

# Four Challenges Facing a Ukrainian-Russian Truce. Part I: The Constitutional Impasse

Andreas Umland  
13 February 2023

## Executive Summary

The already heated discussion among policymakers and policy shapers in the West on how the Russian-Ukrainian war could and should end is intensifying by the month. Regardless of one's stance on the desirability or possibility of a negotiated conclusion to the war, the difficulties in reaching such a settlement must be acknowledged by all participants in the debate. The experience of various countries of Moscow's neo-imperial meddling abroad over the past three decades provides ample grounds for scepticism.

On the cessation of the current Russian-Ukrainian war, there will be at least four groups of reasons why negotiations between Kyiv and Moscow will probably either not take place or not achieve any tangible results, let alone a lasting peace. These include a constitutional impasse and domestic political factors in both countries, on the one hand, and various long-term strategic as well as security/political considerations in Kyiv and the West, on the other. This essay is the first of a four-part series of commentaries outlining the barriers to a negotiated solution to the conflict. The discussion below examines the manifest conflicts between the constitutions of Ukraine and Russia. The three subsequent essays deal with the issue of political resistance to concessions to achieve a peace deal in Ukraine and Russia; the strategic foolishness of Kyiv entering into an agreement with Russia; and the destructive repercussions for the international security order of a partial satisfaction of Moscow's pretensions through agreement of a peace deal.

## The Special Case of Crimea

This peculiar legal problem has been in existence since 18 March 2014 when the Russian Federation officially included the Crimean Peninsula in its territory. The annexation of Crimea was officially acknowledged only by a few countries and in certain political circles around the world.

However, the Black Sea peninsula has always been a special region within Ukraine – a fact that was duly acknowledged by Kyiv back in the early 1990s. The post-Soviet constitution of an otherwise unitary Ukrainian state that emerged out of a Soviet republic made an exception for the peninsula. Ukraine's 1996 basic law allowed the existence of the so-called Autonomous Republic of Crimea, which continues to legally exist today. Crimea's special status was designed to account for the demographic and historical specificity of the peninsula within the Ukrainian state.

Despite Crimea's special status and the enhanced rights conferred on the peninsula's population within post-Soviet Ukraine, Russia first covertly invaded and then officially annexed Crimea in February and March 2014. These illegal acts were based, among other things, on the Kremlin's unsubstantiated claim that the rights of ethnic Russians had been violated or were under threat within the autonomous republic. Even more surprising was the fact that Moscow demanded from Kyiv, shortly afterwards in the spring of 2014, that the Donbas region be given a status fundamentally the same as that of the Autonomous Republic of Crimea, which Russian troops had just occupied.

Crimea's 20-year autonomy within Ukraine had not prevented Russia from annexing the peninsula just a few weeks before the start of the Donbas War. This became Moscow's formula for a putative solution to the armed Russian-Ukrainian conflict in the Donets Basin. This curious idea was until 2022 popular not only in Moscow, but also in many Western capitals.

Moscow presented the outside world in 2014 with a semi-plausible explanation for its violation of international law in the Black Sea. Among other dubious assertions, it proclaimed that the history of Crimea in the Tsarist and Soviet empires justified Russia's scandalous 2014 action. The Kremlin's story was certainly an exercise in historical cherry-picking. Many national governments around the world could present – and some do present – similar irredentist narratives referring to this or that historical episode. They too might lay claim to certain territories that once belonged to their country but are now – as a result of putative historical injustice – located in other states.

Notwithstanding the historical dubiousness and political explosiveness of Russia's 2014 rhetoric, unofficially, numerous politicians and diplomats and some experts around the world bought the Kremlin's tale about Crimea. This despite the actual history of Crimea before, during and after the Tsarist period, and the subversive effects of such recognition on the stability of the world's legal order. The implicit acknowledgement of Moscow's claim to the Black Sea peninsula among many non-Russian observers – even some in the West – was one reason why international sanctions in response to Russia's extraordinary actions of February to March 2014 were either mild or non-existent.

Until recently, the Crimea question was perhaps an issue for which a solution could have been either postponed to a distant future or might one day be resolved in partial accordance with

Moscow's preferences. The latter could have happened, for example, through a temporary international administration of the peninsula or by enhancing the autonomy of Ukraine's Autonomous Republic of Crimea still further. Russia's September 2022 annexation of four additional Ukrainian territories, however, removes such options from the table.

## The New Deadlock

The Kremlin's justifications for the recent second annexation of Ukraine's southern and eastern mainland are even flimsier than those for its 2014 incorporation of Crimea. The hitherto semi-open question about the peninsula has now been repackaged into a more central and territorially larger issue about the identity, coherence, and future of Ukraine as a whole. The Crimea problem is now part and parcel of a larger question about the right to exist of a founding member of the United Nations. (The Ukrainian Soviet Socialist Republic belonged to the UNO in 1945–1991.) As a result, a full reversal of Russia's entire illegal westward expansion, according to all of Ukraine's wishes, is now supported by more people and countries across the world than hitherto.

Ominously, Moscow's September 2022 annexation documents and the accordingly revised Russian basic law make explicit claims to Ukrainian land that Russia does not occupy. These territories are either still or once again under Kyiv's control. In fact, none of the four newly annexed mainland Oblasts of Ukraine has been fully captured by Russian forces. This is in contradiction of the Russian state's new self-definition and in partial violation of the Russian Constitution, which includes these Oblasts in the official territory of the Russian Federation.

In fact, Russia has now transformed itself into what is known in political science and international diplomacy as a failed state. Before 2022, Moscow was engaged in reducing the sovereignty and integrity of other nations, such as Moldova, Georgia and Ukraine, by military and non-military means. Now the Russian Federation itself is – according to its own constitution – a country not fully in control of its borders and territory. This is an embarrassing political situation for the Kremlin, both domestically and internationally.

It also creates a curious legal context for negotiations between Kyiv and Moscow, which many politicians, diplomats, experts and lay people outside Ukraine are hoping will be successful. Unless Russia's Constitution is changed, Putin or another Russian President would be unable to return any currently Moscow-controlled Ukrainian territories to Kyiv's control. Instead, Russia's basic law requires the Russian head of state to seek occupation of additional territory not controlled today by Russian troops, but announced as parts of Russia. An official Russian negotiating partner would be obliged by law to insist that Kyiv cedes further Ukrainian land to Moscow in order to bring the text of the Russian Constitution in congruence with the political realities on the ground.

Some might think that the manifest absurdity of such a diplomatic constellation is sufficient to dismiss it out of hand. However, a Russian president or other negotiator would run the risk of being accused of high treason if he or she proposed, agreed or succumbed to violation of the Russian Constitution. The same goes for any Ukrainian president or other negotiator who would also be obliged by their constitution to seek full restoration of Ukrainian territorial integrity and political sovereignty as soon as possible.

This general impasse has, for almost nine years now, been the reason why there have been no serious negotiations on Crimea between Ukraine and Russia since March 2014. Between the summer of 2014 and early 2022 Kyiv and Moscow had been in intense negotiations with each other within the Minsk negotiation and Normandy formats, as well as elsewhere. As the issue of the Black Sea peninsula's status had since its official annexation by Russia become a zero-sum game between Moscow and Kyiv, however, there was nothing to discuss about Crimea. Since September 2022, Moscow has created the same deadlock regarding the four additional regions in south-eastern Ukraine.

## Conclusions and Policy Recommendations

Many observers believe that achievement of a ceasefire between Moscow and Kyiv depends on the political will of some select figures such as the presidents of Russia, Ukraine, the United States, France and the European Commission. This viewpoint ignores the fact that Russia's 2014 and 2022 constitutional changes to the Russian Federation's official state territory have created structural rather than merely personal hindrances to productive peace negotiations with Ukraine. The widespread assumption that better or different political agency and diplomatic engagement on the part of the West, Kyiv or both would be enough to come to a lasting agreement with Moscow is therefore naive.

The constitutional impasse that has emerged since Russia's annexations of 2014 and 2022 is not the only hindrance to meaningful negotiations, as will be outlined in three further commentaries, but it is already on its own sufficient to be sceptical about the potential for a lasting non-military solution to the current conflict. Such an endgame to the current war would – assuming continued Russian recalcitrance – only be possible if Ukraine were to revise its own constitution and thereby renounce itself as an independent state altogether.

In addition to being extremely unlikely, this would not only be deeply unsatisfactory for most Ukrainians, but also call into question the future stability and borders of other states. Their current territories could, following the strategy and behaviour of Moscow since 2014, also be annexed by military and political interventions by their neighbours.

Five policy recommendations for Western individual and collective actors emerge from the constitutional impasse as an obstacle to achieving a Russian-Ukrainian truce. All concern political communication – both public and diplomatic.

- Politicians and other public commentators on Western behaviour vis-à-vis Moscow and Kyiv should more frequently raise and explain the constitutional impasse as a central issue for relations between Russia and Ukraine.
- Self-described realists and pacifists arguing for a negotiated settlement should address or be asked to address the issue of how to overcome this structural hindrance to achieving a peace deal between Moscow and Kyiv.
- Policymakers and policy shapers should outline or be asked to outline the implications of the constitutional impasse for their proposed course of international action in general, and for their countries' continuing support for Ukraine in particular.

- Western policymakers should highlight with their official Russian contact persons – and also, if possible, for ordinary Russians – the fundamental dilemma in Russia's 2014 and 2022 constitutional changes for a settled solution to the conflict between the West and Moscow.
- Western spokespeople should bring to the attention of politicians, diplomats, journalists and other relevant persons in Asia, Africa and South America the generic political and legal implications of Russia's 2014 and 2022 annexations for worldwide security and stability.



## **Andreas Umland**

Analyst at the Stockholm Centre for Eastern European Studies (SCEEUS).

### **About SCEEUS**

The Stockholm Centre for Eastern European Studies (SCEEUS) at the Swedish Institute of International Affairs (UI) is an independent Centre, funded by the Swedish Government, established in 2021. The Centre conducts policy relevant analysis on Russia and Eastern Europe and serves as a platform and meeting place for national and international discussions and exchanges on Russia and Eastern Europe. Any views expressed in this publication are those of the author.

© 2023 Stockholm Centre for Eastern European Studies

### **Previous SCEEUS Publications:**

#### **The Impressive EU-Ukraine Summits – Alongside the Inadequate Enlargement Methodology by Michael Emerson & Steven Blockmans**

*SCEEUS Guest Commentary, 10 February 2023*

#### **Candidate Status – Georgia at the Crossroads by Vano Chkhikvadze**

*SCEEUS Guest Commentary, 6 February 2022*