous Republic's jurisdiction.[978]

In 1993, the Crimean parliament took the initiative to introduce legislation that strengthened the autonomy, first by creating an office for the President of Crimea.[979] The presidential elections on 16

[970] See subchapter 5.4.1.
[971] See subchapter 5.4.3.
[972] See subchapter 5.4.2.
[973] *Law On the Status of the Autonomous Republic of Crimea*, 21 April 1992.
[974] P. Kolstø and A. Edemsky, *Russians in the Former Soviet Republics* (Hurst & Company, 1995) at 194.
[975] Tatarenko (n 965).
[976] *Constitution of the Republic of Crimea*, 5 May 1992, Art. 9.
[977] Reflecting the ongoing war of laws, Ukrainian law called Crimea 'Autonomous Republic', although the Crimean Constitution used the term 'Republic'. This was finally settled in the 1998 Constitution of Crimea. J. Hylton, 'Understanding the Constitutional Situation in Crimea', *Marquette University Law School Faculty Blog*, 16 March 2014.
[978] 'Autonomous Republic of Crimea', *Global Security* (2018). <*https://www.globalsecurity.org/military/world/ukraine/arc.htm*>.
[979] In addition, Crimean Tatars received a quota of 14 seats in the parliament, and Armenians, Bulgarians, Germans, and Greeks received one seat each, but this was a measure for one term only. N. Belitser, 'The Constitutional Process in the Autonomous Republic of Crimea in the Context of Interethnic Relations and Conflict Settlement', *International Committee for Crimea*, 20 February 2000.

January 1994 were won by Yuri Meshkov, who had campaigned for Crimean secession and union with the Russian Federation and who decreed for a new independence referendum right after taking office. Although the Ukrainian President vetoed several Crimean laws, relations remained peaceful, and negotiations continued over the extent of Crimean self-government. In May 1994, the Crimean parliament adopted a law 'On Renewal of the Constitutional Basis of the Statehood of the Republic of Crimea'. It indicated a desire for more autonomy or even outright independence as it aimed to change the legal status of Crimea as a part of Ukraine and thus violated the Ukrainian Constitution and the April 1992 law on the status of Crimea.[980] International involvement followed on 24 November 1994, when the OSCE established 'Mission to Ukraine' with the task of supporting the work of experts on constitutional and economic matters and reporting on the Crimean situation.[981]

After further failed negotiations with the Crimean authorities, in March 1995, the Ukrainian parliament passed a law on the status of Crimea.[982] It repealed the 1992 Crimean Constitution, abrogated all Crimean laws and decrees contradicting Ukrainian legislation, and removed the post of President of Crimea as well as the incumbent Meshkov. The province's name was changed from the 'Republic' to the 'Autonomous Republic' of Crimea.

Ukraine adopted a new Constitution in 1996. It proclaimed Ukraine a unitary state with sovereignty over all its territory and that the Autonomous Republic of Crimea is an integral part of the administrative and territorial structure of Ukraine.[983] Under the Constitution, Crimea was still awarded many characteristics of a state: its representative organ entitled to adopt the Constitution for the Autonomous Republic and other legal acts; local government; emblem, hymn, flag, and state language (Russian).[984] Yet, these rights were substantially limited - the Crimean Constitution had to be approved by the Ukrainian parliament, and all Crimean legislation had to be in conformity with the Ukrainian Constitution and legislation.[985] Notably, the Constitution explicitly prohibits Crimean secession or any other territorial modification of the territory of Ukraine.[986]

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[980] A. Bloed (Ed), *The Conference on Security and Co-Operation in Europe: Basic Documents, 1993-1995* (Martinus Nijhoff Publishers, 1997) at 788.
[981] The Mission was closed in 1999, and it had an essential contribution to the stabilization of the national relations between Ukraine and Crimea. *<https://www.osce.org/mission-ukraine-1999-closed>*.
[982] *On the Autonomous Republic of Crimea*, Act No. 0095, 17 March 1995.
[983] *Constitution of Ukraine*, adopted at the Fifth Session of the Verkhovna Rada of Ukraine on 28 June 1996, Arts. 2 and 133.
[984] *Ibid.* Title X, Art. 134-139.
[985] *Ibid.* Art. 135.
[986] *Ibid.* Arts. 92(13), 92(18), and 157.

Finally, Crimea adopted its new Constitution on 21 October 1998, concurring with the 1996 Constitution of Ukraine. It was approved by Ukraine and became effective on 23 December 1998. According to the Constitution, Crimea exercises normative regulation over numerous areas.[987] Although the Crimean parliament selects the head of the Crimean government, this is subjected to a veto by the Ukrainian President.[988] In sum, since 1998, Crimea has enjoyed a more limited but not insignificant territorial autonomy within Ukraine.

With the Crimean population being predominantly Russian,[989] the dispute between Ukraine and Crimea always had a third stakeholder just across the border. The separatist elements in Crimea found support from the Russian Duma, which in 1992 had declared the 1954 transfer of the ASSR from the RSFSR to Ukraine to have been illegal and in 1993 that Crimea was a part of Russia. Nevertheless, President Yeltsin did not press the issue, and the question over the sovereignty over Crimea was cemented with the 1997 Treaty of Friendship, Cooperation and Partnership between Russia and Ukraine,[990] where Russia unambiguously recognized Ukraine's borders and sovereignty over Crimea in exchange for rights to keep its Black Sea Fleet in Sevastopol Naval Base until 2017.[991] After these issues had been settled, the advocating of a union between Russia and Crimea was significantly curtailed in Crimea and in Russia, although a few warning signs were visible before 2014.[992]

To conclude, the interaction between Ukraine and Crimea displays a complex ethnofederal bargaining process. The resulting compromise provided the former ASSR with a meaningful autonomy, but was less than expected and thus contributed to separatist tendencies. Without Ukraine having upgraded

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[987] These areas are agriculture and forestry; land reclamation and mining; public works, crafts and trades; charity; city construction and housing management; tourism, hotel business, fairs; museums, libraries, theatres, other cultural establishments, historical and cultural preserves; public transportation, roadways, water supply; hunting and fishing; and sanitary and hospital services. *Constitution of the Autonomous Republic of Crimea*, adopted on 21 October 1998, Art. 18(2).

[988] *Ibid.* Art. 36(1).

[989] According to the All-Ukrainian population census of 2001, Russians made up 58,3% of the population of Crimea. <*https://web.archive.org/web/20111217151026/http://2001.ukrcensus.gov.ua/eng/results/general/nationality/*>.

[990] *Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation*, signed in Kiev on 31 May 1997, entered into force on 1 April 1999.

[991] *Partition Treaty on the Status and Conditions of the Black Sea Fleet*, signed on 28 May 1997 and entered into force on 12 July 1999. The Treaty consisted of three separate treaties: *Agreement between the Russian Federation and Ukraine on the Parameters of the Division of the Black Sea Fleet*; *Agreement between the Russian Federation and Ukraine on the Status and Conditions of the Presence of the Russian Federation Black Sea Fleet on the territory of Ukraine*; and *Agreement between the Government of the Russian Federation and the Government of Ukraine on Payments Associated with the Division of the Black Sea Fleet and Its Presence on the territory of Ukraine*. A fourth treaty, *Agreement between Ukraine and Russia on the Black Sea Fleet in Ukraine* was signed on 21 April and ratified on 27 April 2010. It extended the Russian lease over Sevastopol until 2042.

[992] In September 2008, the Ukrainian Foreign Minister Volodymyr Ohryzko accused Russia of giving out Russian passports to the population in Crimea and described it as a 'real problem' given Russia's declared policy of military intervention abroad to protect its citizens. <*https://www.smh.com.au/world/cheney-urges-divided-ukraine-to-unite-against-russia-threat-20080906-4auh.html*>. After the Russian recognition of independencies of Abkhazia and South Ossetia from Georgia in 2008, the former Chairman of the Crimean parliament said then that he hoped that Russia would treat Crimea the same way as it had treated South Ossetia and Abkhazia. C. Levy, 'Russia and Ukraine in Intensifying Standoff', *The New York Times*, 27 August 2009.

Crimean status to an ASSR in February 1991, the inhabitants would have been a simple territorially concentrated ethnic minority. However, as they held an ASSR status at the moment of the dissolution, they expected at least the same rights as their counterparts. The process of negotiating power-sharing treaties with the former ASSRs and AOs in the Russian Federation was a natural reference point.

The 1992 Crimean Constitution stated that although a part of Ukraine, Crimea exercises its sovereign rights over its territory, which cannot be altered without its consent, and that the bearers of this sovereignty are the people of Crimea.[993] This was a typical example of thinking along with the Soviet asymmetrical federation framework - for the former ASSRs it was not uncommon to view their legal position as a territory not entitled to independence but to 'territorial sovereignty', i.e., very significant autonomy in their territory with strong constitutional guarantees including a veto right over any changes. Thus, while being a part of Ukraine, Crimea functioned under its Constitution based on the sovereignty of its people, and its relations with Ukraine were regulated by treaties and agreements.[994] This constitutional order was almost a direct copy of the Soviet era. It continued the asymmetric ethnofederal model and co-opted it with the new realities, such as the loss of the arbitrating federal center, a multi-party democratic system, and a more rule of law state. However, it was not to last.

The still valid 1998 Constitution[995] curtails Crimean autonomy on many grounds. First, while Crimea retains the right to have its parliament, government, Constitution, state language, emblem and flag,[996] this has notable limits: the Crimean Constitution has to be approved by the Ukrainian parliament, which underlined its subordinate position, and all Crimean legislation has to be in conformity with the Ukrainian Constitution and laws.[997] Second, the Ukrainian President has a veto right over the selection of the Prime Minister of Crimea.[998] Finally and most importantly, unlike the 1992 Constitution that had stated that Crimea is sovereign, functioning under its Constitution and basing its relations with Ukraine on treaties between the two, the 1998 Constitution states unambiguously that the Autonomous Republic of Crimea exercises 'any and all powers as may be delegated to it by

[993] *Constitution of the Republic of Crimea* (n 976) Arts. 1, 2, and 7(1).
[994] *Ibid.* Art. 9.
[995] Crimean parliament passed a new Constitution on 11 April 2014, but this was done under foreign occupation and has not been recognized by the Ukrainian parliament. As the international community does not recognize Russian annexation of Crimea, according to *ex injuria jus non oritur* the 2014 Constitution is null and void.
[996] *Constitution of the Autonomous Republic of Crimea* (n 987) Arts. 134-139.
[997] *Ibid.* Art. 135.
[998] *Ibid.* Art. 36(1).

Ukrainian laws pursuant to the Constitution of Ukraine'.[999] Thus, the asymmetric 'co-sovereignty' with Ukraine was transformed into a more conventional limited territorial autonomy.

All that being said, despite all the limitations introduced by the 1998 Constitution, Crimea did continue to exercise normative regulation right over many important policy areas, such as agriculture, land reclamation, public works, city construction, public transportation, tourism, and culture.[1000] Moreover, the Crimean territory was affirmed to be the 1991 *uti possidetis* territory - i.e., the same as that possessed by the ASSR Crimea - and Crimea held a 'double veto' over any changes to this territory as it was only changeable after a local referendum and by a resolution by the Crimean parliament. Therefore, I conclude that Ukraine passed the second-level requirements listed in the EC Guidelines and the Statement on the USSR, and its international recognition in December 1991 was not premature. After 1998, Crimean autonomy has been notably weaker than in the late-Soviet and early Ukrainian independence periods but has nevertheless remained meaningful and compares favourably with the other ethnofederalized SSRs.

5.3.4 Conclusions

The constitutional statuses that Uzbekistan, Tajikistan, and Ukraine chose to provide for their former ASSRs and AOs are similar in many ways. Moreover, they all chose to maintain their inherited administrative borders without changes, complemented with constitutionally guaranteed veto right to the subunits for any adjustments of these borders.[1001] This should not come as a surprise, given the shared ethnofederal history of the former SSRs. In turn, Karakalpakstan and Gorno-Badakhshan were content with their autonomy and decided not to pursue armed or even peaceful separatism after the new Constitutions of Uzbekistan and Tajikistan had been adopted. Ukraine and Crimea had a more confrontational relationship manifested in Crimean attempts for separation or union with Russia and the subsequent pushback by Ukraine limiting province's autonomy. To summarize, Uzbekistan and Tajikistan provided their subunits with constitutional positions that were very similar to the ones under the Soviet constitutional system.[1002] Crimea enjoyed even more extensive autonomy until 1998 when its internal self-determination was significantly curtailed. Regardless, it still enjoyed meaningful autonomy, and there were no major confrontations with Ukraine prior to 2014.

[999] *Ibid.* Art. 1(1).
[1000] *Ibid.* Art. 18(2). Tourism was particularly important, with around six million tourists visiting Crimea annually before 2014.
[1001] This is the baseline scenario for *uti possidetis meritus*. See Chapter 6.
[1002] The lesser rights invested upon Gorno-Badakhshan is in conformity with its lower AO status.

Next, I proceed to analyze those former SSRs that decided after 1991 to outright reject their ethnofederal legacy and the rights of their subunits, and how the subunits responded to such policies.

5.4 Ethnofederalism Rejected: Azerbaijan, Moldova, and Georgia

The cases of competing claims of sovereignty over territory analyzed in this subchapter - Azerbaijan, Moldova, and Georgia - are notably different from the previous examples. The first difference is that in these cases, there was a clear and articulated decision by the central authorities to reject the ethnofederal legacy and to abolish the self-governing rights of the subunits.[1003] The other major difference is that - not accidentally - in *all* these cases, the central government faced such a pushback from the subunits that they lost control over them during the 1990s. Since then, the former ASSRs and AOs have existed in a legal limbo without any clear path forward. They have de facto control over their territory and seek in vain recognition for their independencies. The international community has pressured them to negotiate with the central authorities on a possible return of their autonomy. Nevertheless, the lack of goodwill between the parties and the considerable passage of time has made these attempts futile so far.[1004]

5.4.1 Azerbaijan: Nakhchivan and Nagorno-Karabakh

Azerbaijan inherited two ethnofederal units, a predominantly Azeri ASSR of Nakhchivan and a predominantly Armenian AO of Nagorno-Karabakh. As an ASSR, Nakhchivan had a substantial autonomy based on the April 1990 USSR constitutional amendments. It had been recognized holding the right to self-determination and possessing all state power on its territory apart from powers expressly transferred to the USSR or the host SSR. Moreover, relations between Nakhchivan and Azerbaijan were determined by the treaties and conventions they conclude within the Soviet legal framework.[1005] In contrast, as an AO, Nagorno-Karabakh had limited autonomy without any sovereign attributes.[1006] This was the legal landscape in Azerbaijan at the dissolution of the USSR and the application of *uti possidetis* in December 1991.[1007]

What took place in Azerbaijan after 1991 is a part of a pattern in the post-Soviet context of a former SSR confronting its subunits. With less of an ethnic element and no third party involvement,

[1003] However, there were exceptions in these states - Azerbaijan, and Georgia retained most of the autonomy for their former ASSRs of Nakhichevan and Ajara, while Moldova gave a substantive autonomy to a minority previously lacking one in Gagauzia.
[1004] The apparent aberration was the timing of this pressure - if the EC had indeed consistently demanded the fulfilment of the second-level of self-determination before the recognition decision, it would have had the needed leeway. See subchapter 4.4.
[1005] See subchapter 3.7.4.
[1006] See subchapter 3.5.3.
[1007] Azerbaijan was recognized by the US and the EC states between late December 1991 and January 1992, and by Russia on 4 April 1992. It became a UN member state on 2 March 1992.

Azerbaijan's relations with Nakhchivan have been smooth since its independence, whereas the dispute over Nagorno-Karabakh has led to a lasting frozen conflict.

The ethnofederalization of Azerbaijan took place in the early 1920s. After the 1917 October Revolution and subsequent turmoil, Armenia and Azerbaijan declared their independencies from Russia and fought each other for the ownership over Nakhchivan and Nagorno-Karabakh. A subsequent invasion by the Red Army in July 1920 abolished their short-lived independencies, and they were declared as SSRs of the USSR. In November 1920, Bolsheviks promised to transfer Nakhchivan to Armenia, but an early 1921 referendum demonstrated a 90% support for staying within Azerbaijan. The ASSR of Nakhchivan was created on 16 March 1921. Its autonomy was internationally guaranteed in 1921 by the Treaty of Kars with Turkey, which stated that Nakhchivan 'constitutes an autonomous territory under the protection of Azerbaijan'.[1008] Finally, the ASSR was formally incorporated into Azerbaijan on 9 February 1924.

Nakhchivan remained peaceful until the late 1980s, when the relations between the SSRs of Armenia and Azerbaijan soured. Azerbaijan had declared its sovereignty already on 23 September 1989 and was acting with relative independence from the USSR. However, a Soviet intervention in January 1990[1009] led the Supreme Soviet[1010] of the Nakhchivan ASSR to threat to secede from the USSR in protest.[1011] On 17 November 1990, Azerbaijan renamed Nakhchivan as an 'Autonomous Republic', and in August 1991, Azerbaijan declared its independence from the USSR.[1012]

Azerbaijan adopted its new Constitution in 1995, under which the Autonomous Republic retained most of its Soviet-era autonomy. It was termed an 'autonomous state within the Azerbaijan Republic',[1013] with its legislative assembly and Cabinet of Ministers.[1014] Nakhchivan's Constitution and laws cannot be in contradiction with the Azerbaijani ones, its Constitution must be approved by the Azerbaijani government, and all the key appointments - the prime minister and local executives -

[1008] *Treaty of Friendship between Turkey, the Socialist Soviet Republic of Armenia, the Azerbaijan Socialist Soviet Republic and the Socialist Soviet Republic of Georgia*, 23 October 1921, Art. 5. Preamble of Nakchivan's 1998 Constitution refers to this treaty.
[1009] Worried by the escalating tensions between Armenia and Azerbaijan, on 15 January the USSR declared a state of emergency in the province and the nearby areas and on 19-20 January dispatched 11 000 troops to quell protests in Azerbaijan's capital Baku, causing widespread chaos and casualties. The incident - known in Azerbaijan as 'Black January' - led to Azerbaijan's Communist Party losing its legitimacy and popular support. M. Croissant, *The Armenia-Azerbaijan Conflict: Causes and Implications* (Prager, 1998) at 37-38.
[1010] Highest legislative organ in the SSRs and the ASSRs.
[1011] *Law on the Procedure for Resolving Questions Connected with a Union Republic's Secession* (n 489). Under this legislation, an AO could decide after a referendum whether it would like to secede with the host SSR or to remain within the USSR.
[1012] In fact, it declared the restoration of its independence that had been illegally deprived by the 1921 Soviet invasion. *Declaration of the Supreme Soviet of the Republic of Azerbaijan about a Restoration of Independence of the Republic of Azerbaijan*, 30 August 1991.
[1013] *Constitution of the Republic of Azerbaijan*, adopted on 12 November 1995, Art. 134(I).
[1014] *Ibid.* Arts. 135 and 140.

are made only by the recommendation of the President of Azerbaijan.[1015] Nakhchivan's Constitution was approved in late 1998 within the parameters set by the Constitution of Azerbaijan. Its territory was stated as 'inviolable and indivisible', but it retained no national symbols.[1016] Nakhchivan exercises only the powers that are delegated to it, cannot unilaterally reallocate rights, and does not have a right to secession. It continues to have a Constitution and a Constitutional Court, but it is not termed sovereign, and its relations with the parent-state are not regulated by treaties but solely by the Azerbaijani Constitution that Nakhchivan cannot affect.[1017] While it is, in the end, a reduced version of the Soviet-era autonomy, the lack of ethnic component or any kind of oppression from Azerbaijan has kept the population content with their position. Therefore, I conclude that in relation to its former ASSR, Azerbaijan passed the second-level requirements that the international community insisted upon for the SSRs, namely those listed in the EC Guidelines and the Statement on the USSR.

The negotiated autonomy of Nakhchivan is in stark contrast with Azerbaijan's relations with the predominantly Armenian AO of Nagorno-Karabakh.[1018] Despite its ethnic composition, the AO was established on 7 July 1923 within the SSR of Azerbaijan. Just like many other Soviet subunits, it started to display secessionist tendencies in the late 1980s and was encouraged by the neighbouring SSR of Armenia that aimed to incorporate Nagorno-Karabakh. In February 1988, the Soviet of Nagorno-Karabakh appealed to the USSR Supreme Soviet to transfer the AO from Azerbaijan to Armenia, followed by a similar appeal by the Armenian Supreme Soviet.[1019] After Moscow stood firm against any changes in borders between the SSRs,[1020] the situation escalated further, and the European Parliament issued a Resolution where they regarded the inclusion of 80% Armenian AO into Azerbaijan as 'arbitrary' and called for the USSR to study the compromise proposals made by Armenia to temporarily either govern the AO from Moscow or to unite it with the RSFSR.[1021]

Notwithstanding, Azerbaijan was taking its distance from the federal center and declared its independence in August 1991. In September, the AO followed suit by proclaiming its independence

[1015] *Ibid.* Arts. 134(V-VI), 140(II), and 141.
[1016] *Constitution of the Nakhichevan Autonomous Republic*, adopted on 29 December 1998, Arts. 6 and 10.
[1017] *Ibid.* Arts. 1, 24, 25, and 44.
[1018] According to the population census of 12 January 1989, the population of the AO was around 189 000 persons, with 139 000 (73,5%) Armenians and around 48 000 (25,3%) Azerbaijanis. Numbers quoted in 'Nagorno-Karabakh Autonomous Oblast of the Azerbaijan SSR', Republic of Azerbaijan Ministry of Foreign Affairs.
[1019] This was accompanied by first-ever mass demonstrations in the USSR with hundreds of thousands of Armenians protesting at the streets of Yerevan. 'Nagorno-Karabakh: Timeline of the Long Road to Peace', *Radio Free Europe*, 10 February 2006.
[1020] *The 1977 Constitution of the USSR* (n 200) Art. 78 prohibited changing the SSR territory without its consent.
[1021] European Parliament Resolution on the Situation in Soviet Armenia, *Official Journal of the European Communities*, No C 94/117, July 1988.

as the 'Nagorno-Karabakh Republic',[1022] which was reaffirmed in December via referendum boycotted by the Azeri population.[1023] Azerbaijan countered this by abolishing the Nagorno-Karabakh Autonomous Oblast in November 1991.[1024] However, Azerbaijan did not have a right to make this change unilaterally - according to the USSR Constitution, the abolition of an AO status could only be possible after upon submission by the Council of the People's Deputies of the AO concerned.[1025] Moreover, Azerbaijan violated its Law on Nagorno-Karabakh Autonomous Oblast of 16 June 1981, which prohibited changing the AO's borders without its consent.[1026] Finally, the USSR Constitutional Oversight Committee Resolution founded Azerbaijan's abolishment of the AO's autonomy unconstitutional and called for the restoration of its previous status.[1027] Therefore, legally Nagorno-Karabakh continued to enjoy an AO status according to the applicable Soviet legislation until the dissolution of the USSR on 26 December 1991, and at the moment of the recognition of its independence, Azerbaijan had within its *uti possidetis* borders one AO and one ASSR.

When Azerbaijan tried to establish a direct rule over the AO after 1991, a full-scale war ensued with Armenia intervening on behalf of Nagorno-Karabakh. A ceasefire was reached through Russian mediation on 12 May 1994. The ensuing frozen conflict has lasted to this day with periodical bursts of violence, the latest in the summer of 2016. The 1995 Constitution of Azerbaijan does not mention Nagorno-Karabakh, which has been left without any rights whatsoever under Azerbaijani legislation.

To summarize, in relation to its AO, Azerbaijan decided to break the Soviet ethnofederal arrangement in its entirety. According to the Soviet-era AO status, Nagorno-Karabakh had its parliament and a right to veto any changes to its territory, as well as regional representation of 12 deputies in the Supreme Soviet of the SSR of Azerbaijan. It had a relatively wide range of self-governing powers on local issues, and its language rights were guaranteed.[1028] However, the Azerbaijani law abolishing the AO's autonomy changed the equation and demonstrated a grave breach on the right to internal self-determination of the people of Nagorno-Karabakh, as well as the applicable Soviet laws. The abolition of the autonomy was even more tragic since Nagorno-Karabakh is located entirely inside Azerbaijan's borders. Hence, any separatist attempt would most likely involve the kin state Armenia,

[1022] *Declaration on Proclamation of the Nagorno Karabakh Republic*, adopted on a joint session of the Nagorno-Karabakh AO and Shahumian regional councils of people's deputies on 2 September 1991. Nagorno-Karabakh declared itself as a SSR of the USSR.
[1023] Zürcher (n 174) 168.
[1024] *Law on Abolition of Nagorno Karabagh Autonomous Region*, 26 November 1991. The Law was based on Arts. 68 and 104 of the *Constitution of the Soviet Socialist Republic of Azerbaijan*, adopted on 21 April 1978.
[1025] *The 1977 Constitution of the USSR* (n 200) Art. 86.
[1026] S. Avakian, *Nagorno Karabagh: Legal Aspects* (Tigran Mets, 2013) at 17.
[1027] *Ibid.*
[1028] See subchapter 3.5.3.

which would have to occupy large swathes of Azerbaijani land to maintain a land corridor to the separatist province. In addition, the landlocked Nagorno-Karabakh is even less viable for independent statehood than the other Soviet subunits, and it would have been essential to achieve the continuation of its autonomy and to negate the separatist tendencies.

I conclude that, in relation to its AO, Azerbaijan did not pass the second-level requirements as portrayed in the EC Guidelines and the Statement on the USSR. Azerbaijan transgressed the Guidelines criteria concerning the right to self-determination,[1029] the guarantees for the rights of ethnic and national groups in accordance with the CSCE framework,[1030] the inviolability of all frontiers that can only be changed by common agreement,[1031] and the commitment to settle any state succession and regional disputes by agreement or by arbitration.[1032] Therefore, the international recognition of Azerbaijan in December 1991-January 1992 was premature.

Azerbaijan's breaches of the Nagorno-Karabakh's rights have destroyed any legitimacy of its rule over the province from the Karabakh point of view. The timely Armenian military involvement has created a lasting frozen conflict with neither side willing to make substantial concessions to solve the

[1029] *Guidelines* (n 4) para. 3. According to the *Helsinki Final Act* (n 13) Chapter VIII: 'By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development'.

[1030] *Ibid.* para. 4. Especially relevant in the CSCE framework is the *Document on the Human Dimension* (n 826). According to the Document's Art. 5.2, the form of government has to be representative in character. Under the ethnofederal system, Nagorno-Karabakh had a quota of 12 deputies in the Azerbaijani legislature, which was unilaterally abolished by Azerbaijan on 26 November 1991. Art. 24 makes reference to the ICCPR of which's Art. 1 states that '[a]ll peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'. A unilateral and unconstitutional abolition of the former autonomous status is in obvious contradiction to this commitment. According to Arts. 32-33, the 'persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will', and '[t]he participating States will protect the ethnic, cultural, linguistic, and religious identity of national minorities on their territory and create conditions for the promotion of that identity'. Under Art. 35 '[t]he participating States will respect the right of persons belonging to national minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities. The participating States note the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic, and religious identity of certain national minorities by establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned'. Finally, according to Art. 38 '[t]he participating States, in their efforts to protect and promote the rights of persons belonging to national minorities, will fully respect their undertakings under existing human rights conventions and other relevant international instruments'. Azerbaijani actions obviously tried to assimilate the people of Nagorno-Karabakh against their will by abolishing their autonomy and breached their right to participate in public affairs. Via the USSR's commitments, Azerbaijan was bound by this CSCE framework, and its actions can only be seen as in violation of it.

[1031] *Ibid.* para. 5. As I have accounted for in more detail in subchapter 3.5, the Soviet ethnofederal structure realized the right to self-determination via ethnoterritorial autonomy. The lower-level subunits (ASSRs and AOs) territory was just as indivisible as the SSRs, and they had a constitutionally guaranteed veto over any changes to it. Thus, the Guidelines criterion on the inviolability of all frontiers must be read in conjunction with the Soviet ethnofederal system, i.e., guaranteeing the lower-level frontiers as well.

[1032] *Ibid.* para. 6. The borders of the AO of Nagorno-Karabakh were drawn and guaranteed by the federal center, thus making this essentially a question of state succession - the USSR gave Nagorno-Karabakh to the SSR of Azerbaijan under the condition that it had a meaningful autonomy. Azerbaijan should have been conditioned to settle its dispute with Nagorno-Karabakh via mutual agreement or international arbitration. The latter is currently taking place in the format of the OSCE Minsk, but without the recognition leeway.

dispute. By making its recognition contingent on the fulfilment of the conditions of the second-level of self-determination, the international community tried to ensure the right to (internal) self-determination of the subunits. However, the decision to recognize Azerbaijan despite the abolishment of the AO's autonomy inadvertently caused the consolidation of the conflict.

5.4.2 Moldova: Gagauzia and Transnistria

Moldova became independent with one former ASSR of Transnistria and with a relatively large but dispersed Turkic minority of Gagauzians. Both cases stand out in contrast to other post-Soviet territorial disputes as neither was an existing ethnofederal unit at the moment of the dissolution of the USSR - Transnistria had lost its ASSR status in 1940, whereas Gagauzia had never held any status.[1033] Nevertheless, both minorities thought in the ethnofederal terms and posed real challenges to the unity of the Moldovan state. Eventually, Moldova was able to negotiate a very substantial autonomy for the Gagauzians, but the dispute with Transnistria and a third party involvement there produced another lasting frozen conflict.

The complex ethnofederal history of Moldova began on 7 March 1924, when the USSR created an AO of *Moldavia* within the SSR of Ukraine. On 8 October 1924, the AO was upgraded to an ASSR and expanded to include adjacent Ukrainian areas. On 2 August 1940, after the USSR had issued an ultimatum to Romania and annexed its territory known as Bessarabia, a new unit of Moldavian SSR was created. It included Bessarabia and the area corresponding to today's Transnistria, with the rest of the Moldavian ASSR being incorporated back to Ukraine without autonomy.[1034] During 1941-1944, Moldavia was occupied by Romanians who reorganized the area administratively, creating a 'Governate of Transnistria'.[1035] However, after the USSR reoccupied the area, the Moldavian SSR was restored as a unitary SSR, and it was not ethnofederalized during the rest of the Soviet era.

Just like in many other ethnofederal units, the glasnost era[1036] brought about a revival of nationalism in Moldavia. When political parties and movements were allowed to be established, a 'Popular Front of Moldova'[1037] started advocating for secession from the USSR from 1988 onwards. In 1989, it organized mass demonstrations under the title 'Grand National Assembly'. In this capacity, the

[1033] Apart from two weeks of self-proclaimed independence in January 1906. Accounted for in J. Minahan, *One Europe, Many Nations: A Historical Dictionary of European National Groups* (Greenwood, 2000) at 274.
[1034] Moreover, Bessarabia's Black Sea and Danube frontage were transferred to Ukraine at this point.
[1035] The name is derived from the Russian geographical moniker *Pridnestrovye*.
[1036] See subchapter 3.7.2.
[1037] Rejecting the Soviet term 'Moldavia'.

'Assembly' pressured the SSR parliament to adopt a language law that switched the official script from Cyrillic to Latin.[1038] The Popular Front won the first democratic elections in Moldavia in February and March 1990, and on 23 June 1990, it declared sovereignty as the 'SSR of Moldova'.

At this point, the national tensions within the SSR started to escalate in the two minority areas, Transnistria in the East and Gagauzia in the South. According to the 1989 Soviet census, while the population of Moldova as a whole was 64,5% Moldovan, with 13,8% Ukrainians and 13% Russians, in Transnistria, the numbers were 39,9% Moldovan, 28,3% Ukrainian and 25,5% Russian.[1039] Moreover, while the Gagauz made up only 4% of the population of Moldova, they made up an overwhelming majority in many areas in the South of the country.[1040] Therewith, as the Popular Front government started calling for independence and possible unification with Romania, as well as removal of Russian as the official language of the Republic, minorities started to assert themselves.

First, Gagauzia declared itself as an ASSR within the USSR on 12 November 1989, which was rejected by the Supreme Soviet of Moldova. After the Moldovan elections, Gagauzia renewed its declaration on the ASSR status on 22 June 1990, again to be rejected by the Moldovan authorities. Finally, on 19 August 1990, Gagauzia aggravated the situation by declaring itself the 'Gagauz SSR' of the USSR.[1041] In response, Moldova organized armed volunteer units to stop the planned elections in Gagauzia in October. Only an intervention by the Soviet troops saved the situation from escalating into armed conflict between Moldovans and Gagauzians. After Gagauzia rejected Moldova's first proposal for limited autonomy in 1991, the relations remained frozen as Moldova's focus shifted on its even more assertive minority area in the east.

Following a very similar trajectory, after the Moldovan sovereignty declaration, Transnistria announced its independence within the USSR as 'Pridnestrovian Moldavian SSR' on 2 September 1990.[1042] The breakaway unit sought historical legitimacy from the pre-1940 Moldavian ASSR and from the fact that - in case of a possible Moldovan unification with Romania - the Transnistrian area

[1038] *Law on the Status of the State Language*, 31 August 1989.
[1039] *The 1989 All-Union Census of the Union of Soviet Socialist Republics*, conducted on 12-19 January 1989.
[1040] The only available statistics from the Autonomous Territorial Unit of Gagauzia are from 2014, when the Gagauz made up 83,8% of the population, with Moldovans making up 4,7%. The 2014 Republic of Moldova Census, conducted on 12-25 May 2014.
[1041] P. Järve, 'Gagauzia and Moldova: Experiences in Power Sharing' in M. Weller and B. Metzger (Eds), *Settling Self-Determination Disputes: Complex Power-Sharing in Theory and Practice* (Martinus Nijhoff Publishers, 2008) 307-344 at 314.
[1042] The proclamation was made by the 'Second Congress of the Peoples' Representatives of Transnistria', acting as an *ad hoc* Assembly but without any institutional legitimacy.

had never been part of Romania. However, in December 1990, President Gorbachev declared the Transnistrian proclamation to be lacking any legal basis and annulled it by a presidential decree.[1043]

It is noteworthy that both Gagauzia and Transnistria thought about self-determination on exclusively Soviet terms - despite their 'independence' declarations, by declaring themselves as an ASSR or a SSR they sought merely an autonomy within the USSR and to legitimate their actions under the Soviet legal framework.[1044] Regardless, lacking any formal ethnofederal status under the USSR Constitution, their unilateral calls for autonomy were deemed unconstitutional by Moldovan and Soviet officials. Therewith, while Gagauzians and Transnistrians could argue for a right to (internal) self-determination in general, they could not base their claims on the existing ethnofederal system.

Moldova declared its independence in August 1991,[1045] and was recognized independent by the end of the year.[1046] After there was no longer a federal center that could mediate between the parties and armed clashes occurred between Moldovan and Transnistrian forces. The conflict intensified in March 1992, when the Soviet 14th Army stationed in the area joined the separatists,[1047] drove out Moldovan forces, and captured the City of Bender on the Moldovan side of the proclaimed 'border'. This, in turn, led to the fleeing of up to 100 000 ethnic Moldovans from the area. A ceasefire in July 1992 provided for the establishment of a Russian-Moldovan-Transnistrian peacekeeping force, stationed in a buffer zone between the parties and overseen by the 'Joint Control Commission'.[1048]

After the ceasefire calmed the situation, the newly-independent Moldova faced difficult choices in terms of negotiating a lasting solution to its newly found national question. First, it started to negotiate with Gagauzia, where the involvement of President of Turkey Süleyman Demirel helped to pave the way for a constitutionally recognized self-government for the province. This process began with Moldova replacing its 1978 SSR Constitution by a new Constitution in August 1994,[1049] which opened up the possibility to create autonomous areas in Transnistria and Gagauzia with a separate

[1043] A. Vaseashta and S. Enaki, 'The Transnistria Equation: Transnistria' in A. Vaseashta, E. Braman and P. Susmann (Eds), *Technological Innovations in Sensing and Detection of Chemical, Biological, Radiological, Nuclear Threats and Ecological Terrorism* (Springer, 2010) 141-148 at 143.
[1044] Many ASSRs that tried to stay within the USSR or gain independence invoked the Soviet secession law for legitimization.
[1045] *Declaration of Independence of the Republic of Moldova*, adopted on 27 August 1991 by the Moldovan Parliament.
[1046] Moldova was recognized independent by the US on 26 December 1991, by the EC states on 31 December 1991, and was admitted to the UN as a member state on 2 March 1992. Moldova had already changed its name to the 'Republic of Moldova' on 23 May 1991.
[1047] The 14th Soviet Army was supposed to give up its military equipment to Moldova and return to Russia, but its commander Lebed was acting without authorization from Moscow.
[1048] *Agreement on the Principles for a Peaceful Settlement of the Armed Conflict in the Dniester Region of the Republic of Moldova*, signed on 21 July 1992.
[1049] *Constitution of the Republic of Moldova*, adopted on 12 August 1994. The Constitution has since been amended eight times.

law. Five months later, the Moldovan parliament passed a law on Special Status of Gagauzia.[1050] According to the Law, 'Gagauzia is an autonomous territorial entity with a special status that as a form of self-determination of Gagauzians, is an integrant part of the Republic of Moldova'.[1051] All its laws have to comply with Moldovan laws and Constitution,[1052] it has its symbols of statehood (anthem, emblem, and a flag),[1053] and, most importantly, a right to secede in case of a change in the legal status of Moldova - such as unification with Romania.[1054]

The People's Assembly of Gagauzia has a right to pass laws on many areas of local importance, including local budget, taxation and social welfare,[1055] to decide on the names and territorial organization of localities, borders of districts, towns and villages, and to hold a local referendum and to take part in the realization of the domestic and foreign policy of Moldova on matters concerning Gagauzia.[1056] Moreover, Gagauzia has its governing organ, the Executive Committee, which is approved by the Gagauzian parliament on the proposal of the Governor of Gagauzia.[1057] Following, based on the Law, a referendum was held on 5 March 1995, which determined the communities that would join the new autonomous Gagauz entity. Finally, after being pressured by the Council of Europe,[1058] Moldova amended its Constitution on 25 July 2003 and recognized Gagauzia as an 'autonomous territorial unit'.[1059] According to the Venice Commission, 'the extent of the powers conferred on the Gagauzian autonomous institutions is very striking. The range of matters on which the People's Assembly can legislate is almost comprehensive. It is difficult to see any important area which is excluded from their competence apart from than defence and foreign policy'.[1060]

It might seem surprising that Moldova provided Gagauzians - a population without any prior ethnofederal status - with a very extensive and constitutionally guaranteed self-governance and qualified the participating areas after a local referendum. The guarantees go as far as give Gagauzia

[1050] *Law on Special Legal Status of Gagauzia*, Nr.344-XIII, adopted on 23 December 1994.
[1051] *Ibid.* Art. 1(1).
[1052] *Ibid.* Art. 2.
[1053] *Ibid.* Art. 4.
[1054] *Ibid.* Art. 1(4)
[1055] Science, culture, education, housing and utilities, urban development, health, physical culture and sports, local financial, budgetary, and tax activities, economy and environment, labour relations and social welfare. *Ibid.* Art. 12(2).
[1056] *Ibid.* Art. 12(3).
[1057] *Ibid.* Art. 16. However, under Art. 14 the Governor of Gagauzia has to be approved by President of Moldova.
[1058] *Ibid*. at 51.
[1059] *Amended Constitution of the Republic of Moldova*, adopted on 25 July 2003, Art. 111. While the amendments inserted many provisions from the Law on the Special Status of Gagauzia into the Constitution, they omitted the provision for secession and described Gagauzia as 'a constitutive and inalienable part of the Republic of Moldova'.
[1060] European Commission for Democracy Through Law (Venice Commission), *Law on Modification and Addition to the Constitution of the Republic of Moldova*, N° 191 / 2002, Comments by: Mr James HAMILTON (Member, Ireland) at para. 21.

a Soviet-style secession right. In contrast, the conflict with the former ASSR of Transnistria has been challenging to settle. There are several interconnected issues: what should be the relationship between Transnistria and Moldova, what would be the boundaries of the Transnistrian entity,[1061] what to do with the Russian troops present in Transnistria (by the continuing invitation of the Transnistrian de facto authorities),[1062] and should Moldova be federalized if it has a second autonomous entity within its territory.[1063] While these complexities are relevant, I argue that the key difference between Transnistria and Gagauzia is that due to the former's high expectations, it was less prone to compromise, and the subsequent war destroyed the remaining basis for a negotiated settlement.

However, despite the numerous challenges, there are grounds for optimism. There has been no fighting between the parties since the ceasefire and, notwithstanding its multinational composition, Transnistria itself has not had any inter-ethnic tensions. Indeed, it has developed what the CSCE Mission to Moldova has called as a 'distinct Transdniestrian feeling of identity' which is based on Russian language, geography, and history.[1064] In May 1997, Moldova and Transnistria signed a Memorandum on normalizing their relations,[1065] which gave Transnistria a right to participate in the conduct of Moldovan foreign policy on 'questions touching its interests', and to maintain independent international contacts in economic, scientific, and cultural spheres.[1066]

Under Article 111 of the 1994 Constitution, Moldova adopted a law on Transnistrian autonomy in 2005.[1067] It defined Transnistria as an 'autonomous territorial entity' and an 'integral part of Moldova', and established a mechanism to define the areas to be included in the entity in the same manner as in Gagauzia.[1068] It gave Transnistria the right to have its state symbols to be used along

[1061] The biggest issue is the city of Bender, which is included in what the de facto Transnistrian state claims, but is excluded from the Moldovan Law on Administrative-Territorial Units of the Left Bank of the Dniester. Subsequently, some territories claimed by Transnistria are excluded from the Autonomous territorial unit with special legal status Transnistria.
[1062] According to Art. 4 of the 1992 ceasefire agreement (n 1048).
[1063] According to Wolff, the future territorial construction of Moldova will require considering the representation of territorial entities within the state at the center. S. Wolff, 'The Prospects of a Sustainable Conflict Settlement for Transnistria', 14 September 2014 at 7. <*https://www.researchgate.net/publication/265001842_The_Prospects_of_a_Sustainable_Conflict_Settlement_for_Transnistria*>.
[1064] CSCE Mission to Moldova, *Report No. 13*, 13 November 1993, Chapter II.
[1065] *Memorandum on the Basis for Normalization of Relations between the Republic of Moldova and Transdneistria*, signed on 8 May 1997. According to the memorandum Preamble and Art. 1, the parties reaffirmed their commitment to principles on the UN, OSCE, and generally recognized norms of international law; to the agreements reached previously between the Republic of Moldova and Transdniestria; Recognizing the responsibility for securing civil peace, international concord, the strengthening of stability and security in this area of Europe; not to resort to the use of force or the threat of force in their mutual relations, but by solving any differences through negotiations and consultations with the assistance and mediation of the Russian Federation and Ukraine - as guarantor States of the agreement - and of the OSCE, with the assistance of the Commonwealth of Independent States.
[1066] *Ibid.* Art. 3.
[1067] *Law on the Main Notes about Special Legal Status of Settlements of Left Bank of Dniestr (Transnistria)*, No 173, adopted on 22 July 2005.
[1068] *Ibid.* Art. 3.

with Moldovan ones. The official languages would be Moldovan, Ukrainian, and Russian.[1069] Transnistria could resolve independently all the issues of legal, economic and social development that are referred to its jurisdiction by the Constitution and other laws of the Republic of Moldova and - in similar wording than in the 1997 memorandum - could establish external contacts independently in the economic, scientific and humanitarian fields.[1070] However, the details of the power-sharing between Moldova and Transnistria would be clarified in a later organic law that would be adopted by the two parties together after the withdrawal of Russian troops from Transnistria.[1071] Finally and most importantly, according to Article 12 the adoption of the Law on Transnistria 'will be accompanied by the adoption of a system of international guarantees'.[1072]

Despite the compromises made by Moldova in its 2005 Law on Transnistria, the population of the breakaway entity remained independence-orientated. In 2006, a referendum gave 90 percent support for Transnistrian independence and a subsequent voluntary joining to the Russian Federation.[1073] Since its declaration of independence in September 1990, Transnistria has been recognized only by three other mostly non-recognized former Soviet subunits of Abkhazia, South Ossetia, and Nagorno-Karabakh. The proclaimed de facto state[1074] has its government, parliament, postal system, currency, and state symbols, but persisting non-recognition continues to hinder its development.

To summarize, the Moldovan case stands out of the other post-Soviet territorial disputes in many aspects. For one, according to the application of *uti possidetis*, Moldova did not inherit any ethnoterritorial units and thus did not break any ethnofederal arrangements.[1075] Notwithstanding, it had one clearly demarcated unit with a claim to a national identity separate from the central Moldovan state (Transnistria) and a clearly separate cultural and lingual group without a demarcated area

[1069] *Ibid.* Art. 6. Moldovan would be based on Latin script. The rest of Moldova had already switched to Latin script in 1989 (n 1038), but Transnistria had retained Cyrillic and has kept it in place since then. During the Soviet-era, Romanian was written in Cyrillic alphabet in Transnistria from 1924 to 1932, and from 1940 until 1989.
[1070] *Ibid.* Arts. 8 and 9.
[1071] *Ibid.* Art. 1(2).
[1072] However, as pointed out by Oleh Protsyk, the law does not create international guarantees but only 'envisages the creation of a system of internal guarantees of such a status'. O. Protsyk, 'Democratization as a Means of Conflict Resolution in Moldova' 4(1) *European Yearbook of Minority Issues*, 2004/2005 (Brill, 2006) 723-737 at 728.
[1073] J. Loughlin, V. Kolossov and G. Toal, 'Inside the Post-Soviet De Facto States: A Comparison of Attitude is Abkhazia, Nagorny Karabakh, South Ossetian, and Transnistria' 55(5) *Eurasian Geography and Economics* (2014) 423-456 at 437. The reasoning on joining Russia can be explained by both the shared Soviet nostalgia by all three major ethnic groups in Transnistria whose main common language is Russian, as well as by the fact that, on top of Moldovan citizenship, most Transnistrians also have Russian and Ukrainian citizenship. In 2016, the Transnistrian government declared that it was time to enact the results of the 2006 referendum.
[1074] According to Toal and O'Loughlin, a de facto state is a political entity that has proclaimed itself sovereign over a specified territory and controls all or part of that territory for at least two years. G. Toal and J. O'Loughlin, 'Frozen Fragments, Simmering Spaces: The Post-Soviet De Facto States' in E. Holland and M. Derrick (Eds), *Questioning Post-Soviet* (The Wilson Center, 2016) 103-126 at 107.
[1075] In a somewhat puzzling development, Moldova has given a better autonomy to Gagauzia than Transnistria, a former ASSR. Notwithstanding, neither was an autonomous unit at the moment of the dissolution, and thus no ethnofederal agreements were breached.

(Gagauzians). Moldova was able to solve its dispute with Gagauzia by giving it ethnoterritorial status with a wide-ranging, meaningful autonomy up to a right to secession,[1076] whereas the periodic negotiations with Transnistria have not amounted to an agreement acceptable to both sides. In relation to the second-level requirements, Moldova has belatedly moved into observance. However, at the moment of the international recognition of Moldova's independence, it did not abide by the rights of ethnic and national groups in accordance with the CSCE framework,[1077] although its breaches were certainly not as grave as Azerbaijan's. Thus, the international recognition of Moldova was premature.

The Moldovan case has two especially noteworthy aspects. First, it was able to settle its dispute with Gagauzia based on *territorial autonomy*. In my opinion, this is the most workable solution to the post-Soviet territorial disputes. It is in accordance with the ethnofederal system that the minorities are familiar with and the territorial integrity of the successor states that the international community insists upon. Second, Moldovan attempts to reach an agreement on autonomy with Transnistria have always included international guarantees,[1078] which is another important post-Soviet trait. During the Soviet era, the center often needed to act as an outside guarantor and mediator. The continuation of this baseline solution is a way to re-establish the trust between the parties that is needed to agree upon a deal on self-governance.[1079]

5.4.3 Georgia: Ajara, Abkhazia, and South Ossetia

Georgia was the most ethnofederalized SSR after the RSFSR and became independent with three ethnofederal units: the ASSRs of Ajara and Abkhazia, and the AO of South Ossetia. While Ajarans were a subgroup of Muslim Georgians, Abkhazians and Ossetians had been recognized as separate peoples by the USSR in the ethnofederal system. As ASSRs, Ajara and Abkhazia had a substantial autonomy based on the April 1990 USSR constitutional amendments.[1080] They had gained a recognition that they held the right to self-determination and possessed all state power on their territory apart from powers expressly transferred to the USSR or the host SSR, and relations between them and Georgia were determined by the treaties and conventions they conclude within the Soviet

[1076] Roeder concludes that Moldova has given such an extensive autonomy to Gagauzia that it is the only post-Soviet state alongside Uzbekistan that has maintained the Soviet-era doctrine of 'pooled sovereignty', i.e. competing and overlapping sovereignty over a territory. Roeder (n 884) 67.
[1077] *Guidelines* (n 4) para. 4; and Arts. 32-33 and 35 of the *Document of the Copenhagen Meeting* (n 815). When Moldova was admitted to the UN as a member state on 2 March 1992, the Transnistria War had just entered its most violent phase.
[1078] Russia and Ukraine are specified as the guarantors of the 1997 Memorandum on Transnistrian autonomy, and the 2005 *Law on the Main Notes about Special Legal Status of Settlements of Left Bank of Dniestr* (n 1067) Art. 12 also calls for international guarantees.
[1079] I utilize these findings with *uti possidetis meritus* in the next Chapter.
[1080] See subchapter 3.7.4.

legal framework.[1081] South Ossetia, as an AO, had a limited autonomy without any sovereign attributes.[1082] This was the legal landscape in Georgia at the dissolution of the USSR and the application of *uti possidetis* in December 1991.[1083]

The ethnofederalization of Georgia began in March 1921, when the ASSR of Ajara was created by the Treaty of Kars.[1084] In December, Abkhazia was made a SSR but with a particular 'Treaty Republic' status,[1085] under which it transferred parts of its powers, including foreign policy and trade, to Georgia. Finally, the AO of South Ossetia was created in Northern Georgia in April 1922.

Following a very similar pattern than that of Moldova, in the late 1980s, Georgians started to demand a more independent position in the USSR. They mobilized around nationalism and radicalized considerably after the Soviet troops crushed a demonstration in the capital Tbilisi on 9 April 1989. The nationalist movement proclaimed Georgian the only official language in August 1989, followed by the nationalist parties winning an election in October 1990 and their leader Zviad Gamsakhurdia becoming the Chairman of the Supreme Council of Georgia[1086] in November 1990. In March 1991, the SSR government annulled all Soviet legislation on Georgia and organized a referendum with overwhelming support for independence.[1087] Subsequently, the independence of Georgia was proclaimed on 9 April 1991 - the second anniversary of the 1989 Soviet crackdown - under the leadership Gamsakhurdia, who was elected President in the following month.

Gamsakhurdia's ultra-nationalism managed to alienate all three Georgian subunits simultaneously by proclaiming not only 'Georgia for Georgians' but also limiting this to Christian Georgians.[1088] As they were rejecting the Soviet history altogether, the Georgian nationalists regarded the ethnofederal subunits as Soviet 'imperial encumbrances on the Georgian body politic'.[1089]

Unsurprisingly, the three subunits began to rebel against the Georgian authorities. In Ajara, the Chairman of the local Supreme Council Aslan Abashidze began to build an independent power base

[1081] See subchapter 5.4.3.
[1082] See subchapter 3.5.3.
[1083] Georgia was recognized independent by the US on 25 December 1991 and by the EC in the first half of the 1992 and became a UN member state on 31 July 1992.
[1084] N 1008.
[1085] In Russian *договорная республика*. There were no other examples of Treaty Republics in the Soviet ethnofederal system.
[1086] Equivalent to the post of the head of local government, the highest position in a SSR or an ASSR.
[1087] G. Hewitt, 'Abkhazia, from Conflict to Statehood', *Open Democracy*, 13 July 2012.
[1088] M. Toft, 'Multinationality, Regions and State-Building: The Failed Transition in Georgia' in Hughes and Sasse (n 892) 123-142 at 133.
[1089] Toal and O'Loughlin (n 1073) 106.

and an army of his own, opposing openly Georgian rule over Ajara. In contrast, Abkhazia and South Ossetia tried to upgrade their ethnofederal statuses. Abkhazia aimed to re-establish the 'Treaty Republic' status it had lost when it was demoted to an ASSR status within Georgia in 1931. South Ossetia proclaimed itself as a SSR in September 1990. Georgia replied to this on 11 December 1990 by dissolving the AO of South Ossetia and terminating its autonomy.[1090] According to the new Georgian legislation, the AO's actions had contradicted the Constitutions of Georgia and the USSR, as well as basic principles of international law. Moreover, Georgia was pointing out that Ossetians already have a homeland (the ASSR of North Ossetia in the RSFSR).[1091]

After the Georgian independence declaration, there was an impasse. Georgia explicitly rejected all of the Soviet legacy, including the ethnofederal arrangements. Abkhazia wanted either independence or a very loose confederation with Georgia, whereas South Ossetia wished to stay in the USSR or to join the Russian Federation.[1092] Ajara just wanted to be left alone.

Tragically, Georgia gained international recognition within its *uti possidetis* borders while already fighting a war against South Ossetia to bring it under its sovereignty. Moreover, shortly after receiving a UN membership, Georgia attacked Abkhazia to reclaim that territory as well.[1093] After fierce fighting, an intervention by Russian troops achieved a victory for Abkhazia and South Ossetia, which caused forced displacement of approximately 200 000 Georgian refugees from Abkhazia alone.[1094]

Under the Russian mediation but nominally under the CIS auspices, a ceasefire was signed with South Ossetia in Sochi on 24 June 1992 and with Abkhazia in Moscow on 14 May 1994.[1095] South Ossetian agreement established a joint control commission and three separate peacekeeping contingents (Georgian, Ossetian, and Russian).[1096] The Abkhazian agreement stipulated that the peacekeeping forces were to be provided by the CIS, but in reality, they were mostly Russian. [1097] An unarmed UN

[1090] *Law of the Republic of Georgia on Abolition of the Autonomous Oblast of South Ossetia*, adopted on 11 December 1990.
[1091] Notably, Georgia never abolished the Abkhazian autonomy, which did not have an ethnic homeland outside Georgia.
[1092] B. Coppieters, 'The Roots of the Conflict' in C. Jonathan (Ed), *A Question of Sovereignty. The Georgia-Abkhazia Peace Process*, Conciliation Resources, Accord issue 7, October 1999.
[1093] The war started in earnest on 14 August 1992 when Georgian militias crossed the border river Ingur. Hewitt (n 1087).
[1094] 'Georgia/Abkhazia: Violations of the Laws of War and Russia's Role in the Conflict' 7(7) *Reports*, Human Rights Watch, March 1995. This tilted the population balance, and in the 2011 census, there were 122 069 Abkhazians, 43 166 Georgians, 41 864 Armenians, and 22 077 Russians. According to these figures, Abkhazians represented an absolute majority (50,71%) of the population.
[1095] The South Ossetian ceasefire was brokered by Russia, the Abkhazian ceasefire by Russia, the US, France, Germany, and the United Kingdom.
[1096] The peacekeeping forces were created under the 1996 *Memorandum on Measures to Provide Security and Strengthen Mutual Trust between Sides in the Georgian-South Ossetian Conflict.* The composition of the peacekeeping formations followed the same pattern as in Moldova (n 1048).
[1097] *Agreement on a Cease-fire and Separation of Forces*, 14 May 1994.

Observer Mission in Georgia (UNOMIG) was charged with monitoring observance of the ceasefire. As the two agreements did nothing to solve the status questions, Abkhazia and South Ossetia remained legally under Georgian rule but de facto acting independently. Both declared independence (South Ossetia in 1992, Abkhazia in 1999) but remained internationally unrecognized.

These frozen conflicts produced strange constitutional situations, especially in regard to Abkhazia. Georgia was insisting that it was merely restoring the pre-1921 independence that had been illegally taken away from it by the Soviet invasion and subsequent annexation in the early 1920s.[1098] This, in turn, would revoke all the ethnofederal changes since then, making Georgia a unitary Republic. Abkhazia responded that the reversion to the Georgian pre-1921 independence would cut all formal Abkhazian ties to Georgia. Therewith, they were arguing that the international community's recognition of Georgia within *uti possidetis* borders that included Abkhazia was a mistake.[1099]

As Georgia did not legislate on Abkhazia's and Ajara's legal statuses before 1995, under international law, the former ASSRs whose statuses had not been changed continued to enjoy a comfortable level of autonomy. The 1995 Georgian Constitution recognized Ajara (a 'territorial unit') and Abkhazia (an 'Autonomous Republic') but termed South Ossetia as a 'Former Autonomous Region of South Ossetia'.[1100] The Constitution did not determine the division of powers between Georgia and the subunits but demanded a separate law on this topic.[1101] Referring to the ceasefire agreements, Article 2 stated that the 'territorial state structure of Georgia shall be determined by a Constitutional Law on the basis of the principle of circumscription of authorization after the complete restoration of the jurisdiction of Georgia over the whole territory of the country', and explicitly prohibited secession of the autonomous units.[1102] Moreover, as a considerable incentive, Article 4 promised to create an upper chamber to be added to the Parliament of Georgia, with representational quotas from the subunits.[1103]

Abkhazia refused to accept the offered provisions, and as all the further status between the parties failed, it declared independence in 1999. The act was condemned by Georgia and ignored by the

[1098] The Baltic States had utilized the same line of legal argumentation previously. F. Clines, 'Secession Decreed by Soviet Georgia', *The New York Times*, 10 April 1991. Importantly, however, in the international recognition practice, the Baltic States' claim was recognized whereas Georgia's was not. Therewith, Georgia became independent from the USSR via state dissolution and succession.
[1099] While both Georgia and Abkhazia could certainly make these claims, the fact remains that only the Baltic States and the Russian Federation were seen to be re-establishing their old independent statuses, whereas all the other SSRs were recognized independent as new states. Subsequently, when Georgia was recognized independent in 1992, it did contain three ethnofederal units within its borders.
[1100] *Constitution of Georgia*, adopted by the Parliament of the Republic of Georgia on 24 August 1995, Art. 2.
[1101] *Ibid.* Art. 7(2); and amended *Constitution of Georgia* (20 April 2000) Art. 3(3).
[1102] The 'alienation of the territory of Georgia is prohibited'. *Ibid*.
[1103] *Ibid.* Arts. 4, 55, and 57.

international community. Meanwhile, negotiations continued with Ajara. In April 2000, a constitutional amendment granted Ajara the status of an Autonomous Republic but still did not define the division of powers.[1104] After Mikhail Saakashvili became President of Georgia in 2003, the tensions began to build up between the center and the subunits. In April 2004, Saakashvili made an ultimatum to the Ajaran 'President' Abashidze, demanding the dismantlement of his militias and the acceptance of the central government authority.[1105] On 5 May 2004, Abashidze gave in, and the Autonomous Republic returned under Georgian control.

On 1 July 2004, Georgia enacted a 'Constitutional Law of Georgia on the Status of the Autonomous Republic of Ajara', which defined Ajara as 'a territorial unit which constitutes an inseparable part of Georgia'.[1106] Its territory was affirmed to be the same as the ASSR of Ajara's. Its borders could be changed with an initiative of two-thirds of the local Parliament and by a subsequent decision by the Parliament of Georgia.[1107] Ajara was given individual state symbols and the right to a Constitution. Its powers were said to be based on the 'Constitution of Georgia, this Law and the Constitution of the Autonomous Republic of Ajara'.[1108] Ajaran Parliament was given a right to legislate over its Government and Parliament, and over, e.g., education, science, culture, tourism, agriculture, and infrastructure.[1109] Moreover, it had a right to approve the local budget, the composition of the local Government, including its Chairperson, and to dismiss the Government by a vote of two-thirds.[1110]

The President of Georgia was given the right to dismiss the Ajaran Parliament or Government with the consent of Georgian Parliament if they were seen to 'pose a danger to the sovereignty and territorial integrity of the country' or to the exercise of central government's rule.[1111] The Georgian Constitutional Court can abrogate Ajaran legal acts if found to be in contradiction with the Constitution or laws of Georgia.[1112] Ajara was stated to 'enjoy financial autonomy' by administrating

[1104] *Constitution of Georgia (2000)* (n 1101).
[1105] On 2 May 2004, Saakashvili said that '[w]e will give him 10 days to return to Georgia's constitutional framework, stop violations of law and human rights, and start to disarm'. 'Georgia Gives Ultimatum to Ajara', *BBC News*, 2 May 2004.
[1106] *Constitutional Law of Georgia on the Status of the Autonomous Republic of Ajara*, adopted on 1 July 2004, Art. 2.
[1107] *Ibid.* Art. 4.
[1108] *Ibid.* Arts. 5 and 6.
[1109] *Ibid.* Art. 7.
[1110] *Ibid.* Art. 14.
[1111] *Ibid.* Arts. 12 and 16.
[1112] *Ibid.* Art. 13.

the revenues from local taxes.[1113] In 2017, Ajara received added rights to appoint head officials and to create new agencies and ministries without the approval of the central government.[1114]

In contrast, the negotiations over the statuses of Abkhazia and South Ossetia are at an impasse. After a renewed attempt of Georgia to take over South Ossetia via military force and a renewed Russian intervention in August 2008, the two unilaterally proclaimed de facto states have not received many recognitions internationally[1115] and continue to exist in a legal limbo where the international community still regards them as a part of Georgia. On the other side of the dispute, Georgia continues to pass legal acts concerning the territories but is unable to enforce them in any meaningful way.[1116]

To summarize, Georgia is a fairly typical case of the results of rejecting its ethnofederal legacy. When deconstructing the phenomenon, we can detect three different trajectories. Ajara was the only former subunit whose status was clarified with a separate law. On the basis of this law, it is clear that the continuation of the Ajaran autonomy resembles the Nakhichevan case from Azerbaijan - the lack of ethnic component and third party involvement built up the trust needed to achieve a peaceful transition and meaningful autonomy for the former ASSR. In contrast, the abolition of the South Ossetian autonomy resembles the case of Nagorno-Karabakh - likewise a former AO - in Azerbaijan. The outright rejection of the ethnofederal legacy, and the fact that this was ignored and passively approved by the international community, led to a counteraction of a unilateral declaration of independence and armed uprising against the central government. Finally, the Abkhazian case differs from the two other Georgian subunits in many aspects. As a former SSR, Abkhazia never abandoned its goal for a more independent posture vis-à-vis Georgia and the declaration of the restoration of pre-1921 independence in Georgia only deepened the distrust between the parties.[1117] However, Abkhazia is a challenging case for external self-determination, as the Abkhaz constituted less than 18% of the population of the ASSR before the forced expulsions of Georgians after the war of 1992-1994.[1118]

In relation to the second-level requirements as portrayed in the EC Guidelines and the Statement on the USSR, at the moment of Georgia's recognition in March 1992, the picture is rather clear. Georgia

[1113] *Ibid.* Art. 22.
[1114] 'What is Changed in the Constitutional Law of Georgia on Ajara?', *Ajara TV*, 22 June 2017.
[1115] As of 5 June 2020, Abkhazia and South Ossetia have received recognitions by five UN member states. In addition, two UN member states had previously recognized them but have withdrawn their recognition.
[1116] These include a *State Strategy on Occupied Territories: Engagement through Cooperation*, 27 January 2010, and *Law On Occupied Territories*, Law No 2676, 26 February 2010.
[1117] Although Georgia did display in the 1995 Constitution a more conciliatory attitude towards Abkhazia than to South Ossetia.
[1118] According to the 1989 census, quoted in <*https://minorityrights.org/minorities/abkhaz/*>. In 2011, the Abkhaz made up a slightly over 50% of the population (n 1091).

had continued Ajaran autonomy, and the 1995 Constitution did abide by the rights of ethnic and national groups in accordance with the CSCE framework.[1119] Yet, Georgia was breaching the rights of its two other subunits that it had inherited within its *uti possidetis* borders. The outright attack against Abkhazia and the abolishment of South Ossetian constitutionally guaranteed autonomy are in stark violation of the Guidelines' criteria on the 'inviolability of all frontiers which can only be changed by peaceful means and by common agreement' and the 'commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning state succession and regional disputes'.[1120] Thus, Georgia did not fulfil the requirements in relation to Abkhazia and South Ossetia, and its international recognition was premature. As the aim was to promote peaceful state succession, it would have been of utmost importance for the international community to insist upon the continuation of the ethnofederal autonomies at this point when they had the leeway to do so. The failure has led to the consequences that should be familiar to us already at this point - ethnic violence, unilateral declarations of independence, outside intervention, de facto independencies, fragmentation of the successor state, and lasting frozen conflict with no negotiated end in sight.

In the end, the international community did not accept Georgian claim for the restoration of its pre-1921 independence but instead recognized it within its *uti possidetis* borders due to the dissolution of the USSR in the late 1991. Therewith, they demanded the second-level requirements listed in the Guidelines for their recognition - guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the CSCE framework; inviolability of all frontiers which can only be changed by peaceful means and by common agreement; commitment to settle by agreement all questions concerning state succession and regional disputes - but failed to follow through with this demand. I conclude that this breached the evolutionary logic of *uti possidetis* and failed to produce a peaceful settlement of state succession.

5.4.4 Conclusions

While the cases of Azerbaijan, Moldova, and Georgia contain unique elements, there are common patterns. In all the cases where the autonomy of a former ethnofederal unit was abolished or curtailed - Abkhazia, South Ossetia, Nagorno-Karabakh, and Transnistria - there was a territorial conflict, which the host state was unable to win as external stakeholder took part in the fighting.[1121] In contrast,

[1119] *Guidelines* (n 4) para. 4; and Arts. 32-33 and 35 of the *Document of the Copenhagen Meeting* (n 815).
[1120] *Guidelines* (n 4).
[1121] Transnistria was not an ethnofederal unit at the moment of the dissolution, but it did have a history as an ASSR.

in Nakhichevan and Ajara, where there was the continuation of their former autonomous statuses, there was no conflict.[1122] Moreover, the successor states viewed the statuses of their ASSRs and AOs on different terms: when the federal control loosened in the late 1980s, the host states tried to abolish their AOs instantly, whereas there were at least attempts to negotiate with the ASSRs.[1123]

The tragedy of the frozen conflicts in the post-Soviet space is that after the host state had suffered a military defeat and had withdrawn its forces, it has offered the subunits similar autonomies than those of which's abolition had led to the conflict in the first place.[1124] The post-conflict autonomy offers by Azerbaijan, Moldova, and Georgia have been seen as too little and too late by the de facto independent breakaway states. The successor states had missed their opportunity to maintain their territorial integrity in the early 1990s when there was still enough goodwill to achieve multinational unity.

5.5 Ethnofederalism Distorted: Yugoslavia and the Third Level of Self-Determination

In this subchapter, I go through the last trajectory of the socialist federal dissolutions, the successor states of the SFRY. These cases are comparable to the Soviet successor states as the SFRY had copied the Soviet ethnofederal model into their constitutional system,[1125] and the recognition of the SFRY successor states was regulated under the same EC Guidelines criteria. However, the cases of the SFRY have an added complexity as their recognition was further contingent by the EC Declaration of Yugoslavia.[1126] The additional criteria included making an application by a deadline to a special Arbitration Commission and to accept the provisions laid down in the draft Convention of the Conference on Yugoslavia. These conditions were a lot stricter than in the Soviet cases, especially in regard to the rights of national and ethnic groups.

The more encompassing criteria for the SFRY successor states resulted in a distortion of the ethnofederal legacy. Indeed, the SFRY disintegration began when the only ethnofederalized SR,

[1122] The standoff between Ajara and Georgia did not contain an ethnic element and was resolved peacefully.
[1123] This is yet another example of thinking in the inherited Soviet terms, which I have utilized in my *uti possidetis meritus* proposal. As defined by the ICJ, *uti possidetis* 'applies to the State as *it is*, *i.e.* to the "photograph" of the territorial situation then existing. The principle of *uti possidetis* freezes the territorial title; it stops the clock, but does not put back the hands' (*Frontier Dispute* (n 2) para. 30). However, I claim that it is impossible to deny that the modern understanding of the 'territorial title' that the ICJ was referring to has developed into a more complex set of manifestations.
[1124] For example, Azerbaijani offers of the highest level of autonomy available in international practice for Nagorno-Karabakh has not been accepted. This offer has never been officially revoked. R. Rahimov, 'Kurdish Referendum: Implications for the Karabakh Conflict' 14(121) *Eurasia Daily Monitor* (2017).
[1125] See subchapter 4.2.2. In one of the few departures from the Soviet model, the Yugoslav SRs gained a slightly greater fiscal power than their SSRs counterparts in the USSR. D. Rusinow, 'Reopening of the "National Question" in the 1960s' in L. Cohen, J. Dragović-Soso (Eds), *State Collapse in South-Eastern Europe: New Perspectives on Yugoslavia's Disintegration* (Purdue, 2007) 131-148 at 131.
[1126] N 224.

Serbia, decided to keep its subunits in name while unilaterally and unconstitutionally de facto abolishing all their relevant rights, causing alarm among the other SRs.[1127] Especially the rejection of the rights of the Kosovars - a third largest national group in the SFRY according to the last 1991 census - led to Kosovo's subsequent rejection of a common future in Serbia and an armed uprising against it. Moreover, the case of Kosovo activated other minorities without prior ethnofederal status to question their links to their host state and to demand territorial autonomies in Bosnia-Herzegovina and Macedonia, respectively. Finally, Kosovo has become a highly influential example for the post-Soviet ethnofederal conflicts, making the negotiated solutions there even less likely.[1128]

5.5.1 Introduction: The Long Dissolution of the Socialist Federal Republic of Yugoslavia

As accounted for previously, the SFRY became the second ethnofederal socialist state with the proclamation of the right to self-determination to all Yugoslav peoples. In 1945, the previously unitary Yugoslavia was ethnofederalized and subdivided into six SRs (equivalent to the SSRs). In 1974, the SFRY adopted its last Constitution, according to which the SR of Serbia had two Socialist Autonomous Provinces (SAPs, equivalent to ASSRs),[1129] which were simultaneously constituent components of both Serbia and the SFRY. The SAPs were given a remarkably high level of autonomy, even surpassing the status given to the Soviet ASSRs in 1990.[1130]

Briefly, in the late 1980s, the SFRY was ruled by a collective presidency called Presidium, with a rotating one-year chairmanship for each federal unit.[1131] In 1989, Serbia tried to take over Presidium, which alarmed the other SRs and led to the dissolutions of the ruling Party[1132] and Presidium in early 1990.[1133] With Slovenia and Croatia announcing plans to secede from the dysfunctional SFRY, Serbia took over the remaining federal organs and warned that such moves would be countered by force. In this volatile moment, Prime Minister of the SFRY pleaded for mediation from the EC and other

[1127] For more the destruction of the SFRY state, see subchapter 4.2.7.
[1128] The recognition of Kosovo independence in 2008 has made the former ASSRs even more determined to pursue outright independence from their host state and has allowed them to accuse the West of 'double standards' in self-determination disputes. Siding with the post-Soviet separatists, Russia has also used the double standard accusation, for instance, by the UN Ambassador Churkin in April 2007. 'Russian, U.S Diplomats Clash At UN Over Abkhazia', *RadioFreeEurope*, 11 April 2007.
[1129] The two SAPs were Vojvodina (with a significant Hungarian minority) and Kosovo (predominantly Albanian). They were not given a SR status, because they were seen to be having 'homelands' abroad in Hungary and Albania, respectively.
[1130] According to Art. 294 of the 1974 SFRY Constitution, the SAPs had a veto right over Serbian legal acts concerning their affairs. '[i]f a bill, draft regulation or draft enactment or any other issue concerning the general interests of a Republic or Autonomous Province, or the equality of the nations and nationalities is on the agenda of the Federal Chamber, and if so requested by the majority of delegates from one Republic or Autonomous Province, resort shall be made to a special procedure to consider and adopt such a bill, draft enactment or issue'. The special procedure required that all SRs and SAPs reach a common position, or the bill would be rejected.
[1131] The 1974 SFRY Constitution (n 189) Art. 313.
[1132] Accounted for in detail in Pauković (n 192) 21-33. The League of Communists was the only allowed political party according to the Preamble VIII of the 1974 Constitution of the SFRY.
[1133] Busky (n 193) 36.

international actors.[1134] The EC attempted to reconcile the competing claims in the SFRY by organizing a Peace Conference in late 1991.

According to the Conference's Draft Settlement proposal, the SRs would be recognized within their *uti possidetis* borders if they guarantee for their ethnic and national minorities all the rights envisaged in the 1966 Covenants, the CSCE Documents and the Council of Europe protocols, as well as the right to participation to the governance of the SR concerning their affairs.[1135] Most importantly, the Draft demanded that 'areas in which persons belonging to a national or ethnic group form a majority, will enjoy a special status (autonomy)', which included the right to have national emblems, a legislative body, an administrative structure including a regional police force and a judiciary responsible for matters concerning the area, as well as provisions for appropriate international monitoring of the fulfilment of these rights.[1136]

In December 1991, the EC issued the Declaration on Yugoslavia that promised to recognize any SR requesting for it if it accepts the conditions of the Guidelines and the conditions laid down in the Draft Convention, especially considering human rights and the rights of national or ethnic groups.[1137] This was seen as essential, as the national tensions were high in the collapsing SFRY. Especially the question over the rights of Serbs and Albanians were hard to resolve - the application of *uti possidetis* would leave a remarkable number of ethnic Serbs in Croatia and Bosnia-Herzegovina,[1138] and Kosovo Albanians in Serbia. Eventually, Slovenia, Croatia, Macedonia, and Bosnia-Herzegovina send their recognition applications to the EC, whereas Serbia and Montenegro proclaimed that they continue the existence of the SFRY under the name of FRY.[1139]

In March 1992, the EC and the US issued a joint declaration pledging their support for the principles of the Conference on Yugoslavia - respect for the *uti possidetis* borders and the rights of all national and ethnic groups - and promised to coordinate their recognition processes.[1140] Especially important in this regard was that they pledged to 'coordinate their approach to Serbia and Montenegro, which have expressed the wish to form a common state, and lay particular emphasis on their demonstrable

[1134] Bagwell (n 632) 494.
[1135] Peace Conference on Yugoslavia, 'Arrangements for a General Settlement', 4 November 1991, Chapter I Art. 1(f) and Chapter II Arts. 2a(1) and 2b.
[1136] *Ibid.* Art. 2c.
[1137] N 224.
[1138] N 232.
[1139] The Constitution of the FRY maintained that it was a legal continuation state of the SFRY, but excluded any territorial claims on the four seceding republics. *UN Doc A/46/915* (n 225). However, the continuation of the SFRY was not accepted in state practice.
[1140] *US/EC Declaration on the Recognition of the Yugoslav Republics*, Brussels, 10 March 1992.

respect for the territorial integrity of other republics and for the rights of minorities on their territory as well as their willingness to negotiate Yugoslav state succession issues at the EC Conference'.

In sum, at the moment of the dissolution of its dissolution in 1991-1992, the SFRY consisted of six SRs and two SAPs. When the EC was given a lead to form a recognition policy towards the SRs, it concluded that just like in the Soviet dissolution only the first tier ethnofederal units would have the right to independent statehood. As the SAPs had held an even higher status than the Soviet ASSRs, they were given more rights in the application of *uti possidetis* as the EC's Draft Convention demanded the continuation of their autonomies. Moreover, some rights provided for in the Draft Convention were not limited to the SAPs but concerned other non-titular ethnic groups as well. Nevertheless, a similar pattern than in the Soviet cases developed: despite the strict conditions, the international community prematurely recognized the SRs without sufficient guarantees for autonomy. Violence ensued, after which there was be negotiations on autonomy but from a significantly weaker negotiating position and without the leeway of international recognition.

I begin by the cases of the two SAPs in the SR of Serbia, followed by the two cases where an internationally guaranteed autonomy would be given to two groups that did not enjoy any ethnofederal status and territorial autonomy in the SFRY era, Republika Srpska and Ilirida.[1141]

5.5.2 Serbia: Vojvodina and Kosovo

Serbia was ethnofederalized with the creation of Vojvodina and Kosovo in the first 1946 SFRY Constitution.[1142] Vojvodina had a notable Hungarian minority, but throughout its existence, a Serb plurality,[1143] whereas Kosovo was almost 80% Albanian in the last SFRY census.[1144] Thus, while sharing the same autonomous rights and the curtailment of those rights in the late 1980s, the two cases were rather different in terms of the right to self-determination. Vojvodina resembles more like the cases of the ASSRs of Nakhichevan and Ajara, as the ethnic component did not play such a role.

[1141] Even though there would be other ethnoterritorial conflicts to cover in the SFRY - the Republic of Serbian Krajina and the Croatian Republic of Herzeg-Bosnia - but these cases did not involve former ethnofederal subunits or facilitated the creation of new territorial subunits, so I exclude them from my analysis. The same applies to the two self-proclaimed 'People's Republics' in Ukraine's Donbas.
[1142] The 1946 Constitution (n 241), Art. 2: 'The People's Republic of Serbia includes the autonomous province of Vojvodina and the autonomous Kosovo-Metohijan region'.
[1143] According to the last SFRY census in 1991, the population was 57,2% Serbs and 16,9% Hungarians.
[1144] According to the 1981 census, the Province had an Albanian majority of 77,42%, with 13,2% Serb minority. Albanians boycotted the last official SFRY census of 1991.

The extent of the SAPs autonomy shifted throughout the years until they gained a close-to-equal status with the SRs in the last 1974 Constitution.[1145] In it, the SAPs were made constituent units of the SFRY that could forge direct links with federal authorities and bypass Serbia altogether, giving them a '*de facto* republican status'.[1146] The SAPs gained a right to have their own Constitution, assemblies, and executive councils, with 'no vertical superiority or subordination' between their organs and Serbia's.[1147] For example, the Kosovo Assembly was the highest authority in the Kosovo SAP. It had the power to change the SAP Constitution and veto changes to the Constitution of the SFRY or Serbia that would have affected Kosovo's legal position. In addition, the Kosovo Assembly had the power to issue laws and budgets and to appoint and recall presidents, judges, and high officials in the province. Finally, the SAPs territory could no longer be altered without their consent.[1148]

While the Constitution retained some asymmetry between the SRs and SAPs, the line was blurred considerably with references to the SAPs 'sovereign rights',[1149] and by giving them equal right to introduce bills for all-Union laws[1150] and a 2:3 ratio in the number of federal representatives.[1151] Several articles of the Constitution reaffirmed their equality with the SRs.[1152] Inversely, Serbia felt its territorial integrity threatened by the highly autonomous statuses of the SAPs.

After taking control over Serbia, in the summer of 1988 Milošević started undermining the SFRY central authority.[1153] In the spring of 1989, Serbia passed a series of constitutional amendments, severely curtailing the SAPs autonomies, for example, by taking away their veto right over changes

[1145] Later reproduced in the subsequent 1974 Constitutions of the SR Serbia, the SAP of Vojvodina, and the SAP of Kosovo. For more on the changing statuses of the SAPs, see subchapters 4.2.2-4.2.6.
[1146] Pavlović (n 663) 16.
[1147] *Written Comments of Slovenia* (n 664) 30.
[1148] The 1974 SFRY Constitution (n 189), Art. 5. As summarized in the Written Comments of Slovenia, '[a]t the federal level, autonomous provinces were equal to republics also with regard to decision making powers on the following main issues: Republics and autonomous provinces took decisions on amendments to the SFRY Constitution on an equal footing (Arts. 398-402 of the SFRY Constitution), meaning the consent of autonomous provinces was required for the adoption of an amendment to the SFRY Constitution; Federal bodies decided on laws and other issues stipulated by the Constitution (Arts. 398-402 of the SFRY Constitution and amendment No. 40) on the basis of the agreement of republic and provincial assemblies; The Federation concluded certain treaties in agreement with the competent republic or provincial bodies (Art. 271 of the SFRY Constitution); Republics and autonomous provinces cooperated with foreign bodies, organisations and international organisations (amendment No. 36 to the SFRY Constitution); Republics and autonomous provinces could request a special decision-making procedure in the Federal Chamber of the SFRY Assembly (Art. 294 of the SFRY Constitution)'. *Written Comments of Slovenia* (n 664) 10.
[1149] *Ibid.* Art. 4.
[1150] *Ibid.* Art. 293.
[1151] *Ibid.* Arts. 291-292. The main legislative body, the Federal Chamber, had 30 representatives from each SR and 20 from each SAP. The secondary body, the Chamber of Republics and Provinces, had 12 from each SR and eight from each SAP. The Constitutional Court of the SFRY had two judges from each SR and one from each SAP. The highest authority of the federation, the SFRY Presidium, had one representative from each SR and one from each SAP.
[1152] E.g., Arts. 1 and 3. A leading Yugoslav constitutional lawyer Mirić held an opinion that 'under article 4 of the SFRY Constitution, the socialist autonomous province is not only autonomous, but even sovereign: it is the locus of the exercise of the sovereign rights of the working people and citizens and of the nationalities and ethnic minorities'. Quoted in *East Europe Report* (n 670) 97.
[1153] See subchapter 4.2.7.

in the Serbian SR Constitution and giving the Serbian Constitutional Court vertical superiority over the Constitutional Courts of the SAPs.[1154]

Because Vojvodina was more malleable than Kosovo, Serbia left it with some autonomous functions, including its parliament and government, in its 1990 SR Constitution.[1155] However, Serbian relations with Kosovo deteriorated quickly when the Kosovo Assembly contested Serbian constitutional amendments. The Kosovo Assembly was forced to consent to the changes under a state of emergency and without the required two-thirds of a majority. When it further protested, Serbia dissolved the Assembly altogether and assumed its functions.[1156] The process for dismantling the autonomous structures of Kosovo was continued with a series of measures and laws in the summer of 1990,[1157] culminating in a new Serbian SR Constitution that abolished most of Kosovo's autonomy.[1158] In turn, members of the dissolved Kosovo Assembly declared independence from Serbia on 2 July 1990, demanding Kosovo to be recognized as a SR of the restructured SFRY.[1159]

Despite these unilateral actions by Serbia, there were no changes to the status of Kosovo in the applicable SFRY Constitution.[1160] The abolishment of Kosovo's autonomy was contrary to several articles of the 1974 SFRY Constitution,[1161] and violated several individual federal laws[1162] and the principle of *vacatio legis*.[1163] The assumption of the Kosovo Assembly's functions had no basis in

[1154] The most important were the following: Amendment 29 made certain provision of the constitutions of SAPs not applicable if the assembly of the SAP did not harmonize them within one year. Amendment 33 considerably weakened the SAPs' status in relation to passing laws relating to legislation applicable throughout the SR Serbia. Amendment 44 stipulated that the Serbian Constitutional Court could begin to decide on certain matters without the Kosovo Constitutional Court having yet concluded its proceedings on the matter. Amendment 47 abolished Art. 427 of the Constitution of Serbia, which stated that Serbia decided on the amendments to its constitution on the basis of agreement with the SAP assemblies, which now could only give 'opinions'. However, the SAPs retained the right to give their consent to amendments of the SFRY Constitution, which the Serbian amendments were breaking.
[1155] *Constitution of the Republic of Serbia*, adopted on 28 September 1990, Art. 111.
[1156] Janjic, Lalaj and Pula (n 701) 279.
[1157] See subchapter 4.2.7.
[1158] 'In the constitutional order of Serbia there still are autonomous provinces, but now as units of territorial autonomy, such as the provinces in Italy, and autonomous communities in Spain, in other words - without state functions. In such a way, the autonomy in Serbia is returned to its standard theoretical frameworks, where it should be and where it is the only possible form of democratic state order of a single State'. *Constitution of the Republic of Serbia* (n 1152) Preface. See more in March and Sil (n 702) 5. Finally, the 1992 *Constitution of the Federal Republic of Yugoslavia* (n 783) does not mention the SAPs.
[1159] Tierney (n 296) 269. However, when the SFRY dissolved the Constitution of Kosovo was amended to include the eventual goal of independence. Koinova (n 877) 104.
[1160] Both the SFRY Constitutional Court and the Federal Assembly tried to intervene in 1990 to make the SRs change their constitutions (the Constitutional Court concluded that all the SRs except Montenegro had violated the 1974 SFRY Constitution with their 1988-1989 amendments), but none of them did as the SFRY was becoming increasingly paralyzed.
[1161] The 1974 SFRY Constitution (n 189), Arts 2 and 5. The abolishment of the SAP autonomy was, in effect, a territorial modification of the SFRY territory, which was not left for the discretion of the SRs but needed the federal government's constitutional ratification.
[1162] For example, *Law on the Foundations of State Administration and Federal Executive Council, Law on General Administrative Procedure*, and *Law on Administrative Disputes*. Summarized in *Written Comments of Slovenia* (n 664) 20.
[1163] The principle of *vacatio legis* requires that a certain time limit must elapse from the date of the promulgation of the law until its entry into force. For example, three legal acts by Serbia were adopted, published in the Official Journal, and entered into force on the very same day, 26 June 1990. *Ibid*. at 23.

the 1974 SFRY Constitution as it was not in a subordinate position to the Serbian Assembly. I conclude that the abolishment of Kosovo's autonomy was not in accordance with the legal order of the SFRY. Thus, it was an invalid act and will not affect the utilization of *uti possidetis*, which is based on the *last legal order at the moment of the dissolution*.

While Serbia had insisted that the abolishment of Kosovo's autonomy was an internal affair, the issue became internationalized with the dissolution of the SFRY and the need for the FRY to be recognized either as a sole continuation state or as one of the successor states of the SFRY. Using this leeway, the EC and the Badinter Commission tried to force Serbia to re-establish Kosovo's autonomy. In March 1991, the European Parliament issued a declaration where they demanded that 'the constituent republics and autonomous provinces of Yugoslavia must have the right to freely determine their own future in a peaceful and democratic manner and on the basis of recognized international and internal borders'.[1164] In June 1992, European Council called for the Serbian leadership to 'refrain from further repression and to engage in serious dialogue' with representatives of Kosovo on autonomy in the framework of the Conference on Yugoslavia.[1165]

The Badinter Commission's opinions 2 and 4-7 all demanded the implementation of the provisions of Chapter II of the November 1991 Draft Convention.[1166] Moreover, all the relevant international instruments that the Badinter Commission was referring to - the Helsinki Final Act, the Charter of Paris, and the EC Guidelines - demand the inviolability of *all frontiers*. While Opinion No. 8 ruled that 'the process of dissolution of the SFRY, referred to in Opinion No. 1 of 29 November 1991 is now complete and that the SFRY no longer exists',[1167] Opinion No. 10 added that the FRY 'is a new state which cannot be considered the sole successor to the SFRY' and that the EC's recognition of it would be subject to its compliance with the conditions laid down by general international law and the Guidelines of 16 December 1991.[1168]

In accordance with these demands, the EC was holding out its recognition of the FRY. In order to gain recognition, on 27 April 1992 the FRY produced a declaration in which it promised to accept

[1164] S. Woodward, 'Redrawing Borders in a Period of Systemic Transition' in M. Esman and S. Telhani (Eds), *International Organizations and Ethnic Conflicts* (Cornell, 1995) at 208.
[1165] *Declaration on Former Yugoslavia* (n 786).
[1166] The most important opinion in relation to the status of Kosovo was Opinion No. 5, in which the Badinter Commission considered whether Croatia had fulfilled the conditions in the Guidelines and whether it had fulfilled all the provisions of the Draft Convention on 4 November 1991. *Opinion No. 5* (n 226).
[1167] *Opinion No. 8* (n 785). On the same day, Opinion No. 9 concerned the state succession was given.
[1168] *Opinion No. 10* (n 788). In addition, the UN Security Council resolutions 757 (30 May 1992) and 777 (16 September 1992) had explicitly denied the continuation of the SFRY.

'all basic principles of the Charter of the United Nations and the CSCE Helsinki Final Act and the Paris Charter, and particularly the principles of parliamentary democracy, market economy and respect for human rights and the rights of national minorities' and that it 'shall ensure the highest standards of the protection of human rights and the rights of national minorities provided for in international legal instruments and CSCE documents'.[1169] In November, the Serbian parliament declared that the minority rights granted to Albanians were well above the international standards and that international law did not grant a right to secession to minorities. The parliament stated willingness to start a dialogue but only within the framework of the Constitution of the Republic of Serbia.[1170]

The international community kept on putting pressure on the FRY over Kosovo. On 15 June and again on 27 June 1992, the EC declared that it 'reminds the inhabitants of Kosovo that their *legitimate quest for autonomy* should be dealt with in the framework of the Peace Conference'.[1171] In July 1992, G7 demanded the re-establishment of the autonomy status according to the Draft Convention,[1172] while the CSCE insisted that the Serb authorities stop repression and engage in serious dialogue with Albanians.[1173] In August, the International Conference on the Former Yugoslavia obliged that the FRY authorities 'restore in full the civil and constitutional rights of the inhabitants of the Kosovo and Vojvodina'.[1174] In December, European Council demanded unambiguously that the 'autonomy of Kosovo within Serbia must be restored'.[1175] In November 1993, the EU endorsed the re-establishment of Kosovo's autonomy in its European Action Program for Yugoslavia.[1176]

In contrast to the demands of international organizations, there was no serious dialogue in the FRY on the autonomy of Kosovo. On the contrary, the situation was getting worse, with several reports affirming the grave situation in the province.[1177] For example, in December 1994, the UN General Assembly Resolution demanded that the FRY revokes 'all discriminatory legislation, in particular

[1169] Finally, the FRY promised to grant the national minorities in its territory all those rights which would be recognized and enjoyed by the national minorities in the other CSCE States. *Declaration on a New Yugoslavia*, Belgrade 27 April 1992.
[1170] *Declaration on Human Rights and the Rights of the National Minorities*, Parliament of the Republic of Serbia, 27 November 1992.
[1171] The EC Press Statement, Luxembourg, 15 June 1992 (Quoted in Tierney (n 296) 266); and *Declaration on Former Yugoslavia* (n 786), italics mine. Tierney continues that '[a]s a consequence, Kosovo had a right only of internal self-determination' and the Peace Conference did not consider its right to external self-determination. *Ibid*.
[1172] G7 urged 'the Serbian leadership to respect minority rights in full' and to 'engage in serious dialogue with representatives of Kosovo to define a status of autonomy according to the Draft Convention'. *Declaration on Former Yugoslavia*, 6-8 July 1992.
[1173] *The CSCE Summit Declaration on the Yugoslav Crisis*, 10 July 1992.
[1174] *International Conference on the Former Yugoslavia*, 26-28 August 1992 Paper by the Co-Chairman (No. 246h).
[1175] *Declaration on former Yugoslavia*, European Council, Edinburgh, 11-12 December 1992.
[1176] *The Kosovo Report* (n 797) 58.
[1177] *Sixth Periodic Report on the Situation of Human Rights in the Territory of the Former Yugoslavia*, Special Rapporteur of the Commission on Human Rights, 1 March 1994; and *Statement of the Chairman of the CSCE Permanent Committee*, 28 April 1994.

that which has entered into force since 1989, and establish genuine democratic institution in Kosovo, including the parliament and the judiciary'.[1178]

Notwithstanding their own criteria and other cumulating international pressure, on 9 April 1996 the EU member states collectively recognized the FRY. Their joint declaration stated that good relations with the FRY would depend on 'the granting of a large degree of autonomy for Kosovo within the FRY'.[1179] In effect, the EU chose a formal relationship with the FRY over the status of Kosovo. This proved to be an error as the national relations in the province continued to escalate. In August 1996, the UN Commission on Human Rights indicated its grave concern on the deterioration of the human rights situation and promoted for the establishment of an international presence in Kosovo.[1180] The violence spiralled out of control, and the last international effort to peacefully restore Kosovo's autonomy via the Rambouillet Accords in March 1999 failed when the FRY refused to sign.[1181]

To summarize, in relation to the third level requirements as portrayed in the EC Guidelines and the Declaration of Yugoslavia, at the moment of its international recognition the FRY was in an obvious breach. It had not abided by the rights of ethnic and national groups in accordance with the CSCE framework,[1182] and the wholesale abolishment of its internal autonomies was in stark violation of the Guidelines' criteria on the 'inviolability of all frontiers which can only be changed by peaceful means and by common agreement' and the 'commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning state succession and regional disputes'.[1183] Even more grievously, the FRY was in clear defiance of the Draft Convention's demands on the rights of ethnic groups, including autonomy,[1184] the framework which had also been endorsed on several occasions by the CSCE, the EC/EU, G7, the UN Special Rapporteur of the Commission on Human Rights, and the UN General Assembly.[1185]

Therefore, I can only conclude that the recognition of the FRY in 1996 was premature. With it came the consequences we should already be familiar with from the Soviet examples - ethnic violence, outside intervention, and the fragmentation of the successor state. The international community's

[1178] UN GA Resolution 49/204, 23 December 1994.
[1179] *Declaration by the Presidency on Behalf of the European Union on Recognition by EU Member States of the Federal Republic of Yugoslavia* (n 799).
[1180] Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Resolution 1996/2*, 19 August 1996.
[1181] *Interim Agreement for Peace and Self-Government in Kosovo* (n 55). The Agreement was signed by the Albanian, American, and British delegations.
[1182] *Guidelines* (n 4) para. 4; and Arts. 32-33 and 35 of the *Document of the Copenhagen Meeting* (n 815).
[1183] *Guidelines* (n 4).
[1184] 'Arrangements for a General Settlement' (n 1135) Chapter II Art. 2c.
[1185] N 1171-1178.

failure to pressure the Serbian leadership to re-establish Kosovo's autonomy contributed to the escalation of the situation into a full-scale war in 1998-1999. After a controversial North Atlantic Treaty Organization (NATO) intervention, the UN Security Council resolution 1244 had established UN administration over Kosovo, and obligated Serbs and Albanians to negotiate over the province's future status. Here, the international community regained leeway over the FRY to establish a meaningful autonomy for Kosovo. However, it was too late at this point as the national relations had become too polarized due to the prolonged period of mutual distrust and violence.

5.5.3 Bosnia-Herzegovina and Republika Srpska

The strange case of Republika Srpska differs from the other post-Soviet and post-Yugoslav territorial disputes. Along with Gagauzia, it is only the second instance where a state decided to create a territorial autonomy to a national group without any previous self-governing status.[1186] Notably, unlike Gagauzia that was a sovereign decision of Moldova and made without foreign pressure, Republika Srpska was created, recognized, and guaranteed by the international community.

After its first free elections in November 1991, Bosnia-Herzegovina held an independence referendum in March 1992 and was recognized independent without any inherited internal administrative lines in April 1992.[1187] However, it succumbed to the Civil War almost instantly. A devastating three and a half years of conflict between the Bosniaks and the Croats on the one side and a self-proclaimed Serb-entity called the 'Republika Srpska' supported militarily by the FRY on the other side ensued.[1188] After a series of international mediation efforts,[1189] the Bosnian War was finally put to an end with the Dayton Accords on 21 November 1995,[1190] where the intervening states re-wrote the Constitution of Bosnia-Herzegovina.[1191] The Dayton Accords established a new three-member presidency to act as a head of state and decentralized the state into two radically autonomous

[1186] There were other self-proclaimed entities without prior ethnofederal status during the Yugoslav Wars - such as the Republic of Serbian Krajina (*rɐ̀pûblika sr̀pska: krâjina*), proclaimed independent from Croatia - but they received no international recognition and were incorporated back to their host state.
[1187] By the EC on April 6th and by the US in the following day. Bosnia-Herzegovina became a UN member state on 22 May 1992.
[1188] For a good overview of the conflict with special attention to its internal and international politics, see Burg and Shoup (n 791).
[1189] There were three major attempts to end the Bosnian War via power-sharing agreement prior to the Dayton Peace Agreement. In February 1992, the EC Peace Conference produced a Carrington-Cutileiro peace plan (also known as the Lisbon Agreement), which called for ethnic power-sharing and devolution of power to local ethnic communities. Next, in January 1993, a Vance-Owen plan would have divided Bosnia into ten semi-autonomous regions. The plan was accepted by the 'President' of Republika Srpska on 30 April 1993 but was rejected by the National Assembly of Republika Srpska a week later. Finally, in July 1993, a Stoltenberg plan called for the division of Bosnia into three ethnic mini-states, but the Bosniak side rejected the plan in August, and the war continued until 1995.
[1190] *General Framework Agreement* (n 790). While the Agreement ended the wars between the former SRs, the omission of Kosovo led to the armed separatist uprising there a few years later.
[1191] Indeed, the new Constitution was first produced as Annex 4 of the Dayton Accords. *General Framework Agreement* (n 790).

entities: the Federation of Bosnia-Herzegovina and Republika Srpska.[1192] The former consisted of 10 cantons, each with their government, parliament, and courts.[1193] The Constitution provides for proportional representation to the three constituent peoples in the government and gives mutual vetoes to all of them in the case of a 'vital national interest' of the group. In addition, all the groups need to be proportionally represented also in the executive, the legislative, and judiciary branch of the government.[1194] The Dayton Accords also established a special international body called the Office of the High Representative, which was put in charge of the implementation of the Accords.[1195] Finally and most importantly, the Dayton framework was backed by extensive internal guarantees by the UN Peace Implementation Council, the EU Special Representative, and NATO.[1196]

As the territorial modifications created by the Dayton Accords brought a *de facto* re-partition of the state, it conflicted with the general policy of retaining the former internal borders via *uti possidetis* favoured by the international community and the Badinter Commission.[1197] Eventually, Bosnia-Herzegovina was forced to accept a major reconfiguration of the state's internal borders in order to satisfy the self-determination demands of the Serb minority.[1198] What is worse, the recognition of Republika Srpska as a constituent unit of a federal Bosnia-Herzegovina is a blatant example of a case where a minority achieved an internationally recognized and highly inclusive autonomy via the use of force, whereas the ASSRs and SAPs that had already possessed this kind of status were ignored.[1199] As observed by Trbovich, '[t]he force employed affected the application of the right to self-determination, translating this right to territorial autonomy in Bosnia, self-government under international supervision in Kosovo and Metohia, decentralization and group rights in Macedonia, or nominal human rights without a right to territorial autonomy in Croatia'.[1200]

The Dayton Accords were the last plausible venue that could have provided legal guarantees for the rights of Kosovo, as should have been the case considering the EC Guidelines, The Hague Peace

[1192] *Ibid.* Arts. V and 1(3).
[1193] According to Jenne and Huszka, this was supposed to represent the right balance between centripetalism and centrifugalism. E. Jenne and B. Huszka, 'The Importance of Being Balanced: Lessons from Negotiated Settlement to Self-Determination Movements in Bosnia, Macedonia, and Kosovo' in J. Alterman and W. Todman (Eds), *Independence Movements and Their Aftermath: Self-Determination and the Struggle for Success* (CSIS, 2019) 117-137 at 121.
[1194] Summarized in E. Đonlić, 'Protection of the Vital National Interest in Bosnia and Herzegovina', *ES Think Tank*, 4 December 2017.
[1195] R. Cohen and A. Radin, 'Russia's Hostile Measures in Europe' (Rand, 2019) at 75-76.
[1196] Jenne and Huszka (n 1193) 126.
[1197] Bartos (n 19) 77.
[1198] *General Framework Agreement* (n 790) Art. 3. The Serbs in Bosnia-Herzegovina had had no ethnofederal status under the SFRY Constitution.
[1199] The Dayton Accords were generous to the Serb side in order o end the three-year Civil War in Bosnia-Herzegovina rapidly.
[1200] Trbovich (n 282) 293.

Conference Draft Conventions and the Badinter Commission opinions.[1201] Nevertheless, the chance was missed, and the FRY was recognized in the following year, with notorious consequences.[1202]

While lacking the former ethnofederal subunits, as a former SR Bosnia-Herzegovina was still obliged to fulfil the requirements listed the EC Guidelines, to make an application to the Badinter Commission and to accept the provisions on human rights and the rights of national and ethnic groups as laid down in the Conference on Yugoslavia's Draft Convention. According to the Badinter Commission, after Bosnia-Herzegovina had undertaken to apply the UN Charter, the Helsinki Final Act, the Charter of Paris, the ICCPR and other similar instruments of human rights, and guaranteed these in its new Constitution on 31 July 1990, it was in accordance with the Draft Convention's requirements on the rights of national groups.[1203] However, the Badinter Commission concluded that the will of the people in Bosnia-Herzegovina to establish a common state had not been sufficiently established, and thus, it should not be recognized until there would be a referendum under international supervision. Nonetheless, the international community recognized Bosnia-Herzegovina - already in a Civil War - a few months later. This was premature, as admitted later by the UN Secretary-General.[1204]

When comparing the cases of Kosovo and Republika Srpska, the EU's recognition policy in the early 1990s is rather troubling. Kosovo, a previously constituent autonomous unit of the SFRY, did not receive even the *same rights* as Bosnian Serbs without any prior status. The status of Republika Srpska in Bosnia-Herzegovina is comparable to Kosovo's autonomy in the 1974 SFRY Constitution, especially on the ability of the Serb minority to participate within the political organs of the federation and to use a veto right in constitutional matters.[1205] Yet, the fact remains that this status upgrade was accomplished by the use of force and was built upon no previous legal basis, while the international community chose to ignore Kosovo's *peaceful* demands until they likewise chose to seek recognition via armed uprising in 1998. The outcome is an antithesis of *uti possidetis*' main function - to secure the peaceful transfer of sovereignty in a case of independence or state dissolution.

[1201] According to Russell, the reason for Kosovo's exclusion from the Dayton Accords was that the 'one man whose cooperation was deemed to be absolutely essential, Slobodan Milosević, was adamantly opposed to any discussion of Kosovo at Dayton. The success of Ibrahim Rugova in keeping the Kosovo Albanian independence movement peaceful failed to garner international support for their cause, but made it easier for the West to acquiesce to Milosević's demands and look the other way'. Russell (n 794) 504-505.

[1202] The disappointment caused by the exclusion then drove some Kosovars to pursue self-determination in similar extra-legal means, via an armed uprising by the Kosovo Liberation Army, not unlike the separatists in several of the former ASSRs since 1991.

[1203] *Opinion No. 4* (n 226).

[1204] Accounted for in D. Cruise, 'The Premature Recognition of Bosnia-Herzegovina: Letters from Javier Pérez de Cuéllar' 1(1) *Brown Journal of Foreign Affair*s (Winter 1993-1994) at 133-144.

[1205] For example, Republika Srpska was guaranteed one-third of the seats in both the upper and lower chambers of the Parliamentary Assembly, the House of Peoples (Art. IV.9) and the House of Representatives (Art. IV.10). The veto right was affirmed in Art.V.7. *General Framework Agreement* (n 790), *Annex 4: Constitution of Bosnia-Herzegovina*.

5.5.4 Macedonia and Ilirida

The international community's decisions to prematurely recognize Bosnia-Herzegovina and to leave Kosovars on the mercy of Milošević's Serbia led to armed ethnic conflicts and subsequent NATO military interventions to stop these conflicts. In 2001, the pattern continued in Macedonia, but fortunately the intervention was done early enough to avoid large scale conflict.

Despite having a significant ethnic Albanian minority, the SR of Macedonia was not ethnofederalized during the SFRY era. After its first free election in November 1990, Macedonia held a referendum for independence on 8 September 1991 with overwhelming support. Subsequently, it declared independence on 25 September and adopted a new Constitution on 17 November 1991. The Constitution did not establish any territorial autonomies, but it promised that Albanians and other minorities enjoy full equality as citizens and that human rights, freedoms, and ethnic equality are guaranteed.[1206] The national minorities - 'nationalities'[1207] - were guaranteed the right to freely express, foster, and develop their identity and national attributes, as well as the protection of their ethnic, cultural, linguistic, and religious identity.[1208]

These guarantees were not seen as sufficient by the large Albanian majority, presiding over Western Macedonia.[1209] They held their own referendum on the status of the Albanians in Macedonia in January 1992, with a clear majority for the option of autonomy. On 31 March 1992, Albanians held a great demonstration in the capital Skopje, demanding that the international community refrain from recognizing Macedonia until Albanians are autonomous.[1210] They also declared the area as the 'Autonomous Republic of Ilirida',[1211] which did not gain international recognition.

Macedonia's recognition was delayed, but this was due to a name dispute with Greece rather than its minority protection.[1212] Nevertheless, Macedonia became a UN member state on 8 April 1993, and was recognized independent by the EC in December 1993 and by the US on 8 February 1994. The national relations remained tense, with the Kosovo conflict (1998-1999) aggravating the situation

[1206] *Constitution of the Republic of Macedonia*, adopted on 17 November 1991, Preamble.
[1207] 'Nationalities' was an SFRY term for non-titular nations of the federation. See subchapter 4.2.5.
[1208] *Constitution of the Republic of Macedonia* (n 1206), Art. 48.
[1209] The Albanians constituted 25,2% of the Macedonian population in the 2002 census. As noted by Maria Koinova, the demands of the Albanians in Macedonia were blocked precisely at the time when the system was opened, and they were allowed to organize politically. Koinova (n 877) 96.
[1210] Z. Daskalovski, *Walking on the Edge: Consolidating Multiethnic Macedonia, 1989-2004* (Globic Press, 2006) at 68.
[1211] '*Republika e Iliridës*'. S. Vaknin, 'The Disingenuous Dialogue', *The Eurasian Politician*, Issue 4 (2001).
[1212] Due to the name dispute and Greece's objections, Macedonia joined the UN as a 'Former Yugoslav Republic of Macedonia' and could not pursue the EU or NATO memberships. The dispute was finally solved with the *Prespa Agreement* on 12 June 2018, which changed Macedonian name to North Macedonia. The Agreement was ratified on 25 January and became effective on 12 February 2019.

further. Finally, in early 2001 a group of veterans from the Kosovo War began a low-intensity armed insurgency against the Macedonian authorities under the name 'Albanian National Liberation Army'.[1213] However, this time the international reaction was quick, and NATO pressured the rebels and the Macedonian leadership into signing the 'Ohrid Framework Agreement'[1214] in order to settle the competing claims to self-determination within the single Macedonian state.

The Framework Agreement established a meaningful autonomy for the Albanian minority. They received a veto right on laws concerning culture, language, education, state symbols, local finances and elections, and boundaries of municipalities.[1215] Furthermore, the Agreement promised to assure equitable representations of minorities in public administration, with particular attention to the police force and the Constitutional Court.[1216] Finally and crucially, the functionality of the Framework Agreement was assured via extensive external guarantees, with the introduction of a 3500 NATO peace-keepers in Macedonia and the EU appointed a special representative to oversee the implementation of the Agreement.[1217] Soon afterwards, Macedonia amended its Constitution on 16 November 2001 to take into account the Framework Agreement.[1218] Thus, eventually, the crisis in Macedonia was solved by reproducing the ethnofederal model as a desirable alternative to the ethnic clashes and frozen conflicts all around the other successor states.

To conclude, just as in the cases of Serbia and Bosnia-Herzegovina, Macedonia was obliged to fulfil the third level self-determination requirements. While it was treating its nationalities better than neighbouring Serbia at a time, it was unclear whether the situation in Macedonia was in accordance with the 4 November 1991 Draft Convention's demands, which guaranteed for any group 'forming a substantial percentage of the population in the Republic' a 'general right of participation in public affairs, *including participation in the government of the Republics concerning their affairs*'.[1219] Moreover, it gave the right for the recognized national groups to have their own national emblems, legislative bodies, regional police forces, and judiciaries, subjected to international monitoring.[1220]

The 1991 Constitution of Macedonia guaranteed its nationalities the right to freely express, foster, and develop their identity and national attributes, as well as the protection of their ethnic, cultural,

[1213] Jenne and Huszka (n 1193) 121-122.
[1214] *Framework Agreement*, signed at Skopje on 13 August 2001.
[1215] *Ibid.* Art. 5.2.
[1216] *Ibid.* Arts. 4.2 and 4.3.
[1217] Jenne and Huszka (n 1193) 122.
[1218] *Constitution of Macedonia*, amended on 16 November 2001.
[1219] *Treaty Provisions for the Convention* (n 751) Art. 2.B.3. Italics in the original.
[1220] *Ibid.* Art. 2.B.2.

linguistic, and religious identity, thus providing a better minority protection regime than most of its SR counterparts. Moreover, the Badinter Commission evaluated the 1991 Constitution in its Opinion No. 6. According to the Badinter Commission, in response to the question what measures Macedonia has taken to guarantee the rights of the ethnic and national groups and minorities on its territory, the 'Constitution of the Republic of Macedonia provides for the establishment for Council for Interethnic Relations, which will deal with such matters at Republic level. All nationalities are equally represented on the Council'.[1221] Moreover, the Badinter Commission confirmed that Macedonia had accepted the 4 November 1991 Draft Convention, especially Chapter II on the rights of national and ethnic groups, which were expressed in the 1991 Constitution's Articles 7, 9, 19, 45 and 48. Finally, it concluded that Macedonia satisfied the tests of the EC Guidelines and Declaration on Yugoslavia.[1222] Thus, the international recognition of Macedonia in 1993-1994 was not premature.

5.5.5 Conclusions

The ethnic clashes following the SFRY dissolution are prime examples of the problems related to the ethnofederal categorization of populations as either 'nations' such as Serbia, 'nationalities' such as Kosovo Albanians, or 'ethnic groups' lacking ethnoterritorial autonomy, such as Bosnian Serbs and Macedonian Albanians.[1223] The international community's interpretation equated the rights of the nationalities and ethnic groups on the disadvantage of the former,[1224] and downgraded peoples outside their titular SR to this category as well.[1225]

To their credit, the international community did try to advance the socialist federal dissolutions within the general international law framework, which meant, among other things, ensuring the respect of the rights of minorities in the successor states of the USSR and the SFRY. Due to the potentially more precarious national relations, the successor states of the SFRY were demanded even more comprehensive minority rights protection. However, in Bosnia-Herzegovina, Kosovo, and Macedonia, the 'minorities' evaluated even this minority protection framework as insufficient. As

[1221] *Opinion No. 6* (n 226). A constitutional amendment established the Council for Interethnic Relations in 1991. It consisted of the President of the Macedonian Assembly and two members from each of the nationalities. According to Art. 78: 'The Council considers issues of inter-ethnic relations in the Republic and makes appraisals and proposals for their solution. The Assembly is obliged to take into consideration the appraisals and proposals of the Council and to make decisions regarding them'. The Badinter Commission also stated that Macedonia has pledged not to try to alter its borders by force, to participate in non-proliferation of nuclear weapons, and to settle by agreement all questions relating to the state succession of the SFRY.
[1222] *Ibid.* Art. 5.
[1223] See subchapter 5.1.
[1224] Kosovo, the constituent part of the SFRY with a veto right over the decisions of Serbian parliament concerning its rights, was not recognized to have any more rights than any single ethnic group in the SFRY. This amounted to a de facto non-recognition of its substantial SAP status, which led to disillusionment and separatism.
[1225] I.e., the Serbs in Croatia and Bosnia-Herzegovina, although in the latter case they eventually received more substantive rights.

their legitimate grievances were not addressed, first the downgraded Serbs in Bosnia-Herzegovina and then the ignored Kosovo Albanians in Serbia started to pursue independence via armed uprisings against the central state. Finally, in 2001 their examples encouraged the Macedonian Albanians to demand a recognized territorial autonomy. Fortunately, an international intervention was timely enough to curtail violence before the situation escalated further.[1226]

In retrospect, one can observe a major loophole in the international recognition system, as the promotion of peace and security eventually overturned national sovereignty and territorial integrity of the successor states. After having resorted to violence, Bosnian Serbs and Macedonian Albanians received a de facto status elevation to the second-level ethnofederal tier of 'nationalities', with similar rights than the former ASSRs and SAPs. Furthermore, the actual former SAP of Kosovo received no recognized rights whatsoever before following suit on the path to the ethnic uprising, after which it received a de facto promotion to the SR status,[1227] and its independence was duly recognized.

The international community was eventually able to mediate some kind of a solution in all three cases, but only after armed conflicts. Moreover, the solutions in both Bosnia-Herzegovina and Kosovo have major flaws.[1228] The key is to realize that a more decisive international mediation before awarding recognition could produce more acceptable outcomes to all parties concerned, taking advantage of the period when there is still enough goodwill to achieve multinational unity. Next, I present the main problems of the current frozen conflict mediation efforts.

5.6 The Contemporary International Mediation Framework of the Frozen Conflicts

In 2002, Dov Lynch lamented that there had been virtually no comparative study on the post-Soviet territorial conflicts and separatist states and that a 'critical gap has emerged in our understanding of security developments in the former Soviet Union'.[1229] While a few scholarly contributions on this

[1226] The overall number of persons killed numbered around 150-250. K. Bender, 'How the EU and the US Stopped a War and Nobody Noticed: The Containment of the Macedonian Conflict and EU Soft Power' in M. Berdal and D. Zaum (Eds), *Political Economy of Statebuilding: Power After Peace* (Routledge, 2013) 324-341 at 341. These numbers, while significant, pale in comparison to the bloody conflicts of Kosovo and Bosnia-Herzegovina.
[1227] In their recognition letters, many states referred to Kosovo as one of the unresolved status questions of the dissolution of the SFRY. For example, the Prime Minister of the United Kingdom commented on the independence of Kosovo the very same day that '[f]irstly, I want to close the chapter that has followed the break-up of Yugoslavia. Kosovo has been and is the last unresolved status issue. <*https://www.gettyimages.fi/detail/video/independence-declaration-statement-by-rpime-minister-news-footage/685378950*>.
[1228] Bosnia-Herzegovina only barely functions as a state and is dependent on international aid and presence, whereas Kosovo has been unable to normalize its relations with Serbia and lacks universal recognition as an independent state.
[1229] D. Lynch, 'Separatist States and Post-Soviet Conflicts' 78 *International Affairs* (2002) 831-848 at 832.

topic have emerged since,[1230] the field remains, in general, an underdeveloped area of study, especially in regard to the effect of the application of *uti possidetis* in these conflicts.

Frozen conflicts remain a prominent international problem for several reasons. First, even when they stay frozen - i.e., non-violent - they hinder reforms and development in the affected states.[1231] In addition, these cases do not necessarily remain frozen, as displayed by the 2016 flare-up of violence between Armenians and Azerbaijanis over Nagorno-Karabakh.[1232] Thus, the frozen conflicts present a consistent and continuing threat to regional development and security. Fortunately, international organizations recognize this problem. Already in the 1992 Helsinki Summit Meeting, the OSCE created an office for the High Commissioner on National Minorities 'as an instrument for conflict prevention at the earliest possible stage'. It focuses on disputes involving national minorities that have an international character and that have the propensity to cause inter-state tension or to ignite international armed conflict.[1233] Moreover, the EU has taken a more assertive stance towards the secessionist conflicts, especially after launching the Eastern Partnership in 2009.[1234] For instance, the EU's Special Representative for the South Caucasus stated in 2011 that 'EU cannot afford white spots to develop on the map of its immediate neighborhood',[1235] and the 2015 European Neighborhood Policy review states that '[p]rotracted conflicts continue to hamper development in the region'.[1236]

Second, a comparative study on separatist movements shows that those groups who had autonomy and lost it are likeliest to launch separatist campaigns.[1237] According to Cuffe and Siroky, 89% of the groups who had lost their autonomy have launched separatist campaigns. In contrast, only 2% of the groups that were never autonomous and 21% of those that remained autonomous have done so.[1238]

[1230] See, for example, Zürcher (n 174); M. Kapitonenko, 'Resolving Post-Soviet "Frozen Conflicts": Is Regional Integration Helpful?' 3(1) *Caucasian Review of International Affairs* (2009) 37-44; D. Trenin, I. Fediukin, A. Ryabov et al, 'Post-Soviet Conflicts', *Carnegie Moscow Center*, 1 September 2006; and *Post-Soviet Frozen Conflicts: A Challenge for European Security*, Warsaw Institute Special Report, 14 March 2019.

[1231] Including a possible integration with the EU in the cases of Georgia, Moldova, and Ukraine.

[1232] Also, one could list the 2014 annexation of Crimea as a case where a legally frozen peaceful conflict erupted into armed aggression.

[1233] Under the High Commissioner's mandate, the 'human dimension' of the conflicts includes human rights and humanitarian affairs. 'From the perspective of comprehensive security, respect for human dimension commitments, including respect for the rights of persons belonging to national minorities, is fundamental to achieving and maintaining peace and security in the region'. 'High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe' in *United Nations Guide for Minorities*, Pamphlet No. 9 (2011).

[1234] *<https://eeas.europa.eu/diplomatic-network/eastern-partnership_en>*.

[1235] *Statement by the EUSR for the South Caucasus Peter Semneby*, OSCE Permanent Council, Vienna, 10 February 2011. In addition, Semneby was the main author of the EU's Non-Recognition and Engagement Policy for Abkhazia and South Ossetia. T. De Waal, *Uncertain Ground: Engaging with Europe's De Facto State and Breakaway Territories* (Carnegie Europe, 2018) at 15.

[1236] *Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, High Presentative of the Union for Foreign Affairs and Security Policy, Brussels, 18 November 2015.

[1237] J. Cuffe and D. Siroky, 'Paradise Lost: Autonomy and Separatism in the South Caucasus and Beyond' in J. Cabestan and A. Pavković (Eds), *Secessionism and Separatism in Europe and Asia: To Have a State of One's Own* (Routledge, 2013) 37-52 at 38.

[1238] *Ibid*. at 42.

As I demonstrated earlier, all but one of the ethnofederalized successor states of the USSR and the SFRY that retained meaningful parts of the ethnofederal arrangement were spared of separatism. In contrast, all of those rejecting the ethnofederal legacy have faced conflicts with the former subunits.

Third, the number of people living in these conflict areas has been growing. There are nearly one million people combined in Abkhazia, South Ossetia, Nagorno-Karabakh, and Transnistria. Crimea had a population of almost 2,3 million in the last census,[1239] and the rebel areas of Donbas are home for another 2,7 million. Simultaneously, the affected areas are getting empty. For example, in 2003-2013, around 10% of the total population of Donbas emigrated from the area. In Bosnia-Herzegovina, the population has shrunk since the Dayton Accords by another 11%.[1240] Therewith, despite the increasing emigration from the affected areas, the number of people suffering due to frozen conflicts is large and increasing.

Finally, the potential target group of states is significant. According to Roeder, there were altogether 115 'Segment states' in 2000[1241] - i.e., separate communities of peoples who have been allocated different decision rights that are linked to specific territories.[1242] Russian Foreign Minister Lavrov went even further and called Kosovo a precedent for an estimated '200 territories' around the world.[1243] In addition, 20 UN member states have a specific area with a constitutionally guaranteed autonomy, with at least three of them having invested upon the autonomous unit a right to secession.[1244] Thus, the potential impact of the 'domestic and international politics of self-determination'[1245] cannot be overstated.

[1239] Conducted by Russia in December 2014. *<https://web.archive.org/web/20151104175105/http://en.krymedia.ru/society/3365334-Results-of-Census-Population-of-Crimea-is-2284-Million-People>*.
[1240] From 36% in 1995 to 47% in 2017. M. Samorukov, 'A New Approach for Conflict Resolution in Eastern Europe', *Mad'an*, 26 May 2018.
[1241] Roeder (n 884) 47.
[1242] 'These states are based on varying notions of sovereignty - that is, their answers to the question, what population possesses the power to allocate and reallocate decision rights? Second, they vary in the ways their constitutions have allocated decision rights - specifically, the extent to which they empower the people of each segment-state to design their political institutions, and to participate in the governance of the common-state'. *Ibid*. at 63.
[1243] 'Russia Says Kosovo Creates Precedent for Separatists', *Reuters*, 23 January 2008.
[1244] The states with constitutional territorial autonomy arrangements are Belgium, Canada, Denmark, Finland, France, India, Indonesia, Italy, Moldova, the Netherlands, Nicaragua, Panama, Papua New Guinea, Philippines, Portugal, Spain, Sudan, Tanzania, Ukraine, and the United Kingdom. T. Benedikter (Ed) *Solving Ethnic Conflict through Self-Government A Short Guide to Autonomy in Europe and South Asia* (EURAC Research, 2009) at 134. Benedikter's qualification omits states such as the Russian Federation.
In addition, three Constitutions stipulate a right to external self-determination in the form of independence; Ethiopia, the Netherlands, and Saint Kitts and Nevis. The 1995 Constitution of Ethiopia proclaims the unrestricted right of 'Nations, Nationalities and Peoples' to 'self-determination up to secession' (Art. 39.1). The 1983 Constitution of Saint Kitts and Nevis, grants the smaller island of Nevis the unilateral right to secede if supported by the people of Nevis in a referendum by a two-thirds majority (Art. 113). Finally, the Statute of the Kingdom of Netherlands Art. 58 states that Aruba can launch, at any time, the procedure to declare its independence.
[1245] As paraphrased by Stefan Wolff in Wolff (n 1063) 16.

In sum, this phenomenon already directly affects several UN member states and millions of people, and has a great potential to be even more prevalent in the future. It has been internationally recognized as a severe issue, and research has shown that peoples who have lost a previously held autonomous status display an overwhelming tendency to challenge the sovereignty of the host state.[1246]

As the international community has acknowledged its partial failure in facilitating a peaceful dissolution process and as the subsequent conflicts posit a threat to international peace and security, an extensive series of international mediation efforts have been initiated to solve the frozen conflicts. For Azerbaijan, the Minsk Process spearheads the OSCE's efforts to find a peaceful solution to the Nagorno-Karabakh conflict. The Process is co-chaired by France, Russia, and the US. For Georgia, there is the Geneva International Discussions, a series of international talks that are co-chaired by the OSCE, the EU, and the UN. The Discussions bring together representatives of Georgia, Russia, Abkhazia, South Ossetia, and the US. For Moldova, there is the '5+2 format'[1247] involving Moldova, Transnistria, the OSCE, Russia, Ukraine, the EU, and the US.[1248] For Kosovo, there was the UN-sponsored Kosovo status process in 2006-2007, terminated after the UN Special Envoy Ahtisaari proposed to settle the conflict via 'supervised independence' for Kosovo.[1249]

Despite international efforts, misunderstandings over the nature of these conflicts has made mediation reactive, prolonged, and ineffective. While ceasefires have mostly held, the following negotiations over the future status of the separatist areas has led to a dead-end with a seemingly pointless negotiation simulation taking place periodically without any progress. The international community has failed to preempt the conflicts via the existing legal framework or to mediate them in any meaningful way. This is an unacceptable state of affairs in an area of international law that is essential to the peace and prosperity of the affected areas and to the international community as a whole.

Only by understanding the logic that is sustaining the current impasse can there be a chance to start to remedy the situation. The greatest misassumption is the one relating to the aims of the separatists. Usually it is assumed that while they are officially proclaiming the goal of sovereignty, they would accept a lower form of self-governance in the form of autonomy.[1250] This was undoubtedly the

[1246] N 1237.
[1247] Officially the *Permanent Conference for Political Questions in the Framework of the Negotiating Process on the Transnistrian Settlement*.
[1248] All three mediation formats can be found in <*https://www.osce.org/conflict-prevention-and-resolution*>.
[1249] *Comprehensive Proposal For the Kosovo Status Settlement* (n 271).
[1250] D. Lynch, 'Separatist States and Post-Soviet Conflicts' in W. Slater and A. Wilson (Eds), *The Legacy of the Soviet Union* (Palgrave Macmillan, 2004) 61-82 at 68.

situation in the early 1990s when all of the separatist areas voted to stay in the USSR as autonomous subjects. However, the current negotiations should acknowledge that the demands of separatists have changed after their experiences in 1992-1994. Thus, the negotiations should be based on the reality of the 2020s and not put forward proposals based on the reality of 1991. It should be recognized that the separatists are highly suspicious of the motives of the parent state and of whether it will respect the principle of *pacta sunt servanda* without firm outside guarantees. Moreover, apart from the shared Soviet past, there is a notable absence of shared destiny and a common state idea between the successor states and the former subunits, which makes any power-sharing very difficult.[1251] Finally, the passage of time contributes to the further drifting apart of the host state's and subunit's competing national projects.

Just prior to the armed separatist uprisings in the post-Soviet space in 1992-1994, the international mediation system gained valuable experience in mediating peace in Cambodia. The 1991 'Agreement Concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia'[1252] was a product of three years of negations.[1253] It contained all the important elements that the international community has tried to reproduce in later mediation efforts, including extensive international guarantees and constitutionally enshrined commitments by Cambodia.[1254] In exchange, the signatory states promised 'to recognize and to respect in every way the sovereignty, independence, territorial integrity and inviolability, neutrality and national unity' of Cambodia.[1255] A UN Transitional Authority in Cambodia was established to act as a peacekeeping mission and - for the first time in the Organization's history - to take over the administration of an independent state for a limited period of time.[1256] The subsequent mediation efforts for the frozen conflicts were based on the Cambodian model.[1257]

[1251] *Ibid*. at 71 and 80.
[1252] *Agreement Concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia (Framework for a Comprehensive Political Settlement of the Cambodia Conflict or Paris Accords)*, signed 23 October 1991.
[1253] S. Ratner, 'The Cambodia Settlement Agreements' 87(19) *The American Journal of International Law* (1993) 1-41 at 1.
[1254] Such as its future domestic and international conduct and the adoption of 'perpetual neutrality' status in the Constitution.
[1255] N 1252, Art. 2(1).
[1256] The UN Transitional Authority held a mandate from March 1992 to September 1993. Its important mission was to guarantee all the rights and freedoms embodied in the Universal Declaration of Human Rights and other international human rights instruments.
[1257] First process was the OSCE initiated the *Minsk Process* on 24 March 1992 to find a peaceful solution to the Nagorno-Karabakh conflict, followed by Moldova in 1997, when the OSCE established a *Permanent Conference for Political Questions in the Framework of the Negotiating Process on the Transnistrian Settlement* involving Moldova, Transnistria, the OSCE, Russia, Ukraine, the EU, and the US. N 1248.
While the Cambodian case did not involve a predominantly ethnic dispute, it had several common characteristics with the post-Soviet frozen conflicts: internal conflict with external involvement, gross human rights violations and a significant flux of refugees.

5.6.1 Nagorno-Karabakh

In the late 1980s, Azerbaijan became the first SSR with an ethnic uprising of a separatist subunit when the Armenian minority in the Nagorno-Karabakh AO began pursuing an upgrade to their status or joining the neighboring Armenian SSR. After the dissolution of the USSR, the conflict evolved into open warfare, with Armenia joining on the side of Nagorno-Karabakh. While the Nagorno-Karabakh authorities signed a ceasefire agreement in 1994, since 1998 Armenia has taken over the responsibility of representing them in the Minsk Group negotiations as Azerbaijan refuses to recognize the separatists as a negotiating party. The most comprehensive product of the efforts of the Minsk Group are the 'Madrid Principles' put forward on 29 November 2007. The Principles include provisions for the final legal status of Nagorno-Karabakh to be determined through a plebiscite allowing the free and genuine expression of the will of the population; an interim period until the final status determination, during which the inhabitants will have the right to 'protect and control their political and economic viability and security within a democratic society committed to the rule of law', with their human rights and fundamental freedoms being secured; a land corridor linking Nagorno-Karabakh to Armenia;[1258] the right to return of all internally displaced persons and refugees from the conflict areas on voluntary basis when the UN High Commissioner for Refugees has determined that conditions are appropriate; a joint supervisory commission led by the Minsk Group countries that will monitor and settle all issues related to the implementation of the Peace Agreement; and the provision to request the UN Security Council to adopt a resolution endorsing the Peace Agreement.[1259]

While the resolution of the status of Nagorno-Karabakh seemed to be moving forward with the Madrid Principles, the negotiations have hit an impasse. This is due to the mutual distrust caused by the conflict, manifested today as the virtual non-existence of any relations between Azerbaijan and the separatist authorities.[1260] Nevertheless, the Madrid Principles offer us valuable lessons on the topics that such negotiations should entail. First, a plebiscite could be used to settle the final legal status, but only after the forcibly displaced peoples are allowed to return on a voluntary basis. Second, before the final status is settled, the basic human rights and freedoms of the population have to be guaranteed and monitored by external forces. Finally, there needs to be a Peace Agreement endorsed

[1258] In its *uti possidetis* borders, Nagorno-Karabakh is completely surrounded by Azerbaijan.
[1259] *Basic principles for a Peaceful Settlement of the Nagorno-Karabakh Conflict*, transmitted at the OSCE Ministerial Council, Madrid, 29 November 2007), principles 1, 2, 4, 5, 6, 11, 12 and 13.
[1260] Azerbaijan only negotiates with Armenia and fails to see that Armenia cannot impose any kind of solution to Nagorno-Karabakh.

by a UN Security Council resolution and an impartial supervisory commission that settles any issues relating to fulfilling the obligations of the Agreement.

5.6.2 Transnistria

In Moldova, a four-month war took place in 1992 between the central authorities and the former ASSR of Transnistria that had a significant Russian and Ukrainian minorities. Apart from being less violent, this was a very typical post-Soviet separatist conflict where an outside intervention secured the victory of the smaller separatist entity. The first attempt of international mediation came with 'quadripartite' political consultations involving Moldova, Romania, Russian, and Ukraine, launched on 23 March 1992 in the auspices of the CSCE Ministerial Conference.[1261] The four parties issued a declaration that promised to guarantee both the territorial integrity of Moldova and respect for human rights, including the rights of ethnic minorities.[1262] In 1993, the CSCE got more involved and released a Report, which noted that '[s]ome of the Mission's interlocutors claim that "international guarantees" are needed to buttress any agreement on special status for Transdniestria' and that 'the conclusion of an agreement under the auspices of the CSCE could enhance the trust of both sides in its duration and reliability'.[1263] Notwithstanding, Russia came to dominate the mediation efforts, which resulted in the signing of a Memorandum on the normalization of relations in May 1997.[1264] The Memorandum made Russia and Ukraine both mediators and guarantors of the future status agreement for Transnistria.[1265] It included some federalization aspects, such as 'Transdniestria shall participate in the conduct of the foreign policy of the Republic of Moldova - a subject of international law - on questions touching its interests. Decision of such questions shall be taken by agreement of the Parties. Transdniestria has the right to unilaterally establish and maintain international contacts in the economic, scientific-technical and cultural spheres, and in other spheres by agreement of the Parties'.[1266] On the basis of the Memorandum, a series of negotiations took place. They resulted in settlement proposals by Russia in 2003,[1267] jointly by Russia, Ukraine, and the OSCE in 2004,[1268] and

[1261] C. Vacaru, 'Resolution Mechanisms of the Transnistrian Conflict' 6(4) *Studia Politica: Romanian Political Science Review* (2006) 905-121 at 907.
[1262] V. Chiver, 'Role of Ukraine in the Transnistrian Conflict Settlement', *Institutul de Politici si Reforme Europene*, May 2016 at 4.
[1263] *Report No. 13* (n 1064) 5(g). Transdniestria is another form to type the name of the area, but I am using the version used by the official Moldovan sources, Transnistria.
[1264] *Memorandum on the Basis for Normalization of the Relations between the Republic of Moldova and Transnistria*, signed in Moscow on 8 May 1997.
[1265] *Ibid.* para. 1.
[1266] *Ibid.* para. 3.
[1267] *Russian Draft Memorandum on the Basic Principles of the State Structure of a United State in Moldova*, 17 November 2003.
[1268] *Proposals and Recommendations of the Mediators from the OSCE, the Russian Federation, and Ukraine with regard to the Transdniestrian Settlement*, 13 February 2004.

finally one by Ukraine in 2005.[1269] Throughout the negotiations, both parties agreed to refrain from exerting pressure on the other, giving Transnistria a chance to build a de facto state undisturbed.[1270]

The Russian proposal included articles to federalize Moldova with separate autonomy agreements for Transnistria and Gagauzia. It included exclusive and joint competences for the federal units and proportional power-sharing with a reserved seat in the Constitutional Court and the Senate for Transnistria and Gagauzia, supplemented with qualified majorities.[1271] It obliged international treaties being concluded after joint consultation, declared Moldova as a neutral and demilitarized state 'with the borders of the Moldovan SSR on 1 January 1990', and gave Transnistria a right to secession that was entrenched into the Constitution with qualified majorities needed for amendments.[1272] However, Moldova rejected the proposal due to the excessive leverage it would have given to the federal units to determine the country's foreign policy.[1273]

The 2004 Joint Proposal proposed Transnistria to become a federal subject of Moldova and listed exclusive and joint competences in detail. It required a two-thirds majority in both houses of parliament to amend the Constitution and that any disagreements over the implementation of the power-sharing to be resolved via international mediation. Finally, just like the Russian proposal, it included the option for Transnistrian secession and called for the creation of an integrated system of international guarantees with an enforcement mechanism.[1274] Moldova rejected the proposal.

The Ukrainian proposal envisioned a unitary state with autonomy for Transnistria. It called for Moldova to draft a law on division of powers jointly with Transnistria and to form a Conciliation Committee with international participation to resolve disputes over the interpretation of the law.[1275] It included the secession option for Transnistria and promised that Russia, Ukraine, and the OSCE would guarantee the proposal. Moldova accepted the proposal with some reservations.[1276]

[1269] *Plan for the Settlement of the Transdniestrian Problem*, 16 May 2005.
[1270] Russia has a dual role as both a mediator and a conflict party and, thus, shares responsibility for the emergence and development of Transnistrian statehood. 'The extent of Moscow's support - security guarantees through a military presence, consistent diplomatic and propaganda backing, political advice and cooperation, and economic and financial support on a considerable scale - led the European Court of Human Rights to conclude in four separate cases that Russia exercises extraterritorial jurisdiction and therefore shares responsibility for human rights violations'. S. Fischer (Ed), *Not Frozen! The Unresolved Conflicts over Transnistria, Abkhazia, South Ossetia and Nagorno-Karabakh in Light of the Crisis over Ukraine* (SWP Research Paper, 9/2016) at 30.
[1271] *Russia Draft Memorandum* (2003), paras. 4, 5, 6, 9(b), 10(a), and 13(2).
[1272] *Ibid.* preamble and paras. 1, 3(14), and 15.
[1273] *Ibid.* para. 3(11). The proposal would have entailed a long-term continuance of Russian military presence, which Moldova rejected.
[1274] N 1268.
[1275] Wolff (n 1063) 16.
[1276] *Ibid*. at 29. Notably, all the proposals included the option for Transnistria secession. However, it was always conditioned with the possible unification of Moldova and Romania.

Following, as an important confidence-building measure demanded by the Ukrainian proposal, Moldova passed a framework law on Transnistria in July 2005.[1277] It granted Transnistria 'territorial autonomy' without a clear definition of its limits. Controversially, it gave Moldova a right to change the boundary of Transnistria 'on the basis of local referenda conducted according to the legislation of the Republic of Moldova'. Finally, it conditioned further negotiations with Transnistria to the withdrawal of the Russian troops from the area, as stipulated in the OSCE Summit in 1999.[1278]

Unfortunately, just like in Nagorno-Karabakh, the process towards a settlement has stalled since 2005 and remains unsolved. In 2016, the Parliament of Moldova issued unilaterally as another confidence-building measure a declaration that affirmed the 'inviolability, sovereignty, independence and permanent neutrality of Moldova'.[1279] It is revealing that by using strikingly similar terminology than the 1991 Cambodian settlement, Moldova was demonstrating what it thought it is required to provide in order to have its territorial integrity guaranteed and respected by the international community. Nevertheless, this has failed to break the deadlock in the negotiations.

5.6.3 Kosovo

The dissolution of the SFRY began in the late 1980s with the conflict between Serbia and its autonomous subunit Kosovo. After a decade of worsening relations, the situation escalated into open armed conflict in 1998. In 1999, after the controversial NATO intervention and similarly to Cambodia in 1991, a UN Interim Administration Mission in Kosovo (UNMIK) was established by UN Security Council Resolution 1244. It stipulated that one of the main responsibilities of the UN administration was to facilitate 'a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords (S/1999/648)'.[1280] For the first years of international administration, the official policy of UNMIK was 'Standards before Status', which in effect froze the status negotiations in favor of protection of human and minority rights, and implementing the Council of Europe's Framework Convention for the Protection of National Minorities and effective mechanisms in response to any violations.[1281]

[1277] *On Fundamental Regulations of the Special Legal Status of Settlements on the Left Bank of the River Nistru (Transnistria)*, 27 July 2005.
[1278] *Ibid.* Arts. 2(2), 3(1), and 3(3).
[1279] M. Popșoi, 'Transnistria Moves Towards Russia Despite Talk of Rapprochement With Moldova' *Eurasia Daily Monitor*, 5 April 2016.
[1280] The UN Security Council Resolution 1244, adopted on 10 June 1999. The Rambouillet Accords were a mediation proposal put forward in early 1999 to settle the conflict via extensive autonomy to Kosovo. The Annex of the Resolution 1244 stated that the political solution should take 'full account of […] the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia'.
[1281] NATO-led Kosovo Force (KFOR) was established to enforce the agreement.

The UN-led status talks led by the UN Special Envoy for Kosovo Martti Ahtisaari got underway in 2006. After a series of negotiation rounds, Ahtisaari presented his settlement proposal in early 2007.[1282] It called for a sovereign Kosovo operating within a framework of 'supervised independence' that would embody significant protections of human rights and provide the Serb communities with extensive minority rights, along with guarantees for legislative representation and local competencies for regional self-administration.[1283] This consisted of devolving state powers to municipalities - giving local majorities de facto control over their affairs - and reserving seats for minorities in the Parliament. Moreover, the proposal established a double-majority requirement for changing the Constitution and adopting laws of vital minority interest.[1284] Finally, it called for extensive external guarantees by the UN, NATO, the EU, and a newly established body called the International Steering Group of Kosovo, consisted of France, Germany, Italy, Russia, the United Kingdom, the US, and the EU.[1285] However, the proposal was rejected by Serbia and abandoned on 20 July 2007. After Kosovo and Serbia had failed to make any progress by a deadline set by the UN Secretary-General Ban Ki-moon,[1286] Kosovo unilaterally proclaimed independence on 17 February 2008.

Ahtisaari acknowledged his proposal being far from optimal, but due to the diametrically opposed positions of the parties, there was no other choice than a compromise that would not satisfy either side's hopes in full. In contrast, the Russian view had been that any solution must be acceptable to both Kosovars and Serbians.[1287] In the end, Kosovo's leadership accepted the demands of the settlement proposal. While they realized it would create a weak state, they understood that this was the price to pay for international support for their independence. In turn, Serbian leadership rejected the proposal on the grounds of it violating the UN Security Council Resolution 1244 framework.[1288]

While Serbia has consistently rejected Kosovo's independence, an EU-mediated dialogue process between the parties has been underway since 2011.[1289] Predictably, it suffers from the same problem than the original status process - the two sides have diametrically opposed views and are unwilling to

[1282] *Comprehensive Proposal For the Kosovo Status Settlement* (n 271).
[1283] M. Rossi, 'Ending the Impasse in Kosovo: Partition, Decentralization, or Consociationalism' 42(5) *Nationalist Papers* (2014) 867-889 at 870.
[1284] Jenne and Huszka (n 1193)125.
[1285] *Comprehensive Proposal For the Kosovo Status Settlement* (n 271) Annex IX.
[1286] N. Wood, 'Momentum Seems to Build for an Independent Kosovo', *The New York Times*, 2 October 2007.
[1287] M. Nichols, 'U.N report recommends Kosovo independence', *Reuters*, 26 March 2007.
[1288] Rossi (n 1283) 870. Revealingly, a Kosovo Albanian politician Veton Surroi commented on the Kosovo status process negotiations in 2006 as 'Belgrade is trying for Dayton; we are trying for Ohrid' in relation to the decentralization of the state. *Ibid*. at 878.
[1289] In March 2012, Serbia agreed to dismantle its parallel structures in the north of Kosovo as part of EU accession negotiations. Soon after, northern municipalities indicated their willingness to integrate into Kosovo.

compromise. Kosovo will most likely reject any further decentralization, as they see themselves having already conceded a lot in 2007 for the price of their independent statehood.[1290] However, due to Serbia's and Kosovo's hopes for European integration, the EU has leverage over them and has insisted upon Serbia fulfilling certain benchmarks for any progress on its membership aspirations.

5.6.4 Abkhazia and South Ossetia

Georgia inherited three Soviet subunits, two of which were in the early 1990s willing and capable of challenging the host state's territorial integrity. The cases of Abkhazia and South Ossetia continue the Soviet separatism pattern - in 1992-1994, an externally supported armed uprising by former ethnofederal units had led to a ceasefire but not to a peace treaty. International mediation efforts ensued and after lengthy consultations among the 'Group of Friends of the UN Secretary-General on Georgia' - Germany, France, Russia, the United Kingdom, and the US - the UN Special Representative for Georgia Dieter Boden outlined a series of principles informally known as the 'Boden Document'. He hoped that the principles would form the basis for negotiations towards a final settlement of the Georgian-Abkhaz conflict. They defined Abkhazia as a sovereign entity within Georgia, affirmed the equality between the governments of Georgia and Abkhazia, and that either of them could unilaterally terminate or modify the federal agreement.[1291] However, in the end, Abkhazia rejected the proposal. One reason was that the lack of trust between the parties was enhanced by the new autonomy arrangement that Georgia provided for Ajara in 2004, which curtailed its rights and have made Abkhazia and South Ossetia wary of trusting Georgian proposals. On the other hand, Georgia is in a rather delicate position as it fears that if it gives too much autonomy to its subunits, the significant Armenian and Azerbaijani minorities in Kverno Kartli and Samtskhe-Jakaveti could demand similar treatment, possibly inviting Armenia and Azerbaijan to intervene on their behalf.[1292]

[1290] Rossi (n 1283) 881.
[1291] J. Wheatley, 'The Case for Asymmetric Federalism in Georgia: A Missed Opportunity' in M. Weller and K. Nobbs (Eds), *Asymmetric Autonomy and the Settlement of Ethnic Conflicts* (Penn, 2010) 213-230 at 219.
[1292] Il. Abbasov, H. Delihuseyinoglu et al, 'Ethnic Groups and Conflicts in the South Caucasus and Turkey' *The Caucasus Edition - Journal of Conflict Transformation* (2016) 1-30 at 12.

In 2008, the frozen conflicts of Georgia received new international attention after the Five Days War between Georgia and Russia. After the event, the old ineffective mediation formats[1293] were succeeded by the Geneva International Discussions, co-chaired by the OSCE, the UN, and the EU. Both conflicts of Georgia are now negotiated jointly. The role of Russia in the mediation is problematic - it continues to insist on a mediating role alongside the other co-chairs, but Georgia refuses to acknowledge Abkhazia and South Ossetia as direct parties to the conflict and argues that they are under Russian occupation. The Geneva International Discussions have not been able to put forward any settlement proposals. This is partly due to an even more hostile environment between the parties than is the case in the other post-Soviet conflicts.[1294]

5.6.5 Donbas and Crimea

Finally, since 2014 there has been a crisis in Ukraine that began with the Russian takeover of Crimea, followed by a Russian supported uprising in the Donbas area of Eastern Ukraine. Here, the mediation efforts have - again - been ineffective, and they only concern the conflict in Donbas.[1295] Moreover, in Crimea, the role of Russia as a direct participant to hostilities and the stakes involved have made any international mediation impossible thus far. In Donbas - where Russia denies direct involvement - the negotiations have taken place and have resulted in the signing of the two Minsk Agreements in 2014-2015. In terms of *uti possidetis*, it is important to keep in mind that only Crimea is a 'legitimate' post-Soviet conflict with a former self-determination unit seeking enhanced legal status,[1296] whereas the self-proclaimed 'People's Republics' in Donbas lack a former ethnofederal status.

[1293] The United Nations Observer Mission in Georgia (UNOMIG) had been established in 1993 after the ceasefire between Georgia and Abkhazia was concluded. In 1997, the 'Geneva peace process' was launched, with Russia as a 'facilitator' and the OSCE and the 'Group of Friends of the Secretary-General on Georgia' as observers. S. Stewart, 'The Role of the United Nations in the Georgian-Abkhazian Conflict' 2 *Journal on Ethnopolitics and Minority Issues in Europe* (2003) 1-30 at 1-3.
In South Ossetia, the CSCE had set up a mission on 6 November 1992 to monitor the peacekeeping operation of Georgians, Russian and Ossetian, stipulated by the 24 June 1992 Sochi Ceasefire Agreement. Furthermore, a special position was created for the Personal Representative of the CSCE Chairman-in-Office for Georgia whose mission was to 'facilitate the creation of a broader political framework, in which a lasting political conciliation can be achieved based on the CSCE principles and commitments.' The CSCE, Personal Representative of the CSCE Chairman-in-Office for Georgia (November 1992), '17-CSO/Journal No. 2, Annex 2'.
Both formats were replaced in 2008 by Geneva International Discussion that attempts to produce a joint resolution to both conflicts.
[1294] Displayed, for instance, by Georgian official documents and legislation, including a *State Strategy on Occupied Territories: Engagement through Cooperation* (n 1116); and *Law On Occupied Territories* (n 1116).
[1295] It has been given priority due to some 13 000 people have died and two million having been displaced. S. Pifer, 'Five Years After Crimea's Illegal Annexation, the Issue Is No Closer to Resolution', *Order From Chaos,* Brookings Institute, 18 March 2019.
[1296] Moreover, this definition obscures the conflict somewhat, as it could be argued that it is more between Russian and Ukraine than any real grievances between the peoples of Crimea and the host state Ukraine. For instance, in the last internationally recognized election, the pro-Russia party that later gained power in murky circumstances and accomplished the transfer of Crimea to Russia only gained 4% of the vote in the peninsula.

The first Minsk Agreement was concluded under the auspices of the OSCE in September 2014 by the representatives of Ukraine, Russia, and the two 'People's Republics' of Donetsk and Luhansk.[1297] The Agreement and the subsequent Package of Measures for its implementation[1298] stipulated an immediate ceasefire monitored by the OSCE; decentralization of power in Ukraine; amnesty for the rebel forces and leaders; and setting up an OSCE mission to monitor the implementation of the Agreement.[1299] Notwithstanding, the ceasefire did not hold. After a series of tense international negotiations,[1300] a joint Franco-German plan that revived the original Minsk Agreement was signed in Minsk in February 2015. Like its predecessor, 'Minsk II' called for an immediate and an OSCE monitored ceasefire; amnesty to the rebels; and constitutional reform in Ukraine agreed together with the Donetsk and Luhansk representatives.[1301] However, Minsk II went significantly further than the original Agreement. It demanded that Ukraine specifies within 30 days which areas in Donbas will fall under the specification of a territory subject to a special self-governing regime as stipulated by the Ukrainian law 'On Temporary Order of Local Government in Some Regions of the Donetsk and Luhansk Regions'. In addition, Minsk II demanded that Ukraine begins a dialogue to hold elections in these areas and that all foreign armed forces must be withdrawn from Ukraine.[1302] Finally, it states that the Trilateral Contact Group would monitor the implementation of the Agreement, with special emphasis on 'the right to self-determination with regard to language', on Ukraine supporting Donetsk and Luhansk regions and assisting them with cross border cooperation with the Russian Federation, and that the regions can create their own people's militias (police) to maintain public order.[1303]

Following, Ukraine adopted the agreed-upon law on the 'special status' for the regions on 17 March 2015, but the government faced immediate criticism by the opposition.[1304] Furthermore, Ukraine and the regions were unable to agree on how to hold elections in the rebel-held areas, and the OSCE refused to send election observers to the conflict zone without an invitation by Ukraine.[1305] A chain reaction ensued - since there were no recognized elections held in the regions, they had no legitimate representatives that Ukraine could negotiate a decentralizing constitutional reform with. As the parties

[1297] *Protocol on the results of consultations of the Trilateral Contact Group*, signed in Minsk 5 September 2014.
[1298] *Package of Measures for the Implementation of the Minsk Agreements*, signed in Minsk 15 February 2015.
[1299] *Ibid.* paras. 1, 3, 4, 5, 11, and 13.
[1300] For example, in February 2015, President Hollande of France called the proposed Minsk II plan as 'one of the last chances' for peace in Ukraine. 'Ukraine crisis: "Last chance" for peace says Hollande', *BBC*, 7 February 2015.
[1301] *Ibid.* paras. 1, 2, 3, 5, and 11.
[1302] *Ibid.* paras. 4 and 10. In this case, Ukraine almost made it by the deadline, but several other deadlines passed a long time ago.
[1303] *Ibid.* para. 13.
[1304] For example, the leader of the Ukrainian Party Right Sector called Minsk II unconstitutional. 'Dmytro Yarosh: "Right Sector" to fight until complete liberation of Ukraine from Russian occupants', *Euromaidanpress,* 14 February 2015.
[1305] *Ukrayinska Pravda*, 3 July 2015.

failed to meet this demand, the advancement in fulfilling the other requirements stalled.[1306] The latest meeting between the Presidents of Ukraine and Russia in the Paris Normandy Summit on 9 December 2019 made moderate progress in terms of exchange of prisoners of war but failed otherwise to break the deadlock of the Minsk Process.

While the mediation efforts over the Donbas conflict have failed because of the lack of implementation, the mediation over the conflict in Crimea has not even begun. According to Pastukhov, the problem in Crimea is that it is impossible to agree on the status questions because of the diametrically opposite approaches of Ukraine and Russia.[1307] Both have a basis for claims for sovereignty over Crimea, and neither is prepared to compromise on this question.[1308]

This sounds rather familiar. Just like with the other post-Soviet territorial disputes, the overlapping claims on Crimea and the lack of trust generated by the armed conflict has forced the parties into a frozen conflict, a dead-end situation where they are unwilling to compromise on their irreconcilable demands for complete sovereignty.[1309] As Ukraine cannot accept any other solution than the return of Crimea and Russia has invested an incredible amount of political will and funds in cementing its hold over the peninsula, the sides have seen negotiations futile. This uncompromising attitude is missing in Donbas, and thus negotiations and international mediation there has been possible.

5.6.6 Conclusions on International Mediation Efforts

There are several lessons to be learned from international mediation attempts. First, extensive international participation does not guarantee results. Second, the lack of ethnic component or an external ethnic stakeholder in Cambodia made a lasting solution possible, whereas most of the territorial conflicts of the post-Soviet space remain unresolved. Thirdly and most importantly, the very metaphor of frozen conflict is misleading. In reality, the conflicts are not 'frozen' as several facts

[1306] According to Max Bader, the Minsk II failed because it was designed to fail: the separatists in Donbas and their Russian backers never intended to implement several of its articles, while Ukraine could not implement point 11 (giving Donbas special autonomy status) even if it wanted to, as this would never receive the needed majority in the Ukrainian parliament. According to Francisco de Borja Lasheras, the West must avoid 'Daytonization of Ukraine', meaning a process of entrenching partly artificial divisions and empowering spoilers for the sake of immediate peace at the expense of democracy and progress. Comments by Bader and de Borja Lasheras in J. Dempsey, 'Can the Minsk Agreement Succeed?', *Carnegie Europe*, 22 February 2017.
In December 2018, a Ukrainian news agency reported that not a single provision of Minsk II had been fully implemented. 'Almost entire "grey" zone in Donbas liberated by Ukraine without Minsk deal breach - adviser', *UNIAN*, 27 December 2018.
[1307] V. Pastukhov, 'Krymkong. What to Do When you cannot Leave, and It Is Impossible to Return', Opinion, *Republic*, 18 March 2019. Pastukhov concludes that the situation in Crimea is extraordinary and thus requires a joint Ukrainian-Russian administration.
[1308] P. Goble, 'Pastukhov Floats Idea of Joint Ukrainian-Russian Administration of Crimea', *Window on Eurasia*, 18 March 2019.
[1309] While the ethnofederal background is decisive in relation to the conflict starting and escalating in Crimea, I need to note that the underlying reasons for the conflicts go far deeper than the right to self-determination of the Russian speaking population in Crimea or Ukraine's East. For the political drivers of the conflict, see, inter alia, D. Treisman, 'Why Putin Took Crimea - The Gambler in the Kremlin' *Foreign Affairs*, May/June 2016.

have changed on the ground, making the situation very different from the early 1990s context.[1310] Indeed, what is frozen is the mindset of the conflicting parties and international mediators.

The disputing parties in frozen conflicts have been unable to move one inch from their political and legal dugouts, leaving no space between their stances for a compromise to form. The same dynamic has been present in all of the separatist conflicts of the successor states of socialist federal dissolutions. By participating in international mediation, the host state feels that it has walked the extra mile. Furthermore, it has been willing to meet the separatist halfway, offering autonomy in exchange for the recognition of its sovereignty and territorial integrity. In contrast, the separatist side sees this as insufficient and is unwilling to settle for anything but independence. In one case, the host state was able to finally move from its trenched position towards a compromise that would grant the separatists everything short of a full independence - but only when it was already too late to realistically reach an agreement. This happened between Serbia and Kosovo in November 2009,[1311] after Kosovo had taken its fateful step of the unilateral declaration of independence in February 2008 and a significant number of the UN member states had taken equally fateful steps to recognize it.

As I have accounted for previously, it is essential for the international community to mediate a solution to a territorial dispute before the diametrically opposing positions of the parties have been entrenched by mutual distrust due to armed clashes. The most important leverage that external actors can have on these internal disputes of a newly-independent state is over recognition and membership in international organizations. In some cases, international actors can hold additional leverage based on the political aspirations of the target state - the opinions of the EU had an enormous effect on the successor states of the SFRY and on those of the USSR that have aspirations for European integration.

Although the international community erroneously forfeited its leverage of recognition and withholding the UN membership in the 1990s, the EU still has a second chance to use its soft power to force a compromise on those successor states that have indicated their willingness to join the EU: Georgia, Moldova, Serbia, and Ukraine.[1312] Moreover, the EU has additional soft power towards these states as well as Armenia and Azerbaijan through its European Neighborhood policy, which offers financial assistance to the countries close to the EU that meet the strict conditions of governmental

[1310] D. Lynch, *Engaging Eurasia's Separatist States: Unresolved Conflicts and De Facto States* (United States Institute of Peace, 2004) at 42.
[1311] A. Vasović, 'Serbia must reach agreement with Kosovo to join EU by 2025', *Reuters*, 7 February 2018.
[1312] However, this leverage does not extend to the separatists in Georgia, Moldova, and Ukraine, all of which lean towards Russia and aim to join the Eurasian Economic Union instead of the EU.

and economic reform.[1313] The process is normally underpinned by a detailed Action Plan agreed by Brussels and the target country, and it can include conditions regarding national minorities.[1314]

5.7 Between Peoplehood and Minority: Conclusions on the Socialist Federal Dissolutions

In this Chapter, I have demonstrated how all ethnofederalized successor states experienced either calls for autonomy or outright separatism of varying intensity. The ones that chose to continue the autonomous statuses of their subunits in some meaningful manner were able to secure a peaceful balance between the right to internal self-determination and territorial integrity, whereas the ones who chose to curtail seriously or to revoke previous autonomies have succumbed to separatist violence.

What is notable in these cases is that the choice of whether to continue or to completely ignore the former autonomous subunits was left to the successor states themselves, especially in the cases of the USSR. This troubling interpretation of the right to self-determination reveals the main legal problem in the socialist federal dissolutions. The lower-level subunits lacked the status to be recognized as peoples entitled to independence, but categorizing them as simple 'minorities' entitled to the minimum level of minority protection under the international conventions was such a fundamental decrease in their status and self-governing rights that a few of them chose to accept their new position. This, in turn, delegitimized the central authorities of the host state and led to state fragmentation. In most of the cases, the successor states lost the ensuing conflicts because of foreign intervention,[1315] whereas the separatists lost the aftermath of the conflicts, remaining stuck with an unrecognized status, which is highly unfavourable within a state-centrist international law framework.

As demonstrated by Maria Koinova using the examples of Kosovo, Macedonia, and Bulgaria, the key to whether a minority will challenge the new rule after the transformation from communism is not the absolute scope of the rights given to it in the new constitution of the host state, but rather the

[1313] In addition to other issues surrounding positive transformation. The 16 countries that comprise the European Neighborhood under this policy are Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, the Palestinian Authority, Syria, Tunisia and Ukraine. A. Staab, *The European Union Explained: Institutions, Actors, Global Impact* (Indiana University Press, 2011) at 156-157.
[1314] See, for example, European Commission, 'North Macedonia 2019 Report', *2019 Communication on EU Enlargement Policy*, Brussels, 29 May 2019.
[1315] By Russia in Georgia and Moldova, by Armenia in Nagorno-Karabakh, by Serbia in Bosnia-Herzegovina, by NATO in Kosovo and by Kosovo War veterans in Macedonia.

relative change of minority's status in comparison to its prior constitutional position.[1316] The ethnofederal conflicts in the post-Soviet space support her argument.

As I have argued in the previous Chapters, in order for *uti possidetis* to fulfil its role as the guarantor of peaceful change of sovereignty via retention of the old administrative borders, the recognizing states - wielding prominent power with their recognition decision - must take into account both internal and external frameworks at the moment of the dissolution. The legal status of an ASSR in 1990 is a case in point. Under the USSR constitutional framework, it was a constituent part of both the USSR and the host SSR but only on the basis of 'free self-determination of peoples'; it possessed all state power on its territory that was not expressly transferred to the USSR or the host SSR; it was governed by its governments under its Constitution; it had its set of national emblems; and it held a veto right to any changes on its territory.[1317] It is quite understandable that when the newly-independent host state decided to abolish unilaterally all these rights and the international community promised them only the minimum minority rights framework amounting to a little more than the right to use their own language and choose their own nationality,[1318] the situation escalated into a separatist uprising in most of the ethnofederalized successor states within months of independence. One should approach the situation using the terminology that the parties are used to, in this case, by negotiating a settlement between the center and the subunits with *different levels of self-determination rights*. As the Soviet theory of sovereignty allowed a hierarchy of sovereign powers, the non-recognition of the lower-level subunits' rights by the recognizing states was not just ignorant, it was outright dangerous.

In addition to the distrust that the former ASSRs and AOs have had in relation to their host state, they have inherited a reciprocal trust towards Russia. This is quite natural - in the Soviet era Moscow often acted as a mediator over the disputes between the SSRs and their subunits, and the ASSRs had even had a right to stay within the USSR if their host state would choose to secede.[1319] Since the early 1990s, Russia has been involved in the conflicts, both as a mediator and as an indirect participant.

[1316] Koinova (n 877) 84. The Bulgarian case not covered in this Chapter was about the rights of the minorities there, most prominently Turks who made up around 9% of the population at the end of the Cold War. As demonstrated by Koinova, Bulgaria has not suffered from serious ethnic clashes even though it prohibited the formation of nationalist parties and any kind of territorial devolution due to the fact that the relative change of the minorities' position was not significant compared to the socialist era. *Ibid*. at 12.
[1317] See subchapter 3.7.4. The case of Kosovo is even more blatant example of downgrading in status, as it held even stronger autonomy than the ASSRs.
[1318] Referring to the case of the Serbs in Croatia and Bosnia-Herzegovina, the Badinter Commission demanded that 'the Republics must afford the members of those minorities and ethnic groups all the human rights and fundamental freedoms recognized in international law, including, where appropriate, the right to choose their nationality'. *Opinion No. 2* (n 289).
[1319] However, no ASSR was able utilize this law as the USSR dissolved before any of them could hold the mandatory referendums.

The tragedy and irony in the international mediation efforts is that they are trying to achieve the same thing that the 'minorities' had been demanding in the early 1990s - internationally guaranteed territorial autonomy and internal self-determination. For example, in 2009, the parties of the Minsk Process agreed on the set of principles to settle the conflict over Nagorno-Karabakh as 'a reasonable compromise based on the Helsinki Final Act principles of Non-Use of Force, Territorial Integrity, and the Equal Rights and Self-Determination of Peoples'. The principles included the return of Nagorno-Karabakh to Azerbaijan with international security guarantees for its self-governance.[1320] Similarly, on 30 May 2006 the Serb side finally tried to offer Kosovo a UN-supervised autonomy.[1321]

Notwithstanding, this is not a case of better late than never. The ethnic conflicts of the 1990s - in 1992 over Transnistria, in 1992-1993 over Abkhazia, in 1991-1992 over South Ossetia, in 1992-1994 over Nagorno-Karabakh and in 1998-1999 over Kosovo – mostly annihilated any potential compromises between the parties, complicated the national building processes in the affected successor states and brought into power veterans of the secessionist wars in the subunits' side whose legitimacy was partially bound with the tough line against any re-incorporation. The fact that the OSCE, the UN, the EU, and other international organizations and individual countries have invested so much time and resources into the mediation processes without much progress in over 25 years speaks volumes on the irreconcilable positions of the parties. This is why there needs to be adequate international involvement at the time of the dissolution before the conflict erupts and while the international community still wields the political weapon of recognition.

[1320] *Statement by the OSCE Minsk Group Co-Chair countries*, 10 July 2009.
[1321] <*https://www.rferl.org/a/1068774.html*>. Kosovo rejected the proposal as unacceptable and unrealistic.

6. The Theory of Orderly State Dissolution: *Uti Possidetis Meritus*

In the previous five Chapters, I have presented the evolutionary logic of the *uti possidetis* (*juris*) doctrine, alongside the internal and external frameworks that have to be taken into account with its application. Moreover, I have analyzed the endemic territorial conflicts that are direct symptoms of the inadequate adaptation of *uti possidetis* in the socialist federal dissolutions, demonstrating both the original legal problem and its real-life impact. In this Chapter, I formulate my (*uti possidetis*) *meritus* proposal based on the key findings of the dissertation.

Meritus is a modified version of the *uti possidetis* doctrine, based on the latter's evolutionary nature. As demonstrated in Chapter 2, *uti possidetis* needs to evolve alongside other international law principles. This evolution took place insufficiently in the socialist federal dissolutions, producing territorial conflicts. I claim that the current version is still based on its latest successful application cycle in the 1960s and is inadequate to settle the competing claims of self-determination in a different post-Cold War setting. However, *uti possidetis* can be restored to a functioning mode via updating it into the contemporary international law framework by utilizing the *meritus* formula. As presented in Chapters 3 and 4, under the *meritus* variant *uti possidetis* is applied in a manner that takes fully into account both internal and external legal frameworks relating to a particular state dissolution. This amounts to establishing the exact level that *public international law* and the *constitutional order of a state* provided for the ethnic group in question at the moment of the dissolution or independence.

6.1 Introduction: Two Sides of *Uti Possidetis Meritus*

As a modification of existing international law doctrine and relying on its authority*, meritus* has two notable uses for the contemporary international law - one oriented in the past and one in the future. First, in the cases of state dissolution or independence that have taken place since the third cycle of *uti possidetis* in the early 1990s, *meritus* can be used to look backwards in order to understand the claims of a particular separatist movement and to re-start that particular conflict mediation from a more realistic basic assumption. In relation to the territorial conflicts of the post-Soviet space, *meritus* can provide insights from the internal dynamics of ethnofederalism that are needed to coordinate the conflicting parties' competing claims. In this role, *meritus* advances as a baseline solution for these conflicts *an asymmetric territorial settlement* that acknowledges the former ethnofederal subject as a self-governing unit. Accordingly, the new self-governance arrangement is based on the previous

status of the unit. It is realized via territorial autonomy with distributed powers supplemented with consociation agreement and a clear mechanism for policy coordination and dispute resolution. Moreover, this solution has to be entrenched in both internal and international law while simultaneously re-affirming and solidifying the host state's territorial integrity and sovereign status.[1322] In this role, *meritus* seeks to find feasible solutions to territorial conflicts *by conceptualizing a particular state dissolution dynamic*. By providing an *ex post facto* framework for the mediation efforts of a given post-Soviet territorial conflict, *meritus* demonstrates what the lower-level units should have been awarded according to a legally more consistent interpretation of the *uti possidetis* doctrine. This, in turn, can provide fresh ideas and proposals into the cases currently under international mediation that I analyzed in Chapter 5 - Abkhazia, South Ossetia, Nagorno-Karabakh, and Transnistria.[1323] In sum, the settlement of overlapping claims on territory and self-determination in a state dissolution context is possible only after understanding the background and scope of the subunits' demands.[1324]

The second form of application of *meritus* is a *de lege ferenda* proposal to ensure that an erroneous utilization of *uti possidetis* does not again bring about territorial conflicts. The bipartition formula that was applied in the early 1990s gave ethnic groups either all rights or no rights jeopardized the promotion of internal self-determination and was not in accordance with the evolution of *uti possidetis*. By rejecting this artificial division, *meritus* can find the middle ground between the competing and overlapping territorial claims before there is a point of no return in the form of armed conflict and the resulting loss of goodwill between the parties. Further, by factoring in both internal and external dimensions of state dissolution, *meritus* possesses the capacity to secure all internal borders. This is done via an *expanded recognition of internal borders in accordance with the internal and external self-determination dichotomy*, which bases recognition in the acknowledgement of the actual political divisions in place at the moment of the dissolution. In this role, *meritus* is a framework under which the rights of ethnic groups and minorities can be guaranteed and protected in a state dissolution context via *uti possidetis juris*.

[1322] In relation to Transnistria, Wolff has argued that any future agreement could provide 'an "international anchor" for Moldova's sovereignty (thus emphasising that Moldova is the sole subject of international law) and territorial integrity'. Wolff (n 1063) 20.
[1323] In addition, in a bit of a different context, there are still negotiations taking place in the cases of Kosovo and Ukrainian Donbas.
[1324] Notwithstanding, it is equally important to understand the irrefutable changes that have taken place in the attitudes of the conflicting parties. Any mediation proposal has to be based on the situation of the 2020s, not on that of the early 1990s.

Therefore, when a new state is emerging, *meritus* can be used to recognize areas that have a potential for ethnic conflict and to find a balance between the competing territorial claims before the situation escalates and while the international community still has leverage over recognition.[1325] Subsequently, *meritus* can prevent incompatible self-determination claims from escalating into the false choice of providing for an ethnic group either all rights or no rights. This zero-sum approach ignited the territorial disputes in the successor states in the first place. This, in turn, can restore *uti possidetis* into its original role as a peace project, aiming to achieve a peaceful change of sovereignty in the case of state dissolution. In sum, I propose that the international community changes its black-or-white categorization and expands its view of the internal borders. This varies on a case by case basis, but in the case of the socialist federations, the essential component is to include the notion of *different levels of sovereignties* that the dissolved state entity used to recognize. To paraphrase the ICJ, this is the only way to take a correct 'photograph'[1326] of the situation prior to the dissolution.

Many scholars have noted that the abolishment of the socialist era autonomies has led to territorial conflicts in the successor states.[1327] While my approach shares this premise, it has two distinct features that can provide a fresh perspective to the issue. I argue for a new legal framework based on the existing international law, especially on the *uti possidetis* doctrine. Moreover, my formula utilizes the tools that exist by default in a state dissolution or independence context - the issue of recognition and a set of soft power instruments, especially effective with those states that see their future in the EU.[1328] Timing is of the essence. For example, after the fact of recognition that particular leverage is lost.[1329]

There are three key insights that *meritus* builds upon when establishing a new framework for an orderly state dissolution that settles the overlapping claims on territory based on the right to self-

[1325] After which it is usually much harder to find common ground. See subchapter 5.7.
[1326] 'It (*uti possidetis*) applies to the State as it is, i.e., to the "photograph" of the territorial situation then existing' (*Frontier Dispute* (n 2) para. 30).
[1327] See, inter alia, Cuffe and Siroky (n 1237) 46; and T. De Waal, 'Revenge of the Border', *Carnegie Europe*, 8 December 2016.
[1328] For example, the fact that Macedonia was seeking membership of the EU and NATO gave these organizations a certain amount of leverage over the Macedonian leadership. When Macedonia signed a Stabilization and Association Agreement with the EU in April 2001, Prime Minister Georgievski promised to meet a June deadline for improved relations between Macedonians and Albanians. K. Kubo, 'Host State Responses to Ethnic Rebellion: Serbia and Macedonia in Comparison' in Cabestan and Pavković (n 1234) 82-98 at 93. This also explains the EU's passivity and poor record in trying to help to solve the Nagorno-Karabakh conflict: as neither Armenia nor Azerbaijan are aiming for EU integration, the Union lacks leverage over the parties.
In relation to the secessionist attempts in Scotland and Catalonia, the EU has taken the stance that if independent these states would not get an automatic membership. S. Carrell, 'Barroso Casts Doubt on Independent Scotland's EU Membership Rights', *The Guardian*, 12 September 2012; R. Emmott and G. Jones, 'Independent Catalonia Would Need to Apply to Join EU: Juncker', *Reuters*, 14 September 2017. This factor would certainly have to be taken into account if Scotland or Catalonia would renew its bid for independence. This reflects the EU's continuous soft power leverage over self-determination disputes in Europe and adjacent areas.
[1329] There is no applicable doctrine on withdrawing recognition, although this has taken place in a few instances. For example, Tuvalu recognized Abkhazia and South Ossetia independent in 2011 but withdrew its recognition in 2014. Sahrawi Arab Democratic Republic has received 84 recognitions by the UN member states altogether, but of these 40 have withdrawn of 'frozen' their recognition since.

determination and territorial integrity. First, when coordinating the level of rights of the emerging state's national groups, there needs to be a *reasonable balance* between the division of power, including territorial autonomy and power-sharing in the common state institutions.[1330] The latter includes political consociation, i.e., guaranteed group representation in the executive and legislative organs of the state. The determinant of a successful political consociation is the right balance. For example, the settlements in Macedonia, Kosovo, and Bosnia-Herzegovina yielded notably different results - Macedonia achieved a workable agreement between minority empowerment and state functionality,[1331] whereas Bosnia-Herzegovina is so heavily tilted towards the former that it fails to deliver a functioning state model.[1332] Kosovo has a mostly operational state structure but with implementation problems.[1333]

Second, when there is an attempt to empower a national group through territorial autonomy or inclusion into the state organs, the main factor whether the group in question will accept the new framework is not the actual scope of these rights but the *relative change of their status* in comparison to the previous position.[1334] This is what has obviously gone wrong with the post-Soviet mediation efforts. The inadequate understanding or knowledge of the ethnofederal system led the international community to misinterpret the emerging ethnic conflicts and amounted to the mediation proposals being way too little way too late. As ethnofederalism continues to affect the discourse of the participants, it is also the frame of reference where possible solutions might be accessible.

Third, there is no credible alternative to updating *uti possidetis* in the international legal system. As the CSCE Report in 1991 noted that '[i]ssues concerning national minorities, as well as compliance with international obligations and commitments concerning the rights of persons belonging to them, are matters of legitimate international concern and consequently *do not constitute exclusively an internal affair of the respective State*'.[1335] The only alternative to an orderly *uti possidetis* dissolution is that the competing claims to statehood in ethnically mixed areas are solved by the use of force, which in turn contributes negatively to the preservation of international peace and security.

[1330] Jenne and Huszka (n 1193) 118.
[1331] *Ohrid Framework Agreement*, signed on 13 August 2001.
[1332] *General Framework Agreement for Peace in Bosnia and Herzegovina* (n 790).
[1333] *Comprehensive Proposal for Kosovo Status Settlement* (n 271) and the subsequent *Constitution of the Republic of Kosovo*, signed on 7 April 2008.
[1334] Koinova (n 877) 84.
[1335] *Report from the Meeting of Experts on National Minorities* (n 867), Chapter II. Italics mine.

In sum and as accounted for in Chapter 4, the international community made the right decision to insist upon the rights of national groups and minorities in exchange for recognition in the early 1990s, but sadly did not follow through with this commitment. As noted by Ian Brownlie, according to *uti possidetis* 'the change of sovereignty does not *as such* change the status of a boundary, and thus pre-existing disputes will subsist as an aspect of the principle of continuity'.[1336]

Therewith, in order to demonstrate how the pre-existing disputes continue to linger on despite *uti possidetis* supposedly having solved the self-determination questions in the post-Soviet area, in the following pages, I advance my argument for *meritus* that does not exclude the lower-level ethnofederal boundaries. I begin by presenting the two forms of application for *uti possidetis meritus* that unite the key insights from the past Chapters and the different proposals advanced in territorial conflicts in the post-Soviet space and elsewhere since the end of the Cold War.[1337]

6.2 *Uti Possidetis Meritus* as a Mediation Tool

The first potential application field for *meritus* is in the current international mediation efforts. Although I am using the post-Soviet cases as examples in this subchapter, *meritus* is a principle of general scope. As such, by using *uti possidetis* to delineate borders while simultaneously taking into account the combination of internal (former constitutional order) and external (contemporary public international law) factors at the moment of host state's independence, *meritus* specifies the extent of the right to self-determination of a designated internal border.

While there are several comprehensive proposals to solve a particular post-Soviet or post-SFRY ethnic conflict,[1338] systematic proposals for the general framework have been lacking. The current research of frozen conflicts is fragmented, and mostly on the field of political science. *Meritus* complements the research field by proposing a conclusive framework for the ethnofederal conflicts of the post-Soviet space that is based on general principles of international law - mainly, an updated version of the *uti possidetis* doctrine, the right to self-determination, and territorial integrity of states. It has a clear advantage to the proposals advanced thus far, as the understanding of the asymmetrical

[1336] N 225.

[1337] For example, by the European Center for Minority Issues: Kosovo. See also A. Zeqiri, P. Troch et al, 'The Association/Community of Serb-Majority Municipalities: Breaking the Impasse', *European Center for Minority Issues: Kosovo*, June 2016; Rossi (n 1283) 867-889; S. Wolff, 'Cases of Asymmetrical Approaches to State Design' in M. Weller and K. Nobbs (Eds), *Asymmetric Autonomy and the Settlement of Ethnic Conflicts* (Penn, 2010) 17-47; and Wolff (n 1063). In addition, I have utilized Will Kymlicka's theory on 'group-differentiated rights' and commentaries on it. The theory explains why certain rights in a state are group-differentiated, i.e., why the members of certain groups should have rights regarding language, representation, etc., that the members of other groups do not have. W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, 1995) at 34.

[1338] See, inter alia, Wolff (n 1063) on Transnistria, Rossi (n 1283) on Kosovo, and Wheatley (Wheatley in Weller and Nobbs (n 1291) 213-230) on Georgia.

ethnofederal model helps to mold compromise solutions that both of the parties have already found acceptable during the socialist federal era. Finally, *meritus* gains legitimacy from the conflicting parties by an in-depth understanding of the ethnofederal system and by being derived from public international law. In sum, assuming that there is any room left for compromise in these prolonged frozen conflicts, *meritus* has a better chance of succeeding than the numerous previous attempts.

That being said, one should not oversimplify the situation as there are two major difficulties in trying to reproduce the mostly harmonious coexistence of the federal times. First, previously there existed a central government that mediated between a host state and its subunits. This problem should be acknowledged, and any lasting resolution should consist of mechanism for dispute or be entrenched to international law, for example, via a UN Security Council resolution.[1339] Second, as I mentioned earlier, the events since the successor states achieved their independencies, including outright rejection of their subunits' right to autonomy and subsequent armed clashes, have destroyed a significant amount of goodwill needed to achieve a compromise solution through international mediation. While there are no easy answers to this problem, credible international guarantees for any settlement would certainly increase the chances for the parties to reach and uphold an agreement.[1340]

I have identified five main components that have to be included in any compromise proposal for a post-Soviet territorial conflict involving former ethnofederal subunits: territorial autonomy, a power-sharing agreement with systemic policy coordination, a consociation agreement, mechanism for dispute resolution, and some form of international guarantees. In addition to these, every case has its unique elements, and *meritus* can contain special provisions such as exclusions, demilitarization, or other international concerns.[1341] Finally, while the negotiations are ongoing and the final status is being settled, the basic human rights and freedoms of the population have to be guaranteed and monitored by external forces. A suitable model for this was UNMIK's 'Standards before Status' policy, which in effect froze the status negotiations temporarily to ensure first the protection of human and minority rights, the implementation of the Council of Europe's Framework Convention for the Protection of National Minorities, and effective mechanisms in response to any violations.

[1339] For example, the UN Security Council resolution 1371 confirmed the Ohrid Agreement between Macedonia and its Albanian minority. *S/RES/1371*, 26 September 2001.
[1340] One good example is the 1997 Memorandum on Transnistrian autonomy in which the Russian Federation and Ukraine are specified as the guarantor states of the autonomy arrangement. The 2005 *Law on the Main Notes about Special Legal Status of Settlements of Left Bank of Dniestr* (n 1067) Art. 12 likewise calls for international guarantees.
[1341] For example, the Cambodian Peace Agreement called for the 'permanent neutrality' of Cambodia. See subchapter 6.2.1.

6.2.1 Territorial Autonomy

As the post-Soviet internal conflicts revolve exclusively around territory, there is no credible alternative to the territorialization of autonomy.[1342] The Soviet ethnofederal model was based and found legitimacy in providing 'homelands' for the multinational peoples of the federation. It is no coincidence that all but one of the eight ethnofederalized successor states faced separatist challenges from their subunits, compared to none of the non-ethnofederalized successor states.[1343] Indeed, territorial autonomy is the most workable solution as it is seemingly equally acceptable to both the conflicting parties and to the international community - it is in accordance with the ethnofederal system that conflicting parties have found legitimate in the past, and with territorial integrity of the successor states that the international community posits such a value to and has insisted upon.

For a territorial autonomy to work, it requires clearly demarcated borders. The baseline scenario should be the obvious, stemming from the *raison d'etre* of *uti possidetis*: to advance the peaceful resolution of territorial disputes by preserving the former administrative borders. Therewith, the territorial autonomy for Abkhazia in an independent Georgian state should be within the confines of the former ASSR of Abkhazia.[1344] In some special cases, there might be a need to determine the will of the population in question by a referendum, which could be used either to map out possible alternatives for self-governing status or to approve the final status after negotiations have been concluded. However, as the status is based on *uti possidetis*, before a referendum takes place, the forcibly displaced peoples need to be allowed to return on a voluntary basis.[1345]

6.2.2 A Power-Sharing Agreement

The question of power-sharing is essential for the success of an autonomy model, but also a potential flashpoint in negotiations. This is due to the fact that the former lower-level ethnofederal units are very aware that there is no longer a federal center to intervene on their behalf and will thus certainly aim to maximize their power within the organs of the parent state. Conversely, the successor state wants to keep the subunits' interference at a minimum so that they cannot compromise the functioning

[1342] Other autonomy alternatives include personal and cultural autonomy (see M. Weller, 'Introduction' in M. Weller and K. Nobbs (Eds), *Asymmetric Autonomy and the Settlement of Ethnic Conflicts* (Penn, 2010) 1-16 at 3), but these would be unsuitable and unacceptable for the former post-Soviet minorities with ethnofederal background.
[1343] See Chapter 5.
[1344] In some cases involving ethnic minorities that did not possess a prior ethnofederal unit, there might be a need for a referendum to establish which communities would be willing to join the new autonomous entity. This has taken place in Moldova (Gagauzia) and Macedonia (Ilirida). As neither of these peoples had a former ethnofederal unit, there was a pressing need to demarcate the new entity.
[1345] After an external monitoring body has deemed the situation safe for them to return. This is a particularly important issue in Abkhazia and Nagorno-Karabakh, increasingly important in Ukraine, and less important in Moldova.

of an independent, sovereign state. These are equally legitimate concerns, and they need to be carefully balanced in any settlement proposal.

Therefore, while there can certainly be almost endless possibilities for a power-sharing agreement, the mediation history in the post-Soviet context proves that for an agreement to be perceived legitimate, it has to be based on the previous power-sharing arrangements. Consequently, we need to revisit the legal statuses of the ASSRs, the AOs, and the SAPs.

In brief, the ASSRs were the second-level ethnofederal units with extensive self-governance. They had a governmental structure that was almost an exact parallel to its host state's, including their own legislative, executive, and judicial systems. The ASSR territory could not be altered without its consent, and significant downgrading of its autonomy would have to be codified in the federal Constitution. However, as a major and noteworthy limitation in relation to their status, the ASSRs did not have the right to independent foreign relations or secession.

This status should form the fundamentals when drafting a sustainable autonomy arrangement for a former ASSR. These units have been particularly prone to ethnic conflicts, as Abkhazia, Chechnya, Crimea, and Transnistria all held the ASSR status during the Soviet era. The international mediators should acknowledge that these peoples were recognized as 'nations' in the ethnofederal system and had comprehensive self-governance arrangements that enabled them to run their mini-states relatively freely under their own state structure and state emblems. Following, based on these factors, any attempt for abolishing or significantly curtailing these autonomies would certainly be challenged.

Nevertheless, a closer look at the legal position of the ASSRs in relation to the federal center reveals that it remained notably lower than the host SSR's, and an appropriate continuation of the ASSR status does not entail a right to independent statehood. It does not even have to mean confederalization or federalization of the host state, as it can be accomplished via an autonomy arrangement.[1346] Since the ASSRs did not have a right to have independent foreign relations or a right to secession, it is within the parameters of *meritus* that they remain as a part of the host state and that their territorial autonomy does not have external dimensions, apart from possible international guarantees or dispute settlement mechanisms.

[1346] For example, in the early 2000s, Moldova was ready to accept for Transnistria a degree of autonomy that would have been even more advanced than that of Gagauzia, which is frequently mentioned as an international model. However, Transnistria insisted on a confederation, allowing it to block any major foreign policy decisions and giving it a right to secession.

Consequently, when forming a sustainable autonomy arrangement for the former AOs, the international mediators should begin by acknowledging their decisively more limited legal position. The AOs were on the third, pronouncedly lower status of self-governance than the 'nations' that received their own ASSRs. In contrast, the status of an AO was given to smaller 'nationalities' that were lower in the ethnofederal hierarchy. The AOs did not possess any state-like attributes such as their own parliaments, governments, or constitutions, and even their territory could be changed without their consent. Yet, one should not dismiss these autonomous statuses as their continuing existence as self-governance units were constitutionally guaranteed - it was only possible to abolish an AO with its consent and this would have to be codified in the federal Constitution. Due to this feeling of entitlement, the former AOs of Nagorno-Karabakh and South Ossetia have risen to fight for their internal self-determination and to challenge their host state.

To summarize, the status of an AO resembled more of a 'normal' autonomy with constitutional guarantees. In this sense, solving the status of a former AO should be easier than that of the former ASSRs. A limited autonomy arrangement should not be seen as any compromise of the sovereignty of the host state, especially in those cases where the AO was only included in the host's territory during the federal era.[1347] Nevertheless, international guarantees play a decisive role given the power imbalance and the lack of goodwill between the former AOs and SSRs, as well as their history of using the federal center as an outside mediator in the case of a dispute.

Finally, there is the case of the former SAP of Kosovo, the second-level unit of the SFRY. It is very illustrative as it shows that no matter how much international involvement was invested upon the negotiations, there was no way around the Kosovo status impasse. Additionally, it is not a coincidence that this is the only former ethnofederal subunit that has received a substantial recognition for its independence. The crux of the matter is that the last SFRY Constitution (1974) had created a de facto confederation, with Kosovo as a de facto Republic (equivalent to the SSRs of the USSR), albeit without the right to secession. Under the Constitution, Kosovo was a constituent unit of the SFRY, with its governmental structure that had 'no vertical superiority or subordination' towards the host state's organs.[1348] Moreover, through the system of 'consensus in decision-making', Kosovo held the

[1347] This took place in the cases of the ASSRs of Transnistria and Crimea, and the AO of Nagorno-Karabakh.
[1348] *Written Comments of Slovenia* (n 664) 30.

same veto right as the Republics over many aspects of the federal legislation, including any changes to its status or territory.[1349]

This arrangement produced two problems. First, any disagreement between the Republics or SAPs could paralyze the federal organs, as happened in 1991, culminating in the federal collapse. Second, when the SFRY dissolved, the international community was at first unsure how to handle the question of Kosovo. Eventually, it was decided that only the Republics should be recognized independent. When added to the gradual abolition of Kosovo's autonomy in 1989-1992, this led to the rejection of the legitimacy of the Serb rule. After the situation escalated into open violence and NATO and UN had to intervene, the status settlement process led into an inevitable dead-end: realistically, to Kosovars, an acceptable compromise solution could not amount to less than the confederal arrangement of the 1974 SFRY Constitution - but this, in turn, could never be acceptable to Serbia. Thus, when this compromise was in effect taken from the table, there were just two uncompromising alternatives available: an autonomy arrangement giving Kosovo fewer rights than in the late SFRY era,[1350] or an internationally supervised independence that ultimately took place in 2008.

Under *meritus*, the application of *uti possidetis* should recognize and include the self-government institutions as they legally were at the moment of state dissolution. The level of self-governing rights should be determined by the former ethnofederal position of the subunit in question. Every power-sharing agreement would naturally be unique, but in a crude form, there would be three main types of agreements stemming from the previous statuses of the subunits and the application of *uti possidetis*. The highest level of internal self-determination should be provided for the former ASSRs, second-level for the former AOs, and the lowest level for those units that did not have an active ethnofederal status at the moment of the federal dissolutions.

The last variant would be the most pervasive and the only one applicable in a non-ethnofederal setting.[1351] It should entail enhanced local governance of some demographically distinct

[1349] See subchapter 4.2.5.

[1350] This, while seemingly less controversial of the two options, was in fact not realistic. The bloody war and ethnic cleansing of 1998-1999 had destroyed the last vestiges of a common state idea. The only workable solution would have been something that took place in Bosnia-Herzegovina, which would have amounted to almost the same situation as what we have today - an aspirant state of Kosovo that functions on a daily basis outside Serbian state framework.

[1351] Potential target areas are numerous. For example, just to name a few in Europe, there are active separatist political movements in Basque, Catalonia, Corsica, Donbas, Flanders, Republika Srpska, and Scotland. A hypothetical dissolution of, for example, Bosnia-Herzegovina without consensual agreement between the parties would create two independent states. However, *uti possidetis meritus* would also recognize the rights of the lower-level units - the cantons of the Federation of Bosnia and Herzegovina - as well as the recognized minorities in the successor states.

municipalities, an exemplar of which is the Ohrid settlement in Macedonia.[1352] This level should be provided for all the recognized minorities lacking a previous self-determination unit[1353] and would be based on the CSCE/OSCE framework for minority protection, the EC Guidelines, and the 4 November 1991 Draft Convention of The Hague Peace Conference on Yugoslavia.[1354] This solution would provide a compromise that would be in accordance with both *uti possidetis*' evolutionary nature and the previous status quo that both the host states and the subunits had learned to accept.

The self-governance institutions should be modelled on the previous experiences and could contain symbols of statehood, such as own assembly, statehood symbols, and a constitution or a statute. In general, the symbolism should be taken seriously, and especially the former highest level units usually insist upon this. Some have argued that providing ethnic minorities with the vestiges of statehood might encourage them to demand more and more, eventually amounting to independence.[1355] However, my proposal is based on *uti possidetis* - these vestiges of statehood were already the norm for the ethnofederal units for decades, and reintroducing them would build up the goodwill needed to give a negotiated solution a chance of success. Thus, under *meritus*, the comprehensive settlement would give the subunits statute-making powers based on their previous position.[1356]

Just as in the Soviet era, a power-sharing agreement should have an exhaustive list of exclusive and joint competences. Again, every case would be different, as the rights of the ethnofederal units changed significantly in the late Soviet era transformation in 1990-1991, and there was considerable differentiation between the host SSRs.[1357] Notwithstanding, an important element of the asymmetric ethnofederalism is that the power-sharing needs to be accomplished through *devolution*, not

[1352] Weller (n 1342) 6.
[1353] These minorities could have had clearly demarcated autonomous borders with varying degrees of territorial self-governance (such as Catalonia and Scotland), but without federal history that used to realize the right to self-determination to its minorities by giving them territorial self-determination units. Subsequently, these minorities would certainly settle for less of status, as the main factor in igniting separatist uprisings was the relative change of minorities' position after dissolution of a former state.
[1354] E.g., in the Guidelines (n 4) the EC demanded that in order to gain recognition, the SSRs had to '[r]espect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights' and the '[g]uarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE'. In addition, there would be the highest level for the former SAP of Kosovo. However, in that case, it is of my opinion that the only realistic way forward is to accept Kosovo's independence as a *fait accompli*, even as I do not think this is unproblematic in terms of the general principles of international law.
[1355] According to Basta, the 'integrationist' school arguing for the slippery slope of autonomy leading into calls for independence includes Valerie Bunce, David Ciepley and Eric Nordlinger. K. Basta, 'The State between Minority and Majority Nationalism: Decentralization, Symbolic Recognition, and Secessionist Crises in Spain and Canada' 48(1) *The Journal of Federalism* (2017) 51-75 at 53.
[1356] For the ASSRs, this would mean a right to have their own constitution, for the AOs their own charter. Both instruments would obviously have to stay within the limits of their area of competence. The existence of the constitutions/charters and the inability of the host state to unilaterally make changes to them should be constitutionally guaranteed, just as in the federal era.
[1357] For example, the ASSRs of Karakalpakstan and Crimea obtained a significant raise in status and increase in their competences in 1991. See more in subchapters 5.3.1 and 5.3.3.

decentralization. In the latter case, a unitary state gives a territorial unit a chance to exercise public power on its behalf, in a clear subordinate position. This would not work in the post-Soviet context. Instead, there should be a full devolution of public authority, giving the autonomous a right to exercise direct public power in their own domain.[1358] This should be accommodated with the minority's own police force.[1359] Finally, there should be encompassing policy coordination in relation to both joint and exclusive competences.

One example of an extensive power-sharing agreement is that of the SAP of Kosovo in the 1974 SFRY Constitution, under which it had the same decision making powers than the first-level SRs on many grounds. Among other things, its consent was needed on any constitutional amendments, all-Union laws were decided on the basis of the agreement of the SR and the SAP assemblies, and both the SRs and the SAPs could request a special decision-making procedure in the SFRY Assembly.[1360]

Finally, a genuine self-governance arrangement should include power-sharing in the field of the judiciary. This should take the form of regional courts that - while being part of the unified judicial system of the state - would serve as the highest-instance court for the matters within the self-governance framework.[1361]

The inspection of the legal statuses given to the former Soviet subunits offers us an interesting legal archipelago with some recurring themes. In general and unsurprisingly, the former ASSRs have received a more comprehensive set of distributed powers. Furthermore, those SSRs that more or less continued the ethnofederal autonomy have fared notably better. This took place in Uzbekistan, Ukraine, partially in Georgia and, to a lesser extent, in Russia. Uzbekistan gave its former ASSR of Karakalpakstan an extensive autonomy to regulate its local affairs and governance, complimented with concurrent decision-making in the parliament of Uzbekistan that gives it a virtual veto right on constitutional changes.[1362] The power-sharing agreement between the Russian Federation and the ASSR of Tatarstan proclaimed the latter to be 'a sovereign state, a subject of international law

[1358] Weller (n 1342) 4.
[1359] In Kosovo - where there was no inherited ethnofederal subunit for the Serbs - the unitary state has adopted symmetrical representation in the civil service, according to which in the central level at least 10% of the positions are reserved for persons belonging to communities that are not majority in Kosovo and who fulfil the specific employment criteria. *Law No.03/L-149 on the Civil Service*, 14 June 2010, Art. 11.3.
[1360] *Written Comments of Slovenia* (n 664) 10.
[1361] This is what Stefan Wolff has argued for in the case of Transnistria. S. Wolff, 'A Resolvable Frozen Conflict? Designing a Settlement for Transnistria', *ECMI Brief 26* (November 2011) at 7. This has also being exercised, for instance, in Kosovo, where according to the Constitution of Kosovo Art. 114, 15% of Supreme Court judges must be members of minority communities.
[1362] See subchapter 5.3.1.

associated to the Russian Federation', which reserved for itself the right to conduct foreign relations, hold exclusive ownership of natural resources, and restrict military service of its citizens to its territorial jurisdiction.[1363] While Georgia breached the rights of Abkhazians and Ossetians, it managed to build a functioning autonomy for the former ASSR of Ajara, which obtained under a 2004 Constitutional Law a right to state symbols and its Constitution.[1364]Ajaran Parliament was given a right to legislate over its Government and Parliament, and cover such areas as agriculture, education, culture, and infrastructure.[1365] Finally, even after a decrease in its autonomous rights in 1996, Crimea continued to exercise normative regulation over numerous areas.[1366] The successor states have been notably less accommodating with their former AOs. Only Tajikistan and Russia have continued their autonomies,[1367] whereas the rights of the other former AOs have been outright abolished.

To conclude, the continuation of the Soviet-era autonomies in some meaningful form was both in accordance with *uti possidetis* and has produced peaceful national relations in the subject states. Accordingly, for any settlement proposals to be acceptable to the former ethnofederal subunits, the baseline scenario should be the continuation of the power-sharing agreement as it stood at the moment of the dissolution of the USSR in late 1991.

6.2.3 A Consociation Agreement

A reasonable autonomy arrangement often requires an appropriate consociation agreement, which is also found as a condition for meaningful minority protection in many of the EU's Accession Agreements.[1368] However, when trying to find a balanced solution for the territorial conflicts involving former ethnofederal units, it is crucial to recognize that - apart from the RSFSR - the successor states of the USSR were federal components but not federations in themselves. Consequently, *meritus* advocates for the continuation of the ethnofederal system, i.e., asymmetrical territorial autonomy, which does not have to include federalizing the host state. This is an important

[1363] Quoted in Hughes (n 892) 52. However, Tatarstan's autonomy was severely curtailed in 2017 when the Russian Federation refused to extend the power-sharing agreement between the two.
[1364] *Constitutional Law of Georgia on the Status of the Autonomous Republic of Ajara* (n 1106) Art. 2.
[1365] It also had a right to approve the local budget and the composition of the local Government. *Ibid.* Arts. 14 and 7.
[1366] These areas are agriculture and forestry; land reclamation and mining; public works, crafts and trades; charity; city construction and housing management; tourism, hotel business, fairs; museums, libraries, theatres, other cultural establishments, historical and cultural preserves; public transportation, roadways, water supply; hunting and fishing; and sanitary and hospital services. *Constitution of the Autonomous Republic of Crimea* (n 987) Art. 18(2).
[1367] Gorno-Badakhshan retains the AO title. It is described as an integral part of Tajikistan, and while notably not sovereign, its territory cannot be changed without its consent. It has its parliament, which has a right of 'legislative initiative'. See subchapter 5.3.2.
Russia inherited five AOs at the dissolution of the USSR. It promoted four of them to the 'Republic' status with somewhat enhanced rights and has retained the AO title for the only remaining Jewish Autonomous Oblast. See subchapter 5.2.
[1368] Rossi (n 1283) at 872.

distinction to make, as many of the mediation attempts have failed because they have insisted on federalizing the host state.[1369] For example, the deal breaker in the 2003 Kozak Memorandum to settle the Transnistrian issue was the demand to federalize Moldova, which would have given Transnistria a veto right in foreign policy decisions. The ASSRs, let alone AOs, did not have a right to independent foreign relations or a veto right to the host SSRs' relations.[1370]

Thus, any mediation attempts that are based on *uti possidetis* should start from the premise that the former ethnofederal unit is unlikely to accept a less of a position than a corresponding internal self-governing position than the one of the Soviet-era. This should not include the right to disrupt the activities of the host state outside its territorial autonomy. That being said, in some cases, a meaningful autonomy should contain a right to have an appropriate - but not decisive - say in the running of the state. This could be accomplished by qualified majorities in the host state's parliament in some specific policy areas that are important for the subunit. These qualified majorities could be predetermined or triggered according to a procedure. The aim is to give the subunit a limited veto power in areas that could be seen as absolutely essential to a functional autonomy arrangement.[1371]

For example, under the current constitutional system of Kosovo, a permanent Committee on the Rights and Interest of Communities within the Kosovo Assembly guarantees the 'vital interests' of communities in the legislative process. An interlocking regime promoting and protecting minorities includes Kosovo's ethnic groups into the running of the state.[1372] This has been accomplished via enhanced political representation and the entrenchment of parliamentary double-majorities in the

[1369] According to Wolff, by embracing asymmetry, 'states can avoid the dreaded "f-word" federalization'. Moreover, asymmetry gives 'a significant degree of flexibility to cater to the very specific situational characteristics that a conflict might bring with it, and that need to be addressed in its settlement'. Wolff (n 1334) 24.

[1370] The right of the ASSRs to establish foreign relations was before the 1990s rather symbolic but gained real meaning at the last stages of the Soviet federal era.

[1371] One could use as an example here of the 2007 Kosovo Status Settlement Proposal that envisioned a double-majority requirement for changing the subunit's Constitution and adopting laws of 'vital minority interest'. This should not be an expansive category. The key to a workable autonomy arrangement is that it does not paralyze the functioning of the state. Bosnia-Herzegovina could be seen as a cautionary example of this.

[1372] The UNMIK Regulation 2001/9 followed the 'group-differentiated rights' model of minority protection (n 1334) when setting up the 'Constitutional Framework for Provisional Self-Government'. According to Benedek, it went beyond the Council of Europe *Framework Convention for the Protection of National Minorities* (n 561) and the *European Charter for Regional or Minority Languages*. W. Benedek, 'Final Status of Kosovo: The Role of Human Rights and Minority Rights' 80(1) *Chicago-Kent Law Review* (2005) 215-233 at 221.

areas affecting them.[1373] However, the implementation of the minority protection regime has not been entirely successful.[1374]

Every individual autonomy arrangement would require the determination of the appropriate level of representation for the minority units based on numerous factors. Nevertheless, according to *meritus*, the guideline should be the previous consociation levels. In relation to the federal center, these were around one-third of the host state's representatives for the ASSRs and one-sixth for the AOs,[1375] and varied between equal and two-thirds representation for Kosovo. However, as there were significant differences between the ASSRs and the AOs, more relevant quota to be followed is the one of the subunit's representation in the host state's parliament. For example, this was around 3,33% for Nagorno-Karabakh in Azerbaijan's parliament and 4% for Gorno-Badakhshan in Tajikistan's parliament. In addition, in the more heterogeneous minority units, there would have to be consociation agreements for the subunit's parliament as well.[1376]

The autonomy settlement should be constitutionally entrenched in the legal system of the host state, and in some instances, it could be included in international agreements.[1377] The key is to find a balance between stability and flexibility: the autonomy arrangement should be hard to change (in order to have stability), but still flexible and dynamic rather than static arrangement.[1378] In other words, there need to be clear rules on how to jointly change the rules if need be.

Finally, consociation should be extended to judicial power-sharing, as an autonomy agreement cannot function without an impartial dispute resolution system. Moreover, minority representation in the

[1373] A double-majority requires that both all of the representatives and of all of the minority representatives voting in favor. M. Warren and A. Zeqiri, 'Decentralization or Destabilization? Striking an Ethnic Balance in the Balkans', *IPI Global Observatory*, 8 July 2016.
[1374] According to Adem Beha, while Kosovo's Constitution and subsequent legislation - most importantly Law on Protection and Promotion of the Rights of Communities - embeds almost all key international legal standards on minority rights, many of these remain unimplemented in practice. A. Beha, 'Minority Rights: An Opportunity for Adjustment of Ethnic Relations in Kosovo?' 13(4) *Journal on Ethnopolitics and Minority Issues in Europe* (2014) 85-110 at 86.
[1375] While the SSRs had 32 representatives in the main Soviet legislative body, the ASSRs had 11, and the AOs had five. The 1936 Constitution of the USSR (n 399) Art. 35, and the 1977 Constitution of the USSR (n 200), Art. 110.
[1376] This would be especially important in Abkhazia and Crimea. It has already happened in Kosovo, where the Constitution reserves 20 of the 120 parliamentary seats to minorities and guarantees that at least one minister has to be a Serb and one minister has to belong to another minority. Moreover, the Constitution created the 'Consultative Council for Communities' (started working in 2009), which serves as a channel of inter-ethnic coordination and consultation. *Constitution of the Republic of Kosovo* (n 1332) Arts. 60, 81, and 96. According to the OSCE Mission in Kosovo, the Consultative Council provides 'a forum for regular exchange between communities and institutions' that aims to 'provide a link between communities and Kosovo institutions; and to review draft legislation and policy the government endorses it, and ensure that the views of communities are taken into consideration'. The Consultative Council is composed primarily of representatives of all non-Albanian communities in Kosovo and of selected central-level institutions that address issues of special concern for communities. The OSCE Mission in Kosovo regularly monitors the Council's work. 'Performance and Impact of the Consultative Council for Communities: 2015-2016', *the OSCE Mission in Kosovo*, 14 December 2017 at 4-5.
[1377] Weller and Nobbs (n 1342) 4.
[1378] As observed by Wolff, all successful autonomies have seen significant changes to their frameworks over time. Wolff (n 1361) 22.

judiciary will build up trust for the common cause. Therefore, the highest courts of the state, including the Constitutional Court, should, in some cases, have a mandatory representation of the minorities.[1379]

6.2.4 International Guarantees and Mechanisms for Dispute Resolution

In addition to securing an autonomy arrangement through consociation in parliament - likely through a right to veto - and judicial system, the undeniable fact is that the long and consuming frozen conflicts have built up so much distrust between the parties that any credible agreement is going to need international guarantees. Throughout the Soviet-era, there was a need for an external guarantor and mediator, with the federal center assuming this role. Building up on this legacy is an obvious way to establish the amount of trust between the parties needed to reach and maintain a self-governance arrangement. International guarantees are also an effective way to commit external parties to the maintenance of the settlement. The obvious gain for the international community is to decrease threats to international peace and security, which all these conflicts spread even in their 'frozen' state.

There are several ways to guarantee an autonomy agreement internationally. First, a settlement can be achieved via an international peace treaty that has multiple signatories, such as the one in Bosnia-Herzegovina.[1380] Second, it can be confirmed by the UN Security Council resolution, as was done in the Cambodian settlement.[1381] This is very beneficial, as it gives the agreement added weight and has the potential to involve the Security Council to any violations. Finally, in the most difficult cases, a temporary international administration of the conflict area - such as UNMIK in Kosovo - might be needed. This could ensure the maintenance of the protection of human and minority rights, which in Europe would consist of fulfilling the OSCE's and Council of Europe's minority protection standards.

In addition to international guarantees, there might be a need to ensure that the autonomy agreement continues to function even when there are disputes. This should be secured primarily through consociation - in both the parliament and the Constitutional Court - that would give the protected minority a possible veto right over changes to its constitutional position. In some trickier cases, the need for outside mediation in dispute resolution would be imperative. This could be accomplished by a predetermined panel of mediators, involving quotas from both the disputing parties as well as from

[1379] *Ibid*.
[1380] *Dayton Peace Agreement Documents*, initialled in Dayton on 21 November 1995.
[1381] *S/RES/718*, adopted on 31 October 1991.

external countries.[1382] One possible model would be the Council for Interethnic Relations introduced by Macedonia in a constitutional amendment in 1991.[1383] It consists of the President of the Macedonian Assembly and two members from each of the nationalities and has the main function of considering issues of inter-ethnic relations in the country and making appraisals and proposals for their solution. The Macedonian Assembly is obliged to take into consideration the appraisals and proposals of the Council and to make decisions regarding them.[1384]

6.2.5 Special Provisions

The list of requirements for a functioning autonomy settlement for the post-Soviet frozen conflicts that I have provided in the previous subchapters is, naturally, a general set. By an in-depth understanding of the affected peoples' ethnofederal background, *meritus* is flexible and moldable enough to take into account the special circumstances of any particular case and can thus offer particular solutions. In addition to the previously listed requirements, these special provisions may include exclusion clauses, demilitarization options, international core issues, or referendums.

The exclusion clauses could address some potentially problematic areas between the host state and its subunits. For instance, to reassure the remaining Serb minority, the possibility of Kosovo joining Albania was banned by the UN Security Council resolution 1244. Likewise, the settlement with Gagauzia[1385] and the proposals for Transnistria[1386] have contained clauses that would allow the subunit to exercise external self-determination in the event of unification of Moldova with Romania.

Special provisions could also address international concerns, such as demilitarization or a non-aligned policy imposed upon the host state. This took place in Cambodia and has been suggested in Transnistria. They might also include such external concerns as language rights, for example, in the cases of Crimea and Donbas. Finally, special provisions could include an option for an internationally supervised referendum. It could be used to settle the status question in some future date,[1387] or to choose between competing proposals for autonomy. In the cases of minorities lacking a history of

[1382] Many international peace agreements include provisions for an impartial supervisory commission that settles disputes relating to the fulfilment of the peace agreement. See, for example, *Verification/Monitoring Mechanism: General Peace Agreement for Mozambique*, signed 4 October 1992.
[1383] N 1221. The Council was also mentioned in the Opinion No. 6 (n 226).
[1384] Amended Art. 78 of the Constitution of the Republic of Macedonia, quoted in V. Neofotistos, *The Risk of War: Everyday Sociality in the Republic of Macedonia* (University of Pennsylvania, 2012) at 140.
[1385] In 1994, the OSCE was able to obtain a wide-ranging settlement between Gagauzia and the central Moldovan government, later adopted in Moldovan organic law.
[1386] See subchapter 5.6.2.
[1387] This has been suggested in Nagorno-Karabakh, but only after the forcibly displaced persons have been allowed to return.

territorial autonomy, a referendum could establish which areas with a certain amount of minority peoples would be included in the territorial autonomy unit.[1388]

6.2.6 Conclusions on *Meritus* as a Mediation Tool

There have been two main, insurmountable obstacles to reach a compromise in the post-Soviet mediation formats since the early 1990s. First, the insufficient application of the otherwise correct legal rule breached the right to internal self-determination and territorial integrity of the subunits, causing the complete breakup of relations between them and the host state. Consequently, the international mediation efforts began as a reaction to the conflict, already in a far from ideal position to reach a mutually acceptable agreement between the parties.

Second, the negotiations have not acknowledged the legal breach that ignited the conflicts in the first place, but have instead focused on reaching a political solution based on the 'earned' right of the separatists to be a part of the negotiations based on their military successes. This is a reoccurring but fundamentally problematic framing of the right to self-determination that has taken place Abkhazia, Ilirida, Kosovo, Nagorno-Karabakh, Republika Srpska, South Ossetia, and Transnistria.[1389]

Meritus advances an argument against the current reactive system that, in effect, invites and rewards the use of force as a tool to settle self-determination disputes. Under *meritus*, the ethnic group's right to self-determination is acknowledged based on the combination of their previous position and *uti possidetis*, thus producing predictable and legitimate territorial solutions to competing territorial claims. The currently deadlocked mediation formats are in a dire need for new approaches. As phrased by Japaridze and Rondeli:

> 'These conflicts are not frozen at all - far from it: they are alive, brewing, draining our resources, obstructing the development plans and deteriorating our relations with neighbors. What is frozen, is the conflict resolution process, which perpetuates the existence of absolutely uncontrolled territories'.[1390]

[1388] This took place in Gagauzia in 1995.

[1389] In all of these cases, previously unrecognized or non-existent territorial units have earned a right for a seat in the negotiation table based on an armed uprising against the parent state. The cases of Ilirida, Kosovo, and Republika Srpska have already been successful - Kosovo is recognized independent by a majority of states, whereas Ilirida and Republika Srpska have received a constitutionally guaranteed, strong autonomy within their host state. Abkhazia, Nagorno-Karabakh, South Ossetia, and Transnistria are all taking part in the seemingly never-ending international mediation efforts on their future status.

[1390] T. Japaridze and A. Rodenli, 'Europe is on Georgia's Mind' in R. Asmus, K. Dimitrov and J. Forbrig (Eds), *A New Euro-Atlantic Strategy for the Black Sea Region* (The German Marshall Fund of the United States, 2004) 40-47 at 45.

6.3 *Uti Possidetis Meritus* as a Principle of the Preservation of Boundaries

The second potential mode of application of *meritus* is in the future state dissolution or independence frameworks. As accounted for in Chapter 2, the first two cycles of *uti possidetis* in the 1810s Latin America and the 1960s Africa and South-East Asia can be considered successes, and the borders drawn at the time remain mostly unchanged. Despite the fears of many, the maintenance of the 'non-natural' borders in Africa has produced relatively few territorial conflicts.[1391] Hence, the key accomplishment of *uti possidetis* is evident. Apart from a peaceful agreement between the parties - rarely forthcoming - there remain no plausible alternatives to drawing borders in the case of a state dissolution or independence. A more 'self-determination friendly' solution in the form of series of internationally supervised plebiscites would likely produce non-viable mini-states and never-ending mini-secessions. This leaves then only the 'might makes right' argument,[1392] an armed conflict to settle competing self-determination claims, which is in its very essence contrary to international law.

In conclusion, the problem with the third cycle of *uti possidetis* was the existence of several subsets of internal administrative borders. I argue that *uti possidetis* has always been successful *in relation to the borders it has recognized*. In the early 1990s, this meant the highest level of SSRs in the USSR and the SRs in the SFRY. However, the bypassing of the other internal borders left the lower-level subunits with a few choices. They could either hope that their newly-independent host state would continue to respect their autonomy - which took place only in a few cases[1393] - or they could choose to challenge the territorial integrity of the host state via an armed uprising.

Therewith, the third cycle of *uti possidetis* ended up producing ethnic violence and frozen conflicts that international law has been unable to solve ever since. This is an unsustainable situation from both legal and policy perspectives. *Uti possidetis* has to be updated for it to be relevant in the future. *Meritus* offers this update and aims to accomplish the original mission of *uti possidetis*: promoting the peaceful settlement of territorial disputes. In essence, my proposal calls for an *expanded recognition of internal borders*, which amounts to *inheriting territorial autonomy and systemic power-sharing*. Furthermore, *meritus* secures the compliance of the conflicting parties via three means: the authority of *uti possidetis*, external commitment in the form of international guarantees, and international recognition alongside other possible soft power tools.

[1391] There are few exceptions - the unilaterally declared states of Biafra and Katanga, the independence of Eritrea and the fragmentation of Somalia - but still significantly less than the expectations were in a Continent with most borders relative to its area in the world.
[1392] See n 158.
[1393] See subchapter 5.3.

6.3.1 Expanded Recognition of Internal Borders in Accordance with the Internal and External Self-Determination Dichotomy

As demonstrated in Chapter 4, the failure of *uti possidetis* in the 1990s was that its application did not take into account the evolution of the right to self-determination that had taken place since the second cycle. A clearly recognized content of the right to internal self-determination would have made it impossible to ignore the legitimate grievances of the lower-level ethnofederal subunits. However, the current version of the right to self-determination under international law is ambiguous - it gives 'all peoples' this right, but outside decolonization context, the right cannot seem to overrule territorial integrity. Thus, in a conflicting situation, territorial integrity triumphs, and the right to self-determination has to be accomplished in its internal variant, i.e., within the host state's borders.

In the cases of federal dissolution, the constituent peoples are not bound by the territorial integrity of the federal state as it ceases to exist. Therefore, in the socialist federal dissolutions, the right to self-determination of the first-level ethnofederal units was unchallenged, amounting to a right to independent statehood. Consequently, all of them were recognized as independent states.

The lower-level subunits likewise used to have a right to self-determination as recognized by the earlier federal state. After the dissolutions, this right was qualified by their - now independent - host state's territorial integrity, and thus they could not secede without the host state's approval. Hence, their self-determination should have been recognized as the internal variant. Notwithstanding, the international community erroneously recognized only the rights of the first-level units and left the lower-level subunits to the mercy of their new host states. As demonstrated in Chapter 5, all the successor states that inherited ethnofederal units and tried to abolish their autonomy faced ethnic uprisings and armed conflict. These tragedies were not simply political failings, as the insufficient application of the relevant international law principles played its part.

The key insight of *meritus* is that the feeling of entitlement plays a decisive role in whether a territorial conflict will erupt. For example, under the ethnofederal system, the subunits received their self-determination level based on *merit*, which amounted to a feeling of earned sovereignty.[1394] In 1991, this produced incompatible territorial claims - the SSRs felt entitled to unqualified sovereignty while the lower-level subunits felt equally entitled to the continuation of their autonomies. In addition, there was often a problem with the transfer of territory. In many cases, the lower-level subunits were only

[1394] Promotions and demotions of one ethnofederal tier were possible and quite frequent. For example, Karelian and Abkhazian SSRs were demoted, and four AOs were promoted to the ASSR status during the Soviet-era. See subchapter 3.5.

made a part of the host state during the federal era. This combination has made many of them emphasize that they have earned their autonomy and that they have never been a part of a unitary host state without it. Consequently and logically, they do not find the host state's unitary rule legitimate.

In the 1986 *Frontier Dispute* case, the ICJ clarified the content of *uti possidetis*:

> 'It (uti possidetis) applies to the State as *it is*, i.e., to the "photograph" of the territorial situation then existing. The principle of *uti possidetis* freezes the territorial title; it stops the clock, but does not put back the hands'.[1395]

While this is an entertaining metaphor, *uti possidetis*, in its current form, is not a 'photograph' of the territorial situation then existing. If it was, Abkhazians and Ossetians would not have been ignored and would not have started their armed challenge against the Georgian state. Rather, *uti possidetis* is a sketch, or a photograph after some editing has taken place. It affirms the borders *after* there has been a critical choice of which borders to include in the picture. In reality, the closer you zoom into the original picture, the more dividing administrative lines appear. In the early 1990s, the international community made a value choice, after which the chosen borders were highlighted, and the rest photoshopped out of the picture.

In general, the borders created by *uti possidetis* have great potential to be challenged by minorities. As long as there is no generally accepted solution to the clash between self-determination and territorial integrity, *uti possidetis* has to address their grievances. However, the current version of *uti possidetis* produces clear cut divisions between winners and losers. For example, in Georgia, its application led to giving all rights to the former SSR of Georgia while giving no rights whatsoever to the former ASSR of Abkhazia.[1396] As this is the latest major round of application of *uti possidetis*, if reapplied to a case of a state dissolution in the future, it has enormous potential to fail again.[1397]

Accordingly, *meritus* bases recognition in the acknowledgement of all political divisions in place at the moment of the dissolution. It aims to 'freeze' the internal legal order of the dissolving state entity and to establish which administrative borders have significance in the self-determination context. Most importantly, this includes territorial entities[1398] that have been designated as self-determination

[1395] *Frontier Dispute* (n 2) para. 30.
[1396] Abkhazia is even more controversial, as it held a SSR status until 1931, after which it had been demoted to the status of an ASSR.
[1397] Many scholars have called for reformation of the *uti possidetis* doctrine after the third cycle of the socialist federal dissolutions. See Klabbers and Lefeber in Brölmann (n 49) 76), and Allen and Castellino (n 49) 24).
[1398] *Uti possidetis* is concentrated exclusively on borders, and thus, I focus here on territorial autonomy and not on its personal or cultural manifestations.

units or that have been provided with a territorial autonomy.[1399] After the target group has been established, *meritus* can proceed to provide content for the retention of borders.

6.3.2 Inheriting Territorial Autonomy and Constitutional Power-Sharing

After identifying the affected internal borders, *meritus* salvages these borders and the self-governance arrangements that come with them into the new state.[1400] Accordingly, the emerging state inherits the internal borders as drawn by the former sovereign. While this certainly qualifies its territorial sovereignty, it is how *uti possidetis* functions. If the emerging state that has self-determination units within its borders wants to maintain its full territorial extent - often only acquired under the former sovereign - it has to accept the limitations over some of this territory. If it is unwilling to do so, the only alternative is to accept the external form of self-determination for its subunits and the partial forfeiting of its territorial integrity.

Therewith, the main function of *meritus* is to maintain all relevant borders and the rights contained within those borders. For the host state, this amounts to its borders being internationalized and its status promoted to seemingly full sovereignty, which is simultaneously qualified by the continued existence of its internal borders that *meritus* recognizes and brings into international attention. The combination of internal (former constitutional order) and external (public international law) factors at the moment of the host state's independence specifies the extent of the right to self-determination of its subunits. In essence, this means that the former power-sharing agreement is inherited as appropriate. Still using the socialist federations as examples, Table 2 presents the constitutional statuses of the ASSRs, the AOs and the SAP of Kosovo at the moment of the dissolutions:

[1399] For example, the USSR had built its ethnofederal model on the basis of different levels of self-determination units, with the term itself used in the 1977 Constitution and in the late Soviet national legislation. The same applied to an even greater extent in the SFRY.
[1400] This is due to the fact that under *uti possidetis* 'the change of sovereignty does not *as such* change the status of a boundary' and the principle of continuity applies. Brownlie (n 225) 58.

Table 2: The Constitutional Statuses of the Autonomous Ethnofederal Subunits

	Own constitution, government, and assembly	Relations with the host state	Consent needed for territorial alteration	Distribution of powers	Consociation	The direct subject of the federation
Autonomous Soviet Socialist Republics	Yes	Defined by treaties and agreements. No right to secession or external relations, but a right to remain within the USSR if the host state secedes	Yes	ASSRs possess all state power on their territory apart from powers expressly transferred to the USSR or the host SSR	11 representatives from each ASSR (32 from each SSR) in the USSR Assembly, individual representation quotas in the host state's parliament	Yes
Autonomous Oblasts	No	Defined by treaties and agreements concluded within the USSR constitutional framework. No right to secession or external relations	No	AOs possess all state power on their territory apart from powers expressly transferred to the USSR of the host SSR	Five representatives from each AO in the USSR Assembly, individual representation quotas in the host state's parliament	No
Socialist Autonomous Province of Kosovo	Yes	Could bypass the host state's authorities completely. No right to secession	Yes, and a veto over most of the federal legislation	Kosovo could introduce bills for all-Union laws	Equal in the Presidium, 2:3 in the Assembly, 1:2 in the Constitutional Court	Yes

The SSR Constitutions provided the details on how powers were distributed, what areas were under exclusive and joint jurisdictions of the parties, and the details on consociation in the host state's Supreme Soviet (legislative).[1401] *Meritus* starts from the premise that while the consociation within the federal center organs is obsolete, within the SSR level it remains in force as the last legal order of the dissolved federal state. As the SSRs were given their borders via *uti possidetis* according to the last Constitution, it is within the logic of the rule that the lower-level borders, i.e., power-sharing and consociation agreements, are inherited alongside the internationalized SSR borders. In Table 3, I have listed some examples of the kind of arrangements that have been acceptable to the ethnofederal units:

[1401] For example, usually around 3-4% for the AOs. See subchapter 6.2.3.

Table 3: The Self-Governing Statuses Granted to a Few Selected Former Ethnofederal Units

	Own constitution, government, and assembly	Relations with the host state	The sovereignty of the autonomous entity	Distribution of powers	Consociation	International guarantees
Karakalpakstan (former ASSR of Uzbekistan)	Yes	Treaties and agreements. A right to secession. Disputes 'shall be settled by reconciliation'	Sovereign, consent needed for territorial changes	Extensive autonomy to regulate local affairs and governance	Concurrent decision-making with mutual vetoes	No
Gorno-Badakhshan (former AO of Tajikistan)	No	Set by the host's Constitution, authorities accountable to the host's President	'Integral part' of the host, not sovereign but consent needed for territorial changes	Own parliament	1/33 (3%) representation and a 'legislative initiative' in the host's parliament	No
Crimea (former ASSR of Ukraine)	Yes, since 1996 the Constitution has to be approved by the host	Treaties and agreements. No right to secession	Under the 1992 Constitution sovereign, since 1996 not sovereign but consent needed for territorial changes	Only powers delegated by the host, may pass local laws that do not contradict the host's	12/450 (2,7%) representation in the host state's parliament. Host state appoints the local prime minister	No
Nakhchivan (former ASSR of Azerbaijan)	Yes	Subordinate, set by the host state's Constitution, all laws have to comply	Not sovereign	Only local affairs, all key appointments made by the host's President	No quota representation in the Parliament of Azerbaijan	Treaty of Kars (1921)
Ajara (former ASSR of Georgia)	Yes	Subordinate, set by the host state's Constitution, all laws have to comply	No, 'inseparable part' of the host state, but consent needed for territorial changes	'Financial autonomy', may pass local laws and in areas that host delegates	Provided when the entire territory is under host state's jurisdictions, can suggest all-Union bills	No

In sum, *meritus* aims to provide stability and security by recognizing the former subunits, not as independent states but as internal sub-state entities. Moreover, *meritus* ensures the continuation of the previous national coexistence by requiring the host state to either maintain the former ethnofederal agreement or to agree on letting its subunits pursue external self-determination via independent statehood. Next, I demonstrate the three means that *meritus* utilizes in order to accomplish the ambitious goal of continuing the former ethnofederal agreement: the authority of *uti possidetis*, international guarantees, and soft power tools, including state recognition.

6.3.3 The Need for Compromises and the Authority of *Uti Possidetis*

Uti possidetis juris borders are often contested. Some of the former SSRs argue that the ethnofederal borders did not reflect the actual location of ethnic groups or the will of the people, e.g., as happened in the dispute between Russia and Ukraine over Crimea after 1991. Some minorities feel neglected as they were either not provided with ethnofederal units at all,[1402] or had been demoted in the federal era and thus did not have a right to the full extent of self-determination that they feel entitled to.[1403]

Notwithstanding these legitimate grievances, apart from a mutual agreement between the parties, *uti possidetis* cannot take them into account. Its *raison d'etre* is to be the backstop in case everything else fails and to provide an acceptable compromise, which itself does not contain a room for further compromises. Therefore, *uti possidetis* internationalizes the borders of the emerging entity as they were under the constitutional order of the previous sovereign. As described by the ICJ in 1986:

> 'These frontiers, however unsatisfactory they may be, possess the authority of the *uti possidetis* and are thus fully in conformity with contemporary international law'.[1404]

That being said, while there is no room for compromise within the 'internationalized' borders - e.g., Georgia becoming independent within the borders of the former SSR of Georgia and containing two ASSRs and one AO - under *meritus* the lower-level borders provide room for negotiations to maintain the territorial integrity of the successor state. The above-mentioned quote from the ICJ works both ways. However unsatisfactory for Abkhazians, under *meritus*, they have to remain within Georgian state as long as it respects their right to internal self-determination, and this is in full conformity with contemporary international law. Conversely, no matter how unsatisfactory for Georgians, under *meritus*, they have to accept that their territorial sovereignty is qualified in relation to Abkhazia, Ajara, and - to a lesser extent - South Ossetia. In other words, both the successor states and their

[1402] Such as was the case with Gagauzians in Moldova.
[1403] For example, former SSRs of Abkhazia.
[1404] *Frontier Dispute* (n 2) para. 149.

ethnofederal units can plead under the same legal rule that the other cannot have full sovereignty over *their* territorial possession. Using the same example, Georgia can claim that *uti possidetis* gives it territorial ownership over Abkhazia, whereas Abkhazia can claim that *uti possidetis* gives it a right to internal self-determination over its former ASSR territory, thus restricting Georgian rights over it. The personal scope of application of *uti possidetis* gives both the subunits a right to plead for it being used to internationalize their internal borders. These claims were not incompatible under the USSR, and they are not incompatible now. In sum, if Georgia wants to maintain the *entire* territorial extent of the former SSR of Georgia, including its three ethnofederal subunits, it has to recognize that it contains three ethnofederal subunits.

6.3.4 International Guarantees

Just like in the case of settling the post-Soviet frozen conflicts, international guarantees can be used in a state dissolution context to commit the parties to the maintenance of the former ethnofederal settlement. While this requires some considerable international effort, the advantage is that this is a law-based and cost-effective way to decrease potential threats to international peace and security.

There are several ways the international community can guarantee the continuation of a former autonomous agreement. This can be done via a multilateral agreement,[1405] a UN Security Council resolution,[1406] or, in the most difficult cases, a temporary international administration of the conflict area.[1407] International involvement is very beneficial, as it potentially binds external actors to react to any violations and could ensure the protection of human and minority rights.[1408] Finally, there might be a need to ensure that the autonomy agreement continues to function even when there are disputes. This should be secured through consociation and a possible veto right to any changes on autonomy.

6.3.5 State Recognition and Soft Power Tools

Finally, if the successor state continues to breach the rights of its subunits after all other means have been exhausted, there are several soft power tools that the international community can utilize. The most important one is state recognition. The desperate need for the emerging state authorities to establish an internationally recognized state should be used as leverage.[1409] After all, the recognition is given to a state in its *uti possidetis* borders. *Meritus* is calling the external states to recognize *all*

[1405] Like the one that took place in Bosnia-Herzegovina (*Dayton Peace Agreement Documents* (n 1380).
[1406] N 1252.
[1407] Such as UNMIK in Kosovo.
[1408] In Europe, this would consist of fulfilling the OSCE's and Council of Europe's minority protection standards.
[1409] For more on conditioned recognition, see subchapter 5.1.

the relevant borders. In some cases, the target state might resist for a long period. However, the breach of its autonomy agreement should be seen as an internationally wrongful act that under *ex injuria jus non oritur* cannot be recognized.[1410] For example, the inhabitants of Kosovo challenged the Serbian authorities peacefully until 1996, when the EU recognized Serbia independent containing Kosovo. Only after this event did a group of Kosovars establish the Kosovo Liberation Army, which started an armed uprising against Serbia in 1998. Therefore, the EU and the international community that followed suit with the recognition of Serbia made things worse by recognizing the illegitimate situation that the inhabitants could not accept. Moreover, having obtained recognition, the Serbian authorities felt less need to restrain themselves, which led to the Kosovo War in 1998-1999.

Recognition, especially when done in a collective form such as in the auspices of the UN or the EU, is a powerful coercion tool. The added advantage is that recognition is a passive way to handle the situation, as withholding it does not require any formal act. Other tools include using the leverage of membership in regional organizations. A possibility for more advanced European integration can be an especially significant incentive. For example, the EU has been able to force Serbia and Kosovo to resume their negotiations by making the advancement of their European integration contingent upon these negotiations. Moreover, many EU accession agreements contain clauses on consociationalism as a part of minority protection policies.[1411] All things considered, the effect of conditioning membership in some organizations cannot be overstated - Macedonia was even willing to change its official state name in order to advance its applications to the EU and NATO.

6.4 Case Study: Azerbaijan, Nagorno-Karabakh, and *Uti Possidetis Meritus*

The seemingly never-ending territorial dispute between Azerbaijan and its ethnofederal subunit Nagorno-Karabakh can be used as a descriptive example of the functioning of *meritus* on a real-life case. Briefly, after being recognized territorially fully sovereign by the international community in the early 1990s, Azerbaijan proceeded to abolish the autonomy of its former AO, which had a predominantly Armenian population. Neighboring kin-state Armenia intervened militarily, which led to six years of war between Azerbaijan and Armenia backed Nagorno-Karabakh. Despite extensive international mediation for the past 25 years, the conflict remains as deadlocked as ever.[1412]

[1410] The annexation of the Baltic States by the USSR (1940) and of Crimea by Russia (2014) have not been recognized in state practice.
[1411] Rossi (n 1283) 872.
[1412] I have chosen Nagorno-Karabakh for its relative non-complexity in the post-Soviet conflict setting: the ASSR of Abkhazia used to be a SSR, Transnistria lacked official status in 1991, and the ASSR of Crimea and the former AO of South Ossetia have been recognized independent by Russia (former has even been annexed). These issues naturally complicate international mediation efforts.

The impossibility of resolving the dispute is an attestation of the fact that the conflict is not just political but has legal origins. Under international law, if there is a conflict between the right to self-determination and territorial integrity, all else being equal, the latter will prevail. However, the problem in Azerbaijan over Nagorno-Karabakh is due to the third international legal principle - *uti possidetis* - which ended up distorting both self-determination and territorial integrity. It internationalized the SSR borders of Azerbaijan but ignored the lower-level borders. Consequently, as the lower-level borders delineated the location of a self-determination unit, bypassing it ended up breaching both the right to (internal) self-determination of the Armenian minority and Nagorno-Karabakh's (constitutionally guaranteed) right to territorial integrity. Hence, in order to rebalance the first two, we need to re-think the third international legal principle relating to territory, *uti possidetis*.

As summarized in Chapter 5, Azerbaijan's recognition was conditioned upon it guaranteeing the rights of its minorities in accordance with the commitments subscribed to in the framework of the CSCE, respecting the inviolability of all frontiers, and committing to settle by agreement or arbitration all questions concerning state succession and regional disputes.[1413] At the moment of the dissolution of the USSR, Nagorno-Karabakh was a lower-level ethnofederal unit that did not possess any state like attributes but held a veto right over any changes to its autonomy.[1414] At first glance, the Nagorno-Karabakh status question seems relatively simple to solve as it would only be entitled to a limited autonomy arrangement that should not be seen as compromising the sovereignty of the host state. Moreover, the former AO is situated entirely inside the borders of Azerbaijan, making unilateral independence even more remote possibility. Finally, no country has recognized Nagorno-Karabakh's independence, which in turn increases the possibilities to find a compromise through negotiations. Yet, despite persistent international mediation, the conflict resolution is at an impasse. There is a pressing need for a fresh perspective by utilizing *meritus*, which establishes the framework to transfer the Soviet-era status of Nagorno-Karabakh to contemporary international law setting on four domains: power-sharing, consociation, external guarantees, and special provisions.

In relation to *power-sharing*, the former AOs' territorial autonomy did not include a right to secession or external relations. Consequently, Nagorno-Karabakh should continue to enjoy similar territorial

[1413] *Guidelines* (n 4).
[1414] The abolition of Nagorno-Karabakh's autonomy breached Art. 86 of the USSR Constitution (it was only possible upon submission by the Council of the People's Deputies of the AO concerned) and Azerbaijan's own Law on Nagorno-Karabakh AO. It was condemned by the USSR Constitutional Oversight Committee (Avakian (n 1026) 17).

self-governance,[1415] including a relatively wide range of powers on local issues[1416] and guaranteed language rights.[1417] Notably, this should include a veto right over changes to its status,[1418] but should not include overrepresentation in the field of external relations of the host state.

Under the Soviet system of *consociation*, Nagorno-Karabakh had 12 representatives in the Supreme Soviet (Parliament) of the SSR of Azerbaijan, which had a total of 360 deputies.[1419] A mutually acceptable compromise should maintain this level.[1420] For instance - and not by coincidence - Tajikistan chose to uphold the exact representational quota and the right to a legislative initiative for its AO of Gorno-Badakhshan, and this agreement has held since.[1421] Thus, Nagorno-Karabakh would likely have viewed the continuation of its representation quotas legitimate, decreasing support for separatism. Moreover, the continuation of its self-governing status would have affected Azerbaijan's domestic policies only in a limited manner and would not have affected its external policies.

In terms of *external guarantees*, if Azerbaijan would have continued the legal status of Nagorno-Karabakh, there would not have been the ethnic conflict that has produced the lack of trust between the parties.[1422] Furthermore, Armenia would probably have reacted if Azerbaijan would have unilaterally breached its Constitution and tried to abolish the autonomy of Nagorno-Karabakh.[1423] Therewith, the continuation of the constitutionally guaranteed autonomy for Nagorno-Karabakh in the early 1990s would probably not have needed explicit international guarantees. That being said, if Armenia (representing Nagorno-Karabakh) and Azerbaijan would come to an agreement in the 2020s, any subsequent autonomy arrangement would likely need extensive external guarantees.[1424]

[1415] According to *uti possidetis*, the area should correspond with the borders of the AO of Nagorno-Karabakh as they stood in December 1991 when the federal center ceased to exist. Moreover, it would be advisable to accommodate territorial autonomy with the minority's own police force and symmetrical representation in the civil service, as was done in Kosovo (see n 1359).

[1416] For example, the former ASSR of Ajara was given rights over such areas as local education, science, culture, tourism, agriculture, and infrastructure. *Constitutional Law of Georgia on the Status of the Autonomous Republic of Ajara* (n 1106) Art. 7.

[1417] For example, under the UN administration in the 2000s and in the 2008 Constitution, Kosovo developed a regime protecting its minorities, including through legally secured equal citizenship and language rights. Warren and Zeqiri (n 1373).

[1418] Finally, any genuine power-sharing agreement should reach the field of the judiciary, and quota representation (with possible double majority requirements) should be considered for the highest courts.

[1419] I.e., 3,33%. Nagorno-Karabakh also had five deputies in the USSR Supreme Soviet, whereas the ASSRs had 11 and SSRs 32.

[1420] The current Parliament of Azerbaijan - *Milli Majlis* - has 125 deputies. The retention of the Soviet-era representation for Nagorno-Karabakh would amount to four deputies.

[1421] Under the Constitution of Tajikistan (n 951), Gorno-Badakhshan has one deputy in the 33 member Upper Chamber (Majlisi Milli) of Tajikistan, which constitutes exactly the same percentage (~3%) that the AOs had representatives in the Supreme Soviet of their host SSR in the Soviet-era. Similarly, under the 1998 Constitution, Crimea had ~2,7% representation in the Parliament of Ukraine.

[1422] Azerbaijan has proposed to raise Nagorno-Karabakh's status to an autonomous republic with a significant self-governance, conditioned on it renouncing its claim to full statehood. This compromise would certainly need extensive international guarantees.

[1423] Indeed, in 1991 Armenia was even willing to intervene militarily to help the Armenian minority in Azerbaijan.

[1424] This could be done by designating Guarantor States, which was suggested in the case of Transnistria in 2003 (see subchapter 5.6.2), by international multilateral agreement, signed by the co-chairs of the Minsk Group (France, Russia and the US), by a UN Security Council resolution, or by a temporary international administration over the conflict area, such as the UNMIK in 1999.

Furthermore, a fair and accountable *dispute resolution framework* should be put in place. A useful model for this could be the previously mentioned Council for Interethnic Relations in Macedonia,[1425] which guarantees representation for each of the nationalities and offers proposals for inter-ethnic issues that the Macedonian Assembly is obliged to take into consideration.[1426]

Finally, while the settlement of the Nagorno-Karabakh conflict in the early 1990s would likely not have required any *special provisions*, a settlement in the 2020s would need to uphold the 2007 Madrid Principles. These include the return of the territories currently under Armenian occupation to Azerbaijani control; an interim status for Nagorno-Karabakh providing guarantees for its security and self-governance; a corridor linking Armenia to Nagorno-Karabakh; future determination of the final legal status of Nagorno-Karabakh through a legally binding referendum after all internally displaced persons and refugees have been given a chance to return to their former places of residence; and international security guarantees that would include a peacekeeping operation.[1427]

In sum, according to *meritus*, the international community should have extended the application of *uti possidetis* into the lower-level ethnofederal borders. It should have recognized the right to internal self-determination for the Armenian minority in the ethnofederal unit of Nagorno-Karabakh. Consequently, the international recognition of Azerbaijan's independence within its *uti possidetis* borders would have been conditioned on it, in turn, recognizing that it has an ethnofederal unit within these borders. Nagorno-Karabakh would have inherited its constitutionally guaranteed territorial autonomy with the corresponding level of consociation within Azerbaijan's governance. However, this did not take place. Instead, despite its pledges, Azerbaijan breached the rights of its minority, and, despite its criteria, the international community turned the blind eye and awarded it with recognition. To find a mutually acceptable and legitimate solution, the contemporary mediation efforts of the Minsk Group should start from the baseline, as described above.[1428]

6.5 Conclusion: Resolving Territorial Conflicts with Territorial Solutions

The research topic of this dissertation has been the international law framework applicable to a state dissolution. More precisely, I have analyzed the interplay of the tools provided by international law to settle overlapping claims on territory - self-determination of peoples, territorial integrity of states,

[1425] See subchapter 6.2.4.
[1426] Neofotistos (n 1384) 140.
[1427] *Basic principles for a Peaceful Settlement of the Nagorno-Karabakh Conflict* (n 1259).
[1428] As an AO, Nagorno-Karabakh did not have a right to secession (or to join Armenia) in 1991 and does not have it in the 2020s either. Conversely, Azerbaijan never had unqualified territorial sovereignty. The compromise is to be found in the middle, via *meritus*. It suggests using the formula that both sides have already been able to agree upon and live by during the Soviet-era.

and *uti possidetis*. The main claim has been that while *uti possidetis* is meant to be only the final backstop in case the parties fail to reach an agreement, this is more of a rule than an exception. For this reason, I find it unsettling that the latest application rounds of *uti possidetis* have produced territorial conflicts and breached the right to self-determination. In order to regain the balance between self-determination and territorial integrity, *uti possidetis* as the third piece of the international legal toolkit concerning territorial disputes needs to be reinvented for it to remain relevant and to produce legitimate territorial solutions in the future. *Meritus* is my proposal for achieving this.

Revisiting the socialist federal dissolutions demonstrates the problem. One of the key insights that the external actors failed to recognize in relation to the territorial conflicts of the former USSR and SFRY is that, in essence, these conflicts have not been ethnic but *territorial*. This is due to the fact that the peoples there have thought of the conflict on ethnofederal terms, with the legitimate unit of their self-determination aspirations consistently being the territorially autonomous entity assigned to a particular group, not the ethnicity *per se*. Subsequently, the attempt to update *uti possidetis juris* in the third cycle turned out to be incomplete, distorting the contemporary right to self-determination and producing territorial conflicts. Simply put, the former ethnofederal units saw minority rights as insufficient in contrast to their previous (territorial) self-governing statuses.

In order for a particular state dissolution to be as orderly as possible, the international community has to acknowledge and understand the applicable internal and external components of that case. In the internal realm, there needs to be a sufficient understanding of the way the parties themselves approach the question of self-determination. If this had been the case in the third cycle of *uti possidetis* in 1991, it is unlikely that the outside states would have ignored the abolishing of the internal self-determination units in the successor states as soon as they were free from the federal constitutional framework that rejected the possibility of doing this without the subunit's consent. Furthermore, under the external framework - i.e., public international law, most importantly the right to self-determination as it was in the early 1990s - one simply cannot justify the all rights/no rights dichotomy[1429] that the recognizing states chose in the third cycle.

While the successor states may abolish their inherited internal borders, they do not disappear in international law sense if and when they are recognized by *uti possidetis*.[1430] As the continuation of

[1429] I.e., recognizing full and unqualified territorial sovereignty for Serbia over Kosovo (all rights) while making polite requests to the Serb leadership to uphold the rights of its minorities without any remedies if this would not be the case (no (executable) rights).
[1430] Similarly, the internal administrative borders of Ukraine do not disappear just because Crimea is currently under foreign occupation.

the previous autonomy arrangements is both in accordance with the evolutionary logic of *uti possidetis* and has empirically produced peaceful national relations in this area otherwise prone to ethnic conflicts, the need to update *uti possidetis* in the form of *meritus* is evident. While there have been several proposals to solve a particular post-Soviet or SFRY conflict, *meritus* has several benefits - being based on existing international law framework, it has a more encompassing scope, and it provides solutions that have already been accepted by the conflicting parties in the past. Thus, *meritus* has both internal and external legitimacy to provide solutions to these competing territorial claims.

Essentially territorial conflicts can be remedied with territorial solutions.[1431] In this dissertation, I have presented the origins of territorial conflicts that have taken place in the areas of the two late socialist federations, i.e., their ethnofederal background and the misapplication of *uti possidetis* ignoring this background in the early 1990s. These conflicts remain unsolvable and continue to hinder the development and security of the areas concerned. Yet, there is a key to both finding solutions for the existing conflicts and preempting them in the future. In sum, here are my main propositions:

As a baseline solution for the conflicts involving former autonomous entities, *meritus* advances *asymmetric territorialization*[1432] that recognizes the former territorial subject as a self-governing unit.

In order to find feasible solutions for ethnic conflicts that result from a particular state dissolution, its particular dissolution dynamic has to be conceptualized. There needs to be an in-depth understanding of the content of self-determination under the constitutional order of the dissolved entity. I propose that the international community changes its black-or-white categorization and expands its view of the internal borders by including - when relevant - the set of different levels of sovereignties that the dissolved state entity used to recognize. This is essential, as the relative change on the rights of minorities is often the determining factor on whether they will pursue separatism.

Therewith, finally and most importantly, *meritus* calls for *expanded recognition of internal borders in accordance with the internal and external self-determination dichotomy*. In this manner, it is a framework under which both the right to self-determination as well as minority rights can be guaranteed and protected in a state dissolution context via *uti possidetis juris.*

[1431] For the essentially non-territorial conflicts, enhanced local governance of demographically distinct municipalities based on the CSCE/OSCE framework for minority protection, the EC Guidelines, and the 4 November 1991 Draft Convention. See subchapter 6.2.1.
[1432] This does not require federalizing the host state. See n 1369.

7. Conclusions: Salvaging *Uti Possidetis Juris*

In essence, this dissertation has focused on state succession and border delineation in the broadest meaning of these terms under international law. In the introductory Chapter 1, I posed the following research question: *what are the legal legacies of the socialist federal dissolutions for international law in general and the post-federal successor states in particular?* I then divided this question into three sub-questions: What mistakes were made with the application of *uti possidetis* in the socialist federal dissolutions? What would have been a more orthodox application of *uti possidetis*? Finally, in conclusion, what are the legal legacies of the socialist federal dissolutions?

To answer the first research question, I have to establish how *uti possidetis* was applied in the early 1990s, and what was wrong with this interpretation of the rule. Consequently, in Chapter 2, I presented the default legal rule in the cases of state dissolution and independence - *uti possidetis* - and reconstructed from the events an evolutionary process that has carried this old Roman legal principle into the contemporary international setting. I then demonstrated how and why the international community chose a particular version of *uti possidetis* regarding the latest grand application round, the socialist federal dissolutions of the 1990s. The regretful distortions in this application illustrate the need to update the doctrine. My main argument is that the transformation into a non-colonial context disrupted the vital evolution of *uti possidetis*, generating a series of territorial conflicts in the affected areas.

Part II proceeded to answer the second question - what would have been a more correct version of the doctrine in the early 1990s setting - by providing two components for a *doctrinally justifiable update of uti possidetis*. Chapter 3 accounted for the *lex specialis* of the socialist federal dissolutions, the *internal legal context* at the moment of the dissolution, i.e., the socialist ethnofederal model. Chapter 4 construed the external component, *the international legal framework*, at the moment of the dissolution. It focused especially on the division of the right to self-determination into its external and internal variants since the 1960s. Together, the two components presented in Part II give us access to what should be the content of *uti possidetis* according to its evolutionary logic.

Part III answers the last research question, i.e., what are the legal legacies of the socialist federal dissolutions. Chapter 5 analyzed the legal fallout of *uti possidetis* in the successor states of the USSR and the SFRY: how they chose to confront their national minorities and on what legal basis, the regional territorial conflicts that followed, and why the extensive international mediation efforts have

seen no success since. In sum, it is a damning account on a series of mistakes made, and it explains why the post-Soviet space has become a region of endemic territorial conflicts. Finally, Chapter 6 concluded the dissertation by bringing together the lessons learned from all the previous chapters: why *uti possidetis* needs to evolve (Chapter 2), the two missing components of this evolution (Chapters 3 and 4), and the inescapable price of not updating it (Chapter 5). The synthesis of these lessons contains the solution to the dilemma of *uti possidetis*, which Chapter 6 provides in the form of (*uti possidetis*) *meritus* ('as you have earned, so you may possess'). This needed update of the doctrine is my contribution to the research field. My aim has been nothing less than to provide a tool that can be used to rebalance the legal principles of the right to self-determination and territorial integrity in the future cases of state dissolution.

The socialist federal dissolutions have left behind a two-fold legal legacy. First, in relation to international law in general, they have distorted the essential legal formula used by default in a state dissolution context. The application of *uti possidetis* in the socialist federal dissolutions failed to guarantee the right to self-determination in the affected states, both in terms of the right in general as well as how it was perceived in the socialist system in particular. This negative development decreases the chances of peaceful solutions to territorial conflicts in the future. Second, in relation to the successor states, the 1990s misapplication has left many of them fragmented and plagued with territorial conflicts. Most of these conflicts remain unresolved almost 30 years later.

The proposed *meritus* formula recognizes the need to salvage *uti possidetis*, and aims to contribute to repairing both these negative legal legacies. *Meritus* can be used to settle the already existing territorial disputes and to preempt new ones from occurring in the cases of independence or state dissolution. It calls for *expanded recognition of internal borders in accordance with the contemporary right to self-determination*. It draws legitimation from and is in full conformity with the old *uti possidetis* framework. In this role, *meritus* aims to restore *uti possidetis* into a functioning mode by updating it into being in accordance with the other contemporary international law principles. This amounts to establishing the exact level that the public international law and the constitutional order of the state provided for the ethnic group in question at the moment of the dissolution, i.e., the legitimate expectation (*meritus*) of a former autonomous unit to self-rule in the

form of a constitutionally guaranteed autonomy. In sum, *meritus* is a formula for a comprehensive interpretation of the 'photograph' of the frozen 'territorial title' as portrayed by the ICJ in 1986.[1433]

In my opinion, the controversial decision to insist upon the process of dissolution taking place in the SFRY was the right one: in the absence of an agreement on borders and state succession, *uti possidetis* is the doctrine of last resort. For example, the Serbian rejection of both the dissolution of the SFRY and the notion that the Yugoslav internal borders would be used as a blueprint for dissolution demanded a decisive international legal response. Despite its shortcomings, in absence of agreement between the parties, there are no plausible alternatives to *uti possidetis* in the cases of dissolution.

In complete conformity with the doctrine's earlier evolutionary logic, the EC, The Hague Peace Conference, and the Badinter Commission attempted to update it by adding new conditions to be fulfilled in order for a state to be awarded recognition. These included a mostly overlapping combination of criteria provided in the Guidelines, the Declaration on Yugoslavia, and The Hague Peace Conference's 4 November 1991 Draft Convention. In this manner, they aspired to highlight *all* the internal borders of the metaphorical 'photograph' of Yugoslavia in 1991.

In the end, the update attempt turned out to be incomplete. In effect, the EC recognized internal self-determination to be the right for ethnic groups but incoherently did not provide this for the established, constituent self-determination units. The lower-level ethnofederal units became victims of this failure. Moreover, the EC reasonably strived for as little fragmentation of the SFRY as possible, and the SRs seemed like a logical instrument to draw the line on minority secessions. I agree with this decision to the extent of limiting secessions.[1434] However, the subsequent relentless categorization and all rights-no rights dichotomy between the first level and the lower-level ethnoterritorial units inevitably jeopardized the promotion of internal self-determination.[1435] In essence, the EC and, subsequently, the international community failed to guarantee the right to self-determination to all the stakeholders. According to the applied version of *uti possidetis*, the successor states had only limited obligations towards their autonomous subunits, whose internal borders - and, with it, legal

[1433] *Frontier Dispute* (n 2) para. 30. However, as accounted for previously, *uti possidetis* has never been a photograph but rather a modified version of the reality. See subchapter 6.3.1.

[1434] As recognized by the EC, only the highest ethnofederal level possessed the right to secede from the federation. Now, since the successor states were formed on the basis of *uti possidetis*, the right to the secession of the SSRs has no legal relevance, and it becomes harder to argue that the ASSRs had simply no rights. In addition, the ASSRs were direct subjects of the federation and the host SSR. Thus I argue that they did not have a right to independence but had a special legal status.

[1435] As pointed out by Peters, in the socialist federal dissolutions, *uti possidetis* 'has only been applied to the boundaries of first-order sub-units […]. In practice, no "new" *uti possidetis* has emerged so far which would protect second- or third-level entities within the Soviet Union, ranging from Abkhazia to Chechnya. So the fiction was upheld that below that level, no ethnic or social differences exist which would demand the further fragmentation of territories'. Peters (n 25) 121.

guarantees - were airbrushed out of the 'photograph'. With no reason to compromise further, the host states took a hard line towards their former autonomous units. This led to incompatible demands and, eventually, armed separatism.

The policy failures of the early 1990s have two valuable lessons, both of which relate to my proposal for *meritus* and are exhibited in Chapter 6. First, state dissolutions and independencies will almost certainly happen again in the future. If *uti possidetis* is reapplied, it is of utmost importance to update it into contemporary international law setting. Only by rediscovering the legal nature of *uti possidetis* can the international community avoid the appearance of more Abkhazias, Kosovos, and Crimeas. Second, while the post-Soviet and post-SFRY territorial conflicts are a lot more challenging to settle in the 2020s that they would have been in the 1990s, they are not beyond solutions. *Meritus* seeks to find feasible settlements *by conceptualizing a particular state dissolution dynamic*. By providing an *ex post facto* framework for the mediation, *meritus* demonstrates what the lower-level units should have been awarded according to a legally more consistent interpretation of the *uti possidetis* doctrine. *Meritus* has an undeniable advantage to other proposals to solve a particular post-Soviet conflict due to it possessing both internal and external legitimacy to provide solutions to these competing territorial claims.[1436]

There are plenty of territorial conflicts in the post-Soviet and post-Yugoslav areas to choose from, but let us take Kosovo as an example. In 1996, Serbia was recognized as independent,[1437] possessing the entire territorial extent of the former SR of Serbia that included two former SAPs of Kosovo and Vojvodina.[1438] As the conceptual logic of *uti possidetis* determines, a change of sovereignty by itself does not change the status of a boundary.[1439] Since Serbia wanted to maintain its entire SR area, it should have then inherited the autonomous status that the SFRY had instilled upon Kosovo, in accordance with its international legal obligations. In effect, if applied in 1991, *meritus* would have awarded Kosovo the continuation of its substantial autonomy via leverage over recognition. This would have been accomplished by recognition of the continuation of Kosovo's autonomous borders,

[1436] Being based on existing international law framework, it has a more encompassing scope than a proposal to solve just a particular conflict, and it provides solutions that have already been accepted by the conflicting parties in the past.
[1437] At this point, under the name of the FRY and in a confederation with Montenegro. In 2003, the name of the state was changed to the State Union of Serbia and Montenegro. In 2006, the Union was dissolved with the independence of Montenegro.
Concerning *uti possidetis*, it is noteworthy that there remains a border dispute between Montenegro and Croatia over an area in the Bay of Kotor which, in the SFRY-era, did not belong to either SR but was under the control of the Army of Yugoslavia. B. Huszka, 'The Power of Perspective: Why EU Membership Still Matters in the Western Balkans', *European Council on Foreign Relations Policy Brief*, January 2020 at 29.
[1438] While Vojvodina held the same rights, its case differs from the others and is beyond the scope of this dissertation. See n 630.
[1439] N 63.

with the rights instilled on those borders. Notably, these right would not have included the right to (unilateral) secession, and the territorial integrity of Serbia would thus have been upheld.

At first, the EC insisted on the continuation of Kosovo's autonomy. However, importantly and unlike the *meritus* formula, they did not portray it as a legal right of Kosovars derived from *uti possidetis*, but rather as a political compromise. The incontrovertible difference between a political compromise and a legal obligation is that the former is notably easier to breach afterwards, as indeed took place with the unconditional recognition of Serbia a few years later. This decision came back to haunt the international community in the late 1990s, when the betrayed Kosovars started an armed uprising against Serbia, thereby demonstrating that all rights/no rights dichotomy is not a realistic solution to the conflicts over territory.

Just like Serbia, all ethnofederalized successor states experienced either the calls for autonomy or separatism. The general pattern was clear: the ones that chose to continue autonomy in some meaningful manner were able to secure a peaceful balance between the right to internal self-determination and territorial integrity. In contrast, the ones who chose to curtail severely or to revoke previous autonomies succumbed to separatist violence. Finally, the tragedy of international mediation of these crises has been that they aim more-or-less to achieve the same thing that the more consistent version of *uti possidetis* would have awarded to the minorities in the first place - territorial autonomy and internal self-determination - but from a considerably weaker negotiating standpoint.

Due to the bipartition formula that was applied in the early 1990s, the lower-level subunits, some of them with larger populations than many EU member states, were caught in a legally vicious place, in between 'peoplehood' and 'minority' statuses.[1440] By rejecting the EC's artificial division that gave ethnic groups either all rights or no rights, *meritus* can find the middle ground between the competing and overlapping territorial claims before there is a point of no return in the form of armed conflict and the resulting loss of goodwill between the parties. By factoring in both internal and external dimensions of state dissolution, *meritus* possesses the capacity to secure all internal borders and protecting the rights of all ethnic groups and minorities.

In the end, *uti possidetis* exists at the crossroads of law and policy. The main problem that *meritus* seeks to remedy is that while it is common sense that certain pre-existing borders have to be used to delineate the emerging entities, the current form of *uti possidetis* fails to determine which of those

[1440] See subchapter 5.7.

borders to use. The politics steps in to fill the vacuum, thus compromising the predictable nature inherent in a legal principle. *Uti possidetis* requires a fundamental overhaul, as it cannot be expected to contribute to the promotion of peace and security as long as it continues to be in contradiction with other international legal principles. Therewith, *meritus* aims to bring back the law to the doctrine.

* * * *

Given the importance of both the topics of the current international mediation efforts of the post-Soviet frozen conflicts and the future state succession in the cases of dissolution or independence, I cannot but conclude that much remains to be done in terms of research. Fortunately, the keys to solving each of the post-Soviet territorial disputes are contained within the *uti possidetis* doctrine. Here are my final takeaways in relation to the socialist federal dissolutions:

First, the ethnoterritorial conflicts in the post-Soviet and post-Yugoslav areas have not been ethnic but territorial. Peoples have thought of the conflict on ethnofederal terms, with the legitimate unit of their self-determination aspirations being the territorially autonomous entity, not the ethnicity *per se*. This insight offers a basic formula. Essentially territorial conflicts can be remedied with territorial solutions.[1441] As a baseline solution for conflicts involving autonomous entities, *meritus* advances asymmetric territorialization recognizing the former territorial subject as a self-governing unit. This process should begin with conceptualizing a particular dissolution dynamic that has created the territorial dispute. There needs to be an in-depth understanding of the content of self-determination under the constitutional order of the dissolved entity. I propose that the international community changes its black-or-white categorization and expands its view of the internal borders by including - when relevant - the set of different levels of sovereignties that the dissolved state entity used to recognize. This is essential, as the relative change on the rights of minorities is often the determining factor on whether they will pursue separatism.

Finally and most importantly, *meritus* calls for *expanded recognition of internal borders in accordance with the internal and external self-determination dichotomy*. In this manner, it is a framework under which both the right to self-determination and minority rights can be guaranteed and protected in future state dissolutions. The *uti possidetis* doctrine can be salvaged in the process.

[1441] For the essentially non-territorial conflicts, enhanced local governance of demographically distinct municipalities based on the CSCE/OSCE framework for minority protection, the EC Guidelines, and the 4 November 1991 Draft Convention. See subchapter 6.2.1.

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