

## **‘Uti possidetis’ and the Armed Conflict in Ukraine**

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### **Abstract**

The present article debates the legitimacy of “uti possidetis” in light of the ongoing war in Ukraine. The war in Ukraine is not the first in the post-Soviet world. The dismantling of the USSR and the rapid birth of new states incited violence all over, at a large extent because of the way the borders were drawn in the post-Soviet era, in line with “uti possidetis” technique. ‘Uti possidetis’ constitutes a traditional method for the division of dissolved states into new ones, as well as of former colonies. What is examined in the present article is whether the specific way in which ‘uti possidetis’ was implemented in relation to Ukraine constituted a violation of self-determination, therefore -potentially- providing legitimacy to the Russian SMO.

### **Keywords**

Ukraine, Special Military Operation, Uti possidetis, Self- determination, state sovereignty, borders

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## Introduction

It has been more than one year since the Russian 'special military operation' (SMO) began. It was rather obvious from day one that it would become a military intervention that would change the world. Ukraine became the place of a partially proxy conflict between Russia and the US.<sup>2</sup>

The war in Ukraine is not the first in the post-Soviet world. The dismantling of the USSR and the rapid birth of new states incited violence all over, at a large extent because of the way the borders were drawn in the post-Soviet era. It is not by coincidence that part of the Russian efforts to justify the SMO is related to the 'birth' of Ukraine following the dissolution of USSR, in line with the principle of 'uti possidetis'.

As the President of the Russian Federation had stated in his address, during which he declared the launch of the SMO in Ukraine, it is 'territories adjacent to Russia, which I have to note is our historical land...'<sup>3</sup> This was not the primary justification for the SMO, but was nevertheless an important one.<sup>4</sup> It shows the historical grievances and their role in the eruption of conflicts.

'Uti possidetis' constitutes a traditional method for the division of dissolved states into new ones, as well as of former colonies, albeit not always successful in terms of the viability of the new states, the preservation of peace and security, and the respect of the right of self-determination of the peoples involved. What is

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<sup>2</sup> John S. Reshetar, 'The Ukrainian Revolution in Retrospect' (1968) *Canadian Slavonic Papers / Revue Canadienne Des Slavistes*, Vol. 10 (2), On Sna. 116–32.

<sup>3</sup> President of Russia, Address by the President of the Russian Federation, 24 February 2022, available at <http://en.kremlin.ru/events/president/news/67843> (last accessed 14 August 2022).

<sup>4</sup> The president of Russia invoked an array of reasons for the Russian intervention. He invoked the defense of the two self-proclaimed People's Republics in the area of Donbass, the alleged commitment of genocide against them by Ukraine and the distortion of security in Europe because of NATO expansion.

examined in the present article is whether the specific way in which 'uti possidetis' was implemented in relation to Ukraine constituted a violation of self-determination, therefore -potentially- providing legitimacy to the Russian SMO. It must be stressed that it is not the legitimacy of the SMO in general that is examined in the present article, but solely whether the way that 'uti possidetis' was implemented in the case of Ukraine violated self-determination of part of the population of Ukraine, thus constituting a reason for the legitimisation of the Russian SMO, or not.

In order to move with the specific analysis, in the first part, some historical events related to the war in Ukraine are briefly presented. Then, the fundamentals of 'uti possidetis' are examined, as well as its relationship with self-determination. This analysis is then projected on the historical facts about the Ukrainian post-Soviet independence and it is assessed whether Russia could invoke the specific way that 'uti possidetis' was implemented in the case of Ukraine as justification for its SMO, that began in 2022.

### **1. A Brief History of the Events Leading to the War in Ukraine**

The events that led to the war in Ukraine -very briefly- followed the collapse, in late 2014, of the negotiations between the then president of Ukraine, Yanukovich, and the EU for a new treaty opening up the economy of Ukraine for the EU. Following the impasse of the negotiations, the 'Euromaidan' events broke out, leading to significant turmoil in Kyiv as well as in other parts of Ukraine. An initial agreement, after the mediation of foreign actors, between president Yanukovich and the opposition, which foresaw new elections, was achieved but soon collapsed, with an attack against president Yanukovich and the departure of

the president of Ukraine to Russia, allegedly for an official visit. While the latter was abroad, the Ukrainian parliament decided to impeach him right away. Nevertheless, the procedure that was followed fell short of the necessary constitutional majority.<sup>5</sup> In spite of this, the Ukrainian parliament moved on with the impeachment. Ukraine's new, unconstitutionally positioned leadership, was recognised by both the US and the EU as legitimate.<sup>6</sup>

The violence did not stop there. On 26 February 2014, unmarked gunmen - Russian soldiers most likely- occupied strategically important buildings in the Crimean capital, Simferopol. This was immediately followed by the proclamation of the Autonomous Republic of Crimea;<sup>7</sup> then the referendum on union with Russia was called, which was approved by a large majority of the participants.<sup>8</sup> On 17 March 2014, the 'Autonomous Republic of Crimea', on the basis of the referendum of the previous day, declared its independence and then submitted a

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<sup>5</sup> Agreement on the Settlement of Crisis in Ukraine, Kyiv, 21 February 2014, available at [www.auswaertiges-amt.de/cae/servlet/contentblob/671350/publicationFile/190027/140221-UKR\\_Erklaerung.pdf](http://www.auswaertiges-amt.de/cae/servlet/contentblob/671350/publicationFile/190027/140221-UKR_Erklaerung.pdf) (last accessed 9 October 2016).

<sup>6</sup> Howard Amos and Harriet Salem, 'Ukraine Clashes: Dozens Dead after Odessa Building Fire', *The Guardian*, 02 May 2014, available at <https://www.theguardian.com/world/2014/may/02/ukraine-dead-odessa-building-fire> (last accessed 25 June 2022).

<sup>7</sup> It is important to stress here that the traditionally pro- Russian Crimea, shortly after the overthrow of president Yanukovich, saw the new authorities in Ukraine revoking the State Language Policy Bill, thus banning Russian as an official language of Ukraine. In a situation of delicate intercommunal balances, this step was considered as a major provocation against the Russian-speaking population of Ukraine.

Verkhovna Rada of Ukraine, 'On Principles of the State Language Policy', available at <http://zakon4.rada.gov.ua/laws/anot/en/> (last accessed 23 February 2023).

<sup>8</sup> Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol, available at [www.voltairenet.org/article182723.html](http://www.voltairenet.org/article182723.html) (last accessed 25 June 2022).

request to the Russian Federation for membership, which was accepted a day later.<sup>9</sup>

The Ukrainian Constitutional Court and the Ukrainian Parliament had meanwhile declared the referendum invalid,<sup>10</sup> as unconstitutional.<sup>11</sup> The referendum was condemned by the US, the EU and also by the UN General Assembly,<sup>12</sup> which, with a strong majority, called on states not to recognise the change in Crimea's regime.<sup>13</sup>

In April 2014, two independent 'People's Republics' were proclaimed in the Donbass<sup>14</sup> region –one in Lugansk and the other in Donetsk, respectively– and clashes broke out with Ukraine's armed forces.<sup>15</sup> Following the two referenda,

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<sup>9</sup>'Agreement on the Accession of the Republic of Crimea to the Russian Federation', 18 March 2014, available at <http://narrow.Kremlin.ru/news/6890> (last accessed 10 July 2022); Chris Borgen, 'The Crimea, Compliance, and the Constraint of International Law', *Opinio Juris*, 03 March 2014, available at <http://opiniojuris.org/2014/03/03/crimea-compliance-constraint-international-law/> (last accessed 11 July 2022).

<sup>10</sup> Constitutional Court of Ukraine, Summary to the Decision of the Constitutional Court of Ukraine, No.2-rp/2014, 14 March 2014, available at <http://www.ccu.gov.ua/en/doccatalog/list?currDir=238920> (last accessed 25 February 2023).

<sup>11</sup> Constitution of Ukraine, text provided by the Ukrainian authorities on 13 March 2014, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2014\)012-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2014)012-e), Arts. 2, 73, 134, 138(2), 157; Anne Peters, 'Sense and Nonsense of Territorial Referendums in Ukraine, and Why the 16 March Referendum in Crimea Does Not Justify Crimea's Alteration of Territorial Status under International Law', *Ejil Talk*, 16 April 2014, available at [www.ejiltalk.org](http://www.ejiltalk.org) (last accessed 08 March 2023).

<sup>12</sup>UN GA Resolution 68/262, 27 March 2014, Territorial Integrity of Ukraine, UN Doc. A/RES/68/262 (2014).

<sup>13</sup> Lauri Mälksoo, 'Crimea and (the Lack of) Continuity in Russian Approaches to International Law', *Ejil Talk*, 28 March 2014, available at <https://www.ejiltalk.org/crimea-and-the-lack-of-continuity-in-russian-approaches-to-international-law/> (last accessed 11 July 2022).

<sup>14</sup> On historical trends of self- identification of the population in Donbass, see: Paul S. Pirie, 'National Identity and Politics in Southern and Eastern Ukraine', (1996) *Europe-Asia Studies*, Vol. 48 (7), 1079-1088, 1079.

<sup>15</sup> Becky Sullivan, 'Russia's at War with Ukraine. Here's How we Got Here', *NPR*, 24 February 2022, available at <https://www.npr.org/2022/02/12/1080205477/history-ukraine-russia?t=1657615910439> (last accessed 12 July 2022).

Donetsk and Lugansk People's Republics declared independence respectively.<sup>16</sup> The referenda were not recognised as legitimate, nor was the two self-proclaimed republics' independence by anyone internationally, until February 2022. Russia eventually recognised their independence and later declared them to have become members of the Russian Federation.<sup>17</sup> Back in 2015 Russia did not officially admit that it had sent troops to the two 'People's Republics'.<sup>18</sup>

The internal conflict in Donbass, which began in 2014,<sup>19</sup> was temporarily frozen, with the two Minsk agreements -or protocols.<sup>20</sup> The main provision of these agreements, in addition to the ceasefire and the withdrawal of heavy weapons, was the combination of autonomy in the Donbass region with a simultaneous change in Ukraine's constitution and with the restoration of Ukraine's sovereignty. The

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<sup>16</sup> David Stout, 'Ukrainian Rebels Claim Huge Victory in Self-Rule Referendum', *Time*, 12 May 2014, available at <https://time.com/95748/ukrainian-separatists-referendum-donetsk-luhansk/> (last accessed 25 June 2022). The actual position of the population of Donbass is almost impossible to be identified. Regarding such an attempt, see: Elise Giuliano 'Who Supported Separatism in Donbas? Ethnicity and Popular Opinion at the Start of the Ukraine Crisis' (2018) *Post-Soviet Affairs*, Vol. 34 (2-3), 158- 178, 158.

<sup>17</sup> United Nations Human Rights Office of the High Commissioner, 'Report On The Human Rights Situation In Ukraine', 1 August 2021 - 31 January 2022, (2022), In para. 31; United Nations Human Rights Office of the High Commissioner, 'Accountability for Killings in Ukraine from January 2014 to May 2016', (2016), 3-51.

<sup>18</sup> Interview with Radio Europe 1 and TF1 TV channel, 4 June 2014, Russian presidential website, and BBC Monitoring Online, 4 June 2014, available at [www.bbc.monitoringonline.com](http://www.bbc.monitoringonline.com) (last accessed 9 October 2016); V. Churkin at Security Council 7125th meeting, 3 March 2014; Roy Allison, Russian "deniable" Intervention in Ukraine: How and Why Russia Broke the Rules' (2014) *International Affairs*, Vol. 90 (6), 1264-1265.

<sup>19</sup> The Ukrainian side right away accused Russia of participating in the conflict in Donbass with troops of its own. Russia denied these allegations claiming that only volunteers from Russia assisted the secessionists in Donbass. The Ukrainian allegations, if accepted, then the conflict in Donbass from 2014 to 2022, from non-international initially, became international after the active participation of Russian troops.

<sup>20</sup> 'Package of Measures for the Implementation of the Minsk Agreements' (Press release) (in Russian). *Organization for Security and Co-operation in Europe*, 12 February 2015, available at <https://www.osce.org/files/f/documents/5/b/140221.pdf> or <https://www.telegraph.co.uk/news/worldnews/europe/ukraine/11408266/Minsk-agreement-on-Ukraine-crisis-text-in-full.html>.

constitution, however was never amended, the agreements were not implemented and the present president of Ukraine, V. Zelensky had declared, shortly before the SMO, that the agreements could not be implemented, following similar rhetoric by the previous Ukrainian president, Poroschenko.<sup>21</sup> On 24 February 2022, Russia's 'special military operation' in Ukraine began, after months of heightened tension and a failed attempt by Russia for a new international agreement with NATO and with the US.<sup>22</sup>

## 2. 'Uti possidetis' and Self-Determination

As mentioned above, president Putin made a direct reference to the way in which post-Soviet Ukraine has been created, while he was careful enough not to attempt to justify the SMO solely or mainly on this argument, in order to avoid, as much as possible, accusations of revisionist policy.<sup>23</sup> Before moving to the main focus of the present analysis, which is about 'uti possidetis' and self-determination, it is crucial to pay some attention to whether the secession from Ukraine by the

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<sup>21</sup> 'Zelensky Admits he Never Intended to Implement Minsk Agreements', *Al Mayadeen English*, available at <https://english.almayadeen.net/news/politics/zelensky-admits-he-never-intended-to-implement-minsk-agreements> (last accessed 21 March 2023); 'Poroshenko Rejects Change of Territorial Lines Enshrined in Minsk Pact', *Reuters*, available at <https://www.reuters.com/article/ukraine-crisis-poroshenko-minsk-idUSB4N0RB01120150207> (last accessed 21 March 2023); Peter Schwarz, 'Former German Chancellor Merkel Admits the Minsk Agreement was Merely to Buy Time for Ukraine's Arms Build-up', *World Socialist Web Site*, available at <https://www.wsws.org/en/articles/2022/12/22/ffci-d22.html> (last accessed 21 March 2023).

<sup>22</sup> Steven Pifer, 'Russia's Draft Agreements with NATO and the United States: Intended for Rejection?', *Brookings*, 21 December 2021, available at <https://www.brookings.edu/blog/order-from-chaos/2021/12/21/russias-draft-agreements-with-nato-and-the-united-states-intended-for-rejection/> (last accessed 21 March 2023).

<sup>23</sup> Brian Girvin, 'Putin, National Self-Determination and Political Independence in the Twenty-first Century' (2023), *Nations and Nationalism*, Vol. 29 (1), 39-44, 39.

self-proclaimed 'People's Republics', as well as of Crimea, can be considered in principle lawful or not.

The legitimacy or not of the secession of Lugansk, Donetsk and Crimea, has been a matter of significant legal debate, in the wider context of the legitimacy or not of secession.<sup>24</sup> The relationship between secession<sup>25</sup> and international law is inherently complex, both in terms of legal theory and legal practice.<sup>26</sup> The mainstream approach in international legal theory is that, outside the decolonisation context and as long as we do not talk about 'people', there is no right to secession. The practice however of international law is not that unanimous. The secession of Bangladesh, indicatively, following the military intervention of India against Pakistan, was recognised as legitimate very quickly by 47 states and shortly afterwards by the international community in general, following Pakistan's recognition of the new state as well.<sup>27</sup> Furthermore, the dissolution of what used to be Yugoslavia is often categorised as the disintegration of a federal state, but, in practice, it represents a series of secessions, which the EU and the US rushed to recognise as legitimate.<sup>28</sup>

Among the cases pertaining to former Yugoslavia, the one of Kosovo<sup>29</sup> stands

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<sup>24</sup> It is examined here only parenthetically as it is not the main theme of the present article.

<sup>25</sup> The term widely used is that of 'remedial secession', supposedly describing a condition of such denial of internal self-determination rights to a minority, that its secession from the existing state becomes the sole remedy, an 'ultimum remedium'. Given that the theme of the present article is not about whether such conditions of deprivation of internal self-determination existed for part of the Ukrainian population, reference to secession is only made.

<sup>26</sup> Théodore Christakis, 'Les Conflits de Secession en Crimée et dans l'Est de l'Ukraine et le Droit International' (2014) *Journal du Droit International*, 23-48.

<sup>27</sup> John Dugard and David Raic, 'The Role of Recognition in the Law and Practice of Secession', in Michael Cohen (ed.), *Secession: International Law Perspectives* (Cambridge: Cambridge University Press, 2006).

<sup>28</sup> EC Declaration on the Situation in Yugoslavia; Dugard and Raic (no 26), 128.

<sup>29</sup> Jure Vidmar, 'International Legal Responses to Kosovo's Declaration of Independence' (2009) *Vanderbilt Journal of Transnational Law*, Vol. 42 (3), 784.

out, among other reasons because it led to a highly problematic syllogism by the International Court of Justice (ICJ).

Following Serbia's capitulation to NATO, UN Security Council Resolution 1244 (1999) was adopted within the framework of Chapter VII of the UN Charter. This resolution, while affirming the unity of the Federal Republic of Yugoslavia, effectively stripped the federal government of practical control over Kosovo, ultimately creating conditions conducive to the de facto independence.<sup>30</sup> On 8 October 2008, the United Nations General Assembly (UNGA), in Resolution 63/3, requested the ICJ's opinion on the Kosovo authorities' declaration of independence. The specific question posed by the UNGA to the ICJ was whether the unilateral declaration of independence was consistent with international law.<sup>31</sup> The judgment of the ICJ was based on a distinction between the act of proclaiming independence on the one hand, and the existence of a right of secession on the other. The ICJ thus stated that '...it is entirely possible for a particular act –such as the unilateral declaration of independence– not to violate international law without necessarily constituting an exercise of a right...', since '...international law did not contain a ban on declarations of independence'.<sup>32</sup>

The crux of the issue in the ICJ judgment appears to be that it suggests anyone can make any declaration, including a declaration of independence, without

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<sup>30</sup> UN SC 1244(1999), Ban Ki-moon, Sec. Gen., United Nations, to the President, United Nations Sec. Council, U.N. Doc. S/20071168 (26 Mar. 2007).

<sup>31</sup> UN GA Res/ 63/3 (2008).

<sup>32</sup> Advisory Opinion, Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, ICJ, 403 (2010), 9, 56, 79 [hereinafter Kosovo Case]; Marco Milanovic, 'Arguing the Kosovo Case', in Marco Milanovic and Michael Wood (eds.), *The Law and Politics of the Kosovo Advisory Opinion* (Oxford: Oxford University Press, 2014); Thomas Burri, 'The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links' (2010) *German Law Journal*, Vol. 11 (7), 886.

triggering any legal consequences, as such declarations seemingly fall outside the purview of international law. However, the declaration of independence and secession, by definition, disrupts internal state legitimacy. From the perspective of internal legality and state sovereignty, the declaration of independence is inherently a forceful act, even if it does not involve the use of kinetic force, and this cannot be disregarded under international law. To comprehend the complexities arising from the ICJ's reasoning, we must consider that if it is not illegal to declare independence and secede from a state -the primary act- then why would it be illegal for this new entity to be recognised by a third state -the secondary act?<sup>33</sup> The ICJ syllogism opened a huge loophole in the mainstream approach of the illegitimacy of secession.

Obviously, on the other hand, there are several instances of denial of the international community to recognise secession. Notable examples include the self-proclaimed republics of Donbass, the situations in Abkhazia and Ossetia within Georgia, the self-proclaimed 'Republic of Artsakh' in Azerbaijan, Catalonia's attempt at independence from Spain, Transnistria in Moldova, and occupied Northern Cyprus.<sup>34</sup>

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<sup>33</sup> Diane Desierto, 'Non-Recognition', *EJILTALK*, 2022, available at <https://www.ejiltalk.org/non-recognition/> (last accessed 11 July 2022); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, [2004], ICJ, 59; Legal Consequences For States Of The Continued Presence Of South Africa In Namibia (South West Africa) Notwithstanding Security Council Resolution [1970], ICJ, 119.

<sup>34</sup> Mihaly Borsi, 'Transnistria - An Unrecognized Country Within Moldova' (2007) *SEER Journal For Labour And Social Affairs In Eastern Europe*, 45; Louise Arbour, 'Self-Determination and Conflict Resolution: From Kosovo to Sudan', *International Crisis Group*, 2010, available at <http://www.crisisgroup.org/en/publication-type/speeches/2010/Louise-Arbour-self-determination-and-conflict-resolution-from-kosovoto-sudan.asp> (last accessed 19 March 2023); Milena Sterio, 'Self-Determination and Secession under International Law: The New Framework' (2015) *ILSA J. INT'L & COMP. L.*, Vol. 21 (2), 302.

Several judicial decisions have not clarified -at least not without raising doubts, too- the issue in spite of their significance. In the Åland Islands case, the committee appointed by the League of Nations reached two key conclusions. First, it established a common foundation between the protection of minorities and the right to self-determination. Second, the committee emphasised that, when a state either maltreated minorities or was unable to safeguard their interests, the dispute could no longer be considered solely within the realm of internal competence. In such cases, the right to secession had to be acknowledged as an exception.<sup>35</sup>

Another important case is the one of the Constitutional Court of the Russian Federation, in 1992. This decision pertained to the establishment of an independent Republic of Tatarstan following the dissolution of the USSR.<sup>36</sup> In that case, the Constitutional Court ruled that the right to self-determination does not justify actions that compromise territorial integrity. Nevertheless, the decision itself continued to argue that, in situations where fundamental human rights are gravely violated and no other remedy is available other than territorial secession, the right to self-determination could potentially justify secession.<sup>37</sup>

A similar approach was taken by the Canadian Supreme Court in the Quebec case. In contrast to the cases involving foreign occupation, the court emphasised that the legalisation of the secession of a portion of the population might be

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<sup>35</sup> The Aaland Islands Question, [1921], PCIJ, 28; Nathaniel Berman, 'Sovereignty in Abeyance: Self-determination and International Law' (1988) *Wisconsin International Law Journal*, 69-72.

<sup>36</sup> Yeghia Tashjian, 'Turkey's Soft Power in Russia: The Case of Tatarstan', *The Armenian Weekly*, 16 May 2022, available at <https://armenianweekly.com/2022/05/16/turkeys-soft-power-in-russia-the-case-of-tatarstan/> (last accessed 29 June 2022).

<sup>37</sup> Christian Tomuschat, 'Self-Determination in a Post-Colonial World', in Christian Tomuschat (ed.), *Modern Law and Self-Determination* (Dordrecht: Martinus Nijhoff Publishers, 1993), 16; Markku Suksi, 'Keeping the Lid on the Secession Kettle – a Review of Legal Interpretations Concerning Claims of Self-Determination by Minority Populations' (2005) *International Journal on Minority and Group Rights*, Vol. 12 (2/3), 189-226, 212.

warranted when that specific population is denied any effective exercise of the right to self-determination.<sup>38</sup> The decision, of course, referred to 'extreme ... cases' providing a 'safeguard clause'.<sup>39</sup> In the same decision, it is mentioned that "... a people may include only a portion of the population of an existing State".<sup>40</sup> In the *Loizidou v. Turkey* case, Judge Wildhaber of the European Court of Human Rights (ECHR) arrived at a similar conclusion.<sup>41</sup>

The African Commission for Human and Peoples' Rights, in the Katanga case, determined that, as there were no indications that the Katanga community was denied the right to participate in the governance of Zaire, their exercise of internal self-determination should be compatible with the territorial integrity of Zaire.<sup>42</sup> It suggests that the denial of internal self-determination, typically associated with extreme human rights violations, may potentially warrant secession.<sup>43</sup> This stance has garnered significant support among some of the most influential international scholars, but remains far from unanimous.<sup>44</sup> The primary

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<sup>38</sup> Reference re. Secession of Quebec, [1998], Supreme Court of Canada, 154 [hereinafter Quebec].

<sup>39</sup> Jure Vidmar, 'Remedial Secession in International Law: Theory and (Lack of) Practice' (2010) *St Antony's International Review*, Vol. 6 (1), 37-56, 40.

<sup>40</sup> Quebec (no. 38), 123-124.

<sup>41</sup> *Loizidou v Turkey* EHRR 1997 244, 535 (Judge Wildhaber concurring, joined by Judge Ryssdal).

<sup>42</sup> *Katangese Peoples' Congress v. Zaire*, African Commission on Human and People's Rights, 1995, 6.

UN SC Resolution 169 (1961); Georges Abi-Saab, *The United Nations Operation in the Congo 1960-1964*, 1st ed (Oxford: Oxford University Press, 1978), 108-142; Kenneth Simmonds, *Legal Problems Arising from the United Nations Military Operations in the Congo* (1st ed.) (Dordrecht: Martinus Nijhoff Publishers, 1968), 82-98.

<sup>43</sup> Rocky Esposito, 'Ukraine, Self-Determination, and Emerging Norms for Unilateral Secession of State' (2020) *Washington University Global Studies Law Review*, Vol. 19 (1), 139-163.

<sup>44</sup> Simone Van den Driest, *Remedial Secession. A Right to External Self-Determination as a Remedy to Serious Injustices?* 1st ed (Cambridge: Intersentia, 2013), 106-107; Antonio Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (1st ed.) (Cambridge, Cambridge University Press, 1995), 118; Lee Buchheit, *Secession: The Legitimacy of Self-Determination*, 1st ed. (New Heaven, CO: Yale University Press, 1978), 221-222.

objection centres around the question of who will assess whether the required criteria for remedial secession have been met on the ground.<sup>45</sup> The 'safeguard clause' itself is inherently ambiguous, particularly considering the importance placed on territorial integrity.<sup>46</sup>

In all the aforementioned cases, a form of conditionality is established, which, broadly speaking, is linked to the denial of internal self-determination to a distinct group within a state's population. The exception to the prohibition mentioned above is essentially referred to as the 'safeguard clause'.<sup>47</sup>

These differentiations in international practice are depicted in the position of several international scholars, who argue that international law generally maintains a neutral stance on secession, since it is often regarded as an internal state matter. However, it is worth noting that while international law typically refrains from directly assessing the internal constitutional affairs of each state, it does take an interest in their internal developments when they lead to the emergence of potential new international actors.

The former UN Secretary-General, U Thant, was among the early voices to highlight the nearly intractable dilemma between state sovereignty and self-determination that can give rise to secession.<sup>48</sup> In the period following World War

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<sup>45</sup> Alexandra Xanthaki, *Indigenous Rights and United Nations Standards. Self-determination, Culture and Land* (1st ed.) (Cambridge: Cambridge University Press, 2007), 144.

<sup>46</sup> Malcolm Shaw, 'Peoples, Territorialism and Boundaries' (1997) *European Journal of International Law*, Vol. 8 (3), 478-507, 483.

<sup>47</sup> Esposito (no 43) 70; Van, Vernon, *Human Rights, The United States and the World Community*, 1st ed. (Oxford: Oxford University Press, 1970), 102.

<sup>48</sup> James Crawford, *The Creation of States in International Law*, 1st ed (Oxford: Clarendon Press, 2007).

II, the Declaration on Principles of International Law implied a possibility for legitimate -remedial- secession, by foreseeing that:

Nothing in the foregoing paragraphs [concerning the right of self-determination] shall be construed as authorizing or encouraging any action which would dismember or impair... 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.<sup>49</sup>

The UN General Assembly's relevant declaration is non-binding. Nevertheless, it serves as an indication that the prevailing legal opinion within the international community is that secession can be considered under certain circumstances, specifically when a state exercises its sovereignty in a manner that violates the internal self-determination, at least for a portion of its population.<sup>50</sup> The bottom line of this short analysis is that secession outside the de-colonisation is in principle prohibited under international law. Still, the exceptions are not that few and some extent of conditionality regarding the implementation of internal self-determination is implied for state sovereignty. While in the case of Donbass especially, the two Minsk agreements imposed some conditions upon the Ukrainian state sovereignty, the vast majority of the international community

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<sup>49</sup> UN GA Res. 2625 (1970), Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations.

<sup>50</sup> Markku Suksi, 'On Mechanisms of Decision-Making in the Creation (and the Re-Creation) of States – with Special Reference to the Relationship between the Right to Self-Determination, the Sovereignty of the People and the Power Constituent' (1997) *Magazine for Jurisprudence*, 426.

declined to concede legitimacy to the secession both of the two self-proclaimed People's Republics and to Crimea.

As for 'uti possidetis', it was introduced in Roman private law -where it referred to the possession of private property without an original title- and it developed to an international law principle describing a method for the formation of state boundaries.<sup>51</sup> As Malcolm Shaw described it,

the principle of uti possidetis juris developed as an attempt to obviate territorial disputes by fixing the territorial heritage of new states at the moment of independence and converting existing lines into internationally recognised borders, and can thus be seen as a specific legal package, anchored in space and time, with crucial legitimate functions.<sup>52</sup>

'Uti possidetis' was widely adopted in the process of de-colonisation, when new states emerged from within the old colonial states and empires, with contested claims in terms of their territories and the population that they should include. The Organisation of African Unity (OAU), at its meeting in Cairo in 1964, committed itself to the inviolability of borders as formulated by the former colonial powers,<sup>53</sup> a decision which the ICJ reaffirmed in the 'Frontier Dispute' case between Burkina Faso and Mali.<sup>54</sup> The African states -the core of de-colonised states- preserved 'uti possidetis', in spite of the fact that its implementation followed the borders that

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<sup>51</sup> J. B. Moore, *Costa Rica Panama Arbitration: Memorandum on Uti Possidetis*. (Rosslyn, VA: Commonwealth, 1913), 6; John Dugard, *International Law: A South African Perspective* (South Africa: Jute, 2006), 15-82.

<sup>52</sup> Malcolm Shaw, 'The Heritage Of States: The Principle Of Uti Possidetis Juris Today' (1996) *British Yearbook of International Law*, Vol. 67 (1), 75-76.

<sup>53</sup> Christian Tomuschat, 'Secession and Self-Determination,' in Michael G. Cohen, *Secession: International Law Perspectives* (Cambridge: Cambridge University Press, 2009), 27.

<sup>54</sup> ICJ, Frontier Dispute, Burkina Faso/ Republic of Mali, Judgment of 22 December 1986, 567, para. 25

were drawn by the former colonial forces, not because of its historical fairness in terms of the synthesis of each state's population, but because any other solution could be proven catastrophic, given the way that the colonial forces had brought together, in common administrative units, different communities.<sup>55</sup>

It is not clear what is the actual legal nature of 'uti possidetis' under international law. It has been suggested that it constitutes principle, customary norm, technique.<sup>56</sup> Without entering a detailed legal analysis, it must be mentioned that, in spite of its frequent use, the identification of *opinio juris* is not ascertained beyond any doubt. There are no international treaties or other legal documents proving that the international community shares the *opinio juris* that 'uti possidetis' is to be implemented in all relative cases.<sup>57</sup> There are cases in the course of which, states agreed to deviate from 'uti possidetis'.<sup>58</sup> In such a sense it cannot be suggested that it constitutes a norm of customary law.

The ICJ, in the Frontier Dispute case, held that 'uti possidetis' constitutes a general principle in the framework of de-colonisation.<sup>59</sup> In the same case, the Court also held that 'there is no need for the purposes of the present case, to show that this is a firmly established principle of international law where decolonization is concerned'.<sup>60</sup> As judge Yusuf pointed in his separate opinion in the 'Frontier Dispute (Burkina Faso/Niger)' case: '...the primary purpose of this principle was

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<sup>55</sup> Steven R. Ratner, *Drawing a Better Line: UTI Possidetis and the Borders of New States* (Cambridge: Cambridge University Press, 2017), 591.

<sup>56</sup> Fozia Lone, 'Uti Possidetis Iuris', *Oxford Bibliographies*, 23 March 2012, available at <https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0065.xml> (last accessed 25 March 2023).

<sup>57</sup> Daniel Bardonnet, 'Les Frontières Terrestres et la Relativité de leur Tracé' (1976V) 153 *Recueil des Cours* 9, 56.

<sup>58</sup> Ratner (no. 55).

<sup>59</sup> ICJ, Frontier Dispute, 1986 at 565; ICJ Territorial Dispute (Libya/Chad), 1994 at. 6, 89

<sup>60</sup> ICJ Frontier Dispute, 1986 at 557.

to ensure that there was no terra nullius open to occupation by foreign imperial powers in Spanish America... The second objective of uti possidetis juris was to establish a method or criterion for boundary delimitation where two States, formerly subject to the same metropolitan power, emerged from decolonization.<sup>61</sup> In other words, it possessed a certain status as a principle under conditions which no longer exist -no one refers to 'terra nullius' anymore. According to the Chamber of the Court in the case 'Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)': 'uti possidetis juris is essentially a retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes'.<sup>62</sup>

Its identification as a principle of international law is ambiguous. It seems most suitable to consider it as a technique, the outcome of which becomes legally binding once states' borders are delimited. After all, the 1978 Vienna Convention held that '[a] succession of States does not as such affect ... a boundary established by a treaty ...'.<sup>63</sup> Essentially, 'uti possidetis' can be followed upon as one of the many choices, once no other treaty or no jus cogens norms are breached.<sup>64</sup> What legally entrenches 'uti possidetis' is not its own legal nature -of whatever type-

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<sup>61</sup> ICJ, Frontier Dispute (Burkina Faso/Niger), (2013), Separate Opinion of Judge Yusuf, paras. 11-12.

<sup>62</sup> ICJ, Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening), (1992), p. 388, para. 43.

<sup>63</sup> United Nations Conference on Succession of States in Respect Of Treaties, Official Documents (1979) Art. 11, 3.

<sup>64</sup> See also: Jan Klabbers and René Lefeber, 'Africa: Lost between Self-Determination and Uti Possidetis', in Catherine Brolmann, René Lefeber and Marjoleine Zieck (eds), *People Minorities in International Law* (Dordrecht: Martinus Nijhoff Publishers, 1993), 37, 63.

but, indirectly, the delimitation of state borders which, as an element of state sovereignty, are covered by jus cogens.<sup>65</sup>

However, in spite of being jus cogens, the respect of state sovereignty, including the borders of each state, is not absolute.<sup>66</sup> It has to be balanced with other jus cogens norms, including self-determination. This is the core theme of the article: did 'uti possidetis', which is legally entrenched through the delimitation of state borders, in the case of Ukraine contradict self-determination, which is also a jus cogens norm, when USSR was dissolved and the borders of Ukraine formulated? Should therefore 'uti possidetis' in Ukraine and the Ukrainian borders at least partially lose their legitimacy and in such a sense justify the Russian SMO? It must be explained here that this question is posed in relation to the past. The article and the particular question refer to the period of the dissolution of the USSR and the formation of Ukraine. Back then there was no pre-formulated Ukrainian people, as was the case after Ukrainian independence. So in reality the question can be paraphrased as follows: 'is the formation of the independent Ukrainian state based on an initial violation of self-determination of a group of people that came to be part of the people of Ukraine, because of an unfair implementation of uti possidetis?'

In order to answer this question, in combination with the analysis on 'uti possidetis', we must briefly examine the fundamentals of self-determination as well. The right of self-determination places peoples as such at the forefront of international law. Without going into subtle conceptual differences, self-

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<sup>65</sup> Gregory H. Fox, 'Self-Determination in the Post-Cold War Era: A New Internal Focus?' (1995) *Michigan Journal of International Law*, Vol. 16 (3), 733-781, 751-752

<sup>66</sup> Robert Rosenstock, 'The Declaration of Principles of International Law Concerning Friendly Relations. A Survey' (1971) *American Journal of International Law*, Vol. 65 (5), 713-735, 732.

determination is treated both as a right and as a fundamental principle of international law, belonging to the *jus cogens*,<sup>67</sup> as the ICJ confirmed in the East Timor case.<sup>68</sup>

The consultations that took place before the adoption of the Charter are enlightening about the positions of the authors of the charter. Some states were hesitant or even hostile to the inclusion of the right to self-determination in the UN charter, for fear of losing their colonies, separatist movements, or the exploitation of the right, while on the contrary other states enthusiastically supported its inclusion in the Charter.<sup>69</sup> Eventually self-determination was included in the Charter -in articles 1 par. 2 and 55- and further developed, with a focus on the fight against colonialism, racism, the illegal occupation of territories, neo-colonialism, especially in the form of the exploitation of the natural resources of developing states by foreign powers.<sup>70</sup> Indirect references can also be found in the Universal Declaration of Human Rights, in the preamble and, in addition, in Articles 21 and 22, which make reference to political and economic self-determination.

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<sup>67</sup> Zubeida Mustafa, 'The Principle of Self-Determination in International Law' (1971) *The International Lawyer*, Vol. 5 (3), 479- 487, 479; Cornell Law School Legal Information Institute, 'Self-Determination', available at [https://www.law.cornell.edu/wex/self\\_determination\\_\(international\\_law\)](https://www.law.cornell.edu/wex/self_determination_(international_law)) (last accessed 22 May 2022).

<sup>68</sup> ICJ, East Timor (Portugal v. Australia), ICJ Reports 1995, In Sna. 102, para. 29. Also, Commentary to Article 40, para 5. Report of the ILC, GAOR, Supp. No. 10 (A/56/10), p. 284.

<sup>69</sup> L. Henkin, *International Law: Politics, Values and Functions* (Dordrecht: Martinus Nijhoff Publishers, 1990), 146; N.D. Arnison, 'International Law and Non- Intervention, When Do Humanitarian Concerns Supersede Sovereignty?' (2003) *Sum Fletcher F. World AFF* 17, 203; T. Franck, 'Collective Security and UN Reform: Between the Necessary and the Possible' (2005-2006) *Chicago Journal of International Law* 6, 601.

<sup>70</sup> C. J. Iorns, 'Indigenous Peoples and Self- Determination: Challenging State Sovereignty' (1992) *Case Western Reserve Journal of International Law* 24, 246; Charter of the United Nations, Article 55.

It is above all, the International Covenant on Economic, Social and Cultural Rights, as well as the Covenant on Civil and Political Rights, which, in their common Article 1, make a clear reference to the right to self-determination. They guarantee that self-determination has both an external and an internal dimension. Internal self-determination concerns the relationship between governed and rulers within the community residing in a certain territory.<sup>71</sup> However, resorting to such a general approach usually serves as a starting point, since the exact way of consensus and representativeness does not constitute common ground between different political systems but, on the contrary, a point of conflict.<sup>72</sup>

Some fundamental elements, however, of internal self-determination are articles 19, 21, 25a, 25b of the Covenant on Civil and Political Rights, which refer to freedom of expression, the right to peaceful assembly and union, the right to participate in public affairs directly or through elected representatives, the right to vote. Reference can be made also to Article 21 of the Universal Declaration of Human Rights and to UN GA resolutions 637A and 1541(1960).

Possibly the most fundamental issue of self-determination touches on the question of who can be identified as a subject imbued with the potential of self-determination.<sup>73</sup> The implementation of self-determination presupposes the ontological and political existence of the subject who decides how to dispose of itself, entering the framework of international law, even by causing a breach in

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<sup>71</sup>K. S. Shehadi, 'Ethnic Self-Determination and the Break-up of States', (1993) *The Adelphi Papers*, Vol. 33 (283), In Sna. 16.

<sup>72</sup>A. Michalska, 'Rights of Peoples to Self-Determination in International Law', in W. Twining (ed.), *Issues of Self-Determination*, (Aberdeen: Aberdeen University Press, 1991), 88.

<sup>73</sup>S. A. Paulk, 'Determination of Self in a Decolonized Territory: The Dutch, The Indonesians, and the East Timorese', (2001) *Emory International Law Review*, Vol. 15 (267), 296-297.

state sovereignty and cohesion.<sup>74</sup> What is the subject entitled to the right of self-determination? This is always the most complicated political and legal issue,<sup>75</sup> with different currents of international law and international politics arguing over its interpretation and application.<sup>76</sup> The identification of a group of people as 'peoples' -as well as 'nation'- constitutes one of the most complicated historical and legal problems.<sup>77</sup>

When we talk about the population of a state as a whole, things are somewhat simpler: it concerns the citizens of that state. The use of the term 'minority' is of little help when minorities move from the stage of asserting their rights within a state to -seeking- their emergence into peoples with a distinct right to self-determination and therefore secession.

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<sup>74</sup> H. Fan, 'The Missing Link between Self-Determination and Democracy: The Case of East Timor', (2007) *Northwestern Journal of International Human Rights*, Vol. 6 (1), 18.

J. K. Weinberg, 'Whose Right is it Anyway? Individualism, Community, and the Right to Die: A Commentary on the New Jersey Experience', (1988) *Hastings Law Journal*, Vol. 40 (119), 128-130.

L. Seshagiri, 'Democratic Disobedience: Reconceiving Self-Determination and Secession at International Law', (2010), *Harvard International Law Journal*, Vol. 51 (2), 553, 554, 556;

R. L. Gana, 'Which "SELF"? Race and Gender in the Right To Self Determination as a Prerequisite to the Right to Development', (1995) *Wisconsin International Law Journal*, Vol. 14 (133), 142, 151.

<sup>75</sup> H. G. Espiell, 'The Right to Self-Determination: Implementation of United Nations Resolutions', (1980) *United Nations Digital Library*, para. 59, available at U.N.Doc.

E/CN.4/Sub.2/405/Rev.1, U.N.Doc. E/CN.4/Sub.2/405/Rev.1 (last accessed 22 March 2024); A.

E. Eckert, 'Free Determination or the Determination to be Free? Self-Determination and the Democratic Entitlement', (1999) *UCLA J. International Law & Foreign Affairs* 4, 55, 68; A.

Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', in Simpson, G. (ed.), *The Nature of International Law* (London: Routledge, 2001).

<sup>76</sup> Conference on Security and Cooperation in Europe: Final Act, (1975), available at

[www1.umn.edu/humanrts/osce/basics/finact75.htm](http://www1.umn.edu/humanrts/osce/basics/finact75.htm) (last accessed 7 February 2015);

Charter of Paris, available at [www.osce.org/mc/39516](http://www.osce.org/mc/39516) (last accessed 7 February 2015); F. L.

Kirgis, Jr., 'The Degrees of Self-Determination in the United Nations Era', (1994) *The American Journal of International Law*, Vol. 88 (304), 304-306.

<sup>77</sup> Al. Pellet, 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples', (1992) *European Journal of International Law*, Vol 3 (2), 178.

Although various common features have been proposed in terms of the definition of the term 'peoples' and 'nation' -the ontological basis of the right to self-determination, that is- such as the common language, the common religion, the cultural proximity, the establishment in a certain geographical context, the self-perception of a community as a nation and various more, the historical reality of the nation as well as the term 'peoples' turns out to be much more complex.

In fact, when the term 'peoples' is interpreted as synonymous with the concept of 'community', then the recognition of the right to self-determination is divided into even smaller and more complex, in terms of definition, groups of people. We must, therefore, resort to a combination of criteria, the 'feeling' of self-determination and ultimately the criterion of the very act of claiming self-determination in contradiction to the existence of the state, while accepting the real danger of confusion as to the exact identification and categorisation of different population groups.

However, it is impossible to formulate in advance an equation for the internal relationship of these different criteria in order to identify the subject with the potential, according to international law, of claiming self-determination. The claim to self-determination beyond state sovereignty and in contrast to it is, in each case, a unique situation: if successful, it entails the detachment of territory from a state, with the aim of creating a new state or uniting with a third state.<sup>78</sup>

Given that self-determination, therefore, refers also, and apart from states, to communities of people as breaching the unity of a state, is it possible for 'uti possidetis' to violate self-determination, especially given that the main scope of

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<sup>78</sup> Cohen (no. 27) 2-3; J. Dahlitz (ed.) *Secession and International Law: Conflict Avoidance, Regional Appraisals* (The Hague: Asser Press, 2003), 6; J. Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 2006), 375.

'uti possidetis' is the -supposed- stability that it offers, on the basis that it follows the pre-existing administrative borders without dealing with how these were initially drawn? Should the distinction between the de facto and the de jure possession of the territory, as well as the national, tribal, racial, religious, communal synthesis of the population within the specific lines, be indifferent for the formation of the territory of the state?<sup>79</sup>

After all, 'uti possidetis' follows borders which have been determined under different political situations. These pre-existing borders are to be implemented in new and different conditions. In such a framework, self-determination, in spite of constituting jus cogens norm, may bend in favour of 'uti possidetis', which is a technique. In legal -and political- terms it is an unequal trade-off violating the hierarchy of international law. In the name of avoiding complications, the wellbeing and the will of the local communities can be subjugated to alleged borders' stability and further lead to violation of jus cogens.<sup>80</sup>

In legal terms, the counter-argument is that it is not in favor of 'uti possidetis' that self- determination bends but in favor of respect for state sovereignty, fundamental part of which is the respect of the territorial integrity. While this argument is correct from a strict, legal point of view, the reality is different in practice, since it is 'uti possidetis' that in principle determines the new borders. The issue is not procedural but substantial. Do we take into account, when drawing borders, the will of the peoples or not?

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<sup>79</sup>Anne Peters, 'The Principle of Uti Possidetis Juris: How Relevant is it for Issues of Secession?', in Christian Walter, Antje von Ungern-Sternberg, and Kavus Abushov (eds), *Self-Determination and Secession in International Law* (Oxford: Oxford University Press, 2014), 15-35.

<sup>80</sup>Avishai Margalit and Joseph Raz, 'National Self-Determination', (1990) *The Journal of Philosophy*, Vol. 87 (9), 439, 457.

We need to remember that the birth of states, as well as the dissolution of pre-existing ones, is almost always an 'anomalous' situation in international law as a constitutive moment in history. It is on such grounds that not less but more attention to self-determination must be paid. Under such circumstances, the main problem becomes, not the method for the delimitation of borders, such as 'uti possidetis', but whether whatever method for borders' delimitation is complicit with the imperative of self-determination to consult with the local communities or peoples and identify their will or not. Plebiscites are often referred as such means,<sup>81</sup> although they are not free of risks -including issues related to the participants, the organisation, the transparency and the territory where they will be held.<sup>82</sup> Therefore 'uti possidetis' is not per se the problem but whether it is implemented with or, without taking into account self-determination.

Summing up, 'uti possidetis' as a technique and self-determination as a right and jus cogens norm, may find each other at odds and in a tense relationship. The latter is binding, whereas the former derives its bindingness from the respect of state sovereignty and territorial integrity. Reliance on 'uti possidetis', without taking into account the will of the peoples' concerned violated self-determination, may also compromise the cohesion of the new state. We must not forget that the USSR was anomalously dissolved and in contradiction to its constitutional provisions. In this sense, we cannot talk about a parent state agreeing to the relinquishment of territories where its nationals reside in a constitutionally proper way. The crucial aspect therefore in the relationship between 'uti possidetis' and

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<sup>81</sup> ICJ Reports, Western Sahara Case, (1975) at 33; Antonio Cassese, *Self-Determination Of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995), at p. 190.

<sup>82</sup> Pal Kolsto, 'The New Russian Diaspora: Minority Protection in the Soviet Successor States', (1993) *Journal of Peace Research*, Vol. 30 (2), 197, 207-208.

self-determination in order to assess whether the former violates the latter, consists in the determination on an ad hoc basis of whether the will of the peoples concerned has been taken into account. Having analysed the essentials of this relationship, the next question to be answered is whether in the case of Ukraine, 'uti possidetis' violated self-determination at least for part of the population in Ukraine. In order to provide an answer, some basic historical elements are presented.

### **3. Uti possidetis in Ukraine**

Ukraine became an independent state following the dissolution of the USSR. 1991 was the year of cataclysmic changes and eventually dissolution of the USSR. The latter took place at a rapid scale and raised a wide variety of issues of political and legal nature. As already mentioned, 'uti possidetis' guided the dissolution of the USSR. The question is whether the specific way of its implementation violated, at the time of its implementation, the self-determination of the Soviet people, of the people in Ukraine or of part of them, by failing to take into account their expressed will, creating a situation of historical injustice that could somehow be invoked in order to justify the Russian SMO of 2022.

Most analyses begin -and often end- with the referendum regarding the independence of Ukraine. This is not the whole picture though. Before the referendum about the independence of Ukraine, another one had taken place. It was 17 March 1991 when the citizens of the USSR were asked, in a referendum, the following question: '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?'<sup>83</sup> Contrary to USSR laws, 6 republics declined to take part in the referendum but -surprisingly enough from a present perspective- Ukraine participated. The results in Ukraine were vastly in favour of the preservation of USSR, as was the case in all of the Republics that participated: 70,5% voted 'yes' in Ukraine,<sup>84</sup> while 76,43% voted for 'yes' all over the USSR.<sup>85</sup>

The referendum was held in line with the Fourth Congress of People's Deputies of the USSR. In his address to the country, on 7 February 1991, Michael Gorbachev emphasised the multinational synthesis of all the socialist republics. The dissolution of USSR into distinct national states would be catastrophic for the populations living outside their 'republic of origin', who were no less than 75 million all over the USSR.<sup>86</sup>

The outcome of the referendum was ignored. In spite of the expressed will of the vast majority of Soviet citizens in the majority of the Soviet republics –9 out of 15- shortly before the implementation of the outcome of the referendum, an attempt for a coup against Gorbachev, in August of the same, year took place.<sup>87</sup> The coup failed, but so did the approved reformation of the USSR. Instead, and

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<sup>83</sup> Lewis Siegelbaum, 'March Referendum', *Seventeen Moments in Soviet History*, available at <https://soviethistory.msu.edu/1991-2/march-referendum/> (last accessed 2 April 2023).

<sup>84</sup> Alex Kireev, 'Ukraine. Referendum on the Preservation of the USSR 1991', *Electoral Geography* 2.0, available at <https://www.electoralgeography.com/new/en/countries/f/ukraine-referendum-on-the-preservation-of-the-ussr-1991.html> (last accessed 2 April 2023).

<sup>85</sup> Kirill Zykov, 'Soviet Collapse Violated the People's Will, Gorbachev Says', *Moscow Times*, 17 March 2021, available at <https://www.themoscowtimes.com/2021/03/17/soviet-collapse-violated-the-peoples-will-gorbachev-says-a73267> (last accessed 2 April 2023).

<sup>86</sup> Richard Sakwa (ed.), *The Rise and Fall of the Soviet Union, 1917-1991* (London: Routledge, 1999), 471-473.

<sup>87</sup> Fid Backhouse et al., '1991 Soviet coup attempt', *Britannica*.

contrary to the March referendum, the USSR was dissolved into independent national states, under the initiative of the heads of the -former- socialist republics.

Ukrainian independence was proclaimed by referendum on 1 December 1991,<sup>88</sup> by a strong majority,<sup>89</sup> as part of the dissolution of the USSR.<sup>90</sup> Therefore, within less than one year, two referenda took place, with contradictory outcomes. The first, in favour of the preservation of USSR. The second -after USSR was practically dissolved- in favour of Ukrainian independence -which, by the way, offered no alternative, since the USSR had already ceased to exist. What is often overlooked is that different and contradictory 'peoples' emerged as subjects of law -both domestic and international- during the procedure of USSR dissolution, which was followed by declarations of independence: the Soviet people who reiterated their existence as the lawful subject of the USSR on the one hand, and the peoples of each ex-federal socialist republic which claimed and eventually managed to form national states following a de facto reverse of the Soviet referendum. While we usually discuss about secessionist movements within the newly formed back then national states, the emergence of these states in the first place was the outcome of secessionism that was contradictory to the referendum of the Soviet people.

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<sup>88</sup> Terrace Hunczak, *The Ukraine, 1917-1921; A Study in Revolution*, (Cambridge: Harvard University Press, 1977), 391-395.

<sup>89</sup>'Independent Ukraine', *Britannica*, available at <https://www.britannica.com/place/Ukraine/The-Maidan-protest-movement> (last accessed 24 June 2022). Still the interpretation of the vote is not unanimously interpreted. In certain, eastern parts it had pro- socialist and not pro-nationalistic meaning.

Irina Predborska, Katya Ivaschenko and Ken Roberts, 'Youth Transitions in East and West Ukraine', (2004) *European Sociological Review*, Vol. 20 (5), 403, 408-09.

<sup>90</sup> Esposito (no. 43) 141, 142.

The messages in terms of self-determination are -to say the least- mixed: within one year, both the preservation of USSR and the Ukrainian independence were approved. In addition, even since the first years of Ukrainian independence, it was obvious that for a certain part of the population, mainly inhabiting Crimea and Donbass, there was discontent with the central Ukrainian authorities. The most important issue in this sense does not emerge in relation to 'uti possidetis' per se, but in terms of whether the dissolution of the USSR in the first place in favour of national states -the borders of which were designed according to 'uti possidetis'- constituted a violation of self-determination of the Soviet people in general - therefore of the Ukrainian people or part of them as well- creating therefore some type of historical 'injustice' that Russia could invoke in 2022.

The answer to the above question has a political and a legal aspect. Regarding the political aspect, we know that the implementation of 'uti possidetis' in the post-Soviet states in general -and in Ukraine in particular- failed to bring stability, giving birth to a number of conflicts: Chechnya and Dagestan, South Ossetia and Abkhazia, Transnistria, Nagorno Karabakh, Crimea, Donetsk, and Lugansk.<sup>91</sup> This is an indirect proof of not taking into account the will of the relevant populations, at least up to a certain extent. Indicative of the difficult relations within Ukraine right from the beginning of its life as an independent state, was also the referendum of 1994, which took place in the two oblasts of Donetsk and Lugansk, when the vast majority voted for a federal and not a centralised form of statehood -in Donetsk- as well as for the preservation of the Russian language as an official

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<sup>91</sup> Bruno Coppieters, 'The Roots of the Conflict', in *Accord: A Question Of Sovereignty*, 18 (Conciliation Resources, 1999); Borsi (no. 34) 45.

one.<sup>92</sup> The outcome of the referendum was not a negation of Ukrainian independence. Still, it was indicative of cautiousness –if not hostility- towards the central government, which was also sustained in a more open way, in the -illegal under Ukrainian law- Crimean referendum of 1994.<sup>93</sup>

This is not strange given the complexities of the history of Ukraine,<sup>94</sup> as well as the synthesis of the main national groups. The most recent census took place 22 years before, in 2001.<sup>95</sup> According to the data at the time, 77.8% of Ukraine's population identified themselves as Ukrainians and 17.3% as Russians. In 1995, Dominique Arel wrote that about 37.4 million of its inhabitants identified themselves as Ukrainians, while 11.4 million as Russians.<sup>96</sup> The numbers vary and can be misleading. In any case it is quite obvious that there were at least two major communities with, up to some extent, a different self-identification.<sup>97</sup>

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<sup>92</sup> M. K. Flynn 'Political Mobilization in Eastern Ukraine: The Referendum of 1994 in the Donetsk Oblast' (1996) *The European Legacy*, Vol. 1 (1), 342-349.

<sup>93</sup> Kelly Buchanan, 'Crimean History, Status, and Referendum', *Custody Legis*, 13 March 2024, available at <https://blogs.loc.gov/law/2014/03/crimean-history-status-and-referendum/> (last accessed 24 June 2022).

<sup>94</sup> Vira Kachur et al., 'The Role of Legal Culture in Maintaining Social Stability and Countering Separatist Movements: The Case of Ukraine', (2020) *European Journal of Sustainable Development*, Vol. 9 (1), 294- 299, 294; John O' Loughlin, Gerard Toal and Vladimir Kolosov, 'The Rise and Fall of "Novorossiia": Examining Support for a Separatist Geopolitical Imaginary in Southeast Ukraine', (2017) *Post-Soviet Affairs*, Vol. 33 (2), 124, 124-144.

<sup>95</sup> Jeffrey Mankof, 'Russia's War in Ukraine, Identity, History, and Conflict', *Center for Strategic and International Studies*, April 2022, 1-12; Dominique Arel, 'Interpreting "Nationality" and "Language" in the 2001 Ukrainian Census' (2002) *Post-Soviet Affairs*, Vol. 18(3), 213, 213-249.

<sup>96</sup> Sergiu Constantin, 'Ethnic and Linguistic Identity in Ukraine? It's Complicated', *eurac research*, 21 March 2022, available at <https://www.eurac.edu/en/blogs/mobile-people-and-diverse-societies/ethnic-and-linguistic-identity-in-ukraine-it-s-complicated> (last accessed 11 July 2022); Dominique Arel, 'Language Politics in Independent Ukraine: Towards One or Two State Languages?' (1995) *Nationalities Papers*, Vol. 23 (3), 597, 598.

<sup>97</sup> Volodymyr Kulyk, 'Language Identity, Linguistic Diversity and Political Cleavages: Evidence from Ukraine' (2011) *Nations and Nationalism*, Vol. 17(3), p. 627, 627–648;

Further, politically speaking, it was highly controversial what the actual will of the Soviet peoples was back then. As mentioned above, the application of 'uti possidetis' must comply with the expressed will of the populations concerned, otherwise self-determination is violated. In this regard, it is reasonable to argue that, in the process of dissolving the USSR, the will of the peoples concerned, meaning foremost the Soviet people as such, including the population of Ukraine, was partially violated since the decision of the original referendum to preserve the USSR was never implemented. It could be said that, in any case, the 1991 referendum which was in favour of the preservation of the USSR is irrelevant, given the dissolution of the USSR. There was no federation of which Ukraine could remain a part. This, however, is not accurate. It was exactly the fact that the will of the Soviet people was violated because of the non-implementation of the initial referendum, that led to the unconstitutional de facto dissolution of USSR, therefore practically eradicating the choice of USSR preservation and raising the sole prospect of the creation of new national states. In addition, as mentioned above, it must be kept in mind that, at the time of violent -both metaphorically and literally- transition from the preservation of USSR to its unconstitutional dissolution, there were no established 'peoples' or communities excluded from becoming peoples in advance, but communities which because of 'uti possidetis' found themselves in national states either as the majority or as the minority, without having much to say about these new conditions, apart from accepting them or rejecting them -in the cases where referenda were held.

The aforementioned, however, do not negate that there was a second referendum in favor of Ukraine's independence, which however followed the de facto end of the USSR. In other words, the Ukrainian borders resulted from a referendum -and,

in this sense, there is an alignment of 'uti possidetis' with self-determination- but only in part, given that a few months earlier, the same population had expressed itself differently when it was given the opportunity to choose either the multinational state of the USSR or the independence of Ukraine. Politically, then, there is a certain extent of conflict between the independence of Ukraine and other post-Soviet states with the self-determination of the Soviet people. In this sense it can be a conflict, not specifically of the 'uti possidetis' technique with the self-determination of the people concerned, but in general of the dissolution of the USSR including 'uti possidetis' as well.

The political dispute about the respect of self-determination is accompanied by a relevant legal conflict as well. The legal question is whether there can be a denial of the legality of Ukraine's borders, on the basis of the possible violation of the self-determination of part of the Ukrainian people due to the way Ukraine became independent and its borders were drawn.

A first counter-argument against such an argument is that self-determination can be attributed only to the whole of a 'people' of a state and not part of it.<sup>98</sup> This is not completely true however. There are cases of secession, as mentioned above.<sup>99</sup>

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Robert Malley, 'Ukraine Is Ground Zero for the Crisis Between Russia and the West', *The Atlantic*, 16 July 2018.

<sup>98</sup> Loqman Radpey, 'Remedial Peoplehood: Russia's New Theory on Self-Determination in International Law and its Ramifications beyond Ukraine', *EJILTalk*, 7 October 2022, available at <https://www.ejiltalk.org/remedial-peoplehood-russias-new-theory-on-self-determination-in-international-law-and-its-ramifications-beyond-ukraine/> (last accessed 19 April 2023).

<sup>99</sup> P. Nanda, 'Self-Determination in International Law: The Tragic Tale of Two Cities - Islamabad (West Pakistan) and Dacca (East Pakistan)', (1972) *The American Journal of International Law*, Vol. 66 (2), 321, 321-336; Steven Woehrel, 'Kosovo: Historical Background to the Current

Given such ambiguous and conflicting approaches, where does law stand and what does it tell us about Ukraine in relation to 'uti possidetis' and self-determination? In order to reach an answer, we need to look at the issue from a slightly different perspective, focused on the historical events. The legal problem with the denial of the outcome of 'uti possidetis' regarding Ukraine is different: first of all, the referendum for Ukrainian independence cannot be simply overlooked as it obviously produces legitimacy. Secondly, and most important, in the 1994 Budapest Memorandum, the US, Russia and the UK pledged 'to respect Ukraine's independence and sovereignty and existing borders' and 'to refrain from threatening or using force' against the country.<sup>100</sup> It was on these grounds that Ukraine handed over its nuclear arsenal.<sup>101</sup> The memorandum provided assurances rather than guarantees as to Ukraine's sovereignty and integrity, and therefore included a level of assurance lower than that of guarantees, but again it demonstrated Russia's commitment to Ukraine's borders and population composition.

We must not forget that the principle of the preservation of state borders in international law,<sup>102</sup> constitutes a fundamental principle -jus cogens- designed to

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Conflict', CRS Report for Congress, June, 1999, available at <https://sgp.fas.org/crs/row/RS20213.pdf> (last accessed 19 August 2022).

<sup>100</sup> Memorandum on security assurances in connection with Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons, Budapest, 5 December 1994, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%203007/Part/volume-3007-I-52241.pdf> (last accessed 19 August 2022).

<sup>101</sup> Steven Pifer, 'Why Care about Ukraine and the Budapest Memorandum', *Brookings*, 5 December 2019, available at <https://www.brookings.edu/blog/order-from-chaos/2019/12/05/why-care-about-ukraine-and-the-budapest-memorandum/> (last accessed 19 August 2022).

<sup>102</sup> ICJ, *Temple of Preah Vihear (Cambodia v. Thailand)*, 1962, at p. 34.

ensure stability and peace internationally.<sup>103</sup> Indeed, respect for borders and therefore for state sovereignty and territorial integrity cannot be compromised even if the treaty on which those borders were to be defined has otherwise been violated.<sup>104</sup>

Therefore, while there are, from a political perspective, reasonable concern about how much self-determination was respected in the framework of the formation of the post-soviet states in general and in the case of Ukraine in particular, from a *stricto sensu*, legal perspective, Russia itself adhered to the specific formation of Ukraine, through the 'uti possidetis' technique.<sup>105</sup>

#### 4. Conclusions

The implementation of 'uti possidetis' in a number of cases has produced anything but stability. While it seems wise to follow predetermined lines on the grounds -i.e. administrative borders- the truth is that state formation is almost always more complicated than this, given that the peoples are the foundations of states, not the borders' lines. Following 'uti possidetis' without taking into account the aspirations for self-determination always undermines the stability and cohesion of the states in-the-making.

That proved to be the case very often both with de-colonisation, as well as with the former USSR and former Yugoslavia. The last two cases are characteristic: the goals of multi- ethnic socialist states regarding the formation of their citizenship

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<sup>103</sup> R. Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963), In Sna. 70.

<sup>104</sup> ICJ, Treaty between Libya and France, (1994) In Sna. 37.

<sup>105</sup> *Yearbook of the International Law Commission*, 1974, vol. I, 83, 204-221.

were different from the ones of the national, capitalist states that followed. Especially in the USSR, the socialist republics were multi-ethnic on purpose. Projecting the administrative borders of the former model to the latter led to several complications.

The inclusion of territories and minority populations in new, national states with a dominant ethnic group and very little, if any, culture of multi-ethnic coexistence, compromised the viability of these new states. 'Uti possidetis' came at the expense of unique local conditions and historical accuracy, thus very often creating incohesive societies, which eventually became, in several cases, unstable states. The implementation of 'uti possidetis' in such cases seems to be an oversimplistic way of dealing with deep historical issues; it is based on the assumption of the imposition of a 'cosmopolitan diktat', which very often -if not most often- turns out not to be the case.<sup>106</sup>

'Uti possidetis' can 'work' as a policy, provided that the new states are proven inclusive enough on the one hand and that the successive movements fade on the other hand.<sup>107</sup> Once these conditions are not met, as we saw in the cases of former Yugoslavia and the USSR, ethnic minorities may simply find themselves on the wrong side of the borders and therefore become victims of ethnic cleansing or similar acts. This was to what, characteristically, the short-sightedness of the

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<sup>106</sup> John Chipman, 'Managing the Politics of Parochialism', in Michael E. Brown (ed.), *Ethnic Conflict and International Security* (Princeton, NJ: Princeton University Press, 1993), 143-170.

<sup>107</sup> Steven R. Ratner, 'Drawing a Better Line: UTI Possidetis and the Borders of New States', (1996) *The American Journal of International Law*, Vol. 90 (4), 590, 591.

Badinter Commission contributed by holding 'uti possidetis' as the rule for the creation of the new states, unless other agreements could be reached.<sup>108</sup>

The case of the independent state of Ukraine has been plagued by these problems from the outset. Having included a large part of the population of Russian origin, with economic and political conditions which were not conducive to a multinational state and with great distrust on the part of the population towards the central authorities, it also had the misfortune of becoming a field of conflict between world powers. From a political point of view, therefore, we can argue that the way in which 'uti possidetis' was applied did not prove effective in terms of internal Ukrainian peace and stability. From the point of view of international law, however, Russia's policy towards Ukraine during the period of its independence and in subsequent years does not allow justification of SMO on the basis of some alleged historical injustices against the Russian-speaking part of the Ukrainian population or because of the violation of its right of self-determination.

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<sup>108</sup> Conference on Yugoslavia, Arbitration Commission Opinion No. 3 (Jan. 11, 1992), 31 ILM at 1500.

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