

Prelude to Mayhem: The Failure of International Efforts to Prevent War in Ukraine

JOHN QUIGLEY

The author served as Legal Expert in Ukraine in 1994–95 under the Organization for Security and Cooperation in Europe as the OSCE endeavored to negotiate an autonomy status for Crimea within Ukraine. The OSCE work was part of its broader effort to protect groups of ethnic Russians who were rendered minority populations as result of the breakup of the USSR. Crimea’s population is predominantly Russian. The OSCE perceived that resentment against ethnic Russians in the newly independent states was a source of political instability that could lead to war. Crimea was part of Russia from tsarist times, having become connected to Ukraine administratively only mid-twentieth century. The OSCE efforts were not successful. Ukraine did not grant substantial autonomy to Crimea. In this Article, the author gives an account of the OSCE effort, from the perspective of a participant: how the project was approached, how the parties reacted, and the reasons for the ultimate failure. The Article raises the question of whether more could have been done to avert the 2022 war in Ukraine.

TABLE OF CONTENTS

I. INTRODUCTION	1197
II. MINORITY PROTECTION VERSUS POLITICAL STABILITY	1198
III. THE CSCE EFFORT TO PREVENT INSTABILITY	1202
IV. A CSCE APPROACH TO THE GOVERNMENT OF UKRAINE.....	1204
A. <i>Crimea’s Search for Autonomy</i>	1207
B. <i>Language and Citizenship in Crimea</i>	1209
C. <i>Crimea’s Connection to Ukraine</i>	1212
V. CSCE EFFORTS IN UKRAINE/CRIMEA	1213
VI. PROPOSALS FOR UKRAINE/CRIMEA.....	1216
VII. AN EFFORT AT BRINGING THE PARTIES TOGETHER	1220
VIII. THE CSCE/OSCE FAILURE	1224
IX. THE 2022 WAR	1225

I. INTRODUCTION

The war in Ukraine began of a sudden in 2022, but the setting was years in the making. Of the two major pieces of that setting, one is the relationship between the Russian Federation (RF) and the Western powers, who were assembled as the North Atlantic Treaty Organization. The other is the status of the Russians who inhabit Ukraine. This author was a participant in a diplomatic

effort undertaken at the European level in 1994 that aimed to minimize the risk that this latter matter—the status of Russians in Ukraine—might lead to war between the RF and Ukraine. The effort focused on Crimea, which had the highest concentration of Russians in Ukraine.

This Article explains the diplomatic effort of 1994 and relates it to the 2022 war. The Article first outlines European efforts to protect minorities of Russians in the various states that formed out of the Soviet Union after 1991. It next explains that effort in Crimea, which involved centrally a proposal by a team of which this author was a part for territorial autonomy for Crimea. By 1996, that effort had run its course. The grievances that led us to the autonomy proposal remained unsatisfied through 2014, when the Russian army forced the Ukrainian army out of Crimea and the RF incorporated it.¹ Then, in 2022, the broader peace between Ukraine and the RF broke down, when the RF invaded Ukraine on a stated rationale of protecting the Russians of Ukraine's Donbas region.² The Article raises the question of whether the 2022 war could have been averted had the 1994 autonomy proposal for Crimea succeeded.

II. MINORITY PROTECTION VERSUS POLITICAL STABILITY

When the Soviet Union came apart in 1991, territories that had been part of the Russian Empire reaching back into tsarist times suddenly became independent states.³ The population of these new states included large numbers of Russians.⁴ Nationalist pride in the new states, plus resentment against Russia, made for a tinderbox.⁵ The situation bore an uncanny parallel to Europe after World War I, when the demise of the German and Austro-Hungarian empires turned pockets of Germans and Hungarians into minorities in states dominated

¹ Press Release, Kremlin, Laws on Admitting Crimea and Sevastopol to the Russian Federation (Mar. 21, 2014), <http://www.en.kremlin.ru/events/president/news/20625> [<https://perma.cc/2WTA-4UXX>]. See generally C.J. Chivers & David M. Herszenhorn, *In Crimea, Russia Showcases a Rebooted Army*, N.Y. TIMES (Apr. 2, 2014), <https://www.nytimes.com/2014/04/03/world/europe/cremia-offers-showcase-for-russias-rebooted-military.html> [<https://perma.cc/Z9VZ-7PR7>]. In this Article, the Western spelling “Crimea” will be used in preference to “Krym,” which is the spelling in both Ukrainian and Russian.

² Vladimir Putin, President, Russ. Fed'n, Address on Events in Ukraine (Feb. 21, 2022), <http://en.kremlin.ru/events/president/news/67828> [<https://perma.cc/S2BD-PRW9>].

³ See John Quigley, *Dilemmas for Russia in the 'Near Abroad,'* 2 PARKER SCH. J. E. EUR. L. 639, 640 (1995).

⁴ Approximate Russian population percentages at the time were: Azerbaijan 7.9%, Uzbekistan 10.8%, Turkmenistan 12.6%, Kazakhstan 40%, Tajikistan 10%, Kirghizia 25.9%, Moldova 12.8%, Latvia 32.8%, Lithuania 8.6%, Estonia 30%, Belarus 11.9%, Ukraine 21.5%, Georgia 7.4%, Armenia 2.3%. See Gerald Nadler, *Russians Feel Alone in Estonia; Ethnic Minority Fearful of Future*, WASH. TIMES, June 1, 1992, at A1.

⁵ See GWENDOLYN SASSE, *THE CRIMEA QUESTION: IDENTITY, TRANSITION, AND CONFLICT* 129 (2007) (writing well prior to armed hostilities, said that the ethnicity issue presented “a high potential for conflict during the period of transition from the Soviet Union to an independent Ukraine”).

by an ethnic group that resented their presence.⁶ That circumstance facilitated the rise of fascism in Germany and formed the context for Third Reich invasions that brought on World War II.⁷ In 1991, analysts warned of a risk that the Russian Federation might do the same.⁸ In 1992, the Russian Federation gave reason to believe that the concern of these analysts was not misplaced.⁹ Defense Minister Pavel Grachev warned ominously that any infringement on the “honor and dignity” of ethnic Russians in the newly independent states could bring “the most ironhanded measures, including the use of armed forces.”¹⁰

The governments of the new states, not surprisingly, promoted their own culture, and in particular the use of their languages. The nationalities they represented were spreading their wings, exulting in their independent status. The newly minority Russians felt vulnerable.¹¹ Many did not know the language of the states in which they now found themselves. They feared that the new dispensation would affect them adversely. They no longer felt the protection of a Russian-dominated Soviet government. In the year 1993, a year for which an estimate was published, some two million persons, mostly Russian, emigrated to the Russian Federation from the new states.¹²

European institutions had watched the developing situation with trepidation in the months before the Soviet dissolution. The Council of Europe, a pan-Europe body with an orientation to rights protection, took up minority rights, beginning work on a treaty on the topic.¹³ Another pan-European organization of states, the Conference on Security and Cooperation in Europe (CSCE) also began to focus on protection of minorities, but less as an end in itself than as a way to prevent war.¹⁴ The CSCE was a loose association of states that had formed in 1975 at a meeting in Helsinki, Finland, to manage the Cold War.¹⁵

⁶CONF. ON SEC. & COOP. IN EUR., INTERIM REPORT OF EXPERTS ON THE CONSTITUTIONAL STATUS OF CRIMEA 1 (1994) [hereinafter CSCE INTERIM REPORT].

⁷See, e.g., Richard Blanke, *The German Minority in Inter-War Poland and German Foreign Policy – Some Reconsiderations*, 25 J. CONTEMP. HIST. 87, 96 (1990) (stating that defense of ethnic Germans in Poland was a “means to an end” for Germany’s Nazi regime).

⁸Danilo Türk, *Le Droit Des Minorités en Europe*, in LES MINORITES EN EUROPE: DROITS LINGUISTIQUES ET DROITS DE L’HOMME 447 (1992) (Fr.) (comparing the situation to the transformation of Europe after the fall of the Habsburg and Ottoman empires).

⁹See *id.*

¹⁰Margaret Shapiro, *Defense Chief Assails Anti-Russian Bias: Republics Warned to Protect Minority Rights*, WASH. POST, June 6, 1992, at A18.

¹¹SASSE, *supra* note 5, at 137 (stating that in Crimea, circa 1991, the Russians were concerned over “growing Ukrainian nationalism,” expressed in particular in promotion of the Ukrainian language to the detriment of use of Russian).

¹²Celestine Bohlen, *Russia’s Ethnic Tapestry Is Threaded Through with Bigotry*, N.Y. TIMES, Jan. 9, 1994, at E5.

¹³COUNCIL OF EUR., FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES AND EXPLANATORY REPORT, Doc. H9510 (1995).

¹⁴See The Final Act of the Conference on Security and Cooperation in Europe, Aug. 1, 1975, 14 I.L.M. 1292.

¹⁵*Id.*

Membership in the CSCE included both the Soviet Union and the United States, in addition to most of Western Europe. The CSCE enjoyed strong backing from the United States. The U.S. Congress established what it called the Commission on Security and Cooperation in Europe (U.S. Helsinki Commission), composed of some of its own members, to promote the Commission on Security & Cooperation in Europe's work.¹⁶ In 1990, meeting in Copenhagen, the CSCE voiced concern that if minority groups were not allowed to flourish, war might follow.¹⁷ The CSCE vowed to act on the subject.¹⁸ "The participating States," pledged the Copenhagen conferees, "will protect the ethnic, cultural, linguistic and religious identity of national minorities on their territory and create conditions for the promotion of that identity."¹⁹ Linguistic rights received special mention: "Persons belonging to national minorities have the right," it was declared, "to use freely their mother tongue in private as well as in public."²⁰ They also had a right, it was declared, "to establish and maintain unimpeded contacts among themselves within their country as well as contacts across frontiers with citizens of other States with whom they share a common ethnic or national origin, cultural heritage or religious beliefs."²¹

From the start, tension surfaced between the aim of protecting minorities and a desire to prevent separatism.²² The Copenhagen conferees warned that minorities should not try to break away to form their own state.²³ "None of these commitments," the Copenhagen document continued, "may be interpreted as implying any right to engage in any activity" that might violate "obligations under international law . . . including the principle of territorial integrity of States."²⁴

The CSCE followed up with an ambitious plan, outlined in a document a few months later, called the Charter of Paris for a New Europe.²⁵ This document highlighted the self-determination of peoples but drew attention to its potentially destabilizing consequence by stressing that it should be exercised only within limits set by "the relevant norms of international law, including those relating to territorial integrity of States."²⁶ At the same time, a Conflict Prevention

¹⁶ Act of June 3, 1976, Pub. L. No. 94-304 (codified as amended at 22 U.S.C. §§ 3001-3009).

¹⁷ See *Extracts from the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, in *QUIET DIPLOMACY IN ACTION: THE OSCE HIGH COMMISSIONER ON NATIONAL MINORITIES* 242 (Walter A. Kemp ed., 2001) [hereinafter *Extracts*].

¹⁸ *Id.* at 290.

¹⁹ *Id.* at 291.

²⁰ *Id.*

²¹ *Id.*

²² See generally *QUIET DIPLOMACY IN ACTION: THE OSCE HIGH COMMISSIONER ON NATIONAL MINORITIES* (Walter A. Kemp ed., 2001).

²³ *Extracts*, *supra* note 17, at 243.

²⁴ *Id.*

²⁵ See Charter of Paris for a New Europe, at 3, Nov. 21, 1990, 30 I.L.M. 190.

²⁶ *Id.* at 5.

Center was established, to be based in Vienna, to ensure that a minority's self-assertion not threaten the integrity of states.²⁷ The Charter anticipated the convening of a meeting of experts to seek practical ways to protect minority groups.²⁸ That meeting was held in July 1991, where a variety of constructive measures was proposed for states to address minority issues.²⁹ With an eye on Eastern Europe, the experts declared their particular focus on "the importance of exerting efforts to address national minorities issues, particularly in areas where democratic institutions are being consolidated and questions relating to national minorities are of special concern."³⁰ Their report also staked out the proposition that minority issues are "matters of legitimate international concern and consequently do not constitute exclusively an internal affair of the respective state."³¹

As another follow-up to the Copenhagen meeting, the CSCE held a conference in Moscow the next year.³² There, a document was issued stressing that "the commitments undertaken in the field of the human dimension of the CSCE are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned."³³ Provision was made for a list of experts on minority issues to be drawn up. "A participating State," the Moscow document read, "may invite the assistance of a CSCE mission, consisting of up to three experts, to address or contribute to the resolution of questions in its territory relating to the human dimension of the CSCE."³⁴

The importance of a minority's right to use its own language was highlighted in 1992 in a European Charter for Regional or Minority Languages, adopted by the Council of Europe.³⁵ Around the same time, minority protection was addressed by the United Nations, which had previously eschewed the topic in favor of seeking protection for all persons as individuals, under the banner of human rights.³⁶ The U.N. General Assembly proclaimed for minorities "the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without

²⁷ *Id.* at 13.

²⁸ *Id.* at 22.

²⁹ *Report of the CSCE in Europe Meeting of Experts on National Minorities*, in THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE: ANALYSIS AND BASIC DOCUMENTS, 1972–1993, at 593–99 (Arie Bloed ed., 1993).

³⁰ *Id.* at 594.

³¹ *Id.* at 595.

³² *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE*, in THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE: ANALYSIS AND BASIC DOCUMENTS, 1972–1993, at 605 (Arie Bloed ed., 1993).

³³ *Id.* at 606.

³⁴ *Id.* at 608.

³⁵ European Charter for Regional or Minority Languages, Nov. 5, 1992, E.T.S. No. 148.

³⁶ See, e.g., G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

interference or any form of discrimination,” adopting a Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities.³⁷ The Council of Europe saw minority protection as important for keeping the peace of Europe.³⁸ In 1993, it issued a statement expressing “our awareness that the protection of national minorities is an essential element of stability and democratic security in our continent.”³⁹

III. THE CSCE EFFORT TO PREVENT INSTABILITY

Among the international institutions, it was the Commission on Security & Cooperation in Europe that moved towards practical action to avert warfare that might be generated by ill-treatment of minorities. A proposal was made to the CSCE by the Dutch Government to create a post for a CSCE official who could work behind the scenes to quell potential conflict arising from a state’s relation with its minorities.⁴⁰ The title would be High Commissioner on National Minorities.⁴¹ It was the former Soviet territories that provided the impetus for the idea.

The proposal was met with skepticism.⁴² Some governments were wary of outsiders intervening in conflicts within their borders.⁴³ An outsider might not understand the nuances of a conflict involving a country’s minority group.⁴⁴ Intervention, it was feared, might exacerbate a conflict, rather than resolve it.⁴⁵ Despite these concerns, the post was created.⁴⁶ The CSCE said that the focus should be on situations of “tensions involving national minority issues which have not yet developed beyond an early warning stage” but that might “have the potential to develop into a conflict within the CSCE area, affecting peace.”⁴⁷

The post was taken up on January 1, 1993, by Max Van der Stoel, a seasoned Dutch diplomat.⁴⁸ Van der Stoel had served as Minister of Foreign Affairs for

³⁷ G.A. Res. 47/135, art. 2 (Dec. 18, 1991).

³⁸ See European Charter for Regional or Minority Languages, *supra* note 35.

³⁹ Council of Eur., *Vienna Declaration on the Reform of the Control Mechanism of the ECHR, on National Minorities, and on a Plan of Action Against Racism*, 14 HUM. RTS. L.J. 373 (1993).

⁴⁰ See COMM’N ON SEC. & COOP. IN EUR., 102D CONG., REP. OF THE CSCE HIGH COMM’R ON NAT’L MINORITIES 1 (1993).

⁴¹ Jennifer Jackson Preece, *National Minority Rights vs. State Sovereignty in Europe: Changing Norms in International Relations?*, 3 NATIONS & NATIONALISM 345, 350 (1997).

⁴² *Id.* at 353.

⁴³ See QUIET DIPLOMACY IN ACTION: THE OSCE HIGH COMMISSIONER ON NATIONAL MINORITIES, *supra* note 22, at 13.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 16.

⁴⁷ *Id.*

⁴⁸ Max van der Stoel, High Comm’r on Nat’l Minorities, Conf. on Sec. & Coop. in Eur., Remarks on Preventive Diplomacy in Situations of Ethnic Tensions: The Role of the CSCE High Commissioner on National Minorities (Jan. 27–28, 1994).

the Netherlands, as well as its ambassador to the United Nations.⁴⁹ Van der Stoel focused initially on Estonia.⁵⁰ Citizenship and language were the obstacles there.⁵¹ A sector of Estonia on the border with Russia was inhabited mainly by Russians.⁵² Until early 20th century, Estonia had been part of the Russian Empire.⁵³ It gained independence in 1918 but was incorporated into the Soviet Union in 1940.⁵⁴ Legislation adopted in Estonia in February 1992 limited citizenship to persons who held it prior to 1940.⁵⁵ Russians who moved to Estonia after 1940 would not qualify for citizenship.⁵⁶ The Government of the Russian Federation pointedly called Estonia out for disadvantaging these Russians.⁵⁷ The United States, concerned that Russia might invade, urged Estonia to protect its Russian minority.⁵⁸

Van der Stoel communicated with the Estonian Government, largely out of the public eye, to encourage amelioration.⁵⁹ Estonia did ease its citizenship qualifications but still imposed a requirement of knowledge of the Estonian language that most of Estonia's Russians could not meet.⁶⁰ Van der Stoel was able to convince the Estonian Government to soften the language requirement.⁶¹ Tension between Estonia and the Russian Federation eased.⁶²

⁴⁹ QUIET DIPLOMACY IN ACTION: THE OSCE HIGH COMMISSIONER ON NATIONAL MINORITIES, *supra* note 22, at 22.

⁵⁰ COMM'N ON SEC. & COOP. IN EUR., *supra* note 40, at 132. Estonia joined the Commission on Security & Cooperation in Europe in September 1991. *Expansion of the CSCE/OSCE, ORG. FOR SEC. & COOP. IN EUR.*, <https://www.osce.org/who/timeline/1990s/05> [<https://perma.cc/FV29-ZFP2>].

⁵¹ See QUIET DIPLOMACY IN ACTION: THE OSCE HIGH COMMISSIONER ON NATIONAL MINORITIES, *supra* note 22, at 132–33.

⁵² *Id.*

⁵³ Rein Taagepera, *Estonia's Road to Independence*, 38 PROBS. COMMUNISM 11, 13 (1989).

⁵⁴ *Id.* at 13–14.

⁵⁵ COMM'N ON SEC. & COOP. IN EUR., RUSSIANS IN ESTONIA: PROBLEMS AND PROSPECTS (Sept. 1992), <https://www.csce.gov/wp-content/uploads/2016/05/Russians-in-Estonia-Problems-and-Prospect.pdf> [<https://perma.cc/AUZ3-FZU7>].

⁵⁶ *Id.*

⁵⁷ *Charging 'Apartheid,' Russia May Cut Off Estonia's Oil*, CHI. TRIB., June 29, 1993, at N11.

⁵⁸ Doyle McManus, *Christopher Prods Baltics on Behalf of Their Minority Russians*, L.A. TIMES, Oct. 28, 1993, at A13.

⁵⁹ Letter from Max van der Stoel, High Comm'r on Nat'l Minorities, Comm'n on Sec. & Coop. in Eur., to Lennart Meri, President of Estonia (July 1, 1993), in THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE: ANALYSIS AND BASIC DOCUMENTS, 1972–1993, at 1087, 1090–91 (Arie Bloed ed., 1993).

⁶⁰ Compare *id.* at 1088, with Citizenship Act, 1995, § 8 (RT I 1995, 12, 122) (Est.), https://ec.europa.eu/migrant-integration/sites/default/files/2009-02/doc1_7493_669035607.pdf [<https://perma.cc/366T-SQFV>].

⁶¹ Citizenship Act, 1995, § 8 (Est).

⁶² See QUIET DIPLOMACY IN ACTION: THE OSCE HIGH COMMISSIONER ON NATIONAL MINORITIES, *supra* note 22, at 66.

Van der Stoel saw a need for preventive diplomacy over minority issues in Eastern Europe generally. “In more fragile democratic systems,” he warned at a 1994 security conference, “opportunistic leaders may have ample possibilities for exacerbating ethnic divisions.”⁶³ He explained that war prevention in these situations might require outside involvement: “Opportunities for peaceful resolution do often exist, especially at the earliest stages of tension, but reconciliation often requires the appropriate engagement of outsiders in promoting dialogue.”⁶⁴ In a statement that seems prophetic in light of the 2022 war in Ukraine, Van der Stoel said, “The international community has essentially two choices in this regard: conflict prevention at the early stages, or if a conflict is allowed to develop, crisis management under often difficult circumstances.”⁶⁵ Van der Stoel advised the former path:

The preferable option is conflict prevention. It is easier, more cost-effective, and more constructive for the international community to address escalating tensions before the conflict erupts. Bargaining positions have generally not yet hardened, and the parties may still have considerable interest in peaceful solutions, particularly at the earliest stages of friction. The cycle of violence and revenge has also not yet taken hold. Early on, there may still be numerous possibilities for resolving specific differences. More importantly, there may still be possibilities for creating processes and mechanisms for managing inter-ethnic relations peacefully. Outsiders who are independent and impartial may play a crucial role in this pre-conflict stage.⁶⁶

Van der Stoel called his post as High Commissioner for National Minorities “an instrument for preventive diplomacy.”⁶⁷

IV. A CSCE APPROACH TO THE GOVERNMENT OF UKRAINE

In 1994, Van der Stoel focused on Ukraine, which had joined the CSCE in 1992.⁶⁸ He visited the eastern reaches of the country.⁶⁹ Language issues drew

⁶³ Max van der Stoel, High Comm’r on Nat’l Minorities, Conf. on Sec. & Coop. in Eur., Remarks on Preventive Diplomacy in Situations of Ethnic Tensions: The Role of the CSCE High Commissioner on National Minorities (Jan. 27–28, 1994).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ OSCE, MINISTRY OF FOREIGN AFFS. OF UKR. (July 20, 2021), <https://mfa.gov.ua/en/about-ukraine/cooperation-international-organizations/participation-ukraine-activities-organization-security-and-co-operation-europe> (on file with the *Ohio State Law Journal*).

⁶⁹ Letter from Max Van der Stoel, High Comm’r on Nat’l Minorities, Conf. on Sec. & Coop. in Eur., to Anatoly Zlenko, Minister of Foreign Affs., Ukr. (May 15, 1994), in THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE: BASIC DOCUMENTS, 1993–1995, at 785 (Arie Bloed ed., 1997).

his attention to Donetsk Province, where Russians predominated numerically in the local population.⁷⁰ In a letter to Ukraine's Foreign Minister, Anatoly Zlenko, Van der Stoel detailed his concerns.⁷¹ "As I found during my visit to Donetsk," Van der Stoel wrote, "the language question is clearly a sensitive issue in this region."⁷² He continued: "In my view, it is fully understandable that, after such a long period of neglect, a special effort is being made to restore the Ukrainian language to its rightful place, and that Ukrainian is now one of the compulsory subjects in the curriculum of Russian schools."⁷³ He suggested, however, that it would "seem advisable" for Ukraine "to make it clear to the Russian population in the east that for those who have not had the opportunity to learn the Ukrainian language in the schools, this will have no negative consequences for their job opportunities, and that there are no reasons for them to fear a process of forced Ukrainisation."⁷⁴ Van der Stoel was critical that Russian had not been made an official language in Ukraine:

In the consultative poll coinciding with the recent parliamentary elections in the Donetsk Oblast [province] about 89% of the population pronounced itself in favour of Russian as an official language in their region. As more than 70% of the population participated in the poll and the percentage of the voters favouring such a step exceeds the percentage of persons of Russian origin in this region, it must be assumed that apart from the Russian population a considerable group of Ukrainians voted in favour of such a step.⁷⁵

Zlenko replied, telling Van der Stoel that the Ukrainian legislation on national minorities allowed for use of Russian, thereby providing assurance that Russian speakers would not suffer discrimination in employment.⁷⁶ Donetsk Province, together with neighboring Luhansk Province, makes up a region referred to as the Basin of the Don River (Donbas), located as it is on the banks of a tributary of the Don.⁷⁷

In his letter to Zlenko, Van der Stoel made a particular plea in regard to Crimea, whose population was overwhelmingly Russian.⁷⁸ Van der Stoel suggested what he called a "settlement" that "would, on the one hand, reaffirm the need to maintain the territorial integrity of Ukraine but which, on the other hand, would contain a complete programme of steps to solve various issues

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Letter from Max Van der Stoel to Anatoly Zlenko, *supra* note 69.

⁷⁵ *Id.* at 786.

⁷⁶ *Id.* at 788; Law on National Minorities in Ukraine, 1992, art. 6 (Act No. 2494-12), <https://cis-legislation.com/document.fwx?rgn=16949> [https://perma.cc/VW5R-42D4] (providing the right to use minority languages).

⁷⁷ *Donbas*, *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/place/Donbas> [https://perma.cc/N3PF-8L3F].

⁷⁸ Letter from Max van der Stoel to Anatoly Zlenko, *supra* note 69, at 785.

concerning the implementation of the formula of substantial autonomy for Crimea.”⁷⁹ “Urgent action,” he said, was needed “to ensure that the differences between the central government and the Crimean administration will not lead to ethnic discord.”⁸⁰

For the Crimea situation, Van der Stoel went one step beyond what he had suggested for Donetsk Province. “Considering the extremely complicated and delicate issues involved, I suggest that your government explores the possibility of the CSCE providing assistance, for instance in the form of a team of constitutional and economic experts who could, after investigation of the issues in dispute, provide some suggestions for solutions.”⁸¹ As a follow-up, a CSCE delegation visited Kyiv and Simferopol, the Crimean capital, and reported that each side was receptive.⁸² Each viewed the CSCE as potentially an aid to its cause. For Crimea, it was that the CSCE promoted minority rights.⁸³ For Ukraine, it was that the CSCE promoted state sovereignty.⁸⁴

Crimea President Iurii Meshkov indicated to the Commission on Security & Cooperation in Europe visitors the advisability of autonomy as mentioned by Van der Stoel, calling it the Tatarstan model.⁸⁵ The Russian Federation had just concluded an agreement with Tatarstan, a territory in the Ural Mountains whose population (Tatars) sought self-rule.⁸⁶ The Tatarstan agreement conceptualized the relationship between Tatarstan and the Russian Federation as one based on consent between the two. Some Ukrainian officials saw the Tatarstan model as applicable to Ukraine and Crimea, while others did not.⁸⁷ One pointed out that the Russian Federation had a federal structure, whereas Ukraine was a unitary state.⁸⁸

Ukrainian officials harbored concern that CSCE intervention might encourage the Crimeans to separate from Ukraine.⁸⁹ CSCE could give advice

⁷⁹ *Id.* at 786.

⁸⁰ *Id.* at 786–87.

⁸¹ *Id.* at 787.

⁸² See Notes from CSCE Meetings in Kyiv, June 8–9, 1994 (on file with author); Notes from CSCE Meetings in Simferopol, June 10, 1994 (on file with author).

⁸³ See Notes from CSCE Meetings in Simferopol, *supra* note 82, at 7.

⁸⁴ See RANDOLF OBERSCHMIDT, IMPROVING THE EFFECTIVENESS OF OSCE MISSIONS: THE CASE OF UKRAINE 107 (2002).

⁸⁵ Notes from CSCE Meetings in Simferopol, *supra* note 82, at 6.

⁸⁶ On Delimitation of Jurisdictional Subjects and Mutual Delegation of Powers Between the State Bodies of the Russian Federation and the State Bodies of the Republic of Tatarstan, Russ-Tatarstan Feb. 15, 1994; see also Richard Boudreaux, *Tatarstan Reaches Pact with Moscow, Drops Sovereignty Bid*, L.A. TIMES (Feb. 18, 1994), <https://www.latimes.com/archives/la-xpm-1994-02-18-mn-24480-story.html> [<https://perma.cc/7GBB-XGN4>]; Hafeez Malik, *Tatarstan's Treaty with Russia: Autonomy or Independence*, 18 (2) J. S. ASIAN & MIDDLE E. STUDS. 1 (1994).

⁸⁷ Notes from CSCE Meetings in Kyiv, *supra* note 82, at 1–5.

⁸⁸ *Id.*

⁸⁹ *Id.*

but should not try to mediate between Ukraine and Crimea.⁹⁰ Ukrainian officials opposed any arrangement that implied international status for Crimea.⁹¹ The CSCE, it was hoped, would dissuade the Crimeans from claiming status under international law.⁹² As for the language situation in Crimea, there was said to be no discrimination against the use of Russian, rather, it was the Ukrainian language that was being suppressed by Russian officials in Crimea.⁹³ Ukrainian as the state language had to be defended to ensure its use in Crimea.⁹⁴

At the same time, for Ukraine, there were good reasons to see the Crimea situation resolved in a way that satisfied Crimea's Russians. Ukraine was a fragile country from an ethnic standpoint, the western sectors being populated by Hungarians and Poles from times when their areas were held by others.⁹⁵ Separatism in Crimea might encourage separatism in these western sectors. An additional reason to placate Crimea's Russians was to dampen their desire to separate from Ukraine and to deprive the Russian Federation of a reason, or a pretext, to intervene militarily.⁹⁶ The Commission on Security & Cooperation in Europe did not engage with the RF over Crimea.⁹⁷ The RF did not appear to be opposed to what the CSCE was projecting to do, however.⁹⁸ It had no reason to oppose, given that the CSCE was seeking to protect the Russians in Crimea.⁹⁹

A. Crimea's Search for Autonomy

Van der Stoel's plea about language in his letter to Zlenko reflected the concern of Russians in Ukraine that their ability to function in the life and economy of Ukraine would be restricted if they could not use Russian. Already in 1989, prior to the dissolution of the Soviet Union, the Supreme Soviet of the Ukrainian SSR adopted a law to promote use of the Ukrainian language.¹⁰⁰ While recognizing Russian as a language of inter-cultural communication,¹⁰¹

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Notes from CSCE Meetings in Kyiv, *supra* note 82, at 1–5.

⁹³ *Id.* at 2, 4.

⁹⁴ *Id.*

⁹⁵ See Volodymyr Kulyk, *Revisiting a Success Story: Implementation of the Recommendations of the OSCE High Commissioner on National Minorities to Ukraine, 1994–2001*, at 10 (Ctr. for OSCE Rsch., Working Paper No. 6, 2002).

⁹⁶ See Shapiro, *supra* note 10.

⁹⁷ See John Quigley, *I Led Talks on Donbas and Crimea in the 90s. Here's How the War Should End*, RESPONSIBLE STATECRAFT (May 9, 2022), <https://responsiblestatecraft.org/2022/05/09/i-led-talks-on-the-donbas-and-crimea-in-the-1990s-heres-how-the-war-should-end/> [https://perma.cc/7VSQ-GMNV].

⁹⁸ See *id.*

⁹⁹ *Id.*

¹⁰⁰ SASSE, *supra* note 5, at 137; see also *Supreme Soviet of Ukraine Adopts Official Draft of Law on Elections and Language*, 37(4) UKR. R. 53 (1989).

¹⁰¹ Про мови в Українській [On Languages in the Ukrainian SSR], art. 4, Відомості Верховної Ради УРСР (ВВР), Oct. 28, 1989, Додаток до N 45, ст.631.

that law declared Ukrainian to be the only state language of the Ukrainian SSR.¹⁰² In Crimea, however, Ukrainians constituted less than one quarter of the population,¹⁰³ and even among these ethnic Ukrainians, nearly half identified Russian as their native language.¹⁰⁴ Only four per cent of the Crimean population self-identified as Ukrainian speakers.¹⁰⁵ This Ukrainian law on language fanned separatist sentiment in Crimea.¹⁰⁶

Under the 1978 constitution of the Ukrainian SSR, Crimea was one of the twenty-five provinces.¹⁰⁷ In 1991, the Ukrainian SSR Supreme Soviet designated Crimea as an autonomous republic, thereby giving it greater status than that of a province.¹⁰⁸ A new constitution adopted for the Ukrainian SSR in June 1991 confirmed that status.¹⁰⁹ When Ukraine separated from the Soviet Union a few months later, Ukrainian authorities held on to Crimea.¹¹⁰ The Crimea Supreme Soviet declared Crimea to be independent, but within Ukraine.¹¹¹ The Ukraine parliament confirmed Crimea's status as an autonomous republic of Ukraine.¹¹²

In 1992, the Crimea Supreme Soviet again declared independence from Ukraine, subject to the holding of a referendum on the subject.¹¹³ It was not clear what "independence" meant, since there was not support in Crimea for it to be independent of both Ukraine and Russia.¹¹⁴ The next day, in fact, the

¹⁰² Про мови в Українській [On Languages in the Ukrainian SSR], art. 2, Відомості Верховної Ради УРСР (ВВР), Oct. 28, 1989, Додаток до N 45, ст.631.

¹⁰³ According to a 1989 census, ethnic Ukrainians made up 25.8% of the population of Crimea. See Kulyk, *supra* note 95, at 12.

¹⁰⁴ *Id.*

¹⁰⁵ SASSE, *supra* note 5, at 137.

¹⁰⁶ *Id.*

¹⁰⁷ КОНСТИТУЦІЯ (ОСНОВНИЙ ЗАКОН) УКРАЇНИ [CONSTITUTION (BASIC LAW) OF UKRAINE], Apr. 20, 1978, art. 77.

¹⁰⁸ SASSE, *supra* note 5, at 136, 138; Закон української радянської соціалістичної республіки про відновлення кримської автономної радянської соціалістичної республіки, Feb. 12, 1991, N 712-XII, cited in Doris Wydra, *The Crimea Conundrum: The Tug of War Between Russia and Ukraine on the Questions of Autonomy and Self-Determination*, 10 INT'L J. MINORITY & GRP. RTS. 111, 114 (2003).

¹⁰⁹ CONSTITUTION (BASIC LAW) OF UKRAINE, *supra* note 107, at art. 75 (showing Crimea as an autonomous republic within Ukraine, updated June 19, 1991).

¹¹⁰ Vicki L. Hesli, *Public Support for the Devolution of Power in Ukraine: Regional Patterns*, 47 EUR.-ASIA STUDS. 91, 98 (1995).

¹¹¹ *Soviet Turmoil; Crimea Declares Independence*, N.Y. TIMES, Sept. 6, 1991, at A12.

¹¹² *On the Demarcation of Plenary Powers Between the Organs of State Power of Ukraine and of the Republic of Crimea*, art. 1, reprinted in THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE: BASIC DOCUMENTS, 1993-1995, at 796 (Arie Bloed ed., 1997).

¹¹³ Serge Schmemmann, *Crimea Parliament Votes to Back Independence from Ukraine*, N.Y. TIMES, May 6, 1992, at A8; see also SASSE, *supra* note 5, at 145-46 (discussing the Act on the State Independence of the Crimean Republic, adopted May 5, 1992).

¹¹⁴ Bohdan Fediw, *The Crimean Problem: Post-Independence Ukraine's Regional Instability*, 4 WORLD AFFS. 76, 78, 82 (2) (2000).

Crimea Supreme Soviet adopted a constitution that said that Crimea was “part of Ukraine” and that its relations with Ukraine were based on “mutually agreed laws and agreements.”¹¹⁵ In response, the Ukraine parliament provisionally adopted a law (June 1992) shoring up the autonomy suggested by the title of autonomous republic.¹¹⁶ Importantly, that Ukraine enactment specified that the powers accorded to Crimea under it “may not be changed without the agreement of the supreme legislative organs of Ukraine and the Republic of Crimea.”¹¹⁷ This proviso seemed to protect Crimea from infringements on its status.

B. *Language and Citizenship in Crimea*

Achievement of a certain distance from Ukraine was viewed in Crimea as defense against the Ukraine Government’s promotion of Ukrainian-ness.¹¹⁸ A draft for a new Ukraine constitution specified Ukrainian as the “language of the state.”¹¹⁹ Russian was not mentioned by name, but in localities in which a particular nationality predominated, its language, said the draft, could be used as “official in state bodies and institutions.”¹²⁰ Regarding citizenship, the draft Ukrainian constitution specified a single citizenship, thereby excluding a Crimean citizenship; it provided, moreover, “A Ukraine citizen may not simultaneously hold citizenship of another state.”¹²¹ Many Russians in Crimea wanted an option to hold dual Russian citizenship as a way of ensuring rights to which they had been accustomed while the Soviet Union existed.¹²² Some 30% of Crimea’s population were retirees from Russia’s civil bureaucracy or its military, many of them having served in the Black Sea Fleet.¹²³ With the connection to Moscow gone, they were concerned that they might have

¹¹⁵ The Constitution of the Autonomous Republic of Crimea, May 6, 1992, art. 9. Amendments to the constitution were adopted four months later, but the language quoted from art. 9 was not changed. Constitution of the Crimean Republic, adopted at the seventh session of the Supreme Soviet of Crimea, May 6, 1992, with changes and additions at the tenth session of the Supreme Soviet of Crimea, Sept. 25, 1992.

¹¹⁶ Doris Wydra, *The Crimea Conundrum: The Tug of War Between Russia and Ukraine on the Question of Autonomy and Self-Determination*, 10 INT’L J. MINORITY & GRP. RTS. 111, 117 (2003); Taras Kuzio & David J. Meyer, *The Donbas and Crimea: An Institutional and Demographic Approach to Ethnic Mobilization in Two Ukrainian Regions*, in STATE AND INSTITUTION BUILDING IN UKRAINE 297, 311 (Taras Kuzio, Robert S. Kravchuk & Paul D’Anieri eds., 1999).

On the Demarcation of Plenary Powers Between the Organs of State Power of Ukraine and of the Republic of Crimea, *supra* note 108, art. 15.

¹¹⁸ See SASSE, *supra* note 5, at 137.

¹¹⁹ CONST. OF UKRAINE (DRAFT), Oct. 26, 1993, art. 7.

¹²⁰ *Id.*

¹²¹ *Id.* art. 17.

¹²² Per a question asked in the March 27, 1994 referendum. See Draft Statute of the Crimea Republic “Citizenship of the Crimea Republic” (first reading, July 21, 1994).

¹²³ Maryana Chorna, *The Crimean Labyrinth: All Paths Lead to the Military-Industrial Complex*, 1 DEMOS 9, 11 (1994).

difficulty continuing to collect their pensions. They were also concerned about access to higher education in Russia for their children. Being Russian, they regarded Russia's universities as more appropriate for higher education.

In January 1994, an election was held for the presidency of Crimea, and candidates favoring separation from Ukraine or merger with Russia gained 73% of the votes.¹²⁴ In a runoff to decide the election, Iurii Meshkov gained 75%.¹²⁵ Meshkov had campaigned on a platform of putting Crimea back under Russia.¹²⁶ This result indicated that the Crimean electorate was more inclined to separation from Ukraine than was the Crimea Supreme Soviet.¹²⁷ A referendum in Crimea on its status was contemplated but was deferred after Ukrainian President Leonid Kravchuk issued a decree banning it, on grounds that Crimea's status fell under the jurisdiction of Ukraine's parliament.¹²⁸ On March 27, 1994, the postponed referendum was held, however.¹²⁹ The question posed was not separation from Ukraine, but greater autonomy within Ukraine. The vote went 78% for greater autonomy.¹³⁰ The US Central Intelligence Agency reportedly worried that this sentiment, though not for total separation from Ukraine, might bring conflict between Ukraine and Russia.¹³¹ Some Crimean political figures were said to be promoting a plan to unite Crimea together with the southern and eastern sectors of Ukraine.¹³² A second question in the March referendum was on dual citizenship; 82% said it should be available to Crimeans.¹³³

A US journalist writing from Crimea in May 1994 found "vehemence and seeming unanimity of public opinion" for separation from Ukraine, even among

¹²⁴ Sonni Efron & Mary Mycio, *Separatists Win Big in Crimea Vote: Candidates Who Favor Independence or Rejoining Russia Gain 73% of Presidential Ballots*, L.A. TIMES, Jan. 18, 1994, at A27; VICTOR TKACHUK ET AL., *THE CRIMEA: CHRONICLE OF SEPARATISM* (1992–1995), at 72–73 (1996).

¹²⁵ Robert Seely, *Crimean Vote Result Could Spur Conflict*, WASH. POST, Feb. 1, 1994, at A16; *Separatist Winning Crimea Presidency*, N.Y. TIMES, Feb. 1, 1994, at A8.

¹²⁶ *Crimea Leader Names Russian as his Premier*, N.Y. TIMES, Feb. 14, 1994, at A9.

¹²⁷ See STEVE WOEHLER, CONG. RSCH. SERVICE., 94-738F, *UKRAINE'S UNCERTAIN FUTURE AND U.S. POLICY* (1994).

¹²⁸ Robert Seely, *Ukraine Bars Plebiscite [sic] in the Crimea*, WASH. POST, Mar. 16, 1994, at A23.

¹²⁹ *Referendums Held in Crimea*, GLOB. TIMES (Mar. 16, 2014), <https://www.globaltimes.cn/content/848753.shtml> [<https://perma.cc/6HHW-R8HV>].

¹³⁰ *Id.*; Lee Hockstader, *Crimeans Vote for Autonomy: Russia-Ukraine Rift Seen Likely to Grow*, WASH. POST, Mar. 28, 1994, at A1; Mary Mycio, *Crimea-Ukraine Tensions Rise with Dueling Decrees*, L.A. TIMES, Apr. 9, 1994, at A12 (stating that "almost 80%" voted in the affirmative, and characterizing the vote as one "that, in effect, declared Crimea independent").

¹³¹ Lee Hockstader, *Separatist Storm Brewing in Crimea: Return to Russia Beckons as Promises of Ukraine Independence Falter*, WASH. POST, May 14, 1994, at A16.

¹³² Chorna, *supra* note 123, at 13–14.

¹³³ *Referendums Held in Crimea*, *supra* note 129.

the ethnic Ukrainians of Crimea.¹³⁴ “Although 20 to 25 percent of the peninsula’s population is Ukrainian,” he wrote, “most are Russian-speaking and thoroughly integrated with the Russian population.”¹³⁵ The journalist reported “no signs of significant or organized opposition to Meshkov’s policies from Crimeans of Ukrainian descent.”¹³⁶ “As for the ethnic Russians,” he wrote, “they are determined to shake off Kiev’s yoke.”¹³⁷ He quoted one Russian woman saying, “When we were part of the U.S.S.R. we felt like the owners of our destinies. Now we’re like squatters—squatters in our own land.”¹³⁸ Crimea’s deteriorating economic situation was blamed on Ukraine, whose leadership was said to be unreceptive to reform in the direction of privatization.¹³⁹

In July 1994, Kravchuk was succeeded by Leonid Kuchma as President of Ukraine.¹⁴⁰ Kuchma was more favorably inclined towards Crimean self-rule.¹⁴¹ In July, the Crimea Supreme soviet floated a draft statute on citizenship that would allow for dual citizenship.¹⁴² Crimeans were to be allowed to opt for a citizenship in addition to that of Ukraine.¹⁴³ The draft Crimean law recited as the reason for dual citizenship the “change in the political situation resulting from the dissolution of the USSR and the disruption of familial, spiritual, cultural and economic connections of Crimea with Russia.”¹⁴⁴

¹³⁴ Hockstader, *supra* note 131, at A16.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*; see also Chorna, *supra* note 123, at 14.

(reporting that 53% of Crimean Ukrainians supported merger of Crimea with the Russian Federation).

¹³⁹ Hockstader, *supra* note 131, at A16.

¹⁴⁰ Steven Erlanger, *Ukrainians Elect a New President*, N.Y. TIMES (July 12, 1994), <https://www.nytimes.com/1994/07/12/world/ukrainians-elect-a-new-president.html> [<https://perma.cc/6FFC-KYGF>].

¹⁴¹ SASSE, *supra* note 5, at 171.

¹⁴² Draft Statute of the Crimea Republic “On Citizenship of the Crimea Republic” (first reading, July 21, 1994), art. 8 (“A citizen of the Crimean Republic may hold citizenship of another state (dual citizenship) in accordance with this Law and inter-state treaties of the Republic.”).

¹⁴³ Legislative Initiative of the Supreme Soviet of Crimea in the Supreme Soviet of Ukraine to amend and expand Article 31 of the Constitution (Basic Law) of Ukraine, the Law of Ukraine “On Citizenship of Ukraine,” and other legislation of Ukraine on dual citizenship in the Crimea Republic, Sec. I.I, Aug. 1994. (Copy, in Russian, on file with author).

¹⁴⁴ *Id.* at 1.

C. Crimea's Connection to Ukraine

Beyond ethnicity, the Russians of Crimea had other reasons for separate status. Historically, Crimea was more connected to Russia than to Ukraine.¹⁴⁵ Ukraine became a territorial entity only after the Bolshevik Revolution of 1917, when republics were formed in the various ethnicity sectors of the Russian Empire.¹⁴⁶ Ukraine was called the Ukrainian Soviet Socialist Republic.¹⁴⁷ The Russian sector of the Soviet Union was the Russian Soviet Federative Socialist Republic.¹⁴⁸ In the post-1917 division of territory, Crimea was placed in the Russian SFSR. Crimea came under the Ukrainian SSR only in 1954.¹⁴⁹ This transfer came about, as a matter of form, when the Supreme Soviet of the Russian SFSR raised its advisability with the Supreme Soviet of the USSR, whereupon the Supreme Soviet of the Ukrainian SSR expressed approval, explaining as the reasons “the commonality of their economy, the territorial proximity, and the close economic and cultural ties.”¹⁵⁰ The Supreme Soviet of the USSR then effected the transfer.¹⁵¹

Those stated reasons for the transfer were likely not the actual ones. Although supplies for Crimea came predominantly from Ukraine, economic connections to Russia were just as strong.¹⁵² Crimea was just as close geographically to Russia.¹⁵³ Cultural ties to Russia were stronger.¹⁵⁴ Ukrainians never numbered more than one-quarter of Crimea's population.¹⁵⁵ The majority population had been Russian since the 19th century, when Crimea, like Ukraine,

¹⁴⁵ Wydra, *supra* note 116, at 112.

¹⁴⁶ Oleksandr Merezhko, *The 1917 October Russian Revolution and International Law*, 3 JUS GENTIUM: J. INT'L LEGAL HIST. 451, 455–57 (2018).

¹⁴⁷ *Ukraine Profile—Timeline*, BBC (Mar. 5, 2020), <https://www.bbc.com/news/world-europe-18010123> [<https://perma.cc/HA4F-5UFR>].

¹⁴⁸ See Merezhko, *supra* note 146, at 456.

¹⁴⁹ DECREE OF THE PRESIDIUM OF THE UKRAINIAN SUPREME SOVIET, ‘CONCERNING THE SUBMISSION OF THE RSFSR SUPREME SOVIET PRESIDIUM CONCERNING THE ISSUE OF THE TRANSFER OF THE CRIMEAN OBLAST TO THE UKRAINIAN SSR,’ (Wilson Center Digital Archive trans.) (1954), <https://digitalarchive.wilsoncenter.org/document/decreed-presidium-ukrainian-supreme-soviet-concerning-submission-rsfsr-supreme-soviet> [<https://perma.cc/A64R-8F2X>].

¹⁵⁰ *Id.*

¹⁵¹ *USSR Supreme Soviet, Law on the Transfer of the Province of Crimea from the RSFSR to the Ukrainian SSR*, [Zakon o peredache Krymskoi oblasti iz sostava RSFSR v sostav Ukrainskoi SSR], Apr. 26, 1954., <https://www.jmhum.org/en/news-list/932-this-day-february-19-1954-a-decree-transferring-the-crimean-peninsula-from-the-russian-soviet-federative-socialist-republic-to-the-ukrainian-ssr> [<https://perma.cc/KEH3-R4DY>].

¹⁵² See Lewis Siegelbaum, *The Gift of Crimea*, SEVENTEEN MOMENTS IN SOVIET HIST. (Aug. 4, 2023), <https://soviethistory.msu.edu/1954-2/the-gift-of-crimea/> [<https://perma.cc/559Y-D89R>].

¹⁵³ Bridget Kendall, *Ukraine Maps Chart Crimea's Troubled Past*, BBC (Mar. 13, 2023), <https://www.bbc.com/news/world-europe-26476314> [<https://perma.cc/7VJ3-GL7M>].

¹⁵⁴ Siegelbaum, *supra* note 152.

¹⁵⁵ See *id.*

was part of the Russian Empire. Crimea was defended by the Russian Army from assault by Britain and France in the Crimean War of 1855, a defense that held almost mythological status for the Russian public.¹⁵⁶ For Ukraine, Crimea lacked the symbolic importance it held for Russia.¹⁵⁷

Several explanations are given by historians for the 1954 transfer.¹⁵⁸ One is that it facilitated the planned construction of a canal to take water from the Dnipro River (in Ukraine) to Crimea.¹⁵⁹ Another is that the transfer helped Nikita Khrushchev gain political support from the head of the Ukrainian communist party as Khrushchev jockeyed for power following the death of Joseph Stalin.¹⁶⁰ One important part of Crimea was excluded from the transfer. This was the City of Sevastopol, site of the naval port facilities that housed the Russian navy since the 19th century.¹⁶¹ They remained under control of Moscow.¹⁶² In 1990, the Crimea Supreme Soviet asked the supreme soviets of the USSR and the Russian SFSR to declare the 1954 transfer invalid.¹⁶³ In 1992, after the USSR disbanded, the RF parliament did declare that the documentation of 1954 to transfer Crimea had been legally invalid.¹⁶⁴

V. CSCE EFFORTS IN UKRAINE/CRIMEA

Following the June 1994 Commission on Security & Cooperation in Europe discussions in Kyiv and Simferopol, the CSCE moved to establish an on-the-ground presence in Ukraine of the type that the CSCE charted at its 1991 Moscow meeting.¹⁶⁵ A CSCE mission focusing on Crimea, to be operational by November 1994, would be based in Kyiv, with a branch office in Simferopol.¹⁶⁶ Under CSCE guidelines, the mission's members would not necessarily have a

¹⁵⁶ John Jaworsky, *Crimea's Importance to Ukraine and its Future Security*, in CRIMEA: DYNAMICS, CHALLENGES, AND PROSPECTS 135, 137 (Maria Drohobycky ed., 1995).

¹⁵⁷ *Id.* at 138.

¹⁵⁸ Sergei V. Moshkin, *Why Did Khrushchev Transfer Crimea to Ukraine?*, BALTIC RIM ECONOMIES (Apr. 28, 2022), <https://sites.utu.fi/bre/why-did-khrushchev-transfer-crimea-to-ukraine/> [<https://perma.cc/75H4-CTZC>].

¹⁵⁹ *Id.*

¹⁶⁰ SASSE, *supra* note 5, at 119.

¹⁶¹ Wydra, *supra* note 116, at 116–17, 124.

¹⁶² SASSE, *supra* note 5, at 229.

¹⁶³ *Id.* at 136.

¹⁶⁴ Постановление ВС России “О правовой оценке решений высших органов государственной власти РСФСР по изменению статуса Крыма, принятых в 1954 году” [Legal assessment of the decisions of RSFSR state bodies changing the status of Crimea in 1954] (Russ. Fed’n), <http://sevkrimrus.narod.ru/ZAKON/o1954.htm> [<https://perma.cc/V8SM-LN46>].

¹⁶⁵ COMM’N ON SEC. & COOP. IN EUR., THE MOSCOW MEETING OF THE CONFERENCE ON THE HUMAN DIMENSION OF THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE 15–16 (1991) [hereinafter MOSCOW MEETING]; *see also* CONF. ON SEC. & COOP. IN EUR., ANNUAL REPORT 10 (1994) [hereinafter CSCE ANNUAL REPORT].

¹⁶⁶ CSCE ANNUAL REPORT, *supra* note 165, at 10.

background on the Ukrainian-Russian situation.¹⁶⁷ The mission was to assist a team to be constituted of persons with regional and language expertise.¹⁶⁸ It was that team that would confer with the two parties and make recommendations.¹⁶⁹

The Commission on Security & Cooperation in Europe contemplated an outcome in Ukraine that would involve protection of the Russian population, in line with the Copenhagen and Moscow statements.¹⁷⁰ The team was to include two experts in constitutional law, since the CSCE aim was to promote an arrangement whereby Crimea would be part of Ukraine but would enjoy a measure of self-rule.¹⁷¹ A third expert was to have a background in economics, since the anticipated arrangement would involve local control of at least some aspects of Crimea's economy.¹⁷² The economic situation in Crimea was unstable in the transition out of a planned economy, and it was thought that ethnic tension might ease if the economy were put on a solid footing.¹⁷³

The three-member team was to examine the situation and then formulate solutions.¹⁷⁴ Importantly, after assessing the aspirations of each side, the team was to encourage their representatives to overcome differences through face-to-face dialogue.¹⁷⁵ The CSCE defined the project as sending "experts on constitutional and economic matters to Ukraine to facilitate the dialogue between the central Government and Crimean authorities concerning the autonomous status of the Republic of Crimea within Ukraine and, in particular, to formulate specific recommendations towards the solution of existing problems with due regard to the fundamental principles of the Constitution of Ukraine."¹⁷⁶ The Chairman-in-Office, the executive of the CSCE, was directed to appoint these experts by July 1, 1994.¹⁷⁷

Three Commission on Security & Cooperation in Europe member states—Germany, Italy, and the United States—were asked to propose names.¹⁷⁸ Germany nominated an economist, Hermann Clement, of the Osteuropa Institut

¹⁶⁷ See *id.* at 4.

¹⁶⁸ *Id.* at 15.

¹⁶⁹ *Id.* at 10, 15.

¹⁷⁰ See *id.* at 4; MOSCOW MEETING, *supra* note 165, at 5; see also Paulina Rezler, *The Copenhagen Criteria: Are They Helping or Hurting the European Union?*, 14 *TOURO INT'L L. REV.* 390, 392 (2011).

¹⁷¹ John Packer, *Autonomy Within the OSCE: The Case of Crimea*, in *AUTONOMY: APPLICATIONS AND IMPLICATIONS*, 295, 307 n.39 (Markku Suksi ed., 1998).

¹⁷² *Id.*

¹⁷³ See *id.* at 309–10.

¹⁷⁴ See *id.* at 307.

¹⁷⁵ *Id.* at 308.

¹⁷⁶ CSCE, Committee of Senior Officials, 27-CSO/Journal No. 3, Annex 2, June 15, 1994, reprinted in *THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE: BASIC DOCUMENTS, 1993–1995*, at 293 (Arie Bloed ed., 1997); OBERSCHMIDT, *supra* note 84, at 93.

¹⁷⁷ Packer, *supra* note 171, at 307.

¹⁷⁸ Quigley, *supra* note 97. It was not indicated by the Committee of Senior Officials how these three countries were chosen.

in Munich, while Italy nominated Gianmaria Ajani, a law professor of the University of Trento.¹⁷⁹ Both Clement and Ajani had backgrounds on Eastern Europe, and each knew Russian, which was expected to be the language of dialogue. Each was accepted by the CSCE.

When the United States nominated a constitutional law specialist who lacked regional expertise, the CSCE asked it to re-consider. A second constitutional law nominee evoked the same reaction. It was at that juncture that my name was suggested as result of an encounter I had had with CSCE personnel in Moldova the previous year.

The Commission on Security & Cooperation in Europe already had a mission on the ground in Moldova, to deal with ethnic issues not unlike those in Ukraine.¹⁸⁰ In Moldova, the numerically dominant population was Romanian, but one sector inhabited largely by Ukrainians and Russians had broken away.¹⁸¹ The sector came to be called Transdnestr, for being on one side of the Dnestr River, which flowed through Moldova.¹⁸²

At the request of the United States Information Agency, I had consulted in Moldova, a consultation that included a session in Moldova's parliament. My stay in Moldova gave me an opportunity to see inter-ethnic conflict in the former Soviet space at close range. In Moldova, one point of contention was whether, in the Transdnestr sector, the Romanian language would be taught to schoolchildren in the Cyrillic alphabet or in the Latin alphabet.¹⁸³ In the nineteenth century, the Cyrillic alphabet was used in that region to write the Romanian language, but in more recent times the Latin alphabet was used.¹⁸⁴ In Transdnestr, the schools were using Cyrillic script.¹⁸⁵ One morning I was awakened in my hotel room by a confrontation on the street below. Parents of children in the Transdnestr schools were protesting over the orthography issue, fearing that their children would be disadvantaged career-wise if they could not write in the way Romanian was written in the rest of Moldova.¹⁸⁶ In Moldova, I also took part in a conference on the problems of countries like Moldova whose population is ethnically diverse.¹⁸⁷ A lecture that I gave in Russian focused on

¹⁷⁹ See Letter from Max van der Stoep, High Comm'r of Nat'l Minorities, Conf. on Sec. & Coop. in Eur., to Hennady Udovenko, Minister of Foreign Affs., Ukr. (May 15, 1995), reprinted in THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE: BASIC DOCUMENTS, 1993–1995, at 792–93 (Arie Bloed ed., 1997).

¹⁸⁰ COMM'N ON SEC. & COOP. IN EUR., CSCE MISSION TO THE REPUBLIC OF MOLDOVA, 19-CSO/Journal No. 3, Annex 3 (1993).

¹⁸¹ John Quigley, *Towards International Norms on Linguistic Rights: The Russian-Romanian Controversy in Moldova*, 10 CONN. J. INT'L L. 69, 74, 82 (1994).

¹⁸² See *id.* at 82.

¹⁸³ *Id.* at 83.

¹⁸⁴ *Id.* at 73.

¹⁸⁵ *Id.* at 83.

¹⁸⁶ *Id.*

¹⁸⁷ See Letter from Vladimir Solonari, Chairman, Civ. Peace & Democracy in Multi-Ethnic Soc'ys, to author (Sept. 9–12, 1993) (on file with author).

autonomy regimes for sectors of a country inhabited by a minority population.¹⁸⁸ CSCE personnel who attended my lecture knew that the United States and CSCE had yet to agree on an expert for Ukraine. At CSCE suggestion, the US Department of State nominated me, and the CSCE in turn appointed me.¹⁸⁹

VI. PROPOSALS FOR UKRAINE/CRIMEA

In August 1994, our three-member team ventured out to Kyiv and Simferopol,¹⁹⁰ where we met with officials and others to assess the situation.¹⁹¹ We were to promote a governance arrangement that would keep Kyiv out of Crimean affairs to some degree, but we were not to suggest anything counter to “the fundamental principles of the Constitution of Ukraine,” which included the supremacy of Ukraine’s parliament.¹⁹²

In Simferopol, we were handed a position paper by Sergei Tsekov, Speaker of the Crimea Supreme Soviet.¹⁹³ It quoted from the 1992 Crimea constitution the language reciting that Crimea was part of Ukraine, but that Ukraine-Crimea relations should be based on agreement.¹⁹⁴ The effect, the paper continued, would be to change Ukraine from a unitary state to a federation.¹⁹⁵ The anticipated treaty would be titled “On the demarcation of spheres of competence and the mutual delegation of plenary powers between the organs of state power of Ukraine and the organs of state power of the Republic of Crimea.”¹⁹⁶ “Relations between the Russian Federation and the Republic of Tatarstan,” the paper explained, “serve as the model.”¹⁹⁷ The paper finally said that the Ukraine-Crimea treaty would “define a legal mechanism for the resolution of the conflicts that may be expected to arise as the two sides realise their powers.”¹⁹⁸ Tsekov told us that he hoped that the Commission on Security &

¹⁸⁸ Lecture, John Quigley, *Accommodating the Interests of Nationalities in a Multi-National State: International Practice*, Bender, Moldova, Sept. 10, 1993.

¹⁸⁹ Letter from Francesco Bascone, Coordinator of Conf. on Sec. & Coop. in Eur. Missions, to author (July 30, 1994) (on file with author).

¹⁹⁰ QUIET DIPLOMACY IN ACTION: THE OSCE HIGH COMMISSIONER ON NATIONAL MINORITIES, *supra* note 22, at 189.

¹⁹¹ ORG. FOR SEC. & COOP. IN EUR., SURVEY OF OSCE LONG TERM MISSIONS AND SANCTIONS ASSISTANCE MISSIONS 18 (1995).

¹⁹² OBERSCHMIDT, *supra* note 84, at 93.

¹⁹³ SERGEI TSEKOV, SPEAKER OF CRIMEAN PARLIAMENT, PROPOSAL FOR A CONSTITUTIONAL TREATY BETWEEN THE REPUBLIC OF CRIMEA AND UKRAINE 13 (Aug. 1994).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 14; *see also* A.V. MAL'GIN AND S.N. KISELEV, КРЫМ: РАЗМЫШЛЕНИЕ О БУДУЩЕМ [CRIMEA: THOUGHTS ABOUT THE FUTURE], *in* A.R. NIKIFOROV, A.V. MAL'GIN

Cooperation in Europe would embrace a right to self-determination for the population of Crimea.

Other Crimean officials we met said that the 1954 transfer of Crimea to Ukraine had been a mistake. Ukraine's control of Crimea, one said, felt like a military occupation by a foreign power. The Crimean officials faced a dilemma on their desired end-game. While they did not want to be part of Ukraine, they did not want a self-standing state, and they understood that the Russian Federation was not prepared to take them in.¹⁹⁹

On the Kyiv side, our team was not greeted with proposals. The Government of Ukraine saw no difficulty with the *status quo*.²⁰⁰ Crimea as part of Ukraine was said to give no cause for Van der Stoel's concerns. Crimea was under no pressure from Ukraine. The Russians of Ukraine had nothing to fear from Ukraine. The Russians in Crimea enjoyed the same civil rights as the rest of Ukraine's population. They had, in particular, full scope to use the Russian language in private and public communication.

After a second visit in October, we wrote up an interim report for the CSCE.²⁰¹ We confirmed that the situation fell within the range of those identified in the Copenhagen and Moscow documents as meriting outside attention to avert war.²⁰² "Such situations," we wrote, "have been considered by the international community to bear an international aspect and to call for international attention, both to protect the rights of the group, and to regulate a situation that might be a source of international instability."²⁰³ We found the "international regulation" to be merited as it had been after "the disintegration of the Austro-Hungarian Empire" in World War I.²⁰⁴

We were ready to make a proposal. We wrote, "An appropriate way to define the relationship would be the signing of a written agreement that would establish the basics of the relationship between Ukraine and the Republic of Crimea."²⁰⁵ "This would not be an international treaty and would not be concluded on the basis of Crimea having the status of a subject of international law."²⁰⁶ Such an agreement would provide for self-rule in Crimea over various aspects of life and would allow Crimeans to hold Russian citizenship in addition

AND S.N. KISELEV, ТРИ ПРОЕКЦИИ КРЫМСКОЙ ИДЕИ [THREE VIEWS OF THE CRIMEA IDEA] 6, 7 (1995) (advocating a treaty between Crimea and Ukraine).

¹⁹⁹ SASSE, *supra* note 5, at 172, 177.

²⁰⁰ See WOEHLER, *supra* note 127, at 14.

²⁰¹ CSCE INTERIM REPORT, *supra* note 6, at 1. *But cf.* Packer, *supra* note 171, at 307 (stating that we reported finding that the main underlying issues were economic in character. While we did find economic issues to be relevant, we reported that it was the ethnic issues at the heart of the dispute).

²⁰² CSCE INTERIM REPORT, *supra* note 6, at 1.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 2.

²⁰⁶ *Id.*

to Ukrainian citizenship, but only with RF and Ukrainian consent.²⁰⁷ “This may be accomplished for Crimeans,” we wrote, “if provided for in appropriate agreements between Ukraine and the Russian Federation.”²⁰⁸

We anticipated the need for a mechanism to police a Ukraine-Crimea agreement.²⁰⁹ For that purpose, we envisaged a bilateral commission to resolve disputes if Ukraine were to encroach, or if Crimea were to exceed its prerogatives: “Each side would appoint an equal number of representatives to the commission.”²¹⁰ “The commission would conduct its deliberations under the chairmanship of a person designated by an international organization such as the CSCE.”²¹¹

We were aware, of course, that our proposal was close to what the Crimeans were asking and that it was not what the Ukrainians wanted.²¹² But the RF had been willing to tolerate a written agreement with Tatarstan and had been able to maintain overall control.²¹³ Our task, moreover, had not been to find a middle ground.²¹⁴ It was to develop recommendations to avert warfare in future.²¹⁵ We could not be certain that what we were proposing would avert warfare. We did not know if it would be enough for the Crimean’s, or for the Russian Federation. We knew that the reaction of the Government of Ukraine was likely to be negative.

I wrote our proposal in the form of an agreement to be signed by Ukraine and Crimea. The draft agreement never reached those parties, however. When I showed it to Van der Stoel, he was quick to reject it. It would be a useless exercise because Ukraine would not embrace it, he thought, and Ukraine might refuse further collaboration with the CSCE.²¹⁶ Van der Stoel’s approach to negotiating reflected caution, with a premium on keeping a dialogue going. The situation on the ground, moreover, found the two sides moving even farther apart in their stances.²¹⁷ Just at that time, the Ukraine parliament annulled a number of Crimean laws that were said to violate the law of Ukraine.²¹⁸ While that action made an accommodation more difficult to attain, the RF had its hands

²⁰⁷ CSCE INTERIM REPORT, *supra* note 6, at 3–4.

²⁰⁸ *Id.* at 3.

²⁰⁹ *See id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² OBERSCHMIDT, *supra* note 84, at 95 & n.11.

²¹³ *See id.*

²¹⁴ *See* Kulyk, *supra* note 95, at 46 (noting that “many Ukrainian parliamentarians did not consider the Crimean proposals a step towards a promise”).

²¹⁵ *Extracts*, *supra* note 17, at 244.

²¹⁶ Experts were expected to promote the work of the High Commissioner, not act at cross purposes. *See* Rob Zaagman, *The CSCE High Commissioner on National Minorities: An Analysis of the Mandate and the Institutional Context*, in *THE CHALLENGES OF CHANGE: THE HELSINKI SUMMIT OF THE CSCE AND ITS AFTERMATH* 113, 163 (Arie Bloed ed., 1994).

²¹⁷ *See* Kulyk, *supra* note 95, at 43.

²¹⁸ *Id.* at 38.

full in a way that seemed to leave more time for diplomacy. Separatists in the southern Russian region of Chechnya opened a war of secession.²¹⁹ There seemed little chance that the RF would seek confrontation with Ukraine while its attention was focused on Chechnya.²²⁰

Rather than make a proposal, we would organize what Van der Stoel called a roundtable, a meeting that might run several days, where each side could air views in the other's presence.²²¹ Invitees would be governmental figures just below the top leadership, persons who hopefully could speak without their statements being taken as fixed positions.²²² Governmental figures at that level might be more willing to acknowledge the validity of positions of the other side, or even to offer concessions.²²³

Getting the two sides together in such a setting would in itself be an achievement. The goal would not be to gain immediate consensus, but rather to make each side more willing compromise. Arrangements were made with the Swiss government to hold the roundtable in Switzerland.²²⁴ A meeting on neutral turf might encourage candor.²²⁵ Switzerland, moreover, was associated by its history with peace-making.²²⁶

Relevant officials on each side showed willingness to participate, and we scheduled the roundtable for May 1995.²²⁷ In March, however, a move on the Ukraine side complicated the task.²²⁸ The Ukraine parliament adopted a statute abolishing the office of presidency in Crimea and annulling the Crimea constitution of May 1992.²²⁹ Ukrainian President Kuchma issued a decree to implement the statute.²³⁰ This action left Crimea with little self-rule.²³¹

²¹⁹ James P. Gallagher, *Breakaway Region Tests Yeltsin's Nerve: Chechnya Crisis a 'Bay of Pigs' for Wary Russia*, CHI. TRIB., Nov. 30, 1994, at L3.

²²⁰ See generally *id.*

²²¹ Kulyk, *supra* note 95, at 43; OBERSCHMIDT, *supra* note 84, at 97.

²²² See Kulyk, *supra* note 95, at 44.

²²³ See Packer, *supra* note 171, at 308–09.

²²⁴ See *id.* at 308.

²²⁵ See *id.*

²²⁶ See generally Thomas Fischer & Daniel Möckli, *The Limits of Compensation: Swiss Neutrality Policy in the Cold War*, 18 J. COLD WAR STUDS. 12–35 (2016).

²²⁷ OBERSCHMIDT, *supra* note 84, at 97.

²²⁸ James Rupert, *Striking at Separatists, Ukraine Abolishes Crimea's Charter, Presidency*, WASH. POST, Mar. 18, 1995, at A22.

²²⁹ *The Law of Ukraine On Canceling the Constitution and Certain Laws of the Crimea*, March 17, 1995, reprinted in THE CRIMEA: CHRONICLE OF SEPARATISM (1992–1995), at 112 (Ukrainian Ctr. for Indep. Pol. Rsch. ed., 1996).

²³⁰ *Decree of President of Ukraine on Some Issues Relating to Relations between the Central Executive Bodies and those of the Autonomous Republic of the Crimea*, March 31, 1995, reprinted in THE CRIMEA: CHRONICLE OF SEPARATISM (1992–1995), at 134 (Ukrainian Ctr. for Indep. Pol. Rsch. ed., 1996).

²³¹ *Ukraine tightens grip on Crimea*, CHI. TRIB., Apr. 2, 1995, at L16 (stating that Kuchma's action virtually eliminated the autonomous status of Crimea); James Rupert, *Ukraine Cracks Down on Crimea*, WASH. POST, Apr. 2, 1995, at A34 (stating that Kuchma's action put Crimea under direct control of Ukraine).

At that juncture, the Russian Federation took its first concrete action on Crimea.²³² In reaction to the Ukrainian clampdown, it announced that it would accept applications for Russian citizenship at its consulate in Crimea, to allow for dual RF-Ukraine citizenship.²³³ In reaction to this announcement, the Ukraine Government shuttered the Russian consulate in Crimea.²³⁴

That reaction brought a response from the RF on the diplomatic plane. Noting pointedly that Russians made up two-thirds of Crimea's population, RF President Boris Eltsin averred that "we are not indifferent to the fate of Crimea."²³⁵ He called for Crimea's status to be determined through political dialogue between Simferopol and Kyiv.²³⁶ At the time, Eltsin and Kuchma were negotiating a friendship treaty.²³⁷ Eltsin suspended the negotiations, saying that they could not resume while the interests of the Crimean's were not being respected.²³⁸

Eltsin's statement precipitated a war of words between the RF and Ukraine. A spokesperson for President Kuchma reacted that "Crimea is an internal matter for Ukraine."²³⁹ RF Foreign Minister Andrei Kozyrev then dialed the rhetoric up another notch, saying, in obvious reference to Crimea, "There may be cases when the use of military force may be necessary to protect our compatriots abroad."²⁴⁰

Ukraine's move to shore up control of Crimea brought reaction in Crimea itself. The Crimea Supreme Soviet called for a referendum, to be held on June 25, 1995, to ask the Crimean electorate whether it supported the Crimea constitution of May 1992.²⁴¹ Such a vote would be expected to show support for the May 1992 constitution, hence to reject Ukraine's clampdown.

VII. AN EFFORT AT BRINGING THE PARTIES TOGETHER

These moves and countermoves did not bode well for our roundtable. At the same time, they added new urgency, to keep the situation from spinning out of control.²⁴² We proceeded with the roundtable on schedule the second week in

²³² James Rupert, *Warming Relations Turn Chilly Between Russia and Ukraine: Key Region of Crimea Again Is Focus of Diplomatic Dispute*, WASH. POST, Mar. 31, 1995, at A34.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ James Rupert, *Yeltsin Criticizes Ukraine's Crimea Policy*, WASH. POST, Apr. 16, 1995, at A23.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *See id.*

²³⁹ *Id.*

²⁴⁰ Lee Hockstader, *Moscow Says it May Use Force to Protect Russians in Ex-Soviet States*, WASH. POST, Apr. 19, 1995, at A28.

²⁴¹ Kulyk, *supra* note 95, at 42; *Ukraine Tightens Grip on Crimea*, CHI. TRIB., Apr. 2, 1995, at L16.

²⁴² OBERSCHMIDT, *supra* note 84, at 96-97.

May 1995.²⁴³ By this time, the CSCE sported a new title.²⁴⁴ In January 1995, it re-named itself the Organization for Security and Cooperation in Europe, since by then it had come to be more than simply a series of conferences.²⁴⁵

For the sessions in Switzerland, the Swiss Government offered the venerable Hotel Reber in Locarno. In a picturesque setting on the shore of Lake Locarno, the Reber provided a setting conducive to dialogue. The only logistical hitch, albeit a minor one, was that the main rail line for trains arriving into Locarno ran within meters of the Reber's conference room. Each time a train passed, the discussion had to be paused.

The participant list was encouraging. From each side we had seven or eight executive branch or parliamentary figures. The Council of Europe sent an observer. To organize the discussion, we divided the time between economic issues and status issues. Economic issues were first on the agenda, with me chairing. Then for the status issues, Van der Stoel chaired. The language for the roundtable was Russian, the obvious choice because the Ukrainians were all fluent in it. During a coffee break, however, one of the Ukrainian participants asked me if I had Russian parentage. I could not discern whether he meant to compliment me on my Russian, or whether he was probing for pro-Crimea bias.

The dialogue was approached constructively by the two parties.²⁴⁶ It was conducted in an atmosphere of respect for opposing views.²⁴⁷ On the issues of tax collection and division of state-owned property, there was support, on both sides, for the concept of a formal agreement as the basis of accommodation.²⁴⁸ At the same time, on the Ukrainian side, there was insistence that, in general, the relationship should be governed by Kyiv.²⁴⁹

On the Crimean side, it was suggested to revive the Ukraine law of June 1992, which gave Crimea a veto over any reduction in its powers.²⁵⁰ References to international law that were made on the Crimean side drew retort from the Ukrainian side, which insisted that the relationship between Ukraine and Crimea was not that of sovereign states.²⁵¹ Potential involvement by the RF weighed on the minds of the Ukrainian participants.²⁵² One Ukrainian parliamentarian said he hoped that the OSCE would react to any pressure that the Russian Federation

²⁴³ *Id.* at 97.

²⁴⁴ Press Release, Org. for Sec. & Coop. in Eur., CSCE becomes OSCE (Jan. 3, 1995), <https://www.osce.org/secretariat/52527> [<https://perma.cc/DBH5-YTJ3>].

²⁴⁵ *Id.*

²⁴⁶ OBERSCHMIDT, *supra* note 84, at 97; *see* Kulyk, *supra* note 95, at 44.

²⁴⁷ *See* Kulyk, *supra* note 95, at 44.

²⁴⁸ *See id.* at 52–53 (discussing later Crimean efforts to win concessions from Kyiv on autonomous property rights and taxation).

²⁴⁹ *See* Letter from Max van der Stoel to Hennady Udovenko, *supra* note 180, at 792–93.

²⁵⁰ *See* Kuzio & Meyer, *supra* note 116, at 311.

²⁵¹ *See* Kulyk, *supra* note 95, at 32.

²⁵² *See id.* at 24 (outlining Ukrainian policy-makers reactions to Russian stance on Crimea).

might exert on Ukraine in regard to Crimea. “God forbid,” were his words, “that there should be a conflict in Ukraine.”

The roundtable did not end with a shared statement, as that had not been the aim. A few days later, however, Van der Stoel followed up with a letter to Hennady Udovenko, who had succeeded Zlenko as Ukraine’s foreign minister.²⁵³ In the letter, Van der Stoel averred that the “[t]hree days of discussions enabled the experts appointed by the OSCE, Professor Ajani, Dr Clement and Professor Quigley, as well as the head of the OSCE Mission to Ukraine, Ambassador Kohlschuetter²⁵⁴ and myself, to acquire a deeper insight into various aspects of the differences which have arisen with the Parliament of the Autonomous republic of Crimea.”²⁵⁵

Framing his letter as expressing the views of all of us, Van der Stoel wrote that we were urging the Crimeans not to proceed with the referendum they were planning in reaction to Ukraine’s March action.²⁵⁶ The main point of the letter was a suggestion that Ukraine implement its law of June 1992.²⁵⁷ Van der Stoel wrote that “a considerable number of participants in the Round Table, who often differed in the past, expressed the view that the law of Ukraine on the demarcation of powers between the organs of state power of Ukraine and the Republic of Crimea of June 1992 (which did not enter into force) contained important elements for an eventual solution of the problem.”²⁵⁸ That claim that Ukrainians at Locarno had expressed readiness to implement the June 1992 law was geared to persuading Udovenko, even if it exaggerated the reality. In any event, Van der Stoel attached to the letter the key provisions of the June 1992 law.²⁵⁹ The most important provision was the one that said that the enumerated powers of Crimea “may not be changed without the agreement of the supreme legislative organs of Ukraine and the Republic of Crimea.”²⁶⁰ Such a provision would have prevented the unilateral action that Ukraine had just taken in March.²⁶¹

In the letter, Van der Stoel also took up the issue of dual Russia-Ukraine citizenship, noting that “the need of dual citizenship of Ukraine and the Russian Federation has been brought up by the Parliament of the Autonomous Republic of Crimea.”²⁶² Van der Stoel explained that the motivation on the Crimean side was “the problems which the many pensioners living in Crimea have with the

²⁵³ See Letter from Max van der Stoel to Hennady Udovenko, *supra* note 179, at 792.

²⁵⁴ *Id.* (clarifying that Andreas Kohlschütter was Head of the Commission on Security & Cooperation in Europe Mission in Ukraine).

²⁵⁵ *Id.*

²⁵⁶ See generally *id.*

²⁵⁷ *Id.* at 792–93.

²⁵⁸ Letter from Max van der Stoel to Hennady Udovenko, *supra* note 179, at 794.

²⁵⁹ *Id.* at 796–99.

²⁶⁰ *Id.* at 799.

²⁶¹ *The Law of Ukraine on Canceling the Constitution and Certain Laws of the Crimea*, *supra* note 229.

²⁶² Letter from Max van der Stoel to Hennady Udovenko, *supra* note 179, at 794.

transfer of their pensions from the Russian Federation, and the opportunities which this could open for Crimeans wanting to study in the Russian Federation.”²⁶³ Over the next few weeks, Kohlschütter lobbied in favor of the letter’s proposals in talks with officials in Kyiv and Simferopol.²⁶⁴ The Crimea Supreme Soviet called off the referendum.²⁶⁵

In late June, Udovenko responded to Van der Stoel in writing.²⁶⁶ Udovenko expressed appreciation for the OSCE advice to Crimea not to conduct a referendum.²⁶⁷ Crimea’s decision not to proceed with it, Udovenko said, was “evidence of a certain influence of recommendations developed in Locarno.”²⁶⁸ As for the suggestion to revert to the Ukraine law of June 1992, Udovenko said nothing.²⁶⁹ That silence spoke volumes, since this had been the main point of Van der Stoel’s letter. As for the suggestion on dual citizenship, Udovenko characterized the issue dismissively as “the so-called problem of dual (Ukraine and the Russian Federation) citizenship” and said that concerns about pensions and education should be addressed as self-standing issues, not by dual citizenship.²⁷⁰ In his letter, Udovenko said nothing about autonomy for Crimea, instead referring pointedly to the need for a “united, sovereign and democratic Ukraine.”²⁷¹ “Sovereignty” in the context of Ukraine-Crimea relations was code for full power to Ukraine.

Udovenko devoted the remainder of his letter to criticism of the Crimea Supreme Soviet, which he said had failed to work constructively.²⁷² He said that its leaders had tried “to put in question the unity of our state and its territorial integrity,” efforts that he said held “no future.”²⁷³ He expressed his hope that efforts by Ukraine and the OSCE, and specifically what had been done at the roundtable, “will help convince Crimean politicians in the objective need to look” for what he called “compromise settlements within the framework of the legislation in force in Ukraine and on the basis of OSCE principles.”²⁷⁴ The “legislation in force in Ukraine,” particularly that of March 1995, of course, left predominant power with Ukraine, and by “OSCE principles,” Udovenko

²⁶³ *Id.*

²⁶⁴ Kulyk, *supra* note 95, at 47.

²⁶⁵ *Id.*

²⁶⁶ See Letter from Hennady Udovenko, Minister of Foreign Affs., Ukr., to Max Van der Stoel, High Comm’r of Nat’l Minorities, Conf. on Sec. & Coop. in Eur. (June 30, 1995), reprinted in *THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE: BASIC DOCUMENTS, 1993–1995*, at 800–01 (Arie Bloed ed., 1997).

²⁶⁷ *Id.* at 800.

²⁶⁸ *Id.*

²⁶⁹ See generally *id.*

²⁷⁰ *Id.* at 801.

²⁷¹ *Id.*

²⁷² See Letter from Hennady Udovenko to Max Van der Stoel, *supra* note 266, at 801.

²⁷³ *Id.*

²⁷⁴ *Id.*

doubtless meant the OSCE emphasis on existing territorial integrity.²⁷⁵ By both what he said and what he omitted, Udovenko was making clear to Van der Stoel that Ukraine planned nothing to accommodate to Crimea's desire for autonomy.

Van der Stoel's suggestions in his letter were, to be sure, more in keeping with the positions of Simferopol than of Kyiv. Those suggestions expressed what seemed obvious to those of us on the team and to the OSCE officials who had involved themselves on Crimea, namely, that a disregard of the aspiration among the Crimeans for self-rule would leave the situation combustible, opening a serious risk of RF military intervention.

VIII. THE CSCE/OSCE FAILURE

Undeterred, Van der Stoel reverted to Udovenko in October 1995 after making another visit to Ukraine, but neither this communication nor a written reply to Van der Stoel from Udovenko opened new doors.²⁷⁶ No movement towards autonomy for Crimea was generated.²⁷⁷ My three-member team had been set up as a short-term operation, and after Locarno our work effectively ended.²⁷⁸ Van der Stoel attempted another roundtable in 1996, drawing some of the same participants to a session in the Netherlands.²⁷⁹ Kohlschütter, who found Van der Stoel's tactics insufficiently assertive, continued to press the Ukrainian officials to increase Crimean autonomy.²⁸⁰ Van der Stoel's caution was informed by his knowledge that the CSCE/OSCE had no enforcement power.²⁸¹ Kohlschütter's strategy led him to be discounted on the Ukraine side.²⁸² Van der Stoel kept the Ukrainians' confidence, and some concessions were made by Kyiv,²⁸³ but in a way that left the scope of Crimea's self-rule in the hands of Ukraine alone.²⁸⁴

From 1995, the Crimean parliament came to be dominated by elements more receptive to accommodating to Ukraine.²⁸⁵ These elements may have been satisfied with the status that Ukraine offered, or they may have been making the

²⁷⁵ *Id.*

²⁷⁶ See Letter from Max Van der Stoel, High Comm'r of Nat'l Minorities, Conf. on Sec. & Coop. in Eur., to Hennady Udovenko, Minister of Foreign Affs., Ukr. (Oct. 12, 1995), reprinted in THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE: BASIC DOCUMENTS, 1993-1995, at 802-05 (Arie Bloed ed., 1997); Letter from Hennady Udovenko, Minister of Foreign Affs., Ukr., to Max Van der Stoel, High Comm'r of Nat'l Minorities, Conf. on Sec. & Coop. in Eur. (n.d.), reprinted in THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE: BASIC DOCUMENTS, 1993-1995, at 806-07 (Arie Bloed ed., 1997).

²⁷⁷ Kulyk, *supra* note 95, at 49, 52.

²⁷⁸ OBERSCHMIDT, *supra* note 84, at 95.

²⁷⁹ Kulyk, *supra* note 95, at 56-57.

²⁸⁰ See *id.* at 46.

²⁸¹ See OBERSCHMIDT, *supra* note 84, at 93.

²⁸² *Id.* at 108.

²⁸³ See Kulyk, *supra* note 95, at 64-67.

²⁸⁴ See *id.* at 69.

²⁸⁵ Kuzio & Meyer, *supra* note 116, at 313.

best of a difficult situation. In Ukraine in 1996, discussions over drafts of a new constitution revealed willingness on the part of some politicians to broaden autonomy for Crimea.²⁸⁶ The final text contained a chapter on Crimea and afforded certain enumerated powers of self-rule but specified at the same time (Article 135) that Crimea's constitution and laws must conform to Ukrainian legislation.²⁸⁷ The 1996 constitution gave Crimea no avenue to prevent future diminution of its powers.²⁸⁸

The limited character of Crimea's powers under the 1996 constitution was noted by an advisory board of the Council of Europe that monitored rule of law in member states of the Council.²⁸⁹ This body is called the European Commission for Democracy through Law but is usually referred to as the Venice Commission.²⁹⁰ The Venice Commission conducted a review of the Ukraine 1996 constitution.²⁹¹ With respect to Crimea, it pointed out that Crimea's exercise of the enumerated powers of self-rule could be overridden by the Ukraine parliament, since, per Article 135, Ukraine legislation could trump that of Crimea.²⁹² To dramatize the limited nature of Crimea's powers, the Venice Commission compared Crimea to constituent territorial entities of other countries in Europe.²⁹³ The Commission said that Crimea's level of self-rule under the 1996 constitution was less than that enjoyed by a state (*Land*) in Germany or by a region (*Comunidad autónoma*) in Spain.²⁹⁴

IX. THE 2022 WAR

In 2022, the concerns of the Russian population of the Donbas—mirroring the concerns cited by Van der Stoel in his 1994 letter—were cited as justification for the Russian Federation's military incursion into Ukraine.²⁹⁵ In his address of February 21, 2022, announcing the action, Russian President Vladimir Putin mentioned support from the Russians of the Donbas as a reason for recognizing the independence of Ukraine's Luhansk and Donetsk provinces.²⁹⁶ He explained that the populations of those provinces considered themselves to be

²⁸⁶ See Kulyk, *supra* note 95, at 61–63.

²⁸⁷ CONST. OF UKRAINE June 28, 1996, 5th Sess., art. 135.

²⁸⁸ See *id.* arts. 134–39.

²⁸⁹ See generally EURO. COMM'N FOR DEMOCRACY THROUGH L., *Draft Opinion on the Constitution of Ukraine*, 27th Sess., Doc. CDL(1997)001 (Jan. 16, 1997) [hereinafter *Draft Opinion*].

²⁹⁰ *For Democracy Through Law*, COUNCIL OF EUR., https://www.venice.coe.int/WebForms/pages/?p=01_Presentation [<https://perma.cc/EE5K-HKK5>].

²⁹¹ *Draft Opinion*, *supra* note 290, at 2.

²⁹² *Id.* at 9.

²⁹³ See *id.*

²⁹⁴ See *id.*

²⁹⁵ See Putin, *supra* note 2.

²⁹⁶ *Id.*

Russian by ethnicity, and Russian Orthodox by religion.²⁹⁷ In the Russian parliament, laws were adopted ratifying treaties with the two provinces, one with Luhansk²⁹⁸ and another with Donetsk.²⁹⁹ Regardless of whether the situation in the Donbas was in fact the reason for the military action, it provided a rationale for it.

It may well be that the CSCE/OSCE was on a fool's errand trying to find a status for Crimea that would avert eventual war. The Russians of Crimea did not see Crimea as legitimately a part of Ukraine.³⁰⁰ Once a more assertive government was in power in Moscow, a merger with the Russian Federation might have been welcomed by the Russians of Crimea regardless of any autonomy that Ukraine might have allowed.

As of 1994–95, in any event, Ukraine was insisting on respect for its existing sovereignty.³⁰¹ There was little prospect it would yield significant control. Our team was asked to formulate recommendations to avert war, but any meaningful recommendations ran up against Ukrainian sovereignty.³⁰² The member states of the OSCE, even while understanding the need to protect Crimea's Russian population, were sympathetic to Ukraine's concerns for its sovereignty.³⁰³ As Van der Stoel understood, we on the ground could make recommendations geared to prevent war, but OSCE member states were not willing to pressure Ukraine to accept them.³⁰⁴ They put greater importance on Ukraine's sovereignty than on Crimea's autonomy.³⁰⁵ Analysts have fingered the emphasis that is placed by the international community on territorial sovereignty as an impediment to preventive diplomacy in situations in which a territorial divorce might be the best option.³⁰⁶

In retrospect, the proposal made by our team might well have been preferable for Ukraine than what transpired. Ukraine might have learned to live with autonomy in Crimea. Ukraine might have been more willing to afford some

²⁹⁷ *Id.*

²⁹⁸ *President Signed Federal Law on Ratifying the Treaty of Friendship, Cooperation and Mutual Assistance Between the Russian Federation and the Lugansk People's Republic*, PRESIDENT OF RUSSIA (Feb. 22, 2022), <http://en.kremlin.ru/events/president/news/67834> [<https://perma.cc/M43T-U3FM>].

²⁹⁹ *President Signed Federal Law on Ratifying the Treaty of Friendship, Cooperation and Mutual Assistance Between the Russian Federation and the Donetsk People's Republic*, PRESIDENT OF RUSS. (Feb. 22, 2022), <http://en.kremlin.ru/events/president/news/67835> [<https://perma.cc/EED2-M3JG>].

³⁰⁰ See Kulyk, *supra* note 95, at 33.

³⁰¹ See *id.* at 38.

³⁰² See *id.* at 45.

³⁰³ *Id.* at 42.

³⁰⁴ *Id.* at 43.

³⁰⁵ See, e.g., Robert Seely, *Canceled Crimean Poll May Be Held*, WASH. POST, Mar. 19, 1994, at A16 (indicating that United States wanted Crimea to stay in Ukraine).

³⁰⁶ See Bruce Jentleson, *Preventive Diplomacy and Ethnic Conflict: Possible, Difficult, Necessary*, in *THE INTERNATIONAL SPREAD OF ETHNIC CONFLICT: FEAR, DIFFUSION, AND ESCALATION* 293, 309–11 (Donald S. Rothchild & David A. Lake eds., 2020).

measure of autonomy to the Russians of the Donbas. The Russians of the Donbas might not have taken up arms against Ukraine in 2014.³⁰⁷ The tragedy of the 2022 war lay not only in the devastation it wrought, but in the fact that a major precipitating factor, the status of Ukraine's Russian population, was flagged thirty years earlier as a situation that might lead to war, and that the international community was not able to take meaningful action.

³⁰⁷ See John Quigley, *Finding a Way Forward for Crimea*, CAMBRIDGE INT'L L.J. (Mar. 5, 2014), <https://cilj.co.uk/2014/03/05/john-quigley-finding-way-forward-crimea/> [<https://perma.cc/8TN3-AWU6>].